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Partisan in the Culture Wars

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Justice Scalia's dissent in *Romer v. Evans*[1] protested that the decision in that case made the Supreme Court a partisan in the "culture war" surrounding gay rights.[2] The charge has undeniable force. But Justice Scalia's protest was, in a fundamental way, understated: what makes his complaint about *Romer* so persuasive is that the ruling there is not an isolated instance. The Supreme Court is a regular participant in the "culture wars" that divide Americans on so many social issues. And in these ongoing conflicts, the Court is a systematic partisan for one side—the liberal side.

The true character of this "culture war" is apt to be obscured by strained appropriations of populist-style rhetoric. The title of this symposium illustrates the problem: in identifying constitutional law with the "dogma of the educated elite," it inevitably suggests that the opposing side must be . . . , what else but the ignorant mass? Justice Scalia, himself, speaks of a battle between the "knights" and the "villeins."[3] No doubt, such rhetoric is deployed with sarcasm and meant to carry a polemical thrust—even judges and law professors like to see themselves as "defending the public" rather than lording it over the peasantry. But the rhetoric still distracts from the underlying reality.

The kernel of truth in these characterizations is that constitutional law does reflect, at least in a general way, the assumptions of contemporary legal scholars. In this particular subset of the "educated elite," it is certainly true that the outlook of social conservatives is rarely voiced and still more rarely given a respectful hearing. So, for example, as Justice Scalia notes,[4] almost no one in the world of the

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1. 517 U.S. 620 (1996).

2. *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

3. *See id.* at 652 (quoting Scalia's dissent that explained, "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

4. *See id.* at 652-53 (Scalia, J., dissenting) (stating,

> How [the legal establishment] feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals.).

(quoting Bylaws of the Association of American Law Schools, Inc. § 6-4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, *in* 1995 HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS). This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes

law schools dares to say that homosexual practices are morally wrong and ought to be discouraged: in the legal academy, such views are regarded as more or less on a par with arguments for racial segregation or white supremacy. Legal scholarship was not always this way and I do not know why the ideological impulses of contemporary liberalism have become so deeply entrenched in contemporary law schools. It may be that, in the wake of the strenuous liberal activism of the Warren and Burger Courts, legal scholarship has had a disproportionate appeal to those who view the law as a tool for centrally directed social "reform." I would say, at any rate, that this outlook virtually defines one side in the contemporary "culture wars"—and it unquestionably does receive continuing, powerful support from the Supreme Court.

Still, it remains a great distortion to see the dominant legal culture as speaking for all educated people and then to identify its adversaries simply with mindless mass opinion. Forty years ago, it may have been plausible to see the central challenge of constitutional law—making good on the Supreme Court's ruling against racial segregation—in more or less these terms. But after all, the defenders of segregation in the South were soon overwhelmed by the massed resources of the federal government, backed by a clear shift in public opinion. Defenders of segregation have—blessedly—not been a visible force in American politics for several decades now. But a quarter century after *Roe v. Wade*,[5] the country is still torn by a fierce political debate about abortion. Liberal opinion has not triumphed on the abortion question—that is, it has not triumphed outside the smug precincts of the legal academy—because the opposing side is not, after all, simply a horde of half-educated yokels. What is true for this most serious issue in the "culture war" is also true on most other social issues. Serious political battles require intellectual energy and conviction on both sides—and there is more than enough on the conservative side to maintain a spirited public debate.

There is also a deeper distortion in characterizations of this ongoing conflict as a battle between the sophisticated "classes" and the boorish "masses."[6] The truth is

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that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws. *See, e.g.*, Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975) (showing the pains Congress took to exclude homosexuals specifically from the Americans With Disabilities Act of 1990, 42 U.S.C.A. § 12211(a) (West 1988)).

5. 410 U.S. 113 (1973).

6. *See* Lino A. Graglia, Romer v. Evans: *The Amendment 2 Controversy: People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 412 (1997) (overstating the case in supposing that the essential conflict is simply majoritarian:

> Whatever the reason, American academics and others who live professionally in a world of words tend overwhelmingly to be people of the left with adversarial attitudes to the beliefs and traditions of most of their fellow citizens. Across the spectrum of basic social policy issues—capital punishment, prayer in the schools, suppression of pornography, swift and effective enforcement of the criminal law, busing for school racial balance, and so on—their views and the views of most Americans could hardly be more opposed.).

The examples are well-chosen but obscure the fact that the majority is not always on the side of the "religious right"

that social conservatives, those who align themselves with a serious political effort, are themselves a distinct minority. Yes, there is a populist tradition that is sometimes deployed by conservatives against liberals. But there is also a very old tradition of anti-Catholic bigotry in America and a long tradition of northern and urban disdain for the "Bible Belt"—and these prejudices are readily and effectively invoked by liberal voices in the culture war. Polls consistently show that the majority of Americans, while they are wary of liberals, also feel distrustful and uneasy toward the "right-to-life movement" and the "religious right." It is not only conservatives who appeal to populist rhetoric. Liberals do so quite as often and quite as effectively in many political debates—which is why, for example, the "religious right" is so often viewed as a conspiracy of holier-than-thou, would-be tyrants.

If one strips away the populist rhetoric on both sides, the policy debates that make up the "culture war" are not really about liberty as a general principle, nor about equality as a general ideal. The debates are not even about "elitism" versus "democracy" in the making of public policy. On one side, the animating aim is to preserve (or revitalize) a role for law in fostering (or at least in accommodating) traditional moral norms and their religious roots. On the other side, the aim is to associate law with "progress"—understood as progressive liberation from these norms. Of course, not all disputes, even on matters of social policy, directly or clearly engage these competing visions. But there is no making sense of notions like "culture war," I believe, except in something like these terms.

In whatever way one characterizes the two sides, there is no doubt that only one side derives direct assistance from the Supreme Court, while the other is reduced almost exclusively to politics. The point can be obscured because social conservatives are necessarily forced to engage in coalition politics to win political majorities and their coalition partners—those who favor smaller government in the interest of greater market freedoms—have won some small victories from the Court in recent years.[7] But no one even expects the Court to lend direct assistance to social conservatives.

Thus, the Court has occasionally permitted some incidental degree of state regulation of abortion—in decisions denounced as "conservative."[8] What is meant

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or of social conservatives. In Graglia's view, the choice for the Court is protecting minority rights or passively accepting majoritarian decisions. *Id.* at 411. The point to notice is that the Court takes sides on which "minority" concerns it will champion.

7. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995) (invalidating an affirmative action racial preference hiring program); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (determining that land regulation constituted a taking under the Fifth Amendment thereby requiring monetary compensation).

8. *See, e.g.*, Mazurek v. Armstrong, 520 U.S. 968 (1997) (rejecting a claim that a statute requiring a licensed physician to conduct abortion was an undue burden on the right to abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (finding a state statute requiring a 24 hour waiting period and parental consent as not unduly burdening the right to abortion); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding state prohibition on the use of public facilities in abortions).

by that characterization is that the decision is a bit less liberating than liberals might prefer. No constitutional decision of the Supreme Court has endorsed the opposing contention that babies in the womb do have rights that the government *must* protect. The issue before the Court has always been framed, since *Roe v. Wade*,[9] in terms of how much regulation of abortion governments *may* impose—and the answer has generally been the liberal answer: not very much.[10]

Romer was another ruling in this vein. The essential question, as the majority framed the issue, was whether voters in Colorado could impose constitutional obstacles to gay rights measures.[11] Liberals favor laws that prohibit discrimination on the basis of sexual preference, since this reduces traditional sexual morals to the level of arbitrary "preferences." Social and religious conservatives have often opposed such measures for just this reason. But the amendment adopted in Colorado was not so much an expression of traditional moral views as a compromise between moral traditionalists and opponents of regulation, by which homosexual lifestyles would neither be forbidden nor expressly protected. The Court's ruling was that Colorado voters behaved with "irrational animus" when they tried to ban gay rights laws.[12]

Liberal opinion hails this ruling as a vindication of "equality": no group, say defenders of the *Romer* decision, should be excluded from the chance to press for its own favored policies.[13] Justice Scalia's dissent protested that state constitutions have long excluded certain policies from being enacted—that is, after all, the purpose of a constitution.[14] Moreover, as Scalia noted, such policy exclusions have sometimes been written into constitutions for the very purpose of disabling the political aims of a targeted group: Scalia gave the example of anti-polygamy provisions instated to exclude Mormon practices.[15]

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9. 410 U.S. 113 (1973).

10. *See generally* Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (evidencing judicial restraint in refusing to extend *Roe* to discover a "privacy" right to physician assisted suicide). However, the pattern in *Glucksberg* was the same: the issue was whether the supposed "right to privacy" should be extended, not whether a competing "right to life" would require states to protect weak and confused people from being hastened to their graves with fatal "assistance." The question, in other words, was how much of the liberal social agenda the Court should enact at that moment—and several justices expressly reserved their discretion to enact some version of assisted suicide in a later case. By contrast, the Court had no time to consider a right-to-life challenge to Oregon's new law authorizing assisted suicide. *Id.* at 2270.

11. *Romer*, 517 U.S. at 624.

12. *Id.* at 634.

13. *See generally id.* at 624-28 (elucidating the argument endorsed by the Supreme Court of Colorado and evidently endorsed as well, though rather glancingly, in Justice Kennedy's opinion: Amendment 2 was held to violate an asserted equal protection principle "that government and each of its parts remain open on impartial terms to all who seek its assistance"). Justice Kennedy's opinion seemed to place more emphasis on the "second and related point" that Amendment 2 was unconstitutional because it was "born of animosity toward the class of persons affected" and did not "bear a rational relationship to a legitimate governmental purpose." *Id.* at 633-35.

14. *Id.* at 641-42 (Scalia, J., dissenting).

15. *Id.* at 649-51 (Scalia, J., dissenting); *see* Davis v. Beason, 133 U.S. 333, 346-47 (1890) (holding that denying polygamists the right to vote does not offend any constitutional or legal principle), *overruled by* Romer v. Evans, 517 U.S. 620 (1996); *see also* Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (determining that precluding

In fact, the point has a much more immediate, current bearing. In the last decades of the nineteenth century, at the same time that states were imposing constitutional restrictions to curb would-be polygamists, many states added a "Blaine amendment" to their state constitutions to prohibit state aid to sectarian schools.[16] These provisions were modeled on a proposed amendment to the Federal Constitution, championed by Senator James G. Blaine, which became a rallying point for opponents of Roman Catholic schooling. For more than a century since then, these state constitutional amendments (still in place in more than thirty state constitutions) have posed a firm barrier to advocates of public financial assistance to parochial schools.

What is the difference between a state Blaine amendment and the Colorado amendment rejected in *Romer*? In one case, a particular constituency is denied the opportunity to get what it wants from the state legislature or a city council; in the other case, another constituency is so denied. Perhaps the most salient difference is this: the homosexual challengers in *Romer* elicit the Court's sympathy as representatives of a persecuted minority, whereas parents seeking state aid for religious education do not. The Blaine amendments were quite clearly an expression of anti-Catholic animus: their proponents made no secret of their fear of Catholic influence. But the Supreme Court does not concern itself with this undeniable, historical fact, because the Court itself shares the current rationale for such policies: religion is dangerous and should, indeed, be excluded from public assistance.[17]

Since the early 1970s, the Supreme Court has elaborated an extensive case law on this theme. What nineteenth century Protestants assumed would require a new constitutional amendment, the Court has found within the contours of the old First Amendment: government, it is said, must assume a posture of "neutrality" which means that it may not fund religious schools—even if it chooses to fund every other kind of private school. So we have a unique disability imposed on advocates for this one, particular form of public funding. The Court indeed carved a unique provision into the law of standing in the 1970s to enforce this unique disability: taxpayers have standing to protest government funding of religious institutions—but for no other purpose.[18] Advocates of abortion services may lobby state legislatures or Congress to fund their clinics; those who regard such "services" as monstrous may

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Morman polygamists from voting actually serves to reinforce the moral values and promote social improvement).

16. *See* Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941-45 (1951) (discussing the vitriolic debate surrounding the Blaine Amendment).

17. *See* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (insisting that government funding for religious schools would be "divisive" and that such "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect"—this from a Court soon to unleash the most divisive political divisions in recent history with its decisions mandating forced busing for integration and abortion on demand!).

18. *Compare* Flast v. Cohen, 392 U.S. 83 (1968), *with* Schlesinger v. Reservists, 418 U.S. 208 (1974), *and* United States v. Richardson, 418 U.S. 166 (1974) (refusing to extend the reasoning of *Flast* outside challenges based on the First Amendment Establishment clause).

protest in the political process but have no constitutional veto to invoke against such funding. Indeed, the state may provide subsidies to an array of gay activist programs—from art exhibits to educational or counseling programs or public parades—and opponents have no constitutional grounds to object. It is only state funding of religious institutions that provokes a special right for the citizen-censor to cry foul in the courts.

The same asymmetry reappears in disputes about public schools. The Supreme Court thinks it worthwhile to make a federal case—and indeed, a Supreme Court case—when a Reform rabbi is invited to offer a rather perfunctory benediction at a high school graduation.[19] At almost the same moment in the early 1990s, public schools in New York City required elementary school students to learn respect for gay life by getting students to read controversial books like *Heather Has Two Mommies*.[20] Many more people were outraged by this sort of gay advocacy in New York schools than by the rabbi's graduation benediction in Rhode Island.[21] But only the former became a Supreme Court case because there is no general right to be free from offensive exhibitions in public schools (or in public settings of any kind). There is only a unique right for secularists to protest against religious displays.

The asymmetry can indeed reach quite astonishing extremes. Well known are the victories in the Supreme Court's campaign of vigilance against religious displays in public settings: the mere posting of the Ten Commandments in a public school hallway was judged to be an unconstitutional endorsement of religion,[22] as was a moment of silence at the beginning of school,[23] as was the display of a Christmas crèche (even with a Chanukah menorah) before the Pittsburgh City Hall.[24] Less known are the counterpart cases where social conservatives sought to protest offensive displays in public schools. In *Brown v. Hot, Sexy and Safer Productions, Inc.*,[25] for example, parents protested a junior high sex education program which asked students to try to show how their faces looked during orgasm.[26] This case is not famous because it did not reach the Supreme Court. It was dismissed summarily for failure to state an actionable claim; merely being offended is not enough if the offense is not caused by religion. Perhaps the protesting parents were themselves religious. Such people are not to inject their prejudices into constitutional law.

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19. Lee v. Weisman, 505 U.S. 577 (1992).

20. *See generally Freedom the Annual Error*, FLA. TIMES-UNION (Jacksonville), Sept. 27, 1998, at F2 (lamenting that school librarians have selected homosexual-lifestyle books as appropriate for grade school children).

21. *See Lee*, 505 U.S. at 633 (Scalia. J., dissenting) (noting that the majority's view of the Establishment Clause runs counter to a long-standing and well-supported tradition of religious officials providing benedictions at graduations).

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

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

24. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

25. Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995).

26. *Id.* at 529.

Viewed in this light, the question is not about "equality" as a general constitutional principle. It is about *which* claims for equality are viewed with concern and respect—and which can be shrugged off. In other words, it is about inequality. The point is not even that the Court has a strong bias against traditional religion—though, in fact, that is a reasonable inference from the case law. But the larger point is that, on most social issues, the Court's agenda is framed by a particular liberal perspective. And whatever else it is, that agenda is no more inherently devoted to "liberty" than to "equality."

Here again, *Romer* is instructive. Many citizens who voted for the Colorado amendment seem to have had an animus against regulation more than against homosexuality. Suppose that the manager of a small business feels that a particular employee is offending customers and reducing sales. If there is a gay rights ordinance and the employee is gay, the manager must hesitate to make the decision he would otherwise make to terminate this troublesome employee. Suppose a landlord wants to keep his building more attractive by excluding people who host wild, noisy parties. If there is a gay rights ordinance and the tenant who hosts such parties is gay, this landlord must also hesitate to act on his business instincts. One can say many things about such business people. The one thing that cannot be said is that the *Romer* decision—which insists that the state cannot remove the threat of gay rights regulation—is making them more free.

The issue is not liberty—certainly not liberty for everyone. It is who gets to invoke the rhetoric of liberty and in *Romer*, the underlying winners were those who wanted to invoke the rhetoric of liberty to regulate others. If it is said that commercial liberty does not rank as high on the scale of constitutional values as personal liberty or privacy or sexual autonomy, the answer must be: precisely. Nothing in the text of the Constitution indicates that the liberty of the businessman must have a lower claim than the liberty of the homosexual. And this is certainly not a conclusion that can be teased out of *The Federalist Papers* or the ratification debates. It is simply a cherished belief of contemporary liberals.

On the other side, however, the structure of constitutional law does little for religious liberty. Suppose that a locality or state does exercise the right now enshrined by *Romer*, the right to impose a gay rights ordinance. What happens when someone with strong religious objections to homosexuality says he does not want to have a homosexual employee in a small workplace or a homosexual roommate in a rented apartment? The Supreme Court has not yet addressed such questions, but it has evidently sent a clear signal to lower courts. Every court that has considered religious challenges to gay-rights ordinances has concluded that homosexual rights—the right to force others to contract—must take priority over the rights of religious people, even when they assert the very traditional right to refuse to

contract.[27] Religious liberty gains as little respect in these battles as commercial liberty.

Meanwhile, in the same term as it enshrined government openness to gay-rights ordinances as a constitutional right, the Supreme Court also proclaimed a fundamental right for women to attend any state-assisted institution open to men—or anyway, any state military institution. The Court's ruling in the Virginia Military Institute (VMI) case is a feminist tirade that repeatedly equates distinctions between the sexes with racial segregation.[28] The clear implication of Justice Ginsburg's opinion is that those who support an all-male military institution are the moral equivalents of racists. Nevermind that the Court itself has approved different treatment of the sexes in other military contexts—most notably in the all-male draft.[29] Women *must* have all the rights of men and be treated just like men—at least when the target is sufficiently isolated and vulnerable to make this absurd position seem plausible.

The premise of the VMI decision, that women could be treated just like men, was patently untrue. The military has different training norms for women than for men, because, among other things, women do not have the same physical capacities as men and in general do not seem to have the same aggressiveness. What followed, predictably, was that VMI had to be redesigned to make it more accommodating to women.

Meanwhile the Court has extended protections for women in the workplace on the theory that what offends women may be "harassment" and hence a denial of equality. Since its initial ruling in *Meritor Savings Bank, FSB v. Vinson*,[30] every subsequent decision has extended the potential reach of "sexual harassment" regulation beyond actual coercion to offensive language—language which almost certainly would not offend most men but can be actionable if it is thought to offend the "reasonable woman." Whatever else this accomplishes, it does not promote general freedom. It is perfectly clear that employers are given strong incentives to

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27. *See, e.g.*, Dale v. Boy Scouts of America, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998) (holding that the Boy Scouts cannot invoke religious objections to homosexuality to exclude gay scoutmaster), *cert. granted*, -- A.2d -- (N.J. 1998); Presbytery of New Jersey v. Florio, 902 F. Supp. 492 (D.N.J. 1995) (rejecting challenge to sexual orientation component of New Jersey Law Against Discrimination as applied to religious organizations); *see also* Collins v. Secretary of the Commonwealth, 556 N.E.2d 348 (Mass. 1990) (manifesting the exception that proves the rule: the Massachusetts Supreme Judicial Court refused to allow a referendum on a measure which would have exempted religious institutions from a gay rights statute on the ground that it included some exemptions for religious institutions and the state constitution bars referenda on religious matters. The point was to ensure that the matter could not be put to voters—who might have shared religiously based moral objections, even if religious institutions were exempted from direct coverage).

28. United States v. Virginia, 518 U.S. 515 (1996).

29. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, (1981) (holding that an all-male draft is not violative of the Constitution).

30. 477 U.S. 57 (1986). *See, e.g.*, Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993) (evidencing the Supreme Court's willingness to implement a reasonable person standard to assess sexual harassment claims); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (recognizing that damages are available for an alleged Title IX violation).

regulate the speech of employees to ward off complaints from women complaining of harassment. So the government is coercing businessmen to limit the free speech of employees. Is this a First Amendment problem? Not to the Supreme Court. The problem is not raised even once in the Supreme Court's several rulings on sexual harassment.

As it happens, most social conservatives would probably not object to banning (or at least chilling) crude or indecent speech in the workplace. But the point is that this sort of restriction on speech goes almost unnoticed because it is a central theme in feminist agitation. When social conservatives object to obscenity (including the most vile sorts of child pornography on the Internet), the issue suddenly looks very different. *That* is a First Amendment free speech issue for the Supreme Court—exemplified by the Court's prompt move to strike down the Communications Decency Act (CDA).[31] The sorts of "speech" that the CDA sought to regulate are far more outrageous than the office banter or smutty remarks so often swept up in harassment claims. Why the difference? I submit the difference is that the Court is afraid to disappoint its feminist constituency and rather is eager to knock down social conservatives, the recognized enemies to freedom in the liberal world-view.

When feminist organizations seemingly reversed their positions to defend President Clinton from charges of sexual harassment, their main line of argument was telling—and in its way quite consistent: "sexual harassment," they insisted, was not about sexual morals but simply about equality. So it is, in the Court's approach to free speech: what is taken to be equality—as defined by liberal opinion—may trump free speech, but standards of public morals or basic decency quite often will not. Censorship in schools is intolerable—when motivated by religion. Even removal of books from a school library may violate constitutional rights when the removal is suspected of being religiously motivated.[32] But religious expression in schools must be censored.

When it comes to self-styled Nazis, seeking to march through a neighborhood of Holocaust survivors, the Court finds nothing worth reviewing: the claims of free speech must triumph over claims of protection from the most painful sorts of affront.[33] This was the ACLU position. When it comes to anti-abortion protesters harassing the clientele of abortion clinics, the Court approves the ferocious artillery of a RICO suit[34]—which even the ACLU saw as chilling to free speech. But feminist causes have always triumphed over free speech in the Supreme Court.

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31. Reno v. ACLU, 117 S. Ct. 2329 (1997).

32. *See* Board of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) (restricting attempted removal of "unsuitable" books from school library); Bowman v. Bethel-Tate Bd. of Educ., 610 F. Supp. 577 (S.D. Ohio 1985) (issuing an injunction against the local school board from barring the production of an anti-religious play in elementary school).

33. *See* Smith v. Collin, 436 U.S. 953 (1978) (denying certiorari on court of appeals' ruling at 578 F.2d 1197 that Nazi march must be allowed under First Amendment).

34. National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).

To be sure, free speech doctrine is now so massive and so confused that broad generalizations always have exceptions. Free speech rulings have in some cases offered protection for religious conservatives. But even the victories are revealing. In *Rosenberger v. Rectors of University of Virginia*,[35] the Court could barely muster five votes for the proposition that a college which funds all other sorts of student publications cannot exclude student religious publications.[36] Apart from hand wringing concurrences by Justices Kennedy and O'Connor, four justices—and both lower court opinions—interpreted the precedents as requiring religious publications to be uniquely excluded.[37] In *Capitol Square Review and Advisory Board v. Pinette*,[38] the Court brought its conflicting liberal impulses—its inclination to protect extremist and indecent speech versus its concern to purge public authority of any taint of religion—into an exquisite moment of balance: it approved a display of a cross in front of the Ohio state capitol building on the understanding that it was posted by the Ku Klux Klan rather than a legitimate religious organization.

Such contrasts could be elaborated at much greater length. But the point should be clear enough. The asymmetry has scarcely received notice among legal scholars. The debate is almost entirely about why the Court does not enact still more of the liberal agenda. No one seems to notice that the liberal agenda is, in fact, the determining agenda for the Court when it comes to social issues: the main question is how much of it the Court will or will not accept in the latest go-round.[39]

I do not think this will last forever, however. It is not that I expect the Court to retreat to a general or generic posture of judicial restraint. I am not even sure, at this

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35. 515 U.S. 819 (1995).

36. *See id.* at 837, 845-46 (deciding that university regulation's denial of funds because of espousal of religious ideas violated petitioner's "right of free speech guaranteed by the First Amendment" and risked undermining "the very neutrality the Establishment Clause requires").

37. *Rosenberger*, 515 U.S. at 831-837.

38. 515 U.S. 753 (1995).

39. *See* Graglia, *supra* note 6, at 411 (opining that,

> The . . . final thing one needs to know to fully understand the creation and operation of constitutional law in our society is that the Supreme Court rulings of unconstitutionality are not random in their political impact. Over the past few decades, they have served, with few exceptions, to enact the policy agenda of the left. It would be only a small exaggeration to say that the American Civil Liberties Union never loses in the Supreme Court, even though it does not always win. It either obtains a victory it could not obtain in the ordinary political process—as in *Romer* and *Griswold*—because the majority of the American people oppose it, or it is left where it was to try again on another day. *Griswold*, for example, was the third and finally successful try to have the Court invalidate the Connecticut anti-contraception statute.
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> For conservatives, the situation is precisely the reverse. They almost never win positive victories in the Supreme Court—obtain policy decisions they could not obtain in the ordinary political process—even though they do not always lose. Conservatives could never expect to obtain in the Supreme Court, for example, the conservative counterpart to the liberal victory in *Romer*, a ruling that the grant of special protection to homosexuals is unconstitutional because it impermissibly infringes upon the freedom of individual choice. The most conservatives can ask from the Court is that it permit them to continue to fight for their side of an issue in the ordinary political process. *Romer* illustrates that even this is usually more than the Court is willing to grant.).

point, that anyone could reliably define such a posture—unless it means dutifully rejecting every constitutional challenge to any and all laws. But the Court is too accustomed to grand policy-making for that, and the country by and large seems to accept a free-wheeling policy role for the Court. My optimism is certainly not founded on hope that an aroused populace will march on the Court—wielding pitchforks and torches, in classic mob formation—to enforce a more conservative policy line.

My optimism is grounded simply on the perception that liberalism is already falling into so much contradiction and confusion that it is getting increasingly hard even for liberals to know what it is they are supposed to stand for. President Clinton is the worthy figure head of the new liberalism—one moment urging school uniforms for public school students, then chasing off to stop teen tobacco use and rounding off his day by vetoing a ban on partial birth abortions. I believe the moral collapse of liberalism will be liberating for the Supreme Court. And I do hope Justice Scalia is still on the Court to savor the transition to a saner course in constitutional law.