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CONSTITUTIONALITY OF TUITION VOUCHERS: ADDRESS DELIVERED TO MARQUETTE UNIVERSITY LAW SCHOOL, OCTOBER 7, 1992

ANTHONY CARDINAL BEVILACQUA, ARCHBISHOP OF PHILADELPHIA*

Coming, as I do, from Philadelphia—the City of Brotherly Love—I am delighted to join this gathering in the beautiful land of Milwaukee, and I am honored to have been asked to participate in the centennial celebration of Marquette University Law School. I am reminded of a story about Dr. Oliver Wendell Holmes, Sr. It is said that, while he was still practicing medicine, Dr. Holmes was going to visit a patient just as a priest was leaving the bedside.

“Good morning, doctor,” said the priest, “your patient is very ill—he is going to die.”

“Yes,” said Holmes, “and he’s going to hell.”

“No, I have just given extreme unction—and you must not say such things!”

“Well,” came the reply, “you expressed a medical opinion, and I have just as much right to a theological opinion.”¹

I claim neither the wit of Dr. Holmes, the elder, nor the jurisprudential acumen of his son, Justice Oliver Wendell Holmes, Jr. I do, however, have an acute interest in the topic of this evening’s conference: the constitutionality of educational choice legislation that would provide tuition vouchers to parents for the school of their choice, whether public or private, sectarian or nonsectarian.

Whether by coincidence or providence, I cannot say; however, it is interesting that this host city has a parental choice program of public funding to permit children from low-income families to attend private schools. Earlier this year, the Supreme Court of Wisconsin upheld this program.² I realize that the decision was based on the State Constitution of Wisconsin and that the plan excludes private schools that have a religious affiliation. The topic of my presentation this evening is the constitutionality—under the United States Constitution—of a parental choice program that would

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1. M.A. DEWOLFE HOWE, *HOLMES OF THE BREAKFAST-TABLE* 115 (1939).

2. *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

provide tuition vouchers to parents regardless of the religious affiliation of the school to which they wish to send their children.

In 1892, the year this law school was founded, the United States Supreme Court ruled that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."³ The Supreme Court long continued to give voice to this idea of tolerance of religion throughout the United States. Justice Douglas, writing for the Court in 1952, stated this principle as follows:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe.*⁴

Yet, today, more than 200 years after the Bill of Rights was ratified, jurisprudential precedent concerning the Religion Clause of the First Amendment is quite muddled. Chief Justice Rehnquist noted this "doctrinal confusion" with the following examples:

[A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State in-

3. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465 (1892).

4. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (emphasis added).

side the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.⁵

Even worse than these seemingly inconsistent and irreconcilable distinctions by the Court is the hint of hostility toward religious schools and their teachers and administrators indicated in some Court opinions.⁶ This hostility exists despite the Court's repeated assertion that "[n]eutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity."⁷

Currently, Establishment Clause challenges to programs involving public assistance to religious-affiliated schools are considered under the three-part test of *Lemon v. Kurtzman*:⁸ "First, 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.'"⁹

I believe that all three conditions of the *Lemon* test are met by a school choice program that provides vouchers to parents in an effort to assist them in the educational responsibilities of their children and, at the same time, allows them to choose the school in which they wish to have their children

5. *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, C.J., dissenting) (footnotes and citations omitted); see also *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (stating that varied interpretations of the Establishment Clause have left even "the most conscientious governmental officials" guessing what motives will be unconstitutional); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 n.5 (1973) ("[I]t is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no 'bright line' guidance is afforded.").

6. See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236, 251-52 (1968) (Black, J., dissenting); see also *Lemon v. Kurtzman*, 403 U.S. 602, 617-19 (1971).

7. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976); accord *School Dist. v. Ball*, 473 U.S. 373, 382 (1985); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); see also Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1599 (1989) ("The separation concept, however, is really a servant of an even greater goal; it is a means, along with concepts such as accommodation and neutrality, to achieve the ideal of religious liberty in a free society.").

8. 403 U.S. 602 (1971).

9. *Id.* at 612-13 (citations omitted).

educated. Even Professor Laurence H. Tribe, not usually considered an ally of religious school interests, said, "One would have to be awfully clumsy to write voucher legislation that could not pass constitutional scrutiny."¹⁰ Professor Tribe explained:

Although *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding a book lending program violative of equal protection insofar as it aided racially segregated schools) would seem to forbid using such publicly subsidized vouchers at racially discriminatory private schools, the cases from *Everson* through *Wolman* indicate that, so long as the class of beneficiaries is sufficiently broad and so long as aid is channeled only to parents and children, the establishment clause should not pose an insuperable barrier to using such vouchers at parochial schools. Indeed, to exclude only church-related schools from such a voucher system might pose substantial free exercise problems.¹¹

As to the first part of the evaluation, there can be no doubt that a statute granting vouchers to parents for their children's education has a "secular legislative purpose." In *Committee for Public Education & Religious Liberty v. Nyquist*,¹² the Court acknowledged the public purpose of educational assistance legislation (although the statute was ultimately struck down as unconstitutional), explaining:

We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. And we do not doubt—indeed, we fully recognize—the validity of the State's interest in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.¹³

Under the second prong of the *Lemon* test, the principal or primary effect must be one that "neither advances nor inhibits religion."¹⁴ Such would be the case with a universally applied tuition voucher system. It would permit parents of children to determine the schools of their choice

10. *Can Vouchers Hurdle Church-State Wall?*, N.Y. TIMES, June 12, 1991, at B5; see also Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123.

11. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-9, at 846 n.33 (1978).

12. 413 U.S. 756 (1973).

13. *Id.* at 773; accord *Mueller v. Allen*, 463 U.S. 388, 395 (1983); *Sloane v. Lemon*, 413 U.S. 825, 829-30 (1973); *Lemon*, 403 U.S. at 613.

14. *Lemon*, 403 U.S. at 612-13.

based upon nonmonetary matters (or at least with less of a concern about cost than is currently the case). Any benefit to religion or religious institutions would result *indirectly* from the free choice of individuals. This has been specifically upheld by the Supreme Court of the United States in *Witters v. Washington Department of Services for the Blind*¹⁵ and *Mueller v. Allen*.¹⁶

In *Witters*, Justice Marshall wrote for a unanimous Supreme Court that public funds, appropriated under a vocational rehabilitation assistance program, could be used by a blind person to pay tuition at the Inland Empire School of the Bible.¹⁷ Central to *Witters* were the following factors: (1) funding went to the recipient institution only through the free choice of the individual student receiving the benefit from the state;¹⁸ (2) the program made funds generally available to all students similarly situated without regard to the public or nonpublic, sectarian or nonsectarian nature of the institution;¹⁹ and (3) the program "creates no financial incentive for students to undertake sectarian education."²⁰

Justice Marshall succinctly set forth the issue in *Witters*: whether the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian College and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.²¹

We would do well to be as succinct and direct: Does the First Amendment preclude the national or state governments from extending assistance under an educational choice program to financially overburdened taxpayers striving to fulfill their parental responsibilities (and state truancy laws) by assuring their children's education? Paraphrased, that is the issue as framed in *Witters*. The answer should be the same: No such federal constitutional barrier exists.

Mueller upheld a Minnesota program allowing tax deductions for "actual expenses incurred for the 'tuition, textbooks and transportation' of dependent children attending elementary or secondary schools."²² In

15. 474 U.S. 481 (1986).

16. 463 U.S. 388 (1983).

17. *Witters*, 474 U.S. at 483.

18. *Id.* at 487.

19. *Id.*

20. *Id.* at 488.

21. *Id.* at 482.

22. *Mueller v. Allen*, 463 U.S. 388, 391 (1983).

applying the three-part *Lemon* test, the Court agreed that the statute had a secular legislative purpose:

A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.²³

The Court also held that the statute did not have the primary effect of advancing religion. Among the considerations leading to this conclusion: (1) the tax deduction for educational expenses was "only one among many deductions . . . under the Minnesota tax laws";²⁴ (2) "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools";²⁵ and (3) under the Minnesota legislation, public funds become available to religious institutions "only as a result of numerous private choices of individual parents of school-age children."²⁶

The *Mueller* Court distinguished its earlier *Nyquist* decision, noting that in *Nyquist* the public assistance was directed to parents of children in non-public schools only. Moreover, and specifically relevant to our topic this evening, the Court reiterated what had been intimated in *Nyquist*: "that 'public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted' might not offend the Establishment Clause."²⁷ Because

23. *Id.* at 395; cf. Arlin M. Adams, *Is the Supreme Court Making a Significant Shift in Church-State Jurisprudence?*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, II, at 69, 78 (Dean M. Kelley ed., 1986) ("[T]he Founders had a deep faith in the Almighty and the blessings of religion. When the schools can in some way teach young citizens tolerance and respect for religious diversity, I believe that religion, the Constitution, and the nation will be better for it.").

24. *Mueller*, 463 U.S. at 396.

25. *Id.* at 397 (emphasis added).

26. *Id.* at 399.

27. *Id.* at 398 (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 (1973)). *Nyquist* also had rejected the argument that its ruling on the First Amendment in any way jeopardized the "educational assistance provisions of the 'G.I. Bill,' 38 U.S.C. § 1651." *Nyquist*, 413 U.S. at 783 n.38.

the Minnesota tax deduction entailed no new provisions for enforcement in, or supervision of, religious schools, the *Mueller* Court dismissed any concerns about "excessive entanglement" of the state and religion.²⁸

Two cases decided in 1992 are also of particular interest. In *Luthens v. Bair*,²⁹ U.S. District Chief Judge Harold D. Vietor upheld a statute permitting tax credits or tax deductions for the payment of elementary or secondary school tuition and the purchase of textbooks. The court found the tax credit or deduction allowable under the Supreme Court's analysis in *Muel-ler* and distinguishable from *Nyquist*.³⁰ Among the findings of fact in his opinion, Chief Judge Vietor noted that approximately ten percent of the students in Iowa attended accredited nonpublic schools and that most of those students attended Catholic schools, while others were enrolled in schools affiliated with other religious denominations.³¹ He noted that a school must be accredited for the parents to receive the tax deduction or credit, that some of the religious schools had a pervasive sectarianism, and that the Iowa Department of Revenue and Finance had issued a regulation that would allow the deduction or credit only in proration of the costs incurred for their children's nonreligious tuition and textbook purchases.³²

Chief Judge Vietor had no problem finding a secular legislative purpose. Concerning the third part of the *Lemon* test, the court was just as confident that there was no "excessive entanglement."³³ Noting that "the benefits of the deduction/credit law go to the parents of schoolchildren rather than to the schools,"³⁴ the court found that "[t]heir 'character' is that of human beings and their 'purpose' is to educate their children."³⁵ Answering the plaintiffs' argument that the sectarian schools might need to be audited in order to assure that an individual taxpayer's deduction or credit was appropriate, the court stated:

The danger of parochial school records being subpoenaed in connection with the audit of a tuition deduction appears to be minimal, if not non-existent—certainly no greater than the danger of a subpoena to a church for records in connection with a claimed deduction of a charitable contribution to the church.³⁶

28. *Mueller*, 463 U.S. at 403.

29. 788 F. Supp. 1032 (S.D. Iowa 1992).

30. *Id.* at 1038.

31. *Id.* at 1033.

32. *Id.* at 1033-35.

33. *Id.* at 1037-40.

34. *Id.*

35. *Id.*

36. *Id.* at 1041.

In addressing whether the Iowa statute had a principal or primary effect of advancing religion—the *second* part of the *Lemon* test—Chief Judge Vior engaged in a thorough analysis and distinguished *Mueller* from *Nyquist*. In *Nyquist*, “[t]he New York statute provided for direct money grants to nonpublic schools, a tuition grant program for tuition reimbursements to qualifying parents of children attending nonpublic schools, and a form of tax relief for those who failed to qualify for the tuition grant program.”³⁷

In *Mueller*, on the other hand, the aid was in the form of one of many legislative tax deductions in Minnesota.

[T]he aid went to parents of schoolchildren rather than directly to the schools; the financial benefit resulting to parochial schools was attenuated; and the benefits of the law “can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools.” The same significant features characterize the Iowa law.³⁸

In *Zobrest v. Catalina Foothills School District*,³⁹ a three-judge panel held that the Establishment Clause prohibits government funds from being used to employ a sign language interpreter for a deaf student in a Catholic high school.⁴⁰ Although the issue seemed almost identical to that treated by the Supreme Court in *Witters*, two of the three judges distinguished *Zobrest* on the grounds that “the government would be required to place its own employee in the sectarian school.”⁴¹ The majority in *Zobrest* found:

Here, denial of aid to the Zobrests does impose a burden on their free exercise rights. They will have either to forgo a sectarian education for James in order to receive the assistance of a sign language interpreter for him at school, or they will have to pay the cost of the interpreter’s services themselves, while keeping him at Salpointe.

However, a compelling state interest justifies the imposition of this burden. The government has a compelling interest in ensuring that the Establishment Clause is not violated.⁴²

Circuit Judge Thomas Tang filed a spirited dissenting opinion.⁴³

37. *Id.* at 1038.

38. *Id.* (quoting *Mueller v. Allen*, 463 U.S. 368, 402 (1983) (citation omitted)).

39. 963 F.2d 1190 (9th Cir. 1992), *rev’d*, 113 S. Ct. 2462 (1993).

40. *Zobrest*, 963 F.2d at 1196-97.

41. *Id.* at 1195.

42. *Id.* at 1196-97.

43. *Id.* at 1197 (Tang, J., dissenting). This is worth reading for Judge Tang’s analysis of the relevant Supreme Court cases and his view of the relationship between the free exercise and establishment aspects of religious liberty.

I agree with the majority's conclusion that denying the Zobrests a sign language interpreter unconstitutionally burdens their free exercise of religion.

However, because I do not believe that the provision of a sign language interpreter in this case violates the Establishment Clause of the federal Constitution, I would hold that no compelling interest justifies the state's withholding of benefits. To the extent the School District has an interest in separating church and state further than required by the First Amendment, that interest must yield to the Zobrests' free exercise rights. "[T]he State interest asserted here—in achieving greater separation of Church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause."⁴⁴

As I have explained, I believe that a generally applied system of vouchers to allow parents to enroll their children in the schools of their choice—public, private, religious or nonsectarian—is within the bounds of our Constitution under current precedent.⁴⁵ I am aware, however, that there are those who may say that the educational choice voucher plan is but one of those "ingenious plans for channeling state aid to sectarian schools,"⁴⁶ or one of the "new ways of achieving forbidden ends."⁴⁷ I wholeheartedly disagree. The ends are not forbidden; the ways are not inappropriate. Nor, for that matter, is a universally applied tuition voucher system one that "approaches the verge"⁴⁸ of a law respecting the establishment of religion. Chief Justice Burger answered such concerns, commenting that "carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits."⁴⁹

44. *Id.* at 1205 (Tang, J., dissenting) (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

45. I am indebted to Professor Michael W. McConnell for his thorough analysis of this issue. He has stated that "recent decisions make it all but certain that a genuinely neutral and non-discriminatory program of educational choice would be sustained." McConnell, *supra* note 10, at 144. "Education choice plans are in effect, a 'G.I. Bill' for kindergarten through high school, and would likely sustain a challenge . . ." *Id.* at 147. The Supreme Court has "intimated" as much in *Mueller and Nyquist*. See *supra* note 27 and accompanying text.

46. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973).

47. *Wolman v. Walter*, 433 U.S. 229, 266 (1977) (Stevens, J., concurring in part and dissenting in part); see also *Lemon v. Kurtzman*, 403 U.S. 602, 641 (1971) (Douglas, J., concurring) ("[S]ophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones.").

48. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

49. *Meek v. Pittenger*, 421 U.S. 349, 387 (1975) (Burger, C.J., concurring in part and dissenting in part). In a subsequent decision Justice Powell wrote as follows:

It is important to keep these issues in perspective. At this point in the 20th Century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious

It is strange that in a federal republic where the jurisdiction of the national government and that of the several states often overlap, we seem unable to accept the same concerning religion and public policy. Church and state are institutionally autonomous. Neither derives its existence, nature, or authority from the other; neither is subservient to the other. Instead, each is supreme in its own nature and within its own constitution. However, in a society such as ours, they are necessarily interdependent. As Justice O'Connor wrote:

In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. . . . The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.⁵⁰

States impose the requirement of compulsory education as a benefit to all society; parochial schools benefit society as a whole, not just the children enrolled in parochial schools. As Justice White explained:

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. . . . Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school.⁵¹

lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.

Wolman, 433 U.S. at 263 (Powell, J., concurring in part and dissenting in part) (citations omitted); see also Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 646 (1992).

50. *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring); see also Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117-18 (1992).

51. *Lemon*, 403 U.S. at 661-62 (White, J., concurring in part and dissenting in part).

"It is enough for me," Justice White continued, "that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion."⁵²

In his concurring opinion in *Lemon*, Justice Douglas harkened toward "a state of so-called equilibrium where religious instruction was eliminated from public schools and the use of public funds to support religious schools was deemed to be banned."⁵³ He inadvertently undermined this position, however, by citing *Torcaso v. Watkins*,⁵⁴ the 1961 Supreme Court case whose revolutionary footnote eleven identified "Ethical Culture" and "Secular Humanism" as "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God."⁵⁵ Justice Douglas mentioned both the "secular" aspects of a sectarian school's education and the teaching of the "humanities," concluding that "sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones."⁵⁶

In fact, the sophisticated truth is that the deemed "equilibrium" is for all public schools to promote the "religion" of "secular humanism," and there lies the seeds of a problem with the Establishment Clause as well as that of the free exercise of religion. As Professor Mary Ann Glendon pointed out:

Nowhere have the deleterious effects of an excessively narrow view of free exercise and an inflated concept of establishment been

52. *Id.* at 664; *accord* *Meek v. Pittenger*, 421 U.S. 349 (1975). Chief Justice Burger wrote:

The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.

Id. at 387 (Burger, C.J., concurring in part and dissenting in part); *see also id.* at 395 (Rehnquist, J., concurring in part and dissenting in part).

53. *Lemon*, 403 U.S. at 629 (Douglas, J., concurring).

54. *Id.* at 640 (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

55. *Torcaso*, 367 U.S. at 495 n.11.

56. *Lemon*, 403 U.S. at 641 (Douglas, J., concurring).

more apparent than in the cases involving education. In a judicial pincer movement, one line of decisions requires the public schools to be rigorously secular, while another has struck down most forms of public assistance to parents of private school students who desire to protect their children from a public educational system that is often actively promoting values that are profoundly at odds with the family's religious convictions. The net result has been that a crucial aspect of religious freedom can be exercised only by families wealthy enough to afford private education after paying taxes to support public schools.⁵⁷

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁵⁸ There are hundreds of articles written about this opening passage to the Bill of Rights.⁵⁹ Still, we are far from any definitive agreement concerning its meaning; nor, it seems, from the divergence of views and opinions, are we close to finding a consensus.⁶⁰ The crux of the matter, however, is that the Framers of the First Amendment intended it as a preservation of religious liberty⁶¹—a preventive measure against government intrusion into an individual's most personal and most precious adherence to tenets that predate and precede all of our founding documents and the many cases and articles that the founding documents have spawned. This first of our fundamental rights, both in its position in the Bill of Rights—first enumerated in the First Amendment—and in its precedence from the Author of Life, is rather as beacon. Perhaps a better description, though, would be "twin beacons," which are "designed to protect and preserve both government and religion."⁶²

As Professor Michael W. McConnell so astutely noted:

57. Mary Ann Glendon, *Law, Communities and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 679 (1992) (footnotes omitted).

58. U.S. CONST. amend. I.

59. See, e.g., David L. Gregory & Charles J. Russo, *Let Us Pray (But Not 'Them!'): The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273, 292 n.64 (1991). For a thorough annotated bibliography, see Lucy S. Payne, *Uncovering the First Amendment: A Research Guide to the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 825 (1990). The bibliographical annotation includes selected materials published from 1980. *Id.* at 827.

60. See Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841 (1986). This is still the case despite Kurland's co-editing of a five-volume treatise on the origins of the 1787 Constitution and the 1789 amendments. See *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 1987).

61. Kurland, *supra* note 60, at 860; Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991); see also *supra* notes 3, 4, 7, 44 and accompanying text.

62. Arlin M. Adams & Sarah B. Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 318 (1988).

Exponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the first amendment: the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on. These actions . . . are much easier to understand if one sees religious coercion as the fundamental evil against which the clause is directed. . . . I have run across no persuasive evidence that the Framers of the first amendment considered evenhanded support for all religions or religion in general, in the absence of a coercive impact[,] an establishment of religion.⁶³

Justice Story's 1815 opinion, much closer in time to ratification of the First Amendment, is instructive: "[T]he free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers [or] for the endowment of churches"⁶⁴

Attorney William B. Ball has highlighted the impending public policy conflict over education due to the so-called "equilibrium"⁶⁵ that, in fact, is a secular humanization of public schools, often inculcating students with ideas and ideals that many in the general populace consider to be disvalues. Referring to a state court case of some years ago,⁶⁶ Mr. Ball reports the position of a school board policy that conflicted with the values of the parents in the community.⁶⁷ The parents presented much evidence at trial and were successful. The state supreme court also found in favor of the parents

63. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986). In *Jaffree v. Board of Sch. Comm'n*, 554 F. Supp. 1104 (S.D. Ala.), *rev'd sub. nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), and *aff'd*, 472 U.S. 38 (1985), Chief Judge Brevard Hand notes a resolution of July 27, 1787, which provided to the Moravian Brethren at Bethlehem, Pennsylvania, support in order "to civilize the Indians and to promote Christianity." *Id.* at 1117 n.21 (citing ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982)). The same example is given in Smith, *supra* note 61, at 255. Additionally,

[O]n October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that federal money was to be used to support a Catholic priest and to build a church for the ministry of the Kaskaskia Indians. The treaty was ratified on December 23, 1803.

Jaffree, 554 F. Supp. at 1117.

64. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815).

65. See *supra* text accompanying note 53.

66. *Kentucky State Bd. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980).

67. William B. Ball, *Parental Rights in Schooling*, in A BLUEPRINT FOR EDUCATION REFORM 11 (Connaught Marshner ed., 1984).

based on the state constitution and *certiorari* was denied by the United States Supreme Court.⁶⁸

Educational choice initiatives are worthwhile for the many advantages that they secure for our children, their parents, local communities, and society in general. The choice of value-oriented education—whatever nature it may take—is a prerogative of each of us and a blessing that our forbears had secured long ago for us and our posterity.

It is essential that the courts remove the artificial conflict between “establishment” and “free exercise” and allow the people and their governments to institute programs of sweeping, honest, competitive educational choice. Otherwise today’s confusion may turn to chaos as parents flood the courts to assert their rights of “free exercise” and parental privilege to assure the proper education of their children.⁶⁹

Let the “twin beacons” of religious liberty, free from unwarranted government intrusion, be used to guide both the ship of state and the barque of church, not to hamper but to assist them in their differing but intertwined spheres of human affairs.

68. *Id.* at 29-35.

69. *Cf. The Education Revolution*, WALL ST. J., June 25, 1992, at A16. “Recent lawsuits filed by The Institute for Justice on behalf of parents in both Los Angeles and Chicago ask that control of the children’s share of state school aid be transferred to their parents so they can enroll them in other public or private schools.” *Id.*