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Preserving the Establishment Clause: One Step Forward and Two Steps Back

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PRESERVING THE ESTABLISHMENT CLAUSE: ONE STEP FORWARD AND TWO STEPS BACK

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I. INTRODUCTION

> Candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.[1]

This statement regarding Establishment Clause doctrine rings as true today as it did when made by Chief Justice Burger three decades ago. The Supreme Court rendered two significant church/state decisions pertaining to schools in June 2000,[2] and although handed down only nine days apart, the Court's rationales in these cases are somewhat difficult to reconcile. In fact, it appears that the Court is heading down two divergent paths in interpreting Establishment Clause restrictions on government action, depending on whether the contested practices involve devotionals in public schools or government assistance to sectarian schools. This article reviews these two recent decisions and their implications for Establishment Clause doctrine and for school policies and practices.

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1. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

2. Mitchell v. Helms, 120 S. Ct. 2530, 793 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

II. THE *SANTA FE* CASE

In *Santa Fe Independent School District v. Doe*, the Supreme Court, in a six-to-three ruling, struck down a Texas school district's policy authorizing student-led devotionals before public school football games as violating the Establishment Clause of the First Amendment.[3] Parents initially filed suit in 1995, complaining of numerous proselytizing activities (e.g., teachers promoting Christian revival meetings and chastising children of minority faiths) in addition to the school district's practice of allowing student council officers to read overtly Christian prayers at graduation ceremonies and home football games. The school district altered its policy pertaining to graduation devotionals several times prior to and during the litigation in an effort to ensure compliance with Fifth Circuit precedent upholding student elections to authorize nonproselytizing, nonsectarian, student-led graduation invocations and benedictions.[4] The district finally formalized its football game invocations in a policy essentially identical to the graduation prayer policy, in that both authorized two elections; one to determine whether to have invocations, and the second to select the student to deliver them. Subsequently, the district removed the "nonsectarian, nonproselytizing" restriction on the prayers in both policies, but included the notation that if judicially enjoined, the prior policies with this restriction would automatically be in effect.[5] The trial court ultimately found that the challenged proselytizing incidents had been curbed and were not attributable to school district policies or customs, and moreover that the plaintiffs did not prove compensable harm. But the court ordered the school district to reinstate the "nonproselytizing, nonsectarian" restriction in its policies pertaining to student-led devotionals at graduations and football games.

On appeal, the Fifth Circuit Court of Appeals reiterated its position that student-initiated graduation prayers can satisfy

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3. 530 U.S. 290 (2000),120 S. Ct. 2266 (2000).

4. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert denied*, 508 U.S. 967 (1993). For a discussion of the somewhat complicated developments during the early stages of the *Santa Fe* litigation, *see* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 809-814 (5th Cir. 1999).

5. *Santa Fe*, 168 F.3d at 812-13. The policy was again modified to eliminate "prayer" from its title and to add references to student-led "messages" and "statements" in addition to "invocations."

the Establishment Clause, but disagreed with the district Court's conclusion that prayers referring to specific deities are nonsectarian. Focusing on the football game devotionals, the appeals court held that this policy abridged the Establishment Clause, even if the restriction on the type of prayers was reinstated.[6] The appeals court distinguished student-led prayers in graduation ceremonies from such devotionals at athletic events that occur more frequently, involve a more diverse age span of students, and can hardly be justified to make sporting events more solemn.

The Supreme Court agreed to review this decision, limiting its ruling to the policy pertaining to student-led prayers before football games. Plaintiffs argued that having students decide to include invocations at the athletic events and to identify a classmate to lead the devotionals removed public school sponsorship because the devotionals were initiated by private actors. Accordingly, they asserted that such private student expression should be treated like other private speech in that it does not implicate Establishment Clause restrictions on government action.

The Supreme Court majority disagreed with these assertions and went beyond simply affirming the reasoning of the appellate court. The majority addressed the broader issue of the legal status of student-led devotionals in public education, making some important statements regarding what constitutes religious expression that is sponsored by the public school or at least perceived to be. The *Santa Fe* majority declared that student-led expression at a school event held on school property under the supervision of school personnel and representing the student body could not be considered private speech.[7] Even

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6. *Id.* at 816-18. The appellate court emphasized that the "nonsectarian, nonproselytizing" limitation had been important when it upheld student-initiated graduation prayers , but concluded that this restriction could not save the student-led prayers before football games from being invalidated under the Establishment Clause. In *Clear Creek* 977 F.2d 963, *supra* note 4, the court further noted that, "a policy is not insulated from constitutional scrutiny under the Establishment Clause merely because it permits rather than requires religious speech when selected and given by students." *Id.* at 815-16. Earlier, the Fifth Circuit Court of Appeals had described a high school graduation as a "once-in-a-lifetime event" contrasted with athletic events that are held in settings far less solemn and extraordinary. *See* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995) (finding an Establishment Clause violation in a school district allowing employees to lead or encourage prayers in curricular or extracurricular public school activities).

7. 530 U.S. at 309-10.

though students made the ultimate choice of speakers and content, the school authorized the student election in the first place. The degree of school involvement gave the impression that the devotionals at issue represented the school, leading the Court majority to conclude that the practice entailed both perceived and actual endorsement of religion.[8] The majority reasoned that the policy had a sham secular purpose and, like the district's previous initiatives, was intended to promote Christian religious observances in school-related events.[9] While rejecting the argument that Establishment Clause concerns can be eliminated by delegating decisions to students, the majority emphasized that nothing in the Constitution prohibits public school students from voluntarily praying at school; only state sponsorship of such devotionals runs afoul of the Establishment Clause.[10]

The Court in *Santa Fe* reiterated a commitment to the purpose of the Bill of Rights, which is to shield certain subjects from the political process, and noted that the Establishment Clause is intended "to remove debate over this kind of issue from governmental supervision or control."[11] From its recent decision in *Board of Regents of University of Wisconsin System v. Southworth*, the Court emphasized that a student referendum substituting "majority determinations for viewpoint neutrality" would undermine the constitutional principle that "minority views are treated with the same respect as are majority views."[12] Indeed, the Court reasoned that the use of student elections simply intensifies the lack of representation of minority views, ensuring that they will never be heard.

The *Santa Fe* majority relied heavily on *Lee v. Weisman* in

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8. *Id.* at 305. Chief Justice Rehnquist severely chastised the majority for striking down the revised policy before it had even been implemented. *See id.* at 318 (Rehnquist, C.J., dissenting); *infra* text accompanying note 21.

9. *Id.* at 308-09. The Court noted that the school did not hold a new election pursuant to the revised policy but used the results of the election held under the previous policy, indicating a continuation of practices to infuse devotionals in public school activities. *Id.* at 309. The Court emphasized that it is necessary to carefully review the history and context of the challenged action in determining its facial validity. *Id.* at 303. *See also infra* note 84.

10. *Id.* at 313.

11. *Id.* at 310.

12. *Id.* at 304, *quoting* Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000) (upholding a university's mandatory student activity fees, but ruling that student elections to determine what speech is subsidized by the university run afoul of the Free Speech Clause by disenfranchising minority viewpoints).

which the Supreme Court struck down clergy-led devotionals in public school graduations in 1992.[13] In *Weisman*, the Court held that at a minimum, students cannot be coerced to support or participate in religious exercises or to make a choice between a meaningful school event and being subjected to devotionals that offend their religious beliefs.[14] However, the Court in 1992 did not address the constitutionality of student-initiated devotionals, which became a very volatile issue in the wake of *Weisman* as religious groups and public school districts sought creative ways to comply with the letter (if not the intent) of the Supreme Court's decision. Challenges to such student-led religious activities generated conflicting appellate court rulings,[15] but in the most recent opinions, momentum seemed to be building to protect student-initiated devotionals as private expression under the Free Speech Clause. To illustrate, the *Santa Fe* decision was rendered on the heels of two rulings in which the Eleventh Circuit Court of Appeals upheld student-initiated sectarian graduation messages and other private religious expression in public schools.[16]

A number of school districts welcomed a broad interpretation of Free Speech Clause protection of student religious expression and accordingly allowed students to orchestrate graduation prayers, and in some instances, allowed student-initiated religious expression in other school activities.[17] But

13. 505 U.S. 577 (1992).

14. *Id.* But only Justice Kennedy in the *Weisman* majority asserted that such coercion was required to abridge the Establishment Clause. *See infra* text accompanying note 106.

15. For example, *compare* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (upholding student elections to decide whether to have student-led graduation devotionals) *with* ACLU of NJ v. Blackhorse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (striking down such student elections among seniors to determine whether prayers will be included in the graduation ceremony).

16. *See* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded,* 120 S. Ct. 2714 (2000), *on remand sub nom.,* Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000) (lifting injunction on private religious speech and affording Free Speech Clause protection to student-initiated religious expression in school-related activities); Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (upholding school policy allowing students to select their graduation messages), *vacated and remanded,* 121 S. Ct. 31 (2000). *See infra* text accompanying notes 76-80.

17. There has been some controversy regarding efforts to designate students' graduation speeches as a forum for student expression that will not be subject to prior review by school authorities. The Supreme Court has not clarified whether school authorities can relinquish control over students' graduation speeches, although generally assumed they can. *See* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998),

the legitimacy of such practices may be short lived as the Supreme Court in *Santa Fe* appears to have dealt a severe blow to this trend of expanding what is considered private religious expression that is entitled to Free Speech Clause protection.[18] The Court's conclusion that school districts abridge the Establishment Clause by allowing students to decide to have student-led devotionals at school-sponsored athletic events will likely be used by those contesting graduation invocations and other types of student-orchestrated religious expression in public schools.

In his biting dissent in *Santa Fe*, Chief Justice Rehnquist not only faulted the majority for its holding but also for its tone, which he claimed "bristles with hostility to all things religious in public life."[19] Asserting plausible secular purposes for the policy (e.g., to promote good sportsmanship and student safety and to establish the appropriate environment for the event), the Chief Justice argued that courts should defer to a school district's articulated intent for the practices. He further contended that the speech at issue under the contested policy should be considered private expression. Declaring that government policies are not required to be completely neutral as to religious content,[20] he faulted the majority for distorting exist-

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vacated and remanded en banc, 177 F.3d 789 (9th Cir. 1999) (upholding Idaho school district's policy that barred school authorities from censoring students' graduation speeches and granted student speakers, selected by academic standing, discretion to select their messages). Although the full Ninth Circuit vacated the ruling because the plaintiffs had graduated, the controversial policy remained in force. Yet, courts generally have ruled that schools are not required to consider the graduation ceremony as a forum for student expression and can exert control over students' speeches. If they do exercise such administrative approval, they may be obligated to censor speeches that promote religious tenets. *See* Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000) (relying on *Weisman* and *Santa Fe* in upholding a school district's rejection of a student's sectarian graduation speech, as the speech would bear the imprint of the school district and constitute government endorsement of religion in violation of the Establishment Clause).

18. 530 U.S. 290, 309-15 (2000).

19. *Id.* at 318 (Rehnquist, C.J., dissenting).

20. *Id.* at 325. He accused the majority of applying "the most rigid version of the oft-criticized" tripartite *Lemon* test (requiring government action to have a secular purpose, to have a primary effect that neither advances nor impedes religion, and to avoid excessive government entanglement with religion). *Id.* at 319. *See infra* note 60. However, the majority only briefly referred to *Lemon*, *Santa Fe*, 530 U.S. at 314. The majority focused on the contested policy's sham secular purpose more than on the other elements of the tripartite test, causing Zirkel to characterize the majority opinion as "lightly evoking nuances" of the *Lemon* test. *See* Perry Zirkel, *The Games, They Are A-Changin'*, 82 PHI DELTA KAPPAN 175 (2000).

ing precedent and invalidating the school district's new policy before it had even been put into place.[21] He considered the revised policy a good-faith effort to comply with the district Court's order.

Advocates of church/state separation were relieved that the Court in *Santa Fe* concluded that the student-led devotionals at issue represented the school because a contrary conclusion would have given a green light to all types of student-organized religious activities in public education. But the ruling generated volatile reactions from conservative citizen groups and from some school districts that wanted to retain such practices. Jan LaRue of the conservative Family Research Council asserted that, "the government's 'benign neutrality' toward religion in this country is nothing short of malevolent hostility."[22] Illustrative of protests against the ruling, in the fall 2000, fans at football games in a number of school districts throughout the south, including the Santa Fe district, stood and "spontaneously" recited the Lord's prayer.[23] Rob Boston for Americans United for Separation of Church and State indicated that his organization had received numerous reports of informal protests at school events as a result of the *Santa Fe* ruling.[24] Julie Underwood, General Counsel for the National School Boards Association, said that school prayer advocates are using other creative strategies to bring religion into schools, such as giving students book covers with religious messages on them.[25]

III. THE *HELMS* CASE

In the second ruling rendered nine days after *Santa Fe*, the Supreme Court in *Mitchell v. Helms* found no Establishment Clause violation in using federal aid to purchase instructional materials and equipment for student use in sectarian schools.[26]

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21. 530 U.S. at 320 (Rehnquist, C.J., dissenting)

22. Jan LaRue, Family Research Council, *quoted in Supreme Court Says 'No' to Student-led Prayers,* THE HERALD-TIMES, BLOOMINGTON, IN, June 20, 2000, at A1, A11.

23. *Movement Hopes to Skirt Supreme Court Ruling*, THE HERALD-TIMES, BLOOMINGTON, IN, August 24, 2000, at A7.

24. *Group Reports Prayer Protests as School Year Begins*, (Sept. 1, 2000) <http://www.CNN.com>.

25. Julie Underwood, *quoted in Courts Will Rule on Important School Issues*, SCHOOL BOARD NEWS, September 26, 2000, at 6.

26. 120 S. Ct. 2530 (2000). On remand, the Fifth Circuit Court of Appeals

Specifically, the ruling allows public funds for computers, other instructional equipment, and library books that are used in religious schools under the Federal Chapter 2 program of the Education Consolidation and Improvement Act of 1981 (originally part of the Elementary and Secondary Education Act of 1965), which is now Subchapter VI of Chapter 70 of the Improving America's Schools Act of 1994.[27] In the school district at issue, about 30% of these funds are allocated for such equipment and materials in private – primarily sectarian – schools. Considerable attention focused on this case because the Fifth Circuit Court of Appeals had struck down the practice under the Establishment Clause, creating a conflict with the position taken by the Ninth Circuit Court of Appeals a few years earlier.[28] Compared to the *Santa Fe* ruling, the Supreme Court's action is more difficult to analyze in *Helms* because it has no majority opinion. While six Justices supported the Court's holding, only four signed the *Helms* plurality opinion.[29] Respondents argued that the aid was divertible for religious purposes, was direct and nonincidental, and supplanted rather than supplemented private school funds. Justice Thomas, speaking for the plurality, found none of these contentions persuasive, rejecting a distinction between direct and indirect aid that has appeared in prior cases involving challenges to the use of government funds in religious schools.[30] The plurality rea-

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changed its position regarding the federal aid program and its Louisiana counterpart to conform with the Supreme Court ruling and reinstated its judgment that the Louisiana special education program and transportation program (providing public support for children attending parochial schools) were also constitutional. Helms v. Picard, 229 F.3d 467 (5th Cir. 2000).

27. 20 U.S.C. §§ 7301-7373. Prior to 1994, this provision was codified at 20 U.S.C. §§ 2911-2976.

28. *Compare* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) *with* Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449 (9th Cir. 1995) (finding no Establishment Clause violation in the distribution of Chapter 2 funds to parochial schools).

29. Chief Justice Rehnquist and Justices Scalia and Kennedy signed Justice Thomas' plurality opinion, and Justices O'Connor and Breyer signed a concurring opinion.

30. 120 S. Ct. at 2544-46. *See, e.g.,* School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (striking down shared-time and community-education programs providing classes for nonpublic school students at public expense in rooms leased from the nonpublic schools); Wolman v. Walter, 433 U.S. 229 (1977) (invalidating direct government subsidies to parochial schools in terms of funds for remedial, guidance, and therapeutic services provided on parochial school grounds and for instructional materials and equipment, standardized tests, and fieldtrip transportion for parochial school students); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (invalidating direct public aid to parochial schools for the development and administra-

soned that religious indoctrination or subsidization cannot be attributed to the government when aid, even direct aid, is distributed based on secular criteria, is available to religious and secular beneficiaries on a nondiscriminatory basis, and flows to religious schools only because of private choices of parents.[31]

Also rejecting the argument that the aid was unconstitutional because it could be diverted for religious purposes, the plurality relied on the neutrality principle in concluding that if eligibility for the aid is determined in a manner that satisfies the Constitution, subsequent use of the aid for religious purposes is not imputed to the government, "and is thus not of constitutional concern."[32] Justice Thomas declared for the plurality: "We did not, as respondents do, think that the use of governmental aid to further religious indoctrination was synonymous with religious indoctrination *by* the government or that such use of aid created any improper incentives" for parents to send their children to religious schools.[33] Conceding that the equipment at issue could be diverted for sectarian uses, the plurality asserted that the central issue is not divertibility of the aid because government support for secular activities always frees parochial school resources for religious purposes. Instead, the plurality emphasized that the constitutional standards are whether the aid itself would be appropriate for a public school to receive and whether it is distributed in an even-handed manner – conditions satisfied by the aid at issue in *Helms*. The plurality also dismissed the concern about public funds going to "pervasively sectarian" institutions, concluding that such an assessment of "degree" discriminates on the basis of religion.[34]

Justices O'Connor and Breyer provided the crucial concurring votes to uphold the government aid program in *Helms*.[35] They agreed with the four Justices in the plurality that *Meek v. Pittenger*[36] and *Wolman v. Walter*[37] were no longer good law in

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tion of state-required and teacher-prepared tests and record-keeping practices).

31. 120 S. Ct. at 2541.

32. *Id.* at 2547. *See* discussion of the current application of the neutrality principle, *infra* text accompanying note 95.

33. *Id.* [emphasis added].

34. *Id.* at 2550-51.

35. *Id.* at 2556 (O'Connor & Breyer, JJ., concurring).

36. 421 U.S. 349 (1975) (striking down use of public funds for instructional materials and equipment and provision of auxiliary services in parochial schools).

37. 433 U.S. 229 (1977), *supra* note 30.

so far as these decisions would prohibit the distribution of aid for instructional materials and equipment that might be used for some sectarian purposes. Among their holdings, *Meek* and *Wolman* had barred state aid in the form of providing maps, slide projectors, and other materials and equipment to sectarian schools. These six Justices also supported a modification of the *Lemon* test, making it explicit that excessive entanglement is simply part of consideration of a policy's effect.[38] The plurality and concurring Justices identified three criteria for assessing a statute's primary effect: whether it results in government indoctrination, defines recipients by reference to religion, or creates excessive government entanglement with religion.[39]

But Justices O'Connor and Breyer were troubled by parts of the sweeping plurality rationale, which they feared would go too far in allowing direct aid that advances sectarian objectives of religious organizations. They disagreed with the plurality's conclusion that any government-aid program would be constitutional solely because the aid is neutrally distributed to religious and secular entities. They also seemed more interested than the plurality in assurances that the aid supplements and does not supplant private school funds, and that actual diversion of the aid to religious purposes is de minimis.[40]

Justice Souter, writing a dissenting opinion that was also signed by Justices Stevens and Ginsburg, found many aspects of the plurality opinion problematic. Most importantly, Justice Souter asserted that the plurality adopted "a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate inquiry into a law's effects"[41] and negate the constitutional principle that the

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38. This modified *Lemon* standard is more akin to the Establishment Clause standard used prior to 1970. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (assessing the purpose and effect of challenged government action in striking down daily Bible reading in public schools). Although the *Lemon* tripartite test received its name in Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court actually articulated the three criteria the year before in Walz v. Tax Comm'n, 397 U.S. 664 (1970) (rejecting an Establishment Clause challenge to property tax exemptions for property used solely for religious worship). *See supra* note 20 for a description of the three-prong test.

39. The district Court's conclusion that the law has a secular purpose was not challenged. Also, the Supreme Court accepted the district Court's conclusion that there was no excessive entanglement and thus focused on the first two criteria in determining that the law's effect was constitutional. *See* 120 S. Ct., at 2540.

40. *Id.* at 2562-69 (O'Connor, J., concurring).

41. *Id.* at 2573 (Souter, J., dissenting).

government cannot aid a school's religious mission. He contended that, "the plurality position breaks fundamentally with Establishment Clause principle, and with the methodology painstakingly worked out in support of it."[42] He noted that over time the principle of neutrality had been used in at least three ways – to identify the appropriate government posture between impermissible encouragement or discouragement of religion, to characterize a government benefit as secular, and now to indicate nondiscrimination in conferring benefits on secular and religious institutions.[43] Justice Souter vigorously argued that "evenhandedness neutrality" should not be a stand-alone criterion to assess constitutional intent or effect.[44]

He noted that government aid to pervasively sectarian institutions and to primary and secondary religious schools raises particular concerns because young students are highly susceptible to religious indoctrination.[45] While all Justices agreed that the government is prohibited from providing aid with a clear religious content to public or sectarian schools, the three dissenting Justices would have gone further than the plurality in prohibiting aid that can be diverted to religious education, particularly direct subsidies to religious schools. Justice Souter cited evidence that the aid at issue in *Helms* already had been diverted for sectarian purposes in some of the parochial schools. He also contended that a federal education aid program, such as this one that can be used to supplant expenditures for offerings at religious schools, is constitutionally prohibited.

Those advocating public support for private education were encouraged by the *Helms* ruling, as were proponents of voucher programs that allow public funds to flow to parochial schools based on parental choices.[46] But critics have voiced great concern that *Helms* will open the floodgates regarding government aid to religious schools. Barry Lynn, Executive Director of Americans United for Separation of Church and State, has asserted that the *Helms* decision "takes a sledgehammer" to the wall of separation between church and state.[47]

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42. *Id.*
43. *Id.* at 2578. *See infra* text accompanying note 90.
44. *Id.* at 2581.
45. *Id.* at 2583.
46. *See infra* text accompanying note 98.
47. Barry Lynn, *quoted in Supreme Court Ruling Expands Public Aid to Paro-*

IV. INTERNAL CONSISTENCY IN THESE DIVERGENT PATHS?

Comparing *Helms* and *Santa Fe*, it appears that a block of Justices is unwilling to accommodate religious observances in public schools, while a different block (with some overlap) is willing to accommodate sectarian schools in terms of government aid for their students. Thus, the Court appears to be heading down somewhat incongruent tracks in these two areas of Establishment Clause litigation involving education. The "private actor" justification for church/state involvement seems persuasive in state-aid cases in that neutrality is assured and government involvement reduced if aid goes to religious schools because of parents' decisions regarding where their children will be educated. However, allowing students to vote to deliver religious messages in public schools does not provide a sufficient circuit breaker to make the students private actors, which would remove school sponsorship of the student-led religious activities.[48]

Only Justice Kennedy endorsed the majority opinion in *Santa Fe* and the plurality opinion in *Helms*, and Justices O'Connor and Breyer joined him in supporting, in part, the different interpretations of Establishment Clause restrictions in the two cases. There is some sentiment that the two lines of cases are internally congruent in applying the Establishment Clause,[49] but such consistency is more apparent in recent judicial pronouncements regarding state aid to parochial schools than in the judicial posture toward religious influences in public education.

A. The Movement Toward Accommodation in State-Aid Cases

The Supreme Court's support of religious accommodations in terms of allowing government support for parochial school students has been steady at least since 1993,[50] with some evi-

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chial Schools, SCH. BD. NEWS, July 11, 2000, at 1, 8.

48. *See* Mitchell v. Helms, 120 S. Ct. at 2541-42; Santa Fe v. Doe, 120 S. Ct. at 2277-79.

49. *See* Mark Walsh, *Church-State Rulings Cut Both Ways*, EDUC. WEEK, July 12, 2000, at 1, 40.

50. *See* Mitchell v. Helms, 120 S. Ct. 2530 (2000); Agostini v. Felton, 521 U.S. 203 (1997) (lifting injunction and rejecting Establishment Clause challenge to the use of pubic school personnel to provide remedial services in parochial schools); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that the Establishment Clause does not require a public university to deny student activity funds to stu-

dence of the accommodationist trend much earlier.[51] After all, government aid to provide transportation and secular textbooks for parochial school students has been upheld since the mid-twentieth century,[52] and these precedents have not been disturbed. Despite Justice Souter's assertion that government aid used to supplant private school funds is unconstitutional,[53] for decades the use of public funds to provide textbooks for parochial school students has allowed the sectarian school's textbook funds to be redirected for religious purposes. Also, the Supreme Court in 1980 found government support for state-required testing programs in private schools to be constitutional,[54] casting doubt on its earlier pronouncements that aid to develop and administer state-required as well as teacher-developed tests abridges the Establishment Clause because such tests potentially could be used to advance sectarian pur-

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dent groups that will use the funds to distribute sectarian publications); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (rejecting Establishment Clause challenge to the use of public funds for sign language interpreters to assist hearing deficient children in parochial schools). *But see* Board of Educ. v. Grumet, 512 U.S. 687 (1994); *infra* note 61.

51. As Justice Thomas observed in *Helms*, "the principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini* [citation omitted], but also in *Zobrest, Witters,* and *Mueller.*" 120 S. Ct. at 2542. *See* Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986) (upholding use of federal vocational rehabilitation aid to support ministerial training); Mueller v. Allen, 463 U.S. 388 (1983) (upholding state tax benefit for educational expenses available to parents of public or private school students).

52. *See* Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1962) (finding no Establishment Clause violation in a state law requiring public school districts to loan secular textbooks to all secondary students, including those attending parochial schools); Everson v. Board of Educ., 330 U.S. 1 (1947) (rejecting an Establishment Clause challenge to the use of public funds to provide transportation services for non-public school students); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (rejecting a Fourteenth Amendment challenge to a state law requiring books to be furnished free to students attending public or private schools). *Everson* often is cited as the beginning of the separationist period in interpreting the Establishment Clause in terms of state aid to parochial schools, because, despite its holding, the Court made a strong separationist statement: "Neither a state nor the Federal government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state,'" 330 U.S. at 15-16. But the *Everson* Court also showed some support for the nondiscrimination theory, recognizing that the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, nonbelievers, Presbyterians, or the members of any other faith, because of the faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16.

53. Mitchell v. Helms, 120 S. Ct. 2530, 2588-89 (2000) (Souter, J., dissenting).

54. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

poses.[55]

Then, in 1993, the Supreme Court found no Establishment Clause violation in using public funds for sign language interpreters in parochial schools,[56] signaling a paradigm shift that was solidified in 1997 when the Supreme Court overturned the prohibition against allowing public school personnel to provide remedial instruction in religious schools.[57] In both of these decisions, the Court rejected the notion that the Establishment Clause lays down an "absolute bar to the placing of a public employee in a sectarian school."[58] And with *Helms* explicitly overturning the holdings of *Meek* and *Wolman* regarding the use of public funds for instructional equipment and materials in sectarian schools, there are very few rulings left that reflect the Supreme Court's separationist stance in connection with state aid to nonpublic schools. In fact, the Supreme Court seems to have dismantled most of the decisions, rendered during the heyday of the stringent *Lemon* test, in which it struck down various types of public assistance to private schools.[59]

The only separationist decisions of this period that have not been eroded at least in part by subsequent Supreme Court opinions involved government aid made available *solely* to private schools or their patrons, such as support for nonpublic school teachers' salaries in secular subjects, grants to maintain private school facilities, and reimbursement to parents for a portion of private school tuition.[60] And the only separationist

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55. *See* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973), *supra* note 30; Meek v. Pittenger, 421 U.S. 349 (1975), *supra* note 36.

56. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

57. Agostini v. Felton, 521 U.S. 203 (1997), overturning its ruling that barred the use of public school personnel to provide Title I remedial services on sectarian school premises, Aguilar v. Felton, 473 U.S. 402 (1985), and the portion of its decision that invalidated a shared-time program under which public school classes were provided for parochial school students on parochial school premises, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *supra* note 30. *See* Ralph Mawdsley, *Extending the Limits of Permissible Government-Religion Interaction:* Stark v. Indep. Sch. Dist. No. 640, 124 EDUC. L. REP. 499, 501 (1998).

58. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993).

59. This lends some support to Justice Thomas' assertion that *Meek* and *Wolman* were simply anomalies, 120 S. Ct. at 2540. *See supra* notes 30 and 36.

60. *See* Sloan v. Lemon, 413 U.S. 825 (1973) (striking down reimbursement to parents for part of tuition paid to nonpublic schools); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down direct grants for maintenance and repair of private schools, tuition reimbursements to parents of nonpublic school children, and tax benefits restricted to parents of private school students); Lemon v. Kurtzman, 403 U.S. 602 (1971) (striking down a Rhode Island statute calling

decision in this domain in the 1990s was *Board of Education v. Grumet*, in which the Supreme Court struck down a legislative attempt to create a separate school district to serve special-needs Satmar Hasidic children whose strict form of Judaism does not allow them to be educated with non-Satmars.[61]

B. The Winding Path Involving Student-led Devotionals in Public Schools

The federal judiciary's posture pertaining to devotional activities in public schools does not reflect as consistent a trend in recent Establishment Clause interpretations. Notwithstanding assertions that public education is the last bastion of church/state separation,[62] several contrary federal appellate decisions have been rendered recently, and some Supreme Court action regarding religious influences in public schools is difficult to categorize as separationist. Most of these cases have involved an expansive view of constitutional protection of private religious expression that does not implicate Establishment Clause restrictions.

Starting in the early 1980s the Supreme Court began emphasizing the First Amendment principle of equal access for and equal treatment of private religious expression. Ira Lupu has observed that, "even the standard-bearers of the separationist tradition have been prepared to cede territory in the name of competing rights . . . [that] include the rights to be free of official discrimination with respect to religious exercise, freedom of speech, and freedom of association."[63] Some com-

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for salary supplements for teachers of secular subjects in private schools and a Pennsylvania statute calling for reimbursement to private schools of the costs of teachers' salaries, textbooks, and instructional materials in secular subjects). *See also* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (striking down state aid earmarked only for private schools in connection with various testing and record-keeping practices), *supra* note 30. But the Court subsequently upheld state aid made available for state-required testing and recordkeeping practices in both public and private schools, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980), *supra* note 54.

61. 512 U.S. 687 (1994). *But see* Stark v. Indep. Sch. Dist. No. 640, 123 F.3d 1068 (8th Cir. 1997), *cert denied*, 523 U.S. 1094 (1998) (upholding a school district's decision to reopen a one-class school with a modified curriculum in response to a request from the Brethren sect); Mawdsley, *Extending the Limits of Permissible Government-Religion Interaction*, *supra* note 57.

62. *See* Ira C. Lupu, *The Lingering Death of Separationism* 62 GEO. WASH. L. REV. 230, 231-34 (1994).

63. *Id.* at 249.

mentators have traced the origins of the current version of neutrality that prohibits discrimination against religious viewpoints to *Widmar v. Vincent*, in which the Supreme Court held in 1981 that state-supported universities could not discriminate against religious groups in making campus facilities available for student organizations to meet.[64] But Douglas Laycock has argued that the roots of the nondiscrimination neutrality theory can be traced much further back in First Amendment litigation.[65]

At the precollegiate level, the Free Speech Clause principle was augmented in 1984 by the Equal Access Act (EAA), under which federally assisted secondary schools that have established a limited forum for student groups to meet during noninstructional time cannot deny school access to noncurriculum student groups based on the religious, philosophical, or political content of their meetings.[66] In 1990, the Supreme Court in *Board of Education of Westside Community Schools v. Mergens* rejected the contention that the EAA abridges the Establishment Clause because student religious groups are allowed to meet, recognizing the law's clear secular purpose of preventing discrimination against religious and other private expression.[67] The Court emphasized that unlike government speech promoting religion that is prohibited by the Establishment Clause, private religious expression is protected by the Free Speech and Free Exercise Clauses.[68] In subsequent cases, federal appellate courts have ruled that the EAA prevails over state constitutional provisions requiring greater separation of church and state than demanded by the Establishment Clause,[69] and

64. 454 U.S. 263 (1981). *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers* 46 EMORY L. J. 1, 21 (1997); Lupu, *The Lingering Death of Separationism*, *supra* note 62, at 247. *See also* Wallace v. Jaffree, 472 U.S. 38, 106 (Rehnquist, J., dissenting), where Chief Justice Rehnquist claimed that the Establishment Clause does "not require government neutrality between religion and irreligion nor . . . prohibit the federal government from providing non-discriminatory aid to religion."

65. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 62 (1997).

66. 20 U.S.C. §§ 4071-4074 (2000).

67. 496 U.S. 226, 249 (1990).

68. *Id.* at 250.

69. *See* Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist., 66 F.3d 1535 (9th Cir. 1995) (relying on the EAA to allow student religious group to meet during lunch period since it was noninstructional time and other student groups were allowed to meet); Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641 (9th Cir. 1993), *cert.*

have allowed student religious groups to require certain officers to be Christians to safeguard the spiritual content of their meetings.[70]

During the 1990s, the Supreme Court made some definitive pronouncements about the protection of private religious expression against viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court held that if secular community groups are allowed to use the public school after school hours to address particular topics (i.e., family life and child rearing), groups that approach these topics from religious perspectives cannot be denied public school access.[71] In essence, school districts cannot enforce policies governing facility use during nonschool time that entail viewpoint discrimination against a religious group's message. Some courts have broadly interpreted the *Lambs Chapel* principle in protecting religious viewpoints from differential treatment with respect to public school access during nonschool time.[72]

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denied, 510 U.S. 819 (1993) (finding that the EAA prevailed over antiestablishment provisions in state law; a student religious group could not be barred from the public school's limited forum for student meetings).

70. Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996), *cert. denied*, 519 U.S. 1040 (1996).

71. 508 U.S. 384 (1993).

72. *See, e.g.*, Shumway v. Albany County Sch. Dist. No. One, 826 F. Supp. 1320 (D. Wyo. 1993) (ruling that a religious group could rent the high school gymnasium for a baccalaureate program because other community groups were allowed to use the school gym for various events; finding no school sponsorship even though the school band performed and the school's graduation announcements included the baccalaureate program). But courts have ruled that the government can prohibit religious worship in a limited forum. *See, e.g.*, Campbell v. St. Tammany Parish Sch. Bd, 231 F.3d 937 (5th Cir. 2000) (finding no viewpoint discrimination in school district's policy permitting use of school facilities for recreational and civic activities and excluding political meetings, for-profit fund-raising, and religious services); Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (upholding a school district's prohibition on religious groups using the public school on a weekly basis for Sunday worship services, reasoning that the prohibition on worship services was viewpoint neutral and appropriate in a limited forum). The line may not always be clear, however, between religious worship, which can be barred from a limited forum, and the discussion of topics from a religious perspective, which must be allowed on any topic that is addressed in the forum from a secular perspective. *Compare* Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1994), *cert denied,* 515 U.S. 1173 (1995) (holding that since scouts were allowed to meet at a public middle school after school hours to discuss character education, it would be viewpoint discrimination to bar a parent-led religious youth group access to address the same topic) *with* Good News Club v. Milford Central Sch. Dist., 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (upholding a school district's denial of school access to a religious youth organization under its "community use" policy because the meetings would entail religious instruction and prayer). Perhaps the Su-

A 1995 higher education decision, *Rosenberger v. Rector and Visitors of the University of Virginia*, can be classified as a "state-aid" case, but the Supreme Court also addressed the equal treatment of private religious and secular expression. Ruling that a public university could not withhold support from a student religious group seeking to use student activity funds to publish sectarian materials, the Court majority concluded that religious material must be treated like other material in student-initiated publications.[73] The majority denounced the University's attempt to deny support to the religious group as discriminating against religious viewpoints of private persons whose speech it subsidizes. The Court held that the government's equal treatment of religious and secular private expression is not only permitted by the Establishment Clause, but in some circumstances is required by the Free Speech Clause. The majority reasoned that since the institution was providing "secular printing services on a religion-blind basis," there was "no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."[74]

Given the Supreme Court's protection of private religious expression against viewpoint discrimination in *Lamb's Chapel* and *Rosenberger*, it is not surprising that several federal appellate courts have relied on these rulings in broadly interpreting what constitutes such private speech.[75] As noted previously, the Eleventh Circuit Court of Appeals delivered two recent rulings that represent an expansive stance regarding the reach of the Free Speech Clause in protecting students' private religious

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preme Court will use the latter case to provide some clarification regarding the content/viewpoint and worship/expression distinctions in facility-use policies.

73. 515 U.S. 819 (1995).

74. *Id.* at 848. *See* Arval A. Morris, *Separation of Church and State? – Remarks on* Rosenberger v. University of Virginia, 103 EDUC. L. REP. 553-71 (1995).

75. Even before these decisions, the Fifth Circuit Court of Appeals upheld the practice of allowing students to decide by election whether to have student-led graduation devotionals. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *vacated and remanded,* 505 U.S. 1215 (1992), *on remand,* 977 F.2d 963 (5th Cir. 1992), *cert. denied,* 508 U.S. 967 (1993). After two federal appellate courts reached an opposite conclusion, the Supreme Court muddied the waters by vacating the Ninth Circuit ruling, thus reinstating the federal district court's decision that upheld a policy allowing students to determine the fate of student-led graduation devotionals. *See* Harris v. Joint Sch. Dist., 41 F.3d 447 (9th Cir. 1994), *vacated,* 515 U.S. 1155 (1996). *See also* ACLU of N.J. v. Blackhorse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996), *supra* note 15.

expression in public schools.[76] In *Adler v. Duval County*, after a lengthy series of court orders, in 2000, the full court reversed the appellate panel's decision that had invalidated a contested school district policy.[77] The appellate court *en banc* upheld the policy that authorizes public school seniors to select classmates to give graduation messages and allows the speakers to choose the content, which could be religious. Although the school district's memo outlining the policy was entitled "Graduation Prayer," the court emphasized that the student election is not to identify a classmate to deliver a prayer; the graduation message is of unspecified content, which may or may not include a prayer.

In the second Eleventh Circuit ruling, the appeals court in *Chandler v. James* lifted the part of an injunction that had prohibited students from publicly expressing religious views in most school settings in the Dekalb County, Alabama district.[78] The court declared that the Establishment Clause does not require and the Free Speech Clause does not permit suppression of student-initiated religious expression in public schools. The court emphasized that a school policy tolerating religion "does not improperly endorse it."[79] However, the Supreme Court vacated the appellate decisions in both *Chandler* and *Adler* and remanded the cases for further consideration in light of *Santa Fe*.

In October, 2000, the Eleventh Circuit in *Chandler* reinstated its earlier judgment that the injunction could not prohibit genuinely student-initiated religious speech or regulate such expression differently from private secular expression.[80] The appeals court reiterated that the district court's injunction swept too broadly because it equated all student religious speech in a public context at school with expression representing the public school. Distinguishing the Supreme Court's con-

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76. *See* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded*, 120 S. Ct. 2714 (2000), *on remand sub nom.*, Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000); Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000), *vacated and remanded*, 121 S. Ct. 31 (2000); *supra* note 16.

77. 174 F.3d 1236 (11th Cir. 1999), *vacated and different results on rehearing en banc*, 206 F.3d 1070 (11th Cir. 2000). *See also* Doe v. Madison Sch. Dist. No 321, 147 F.3d 832 (9th Cir. 1998), *vacated and remanded en banc*, 177 F.3d 789 (9th Cir. 1999), *supra* note 17.

78. *Chandler*, 180 F.3d 1254 (11th Cir. 1999).

79. *Id.* at 1261.

80. Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000).

demnation of school-sponsored student prayer in *Santa Fe*, the appeals court held that *Chandler* dealt with school censorship of students' private religious expression, which is also unconstitutional. If the Supreme Court agrees to review *Chandler*, perhaps it will clarify the circumstances under which religious speech in public schools is protected by the Free Speech Clause as private expression, and how much control school authorities must exert over the activities for the student expression to represent the school.

The contention that there is a consistent pattern in cases addressing student-led devotionals in public schools or even in the Supreme Court's action in this domain is a stretch. The tension between separationist doctrine and the equal access/treatment concept continues to generate a range of rulings regarding religious expression in public schools.[81] Furthermore, the legal status of several other issues pertaining to sectarian influences in public education remains ambiguous. For example, although it appeared settled that public schools would abridge the Establishment Clause if they allowed religious groups to come into the schools to distribute Bibles and other religious materials,[82] some recent decisions do not follow this pattern. The Fourth Circuit Court of Appeals upheld a West Virginia school district's policy allowing sectarian organizations along with political groups to distribute materials, such as Bibles, in public schools on a designated day because the organizations were considered private entities that do not represent the school.[83] Also, despite the Supreme Court's 1980 ruling that struck down a state law calling for the posting of the Ten

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81. *See* Lupu, *The Lingering Death of Separationism*, *supra* note 62, at 249. In addition to some expansive judicial interpretations of the constitutional protection that should be given to private religious expression, *see supra* note 76, other appellate rulings do not fit a separationist mold. *See, e.g.*, Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11th Cir. 1997) (upholding a Georgia law that requires a moment for silent reflection at the beginning of the day in all public schools); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) (rejecting Establishment Clause challenge to an Illinois law requiring the daily recitation of the Pledge of Allegiance to the American flag in public schools, as the phrase "Under God" does not change this patriotic observance into a prayer).

82. *See, e.g,* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995); Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993), *cert denied*, 508 U.S. 911 (1993).

83. Peck v. Upshur County Bd. of Educ., 155 F.3d 274 (4th Cir. 1998). *See also* Bacon v. Bradley-Bourbonnais High Sch. Dist. No. 307, 707 F. Supp. 1005 (C.D. Ill. 1989) (upholding distribution of Gideon Bibles on the school-owned sidewalk in front of a high school, because it was considered a public forum for use by the general public).

Commandments in public schools,[84] this topic has recently become controversial again with several state legislatures enacting provisions calling for the Ten Commandments to be displayed with other historical documents in public buildings, including schools.[85]

Notwithstanding a number of unresolved issues and the absence of a consistent pattern in public school Establishment Clause opinions, the *Santa Fe* ruling has at least put a damper on efforts to extend free speech protection to all devotional activities that are led by students in public schools. Thus, for the present, it appears that the Establishment Clause may have more vitality in public school controversies than in connection with government funds flowing to religious schools.

V. NEW NEUTRALITY PRINCIPLE

"Neutrality is . . . a coat of many colors."[86]

This observation made by Justice Harlan more than thirty years ago understates the difficulties involved in defining the governmental neutrality toward religion that the First Amendment demands. The search for the appropriate standard to govern church/state relations certainly is not a recent dilemma. When our Federal Constitution was adopted, this issue had "perplexed and plagued the nations of Western Civilization for some fourteen centuries."[87] By including in the Bill of Rights restrictions on federal government activity respecting an establishment of religion, the United States became unique among nations, but delineating the reach of the Establishment Clause

84. Stone v. Graham, 449 U.S. 39 (1980). The federal judiciary carefully evaluates the legislative history of challenged government policies and practices to ascertain if they are designed to advance sectarian doctrine. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 59-61 (1985) (striking down an Alabama law calling for a daily moment of silence for mediation or prayer in public schools as reflecting a legislative intent to have school children engage in silent prayer).

85. *See* Mark Walsh, *Commandments Debate Moves to Statehouse*, EDUC. WEEK, February 16, 2000, at 18, 21. *See also* Books v. City of Elkhart, Ind., 235 F.3d 292 (7th Cir. 2000) (finding that erection of a monument with the Ten Commandments on the municipal building lawn violated the Establishment Clause); *See* Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (enjoining the posting of the Ten Commandments in Harlan County schools).

86. Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

87. Horace Mann League of the U.S. v. Board of Pub. Works, 220 A.2d 51, 60 (Md. 1966).

has remained elusive.[88] Although "neutrality" often is used to characterize the constitutionally required relationship between government and religion, there has never been sufficient elaboration as to exactly what the term means or how it can be attained. Stephen Smith has asserted that finding a truly neutral theory of religious freedom is impossible in part due to the fact that such "theories are always offered from the viewpoint of one of the competing positions that generate the need for such a theory."[89]

In fact, "neutrality" has been championed both by those asserting that government involvement with religion is permissible and by those claiming that it is strictly prohibited.[90] Often cited as the basis for the separationist position is the historic *Memorial and Remonstrance*, adopted in Virginia in 1786, in which James Madison argued that the government should have no jurisdiction over religion.[91] In 1947, Justice Rutledge equated neutrality with "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion,"[92] and Justice Clark wrote for the Supreme Court in 1963 that "wholesome neutrality" withdraws "all legislative power respecting religious belief or expression."[93] According to Justice Souter, the concept of "neutrality" shifted in *Lemon* and its progeny, from "labeling the required position of the government to describing a benefit that was nonreligious."[94]

Currently, however, the term has a much more accommoda-

88. Most Establishment Clause litigation has taken place since the mid-twentieth century after the Supreme Court interpreted the Fourteenth Amendment as incorporating the religion clauses and making their restrictions, originally directed toward the federal government, applicable to state action as well. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The first major Establishment Clause decision was Everson v. Board of Educ., 330 U.S. 1 (1947), *supra* note 52.

89. STEVEN D. SMITH, FOREORDAINED FAILURE 97 (1995).

90. *See generally*, Lisa W. Hanks, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 STAN. L. REV. 903 (1996); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986).

91. James Madison, *Memorial and Remonstrance Against Religious Assessments*, COMMONWEALTH OF VIRGINIA, 1786. Justice Rutledge appended to his dissenting opinion in Everson v. Board of Educ., 330 U.S. 1, 28 (1947) (Rutledge, J. dissenting), the entire *Remonstrance, id.* at 63, and the bill to which it was directed (A Bill Establishing a Provision for Teachers of the Christian Religion), *id.* at 72.

92. 330 U.S. at 31-32 (1947) (Rutledge, J., dissenting).

93. Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

94. Mitchell v. Helms, 120 S. Ct. 2530, 2578 (Souter, J., dissenting).

tionist connotation and seems to be used primarily to depict nondiscrimination toward religion, which Laycock refers to as "formal neutrality."[95] In 1995, Justice Kennedy opined for the Supreme Court: "We have held that the guarantee of neutrality is respected, not offended, when government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[96] At least four of the current Supreme Court Justices equate "neutrality" with evenhanded treatment of religious and secular concerns in terms of government aid,[97] and if the *Helms* plurality can convince one additional Justice to endorse this position, most types of government assistance made available to public and religious schools alike would satisfy the Establishment Clause. Legislatures certainly will capitalize on the plurality's reasoning in *Helms* to press the limits of religious accommodations allowed under the Establishment Clause.

The plurality's logic will be used to argue not only that government assistance to nonpublic schools should expand, but also that the Constitution presents no barrier to proposals to fund education by providing parents with vouchers to use at the public or private school of their choice. Assuming that the aid under a voucher program is distributed in an evenhanded manner and goes to parochial schools only because of private actions, the criteria articulated by the *Helms* plurality would be satisfied. Despite the mixed scoreboard of lower court rulings involving voucher programs,[98] the prospects have become

95. *See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). *See also* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L. J. 1 (2000).

96. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995).

97. *See* the *Helms* plurality, 120 S. Ct. 2530 (2000), *supra* note 29.

98. Striking down voucher plans on Establishment Clause grounds, *see* 234 F.3d 445 (6th Cir. 2000) Stout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, Simmons-Harris v. Zelman, 72 F. Supp.2d 834 (N.D. Ohio 1999), *injunction stayed pending appellate review*, 120 S. Ct. 443 (1999); Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999). Rejecting Establishment Clause challenges, *see* Simmons-Harris v. Goff, 86 Ohio St. 3d 1 (1999); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U. S. 997 (1998). Striking down voucher programs on state constitutional grounds, *see* Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999); Gincomucci v. Southeast Delco Sch. Dist., 742 A.2d 1165 (Pa. Commw. 1999). Rejecting a challenge to a voucher program under state law, *see* Bush v. Holmes, 767 So. 2d 668 (Fla. App. 2000). *See also* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S.

considerably brighter for a favorable Supreme Court ruling on this topic. If voucher programs do expand and dramatically increase government aid to parochial schools, this could change the public/private school ratio in our nation, which would affect the electorate's support for public education. Indeed, of the two recent Supreme Court decisions, *Helms* appears to have the most substantial implications over the long haul, both in terms of education in our nation and Establishment Clause doctrine.

For a period during the 1990s, it appeared that nondiscrimination neutrality also was becoming the dominant consideration in assessing the constitutionality of sectarian influences in public schools if religious expression was involved. As discussed, the Supreme Court in *Mergens, Lamb's Chapel*, and *Rosenberger* made some potent statements regarding the equal treatment of sectarian and secular private expression and expanded what would be considered private (in contrast to government-sponsored) expression.[99] Thus, support for equal treatment of religious expression seemed to be gaining momentum in Establishment Clause litigation pertaining to religious observances and influences in public education. But the *Santa Fe* ruling, although not altering the principle that the Free Speech Clause protects private religious expression, has put some limits on the types of student expression considered "private" and thus beyond the reach of the Establishment Clause.

Justice O'Connor may be the wild card who could determine whether a new accommodationist majority is formed on the Court that will adopt the neutrality principle of the *Helms* plurality at least in state-aid cases. In the past, she has voiced support for "private-choice neutrality" in that decisions by private actors do not implicate the Establishment Clause.[100] She reiterated such support for "true private-choice programs" in *Helms*, suggesting that she would view as constitutional gov-

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810 (1999) (rejecting Establishment Clause challenge to state tax credit of up to $500 for contributions to school tuition organizations to support private school tuition); Martha McCarthy, *School Voucher Plans: Are They Legal?* 26 J. EDUC. FIN. 1 (2000).

99. *See supra* notes 67, 71, and 73. As discussed, the Fourth Circuit Court of Appeals already has espoused a broad interpretation of nondiscrimination neutrality in finding no Establishment Clause violation in a school district's policy granting religious groups access to the public school to distribute Bibles and other sectarian materials on the same terms with secular community groups. *See* Peck v. Upshur County Bd. of Educ., 155 F.3d 274 (4th Cir. 1998), *supra* text accompanying note 83.

100. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring).

ernment aid that flows to private schools because of parents' decisions.[101] Thus, Justice O'Connor may join Justices Thomas, Scalia, and Kennedy, and Chief Justice Rehnquist in upholding school voucher plans and possibly other types of government aid to religious institutions. Prospects are better for nondiscrimination neutrality to become the standard in state-aid cases than in cases involving student-initiated devotionals in public education. Only three of the current members of the Supreme Court – Justices Thomas, Scalia, and Chief Justice Rehnquist – have steadfastly advocated applying this standard to religious expression in public schools.[102] Justice Kennedy is the most promising candidate to join this group since he already has voiced support for nondiscrimination neutrality in state-aid cases. But he has not reflected a consistent pattern in church/state rulings involving schools. He is the only current Justice who has voted with the majority in all education-related Establishment Clause cases since he joined the Court, whether upholding or invalidating the contested government practices at issue,[103] so it is difficult to place Justice Kennedy squarely in the separationist or accommodationist camp. He

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101. 120 S. Ct. 2530, 2559-60 (O'Connor, J., concurring). But she agreed with Justice Souter that nondiscrimination neutrality as defined by Justice Thomas is not sufficient as the single criterion to justify government aid to religious schools. *See id.* at 2557-58. *See also supra* text accompanying note 44.

102. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319-324 (2000) (Rehnquist, C.J., dissenting, joined by Scalia, and Thomas, JJ.). *See also infra* text accompanying note 19.

103. He joined the majority in Mitchell v. Helms, 120 S. Ct. 2530 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Board of Educ. v. Grumet, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Lee v. Weisman, 505 U.S. 577 (1992); and Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990). In one Establishment Clause case involving schools, while supporting the holding of the majority, he wrote a concurring opinion, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397 (1993) (Kennedy, J., concurring). In one nonschool Establishment Clause ruling he also concurred, Bowen v. Kendrick, 487 U.S. 587, 624 (1988) (Kennedy & Scalia, JJ., concurring) (rejecting an Establishment Clause challenge to the facial validity of the Adolescent Family Life Act that provides grants to secular and sectarian organizations for research and services pertaining to premarital adolescent sexual activity and specifies that counseling services cannot advocate abortions). Also, in another nonschool case, Justice Kennedy concurred in part and dissented in part, County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J. concurring, Rehnquist, C.J. & Kennedy, White, & Scalia, JJ., dissenting) (agreeing with the majority in upholding display of a menorah with a Christmas tree outside the city-county office building, but disagreeing that the display of the creche in county courthouse abridged the Establishment Clause).

signed the sweeping plurality opinion in *Helms* but has not always been aligned with the other three Justices in the plurality who have not deviated from an accommodationist stance in Establishment Clause cases involving public or private school issues. Accordingly, Chief Justice Rehnquist and Justices Thomas and Scalia dissented in *Santa Fe*, whereas Justice Kennedy sided with the *Santa Fe* majority and during oral arguments seemed quite concerned about student elections determining whether devotionals would take place.[104] But Justice Kennedy also has not usually espoused the reasoning of the separationist group. Although he wrote the Court's opinion in *Lee v. Weisman*, he was the only Justice in the five-member majority who required evidence of coercion to invalidate the clergy-led graduation prayers.[105] The other four Justices signed concurring opinions indicating that coercion was sufficient, but not required, to abridge the Establishment Clause.[106] Thus, it may be possible to convince Justice Kennedy that the bar should be raised for the Supreme Court to find public school practices in violation of the Establishment Clause since he already has asserted that at least some form of religious coercion would have to be present.

Still another Justice would be needed to form a solid accommodationist majority favoring nondiscrimination neutrality in assessing student-led devotionals in public schools. Of the remaining Justices, only Justice O'Connor seems to be a possibility,[107] although it is doubtful that she would transfer her support of "private-choice neutrality" to student decisions to

104. Mark Walsh, *Court Hears Arguments in Prayer Case*, EDUC. WEEK., April 5, 2000, at 27.

105. Lee v. Weisman, 505 U.S. 577, 594-96 (1992).

106. The concurring Justices in *Weisman* asserted that evidence of government endorsement of religion suffices to abridge the First Amendment. *Id.* at 599 (Blackmun, Stevens, & O'Connor, JJ., concurring); *id.* at 609 (Souter, Stevens & O'Connor, JJ., concurring).

107. Justices Stevens, Souter, and Ginsberg are quite unlikely to do so, given that their voting records favor separationist doctrine. Although Justice Breyer has a mixed voting record in state-aid cases (dissenting in *Agostini* and *Rosenberger*, but concurring in *Helms*), he voted with the majority in *Santa Fe*, which is the only case involving devotional activities in public schools that the Court has reviewed during his tenure on the high court. His position in *Helms* may be the anomaly, as he seems more aligned with the "separationist" group. *See* Mitchell v. Helms, 120 S. Ct. 2530, 2556 (O'Connor & Breyer, JJ., concurring); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Agostini v. Felton, 521 U.S. 203, 255 (1997) (Ginsburg, Stevens, Souter, & Breyer, JJ., dissenting); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting).

lead devotional activities in public schools. She voted with the majority both in *Weisman* and *Santa Fe*, suggesting that she may continue to apply a more stringent standard in assessing religious observances in public schools than in evaluating state aid to parochial schools.[108] Nonetheless, she made the often-quoted statement that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" and has voiced strong support for protecting private religious expression in public education.[109] So, it is not beyond the realm of possibility that in a future decision she might vote to expand the types of student speech classified as "private."

VI. CONCLUSION

Even if the current Justices maintain the tenuous alliances evident in *Santa Fe* and *Helms*, reflecting somewhat divergent strands of Establishment Clause analysis depending on the issue and school setting, new appointments to the Supreme Court are eminent. Several Justices have had health problems, and three are seventy or older. Assuming that eighty-year-old Justice Stevens, who is among the more separationist-oriented current Justices, is replaced by a Justice who supports governmental accommodation toward religion, the constitutionality of voucher programs and other government assistance to sectarian schools will be assured, and additional religious influences in public schools will likely be upheld. Moreover, a shift in the Court's composition could have a formidable impact on Establishment Clause doctrine in general, perhaps signaling a directional shift even more significant than the adoption of

108. *See* 530 U.S. 290 2266 (2000); 505 U.S. 577 (1992). Justice O'Connor also concurred in Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (Powell & O'Connor, JJ., concurring) (striking down a Louisiana law, calling for equal emphasis on creation science whenever evolution is taught in public schools, as advancing religion in violation of the Establishment Clause).

109. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 846 (1995) (O'Connor, J., conncurring) (arguing that, "neutrality, in both form and effect, is one hallmark of the Establishment Clause," in that religion is neither endorsed nor disadvantaged); Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 250 (1990). Justice O'Connor also was in the majority in *Lamb's Chapel* and concurred in *Rosenberger*. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

the *Lemon* test in the early 1970s.[110] Activity in this volatile area of constitutional law during the next decade may affect the contours of our religious liberties for generations to come.

110. *See supra* notes 20, 38.