

Religion and the Constitution: A Libertarian Perspective

*Nadine Strossen**

I. Introduction

I am so honored to deliver this lecture, named after a generous supporter of individual liberty, B. Kenneth Simon. Roger Pilon, who holds the chair in constitutional studies that Ken Simon so generously endowed, has told me about Ken's inspiring commitment to the Constitution and the ideals of the Founders. Ken was an entrepreneur, but he also devoted much time to studying issues of constitutional law and history. In Roger's words, Ken had a "life-long love" for those topics. And thanks to his generosity that love is bearing fruit today.

It is also an honor to follow in the footsteps of my distinguished predecessors in this lecture series, including Chief Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit, who is gracing us with his presence today. Along with the Cato Institute, the ACLU is strictly non-partisan. We neutrally advocate civil liberties principles. Therefore, I applaud and thank Roger for inviting libertarians with diverse ideological views to deliver the Simon Lecture.

Of course, even those of us who agree on basic libertarian principles do not necessarily agree on how they apply in particular contexts. That is why I have entitled my presentation, *A Libertarian Perspective on Religion and the Constitution*. I fully realize that no two thinking libertarians are likely to agree on the whole range of complex issues involved.

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A. Definition of a Libertarian

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<http://www.beforegoinganyfurther.com/ViewFile.aspx?FileId=57312838-596b-4114-a895-7645497468c> Before going any further, I should make some observations about that key term, “libertarian.” I have always thought of myself as both a libertarian and a civil libertarian. Accordingly, I will usually use these terms interchangeably throughout this presentation. Before preparing this lecture, though, I was curious to see if the dictionary definitions of both terms corresponded with my own, largely overlapping, concepts. In fact, the dictionary definitions of both terms are quite similar,¹ but they do correctly note that civil libertarians are not necessarily fiscal libertarians.²

My favorite definitions of these terms came from *Libertarian Lexicon*, published by Jacob’s Libertarian Press. Here at the Cato Institute, you should all be proud of Jacob’s definition of “Libertarian Establishment”: “The body of ‘mainstream’ libertarian thought, as expounded by the Cato Institute and the Reason Public Policy Institute.”³ Correspondingly, here is Jacob’s definition of “left-libertarian,” which it describes as synonymous with “civil libertarian”: “a libertarian who thinks the ACLU is a good thing.”⁴ Since Roger often calls himself a “classical liberal,” I was amused by Jacob’s definition of that term: “a libertarian who does not like being called a libertarian.”⁵

B. Despite Shared Core Values, Libertarians May Well Disagree about Enforcing Them in the Context of Religion

Even though all of us libertarians and civil libertarians share core commitments to maximizing individual freedom and minimizing government power, it is not at all clear how those commitments play out when it comes to construing the Constitution’s provisions concerning religion, which are far from self-explanatory. Certainly,

¹See, e.g., Webster’s Third New International Dictionary 1303 (1986) (“Libertarian: 1. An advocate of the doctrine of free will; 2. One who upholds the principles of liberty. . . .”); *id.* at 412 (“Civil Libertarian: one who upholds the principles of civil liberty; *esp.*: one who defends civil liberties against invasion.”).

²“Libertarianism,” at www.answers.com/topic/libertarianism (accessed June 8, 2006).

³Jacob Halbrooks, *A Libertarian Lexicon* (2001), available at www.geocities.com/libertarian_press/lexicon.html (accessed June 7, 2006).

⁴*Id.*

⁵*Id.*

among ACLU leaders, we have had some heated debates about particular issues and cases in this broad area of liberty, and I always consider such vigorous discussion positive. No issue should be treated in a reflexive fashion, and that is particularly true of issues in this highly sensitive area. Roger has told me that Cato has not often waded into this area, and the last time Cato filed a Supreme Court brief in a religion case, it was a close call as to what position that brief would advocate.⁶

Among other difficulties, the First Amendment's two Religion Clauses are at least occasionally in tension with each other. Therefore, if we enforced either provision to its logical extreme, that would violate the other one. Since I will be focusing on those two clauses, let me remind you of their exact language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷

If we read the Establishment Clause as barring *any* government support for religion, including even police and fire protection, then that would at least arguably violate the Free Exercise Clause, because it would discriminatorily disfavor religious individuals and institutions, denying them essential public services that government provides for everyone else. Conversely, if we read the Free Exercise Clause as barring *any* government regulation of religion, including even regulation that is necessary to protect public safety, then that would at least arguably violate the Establishment Clause, because it would discriminatorily favor religious individuals and institutions, exempting them from obligations that government imposes on everyone else. However, if neither clause should be read to its logical extreme, that means we must engage in the always difficult process of line-drawing. This line-drawing process is especially difficult given government's growing role, with increasing government regulation and increasing government funding of formerly private undertakings.

Libertarians should agree about the general, bottom-line principle at stake: that government regulatory and funding programs must

⁶Roger was referring to the brief that the Cato Institute filed in *Locke v. Davey*, 540 U.S. 712 (2004). See Brief of the Institute for Justice, et al. as Amici Curiae in Support of Respondent, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315).

⁷U.S. Const. amend. I.

not constrain or channel individual choices regarding conscience. However, we may disagree about how to apply these principles in the context of particular government programs. In other words, we may well disagree about whether particular government programs do in fact constrain or channel individual religious or conscientious choices.

I will cite two specific recent cases to illustrate diverging libertarian views about how the general principles at stake apply to particular factual circumstances. The ACLU opposed the Cleveland, Ohio, school voucher program that the Supreme Court narrowly upheld in 2002 precisely because we concluded that this program, in effect, steered individual students and parents toward certain parochial schools. In contrast, the Cato Institute—and five justices—disagreed with that assessment.⁸ Conversely, the Cato Institute opposed a Washington State scholarship program, which the Supreme Court upheld in 2004,⁹ because that program did not fund students who were studying for the ministry. Cato argued that this program, in effect, steered individual students away from certain theology majors. In contrast, the ACLU—and seven justices—disagreed with that assessment.

The challenging line-drawing process that is required to enforce both of the First Amendment Religion Clauses has led to increasingly fractured Supreme Court decisions. Consider the Court's most recent pronouncements on point: its two decisions concerning government-sponsored Ten Commandments displays, issued in June 2005—one of which was an ACLU case, I should note.¹⁰ In those rulings, the justices issued a total of ten separate opinions (one for each Commandment?).¹¹ As then-Chief Justice Rehnquist quipped, after he

⁸Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

⁹Locke, 540 U.S. 712.

¹⁰Van Orden v. Perry, 125 S. Ct. 2854 (2005); McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005).

¹¹Van Orden v. Perry, 125 S. Ct. 2854 (2005) (Rehnquist, C.J., announcing the judgment of the Court and delivering an opinion, in which Scalia, Kennedy, and Thomas, JJ., join. Scalia, J., and Thomas, J., filing concurring opinions. Breyer, J., filing an opinion concurring in the judgment. Stevens, J., filing a dissenting opinion, in which Ginsburg, J., joins. O'Connor, J., filing a dissenting opinion. Souter, J., filing a dissenting opinion in which Stevens and Ginsburg, JJ., join); McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005) (Souter, J., delivering the opinion of the Court, in which Stevens, O'Connor, Ginsburg, and Breyer, JJ., join. O'Connor, J., filing a concurring opinion. Scalia, J., filing a dissenting opinion, in which Rehnquist, C.J., and Thomas, J., join, and in which Kennedy, J., joins as to Parts II and III).

had announced the rulings from the bench: “I didn’t know that many people on our court.”¹² Document hosted at <http://www.jesupra.com/post/constitution-viewer.aspx?fid=57310332-536b-44c4-a925-7645d27cfc9c> JD SUPRA¹

C. *We Must Clearly Address These Issues to Dispel the Prevalent Misunderstandings*

Given the current turmoil in this crucial area of constitutional law, we libertarians must address these issues in a clear and comprehensible way. This challenging task is more urgent than ever because these issues are becoming increasingly dominant and divisive in our politics and culture, and because the constitutional principles and libertarian perspectives are so widely misunderstood—a misunderstanding that results in substantial part from demagogic distortion by too many politicians and pundits.

As for the increasing importance of the issues, I can cite the proliferating controversies all over the country that involve contested interactions between government and religion. Recent headline-grabbing examples include: the Terry Schiavo case;¹³ reports about religious indoctrination and harassment at the U.S. Air Force Academy;¹⁴ controversies about the availability of emergency contraception, widely known as the “morning after pill;”¹⁵ steeply increased penalties for, and self-censorship of, broadcast material that the FCC might deem “indecent” or “profane,” in response to pressure from certain influential religious conservatives;¹⁶ and efforts to restrict

¹²Linda Greenhouse, *The Supreme Court: Overview; Justices Allow a Commandments Display, Bar Others*, N.Y. Times, June 28, 2005, at A1.

¹³Abby Goodnough, *The Schiavo Case: The Overview; U.S. Judge Hears Tense Testimony in Schiavo’s Case*, N.Y. Times, March 22, 2005, at A1.

¹⁴Robert Weller, *Religious Prejudice Cited at Academy*, Albany Times Union, June 23, 2005, at A6; Robert Weller, *Air Force Academy Releases New Guidelines that Discourage, but Don’t Ban, Prayer*, Baton Rouge Advocate, August 13, 2005, at 12; *Air Force Academy Guidelines* (August 2005), at www.af.mil/library/guidelines2005.pdf (accessed June 6, 2006); *Revised Interim Guidelines* (February 9, 2006), at www.af.mil/library/guidelines.pdf (accessed June 11, 2006).

¹⁵Gardiner Harris, *U.S. Again Delays Decision on Sale of Next-Day Pill*, N.Y. Times, August 27, 2005, at A1; Editorial, *Morning After in America*, L.A. Times, March 26, 2006, at 4; Gardiner Harris, *F.D.A. Gains Accord on Wider Sales of Next-Day Pill*, N.Y. Times, August 9, 2006, at A13.

¹⁶*Senate Passes Indecency Bill, Sends it to House* (Public Broadcasting Report May 26, 2006) (transcript on file with author); Bill Carter, WB, *Worried About Drawing Federal Fines, Censors Itself*, N.Y. Times, March 23, 2006, at E1.

the teaching of evolution and promote the teaching of Intelligent Design in public schools.¹⁷ Document hosted at <http://www.supremecourt.gov/docstore/historic.do?cid=10332-536b-44c4-a925-7645d27cfc9c>

As for the misunderstanding and distortion that mar debates in this area, I can cite as all-too-typical the widespread mischaracterization of the Supreme Court's two recent Ten Commandments rulings. Just three days after the decisions were handed down, for example, Congressman Ernest Istook held a press conference to announce his proposed constitutional amendment,¹⁸ co-sponsored by more than 100 members of Congress, to reverse one of these rulings as well as other Supreme Court decisions concerning the relationship between religion and government.¹⁹ Istook's rationale for the amendment reflects basic misconceptions about how the Court actually ruled in those cases. In particular, he said that "the courts are using the First Amendment to attack religion,"²⁰ a view shared by too many politicians as well as members of the public and the press. That view reflects the familiar but false assumption that strong enforcement of the First Amendment's Establishment Clause is somehow hostile to religion.²¹ Yet, as the Court consistently explains when striking down a measure under the Establishment Clause, the clause is designed to *protect* religion and religious liberty,²² which is why many devout

¹⁷Brenda Goodman, Teaching the Bible in Georgia's Public Schools, N.Y. Times, March 29, 2006, at B7; Kirk Johnson, Evolution Measure Splits State Legislators in Utah, N.Y. Times, February 5, 2006, at 18; Laurie Goodstein, Schools Nationwide Study Impact of Evolution Ruling, N.Y. Times, December 22, 2005, at A20; Michael Powell, Judge Rules Against Intelligent Design, Wash. Post, Dec. 21, 2005, at A3.

¹⁸News Release, Istook Heads Coalition to Protect Public Displays of Religious Expression (June 30, 2005), available at www.house.gov/istook/religiousfreedom/documents/rel_063005.pdf (accessed June 11, 2006) (hereinafter Istook News Release).

¹⁹Religious Protection Amendment, H.J. Res. 57, 109th Cong., 1st Sess. (2005).

²⁰Istook News Release, *supra* note 18.

²¹See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting) (describing the majority opinion, striking down a government-sponsored courthouse display of the Ten Commandments, as "ratchet[ing] up the Court's hostility to religion").

²²*Id.* at 2746–47 (O'Connor, J., concurring) ("When we enforce [the Establishment Clause], we do so for the same reason that guided the Framers—respect for religion's special role in society. . . . Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.").

believers and religious leaders ardently advocate strong ^{JD SUPRA} between government and religion.²³ Document hosted at <http://www.uscourts.gov/computers/religion.asp?fid=57310332-536b-44c4-a925-7645d27cfc9c>

Congressman Istook's false charge that the Supreme Court has been attacking religion overlooks both the Court's many rulings that uphold and enforce the Free Exercise Clause²⁴ and its rulings that enforce statutes protecting religious freedom, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA).²⁵ Only a month before the Supreme Court's recent Ten Commandments decisions, for example, the Court ruled unanimously that RLUIPA was constitutional. In that case, *Cutter v. Wilkinson*,²⁶ the Court held that RLUIPA was an appropriate accommodation of the religious freedom rights of prisoners and other institutionalized persons, rejecting a claim that it violated the Establishment Clause. Unfortunately, that overtly pro-religion ruling received far less attention from politicians and the press than the Ten Commandments decisions, which were too often wrongly portrayed or perceived as anti-religion. But while *Cutter* was being ignored by Congressman Istook and his allies, other critics of the Court²⁷ were complaining that the Court was too protective of religion in *Cutter* and in many other cases under the Free Exercise Clause.²⁸

The general misunderstanding about the courts' alleged "attacks" on religion is also reflected in many specific misstatements about religious activities that the Supreme Court purportedly has outlawed, when in fact it has done no such thing. To illustrate this

²³ See Nadine Strossen, Religion and Politics: A Reply to Justice Antonin Scalia, 24 Fordham Urb. L.J. 427, 448 (1997).

²⁴ See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

²⁵ 42 U.S.C. §§ 2000cc et seq.

²⁶ 544 U.S. 709 (2005).

²⁷ A prominent example is Marci Hamilton, *God vs. the Gavel* (2005).

²⁸ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring); Philip B. Kurland, *Religion and the Law* (1962); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L.J. 555 (1998); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1315 (1994); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75 (1990).

widespread pattern, including among policymakers. In 2002, Congressman Istook introduced a constitutional amendment, he said that it “will protect the ability [of] schoolchildren to pray at school, individually or together.”²⁹ But no constitutional amendment is needed for that purpose. The Supreme Court has consistently upheld the rights of students to pray at school, either alone or in groups.³⁰ In fact, student-initiated Bible clubs are flourishing at schools all over the country.³¹

It is also noteworthy that the many Supreme Court decisions and other legal developments that overtly protect religion and religious liberty have all been championed by civil libertarians as well as courts. For example, the religious liberty statute that the Court upheld in *Cutter* was spearheaded in Congress and defended in the courts by both the ACLU and Americans United for Separation of Church and State.³² Yet, in many circles, both organizations are far better known for staunchly defending the Establishment Clause than for equally staunchly defending the Free Exercise Clause.

In addition to the Istook constitutional amendment, many other policy initiatives are premised on similar misunderstandings about what the courts actually have held concerning religion. Therefore, for a rational policymaking process in this crucial area, it is essential to dispel those misunderstandings and, to get beyond the rhetoric and the pandering, to examine the actual judicial rulings and the underlying constitutional principles. The ACLU is so concerned about these growing controversies and associated misunderstandings that we recently launched a new “Program on Freedom of

²⁹Istook News Release, *supra* note 18.

³⁰See, e.g., Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

³¹Court Ruling Has Been “Good News” For School Bible Clubs, Religionlink (August 26, 2002), at www.religionlink.org/tip_020826a.php (accessed June 7, 2006).

³²Brief of Americans United for Separation of Church and State et al. as Amici Curiae Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877) (“Amici served as active members of a broad coalition of religious, civil-rights, labor, and other organizations that advocated for the Religious Land Use and Institutionalized Persons Act (‘RLUIPA’). Thus, amici have a significant interest in having this Court reject respondents’ facial challenge to the constitutionality of Section 3 of RLUIPA.”).

Religion and Belief” to coordinate our many efforts in JD SUPRA³³ In particular, we aim to complement our traditional legislative strategies with efforts to communicate more clearly and effectively to the public and the media. The director of this new initiative, Dr. Jeremy Gunn, is not only a lawyer but also a theologian.³⁴ Thus, I welcome this opportunity today to address this important audience as part of the ACLU’s more general outreach effort.

For all those on the so-called Religious Right who demonize the ACLU as the “Anti-Christian Litigation Union,” to quote some fundraising letters I have seen,³⁵ I urge you to read Cardozo Law School Professor Marci Hamilton’s recent book, *God vs. the Gavel*,³⁶ which criticizes the ACLU for what she contends is our excessive defense of the rights of Christians and other religious believers.³⁷ Actually, I am quite fond of collecting various twists that ACLU critics have given to our acronym, ranging from “All Criminals Love Us,” to “Always Causing Legal Unrest.” My own personal favorite is: “Aw, C’mon, Lighten Up!”

My favorite story about a politician unfairly attacking the ACLU’s positions concerning religion arose from a Pawtucket, Rhode Island, case that led ultimately to an important 1984 Supreme Court decision.³⁸ Our clients had complained that the city’s nativity scene included, to quote the Court’s opinion, “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, . . . a clown, an elephant, and a teddy bear.”³⁹ (No wonder

³³Dr. Jeremy Gunn, Expert on Religious Freedom, to Lead New ACLU Program on Freedom of Religion and Belief (July 14, 2005), available at www.aclu.org/about/staff/20074prs20050714.html (accessed June 7, 2006).

³⁴*Id.*

³⁵The “Anti-Christian Liberties” Union (ACLU), Traditional Values Coalition Special Report, at www.traditionalvalues.org/pdf_files/ACLU.pdf (accessed June 8, 2006); ACLU vs. America: Exposing the Agenda to Redefine Moral Values, available at www.acluvsamerica.com/main/default.aspx (quoting D. James Kennedy, Coral Ridge Ministries) (accessed June 8, 2006); Charles R. Hosler, ACLU: Anti-Christian Litigation Union, The North Carolina Conservative (August 9, 2005), available at www.northcarolinaconservative.com/archives.php?subaction=showfull&id=1123596165&archive=1123598799&start_from=&ucat=& (accessed June 8, 2006).

³⁶Marci Hamilton, *God vs. the Gavel*, *supra* note 27.

³⁷*Id.* at 180.

³⁸*Lynch v. Donnelly*, 465 U.S. 668 (1984).

³⁹*Id.* at 671.

some sincere Christians considered this display to be a ^{document hosted at} <http://www.beliefs.com/post/attacking-the-ACLU-and-300-objectionists-at-the-7645427628> ^{JD SUPRA} to their help. In attacking the ACLU and 300 objectionists at the 7645427628, the mayor at least showed some humor. Jealousy motivated us, he said: "They don't have three Wise Men and a virgin in their whole organization."⁴¹

D. Two Major Aspects of My Libertarian Perspective: Summary

Against that political background, let me now discuss two major aspects of my libertarian perspective on religion and the Constitution. First, I will critique a general pattern in the Supreme Court's recent jurisprudence concerning both Religion Clauses, which unjustifiably saps them of their libertarian force, substituting instead only a weakened egalitarian protection. Second, and interrelatedly, I will explain why strong enforcement of both Religion Clauses promotes religious liberty and freedom of conscience.

II. The Supreme Court's Substitution of Weak Egalitarianism for Strong Libertarianism as a General Pattern in Several Areas of Constitutional Law

In recent years, the Court has radically revised both Religion Clauses through the same general approach. It has devalued the central libertarian concern of each clause and instead has over-emphasized peripheral egalitarian concerns. In this important

⁴⁰ *Id.* at 711–12 (Brennan, J., dissenting) ("To suggest, as the Court does, that [the creche] is merely 'traditional' and therefore no different from Santa's house or reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of 'history' nor an unavoidable element of our national heritage."); *id.* at 727 (Blackmun, J., dissenting) ("The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display. . . . The import of the Court's decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning. . . .").

⁴¹ Editorial, Short Circuits, *Boston Globe*, December 12, 1982 (no page number available).

respect, the Court's Religion Clause jurisprudence para JD SUPRA⁴² rights concerning two other key constitutional rights that I defined in a prior article:⁴³ rights protected by the Fourth Amendment⁴⁴ and by the First Amendment's Free Speech Clause.⁴⁵ I will briefly outline the Court's regressive rulings in those other areas too since they shed light on the similar trends concerning the Religion Clauses.

A. The Modern Court Previously Enforced Absolute Liberties in Those Areas

In all of those areas, the modern Court previously enforced a certain absolute baseline of liberty for everyone, subject to only narrow exceptions, such as when the government can show that a restriction satisfies "strict scrutiny" because it advances a compelling governmental interest by narrowly tailored means.⁴⁵ Under the Fourth Amendment, prior to the Rehnquist Court's revisionism, the modern Court enforced our right to be free from searches and seizures absent individualized suspicion.⁴⁶ Under the First Amendment's Free Speech Clause, invoking the "public forum doctrine," the Court enforced our right to engage in expressive activities on public property that was physically compatible with such activities.⁴⁷ Under the Free Exercise Clause, the Court enforced our right

⁴²Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 *Hastings L.J.* 285 (1991).

⁴³U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

⁴⁴U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

⁴⁵Erwin Chemerinsky, *Constitutional Law* 673 (3d ed. 2006).

⁴⁶See, e.g., *Florida v. Royer*, 460 U.S. 491, 498 (1983); *United States v. Ortiz*, 422 U.S. 891, 896 (1975) ("To protect . . . privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search"); *Terry v. Ohio*, 392 U.S. 1 (1968); *Carroll v. United States*, 267 U.S. 132, 161 (1925) (according to the classic definition, probable cause exists "[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed" by the individual who is the subject of the search or seizure).

⁴⁷See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Hague v. CIO*, 307 U.S. 496 (1939).

to be free from government regulations that substantiate religious beliefs or practices.⁴⁸ Finally, under the Establishment Clause, the Court enforced our right to be free from government funding of religious institutions.⁴⁹

I will now interject one explanatory comment about the Establishment Clause, and how it fits into this general scheme. Unlike the other constitutional provisions just cited, the Establishment Clause is not expressly phrased in terms of individual freedom. But a central objective of the clause, including its long-enforced ban on government financing of religion, is to protect individual religious liberty and freedom of conscience. Indeed, experts maintain that protecting liberty of conscience was the central objective of both the Establishment Clause itself and its core no-funding principle.⁵⁰ That conclusion is espoused, for instance, by N.Y.U. law professor and intellectual historian Noah Feldman in his recent book on church-state issues.⁵¹

Even before the First Amendment was added to the Constitution, the original unamended Constitution contained one reference to religion, and it too protected freedom of conscience. Article VI, Clause 3 provides that “no religious Test shall ever be required as a Qualification for any Office or public Trust under the United States.” Significantly, that provision made religious beliefs, or the lack thereof, completely irrelevant to full and equal participation in the political process. This is especially remarkable, since the Constitution did not make race similarly irrelevant until almost a century

⁴⁸See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁴⁹See, e.g., *Roemer v. Board of Public Works of Md.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947).

⁵⁰*Zelman v. Simmons-Harris*, 536 U.S. 639, 710 (2002) (Souter, J., dissenting).

⁵¹Noah Feldman, *Divided by God: America’s Church and State Problem—and What We Can Do About It* 49, 50 (2005).

later, after the Civil War,⁵² and it did not make gender irrelevant until well into the twentieth century.⁵³ Our Government's initial explicit protection for freedom of belief reflects the Framers' view, strongly influenced by John Locke, that government simply had no legitimate power in this sphere.⁵⁴

Bearing in mind the Establishment Clause's role as a guarantor of individual freedom of conscience, I will now return to the four absolute libertarian precepts the modern Court previously enforced under the Establishment Clause, the Free Exercise Clause, and the two other constitutional provisions I cited. In addition to those four libertarian precepts, the Court also enforced a corollary right to be free from discrimination in exercising those freedoms, which the Equal Protection Clause⁵⁵ already guarantees. For example, under the Free Exercise Clause, the Court enforced not only our absolute libertarian right to be free from government regulations that substantially burden our religious beliefs (regardless of whether other religious beliefs are similarly burdened), but also our egalitarian right to be free from government regulations that discriminatorily single out and burden our particular religious beliefs. Then, about two decades ago, around the time that William Rehnquist became chief justice (in 1986), the Court began to overlook the absolute libertarian core of those constitutional rights and to enforce instead only their egalitarian corollaries. Moreover, the Court has enforced only a formal concept of equality that does not provide meaningful protection against actual discrimination in the exercise of constitutional rights. Because the Equal Protection Clause already guarantees de jure equality in the exercise of rights, this reading of specific Bill of Rights guarantees deprives them of independent significance.⁵⁶ The result, in terms of our liberties, is equal *non*-protection.

⁵²See, e.g., U.S. Const. amend. XV (ratified 1870) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

⁵³See, e.g., U.S. Const. amend XIX (ratified 1920) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

⁵⁴Feldman, *supra* note 51, at 30.

⁵⁵U.S. Const. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

⁵⁶See *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141–42 (1987) (rejecting argument that free exercise claims should be subject to rational basis review). *Hobbie* held that "[s]uch a test . . . relegates a serious First Amendment value to the

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In my past writings I have described this rights-reducing pattern most fully concerning the Fourth Amendment's protection against searches and seizures lacking individualized suspicion.⁵⁷ I will comment briefly about that Fourth Amendment devolution now, since it sets the stage well for considering the parallel pattern concerning the other rights at issue, including the rights guaranteed by the First Amendment's Religion Clauses.

The Supreme Court first upheld suspicionless searches for criminal law enforcement purposes in 1990, in a radical break from both its longstanding precedents and the Fourth Amendment's intent. In *Michigan Department of State Police v. Sitz*,⁵⁸ the Court upheld mass suspicionless searches at "drunk driving roadblocks," stressing that those searches were conducted in a uniform, non-discriminatory fashion. That holding has become the constitutional cornerstone for the proliferating forms of mass searches and seizures to which we are all being subjected,⁵⁹ including, beginning in the summer of 2005, in mass transit systems.⁶⁰ So long as we are all equally subject to

barest level of minimal scrutiny that the Equal Protection Clause already provides." *Id.* at 141; see also *Petition for Rehearing at 11-12, Employment Div. v. Smith*, 494 U.S. 872 (1990), reh'g denied, 496 U.S. 913 (1990) (Court's reinterpretation of Free Exercise Clause "drastically restricts [its] meaning . . . , making it a stepchild of the . . . Equal Protection Clause.").

⁵⁷See generally Strossen, *supra* note 42.

⁵⁸496 U.S. 444 (1990).

⁵⁹See, e.g., *A Threat to Student Privacy*, N.Y. Times, July 4, 1999, at 10; Linda Greenhouse, *Justices Question Georgia Law Requiring Drug Tests for State Candidates*, N.Y. Times, January 15, 1997, at A15; ACLU Challenges Detroit Police Over Mass Searches of Public School Students (June 10, 2004), at www.aclu.org/studentsrights/gen/12843prs20040610.html (accessed June 7, 2006).

⁶⁰The ACLU's state-based affiliate in New York, the New York Civil Liberties Union, promptly brought a constitutional challenge to the mass suspicionless searches of New York City subway passengers that were initiated in July 2005. Among other problems, these searches are more intrusive and coercive than other forms of suspicionless searches that the Supreme Court has upheld, including at drunk driving roadblocks. *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005); Alan Feur, *Appeals Court Upholds Random Police Searches of Passengers' Bags on Subways*, N.Y. Times, August 12, 2006, at B5 ("the ACLU argued that the searches were too infrequent and haphazard to be effective and violated the Fourth Amendment's provision against unreasonable searches and seizures without a specific cause").

government invasions of our privacy, we are told, it does not follow that those invasions are unjustified based on no individual suspicion of any wrongdoing.⁶¹

The first time the Court even suggested that such mass suspicionless searches and seizures might be constitutional was in 1979, in dicta in *Delaware v. Prouse*.⁶² The Court's actual *holding* in *Prouse* was that the Fourth Amendment does bar a suspicionless search of an *individual* motorist.⁶³ However, the Court noted in dicta that the Fourth Amendment might permit *mass* suspicionless searches of *all* motorists.⁶⁴ Then-Justice Rehnquist disagreed with the majority's striking-down of the single suspicionless search at issue in *Prouse*.⁶⁵ He also mocked the majority's suggestion that an otherwise-unconstitutional search could somehow be transformed into a *constitutional* search by being multiplied on a mass scale. To quote his acerbic observation: "The Court . . . elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence."⁶⁶ Ironically, under Rehnquist's ideological leadership as chief justice, the Court elevated that adage to an even more exalted status, applying it not only to the Fourth Amendment, but also to other Bill of Rights guarantees, including the First Amendment's twin Religion Clauses.

⁶¹ See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005) (upholding use of drug-sniffing dog where lawful traffic stop was not extended beyond time necessary to issue warning ticket and to conduct ordinary inquiries incident to such a stop); *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004) (holding that arrest of *Terry* stop suspect for refusal to identify himself, in violation of Nevada law, did not violate Fourth Amendment); *Board of Education v. Earls*, 536 U.S. 822 (2002) (holding that policy requiring all students who participated in competitive extracurricular activities to submit to suspicionless urinalysis drug testing did not violate Fourth Amendment); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (holding that policy requiring student intermural athletes to submit to suspicionless urinalysis drug testing did not violate Fourth Amendment); but see *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that hospital's reporting results of urinalysis drug tests of pregnant welfare recipients to police violate Fourth Amendment); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that city's drug interdiction checkpoints for cars, using drug-sniffing dogs, violate Fourth Amendment); *Chandler v. Miller*, 520 U.S. 305 (1997) (holding that Georgia's requirement that candidates for state office pass urinalysis drug test violates Fourth Amendment).

⁶² 440 U.S. 648 (1979).

⁶³ *Id.* at 663.

⁶⁴ *Id.*

⁶⁵ *Id.* at 667 (Rehnquist, J., dissenting).

⁶⁶ *Id.* at 664 (Rehnquist, J., dissenting).

C. Summary of Rights-Reducing Pattern in These Areas

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 will now outline this general pattern of substituting libertarian values with egalitarian ones in four areas of the Court's jurisprudence: its rulings concerning the Fourth Amendment and the First Amendment Free Speech Clause, as well its rulings concerning the First Amendment's Religion Clauses. This repeated general pattern provides a fuller context in which I will then address in more detail the Court's reduced vision of the Religion Clauses specifically.

I can most easily summarize the parallel patterns regarding these four constitutional rights by listing for each one what I call the "libertarian proposition," the "egalitarian corollary," and the "reductionist redefinition." In each case, the "libertarian proposition" is the individual liberty that the Court previously protected, in rulings that I believe were constitutionally correct. The "egalitarian corollary" is the auxiliary guarantee that the Court has inferred from each of these constitutional provisions. I certainly have no quarrel with the Court's rulings that the liberty in question may not be denied on a discriminatory basis. But that unremarkable conclusion is independently supported by the Equal Protection Clause. Therefore, it would sap these other specific constitutional provisions of independent meaning to reduce them only to their egalitarian corollaries, rendering them merely redundant of equal protection principles. Yet that is exactly what the Court has done through what I call its "reductionist redefinitions" of the constitutional rights I am examining.

Set out below are these three stages in the Court's analysis for each of the four rights at issue. I will start with the Fourth Amendment.

Libertarian proposition: Government may *not* conduct suspicionless searches and seizures of anyone.⁶⁷

Egalitarian corollary: Government may not *discriminatorily single out particular individuals for suspicionless searches and seizures.*⁶⁸

Reductionist redefinition: Government *may* conduct suspicionless searches and seizures of anyone so long as it does not *discriminatorily single out particular individuals.*⁶⁹

⁶⁷See, e.g., *supra* note 46.

⁶⁸See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979).

⁶⁹See, e.g., *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

Now let us consider the same regressive pattern and Amendment Free Speech Clause regarding what is the “public forum doctrine.”⁷⁰

Libertarian proposition: Government may *not* bar expressive activities from public property that is compatible with such activities.⁷¹

Egalitarian corollary: Government may not *discriminatorily* bar particular speakers or ideas from such public property.⁷²

Reductionist redefinition: Government *may* bar all expressive activities from such public property so long as it does not *discriminatorily* bar particular speakers or ideas.⁷³

Now consider this pattern as to the Free Exercise Clause.

Libertarian proposition: Government may *not* impose substantial burdens on sincerely held religious beliefs.⁷⁴

⁷⁰Erwin Chemerinsky, *Constitutional Law* 1086 (3d ed. 2006).

⁷¹See, e.g., *United States v. Grace*, 461 U.S. 171 (1983) (declaring unconstitutional a broad restriction of speech on the public sidewalks surrounding the Supreme Court’s building); *Brown v. Louisiana*, 383 U.S. 131 (1966) (reversing the conviction of a group of African-Americans who had conducted a silent sit-in as a protest at a racially segregated public library).

⁷²See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980) (declaring unconstitutional an Illinois statute that prohibited picketing or demonstrations around a person’s residence unless the dwelling is used as a place of business or is a place of employment involved in a labor dispute); *Chicago v. Mosley*, 408 U.S. 92 (1972) (declaring unconstitutional an ordinance that prohibited picketing or demonstrations within 150 feet of a school building while the school was in session, except for peaceful picketing in connection with a labor dispute).

⁷³See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a regulation on protests outside abortion clinics based on the conclusion that the restrictions on speech were content-neutral); *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding a restriction on solicitations on post office properties); *Frisby v. Schultz*, 487 U.S. 474 (1988) (sustaining an ordinance that prohibited picketing “before or about” any residence); *Cornelius v. NAACP*, 473 U.S. 788 (1985) (upholding a federal regulation limiting charitable solicitations of federal employees during working hours); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding an ordinance that prohibited the posting of signs on public property); *Greer v. Spock*, 424 U.S. 828 (1976) (holding that military bases, even parts of bases usually open to the public, are nonpublic forums); *Adderly v. Florida*, 385 U.S. 39 (1966) (holding that the government could prohibit speech in the areas outside prisons and jails).

⁷⁴See, e.g., *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (“The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141 (1987) (laws burdening religion “must be subjected to strict scrutiny

Egalitarian corollary: Government may not discriminate against particular sincerely held religious beliefs when imposing regulations that impose substantial burdens on them.⁷⁵

Reductionist redefinition: Government may impose substantial burdens on sincerely held religious beliefs so long as it does not discriminatorily single out particular religious beliefs.⁷⁶

Finally, here is the devolving pattern as to the Establishment Clause.

Libertarian proposition: Government may not directly fund religious institutions.⁷⁷

Egalitarian corollary: Government may not discriminatorily single out religious institutions to receive direct funding.⁷⁸

Reductionist redefinition: Government may directly fund religious institutions so long as it does not discriminatorily single out religious institutions to receive such funding.⁷⁹

Against this backdrop of the Court's general pattern, displacing the absolutist libertarian protection of rights with the relativistic, egalitarian protection, I will next examine more closely how this pattern has infected the Court's Religion Clause rulings in particular.

and could be justified only by proof by the State of a compelling interest'); *United States v. Lee*, 455 U.S. 252, 257–58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that free exercise of religion required that Amish parents be granted an exemption from compulsory school laws for their 14- and 15-year old children); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (a generally applicable regulation can be applied to religious objector only if "some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right").

⁷⁵See generally, *Board of Education of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Hernandez v. C.I.R.*, 490 U.S. 680 (1989); *Larson v. Valente*, 456 U.S. 228 (1982).

⁷⁶*Employment Division v. Smith*, 494 U.S. 872 (1990).

⁷⁷*Everson v. Board of Education of Ewing*, 330 U.S. 1, 18 (1947).

⁷⁸See *Mitchell v. Helms*, 530 U.S. 793, 881–84 (2000) (Souter, J., dissenting) (summarizing cases); see also *Larson v. Valente*, 456 U.S. 228, 246 (1982) (striking down law that "grants denominational preferences of the sort consistently and firmly deprecated in our precedents"); *Everson*, 330 U.S. at 15 (stating that Establishment Clause bars "laws which aid one religion" or "prefer one religion over another").

⁷⁹*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion).

III. The Court's Reductionist Redefinition of the Free Exercise Clause

In the modern constitutional era, the Court had consistently accorded religious liberty the same high degree of First Amendment protection that it has granted to other First Amendment freedoms, including freedom of speech. Given the fundamental nature of all such rights, any restriction on them is presumptively unconstitutional, and government may justify any such restriction only by satisfying the heavy burden of showing that it is necessary to promote a countervailing goal of compelling importance; this is the "strict scrutiny" standard.⁸⁰ Moreover, the Court appropriately has imposed this heavy burden of proof on the government to justify any general measure that has the effect of restricting First Amendment freedoms in a particular context, even if the government did not specifically intend that rights-restricting effect.⁸¹

A. The Court's Prior Strong Protection of Individual Religious Liberty

In the Court's modern jurisprudence, the Free Exercise Clause was viewed as guaranteeing some absolute degree of freedom from government burdens on religious exercises, regardless of how equally or widely dispersed those burdens might be, and regardless of whether the government imposed those burdens inadvertently rather than intentionally.⁸² Consistent with those fundamental First Amendment principles, throughout the modern constitutional law era, the Court required government to make exceptions to generally applicable laws that infringed on religious liberty, just as it required regarding generally applicable laws that infringed on free speech. Specifically, the Court held that if any law imposed a substantial burden on a sincerely held religious belief, the government had to make an exception to accommodate that religious belief unless it

⁸⁰See generally Erwin Chemerinsky, *Constitutional Law* 1252 (3d ed. 2006).

⁸¹See, e.g., *Minneapolis Star and Tribune Co. v. Minnesota Commission of Revenue*, 460 U.S. 575, 592 (1983).

⁸²See, e.g., *Employment Division v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) ("The First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices. . . . Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice."); *Wisconsin v. Yoder*, 406 U.S. 205, 214–20 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940).

could satisfy strict scrutiny by showing that denying the ^{Document hosted at JDSUPRA on} <http://www.jdsupra.com/documenthost.aspx?0d-670025-1104-926-7645d27cfc9c> was necessary to promote a goal of compelling importance.

A leading early case that enforced this understanding of free exercise rights was *Sherbert v. Verner*, decided in 1963.⁸⁴ *Sherbert* held that a state could not enforce one of its general requirements for receiving unemployment compensation, availability for work on Saturday, against a woman who sincerely believed that she had a religious duty not to work on Saturday, but instead to observe it as the Sabbath, a day of rest.⁸⁵ The state had not intentionally written its unemployment compensation rules to impose special burdens on Sabbatarians. Rather, the state simply had not considered Sabbatarians and the adverse impact that the Saturday work requirement would have on them.⁸⁶ The *Sherbert* Court correctly understood the Free Exercise Clause as ensuring an absolute right to freedom from any substantial burden on the exercise of one's beliefs, no matter how inadvertently the government might have imposed that burden. The government could avoid exempting the religiously burdened individual from the general legal obligation only if it could satisfy the strict scrutiny standard; in this context, the government would have to show that the exemption would prevent it from achieving an objective of compelling importance.⁸⁷ After *Sherbert*, the Court

⁸³ See, e.g., *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141 (1987) (laws burdening religion "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *United States v. Lee*, 455 U.S. 252, 257–58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (generally applicable regulation can be applied to religious objector only if "some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right").

⁸⁴ 374 U.S. 398 (1963).

⁸⁵ *Id.* at 403–04.

⁸⁶ *Id.* at 406–09.

⁸⁷ *Id.* at 408–09.

consistently enforced these Free Exercise Clause or ^{JD SUPRA} many cases.⁸⁸ Document hosted at <http://www.jdsupra.com/post/documentViewer.aspx?fid=57310332-536b-44c4-a925-7645d27cfc9c>

B. The Court's Radical Revisionism: Employment Division v. Smith

In a widely criticized 1990 decision, *Employment Division v. Smith*,⁸⁹ the Rehnquist Court essentially overturned *Sherbert* and all of its progeny, thus gutting the Free Exercise Clause as a guarantor of religious liberty. The Court reduced the Free Exercise Clause to a mere shadow of the Equal Protection Clause, holding that it protects only against government measures that overtly or intentionally single out particular religious beliefs for discriminatory burdens. Under this shrunken remnant of the clause, it does not matter how burdensome the government's regulation is for how many religious observers. Nor does it matter how unnecessary that burden is in terms of advancing any government goal. Under *Smith*, you cannot even state a claim under the Free Exercise Clause—your case is summarily dismissed—unless you can show that the government deliberately discriminated against religion. It is not even enough to show that the government treated religion with reckless indifference.⁹⁰

C. The Court's Abdication of Its Special Responsibility to Protect the Rights of Individuals and Members of Minority Groups

The *Smith* Court's sterile view of the Free Exercise Clause eliminates that clause's historical role as a safety net for members of minority religious groups, whose beliefs are the most likely to be burdened by laws enacted through our majoritarian political processes. Justice O'Connor stressed this fatal flaw in her separate opinion in *Smith*, which excoriated the majority's abandonment of longstanding Free Exercise Clause standards. As she wrote:

⁸⁸See *supra* note 74.

⁸⁹494 U.S. 872 (1990).

⁹⁰*Id.* at 877 (“[T]he ‘exercise of religion’ often involves not only belief . . . but the performance of (or abstention from) physical acts. . . . [A] state would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. . . . [I]f prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”). *Id.* at 872 (implying that the Free Exercise Clause would prohibit only criminal law that is “specifically directed” at particular religious practice).

[F]ew States would be so naive as to enact a law d prohibiting or burdening a religious practice as such the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.⁹¹

Justice O'Connor aptly concluded that *Smith's* stunted view of the Free Exercise Clause "relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."⁹²

The *Smith* majority opinion candidly acknowledged that, henceforth, the Free Exercise Clause would no longer secure religious liberty for adherents of minority religions. Instead, the majority relegated their freedom to the good will of legislative majorities—or the lack thereof.⁹³ Moreover, the *Smith* majority expressly admitted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in. . . ."⁹⁴ Indeed, the majority could hardly deny that fact, considering that *Smith* itself, as well as two other recent cases in which the Court had rejected free exercise claims, all involved formally neutral government measures that just happened to severely undermine the free exercise rights of Native Americans.⁹⁵ Likewise,

⁹¹ *Id.* at 894 (O'Connor, J., concurring). Justice O'Connor further observes:

There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.

Id. at 901.

⁹² *Id.* at 894 (quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141–42 (1989) (quoting *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring in part and dissenting in part))).

⁹³ *Id.* at 890.

⁹⁴ *Id.*

⁹⁵ *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (rejecting free exercise challenge to federal government's logging and road construction activities on lands sacred to several Native American tribes, even though it was undisputed that these activities "could have devastating effects on traditional Indian religious practices"); *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting free exercise challenge to federal benefits statute requiring benefit applicants and recipients to supply their Social Security numbers, despite claim by Native American parents that it would violate their religious beliefs to obtain and provide Social Security number for their daughter).

in another recent case, the Court had rejected the free exercise of an Orthodox Jew whose religious beliefs were also a formally neutral government measure.⁹⁶

How did the *Smith* majority justify the admittedly discriminatory impact that its decimated constitutional protection would continue to have upon minority religions? It simply asserted, in conclusory fashion, that such discriminatory deprivation of liberty is the “unavoidable consequence of democratic government.”⁹⁷ That statement ignores the constitutional role of the Bill of Rights and the constitutional responsibility of the federal courts to enforce it.⁹⁸

In our constitutional system, which does not create a pure democracy, representatives who are elected by majorities may not deprive minorities of their fundamental freedoms, including religious liberty. In this vein, we should recall the memorable words of Justice Jackson in *West Virginia Board of Education v. Barnette*.⁹⁹ Notably, this 1943 case was a landmark in establishing not only religious liberty, but also the Supreme Court’s special role in protecting constitutional freedoms more generally. *Barnette* overturned the Court’s 1940 ruling in *Minersville School District v. Gobitis*,¹⁰⁰ and held that the First Amendment bars public schools from forcing students to pledge allegiance to the flag when they have any conscientious objections. In both cases, the challenge was brought by Jehovah’s Witness school children who believed that to salute the flag constituted idolatry and thus violated their religious convictions and duties. A key passage in *Barnette*, which the Court has quoted and relied on many times

⁹⁶Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting challenge to Air Force regulations that forbade the wearing of a yarmulke by an ordained Orthodox Jewish rabbi who was a commissioned Air Force officer working as a clinical psychologist on an Air Force base, despite his sincere belief that he had a religious obligation to wear it).

⁹⁷Employment Division v. Smith, 494 U.S. 872, 890 (1990).

⁹⁸See *id.* at 902 (O’Connor, J., concurring):

In my view . . . the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses and the Amish.

⁹⁹319 U.S. 624 (1943).

¹⁰⁰310 U.S. 586 (1940).

since, directly repudiates the assertion by the *Smith* majority, ^{Document hosted at JDSUPRA} which is quoted above, that members of minority faith groups are burdens on their religious practices as the “unavoidable consequence of democratic government.” To the contrary, as the *Barnette* Court declared:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁰¹

In *Smith*, this eloquent statement of central constitutional principle, directly relevant to religious liberty, is not cited by the majority, but instead relegated to Justice O’Connor’s separate opinion.¹⁰² Indeed, the *Smith* majority did not even cite the landmark *Barnette* precedent at all. Worse yet, the *Smith* majority opinion twice did cite, and rely on, the Court’s 1940 *Gobitis* decision,¹⁰³ which had rejected the religious freedom claims of the Jehovah’s Witness schoolchildren, and which *Barnette* overturned just three years later. Moreover, both times that the *Smith* majority referred to *Gobitis* in purported support of its reasoning, it did not even acknowledge that this decision had been promptly overruled, and hence had been a binding precedent for only several years, half a century earlier!¹⁰⁴ Even the Court’s discredited decision in *Plessy v. Ferguson*,¹⁰⁵ which upheld the pernicious “separate but equal” doctrine authorizing racially segregated public facilities, had a much longer, and more recent, pedigree as accepted constitutional doctrine. *Plessy* was not overturned until 1954, in *Brown v. Board of Education*;¹⁰⁶ by then it had been the law of the land for fifty-eight years, fifteen years longer than *Gobitis* had not

¹⁰¹ *Barnette*, 319 U.S. at 638.

¹⁰² *Smith*, 494 U.S. at 902 (O’Connor, J., concurring).

¹⁰³ *Id.* at 879.

¹⁰⁴ Zachary Heiden, *Fences & Neighbors*, 17 *Cardozo Stud. L. & Lit.* 255, 230 n.12 (2005) (“At the time, *Gobitis* was generally regarded as completely gone . . . yet Scalia made Justice Frankfurter’s *Gobitis* reasoning a central part of his argument.”).

¹⁰⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁰⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

been the law of the land when the *Smith* Court relied on it ^{Document hosted at JDSUPRA³},
in citing *Gobitis* but not the decision that overruled it. ^{http://www.jdsupra.com/postdocumentviewer.aspx?DL=573025386-444-a325-7645d27cfc9}
the *Smith* majority opinion blatantly violated the most basic rules
for citing legal authorities;¹⁰⁷ more fundamentally, in tandem, it vio-
lated the most basic constitutional principles that *Barnette* so elo-
quently enunciated.

*D. Individual Rights Advocates Support Strong Enforcement of Both
Religion Clauses*

Extraordinarily broad coalitions of civil liberties and religious
organizations have pushed for various legislative “fixes” to the *Smith*
Court’s decimation of the Free Exercise Clause. I am proud that the
ACLU has played a leadership role in that process, including by
drafting, lobbying for, and defending in court both major federal
laws on point: the “Religious Freedom Restoration Act”¹⁰⁸ or
“RFRA”; and the “Religious Land Use and Institutionalized Persons
Act”¹⁰⁹ or “RLUIPA.” I personally testified in support of RFRA in
both the House and the Senate, along with spokespersons for a
diverse group of coalition partners, including the head of the
National Association of Evangelicals. The news media picked up on
a shot of the two of us hugging each other, since it apparently had
a “strange bedfellows” appeal.

Yet the ACLU’s leadership of efforts to revitalize legal protection
for religious liberty, post-*Smith*, and our close collaboration with
many religious denominations in those efforts, illustrate a fact that
is too often obscured by politically motivated distortions: that civil
libertarians are as vigorous in our defense of the Free Exercise Clause
as in our defense of the Establishment Clause. Professor Marci Ham-
ilton strongly disagrees with the views of the ACLU and other civil
libertarians about the Free Exercise Clause, but she would certainly
agree that our views strongly support both religious liberty and
religion. Indeed, from her perspective, we *too* strongly support both
religious liberty and religion.¹¹⁰

¹⁰⁷The Bluebook: A Uniform System of Citation 93 (Columbia Law Review Assn.
et al. eds., 18th ed. 2005) (Rule 10.7.1(c)).

¹⁰⁸42 U.S.C. §§ 2000bb et seq.

¹⁰⁹*Id.* §§ 2000cc et seq.

¹¹⁰Hamilton, *God vs. the Gavel*, *supra* note 27, at 180.

E. Congressional and Court Reconsideration of Free Exercise

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Since my mandate in delivering the Simon Lecture is to focus on constitutional issues, I will not now discuss the legislative responses to the Court's constriction of the Free Exercise Clause in *Smith*, and the Court's replies to those responses,¹¹¹ all of which makes for an ongoing, important saga in its own right, involving other constitutional issues, including separation of powers and federalism. For purposes of my present theme, the Constitution's protection of religious liberty, I just want to underscore a basic constitutional reality about any so-called statutory fix: No statute can really "fix" a flaw in the Court's enforcement of constitutional rights. Constitutional rights, by definition, are especially entrenched and are not subject to revocation by a mere majority vote of our elected representatives in Congress with the president's assent.

It is a shame that the Supreme Court never has reconsidered its radical rewriting of the Free Exercise Clause in *Smith*, as several justices have urged it to do.¹¹² Indeed, in a real sense, the Court never even considered that radical rewriting in the first instance, even in *Smith* itself. In the Supreme Court, the briefs and oral arguments had been confined to the sole issue on which the Court had granted review: whether Oregon had to exempt members of the Native American Church, with its sacramental use of peyote in religious rituals, from its general law criminalizing peyote use.¹¹³ In constitutional law terminology, the issue was whether the state's non-exemption satisfied strict scrutiny.

¹¹¹ See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding the constitutionality of one portion of Religious Land Use and Institutionalized Persons Act against contention that it violates Establishment Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act, insofar as it applies to state and local governments, as exceeding Congress' power).

¹¹² *Boerne*, 521 U.S. at 544–45 (O'Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment); *id.* at 578 (Blackmun, J., concurring).

¹¹³ See *Petition for Writ of Certiorari, Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213).

Throughout the protracted history of the *Smith* litigation, the Supreme Court had also reviewed on a previous occasion a party or judge had argued that any standard other than strict scrutiny should govern. Yet without the benefit of briefs or oral arguments, the *Smith* majority, on its own, refused to assess the state's nonexemption under a strict scrutiny standard. Indeed, it even refused to review that nonexemption under any standard at all. Instead, the Court merely announced a new per se rule that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,"¹¹⁵ notwithstanding the Free Exercise Clause.¹¹⁶

IV. Majoritarian Advocates Support Weak Enforcement of Both Religion Clauses

Before I elaborate on how the Rehnquist Court's equal non-protection approach has eviscerated the Establishment Clause, paralleling what it did to the Free Exercise Clause in *Smith*, I will first develop another, related theme that also links the Court's recent jurisprudence under both clauses: its excessive deference to majoritarian political and religious preferences. I have already addressed this point concerning the Court's Free Exercise analysis in *Smith*. I will now discuss how this majoritarian deference characterizes certain justices' views of both First Amendment Religion Clauses.

¹¹⁴See *Smith*, 494 U.S. at 875 (describing procedural history). The Supreme Court's previous decision in *Smith* is reported at 485 U.S. 660 (1988).

¹¹⁵*Smith*, 494 U.S. at 878–79.

¹¹⁶The plurality's sweeping revision of Free Exercise Clause jurisprudence was without the benefit of briefs or oral arguments. That was one basis for the petition for rehearing that was jointly filed by a broad array of constitutional scholars, religious organizations, and other individuals and groups. Petition for Rehearing at 5–6, *Employment Division v. Smith*, 494 U.S. 872 (1990), reh'g denied, 496 U.S. 913 (1990):

Because the Court's far-reaching holding resolved an issue not briefed by the parties, because recent research on the history of the Free Exercise Clause demonstrates that the broader reading of the Clause rejected by the Court . . . was contemplated by the Framers of the First Amendment, and because assertions that the Court has "never held" that the Free Exercise Clause requires government to justify unintended burdens on free exercise must come as a surprise to the federal and state courts, state attorneys general, and treatise writers who have uniformly read this Court's Free Exercise decisions from as far back as at least *Sherbert v. Verner*, as holding precisely that, a rehearing is appropriate.

A. Justice Scalia, Who Authored *Smith*, Gutting the Free Exercise Clause, also Advocates a Weakened Version of Establishment Clause

For those who falsely equate strong defense of the Establishment Clause with hostility toward religion, and who correspondingly assume that a limited view of the Establishment Clause should be equated with support for religion, the *Smith* decision and its aftermath should be puzzling. I have already noted that the legislative attempts to repair some of *Smith*'s damage to religious freedom have been spearheaded, contrary to stereotypes, by organizations that also strongly support anti-establishment values, including the ACLU and Americans United for Separation of Church and State. The lineup on the Supreme Court should also be puzzling to the too many politicians and pundits who complain that the Court's rulings enforcing the Establishment Clause undermine religion.

How many of those aligned with the so-called Religious Right realize that *Smith*, the decision that gutted the Free Exercise Clause, was authored not by one of the Court's champions of a strong Establishment Clause but rather by the Religious Right's very own poster justice, Antonin Scalia? I hasten to add that Justice Scalia has strongly defended particular constitutional rights and has written some landmark opinions that eloquently espouse libertarian principles.¹¹⁷ I should also note that he and I are personal friends, despite our disagreements on particular issues.¹¹⁸ But when it comes to the Religion Clauses, I wish the Religious Right would realize that Justice Scalia is religiously wrong!

Moreover, several other justices join Justice Scalia in their unduly narrow views of both Religion Clauses, in both contexts substituting for a core libertarian protection only a peripheral egalitarian protection, as I outlined earlier. Correspondingly, many justices who have most strongly enforced the Establishment Clause also have most strongly enforced the Free Exercise Clause, objecting to the *Smith* decision's undue constriction of that clause.¹¹⁹

¹¹⁷Nadine Strossen, Tribute to Justice Antonin Scalia, 62 N.Y.U. Ann. Surv. Am. L. 1, 7 (2006).

¹¹⁸*Id.*

¹¹⁹For example, the following justices have explicitly supported the *Smith* ruling, with its limited view of the Free Exercise Clause, and also have endorsed only a limited view of the Establishment Clause (they are listed in alphabetical order): Justices Kennedy, Rehnquist, Scalia, and White. Conversely, the following justices

B. Both Religion Clauses Are Anti-Majoritarian

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Those patterns in the justices' rulings—treating both First Amendment Religion Clauses similarly, and either strictly enforcing both, or weakly enforcing both—might at first seem counter-intuitive. However, any impression that these Establishment Clause and Free Exercise Clause rulings are inconsistent with each other only reflects the prevalence of the political rhetoric that the Establishment Clause is anti-religion. Only if one accepts this allegation would one expect an advocate of Establishment Clause values to reject Free Exercise Clause values, and vice versa. Yet the Establishment Clause, far from being averse to religion, is beneficial to it.

Along with all provisions in the Bill of Rights, including the Free Exercise Clause, if the Establishment Clause can fairly be described as anti-anything, it is anti-*government*. Put a bit more elegantly, both Religion Clauses, as well as other Bill of Rights provisions, minimize government power in order to maximize individual liberty. In our democratic republic, every provision in the Bill of Rights constrains the power even of democratically elected representatives to limit the rights of individuals and minority groups in the name of the majority. In short, those provisions are anti-*majoritarian*. Accordingly, the First Amendment Religion Clauses protect individual religious liberty and freedom of conscience in the face of majoritarian religious preferences and the accompanying majoritarian political pressures.

C. Justice Scalia's Majoritarian Approach to the Establishment Clause

As discussed above, from a constitutional and libertarian perspective, *Smith's* most fundamental flaw was its suggestion that religious liberty for minority groups must be relegated to the vicissitudes of the majoritarian political process. To all of us who are familiar with Justice Scalia's overall jurisprudence, this is hardly a shocking position for him to take, since he so consistently votes to remit to the

have explicitly criticized *Smith's* limited view of the Free Exercise Clause, and also have supported robust enforcement of the Establishment Clause (they are listed in alphabetical order): Justices Blackmun, Brennan, Marshall, O'Connor, and Souter. (Some of the current justices are not included in either list because they have not yet had the occasion to opine expressly on one or both of these issues.)

political process what civil libertarians and libertarians ¹²⁰ to be fundamental constitutional rights. ¹²⁰ Document hosted at <http://www.jdsupra.com/post/DocumentViewer.aspx?id=57310332-536b-44c4-a925-7645d27cfc9c>

That same deference to the political branches of government, and that same penchant to uphold laws that reflect majoritarian religious preferences at the expense of religious minorities, carries through to the Establishment Clause rulings of Justice Scalia and others on the current Court. In the Court's most recent Establishment Clause cases, its two Ten Commandments decisions,¹²¹ Justice Scalia, along with three other justices, expressly opined that the Establishment Clause should permit government to sponsor religious displays that promote the religious beliefs of the majority of Americans.¹²² In the ACLU's Ten Commandments case, in which the majority struck down the Kentucky courthouse displays, Justice Scalia's opinion actually relied on statistics indicating that 97.7 percent of people living in this country are affiliated with Christianity, Judaism, and Islam, three monotheistic faiths.¹²³ Given those numbers, he concluded, government officials and agencies should be free to promote a religious belief in a single deity.¹²⁴

That assertion raises factual problems, insofar as Islam apparently does not regard the Ten Commandments as authoritative.¹²⁵ It also raises constitutional problems insofar as the Court had always held that the Establishment Clause is most profoundly violated by government measures promoting particular religions or denominations,¹²⁶ and all of the Ten Commandments displays at issue in both

¹²⁰See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

¹²¹*Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

¹²²*Van Orden*, 125 S. Ct. at 2864 (Scalia, J., concurring).

¹²³*McCreary*, 125 S. Ct. at 2753 (Scalia, J., dissenting).

¹²⁴*Id.* at 2752 (Scalia, J., dissenting).

¹²⁵Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *Fordham L. Rev.* 1477, 1519 (2005); see also Brief of Amici Curiae Anti-Defamation League et al. in Support of Respondent, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (No. 03-1500); Brief of Amici Curiae Anti-Defamation League et al. in Support of Petitioner, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (No. 03-1693).

¹²⁶See *Larson v. Valente*, 456 U.S. 228, 244 (1982); *School District of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963); *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 15 (1947); see also *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).

cases featured the same particular version that had been espoused by the same particular denominations. Not only were those were the Protestant denominations that were numerically and politically dominant in the local communities where the challenged Ten Commandments displays were located. Correspondingly, all of those displays were inconsistent with the versions of the Ten Commandments that are espoused by other denominations, including Catholics, Jews, and Lutherans.¹²⁷

Even beyond those serious problems, Justice Scalia's expressly majoritarian analysis is at odds with the general concept of constitutionally entrenched rights that courts should protect, even—indeed, especially—against majoritarian policies and preferences. As Justice O'Connor succinctly put it in her concurring opinion in the ACLU's Ten Commandments case from Kentucky, "We don't count heads in enforcing the First Amendment."¹²⁸ To support that assertion she cited *Barnette*.

Just as it is no coincidence that Justice Scalia espoused such narrow views of both Religion Clauses in both *Smith* and the Ten Commandments cases, it is also no coincidence that Justice O'Connor strongly rebuffed those views in the same cases, consistently sounding the same anti-majoritarian, pro-libertarian theme in both. As noted above, Justice O'Connor castigated Justice Scalia's opinion in *Smith* for riding roughshod over the rights of religious minorities, quoting *Barnette's* key language on point.¹²⁹

When we consider both Religion Clauses, and the array of positions that have been advocated by justices and others, including the ACLU, it should be clear that the critical vectors are not for or against religion, as too many politicians and others contend, but rather for or against individual liberty. In the judicial context, the critical vector is whether one is for or against strict judicial scrutiny of laws reflecting majoritarian religious preferences.

¹²⁷The Ten Commandments (a.k.a. The Decalog), Its Text and Grouping, at http://www.religioustolerance.org/chc_10c4.htm (accessed June 13, 2006).

¹²⁸McCreary, 125 S. Ct. at 2747 (O'Connor, J., concurring).

¹²⁹Employment Division v. Smith, 494 U.S. 872, 902–03 (1990) (O'Connor, J., concurring).

V. The Court's Reductionist Redefinition of the Establishment Clause

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Now I will return to the first of my two interlinked major points and elaborate on the Court's recent reductionist redefinition of what it had long held to be a core Establishment Clause tenet: its absolute bar on any government funding of any religious institution.

A. *Egalitarian Concerns Should Not Trump Libertarian Concerns in the Context of School Vouchers and Other Government Funding Programs*

Throughout modern constitutional history, the Supreme Court has consistently held that the Establishment Clause imposes an absolute bar on government funding of any religious institution.¹³⁰ As I already noted, Roger Pilon told me that he and others at the Cato Institute are of the view that in this context, equality concerns should at least sometimes trump libertarian First Amendment concerns, so that if government chooses to fund programs run by secular institutions, then religious institutions must be free to apply for that funding as well. To hold otherwise, he said, would be to discriminate against religious institutions and thus burden the free exercise of religion, drawing an analogy to the Court's holding in *Sherbert*. I respect that position, but let me explain why I believe it is wrong.

Most fundamentally, religion is constitutionally distinct from everything else under the First Amendment, because it alone is singled out under the Establishment Clause. Although reasonable libertarians and civil libertarians might well disagree about exactly what limits this clause imposes on government involvement with religion, we surely must all acknowledge that it does indeed impose some such limits specifically and only on religion, and it thus mandates some distinctive—*i.e.*, non-equal—treatment of religion.

¹³⁰See *Mitchell v. Helms*, 530 U.S. 793, 873–99 (2000) (Souter, J., dissenting) (summarizing cases); *id.* at 899 (“This stretch of doctrinal history leaves one point clear beyond peradventure: . . . we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools.”); *Rosenberger v. Rector & Visitors of the University of Va.*, 515 U.S. 819, 873–84 (1995) (Souter, J., dissenting) (summarizing cases).

B. *The Establishment Clause Absolutely Bars All Government Funding of Religion* Document hosted at JDSUPRA[®]
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Now I will outline the abundant authority for the conclusion that the Establishment Clause's distinctive treatment of religion includes an absolute bar on all government funding, including government funding that is part of an otherwise broadly distributed benefits program. That conclusion is supported by constitutional history, by the purposes underlying the Establishment Clause, by the Court's consistent rulings throughout more than half a century, and by scholars across a broad ideological spectrum.

1. *This Absolute Bar is Supported by Constitutional History*

The relevant pre-constitutional history is well-summarized by University of Texas Law Professor Douglas Laycock as follows:

If the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion They did not substitute small taxes for large taxes; three pence was as bad as any larger sum. The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere.¹³¹

How could any free market libertarian possibly object to that principle?

Professor Laycock's reference to "three pence," of course, is an allusion to one of James Madison's famous lines in his influential *Memorial and Remonstrance against Religious Assessment*, published in 1785.¹³² This *Remonstrance* played the key role in defeating a Virginia

¹³¹Douglas Laycock, *Nonpreferential Aid to Religion: A False Claim About Original Intent*, 28 Wm. & Mary L. Rev. 875, 921–23 (1986). See also T. Curry, *The First Freedoms* 217 (1986) (at the time of the framing of the First Amendment Religion Clauses, "the belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history"); Jesse Choper, *Securing Religious Liberty* 16 (1995) ("There is broad consensus that a central threat to . . . religious freedom . . .—indeed, in the judgment of many the most serious infringement upon religious liberty—is posed by forcing them to pay taxes in support of . . . religious activities").

¹³²James Madison, *Memorial and Remonstrance* (June 20, 1785), available at www.worldpolicy.org/globalrights/religion/madison-remonstrance.html (accessed June 12, 2006).

bill that would have allowed taxpayers to designate a ^{Document posted at JD SUPRA™15} or educational institution as the beneficiary of their assets.¹³³
<http://www.jdsupra.com/posteddocuments/View.aspx?id=131333-3266444-425765276085>

Notably, though, these elements of even-handedness and individual choice did not redeem the tax plan for Madison and his contemporaries, because it still fell afoul of the absolute ban on any government funding of religion. In a central passage, which was widely cited in the founding era and has often been cited in modern Supreme Court decisions,¹³³ Madison posed this rhetorical question, to underscore the absolute principle at stake, essential to individual liberty:

Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?¹³⁴

The principles set out in Madison's *Remonstrance* not only led to the defeat of the Virginia tax bill for general support of religious and educational institutions; it also spurred the adoption of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson.¹³⁵ Along with Madison's *Remonstrance*, Jefferson's bill is also considered authoritative in shaping and interpreting the First Amendment's Religion Clauses.¹³⁶ Two key passages in that famous document, which also have been widely quoted, further demonstrate the primacy of the no-government-funding principle. First, the Bill's Preamble declares that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is

¹³³ See, e.g., *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 n.15 (1986); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 235 n.31 (1977); *Lemon v. Kurtzman*, 403 U.S. 602, 633–34 (1971) (Douglas, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *International Association of Machinists v. Street*, 367 U.S. 740, 779 n.4 (1961) (Douglas, J., concurring).

¹³⁴ Madison, *supra* note 132, at paragraph 3.

¹³⁵ Virginia Act for Establishing Religious Freedom, Va. Code Ann. § 57-1 (1786).

¹³⁶ See, e.g., *Everson v. Board of Education of Ewing*, 330 U.S. 1, 13 (1947) ("This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the [Virginia Act for Establishing Religious Freedom]"); *Watson v. Jones*, 80 U.S. (13 Wall). 679 (1871); *Davis v. Beason*, 133 U.S. 333 (1890).

sinful and tyrannical.”¹³⁷ Second, its text provides that “no person shall be compelled to support any religious worship, place, or institution, whatsoever.”¹³⁸

2. *This Absolute Bar is Supported by the Purposes underlying the Establishment Clause*

The Framers’ absolute opposition to government funding of religion reflected three core objectives that animated the First Amendment’s non-Establishment Clause.

a. *To Protect Individual Freedom of Conscience*

The first such objective is to protect individual freedom of conscience. As I have already noted, some experts consider this to be the clause’s foremost objective.¹³⁹ This paramount goal certainly resonated throughout Madison’s *Remonstrance* and Jefferson’s Virginia Bill for Religious Liberty as a key reason for repudiating any taxpayer support for religion. Indeed, in order to protect freedom of conscience, Jefferson maintained that government could not tax individuals even for the purpose of funding religious institutions of their

¹³⁷ Va. Code Ann. § 57-1.

¹³⁸ *Id.* Roger Pilon and other critics of the foregoing historical arguments in favor of the no-funding principle note that, during the founding era, many colonial and state governments had official established religions, and provided government funding to religious institutions; indeed, Massachusetts did not disestablish its state religion until 1836. Far from ratifying these practices, though, the Establishment Clause was expressly designed to repudiate them at the national level. See, e.g., *Rosenberger v. Rector & Visitors of the University of Va.*, 515 U.S. 819, 869 (1995) (Souter, J., dissenting) (quoting *Everson v. Board of Education of Ewing*, 330 U.S. 1, 10, 11, 13 (1947) (specific citations omitted)):

Madison wrote [the *Remonstrance*] against a background in which nearly every Colony had exacted a tax for church support, . . . the practice having become “so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence;”. . . Madison’s *Remonstrance* captured the colonists’ “conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions. . . .” Their sentiment, as expressed by Madison in Virginia, led not only to the defeat of Virginia’s tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson.

¹³⁹ Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 *Calif. L. Rev.* 673, 675 (2002).

own faith, since that would “depriv[e]” the individual “in-
 comfortable liberty of giving his contributions to the partic-
 whose morals he would make his pattern.”¹⁴⁰

b. To Preserve the Purity of Religion

A second major Establishment Clause objective was to preserve religion and religious institutions from what Madison decried as the “degrad[ing]”¹⁴¹ influence of government. Roger Williams and other devout religious leaders in the colonial era recognized that even what might seem to be beneficial government involvement with religion, including tax support, in fact would undermine religion’s independence and vitality. As Madison’s *Remonstrance* noted, government support of religion “is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world.”¹⁴² In 1947, in the Court’s first modern Establishment Clause case, Justice Rutledge elaborated on Madison’s point as follows: “The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.”¹⁴³

Many contemporary religious leaders and citizens have echoed that concern, in arguing against government-funded support of religion. For example, vouchers for religious schools and other forms of “faith-based funding” have been opposed by no less staunch a stalwart of the so-called Religious Right than Phyllis Schlafly and her Eagle Forum. The Eagle Forum’s newsletter warned: “Because [government funding] brings . . . religion-restricting government regulations, many . . . religions . . . know better than to hand over control of their social service ministries to the government. . . . Government vouchers . . . will just bring more government, not more liberty.”¹⁴⁴ Likewise, the Eagle Forum newsletter warned that vouchers would “destroy private education,”¹⁴⁵ including private religious schools, gradually expunging religion from their curricula.

¹⁴⁰Hening, *Statutes of Virginia* 84 (1823); Henry Steele Commager, *Documents of American History* 125 (1944).

¹⁴¹Madison, *supra* note 132, at paragraph 8.

¹⁴²*Id.* at paragraph 6.

¹⁴³*Everson v. Board of Education of Ewing*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting).

¹⁴⁴Sue Ella Deadwyler, *Eagle Forum of Georgia*, *Georgia Insight* (Jan. 23, 2004), available at <http://www.georgiaeagle.org/index.php?where=insight&id=78>.

¹⁴⁵Cathie Adams, *Vouchers: The Parent Trap*, 6 *Torch* (March 1999), available at www.texaseagle.org/torch/03-99.html (accessed June 12, 2006).

This objection to “faith-based funding”—that it would come even from religious leaders who are strong supporters of President Bush, for whom this has been a pet issue. For example, speaking on his *700 Club* television show in 2001, Pat Robertson said that “what seems to be such a great initiative can rise up to bite the [government-funded religious] organizations as well as the . . . government.”¹⁴⁶ Robertson further stated: “[F]ederal rules will envelope these [religious] organizations, they’ll begin to be nurtured . . . on federal money, and then they can’t get off of it. It’ll be like a narcotic.”¹⁴⁷

In its many past cases reaffirming the core Establishment Clause ban on government funding of religion, the Court has stressed this goal of avoiding “corrosive secularism.”¹⁴⁸ That theme was also stressed in the dissent in the 2002 case in which the Court narrowly upheld a voucher program in Cleveland, Ohio, that systematically channeled massive tax funding into parochial schools, and thus for the first time violated the hitherto absolute no-funding principle. As Justice Souter observed in his powerful dissent from the Court’s 5-4 ruling in that case, *Zelman v. Simmons-Harris*: “When government aid goes up, so does reliance on it; the only thing likely to go down is independence. . . . [One] wonder[s] when dependence will become great enough to give the State . . . an effective veto over basic decisions on the content of curriculums?”¹⁴⁹

The Cleveland voucher program attached regulatory conditions that are typical of conditions we can reasonably anticipate being imposed on other government funding programs, since they reflect widely held secular values in our broader society. But those values are inconsistent with many religious beliefs. Therefore, requiring religious institutions to adhere to them, as a condition of funding, endangers the institutions’ religious liberty. Specifically, the Cleveland voucher program barred any religious schools that received

¹⁴⁶See Rob Boston, *Love for Sale: Faith-based Grant Buys TV Preacher’s Favor, The Wall of Separation: Official Weblog of Americans United for Separation of Church and State* (Feb. 2, 2005), available at http://blog.au.org/2005/02/love_for_sale_f.html (last visited Mar. 2, 2006).

¹⁴⁷*Id.*

¹⁴⁸*School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985).

¹⁴⁹*Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (2002) (Souter, J., dissenting).

government funds from “discriminat[ing] on the basis of religion” and also from “teach[ing] hatred of any person on the basis of . . . religion.”¹⁵⁰ As Justice Souter’s dissent noted, the anti-discrimination provision could mean that “a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification.”¹⁵¹ Likewise, the anti-hate-speech regulation “could be understood . . . to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others. . . .”¹⁵²

c. To Avoid Conflict among Religious Groups

The third major objective underlying the Establishment Clause also supports its categorical ban on government funding; that objective is to avoid the conflict and strife among various religious groups that have torn apart so many societies throughout history and around the world. As Justice Rutledge warned, back in 1947, “Public money devoted to payment of religious costs . . . brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one [religious sect], by numbers [of adherents] alone will benefit most, there another. This is precisely the history of societies which have had an established religion and dissident groups.”¹⁵³

This general danger that Justice Rutledge foretold is clearly evident in the specific context of the Cleveland voucher program at issue in the *Zelman* case. Justice Breyer’s dissent in that case underscored this danger through a series of rhetorical questions:

Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program’s criteria? If so, just how is the State to resolve the

¹⁵⁰ *Id.* at 713.

¹⁵¹ *Id.* at 712.

¹⁵² *Id.* at 713.

¹⁵³ *Everson v. Board of Education of Ewing*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting).

resulting controversies without provoking legitimate fear of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?¹⁵⁴

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Justice Souter's dissent in *Zelman* likewise stressed the religious divisiveness that will likely result from government funding of religious schools; he cited many specific examples of religious doctrines that are controversial in our contemporary society:

Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools. . . . Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or . . . to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. Views like these . . . have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but [also] because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of [government financing], that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.¹⁵⁵

¹⁵⁴ *Zelman*, 536 U.S. at 723–24 (Breyer, J., dissenting).

¹⁵⁵ *Id.* at 715–16 (Souter, J., dissenting). See also *id.* at 724–25 (Breyer, J., dissenting): How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? . . . [A]ny major funding program . . . will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive.

3. *This Absolute Bar is Supported by the Court's Consistent Jurisprudence Throughout More than Half a Century.* Document hosted at JDSUPRA's
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In the Court's first modern Establishment Clause ruling, its 1947 *Everson* decision, the justices unanimously endorsed the centrality of that clause's absolute ban on government funding of religion. Despite their disagreements about other aspects of the Establishment Clause's scope, the justices all concurred that it "means at least this: No tax in any amount, large or small, can be levied to support any religious activities or institutions."¹⁵⁶ In an unbroken string of cases decided between 1947 and 2000, the Court consistently reaffirmed and enforced this principle. As Justice Souter concluded after describing this line of cases: "This stretch of doctrinal history leaves one point clear beyond peradventure: together with James Madison, we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools."¹⁵⁷

This longstanding principle of no government funding for religion remained firmly entrenched until 2000, when it was rejected by a four-person plurality opinion that Justice Souter, in an opinion joined by two other justices, strongly decried for so sharply diverging from the Court's precedents.¹⁵⁸ Then, in 2002, for the first time ever, a narrow majority of the Court upheld a government program that provided substantial, direct aid to religious institutions—specifically, parochial schools. In the *Zelman* case, which the four dissenters correctly called "a dramatic departure from basic Establishment Clause principle,"¹⁵⁹ the Court upheld Cleveland's voucher program. As Justice Breyer put it, the majority "adopt[ed]" an interpretation of the Establishment Clause that this Court rejected more than half a century ago."¹⁶⁰

¹⁵⁶ *Everson*, 330 U.S. at 15–16.

¹⁵⁷ *Mitchell v. Helms*, 530 U.S. 793, 899 (2000) (Souter, J., dissenting).

¹⁵⁸ See *id.* at 900 ("As a break with consistent doctrine the plurality's new criterion [for assessing the permissibility of government aid to religion] is unequalled in the history of Establishment Clause interpretation."); *id.* at 901 n.19 ("Short of formally replacing the Establishment Clause, a cleaner break with prior law [than the plurality's approach] would be hard to imagine."); *id.* at 911 ("The plurality would break with the law. The plurality's notion would be the end of the principle of no aid to the schools' religious mission.").

¹⁵⁹ *Zelman*, 536 U.S. at 717 (Souter, J., dissenting).

¹⁶⁰ *Id.* at 728 (Breyer, J., dissenting).

Jettisoning the Court's long-enforced absolute bar against government funding of religion and the associated individual conscience that depends on that bar, the majority instead substituted only a bar on unequal funding of religion. In thus replacing the Establishment Clause's absolute libertarian guarantee with its egalitarian corollary, the *Zelman* majority countermanded multiple precedents in which the Court had expressly rejected just this substitution. The Court had repeatedly stressed that evenhanded distribution of government aid—as among secular and religious recipients—while certainly a necessary precondition for the constitutionality of any government aid program that benefited religion, was not a sufficient precondition for constitutionality.¹⁶¹ As the four *Zelman* dissenters noted, “[a]s recently as two terms ago, a majority of the Court recognized that . . . evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause.”¹⁶² Accordingly, until the 2002 *Zelman* case, the Court regularly struck down government aid programs that had the constitutionally prohibited purpose or effect of financially supporting the religious mission of religious institutions, even when the programs distributed aid broadly and evenhandedly among secular and religious recipients.¹⁶³

¹⁶¹See *id.* (“An earlier Court found [the majority’s] ‘equal opportunity’ principle insufficient; it read the [Establishment] Clause as insisting upon greater separation of church and state, at least in respect to primary education.”); Mitchell, 530 U.S. at 877 (Souter, J., dissenting) (“Evenhandedness of distribution as between religious and secular beneficiaries is a relevant factor, but not a sufficiency test of constitutionality. There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms.”); Rosenberger v. Rector & Visitors of the University of Va., 515 U.S. 819, 877–80 (1995) (Souter, J., dissenting); *id.* at 877 (“[T]he Court recognizes that evenhandedness is only a ‘significant factor’ in certain Establishment Clause analysis, not a dispositive one”); *id.* at 880 (“[W]e did not, in any of these cases, hold that evenhandedness might be sufficient to render direct aid to religion constitutional.”).

¹⁶²*Zelman*, 536 U.S. at 696 (Souter, J., dissenting).

¹⁶³See, e.g., *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 395 (1985); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *MEEK v. Pittenger*, 421 U.S. 349, 365 (1975); *Committee for Public Ed. v. Nyquist*, 413 U.S. 756, 774 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 480 (1973); *Tilton v. Richardson*, 403 U.S. 572, 683 (1971) (plurality opinion).

4. *This Absolute Bar is Supported by Scholars across a Broad Ideological Spectrum*

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It is noteworthy that scholars across a broad ideological spectrum concur that a core meaning of the Establishment Clause today must continue to be its longstanding bar on government financing of religion. That is true, for instance, even of Michael McConnell, now a judge on the U.S. Court of Appeals for the Tenth Circuit, who has famously advocated a substantially narrowed understanding of the Establishment Clause.¹⁶⁴ Yet even his limited concept of government action that violates the Establishment Clause extends to “legal compulsion to support” religious activities through taxes.¹⁶⁵

Another example is N.Y.U. Law Professor Noah Feldman, who advocates another variation on McConnell’s theme of a radically reduced Establishment Clause. Feldman urges shrinking that clause to encompass only two core principles, which “historically lay at the root of” our Constitution’s treatment of religion.¹⁶⁶ The first core principle is “no coercion,” and the second is “no money.”¹⁶⁷ (Those two principles are mutually independent, so government funding would be banned even if it is not coercive.) Concerning the second principle, no money, Feldman advocates the following absolute rule: “[T]he state may [not] expend its resources so as to support religious institutions and practices.”¹⁶⁸

Let me quote one final, important example of a constitutional scholar who also has forcefully defended the “no funding” principle. He has stressed that this principle is essential for minimizing cultural divisiveness in our pluralistic, diverse society. That last persuasive expert is none other than Cato’s Roger Pilon himself! As Roger put it in 1997:

[T]he more of life we try to live collectively, through the forced association that is government, the more we invite cultural clashes that in the end are irreducible clashes over values. Suppose, for example, that we . . . tried to finance private religious institutions through public taxation. . . . In

¹⁶⁴Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 *Wm. & Mary L. Rev.* 933 (1986).

¹⁶⁵*Id.* at 938 (“[L]egal compulsion to support or participate in religious activities would seem to be the essence of an establishment.”).

¹⁶⁶Feldman, *supra* note 51, at 237.

¹⁶⁷*Id.*

¹⁶⁸*Id.*

our heterogeneous society, the disputes would be in-
able and endless. And there would be no principled re-
sponse to them.¹⁶⁹

VI. Conclusion

Libertarians, as well as civil libertarians, should be very concerned about the widespread misunderstandings of the core libertarian principles embodied in the First Amendment's Religion Clauses, as well as the modern Supreme Court's decisions that have enforced those principles. The Court's more recent, revisionist rulings in the religion area parallel its anti-libertarian rulings regarding the two other constitutional rights that I have also briefly discussed above, under the First Amendment Free Speech Clause and the Fourth Amendment. By elevating ancillary egalitarian concerns over central libertarian precepts, the Court has enforced only a constricted vision of constitutional rights.

I will summarize that constricted vision with a variation on the following famous line by Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."¹⁷⁰ Here is the variation on this theme that captures the critique I have laid out in this article: The law, in its majestic equality, allows all of us alike to undergo suspicionless searches; to be barred from expressive activities on government property that is compatible with such activities; to be forced to choose between honoring our religious beliefs or complying with government regulations, on pain of imprisonment; and to be forced to contribute our tax dollars to religious institutions, in violation of our own beliefs.

¹⁶⁹Roger Pilon, *E Pluribus Unum?: A Symposium on Pluralism and Public Policy*, The American Jewish Committee, Remarks at the Arthur and Rochelle Belfer Center for American Pluralism 62 (1997) (transcript on file with author).

¹⁷⁰Anatole France, *The Red Lily* ch. 7 (1894), reprinted in John Bartlett, *Bartlett's Familiar Quotations* 550 (Justin Kaplan ed., Little Brown 16th ed. 1992).

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