State Action and the Supreme Court's Emerging Consensus on the Line between Establishment and Private Religious Expression

Michael W. McConnell

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, Education Law Commons, First Amendment Commons, Religion Law Commons, and the State and Local Government Law Commons

Recommended Citation

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.speth@pepperdine.edu.
State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression

Michael W. McConnell

October Term 1999 looked, on the surface, like a continuation of the long-running religion wars on the Supreme Court. There were two cases involving religion, raising two of the most contentious hot-button issues in the entire field: school prayer and aid to religious schools. Both cases were decided by six-to-three majorities, and both cases occasioned impassioned dissents. The "liberals" won one, and the "conservatives" won one. Judging from the rhetoric, the two sides are as far apart as ever. In Santa Fe Independent School District v. Doe, the school prayer case, conservative dissenters claimed that the majority "distorts existing precedent" and "bristles with hostility to all things religious in public life." In Mitchell v. Helms, the school aid case, liberal dissenters characterized the plurality opinion as "a doctrinal coup" and accused those who joined the opinion of "attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion."

Two decisions, so closely divided and won by opposite sides, may not appear to be promising material for bringing harmony and coherence to what the lower court in one of the cases called "the vast, perplexing desert" of the Court's Establishment Clause jurisprudence. Yet I will make that claim. Shorn of their confrontational rhetoric, these cases strongly suggest that the Court is on the verge of consensus regarding the fundamental values served by the Establishment Clause. Although expressed in somewhat different language, the principle of the
majority opinion in *Santa Fe*, written by liberal, separationist Justice John Paul Stevens, is essentially identical to the principle of the plurality opinion in *Mitchell*, written by conservative, accommodationist Justice Clarence Thomas. Both opinions treat as decisive the question: Was the religious activity that took place properly attributable to the government or to private parties? If attributable to the government, then the legal arrangements supporting the religious activity are unconstitutional, as an establishment of religion. If attributable to private parties, then the legal arrangements are permissible, and any attempt to censor or discriminate against private religious activity would, at a minimum, raise serious questions under the Free Speech and Free Exercise Clauses.

In short, the emerging Establishment Clause jurisprudence can be seen as a specialized application of the state action doctrine. Contrary to popular impression, the Establishment Clause is not “hostile,” nor is it favorable, to religion; it stands for the proposition that religious activity and advocacy must be a product of the private judgments of individuals and groups. If religious activity is instigated, encouraged, or—in the strongest case—coerced by the government, the government’s acts are unconstitutional. But if religious activity is the product of private judgment, it is permissible—even welcome—within the public sphere. Thus, religion must be private in its *provenance*, but need not be private in its *expression* or *effect*, and need not be cut off from public forums and generally available public programs. The public sphere must be neutral and pluralistic; it need not be secular.

The “state action” line is a useful way to address issues under the Religion Clauses because the values served by the Religion Clauses depend—perhaps more than any other constitutional questions—on the distinction between public and private. Most constitutional provisions concern conduct that is wrongful, whether engaged in by private or public actors. For example, the Equal Protection Clause also has a state action requirement, but racial discrimination is generally odious and, in most cases, illegal, whether practiced by public or private parties. The taking of private property without just compensation is called stealing when done by a private person and unconstitutional when done by the state. The Religion Clauses are different. Precisely the same conduct—leading prayers, for example—is constitutionally *valued* and *protected* if engaged in by private parties, though unconstitutional if done by the government. Unlike most constitutional provisions, therefore, the Religion Clauses are not about wrongful conduct but about ensuring that the time, manner, degree, and theological substance of religious activity in the nation are determined by individuals, families, religious groups, and other private associations. The evil against which the Establishment Clause is directed is not religion, but government control over religion.
I. MITCHELL V. HELMS

Mitchell v. Helms involved the constitutionality of a federal program, Chapter 2 of the Education Consolidation and Improvement Act of 1981, which provides an equal per-student subsidy to public school districts to purchase computers, computer software, library books, and other instructional materials for the use of students attending accredited public or private schools, including religiously affiliated private schools. The plaintiffs, federal taxpayers, contended that this program violated the Establishment Clause by subsidizing education in religious schools. Under the terms of the program, recipients of the materials were permitted to use them only for "secular, neutral, and nonideological purposes." However, the plaintiffs argued—with some plausibility—that in light of the nature of the materials, there could be no assurance that these restrictions were faithfully obeyed or enforced. For example, while a computer might be provided for use in computer-aided mathematics instruction, there is no reliable way to ensure that it could not also be used to access religious materials. Similarly, while a work of literature might be appropriate for secular study, a teacher in a religious school might use it to illustrate religious or theological themes.

The lawsuit targeted the Chapter 2 program in Jefferson Parish, Louisiana, one of the most Catholic counties in the nation. Approximately thirty percent of the student population in Jefferson Parish attends private schools—the large majority of which are Roman Catholic—and therefore, thirty percent of the Chapter 2 funds were allocated to those schools. Plaintiffs conducted four years of intensive discovery, designed to uncover instances in which Chapter 2 materials were used for religious instruction. Their efforts were mostly unavailing. They discovered that some 191 library books of a religious nature had been purchased with Chapter 2 funds, but this violation was discovered and corrected prior to the litigation. They found that audio visual equipment had been used in religion

4. The program was originally enacted as Title II of the Elementary and Secondary Education Act of 1965. It has been repeatedly reauthorized, with minor amendments, since that time. It is now codified at 20 U.S.C. §§ 7301-7373 (1994).
5. Id. § 7351.
9. Id. at 2537.
10. Id. at 2538.
11. Id. at 2554-55.
12. Id. at 2555, 2571-72.
13. Id. at 2555, 2571, 2595.
classes but could not establish that the equipment had been purchased with Chapter 2 funds. They found that in at least one instance, Chapter 2 computers were networked with other computers, so that the Chapter 2 computers would support the entire system in case of a breakdown. They found that record-keeping, labeling, and monitoring was sometimes lax. On cross-motions for summary judgment, based on this record, the district court found that there was no direct evidence of substantial violations. The Court of Appeals neither affirmed nor reversed that finding, relying instead on the categorical view that the government may never provide educational materials other than textbooks to religious schools. In the Supreme Court, however, the four Justices in the plurality and the three Justices in the dissent concluded that there had been violations of the secular use regulations. The question was whether this amounted to a constitutional violation.

There are three basic ways to resolve the issue of aid to private education. The first is to bar all religious schools from receiving educational materials from the state, on the ground that there is no effective way to ensure that such assistance will not directly or indirectly subsidize the religious teaching that goes on in the schools. The second is to allow religious schools to receive public assistance on a neutral basis, provided that the assistance is used only for secular instruction and not for religious teaching. The third is to allow all schools to participate in generally available public programs, so long as the government has acted neutrally in service of a secular purpose.

The Supreme Court has never adopted the first position. In its first school aid decision, Everson v. Board of Education in 1947, the Court upheld a program that provided subsidies for transportation to elementary and secondary schools, including religious schools, over a strong dissent by Justice Rutledge, urging that religious schools be excluded from all forms of public assistance. Since that time, the Court has never attempted to return to the Rutledge position. For many years, it attempted a version of the second approach, allowing some forms of aid and disallowing others, based on the Court's perception of the risk that the aid might be used for religious teaching. That led to an era of shifting, inconsistent, and seemingly arbitrary decisions that will be described below. The question in Mitchell was whether the Court would embrace the third: to allow religious groups to participate on equal terms, without special restrictions on account of their religious nature.

14. Id.
15. Id.
16. These incidents are discussed by the plurality, id. at 2554-54, the concurring Justices, id. at 2570-72 (O'Connor, J., concurring), and the dissent, id. at 2594-96 (Souter, J., dissenting).
17. The district court opinion is unreported.
The *Mitchell* litigation perfectly illustrates the great changes in the Establishment Clause doctrine over the last fifty years. Had the constitutionality of the program been decided thirty years ago, when it was first enacted, it probably would have been upheld. In *Board of Education v. Allen* in 1968, the Supreme Court held that it is constitutional for the states to provide textbooks for the use of students in private, religious schools as long as the textbooks were secular in content and were provided on a neutral basis to all schoolchildren. As late as 1971, the Court stated that the First Amendment "permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials." During this period, the Court also approved substantial public aid to college level, religiously affiliated educational institutions and an extension of tax benefits to religious, nonprofit organizations.

In the ensuing decade, however, the Court issued a series of decisions that significantly narrowed the permissible reach of public aid to private religious education. If *Mitchell* had been brought in the late 1970s, the plaintiffs would almost certainly have won. In *Meek v. Pittenger* and *Wolman v. Walter*, a plurality of the Supreme Court held that it was unconstitutional for states to provide to students attending religious schools a portion of the same educational resources—such as maps, projectors, tape recorders, and science kits—provided to public school students. The Court reasoned that any "[s]ubstantial aid" to the "educational functions" of "church-related elementary and secondary schools" is unconstitutional. That principle would seem to cover computers, software, and library books. The Court made no attempt to reconcile this principle with the textbook case, the college aid cases, or the tax benefits case, and thus left Establishment Clause doctrine in a self-contradictory muddle.

The new standard articulated by the *Meek* plurality sounded absolutist (no substantial aid) but in practice entailed many questions of degree and characterization, which would plague subsequent cases. How much aid is "substantial"? How could the courts distinguish between aid to the "education functions of the schools" and aid to the physical, psychological, social, and pedagogical needs of the students? Moreover, how could the courts distinguish between "pervasively sectarian" and "non-pervasively sectarian" institutions? The

---

difficulties became evident even in the next case, *Wolman v. Walter*. In *Wolman*, a shifting plurality struck down public aid (1) for remedial services, including speech, hearing, and psychological diagnosis and therapy, by public employees on the premises of religiously affiliated schools; (2) for the loan of instructional materials and equipment to students at religious schools; and (3) for transportation from religious schools to secular sites for field trips.\(^{27}\) The plurality sustained programs involving textbooks, standardized tests and grading, diagnostic services by public employees on the premises of religious schools, and remedial services by public employees off of those premises (even in portable classrooms parked at the curb).\(^{28}\) A perusal of the opinion reveals, however, that the reasoning applied to one form of aid was inconsistent with that applied to other forms of aid, leading to the impression that the results were utterly arbitrary and chaotic. The Court frankly acknowledged that it could not reconcile its holding to the textbook case, which it nonetheless reaffirmed.\(^{29}\)

If ever a constitutional theory "prove[d] to be intolerable simply in defying practical workability,"\(^{30}\) it was the "no substantial aid" doctrine of *Meek* and *Wolman*. The basic problem is that almost all inputs into education—books, materials, staff, equipment, et cetera—are secular in content, but nearly all could be used for (or at least contribute to) religious instruction. A textbook may be secular, but an effective teacher could use it in a course of religious instruction. Bricks and mortar are secular, but religious classes could meet inside the classrooms. Even school lunches could be used in a religious way, if God is thanked (as He typically is) at the beginning of the meal. To apply a secular use test rigorously would invalidate virtually every form of aid. To apply it narrowly would uphold virtually every form of aid. To strike a middle ground requires inconsistent application of the standard.

Thus, commentators of every jurisprudential stripe, on and off the Court, have criticized this line of cases for their incoherence and inconsistency.\(^{31}\) The Court of Appeals in *Mitchell* commented "it is tempting to complain that the high Court has instructed us confusingly."\(^ {32}\) Perhaps the best-known comment on the

27. *Wolman*, 433 U.S. at 244, 250, 255.
28. *Id.* at 238, 244, 248.
29. *Id.* at 251-52, 237-38.
decisions came from Senator Daniel Patrick Moynihan, who observed that the
Court had approved books for students in religious schools but not maps, and
inquired what the Court would do with an atlas—"a book of maps." The
decisions were even treated as comic in oral argument before the Court:

QUESTION: Mr. Ball, you’re not really going to try to reconcile all our
entanglement cases, are you, or anything? [General laughter.]
QUESTION: Are you going to tell us why a globe is okay, but a book
isn’t and you know?
COUNSEL: The answer is that —
QUESTION: Senator Moynihan’s question, what about a map and a
book?
COUNSEL: The answer is that I will not, Your Honor. [General
laughter.]

The real problem, of course, was not that the Meek-Wolman
doctrine led to risible results. It was that it prevented legislators, educators, and lower courts from
making accurate judgments about the constitutional constraints in this area. The
unpredictability and arbitrariness of the decisions interfered with the ability of
legislators to improve educational opportunities for all the children of the state.

In the years between 1980 and 2000, the Court increasingly took the view that
religious groups could share in generally available public benefits. The process
began in 1981, in Widmar v. Vincent, a nearly unanimous decision that a student
Bible study group could receive equal access to university facilities. Over the
next twenty years, the principle of neutrality was extended to tuition tax
credits, tuition reimbursement for disabled students for post-secondary education, sign
language interpreters for students at secondary schools, student activity funds for
a religious college magazine, and remedial education for low-income students at
religiously affiliated primary and secondary schools. In the last such decision,
the Court expressly repudiated the principle "that all government aid that directly

34. Transcript of Oral Argument in Zobrest v. Catalina Foothills School Dist., in 224 LANDMARK
BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 521
(Kurland & Casper, eds. 1986).
assists the educational function of religious schools is invalid, which had been
the doctrinal basis for Meek and Wolman.

The rationale for these decisions is perhaps best illustrated by Witters v.
Department of Services for the Blind. In Witters, the state agreed to pay tuition
for blind persons for any course of post-secondary vocational study. Larry
Witters, who was blind, chose to apply his benefits to study to become a minister
or missionary at the Inland Empire School for Bible. It was unquestioned that
the funds paid for religious instruction and that the school itself was a deeply
religious institution. A unanimous Supreme Court held, however, that the
payments did not violate the Establishment Clause. Justice Marshall’s opinion for
the Court identified several aspects of the program as “central to our inquiry.”
First, he noted that funding goes to the recipient institution only through the
choice of the individual student. “Any aid provided under Washington’s
program that ultimately flows to religious institutions does so only as a result of
the genuinely independent and private choices of aid recipients.” Second, he
noted that “Washington’s program is ‘made available generally without regard to
the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted’
and is in no way skewed toward religion.” Third, Justice Marshall stressed that
the Washington program “creates no financial incentive for students to undertake
sectarian education.” Their benefits are neither “greater nor broader” if they
“apply their aid to religious education” than if to secular programs. “[T]he fact
that aid goes to individuals means that the decision to support religious education
is made by the individual, not by the State.” Other cases in this line of precedent
contain similar reasoning. The fundamental point is that when the government
provides benefits to individuals on a neutral basis, for secular purposes, it does not
violate the Establishment Clause when they use those benefits in a religious
setting, even though government funds are used for religious instruction.

The path of precedent is not quite as clear as may appear. First, the Court was
singularly unwilling to reconsider and overrule old precedents, even when they

41. Id. at 225.
42. 474 U.S. 481 (1986).
43. Id. at 483.
44. Id.
45. Id.
46. Id. at 487.
47. Id. at 486-88.
48. Id.
49. Id. at 488 (quoting Comm. for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).
50. Id.
51. Id.
52. Id. In addition, Justice Marshall noted that “nothing in the record indicates that . . . any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.” Id. Five members of the Court wrote that this factor was irrelevant, and in subsequent
decisions, it has been repudiated by the Court. See Mitchell v. Helms, 120 S. Ct. 2530, 2542 n.6 (2000).
had been rejected in principle. For example, even after repudiating the principle that "that all government aid that directly assists the educational function of religious schools is invalid," which was the doctrinal holding of Meek and Wolman, the Court refrained from explicitly overruling those decisions and issued a warning that lower courts should continue to consider themselves bound by earlier decisions until such time as the Supreme Court itself holds that they are no longer good law. Second, the trajectory toward a "neutrality" interpretation of the Establishment Clause was interrupted in 1985 by two five-to-four decisions, Aguilar v. Felton and Grand Rapids School District v. Ball, which returned to the older view, in perhaps the most extreme form ever. Aguilar involved a federal program in which public school specialists provided remedial training to needy children on the premises of their schools, whether public or private, religious or nonreligious. Grand Rapids involved a similar state program in which public school teachers provided remedial and enrichment courses to students in private schools. Not only were these programs neutral, but in light of their structure, the risk that these public school teachers would engage in "religious indoctrination" merely because they were on the premises of a religious school was so slight as to be fanciful. Aguilar and Grand Rapids were not overruled until 1997, only after greatly confusing the doctrinal picture.

The lower courts in Mitchell therefore traversed a doctrinal landscape that was confused, inconsistent, and in flux. They had to decide whether to follow the logic of the Court's recent decisions or the letter of older decisions--especially Meek and Wolman--which had not been formally overruled. The district court followed the logic of the recent decisions and upheld the program. The Fifth Circuit followed the older precedents and invalidated Chapter 2, while issuing its plea to the Supreme Court to clarify the "vast, perplexing desert" of its Establishment Clause jurisprudence.

54. Id. at 237.
57. Aguilar, 473 U.S. at 402.
58. Grand Rapids, 473 U.S. at 375. A separate program, also at issue in Grand Rapids, paid private school teachers to conduct after-school classes at their own institutions. Id. at 375-76. This portion of the case remains good law.
60. See id.
A. The Mitchell Plurality

The Court upheld the Chapter 2 program by a vote of six-to-three.63 Justices Souter, Stevens, and Ginsburg dissented.64 There was no majority opinion. A plurality opinion, written by Justice Thomas and joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, squarely adopted the view that religious institutions are permitted to participate on a neutral basis in generally available public programs.65 The plurality stated that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."66 Indeed, in a footnote, the plurality stated that "to require exclusions of religious schools from such a program would raise serious questions under the Free Exercise Clause."67

Justice Thomas analyzed the case under the three criteria announced in the recent decision, Agostini v. Felton,68 which was written by Justice O'Connor for a five-Justice majority: (1) whether government aid to religious schools results in governmental indoctrination; (2) whether the aid program defines its recipients by reference to religion; and (3) whether the program leads to excessive entanglement.69 Due to the fact that the plaintiffs did not contend that the program led to excessive entanglement, its constitutionality turned on the first two factors.70

In its analysis of the first issue—governmental indoctrination—the plurality insisted that religious indoctrination by private persons, as a result of private choice, does not present an Establishment Clause issue.71 Indeed, to the extent that religious training is attributable to private choice, it is protected by the Free Speech and Free Exercise Clauses. The plurality quoted an earlier decision that noted, "[f]or a law to have forbidden 'effects' . . . it must be fair to say that the government itself has advanced religion through its own activities and influence."72 Private speech does not become attributable to the government merely because the speaker receives the benefit of public resources. When religious speakers use their constitutionally protected right of equal access to

64. Id. at 2572.
65. Id. at 2536-56.
66. Id. at 2551.
67. Id. at 2555 n. 19 (citing Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 532 (1993); Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)).
69. Id. at 215-30; Mitchell, 120 S. Ct. at 2537-56.
70. Mitchell, 120 S. Ct. at 2537-56.
71. Id. at 2541-43.
72. Id. at 2541 (quoting Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) (emphasis in original)).
government property to deliver sermons or offer prayers, those sermons and prayers remain constitutionally private, and do not violate the Establishment Clause—even though, in a sense, they were "subsidized" by the government.

There was no doubt in Mitchell that the religious schools engaged in religious teaching. (I try to avoid the Court's term "indoctrination," because it is unfairly pejorative.) Nor was there any doubt that it would be unconstitutional for the government to require, encourage, or direct schools to engage in religious education. The question was whether the government became responsible for the schools' religious teaching by virtue of its provision of computers, software, and library books to the schools.

The plurality reasoned that the question of "governmental indoctrination" depends on the terms under which aid is provided:

If the religious, irreligious, and a-religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. . . . If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.73

If the government assists all schools, then the government is subsidizing education, but it is neutral toward religion.74

This is a major step toward conforming Establishment Clause jurisprudence to the state action doctrine. As a legal and constitutional matter, religious "indoctrination" is neither good nor bad. But it must be the product of individual decision and not of state action. In the words of the Mitchell plurality, it is necessary to "distinguish [between] indoctrination that is attributable to the State and indoctrination that is not."75 Although the Mitchell plurality did not expressly cite the state action cases, this formulation of the issue—whether the challenged action is "attributable to the State"—is precisely the same language that is found in the state action cases.76

Prior to Mitchell, the "governmental" and "private" distinction was drawn quite differently in cases involving the Establishment Clause than in cases

---

73. Id.
74. See id.
75. Id. at 2541.
involving other constitutional doctrines. This was particularly striking in the context of public subsidies. In *Rendell-Baker v. Kohn* for example, the Court held that actions of a private institution were not attributable to the state even though much of the institution's budget came from public sources.\(^{77}\) For the conduct or speech of a private organization to be attributed to the state, the government must have encouraged or endorsed that conduct or speech in some specific way. Yet, in Establishment Clause cases, it has been presumed that the religious activities of a private organization present a constitutional problem—in other words, that they are attributable to the state—whenever the organization has received public funds, even if the government neither encouraged nor endorsed the religious content. The latter understanding of state action, if taken to its logical extreme, would subject vast aspects of private civil society to constitutional norms intended only for the government. Given the vast network of government facilities and resources on which society depends, the line between state and private action would virtually collapse if the receipt of neutral assistance under neutral criteria sufficed to make the government responsible for private action. *Mitchell* simply applied the logic of *Rendell-Baker* to the Establishment Clause and thus reconciled Establishment Clause doctrine and state action doctrine.

Another way to put the point is to ask whose conduct is limited by the First Amendment. The text of the Amendment provides an answer: "Congress shall make no law."\(^{78}\) After incorporation of the First Amendment through the Fourteenth, this means "[g]overnment may make no law." It is a limitation on the power of the government. It is not a limitation on the activities of private citizens. Under the Establishment Clause doctrine of the *Lemon* era, however, litigation focused on the activity and character of private institutions. Courts would determine first, whether the recipient institution was "pervasively sectarian," and second, whether it engaged in significant "religious activity." This could involve extensive and intrusive investigation, all of it directed at private conduct—as if the private conduct of private institutions were regulated by the Establishment Clause. By contrast, under *Mitchell*, the focus of litigation is on the government.\(^{79}\) Under what terms has the government provided funds?\(^{80}\) Has it treated religious and nonreligious institutions neutrally?\(^{81}\) Has the government engaged in indoctrination?\(^{82}\) Has it created any incentives to engage in (or refrain from engaging in) religious activity?\(^{83}\) If the Establishment Clause is a limitation on government, these are the right questions. We should not be concerned about whether private institutions are "pervasively sectarian" or whether they exercise

---

77. 457 U.S. 830, 843 (1982).
78. U.S. CONST. amend I.
79. See *Mitchell*, 120 S. Ct. at 2536.
80. See id.
81. See id.
82. See id.
83. See id.
their constitutional right to engage in "religious activity"; we should be concerned about whether the government has exercised power in favor of, or against, religion.

The second Agostini criterion—whether the recipients of the aid are defined by reference to religion—was easily answered.\(^{84}\) Chapter 2 aid is provided to all students on a per capita basis, without regard for the religious or nonreligious, public or private character of their schools.\(^{85}\) This means that families choosing what kind of education to obtain for their children will not be influenced by unequal subsidies by the government (insofar as Chapter 2 is concerned; obviously, the availability of a free public education will continue to be a powerful disincentive to choose nonpublic schools). This is as it should be. The state has a strong and legitimate interest in ensuring that children obtain a high-quality education, but it has no legitimate interest in whether that education contains a religious component. The religious or nonreligious character of education is a matter that the First Amendment consigns to private judgment.

Some may argue, as a matter of legislative policy, that the government has a legitimate interest in favoring public over private education, perhaps because of the democratic value of common schools.\(^{86}\) That would be a rationale for confining public subsidies to public schools. It would not, however, justify exclusion only of religious private schools. Once the legislative decision has been made to assist children attending nonpublic schools, the First Amendment, properly understood, should forbid—not require—discrimination against nonpublic schools on the basis of their philosophy, ideology, or religion.

The plurality was less than clear about the relation between the first and second Agostini criteria. According to the plurality, the second criterion "looks to the same set of facts as does our focus under the first criterion," but "the second criterion uses those facts to answer a somewhat different question—whether the criteria for allocating the aid 'create[e] a financial incentive to undertake religious indoctrination.'"\(^{87}\) I think this understates the difference. Far from being redundant, the two criteria reflect two separate strands of Establishment Clause doctrine. The first criterion is concerned with whether the religious instruction is fairly attributable to the government. That relates to the state action issue. This strand of Establishment Clause doctrine is an institutional guarantee against official religious orthodoxy. As Madison argued in his *Memorial and
Remonstrance Against Religious Assessments, "the Civil Magistrate is [not] a competent Judge of Religious Truth." 88 The First Amendment does not attempt to establish any particular balance between religious and secular influences in society; religion is permitted to "flourish according to the zeal of its adherents and the appeal of its dogma." 89 But the First Amendment does stand for the proposition that religious influences must emanate from private sources and not from the government. Thus, to the extent that religious teaching is to be a part of the education of young Americans, this must be the product of decisions made by individual families and religious societies and not of government direction. The first Agostini criterion is a safeguard against that.

The second criterion is concerned with whether the program creates any "financial incentive to undertake religious indoctrination." 90 This relates to the fundamental First Amendment value of ensuring that private individuals and groups are free to make religiously significant judgments on the basis of their own conscience and convictions, without governmental impediment. This is a guarantee of individual religious liberty. The government may not use its power—including its fiscal power—to create incentives or disincentives to practice religion, to favor one religion over another, or to favor religion over the alternatives. The second criterion thus reflects this nation's historic commitment to "full and equal" rights of conscience. 91 Together, these two principles reflect the institutional and individual rights strands of the Establishment Clause.

Under the plurality's interpretation, a favorable conclusion under these two criteria was sufficient to establish the program's constitutionality. 92 There was no need to determine whether the religious school used the educational materials for strictly secular purposes, because the Establishment Clause does not limit the right of private institutions to engage in religious teaching, even with the benefit of neutrally available public resources. 93 Indeed, as if to underscore the point, the plurality expressly agreed with the dissenters that there were documented instances in which Chapter 2 materials had been "diverted" to religious instruction. 94 This did not, however, affect the plurality's legal analysis, because the constitutionality of a government program is determined by the government's actions, not by the actions of private parties. If the government provides roads for everyone, it does not violate the Establishment Clause if some people use those roads to travel to church.

90. Mitchell, 120 S. Ct. at 2543.
92. Mitchell, 120 S. Ct. at 2555.
93. Id. at 2547, 2553-54.
94. Id. at 2554.
B. The O'Connor Concurrence

In a concurring opinion, Justice O'Connor, joined by Justice Breyer, took a somewhat different view. According to these Justices, the Establishment Clause is offended when public resources provided directly to a religious institution are used for religious purposes. They adjudged the Chapter 2 safeguards, however, to be reasonably effective and any violations to be insubstantial. Accordingly, they voted with the plurality to uphold the program. Because it reflects the narrowest basis for the decision, the O'Connor-Breyer concurring opinion presumably will be treated as controlling in lower court litigation, and therefore warrants full discussion.

The O'Connor-Breyer position departed from the plurality's in two respects. First, the concurring Justices disagreed with the plurality's "rule" that "government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content." Second, they disagreed with the plurality's conclusion that "actual diversion" of public funds to religious instruction is of no constitutional significance in cases of direct (albeit neutral) programs.

Even so, the concurring Justices were far closer to the plurality than to the dissent, and far more accommodating to government assistance to religious institutions than the Lemon-era precedents on which the dissenters relied. First, even though it is not dispositive, the concurring Justices continued to treat the neutrality of the program as "important" and endorsed the holdings of past cases that take "a more forgiving view of neutral government programs that make aid available generally without regard to the religious or nonreligious character of the recipient school." In a variety of contexts, Justice O'Connor has expressed

95. See id. (O'Connor, J., concurring).
96. Id. (O'Connor, J., concurring).
97. Id. (O'Connor J., concurring).
98. This may not be certain. Because seven of the Justices came to the conclusion that Chapter 2 materials had actually been diverted to religious instruction, it is odd to say that the concurring opinion, which takes the position that actual diversion is a constitutional violation, reflects the "holding" of the case. See id. The actual "holding" is some combination of the view that the program need only be "neutral" and the view that a program is unconstitutional only if there is substantial evidence of actual diversion. See id. Obviously, this is a doctrinally unstable position, and we can expect further development in future cases.
99. Id. at 2556 (O'Connor, J., concurring).
100. Id. at 2558 (O'Connor, J., concurring).
101. Id. at 2557 (O'Connor, J., concurring).
102. Id. at 2562 (O'Connor, J., concurring) (citing Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986); Agnosti v. Felton, 522 U.S. 803 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)).
reluctance to treat any one factor, such as neutrality, as dispositive. Nonetheless, in every case involving a neutral program, she has come to the conclusion that it is constitutional. For example, in the context of private religious speech on government property, she has declined to endorse Justice Scalia’s categorical position that there is no Establishment Clause problem when the speech is permitted on neutral terms, insisting on a fact-sensitive investigation into the issue of government “endorsement”; but in every such case she has found that private religious speech in a neutral public forum satisfies this test. The difference here seems to be jurisprudential rather than substantive: the plurality, led by Justices Scalia and Thomas, have a preference for crisp, seemingly objective, “rule-like,” constitutional doctrine, while Justice O’Connor prefers more contextual, “standard-like” approaches. Their underlying visions of freedom of religion are not that different.

Unlike the plurality, the concurring Justices maintained that different constitutional rules apply to school aid programs, depending on whether the funds pass through the hands of the individual students or are paid directly to the institution. Let us look at both of these contexts.

1. “True private-choice programs”

Perhaps the most striking feature of the concurring opinion was its agreement with the plurality regarding the constitutionality of what they called “true private-choice programs,” without the need for secular use restrictions. These are programs, like vouchers, in which “the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use.” A prime example is Witters. When aid is provided to individual beneficiaries on a neutral basis, for secular purposes, the Establishment Clause does not bar them from choosing to use their benefits in a religious setting, even if doing so involves indirect public funding of religious instruction. This may be the most significant aspect of the entire Mitchell litigation: on the extremely important

104. Id.
105. Capital Square, 515 U.S. at 774-78; see also Bd. of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990) (O’Connor, J.); supra note 102.
108. Id. (O’Connor, J., concurring).
109. Id. at 2558 (O’Connor J., concurring).
111. See Mitchell, 120 S. Ct. at 2530.
question of educational vouchers, which might reach the Court next Term,\textsuperscript{112} Justices O'Connor and Breyer will likely vote to sustain their constitutionality. Notwithstanding the recent decision of the Sixth Circuit,\textsuperscript{113} a properly designed voucher plan, which is genuinely neutral and provides an array of educational alternatives, is almost certainly constitutional.

The only significant difference between the concurring opinion and the plurality is over the treatment of aid programs in which the allocation criteria are neutral and objective, but where the aid is dispensed directly to the institution rather than passing through the hands of individual beneficiaries.\textsuperscript{114} The plurality maintained that it is “formalistic” to insist that the funds actually pass through the hands of the individual students.\textsuperscript{115} “Although the presence of private choice is easier to see when aid literally passes through the hands of individuals,” the plurality explained, “there is no reason why the Establishment Clause requires such a form.”\textsuperscript{116} That position seems likely to carry the day. In most contexts, the choice of mechanism makes no difference to any matter of substance, and it would be strange to maintain a constitutional distinction based on so insubstantial a difference. In \textit{Witters v. Department of Services}, for example, the Court assumed that the state transmitted funds to the student and the student transmitted funds to the college.\textsuperscript{117} In fact, however, an \textit{amicus} party investigated and found that the check went directly from the state to the college.\textsuperscript{118} It is hard to see what difference it makes. The constitutional principle at stake has to do with governmental favoritism and turns on whether the allocation of funds is determined by governmental discretion or private choice. “True private-choice programs” are examples of programs in which governmental discretion is eliminated, but they are not the only such programs.

The concurring opinion offered three reasons for maintaining the distinction: first, the fact that the money flows through private hands guarantees that “the advancement of religion is therefore wholly dependent on the student’s private decision”; second, the indirect character of the aid vitiates any appearance of endorsement; and third, the distinction is especially important in the case of

\textsuperscript{113} \textit{Simmons-Harris}, 243 F.3d 945 (6th Cir. 2000).
\textsuperscript{114} \textit{See Mitchell}, 120 S. Ct. at 2530.
\textsuperscript{115} \textit{Id.} at 2546.
\textsuperscript{116} \textit{Id.} at 2545.
\textsuperscript{117} 474 U.S. 481 (1986).
\textsuperscript{118} \textit{Brief of Amicus Curiae Anti-Defamation League at appendix, Witters v. Wash. Dep’t of Serv. for the Blind}, 474 U.S. 481 (1986) (No. 84-1070).
"direct monetary subsidies." These arguments are not persuasive. As noted above, the voucher mechanism is not the only way to ensure that the allocation of funds is wholly dependent on the student’s private decision. In Witters, for example, the student controlled the funds—whether the check was addressed to him or addressed to the school. The question of endorsement is one of appearance, and I am skeptical that most “reasonable observers” would perceive any difference. (Direct grants have long been made to religiously affiliated colleges and social welfare agencies, without apparently raising any eyebrows.) The difference between cash and in-kind aid is questionable for reasons discussed below. On the other side of the ledger, adherence to the direct/indirect line can lead to discriminatory and unfair consequences, for no apparent purpose.

For example, in Columbia Union College v. Oliver, now before the Fourth Circuit for the second time, a fully-accredited Seventh-Day Adventist educational institution with an impeccable academic record was denied a per capita educational subsidy because it was “pervasively sectarian,” while several Roman Catholic Colleges in the state were given funds. This would appear to be a violation of the College’s rights of free speech and free exercise, because the sole basis for denying funds was the religious viewpoint of the institution. But because the form of the aid was “direct” (the state transferred funds directly to the institution, rather than to students), the Fourth Circuit held that the college could be excluded if it were “pervasively sectarian.” Looking at each of Justice O’Connor’s rationales, none seems applicable in this context. There is no doubt that the allocation of state funds is “wholly dependent on the student’s private decisions,” because state officials have no discretion whatever to deviate from a per capita payment. As to worries about “endorsement,” grants under this program have been made to Catholic colleges (deemed not to be “pervasively sectarian”) in the state for a quarter of a century, without apparent misunderstanding. One could argue that the differential treatment of Catholic and Seventh-Day Adventist colleges raises more serious “endorsement” and “disparagement” concerns than treating all alike. It is also late in the day to worry about “monetary grants,” because the constitutionality of such “monetary grants” was approved by the Court as long ago as 1976.

Another example of the perverse direct/indirect distinction is Fordham

119. Mitchell, 120 S. Ct. at 2559-60 (O’Connor, J., concurring).
120. Witters, 474 U.S. at 481.
121. See infra notes 153-159 and accompanying text.
University v. Brown. In that case, the Department of Commerce awarded construction grants to public radio stations for improved telecommunications facilities, based on technical criteria having nothing to do with religion. The technical selection team recommended Fordham University, a Jesuit institution, for the award, but was overruled on the ground that Fordham carries a weekly broadcast of the Catholic mass for the benefit of shut-ins. The university argued, quite persuasively, that this was a classic unconstitutional condition and a violation of its freedom of speech. But relying on the direct/indirect distinction, the district court held that it would be unconstitutional to provide the grant. On appeal, the Department of Justice chose not to defend the decision, and the case was settled in Fordham’s favor. Again, applying Justice O’Connor’s three rationales, it is hard to see why the direct character of this form of aid should make any difference to the outcome. Denying a radio station construction funds because of a single weekly program is like denying a public radio station general subsidies because of its editorials—a restriction held unconstitutional in FCC v. League of Women Voters.

Other specific cases might present different issues. We cannot discount the possibility that there may be contexts in which the direct/indirect distinction serves constitutional purposes. One can respect the caution of the concurring Justices on this issue. But it seems likely that the plurality is correct that this is a “formalistic” distinction that should eventually be discarded, at least in its generalized form.

2. Direct-aid programs

Even in the case of direct aid, where public assistance is provided directly to the religious school rather than passing through the hands of the student in the form of a voucher, the concurring Justices made a major step beyond older precedent. Under older precedent, if a recipient institution is “pervasively sectarian,” then it is presumed that most forms of aid to its educational mission are unconstitutional. According to Lemon v. Kurtzman, the leading case from this era, the state had to be “certain” that its aid would not be used for religious purpose, and efforts to monitor the possibility of religious uses were generally deemed to

128. Id. at 688.
129. Id. at 689.
130. Id. at 689-704.
131. Id. at 705.
constitute excessive "entanglement." This was the famous "Catch-22" that made aid to "pervasively sectarian" institutions unconstitutional whenever it was applied with any degree of rigor. (Some aid slipped by, but only because a temporary majority of the Court was willing either to relax the "certainty" standard or to tolerate a reasonable amount of "entanglement." ) By contrast, religiously affiliated but not "pervasively sectarian" institutions, such as most religious colleges and universities, were presumed capable of complying with secular use restrictions, and thus could receive aid. There was no requirement of "certainty," and routine safeguards against religious uses, similar to those applicable to other grant conditions, were treated as constitutionally adequate and tolerable. The effect was to apply different constitutional principles to different religious institutions, seemingly on the basis of the intensity of their religiosity.

The concurring Justices in Mitchell rejected that bifurcated approach. They did not employ the analytical category of "pervasively sectarian" institutions that had been criticized by the plurality for its arbitrariness and its connection to nineteenth century anti-Catholic bigotry. They substituted a unified test in which neutral government aid to religiously affiliated institutions (whether "pervasively sectarian" or not) is unconstitutional only if the plaintiffs "prove that the aid in question actually is, or has been, used for religious purposes." Instead of assuming that "pervasively sectarian" institutions are incapable of complying with secular use restrictions, the concurring Justices averred that "it is entirely proper to presume that these school officials will act in good faith." They placed the burden on the plaintiffs to demonstrate the contrary. Moreover, they repudiated the premise that "the government must have a fail-safe mechanism capable of

---

135. This was the description given to the combination of the "effects" and "entanglement" prongs by the Court in Bowen v. Kendrick, 487 U.S. 602, 615 (1988).
137. Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976). Interestingly, this distinction between "pervasively sectarian" and merely "religiously affiliated" institutions was rejected by a majority of the Justices even at its inception. See Lemon v. Kurtzman, 403 U.S. 602, 667-68 (White, J., concurring in an opinion also applying to Tilton) (arguing that all aid to religious schools-colleges and well as elementary and secondary schools-should be subject to the same constitutional standard, that the aid was constitutional); id. at 659-661 (Brennan, J., dissenting, in an opinion also applying to Tilton) (arguing that all aid to religious schools should be subject to the same constitutional standard and that the aid was unconstitutional).
139. Id. at 2551-52.
140. Id. at 2567 (O'Connor, J., concurring).
141. Id.
142. Id. at 2570 (O'Connor, J., concurring). Justice O'Connor noted that courts must "assume that religious-school instructors can abide by [secular use] restrictions". Id. at 2568 (O'Connor, J., concurring).
143. See id.
detecting *any* instance of diversion."\textsuperscript{144} While "*any* use of public funds to promote religious doctrines violates the Establishment Clause" in theory, only "*extensive violations*" would justify the remedy of holding an entire program unconstitutional.\textsuperscript{145}

This combination of doctrinal adjustments makes religiously affiliated elementary and secondary schools eligible for in-kind public aid on the same constitutional basis as religious colleges and universities for the first time since 1971. Moreover, given the practicalities of litigation, the change wrought by the Mitchell concurrence is even more significant than it may at first appear. Although each doctrinal adjustment involved merely a question of degree or change in presumption, rather than a change in the substantive prohibitions of the Establishment Clause, the effect is to make Establishment Clause challenges to school aid programs expensive to litigate and difficult to win. Under the older cases, religiously affiliated elementary and secondary schools were presumed unable or unwilling to comply with secular use restrictions, making most forms of aid unconstitutional. Plaintiffs could bring facial challenges to entire programs even before they were put into effect, and litigation could be resolved on a motion for summary judgment, without need for elaborate discovery or fact-finding. Under the Mitchell concurring opinion, the government will be able to provide secular, neutral, and nonideological materials and equipment, and the burden will be on opponents of the program to show actual diversion.\textsuperscript{146} That will require "as applied" challenges, with extensive, and expensive, discovery. As Mitchell illustrates, it will not be easy for plaintiffs to prove actual diversion, and even if they do, the result will only be to require modifications in the particular program where violations are found.\textsuperscript{147} Only in the rare case, when the plaintiff documents "extensive" violations, will courts order relief in the form of invalidation of entire programs.\textsuperscript{148}

There is one potentially important caveat. The concurring Justices suggested, in dictum, that "direct monetary aid" to religious institutions may be subject to special limitations, beyond the prohibition of "diversion" to religious uses, because "special dangers" are "associated with direct money grants to religious institutions."\textsuperscript{149} They do not state precisely what these limitations would be. Would accounting controls, similar to those used to ensure that public money is

\textsuperscript{144} Id. at 2569 (O'Connor, J., concurring) (emphasis in original).
\textsuperscript{145} Id. at 2571 (O'Connor, J., concurring) (quoting Bowen v. Kendrick, 487 U.S. 589, 623 (1988)) (emphasis in original).
\textsuperscript{146} See id. at 2567-69 (O'Connor, J., concurring).
\textsuperscript{147} See id. at 2570-71 (O'Connor J., concurring).
\textsuperscript{148} See id. at 2571 (O'Connor, J., concurring).
\textsuperscript{149} Id. at 2566 (O'Connor, J., concurring).
not used for partisan political purposes, be sufficient?\textsuperscript{150} Such controls have long been treated as constitutionally sufficient in the case of public funding of religiously affiliated social service organizations, health care institutions, and colleges.\textsuperscript{151} Or is there a categorical prohibition on money grants to religious schools? None of this is made clear. At least for the time being, however, legislators would be well-advised to structure direct aid programs in the form of in-kind transfers rather than money grants.

It is difficult to fathom the rationale for this distinction. Money grants and in-kind aid are almost identical in their objective effects. There is no apparent constitutional distinction between providing the money for a school to purchase a computer and purchasing a computer for the school. The effect on the taxpayer is the same, and the effect on the students is the same. Notably, the cases involving aid to religious colleges and universities, on which the concurring Justices relied, all involved direct monetary grants, and the Court never suggested that there was any special constitutional issue in those instances.\textsuperscript{152} The only practical difference is that an institution could conceivably use a money grant for a purpose other than that specified by the government. But it is standard practice to provide money grants to private grantees to be used for specific purposes, and if it were not possible to enforce such conditions by routine auditing, the entire premise of federal and state grantmaking would be undermined. Indeed, it would seem to be easier—not more difficult—to enforce restrictions of this sort than to enforce the secular use requirements the concurring opinion is willing to countenance. (If the state grants $2,000 to a school to purchase a computer, it is easier for the auditors to check whether the school has spent $2,000 on a computer than to determine whether the computer was used for any religious purposes.)

Because the concurring Justices are willing to “presume that these school officials will act in good faith” with regard to secular use requirements,\textsuperscript{153} it would be bizarre to assume that they will not comply with straightforward, routine, and objective requirements regarding what will be purchased with public funds, or that the government will be unable to enforce them.

The only explanation provided by the concurring opinion for its special treatment of monetary grants is that “this form of aid falls precariously close to the original object of the Establishment Clause’s prohibition.”\textsuperscript{154} This rationale is entirely unconvincing. The “original object of the Establishment Clause’s prohibition” was direct payments to churches, on a selective basis, for the

\textsuperscript{151} Id.
\textsuperscript{152} See Mitchell, 120 S. Ct. at 2566-67 (O’Connor, J., concurring) (discussing Tilton v. Richardson, 403 U.S. 672 (1971)).
\textsuperscript{153} See supra note 142 and accompanying text.
\textsuperscript{154} See Mitchell, 120 S. Ct. at 2566 (O’Connor, J., concurring).
propagation of religious doctrine.\textsuperscript{155} Aid of this sort would be unconstitutional whether in cash or in any other form. The reason aid to religious schools is distinguishable is that it is provided to all schools on a neutral basis, without regard to their religious or nonreligious character, for the secular purpose of promoting education. If that explanation is persuasive, there is no reason it should not apply to cash as well as to in-kind benefits.

Thus, the new legal landscape looks like this: A school aid program is constitutional if structured as a "true private-choice program," in which the funds are provided directly to an individual who then makes the choice of where to put the aid to use, even if the funds are ultimately used, in part, for religious activities or religious instruction. If a state provides aid directly to a religiously affiliated institution, neutrality is necessary, but not sufficient: aid may not be used for religious purposes, and if the plaintiff can show extensive violations of this secular use requirement, the entire program can be invalidated. Moreover, there are additional, but as yet unspecified, restrictions on direct monetary grants to religious schools, at least at the elementary and secondary level.

II. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE

Santa Fe Independent School District v. Doe, popularly known as the "football prayer case," explored the boundary between two different lines of precedent regarding religious expression in public settings.\textsuperscript{156} In one line of decisions, beginning with the School Prayer Case of the early 1960’s, involving classroom prayer,\textsuperscript{157} and culminating in Lee v. Weisman in 1992, involving prayers by an invited clergyman at a graduation ceremony,\textsuperscript{158} the Supreme Court held that public schools could not include prayers or comparable religious affirmations as part of official school functions—whether or not students or other attendees were compelled to participate. In a second line of decisions, beginning with Widmar v. Vincent in 1980,\textsuperscript{159} and culminating in Board of Education of Westside Community Schools v. Mergens in 1990\textsuperscript{160} and Capitol Square Review and Advisory Board v. Pinette in 1995,\textsuperscript{161} the Court held that private speakers have the right to engage in religious speech (including prayer) on public property on the same terms as speakers who wish to engage in secular speech. The question in

\textsuperscript{155} See id.
\textsuperscript{156} 120 S. Ct. 2266 (2000).
\textsuperscript{158} 505 U.S. 577 (1992).
\textsuperscript{159} 454 U.S. 263 (1981).
\textsuperscript{160} 496 U.S. 226 (1990).
\textsuperscript{161} 515 U.S. 753 (1995).
Santa Fe was how to characterize a public school policy that allowed the student body to elect a spokesperson who was then permitted to deliver "a brief invocation and/or message" of his or her choice at the beginning of varsity football games.\textsuperscript{162} When prayers were delivered pursuant to this policy, were they attributable to the school district (hence unconstitutional)? Or were they an example of private speech in an open speech forum created by the school district (hence constitutional)?

This is essentially the same issue that underlay Mitchell v. Helms. In both cases, there was religious speech by private parties, assisted or made possible by government resources. In Mitchell, the private speech of religious schools was assisted by the loan of educational materials and equipment under Chapter 2.\textsuperscript{163} In Santa Fe, the private speech of students was assisted by giving them bully pulpit of the public loudspeaker before the start of varsity football games.\textsuperscript{164} In both cases, there were various ways in which the problem might be analyzed, depending on the underlying rationale of the Establishment Clause. For example, if the underlying rationale is to protect members of the public from being forced to provide material support to religious activity, even on a neutral basis, then both Chapter 2 and the pre-football "invocation or message" policy should be seen as unconstitutional (along with all other forms of aid to religious education and the use of public forums by religious speakers). If the underlying rationale is to preserve the "wall of separation" between church and state by ensuring that activities that are carried out in the public sphere are strictly secular, then both policies should be seen an unconstitutional. Public programs like Chapter 2 should not include religious institutions, and public school activities, like football games, must not have religious elements. If the underlying rationale is to prevent coercion of unwilling audiences to hear religious messages, then Chapter 2 might be constitutional (attendance at religious schools is by choice only), while the constitutionality of the football "invocation or message" policy would hinge on whether the audience at a football game is "captive," rather than on whether the school district is responsible for the decision to deliver a prayer. In fact, the Court in both cases rejected these approaches and decided on the basis of whether the religious activity was properly attributable to the state.

The procedural posture of the Santa Fe case was complicated and unusual, making proper resolution of the constitutional issue more difficult. When the litigation commenced in 1995, the school district, like others in that part of Texas, had a practice of permitting the student council chaplain (a student) to deliver a prayer over the public address system at the beginning of varsity football games.\textsuperscript{165} Apparently realizing that this policy was constitutionally untenable, the school

\textsuperscript{163} Mitchell v. Helms, 120 S. Ct. 2530, 2536-37 (2000).
\textsuperscript{164} Santa Fe, 120 S. Ct. at 2271.
\textsuperscript{165} Id. at 2271.
district adopted a different policy while the litigation was proceeding, only to replace that policy with a third a few months later. The final policy was the subject of a “facial challenge” brought before the policy was put into effect.

The policy in question provided:

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement and/or invocation to deliver, consistent with the goals and purposes of this policy.

A six-Justice majority, in an opinion by Justice Stevens, affirmed a lower court decision that this policy was unconstitutional on its face. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented. They would have rejected the facial challenge to the policy, while leaving the possibility of an “as applied” challenge to be adjudicated on the basis of a factual record.

A. The State of Lower Court Precedent

The school district’s attempts to devise a constitutional policy for its pre-game ceremonies were greatly complicated by the incoherent state of precedent in the Fifth Circuit where it was located. In the wake of Lee v. Weisman, different panels of the Fifth Circuit adopted different interpretations that, in tandem, produced rules for prayer in public school settings that have little relation to any

166. *Id.* at 2271-73.
167. *Id.* at 2273.
168. *Id.* at 2273 n.6 (quoting the School District’s October 1995 policy).
169. *Id.* at 2283.
170. *Id.*
171. *Id.* at 2283-88 (Rehnquist, C.J., dissenting).
constitutional value. In *Jones v. Clear Creek Independent School District*, a panel held that student-led prayer that was approved by a vote of the students and was nonsectarian and nonproselytizing in content would be permissible at graduation ceremonies. That was a dubious interpretation of *Lee*. While the vote of the student body may insulate the school district, to some extent, from responsibility for the decision, in my opinion this does not solve the "state action" problem. There is little precedent on point, but actions of the student government more closely resemble "state" than "private" action. Indeed, from the point of view of the students themselves, the student government is a government. Moreover, this policy drew no support from the idea of limited public forums for speech, because the policy allowed only one choice of message: prayer. This was neutral in neither a free speech nor an Establishment Clause sense. The attempt to limit the content of the prayers—whatever a "nonsectarian" and "nonproselytizing" prayer might mean—made matters worse. This forced the school district to engage in censorship pursuant to criteria that seem inherently discriminatory among religious viewpoints.

A second panel of the Fifth Circuit responded with *Doe v. Duncanville Independent School District*. Evidently disagreeing with the logic of *Jones* but unable to overrule it, this panel drew a constitutional distinction between graduation ceremonies, in which prayers would be permitted under the *Jones* standards, and all other school functions (including football games), at which prayers would be forbidden no matter what the terms of the policy might be. This distinction between the type of school event has no apparent connection to any constitutional principle, and the combination of the decisions was bound to mislead school boards attempting to comply with the law. These decisions made the cases turn on where the prayers were to be delivered, their theological perspective, and whether they were supported by a majority of the students. Thus, at the time the Supreme Court was asked to review the decision, there was genuine need for clarification of the rules.

**B. The Majority Opinion**

The principal section of the Court’s opinion was devoted to an examination of the policy, beginning with its text, and extending to "factors beyond just the text of the policy," including the historical background, the manner of conducting the student election, the social context, and the perceptions of the students. The Court concluded that the delivery of religious messages "over the school’s public

---

172. See infra note 182 and accompanying text.
173. 977 F.2d 963 (5th Cir. 1992).
174. 70 F.3d 402 (5th Cir. 1995).
175. See id. at 406-08.
177. *Id.* at 2278-81.
address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech."

In this section of the opinion, the Court made no sweeping pronouncements barring religious speech from public settings. In marked contrast to the lower court, the Supreme Court engaged in a careful, context-sensitive analysis of why, under the circumstances of this case, the school district’s argument that the football game prayers were "private speech" should not be accepted. It began by affirming the basic dichotomy between government and private speech, endorsing the statement in an earlier case 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." The Court observed that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" is attributable to the government. Far from "bristling with hostility to all things religious in public life," as Chief Justice Rehnquist charged in dissent, this statement affirms the legitimacy of at least some forms of religious expression on public property, even when officially "authorized."

This is a significant point, because genuinely private student religious expression on school property has frequently been challenged by plaintiffs in court, and often forbidden by school officials. One of the most important free speech controversies of the early 1980s was over whether student Bible clubs could meet after school in public school classrooms. Every court of appeals to address the question held that this would violate the Establishment Clause, until Congress passed the Equal Access Act in 1984. Even then, separationist groups and school boards challenged the Act, and the Ninth Circuit held it unconstitutional. Now—a decade after the Supreme Court upheld its constitutionality—the Equal Access Act is viewed, even by many who opposed it at the time, as a triumph for civil liberties of high school students. That was only one of many conflicts about

178. Id. at 2279.
179. See id. at 2275-79.
180. Id. at 2275 (quoting Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion)) (emphasis in original).
181. Id. at 2275.
182. Id. at 2283 (Rehnquist, C.J., dissenting).
private religious speech in the public school context. In other cases, students have been disciplined for distributing religious literature at school (even where other literature would be permitted);\(^{186}\) class valedictorians have been barred from delivering addresses at graduation that contain religious expression;\(^{187}\) and students have been prevented from writing on religious—and only religious—topics out of a mistaken fear of violating church-state separation.\(^{188}\) These examples illustrate why the Santa Fe majority recognized that the mere fact that private religious speech is authorized by the government and takes place on government property before public audiences does not constitute an establishment of religion.

The Court then proceeded to identify a number of specific facts regarding the text and context of the policy that make it reasonable to attribute football game prayers at Santa Fe Independent School District to the state.\(^{189}\) This analysis focused on two key questions: (1) whether the criteria by which speakers are selected were genuinely secular and neutral toward religion, and (2) whether the government exercised control or influence over the content of their messages.\(^{190}\) This accorded with the approach taken by a quite different majority in *Rosenberger v. Rector and Visitors of the University of Virginia.*\(^{191}\) There, the Court explained that the Establishment Clause applies to religious messages when "the State is the speaker" either because it "enlists private entities to convey its own message" or "determines... [its] content."\(^{192}\) The Santa Fe Court concluded both that the school district effectively "enlisted" the speakers for the purpose of conveying its chosen message and that the school officials regulated the content of the message.\(^{193}\)

First, regarding the identity of the speaker, the Court pointed out that in contrast to a typical free speech forum, under the policy only one student was allowed to speak—the same student for the entire year.\(^{194}\) The Court properly noted that, in and of itself, this would not be constitutionally decisive.\(^{195}\) In this case,
however, the single speaker was chosen by majority vote of the student body. As the Court noted, "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." To make matters worse, the school district did not consider it necessary to conduct a new election for speaker under the new policy—leaving in place the results under a prior policy, which expressly contemplated a prayer. That rendered it almost certain that the speaker was a person willing to make a prayer his message.

Second, regarding the content of the message, the Santa Fe Court noted that the "statement or invocation ... is subject to particular regulations that confine the content and topic of the student's message." The language of the policy singles out "invocations" as the only type of message specifically mentioned. Moreover, the purpose of the message—to "solemnize the event"—narrows the permissible range of topics. The Court concluded that this choice of language "invites and encourages religious messages," because "[a] religious message is the most obvious method of solemnizing an event." Moreover, because these terms are not self-defining, the school administration will presumably exercise some degree of discretionary control over the content of the messages, in order to ensure that they are within the scope of the policy. That detracts from the claim that the messages are purely attributable to the student speaker.

The Court supplemented this analysis of the school's involvement with speaker selection and the content of the message with observations regarding the social context in which the message would be delivered, the perceptions of the audience, and the history of the development of the policy. This led the Court to conclude that there was a significant danger that the messages would be understood as having official sanction, that this was in fact the perception, and that the purpose of the policy was to continue the prior practice of prayers before football games.

I do not have any disagreement with the general proposition that a policy—even if neutral on its face—can be held to be a violation of the First Amendment when the totality of the circumstances demonstrate an

196. Id.
197. Id. at 2276.
198. Id. at 2279.
199. Id. at 2276.
200. Id. at 2277.
201. Id.
202. Id. at 2277.
203. See id. at 2277-79.
204. Id. at 2278-79.
unconstitutional purpose and effect. If officially sanctioned prayers at public events are unconstitutional, government bodies cannot evade constitutional limitations by clever stratagems. Nor do I have any serious disagreement with the Court's conclusions, based on this record, that the Santa Fe policy had the purpose and effect of perpetuating its prior practice of beginning football games with prayer. It is difficult to believe this was a neutral forum for student speech. In the social context of this part of Texas, where football prayer is an established custom, it would be hard to say the Court's conclusions were unreasonable. Indeed, because there is no known custom of student messages at the beginning of football games—other than prayers—in this part of Texas (or elsewhere to my knowledge), the Court's conclusions were more than reasonable.

More importantly, the Court's general approach to the Establishment Clause issue was correct. The Court expressed its conclusions in careful terms, avoiding sweeping or overbroad statements that might interfere with legitimate private religious speech. The Court based its decision on a fact-specific investigation of whether the decision to conduct prayers at football games is properly attributed to the school board or to individual speakers chosen on neutral grounds.\textsuperscript{205} Doctrinally, the importance of the decision does not depend on whether the Court was correct to conclude that the Santa Fe School District's policy was on one side of the line or the other but on whether the constitutional line is drawn on the basis of proper constitutional principles.

C. The Problem With The Facial Challenge

There was, however, a serious technical problem with the Santa Fe decision: the plaintiffs challenged the Santa Fe policy on its face.\textsuperscript{206} A facial challenge is one based solely on the challenged enactment itself, "without the benefit of a record as to how the statute had actually been applied."\textsuperscript{207} In a facial challenge, the court must examine the challenged policy on its own terms, divorced from the particular "circumstances\textsuperscript{208} and without regard to "the manner in which it had been administered in practice."\textsuperscript{209} As the Court observed in United States v. Salerno, a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."\textsuperscript{210} The reason is that when a particular policy is held

\textsuperscript{205} See id.
\textsuperscript{206} Id. at 2281.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 601.
\textsuperscript{210} 481 U.S. 739, 745 (1987). The distinction between facial and as applied challenges has assumed greater importance in recent years, but the contours of the distinction have not been fully worked out. See Matthew Adler, Rights Against Rules: The Moral Structure of American Constitutional Law, 97 Mich. L. Rev. 1 (1998); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1994); Richard H. Fallon, Jr., Commentary: As-Applied and Facial Challenges and Third-Party
unconstitutional on its face, this constitutes a ruling that such a policy would be unconstitutional anywhere, under any circumstances. Typically, a facial challenge is brought without extensive discovery or a detailed factual record, because facts other than the nature of the policy itself are not relevant.

The plaintiffs in Santa Fe had to bring the case as a facial challenge because the new policy had not been implemented, and thus there could be no factual record about its implementation. Accordingly, any discussion of its actual effects, including what speakers would be elected, what messages they would deliver, and what the perceptions of the students would be, was speculative. Such speculation is not inappropriate in an “as applied” challenge, when the totality of the circumstances may be taken into account, and the court is free to draw reasonable inferences from the evidence. But in a facial challenge, the court does not have a full factual record, and the decision is supposed to be based not on the surrounding circumstances, but on the policy itself. This was no small matter in the Santa Fe litigation, because the principal arguments offered by the defendant school board in Santa Fe had to do with the facial nature of the challenge and the need for a remand to allow factfinding on the basis of an actual record.

Stripped of presuppositions based on the social context of the case, the Santa Fe policy is not obviously unconstitutional. The policy has two parts. As the Court explained: “The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similarly majority election.” Neither of these decisions is necessarily about prayer. As the Court noted, “the particular words used by the speaker are not determined by those votes.” Without more information about the social context and the implementation of the policy, it is far from clear that any First Amendment violation would occur. The students might not vote to have a pre-game speech; they might elect a speaker according to wholly secular criteria, such as popularity or speaking ability; the speaker might choose not to offer prayers; and even if the speaker offered prayers, it might be done in a context that made clear the private nature of the speech.

It is difficult to square the Court’s analysis of the Santa Fe case to the strictures of a facial challenge. The Court acknowledged that its “examination . . . [did] not stop at an analysis of the text of the policy.” Indeed, the very reason the Court explored the social context and historical experience surrounding

211. See Santa Fe, 120 S. Ct. at 2281.
212. See id.
213. Id. at 2277.
214. Id.
215. Id. at 2282.
this case was that it was necessary to the conclusion that the district's formally neutral policy was in fact skewed toward prayer.216 The Court expressly relied on such extrinsic information as the failure of the school principal to conduct a new election after adoption of a new policy, the language used by the district in connection with past policies, and factual inferences about social pressure and student perceptions.217 "We refuse to turn a blind eye to the context in which this policy arose," the Court said, "and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."218 But the very idea of a facial challenge is that the policy is unconstitutional in all conceivable applications. If it is necessary to consult "the context" in order to "quell doubts," then it is not a proper facial challenge.

The Court could have dealt with this problem in one of several ways. First, it could have set forth an explanation of the operative legal principles and remanded the case to the trial court for factual findings and an ultimate decision. Second, it could have confined its analysis to the bare text of the policy. It is quite possible that such an analysis would have led the Court to reverse the judgment below. Third, it could have dismissed the writ of certiorari as improvidently granted. A good argument can be made that the Court reached out unnecessarily for this case; it rewrote the question presented in an abstract fashion not warranted by the record, and perhaps it should have recognized that all this was a mistake.

The Court did none of these things. Instead, it tacked on a fourth and final section of the opinion that adopted a much different tone and offered new arguments for the conclusion.219 Rather than seeking to determine whether the religious speech in question was properly attributed to the school district or to the individual student speaker, the Court shifted to an analysis of the school board's subjective motivations for adopting the policy and to the supposed political divisiveness of the policy.220 In striking contrast to the careful and evenhanded tone of the first three sections of the opinion, the final section contained angry denunciations of the school board and made sweeping constitutional judgments based on dubious (and in one case, repudiated) constitutional doctrines.221 It was this section that inspired the dissenters to complain of the majority's "disturbing" tone of "hostility to all things religious in public life."222

It is difficult to reconcile this section of the opinion with the earlier parts. If the fourth section is valid, then the Court's careful examination of the totality of the circumstances in the first three sections was dictum. But if the Court's careful analysis of the full context of the case was necessary to the decision, then the

216. Id.
217. Id. at 2279, 2280, 2283 n.24.
218. Id.
219. See id.
220. See id.
221. See id.
222. Id. at 2283 (Rehnquist, C.J., dissenting).
fourth section—which dispenses with careful analysis and decides the case on the basis of broad pronouncements—was without foundation.

For the most part, the fourth section simply rested on the rhetorical device of treating as self-evident the same conclusions that, in the earlier sections, had been thought to require evidence going beyond the face of the policy. The Court characterized the school board's arguments as "ask[ing] us to pretend that we do not recognize what every Santa Fe High School student understands clearly" and as "ask[ing] us to accept what is obviously untrue." This is the judicial equivalent of raising one's voice to a louder pitch in an argument instead of providing proof of one's position.

More seriously, this section of the opinion relied upon two highly dubious constitutional doctrines to explain why the facial challenge could succeed. First, the Court found that the school district had an "unconstitutional purpose" of "encourag[ing] prayer." Second, the Court found that the policy would encourage "divisiveness along religious lines."

1. Legislative motive

A good argument can be made that bad legislative motive, in the absence of any proven unconstitutional effect, is not a sufficient basis for exercising the power of judicial review. In any event, the Court has consistently held that a law should not be struck down on this ground unless it is "motivated wholly by an impermissible purpose." That is an especially difficult conclusion to reach when there has been no record evidence regarding the statutory purpose.

There are good reasons to be wary of striking down laws that are facially neutral on the basis of claims of illegitimate purpose. (It must be assumed, arguendo, that the policy could be understood as neutral, because otherwise there would be no point to this section of the opinion.) When a school board (or other governmental body) creates new opportunities for private speech, its motives are inherently ambiguous. Maybe they wish to foster free speech, or more speech. Maybe they have a favored message that they think will more likely be communicated if they create the opportunity. Consider the example of a school board attempting to decide whether to institute an equal access policy that would allow student religious groups—along with other extracurricular groups—to meet on
school facilities after classroom hours. Such a policy has been held constitutional on the rationale that it allows a range of free speech activities. It is possible, however, that school officials might adopt the equal access policy with the subjective intention that a student religious club would meet. (It is similarly possible for equal access policies to be adopted in the hope that a gay rights group, or some other group with a message favored by the administration, would take advantage of the opportunity.) This should not affect its constitutionality. Although the officials involved might have a private motivation of favoring one viewpoint over another, the objective purpose of an equal access policy is to open a forum for speech by students on all subjects, from all points of view. It is this laudable objective purpose—not the forbidden private motivation—that should control the outcome. As the Supreme Court explained in its decision upholding the Equal Access Act:

> Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law. Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to ‘endorse or disapprove of religion.’

By the same reasoning, because the policy at issue in *Santa Fe* “on its face grants equal access to both secular and religious speech,” the Court should not have concluded that it had an unconstitutional purpose, at least not without direct evidence to that effect. In this case, there was no direct evidence regarding the school board’s purpose. Purpose was inferred from the statute. As we shall see, however, that inference was unwarranted.

The Court offered two arguments for illicit purpose based on the text of the statute. It argued first that the term “solemnize” would encourage prayer, because “[a] religious message is the most obvious method of solemnizing the event.” To be “the most obvious,” however, is not the same as being the only means of solemnizing an event. It is easy to imagine secular messages that would “solemnize” the occasion—such as a statement about good sportsmanship, recitation of poetry, or the singing of the school’s alma mater. (Whether such messages are likely depends on the social context, which takes the question outside the ambit of a facial challenge.) In *Church of the Lukumi Babalu Aye, Inc. v. City*

---

229. *Id.* at 249 (citations omitted).
230. *Id.* at 228.
232. *Id.*
of Hialeah, the Court faced an analogous linguistic issue.\textsuperscript{233} In \textit{Lukumi}, a city passed an ordinance forbidding the "ritual" slaughter of animals:

Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings.\textsuperscript{234}

The Court held the ordinance unconstitutional only after consulting record evidence that the city council in fact had targeted a particular religious practice and had chosen the language specifically for that discriminatory purpose.\textsuperscript{235}

Second, the \textit{Santa Fe} Court argued that inclusion of the word "invocation" in the policy was evidence that its purpose was to promote prayer.\textsuperscript{236} "Indeed," the Court pointed out, "the only type of message that is expressly endorsed in the text is an 'invocation'—a term that primarily describes an appeal for divine assistance . . . . Thus, the expressed purposes of the policy encourage the selection of a religious message."\textsuperscript{237} That conclusion, however, does not follow. The policy uses the disjunctive phrase "statement or invocation," thus making it plain that the statement need not necessarily be an invocation. In a case involving an analogous linguistic issue, the Court did not rely solely on the statutory language but examined actual evidence regarding legislative intent. In \textit{Wallace v. Jaffree}, the Court considered the constitutionality of a state law authorizing a moment of silence in public school classrooms "for meditation or voluntary prayer."\textsuperscript{238} Like the \textit{Santa Fe} policy, this statute contained a religious and an arguably secular term in disjunction.\textsuperscript{239} The Court struck down the moment of silence law only on the basis of testimony from the legislature sponsor that his purpose was "to return voluntary prayer" to the public schools and that he had no other purpose.\textsuperscript{240} The Court made clear that other, functionally identical, moment of silence laws might be permissible.\textsuperscript{241}

\textsuperscript{233} 508 U.S. 520 (1993).
\textsuperscript{234} \textit{Id.} at 533-34.
\textsuperscript{235} \textit{Id.} at 534-35.
\textsuperscript{236} \textit{Santa Fe}, 120 S. Ct. at 2277.
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} 472 U.S. 38, 40 (1985).
\textsuperscript{239} \textit{Id.} at 56-61.
\textsuperscript{240} \textit{Id.} at 56-57.
\textsuperscript{241} \textit{Id.} at 59.
In *Sante Fe*, by contrast, the case had been litigated as a facial challenge, and thus there was no record evidence regarding the school district's actual intentions. In the absence of record evidence, the Court made inferences, apparently based on its own intuitions regarding the social context, the school district's subjective purposes, and the student body's perceptions. This analysis, it seems to me, went beyond the ambit of a facial challenge. More importantly, if treated as a precedent, this sloppy approach to establishing illegitimate legislative purpose could legitimize attacks on facially neutral statutes based on nothing more than suspicion of bad motive.

2. Political divisiveness

As an alternative basis for deciding the case on a facial challenge, the Court resurrected the long-repudiated idea that a policy can violate the Establishment Clause by encouraging "divisiveness along religious lines." The Court reasoned that regardless of how the policy is implemented or whether a prayer is ever delivered, the policy is unconstitutional because it "impermissibly imposes upon the student body a majoritarian election on the subject of prayer." The Court stated that "[i]n no further injury is required for the policy to fail a facial challenge." This conclusion was unwarranted on the facts and seriously mistaken as a matter of doctrine.

The Court presumed that the Santa Fe policy "entrusts the inherently nongovernmental subject of religion to a majoritarian vote." That is an incomplete reading of the policy. Unlike a policy—such as that approved in *Jones v. Clear Creek Independent School District*—which allows the student body to vote on whether to have a prayer at the graduation ceremony, the student body under the Santa Fe policy votes first on whether to have a pre-game speaker and second on who that speaker will be. This is not the same thing as a vote on prayer. To be sure, it might turn out—in actual practice—to be tantamount to a vote on prayer; in which case it would be unconstitutional as applied. But on its face, the policy is not about prayer; it is about any message that might solemnize the pre-game ceremony. Elections could focus on anything. The argument, therefore, provides no response to the facial challenge problem. If the policy explicitly called for a vote about prayer, it would be unconstitutional on its face, without regard to political divisiveness. Because the policy is about authorizing a message to be

243. *Id.*
244. *Id.* at 2283.
245. *Id.*
246. *Id.*
247. *Id.*
248. 997 F.2d 963 (5th Cir. 1992 (cited in *Santa Fe*, 120 S. Ct. at 2274).
249. *Santa Fe*, 120 S. Ct. 2272.
chosen by the speaker, however, which might or might not be a prayer, the election might or might not turn into a referendum on prayer and thus might or might not generate political divisiveness along religious lines. The political divisiveness argument merely restates the question and gets no closer to an answer.

The Court did not, and logically could not, claim that any student election of a speaker is unconstitutional when the speaker might deliver a religious message. That would suggest that it is unconstitutional for the students to be permitted to elect a commencement speaker, because the election could turn out to be a referendum on religious talks. (It is not unusual for clergy, such as the Rev. Jesse Jackson, to be chosen as commencement speaker.) To be sure, in some circumstances, such an election could turn out to generate religious division—but only in certain circumstances. While a policy that refers to “prayer” on its face is susceptible to a facial challenge, a policy that contains no such reference can be invalidated only in light of actual application and experience, which was not available in this case.

More importantly, as a doctrinal matter, this invocation of the old “political divisiveness” test was a serious mistake. The political divisiveness doctrine has been repudiated many times in majority opinions of the Court—some of them written by Justices who joined in the Santa Fe opinion—and for good reason. It may well be true that one of the underlying purposes of the Religion Clauses was to reduce the likelihood of political divisiveness along religious lines. It is very likely that government actions that violate either the Free Exercise or the Establishment Clause also have the vice of exacerbating politico-religious divisions. Yet, it is not coherent to treat political divisiveness as an independent basis for a constitutional challenge. Any number of legitimate political issues create divisions along religious lines—including civil rights policy, family law issues, foreign policy toward Israel, gay rights, parental rights, and confirmation of cabinet officials, to name just a few examples. We cannot say that government policies that are divisive along religious lines are unconstitutional, for the simple reason that divisiveness is a two-way street. Suppose that proposed policy A tends to divide the nation along religious lines. If one religious group supports A and another religious group opposes A, how do we know whether that makes A constitutionally favored or not? Even if the court were able to identify which issues carry the risk of divisiveness, the insight would provide no basis for deciding

250. See id. generally.
which side of the divisive conflict should prevail.

The Court's casual invocation of this doctrine, without mentioning the fact that it was repudiated in earlier opinions, without explaining why it was doing so, and without confronting the crushing academic criticism the doctrine has received, was as strange as it was unfortunate. Even stranger is the fact that no Justice in the majority—even Justices O'Connor and Kennedy, who have criticized the political divisiveness idea in the past and are not shy about writing concurring opinions when the majority goes too far—held their tongues. I cannot imagine why.

Section four of the Santa Fe opinion thus fails in its mission of explaining why the case could be decided on a facial basis and, in the attempt, threatens to upset sensible constitutional doctrine regarding legislative motivation and political divisiveness. We can hope that the decision is remembered for its careful and fair-minded analysis of the governmental-private line and not for this final and ill-considered section.

III. CONCLUSION

With the exception of section four of the Santa Fe opinion, the Supreme Court in October Term 1999 made significant progress toward consensus about the meaning of the Establishment Clause. Although the two decisions presented victories to opposite wings of the Court and inspired anguished dissents, they both hinged on the question of "state action." One of the most important features of Religion Clause jurisprudence is that the limits apply to the government only. The First Amendment was not intended to inhibit (or encourage) the religious enthusiasm of the American people, but to make religious exercise free from official orthodoxy. When the government is neutral toward religion and private persons are responsible for religious expression and activity, the Establishment Clause is not implicated—even when religious activity takes place in public settings or receives public benefits. Mitchell v. Helms thus held that parents can choose religious schools, and religious schools can engage in religious instruction, without forfeiting their right to share in generally available public benefits for education.252 Santa Fe Independent School District v. Doe held that public policies that are skewed in favor of prayer—even when neutral on their face—are unconstitutional.253 Taken together, these decisions suggest, not a "balance" between religion and secularism, but a complementary principle that religion is a matter for private judgement and conviction.

252. See supra notes 4-155 and accompanying text.
253. See supra notes 156-251 and accompanying text.
PROFESSOR AKHIL REED AMAR’S RESPONSE

PROFESSOR AMAR: As I have tried to explain in my paper, I agree with just about everything that Michael said. So let me just say a couple of words about the methodological issue raised by stare decisis. When should the Court overrule itself? When not? This is the only case last term, Mitchell is, where the Supreme Court explicitly overruled any precedent whatsoever. So I think when Erwin said this is a Court that defers to no one, doesn’t defer to Congress, doesn’t defer to state legislatures, doesn’t defer to police departments or school boards, doesn’t defer to lower courts, doesn’t defer to the Ninth Circuit; well, it does defer to the United States Supreme Court. The Court doesn’t like overruling itself very much, see Dickerson for example on Miranda. See Stenberg reaffirming Roe and Casey, and not giving us much more than a mind-numbing invocation of stare decisis.

So Mitchell is interesting because it openly overrules two cases, although you can’t even get a single opinion for that. It’s sort of two different opinions added together. The only other case last Term that I would say comes close to overruling precedent is Apprendi, which distinguishes some cases. I think Erwin is right in his logic, it’s really quite interesting. And that connects up with what Jon said about values of predictability, gradualism, incrementalism, and stable expectations. Now here’s the interesting thing on Mitchell, although it overruled some cases, to actually follow the past doctrine would have perhaps been more disruptive of the social fabric. It would have been to undo a governmental program that had been operating well and in place for twenty years or so. So here’s an example of how sometimes actually deviating from the precedents actually can be less destabilizing to the social fabric.

In Morrison, the back-to-basics approach would have actually upheld the law, and, I think, been less destructive in some ways than the doctrinal approach invoking the civil rights cases of 1883, which actually struck something down. So these concerns about social fabric and reliance interest and stability interestingly interact with the question whether to overrule or not to overrule.

PROFESSOR KMIEC: Marcia Coyle of the National Law Journal now has some questions for Professors McConnell and Amar.

MS. COYLE: I’m going to take one question and cede the rest of my time to the audience.

Professor McConnell, it’s December 1, 2001, two years after you argued

---

and we later found out that you won *Mitchell v. Helms*,\(^9\) and you’re back before the Supreme Court. Yes, Al Gore won the election. Chief Justice Ginsburg is happy to have you back because she wants to pick up on a question that came up during the *Mitchell v. Helms* argument. It was a question that seemed to cause considerable frustration with Justice Stevens, Justice Souter, and I think it actually started with Chief Justice Rehnquist. How far do you go now? How far after *Mitchell v. Helms* can we go? Can the government provide a program that actually provides the bricks for the religious school? Is there a limiting principle in *Mitchell*, or has the wall come tumbling down?

PROFESSOR McCONNELL: In principle, bricks are no different than computers. The limiting principle is neutral allocation of aid. The aid itself must be neutral in character.

MS. COYLE: So Justice O’Connor, who saw the plurality opinion as breathtakingly broad, was right. She felt it would almost surely pave the way for direct aid to religious organizations, even if they used the funds for religious purposes. So what if you’re before the Court and you’re defending federal aid to a religious organization that’s providing, say, social services in the wake of federal welfare reform? Is that doable now after *Mitchell v. Helms*?

PROFESSOR McCONNELL: Well, of course this isn’t just a hypothetical. As part of the Welfare Act, Congress passed something called the Charitable Choice Act.

MS. COYLE: Yes, and there are challenges. There is litigation pending.

PROFESSOR McCONNELL: Well, it hasn’t gotten past the district court. There are various cases that are percolating up.

MS. COYLE: So I’m asking you to look down the road.

PROFESSOR McCONNELL: I would expect the law is going to be upheld. But of course, since you’re Chief Justice Ginsburg and therefore we are assuming that Vice President Gore is in office, who is likely going to have as one of his litmus tests for appointment of Supreme Court Justices be this very issue, I’m not making predictions as to what any Supreme Court will do under that scenario.

PROFESSOR CHEMERINSKY: I don’t agree with Professor McConnell either as to what the appropriate theory of the Establishment Clause should be or how he predicts what the Supreme Court is likely to do under existing precedent. I believe that the government should not be subsidizing religious education. I believe there should be a separation from church and state. And if there was time, I would explain why I believe it is consistent with the structure and meaning of the Establishment Clause.

But in terms of the precedent that exists right now, we’ve got to remember there are five votes in *Mitchell v. Helms* that the government

---

cannot subsidize religious education. Thomas’ position was emphatically rejected by a majority of the Court, and I think that would put charitable choice and even certain voucher programs very much in danger.

MS. COYLE: That was a question I was going to pose: Do you think the voucher supporters have Breyer’s vote, at this stage?

DEAN VARAT: Because I disagree too, I’d like to put in a word for separation. It may well be that there is a choice between separation and equality, although I tend to think that is a false dichotomy. That is, I think separation itself is, in significant part, a mechanism for preventing inequality, particularly in the context of huge fights within the public sphere or over the allocation of monies that will disproportionately go to religious schools. It’s one thing to talk about formal equality, and I understand all those are powerful arguments, but I think there’s also the question of practical equality.

And I want to add one other thing to my good friend Akhil’s comments, which is that I think, on a documentarian basis, one could make as strong an argument that separation is the big idea, as he made for equality. For example, the religious test oath clause seems to me at least as much in support of a separation notion as it is of an equality notion, and I think the same could be true about attempting to continue the notion that people not be compelled to subsidize religion with their tax dollars.

PROFESSOR JAMES: Two things very quickly. Professor Amar, do you agree with Professor McConnell on the voucher vote tally or at least with the speculation regarding whether the votes are there in favor of the voucher program?

PROFESSOR AMAR: Professor McConnell litigates before the Court, and he’s a better vote counter than I, so I wouldn’t want to contradict him. The only thing I would say is Justice Breyer doesn’t always write, and Justice Breyer has joined in the past quite inconsistent opinions indeed. He and Justice Stevens were the only ones who joined an opinion by Justice Souter concurring in the Southworth10 case, and that opinion has a footnote that’s actually completely inconsistent with Justice Breyer’s approach. So, by joining Justice O’Connor in Mitchell, I think he’s a riddle embraced in an enigma, within a mystery.

PROFESSOR JAMES: And finally, Professor McConnell, why is it that the Court has never really addressed the definition of religion or at least seems to be shying away from it? Why is it that education and so-called secular institutions are not considered religious or normative? What kind of activity

is nonreligious?

PROFESSOR McCONNELL: I think there are two reasons they haven't tackled it. One is that very few concrete disputes have hinged upon it. It has very rarely come to them. The second is it's an extraordinarily hard problem, and hard partly because it cuts two different ways. Most people are very interested in a broad definition of religion for purpose of Free Exercise protection. But a very broad definition of religion for Establishment Clause purposes is unthinkable, because it would suggest, for example, that the government would not be able to put its affirmative weight behind any of the conscientious positions that might be described as not religious, but close enough for Free Exercise purposes.

PROFESSOR JAMES: I gather then you are at least partially in favor of the congressional approach which construes the term broadly for purposes of exemptions from the draft when the draft is imposed?

PROFESSOR McCONNELL: Actually, I tend to be a narrow-definition person precisely because I think that a broad definition makes the Establishment Clause sort of a wrecking operation for government. I'm not keen on those Supreme Court decisions to which you refer.

PROFESSOR KMIEC: We turn now to the freedom of speech, and our presenter is Kathleen Sullivan.