The WAR on Religious Liberty

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I. Introduction

Religious persecution is intensifying around the globe, and Christians are the world's most persecuted religious group. Although religious liberty is protected in the United States by three clauses in the U.S. Constitution and Bill of Rights,[1] the U.S. Supreme Court removed "strict scrutiny" protection from religious liberty in *Employment Division v. Smith* (1990).[2] This decision has enabled and encouraged unprecedented attacks on religious liberty by political progressives in the United States.

This article describes these attacks and addresses four questions. ***First, why are Progressives attacking religious liberty in the United States?*** This article explains how the Progressive movement rejects our founding principles. The Progressive philosophy of naturalism rejects God's existence, and the Progressive jurisprudence of legal naturalism rejects religious liberty.

Second, how are Progressives attacking religious liberty in the United States? The U.S. Supreme Court has reviewed seven tactics used by Progressives to attack religious liberty. This article explains those tactics and these important U.S. Supreme Court opinions.

Third, why should we protect religious liberty? This article presents three arguments. First, religious liberty is the cornerstone of our Constitution and our founding. Our Constitution has enabled unprecedented progress and prosperity in the United States and around the world. Second, religious liberty and political liberty are inseparable. They rise and fall together in the laws of nations. Third, religious liberty is necessary for maintaining our free republic. Free republics require politically virtuous people, and political virtue requires religious liberty.

Fourth, how can we protect religious liberty? Six legal strategies have proven their ability to protect religious liberty. This article explains each strategy and why each has been successful.

This article also carries a solemn warning. Religious liberty and political liberty are inseparable. Neither can flourish in the other's absence. Men are not angels, and any government that denies religious liberty to its people will inevitably deny political liberty as well. Preserving religious liberty is essential to preserving our representative republic.

II. Religious liberty in the U.S.

Religious persecution is intensifying around the globe. The nonpartisan Pew Research Center reports that the number of nations with "high" or "very high" restrictions on religion increased 43% during the decade of 2007 to 2016, from 58 countries to 83.[3] The number of countries persecuting Christians increased 35%, from 107 countries to 144. The number of countries persecuting Muslims increased 56%, from 91 countries to 142, and the number of countries persecuting Jews increased 64%, from 53 countries to 87.[4]

Christians are the world's most persecuted religious group. The International Society for Human Rights, a secular NGO based in Frankfurt, estimated in 2009 that Christians were the victims of 80 percent of *all* acts of religious discrimination in the world.[5] The Pew Research Center reports that Christians were the most persecuted religious group in the world every year from 2007 to 2016.[6] Open Doors USA, a ministry that supports persecuted Christians around the world, reports that the number of Christians persecuted by the top 50 countries on its World Watch List increased 14% from 2018 to 2019, from 215 million to 245 million.[7]

Open Doors reports that 1 in 9 Christians experiences high levels of persecution worldwide.[8] Christians around the world are brutally persecuted, facing imprisonment, torture, and even death. Eleven Christians are killed each day in the top 50 countries on Open Doors' World Watch List.[9] Nevertheless, the persecution of Christians around the world is almost completely ignored by the media and human rights organizations.[10]

In the United States, three provisions in the U.S. Constitution and Bill of Rights protect religious liberty. The First Amendment's Free Exercise Clause forbids Congress from making any law prohibiting the free exercise of religion.[11] **The First Amendment's Establishment Clause forbids Congress from establishing an official religion in the United States, or favoring one religion over another.**[12] The No Religious Test Clause of Article VI, Clause 3 forbids the use of religious tests as a qualification for public office.[13] These provisions reflect the high value the Founders placed on religious liberty. As James Madison wrote, "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[14]

Freedom of religious belief is absolute under the First Amendment.[15] As the U.S. Supreme Court wrote in *Sherbert v. Verner* (1963), "the door of the free exercise clause stands tightly closed against any governmental regulation of religious beliefs."[16] "Government may neither compel affirmation of a repugnant belief,[17] nor penalize or discriminate against

individuals or groups because they hold religious views abhorrent to the authorities." [18] Furthermore, "government may not employ the taxing power to inhibit the dissemination of particular religious views."[19]

Although freedom of religious belief is absolute, the free exercise of religion is subject to regulation for the protection of society.[20] The Free Exercise Clause does not protect terrorism, for example, even if the terrorism is founded on religious belief. Nevertheless, government regulation of free exercise may not *unduly* infringe the protected freedom.[21]

Before 1990, the U.S. Supreme Court held that the free exercise of religion was a "fundamental right" [22] and granted it the highest level of constitutional protection, known as "strict scrutiny" protection.[23] **Under strict scrutiny, the government may not hinder or burden the exercise of a fundamental right unless the government action is necessary and narrowly tailored to accomplish a compelling governmental purpose.**[24] Therefore, although the free exercise of religion is not absolute, it received formidable protection under strict scrutiny.

Three religious liberty cases illustrate strict scrutiny protection. In *Cantwell v. Connecticut* (1940),[25] the state of Connecticut could not require Jehovah's Witnesses to obtain a government certificate in order to distribute literature and solicit contributions. In *Wisconsin v. Yoder* (1972),[26] the state of Wisconsin could not compel Amish children to attend high school in violation of Amish religious beliefs. In *Sherbert v. Verner* (1963),[27] the state of South Carolina could not deny unemployment benefits to a Seventh Day Adventist because she refused to work on Saturday, the Sabbath in her religion.

In 1990, however, the U.S. Supreme Court reversed direction and removed strict scrutiny protection from religious liberty in *Employment Division v. Smith* (1990).[28] Like *Sherbert v. Verner* (1963), *Smith* involved the denial of unemployment benefits. Alfred Smith and Galen Black were members of the Native American Church. They ingested peyote, a hallucinogenic drug, for sacramental purposes at a church ceremony. Their employer, a private drug rehabilitation organization, fired them for ingesting the peyote.

Oregon law denied unemployment benefits to employees discharged for work-related misconduct. When Oregon denied unemployment benefits to Smith and Black, the two men argued that Oregon's denial of benefits violated their free exercise rights under the First Amendment. They argued that the Oregon statute was unconstitutional under the Supreme Court's opinion in *Sherbert v. Verner* (1963), which applied strict scrutiny protection to the free exercise of religion and reversed South Carolina's denial of unemployment benefits to a Seventh Day Adventist.

Justice Antonin Scalia, writing for the majority in *Employment Division v. Smith* (1990), abandoned the rule established in *Cantwell v. Connecticut* (1940),[29] *Wisconsin v. Yoder* (1972),[30] and *Sherbert v. Verner* (1963)[31] and removed constitutional strict scrutiny protection from religious liberty.[32] Scalia ruled that states enforcing laws that substantially burden the free exercise of religion no longer need to meet the strict scrutiny test and prove that the state laws are *necessary* and *narrowly tailored* to achieve a *compelling governmental interest*. States only need to show that the law is *not specifically directed to the religious practice.* The Free Exercise Clause does not protect religious freedom from laws that *incidentally* forbid an act the religious belief requires.

Why did Scalia remove strict scrutiny protection from the free

exercise of religion? Scalia wrote that applying strict scrutiny to religious liberty would "court anarchy:"

> Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. *Any society adopting such a system would be courting anarchy,* but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[33]

Congress overwhelmingly disagreed with Scalia's assessment that strict scrutiny protection for religious liberty "courts anarchy." Congress established a *statutory* strict scrutiny protection to religious liberty in the Religious Freedom Restoration Act of 1993 (RFRA).[34] RFRA passed by a unanimous vote in the House of Representatives and a vote of 97-3 in the Senate.[35] The Religious Freedom Restoration Act provides that "Government shall not substantially burden a person's free exercise of religion," unless it "is in furtherance of a compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest." [36]

Unfortunately, RFRA only provides *statutory* protection to religious liberty, not *constitutional* protection. **Progressives in Congress are currently attempting to remove RFRA's statutory strict scrutiny protection of religious liberty with the so-called "Equality Act."**[37] This bill, which passed the House of Representatives on May 17, 2019, prohibits discrimination based on sex, sexual orientation, and gender identity. The bill prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's "gender identity." This bill is designed to deny the religious liberty of those who would deny such access on religious grounds. Section 1107 of the proposed "Equality Act" specifically prohibits religious liberty defenses under RFRA.

Religious liberty therefore presents the most tenacious obstacle to the Progressive agenda, and Progressives are waging a war to remove it.

Although *Employment Division v. Smith* (1990) removed constitutional strict scrutiny protection from religious liberty, a liberty expressly guaranteed in the First Amendment, the U.S. Supreme Court has extended constitutional strict scrutiny protection to rights not included in the Bill of Rights, including a fundamental right to abortion [38] and gay marriage.[39] The Progressive movement, encouraged by the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), has intensified its attacks on religious liberty. The motives and methods employed in these attacks are described below.

III. Why are Progressives attacking religious liberty?

The United States has enjoyed religious liberty for so long that many take religious tolerance for granted and expect it from others. **Religious tolerance is embedded in the U.S. Constitution and Bill of Rights** in the Free Exercise Clause, the Establishment Clause, and the No Test Act Clause. It is also embedded in federal law in the Religious Freedom Restoration Act of 1993. Nevertheless, the "Progressive" movement [40] that dominates our universities, our media, and many in the Democratic Party [41] rejects religious tolerance. As explained below, religious liberty cases are now the front line in a conflict between incompatible conceptions of God, man, and government.

Progressives have enjoyed significant success in eroding the U.S. Constitution and Bill of Rights to establish the modern administrative state. Religious liberty, however, exempts individuals from the laws that Progressives pass in order to transform American government and culture. Religious liberty therefore presents the most tenacious obstacle to the Progressive agenda, and Progressives are waging a war to remove it.

Progressives reject America's founding principles. The Founders and Progressives are irreconcilably opposed on seven views regarding God, man, and government.[42] Understanding these differences is essential to understanding the war on religious liberty.

First, regarding natural rights and freedom, the Founders believed that all men are created equal and possess inalienable rights. Freedom is a gift of God. Progressives reject these claims. Human beings are not born free, and freedom is the gift of the state.

Second, regarding the formation of society, the Founders held that men form society by consensual social contract. The only legitimate source of political power is the consent of the governed. Progressives, however, reject consent and the social contract as the basis of society. The origin of society is not important, so long as government has all the power needed to remake man in a way that fulfills human potential.

Third, regarding the purpose of government, the Founders believed the purpose of government was to protect God's gift of freedom. Progressives, however, redefine freedom as the fulfillment of human capacities. The purpose of government is to fulfill human capacities by solving every economic, social, and political problem.

Fourth, regarding who should rule, the Founders thought that the laws should be made by a body of elected officials with roots in local communities. Progressives, however, want power placed in the hands of a strong central government, operating through administrative agencies, and run by trained experts.

Fifth, regarding limits on government, the Founders saw government as bound up with all the strengths and weaknesses of human nature. Men are not angels, and men are not governed by angels. Government power must therefore be restricted to prevent tyranny.[43] Government should focus on securing the persons and properties of its people.

Progressives, however, view the state as almost divine. Government must have the power to accomplish two tasks. First, government must protect the poor and other victims of capitalism through the redistribution of wealth, antitrust laws, and government control over the details of commerce and

production. Second, government must become involved in the "spiritual" development of its citizens. This is not done through promotion of religion, but rather by protecting the environment, by promoting personal creativity through education, and by providing spiritual uplift through subsidy and promotion of the arts and culture.

Sixth, regarding God and religion, the Founders saw religious liberty as an inalienable right. Every man is free to follow the dictates of his own conscience. Progressives, however, redefine God as human freedom achieved through the right political organization, or else they simply reject God as a myth.

Seventh, regarding religious tolerance, the Founders considered religious liberty to be an inalienable right. Every man should be free to follow the religious dictates of his own conscience. The Founders therefore ensured religious tolerance through the Free Exercise Clause, the Establishment Clause of the First Amendment, and the No Religious Test Clause.

Progressives, however, hold that neither religious belief nor the free exercise of religion deserve tolerance. Progressives find their philosophical justification for religious intolerance in "naturalism," a philosophy that claims that there is no reality beyond the physical world. Naturalism developed in the first half of the twentieth century with American philosophers such as John Dewey (1859-1952), Roy Wood Sellers (1880-1973), Ernest Nagel (1901-1985), and Sidney Hook (1902-1989). These philosophers sought to ally philosophy more closely with the natural sciences.[44]

Naturalism equates reality with the natural order. Nothing exists except those things that are accessible through our five senses, and nothing is knowable except through the methodology of the natural sciences. Naturalism justifies these claims by the success of science in explaining the world. For naturalists, the self-evident superiority of science makes religious belief unnecessary, undesirable, and unworthy of constitutional protection.

Naturalism applies the methodology of the natural sciences to *all* types of human knowledge and belief, including *religious belief*. In the words of philosopher Sidney Hook, the scientific method "is the only reliable way of reaching truths about the world of nature, society, and man." Naturalism tests the truth of religious beliefs by examining and evaluating the evidence for religious belief "by the same general canons which have led to the great triumphs of knowledge in the past." The naturalist "must follow the preponderance of scientific evidence," and can accept no other evidence for religious belief.[45]

Naturalism claims that if God and moral values exist at all, they must exist solely within the natural world. Science alone is competent to analyze and describe religious beliefs.[46] Since the methodology of the natural sciences cannot prove that God exists, naturalists claim they have disproved God's existence. According to Sidney Hook, naturalists must deny the existence of God "for the same generic reasons that they deny the existence of fairies, elves, and leprechauns."[47]

Naturalism motivates many philosophical projects, and "naturalization" programs abound in the theory of knowledge, in ethics, and most importantly, in the philosophy of law. One leading legal naturalist is Brian Leiter, a philosopher and law professor at the University of Chicago. Leiter's goal in his book *Naturalizing Jurisprudence* (2007) is to explain "where we can locate law and morality within a naturalistic picture of the world."[48]

Leiter turned his attention to religious belief in a book entitled *Why Tolerate Religion?* (2013).[49] Leiter's views on religion illustrate the views of many in the Progressive movement. Leiter states in the preface that he was motivated to write the book after

teaching at the University of Texas from 2001 to 2008, where he witnessed "the pernicious influence of reactionary Christians on both politics and education in the state."[50]

Leiter argues that there is no moral justification for giving constitutional protection to religious liberty. Leiter makes his argument in two steps. First, Leiter defines religion as "beliefs unhinged from reasons and evidence,"[51] and "categorical demands that are insulated from evidence."[52] Religion is characterized by insulation "from ordinary standards of reasons and evidence in common sense and the sciences." Religion, therefore, is a "*culpable* form of unwarranted belief" unworthy of toleration or special protection.[53]

Second, Leiter examines well-known justifications for toleration provided by the philosophers John Rawls (1921-2002), John Stuart Mill (1806-1873), and Frederick Schauer (born 1946). Leiter concludes that nothing in their justifications warrants tolerating religion. "There is no apparent moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action."[54]

Leiter thus states three reasons for denying constitutional protection to religious liberty. First, religion consists of "beliefs unhinged from reasons and evidence."[55] Religion is a "*culpable* form of unwarranted belief" characterized by insulation "from ordinary standards of reasons and evidence in common sense and the sciences."[56] Second, moral beliefs based in religion make "categorical [mandatory] demands that are insulated from evidence."[57] Third, religious people, particularly "reactionary Christians," exert a "pernicious influence on both politics and education."[58]

IV. How are Progressives attacking religious liberty?

Leiter's views justify the war on religious liberty for Progressives. **Progressives have adopted a variety of strategies to destroy religious liberty,** particularly the religious liberty of Christians. Seven of these strategies have been reviewed by the U.S. Supreme Court, and each is explained below. **These strategies include: (1) driving Christian influences out of education, (2) driving Christian influences out of the public square, (3) government discrimination against religious speech and activities, (4) destroying Christian businesses, religious institutions, and educational institutions through arbitrary regulations and excessive fines, (5) destroying freedom of speech for Christians, (6) using federal discrimination laws to usurp the authority of Christian churches and schools to select their own leaders, and (7) destroying the livelihoods of Christians who refuse to abandon their faith.**

The first Progressive strategy for attacking religious liberty focused on driving Christian influences out of education. Schools and universities are particularly influential in our culture because they provide access to the greatest number of impressionable minds. William F. Buckley, Jr.'s first book, *God and Man at Yale* (1951), described the hostility of Yale University professors to religious faith. Buckley criticized his Yale professors for their efforts to destroy their students' religious beliefs.[59]

Early attacks on religious liberty in public schools enjoyed significant success. School prayer was attacked in *Engel v. Vitale* (1962).[60] *Engel* outlawed compulsory school prayer in public schools. *Engel* involved compulsory recitation of the following prayer: "Almighty God, we acknowledge our

dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." [61] Justice Hugo Black, in a 6-1 decision, held that the compulsory prayer violated the Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment. The prayer was a religious activity composed by government officials as part of a governmental program to further religious beliefs.

The *Engel* opinion did not turn on the compulsory nature of the prayer. Justice Black wrote that school prayer violated the Establishment Clause, *even if student observance was voluntary*. Black justified his holding by observing that governmentally established religion is historically associated with religious persecution.[62]

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country.

School prayer involved in *Engel v. Vitale* (1962)

School District of Abington Township v. Schempp (1963) and its consolidated case, *Murray v. Curlett* (1963),[63] outlawed recitation of the Lord's Prayer in Pennsylvania and Baltimore public schools. Bible verses were read, without comment, followed by recitation of the Lord's Prayer. Students were excused upon parental request. Justice Thomas C. Clark, in an 8-1 decision, held this practice violated the Establishment Clause. Justice Clark's opinion cited expert testimony that New Testament verses were "psychologically harmful" to Jewish children and "caused a divisive force within the social media of the school."

Schempp established the following test. If either the *purpose* or the *primary effect* of the government action advances religion, then the action is unconstitutional. The *purpose* of any government action must be secular. The *primary effect* of any government action must neither advance nor inhibit religion.

Wallace v. Jaffree (1985)[64] outlawed moments of silence in public schools. *Wallace* involved an Alabama law authorizing one minute of silence "for meditation or voluntary prayer." Justice John Paul Stevens, in a 6-3 decision, found the statute violative of the Establishment Clause. The purpose of the statute was to endorse religion. The statute was not motivated by any clearly secular purpose.

Notwithstanding these school prayer cases, however, the U.S. Supreme Court made it clear in *Tinker v. Des Moines Independent Community School District* (1969)[65] that students and teachers do not "shed their constitutional rights at the schoolhouse gate." A student's free speech rights apply "when in the cafeteria, or on the playing field, or on the campus during authorized hours…"[66] The student's right to free speech includes the student's right to engage in voluntary prayer. As the U.S. Supreme Court stated in *Santa Fe Independent School District v. Doe* (2000),[67] "Nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." School officials have no authority to approve, edit, or censor student speech because it contains a religious component.[68]

Stone v. Graham (1980)[69] outlawed posting the Ten Commandments in public schools. *Stone* involved a Kentucky law requiring the posting of the Ten Commandments in classrooms. The posted copies were purchased with private contributions, and the Kentucky statute recited a secular purpose: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

The Supreme Court, in a *per curiam* opinion with three dissents, held the statute violated the Establishment Clause. Since the Ten Commandments did not confine themselves to secular matters, the law had no secular legislative purpose. Posting the Ten Commandments served no constitutional educational function. "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[70]

Lemon v. Kurtzman (1971)[71] outlawed state aid to parochial schools. Pennsylvania reimbursed parochial schools for teacher salaries and materials incurred in teaching secular subjects. Rhode Island supplemented the salaries of such teachers. The Pennsylvania statute prohibited payment for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Nevertheless, Chief Justice Warren Burger, in a 7-1 decision, held that such aid violated the Establishment Clause.

Justice Burger wrote that the Establishment Clause was designed to avoid the "three evils" of "sponsorship, financial support, and active involvement of the sovereign in religious activity." **These goals required three tests. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not foster "an excessive government entanglement with religion."**

Lemon held that the Rhode Island and Pennsylvania statutes failed the third prong of fostering "an excessive government entanglement with religion." Although the state could easily ascertain the content of secular textbooks, teachers could easily and impermissibly foster religion. Furthermore, state aid to parochial schools could lead such political divisiveness as would "pose a threat to the normal political process."

A second Progressive strategy for attacking religious liberty is driving Christian influences out of the public square. This strategy, described in Richard John Neuhaus' *The Naked Public Square,*[72] seeks to exclude all religious speech from the public arena and foster public hostility to religious belief. This strategy includes prohibiting public prayer and forcibly removing religious symbols on public property.

Town of Greece, New York v. Galloway (2014)[73] involved public prayer. The town of Greece opened its monthly board meetings with a prayer by local clergy selected from congregations listed in the local directory. The prayer program was open to all creeds, but since the majority of local congregations were Christian, a majority of the prayer givers was Christian. Plaintiffs claimed the prayer program violated the Establishment Clause by preferring Christians to other prayer givers. Plaintiffs sought an order limiting the town to "inclusive and ecumenical" prayers referring only to a "generic God."

Justice Anthony Kennedy upheld the town's prayers in a 5-4

decision, writing that the Establishment Clause must be interpreted "by reference to historical practices and understandings." The governing issue is whether the prayers fit within the tradition followed by Congress and state legislatures. This tradition was approved in *Marsh v. Chambers* (1983),[74] which upheld Nebraska's employment of a legislative chaplain. The Court found that the Town of Greece's prayers fit within this tradition. The prayers to a "generic God" demanded by the plaintiffs, however, did not.

Van Orden v. Perry (2005)[75] involved a suit to remove a monument containing the Ten Commandments from the Texas capitol grounds. Van Orden, a suspended attorney, sued to force the monument's removal under the Establishment Clause. Chief Justice William Rehnquist, in a 5-4 decision, ruled the monument did not violate the Establishment Clause.

Rehnquist began by holding that *Lemon v. Kurtzman* (1971),[76] which prohibits "excessive government entanglement with religion," is inapplicable to a passive monument. Instead, the analysis should be driven by the monument's nature and the nation's history. The Ten Commandments are clearly religious, but they also have an undeniable historical meaning. Rehnquist noted numerous depictions of Moses and the Ten Commandments on federal buildings and monuments in Washington, D.C. The Texas monument did not violate the Establishment Clause simply because it contained religious content or promoted a message consistent with religious doctrine.

On the other hand, the U.S. Supreme Court ordered two counties in Kentucky to remove copies of the Ten Commandments from their courthouses in *McCreary County v. American Civil Liberties Union of Kentucky* (2005).[77] *McCreary County* reached the opposite result from *Van Orden v. Perry* (2005), even though the U.S. Supreme Court *issued both decisions on the same day.*

McCreary County involved a display of the Ten Commandments surrounded by eight equally sized items, including the Bill of Rights and a picture of Lady Justice. The eight items were displayed under the heading, "Foundations of American Law and Government." Contrary to its holding in *Van Orden v. Perry* (2005), the U.S. Supreme Court found that displaying the Ten Commandments violated the Establishment Clause. The Court reasoned that earlier displays of the Ten Commandments in the courthouses had a religious purpose, even though the current display, on its face, appeared not to have a religious purpose.[78]

Another Progressive attack on religious symbols was litigated in *American Legion v. American Humanist Association* (2019).[79] *American Legion* involved the Bladensburg Cross, a 32 foot high cross erected by the residents of Prince George's County, Maryland, in 1918. The cross bears a plaque naming 49 soldiers from Prince George's County who died during World War I. The Bladensburg Cross has served as a site for numerous patriotic events honoring veterans, and monuments honoring the veterans of other conflicts have been added to a nearby park. The Maryland-National Capital Park and Planning Commission acquired the Bladensburg Cross and land in 1961 and uses public funds for its maintenance.

In 2014, the American Humanist Association filed suit alleging that the presence of the Bladensburg Cross on public land, and the Commission's maintenance of the memorial with public funds, violated the Establishment Clause. The American Legion intervened to defend the Cross. The Supreme Court held that the Bladensburg Cross did *not* violate the Establishment Clause. "Even if the monument's original purpose was infused with religion, the passage of time may obscure that sentiment." The monument may be retained for the sake of its historical significance or its place in a common cultural heritage. "The passage of time gives rise to a strong presumption of constitutionality."

Furthermore, "as World War I monuments endured through years and became a familiar part of the physical and cultural landscape, requiring their removal or alteration at this date would be seen by many not as a neutral act." Instead, it would be seen as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions."[80]

A third Progressive strategy for attacking religious liberty is government discrimination against religious speech and activities. The Freedom of Speech Clause of the First Amendment[81] prohibits government from engaging in "viewpoint discrimination" against religious activities. Government must afford religious activities the same opportunities it affords secular activities. Two cases establish this principle.

Houston Baptist University refused, on religious grounds, to comply with the HHS mandate.

The first case, *Lamb's Chapel v. Center Moriches Union Free School District* (1993),[82] involved a New York school board. State law permitted after-hours use of school property. The board permitted use of school property for social, civic, and recreational purposes, but prohibited its use for religious purposes. A Christian church made two requests to use school facilities for a film series by Dr. James Dobson on child rearing. The board denied both requests as "church-related." *Lamb's Chapel* considered whether the school board could discriminate against religious speech.

Justice Byron White, in a 9-0 decision, answered that government could *not* discriminate against religious speech. The facilities were not denied because of the subject, child rearing, but because of the religious viewpoint. Such "viewpoint discrimination" cannot withstand strict scrutiny under the First Amendment.

The second case, *Good News Club v. Milford Central School* (2001),[83] involved the same New York law. Milford Central School enacted a policy permitting the use of its building by district residents for instruction in education, learning, and the arts. It also permitted use for social, civic, recreational, and entertainment purposes.

The Good News Club, a Christian children's club, was denied use of the building because school policy prohibited religious worship. Club activities included songs, Bible lessons, scripture memorization, and prayer. Justice Clarence Thomas, in a 6-3 decision, found the school's denial violated the First Amendment's Freedom of Speech Clause. Furthermore, the Establishment Clause did not require the school to exclude the club.

Justice Thomas wrote that Milford Central School operated a limited public forum. The state may restrict speech in such a forum, but its power to restrict speech is subject to two limits. First, the restriction must be reasonable in light of the forum's purpose. Second, under *Lamb's Chapel*, the restriction must not involve "viewpoint discrimination." Speech cannot be excluded because of its religious nature.

The school's act demonstrated an impermissible state "hostility" to religion. This case was not akin to cases where students felt compelled to act within the classroom setting, such as *Engel v. Vitale* (1962).[84] The club's instructors were not teachers, the meetings were after-hours, and parental permission was required for attendance. Justice Thomas lastly condemned "heckler's veto" jurisprudence in religious expression cases. "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."

A fourth Progressive strategy for attacking religious liberty is forcing Christian businesses, religious institutions, and educational institutions to abandon their faith-based practices through arbitrary government regulations and excessive fines. The Obama administration targeted opponents of abortion using regulations issued under Obamacare. These regulations required Christian businesses, religious institutions, and educational institutions to provide life-terminating abortifacient drugs and abortion-causing IUDs to their employees.

The "Affordable Care Act," popularly known as Obamacare, became law in March, 2010.[85] On June 28, 2013, the Department of Health and Human Services ("HHS") issued an Obamacare mandate that required employers actively to participate in the government's scheme to distribute abortion-causing drugs and abortion-causing IUDs.[86] This HHS mandate was a bureaucratic regulation, issued by the Administrator of the HHS, without any review by Congress or any other elected official. The HHS issued this mandate despite repeated objections by religious organizations.

Hobby Lobby, the Little Sisters of the Poor, and Houston Baptist University refused, on religious grounds, to comply with the HHS mandate. Life-terminating abortifacient drugs and abortion-causing IUDs violated their religious beliefs. Hobby Lobby, a Christian business, faced ruinous fines of *$475 million per year* for refusing to comply with the HHS mandate on religious grounds.[87] The Little Sisters of the Poor, a Catholic order of nuns that runs homes for the elderly poor across the country, faced ruinous fines of *$70 million per year* for refusing to comply with the HHS mandate. Houston Baptist University, a Christian educational institution, faced ruinous fines of *$13 million per year* for refusing to comply with the HHS mandate. Hobby Lobby, the Little Sisters of the Poor, and Houston Baptist University were forced to litigate all the way to the U.S. Supreme Court to protect their religious liberty. Hobby Lobby prevailed in *Burwell v. Hobby Lobby Stores, Inc*. (2014).[88] Little Sisters of the Poor and Houston Baptist University prevailed in *Zubik v. Burwell* (2016).[89] All three defendants relied on the Religious Freedom Restoration Act of 1993 (RFRA).[90] To destroy RFRA's protection of religious liberty, Progressives in Congress are now seeking passage of the so-called "Equality Act."[91]

On October 6, 2017, Health & Human Services issued a new rule[92] with an exemption that protects religious ministries, in compliance with the Supreme Court's ruling in *Zubik v. Burwell* (2016)[93] and a Presidential Executive Order.[94] In its new rule, the federal government admits that it broke the law by trying to force the Little Sisters of the Poor and others to provide services in their health plans that violated their religious beliefs. On November 7, 2018, the government finalized that rule,[95] continuing to protect the Little Sisters of the Poor and other religious ministries.

Shortly after the new rule was issued, however, several states sued the federal government to take away the religious exemption. These states admit they have many programs to provide contraceptives to women who want them. Nevertheless,

they are arguing that non-profits, including the Little Sisters of the Poor, must still be forced to comply with the original HHS mandate or pay tens of millions of dollars in government fines. Seventeen states are now bringing lawsuits against the Little Sisters.[96]

A fifth Progressive strategy for attacking religious liberty is denying freedom of speech to Christians. In *McCullen v. Coakley* (2014),[97] Massachusetts made it a *crime* to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to an abortion clinic.[98] Abortion opponents who engage in "sidewalk counseling" sought an injunction, claiming that the Massachusetts law displaced them from their previous positions and hampered their counseling experts. The opponents sued Massachusetts officials, claiming the law violated their right to free speech under the First Amendment.

The federal government admits that it broke the law by trying to force the Little Sisters of the Poor and others to provide services in their health plans that violated their religious beliefs.

The U.S. Supreme Court agreed with the sidewalk abortion counselors. The Massachusetts statute restricted access to public ways and sidewalks that are traditionally public forums. The government's ability to regulate speech in such locations is very limited. The government may impose reasonable restrictions on the time, place, or manner of protected speech, but only if the government meets three requirements. First, the restrictions must be justified without reference to the content of the regulated speech. Second, the restrictions must be narrowly tailored to serve a significant governmental interest. Third, the government regulations must leave open alternative channels for communication of the information.

The U.S. Supreme Court held that the Massachusetts statute was not sufficiently narrowly tailored. The statute deprived the sidewalk counselors of their two primary methods of communicating with patients, close personal conversations and distribution of literature. Although Massachusetts has a legitimate interest in maintaining public safety and preserving access to abortion clinics, the Massachusetts statute imposed a substantially greater burden on free speech than was necessary to further these legitimate government interests. Since Massachusetts failed to show that it seriously undertook to use less burdensome means, the Massachusetts statute violated the abortion counselors' First Amendment freedom of speech.

A sixth Progressive strategy for attacking religious liberty is using federal discrimination laws to usurp the authority of Christian churches and religious schools to select their own leaders. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012)[99] holds that Americans are free to choose their ministers and religious teachers without regard to federal discrimination laws.

Hosanna-Tabor Evangelical Lutheran Church and School classified its teachers into two categories, "lay" teachers and "called" teachers. "Called" teachers are called to their vocation by God, commissioned as ministers, and performed duties combining teaching and ministering. "Lay" teachers, on the other hand, are not even required to be Lutheran.

Hosanna-Tabor involved a "called" teacher who took a leave of absence for narcolepsy. She requested reinstatement before the school considered her ready. The teacher threatened to sue when her request for reinstatement was denied. This threat violated the religious beliefs taught by the church and school, which prohibit Christians from taking other Christians to court to resolve their disputes.[100] The church congregation voted to rescind her call and Hosanna-Tabor terminated her employment.

The teacher sued for reinstatement under the Americans with Disabilities Act (ADA).[101] The ADA prohibits discrimination by employers based on disability. It also prohibits retaliation against individuals for opposing acts prohibited by the ADA. Hosanna-Tabor claimed a First Amendment "ministerial exception" to government regulation of its ministers.

Hosanna-Tabor raised two issues. First, do federal discrimination laws govern the selection of leaders by religious organizations? Second, can the federal government compel the school to reinstate the teacher as a "called" teacher? Chief Justice Roberts, writing for a unanimous court, answered "no" to both questions.

The U.S. Supreme Court explained that the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses insured that the federal government, unlike the English crown, would have no role in filling ecclesiastical offices.

The U.S. Supreme Court concluded that the Free Exercise and Establishment Clauses bar employment discrimination suits by ministers and religious teachers against their churches. Churches are free to shape their faith and mission under the Free Exercise Clause by selecting their own ministers and religious teachers. The Establishment Clause prohibits *any* government involvement in their selection.

Progressives in Congress are now attempting to bolster their attacks on religious liberty through federal discrimination laws with the so-called "Equality Act."[102] This bill, which passed the House of Representatives on May 17, 2019, prohibits discrimination based on sex, sexual orientation, and gender identity. The bill prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity. This bill claims to promote equality but its true purpose is the denial of religious liberty. Section 1107 of the bill specifically prohibits the Religious Freedom Restoration Act of 1993 from providing a claim, defense, or basis for challenging any discrimination based on sex, sexual orientation, or gender identity.[103]

A seventh Progressive strategy for attacking religious liberty is to force Christians to abandon their faith or lose their livelihood. Jack Phillips is the owner of Masterpiece Cakeshop in Lakewood, Colorado.[104] When two men walked into his cakeshop and requested a custom cake to celebrate their same-sex wedding, Phillips politely declined. Phillips told the

men he would be happy to sell them anything else in his shop. He could not, however, use his artistic talents to celebrate a message that was inconsistent with his Christian faith.

The couple filed a charge against Phillips under the Colorado Anti-Discrimination Act, which prohibits discrimination based on sexual orientation in a "place of business engaged in any sales to the public."[105] The Colorado Civil Rights Commission prosecuted Phillips even though the Commission allowed other Colorado cake artists to decline requests for custom cakes that expressed messages to which the artists objected. Members of the Commission made hostile statements against Phillips' religious beliefs. One member called Phillips' religious liberty defense "a despicable piece of rhetoric." He even compared Phillips to the Nazi perpetrators of the Holocaust.

An administrative law judge found for the same-sex couple. The Colorado Civil Rights Commission's hostility toward Phillips' religious faith was so extreme that the U.S. Supreme Court formally rebuked the Commission. In a 7-2 decision, the Supreme Court reversed the case in Phillips' favor and condemned Colorado's "clear and impermissible hostility toward [Phillips'] sincere religious beliefs." The Supreme Court wrote that "The Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[106]

Private citizens have now joined the Colorado Civil Rights Commission's persecution of Phillips. In June 2017, on the very day that the Supreme Court announced its decision to hear Phillips' case, an attorney called Phillips' shop asking for a custom cake. The attorney wanted a cake that would be blue on the outside and pink on the inside to celebrate his transition from male to female. Phillips politely declined to create the cake because it expressed a message that conflicted with his faith. Phillips believes that God creates us male and female. Gender is a biological reality determined by God, not something we choose or change. When Phillips declined this request, the attorney filed a new complaint with the Colorado Civil Rights Commission.

Less than one month after the U.S. Supreme Court condemned the state's anti-religious hostility toward Phillips in the first case, the state agency made its first finding against Phillips in this new case. Phillips then filed a lawsuit against the relevant state officials. In March 2019, Colorado dismissed its case against Phillips.

With the end of that lawsuit, Phillips thought he could finally go back to focusing on his work. Now, however, the same attorney who filed the second complaint has filed a *third* lawsuit against Phillips in state court. This latest lawsuit seeks monetary damages and attorney's fees from Phillips. If successful, it could bring financial ruin to Phillips and his family.

Another case illustrating the Progressive tactic of forcing Christians to abandon their faith or lose their livelihood is that of Barronelle Stutzman. Stutzman is a 74-year-old florist, grandmother, and the owner of Arlene's Flowers in Richland, Washington.[107] Stutzman has served and employed people who identify as LGBT for her entire career, including her longtime customer and friend Rob Ingersoll for almost 10 years. When Mr. Ingersoll asked her to design custom floral arrangements for his same-sex wedding, Stutzman politely explained that she could not participate in the same-sex wedding because of her faith. Stutzman gave Ingersoll the name of other florists who might be willing to serve him. Mr. Ingersoll said he understood, hugged Stutzman, and left the shop.

After hearing about Stutzman's decision in the news, the Washington State Attorney General decided to take matters into his own hands and sued her. The ACLU followed closely

The Free Exercise Clause of the First Amendment provides that Congress shall make no law prohibiting the free exercise of religion. Freedom of religious belief is absolute under the Free Exercise Clause.

behind. Both lawsuits attacked Stutzman personally as well as her business. The trial court ruled against Barronelle and ordered her to pay penalties and attorneys' fees. On appeal, the Washington Supreme Court concluded that the state government can force Stutzman and other creative professionals to create artistic expression and participate in events with which they disagree.

Stutzman petitioned the U.S. Supreme Court to hear her case. The U.S. Supreme Court vacated the Washington Supreme Court's decision and instructed the Washington Supreme Court to reconsider Stutzman's case in light of the U.S. Supreme Court's decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018).[108] The Washington Supreme Court ruled against Stutzman a second time in 2019, and Stutzman has again asked the U.S. Supreme Court to take her case.

Progressives in Congress are attempting to increase the persecution of Christians like Jack Phillips and Barronelle Stutzman with the so-called "Equality Act."[109] This bill, which passed the House of Representatives on May 17, 2019, prohibits discrimination based on sex, sexual orientation, and gender identity. This bill is designed to deny the religious liberty of Christians, like Jack Phillips and Barronelle Stutzman, who live out their faith. The Equality Act specifically prohibits the Religious Freedom Restoration Act of 1993 from providing a religious liberty defense to claims such as those made against Jack Phillips and Barronelle Stutzman.[110]

V. *Why* should we protect religious liberty?

In view of the Progressive movement's escalating attacks on religious liberty, it is time to refresh our understanding as to why religious liberty should be protected. I offer three reasons. **First, religious liberty is the cornerstone of our Constitution.** Our Constitution has enabled unprecedented progress and prosperity in the United States and around the world. **Second, religious liberty and political liberty are inseparable.** Political liberty and religious liberty developed together in the same struggle against tyranny, and neither can flourish in the other's absence. Men are not angels, and any government that denies religious liberty to its people will inevitably deny political liberty as well. **Third, religious liberty is necessary for maintaining a free republic.** Preserving our form of government requires a politically virtuous people, and political virtue requires religious liberty.

The first argument for protecting religious liberty recognizes that religious liberty is the cornerstone of the U.S. Constitution. Three provisions in the Constitution and Bill of Rights protect religious liberty. The First Amendment's Free Exercise Clause forbids Congress from making any law prohibiting the free exercise of religion.[111] The First Amendment's Establishment Clause forbids Congress from establishing an official religion in the United States, or favoring one religion over another.[112] The No Religious Test Clause of Article VI, Clause 3 forbids the use of religious tests as a qualification for public office.[113]

Three landmark writings influenced the drafting of these clauses with eloquent justifications for religious liberty. John Locke published his *Letter concerning Toleration* (1689) immediately after England's Glorious Revolution. James Madison wrote his "Memorial and Remonstrance against Religious Assessments" (1785) in opposition to a proposed Virginia law providing state support to religious ministers. Thomas Jefferson's Virginia Statute for Religious Freedom (1786) disestablished the Church of England in Virginia and guaranteed freedom of religion to people of all faiths. The justifications for religious liberty advanced by Locke, Madison, and Jefferson are set out below.

The Free Exercise Clause of the First Amendment provides that Congress shall make no law prohibiting the free exercise of religion. Freedom of religious belief is absolute under the Free Exercise Clause,[114] and the Free Exercise Clause protects religious action as well as religious belief.[115] Locke, Madison, and Jefferson gave the following arguments for the free exercise of religion.

Locke argued that neither the New Testament nor Christ's example supports coercion as a means to salvation. Coercion, furthermore, is incapable of producing belief. It is not possible for an individual, by his will alone, to believe what the state tells him to believe. Our beliefs are a function of what we think is true, not what we are forced to do.

Madison argued that in religion, as in all other matters, the will of the majority must not trespass on the rights of the minority. The right to form one's own religious belief is an inalienable right. Religion must therefore be left to the conviction and conscience of each individual. Religious belief can only be directed by reason and conviction, not by force and violence. Men form their opinions on the evidence contemplated by their own minds, not on the dictates of other men's minds.

Jefferson argued that God creates our minds free. Any attempt to influence our minds by temporal punishments, burdens, or civil incapacities only produces hypocrisy and meanness. Coercion in religious matters also contradicts God's plan for religious faith. God has the power to use coercion to propagate his plan for religious faith, but chooses not to do so. Furthermore, all truth is great, and truth will prevail if left to herself. Truth is the proper and sufficient antagonist to error. Truth has nothing to fear from the contest of ideas so long as men are not deprived of their right to free argument and debate. Errors are not dangerous when men are free to contradict them.

The Establishment Clause of the First Amendment disestablishes religion by prohibiting Congress from making any law regarding the establishment of religion in the United States.

The Establishment Clause prohibits the federal government from establishing an official religion, and it also prevents the federal government from favoring one religion over another. Locke, Madison, and Jefferson gave the following arguments for disestablishing religion.

Locke argued that the state is not competent to discern religious truth. States support contradictory and false religions throughout history. Furthermore, neither God nor men have consented to the state's undertaking the care of men's souls.

Madison gave **four reasons** for disestablishing religion. **First,** Madison agreed with Locke that civil magistrates are not competent judges of religious truth, as proven by history. Consequently, freedom of religion must be given equally to all, and no single sect should be entrusted with the care of public worship.

Second, Madison argued that the establishment of religion is counter-productive. Establishing a state religion does not maintain the purity and efficacy of religion. Instead, the establishment of religion produces pride and indolence in the clergy; ignorance and servility in the laity; and superstition, bigotry, and persecution in both the clergy and the laity.

Third, establishing religion produces religious intolerance. Tolerance of religious differences produces social harmony every time it is tried. The establishment of religion, however, destroys the moderation and harmony that religious liberty produces between different beliefs. The Inquisition differs from the intolerance of established religion only in its degree, not in its kind.[116]

Fourth, Madison warned that giving government the power to establish a state religion empowers government to limit religious liberty. This, in turn, gives government the power to limit *all* political liberties and rights, including freedom of the press, trial by jury, the right to vote, and even the right to legislate for ourselves.

Jefferson agreed with Locke and Madison that the state is not competent to discern religious truth. Magistrates are fallible and uninspired men, and magistrates have established false religions around the world and throughout history. Lastly, forcing men to finance the spreading of opinions with which they disagree is sinful and tyrannical.

The No Religious Test Clause of Article VI, Clause 3 prohibits the use of religious tests as a qualification for holding political office.[117] Thomas Jefferson argued that requiring a religious test for holding public office unjustly deprives men of privileges and advantages to which all men are entitled by natural right. Every man should have an equal right to seek public office.

The greatest justification for the No Religious Test Clause, however, comes from the history of civil unrest and revolution caused by three English statutes that established religious tests for holding office.[118] These statutes limited public office to those men whose religious beliefs conformed to the Church of England.

The Corporation Act of 1661 excluded all religious nonconformists from public office. All municipal officials had to take communion in the Church of England.[119] The First Test Act of 1673 excluded Roman Catholics from any civil or military office. It required all civil and military officeholders to swear that they rejected the Roman Catholic doctrine of transubstantiation.[120] The Second Test Act of 1678 required all peers and members of the House of Commons to make a declaration against transubstantiation, invocation of saints, and the sacrament of the Mass.[121] This act excluded all Roman Catholics from both houses of Parliament.

The future James II, then Duke of York, was a secret Roman

Catholic serving as Lord High Admiral when the First Test Act of 1673 was passed. James refused to comply with the act and resigned his position as Lord High Admiral. When he succeeded his brother Charles II in 1685, James II abused his powers as King in an abortive attempt to reimpose Roman Catholicism on England. His extreme abuses of power and illegal violations of English rights brought about the Glorious Revolution in 1688 and cost him the throne of England.

John Locke returned from exile in Holland and published *A Letter concerning Toleration* in 1689. Parliament accepted Locke's arguments for religious liberty and enacted the Toleration Act of 1689.[122] The Toleration Act permitted Protestants who did not conform to the teachings of the Church of England, such as Baptists and Congregationalists, to maintain their own places of worship, their own teachers, and their own preachers. Social and political disabilities remained, however, for nonconformists. England still denied the right to hold public office to Roman Catholics and nonconforming Protestants. The ratification of the First Amendment in 1791 produced the first national guarantee of religious liberty in world history.

The second argument for protecting religious liberty recognizes that religious liberty and political liberty are inseparable. Political liberty and religious liberty developed together, and neither can flourish in the other's absence. The experience of our common history with England demonstrates that men are not angels, and any government that denies religious liberty to its people will inevitably deny political liberty as well.[123]

Henry VIII took England out of the Catholic fold with the Act of Supremacy in 1534. English statutes established the Protestant religion in England, and banned Roman Catholics from teaching, serving in the military, or holding public office. When James II, a Roman Catholic, became king in 1685, he dedicated his reign to establishing an absolute monarchy and forcibly returning England to the Catholic fold. James II openly abused his powers as king during this political and religious struggle. Ultimately, the English people rose up against his tyranny in the Glorious Revolution, ending his reign.

James II employed five illegal and unconstitutional strategies during his political and religious struggle. First, he corrupted the courts to establish a "dispensing" power, allowing him to ignore laws he disliked. James used this power to suspend England's religious laws and place Catholics in control of the army, the Privy Council, the courts, the universities, and the Church of England. Second, James usurped Parliament's power by rigging Parliamentary elections to "pack" Parliament, prosecuting opponents in Parliament, and finally dissolving Parliament altogether. Third, James used the threat of force to control his Protestant subjects by raising an illegal standing army, placing the army under Catholic command, and illegally disarming Protestants. Fourth, James weaponized the courts by illegally denying Protestants due process. Fifth, James established an illegal Ecclesiastical Commission to persecute ministers and university officials who resisted Catholicization.

James illegally suspended England's religious laws on April 4, 1688. Seven Anglican bishops presented a lawful petition to James claiming he had no authority to suspend the laws. James responded by prosecuting them for sedition and libel. A jury acquitted the seven bishops on June 30, 1688, and the Glorious Revolution followed soon after.

James II fled England for France on December 10, 1688. William and Mary consented to the English Bill of Rights on February 13, 1689,[124] prior to taking the throne. Forty-one provisions of the U.S. Constitution and Bill of Rights adopt principles from the English Bill of Rights.[125]

John Locke had fled England in 1683 to avoid judicial murder by Charles II and his younger brother, the future James II.[126] Locke returned to London on February 22, 1689, nine days after the English Bill of Rights became law.[127] Locke quickly published his *First and Second Treatises on Government* (1689) and *A Letter concerning Toleration* (1689). Locke devotes his entire *First Treatise* to arguing against the divine right of kings. Locke's *Second Treatise* established five principles of government that defined the American founding a century later. John Locke's *A Letter concerning Toleration* (1689) argues for religious liberty free from government coercion. John Locke developed all these principles in response to the religious and political tyranny of Charles II (reigned 1680-1685) and his brother James II (reigned 1685-1688), described above. Religious liberty and political liberty thus developed during the same struggle against tyranny. They are inseparable, and neither can flourish in the other's absence.

The ratification of the First Amendment in 1791 produced the first national guarantee of religious liberty in world history.

Thomas Jefferson adopted Locke's five principles of government in the Declaration of Independence.[128] Together, these principles define the American founding. First, all men are created morally and legally equal.[129] Second, God endows men with inalienable rights.[130] Third, men establish civil governments through their own actions. God does not establish kings by divine right.[131] Fourth, the powers of government depend on the consent of the governed.[132] Fifth, men may alter or abolish the government if it becomes destructive.[133] Locke's views on religious toleration influenced the Free Exercise Clause and Establishment Clause of the First Amendment and the No Religious Test Clause of Article VI, Clause 3.

The third argument for protecting religious liberty is the necessity of religious liberty for maintaining a free republic. The Founders never expected the ruin of our republic to come from external enemies. If ruin came to the American republic, it would come from internal vices, just as internal vices caused the ruin of the Roman Republic.[134]

The great challenge facing any free republic is whether its people can maintain the moral discipline and virtue necessary for the survival of free institutions. Men cannot collectively govern a nation if they cannot first govern themselves as individuals. As Edmund Burke wrote, men can only be free if they are able "to place moral chains upon their own appetites. Intemperate minds cannot be free. Their passions forge their own fetters."[135] Preserving our form of government requires a politically virtuous people, and political virtue requires religious liberty.

Charles de Montesquieu discussed the necessity of political virtue for representative republics in *The Spirit of the Laws* (1748), a work that profoundly influenced our Founders. Montesquieu observed that despotisms are common throughout history, but representative republics are rare. Despotisms thrive on fear and coercion. Representative republics, however, require political virtue in their citizens.[136] Political virtue is the spring that sets republican government in motion.[137]

Montesquieu defined political virtue as the love of the laws and country.[138] Political virtue limits political ambition to the sole desire to serve one's country and one's fellow citizens.[139] This requires a constant preference of public to private interest. Political virtue is "a self renunciation, which is ever arduous and painful."[140] Maintaining a republic requires the instilling of political virtue. Instilling political virtue in young people is extremely difficult, and it requires the full force of education.[141]

Political virtue is lost when men are corrupted.[142] When political virtue is lost, love of the laws is lost. The loss of sovereign laws and liberty soon follow. Love of country is lost to avarice and political ambition, and the public treasury becomes the patrimony of ruthless individuals.[143] As Patrick Henry explained, "Bad men cannot make good citizens. No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue."[144]

Constitutions and laws cannot protect us from ourselves. No Constitution, no matter how great, can fill the void created by the loss of political virtue. As George Washington wrote, "No wall of words, no amount of parchment can be formed to stand against boundless ambition aided by corrupted morals."[145]

No legal system, no matter how great, can fill the void created by the loss of political virtue. As the great French writer Alexis de Tocqueville observed, "The best laws cannot make a Constitution work in spite of morals; but morals can turn the worst laws to advantage. That is a commonplace truth, but one to which my studies are always bringing me back. It is the central point in my conception. I see it at the end of all my reflections."[146]

Where should we turn for the moral principles required for self-government? How can we find freedom from the shackles of our passions and appetites? **Progressives rely on government. Naturalists rely on science. Philosophers rely on human reason.**

Experience shows that none of these can supply the moral principles required for political virtue. Government cannot supply the needed principles. Reliance on the coercive power of government inevitably leads to the destruction of liberty and the imposition of tyranny. Science, by definition, is incapable of providing the moral principles required for political virtue. As Albert Einstein observed, "Science can only ascertain *what is*, but not *what should be*, and outside of its domain value judgments of all kinds remain necessary."[147] Philosophers who rely on human reason alone have wholly failed to provide the required principles.[148]

Throughout history, success in transcending human frailty has only been obtained by recognizing the existence of a transcendent moral order. This moral order supplies the necessary principles and motivations to overcome our self-interest, our willfulness, and our capacity for rationalization.[149] Plato argued in his theory of forms that this transcendent moral order exists outside the material world. The Stoics argued that this transcendent moral order exists in a rational and benevolent Nature. Christians believe that this transcendent moral order exists in the providence of an omnipotent, omniscient, and loving God.

Every man has the inalienable right to find his own path, to accept or reject religious beliefs for himself. **No politician, law professor, or Supreme Court justice has the right to tell any individual what he must or must not believe.** As the Establishment Clause provides, government has no right to establish a state religion or to favor any religion over another. As the Free Exercise Clause provides, government has no right to limit the free exercise of religion unless its actions are *narrowly tailored* and *necessary* to achieve a *compelling* governmental purpose. Lastly, as the No Test Act Clause provides, no religious test can be required as a condition of holding public office.

VI. *How* can we protect religious liberty?

Preservation of religious liberty is necessary to preserve our free republic. **We must recognize the current war on religious liberty and take action to preserve it. We must act in four spheres.**

First, in our personal lives, we must be committed to the Judeo-Christian values that made this country great. We must put these principles into practice in our own private lives so that our conduct can be a witness for these values. Only by transforming ourselves can we transform the world beyond ourselves.[150] We must remember the two greatest commandments. First, we must love God with all our hearts, all our souls, and all our minds. Second, we must love our neighbors as we love ourselves.[151] We must also remember Christ's command to do unto others as we would have them do unto us.[152] This requires that we extend to others the same liberties we claim for ourselves.

> *"No wall of words, no amount of parchment can be formed to stand against boundless ambition aided by corrupted morals."*
>
> -George Washington

Second, we must place greater emphasis on the moral education and the development of political virtue in our young people. As Attorney General Barr recently observed, education is *not* vocational training. It is leading our children to the recognition that there is truth. It is guiding our children to develop the faculties to discern and love the truth. It is helping our children to develop the discipline to live by the truth.[153]

Third, we must resist efforts by Progressives to drive religious viewpoints from the public square. As Thomas Jefferson said, all truth is great, and truth has nothing to fear from the contest of ideas. Errors are not dangerous when men are free to contradict them, and truth will prevail so long as it is publicly proclaimed. We must, however, be willing and able advocates of the truth in the public square.

Fourth, we must become courageous and able participants in the struggle being waged against religious liberty in the legal arena. The Becket Fund for Religious Liberty, the Alliance Defending Freedom, and the First Liberty Institute provide excellent legal representation, at no charge, to people of all faiths. We must also be mindful that when we find ourselves in the midst of wolves, we need to be as innocent as doves but as shrewd as serpents.[154]

Six legal strategies have proven their ability to protect religious liberty. First, the First Amendment requires federal and state governments to accommodate the religious practices of individuals. Governments must also recognize the right of individuals to avoid practices that they consider contrary to their faith.[155]

Second, government may not unduly burden the free exercise of religion by individuals, businesses, or religious organizations, including educational institutions. As explained above, the U.S. Supreme Court removed *constitutional* strict scrutiny protection from religious liberty in *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress, however, established a *statutory* strict scrutiny protection for religious liberty the following year by passing the Religious Freedom Restoration Act of 1993 (RFRA).[156] RFRA provides that "Government shall not substantially burden a person's free exercise of religion," unless it "is in furtherance of a compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest."[157]

Third, government cannot engage in "viewpoint discrimination" against Christian activities. The First Amendment requires that federal, state, and local governments must afford the same treatment to religious activities as they afford to secular activities. If a school board permits social, civic, and recreational uses of its school facilities outside of school hours, it must also permit religious groups equal use of those facilities. Once a government establishes an open forum, it must make that forum available to all.[158]

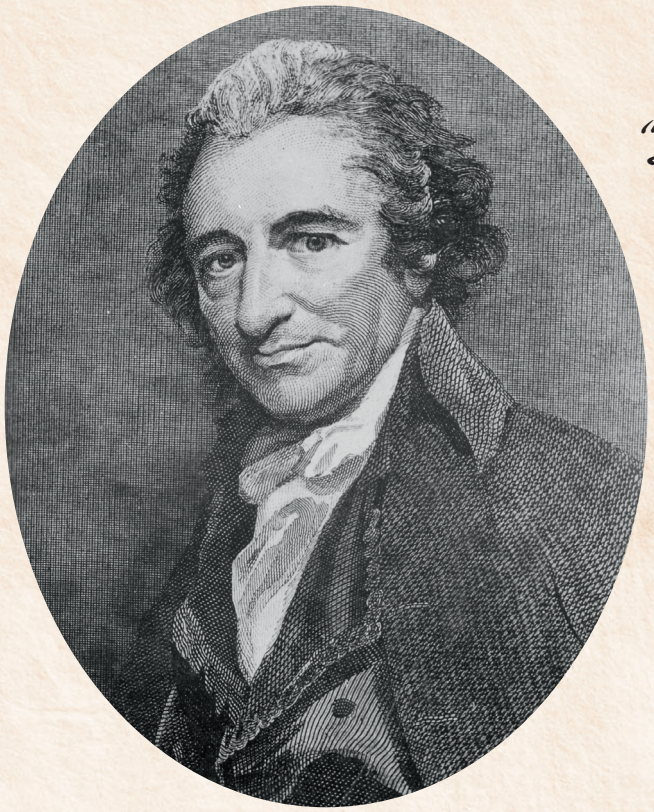
Fourth, government cannot limit the First Amendment free speech rights of Christians. Teachers and students do not shed their right to free speech at the schoolhouse gate.[159] This includes the right to voluntary prayer, "in the cafeteria, or on the playing field, or on the campus." School officials have no authority to approve, edit or censor student speech because it contains a religious component.[160] Government cannot prohibit religious speech in public forums, including streets and sidewalks.[161]

Fifth, Americans are free to honor traditions which have both historical and religious value. Americans are free to engage in public prayer in public proceedings, including city councils[162] and state legislatures.[163] Americans may display the Ten Commandments[164] and war memorials with religious symbols on public lands, and maintain them at public expense.[165]

Sixth, the First Amendment guarantees the right of religious organizations and schools to choose their own ministers and teachers without government interference. Federal laws and regulations, such as the Americans with Disabilities Act, cannot govern the selection of religious leaders by religious organizations.[166]

VII. Conclusion

The war on religious liberty is a contest between two incompatible views of God, man, and government. The Founders' view, established in the U.S. Constitution and Bill of Rights, holds that God created man, giving him freedom and inalienable rights. Government's role and powers are limited to protect man's freedom. Men are free to live according to the religious dictates of their conscience.



"These are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands by it now, deserves the love and thanks of man and woman."

-Thomas Paine

The Progressive view, on the other hand, replaces God with human government. Freedom is the realization of human potential, and freedom is the gift of the state. Government's role and powers are expanded as needed to remake man in a way that fulfills his human potential. Since God does not exist, however, no one is free to live according to religious dictates.

Why are Progressives waging a war on religious liberty? Progressives reject America's founding principles.[167] Although Progressives have enjoyed significant success in eroding the U.S. Constitution and Bill of Rights, religious liberty remains the primary obstacle to the Progressive transformation of our government and culture. Progressives are therefore waging a war on religious liberty, particularly the religious liberty of Christians. The Progressive philosophy of naturalism deifies scientific methodology and rejects the existence of God.[168] Progressive jurisprudence justifies religious intolerance and denies legal protection to religious liberty.[169]

How are Progressives waging a war on religious liberty? The Progressive war on religious liberty employs the following strategies: (1) driving Christian influences out of education, (2) driving Christian influences out of the public square, (3) government discrimination against religious speech and activities, (4) destroying Christian businesses, religious institutions, and educational institutions through arbitrary regulations and excessive fines, (5) destroying freedom of speech for Christians, (6) using federal discrimination laws to usurp the authority of Christian churches and schools to select their own leaders, and (7) destroying the livelihoods of Christians who refuse to abandon their faith.[170]

Why should we protect religious liberty? Religious liberty must be protected for three reasons. (1) Religious liberty is the cornerstone of our Constitution. Our Constitution has enabled unprecedented progress and prosperity in America and around the world.[171] (2) Religious liberty and political liberty are inseparable. Political liberty and religious liberty developed together in the same struggle against tyranny, and neither can flourish in the other's absence. Men are not angels, and any government that denies religious liberty to its people will inevitably deny political liberty as well.[172] (3) Religious liberty is necessary for maintaining a free republic. Preserving our form of government requires a politically virtuous people, and political virtue requires religious liberty.[173]

How can we protect religious liberty? Six legal strategies have proven their ability to protect religious liberty.[174] (1) The First Amendment requires federal and state governments to accommodate the religious practices of individuals. Government must recognize the right of individuals to avoid practices that they consider contrary to their faith. (2) Government may not unduly burden the free exercise of religion by individuals, businesses, or religious organizations, including educational institutions. (3) Government cannot engage in "viewpoint discrimination" against Christian activities. (4) Government cannot limit the First Amendment free speech rights of Christians, including the right to pray. (5) Americans are free to honor traditions which have both historical and religious value, including public prayer and memorials in public places. (6) The First Amendment guarantees the right of religious organizations and schools to choose their own ministers and teachers without government interference.

Thomas Paine wrote in 1776 that "these are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands by it now, deserves the love and thanks of man and woman."[175] The future of our republic depends on protecting religious liberty. Each of us must do our part, in our families, in our schools, in the public square, and, if necessary, in the legal arena as well. The Morris Family Center for Law and Liberty at Houston Baptist University is dedicated to preserving religious liberty, our Constitution, and our Bill of Rights. We hope you will join us.

1 The Free Exercise Clause of the First Amendment forbids Congress from making any law prohibiting the free exercise of religion: "*Congress shall make no law… prohibiting the free exercise [of religion]*;" The Establishment Clause of the First Amendment forbids Congress from establishing an official religion in the United States. "*Congress shall make no law respecting an establishment of religion.*" The No Religious Test Clause of Article VI, Clause 3 prohibits the use of religious tests as a qualification for holding public office: "*but no religious test shall ever be required as a qualification to any office or public trust under the United States*."

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

3 Pew Research Center, June 21, 2018, "Global Uptick in Government Restrictions," 4. This report is available free of charge at https://www.pewforum.org/2018/06/21/global-uptick-in-government-restrictions-on-religion-in-2016/.

4 Pew Research Center, *supra* note 3, at 26.

5 Notre Dame University, April 20, 2017, "Report: In Response to Persecution," 7. This report is a joint 2017 study by the University of Notre Dame's Center for Ethics and Culture, the Religious Freedom Institute, and Georgetown's Religious Freedom Research Project. The report is available free of charge at https://ucs.nd.edu/report/. The complete findings have also been published as *Under Caesar's Sword: How Christians Respond to Persecution* (Cambridge: Cambridge UP, 2019).

6 Pew Research Center, *supra* note 3, at 26.

7 Open Doors USA, 2019, "World Watch List 2019," 5. This report is available free of charge from Open Doors USA at https://www.opendoorsusa.org/wp-content/uploads/2019/01/WWL2019_FullBooklet.pdf.

8 Open Doors USA, *supra* note 7, at 5.

9 *See* https://www.opendoorsusa.org/christian-persecution/stories/11-christians-killed-every-day-for-their-decision-to-follow-jesus/.

10 Notre Dame University, *supra* note 5, at 7: "Perhaps the most troubling aspect of this persecution is the lack of press coverage it receives. Although a few scholars and journalists have documented the phenomenon of Christian persecution, the mainstream media and human rights organizations give it little attention. Georgetown University's Religious Freedom Project analyzed 323 major reports published by Human Rights Watch, one of the world's most influential human rights organizations, over a three-and-a-half-year period (from 2008 to mid-2011) and *found that religious persecution of any kind was the focus of only eight (about 2.5 percent) of the published reports. Fewer than half of that small number of reports focused on Christian persecution.*" [Emphasis added].

11 U.S. Const. amend. 1, cl. 2: "*Congress shall make no law* respecting an establishment of religion, or *prohibiting the free exercise thereof*;" [Emphasis added].

12 U.S. Const. amend. 1, cl. 1: "*Congress shall make no law respecting an establishment of religion*, or prohibiting the free exercise thereof;" [Emphasis added].

13 U.S. Const. art. VI, cl. 3: "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; *but no religious test shall ever be required as a qualification to any office or public trust under the United States*." [Emphasis added]. The U.S. Supreme Court incorporated the No Religious Test Clause under the Fourteenth Amendment in *Torcaso v. Watkins*, 367 U.S. 488 (1961), extending the No Religious Test Clauses to state officials as well as federal officials.

14 James Madison, "Memorial and Remonstrance against Religious Assessments" (1785), paragraph 1.

15 *Cantwell v. Connecticut,* 310 U. S. 296, 303-304 (1940). *Cantwell* involved the right of Jehovah's Witnesses to distribute literature and solicit contributions without first obtaining a certificate from an official of the State of Connecticut. The U.S. Supreme Court stated: "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law… The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.* The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." [Emphasis added].

16 *Sherbert v. Verner,* 374 U.S. 398, 402 (1963), citing *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

17 *Sherbert v. Verner, supra* note 16, citing *Torcaso v. Watkins,* 367 U. S. 488 (1961).

18 *Sherbert v. Verner, supra* note 16, citing *Fowler v. Rhode Island,* 345 U. S. 67 (1953).

19 *Sherbert v. Verner, supra* note 16, citing *Murdock v. Pennsylvania,* 319 U. S. 105 (1943), and *Follett v. McCormick,* 321 U. S. 573 (1944).

20 *Cantwell v. Connecticut, supra* note 15, at 303-304: "Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. *Conduct remains subject to regulation for the protection of society.*" [Emphasis added].

21 *Cantwell v. Connecticut, supra* note 15, at 303-304: "In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."

22 *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972): "Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, *and buttressing this fundamental right* was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." [Emphasis added].

23 *Sherbert v. Verner, supra* note 16, at 406-409 (1963).

24 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

25 *Cantwell v. Connecticut, supra* note 15.

26 *Wisconsin v. Yoder*, *supra* note 22, at 209-212: The Supreme Court described the Amish objections to high school as follows: "Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life… In short, high school attendance with teachers who are not of the Amish faith -- and may even be hostile to it -- interposes a serious barrier to the integration of the Amish child into the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society."

27 *Sherbert v. Verner, supra* note 16. Sherbert, a Seventh-Day Adventist, refused to work on Saturday, which was the Sabbath in her religion. She was fired by her employer as a result. South Carolina's Employment Security Commission ruled that Sherbert could not receive unemployment benefits, ruling that Sherbert's refusal to work on Saturday constituted a failure without good cause to accept available work. The Free Exercise Clause of the First Amendment prohibits the government from setting unemployment benefits eligibility requirements such that a person cannot properly observe key religious principles.

28 *Employment Division v. Smith*, *supra* note 2.

29 *Cantwell v. Connecticut, supra* note 15.

30 *Wisconsin v. Yoder*, *supra* note 22.

31 *Sherbert v. Verner, supra* note 16.

32 *Employment Division v. Smith*, *supra* note 2, Syllabus at 873: "Respondents' claim for a religious exemption from the Oregon law cannot be evaluated under the balancing test set forth in the line of cases following *Sherbert v. Verner,* 374 U. S. 398, 374 U. S. 402-403, whereby governmental actions that substantially burden a religious practice must be justified by a 'compelling governmental interest.' That test was developed in a context -- unemployment compensation eligibility rules -- that lent itself to individualized governmental assessment of the reasons for the relevant conduct. The test is inapplicable to an across-the-board criminal prohibition on a particular form of conduct. A holding to the contrary would create an extraordinary right to ignore generally applicable laws that are not supported by 'compelling governmental interest' on the basis of religious belief."

33 *Employment Division v. Smith*, *supra* note 2, at 888. [Emphasis added].

34 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

35 *See* Davis Laycock, "Free Exercise and the Religious Freedom Restoration Act," 62 Fordham L. Rev. 883, 396 (1994).

36 42 U.S.C. §§ 2000bb-1 (2006). The Supreme Court applied RFRA, *inter alia*, in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014) to exempt Hobby Lobby from Department of Health and Human Services (HHS) regulations requiring employers to provide coverage for 20 FDA-approved contraceptive methods, including four that may have the effect of preventing a fertilized egg from developing.

37 H.R. 5, 116th Congress (2019). The formal summary of this bill, written by the Congressional Research Service of the Library of Congress, is available at https://www.congress.gov/bill/116th-congress/house-bill/5. § 1107 of the proposed Equality Act, H.R. 5, 116th Congress (2019), provides: "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."

38 *Roe v. Wade*, 410 U.S. 113, 152 (1973): "*The Constitution does not explicitly mention any right of privacy.* In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution... *These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy." [Emphasis added]. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), however, the Supreme Court replaced the strict scrutiny standard of review required by *Roe* with the undue burden standard, under which abortion restrictions would be unconstitutional when they were enacted for "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

39 *Obergefell v. Hodges*, 576 U.S. ___ (2015): "This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons *marriage is fundamental under the Constitution apply with equal force to same-sex couples*." [Emphasis added].

40 Thomas G. West, "Progressivism and the Transformation of American Government," *The Progressive Revolution in Politics and Political Science: Transforming the American Regime,* ed. John Marini and Ken Masugi (New York: Rowman and Littlefield, 2005) 13-33. West provides a scholarly comparison of the American Founding and Progressivism.

41 The Congressional Progressive Caucus website, https://cpc-grijalva.house.gov/, states that it is the largest caucus within the House Democratic Caucus. Its 98 members are all members of the Democratic Party. It was founded in 1991 by six members of the U.S. House of Representatives, including Bernie Sanders, who served as its Chair from 1991 until 1999, and Maxine Waters.

42 John Marini and Ken Masugi, "Introduction," *The Progressive Revolution in Politics and Political Science: Transforming the American Regime,* ed. John Marini and Ken Masugi (New York: Rowman and Littlefield, 2005) 1-10; William A. Schambra and Thomas West, "The Progressive Movement and Transformation of American Politics," available online at https://www.heritage.org/political-process/report/the-progressive-movement-and-the-transformation-american-politics.

43 The Federalist No. 51 (James Madison): "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.* In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." [Emphasis added].

44 Jaegwon Kim, "The American Origins of Philosophical Naturalism," *Journal of Philosophical Research* APA Centennial Volume (2003): 83-98.

45 Sidney Hook, "Naturalism and Democracy," *Naturalism and the Human Spirit*, ed. Yervant H. Kirkorian (New York: Columbia UP, 1944) 40-64, 46.

46 Arthur E. Murphy, Review of *Naturalism and the Human Spirit, Journal of Philosophy* 42 (1945): 400-417, 405.

47 Sidney Hook, *supra* note 45, at 45: Hook states further that "for every traditional conception of God, the weight of evidence so far is decidedly in the negative."

48 Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism and Legal Philosophy* (Oxford: Oxford UP, 2007) 3.

49 Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton UP, 2013). *See* Michael W. McConnell, "Why Protect Religious Freedom?" 123 Yale Law Journal 770 (2013) for a critical response to Leiter's arguments.

50 Leiter, *supra* note 49, at *ix.*

51 Leiter, *supra* note 49, at 83.

52 Leiter, *supra* note 49, at 63.

53 Leiter, *supra* note 49, at 81.

54 Leiter, *supra* note 49, at 63.

55 Leiter, *supra* note 49, at 83.

56 Leiter, *supra* note 49, at 81.

57 Leiter, *supra* note 49, at 63.

58 Leiter, *supra* note 49, at *ix.*

59 William F. Buckley, Jr., *God and Man at Yale* (Washington, D.C.: Regnery, 1951).

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

61 *Engel, supra* note 60, at 438.

62 *Engel, supra* note 60, at 432-434 (1962). *But see Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), holding that teachers and students "do not shed their right to free speech at the schoolhouse gate." This right to free speech includes the right to voluntary prayer, "in the cafeteria, or on the playing field, or on the campus." Furthermore, school officials have no authority to approve, edit, or censor student speech because it contains a religious component. *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 313 (2000).

63 *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). Both cases were decided in this opinion.

64 *Wallace v. Jaffree,* 472 U.S. 38 (1985).

65 *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

66 *Tinker, supra* note 65, at 506.

67 *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000).

68 *Santa Fe, supra* note 67, at 313.

69 *Stone v. Graham,* 449 U.S. 39 (1980).

70 *Stone, supra* note 69, at 42.

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

72 Richard John Neuhaus, *The Naked Public Square* (Grand Rapids: Eerdmans, 1988). *See also* William F. Buckley, Jr., *God and Man at Yale* (Washington, D.C.: Regnery, 1951).

73 *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

74 *Marsh v. Chambers,* 463 U.S. 783 (1983). Plaintiffs also complained that the prayers violated the Establishment Clause because they coerced citizens to engage in religious observance. This coercion offended plaintiffs, making them feel excluded and disrespected. The Court found no legal coercion. The board did not direct the public to participate in the prayers, single out dissidents for opprobrium, or indicate its decisions might be influenced by a person's acquiescence to the prayer. Justices Thomas and Scalia contrasted the prayers in this case to the coercive state religious establishments that existed at the founding. Those establishments exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

75 *Van Orden v. Perry,* 545 U.S. 677 (2005).

76 *Lemon, supra* note 71.

77 *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005).

78 *McCreary County, supra* note 77. After reviewing the history of earlier displays of the Ten Commandments by these counties, which the Court judged to have a religious purpose, the Supreme Court stated: "No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays."

79 *American Legion v. American Humanist Association*, 588 U.S. __ (2019).

80 *American Legion, supra* note 79. The Supreme Court quoted this phrase from Justice Breyer's concurrence in *Van Orden* v. *Perry*, *supra* note 75. Importantly, four of the justices noted that the Supreme Court's attempt to find a grand unified theory of the Establishment Clause in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), "was a misadventure" and a failure. "Where monuments, symbols, and practices with a long-standing history follow in the tradition of the First Congress in respecting and tolerating different views, endeavoring to achieve inclusivity and nondiscrimination, and recognizing the important role religion plays in the lives of many Americans, they are likewise constitutional."

81 U.S. Const. amend. 1, cl. 2: "*Congress shall make no law… abridging the freedom of speech*," [Emphasis added].

82 *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993).

83 *Good News Club v. Milford Central School,* 533 U.S. 98 (2001).

84 *Engel, supra* note 60.

85 Obamacare was established by two statutes, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010). One provision of the Affordable Care Act mandates that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for certain preventive care services. 42 U.S.C. § 300gg-13(a).

86 "Coverage of Certain Preventive Services Under the Affordable Care Act," 78 Fed. Reg. 39870. This regulation is available online at https://www.federalregister.gov/documents/2014/08/27/2014-20252/coverage-of-certain-preventive-services-under-the-affordable-care-act.

87 *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

88 *Burwell v. Hobby Lobby, supra* note 87.

89 *Zubik v. Burwell*, 578 U.S. ___ (2016).

90 Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.* In *Burwell v. Hobby Lobby, supra* note 87, the U.S. Supreme Court granted relief under RFRA. *Zubik*, *supra* note 89, however, was decided on May 16, 2016, after Justice Scalia's death on February 13, 2016 but before Scalia was replaced by Justice Kavanaugh on October 16, 2018. In *Zubik*, the U.S. Supreme Court vacated the judgments below and remanded the case, instructing the U.S. Circuit Courts for the 3rd, 5th, 10th, and D.C. Circuits to determine an approach that would accommodate the employers' religious exercise. The *Zubik* Court did not decide whether the employers' religious exercise had been substantially burdened, whether the government had a compelling interest, or whether the HHS mandate was the least restrictive means of serving that interest.

91 H.R. 5, 116th Congress (2019). This bill, which passed the House of Representatives on May 17, 2019, prohibits discrimination based on sex, sexual orientation, and gender identity. This bill claims to promote equality but its true purpose is the denial of religious liberty. Section 1107 specifically prohibits the Religious Freedom Restoration Act of 1993 from providing a claim, defense, or basis for challenging any discrimination based on sex, sexual orientation, or gender identity.

92 Interim Final Rule, "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act," 26 CFR Part 54, 29 CFR Part 2590, and 45 CFR Part 147. 26 CFR Part 54. This rule is available online at http://s3.amazonaws.com/becketnewsite/2017-21851.pdf.

93 *Zubik v. Burwell*, *supra* note 89.

94 Executive Order, "Religious Liberty Executive Order," May 4, 2017. This executive order is available online at http://s3.amazonaws.com/becketnewsite/FREE-SPEECH-AND-RELIGIOUS-LIBERTY-EO.pdf.

95 Final Rule, "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act," 26 CFR Part 54, 29 CFR Part 2590, and 45 CFR Part 147. This rule is available online at https://s3.amazonaws.com/becketnewsite/HHS-Final-Rule-on-Contraceptive-Mandate-Nov-7.pdf.

96 The Becket Fund for Religious Liberty represents the Little Sisters of the Poor in these cases. For details on these cases, see the Becket website at https://www.becketlaw.org/research-central/hhs-info-central/.

97 *McCullen v. Coakley,* 573 U. S. 464 (2014).

98 Reproductive Health Care Facilities Act, Mass. Gen. Laws, ch. 266, §§ 120E½ (a), (b) (2007).

99 *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* 565 U.S. 171 (2012).

100 I Corinthians 6:1-8. "Does any one of you, when he has a case against his neighbor, dare to go to law before the unrighteous and not before the saints? [2] Or do you not know that the saints will judge the world? If the world is judged by you, are you not competent *to constitute* the smallest law courts? [3] Do you not know that we will judge angels? How much more matters of this life? [4] So if you have law courts dealing with matters of this life, do you appoint them as judges who are of no account in the church? [5] I say *this* to your shame. *Is it* so, *that* there is not among you one wise man who will be able to decide between his brethren, [6] but brother goes to law with brother, and that before unbelievers? [7] Actually, then, it is already a defeat for you, that you have lawsuits with one another. Why not rather be wronged? Why not rather be defrauded? [8] On the contrary, you yourselves wrong and defraud. *You do* this even to *your* brethren."

101 The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*

102 H.R. 5, 116th Congress (2019). The formal summary of this bill by the Congressional Research Service of the Library of Congress describes this bill as follows: "The bill prohibits the Religious Freedom Restoration Act of 1993 from providing a claim, defense, or basis for challenging such protections. The bill prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity." https://www.congress.gov/bill/116th-congress/house-bill/5.

103 § 1107 of the proposed Equality Act, H.R. 5, 116th Congress (2019), provides: "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."

104 Phillips has been represented in these cases by Alliance Defending Freedom of Scottsdale, Arizona. These facts are taken from the Alliance Defending Freedom website, https://adflegal.org/detailspages/client-stories-details/jack-phillips.

105 Colo. Rev. Stat. §24–34–601(1)-(2)(a) (2017).

106 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __ (2018).

107 Stutzman has been represented in these cases by Alliance Defending Freedom of Scottsdale, Arizona. These facts are taken from the Alliance Defending Freedom website, http://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman.

108 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, *supra* note 106.

109 H.R. 5, 116th Congress (2019). The formal summary of this bill by the Congressional Research Service of the Library of Congress describes is available at https://www.congress.gov/bill/116th-congress/house-bill/5.

110 § 1107 of the proposed Equality Act, H.R. 5, 116th Congress (2019), provides: "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."

111 U.S. Const. amend. 1, cl. 2: "*Congress shall make no law* respecting an establishment of religion, or *prohibiting the free exercise thereof*;" [Emphasis added].

112 U.S. Const. amend. 1, cl. 1: "*Congress shall make no law respecting an establishment of religion*, or prohibiting the free exercise thereof;" [Emphasis added].

113 U.S. Const. art. VI, cl. 3: "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; *but no religious test shall ever be required as a qualification to any office or public trust under the United States*." [Emphasis added]. The No Religious Test Clause was expanded beyond the text of the Constitution to apply state officials as well as federal officials in *Torcaso v. Watkins*, 367 U.S. 488 (1961).

114 *Cantwell v. Connecticut, supra* note 15, at 303-304.

115 *See Cantwell v. Connecticut, supra* note 15 at 303-304; *Wisconsin v. Yoder*, *supra* note 22, at 212-212; and *Sherbert v. Verner, supra* note 16.

116 James Madison, "Memorial and Remonstrance against Religious Assessments" (1785), paragraph 11: "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State."

117 The text of Article VI, Clause 3 only prohibits the use of religious tests as a qualification for holding federal officials. The U.S. Supreme Court has incorporated the No Religious Test Clause under the Fourteenth Amendment, however, to apply to state officials as well as federal officials. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

118 *See* John O. Tyler, Jr., "The English Bill of Rights," *The Origins of Our Founding Principles* (Houston: Periclitus Press, 2020) 307-327.

119 Corporation Act (1661), 13 Charles II, st. 2, c.1. The Corporation Act also required municipal officials to take an oath never to take arms against the king and that they rejected the Solemn League and Covenant of 1643, an agreement between Scottish Presbyterians and English Parliamentarians to preserve Presbyterianism in Scotland. The requirement that civil officials take Anglican Communion was repealed in the Sacramental Test Act of 1828, 9 George IV, c. 17.

120 First Test Act (1673), 25 Charles II, c. 2. The First Test Act required the following oath: "I, A.B., do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of the bread and wine, at or after the consecration thereof by any person whatsoever." The requirement of this oath was repealed by the Roman Catholic Emancipation Act (1829), 10 Geo. IV, c.7.

121 Second Test Act (1678), 30 Charles II, st. 2, c.1. The future Charles II was specifically excepted from the Second Test Act. The Second Test Act required the following oath: "I, A. B., Do solemnly and sincerely in the presence of God profess, testify, and declare that I do believe that in the sacrament of the Lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever, and that the invocation or adoration of the Virgin Mary or any other St. and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous…" The requirement of this oath was repealed by the Roman Catholic Emancipation Act (1829), 10 Geo. IV, c.7.

122 Toleration Act (1689), I William & Mary, c.18.

123 *See* John O. Tyler, Jr., "The English Reformation and the American Founding," *The Origins of Our Founding Principles* (Houston: Periclitus Press, 2020) 243-272. *See also* The Federalist No. 51 (James Madison): "It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.*"[Emphasis added].

124 Bill of Rights (1689), I William & Mary, st. 2, c. 2. The U.S. Bill of Rights adopts a number of individual rights from the English Bill of Rights. These rights include freedom of speech under the First Amendment, the right to petition the government under the First Amendment, the right to bear arms under the Second Amendment, the right to due process of law under the Fifth Amendment, the right to an impartial jury trial under

the Sixth and Seventh Amendments, and the prohibitions against excessive bail, excessive fines, and cruel and unusual punishments in the Eighth Amendment. The main body of the U.S. Constitution also adopts important principles from the English Bill of Rights. One such principle is the sovereignty of law over political rulers. The Supremacy Clause of Article VI establishes that law wields supremacy over political rulers, and political rulers are bound by the laws like any other citizen. The Take Care Clause of Article II, § 3 requires that the president shall faithfully execute the laws of the United States. Another important principle borrowed from the English Bill of Rights is civilian control of the military. Article II § 2 gives the president the power to command. This power is separated, however, from the powers to raise, fund, and commit our military forces. These powers are all granted to Congress under article I, § 8. Other provisions of the U.S. Constitution adopting principles from the English Bill of Rights include free elections, free debate in Congress, frequent sessions of Congress, and no taxes without the consent of Congress. *See* John O. Tyler, Jr., "The English Bill of Rights," *The Origins of Our Founding Principles* (Houston: Periclitus Press, 2020) 307-327.

125 *See* John O. Tyler, Jr., "The English Bill of Rights," *The Origins of Our Founding Principles* (Houston: Periclitus Press, 2020) 307-327.

126 Locke's patron, the Earl of Shaftesbury, was the leader of the Parliamentary effort to prevent the Duke of York, the future James II, from becoming King of England. During this "Exclusion Crisis" of 1679-1681, opponents of the future James II feared-correctly- that James II would seek to establish an absolute monarchy. Charles II retaliated against Shaftesbury and Locke with false charges that they were involved in the "Rye House Plot" to assassinate Charles II and the Duke of York. In 1683, two of Shaftesbury's supporters, Lord William Russell and Col. Algernon Sidney, were convicted of similar charges by packed juries on fraudulent evidence and put to death. Shaftesbury and Locke fled to Holland to avoid the same fate.

127 Roger Woolhouse, *Locke: A Biography* (Cambridge: Cambridge UP, 2007) 2, 266.

128 Declaration of Independence, July 4, 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

129 First, all men are created morally and legally equal. Men, by nature, are "all free, equal, and independent." (Locke, *Second Treatise*, § 95). The state of nature is a state "of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another." (Locke, *Second Treatise*, § 4). There is no subordination among men in the state of nature, and no man may destroy or use any other men. (Locke, *Second Treatise*, § 6).

130 Second, God endows men with inalienable rights. Every man has the right to preserve himself, and no man may "harm another in his life, health, liberty, or possessions." (Locke, *Second Treatise*, § 6). The right to liberty includes freedom from government without one's consent. (Locke, *Second Treatise*, § 22).

131 Third, men establish civil governments through their own actions. God does not establish kings by divine right. Locke's *First Treatise* (1689) argues that God does not establish kings by divine right. Locke's *Second Treatise* (1689) explains the origin of civil society. Man initially lives in a state of nature. The state of nature is generally peaceable, but three defects make it difficult to protect private property. There is no consent to a common law, there is no impartial judge of disputes, and individuals do not have power to execute just sentences. (Locke, *Second Treatise*, §§ 124-126). Men form a social contract to correct these defects. (Locke, *Second Treatise*, § 21). Man in the state of nature has the right to exact retribution for crimes committed against him. Each man gives up this right under the social contract in exchange for impartial justice backed by overwhelming force. (Locke, *Second Treatise*, §§ 128-131).

132 Fourth, the powers of government depend on the consent of the governed. The people always remain sovereign. Every man has the right to be free from any government without his consent. (Locke, *Second Treatise*, § 22). No one can be compelled to enter a society without his consent. (Locke, *Second Treatise*, § 95). After one consents to form a government, however, he consents to government by majority rule. The consent of the governed justifies majority rule and makes it binding. (Locke, *Second Treatise*, § 99).

133 Fifth, men may alter or abolish their government if it becomes destructive. The governed have the right and duty to resist tyrannical government. Government acts tyrannically when it fails to govern according to known and established laws. "Wherever law ends, tyranny begins." Government exists by the consent of the people to protect the rights of the people and to promote the public good. The people should resist and replace any government that fails in these duties. (Locke, *Second Treatise*, § 202). Government use of force without right violates the rights of subjects and seeks to enslave them. Such acts forfeit the powers entrusted to the government by the people, void the social contract, place the government in the state of nature, and create a state of war against its subjects. Reversion to the state of nature cancels all ties between government and the governed, and every person has the right to defend himself and resist the aggressor. (Locke, *Second Treatise*, § 232).

134 Lord Acton, "Sir Erskine May's *Democracy in Europe*," *Quarterly Review* 145 (January and April 1878): 112-142, 122: "The Roman Republic was ruined, not by its enemies, for there is no enemy it did not conquer, but by its own vices."

135 Edmund Burke, "Letter to a Member of the National Assembly," May, 1791. (The member was Francois-Louis- de Menonville): "Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites…in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist, unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters."

136 Charles de Montesquieu, *The Spirit of the Laws* (1748), 3.3.

137 Montesquieu, *supra* note 136, at 4.5. George Washington agreed: "Virtue or morality is a necessary spring of popular government." George Washington, Farewell Address, Sept. 19, 1796.

138 Montesquieu, *supra* note 136, at 4.5.

139 Montesquieu, *supra* note 136, at 5.3.

140 Montesquieu, *supra* note 136, at 4.5.

141 Montesquieu, *supra* note 136, at 4.5.

142 Montesquieu, *supra* note 136, at 3.3.

143 Montesquieu, *supra* note 136, at 3.3.

144 Patrick Henry, Address to the Virginia Convention, Mar. 23, 1775.

145 George Washington, Proposed Address to Congress, Apr. 30, 1789.

146 Alexis de Tocqueville, "The Superiority of Morals to Laws" (1840).

147 Albert Einstein, "Science and Religion," *Out Of My Later Years* (New York: Citadel, 1956) 21-30, 29. "Although it is true that it is the goal of science to discover rules which permit the association and foretelling of facts, this is not its only aim. It also seeks to reduce the connections discovered to the smallest possible number of mutually independent conceptual elements. It is in this striving after the rational unification of the manifold that it encounters its greatest successes, even though it is precisely this attempt which causes it to run the greatest risk of falling prey to illusions. But whoever has undergone the intense experience of successful advances made in this domain is moved by profound reverence for the rationality made manifest in existence."

148 *See* GEM Anscombe, "Modern Moral Philosophy" *Philosophy* 33.124 (January 1958):1-19. In this classic essay, Oxford philosopher Anscombe surveys the failure of moral philosophies that reject the existence of a transcendent moral order and asserts the following thesis: "It is not profitable for us at present to do moral philosophy; that should be laid aside at any rate until we have an adequate philosophy of psychology, in which we are conspicuously lacking."

149 Attorney General William Barr, "Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame," 11 Oct. 2019.

150 Romans 12:2. "And do not be conformed to this world, but be transformed by the renewing of your mind, so that you may prove what the will of God is, that which is good and acceptable and perfect."

151 Matthew 22:36-40. [36] "Teacher, which is the great commandment in the Law?" [37] And He said to him, "'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.' [38] This is the great and foremost commandment. [39] The second is like it, 'You shall love your neighbor as yourself.' [40] On these two commandments depend the whole Law and the Prophets." [Emphasis in original].

152 Matthew 7:12. "In everything, therefore, treat people the same way you want them to treat you, for this is the Law and the Prophets."

153 Attorney General William Barr, "Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame," 11 Oct. 2019.

154 Matthew 10:16. "Behold, I send you out as sheep in the midst of wolves; so be shrewd as serpents and innocent as doves."

155 *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1943). The First Amendment bars schools from compelling students to salute the American flag and reciting the Pledge of Allegiance if doing so violates the religious beliefs. The students were Jehovah's witnesses who considered these actions a form of idolatry violating Exodus 20:4-5. The U.S. Supreme Court stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *See also Masterpiece Cakeshop v. Colorado Civil Rights Commission, supra* note 96.

156 Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq*. RFRA passed by a unanimous vote in the House of Representatives and by a vote of 97-3 in the Senate. *See* Davis Laycock, "Free Exercise and the Religious Freedom Restoration Act," 62 Fordham L. Rev. 883, 396 (1994).

157 Religious Freedom Restoration Act (RFRA) at 42 U.S.C. §§ 2000bb-1 (2006). The Supreme Court applied RFRA in *Burwell v. Hobby Lobby Stores, Inc*., *supra* note 87, to exempt Hobby Lobby from Department of Health and Human Services (HHS) regulations requiring Hobby Lobby to provide life-terminating abortifacient drugs to its employees. Houston Baptist University prevailed against the same HHS regulations in a similar U.S. Supreme Court case in 2016. *Zubik v. Burwell, supra* note 89. *See* https://www.becketlaw.org/media/supreme-court-victory-texas-baptist-universities/.

158 *Good News Club v. Milford Central School, supra* note 83; *Lamb's Chapel v. Center Moriches Union Free School District, supra* note 82.

159 *Tinker v. Des Moines Independent Community School District, supra* note 65.

160 *Santa Fe Independent School District v. Doe, supra* note 67.

161 *McCullen v. Coakley, supra* note 97, protecting the rights of abortion counselors to speak to abortion clinic clients, and *Cantwell v. Connecticut, supra* note 15, at 303-304, protecting the right of Jehovah's Witnesses to distribute literature and solicit contributions without a government permit.

162 *Town of Greece v. Galloway*, *supra* note 73, holding that public prayer is permitted at town's monthly board meetings.

163 *Marsh v. Chambers supra* note 74, holding the Nebraska state legislature could employ a legislative chaplain.

164 *Van Orden v. Perry*, *supra* note 75, holding that the State of Texas could display a six foot high monolith inscribed with the Ten Commandments on the grounds of the Texas State Capitol. While the Ten Commandments are religious, they also have an undeniable historical meaning. Simply having religious content or promoting a message consistent with religious doctrine does not violate the Establishment Clause of the First Amendment. *But see McCreary County v. American Civil Liberties Union of Kentucky*, *supra* note 77.

165 *American Legion v. American Humanist Association*, *supra* note 79, holding that the Bladensburg Cross did not violate the Establishment Clause. "Even if the monument's original purpose was infused with religion, the passage of time may obscure that sentiment." The monument may be retained for the sake of its historical significance or its place in a common cultural heritage. "The passage of time gives rise to a strong presumption of constitutionality."

166 *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, *supra* note 99.

167 *See* text accompanying notes 42-43, *supra.*

168 *See* text accompanying notes 44-47, *supra.*

169 *See* text accompanying notes 48-58, *supra.*

170 *See* text accompanying notes 59-110, *supra.*

171 *See* text accompanying notes 111-122, *supra.*

172 *See* text accompanying notes 123-133, *supra.*

173 *See* text accompanying notes 134-149, *supra.*

174 *See* text accompanying notes 155-166, *supra.*

175 Thomas Paine, "The American Crisis," *The Pennsylvania Journal*, Dec. 19, 1776.