

2006

What Role Religious Should Play (or not Play) in Our Public Policy Symposium: World Views Collide

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Recommended Citation

23 T. M. Cooley L. Rev. 131 (2006)

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WHAT ROLE RELIGION SHOULD PLAY (OR NOT PLAY) IN OUR PUBLIC POLICY¹

NADINE STROSSEN²

This I would like to thank everyone at the Thomas M. Cooley Law School for their hard work in putting together this impressive program. Special thanks go to Sam Bhimani, the Symposium Editor of the *Thomas M. Cooley Law Review*, who has been so responsive to my many communications throughout the planning process.

I. CONSTITUTIONAL DILEMMAS CONCERNING EQUALITY AND RELIGIOUS LIBERTY INHERENT IN GOVERNMENT FUNDING OF PERVASIVELY SECTARIAN INSTITUTIONS

Sam and his colleagues have asked me to focus on the important issue of what is often called “faith-based funding,” channeling taxpayer dollars to pervasively religious institutions so they can allegedly provide social services. Let me comment on a couple words I used in framing the issue because they lead directly to the heart of the matter.

A. These constitutional dilemmas arise only with pervasively sectarian institutions, not religiously affiliated institutions

First, I noted that the issue concerns “*pervasively* religious institutions.” Neither the American Civil Liberties Union (ACLU) nor other critics of these programs have any objection to taxpayer funding of religiously-affiliated institutions, such as Catholic Charities or Lutheran Social Services. These organizations are sufficiently independent of their affiliated religious namesakes because they have secular missions, adhere to general regulations that are imposed on all recipients of government funds, and promote

1. This Article is an edited version of the oral remarks that Professor Strossen prepared for delivery at the 2005 Thomas M. Cooley Law School Symposium, *World Views Collide*, 23 T.M. COOLEY L. REV 443 (2006). Credit and responsibility for some of the footnotes belong to her Chief Aide, Steven C. Cunningham (N.Y. Law School '99) along with her Research Assistants, Samantha Fredrickson (N.Y. Law School '08) and Jennifer Rogers (N.Y. Law School '07). Most of the credit and responsibility for most of the footnotes belong to the staff of the *Cooley Law Review*, to whom Prof. Strossen conveys her gratitude.

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constitutional values of equality and government neutrality toward religion.³ Most importantly, these religiously-affiliated institutions adhere to prohibitions on discrimination in choosing employees or clients; they also adhere to prohibitions on religious proselytizing with government funds.⁴

In contrast, pervasively religious institutions cannot adhere to such conditions, and should not have to do so, consistent with their religious liberty. For example, as a condition of receiving government funding, Catholic Charities must hire and serve anyone who is otherwise eligible, regardless of factors such as religion, gender, or sexual orientation.⁵ However, for the Catholic Church itself, such kinds of discrimination are mandated by religious beliefs.⁶ For example, the Catholic Church, as a matter of church doctrine, bars women and gay men from serving as priests.⁷

For the foregoing reasons, if the government gave money to the Catholic Church for social services, some important rights would inevitably be violated. This is the basic, inescapable dilemma that is posed by government funding of any sectarian institution to provide social services.⁸ I will illustrate the general problem by referring to a

3. See Catholic Charities U.S.A., *About Us*, <http://www.catholiccharitiesusa.org/about/index.cfm?cfid=7616202&cftoken=57950072> (last visited July 23, 2006); Lutheran Social Services, Inc., *About Us*, <http://www.lsss.org/aboutus.htm> (last visited July 23, 2006); Lutheran Social Services, Inc., *Credentials*, http://www.lsss.org/mediareleases/media_credentials.htm (last visited July 23, 2006).

4. See 42 U.S.C. § 604a (g), (j) (2000).

5. See § 604a (g); Melissa McClellan, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?*, 61 WASH. & LEE L. REV. 1437, 1446 (2004) (discussing the charitable choice provisions in the 1996 Welfare Reform Act).

6. See Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 755-56 (2005) (discussing how narrow definitions of a religious employer ignore the pervasiveness of the Catholic religious mission and teachings).

7. Jan Curry, *The Law of Celibacy Must Change*, <http://www.womenpriests.org/wijnga~1/currie.asp> (last visited July 23, 2006); Ian Fisher & Laurie Goodstein, *In Strong Terms, Rome is to Ban Gays as Priests*, N.Y. TIMES, Nov. 3, 2005, at A1 (reporting that a Vatican document published in November 2005 excluded gay men from the priesthood and pronounced that candidates who "are actively homosexual, have deep-seated homosexual tendencies, or support the so-called 'gay culture[]'" are banned from the priesthood).

8. See *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988) (citing *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

church, but the same problem would exist with a synagogue, temple, mosque, or any other sectarian institution.

On the one hand, if the church is subject to the same regulations as other recipients of government funds, then it will be barred from discriminating on the basis of religion or other criteria in choosing its employees and clients.⁹ It will also be barred from engaging in religious proselytizing while providing social services.¹⁰ These regulations are needed to protect the religious liberty and equality rights of the employees and clients of the church's social service programs.¹¹ But these regulations would undermine the church's own religious liberty rights.¹²

On the other hand, if the government exempted the church from non-discrimination and non-proselytizing regulations, then the religious liberty and equality rights of the employees and clients of the church's social service programs would be violated.¹³ And it would also violate the religious liberty and equality rights of all taxpayers to be forced to fund a religious institution whose beliefs they do not share and which engages in discrimination.¹⁴ It is one thing for members and supporters of a church to choose voluntarily to contribute to it. Making that choice is a person's own First Amendment right. However, as taxpayers, we all have a right to ensure that our government is not using our funds to support institutions that engage in discrimination.¹⁵

*B. Government may fund only secular social services,
not religious proselytizing*

Second, let me clarify a second word that I used in my statement of the issue: I said that proponents of government-funded religion seek to divert our tax dollars to pervasively religious organizations that "allegedly" provide social services. The adverb "allegedly"

9. See § 604a (g), (j).

10. Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 820 (2001) (discussing government regulation of religious entities under school voucher plans and charitable choice plans).

11. *See id.*

12. *See id.*

13. *But see supra* notes 9-12 and accompanying text.

14. *See Lupu, supra* note 10, at 779.

15. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 592-95 (1983).

underscores that some pervasively religious institutions take our tax money to provide religious services rather than secular social services.

Many sad stories have come to light that illustrate this problem. One recent example is the only vocational training program for prison inmates in Bradford County, Pennsylvania. In 2005, the ACLU challenged the program because a significant portion of the inmates' time was spent on compulsory religious lectures and prayer, rather than on learning job skills.¹⁶ As one ACLU lawyer on the case, Mary Catherine Roper, stated:

Incarcerated men and women should not have to [be] subject[ed] . . . to religious proselytizing in order to get the skills they need to reenter the workforce Giving public dollars to private groups to teach inmates job skills . . . is an important part of this country's social safety net, but using taxpayer dollars to convert a captive audience is unconstitutional.¹⁷

Let me cite just one more example of these many disturbing situations: A case that the ACLU is handling right here in Michigan. It started in 2001, when our client, nineteen-year-old Joseph Hanas, pled guilty to a charge of marijuana possession.¹⁸ The court sentenced him to a drug rehabilitation program run by the Pentecostal Church, known as the "Inner City Christian Outreach Residential Program."¹⁹ It turned out that one of the program's goals was to convert Mr. Hanas from Catholicism to Pentecostalism.²⁰ "He was forced to read the [B]ible for seven hours a day and was tested on Pentecostal principles. The staff also told him that Catholicism was a form of witchcraft and they confiscated both his rosary and Holy Communion prayer book."²¹ He was threatened that if he did not do what the pastor told him, he would be thrown out of the program and sent to prison.²² The program director actually told Mr. Hanas's aunt that he "gave up his right of freedom of religion when he was placed

16. Press Release, American Civil Liberties Union, Pennsylvania Jail Requires Religion with Rehabilitation, ACLU Charges (Feb. 17, 2005), <http://aclu.org/religion/govtfunding/16246prs20050217.html>.

17. *Id.*

18. Press Release, American Civil Liberties Union of Michigan, ACLU Files Lawsuit in Defense of Catholic Man Coerced to Convert (Dec. 6, 2005), <http://aclumich.org/modules.php?name=News&file=article&sid=449>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

into this program."²³ During the seven weeks that Mr. Hanas was in this purported drug treatment program, he received no drug treatment whatsoever.²⁴ That was not surprising because not a single one of the program's staff members was a certified or trained drug counselor.²⁵

The *Detroit News* ran a powerful editorial criticizing this case as emblematic of the inherent problems with faith-based funding.²⁶ Its headline says it all: *Religious Coercion in Michigan Case Shows Government Should be Wary of Faith-Based Programs.*²⁷ Let me quote just a few lines from this editorial:

Programs like the one Hanas found himself in are common. In fact, these are the kind of programs that President Bush funded when he was governor of Texas; drug addiction is treated as a sin and Bible study is provided as treatment.

It is also the kind of program that Bush wants to fund under his faith-based initiatives, in which religious indoctrination is dressed up to look like social welfare.

While faith-based programs may be well-motivated and helpful for some, it is not appropriate for the government to fund them or coerce people to participate in them.²⁸

Such government-funded religious indoctrination is doubly-flawed: It deprives needy people of the professional services that would effectively help them; and, to add insult to injury, it deprives these same needy, vulnerable people of their precious religious liberty and freedom of conscience by subjecting them to coercive conversion efforts.²⁹

C. Religious leaders oppose government funding of pervasively sectarian institutions out of concern for religious liberty

When the government funds a pervasively sectarian institution, there is no solution to the problem of proselytization that respects the

23. *Id.*

24. *Id.*

25. *Id.*

26. Wendy Wagenheim, Op-Ed., *Religious Coercion in Michigan Case Shows Government Should be Wary of Faith-Based Programs*, DETROIT NEWS, Aug. 27, 2004, at A9.

27. *Id.*

28. *Id.*

29. See Press Release, American Civil Liberties Union of Michigan, *supra* note 18.

religious liberty of all concerned, just as there is no such solution to the problem of discrimination. The government could protect the rights of the clients of sectarian institutions against coercive, harassing proselytization, as it could prevent problems of discrimination by such institutions, by monitoring those institutions and their social service programs. This kind of monitoring, though, would endanger the institutions' religious liberty and autonomy.

In short, the solution to one violation of religious liberty in turn creates another violation of religious liberty. Here is how that dilemma was described by a coalition of many religious leaders and institutions, called "The Coalition Against Religious Discrimination": "Any 'safeguards' [against discrimination or indoctrination] will be totally unworkable—how will [they] be enforced? Will [we create] a new federal Church Police . . . to monitor these programs? Will churches want their books subject to audit after audit by the government?"³⁰

In light of these insoluble dilemmas, it is not surprising that many diverse religious institutions and leaders have opposed government funding and instead have championed the system that has worked so well for so long: Government funding instead of social service agencies that are only affiliated with religious institutions, but independent of them.³¹ Given such independence, religiously affiliated social service agencies can be subject to the same anti-discrimination and anti-proselytizing regulations that bind other recipients of government funds, and, hence, respect the equality and religious freedom rights of their employees and clients, without violating their own religious freedom.

The complaint that "faith-based funding" would subject religious institutions to intrusive government monitoring has even come 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."³² Robertson further stated: "[F]ederal rules will envelope these [religious]

30. Beth Corbin, *Action Alerts-Your Help is Needed Now* (Mar. 7, 2001), <http://glinn.com/news/actalert.htm>.

31. See Rob Boston, *Love for Sale: Faith-Based Grant Buys TV Preacher's Favor*, *Americans United for Separation of Church and State* (Feb. 2, 2005), http://blog.au.org/2005/02/love_for_sale_f.html.

32. *Id.*

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."³³

In sum, government funding of pervasively sectarian institutions involves important issues of equality and non-discrimination, as well as religious liberty and freedom of conscience. However, Sam asked me to focus on the Establishment Clause issues, consistent with the overall symposium theme.

II. THE ESTABLISHMENT CLAUSE ABSOLUTELY BARS ALL GOVERNMENT FUNDING OF RELIGION

A. Zelman v. Simmons-Harris was a narrow ruling that violated this absolute bar

In 2002, in *Zelman v. Simmons-Harris*,³⁴ the Supreme Court narrowly rejected, by a 5-4 vote, an Establishment Clause challenge to one particular faith-based funding program: Cleveland's school voucher program, which channeled massive tax support to sectarian schools.³⁵ The majority based its holding that the Cleveland program complied with the Establishment Clause on six specific aspects of that program.³⁶ Accordingly, it is unlikely that the Court would uphold any other school voucher program, let alone other forms of government aid to religious institutions, if they did not comply with all of these six criteria. In contrast, the four dissenting Justices compellingly explained why all government funding of sectarian institutions inherently violates core Establishment Clause principles.³⁷

The *Zelman* ruling was the first time the Court departed from what it had long held to be a core tenet of the Establishment Clause: Its absolute bar on any government funding of any religious institution, including funding that is part of a broad and evenhanded benefits program.³⁸

33. *Id.*

34. 536 U.S. 639 (2002).

35. *Id.* at 643-44.

36. *Id.* at 649-52 (holding that (1) a voucher program must be completely neutral with respect to religion; (2) use of vouchers at a religious institution must be a wholly genuine and independent private choice; (3) the vouchers must pass directly through the hands of the beneficiaries; (4) the voucher program must not provide incentives to choose a religious institution over a non-religious one; (5) the program must provide genuine secular options; and (6) the program must have a secular purpose).

37. *Id.* at 686-717 (Souter, J., dissenting).

38. *See id.* at 686-87.

This absolute bar is supported not only by the Court's consistent rulings throughout more than half a century,³⁹ but also by constitutional history,⁴⁰ by the purposes underlying the Establishment Clause,⁴¹ and by scholars across a broad ideological spectrum.⁴²

B. 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:

[I]f 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.⁴³

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 Assessments*.⁴⁴ Madison's "Memorial and Remonstrance" played the key role in defeating a Virginia bill that would have allowed taxpayers to designate any religious or educational institution as the beneficiary of their assessed taxes.⁴⁵ In a central passage, which was widely cited in the founding era and has often been cited in modern Supreme Court decisions,⁴⁶ Madison posed the following rhetorical question to

39. *Id.* at 687-90; see *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Souter, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 284 (2001).

40. See *Zelman*, 536 U.S. at 707-08 (Souter, J., dissenting); see also ROBERT S. ALLEY, *JAMES MADISON ON RELIGIOUS LIBERTY* 213 (1985).

41. *Weisman*, 505 U.S. at 605 (Blackmun, J., concurring).

42. Jeffries & Ryan, *supra* note 39, at 281.

43. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 921, 923 (1985-86).

44. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON ON RELIGIOUS LIBERTY 55, 57 (Robert S. Alley ed., Prometheus Books 1985) (1785).

45. *Political and Religious Life in Eighteenth-Century Virginia*, Library of Congress American Memory, <http://rs6.loc.gov/ammem/repehtml/rpessay.html> (last visited July 23, 2006).

46. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 n.15 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 n.31 (1977); *Lemon v.*

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?"⁴⁷

The principles set out in Madison's "Memorial and 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 Thomas Jefferson's Virginia Statute of Religious Liberty.⁴⁸

Along with Madison's "Memorial and Remonstrance," Jefferson's Bill is also considered authoritative in shaping and interpreting the Constitution's religion clauses.⁴⁹ 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 sinful and tyrannical . . ." ⁵⁰ Second, its text provides that "no man shall be compelled to . . . support any religious worship, place, or ministry whatsoever . . ." ⁵¹

Kurtzman, 403 U.S. 602, 633-34 (1971) (Douglas, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 779 n.4 (1961) (Douglas, J., concurring).

47. MADISON, *supra* note 44, at 57.

48. Virginia Statute of Religious Liberty (Jan. 16, 1786), in DOCUMENTS OF AMERICAN HISTORY, 125-26 (Henry S. Commager ed., 9th ed. 1973) (1786); *see also Reynolds v. United States*, 98 U.S. 145, 163 (1878).

49. *See, e.g., Everson v. Bd. of Educ.*, 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 statute.

Id. (citing *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds*, 98 U.S. at 164; *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)).

50. Virginia Statute of Religious Liberty, *supra* note 48, at 125-26.

51. *Id.*

C. 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.

1. To protect individual freedom of conscience

The first such objective is to protect individual freedom of conscience. Indeed, some experts consider this to be the Clause's foremost objective.⁵² This paramount goal certainly resonated throughout Madison's "Memorial and Remonstrance" and Jefferson's Virginia Statute of Religious Liberty, especially in the passages quoted above.⁵³ This commitment to individual freedom of conscience was so strong that, Jefferson maintained, government could not tax individuals even for the purpose of funding religious institutions of their own faith, since that would "deprive[e]" the individual "of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern."⁵⁴

2. 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]" influence of government.⁵⁵ 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.⁵⁶ As Madison's "Memorial and 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"⁵⁷ In 1947, in the Court's first modern Establishment Clause case, Justice Rutledge elaborated on

52. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 675 (2002).

53. See *supra* notes 44, 48 and accompanying text.

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

55. *Id.*

56. See Feldman, *supra* note 52, at 689.

57. See MADISON, *supra* note 44, at 57.

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."⁵⁸

Many current religious leaders and citizens have echoed this concern when arguing against government-funded support of religion.⁵⁹ 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 the Georgia and Texas chapters of Phyllis Schlafly's Eagle Forum.⁶⁰ The Georgia 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."⁶¹ Likewise, the Texas Eagle Forum newsletter warned that vouchers "would destroy private education,"⁶² including private religious schools, gradually expunging religion from their curricula.⁶³

In past Supreme Court decisions reaffirming the core Establishment Clause ban on government funding of religion, Justices have stressed the goal of avoiding "corrosive secularism."⁶⁴ That theme

58. *Everson v. Bd. of Educ.*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting).

59. See Press Release, American Civil Liberties Union, Prominent Chicago Religious Leaders Applaud Court Order Ending Pentagon's Special Funding for Boy Scout Jamboree (July 7, 2005), <http://www.aclu.org/religion/govtfunding/19899prs20050707.html>; Interview with C. Wetton Geddy, The Jesus Factor (Mar. 4, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/jesus/interviews/gaddy.html>; Peter S. Berg, *Statement Against Charitable Choice Proposals* (Nov. 3, 1999), <http://www.tfn.org/faithnetwork/advocacy/faithbased/rabbistmt/index.php>.

60. See Cathie Adams, *Vouchers: The Parent Trap*, 6(3) TORCH (Texas Eagle Forum) (Mar. 1999), <http://texaseagle.org/torch/03-99.html>; Ella Deadwyler, *Faith-Based Initiative Passes Georgia Senate 40-14, Goes to House*, GA. EAGLE FORUM (Ga. Insight), Jan. 23, 2004, available at <http://www.georgiaeagle.org/?where=insight&ID=78>.

61. Deadwyler, *supra* note 60.

62. Adams, *supra* note 60; see also Jonathan Rauch, *Vouchers: A Liberal Plot to Destroy Private Schools*, NATIONAL JOURNAL, Dec. 23, 2000, http://reason.com/rauch/00_12_23.shtml; Laurence M. Vance, *The Great Voucher Fraud*, (Mar. 28, 2005), <http://lewrockwell.com/vance/vance38.html>.

63. See Rauch, *supra* note 62; see also Vance, *supra* note 62; Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151 (2003).

64. *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985).

continued to be stressed by the dissenters in the *Zelman* case,⁶⁵ which for the first time violated the hitherto absolute no-funding principle.⁶⁶ As Justice Souter observed in his powerful dissent from the Court's 5-4 ruling in that case, "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?"⁶⁷

The Ohio voucher program that *Zelman* upheld attached regulatory conditions that are typical of conditions we can reasonably anticipate being imposed on all government funding programs because they reflect widely held values.⁶⁸ Yet these values are inconsistent with many religious beliefs, thus endangering the religious liberty of religious recipients of government "largesse."⁶⁹ The Ohio voucher program barred any religious schools that received government funds from "discriminat[ing] on the basis of . . . religion" and also from "teach[ing] hatred of any person or group on the basis of . . . religion."⁷⁰ 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."⁷¹ 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."⁷²

3. To avoid conflict among religious groups

The third major objective underlying the Establishment Clause also supports its categorical ban on government funding: To avoid the conflict and strife among various religious groups that have torn apart so many societies throughout history and around the world,

65. *Zelman v. Simmons-Harris*, 536 U.S. 639, 712 (2002) (Souter, J., dissenting).

66. *Id.* at 707-16 (Souter, J., dissenting).

67. *Id.* at 715.

68. *See id.* at 645.

69. *Id.* at 712 (Souter, J., dissenting).

70. *Id.* at 645 (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West Supp. 2002)).

71. *Id.* at 712-13 (Souter, J., dissenting).

72. *Id.* at 713.

including through actual violence.⁷³ 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. That is precisely the history of societies which have had an established religion and dissident groups.⁷⁴

This general danger is very evident in the specific context of the Cleveland voucher program that the Court narrowly upheld in *Zelman*.⁷⁵ As Justice Breyer warned in his dissent in that case:

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 resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?⁷⁶

Justice Breyer's dissent thus shows that the government regulation that inevitably accompanies government funding violates the second Establishment Clause objective: To protect religion from "corrosive secularism."⁷⁷ This government regulation also threatens the Clause's third objective: Avoiding religious divisiveness. Justice Souter explained this downside of government funding of religion in the following general terms:

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

73. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-11 (1947).

74. *Id.* at 53-54 (Rutledge, J., dissenting).

75. See *Zelman*, 536 U.S. at 723-24 (Souter, J., dissenting).

76. *Id.* at 723-24 (Breyer, J., dissenting).

77. See *supra* notes 64-71 and accompanying text.

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.⁷⁸

This general concern was certainly concretely manifest in the Cleveland voucher program.⁷⁹ Recall the state's requirement mentioned above, that no recipient parochial school may "teach hatred" or advocate lawlessness.⁸⁰ As one of the amicus briefs in that case noted, "[I]t is difficult to imagine a more divisive activity' than the appointment of state officials as referees to determine whether a particular religious doctrine 'teaches hatred or advocates lawlessness.'"⁸¹ Justice Breyer offered the following specific examples of this problem under the Ohio voucher program:

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.⁸²

To be sure, it would be an especially egregious Establishment Clause violation if the government singled out religion in general, or

78. *Zelman*, 536 U.S. at 715-16 (Souter, J., dissenting).

79. *See id.* at 649-55.

80. *Id.* at 713 (Souter, J., dissenting) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West Supp. 2002)).

81. *Id.* at 724 (Breyer, J., dissenting) (quoting Brief for Nat'l Comm. for Pub. Educ. & Religious Liberty as Amicus Curiae 23, *Zelman*, 536 U.S. 639 (No. 00-1751)).

82. *Id.* at 724-25.

any particular religion, for preferential funding, above and beyond the funding available to other generally comparable institutions.⁸³ Nonetheless, an evenhanded funding program that included religion among other generally comparable beneficiaries would still fall afoul of the absolute funding bar regarding religion.⁸⁴

D. This absolute bar is supported by the Court's consistent rulings throughout more than half a century

Until the Court's 5-4 *Zelman* decision in 2002, a majority continued to recognize that evenhandedness of government funding programs, as between religious and non-religious recipients, was necessary for constitutionality, but not sufficient.⁸⁵ As Justice Souter wrote in 1995:

Evenhandedness as one element of a permissibly attenuated benefit is . . . a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid.⁸⁶

In fact, until 2002, the Court repeatedly struck down government aid programs that benefited religious institutions, despite the fact that the programs were broad and evenhanded, including nonreligious institutions as well as religious ones. Regardless of what other institutions were also aided, these programs were unconstitutional by virtue of their prohibited purpose or effect of financially supporting the religious mission of religious institutions.⁸⁷ As noted previously, the lineage of this longstanding line of cases goes back to the Constitution's intellectual roots, including Madison's influential "Memorial and Remonstrance."⁸⁸ New York University Law School Professor Noah Feldman summarizes the pertinent intellectual history this way:

All attempts to use government resources to institutionalize religious practices countermand the American tradition of

83. See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

84. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

85. See *id.* at 839.

86. *Id.* at 882 (Souter, J., dissenting).

87. See *Mitchell v. Helms*, 530 U.S. 793, 878-99 (2000) (Souter, J., dissenting); see also *Mueller v. Allen*, 463 U.S. 388 (1983); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1972); *Everson*, 330 U.S. 1.

88. See *supra* Part II.B.

nonestablishment, grounded historically in the belief that government has no authority over religious matters. When government funds social programs under the rubric of charitable choice, the programs must not . . . rely on faith to accomplish their goals, or else the government is institutionally sponsoring the religious mission.⁸⁹

E. This absolute bar is supported by scholars across a broad ideological spectrum

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.⁹⁰ That is true, for instance, even of Michael McConnell—now a judge on the United States Court of Appeals for the Tenth Circuit—who has famously advocated a substantially narrowed understanding of the Establishment Clause.⁹¹ Yet, even his limited concept of government action that violates the Establishment Clause extends to “legal compulsion to support” religious activities through taxes.⁹²

89. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 247 (2005).

90. Jeffries & Ryan, *supra* note 39, at 281-82; *see, e.g.*, Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 451 (2002) (“Accommodationists . . . argue that the Establishment Clause bars . . . direct financial support of purely religious activity by religious bodies [S]eparationists contend that the clause bars . . . financial assistance to religious groups.”); Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 839-40 (1999) (“Facially neutral voucher schemes posit a potential mingling of church-state power that should make anyone—including voucher supporters—step back for a minute.”); *see also Church-State Relations*, American Jewish Committee (Mar. 15, 2006), <http://www.ajc.org> (“The concept of ‘charitable choice’ . . . inappropriately seeks to expand the terms under which governmental funds are made available to faith-based social service providers. AJC opposes charitable choice because it sanctions the funding of religious institutions . . . violating the Establishment Clause of the First Amendment to the Constitution.”); Oliver Thomas, *Partnership or Peril? Faith-Based Initiatives and the First Amendment*, 2 FIRST REPORTS 1, 2 (2001), available at <http://www.firstamendmentcenter.org/about.aspx?id=6265> (“Key to the notion of no establishment is the principle that tax dollars should not be diverted to religious uses. As Thomas Jefferson put it, taxing people for the support of religion is ‘sinful and tyrannical.’”) (footnote omitted).

91. *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (Special Issue: Religion & the State, 1985-86).

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

I will cite just one more example: New York University Law School Professor, Noah Feldman, who advocates another variation on McConnell's theme of a radically reduced Establishment Clause.⁹³ Feldman urges shrinking the Establishment Clause by substituting "the two guiding rules that historically lay at the core of" our Constitution's treatment of religion.⁹⁴ The first core principle is "no coercion," and the second is "no money."⁹⁵ Concerning the second principle—no money—Feldman advocates the following absolute rule: The state may not "expend its resources so as to support religious institutions and practices."⁹⁶

III. CONCLUSION

I will conclude by quoting a statement that well summarizes the problems that plague any government funding of religious institutions to provide social services. While it is not phrased in formal constitutional law terminology, it nevertheless conveys constitutional concerns about the religious liberty of institutions and individuals alike. Moreover, although this statement is completely consistent with the ACLU's views on these issues, in fact, it was written by the Georgia Eagle Forum, which proudly describes itself as a "conservative and pro-family" group.⁹⁷ The Georgia Eagle Forum wrote that a government-funded program is:

[B]ad news for . . . religions that are taken in by the promise of more money to expand their ministries. In reality, it will expand government control of social services, [and] shrink religious influence

. . . .

. . . [I]t's not good for religion, our country or the people who need help.⁹⁸

93. FELDMAN, *supra* note 89, at 237.

94. *Id.*

95. *Id.* These two principles are mutually independent, so government funding would be banned, even if it is not coercive.

96. *Id.*

97. *Mission*, GA. EAGLE FORUM, <http://www.georgiaeagle.org>.

98. Deadwyler, *supra* note 60.

