The Administrative State and the Executive Establishment of Religion

Robin Maril*

This Article argues that the widespread incorporation of religion across the federal government constitutes the executive establishment of religion in violation of the First Amendment because it favors certain religious tenets or beliefs over others. The structural and substantive restraints imposed on presidential power have been inadequate to prevent executive establishment, and, in some ways, they have facilitated it. The rise of the modern administrative state coincided with a time of doctrinal flux in Establishment Clause jurisprudence and the enactment of the Administrative Procedure Act (APA). The absence of a clear, workable constitutional standard invited presidential interpretations that strained the meaning of precedent. The APA facilitated uniform policymaking and left room for the adoption of substantive policy lenses that helped to streamline the incorporation of religious tenets across executive agencies and programs.

The executive establishment of religion entails the promotion of, or collaboration with, specific religious tenets or organizations across the administrative state. It began in earnest during the Reagan administration and is currently embedded throughout federal policies and programs in the form of faith-based initiatives and broad religious exemptions. Executive establishment is uniquely destabilizing to the body politic because it directly conflicts with the unifying purpose of the Establishment Clause by undermining political unity and fostering potential divisiveness on the basis of belief and ideology.

The first section of this Article outlines the structural and substantive limitations imposed on the President by both the U.S. Constitution and the APA. The second section details the evolution of executive establishment and explains how the confluence of shifting U.S. Supreme Court doctrine and the push for administrative uniformity created the perfect storm that led to the incorporation of particular religious tenets and organizations in federal policy and programs. The final section makes proposals for reform after examining the existing institutional safeguards, specifically executive forbearance, judicial review, and legislative oversight. A brief conclusion warns that the continued unchecked adoption of specific religious tenets and religiously motivated policies is inherently exclusionary and directly undermines the unifying spirit of the Establishment Clause.

* Assistant Professor of Law, Willamette University College of Law. Sincere thanks to Steven Green, Daniel Farber, and Kathryn Kovacs for their insightful comments on previous drafts.

INTRODUCTION

The day after leaving office, the political and administrative agenda of the outgoing President transforms into a "legacy" overnight.[1] Incoming presidents take the oath of office with detailed transition plans developed for each federal agency.[2] These plans span thousands of issues and directly impact the diverse communities touched by federal policies and programs.[3] During the first weeks of a new

1. U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January.").

2. Joshua P. Zoffer, *The Law of Presidential Transitions*, 129 YALE L.J. 2500, 2503 (2020) ("They develop detailed policy plans, including their priorities for the critical first one hundred days after assuming office and drafts of executive orders to be signed following inauguration."). Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, 124 Stat. 3045 (2018) (codified at 3 U.S.C. § 102 note).

3. Matt Viser, Seung Min Kim & Annie Linskey, *Biden Plans Immediate Flurry of Executive Orders to Reverse Trump Policies*, WASH. POST (Nov. 7, 2020), https://www.washingtonpost.com/politics/biden-first-executive-orders-measures/2020/11/07/9fb9c1d0-210b-11eb-b532-05c751cd5dc

administration, agency transition teams staff political offices across the federal government and work alongside career civil service leadership to transform broad campaign promises into policy solutions.[4] Regardless of party, it is the prerogative of every incoming President to look critically at the policies of their predecessor and identify how those policies align or conflict with their own administrative goals and promises.[5] The President's power, however, is not unfettered. Policy initiatives are subject to both structural and substantive restraints imposed by the U.S. Constitution and statutory law.[6]

In instances where the subject matter of a particular policy is highly politicized, a change in administration can sometimes trigger a drastic policy reversal.[7] Voters not only support these swift administrative policy changes when the political winds shift in Washington, D.C.; they demand them.[8] Religion is one area, in particular, where policies have vacillated dramatically from administration to administration.[9] For example, the George W. Bush administration promulgated charitable choice rules in 2004[10] that were subsequently rescinded by the Obama administration.[11] The Trump administration then reinstated and expanded the 2004 charitable choice regulations in 2020,[12] and the Biden administration immediately signaled the intent to revise them in 2021.[13]

In many ways, these frequent policy shifts in the context of religion reflect the gulf between our two major parties with respect to values and priorities.[14] Focusing

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2_story.html [https://perma.cc/Q6RT-B63A].

4. Zoffer, *supra* note 2, at 2516; Presidential Transition Enhancement Act of 2019, Pub. L. No. 116-121, 134 Stat. 138 (2020) (codified at 3 U.S.C. § 102).

5. Bethany A. Davis Noll & Richard L. Revesz, *Regulating in Transition*, 104 MINN. L. REV. 1, 7 (2019) (discussing rollback of prior administration's policy agenda); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006).

6. U.S. CONST. amend. I (Establishment Clause); Administrative Procedure Act, 5 U.S.C. §§ 551–559.

7. Noll & Revesz, *supra* note 5, at 2 ("Like many prior presidents, Donald Trump came into office promising to roll back his predecessor's regulations.").

8. Michael D. Shear & Lisa Friedman, *Biden Could Roll Back Trump Agenda with Blitz of Executive Actions*, N.Y. TIMES (Nov. 8, 2020), https://www.nytimes.com/2020/11/08/us/politics/biden-trump-executive-action.html [https://perma.cc/88F2-B8AZ] ("Every president wants to come out of the gate strong and start fulfilling campaign promises before lunch on the first day . . . .").

9. *Id.* (noting that the global gag rule that prohibits federal government funding for foreign organizations providing or talking about abortion services "has been a political Ping-Pong ball since Ronald Reagan was president and is typically in place only under Republican administrations"); Miriam Berger, *Biden Drops Trump's Antiabortion 'Global Gag Rule.' Here's What that Means for Abortion Access Worldwide*, WASH. POST (Jan. 28, 2021), https://www.washingtonpost.com/world/2021/01/28/biden-trump-abortion-global-gag-rule-faq/ [https://perma.cc/K68V-HDGD] ("The decades of Washington-imposed whiplash have left sexual and reproductive health and rights programs around the world scrambling to secure funding—or needing to adjust the services they provide.").

10. Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 Fed. Reg. 42,586 (July 16, 2004).

11. Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,355 (Apr. 4, 2016).

12. Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020).

13. OFF. OF MGMT. & BUDGET, OFF. OF INFO. AND REGUL. AFF., EXEC. OFF. OF THE PRESIDENT, FALL 2021 UNIFIED REGULATORY AGENDA (2021).

14. Shear & Friedman, *supra* note 8 (discussing global gag rule).

on the discreet details of the policies, however, misses a much larger systemic change that has taken place over the last fifty years regarding the scope and nature of religious involvement in federal policy and programs. Since the 1980 election of Ronald Reagan, religion has become embedded both within and across the administrative state.[15] Reagan's presidential platform included sweeping changes regarding the role that religious organizations should play in federal programs.[16] It incorporated numerous religiously informed agenda items, including conscience regulations, family planning policies, and religiously operated grant programs that were then included in future Republican platforms.[17] Although subsequent Democratic administrations may have altered the details of these policies, they have also accepted the fundamental and pervasive integration of religion in federal policy and programs.[18]

This Article argues that the resulting widespread incorporation of religion across the federal government constitutes the executive establishment of religion in violation of the First Amendment because it favors certain religious tenets or beliefs over others.[19] The executive establishment of religion entails the promotion of, or collaboration with, specific religious tenets or organizations. It began in earnest during the Reagan administration, and it is currently embedded throughout federal policies and programs in the form of faith-based initiatives and broad religious exemptions.[20] It is uniquely destabilizing to the body politic because of the nature of the presidency.[21] The Office of the President was designed to be a unifying representative and trusted national voice abroad and in times of crisis at home.[22] Given this critical position, executive establishment of religion directly conflicts with the unifying purpose of the Establishment Clause by undermining political unity and fostering potential divisiveness on the basis of belief and ideology.[23] The systemic and pervasive nature of executive establishment, however, makes it difficult to challenge because of restrictive standing requirements.[24]

Existing constitutional and statutory restraints imposed on presidential power were not only inadequate to prevent executive establishment, but, in some ways, they facilitated it. The rise of the modern administrative state coincided with a time

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15. RICHARD G. HUTCHESON, JR., GOD AND THE WHITE HOUSE: HOW RELIGION HAS CHANGED THE MODERN PRESIDENCY (1988).

16. REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980 (1980) (available at Gerhard Peters and John T. Woolley, *Republican Party Platform of 1980*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1980 [https://perma.cc/B9YA-JTDC] (last visited Aug. 27, 2023)).

17. *Id.*

18. *See, e.g.*, *FACT SHEET: President Biden Reestablishes the White House Office of Faith-Based and Neighborhood Partnerships*, The WHITE HOUSE (Feb. 14, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/14/fact-sheet-president-biden-reestablishes-the-white-house-office-of-faith-based-and-neighborhood-partnerships/ [https://perma.cc/5WP2-66UF].

19. Lynch v. Donnelly, 465 U.S. 668 (1984).

20. HUTCHESON, *supra* note 15, at 225.

21. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

22. Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996).

23. Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705 (2018).

24. Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

of doctrinal flux in establishment jurisprudence.[25] The U.S. Supreme Court endorsed strict separationism in *Everson v. School Board* in 1947.[26] By the early 1980s, it had abandoned the doctrine of strict separationism in favor of even-handed neutrality, but eschewed bright-line rules.[27] The absence of clear standards invited presidential interpretations that stretched the meaning of existing precedents to justify increased collaboration with religion and the incorporation of religious tenets into administrative policy.[28] The year before *Everson*, Congress enacted the Administrative Procedure Act (APA) to instill democratizing elements throughout the administrative state and promote transparency and engagement in the development of administrative policy, most notably its notice and comment provisions that apply to agency rulemaking.[29] The APA is ill-equipped to address executive establishment because it assumes that policy decisions are based on facts, expertise, and public will—not exclusionary religious tenets.[30] Its statutory scheme left room for the adoption of various uniform policy lenses that allowed the incorporation of religious tenets across executive agencies and programs.

The first section of this Article outlines the structural and substantive limitations imposed on the President by both the U.S. Constitution and the APA, including separation of powers concerns and the First Amendment prohibition on the establishment of religion. This section charts the organic growth of the modern administrative state and the corresponding expansion of presidential executive oversight. It examines the evolution of the substantive limitations of the First Amendment, as well as the structural creation of administrative uniformity through the APA. The second section details the evolution of executive establishment that began in earnest during the Reagan administration. It explains how the confluence of shifting U.S. Supreme Court doctrine and the push for administrative uniformity created the perfect storm that led to the incorporation of particular religious tenets and organizations in federal policy and programs. This section notes that the embrace of particular religious tenets and organizations marked a sharp departure from the practice of prior administrations and explains why executive establishment is especially destabilizing to our democracy. The final section grapples with how to address executive establishment. It examines the existing institutional safeguards, specifically executive forbearance, judicial review, and legislative oversight. It further discusses administrative and legislative reforms that could help reverse the course of executive establishment. A brief conclusion warns that the continued unchecked adoption of specific religious tenets and religiously motivated policies is inherently exclusionary and directly undermines the unifying spirit of the Establishment Clause.

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25. *See infra* text accompanying notes 164–181 (describing the shift from strict separationism to even-handed neutrality).

26. Everson v. Sch. Bd., 330 U.S. 1 (1947).

27. *See e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

28. *See infra* text accompanying notes 182–214 (discussing the "Reagan Revolution" and the rise of the New Right).

29. Under the Administrative Procedure Act (APA), the public is entitled to a period of "notice and comment." 5 U.S.C. § 551. It is at this junction that advocates and stakeholders have an opportunity to influence the direction and shape of the regulation. This process typically involves three or four steps.

30. 5 U.S.C. § 553.

I. LIMITATIONS ON EXECUTIVE POLICYMAKING AND THE GROWTH OF THE ADMINISTRATIVE STATE

Franklin Roosevelt popularized presidential policymaking and made it accessible and understandable to the American people. His fireside chats invited everyday people into the whirl of federal policy creation and implementation, as the country desperately tried to respond to the Great Depression.[31] Roosevelt's direct approach to the American people has been credited with increasing public confidence and support for his initiatives.[32] Despite the popularity of Roosevelt's policy proposals, however, he was also well aware of the constitutional restraints imposed on executive power.[33] Although the programmatic success of a policy may depend on public opinion and administrative prowess, not all issues are created equal. Regardless of the weight of the electoral mandate or public support a President brings to the office, both constitutional and statutory restraints on executive power and policy changes persist.

This Section outlines the structural and substantive constitutional and statutory restraints that are most relevant to executive establishment. It first outlines the constitutional limits imposed on presidential policymaking: the structural restraints of the separation of powers doctrine and the substantive command of the Establishment Clause of the First Amendment. It then turns to key statutory reforms enacted during the early years of the modern administrative state that were designed to both democratize and restrain executive policymaking: the Reorganization Act of 1939 and the APA.[34] The final section demonstrates how developments in establishment jurisprudence in the 1940s mirrored the good government and democratic values that undergird the APA. They were both products of a particular historical moment and moved in tandem until the 1980s, when the U.S. Supreme Court repudiated strict separationism.[35]

A. Constitutional Limits on Executive Policymaking

The U.S. Constitution imposes both structural and substantive restraints on presidential policymaking. After the failure of the Articles of Confederation, the delegates to the Constitutional Convention confronted the task of creating a unified, but not tyrannical, federal government.[36] The result was a system of governance where the checks and balances of federalism and the doctrine of the separation of powers constrain the scope of executive power.[37] The Constitution also reflects the persistent memory trails of the weight of the Church of England

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31. DOUGLAS B. CRAIG, FIRESIDE POLITICS: RADIO AND POLITICAL CULTURE IN THE UNITED STATES, 1920–1940 at 154 (2005).

32. *See, e.g.*, William L. Silber, *Why Did FDR's Bank Holiday Succeed?*, 15 ECON. POL'Y REV. 19 (2009).

33. *See e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act of 1933).

34. The Reorganization Act of 1939, Pub. L. 76-19, (codified at 31 U.S.C. § 701); 5 U.S.C. § 551.

35. Lynch v. Donnelly, 465 U.S. 668 (1984).

36. James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 886–87 (2004).

37. *See, e.g.*, Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. Rev. 1745, 1754–55 (2009).

on early American life that resulted in the imposition of substantive or concept-based constitutional limitations on the content of government action in addition to structural safeguards.[38] Accordingly, the Constitution limits both the scope and content of executive action.[39] These limitations have informed the development of the administrative state and continue to guide—and restrain—executive action despite the exercise of broad executive policymaking authority. No amount of procedure, transparency, or public engagement can transform an unconstitutional action into a constitutional one.

The command of the Establishment Clause elevates all discussions of religion in the context of federal policy to the level of a potential constitutional concern. From this perspective, it is even more troubling that some federal policies involving religion can change so swiftly from administration to administration.[40] When the validity of a program or initiative hinges on the administrative interpretation of the First Amendment, it is inappropriate to dismiss drastic policy swings—such as those involving the 2004 Bush-era revisions to federal faith-based grantmaking policies—as mere byproducts of the culture wars and increasing partisan polarization.[41] Such a characterization obscures the true extent to which preferences for certain religious factions and tenets have become embedded within the administrative state. The very public recalibration of the government's relationship with religious organizations, vulnerable populations, and people of faith that occurs with each change of administration is merely a symptom of the quiet creep of executive establishment.[42]

1. The Separation of Powers

The doctrine of separation of powers creates implied structural constitutional limits across the federal government, including on the scope of presidential action. Regardless of the substance of the policy in question, these structural limits restrain presidential authority in order to protect and respect the constitutionally defined duties of another branch or level of government. The procedural structure of the Constitution's separation of powers creates a system of checks and balances granting the President executive power, guided by Congress and reviewed by the judiciary.[43] Informed by Montesquieu's admonition that "there can be no liberty" where the legislative and executive powers are unified in the same person or body of magistrates,[44] the Founders adopted a constitution that created collaborative and

38. *See, e.g.*, THE FEDERALIST NO. 1 (Alexander Hamilton), NOS. 10, 45 (James Madison).

39. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2000).

40. Berger, *supra* note 9 (discussing global gag rule).

41. *See, e.g.*, Tom Gjelten, *How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars*, NAT'L PUB. RADIO (May 23, 2019, 5:00 AM), https://www.npr.org/2019/05/23/724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars [https://perma.cc/6QLM-4YZ4]; Michelle Boorstein, *Our New Culture War Issue: Religion's Public Role*, WASH. POST (Sept. 24, 2014), https://www.washingtonpost.com/local/our-new-culture-war-issue-religions-public-role/2014/09/24/fa81f52e-43f4-11e4-b437-1a7368204804_story.html [https://perma.cc/DF7B-8QHW].

42. Berger, *supra* note 9 (discussing global gag rule).

43. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316 (2006) ("According to the political theory of the Framers, 'the great problem to be solved' was to design governance institutions that would afford 'practical security' against the excessive concentration of political power.").

44. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156-64 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans., 1989).

intersecting branches.[45] The health of this system relies on conflict among the branches rather than consensus.[46] James Madison rested his assurances that the branches would remain balanced on the existence of this friction among branches.[47] Federalist 51 argued that "[t]he great security against a gradual concentration of the several powers in the same [branch], consists in giving to those who administer each [branch] the necessary constitutional means and personal motives, to resist encroachments of the others . . . . Ambition must be made to counteract ambition."[48]

The exact contours of the powers held by each branch have necessarily evolved and transformed in response to the demands of the political moment and the increasing complexity of modern society. The U.S. Supreme Court has acknowledged this inexorable evolution and reasoned that it was implied at the creation of our nation.[49] In the 1983 case *Immigration and Naturalization Service v. Chadha*, the Court held that the Framers anticipated "the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles."[50] This decision reflected the longstanding acceptance of the demand for evolution of power sharing among the branches as articulated most famously in the 1952 *Youngstown Steel* case, *Youngstown Sheet and Tube Co. v. Sawyer*.[51]

In the *Youngstown Steel* case, the Court invalidated President Truman's seizure of Ohio steel mills where workers had been on the brink of striking.[52] Truman had argued that the seizure was justified because of the exigencies of the Korean war, but the Court ruled that the seizure was not an appropriate exercise of executive power.[53] The Court acknowledged the demands of governing an increasingly complex, modern nation. Justice Jackson's concurrence concluded that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[54]

In the latter half of the twentieth century, Congress responded to the demands for a "workable government" by increasing the delegation of power and consolidating various dispersed powers under the Executive.[55] The result was the expansion of the administrative state and the transformation of the role of the

45. Levinson & Pildes, *supra* note 43 at 2317 ("Madison's vision of competitive branches balancing and checking one another has dominated constitutional thought about the separation of powers through the present.").

46. *Id.*

47. THE FEDERALIST NO. 51 (James Madison).

48. *Id.*

49. INS v. Chadha, 462 U.S. 919 (1983).

50. *Id.*

51. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

52. *Id.* at 582 ("We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.").

53. *Id.* at 589.

54. *Id.* at 635 ("It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

55. *Id.*

federal government in American society. However, early movements toward the consolidation of administrative power and the expansion of executive oversight were far from widely accepted. Congress attempted to restrain executive overreach through the Reorganization Act of 1939 and the APA in 1946.[56] This legislation reflects the bipartisan concern that executive power exercised through agency management could undermine the balance of powers. Taken together, the acts solidified the infrastructure of the managerial state while incorporating democratic safeguards such as transparency and public participation.

2. The First Amendment

The structural constitutional limits of federalism and the separation of powers promote democratic ideals and prevent tyranny by limiting the consolidation of power within a single branch or level of government.[57] Largely in response to the efforts of the Anti-Federalists, the first eight amendments in the Bill of Rights provide substantive proscriptions to avoid government encroachment on individual rights, including the religion clauses in the First Amendment.[58] These explicit limits on government policymaking are designed to "set limits and build barriers against government abuse or enlargement of its powers."[59] Substantive constitutional safeguards look to the nature and effect of an action to determine its constitutionality—for example, will the action limit free speech, interfere with access to the ballot, or burden the free exercise of religion?[60] As Professor Michael Dorf explains, the "Constitution's architecture reveals a two-fold strategy for limiting government—first, by delegating only certain powers, and second, by checking valid exercises of those powers with individual rights."[61]

The First Amendment's bar on the government's establishment of religion or interference with free exercise of religion serves to safeguard individual rights by limiting the scope of government intrusion into private life.[62] Well into the First Amendment's third century, scholarly debates persist regarding the Founders' full intent for the Establishment Clause.[63] This unsettled landscape is reflected in the changing standards the Court has applied in establishment cases over the past six

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56. The Reorganization Act of 1939, Pub. L. 76-19, (codified at 31 U.S.C. § 701); 5 U.S.C. § 551.

57. Levinson & Pildes, *supra* note 43, at 2317.

58. The Anti-Federalists did not believe that these structural limits were sufficient protection from government encroachment on individual rights. Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067, 1070 (2012).

59. *See Letters from the Federal Farmer (Oct. 9, 1787)*, *in* THE ORIGINS OF THE AMERICAN CONSTITUTION 261, 272 (Michael Kammen ed., 1986); Brutus, *Essay of Brutus to the Citizens of New York* (Nov. 1, 1787) (Anti-Federalist Paper No. 2).

60. U.S. CONST. amend. I.

61. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1191 (1996) ("Although logically consistent with a vision of rights that only protects against direct burdens, the structure more comfortably fits with a broader role for individual rights.").

62. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

63. Patrick M. Garry, *Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model*, 12 NE. U. L. REV. 660 (2020).

decades.[64] Nuances of this debate also continue to animate public perception regarding what it means to be free from government coercion in the context of faith and conscience.[65]

Within this continuing debate, James Madison's *Memorial and Remonstrance Against Religious Assessments* remains a foundational text synthesizing the antiestablishment views of the founders and is frequently cited in court decisions.[66] Madison drafted *Memorial and Remonstrance* in response to a bill that would have implemented a tax to fund "teachers of the Christian faith."[67] Many religious early leaders supported the legislation believing "that taxes should be offered to all churches through a general assessment lest public morality languish."[68] As the author of the First Amendment, Madison's rebuttal to the proposed tax provides especially relevant insight regarding the antiestablishment values that informed the religion clauses.[69] In *Memorial and Remonstrance*, Madison reflected John Locke's resistance to established religion as a threat to individual conscience and political unity.[70] Madison argued that the proposal undermined the nature of equal citizenship guaranteed by the Constitution, stating that establishment "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[71] Madison further argued that establishment undermined the independence of religion by threatening corruption of religious values in favor of politics.[72] Dismissing the promotion of religiosity as a mechanism for instilling morality and citizenship, Madison concluded that the proposed bill's attempt to "employ Religion as an engine of Civil policy" was "an unhallowed perversion of the means of salvation."[73]

In its landmark 1947 decision *Everson v. School Board*, the U.S. Supreme Court adopted a strict separationist approach to establishment.[74] It relied heavily on Madison's *Memorial and Remonstrance* and quoted from Thomas Jefferson's 1802 *Letter to the Danbury Baptists* to fully erect "a wall of separation between the church and the state."[75] In the letter, Jefferson famously said that the adoption of the First

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64. *Id.* at 665 ("'The doctrinal inconsistency prevalent in the Establishment Clause area prompted one court to describe the law as suffering 'from a sort of jurisprudential schizophrenia.'").

65. *Id.* ("All the different tests have not only failed to provide a consistent constitutional guide to the interaction between government and the religious practices of society; they have failed to produce any lasting agreement on the issue of religion in the public arena.").

66. James Madison, *To the Honorable General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance* (1785), *in* JAMES MADISON ON RELIGIOUS LIBERTY 55, 57 (Robert S. Alley ed., 1985); *see, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18–20 (1947) (quoting Madison's *Memorial and Remonstrance* at length).

67. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1439 (1990).

68. Madison, *supra* note 66, at 58.

69. *Everson*, 330 U.S. at 12.

70. Heyman, *supra* note 23.

71. Madison, *supra* note 66, at 58.

72. *Id.*

73. *Id.* Although recognizing that morality and honesty fostered the health of the new republic, Madison and Thomas Jefferson concluded that these values were best fostered by religion uncorrupted by government intrusion rather than state-supported belief.

74. *Everson*, 330 U.S. at 12.

75. *Id.* at 16. Although Everson quotes Jefferson's Letter to the Danbury Baptists, it does not cite to the letter, but rather to *Reynolds v. United States*, which discussed the Letter at length. Reynolds

Amendment was a declaration that the "legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[76] The Court's adoption of what is referred to as strict separationism with the *Everson* decision continued to inform the government's relationship with religion and people of faith for more than three decades.[77] This period coincided with the rise and eventual growth of the administrative state in the latter half of the twentieth century. As a result, during the initial growth of the administrative state, there was a strong check in the form of strict separationism.

As discussed in Section II.A below, by the 1970s and 1980s, the Court's interpretation of establishment had shifted away from a clear-cut theory of separationism towards "evenhanded neutrality."[78] The movement away from separationism, coupled with a lack of consensus regarding the nuances of the Establishment Clause, facilitated the adoption of the value-centric policy creation and central monitoring by the Executive Office of the President that persists today. Congress has shown little recent appetite or political ability to legislate directly on value-intensive issues, such as religion, apart from fashioning procedural safeguards. This congressional silence emboldened direct and extensive presidential involvement in constitutionally sensitive subject areas through agency and executive action.[79] Such involvement can threaten unprecedented violations of the Establishment Clause, especially when implemented through managerial executive orders designed to promote uniform administrative oversight.[80]

B. Statutory Limits

The growth of the administrative state throughout the 1930s and 1940s triggered uneasiness regarding centralized power, which manifested in statutory reforms that imposed largely structural limitations on executive policymaking.[81] The Founders had been in favor of erecting barriers to direct communication between the President and the people or the President and Congress because they feared a

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v. United States, 98 U.S. 145 (1878). *Reynolds* was the first time that the U.S. Supreme Court addressed the Free Exercise Clause of the First Amendment.

76. Thomas Jefferson, *Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut* (Jan. 1, 1802), *in* THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., 1984) [hereinafter *Letter from Jefferson*] ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.") *Id.*

77. *Everson*, 330 U.S. 1; McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); Wallace v. Jaffree, 472 U.S. 38 (1985).

78. Lynch v. Donnelly, 465 U.S. 668 (1984).

79. Speaking about his faith-based initiatives, President Bush quipped at a White House conference, "I signed an Executive order that said that all faith-based groups should have equal access to Federal money. . . . That's what the initiative said; it said, 'Since Congress isn't moving, I will.'" President George W. Bush, *Remarks at the White House Faith-Based and Community Initiatives Leadership Conference*, 41 WEEKLY COMP. PRES. DOC. 332, 338 (Mar. 1, 2005).

80. Robin S. Maril, *Regulating the Family: The Impact of Pro-Family Policymaking Assessments on Women and Nontraditional Families*, 23 TEX. WOMEN'S L.J. 1 (2013).

81. *See, e.g.*, The Reorganization Act of 1939, Pub. L. 76–19, (codified at 31 U.S.C. § 701); 5 U.S.C. § 551.

populist embrace of a demagogue. With the leap in communication technology that occurred in the twentieth century, the President suddenly had direct and intimate access to the electorate.[82] By the 1930s, years of economic free fall and threats of war in Europe created fertile ground for Roosevelt to foster a cult of personality that he was able to use as a tool to actualize his policy initiatives.

New Deal opponents, including former President Hoover, heavily criticized President Roosevelt's popularization of the presidency and even his fireside chats.[83] However, these criticisms were rooted in normative and historic expectations of the role of the President rather than a constitutional bar. By the end of his administration, Roosevelt had successfully recalibrated this norm and paved the way for seemingly unrestrained executive influence over the moral and social conversations of the day. Congress responded with two significant pieces of legislation designed to check the President's authority to promote policymaking unitarily: the Reorganization Act of 1939 and the APA.[84] Both imposed structural restraints on executive power, but, as discussed below, many of these restraints also served to help spread executive establishment through encouraging and facilitating the imposition of uniformity across administrative agencies.

1. The Reorganization Act of 1939

When President Franklin Roosevelt took office in 1933, he did so with a clear mandate—a landslide electoral college victory and Democratic control of both the House and the Senate.[85] Along with this mandate, the Roosevelt administration also inherited the collapsed economy of the Great Depression and the accompanying human impacts of widespread poverty, deprivation, and inequality.[86] To address the all-encompassing economic crisis, the administration deployed the power of the executive to increase federal regulation in areas such as agriculture, financial markets, banking, nutrition support programs, and social welfare programs more generally. [87] The resulting innovative New Deal programs greatly expanded bureaucratic policymaking and led to the creation of new federal agencies accompanied by a growing class of civil service experts.[88]

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82. For example, President Wilson took steps to humanize the office and popularize the executive policy agenda, dramatizing the state of the union and aggressively transforming the office of the President into a legislative leader. Wilson argued that the executive should have "the personality and initiative to enforce his views upon the people and upon Congress." WILFRED E. BINKLEY, MAN IN THE WHITE HOUSE: HIS POWERS AND DUTIES 166–67 (1959).

83. DOUGLAS B. CRAIG, FIRESIDE POLITICS: RADIO AND POLITICAL CULTURE IN THE UNITED STATES, 1920–1940, at 154 (2005).

84. The Reorganization Act of 1939, Pub. L. 76-19, (codified at 31 U.S.C. § 701); 5 U.S.C. § 551.

85. Kenneth T. Walsh, *The Most Consequential Elections in History: Franklin Delano Roosevelt and the Election of 1932*, US NEWS (Sept. 10, 2008), https://www.usnews.com/news/articles/2008/09/10/the-most-consequential-elections-in-history-franklin-delano-roosevelt-and-the-election-of-1932 [https://web.archive.org/web/20230623112330/https://www.usnews.com/news/articles/2008/09/10/the-most-consequential-elections-in-history-franklin-delano-roosevelt-and-the-election-of-1932].

86. *Id.*

87. *Id.* ("What followed was an unprecedented accretion of federal power.").

88. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1246–48 (1986).

By the late 1930s, executive oversight had expanded to thirty major agencies, from only eight at the turn of the twenty-first century.[89] On the eve of the Second World War, public enthusiasm for centralized administration of government waned as visions of European dictators filled newsreels and trust in bureaucratic expertise deteriorated. The American Bar Association Committee on Administrative Law shared these growing concerns and issued annual reports throughout the decade that promoted the adoption of legislation to restrain the executive and limit the reach of the administrative state.[90] The Committee's inquiry considered

> [t]he practicality and desirability of divorcing quasi-judicial functions from quasi-legislative and executive functions in some or all of those administrative tribunals in which such a combination of functions now exists; of concentrating the quasi-judicial functions in an independent body having the character of an administrative court with appropriate branches and divisions and assisted by examiners or commissioners, its decisions to be subject to judicial review; and of concentrating the quasi-legislative and executive functions under executive officers responsible to the president.[91]

Despite growing calls for restraint, Roosevelt began concerted efforts to expand the scope and power of the administrative state. He convened the President's Committee on Administrative Management, known as the Brownlow Committee, in 1936.[92] Roosevelt presented the Committee's sweeping policy proposals to Congress in 1937.[93] The proposals would have streamlined federal agency management and formalized executive oversight over agencies, including the newly developed social welfare programs.[94]

Roosevelt faced significant opposition from both parties uneasy about enabling the rise of a totalitarian regime.[95] As a result, Congress passed compromise legislation, the Reorganization Act of 1939, that omitted the more sweeping suggestions of the Brownlow Committee.[96] The Reorganization Act created the

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89. Noah Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022).

90. *Report of the Special Committee on Administrative Law*, 56 ANN. REP. A.B.A. 407, 415 (1933).

91. *Id.*

92. Peri E. Arnold, *The Brownlow Committee, Regulation, and the Presidency: Seventy Years Later*, 67 PUB. ADMIN. REV. 1030, 1030–40 (2007).

93. Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2005) ("Roosevelt warmly endorsed the Report and its historic espousal of the unitariness of the executive branch in his message transmitting it to Congress on January 12, 1937, calling it 'a great document of permanent importance.'").

94. *Id.* at 95 ("[T]he Report, in the words of one commentator, sounded 'a clarion call for exclusive presidential control of government reorganization.'").

95. *Id.* at 105 ("The rise of dictatorships in Europe had made the public wary about granting broad powers to the President.").

96. Reorganization Act of 1939, Pub. L. 76-19, (codified at 31 U.S.C. § 701). The Reorganization Act was not reauthorized and lapsed in 1941. Congress did not veto any of the reorganizations. *See also* Yoo et al., *supra* note 93 at 106 (noting that the 1939 Act "conceded the most contentious issues").

Executive Office of the President.[97] It also permitted the President to hire assistants, propose reorganization plans to Congress, and consider economic viability and financial factors in agency management.[98] Although the Reorganization Act did not secure Roosevelt the additional power he had desired, it did embrace far-reaching changes to the executive branch for the first time in its history.

In the first proposed reorganization plan, Roosevelt asserted that administrative efficiency and structure were essential to safeguarding democracy in the face of rising fascism:

> In these days of ruthless attempts to destroy democratic governments, it is boldly asserted that democracies must always be weak in order to be democratic at all; and that, therefore, it will be easy to crush all free states out of existence. Confident in our Republic's years of successful resistance to all subversive attempts upon it, whether from without or within, nevertheless we must be constantly alert to the importance of keeping the tools of American democracy up to date. . . . We are not free if our administration is weak. But we are free if we know, and others know, that we are strong; that we can be tough as well as tender-hearted; and that what the American people decide to do can and will be done, capably and effectively.[99]

2. The Administrative Procedure Act of 1946

World War II intensified the fear of a powerful executive and an intrusive administrative state. As Professor Kovacs notes, the federal wartime agencies responsible for rationing and production controls became a "daily presence—and irritant—for consumers and businesspeople . . . People blamed federal agencies for inflation and chronic shortages. Volunteer price checkers who snitched on violators reminded some observers of totalitarian block wardens or 'kitchen gestapo.'"[100] Partly in response to increasing public pressure, in 1943, the House of Representatives created the Select Committee to Investigate Acts of Executive Agencies Beyond the Scope of their Authority to focus on overreach on the part of executive branch agencies.[101] Three years later, Congress passed the APA.[102]

When the APA was enacted in 1946, it had been in the works in some form for seventeen years. However, Congress did not pass the APA until after the end of

97. Reorganization Act of 1939 § 36, 31 U.S.C. § 701; Exec. Order No. 8248, 4 Fed. Reg. 3864 (Sept. 12, 1939).

98. *Id.*

99. Message of the President, Reorganization Plan No. 1 of 1939, 4 Fed. Reg. 2727 (June 7, 1939).

100. Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 595 (2021) (quoting Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, *in* TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 185, 201 (Daniel R. Ernst & Victor Jew eds., 2002)).

101. H.R. Res. 102, 78th Cong. (1943); *see also* Kovacs, *supra* note 100, at 595.

102. Administrative Procedure Act, 5 U.S.C. §§ 551–559.

the Second World War and the death of Roosevelt.[103] The APA supported a constitutional understanding for the legality of the administrative state while also institutionalizing its safeguards. It is designed to both facilitate and restrain rapid policy change. It was passed in large part as a response to the rise of totalitarian dictatorships abroad, and it refines the Constitution's structural limitations on executive power.[104] The APA codifies democratizing goals of transparency, public engagement, and uniform judicial oversight. This democratization of the administrative process, in turn, promotes equality, inclusivity, and unity. These process-based structural limitations on executive power apply across issue areas and have benefited from rich debate and analysis since the advent of the modern administrative state.[105]

Of course, the Executive's policymaking scope remains limited by substantive constitutional limitations. Whereas questions of separation of powers and APA compliance demand that policies be undertaken by the appropriate branch in compliance with sufficient procedural safeguards, substantive limitations cut to the quick of our national ideals. These limitations demand that policies be consistent with the protections in the Bill of Rights, including the First Amendment. As explained in Section I.C.1 below, shortly after the enactment of the APA, the U.S. Supreme Court engaged the substantive constitutional limits imposed by the Establishment Clause articulating the adoption of the theory of the "high and impregnable wall" between church and state in *Everson*.[106]

C. The Growth of the Administrative State

The structure of the APA and the adoption of a separationist interpretation of the First Amendment by the U.S. Supreme Court were both efforts to create bright lines limiting the power of centralized government. The APA was designed to provide a structural blueprint for a modern managerial presidency and a "workable government" while also supporting restraints that promote the separation of powers and the democratic safeguards embodied by them.[107] At the time of the enactment of the APA, the specter of totalitarianism loomed large over Western democracies, and the APA was intentionally designed as a bulwark against fascism.[108] The reach of the APA, however, is inherently limited to structural and procedural checks. Accordingly, substantive checks, such as prohibitions on establishment of religion, remain essential to protecting individual liberties from executive-based policy actions.

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103. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

104. *Id.*

105. *Id.* at 1559 ("The APA and its history are central to the United States' economic and political development. In the 1930s and 1940s when the APA was debated, much in the United States was uncertain. Many believed that communism was a real possibility, as were fascism and dictatorship.").

106. Everson v. Township of Ewing, 330 U.S. 1 (1947).

107. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

108. Rosenblum, *supra* note 89 ("[D]uring the New Deal, the institutions that would enable executive control of the administrative state were reimagined in light of fascism.").

During the initial expansion of the modern administrative state, the constitutional doctrine of strict separationism provided such a check and ensured that the federal government did not elevate or endorse particular religious tenets or organizations.[109] *Everson* and its progeny endorsed the belief in the need for government to be explicitly excluded from wholly private spheres.[110] Strict separationism not only reflected the Madisonian ideas of safeguarding religious belief from government intrusion, but it also openly grappled with the role that religious identity played throughout World War II and the Holocaust.[111] As explained in Section II.A below, the move towards "even handed neutrality" in the 1980s and the failure of the Court to develop a unified understanding of the scope of the Establishment Clause removed the clear substantive check on executive action that favored particular religious tenets or organizations.[112] This shift then enabled the expansion of executive authority through the incorporation of religion and values within governmental actions and policies.[113]

1. Strict Separationism

During the same period when Roosevelt was cementing the footprint of the modern administrative state, the U.S. Supreme Court's 1940 decision in *Cantwell v. Connecticut* validated the ethos of the New Deal by holding that freedom from government intrusion must be balanced with necessary regulation of individual conduct.[114] In *Cantwell*, the Court applied the Free Exercise Clause of the First Amendment to the states for the first time through the doctrine of incorporation under the Fourteenth Amendment.[115] The case was brought by a Jehovah's Witness who was convicted for violating a state anti-solicitation statute.[116] Police charged Cantwell with disturbing the peace because he played a record on a public sidewalk that expressed negative views about organized religion, particularly Roman Catholicism.[117] The Court reversed Cantwell's criminal conviction, holding that the

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109. Lynch v. Donnelly, 465 U.S. 668 (1984).

110. Everson v. Bd. of Educ., 330 U.S. 1, 14 (1947).

111. Recognizing that religion could promote division, strict separationism reflects the belief that the role of the government is to promote unity.

112. *See infra* text accompanying notes 164–189 (discussing switch from strict separationism to even-handed neutrality).

113. *See infra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

114. Justice Roberts describes the "double aspect" regarding constitutional legislative limits on religion:

> [T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

115. *Id.* at 304.

116. *Id.* at 301.

117. *Id.*

State's interest in keeping the peace did not outweigh his right to publicly express his religious beliefs.[118]

Although the Court protected Cantwell's right to free exercise under the Due Process Clause of the Fourteenth Amendment, it preserved the constitutionality of government regulation of religious conduct that may incite violence or encourage the dangerous types of societal divisions that had occurred in Europe.[119] The Court explained that some level of governmental intervention in religiously motivated conduct may not only be allowed, but may be necessary to promote the health of the democracy.[120] The Court warned that

> [t]he danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all.[121]

The Court held that even though the freedom to believe could not be abridged by the government, religiously motivated conduct "remains subject to regulation for the protection of society."[122]

One year after the enactment of the APA and seven years after *Cantwell*, the U.S. Supreme Court had the occasion to address the scope of the Establishment Clause in *Everson*. [123] Holding that the Establishment Clause of the First Amendment applied to the states, the reasoning of *Everson* also exemplified the national appetite for governmental restraint through clear and explicit limitations on power.[124] In *Everson,* a taxpayer challenged a New Jersey statute that enabled a local school district to reimburse parents for the cost of bus fare for students attending Catholic schools, charging that providing taxpayer dollars to parents supported the Catholic Church and violated the Establishment Clause.[125] The Court determined that providing bus fare to Catholic school students did not violate the Establishment Clause.[126] However, the Court articulated a strict antiestablishment standard of separatism to be applied in future cases.[127]

As noted earlier, the Court in *Everson* relied heavily on the intent of the Founders in drafting the First Amendment, specifically James Madison's *Memorial*

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118. *Id.* at 311.
119. *Id.* at 310.
120. *Id.*
121. *Id.*
122. *Id.* at 304.
123. Everson v. Township of Ewing, 330 U.S. 1, 29 (1947).
124. *Id.* at 18 ("State power is no more to be used so as to handicap religions than it is to favor them.").
125. *Id.* at 3.
126. *Id.* at 18. The Court concluded: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."
127. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (Frankfurter, J., dissenting). Justice Frankfurter's dissent in *Murdock* in 1943 foreshadowed this jurisprudential development in the context of a free exercise case. Frankfurter saw Free Exercise as limited by the Establishment Clause, thereby recognizing the Establishment Clause as a distinct principle rather than a dual component of the religion clauses of the First Amendment. Frankfurter concluded that "the most important of all aspects of religious freedom in this country, namely, [is] that of the separation of church and state." *Id.* at 140.

and Remonstrance and Thomas Jefferson's *Letter to the Danbury Baptists*, sent in 1802. [128] Justice Black's majority opinion constitutionalized Jefferson's wall metaphor and his assertion that Madison drafted the Establishment Clause to erect a "wall of separation between church and state."[129] Justice Black wrote: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." [130] The dissenters also embraced this separationist standard, but they would have held that it had been violated by the reimbursement policy.[131]

Justice Rutledge's dissent provides an even more explicit and broad understanding of establishment as a restriction on the government's relationship with religious entities.[132] He concluded that

> [t]he Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[133]

The Court's embrace of a "wall of separation" framed the national conversation of the First Amendment's establishment prohibitions until the 1980s.[134]

Court decisions like the 1962 school prayer case *Engel v. Vitale*[135] and a similar 1963 case, *Abington Township v. Schempp*,[136] affirmed the separationist principles espoused in *Everson*. In *Engel*, the New York State Board of Regents required that each public school day begin with a prayer that read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[137] Holding for the parents, the Court determined that requiring the recitation of the prayer squarely violated the Establishment Clause, consistent with *Everson*.[138] Writing for the majority, Justice Black restated his interpretation of the First Amendment, saying, "[I]t is no part of the business of government to compose official prayers for any group of the

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128. *Everson*, 330 U.S. at 15 (1947) (citing Reynolds v. United States, 98 U.S. 145, 164 (1878) citing Jefferson's Letter to the Danbury Baptists (Jan. 1, 1802)).

129. *Id.* at 18.

130. *Id.*

131. *See, e.g.*, *id.* at 19 (Jackson, J., dissenting) ("[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.").

132. *Id.* (Rutledge, J., dissenting).

133. *Id.* at 31–32.

134. *Id.* at 16.

135. Engel v. Vitale, 370 U.S. 421 (1962).

136. Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

137. *Engel*, 370 U.S. at 422 (1962).

138. *See contra id.* at 443 (Stewart, J., dissenting).

American people to recite as a part of a religious program carried on by government."[139]

A year later, the Court in *Schempp* followed a similar trajectory, concluding that a Pennsylvania state law mandating the reading of the Christian Bible aloud every morning in public schools violated the principles of separation of church and state under the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[140] The Court held:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.[141]

Through these and subsequent cases, like *Lemon v. Kurtzman*,[142] the Court continued to apply strict separationism, but declined to provide a consistent or clear definition of what it entails. Despite the absence of bright-line standards, the concept of strict separationism continued to inform the understanding of the intersection of government and faith in the minds of both judges and the public for the next four decades.

2. Administrative Uniformity

The postwar period through the 1970s represented a time of unprecedented expansion of the administrative state, as federal policies and programs addressed an increasingly broad array of issues. After World War II and the Korean War, Congress and voters recognized federal regulation of public health and safety and the environment as a necessary and appropriate response to the increasing complexity of a rapidly modernizing society. As federal programs moved increasingly into the nation's private lives, it was inevitable that they would cross paths with religious organizations that were already engaged in social service work in the communities they served. The social programs created under President Johnson's Great Society initiatives were facilitated by the bureaucratic infrastructure developed in response to the New Deal. They were also constrained by the substantive check of strict separationism, which President Johnson personally adopted as a binding principle to all social programs supported by the government.[143]

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139. *Id.* at 425 ("[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.").

140. Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

141. *Id.* at 226 ("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

142. Lemon v. Kurtzman, 403 U.S. 602 (1971).

143. *See, e.g.*, Monroe Billington, *President Lyndon B. Johnson and the Separation of Church and State*, 29 J. CHURCH & STATE 101 (1987) (describing President Johnson's commitment to separationism as informed by his personal understanding of the Constitution and the appropriate role of religion within the exercise of his Presidential duties).

The 1970s saw an increase in the enactment of large statutory regimes, such as the Occupational Safety and Health Act of 1970,[144] the Clean Water Act of 1972,[145] and the Consumer Product Safety Act of 1972, to name just a few.[146] The resulting increase in congressional delegation to the administrative agencies greatly expanded the scope and complexity of the administrative state. Administrative agencies were tasked by Congress with implementing and administering these broad and comprehensive statutes, which required them to create often highly technical regulatory regimes.[147] As agencies were tasked with producing greater, and often highly technical, regulatory schemes, they started to move away from formal rulemaking as prescribed by the APA and toward more informal rulemaking through notice and comment procedures. In response, Congress enacted a series of procedural controls to both monitor and influence the process of informal rulemaking by promoting accountability and transparency.[148] The courts also weighed in by creating additional requirements for rulemaking agencies.[149] Despite these attempts to impose structural constraints, informal rulemaking continued to flourish.

As Congress was delegating more power to administrative agencies, Presidents Nixon and Ford assumed a more direct role in influencing agency rulemaking and administrative policies to ensure that they aligned with the President's political domestic agenda by instituting a centralized approach to policymaking.[150] They both issued executive orders establishing interagency procedures for the review of agency actions that were determined to be "major" or "significant."[151] These executive level checks focused primarily on cost analyses and inflation and largely avoided other areas of policy concern, such as social welfare.[152]

In 1978, President Carter issued Executive Order 12,044, which created the procedural infrastructure for executive branch and interagency review of regulatory actions.[153] It provided a foundation for later efforts to enforce policy uniformity across the administrative state on specific issues. Executive Order 12,044 required agencies to publish regulatory agendas, establish procedures for evaluating "significant" actions, and mandated the inclusion of a specific form of regulatory

144. Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590 (as codified by 29 U.S.C. §§ 651–678).

145. Clean Water Act of 1972, Pub. L. 92-500, 86 Stat. 816 (as codified by 33 U.S.C. § 1151–1165 ("Chapter 23")).

146. Consumer Product Safety Act of 1972, Pub. L. 92-573, 86 Stat. 1207, (1972) (as codified by 15 U.S.C. §§ 2051–2084).

147. *See, e.g.*, Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590 (as codified by 29 U.S.C. §§ 651–678).

148. Maril, *supra* note 80, at 4–7.

149. *Id.*

150. *See, e.g.*, Exec. Order No. 11,821, 3 C.F.R. 926 (1971–1975) (accessed at Gerhard Peters & John T. Wooley, *Gerald R. Ford, Executive Order 11821—Inflation Impact Statements Online*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/executive-order-11821-inflation-impact-statements [https://perma.cc/ZT2E-XAL8] (last visited Aug. 27, 2023)).

151. *Id.* (requiring "inflation impact statements" for all "major" legislative proposals).

152. *See, e.g.*, *id.* (imposing a requirement "that all major legislative proposals, regulations, and rules emanating from the executive branch of the Government [must] include a statement certifying that the inflationary impact of such actions on the Nation has been carefully considered").

153. Improving Government Regulations, Exec. Order No. 12,044, 3 C.F.R 152 (1979) (Mar. 23, 1978).

analysis for each major rule to determine cost effectiveness.[154] Although congressional delegation had greatly increased the power of the administrative state, this new unified approach to policymaking significantly enhanced the power and reach of the presidency. As discussed below in Section II.B.1, its adoption also facilitated the spread of executive establishment beginning in the 1980s.

II. EXECUTIVE ESTABLISHMENT OF RELIGION

By the mid-1980s, the U.S. Supreme Court had stepped back from a strict separationist view of the Establishment Clause in favor of an "even-handed neutrality" approach.[155] The shift in emphasis conveniently accommodated the religiously motivated policy agenda of Ronald Reagan.[156] Early in his administration, President Reagan further centralized the process of administrative rulemaking in the name of uniformity and solidified presidential oversight of agency policymaking.[157] He then began the explicit incorporation of religiosity across federal governmental programs.[158] Reagan instituted the first value-centered, nonprocedural check on agency actions in an effort to ensure that they were analyzed through value-specific lenses.[159] The "pro-family" policy lens that he imposed on agency actions incorporated particular religious tenets that had been advocated by specific religions organizations.[160]

Later administrations continued to build on this foundation and expand the influence of the executive to the realm of faith and values.[161] Individual agencies were transformed into value-setting arms of the White House, as presidential control over administrative actions was extended beyond the management of the rulemaking process. Over time, preferences for particular religious tenets and religious organizations became baked into the fabric of administrative policymaking leading to the ongoing executive establishment of religion. This Section first considers the shift to even-handed neutrality in Establishment jurisprudence. It then turns to the Reagan Revolution and its focus on "traditional family values." It

154. *Id.*

155. Lynch v. Donnelly, 465 U.S. 668 (1984).

156. *See infra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

157. *See infra* text accompanying notes 185–191 (discussing centralized presidential control).

158. *See infra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

159. *See infra* text accompanying notes 192–212 (discussing pro-family policy lens).

160. Exec. Order No. 12,606, 52 Fed. Reg, 34,188 (Sept. 9, 1987). President Clinton rescinded the Executive Order in 1997. Exec. Order No. 13,045, 62 Fed. Reg. 36,965 (Apr. 27, 1997). President's Clinton's Executive Order was titled: Protection of Children from Environmental Health Risks and Safety Risks. *Id.* It made no mention of the prior Executive Order, except to say that it was revoked. *Id.* Congress then enacted legislation requiring "pro-family" impact assessments for all rulemaking in 1998. The requirement was passed as an amendment to the Treasury and General Appropriations Act of 1999. S. Res. 3362, 105th Cong. (1998). The "Family Policy Making Assessment" remains in effect today, mandating a "pro-family" lens for all federal rulemaking. The requirement was passed as an amendment to the Treasury and General Appropriations Act of 1999. S. Res. 3362, 105th Cong. (1998). Unlike Executive Order 12,606, the statutory imposition of a "family assessment" includes a definition of "family" as "a group of individuals related by blood, marriage, or adoption who live together as a single household." *Id.* There is a special exception for an individual who is related by blood, marriage, or adoption. *Id.*

161. *See infra* text accompanying notes 217–257 (discussing the Quiet Revolution).

concludes with a discussion of the current state of executive establishment and a summary of its especially destabilizing consequences.

A. Even-Handed Neutrality Replaces Strict Separationism

The incorporation of Christian values throughout federal executive policymaking and the appointment of Evangelical leaders in the Reagan administration in the 1980s coincided with a significant shift in the U.S. Supreme Court's interpretation of the Establishment Clause.[162] The judicial endorsement of strict separationism had persisted throughout the 1970s, but not without challenge. Justice Rehnquist, and later Justice Scalia, urged the Court to focus on government neutrality when dealing with multiple faith communities as opposed to a strict separationism. [163] It was during this period of uncertainty that the Reagan administration embraced value-centric policy creation and monitoring within the Executive branch. [164] The movement away from separationism enabled the incorporation of value-based administrative policies, which have now become the norm.[165]

In the 1984 case *Lynch v. Donnelly*, the Court signaled a divergence from separationism.[166] In *Lynch*, the Court determined that a nativity creche in a public shopping district operated by the city did not violate the Establishment Clause.[167] Rejecting the understanding of separationism that had prevailed for decades, the Court held that the Establishment Clause is not "a regime of total separation," nor does it "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[168] Further, the Court held that such a complete separation would constitute a "callous indifference" and hostility towards religion counter to the "national tradition as embodied in the First Amendment's guarantee of the free exercise of religion."[169] Writing for the majority, Chief Justice Burger quoted Joseph Story and concluded, "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[170]

A year later in *Wallace v. Jaffree,* Justice Rehnquist penned a dissent to the Court's decision striking down an Alabama law that mandated a moment of silence

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162. The Reagan administration was not silent on its view of the appropriate role of the government and religion. In a 1986 report by Attorney General Edwin Meese, the Department of Justice described the separationism of the 1940s through the 1960s as easily "explained and dismissed summarily." EDWIN MEESE III, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1986), https://www.ojp.gov/pdffiles1/Digitization/115053NCJRS.pdf [https://perma.cc/2XT8-8PE4]. Instead, the administration advocated that the government should assume an accommodationist or neutral role in the interplay with religious organizations. *Id.*

163. *See e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (Rehnquist, J., dissenting).

164. *See infra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

165. *See infra* text accompanying notes 185–191 (discussing centralized executive oversight).

166. Lynch v. Donnelly, 465 U.S. 668 (1984).

167. *Id.* at 671.

168. *Id.* at 673 ("Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause.").

169. *Id.*

170. *Id.* at 678.

or "voluntary prayer" at the beginning of the day.[171] The majority held that the moment of silence violated the Establishment Clause by coercing children into prayer at school.[172] Justice Rehnquist wrote a forceful dissent in accord with the movement away from separationism signaled in *Lynch*. Justice Rehnquist reiterated the vision of governmental neutrality in place of the wall of separation, arguing that *Everson*'s underlying support for strict separationism was ill-founded and ahistorical.[173]

Within a matter of years, the Rehnquist approach to Establishment predominated in the Court. The 1988 case *Bowen v. Kendrick* upheld a federal statute on Establishment grounds despite the administration of a federal anti-teen pregnancy program by religious organizations on behalf of the federal government. [174] The Adolescent Family Life Act (AFLA) of 1981 was a Congressional initiative designed to reduce teenage pregnancy and respond to the "dangers and harm" of teenage sexuality more generally.[175] The AFLA specifically called on community and religious organizations to participate in the delivery of educational and intervention services.[176] The Court found that although religious organizations implementing the value-motivated program may coincide with the ministerial missions of the religious organizations against nonmarital sex and abortion, the statute was secular on its face and in fact neutral.[177] The Court noted,

> The facially neutral projects authorized by the AFLA – including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc. – are not themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.[178]

Citing an earlier case, the Court concluded that neutrality did not mandate that religious organizations be "quarantined from public benefits that are available to all."[179]

B. The Reagan Revolution and Value-Centered Policymaking

The personal religious beliefs of American Presidents have undoubtedly informed each Executive's approach to the office and its responsibilities.

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171. Wallace v. Jaffree, 472 U.S. 38 (1985) (Rehnquist, J., dissenting).

172. *Id.* at 61 ("[W]henever the State itself speaks on a religious subject, one of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'").

173. *Id.* at 92 ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").

174. Bowen v. Kendrick, 487 U.S. 589 (1988); *see also* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

175. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357 (codified at 42 U.S.C. § 300).

176. *Id.*

177. *Bowen*, 487 U.S. at 610.

178. *Id.* at 613.

179. *Id.* at 608.

Historically, the executive actions most frequently intersecting with religion and governance have been limited to the President's use of the bully pulpit to serve as a national moral authority and a champion for values-based legislation.[180] President Reagan departed from these longstanding norms in his public statements, but he also expanded the administrative state to incorporate value-centered procedural guidelines for policymaking.[181] The movement towards even-handed neutrality in the courts arguably gave the Reagan administration the space to incorporate these expressly religious values.[182] Reagan aligned his public statements and policy platform with Evangelical Christian interest groups and their preferred religious tenets.[183] In this way, the President became the promoter of specific religious beliefs, rather than the protector of free exercise.

As explained below in Section II.B.2, the Reagan-era incorporation of value-based assessments into executive rulemaking and sub-regulatory actions established a concrete and far-reaching Executive influence on the administrative interpretation of the religion clauses.[184]

1. Strengthened Presidential Oversight of Administrative Actions

Immediately upon taking office in 1981, President Reagan replaced Carter's 1978 Executive Order with a more extensive set of regulatory procedures.[185] Executive Order 12,291 directed federal agencies to take regulatory action only where "the potential benefits to society for the regulation outweigh the potential costs to society."[186] The Executive Order was consistent with the New Right's belief in small government and general distrust of federal regulation.[187] It required

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180. *See, e.g.*, Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1117 (2007) ("Bush has utilized the power of the bully pulpit by giving numerous speeches across the country and in major policy addresses sermonizing about the need to bring faith-based organizations into the governmental fold.").

181. *See infra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

182. Lynch v. Donnelly, 465 U.S. 668 (1984).

183. Steven M. Gillon, *Reagan Tied Republicans to White Christians and Now the Party is Trapped*, WASH. POST (Mar. 22, 2021), https://www.washingtonpost.com/outlook/2021/03/22/reagan-tied-republicans-white-christians-now-party-is-trapped/ [https://perma.cc/AC76-4AZH].

184. *See infra* text accompanying notes 185–212 (discussing the "Reagan Revolution").

185. Cost-Benefit Analysis, Executive Order 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601.

186. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (discussing increased level of presidential control over agency rulemaking). Early in his first term, President Reagan expanded executive control over rulemaking with Executive Order 12,291. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981). This Executive Order required federal agencies to take regulatory action only if "the potential benefits to society for the regulation outweigh the potential costs to society." *Id.* Agencies were also instructed to submit to the Office of Management and Budget (OMB) a "regulatory impact analysis" of the potential costs and benefits for any proposed rule likely to be economically significant. *Id. See also* Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html [https://perma.cc/5N4B-X7CM].

187. *See generally* ROLAND EVANS AND RONALD NOVAK, THE REAGAN REVOLUTION: AN INSIDE LOOK AT THE TRANSFORMATION OF THE U.S. GOVERNMENT (1981); *see also* Timothy B. Tomasi & Jess A. Velona, *All the President's Men: A Study of Ronald Reagan's Appointment to the U.S.*

agencies to submit a "regulatory impact analysis" of the potential costs and benefits for any proposed rule likely to be economically significant to the Office of Management Budget (OMB).[188] It also imposed both substantive and procedural steps for agencies regarding the promulgation of rules, acknowledging that its goal was to "provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations.[189] In his second term, Reagan expanded on this centralized control in Executive Order 12,498, which mandated that agency leaders determine that all prospective rulemaking be "consistent with the goals of the administration."[190] These changes were designed to further administrative uniformity. They were initially criticized by scholars as an unconstitutional reach of presidential power, but the sheer practicality of managing the growing administrative state silenced many detractors.[191]

2. Value-Centered Policymaking

As the U.S. Supreme Court shifted away from the separationist principles of the postwar era, the Reagan administration was quick to embrace a new, collaborative relationship between the government and religious organizations.[192] In a 1986 report by Attorney General Edwin Meese, the U.S. Department of Justice (DOJ) described the separationism of the 1940s–1960s as easily "explained and dismissed summarily."[193] Instead, Meese advocated for an accommodationist or neutral role for government in the interplay with religious organizations.[194] The resulting collaborative relationships favored certain particular religious tenets and organizations over others, specifically policies aligning with Evangelical beliefs like

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Court of Appeals, 87 COLUM. L. REV. 766, 767–70 (1987) (describing the Reagan administration and its "New Right" supporters).

188. OMB is located in the Executive Office of the President. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb 17, 1981), *reprinted in* 5 U.S.C. § 601.

189. In 1981, the Office of Legal Counsel (OLC) at DOJ came out in favor of these procedural changes. The OLC released a memorandum concluding that the changes were an appropriate exercise of the President's power to "take care that the laws are faithfully executed." Memorandum from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel (Feb. 13, 1981), https://www.justice.gov/file/22586/download [https://perma.cc/VD6J-6NNS].

190. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 4, 1985).

191. *See, e.g.*, Ann Rosenfield, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63, 63–104 (1986) (providing a contemporary discussion of the legal community's response to the constitutional questions raised by the Executive Order).

192. *See, e.g.*, Ronald Reagan, *National Affairs Campaign Address on Religious Liberty* (Aug. 22, 1980) (available at *Ronald Regan National Affairs Campaign Address on Religious Liberty (Abridged),* AM. RHETORIC (Apr. 12, 2022), https://www.americanrhetoric.com/speeches/ronaldreaganreligiousliberty.htm [https://perma.cc/HLE6-QLVC]). Speaking to a large national Christian group, then candidate Reagan said, "I know this is a non-partisan gathering, and so I know that you can't endorse me, but I only brought that up because I want you to know that I endorse you and what you're doing." *Id.* In addition to rhetoric, Reagan also pursued appointments of prominent Evangelical leaders as political appointees. *See e.g.*, Leslie Maitland Werner, *Reagan to Name New Domestic Aide*, N.Y. TIMES (Jan. 30, 1987), https://www.nytimes.com/1987/01/30/us/reagan-to-name-new-domestic-aide.html [https://perma.cc/ED38-4UM7] (noting that Reagan had appointed religious conservate Gary Bauer to numerous positions in the administration).

193. EDWIN MEESE III, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1986) https://www.ojp.gov/pdffiles1/Digitization/115053NCJRS.pdf [https://perma.cc/2XT8-8PE4].

194. *Id.*

abstinence only sex education and school prayer. They were easily facilitated through the increased centralized Executive management of agency activities discussed in the prior section.[195] Although the Court may have opened the door to these relationships, it was the new administrative procedures and norms that enabled them to spread and embed so quickly.

In the summer of 1986, Reagan announced the creation of a presidential working group tasked with developing a report "studying the relationship between federal programs and family life," known as the Family Report.[196] The report published in November of that year detailed an extensive blueprint for a "pro-family" federal agenda.[197] In a public Christmas address, President Reagan announced the completion of the report reiterating the need to protect the family as "a fundamental unit of American life" and one that demands "that when so much around us is whispering the little lie that we should live only for the moment and for ourselves, it's more important than ever for our families to affirm an older and more lasting set of values."[198] Reagan concluded this statement by quoting scripture regarding the birth of Jesus and the description of the holy family.[199] The overt religiosity of this conclusion signaled the federal government's perceived sacredness of the traditional family structure and the essential relationship between the government's dual preservation of both Christianity and conservative family values.

The Family Report described single parent, dual wage-earner, and foster families as problems or symptoms of a fractured social fabric rather than as families.[200] These family forms were described as diluting and diminishing the well-being and prominence of "traditional families."[201] Echoing Reagan's call to move from the "little lie" of "living for ourselves," the Family Report asserted that

> [i]t is simply not true that what we do is our business only. For in the final analysis, the kind of people we are – The kind of nation we will be for generations hence – is the sum of what millions of

195. *See supra* text accompanying notes 185–191 (discussing centralized policymaking).

196. President Ronald Reagan, *Remarks at the Presidential Ceremony for the Presidential Scholars Awards* (June 23, 1986) (available at Gerhard Peters & John T. Wooley, *Remarks at the Presidential Ceremony for the Presidential Scholars Awards Online*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-the-presentation-ceremony-for-the-presidential-scholar-awards [https://perma.cc/RR3V-CXN7] (last visited Aug. 27, 2023)).

197. U.S. DEP'T OF EDUC., THE FAMILY: PRESERVING AMERICA'S FUTURE: A REPORT TO THE PRESIDENT FROM THE WHITE HOUSE WORKING GROUP ON THE FAMILY (Univ. of Mich. Library, 1987), http://babel.hathitrust.org/cgi/pt?id=mdp.39015028455072;seq=5;view=1up [https://perma.cc/T8PU-6X67] (last visited Aug. 27, 2023). The Report maps out what it characterizes as a "pro-family policy" that asserts certain "home truths" regarding which types of families are desirable. *Id.* at 3.

198. Ronald Reagan, *Radio Address to the Nation on Family Values*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Dec. 20, 1986), https://www.reaganlibrary.gov/archives/speech/radio-address-nation-family-values [https://perma.cc/UFE9-V6R8].

199. *Id.*

200. U.S. DEP'T OF EDUC., *supra* note 197. The Family report argued that "the rights of the family are anterior, and superior, to those of the state." *Id.* at 4. The Report described an "anti-family agendA" that believed that there was "a governmental solution to every problem that government had caused in the first place." *Id.* at 1.

201. *Id.*

> Americans do in their otherwise private lives . . . there will be staggering consequences for us all.[202]

In order to restore the "traditional" family to preeminence, the Reagan administration instituted top-down "pro-family" policy controls that were designed to promote uniformity and control family formation and norms.[203] Despite persistently decrying the harms created by government involvement in family life through the Great Society programs, the "pro-family" policies finalized under Reagan imposed greater governmental oversight and federal decision making in programs that impact families.

In 1987 President Reagan signed Executive Order 12,606, titled "The Family."[204] This Executive Order created an assessment and analysis requirement similar to the environmental requirement of the impact statement created by the National Environmental Policy Act (NEPA).[205] Federal agencies were required to evaluate policies and programs for their impact on "the family." This "pro-family" policy lens was designed to "ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies."[206] The Executive Order provided a checklist of criteria that were to be used by agencies when formulating new regulations:

Will the proposal strengthen or erode the stability of the family and, in particular, the marital commitment?

Will the proposal strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?

What message, intended or otherwise, does this program send to the public concerning the status of the family?

What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?[207]

Agencies and departments were then required to identify and provide an acceptable rationale for any proposed regulatory action that may pose a significant potential negative impact on family well-being.[208] In addition to departmental-level agency reviews, OMB and the Office of Policy Development were tasked with a series of enforcement and implementation obligations, including the preparation of a report to "advise the President on policy and regulatory actions that may be taken

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202. *Id.* at 3 (emphasis removed).

203. For a discussion of the myth of a "traditional" American family see STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (2000) (describing the "elusive traditional family").

204. Exec. Order No. 12,606, 3 C.F.R. § 241 (1987).

205. National Environmental Policy Act of 1969 § 2, 42 U.S.C. § 4321 (2012). The statute requires an agency to include a statement on "the environmental impact" as well as alternatives to the proposed course of action. 42 U.S.C. § 4332(C)(i), (iii) (2022). *See* SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMIN. REFORM (1984) (assessing whether environmental impact statements have institutionalized "a greater sensitivity to environmental risks in the federal bureaucracy").

206. Exec. Order No. 12,606, 3 C.F.R. § 241 (1987).

207. *Id.*

208. *Id.*

to strengthen the institutions of marriage and family in America."[209] Although it was embraced by leaders of the Religious Right, the Executive Order received relatively little coverage in the national press and, in the long run, provided scant evidence of concrete policy changes.[210]

Every incoming administration has tweaked, but affirmed, the Reagan-era structure of increased Presidential control over both agency processes and the substantive policy developments drafted by the agencies' civil servant experts. President Clinton maintained the bulk of Reagan's Executive Order 12,498, but he incorporated increased public review and transparency throughout the administrative procedure process in Executive Order 12,866.[211] President Obama articulated a similar, yet broader value-centered lens in Executive Order 13,563 and required agencies to consider "values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[212]

C. Executive Establishment Today

The President's constitutional mandate to faithfully execute and implement laws undoubtedly implicates questions related to the separation of powers and federalism.[213] At the same time, the President must also be responsive to the substantive limits of the First Amendment. Under the current interpretation of the Establishment Clause, there is an extremely strong case to be made that the incorporation of preferences for particular religious tenets and organizations across the administrative state violates the First Amendment. The unchecked adoption of specific religious tenets and religiously motivated policies is inherently exclusionary, thereby directly undermining the unifying spirit of the Establishment Clause and fostering inequality and disunity.[214]

As explained in the prior section, President Reagan transformed the infrastructure of the administrative state and also normalized the incorporation of specific, exclusionary religious tenets within policymaking.[215] These steps laid the foundation for some of today's most complex and destabilizing policy conflicts.[216] Although there are many examples of executive establishment, this Section focuses on two different types of instances. The first involves the evolution of the charitable choice rules that began during the administration of George W. Bush and resulted in the embedding of faith-based initiatives across the federal government. The second example does not involve a particular policy reform but rather examines the

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209. *Id.*

210. In the absence of congressional action on Evangelical issues like school prayer, Reagan's tangible conservative accomplishments across both terms were a disappointment to the Christian Right. However, adoption of value-based Executive Orders, like The Family, coupled with Reagan's aggressive incorporation of Christianity and religiosity through statements and appointments, created a seemingly immovable foundation for future administrations to implement the previously unimaginable religiously motivated policies and programs.

211. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1996).

212. Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

213. U.S. CONST. art. II.

214. *See infra* text accompanying notes 316–332 (discussing why Executive Establishment is a uniquely destabilizing force).

215. *See supra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

216. *See, e.g.*, Berger, *supra* note 9 (discussing global gag rule).

misuse of U.S. Supreme Court Establishment precedent during the Trump administration to justify administrative actions that favored particular religious tenets or organizations.

1. The Quiet Revolution and Charitable Choice

Under strict separationism, faith-based organizations were excluded from federal grants and other programs because of their status as religious organizations.[217] Throughout the ramp up of the Great Society programs of the 1960s, the "high and impregnable" wall of separation held firm.[218] However, the exclusion of faith-based organizations from federal programs and policies also led to persistent claims that the federal government discriminated against religious organizations on account of their religion.[219]

The George W. Bush administration became a champion of faith-based organizations and religious freedom.[220] Faced with a reluctant Congress, Bush created the White House Office of Faith-Based and Community Initiatives (WHOFCI) and set about systematically implementing faith-based policies that reached across departments and agencies.[221] Proponents of the reforms praised the administration's efforts to "level the playing field" for faith-based organizations and to consider new solutions to the social issues.[222] Opponents of the reforms accused the administration of engaging in a power grab that offended the bedrock principle of the "separation of church and state" and violated the Establishment Clause.[223] Towards the end of the Bush administration, the White House issued a report titled *The Quiet Revolution* that detailed the advancements that had been made over the prior seven years with respect to incorporating faith-based organizations and initiatives across the federal government.

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217. THE WHITE HOUSE, THE QUIET REVOLUTION: THE PRESIDENT'S FAITH-BASED AND COMMUNITY INITIATIVE: A SEVEN-YEAR PROGRESS REPORT (2008), https://georgewbush-whitehouse.archives.gov/government/fbci/The-Quiet-Revolution.pdf [https://perma.cc/FGH8-FZCH] [hereinafter THE QUIET REVOLUTION].

218. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947).

219. THE QUIET REVOLUTION, *supra* note 217.

220. *See* Ron Suskibd, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES (Oct. 17, 2004), https://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html [https://perma.cc/R55P-DSNU].

221. Richard Cizik, *The Faith-Based Initiative Controversy*, PBS (Apr. 29, 2004), https://www.pbs.org/wgbh/pages/frontline/shows/jesus/president/faithbased.html [https://perma.cc/YR2U-MBMR] (last visited Feb. 23, 2022).

222. THE QUIET REVOLUTION, *supra* note 217. The report was issued by The White House in February 2008. Its subtitle is "The President's Faith-Based and Community Initiative: A Seven-Year Progress Report."

223. *See, e.g.*, ANNE FARRIS, RICHARD P. NATHAN, DAVID J. WRIGHT, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE (2004), https://rockinst.org/wp-content/uploads/2018/02/2004-08-the_expanding_administrative_presidency_george_w_bush_and_the_faith-based_initiative.pdf [https://perma.cc/EPB3-BDEU]. This report was prepared by the Roundtable on Religion and Social Policy. *Id.* This report concludes that "the absence of new legislative authority has not stopped the Bush administration from using its executive powers to widely implement the Faith-Based Initiative throughout the federal government." *Id.*

The question of the appropriate role of faith-based organizations in federal programs and policies was an issue in the 2000 Presidential campaign.[224] During the campaign, then candidate George W. Bush promised to dedicate billions of federal dollars to faith-based initiatives and create the White House Office of Faith-Based Action.[225] Nine days after his inauguration, on January 29, 2001, President Bush issued two Executive Orders creating the White House Office of Faith-Based and Community Initiatives (WHOFBCI)[226] and creating centers for faith-based and community initiatives (FBCI) in five federal agencies: the Department of Education, U.S. Department of Health and Human Services (HHS), U.S. Department of Housing and Urban Development (HUD), DOJ, and U.S. Department of Labor (DOL).[227] Executive Order 13,198 required all five of the agencies to conduct a department-wide audit, specifically to

> identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by the department, including but not limited to regulations, rules, orders, procurement, and other internal policies and practices, and outreach activities that either facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations in Federal programs.[228]

In August 2001, the White House issued a report detailing the ways that faith-based organizations were discouraged from participating in federal programs titled *The Unlevel Playing Field.* [229] The report provided the framework for future administration policy development. [230] The Bush administration sought congressional support for a range of "charitable choice" programs. [231] These programs were called "charitable choice" because they were considered to empower the recipients of federal services to choose from among providers, including ones that were faith-based.[232]

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224. Laurie Goodstein, *The 2000 Campaign: Matters of Faith; Bush Uses Religion as Personal and Political Guide*, N.Y. TIMES (Oct. 22, 2000), https://www.nytimes.com/2000/10/22/us/2000-campaign-matters-faith-bush-uses-religion-personal-political-guide.html [https://perma.cc/JHF6-MGGW].

225. *Id.*

226. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

227. Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

228. Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

229. THE WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (2001) [hereinafter UNLEVEL PLAYING FIELD], https://georgewbush-whitehouse.archives.gov/news/releases/2001/08/unlevelfield.html [https://perma.cc/5PDX-2N74].

230. *Id.*

231. CONG. RSCH. SERV., RL 32736, CHARITABLE CHOICE RULES AND FAITH-BASED ORGANIZATIONS (2006), https://www.everycrsreport.com/files/20060712_RL32736_174d4404241a8d95052d0d5e76eac7a9a550a02d.pdf [https://perma.cc/N9SU-QZ5J] ("[A]fter Congress failed to enact Charitable Choice rules for more programs, the Bush Administration issued an executive order (EO 13279) that directed that most rules covered under the Charitable Choice rubric be followed by a wide range of social service programs, unless otherwise directed by law.").

232. As President Bush explained at a press conference in February 2001, "I believe that so long as there's a secular alternative available, we ought to allow individuals who we're helping to be able to choose a program that may be run by a faith-based program." Laurie Goodstein, *Bush's Charity Plan is Raising Concerns for Religious Right*, N.Y. TIMES (Mar. 3, 2001), https://www.nytimes.com/

Bush's charitable choice proposals were unable to garner support in Congress.[233] With no congressional backing, President Bush issued a second set of Executive Orders in December 2002 that were designed to implement his goals at the administrative level.[234] Executive Order 13,280 created additional FBCI offices in the Department of Agriculture and the Agency for International Development.[235] Executive Order 13,279 provided the following substantive direction for the WHOFBCI, as well as for the seven agency-based FBCI offices:

Direct federal funding cannot be used for "inherently religious activities."

Organizations are not required to segregate the federal funding they receive for the provision of social services from their "inherently religious activities."

Religious organizations should be able to compete for government grants on the same terms as private non-religious institutions.

Religious organizations that participate in federal grant programs should be able to do so "without impairing their independence, autonomy, expression, or religious character."

Any organization that participates in a federally funded grant program should be prohibited from discriminating against "current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice."

Religious organizations that participate in a federally funded grant program are entitled to prefer coreligionists for employment and are exempted from a prior executive order forbidding religious discrimination by any entity receiving federal funds.[236]

In 2004, Bush issued Executive Order 13,342 that established FBCI offices in the Veterans Administration, the Department of Commerce, and the Small Business Administration (SBA).[237] It was followed in 2006 by Executive Order 13,397 that established an FBCI office at the U.S. Department of Homeland Security.[238] For fiscal year 2005, more than two billion dollars in competitive federal grants were awarded to faith-based organizations.[239] According to the Government

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2001/03/03/us/bush-s-charity-plan-is-raising-concerns-for-religious-right.html [https://perma.cc/GT9D-LEWU].

233. *See* CONG. RSCH. SERV., *supra* note 231 (explaining that Congress failed to act).

234. Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

235. Responsibilities of the Department of Agriculture and the Agency for International Development With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,280, 3 C.F.R. § 1 (Dec. 12, 2002) https://www.govinfo.gov/link/cpd/executiveorder/13280 [https://perma.cc/73B6-BVBV]

236. Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13,279, 67 Fed. Reg. 77141, 77142 (Dec. 16, 2002).

237. Exec. Order No. 13,342, 3 C.F.R. § 180 (2004), https://www.govinfo.gov/link/cpd/executiveorder/13342 [https://perma.cc/5YEM-K9RB]

238. Exec. Order No. 13,397, 3 C.F.R. § 214 (2006).

239. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-616, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY (2006), https://www.gao.gov/assets/gao-06-616.pdf [https://perma.cc/R7C6-A64Q].

Accountability Office, this figure represented a twenty-one percent increase over the amounts awarded in 2003.[240]

As a result of the internal audits and Executive Orders, agencies were directed to "level the playing field" for faith-based organizations.[241] This charge triggered rulemaking, and the most extensive regulations were developed by HHS, HUD, and DOL.[242] These agencies have a significant reach and use federal grant funds to serve the most vulnerable populations. For example, HHS is the largest source of federal social service grants.[243] Under the new faith-based rules, faith-based organizations received HHS funding for abstinence-only education programs, marriage promotion initiatives, and childcare and development programs.[244] In order to be able to partner with faith-based organizations, HHS promulgated new regulations.[245] HHS published its final rule on July 16, 2004.[246] It only received four public comments during the notice and comment period that followed the publication of the proposed rule.[247]

The rule explains at length existing U.S. Supreme Court precedent and the distinction between "direct funding" and "indirect funding," as well as the different rules applying to each.[248] In the case of direct departmental funding, the funding must not support any inherently religious activities.[249] In addition, any government funded activities must be separated by time or location from inherently religious

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240. *Id.*

241. UNLEVEL PLAYING FIELD, *supra* note 229.

242. In addition to formal rulemaking, agencies issue a wide range of informal guidance which can include training manuals for staff, as well as applications for grantees. This occurred across the federal government in order to implement the goals of the WHOFBCI.

243. U.S. DEP'T OF HEALTH & HUM. SERVS., HHS GRANTS, https://www.hhs.gov/grants/index.html#:~:text=HHS%20is%20the%20largest%20grant,are%20eligible%20to%20receive%20funding [https://perma.cc/M8XR-Z5G5] ("HHS is the largest grant-making agency in the US.") (last visited Feb. 23, 2022).

244. *See, e.g.*, MARCIA CROSSE, CONG. RSCH. SERV., GAO-07-87, ABSTINENCE EDUCATION: EFFORTS TO ASSESS THE ACCURACY AND EFFECTIVENESS OF FEDERALLY FUNDED PROGRAMS 11, 11–12 (2011), https://www.gao.gov/assets/gao-07-87.pdf [https://perma.cc/72DW-5S4P].

245. Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of all Department of Health and Human Services Program Participants, 69 Fed. Reg. 10951 (proposed Mar. 9, 2004) (proposed rule).

246. Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 Fed. Reg. 42,586 (July 16, 2004) (final rule).

247. *Id.*

248. *Id.*

249. The rule provides that "direct funding" occurs when:

> As used in this final rule, the term "direct funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, under a direct funding method, the government or an intermediate organization with the same duties as a governmental entity may purchase the needed services straight from the provider. Direct Federal funds may not be used for inherently religious activities. Faith-based organizations that receive direct Federal funds must take steps to separate, in time or location, their inherently religious activities from the federally funded services they offer. In addition, any participation by a program beneficiary in such religious activities must be voluntary and understood to be voluntary.

Id.

activities.[250] However, the rule provides that "faith-based organizations may use space in their facilities to provide Department-funded services, without removing religious art, icons, scriptures, or other religious symbols."[251] Indirectly funded programs trigger the concept of "charitable choice." Indirect funding occurs "as a result of a genuine and independent private choice of a beneficiary . . . through a voucher, coupon, or certificate . . . or similar funding mechanism."[252] In such cases, the affirmative choice of the recipient is thought to break the chain between the government and the provider, making it permissible under the Establishment Clause.[253] Moreover, for indirect funding there is no requirement that the provider separate inherently religious activities by time or location.[254]

The Bush administration memorialized many of these steps in its 2008 report *The Quiet Revolution*.[255] The report provides a comprehensive blueprint for implementing systemic administrative change. In addition, the report outlined the policies and practices of federal agencies that it perceived to be "well beyond constitutional and legislative requirements."[256] These included the following:

Bans or other limitations on some or all religious organizations applying for funding.

Requiring applicants to alter or disguise their religious character to be eligible for funding.

Requiring religious organizations to forfeit their right under Title VII of the Civil Rights Act of 1964 to staff on a religious basis.

Providing lists of prohibited religious activities without a positive affirmation of eligibility or guidance on how faith-based organizations *can* legally and effectively partner with government.

Excessive restrictions on constitutionally permissible religious activities.[257]

Every President since Bush has retained the basic structure of the WHOFBCI, which formalizes a faith-based presence across the executive branch. President Obama retained an office for faith-based initiatives in the Executive Office of the President but renamed it the White House Office of Faith-Based Initiatives and Neighborhood Partnerships.[258] He announced the renaming of the

250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. THE QUIET REVOLUTION, *supra* note 217.
256. *Id.* at 33.
257. *Id.*
258. Exec. Order No. 13,498, 3 C.F.R. § 219 (2010), https://www.govinfo.gov/content/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1.pdf [https://perma.cc/3EFL-3H33]. The Executive Order called for "strengthen[ing] the constitutional and legal footing" of the program. Partnerships With Faith-Based and Other Neighborhood Organizations, 80 Fed. Reg. 47,316 (Aug. 6, 2015), https://www.govinfo.gov/content/pkg/FR-2015-08-06/pdf/2015-18259.pdf [https://perma.cc/G2EU-CFRU] (to be codified at 28 C.F.R. 38). The executive order also created the President's Advisory Council for Faith-Based and Neighborhood Partnerships to provide policy guidance. *Id.* The Environmental Protection Agency started its faith-based program during the Obama administration in October of 2010. EPA News Release, EPA Launches Faith-based and Neighborhood Partnerships Initiative/EPA's Coordination with White House Effort will Support Environmental Education and Healthier Families (Apr. 14, 2011), https://archive.epa.gov/epapages/newsroom_archive/

office at the National Prayer Breakfast on February 5, 2009, shortly after his inauguration.[259] Obama explained:

> The goal of this office will not be to favor one religious group over another – or even religious groups over secular groups. It will simply be to work on behalf of those organizations that want to work on behalf of our communities, and to do so without blurring the line that our founders wisely drew between church and state.[260]

President Trump renamed the Office the White House Faith and Opportunity Initiative in Executive Order 13,831.[261] The Office was directed to consult with faith leaders on a wide range of topics: "poverty alleviation, religious liberty, strengthening marriage and family, education, solutions for substance abuse and addiction, crime prevention and reduction, prisoner reentry, and health and humanitarian services."[262] Trump's Executive Order directed every agency that did not have its own office to appoint a liaison to the White House Office.[263] Four years later, President Biden maintained the office, but changed its name back to the Obama-era name—White House Office of Faith-Based Initiatives and Neighborhood Partnerships.[264] All of these changes back and forth occurred within the first couple weeks or months of the new administration.

The charitable choice rules were likewise maintained by subsequent administrations, although they were subject to frequent revision. For example, the Obama administration promulgated revised charitable choice regulations in 2015.[265] The regulations required faith-based organizations to provide beneficiaries with explicit notice regarding their rights to be free from discrimination on the basis of religion.[266] Freedom from discrimination included the rights of beneficiaries to access services regardless of their religious belief, or refusal to hold a religious belief, or to attend or otherwise participate in religious activities.[267] Organizations were also required to inform beneficiaries about the process for filing a complaint.[268] Importantly, the 2015 charitable choice regulations also required organizations to make reasonable efforts to connect a prospective beneficiary with a secular or

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newsreleases/d49a036b7f10292f85257876007036de.html [https://perma.cc/B728-EY4P] (noting EPA joined the faith-based partnership in October 2010).

259. President Barack Obama, Remarks of President Barack Obama—National Prayer Breakfast: This is My Hope. This is My Prayer. (Feb. 5, 2009). The National Prayer Breakfast is a yearly event in Washington, D.C. that has been attended by every sitting President since 1953. *See* Amy B. Wang, *At National Prayer Breakfast, Biden Asks Why Unity Remains Elusive*, WASH. POST (Feb. 3, 2022), https://www.washingtonpost.com/politics/2022/02/03/national-prayer-breakfast-biden-asks-why-unity-remains-elusive/ [https://perma.cc/SSX7-NKZD].

260. *Id.*

261. Exec. Order No. 13,831, 83 Fed. Reg. 20,715 (May 13, 2018).

262. *Id.* § 2.b.ii.

263. *Id.* § 2.b.iv.

264. Exec. Order No. 14,015, 86 Fed. Reg. 10,007 (Feb. 14, 2021).

265. Federal Agency Final Regulations Implementing Executive Order 13,559: Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,353 (Apr. 4, 2016).

266. *Id.* at 19,363.

267. *Id.*

268. *Id.* at 19,364.

alternative faith-based provider if that beneficiary objected to the religious character of the organization.[269] They also clarified the definitions of "direct" and "indirect" funding and created different levels of discrimination protections for each.[270] Most notably, the regulations limited the carveout for faith-based organizations receiving indirect federal funds.[271] They provided that funding would only be considered "indirect" if the recipient had access to a secular option.[272]

The Trump administration promulgated sweeping changes to the charitable choice regulations in 2020.[273] Most notably, the changes removed the requirement that faith-based organizations provide a referral to a secular organization and the requirement that they inform beneficiaries of their right to be free from discrimination.[274] The preamble to the Trump proposed rules stated that the requirement that a religious organization provide recipients notice of their rights constituted discrimination because a secular organization is not required to do the same.[275] The rule also removed the requirement that there must be a secular option in order for funding to be considered "indirect."[276] In addition, the rule provided that faith-based organizations "may require attendance at all activities that are fundamental to the program," including religious activities.[277] In other words, a beneficiary using a government-funded voucher may be presented with only faith-based service options and may then be compelled to engage in religious practices or activities by the provider.[278] For example, vouchers are used to implement the Substance Abuse and Mental Health Services Administration's (SAMSHA) Access to Recovery program created in 2004 specifically to fund faith-based organizations offering substance abuse counseling and recovery services.[279] Target populations served by the program are individuals in contact with the criminal justice system, including youth, and participation in a substance abuse program is often linked to sentencing and housing considerations.[280] Under the current regulations, an individual could face the decision between participating in a faith-based treatment program requiring worship service attendance or incarceration or continued family separation.

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269. *Id.* at 19,368.

270. *Id.*

271. *Id.* at 19,426. Such services are paid through a voucher, certificate, or another similar form of government-funded payment.

272. *Id.*

273. Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020).

274. *Id.* at 82,040. The rule asserts that the Obama-era requirement of a referral to a secular organization is an undue burden on free exercise. *Id.*

275. *Id.* at 82,048.

276. *Id.*

277. *Id.* at 82,129.

278. *Id.*

279. SAMHSA TECHNICAL ASSISTANCE PACKAGE: ACCESS TO RECOVERY SERVICE MENUS AND RECOVERY SUPPORT SERVICES, https://www.samhsa.gov/sites/default/files/grants/access-recovery-service-menus.pdf [https://perma.cc/CZ3W-LG86] (last visited Aug. 27, 2023).

280. ANDREW BURWICK & GRETCHEN KIRBY, USING VOUCHERS TO DELIVER SOCIAL SERVICES: LEARNING FROM THE GOALS, USES, AND KEY ELEMENTS OF EXISTING FEDERAL VOUCHER PROGRAMS 12 (2007), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/42296/report.pdf [https://perma.cc/MD3M-N3UH].

2. The Misuse of U.S. Supreme Court Precedent

The faith-based initiatives and charitable choice regulations that began under the Bush administration were undertaken based on an executive interpretation of then-existing U.S. Supreme Court precedent.[281] The notice and comment requirements of the APA require recitation of legal authority.[282] For example, the original HHS charitable choice regulations carefully parse Establishment jurisprudence and count on Justices to determine what the Court would likely rule.[283] The detailed distinction between "direct" and "indirect" funding is a reflection of trying to thread this needle.[284] Administrations will obviously characterize or frame precedent in a manner most favorable to their policy objectives, but the Trump administration elevated this practice to a new and alarming level with its interpretation of the 2017 U.S. Supreme Court case *Trinity Lutheran Church of Columbia v. Comer*.[285] As explained in greater detail in below, there are remarkably few checks on the practice of executive interpretation.

Trinity Lutheran challenged the state of Missouri's refusal to allow a church-sponsored school to participate in a state program that provided funding for playground resurfacing simply because of the religious nature of the school.[286] In a 7 to 2 decision authored by Chief Justice Roberts, the Court ruled that the state of Missouri violated the Free Exercise Clause because it discriminated on the basis of religious identity.[287] However, Chief Justice Roberts added an important footnote to clarify the scope of the ruling.[288] Footnote 3 states clearly what the case is about and what it is not about. It says affirmatively that this case "involves express discrimination based on religious identity with respect to playground resurfacing."[289] It further provides that this case does not address "religious uses of funding or other forms of discrimination."[290]

Despite the narrow scope of the ruling in *Trinity*, the Trump administration used the case to justify not just sweeping revisions to the charitable choice rules but also a blanket revision of administration policies.[291] The Trump administration repeatedly asserted that *Trinity Lutheran* stood for the broad proposition that the Supreme Court precedent mandated the granting of religious exemptions restricting

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281. *See, e.g.*, Exec. Order No. 13,198, 3 C.F.R. § 750 (2001) (discussing existing U.S. Supreme Court precedent at length).

282. Administrative Procedure Act (A.P.A.), 5 U.S.C. § 553(b)(2) (requiring that notice and publication include "reference to the legal authority under which the rule is proposed").

283. Exec. Order No. 13,198, 3 C.F.R. § 750 (2001) (discussing existing U.S. Supreme Court precedent at length).

284. *Id.*

285. Trinity Lutheran Church of Columbia v. Comer, 582 U.S. 449 (2017).

286. *Id.*

287. *Id.* at 458 ("[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'").

288. *Id.* at 465 n.3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

289. *Id.*

290. *Id.*

291. Memorandum from Att'y Gen on Fed. L. Protections for Religious Liberty to All Exec. Dept's and Agencies (Oct. 6, 2017) (on file with the Dep't of Just.).

the ability of the government to consider religiously motivated discriminatory conduct.[292] This interpretation of the ruling was patently incredulous given the clear command of footnote 3, but it provided cover for numerous administrative decisions that sanctioned religiously based discriminatory actions.[293] As noted, the revised charitable choice regulations cited *Trinity Lutheran*, but, in a seeming disconnect, they then set forth provisions that directly conflicted with the opinion.[294] The regulations provided that federal agencies must not only evaluate grant requests from faith-based organizations alongside secular organizations regardless of the organization's religious status, but they must also hold these organizations to a different and lesser standard regarding service delivery.[295]

Another example of the misuse of *Trinity Lutheran* involves the revision of the rules governing federal contractors. In August 2018, DOL's Office of Federal Contract Compliance Programs (OFCCP) issued a directive revising the rules binding federal contractors that cited *Trinity Lutheran* for the proposition that federal enforcement of nondiscrimination requirements could violate the First

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292. *See, e.g.*, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019), https://www.govinfo.gov/content/pkg/FR-2019-08-15/pdf/2019-17472.pdf [https://perma.cc/8TMA-5KWD] (adopting a regulation designed to strip workers of basic protections, and empowering businesses and organizations receiving taxpayer dollars to discriminate against their employees with few safeguards from abuse); Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831 (proposed on Nov. 19, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-24385.pdf [https://perma.cc/LPW9-92XM] (proposing revisions to the federal Uniform Administrative Requirements for grant programs that strip explicit nondiscrimination provisions from the existing text); Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2,937 (proposed Jan. 17, 2020), https://www.govinfo.gov/content/pkg/FR-2020-01-17/pdf/2019-26862.pdf [https://perma.cc/8PLU-9G6A] (allowing providers operating a voucher program to require a beneficiary to engage in religious activities); Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed June 14, 2019), https://www.govinfo.gov/content/pkg/FR-2019-06-14/pdf/2019-11512.pdf [https://perma.cc/Q685-57AZ] (eliminating the explicit inclusion of discrimination on the basis of "gender identity" within the regulation's sex nondiscrimination protections); Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811 (proposed July 24, 2020), https://www.govinfo.gov/content/pkg/FR-2020-07-24/pdf/2020-14718.pdf [https://perma.cc/748D-8H84] (allowing shelters receiving taxpayer dollars to turn transgender people away entirely or provide unsafe housing); DOJ Press Release, Office of Public Affairs, Attorney General Sessions Issues Guidance on Federal Law Protections for Religious Liberty, https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty [https://perma.cc/J8LU-37X9], (updated Apr. 19, 2018) (implementing a sweeping directive to federal agencies regarding religious exemptions in part utilizing an overly broad interpretation of the Religious Freedom Restoration Act); U.S. DEP'T OF LAB., DIRECTIVE 2018-03 (2018) https://www.dol.gov/agencies/ofccp/directives/2018-03 [https://web.archive.org/web/20221218062653/https://www.dol.gov/agencies/ofccp/directives/2018-03].

293. Arguably the assertion could have qualified as a frivolous claim had it been asserted in court filings. Fed. R. Civ. P. 11(2).

294. Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020), https://www.federalregister.gov/documents/2020/12/17/2020-27084/equal-participation-of-faith-based-organizations-in-the-federal-agencies-programs-and-activities [https://perma.cc/56JY-45TV].

295. *Id.*

Amendment rights of contractors.[296] The directive was followed by proposed regulations promulgated in June 2019.[297] One of the main responsibilities of OFCCP is to conduct audits, investigate complaints of employment discrimination, and review hiring data to ensure compliance with Executive Order 11,246, which provides certain protections from discrimination for the employees of federal contractors and subcontractors.[298] Issued in 1965, Executive Order 11,246 originally provided protections for employees of federal contractors and subcontractors from discrimination based on race, color, religion, and national origin.[299] Over the past five decades, additional protections have been added to include discrimination because of sex, sexual orientation, and gender identity.[300] These protections provide security to workers and equip them with meaningful administrative recourse.[301] The Executive Order also provides contractors with a clear set of expectations and standards regarding their treatment of employees.[302]

The OFCCP issued final regulations in 2020 that incorporated expansive religious exemptions from compliance with these nondiscrimination provisions, citing *Trinity Lutheran*.[303] It allowed a for-profit federal contractor to claim religious belief as a defense to an allegation or finding of employment discrimination.[304] The exemption was available to any contractor that holds itself out to the public as carrying out a religious mission. However, for purposes of the regulation, an employer could be considered to hold itself out to the public if it provided OFCCP with an unpublished, publicly unavailable response to a private inquiry regarding its religious status.[305] The regulations did not require that the public—or even the employer's own workers—have actual notice that the employer has a religious mission.[306] Moreover, the regulations specifically allowed taxpayer-funded businesses to consider tenets of their faith when making employment and benefit decisions.[307] This provision empowered employers to pick and choose which

296. U.S. DEP'T OF LAB., DIRECTIVE 2018-03 (2018); Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677, at 41,689–80 (proposed on Aug. 15, 2019) ("'This approach, which recognizes contractors' exercise of religion, is also consistent with Supreme Court decisions emphasizing that 'condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.'" (citing Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2022 (2017) (alterations omitted) (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion))).

297. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677, at 41,679, 41,682–85 (proposed on Aug. 15, 2019) (proposing defining "religion" to provide that the term is not limited to religious belief but also includes all aspects of religious).

298. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

299. *Id.*

300. *See, e.g.*, Implementation of Executive Order 13,672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (Dec. 9, 2014); Exec. Order No. 13,672, 3 C.F.R. § 282 (2014).

301. *Id.*

302. *Id.*

303. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 9, 2020).

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

individuals or groups are impacted by the organization's tenets and standards and allowed them to enforce tenets of their faith differently even among impacted populations.[308] For example, a religiously affiliated hospital could hire an openly LGBTQ doctor, but refuse to provide spousal or transition-related health benefits.

The preamble of the OFCCP regulation justifies this broad exemption by arguing that the exemption, "recognizes contractors' exercise of religion[] [and] is also consistent with Supreme Court decisions emphasizing that 'condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.'"[309] This is a gross misapplication of the *Trinity* court's intentionally narrow decision.[310] The preamble obscures the narrow holding of the case and misleadingly suggests that *Trinity Lutheran* requires the federal government to grant broad religious exemptions to federal contractors.[311] The regulation ignores the Court's limiting language that protects organizations from discrimination solely on the basis of religious status, rather than conduct.[312] It also ignores the all-important footnote 3.[313]

As a rule, the Establishment Clause does not prohibit the government from engaging in secular business with a religious organization; however, the Free Exercise Clause does not mandate that the government fund religious activity or ignore religious-based actions that interfere with the operation of a state-funded activity.[314] Businesses are prohibited from discriminating on the basis of religion, sex, or other protected characteristics included in Executive Order 11,246.[315] Businesses that continue to discriminate are not denied federal contracts because of their religious status, but rather they are denied because they fail to meet basic contract requirements. In sum, the federal government under Executive Order 11,246 and its original regulations did not turn away contractors because of "who [they are]" but rather what they "do." The Court's decision in *Trinity Lutheran* does not in any way demand that the Department exempt contractors from compliance with Executive Order 11,246.[316]

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308. *Id.*

309. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 9, 2020).

310. Trinity Lutheran Church of Columbia v. Comer, 582 U.S. 449, 465 n.3 (2017) ("'This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

311. *Id.*

312. *Id.*

313. *Id.* Footnote 3 provides in full: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.*

314. *Id.*

315. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

316. Michelle Boorstein, *Biden Administration Reverses Trump-Era Rule that Expanded Religious Exemptions for Massive Federal Contracting Force*, WASH. POST (Nov. 12, 2021), https://www.washingtonpost.com/dc-md-va/2021/11/12/contractors-religious-exemption-trump-biden/ [https://perma.cc/Y97B-BDYY].

D. A Uniquely Destabilizing Force

Presidential politics have always reflected the personal ideology and temperament of the executive, but the adoption of exclusionary religious tenets within an administrative agenda and political platform is uniquely destabilizing and divisive. As discussed above, the President is entrusted to do much more than "take care that the laws are faithfully implemented."[317] In contrast to the multiplicious nature of Congress, which by its design entails conflicting state-based priorities that culminate into a federal agenda, the democratic election of a single national President is structurally unifying.[318] As Dr. Barber explains, "The President is a symbolic leader, the one figure who draws together the people's hopes and fears for the political future. On top of all his routine duties he has to carry that off–or fail."[319] Successful politicians and leaders recognize the importance of compromise informed by empathy towards those with opposing views as an essential tool for policy formation and governance.

The earliest Presidents recognized that the success and stability of the nation depended upon their ability to serve as a national voice capable of representing diverse interests. President Washington undertook an eighteenth-century goodwill tour after his election, visiting each state in an effort to cement the transition from the Articles of Confederation to a single, sovereign nation. Washington's Southern Tour and subsequent relocation of the Nation's capital to Washington, D.C. served as a meaningful signal of his commitment to representing a unified nation.[320] By Jefferson's inauguration only ten years later, the political divide between parties was arguably as deep as today's, resulting in a tense election and transition from the Federalists to the country's first Republican President.[321] Jefferson's inaugural address spoke directly to this divide, but he placed himself in a position to bridge this gap through civility, respect, and a commitment to core constitutional beliefs. Importantly, Jefferson also recognized the destabilizing nature of established religion on democracy, concluding that

> having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. . . . But every difference of opinion is not a difference of principle.[322]

However, a difference in opinion regarding religious belief in fact is a difference of principle. The modern office of the President is inherently political and therefore unavoidably personal. The most powerful and tangible check on presidential action is, in fact, popular elections. As a result, the President is

317. U.S. CONST. art II, § 3.

318. Yoo et al., *supra* note 93, at 43.

319. JAMES DAVID BARBER, THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE 2 (5th ed. 2020).

320. *See generally* Roy E. Brownell II, *Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development*, 84 ST. JOHN'S L. REV. 423, 572 (2010).

321. *See* Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959 (1999).

322. Thomas Jefferson, U.S. President, First Inaugural Address (Mar. 4, 1801), https://millercenter.org/the-presidency/presidential-speeches/march-4-1801-first-inaugural-address [https://perma.cc/EX4D-9DS5].

incentivized to promote his policies and personal commitments to likely voters. However, the President is also entrusted by the Constitution to be the voice of the whole country.[323] Presidential formal alignment with one exclusionary ideology compromises the office of the Executive, limiting the effectiveness of administrative policies and faithful implementation of the nation's laws. It is important to distinguish formal alignment with exclusionary tenets from a President's personal affiliation with a faith tradition. The former involves the incorporation of policies informed by exclusionary ideology as illustrated by the Reagan and George W. Bush administrations, while the latter reflects a traditional understanding of the exercise of personal, private faith by the executive.[324] Administrative actions developed in response to formal alignment and informed by exclusionary tenets as opposed to traditional political factors or research and analysis expose a dangerous loophole in the APA's democratic checks on executive power.

Courts apply the APA's deferential "arbitrary and capricious" standard in determining the appropriateness of executive discretion in policy making.[325] As a result of this deference, judicial review of discretionary executive actions is necessarily narrow and requires only that the agency articulate a "satisfactory explanation" that describes a "rational connection between the facts found and the choice made."[326] The Court has consistently recognized that policy questions will rarely have one reasonable administrative response.[327] Instead the executive branch faces "value-laden decision making" informed by both tangible factors like research-based risks and benefits, as well as "incommensurables" that must be weighed "under conditions of uncertainty."[328] The Court has also recognized that as an elected branch, the executive must be allowed discretion in weighing political concerns within its policy judgment.[329] Consideration of politics, public relations, special interest group concerns, and national security concerns are appropriate and routinely incorporated within executive branch policymaking.[330]

Despite this wide discretion, the APA safeguards the public from irrational, unreasoned changes that would be contrary to the public interest. The administration is not required, or even expected, to choose the "best possible" policy option when applying executive judgment, but it must show the public that the policy be rational, reflect research-supported findings, and be reasonably likely to achieve the stated objective. Religious ideology is based on faith—"a conviction of things not seen."[331] By its nature, it is not rational or based on reasoned findings.

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323. U.S. CONST. art 2.

324. *See* Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEM. L. REV. 973 (2009).

325. 5 U.S.C. § 706(2)(A).

326. Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

327. *See, e.g.*, Dep't of Com. v. N.Y., 139 S. Ct. 2551, 2571 (2019).

328. *Id.*

329. *Id.* at 2573 (noting that Courts do not consider Executive policymaking as "a rarified technocratic process, unaffected by political considerations or the presence of Presidential power") (citing Sierra Club v. Costle 657 F.2d 298, 408 (D.C. Cir. 1981)).

330. *Id.*

331. *Hebrews* 11:1 (American Standard).

It also leaves little room for compromise. The President may be guided by a personal faith and may consider the policy priorities presented by religious lobbies when developing an administrative agenda. However, wholesale incorporation of a religious lobby's tenets as reasons for policy change risks executive establishment. As Richard Hutcheson has described,

> Trouble arises with the certainty that particular political or social policies are God's will. Trouble is compounded when such certainty is used to justify trampling roughshod over the contrary convictions of others. Certainty about basic biblical or theological truths cannot be translated into certainty about human applications in the modern political and social arena.[332]

In addition to failing to meet APA standards, the incorporation of particular religious tenets within administrative policies and the collaboration with preferred religious organizations is most troubling because of the impact it has on the health of the polity. The emergence of the Religious Right as a political force in presidential politics has made incorporation of religious identity within the presidential persona a zero-sum game. Fundamentalist religions, including the Evangelical Christianity of the religious right, are uncompromising by nature.[333] While establishment generally results in a degradation of equal citizenship as warned by Madison, executive establishment results in the forfeiture of the President as a unifying and self-reflecting voice of the people.[334] In its place, the Executive becomes a voice for an uncompromising minority, whose policies become a tangible representation of the alienation and isolation of other groups from the broader American body. This inevitable political favoritism of one religious group over others in the course of executive establishment is uniquely destabilizing to democracy. The systemic nature of executive establishment, in its current form, directly undermines the core democratic values that the Establishment Clause was designed to protect.

III. RESPONDING TO EXECUTIVE ESTABLISHMENT OF RELIGION

The systemic incorporation of exclusionary religious tenets across the administrative state is the result of a failure of institutional safeguards.[335] This Section examines the existing checks on executive establishment from the perspectives of all three branches of government and identifies avenues for strengthening each. It first argues that instead of practicing executive forbearance, administrations tested constitutional boundaries by expanding faith-based initiatives and preferences beyond what is required to protect free exercise to the point where they risked violation of the Establishment Clause. It then examines how current judicial tools have proven to be ineffective restraints on executive establishment. The APA does not provide sufficient substantive rules explicitly checking executive

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332. RICHARD G. HUTCHESON, JR., GOD IN THE WHITE HOUSE: HOW RELIGION HAS CHANGED THE MODERN PRESIDENCY 225 (1988).

333. *See, e.g.*, H. RICHARD NIEBUHR, CHRIST AND CULTURE 103 (2001); D.A. CARSON, CHRIST AND CULTURE REVISITED 54–55 (2012) (describing the resistance to compromise and accommodation of culture and society within purist sects).

334. MADISON, *supra* note 66.

335. *See supra* text accompanying notes 36–79 (discussing procedural and substantive constraints on the executive).

overreach, and taxpayers do not have standing to challenge administrative spending on establishment grounds.[336] Congress has not taken steps to curtail the spread of faith-based initiatives and the adoption of particular religious tenets. To the contrary, Congress has explored a number of legislative proposals specifically designed to incorporate exclusionary ideology into the application of the First Amendment.[337] Finally, the great indicator of the health of the republic is the power of the electorate to support its constitutional principles. However, reliance on popular support or outrage to restrain governmental action is an imperfect solution. President Bush implemented the faith-based initiatives in response to vocal support from voters. As explained in Section II.B above, creation of the WHOFBCI and charitable choice regulations were the realization of popular campaign promises.

A. Executive Forbearance

Executive establishment is the result of overreach by the executive branch that is met with inadequate monitoring by the other branches. Accordingly, the executive branch has the most straightforward path towards dismantling the current establishment administrative infrastructure. This correction can be accomplished through individual policy changes, as well through the adoption of broader systematic, managerial restraints. In addition to these remedial efforts, incoming presidents could commit to recognizing the important constitutional concerns involved in questions of religion and to approach policy areas invoking religion with caution.[338]

The recent popularity of forbearance as a check reflects a developing acceptance that many of our institutions are preserved through the perpetuation of norms and democratic traditions, rather than explicit laws and regulations.[339] In the absence of these norms, however, democratic governing becomes a much more perilous task. The Reagan administration's collaboration and incorporation of exclusionary religious tenets and adoption of administrative uniformity created new establishment norms to facilitate its policies.[340] The traditional, limiting norms in place have not been fully reestablished. Although Democratic administrations have tweaked application of these norms, these minor recalibrations did little to disavow the inappropriate religious collaboration popularized by the Reagan administration.[341]

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336. Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

337. *See, e.g.*, The First Amendment Defense Act, H.R. 2802, 114 Cong. § 3(a) (2015). The FADA provides:

> Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

338. Admittedly, such a recommendation seems unlikely to hold much sway in our present climate of partisan polarization.

339. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 203 (2018) ("Norms are the soft guardrails of democracy; as they break down, the zone of acceptable political behavior expands, giving rise to discourse and action that could imperil democracy. Behavior that was once considered unthinkable in American politics is becoming thinkable.").

340. *See supra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

341. *See supra* text accompanying notes 217–247 (discussing faith-based initiatives).

An administration committed to reinforcing traditional separation norms could engage in a comprehensive administrative plan to first identify and then propose revisions to inherited policies that privilege certain religious tenets or invite inappropriate collaboration between the administration and religious organizations. Interagency regulatory reviews are frequently used by modern presidents in order to identify and evaluate existing policies against specific ideological or pragmatic metrics. As described in Section II.B above, this is exactly what President George W. Bush did in order to implement his faith-based initiatives.[342] Along with the Executive Order that established the WHOFBCI, President Bush issued a second Executive Order that mandated the audit of existing policies.[343] President Trump engaged in a similar review when he instituted broad reforms regarding the expansion of religious exemptions.[344] His 2017 Executive Order on religious freedom[345] and Attorney General Jeff Sessions' accompanying implementing memorandum served as a catalyst for agencies to re-open rulemaking across the federal government.[346] An interagency review directed at identifying federal policies and programs that reflect executive establishment would be similarly effective in establishing a uniform framework for evaluating and responding to its scope.

In addition to evaluation of existing regulations, incoming administrations could design executive orders restricting the use of value-based or ideological lenses as part of uniform regulatory review. The removal of these specific lenses from the regulatory process would more closely align the purpose of the Executive Office of the President with the original intent of the APA, namely to promote the efficient and transparent implementation of federal policies and good government. Despite the relative ease of adoption and execution, these self-imposed executive restraints or correctives are politically unlikely. Presidents, especially those not supported by conservative Christian groups, like White Evangelicals or the U.S. Conference of Catholic Bishops, may be wary of taking any action that appears hostile to religious freedom. This palpable fear of political backlash has contributed to the ossification of programs like President Bush's *Quiet Revolution*.[347] Moreover, even if a President were to address the current state of executive establishment, the policies and programs could be easily re-instated by an ideologically supportive successor.[348]

B. Judicial Review and Existing Laws

In the case of executive establishment, there are relatively few clear avenues to challenge the administrative web of religious preferences and collaborations that now exist at the federal level. The APA is largely procedural in orientation, meaning that an executive power grab can pass muster if it is procedurally sound. As

342. UNLEVEL PLAYING FIELD, *supra* note 229.

343. Exec. Order No.13,198, 66 Fed. Reg. 8,497 (Jan. 29, 2001).

344. *See supra* text accompanying notes 272–283 (discussing Trump's charitable choice initiatives).

345. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

346. Memorandum from Att'y Gen on Fed. L. Protections for Religious Liberty to All Exec. Dept's and Agencies (Oct. 6, 2017) (on file with the Dep't of Just.).

347. THE QUIET REVOLUTION, *supra* note 217.

348. *See* Aamer Madhani, *Executive Orders: Swift, Powerful, and Easily Reversed*, CHRISTIAN SC. MONITOR (Jan. 28, 2021), https://www.csmonitor.com/USA/Politics/2021/0128/Executive-orders-Swift-powerful-and-easily-reversed [https://perma.cc/J53M-YK9K].

explained below, the constitutional prohibition on establishment presents standing obstacles that may be insurmountable in the case of some execution actions.

1. The APA

As explained above, the APA is largely a set of procedural safeguards. It incorporates good government elements such as transparency and accountability, but it does not provide a substantive check on the Executive. The APA also focuses most squarely on regulations promulgated pursuant to the rules governing informal rulemaking that require notice and comments. Sub-regulatory guidance receives far less deference under the APA because it does not go through the democratic notice and comment process. As a result, it is easy to create administratively, but is also easy to rescind, and it is not seen as binding by the courts. Despite its natural impermanence, sub-regulatory guidance plays a powerful tone setting role. It can signal administrative priorities regarding enforcement, and it can serve as a test balloon for palatability of controversial policies.

The APA provides a number of ways that a regulation can be challenged. Generally, a regulation can be challenged on the grounds that the agency exceeded its statutory authority,[349] the rule is contrary to law,[350] the rule is arbitrary and capricious,[351] or the rule was enacted without observing proper rulemaking procedure.[352] In 2019, a number of states and advocacy organizations used all of these claims to challenge the Trump administration's conscience rule titled *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*.[353] In *New York v. United States*, the Southern District of New York vacated the regulation finding "numerous, fundamental, and far-reaching" violations of the APA.[354] In the litigation, HHS asserted that the purpose of the conscience regulation was to enforce federal conscience laws more effectively and comprehensively.[355] Each of the conscience statutes impacted by the regulation primarily applied to specific, limited circumstances where health care providers or health care entities refuse to participate in abortion, sterilization, or assisted suicide procedures.[356] The regulation, however, was ambiguous and encouraged an overly broad interpretation that reached far beyond what longstanding legal interpretations had understood the

349. 5 U.S.C. § 706(2)(C).

350. 5 U.S.C. § 706(2)(A).

351. *Id.*

352. 5 U.S.C. § 706(2)(D).

353. *See generally* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 45 C.F.R. § 88 (2019).

354. N.Y. v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 577 (S.D.N.Y. 2019). The plaintiffs raised four objections: (1) the rule exceeded the statutory authority, (2) the rule is contrary to law, (3) the rule is arbitrary and capricious, and (4) the rule was promulgated without observing proper rulemaking procedure. *Id.* at 509.

355. *Id.* at 506 ("Explaining why a new Rule was needed, HHS stated that the withdrawal of the 2008 Rule had created confusion about the Conscience Provisions.").

356. *Id.* at 497 ("These provisions principally, although not exclusively, address objections to abortion, sterilization, and assisted suicide, in addition to counseling and referrals related to these services.").

statutes to permit.[357] For example, the rule arguably empowered providers to refuse to provide *any* health care service or information for a religious or moral reason—potentially including not just sterilization and abortion procedures, but also Pre-Exposure Prophylaxis (PrEP), infertility care, treatments related to gender dysphoria, and even HIV treatment.[358]

2. The Establishment Clause

The Establishment Clause prohibits government actions that provide preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion.[359] The administrative turn toward religion and certain religious tenets and organizations began under the Reagan administration in a stated effort to accommodate free exercise rights and this rationale was later endorsed by subsequent administrations.[360] As the U.S. Supreme Court has explained, however, the tension between the Free Exercise Clause and the Establishment Clause sets up a delicate balance and "[a]t some point, accommodation may devolve into an unlawful fostering of religion" in violation of the Establishment Clause.[361] The primary inquiry in an establishment case is whether the government action applies neutrally to religious and secular interests.[362] This Article has argued that the current state of executive establishments offends the core value of the Establishment Clause and violates the constitutional prohibition on the state establishment of religion.[363] Despite the strength of this claim, standing requirements make it difficult to challenge administrative actions on establishment grounds.

In the case of establishment concerns, the harm alleged, by its very nature, may be generalized to all members of society. This perspective of collective harm is at odds with the individual-focused nature of standing requirements. Acting as a restraint on the power of the judiciary, standing requires a plaintiff to allege harm to an individualized or particularized interest that can be redressed by the courts.[364]

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357. *Id.* at 516 ("In sum, contrary to HHS's depiction of it as mere housekeeping, the Rule relocates the metes and bounds—the who, what, when, where, and how—of conscience protection under federal law.").

358. Human Rights Campaign, Comment Letter on Proposed Rule to Protect Statutory Conscience Rights in Health Care (March 27, 2018), https://assets2.hrc.org/files/assets/resources/HRC-HHS-Comment-Final-3.27.pdf [https://perma.cc/46YY-FB67].

359. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

360. *See supra* text accompanying notes 182–212 (discussing the "Reagan Revolution").

361. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–35 (1987).

362. McCreary Cty. v. Am. Civ. Liberties Union of Ky., 545 U.S. 844, 860 (2005). Facially neutral actions that extend common benefits or responsibilities are presumptively valid. *See* Bowen v. Kendrick, 487 U.S. 589 (1988); *see also* Mueller v. Allen, 463 U.S. 388 (1983); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947) (upholding transportation reimbursement program benefitting parents of children attending religious and non-religious schools).

363. Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 709–10 (1985) (stating that a statutory or regulatory accommodation may violate the Establishment Clause where it results in "religious concerns automatically control[ling] over all secular interests" and an "unyielding weighting in favor of [religious interests]").

364. Mass. v. Mellon, 262 U.S. 447, 488 (1923). In addition, the alleged harm must be able to be redressed through the courts' standing requirements.

The U.S. Supreme Court does not recognize citizen standing,[365] but it has allowed taxpayer standing in certain narrow instances, including in the establishment context.[366] In *United States v. Richardson*, the Court acknowledged that exceptions to the prohibition on taxpayer standing was necessary because in certain instances "[i]t can be argued that if [someone with a generalized harm] is not permitted to litigate this issue, no one can do so."[367]

Most importantly for executive establishment, however, the narrow exception for taxpayer standing does not apply to administrative actions unless they are directly tied to the exercises of the appropriation power of Congress under Article I's Taxing and Spending Clause.[368] The Court applied this limitation in the 2007 case of *Hein v. Freedom of Religion Foundation*.[369] In *Hein*, the Freedom from Religion Foundation and its members had challenged the use of federal funds for the creation of the WHOFBCI, specifically as set forth in Executive Order 13,199.[370] The Court ruled 5-4 that the taxpayer-plaintiffs did not have standing to broadly challenge the Bush-era faith based initiatives because the initiatives "resulted from executive discretion, not congressional action."[371]

The Court in *Hein* distinguished an earlier 1968 case that had addressed the scope of the taxpayer standing exception, *Flast v. Cohen*.[372] In *Flast*, taxpayers challenged a federal statute that provided funding for secular textbooks in religious schools.[373] The Court ruled 8–1 that the taxpayer-plaintiffs had shown that they had the "requisite personal stake" in the case because they had successfully satisfied a two-prong test.[374] First, the taxpayers established a "logical link" between their status as taxpayers and the type of legislative action challenged.[375] In taxpayer

365. *Id.* ("The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

366. Flast v. Cohen, 392 U.S. 83 (1968) (outlining an exception to the general prohibition against taxpayer standing in the context of Establishment claims).

367. U.S. v. Richardson, 418 U.S. 166, 179 (1974).

368. *Flast*, 392 U.S. at 102–03. Under the *Flast* exception to the general prohibition on taxpayer standing, taxpayers may challenge actions on the grounds that they exceed specific constitutional limitations (such as the Establishment Clause) under the Taxing and Spending Clause of art. I, § 8, of the U.S. Constitution. *Id.* at 102–03. The Court has maintained its narrow interpretation of this exception, refusing to extend it to permit taxpayer lawsuits challenging executive actions or taxpayer lawsuits challenging actions taken under powers other than taxing and spending. *See generally* CYNTHIA BROUGHER, CONG. RSCH. SERV., R40825, LEGAL STANDING UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE (2011).

369. Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

370. *Id.*

371. *Id.* at 605.

372. *Flast*, 392 U.S. 83.

373. *Id.* at 85–86 ("The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools.").

374. *Id.* at 101 ("A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case.").

375. *Id.* at 101–02 ("[O]ur decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.").

standing cases, this means that the legislation must arise under the Taxing and Spending Clause of Article I, Section 8, of the Constitution.[376] Second, the taxpayers alleged that the challenged action exceeded specific constitutional limitations imposed upon the exercise of congressional taxing and spending power (i.e., the Establishment Clause of the First Amendment).[377]

In *Hein*, the Court held that the taxpayers were not able to satisfy either prong of the test.[378] The Court noted that the expenditures challenged in *Flast* were "funded by a specific congressional appropriation and were dispersed . . . pursuant to a direct and unambiguous congressional mandate."[379] To the contrary, the taxpayer-plaintiffs in *Hein* were not challenging "any specific congressional action or appropriation; nor [asking] the Court to invalidate any congressional enactment or legislatively created program as unconstitutional."[380] The Court explained that the actions challenged in *Hein* were the result of "general appropriations to the Executive Branch to fund its day-to-day activities."[381] However, the Court left the door open for taxpayer standing in cases where the challenged administrative action is tied to an exercise of Congress' taxing and spending power.

The Court in *Hein* reasoned that an extension of the exception to allow the taxpayer-plaintiffs to challenge the WHOFBCI would lead to untenable results "[b]ecause all Executive Branch activity is ultimately funded by some congressional appropriation[.]"[382] It reasoned that "extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to an Establishment Clause challenge by any taxpayer in federal court."[383] The Court also explained that granting the taxpayer-plaintiffs standing would "significantly alter the allocation of power at the national level" and result in "a shift away from a democratic form of government."[384]

As a result of the ruling in *Hein*, the courts did not get to rule on the merits regarding the constitutionality of the Bush era faith-based initiatives. The lack of taxpayer standing to challenge the introduction of faith-based initiatives across the federal government would seem to undermine the core principles of the Establishment Clause.[385] As the Court noted in *Richardson*, the absence of taxpayer standing will in certain circumstances mean that no one has the power to challenge the contested actions or decisions.[386] This is especially true in the case of establishment claims where the harm by its very nature is generalized and diffuse, but a collective harm is not provided a collective remedy.

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376. *Id.* at 103.

377. *Id.* at 102–03.

378. Hein v. Freedom from Religion Found., 551 U.S. 587, 590 (2007).

379. *Id.* at 604 ("The expenditures challenged in Flast, then, were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate.").

380. *Id.* at 605.

381. *Id.*

382. *Id.* at 610–11 ("To see the wide swathe of activity that respondents' proposed rule would cover, one need look no further than the amended complaint in this action, which focuses largely on speeches and presentations made by Executive Branch officials.").

383. *Id.* at 610.

384. *Id.* at 611.

385. United States v. Richardson, 418 U.S. 166, 179 (1974).

386. *Id.*

Although taxpayers may not have standing to challenge executive establishment writ large, they can establish standing to challenge executive actions that are directly tied to a specific exercise of Congress' taxing and spending power.[387] The 2008 Eighth Circuit case *Americans United v. Prison Ministries* is a notable example of an instance where a federal court struck down the government funding of a faith-based organization.[388] In *Americans United*, the Eighth Circuit upheld a District Court ruling that held that the use of tax money for a prison ministry that ran a religious program and entitled inmates who participated to special privileges violated the Establishment Clause of the First Amendment.[389] The District Court judge had reasoned that "[f]or all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one of its penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates."[390] The Eighth Circuit held that the plaintiffs satisfied the requirements for taxpayer standing because the prison ministry was funded by a specific public appropriations act.[391]

C. Legislative Action and Oversight

Congressional oversight of presidential actions is essential to restraining the executive. Congress could directly engage the issue of executive establishment and propose meaningful safeguards through legislation. Looking to the APA, the Religious Freedom Restoration Act (RFRA), and NEPA as models, Congress could craft legislation that incorporates transparency, reporting, and analysis requirements to limit purposeful, abusive misinterpretations of existing Supreme Court case law regarding establishment. However, given the current divided political climate and the splintering nature of topics related to religion, such a proposal is unlikely to be successful.

Short of comprehensive legislation, individual committees and members of Congress can take steps to promote accountability. Formal committee hearings can serve as a useful tool for evaluating executive actions and educating the public and members of Congress about the constitutional and statutory restrictions in place. For example, the U.S. House of Representatives' Judiciary Committee conducted a broad hearing on "The State of Religious Liberty in America" in February 2017. In this hearing, members of Congress questioned witnesses directly about the leaked draft of the 2017 Religious Liberty Executive Order. The Committee specifically addressed the draft order's creation of protections for specific religious tenets consistent with fundamentalist, Evangelical Christianity, including beliefs around

387. Flast v. Cohen, 392 U.S. 83 (1968).

388. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007). The ministry was run by Chuck Colson, one of the Watergate conspirators. *See generally* Diana B. Henriques & Andrew Lehren, *Religion for Captive Audiences, with Taxpayers Footing the Bill*, N.Y. TIMES (Dec. 10, 2006), https://www.nytimes.com/2006/12/10/business/10faith.html [https://perma.cc/V37C-7ZRQ].

389. *Ams. United for Separation of Church and State*, 509 F.3d 406.

390. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 933 (S.D. Iowa 2006).

391. *Ams. United for Separation of Church and State*, 509 F.3d at 420.

family recognition, reproductive health care, and gender transition related care.[392] Exchanges between members of Congress and expert witnesses created a useful record regarding the constitutionality of such a policy and stimulated a national conversation prior to its enactment.[393]

Agency authorizing committees also exercise significant oversight authority through appropriations decisions, as well as more informal requests for information and briefings from agency staff. For example, in 2020 Congress included explicit language in the National Defense Authorization Act (NDAA) directing military leadership to conduct training to fully implement RFRA and apply its protection to military personnel. The provision served as a conclusive instruction to the military regarding RFRA obligations, communicating congressional intent to extend RFRA protections to Department of Defense operations.

CONCLUSION

Since the founding, religion has played a defining role in our nation's character, not because of a uniform subscription to the individual tenets of a specific sect, but rather because of the Constitution's treatment of religion as sacred but separate. The Establishment Clause is sustained by a fragile tension demanding fealty from all branches, and a continued recognition that government-sponsored religion results in division and societal unrest. As the national voice for our shared democratic values, the Office of the President is positioned to serve as a unifying representative across parties. However, the tandem development of the uniform, managerial presidency and the movement of modern Establishment Clause jurisprudence away from strict separationism facilitated the unchecked incorporation of specific religious tenets throughout administrative policies. While the founders recognized that establishment of religion generally was a danger to the body politic, executive establishment is uniquely destabilizing to democracy. It undermines the President's ability to serve as a unifying office under common democratic values, and instead contributes to an increased sense of alienation and isolation. It is critical to acknowledge the scope of executive establishment and position the sum of its individual religiously based policy choices within the larger

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392. During the Hearing, there was a particularly relevant exchange between Representative Jerry Nadler and Rabbi Saperstein.

> Rabbi Saperstein. I think it raises very serious equal protection issues as well as turning over—when you are talking about government contractors, turning over discretionary judgment to that contractor based on their religious belief as to when government services and benefits can be provided to those they serve, and that raises Grendel's Den/Larkin problems that the Court has been very, very resistant about. So I think it raises significant constitutional problems.
> Mr. Nadler. Would it not also raise Establishment Clause questions, setting one belief system or a set of beliefs ahead of others?
> Rabbi Saperstein. I think this does.

The State of Religious Liberty, Hearing Before The Subcommittee On The Constitution And Civil Justice Of The Committee On The Judiciary House Of Representatives, 115th Cong. 10–12 (2017) (testimony of Rabbi Saperstein).

393. Adelle M. Banks, *Constitutionality of Leaked Executive Order on Religious Freedom Called into Question,* DESERET NEWS (Feb. 17, 2017), https://www.deseret.com/2017/2/17/20606456/constitutionality-of-leaked-executive-order-on-religious-freedom-called-into-question [https://perma.cc/5XN8-CW7F].

historic framework of our nation's relationship with religion. Each branch maintains a responsibility to respond to executive establishment and to dismantle the harmful administrative infrastructure developed on its watch since the 1980s. Restoring this balance is a critical step towards promoting national unity and decreasing the growing sense of isolation from the government and alienation from each other. This will not be easy or popular, but it is essential for the health of our democracy and the prospects for our shared future in an increasingly polarized world.