DEBATE 4

HAVE RECENT COURT HOLDINGS ENHANCED OR ERODED RELIGIOUS FREEDOM FOR ALL AMERICANS?

MODERATOR
Colin S. Diver[*]

PANELISTS
Ira C. Lupu[**]
Melissa Rogers[***]
Jesse H. Choper[+]
Steven R. Shapiro[++]

Summary:[+++]

Melissa Rogers asserts that Baptists have historically promoted freedom of religious expression on two counts: freedom from government promotion and interference with religion. Ms. Rogers states that the Court is right in limiting aid to parochial schools and that such aid should be the exception rather than the rule. She also agrees with the Court's reliance on the pervasive sectarian test, which distinguishes religiously affiliated entities that may receive government aid from "pervasively sectarian" ones that may not. Ms. Rogers notes that problems arise when a church seeks government aid but attempts to resist government regulation. The solution, she opines, is for the government to

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[*] Colin S. Diver is the Charles A. Heimbold, Jr. Professor of Law at the University of Pennsylvania School of Law. Professor Diver served as the Dean of the University Pennsylvania School of Law from 1989 to 1999. For more information on Professor Diver, visit The University of Pennsylvania Law School, *Faculty* (visited May 12, 2000) <http://www.law.upenn.edu>.

[**] Ira C. Lupu is the Louis Harkey Mayo Research Professor of Law at the George Washington School of Law. At his request, the editor has omitted Professor Lupu's presentation and any related comments from this debate.

[***] At the time of the conference, Melissa Rogers served as Associate General Counsel for the Baptist Joint Committee on Public Affairs ["BJC"]. She is currently General Counsel for the BJC. Ms. Rogers obtained her law degree from the University of Pennsylvania Law School in 1991. For more information on Ms. Rogers, visit Baptist Joint Committee on Public Affairs, *Melissa Roger's bio* (visited Mar. 27, 2000) <http://www.bjcpa.org/bios/mrbio.html>.

[+] Jesse H. Choper is the Earl Warren Professor of Public Law at Boalt Hall School of Law, University of California, Berkeley. For more information about Professor Choper, visit The Regents of the University of California, *Boalt Hall Faculty Profiles* (visited Mar. 27, 2000) <http://www.law.berkeley.edu/faculty/profiles/jhc>.

[++] Steven R. Shapiro serves as the National Legal Director of the American Civil Liberties Union, and is on the adjunct faculty of Columbia Law School.

[+++] Articles Editor Peter Thambidurai wrote this summary.

prohibit aid to what the Court has termed "pervasively sectarian" entities. Finally, Ms. Rogers states that the equality theory, in which religion is treated the same as non-religion, threatens both Establishment Clause and Free Exercise Clause values.

Professor Jesse Choper, noting that most of the decisions in religion cases are based on Justice O'Connor's swing vote, states that for the past fifteen years, the Court has consistently held that neutral aid provided to organizations, including religious ones, does not violate the Establishment Clause. Professor Choper then discusses five cases that have impacted the Court's view on religious freedom. First, in 1983 the Court held that providing tax deductions to parents for expenses incurred in sending their children to nonprofit schools, including public schools, did not violate the Constitution. Second, in 1986 the Court unanimously held that vocational assistance to the visually handicapped did not violate the Constitution. Third, in 1993 the Court held that it was constitutional for a state to provide a sign language interpreter for students in parochial schools. Fourth, in 1987 the Court held that it was constitutional for public school teachers to enter parochial schools in order to provide remedial education and job counseling. And finally, in what Professor Choper calls the most important decision, the Court held that if a university provided funds to newspapers, it could not deny such funds to newspapers that proselytized a strong religious view[1]point.

Mr. Steven Shapiro states that although recent decisions of the Court have weakened the separation of church and state, they have not yet destroyed it. In his opinion it is unlikely that the Court will uphold vouchers, because they involve the transfer of massive amounts of public funds and could lead to religious indoctrination. Mr. Shapiro highlights the tension between the principles of separation and equality, the need for religion to be free and separate from the State, and the need for all religions to be treated equally, which necessitates regulation and limits on the freedom of religion. Finally, Mr. Shapiro notes that the focus of the Court is shifting from the ultimate recipients of government aid, i.e., students, the disabled and parents, to the institutions that provide such aid.

PROFESSOR DIVER:

All right. For all of you who have been sitting here all day long waiting for the punch line, this is the punch line. This is the final session, and I am delighted to welcome you to it.

My name is Colin Diver. I am a member of the faculty of the University of Pennsylvania Law School, and until two months ago, was its dean. I am thrilled not only to be moderating this final panel, but also to have been a part of the planning of this spectacular conference about which I will have more to say later.

One of the few things I learned as dean is that you are not in control. You cannot control lawyers or faculty members, all you can do is exhort them, and if you are going to try to hold them to time limits, you better lead by example.

So, I am going to try to apply the ten-minute rule to my colleagues religiously. In order to lead by example, I am not going to say anything more than to introduce them.

The speakers will be, in order, a former student of ours here at Penn, Melissa Rogers, who is now the Associate General Counsel for the Baptist Joint Committee on Public

Affairs.[1] Second, a former student here, a former dean and eminent constitutional scholar at the Boalt Hall School of Law, Jesse Choper, the Earl Warren Professor of Public Law. And with a title like that, you had better be good. Finally, at the moment, in absentia, is Steven Shapiro, who is the National Legal Director of the American Civil Liberties Union.[2]

Unfortunately, Nadine Strossen was unable to join us this afternoon. Instead, Steven agreed to step in at the last moment. Now, of course, because he is a litigator, his beeper has gone off. But he will join us before the end of this panel. So, you will hear from him as well.

With no further ado, I turn it over to Melissa Rogers.

MS. ROGERS:

Good afternoon. I am from the Baptist Joint Committee. Inviting a Baptist to speak about the Establishment Clause[3] is risky business. One of my favorite novelists, Walker Percy,[4] described some of the Baptists he knew in the deep South as "a group of evangelistically repulsive anti-Catholics who are political opportunists advocating scientific creationism in the public school[s]."[5] So, I want to thank you especially for your invitation to be with you, knowing that some would consider it somewhat of a leap of faith for you to invite me to this gathering.

But, seriously, Baptists do have a very long history of supporting church/state separation as a means of achieving religious liberty. Now, to some extent in our early

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[1] The BJC is an organization with the goal "to protect, uphold and defend the significant and historical Baptist distinctive of a free church in a free state. Explicit commitment to religious liberty, unwavering dedication to church-state separation and determined resistance to any and all attempts to violate these principles are the committee's reasons for existence." Baptist Joint Committee on Public Affairs, *Frequently Asked Questions About the BJCPA* (visited May 11, 2000) <http://www.bjcpa.org/bjcfaq.html>. For more information about the BJC, visit its web site at Baptist Joint Committee on Public Affairs, *Securing Religious Liberty – The Baptist Joint Committee* (visited May 11, 2000) <http://www.bjcpa.org/>.

[2] The American Civil Liberties Union ["ACLU"] advocates individual rights. It "litigat[es], legislat[es], and educat[es] the public on a broad array of issues affecting individual freedom in the United States." The American Civil Liberties Union, *ACLU Briefing Paper #1, Guardian of Liberty: American Civil Liberties Union* (visited Mar. 27, 2000) <http://www.aclu.org/library/pbp1.html>.

[3] The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion[.]" U.S. CONT. amend. I. Compare the Free Exercise Clause, which provides, "Congress shall make no law . . . prohibiting the free exercise []of [religion.]" *Id.*

[4] For an online project on the works of Walker Percy, visit The Walker Percy Educational Project, Inc., *Walker Percy – Literature, Fiction, Philosophy, Existentialism, Language, Semiotics* (visited May 11, 2000) <http://metalab.unc.edu/wpercy/>.

[5] Walter B. Shurden, *How We Got That Way: Baptists on Religious Liberty and Separation of Church and State* (visited May 12, 2000) <http://www.bjcpa.org/pubs/shurden.html> (citing three of Walker Percy's novels, LOVE IN THE RUINS 22 (1971); THE SECOND COMING 218 (1980); THANATOS SYNDROME 347 (1987)). Percy has even called himself, among numerous other appellations, a "Kierkegaardian Roman Catholic." WALKER PERCY, LOST IN THE COSMOS: THE LAST SELF-HELP BOOK (1983), as posted at The Walker Percy Educational Project, Inc., *Who Is Walker Percy?* (visited May 12, 2000) <http://metalab.unc.edu/wpercy/who.html>. The BJC would probably not argue about being called anti-Catholics, as it acknowledges that the Baptist faith is the exact opposite of Catholicism. George W. Truett, *Baptists and Religious Liberty* (visited May 12, 2000) <http://www.bjcpa.org/pubs/fultruet.html>.

days, that was driven by self-interest. We were a persecuted minority at one time in this country, and we needed to protect ourselves. However, it also stemmed and continues to stem from our theology. We believe that for faith to be valid, it must be voluntary. The State should not be involved in coercing religion, advancing it, or interfering with it. So, Baptists have very staunchly supported the Establishment Clause command that the state must refrain from supporting any particular religion or religion in general.[6]

We believe that recent Supreme Court decisions have largely traced an appropriate line regarding tax funding and religious institutions. The Court has correctly, in our opinion, allowed some discrete and limited types of non-financial aid to parochial school students at the elementary and secondary level.[7] Such aid, we believe, should continue to be the narrow exemption, rather than the broad rule.

More generally, we believe that the "pervasively sectarian" test,[8] which differentiates between religiously affiliated entities that can receive tax funds and pervasively sectarian ones that cannot, has worked reasonably well to protect against the coercion of taxpayers' consciences, and also to protect against excessive entanglement between church and state.

However, looking forward, if vouchers or Charitable Choice were found by the Court to be constitutional, we believe that this would upset this delicate balance and create an environment where Americans would have much less religious freedom. To illustrate that point, I would like to take just three implementation aspects of, particularly, the Charitable Choice ideal to spin out some of the greater dangers that Charitable Choice represents.

When we were talking about Charitable Choice earlier this morning,[9] you heard some talk about equality. The Charitable Choice proponents say there should be equality in participation. But they are really espousing only a half measure of equality: equality in participation, inequality in regulation.

Charitable Choice proponents want the government money for their churches, but they do not want the churches to be regulated as other grant recipients are regulated. Now, I think history and logic counsel that rather than equal participation and unequal regulation, grant recipients, whether they are churches or not, are going to experience equal participation and equal regulation. I also think that if churches receive government grants, they generally should be subject to equal regulation.

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[6] *See* Shurden, *supra* note 5 (discussing, among other things, the history and tenets of the Baptist faith and its staunch support for the separation of church and state).

[7] *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that it was constitutionally permissible for Roman Catholic high school student to bring in his state-supported sign language interpreter under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400).

[8] Most recently, in a dissent from the denial of certiorari, Justice Thomas explained that the Court "invented the 'pervasively sectarian' test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and therefore require religion to permeate all activities." Columbia Union College v. Clark, 527 U.S. 1013 (1999) (Thomas, J., dissenting).

[9] *See Debate 3: Do School Vouchers Violate the Establishment Clause? Are They Good Public Policy?*

But all of this undermines the best rule for religion that our Constitution can articulate, and that is that religion is different and should be treated differently on the Establishment Clause side and the Free Exercise Clause.[10] Religion should be subject to special limitations under the Establishment Clause side. As *Bowen v. Kendrick*[11] teaches, churches should be ineligible to receive government grants and contracts.

On the other side, the Free Exercise side, churches should get special accommodations. A Baptist church should not have to hire a rabbi, and a synagogue should not have to hire a Baptist minister. That does not make any sense. So, when religion is treated differently, it creates this healthy separation between church and state and makes religion truly free to pursue its own agenda.

Now, the equality approach on Establishment Clause matters poses dangers for religious freedom because, for one reason, it may further entrench an equality approach that is currently applied on the Free Exercise side of the equation as a constitutional matter. Many of you know that in 1990, the Supreme Court, in *Employment Division v. Smith*,[12] embraced a version of this equality theory as the predominant rubric under the Free Exercise Clause. It ruled that as long as the law is generally applicable and neutral, then basically a religious claimant has no recourse.[13] For example, if a Jewish boy wants to wear his yarmulke to school, and there is a no-hat rule, he is out of luck because the no-hat rule was not made to target him for his religious observance. Justice Scalia, who wrote this odious opinion, happens also to be a prime proponent of this equality theory on the Establishment Clause side. So, there is some symmetry here.

Many of you who live in Washington, D.C., or participate in politics at the local level, also know that there is a powerful political trend to treat religion just like everything else. There is tremendous pressure on the government to regulate religious institutions just as they regulate other similarly situated institutions, even when the religious institution is not getting a dime of public funding. We believe that, in most cases, this is wrong and should not be the law.

But when there is this tremendous pressure to regulate groups that are not getting any public money, imagine what is going to happen when they receive public money. It will turn out that there will be equal participation and equal regulation. Fundamentally, this equality model on the Establishment Clause side may endanger religious freedom more generally by entrenching the equality model across the board in our Constitution.

A second problem of implementation with Charitable Choice is that, under Charitable Choice, all religions should be treated equally when the government passes out grants and contracts. Of course, this stems from the prohibition on any preference for religion in our Constitution. That is quite appropriate.

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[10] *See supra* note 3.

[11] Bowen v. Kendrick, 487 U.S. 589 (1988).

[12] Employment Div. v. Smith, 494 U.S. 872 (1990).

[13] *See id.* at 879 (affirming "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'") (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

But we have all heard the old saying that law making is like sausage making: you do not want to watch it happen. Well, if law making is like sausage making, then watching the appropriations process and the allocation process is like watching the creation of the most questionable, cheapest sausage in town. And Charitable Choice asks religion to enter into that process.

I grew up in the South. Unfortunately, I know that the Jewish synagogue in town or the Muslim house of worship is not the societal equal of the First Baptist Church. That is the unfortunate truth in this country, at least in parts where I grew up. So, inviting religions into this messy process will give elected officials one more opportunity to play politics with our religions.

Now, you may say we are already into this because we are funding religiously affiliated groups, and they have to run this gauntlet. Certainly there may be some danger there as well. But the danger is increased exponentially and deepened appreciably by inviting churches, synagogues, and mosques into this very political process.

We all know that there are many wounds of division in our country: racial; religious; all kinds. The government cannot heal all those divisions, but it should not be in the business of driving us further apart. Charitable Choice threatens to do this, and on this basis, as well as many others, it should be resisted.

One last aspect of Charitable Choice is an implementation problem that points to greater problems: the idea of the secular alternative. The proponents agree, as we heard this morning, that Charitable Choice simply does not work unless there will always be a readily available secular alternative. But we also know that attention has not been given to this.

The Welfare Reform Law[14] does not even require that notice be given to beneficiaries that they may choose a secular alternative. All these problems associated with Charitable Choice counsel that more work must be done. This must be more heavily scrutinized, at the very least. We should not go willy-nilly into expanding Charitable Choice to every stream of federal funding that deals with social services. These are important problems that point to very important and significant religious freedom values for us all.

So, in conclusion, I would just emphasize that the genius of our vibrant religious landscape in this country is that religion relies on voluntary contributions, rather than compulsory tax funds, for its support. We have rejected the European model, where the churches' coffers are full of public funds and too often the churches' pews are empty. We have also had remarkable religious freedom in this country because, to a large extent, religion has not been regulated. Vouchers and Charitable Choice threaten both these pillars of religious freedom. We will continue to work to ensure that courts recognize that religion is most free when the government refrains from advancing or inhibiting it, and simply leaves it alone.

(Applause.)

PROFESSOR CHOPER:

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[14] Personal Responsibility and Work Opportunity Act of 1996, P.L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of chapter 42 of the United States Code).

I would like to say that it is a treat to return to my old law school, although I would add it is not very much like it was when I was here. Who would have expected that it would change this much in just forty years. I would also like to say that it has been in good hands since I have left. I want to make special mention of the especially capable hands it has been in the last seven to eight years, the gentleman sitting to my left.

PROFESSOR DIVER:
Nine minutes left.

PROFESSOR CHOPER:
I thought the clock starts to run after the introductory remarks, especially with those.

PROFESSOR DIVER:
Fifteen minutes left.

PROFESSOR CHOPER:
I have been asked to discuss the question of how the Supreme Court will ultimately rule on the question of the constitutionality of programs of public financial assistance, particularly in the form of vouchers to all schools, including parochial schools. Although I would very much enjoy discussing the constitutional theory of the religion clauses - and maybe I will have the occasion to do so in the post-period - what I have been asked to discuss is law, at least as best one can define that term when you are talking about decisions of the United States Supreme Court.

I would say that the answer to the question of the constitutionality, which is plainly unclear and has been mentioned a number of times, I believe, in the hands of Justice Sandra Day O'Connor, turns largely on five Supreme Court decisions,[15] all in the last fifteen years. Many of these cases have been mentioned. The Court has held there is no Establishment Clause violation for governmental programs providing neutral aid that includes religious recipients.

I would like to provide somewhat greater content to these five decisions with specific references to how they bear realistically on the ultimate decision.

The first is in 1983 - it is called *Mueller v. Allen*.[16] It involved a Minnesota program of tax deductions for all parents who send their children to all nonprofit schools, which include public schools, for any costs that they have expended for the transportation costs, tuition, textbooks, instructional materials, and equipment.[17] As a constitutional violation, all costs for these materials matter. It was a decision written by then Justice Rehnquist, who is still around, which is not important.

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[15] Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

[16] Mueller v. Allen, 463 U.S. 388 (1983).

[17] *Id.* at 390 n.1.

What was the rationale? Well, I would like to mention three points, all of which bear on the question of the validity of vouchers. First, the Court held that there was no primary effect to aid religion.[18] That is under the famous *Lemon* test,[19] taken from the name of one of the parties and not as a description of its virtue. They said there was no primary effect when aid is given to all people, parents, who send their children to schools.[20]

Secondly, they said it was a grant - this aid was granted to the parents, and not to the schools. The aid, therefore, did not result in a primary effect of aiding religion, when the aid to religion that did result was the product of private choice.[21] That is not an unimportant concept, at least in terms of what the law is. Whether that makes any sense - and I do not think it does - is a different question.

The second case came in 1986, and it was entitled *Witters v. Washington Department of Services for the Blind*.[22] It involved what was entitled a vocational assistance grant to the visually handicapped.[23] The grant helped blind people train themselves for jobs.[24] It was given, in this case, to a young man who was studying at a Christian college to be a pastor, missionary, or youth director.[25] The Court unanimously upheld that, quite surprising in this area, of aid to parochial schools.[26] The rationale was the same as I have just given, and I will not repeat it here.

But there was a special emphasis by five justices, including Justice O'Connor, in two concurring opinions, who said, so long as the aid goes to all, then that bodes well for its ultimate constitutionality.[27]

What are the distinctions between *Witters* and the question of voucher programs? First of all, it involved aid to higher education. The Court has drawn a very sharp distinction between aid to higher education, and aid to elementary and secondary education.[28] A distinction that may or may not make any sense, but that is a distinction sitting out there.

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[18] *Id.* at 396.

[19] In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (internal citations omitted), the Court articulated a three-part test: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"

[20] *Id.* at 397.

[21] *Id.* at 399.

[22] Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986).

[23] *Id.* at 483 n.2.

[24] *Id.* at 483.

[25] *Id.*

[26] Witters, 474 U.S. at 488-89.

[27] *Id.* at 490-93.

Secondly, as someone else mentioned, an insignificant portion of the aid went to church-related institutions.[29] That is also been emphasized in a series of decisions. Whether that makes any sense is also subject, I think, to some question. And, third, I think Justice O'Connor has, since 1986, indicated substantial reservations about the full thrust of that particular opinion.[30]

The next case, in 1993, is called *Zobrest v. Catalina Foothills School District*.[31] The state of Arizona provided a sign language interpreter for a deaf student and included the sign language interpreter for assistance in a parochial school.[32] The Court held that that was not a violation of the Establishment Clause.[33]

First of all, the Court said, no funds reached the parochial school.[34] I do not think that can be said of voucher programs. And therefore, whether that makes any sense again, that is a distinction. The money went to a publicly employed sign language interpreter.[35] Secondly, the Court emphasized, also in an opinion by Justice Rehnquist - not that he believes in these distinctions, but that is what he said to hold a Court together. I do not mean to be critical in that respect. He said the sign language interpreter does not teach or counsel religion; he or she just interprets.[36] That is also not something that would be true in a voucher program that supported everything in a parochial school. And, third, it is worth mentioning that Justice O'Connor dissented from that decision, although not on the merits of the constitutional issue.[37]

Next, there is a case called *Agostini v. Felton*, decided in 1997, which held that public school teachers who go into parochial schools as part of a general program to provide remedial education and job counseling is not a program that violates the Establishment

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[28] *See, e.g.*, Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 738 (1976) (holding that university religious funding, as opposed to elementary, secondary funding, is less politically onerous).

[29] Witters, 474 U.S. at 487-88.

[30] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 223-26 (1997).

[31] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[32] *Id.* at 3.

[33] *Id.*

[34] *Id.* at 12.

[35] Zobrest, 509 U.S. at 12.

[36] *Id.* at 10.

[37] In her dissent, Justice O'Connor pointed out that "the Court should vacate and remand this case for consideration of the various threshold problems, statutory and regulatory, that may moot the constitutional question urged upon us by the parties." *Id.* at 24.

Clause.[38] This was a 5 to 4 decision overruling an earlier decision in 1985, written by Justice O'Connor.[39]

This is very similar to a case that they have taken up this year, which involves not remedial education and job counseling, but computers[40]; I believe the Supreme Court will hold that it does not violate the Establishment Clause when provided in a general program. Of course they say when you make these predictions, those who do the crystal ball in this area have to learn to eat glass; and I have gotten lots of cuts.

Anyway, this was a very narrow decision written in traditional Justice O'Connor fashion. She is a sort of common-law constitutional adjudicator. She said that we hold only that placing public employees in parochial schools does not inevitably aid religion.[41] She emphasized a long series of facts on the program: that it was paying for a supplement to existing services; that no money was going to the parochial school, but the money going to schoolteachers, and there was regular monitoring.[42]

So, we come to the biggest decision in this particular area, and the one that is most relied upon, and indeed has been cited by a number of people as pretty much ending the question of the constitutionality of vouchers. It is called *Rosenberger v. University of Virginia*.[43] It held that if the University of Virginia funds student newspapers, which it did, it may not refuse to fund a newspaper that strongly proselytized a Christian viewpoint.[44] It posed a conflict that is been mentioned here several times, which one must be aware of, between two basic religion clause principles.

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[38] *See* Agostini v. Felton, 521 U.S. 203 (1997).

[39] The Court overruled Aguilar v. Felton, 473 U.S. 402 (1985), stating that Aguilar was not in keeping with the Court's recent decisions. Agostini, 521 U.S. at 208-09.

[40] Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999). On June 28, 2000, the Supreme Court rendered its decision in Helms. Justice Thomas, writing for the six to three majority, held that a Louisiana state program which provides governmental funds via Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 (ESEA) in order to loan educational materials and equipment for public and private schools does not violate Establishment Clause of the First Amendment. Mitchell v. Helms, 2000 WL 826256, *12 (June 28, 2000). In doing so, the court effectively overruled both Meek v. Pittenger, 421 U.S. 349 (1975) (holding a Pennsylvania state program allowing loans of educational materials directly to nonpublic elementary and secondary schools, including church-related institutions, was unconstitutional as contributing to impermissible establishment of religion) and Wolman v. Walter, 433 U.S. 229 (1977) (holding an Ohio state program providing instructional equipment and transportation for field trips directly to nonpublic elementary and secondary schools, including church-related institutions, was unconstitutional as contributing to impermissible establishment of religion.). Mitchell v. Helms, 2000 WL 826256, *12. Chief Justice Rehnquist and Justices Scalia and Kennedy joined in Thomas' decision. Id. at *7. Justice O'Connor filed a concurrence, in which Justice Breyer joined. *Id*. at *28. Justice Souter filed a dissent, in which Justices Stevens and Ginsburg joined. *Id*. at *46.

[41] Agostini, 521 U.S. at 223.

[42] *Id.*

[43] *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995).

[44] *Id.* at 834-35.

First, the government may not fund religious activities. Second, the government must be neutral between religion and non-religion. And neutrality won in this case 5 to 4. The Court held that the First Amendment's Free Speech Clause was violated by viewpoint discrimination, giving it to some newspapers but not others depending upon the viewpoint that they articulated.[45] The Court said the fact that the Establishment Clause, which plainly was at play here because this aided religion, was no bar to aid provided pursuant to a neutral program.[46]

That has very broad implications so far as upholding a voucher system is concerned. Even apart from the fact that it involved higher education, it paid for specific religious proselytization. It was upheld because it was part of a neutral program.[47] But having said that, it was a very narrow opinion.

Lastly, just as Justice Kennedy said, these payments are not made to the religious institutions.[48] They go to the printer, and therefore - well, you know, as Justice Jackson once said about the Supreme Court, he said, we are not final or, "We are not final because we are infallible," he said; "we are infallible because we are final."[49]

Second, Justice Kennedy said - and this I thought is a point of more substance - the payments are not just for a religious institution, but they are for a newspaper.[50] I think quite accurately, he said, if the University of Virginia were not to give money for religious newspapers, you would have to have some bureaucrat there at the University going through all the newspapers to determine whether they had religious content or not, and that smacked of classic censorship.[51] The important part of that is that the decision, therefore, is limited only to newspapers.

Finally, I want to say that Justice O'Connor wrote a separate opinion.[52] And that is not unimportant, because she is one of the five that you need in order to get funds from student activities' fees.[53] She said, that being the case, those who object may well have a constitutional right to get their money back.[54] Well, that does not apply to your ordinary tax program for vouchers.

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[45] *Id.* at 829-31.

[46] *Id.* at 842-43.

[47] Rosenberger, 515 U.S. at 840.

[48] *Id.* at 843-44.

[49] Brown v. Allen, 344 U.S. 443, 540 (1953) (Black, J., dissenting) (advising, "We are not final because we are infallible, but we are infallible only because we are final.").

[50] Rosenberger, 515 U.S. at 844.

[51] *Id.* at 844-45.

[52] *Id.* at 846 (O'Connor, J., concurring).

[53] *Id.* at 847.

So in eleven minutes, I guess. I thank you for the concession. That is where the action is. I do not think anybody knows how the Court is going to come out, including Justice O'Connor.

(Applause.)

MR. SHAPIRO:

I am a quick learner. I am going to begin by complimenting Professor Diver as well, so I will get eleven minutes also. Actually, I am very conscious of the fact that I am the final speaker on a long, albeit productive, day, so I will try to be short.

Professor Choper has, as thoroughly as one can in ten minutes, canvassed the Supreme Court's recent decisions on the Establishment Clause. I have been asked what I think those decisions mean for the Establishment Clause in general and what I think they mean for vouchers and Charitable Choice in particular. It is probably fair to say that those decisions cumulatively have weakened the mortar of the wall of separation between church and state, but I do not think they have crumbled the wall by a long shot. They provide some suggestions of where the Supreme Court may be heading, but that they do not come close to answering the final question. If there is anything on which all the speakers today agree, it is that the Supreme Court will be closely divided when it finally confronts the constitutional questions presented by Charitable Choice and/or vouchers, and that Justice O'Connor's views on the subject will be critical.

In attempting to predict which way the Supreme Court will go, it is important to recognize that there are significant differences between the Supreme Court's recent Establishment Clause decisions and the voucher case. And, again, some of these differences were just described by Professor Choper.

Let me just focus for one moment on *Agostini v. Felton*, which was decided two years ago.[55] The question in *Agostini* was whether public school teachers could enter the parochial schools to provide remedial education to parochial school students.[56] The Supreme Court said, "Yes."[57]

But as Professor Choper quite correctly pointed out, Justice O'Connor added two important caveats. First, in *Agostini*, there was no transfer of money from the public fisc to the treasury of any parochial school;[58] second, there was no plausible reason to believe that those public school teachers, once they entered parochial school, would engage in religious indoctrination.[59] Neither of those things is true in the voucher programs, at least as most commonly discussed now.

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[54] Justice O'Connor noted that a student could bring a challenge under the Free Speech Clause, arguing that the student fee forced the student to pay for opinions and ideas that the student found offensive. Rosenberger, 515 U.S. at 851.

[55] *See* Agostini v. Felton, 521 U.S. 203 (1997).

[56] *Id.* at 208.

[57] *Id.* at 224-35.

[58] *Id.* at 228.

[59] Agostini, 521 U.S. at 226.

To the contrary, there is going to be a significant transfer of dollars from public schools to private schools, including private parochial schools, and that money is going to be available for the purposes of religious indoctrination. So, the fact that the Supreme Court upheld the program in *Agostini*, given all of its caveats, does not by a long shot say that the Supreme Court is prepared to uphold vouchers.

Indeed, what is striking about the string of decisions from *Zobrest* to *Witters* to *Mueller* to *Agostini*, is that none of those cases involved the sort of massive public aid for parochial schools that would be entailed in a voucher program.

For that reason, I do not think the Supreme Court could uphold a voucher program without fundamentally rewriting the Establishment Clause law as we have known it for the last fifty years. Now, there was talk this morning, and I think it is correct to say, that part of this debate is between the people who say the critical principle under the Establishment Clause is equality, sometimes described as neutrality, on the one hand, and those who say separation is the critical issue, on the other hand.

Let me just say a couple of quick things about the equality principle. First, when you talk about equality, you have to ask yourself, equality between whom? What are the similarly situated groups here? Part of what is going on in this debate is, I think, that the comparison groups have changed. The way we used to think about equality in a religious context was to say that the government could not deny a benefit - welfare benefits, drug treatment programs, alcohol treatment programs, public education - the government could not deprive or deny a benefit to any individual because of that individual's religious views. That would be a violation of the equality principle that is embodied in the religion clauses through the Free Exercise Clause. That is the way we used to think of the equality question in terms of church/state separation.

Now the nature of the debate has changed. The focus is no longer on the individual beneficiaries of the program, but on those who are actually going to be providing the benefit. Thus, the argument goes, it violates the equality principle to deny voucher payments to religiously affiliated schools if the state is otherwise funding secular education. At the very least, that

More importantly, such a broad formulation of the equality principle cannot possibly be right. The reason it cannot possibly be right without completely rethinking the way we have conceived of church-state law, is that if it were true that every time the government provided a service through its own agencies, it would have to provide an equal amount of money to churches to provide an equivalent service, then we would not have to go through this entire sham of vouchers.

All the government would have to do is provide direct funding from the state legislature to the parochial schools, paying them precisely the same per-child tuition payment that the state legislature now pays to the public schools. Yet, there are very few people out there who think the Constitution would permit that. If the Constitution would not permit such direct programs, then it cannot be that equality is the sole governing rule.

The second thing to be said about equality is that if the equality principle, as some people have described it, is correct, then not only is the government entitled to provide public dollars for parochial school education - the government ought to be required to do it, as Professor Chemerinsky said.[60] Because if the government does not do it, the denial of that funding would itself be a constitutional violation.

That has not been the way the courts have seen it in the three cases (that I know of) in the last half-dozen years where that precise question has been posed where various state and local governments have created voucher systems, or the equivalent of voucher systems, that provided money for private secular schools, but not private sectarian schools.[61]

In each case, the parochial schools have gone to court and said it is a violation of equal protection and of our right to practice our religion to deny us participation in this program.[62] Each one of those cases has lost, and the Supreme Court has denied certiorari.[63] So the notion that equality is the sine qua non of the religion clause, I think, cannot be correct.

Now, let me just talk for one second about what is going on this year. There is a very important case, again Professor Choper referred to it, that the Supreme Court has taken this year. It comes out of Louisiana: *Mitchell v. Helms.*[64]

The question in *Mitchell v. Helms* is this one: can the state use public funds to provide computers and other equipment - but principally people are now talking about computers - to parochial schools, as well as to public schools, that are educating underprivileged children?[65] Can you use public money under those circumstances? Public, private, parochial, nonparochial? The lower court said you could not. The lower court said it was a violation of the Establishment Clause.[66] The Supreme Court has now agreed to hear it.[67]

If the Supreme Court winds up upholding the program, and reverse the lower court, it will not be because *Agostini* compels that result. The fundamental difference between the computer and the teacher - and this is why it has relevance for vouchers – was articulated by Justice O'Connor when she said that we can trust the public school teacher not to go into that parochial school and teach religion. Once you hand over the computer, it can be used to do all sorts of things, many of which can very deliberately and consciously advance the religious mission of the parochial school.

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[60] *See generally Debate 2: Should the Government Provide Financial Support for Religious Institutions That Offer Faith-Based Social Services?*

[61] Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999); Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (Vt. 1999), *cert. denied sub nom.* Andrews v. Department of Educ., 120 S. Ct. 626 (1999); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

[62] *Id.*

[63] *Id.*

[64] *See* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999); *see also supra* note 40.

[65] Helms v. Picard, 151 F.3d at 350; *see also supra* note 40.

[66] *See* Helms v. Cody, No. 85-5533, 1990 U.S. Dist. LEXIS 3387 (E.D. La. Mar. 27, 1990) (granting plaintiff's motion for summary judgment).

[67] Mitchell v. Helms, 119 S. Ct. 2336 (1999).

And so the question is, when you give resources that can be diverted from a secular mission, to a religious mission, do you cross an Establishment Clause line? That is the question that the Supreme Court is going to be deciding this year in *Mitchell v. Helms*. Thank you.

(Applause.)

PROFESSOR DIVER:

Thank you. This was not a panel characterized by sharp debate, but it certainly was, I think, illuminating and raised a lot of issues. It also brought us back to a lot of things that have been discussed earlier in the day.

So let me, instead of following the format of giving panelists an opportunity to either rebut or ask questions, throw it open to the audience for the last half hour or so of the program. This will give people a chance to ask questions. Please keep them brief. Thank you.

AUDIENCE MEMBER:

Can you say a few words with respect to the recent Supreme Court developments in the area of the Free Exercise Clause and on Congress' attempting to modify recent decisions with a Freedom of Religion Act?[68]

PROFESSOR DIVER:

A what?

AUDIENCE MEMBER:

A Freedom of Religion Act.

PROFESSOR DIVER:

A Freedom of Religion Act. Oh, tough question. Jesse can handle it, I am sure.

PROFESSOR CHOPER:

Well, I mean, it can be handled quickly.

The Supreme Court has held that the old rule which required exemptions for religion from general, burdensome government regulations - that is the so-called *Sherbert-Yoder* Rule[69] - is not the rule anymore. So long as it is a neutral rule, then religion is going to have to find its exemption in the political process, and not in the Supreme Court. That is

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[68] *See* Religious Freedom Restoration Act of 1993, 5 U.S.C. § 504 (1993); 42 U.S.C. §§ 1988, 2000bb – 2000bb-4 (1993).

[69] The rule derives from Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). Under the Sherbert-Yoder test, a person's right to free exercise of religion may be substantially burdened only if the law furthers a compelling state interest and uses the least restrictive means to accomplish that interest. *See* Young v. Crystal Evangelical Church, 141 F.3d 854, 858 (8th Cir. 1998) (applying the Religious Freedom Restoration Act to uphold a debtor's tithe to his church as non-dischargeable debt).

the peyote case, the Oregon case.[70] The Religious Freedom Restoration Act was a reaction to that; it sought to overturn the Supreme Court's decision and reinstate the old rule.[71]

In *City of Boerne v. Flores*,[72] the Supreme Court held that Congress had no power under section five of the Fourteenth Amendment to implement such a rule.[73] So that is where we are today. The Supreme Court threw the ball. I do not know if they threw the ball back to Congress, but Congress took the ball again. Congress has created another statute to use other sources of power in order to achieve this.[74] I think there is a fair chance, but it is by no means clear, that they can carry it off. But I do not think it is a totally futile exercise.

MR. SHAPIRO:

Let me just add one little footnote to that. Even after *Employment Division v. Smith*,[75] where the Court said that religion must generally obey neutral rules,[76] the Court said in another case out of Florida involving adherents of the Santeria religion, that the government cannot pass rules that are deliberately targeted against a particular religion and designed to discriminate that against religion.[77] So that still remains a constitutional no-no.

MS. ROGERS:

The Religious Liberty Protection Act[78] is the piece of legislation that is currently pending in Congress. It was passed by the House this summer,[79] and it is in the Senate, and may be up for a vote by the end of the year. But I just mention it specifically to say, it has faced tremendous political opposition. I think part of that opposition comes from this movement that asks, why should religion be treated any differently from anything else? Why should it be entitled to special protection under the Free Exercise Clause? So, that it is an important marker to watch. Of course, we are in the legislative arena in that area, and not the judicial one.

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[70] *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

[71] Young v. Crystal Evangelical Church, 141 F.3d at 857-58.

[72] City of Boerne v. Flores, 521 U.S. 507 (1997).

[73] *Id.* at 511.

[74] *See infra* note 78.

[75] Employment Div. v. Smith, 494 U.S. 872 (1990).

[76] *Id.* at 878.

[77] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 522 (1993).

[78] Religious Liberty Protection Act of 1998, S.2148, 105th Cong. (1998); H.R. 4091, 105th Cong. (1998); H.R. 1691, 106th Cong. (1999).

[79] H.R. 1691, 106th Cong. (1999).

PROFESSOR DIVER:
Other questions?

AUDIENCE MEMBER:
The Maine case, I think it was the Maine case, where the Maine Supreme Court said we are not going to give public money to a parochial school, that was sort of a throw-away line.[80] I wonder if you all might want to expand on that and its relevance to the voucher matter.

MR. SHAPIRO:
Well, there had been three cases that I know of where that issue has been litigated. Maine is one. It was not a throw-away line in Maine. There were two decisions out of Maine, one out of the state-court system[81] and one out of the federal-court system.[82] Both centered on the question of whether the state could provide money for students to attend private secular schools, but not private sectarian schools. The Maine Supreme Court said there was no requirement that the state provide money for parochial schools in addition to other private schools.[83] That was the question that the plaintiffs sought certiorari from the Supreme Court. And the Supreme Court two or three weeks ago just turned that down.[84]

The same thing happened in Milwaukee. Before the program in Milwaukee was expanded to include parochial schools, the original program only provided vouchers for private nonsectarian schools.[85] Again, there was a lawsuit in federal court seeking to expand it to include parochial schools.[86] The federal district court said no. The case never went any further than that because legislatively the program was amended to expand it.[87]

The final place where that has happened is in Vermont. There was just a decision from the Vermont Supreme Court this summer, same results, saying that there is no constitutional requirement to include parochial schools.[88] The plaintiffs in that case have

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[80] Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 130 (Me.), *cert. denied*, 120 S. Ct. 364 (1999).

[81] *Id*.

[82] Strout v. Albanese, 178 F.3d 51 (1st Cir. 1999).

[83] Bagley, 728 A.2d at 135.

[84] The Court denied certiorari on October 12, 1999. Bagley v. Raymond Sch. Dep't, 120 S. Ct. 364 (1999).

[85] *See* WIS. STAT. § 119.23(2)(a)(1)-(2) (1993).

[86] The Milwaukee case seeking to extend the voucher program to parochial schools was actually brought in state court and appealed to the Wisconsin Supreme Court. The United States Supreme Court subsequently denied certiorari. *See* Jackson v. Benson, 578 N.W.2d 602, 607-08 (Wis.), *motion withdrawn*, 588 N.W.2d 635 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

[87] *See* WIS. STAT. § 119.23(2)(a)(1)-(2) (1999).

just filed a certiorari petition with the Supreme Court that was subsequently denied.[89] So, we will see what the Supreme Court says about that.

But that is the landscape as I know it.

PROFESSOR DIVER:

Yes? Further questions?

AUDIENCE MEMBER:

Would anyone on the panel want to comment on this issue: whether the Religious Liberty Protection Act[90] privileges those people who define their philosophies in life to theological prayer, as opposed to people who have equally strong commitments, but do not define them in theological terms?

PROFESSOR CHOPER:

Well, I do not think the statute addresses that question, of course. It is a question as to what is a religion, and it is a question the Supreme Court has not answered as of yet. The Supreme Court has either finessed it by finding some other ground for its decision, particularly in the draft exemption cases, or it has simply declined to review any case that raises that.

Probably the most famous was a man named Timothy Leary.[91] There are a few people here who are probably old enough to remember him. When he was prosecuted for possession and distribution of LSD, he, you might say he found religion.[92] He said that he did this pursuant to his religion, which was the League for Spiritual Discovery. The Fifth Circuit - you figured that out, the League for Spiritual Discovery - rejected the claims,[93] and the Supreme Court denied certiorari.[94]

There are other cases, marijuana cases, which involved the same sort of issue.[95] So, the answer is nobody knows what the Court is going to do. It is perfectly clear that if you

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[88] Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (Vt.), *cert. denied sub nom.* Andrews v. Vermont Dep't of Educ., 120 S. Ct. 626 (1999).

[89] *Id.*

[90] *See supra* note 78.

[91] For a brief biography on Timothy Leary, see Joe Hughes, *Tune In, Turn On, Drop Out: Timothy Leary and the Psychedelic Revolution* (last modified Jun. 3, 1995) <http://www.andrew.cmu.edu/user/hughes/words/misc/leary.html#Early>.

[92] Dr. Leary was actually convicted of trafficking marijuana and failing to pay taxes on the controlled substance. Leary v. United States, 383 F.2d 851, 855 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

[93] The Fifth Circuit affirmed the decision of the district court. Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *reh'g denied*, 392 F.2d 220 (5th Cir. 1968) (en banc).

[94] Actually, the Supreme Court granted certiorari and reversed Leary's conviction on the basis of his Fifth Amendment right against self-incrimination. Leary, 395 U.S. at 11.

singled out some religions over others for benefits, it would be unconstitutional. That is the Florida case.[96] But what a religion is - you know, the Court has only been around for 200 years. Give them time.

PROFESSOR DIVER:
In the far back, yes.

AUDIENCE MEMBER:
Does the Establishment Clause limit foreign policy? What I am thinking about are two possible extreme examples. One, is the United States choosing to punish a sovereign, for example China, which takes a very anti-religion point of view, and its policy that the United States may choose to punish it by withholding funding, versus supporting a nation that is primarily religion based, for instance Israel, in its establishment? Does the Establishment Clause limit the United States' interaction in either of those directions?

PROFESSOR DIVER:
Apparently not. But for a scholarly response . . .

MS. ROGERS:
Not necessarily. But the values that our country has espoused, one of them being religious freedom, has spawned some recent legislation, the International Religious Freedom Act.[97] Part of that structure established a commission that would work with the State Department in terms of looking at countries and their records on religious freedom.[98] It has a whole intricate mechanism whereby recommendations may be made to the President to sanction other countries for their persecution of people based on their religion.

There have been some recent news articles about a report coming out of that commission and its discussion of China and some other countries that have had poor records on religious freedom.

Rabbi David Saperstein is the Chair of that commission.[99] He is with the Union of American Hebrew Congregations.[100] Congress as well as the President appointed

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[95] *See* United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) (affirming conviction for marijuana possession where defendant claimed violation of his religious practice as reverend and founder of the Church of Marijuana); United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996) (vacating and remanding convictions for marijuana possession to allow defendants to prove they were Rastafarians and possessed marijuana for religious purposes).

[96] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[97] International Religious Freedom Act of 1998, 22 U.S.C. §6401 (1998). To view the text of the Act online, visit Anti-Defamation League, *International Religious Freedom Act of 1998* (visited Apr. 2, 2000)<http://www.adl.org/legislative%5Faction/laws/internationalreligiousfredomact.html>.

[98] *Id.*

[99] *See supra Debate 1: The Role of Religious Institutions in Providing Social Services and Education in Neglected Communities; Reports From the Field.*

members to the commission. That commission is currently at work, and they are looking at these issues very carefully.

MR. SHAPIRO:

There is also some law out there - although this is a slightly different question from the one you were asking - that says federal dollars cannot be given to United States agencies to be used to operate parochial schools abroad.[101] AID[102] was giving money to agencies that were then operating parochial schools in other countries, and that was struck down by the Second Circuit.[103]

PROFESSOR CHOPER:

I do not think it is clear at all that the Establishment Clause does not apply to exercises of governmental power in respect to foreign policy. The situations that you put, contrasting the People's Republic of China with Israel: could you demonstrate, which would be impossible, that the motive of Congress - unless they are willing to say it, which they would not be, even if it were true - was to punish China because they are anti-theological and to benefit Israel because they are a religious country, a religious-based country? If you could prove that, you would be in pretty good shape.

I want to say there was a case called *Miller v. Albright*[104] in the Supreme Court, a couple of years ago, which went a long way towards saying that certain kinds of domestic, prohibited discrimination applied to immigration policy.[105] That was quite a case. So, I would not at all be confident that either the Equal Protection Clause[106] or the religion clauses do not apply as restrictions on government with respect to foreign policy.

AUDIENCE MEMBER:

The case that is being litigated in Cincinnati, looking at the issue over closing schools on Jewish holidays.[107] Do you see that as the beginning of a national trend as an issue that is going to be targeted or is this a run-off issue?

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[100] The Synagogue of the Reform Movement in North America provides leadership on spiritual, ethical, and political issues to help create and sustain Reform Congregations. *Union of American Hebrew Congregations* (visited Feb. 29, 2000) <http://www.shamash.org/reform/vahc/>.

[101] Foreign Assistance Act of 1961, 22 U.S.C. § 2151 (1988).

[102] The Agency for International Development administers the American Schools and Hospitals Abroad program. *See id.*

[103] Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991).

[104] *See* Miller v. Albright, 523 U.S. 420 (1998).

[105] *Id.* at 435.

[106] The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[107] *See Canceling Classes* (visited on Mar. 20, 2000) <http://www.towardtradition.org/press/cincinnatti.htm>.

MR. SHAPIRO:

I honestly do not know the answer to that question. But let me just say something about the case, as I understand it. That is, the objection is not to closing the public schools on the Jewish holidays, if in fact there was going to be significant absenteeism from the schools; it was creating a special rule that applied only to the Jewish holidays. I gather there was not enough absenteeism to meet the threshold that the school district had otherwise established.

So, just to use numbers - and I am making these numbers up - suppose the school district had a rule that said, if 20% of the students and/or faculty are expected to be absent, we will close the schools, and only 10% were expected to be absent for the Jewish holidays. They nonetheless redrafted the rule to be able to close it for the Jewish holidays. So the argument was that was a special preference that was not being given to other religions that were also below the threshold level, and that was the basis for the lawsuit. Whether it is a unique Cincinnati phenomenon or a broader phenomenon, I honestly do not know the answer to that.

AUDIENCE MEMBER:

Almost a year ago Ronald Morgan Dworkin spoke in this room, and gave the Owen Roberts annual lecture. Mr. Morgan Dworkin, for those of you who do not know, is a University Professor at Oxford. One of the interests that he had expressed in a book, not so much in what he spoke about here, entitled LIFE'S DOMINION,[108] was the ethics involved in biomedical decision-making about abortion.

One thing that occurs to me, and I throw the question out to all of you, what do you see, what do you perceive, as the ethics of the tension between religious freedom and establishment in this country? Are those the only ethics? Are there other ethics?

PROFESSOR CHOPER:

I am not sure that the tension is a question of ethics. I think the tension between those two clauses, and it is certainly there, is in trying to make sense of the extent to which the Court ought to take a strong role in defining how that tension should be resolved.

In contrast, there are others who would say, and I think in truth, a majority of the Supreme Court goes in that direction, or at least the four whom we call conservatives[109] on the Supreme Court, are much more willing to defer to the political process, both the national government or particularly state legislatures. They have been given a lot of room to say, well, a little bit of this is all right, a little bit of that is all right.

Most of the decisions of this conservative majority in respect to the Establishment Clause that we have been talking about today - and I think it is important to note that - have been decisions which have upheld the judgment of the political process. So, you can talk about a philosophy of neutrality, you can talk about a philosophy of deference to the majority, or you can talk about the dominant religions in the country. But what you

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[108] RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

[109] *See* Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L.J. 1, 21 (1997).

can also talk about is judicial restraint, the refusal to declare these laws unconstitutional. That encompasses the Free Exercise Clause and the Establishment Clause. It is an important factor to look at when you are trying to determine what the Court is going to do.

In most of these cases involving certiorari, the Court took cases in which the lower courts held the program unconstitutional. The Court has denied certiorari in which the lower court upheld the state legislative program including the question of extending state aid to parochial school programs.[110] This includes private nonsectarian schools, excluding sectarian schools. The Court defers to the political process in all of these cases.

I think that is powerful. It happens to coincide in many ways with the basic ideological views of the conservative block. It coincides with that and the notion of judicial restraint in respect to this area.

AUDIENCE MEMBER:

Have any courts passed on the validity of the G.I. Bill of Rights? As I understand, some of these young men and former soldiers have used the money to become priests, rabbis, and pastors. It seems hard to imagine for substantive infusion of government money, somebody taking government money to become a man of the cloth. How would you distinguish the decision involving the G.I. Bill of Rights from the vouchers issue?

MR. SHAPIRO:

I think Elliot Mincberg on the last panel from People for the American Way,[111] gave the classic explanation for the distinction. It is the difference between universities, on the one hand, and elementary and secondary schools, on the other hand.

The Court has always been more concerned about the union between church and state with younger children than when dealing with older children. Secondly, the G.I. bill is like the vocational scholarship in *Witters*, which a blind student used to go to divinity school.[112] The Court was persuaded, for better or for worse, that only a very small percentage of the actual dollars were going to be used for those religious purposes and saw some meaning in that distinction. There has been no Supreme Court litigation about the constitutionality of the G.I. Bill. Finally, the G.I. Bill has also been described as a form of deferred compensation for veterans.

I think that one of the other things that there would be complete consensus on, not only within this panel, but if you ask federal judges around the country, is that it is sometimes a hopeless task to look for consistency in these Establishment Clause decisions, because the Court has simply not been consistent. There is too much tension between the various principles. They have gone back and forth. They have not quite come up with a rule that fits all situations. As lawyers you are trained to try to reconcile

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[110] *See* cases cited *supra* note 61.

[111] *See supra Debate 3: Do School Vouchers Violate the Establishment Clause? Are They Good Public Policy?*

[112] *See* Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986).

everything. But, truth be told, there are just some issues out there that I think are irreconcilable in this area.

AUDIENCE MEMBER:
I take it the ACLU would oppose the practice? Soldiers taking the money to go to . . .

PROFESSOR DIVER:
Would the ACLU oppose it?

MR. SHAPIRO:
The ACLU took the position in *Witters*, where we did file, that public money should not be used to fund education at a divinity school.[113] I think there is a point, whether that decision is right or wrong, in which differences in quantity become differences in quality. There is a very big difference between a multi-million dollar scholarship program in which a relatively few pennies are going to be used to fund religious education by a few isolated individuals versus a massive public funding program which is primarily designed and used to fund parochial school instruction. Those two seem to me to be different things in the real world.

PROFESSOR CHOPER:
It is a very powerful statement by an advocate, but there is no difference in principle. I agree with you. And I have said so in print. I said the *Witters* case, and the G.I. Bill as applied to religious training, namely the use of compulsorily raised tax funds for those purposes, is unconstitutional in my opinion.[114]

PROFESSOR DIVER:
I have a question regarding the source of funding.
To pick up on your last point, Jesse, a number of speakers spoke about the constitutional offense of compulsorily raised tax funding. Why is that the constitutional touchtone, rather than the simple fact that the government, taking funds from whatever source, is using kind of public-sponsored giving public sponsorship to this? I suppose the way to test that theory is to suppose that Bill Gates or some very wealthy multi-billionaire gave his city or state government money to use for a voucher program. Or suppose that the state said that we are going to take only the money we get from gambling revenues or from sale of services and use it for vouchers. Would that really make any difference constitutionally speaking?

PROFESSOR CHOPER:
Well, I think there is a difference between gambling revenue and donation. The government taxes that, and merely gets money from Bill Gates. If you get money from

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[113] The ACLU filed an amicus curiae brief urging the Court to affirm the denial by the Washington State Commission for the Blind to provide financial assistance to a blind student at a Christian college. *Id.* at 482.

[114] *See* JESSE H. CHOPER, UNTHINKING RELIGIOUS FREEDOM SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGIOUS CLAUSES (1995).

Bill Gates, and you hand it over in the way that government asked, there is an issue of state action.

In the race area, in the famous case decided from this city, *In Re Girard College*,[115] the Court held that the City of Philadelphia could not administer a racially segregatory school system because it was unconstitutional. The Pennsylvania Supreme Court said the City's actions constituted state action.[116] Whether that is transportable to the Bill Gates case discussed above is another question.

MS. ROGERS:

Part of the problem with compulsory tax funds is found in our history in terms of debate over the Virginia Assessment Bill[117] and James Madison's Memorial and Remonstrance.[118] Madison warned that not even three pence of the compulsory money that would go into the public fisc should then be turned around to religion. Of course, Charitable Choice and vouchers have marked differences from that Virginia Assessment.

But many of the arguments that Madison made quite forcefully in that Memorial and Remonstrance still apply, even when talking about Charitable Choice and vouchers. We are concerned about using tax money in a way that creates a dependency of the church on the government and causes churches to lose some of their prophetic voice, because they do not want to bite the hand that feeds them. The genius and freedom that an entity has when it operates solely from funds given by its members who believe its mission may be lost when tax fund are introduced.

PROFESSOR DIVER:

One or two more questions, and then let us wrap it up. George.

AUDIENCE MEMBER:

I would like to quibble with the notion that there is going to be this massive transfer from the public schools to the parochial and private schools. Actually, the transfer is from the public school budget to the parents. That is a distinction with little difference. That is a serious difference here.

In terms of compulsory funding, I do not know a single person in Philadelphia that does not contribute in some way, shape, or form, to the public school assessment that is against us. The public schools here are at ground zero. In terms of the educational services they provide, with about six exceptions, you are talking about Hiroshima after the bomb dropped. It is very difficult for any resident of the city, if they had an option, to talk themselves into sending their kids to the public schools. These schools are not safe;

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[115] In re Girard College Trusteeship, 138 A.2d 844, 868 (Pa.) (granting make-whole relief to plaintiff upon finding of Fourteenth Amendment violation), *appeal dismissed and cert. denied sub nom.* Commonwealth of Pa. v. Board of Directors of City Trusts of Philadelphia, 357 U.S. 570 (1958).

[116] *Id.*

[117] *See generally* Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947).

[118] *Memorial And Remonstrance Against Religious Assessments*, II WRITINGS OF J. MADISON, 1836 (1975).

they do not educate; the peer culture is out of control; and there are a whole lot of other problems.

So what you are doing, in the higher education field, is saying that we can use the G.I. Bill to go to seminary because you are an adult now, and you can make responsible decisions about your education, including the religious component of your education. In this distinction that takes you down to the secondary schools and the primary schools, why can the parents not step in? Whatever happened to the parental right to guide the child into the correct school, even a religious school? And then there is the transfer.

I believe, along with Professor Choper, that there is no distinction between an elementary school and a college when it comes to using a state subsidy for the person who wants to send it there. I also believe that there is no difference between a little bit of support and a lot of support. That is like being a little bit pregnant.

MR. SHAPIRO:

Okay. Let me say two things. The distinction between elementary and secondary schools on the one hand, and universities on the other hand, was not a distinction I was advocating. It was a description of the distinction the Supreme Court has itself adopted,[119] number one.

Number two, parents - this gets back to the same issue that has been repeated over and over again today - of course have the right to send their children to whatever school they want, including parochial schools. It is a different issue from whether the government should pay for it.

When the government gives a voucher, it is also very different from when the government, for example, gives you a tax refund. Because when the government gives you a tax refund, it sends you a check, and you can use that money for whatever you want. You can use it to buy groceries, you can use it to go to the Phillies game, or you can use it to pay for the parochial school tuition of your child. That is fine. That is appropriate, and that is the parents' choice.

When the state gives you a voucher, it writes out a check to you - in most situations it writes out a check to you - with the requirement that it must be endorsed over to the school and can only be used to pay for parochial school tuition. Once the state does that, the fact that the money is passing through your hands momentarily before you turn it over to the only person you can turn it over to is a relatively meaningless formality.

The state could just as easily, it seems to me, eliminate that middle step and send the check directly from the state treasury to the parochial school and fund parochial schools on the same basis as it funds the public schools. If you are going to accept vouchers or advocate for vouchers on an equality principle, you have to be prepared to say that the Constitution would permit the state to directly fund parochial schools without passing through the parents as middlemen. I do not think the Constitution permits that.

PROFESSOR DIVER:

One more question. Yes.

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[119] *See* Roemer v. Public Works of Md., 426 U.S. 736, 738 (1976) (holding that university religious funding, as opposed to elementary, secondary funding, is less politically onerous).

AUDIENCE MEMBER:

The idea of school choice is an accommodation of an individual's religious liberty. There are people in this country who hold the belief that religion is the most important thing in the world. Whether their child learns math or does not might be important, but it is not nearly as important as whether they learn about God. When the government says to them - and that is what compulsory education is - that they must send their children to school, the government should accommodate those individuals by giving them a choice to educate their children.

I agree with compulsory education. It is necessary. But should the government not accommodate a parent by saying that if you choose to raise your child in a religious setting, especially for poor people, that we are going to give you an opportunity for a voucher? Otherwise, all you have is religious liberty for people who can afford it.

There are probably devout Baptists in this city who have to send their children to the public school system that has values very much contradictory to their own, and they cannot afford to do anything but send their children to public schools or they will go to jail. What is your response to that?

MR. SHAPIRO:

Twenty years ago, a group of poor women went to the United States Supreme Court and said that Medicare ought to fund abortion on the same basis that it funds childbirth, because otherwise the government would be using its financing to force women into a decision that they may not agree with but will have to live with the rest of their lives.[120] The Supreme Court said that is not what the Constitution guarantees.[121] It does not guarantee the government will pay for the exercise of your constitutional rights. It guarantees only that the government will not interfere with that constitutional right.[122]

AUDIENCE MEMBER:

I am not talking about its constitutional imperative to pay for your right. I am saying that the government can choose to do it to accommodate religion. In other words, the government does not have to give vouchers. But why can the government not issue vouchers, recognizing the fact that they are infringing upon people's religious beliefs?

MR. SHAPIRO:

I guess my short answer, because time is running out, is to say, "See above," as we lawyers say in briefs. Because that is what we have been talking about for the last six hours. There are some of us who believe it violates the Establishment Clause for the government to do that.

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[120] *See generally* Harris v. McRae, 432 U.S. 464 (1980) (upholding federal statute denying public funding for certain medically necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding Connecticut law that prohibited Medicaid reimbursement for medically unnecessary abortions); Singleton v. Wulff, 428 U.S. 106 (1976) (holding that doctors have standing to bring suit for Medicare reimbursement for abortions on behalf of their poor patients).

[121] *See id.*

[122] *See id.*

AUDIENCE MEMBER:

One last thing. When you take my tax dollars and tell me I have to send my child to school, it might offend you or someone else that I might want to raise my child in a particular religion, but what about the idea of people that cannot raise their child that way? I do not think we are being consistent.

PROFESSOR DIVER:

Well, consistency is, after all, the hobgoblin of big minds and small minds.[123] But it is not something we have been able to achieve, I am sorry to say. However, what we have been able to achieve is a terrific discussion all day long, particularly this afternoon's panel. Let me start, if you would just pause for a moment, by asking you to join me in thanking this afternoon's panelists.

(Applause.)

I would like to make a few concluding remarks. I will promise to keep them brief, if only because I do not know anything about this subject. I am, after all, an Anglican, and we lost the battle 200 years ago. And just to show you what it costs to lose our monopoly, I think only 2% of the population of the United States is Episcopalian today.

I would like to say that we have had - we have benefited from, I think - an absolutely superb program all day long. We have had vigorous debate by extraordinarily articulate and knowledgeable people who have come to us from many different religious experiences, many different walks of life, and many different regions of the country. I think we all collectively owe a tremendous debt of gratitude to them for devoting a lifetime to trying to understand this intractable subject, and then to working very hard to bring that understanding to us today.

I am always struck when I see such extraordinarily intelligent, well-meaning people disagreeing so strenuously. It says to me that you have seen here a microcosm of what the religious clauses of the Constitution are all about. We are very different people. And we have had strenuous disagreements from people who are on the surface in one way very similar, but we are very different people. We have disagreed at many different levels, and we have disagreed about basic approaches regarding how to interpret the Constitution and how to reason about issues of church and state. We have disagreed, I think, about what might be called the burden of proof, which is to say, when there is uncertainty, which sort of uncertain outcome should we most care about preserving or preventing? That is, are we worried about slippery slopes? Are we worried about creating fire walls to prevent some unexpected and undesirable outcome? Or do we have confidence in the ongoing process of dispute resolution, the marketplace of ideas, to work these things out? Because that shapes how we look at these issues. And certainly we have also seen the inevitable interplay between religion and social, economic, and cultural issues.

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[123] RALPH WALDO EMERSON, ESSAYS: FIRST SERIES - SELF-RELIANCE (1841) (stating, "A foolish consistency is the hobglobin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do.").

Two of the issues that we focused most of our attention on today have to do with Charitable Choice and school vouchers. Both of them have to do with the issue of the role that religion can play and that the state can aid or enlist religion in playing in the service of a poor population.

In many ways these debates have been as much about education policy as they have been about religion. They have been as much about policy toward the poor, as they have been about religion. It is unfortunate that so much of the emphasis has fallen on religion and religious organizations. Because, let us face it, the real problem here is that we have a rotten, terrible, inadequate public policy towards poor people. And the reason why we are fighting so much about school vouchers is because we have a lousy educational system in many places.

(Applause.)

The reason we are fighting so much about Charitable Choice is because we have parts of this country, major parts of many cities, in which there are no institutions other than churches that have a ghost of a chance of providing public services to populations that desperately need them. In many ways, we are putting too much of a burden on religion. Religion has enough of a burden to bear without having to, essentially, be the educator or the social server of last resort.

Finally, it seems to me that we are dealing with an issue that is inherently intractable. It is not accidental that the Supreme Court is split 4 to 4, with Sandra Day O'Connor being, I think, equally split internally as the Court is split. It is because when you think about it, we are talking about two different world views, both of which are very pervasive, if not universal.

It happens that the New Testament lesson in my church last Sunday was the famous passage in which Jesus tells the Pharisees and the Herodians that they should render onto Caesar the things that are Caesar's and render onto God the things that are God's.[124] I always thought, to the extent that I thought about this passage, that it was a nice biblical text supporting my sort of liberal namby-pamby separationist's view of church and state.

But I have come to realize increasingly as I have gotten older, and perhaps as my religious convictions have gotten deeper, that there is no need for separation. If you are a true religionist, as some people are, and as some people would define it, there is only God. Caesar is as much a part of God's creation as is this building, a mountain, the natural order, or human society. Therefore, one's religious convictions are pervasive and all-encompassing, and one cannot easily separate.

By the same token, as we enter the next millennium and go well past our 200th birthday as a nation, we cannot, I think, deny that government is all-pervasive. We are extraordinarily heavily regulated in almost everything we do. So we have these two very, very pervasive, if not all-pervasive, world views. And we have to somehow strike a peace treaty.

Well, the fact is that it is going to be an uneasy peace. It has been an uneasy peace, and it is going to be, I think, for as long as we have the religion clauses of the First Amendment. I hope that it is forever. But, if it is, we will be required to remake that

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[124] *Matthew* 22:21.

peace with every generation. That is where organizations such as the ADL come in. It is certainly where the other organizations represented on today's panel come in. It is where legal academics, who devote their lives to understanding and making sense out of the religion clauses, come in as well.

All of you are engaged in the work of helping Caesar and God reconcile. And your work continues to be terribly, terribly valuable. I commend all of you. Particularly, I want to commend the ADL because my good friend, Elizabeth Coleman, brought to me the idea a year or so ago about having a jointly sponsored program on the subject. I cheerfully agreed, with the understanding that we would provide the physical facilities and that the ADL would do everything else. And they have.

I do want to particularly thank and congratulate David Rosenberg and Jerry Green of the ADL for their superb efforts in pulling this off and everyone else associated with the organization. I think the success, the manifest, undeniable success of this enterprise, is really their handiwork. So please join me in thanking them.

(Applause.)

Finally, if you are here for CLE, turn in your cards and evaluations at the registration desk outside. Have a good day.
