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THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE AT THE DAWN OF THE NEW MILLENNIUM: "BRISTL[ING] WITH HOSTILITY TO ALL THINGS RELIGIOUS"* OR NECESSARY SEPARATION OF CHURCH AND STATE?

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I. INTRODUCTION

In its first two cases of the new Millennium involving the Establishment Clause of the First Amendment to the United States Constitution,[1] the Supreme Court continued to reveal the deep ideological polarization of its members on the place of religion in education, whether dealing with prayer at public school activities or aid to religiously affiliated nonpublic schools. In the first of the two disputes, a closely divided Court, in *Santa Fe Independent School District v. Doe (Santa Fe)*,[2]

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* In his strident dissent in *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266, 2283 (2000), wherein the Court struck down student sponsored and led prayer prior to the start of a high school football game, Chief Justice Rehnquist railed that the majority opinion ". . .bristles with hostility to all things religious in public life." (Rehnquist, C.J., dissenting).

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1. In its relevant section, the First Amendment reads that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" U.S. CONST. amend. I.

2. *Santa Fe*, 120 S. Ct. 2266.

ruled that a school board policy permitting student led prayers prior to the start of high school football games violated the Establishment Clause. Nine days later, in *Mitchell v. Helms* (*Helms*),[3] with the majority and dissent essentially changing sides, the Court upheld the constitutionality of a federal statute that permits states to loan educational materials and equipment to public and religiously affiliated nonpublic schools.

Whether the Supreme Court is, in the words of Chief Justice Rehnquist, "hostil[e] to all things religious"[4] thereby attempting to deprive religion of an opportunity to participate in the public marketplace of ideas, or merely maintaining a necessary separation of Church and State, certainly depends on one's perspective. Regardless of how one interprets the Court's most recent decisions, it is clear that the juxtaposition of judicial analyses in *Santa Fe* and *Helms* are worth considering not only because of their impact on education but also for what they mean with regard to the Court's wider First Amendment jurisprudence. As such, the remainder of this article is divided into three sections. The first section sets the stage by briefly reviewing key Supreme Court cases on governmental aid to religiously affiliated nonpublic schools and prayer in public schools. The next section briefly reviews the opinions in *Santa Fe* and *Helms*. The final section of the article examines the meaning of *Santa Fe* and *Helms* for the future of the Supreme Court's Establishment Clause jurisprudence. More specifically, this section of the article focuses on whether the Court has displayed hostility toward religion and what test it is likely to apply in subsequent litigation. The article closes with a reflection on what potential changes in the Court's membership over the next few years might mean for the future of First Amendment jurisprudence.

II. THE DEVELOPMENT OF THE COURT'S FIRST AMENDMENT JURISPRUDENCE

The well documented history of the Court's Establishment Clause jurisprudence on both state aid to religiously affiliated

3. 120 S. Ct. 2530 (2000).

4. *Santa Fe*, 120 S. Ct. 2266.

nonpublic elementary and secondary schools[5] and prayer[6] in a variety of school settings follows anything but a linear progression. In other words, although the Court's first case on the merits of the Establishment Clause,[7] *Everson v. Board of Education*,[8] involved aid, because subsequent litigation also addressed religious activity in the schools,[9] it did not address another case involving aid to nonpublic schools under the Child Benefit test for twenty-one more years.[10] Throughout what might be described as the development of the first generation of the Court's modern Establishment Clause jurisprudence, the Court apparently found it unnecessary to develop a measure

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5. In addition to works cited herein, for recent articles on point, *see, e.g.*, Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1999); Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999); Abner S. Greene, *Why Vouchers are Unconstitutional and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1999); Arval A. Morris, *Public Educational Services in Religious Schools: An Opening Wedge for Vouchers?* 122 EDUC. L. REP. 545 (1998).

6. In addition to works cited herein, for recent articles on point, *see, e.g.*, Ralph D. Mawdsley, *Student Choice and Graduation Prayer: Division Among the Circuits*, 129 EDUC. L. REP. 553 (1998); Lisa C. Shaw, *Student-Initiated Religious Speech, the Classroom, and the First Amendment: Why the Supreme Court Should Have Granted Review in* Settle v. Dickson County School Board, 18 PACE L. REV. 255 (1998); Daniel N. McPherson, *Student-Initiated Religious Expression in the Public Schools: The Need for a Wider Opening in the School House Gate*, 30 CREIGHTON L. REV. 393 (1997); Myron Schreck, *Balancing the Right to Pray at Graduation and the Responsibility of Disestablishment*, 68 TEMP. L. REV. 1869 (1995).

7. Prior to *Everson v. Board of Education,* 330 U.S. 1 (1947), the Court addressed three cases involving nonpublic schools but resolved them under the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause. Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state statute prohibiting the teaching of foreign language to students who had not completed eighth grade); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down a compulsory attendance statute from Oregon that have required parents of students in nonpublic schools to send them to public schools); Cochran v. State Bd. of Educ., 281 U.S. 370 (1930) (upholding a Louisiana statute that provided textbooks for students regardless of whether they attended public or nonpublic schools).

8. 330 U.S. 1 (1947).

9. *See, e.g.,* Illinois *ex rel.* McCollum v. Board of Educ., Sch. Dist. No. 71, 333 U.S. 203 (1948) (striking down a board's practice of permitting religious leaders to come into public schools during the class day to provide religious instruction as violative of the Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding the constitutionality of a released time program that permitted children to leave school early to attend religious classes in religious schools on the basis that it accommodated the wishes of their parents); Engle v. Vitale, 370 U.S. 421 (1962), *see* discussion at note 41 *infra* and accompanying text.

10. *See* discussion of Board of Education v. Allen, 392 U.S. 236 (1968), *infra at* note 21 and accompanying text.

for cases in this arena.

However, in 1971, in *Lemon v. Kurtzman*,[11] the Court enunciated the seemingly ubiquitous tripartite test, employed in virtually all subsequent cases involving religion, as a single standard of review for Establishment Clause cases. The Court asked: (1) whether governmental aid has a secular legislative purpose, (2) whether it has a principle or primary effect that neither advances nor inhibits religion, and (3) whether that effect creates excessive government entanglement. The Court's long time reliance on *Lemon* notwithstanding, questions can be raised about the propriety of this tripartite test, which was crafted from earlier cases on prayer and Bible reading in school. The Court also considered the constitutionality of a state real property tax exemption for church-owned property, making the *Lemon* test a kind of "one-size-fits-all" measure for the different kinds of issues that the Establishment Clause presents. Yet, as the Court struggles to define an appropriate test under which to review interactions between religion and the government, whether with regard to state aid to religiously affiliated nonpublic schools or prayer in public school settings, and despite varying degrees of dissatisfaction among the Justices, the Court continues to rely on *Lemon* or variations on its well-worn theme. Insofar as the Court's Establishment Clause jurisprudence has been so well documented,[12] the remainder of this section highlights the major cases that have shaped the limits of the Court's thinking in K-12 educational settings rather than providing an encyclopedic overview in this ever-growing area.

A. The Supreme Court and State Aid to Religiously Affiliated Nonpublic Schools

Over the past fifty-three years, the Supreme Court has permitted governmental aid on the basis that it helps the indi-

11. 403 U.S. 602 (1971).

12. Even as the Court debates its future, the *Lemon* test continues to generate grist for the academic mill. *See, e.g.*, Carl H. Esbeck, *The* Lemon *Test: Should it be Retained, Reformulated or Rejected?* 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513 (1990); Timothy V. Franklin, *Squeezing the Juice Out of the* Lemon *Test*, 72 EDUC. L. REP. 1 (1992); Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Daniel O. Conkle, Lemon *Lives*, 43 CASE. W. RES. L. REV. 865 (1993); Thomas C. Marks, Jr. & Michael Bertolini, Lemon *Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1997).

vidual children and not their schools. Beginning with *Everson* in 1947, the Court has developed the Child Benefit test, under which aid, in the forms of transportation,[13] text books,[14] and now, in *Helms*,[15] instructional materials, including computers, is available to students who attend religiously affiliated nonpublic schools. Even so, over its lifetime, the Child Benefit test has had a curious history. It was applied with some favor until 1968, was essentially stagnant between 1971 and 1985, and was revitalized in 1993 by a slim majority of the Court.

1. The Genesis of the Child Benefit Test

In *Everson*, the Court upheld the constitutionality of a state statute from New Jersey that reimbursed parents for the cost of transportation for sending their children to nonpublic schools. The Court reasoned that since transportation was paid for by the tax dollars of all parents, regardless of where their children attended school, and because the aid primarily benefited the students, rather than the schools they attended, the statute was constitutional.

As an example of how the Court's Establishment Clause jurisprudence failed to develop in a linear fashion in which there was a logical progression of issues, the next major dispute[16] to shape the Court's development of a test under which to evaluate the propriety of any relationships between religion and government arose in the companion cases of *School District of Abington Township v. Schempp* and *Murray v. Curtlett*.[17] In these cases the Court addressed the constitutionality of a Pennsylvania statute and Maryland rule adopted pursuant to state laws that required Bible reading and/or the recitation of the Lord's prayer at the beginning of the class day in public schools. In both cases the state was not directly involved in the

13. *See Everson*, 330 U.S. 1; *but see* Wolman v. Walter, 433 U.S. 229 (1977) (striking down, inter alia, the use of public school buses to take children from religious schools on field trips for fear of violating the *Lemon* test).

14. *See Allen*, 392 U.S. 236; Meek v. Pittenger, 421 U.S. 349 (1975) and *Wolman*, 433 U.S. 229, (upholding state statutes under which textbooks for secular subjects were loaned to students in nonpublic schools).

15. Mitchell v. Helms, 120 S. Ct. 2530 (2000).

16. Of course, in the interim, the Court ruled in *Illinois ex rel. McCollum v. Board of Education of School District No. 71*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); and *Engle v. Vitale*, 370 U.S. 421 (1962). *See supra* note 10 and text accompanying note 41 for further explanation.

17. 374 U.S. 203 (1963).

composition of the prayers, children participated voluntarily, students could be excused from taking part in the religious activities upon the written request of their parents or guardians, and no single Christian religion was favored.

Schempp introduced a new era in the relationship between religion and government. The Court enunciated a two-part test to invalidate both practices even though neither state was directly involved in the composition of the prayers, students participated voluntarily, and no single religion was favored. In creating a measure under which to evaluate the constitutionality of prayer, the Court maintained that "[t]he test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[18] Perhaps in an attempt to allay concerns that it was anti-religious, the Court hastened to add that nothing in its rationale excluded the secular study of the Bible in public schools in an appropriate context such as literature or history.[19]

The so-called "purpose and effects" test took on added significance later in the decade when the Court applied it in a case involving state aid to religious schools. In *Board of Education v. Allen*,[20] the Court upheld a New York law requiring school boards to loan textbooks for secular instruction to all students on the ground that it applied to all children regardless of whether they attended public or nonpublic schools. In *Allen*, the Court relied heavily on the fact that regulations overseeing the program specified which books on officially approved lists could be used in the nonpublic schools. Until its recent decisions in *Agostini v. Felton*[21] and *Mitchell v. Helms*,[22] *Allen* was not only the last case wherein the Court expanded the horizons of the Child Benefit test in a K-12 setting but was also generally accepted as the outer limit of permissible aid to religiously affiliated nonpublic schools.

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18. *Id.* at 222.

19. "The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion." *Id.* at 300.

20. 392 U.S. 236 (1968).

21. 521 U.S. 203 (1997).

22. 120 S. Ct. 2530 (2000).

2. The Hibernation of the Child Benefit Test

The next major dispute involving the Establishment Clause and state aid to nonpublic schools was *Lemon v. Kurtzman*,[23] wherein the Court invalidated programs from Rhode Island and Pennsylvania. The case from Rhode Island involved a state statute that paid salary supplements to certified teachers in nonpublic schools who taught subjects that were only offered in public schools. Similarly, the dispute from Pennsylvania focused on a state law that reimbursed nonpublic schools for teachers' salaries, textbooks, and instructional materials as long as they did not contain "any subject matter expressing religious teaching, or the morals of any sect."[24] In striking down both programs, the Court added a third element to the "purpose and effects" test. It added excessive entanglement, from *Walz v. Tax Commission of New York City*,[25] to create the tripartite test that it has relied on in virtually all cases involving the Establishment Clause. Writing for the Court, Chief Justice Burger[26] declared that:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[27]

Even though the first two parts of the seemingly ubiquitous and increasingly unworkable *Lemon* test were developed in the context of prayer cases, the Court continued to apply it widely

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23. 403 U.S. 602 (1971).

24. *Id.* at 610.

25. 397 U.S. 664, 674 (1970). "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."

26. For an interesting discussion of the Establishment Clause jurisprudence of the Burger Court, *see* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

27. 403 U.S. 602, 612-13 (1971) (internal citations omitted). When addressing entanglement and state aid to religiously affiliated institutions, Chief Justice Burger noted that the Court took three additional factors into consideration: "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon*, 403 U.S. at 615.

in generally striking down attempts to expand the boundaries of permissible state aid to religious schools. For example, in *Meek v. Pittenger*,[28] a case from Pennsylvania, the Court upheld textbook loans while striking down provisions that would have permitted loans of instructional materials such as laboratory equipment and the on-site delivery of auxiliary services for students who attended religiously affiliated nonpublic schools.[29] Similarly, in *Wolman v. Walter*,[30] a dispute from Ohio, the Court upheld textbook loans, reimbursement for standardized testing, the on-site delivery of diagnostic testing, and off-site delivery of therapeutic aid. At the same time, the Court struck down provisions that would have permitted the loans of instructional materials and the use of public school buses to take children from religiously affiliated nonpublic schools on field trips.[31] Interestingly, in *Mitchell v. Helms*, discussed below, the plurality specifically struck down those portions of *Meek* and *Wolman* that prohibited the loans of instructional materials.[32]

The Child Benefit test reached its nadir in the companion cases of *School District of Grand Rapids v. Ball*[33] and *Aguilar v. Felton*.[34] In *Ball*, the Court struck down a Michigan program designed to provide supplementary classes in classrooms located in and leased from nonpublic schools that were taught by

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28. 421 U.S. 349 (1975).

29. *See also, e.g.*, PEARL v. Nyquist, 413 U.S. 756 (1973) (striking down New York state statutes that provided direct payments to nonpublic schools to maintain facilities and tuition reimbursement and income tax credits that would have allowed low income parents to send their children to nonpublic schools); Sloan v. Lemon, 413 U.S. 825 (1973) (striking down a New York state statute under which the state reimbursed parents for the cost of sending their children to nonpublic schools); Levitt v. PEARL, 413 U.S. 472 (1973) (striking down a New York state statute that reimbursed nonpublic schools for state-mandated educational records where there were insufficient safeguards to ensure that funds were not diverted to religious usages such as testing students on religious matters). *But see* PEARL v. Regan, 444 U.S. 646 (1980) (upholding the revised New York state statute in *Levitt* since sufficient safeguards were set in place to protect against impermissible use of public funds).

30. 433 U.S. 229 (1977).

31. In a ruling that defied the Court's the current trend, in *Mueller v. Allen*, 463 U.S. 388 (1983) the Court upheld Minnesota's state income tax deduction for tuition, uniforms, and books, regardless of whether children attended public or nonpublic schools even though more than 90% of the people who benefited from the program had children in religious schools.

32. *See* Mitchell v. Helms, 120 S. Ct. 2530, 2555 (2000) ("[t]o the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.").

33. 473 U.S. 373 (1985).

34. 473 U.S. 402 (1985).

full-time public school employees and staff from the nonpublic schools who were hired on a part-time basis. The Court argued that while the program had a secular legislative purpose, it was unconstitutional because it violated the Establishment Clause by having the primary or principal effect of advancing religion.

In *Aguilar*, the Court prohibited the on-site delivery of remedial educational services for children who attended religiously affiliated schools in New York City. The aid was provided under the auspices of Title I of the Elementary and Secondary Education Act,[35] a comprehensive program designed to offer remedial assistance for children who are economically disadvantaged. Even in the absence of accusations or evidence of any impropriety, the Court struck it down on the basis that it might lead to excessive entanglement between religious schools and the government. In a strident dissent that essentially became her rationale in subsequently striking down *Aguilar* in *Agostini v. Felton*,[36] Justice O'Connor argued that the Court was "throwing the baby out with the bath water" since the Court's unwarranted concern over fears of excessive entanglement would mean that so many students would be, and in fact were, deprived of greatly needed educational services.[37]

3. Revitalization of Child Benefit

Witters v. Washington Department of Services for the Blind,[38] although decided in the context of higher education, was a harbinger of future developments. In *Witters*, the Court

35. 20 U.S.C. § 2701 *et seq.*

36. 473 U.S. 373, 421 (O'Connor, J., dissenting).

37. Following *Aguilar*, one researcher estimated that perhaps 30% of eligible children in nonpublic schools were deprived of services. Ralph D. Mawdsley & Charles J. Russo, *Supreme Court Upholds Religious Liberty: Educational Implications*, 84 EDUC. L. REP. 877, 893 (1993) at n.141 and accompanying text. Moreover, in *Agostini*, the Court noted that following *Aguilar*, it was estimated that some 20,000 economically disadvantaged students in New York City and more than 183,000 children nation-wide experienced a decline in Title I services. *See* Agostini v. Felton, 521 U.S. 203, 213 (1997).

38. 474 U.S. 481 (1986) (*reh'g denied*, Witters v. Washington Dep't of Servs. for the Blind, 475 U.S. 1091 (1986). In fairness, it should be noted that the Supreme Court of Washington, in *Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied sub nom. Witters v. Washington Dept. of Servs. for the Blind*, 493 U.S. 850 (1989) subsequently found that language in the state constitution prohibited the use of public funds for religious instruction.

decided that a vocational rehabilitation program that provided financial assistance to a blind student studying for the ministry at a Bible college did not violate the Establishment Clause. The Court reasoned that since the student could have relied on the program in a variety of different institutions if, for example, he had wished to study to be an accountant, then it was constitutional since he, and not the college, was the primary beneficiary of the aid.

Zobrest v. Catalina Foothills School District[39] marked the beginning of the resurgence of the Child Benefit test in the K-12 context. Here, the Court relied on the Child Benefit test and ruled that it permitted the on-site delivery of the services of a sign language interpreter for a deaf student as he attended a Catholic high school in Arizona. The Court found that since the interpreter was a mere conduit of information, the student was entitled to receive the services on-site because he, not his school, was the primary beneficiary of the aid.

In *Agostini v. Felton*,[40] the Supreme Court took the unusual step of vitiating an injunction that had been entered after its earlier decision in *Aguilar v. Felton* when it essentially reversed its earlier judgment by striking down an injunction that prohibited New York City from delivering Title I services on-site in religious schools. Writing for the Court, Justice O'Connor, in basically offering her dissent in *Aguilar* as the Court's holding, reasoned that New York City's implementation of Title I did not violate the Establishment Clause because there was no governmental indoctrination, there were no distinctions between recipients based on religion, and there was no excessive entanglement. As such, the Court held that as a federally-funded program that provides supplemental, remedial instruction to disadvantaged children, Title I's delivery of services on-site in religiously affiliated schools did not run afoul of the Establishment Clause because it had appropriate safeguards in place to prevent the endorsement of religion.

B. The Supreme Court and Prayer in Schools

The Court first addressed the propriety of prayer in a school setting when, shortly after the New York State Board of Regents offered a prayer for recitation at the start of the day in

39. 509 U.S. 1 (1993).

40. 521 U.S. 203 (1997).

public schools, parents filed suit arguing that the practice was contrary to their religious beliefs and those of their children. In *Engel v. Vitale*,[41] the Court considered the constitutionality of prayer in schools, holding that the Board violated the First Amendment even though students could have been excused from participation. The Court concluded that governmental involvement in creating the prayer was dangerously close to the official establishment of religion. A year later, in the companion cases of *School District of Abington Township v. Schempp* and *Murray v. Curlett*,[42] the Court, as noted earlier, applied the first two parts of what became the *Lemon* test. In spite of this initial flurry of activity on prayer in schools, after *Schempp*, it was more than twenty years before the Court returned to the question as it focused its attention on litigation involving governmental aid to religiously affiliated nonpublic schools.

As state legislatures sought to circumvent the Court's ban on school-sponsored[43] prayer and religious activity,[44] laws mandating or permitting moments of silence emerged. *Wallace v. Jaffree*[45] was the first such case to make its way to the Supreme Court. Here, an Alabama statute originally providing for a moment of silent meditation was amended to include voluntary prayer. The Court found it unnecessary to proceed beyond *Lemon's* first prong in deciding that the law violated the Establishment Clause because the legislature was motivated solely by the religious purpose of returning organized prayer to the

41. 370 U.S. 421 (1962).

42. 374 U.S. 203 (1963).

43. In *Stone v. Graham*, 449 U.S. 39 (1980), *reh'g denied* 449 U.S. 1104 (1981), 612 S.W.2d 133 (Ky. 1981), the Supreme Court struck down, without the benefit of oral argument, a statute from Kentucky that required the posting of the Ten Commandments on a wall of each public classroom in the Commonwealth on the ground that it violated the Establishment Clause.

44. The Court has held firm against prayer in the schools but not other arenas. *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the Nebraska legislature's practice of hiring a religious chaplain to open each legislative day with a prayer). *But see* Coles *ex rel.* Coles v. Cleveland Bd. of Educ.,171 F.3d 369 (6th Cir. 1999), *petition for rehearing en banc denied*, 183 F.3d 538 (6th Cir. 1999) (striking down a prayer initiated by the board president as violating the Establishment Clause). *But see* Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 11 F. Supp.2d 1192 (C.D. Cal. 1998) (holding that since prayer at the start of a board meeting was not at a school related function, it was constitutional). For a discussion of *Coles*, *see* Charles J. Russo, *Between A Rock and A Hard Place: The Emerging Question of Prayer at School Board Meetings*, 137 EDUC. L. REP. 423 (1999).

45. 472 U.S. 38 (1985).

public schools.[46] In accordance with that decision, the Court struck the law down since it clearly intended to characterize prayer as a favored practice.

In *Karcher v. May*,[47] the only other case involving a moment of silence to reach the Supreme Court, the Justices avoided reaching a judgment on the merits.[48] The Court ruled that the appellants, former leaders of the New Jersey State Assembly and Senate who lost their leadership positions, lacked standing to appeal the Third Circuit's decision upholding a ruling that the statute permitting a moment of silence was unconstitutional.[49]

In 1991, the Court finally accepted a case on the merits of

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46. If ever there was a smoking gun, State Senator Donald G. Holmes, prime sponsor of the bill, provided one. He testified that the law "was an 'effort to return voluntary prayer to our public schools. . .it is a beginning and a step in the right direction.' Apart from the purpose to return voluntary prayer to public school, [he] unequivocally testified that he had 'no other purpose in mind'" when he introduced the bill. *Id.* at 43.

47. 484 U.S. 72 (1987). For a discussion of this case, *see* Steven S. Goldberg, *The Supreme Court Remains Silent on Moments of Silence:* Karcher v. May, 43 EDUC. L. REP. 849 (1988).

48. Early in the twentieth century, five courts, in six different cases, had earlier held that religious activities in the morning did not violate state constitutions. Donahoe v. Richards, 38 Me. 379 (1854); McCormick v. Burt, 95 Ill. 263 (1880); Moore v. Monroe, 20 N.W. 475 (Iowa 1884); Billard v. Board of Educ. of Topeka, 76 P. 422 (Kan. 1904); Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792 (Ky. 1905); Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918). However, at least five courts, including Illinois, which had previously decided to the contrary, held that religious exercise violated their constitutions. *See* State *ex rel.* Weiss v. District Bd., 44 N.W. 967 (Wis. 1890); Freeman v. Scheve, 91 N.W. 846 (Neb. 1902); People *ex rel.* Ring v. Board of Educ. of Dist. 24, 92 N.E. 251 (Ill. 1910); Herold v. Parish Bd. of Sch. Directors, 68 So. 116 (La. 1915); State *ex rel.* Finger v. Weedman, 226 N.W. 348 (S.D. 1929).

49. In *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997), a teacher in Georgia unsuccessfully challenged a state law that permits a moment of quiet reflection in public schools. The Eleventh Circuit affirmed that the law satisfied the *Lemon* test.

More recently, the Fourth Circuit, in an unreported decision, refused to grant an injunction to the American Civil Liberties Union that would have blocked a Virginia statute, Va. Code Ann. § 22.1-203 calling for a ". . . one-minute period of silence [during which] the teacher responsible for each classroom shall take care that all pupils remain silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." Philip Walzer, et al, *Minute of Silence Debuts: Schools Start Required Quiet Interval Despite ACLU Objection*, THE VIRGINIAN-PILOT & THE LEDGER STAR, Sept. 6, 2000, 2000 WL 23683153. Using Justice Stevens obtuse reasoning in *Santa Fe Indt. Sch. Dist. V. Doe,*, 530 U.S. 290 (2000) (*see infra* note 61 and accompanying text), wherein the policy was struck down even before it went into effect, fears of religion creeping into public education may lead some jurists to strike down otherwise facially neutral statutes of this type.

graduation prayer[50] in *Lee v. Weisman*.[51] Based on the school system's policy of inviting religious leaders to pray at graduation ceremonies, administrators in Providence, Rhode Island, asked a rabbi to offer nonsectarian prayers which followed the guidelines prepared by the National Conference of Christians and Jews. After a student and her father unsuccessfully sought to prevent the rabbi from offering the prayers at her graduation, a federal trial court enjoined the district from permitting prayer at graduation ceremonies, holding that doing so violated the effect prong of *Lemon* by creating a symbolic union between religion and the government.[52] The First Circuit affirmed without finding it necessary to expand on the trial court's analysis.[53]

The Supreme Court, in a five to four opinion written by Justice Kennedy, affirmed but surprised most observers by virtually ignoring *Lemon*.[54] Kennedy's opinion focused on two main points: the relationships between the Free Exercise and Establishment Clauses, and the Free Speech and Establishment Clauses. Justice Scalia issued a scathing dissent wherein he declared that the Court went "beyond the realm where judges know what they are doing. The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction ceremonies is, not to put too fine a point on it, incoherent."[55] In the interim, the circuit courts have been split over the propriety of prayer at graduation ceremonies.[56]

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50. For a fuller discussion of prayer at public school graduation ceremonies, *see* Charles J. Russo, *Prayer at Public School Graduation Ceremonies: Exercise in Futility or a Teachable Moment?* BYU EDUC. AND L.J. 1 (Winter 1999). 1-23. *See also* Ralph D. Mawdsley & Charles J. Russo, Lee v. Weisman*: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers*, 77 EDUC. L. REP. 1071 (1992).

51. 505 U.S. 577 (1992).

52. Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990).

53. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

54. 505 U.S. at 577.

55. *Id.* at 636 (Scalia, J., dissenting).

56. Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted, vacated, and remanded*, 505 U.S. 1215 (1992); *on remand*, 977 F.2d 963 (5th Cir. 1992) (upholding student sponsored prayer at a public high school graduation ceremony), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied* 508 U.S. 967 (1993). *See also* Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638 (D. Idaho 1993), *aff'd in part, rev'd in part*, 41 F.3d 447 (9th Cir. 1994), *cert. granted and judgment vacated with directions to dismiss as moot*, 515 U.S. 1154 (1995) (initially holding that since school officials ultimately controlled the ceremony, they could not permit students to decide whether to have public prayer at graduation); ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3rd Cir. 1996) (affirming that a policy of permitting student-

However, it was not until *Santa Fe*,[57] discussed below, that the Court decided to address prayer in a narrow setting such as at a high school football game.[58]

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led prayer at a public high school graduation ceremony violated the Establishment Clause, finding that since the board retained significant authority over the ceremony, prayer could not be upheld as promoting the free speech rights of students); Doe v. Madison Sch. Dist. No. 321, 7 F. Supp.2d 1110 (D. Idaho 1997), *aff'd* 147 F.3d 832 (9th Cir. 1998), *reh'g granted, opinion withdrawn*, 165 F.3d 1265 (9th Cir. 1999), *vacated*, 177 F.3d 789 (9th Cir. 1999) (initially upholding a board policy permitting students, chosen on the basis of neutral secular criteria, to offer uncensored presentations, including prayers, during high school graduation programs since it had a secular purpose, a primary effect that neither advanced nor inhibited religion, and avoided excessive government entanglement with religion); Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (holding that a board policy permitting students to vote on whether to have unrestricted student-led messages at the beginning and closing of graduation ceremonies did not violate the Establishment Clause), *opinion vacated*, 2000 WL 694156 (Oct. 2, 2000).

57. Earlier, the Eleventh Circuit banned prayer prior to the start of public school football games. Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), *cert. denied* 490 U.S. 1090 (1989). *See also* Steele v. Van Buren Pub. Sch. Dist., 845 F.2d 1492 (8th Cir. 1988) (prohibiting a high school band teacher from leading the band in prayer at mandatory rehearsals and performances); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982) (holding that recitation of an expressly Christian prayer initiated by the principal or other school employee at athletic contests and pep rallies violated the Establishment Clause).

58. Lower federal courts have examined the propriety of student-initiated prayer at a variety of school activities other than graduations. *See, e.g.*, Ingbretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996), *cert. denied sub nom.* Moore v. Ingebretsen, 519 U.S. 965 (1996) (invalidating a law that allowed students to initiate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory school events); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1993) (prohibiting school employees from initiating and leading students in prayer before and after athletic practices and competitions); Chandler v. James, 958 F. Supp. 1550 (M.D. Ala 1997), *aff'd in part, rev'd in part, and remanded*, 180 F.3d 1254 (11th Cir. 1999), *request for en banc rehearing denied*, 198 F.3d 265 (11th Cir. 1999) (holding that a school district's act of allowing student initiated, nonsectarian, nonproselytizing voluntary prayer as school-related events did not violate the Establishment Clause since it was required under the Free Speech and Expression Clause of the First Amendment); Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996) (prohibiting a religious club from making announcements, including prayers and Bible readings, over a school wide intercom system; however, the court did permit student-initiated prayer before school to continue); Committee for Voluntary Prayer v. Wimberly, 704 A.2d 1199 (D.C. 1997) (holding that a proposed initiative on nonsectarian, nonproselytizing, student initiated prayer at school related activities was not a proper subject within the meaning of voter initiated measures).

III. THE CASES

A. Santa Fe Independent School District v. Doe

The Board of Trustees of the Santa Fe Independent School District, near Galveston, Texas, following *Lee v. Weisman*[59] and *Jones v. Clear Creek Independent School District*,[60] adopted policies permitting student volunteers to deliver prayers at graduations and football games. In April 1995, students and their parents challenged the prayer policies seeking injunctive relief and money damages under the theory that the policies violated the Establishment Clause.

A federal trial court upheld both policies as long as the prayers were nonsectarian and nonproselytizing. Moreover, since the Board had fall-back policies in place, adopted in the event that they were struck down, requiring the prayers to be nonsectarian and nonproselytizing, the court refused to grant prospective injunctive relief, damages, or attorney fees.[61] Both parties appealed, the plaintiffs because the policies had not been found to violate the Establishment Clause and the defendants since the Board had to use its fall-back policies. The Fifth Circuit affirmed that prayer at graduation had to be nonsectarian and nonproselytizing, reversed and struck down the policy permitting prayers at football games, affirmed the denial of injunctive relief and damages, and reversed the denial of attorney's fees.[62]

1. Supreme Court Majority Decision

Rather than review the broader question of prayer at graduation ceremonies and resolve the split between the Circuits, the Supreme Court granted *certiorari* on the limited question of "[w]hether [the school district's] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[63] As anticipated,[64] a fractured

59. 505 U.S. at 577.

60. On remand following *Lee*, the Fifth Circuit, in *Jones v. Clear Creek Independent School District*, 977 F.2d at 963, essentially followed Justice Scalia's dissent in *Lee* and upheld student-initiated graduation prayer.

61. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

62. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *rehearing en banc denied*, 171 F.3d 1013 (5th Cir. 1999).

63. 528 U.S. 1002 (1999).

Court, in a six to three vote, affirmed that the policy was unconstitutional.[65]

Writing for the majority, Justice Stevens found that just as in *Lee,* prayer at a school-sponsored event, whether a football game or a graduation ceremony, violated the Establishment Clause.[66] However, in *Santa Fe*, Stevens relied on the endorsement test rather than Kennedy's psychological coercion test. Put another way, Stevens reviewed the status of prayer from the perspective of whether its being permitted at football games was an impermissible governmental approval or endorsement rather than as a form of psychological coercion which subjected fans to values and/or beliefs other than their own. In vitiating the prayer policy, Stevens rejected the district's three main arguments.[67] First, Justice Stevens disagreed with the district's position that the policy furthered the free speech rights of students.[68] He argued that the policy did not create a limited public forum as, for example, in *Rosenberger v. Rector and Visitors of University of Virginia,*[69] where the university had to pay for a student publication with a religious perspective, because the district policy in *Santa Fe* limited speech to one single student for an entire season. At the same time, Stevens was unconvinced that the prayer was student, rather than government, speech since the district chose the process by which a student would be selected, the purpose of the message, and when the message would be delivered, namely at a regularly scheduled, school-sponsored function, on school property using a public address system that was under the control of school officials. Consequently, Stevens was of the opinion that a majoritarian process cannot be used to shut out the views of a minority insofar as the selection process assured

64. For a discussion of the Fifth Circuit's ruling and possible outcomes, *see* Ralph D. Mawdsley & Charles J. Russo, *Student Prayers at Public School Sporting Events:* Doe v. Santa Fe Independent School District, 143 EDUC. L. REP. 415 (2000).

65. *See* Doe v. Santa Fe Indep. Sch. Dist., 120 S. Ct. 2266 (2000) Justice Stevens's majority opinion was joined by Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer.

66. *See id.* at 2274.

67. *See id.*

68. *See id.* at 2287.

69. 515 U.S. 819 (1995) (holding that the University's policy of funding the publications of student organizations could not be used to deny funding for a publication with a religious perspective as this was viewpoint discrimination which violated the Free Speech Clause of the First Amendment).

that minority candidates would never have the opportunity to deliver a message and that their views would be effectively silenced.

Stevens rejected the district's second argument, facial neutrality, despite its claim that it had secular goals and purposes: to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. Stevens responded that in relying on the perceptions of an objective student, the alleged secular goals were a sham since based on the district's history of permitting prayer at events it was, in effect, board-sponsored prayer.[70] He also rejected the district's use of two separate student elections as a sham and its claims that prayer at football games was less coercive than at graduations because even if most students could chose to skip the pregame prayer, a number of participants, such as band members, cheerleaders, and players had to be there, indicating that prayer had the improper effect of coercing those present to participate in an act of religious worship. Stevens posited that the policy, which encouraged the selection of a religious message and furthered only one specific kind of message, an invocation, did not further a secular purpose.

Turning to the district's attempted third defense, Stevens almost dismissed out of hand its position that claims for relief were premature since there was no certainty that any of the statements or invocations would be religious until a student actually delivered a solemnizing message. He decided that the policy's unconstitutional purpose was reflected by the board's involvement in the election of the speaker and content of the message coupled with language in the policy identifying what he viewed as the clearly preferred message of a traditional religious invocation. This led Stevens to conclude that even if no student in the school system ever offered a religious message, the policy was unconstitutional because of the district's attempt to encourage prayer.[71]

2. Supreme Court Dissent

Chief Justice Rehnquist's dissent began by declaring that Justice Stevens's opinion "bristles with hostility to all things

70. *Santa Fe*, 120 S. Ct. at 2278.

71. *Id.* at 2279.

religious in public life."[72] What Rehnquist apparently considered most disturbing was, in light of the fact that the policy was never implemented, Stevens's refusal to defer to the district's purposes as other than religious and dismissing them as a sham.

Rehnquist viewed the issue in *Santa Fe* as student, not government, speech where, unlike *Lee's* having a prayer delivered by a rabbi under the direction of a school official, the policy allowed prayer to be selected or created by a pupil. As Rehnquist asserted, if the student had been selected on wholly secular criteria, such as public speaking skills or social popularity, he or she could have delivered a religious message that would likely have passed constitutional muster.[73]

B. Mitchell v. Helms

Mitchell v. Helms,[74] a case with a lengthy procedural history,[75] originally involved three issues, only the third of which reached the Supreme Court. In the parts of the case that were not accepted on appeal, the Fifth Circuit held that following *Agostini v. Felton*,[76] wherein the Court upheld the on-site delivery of federally funded remedial programs in religious schools for poor students in New York City, a Louisiana statute allowing the on-site delivery of special education services in religious schools was constitutional. The Fifth Circuit also affirmed that a nonprofit corporation that paid for transporting children to and from their religious schools was constitutional. The most contentious part of the case at issue before the Supreme Court involved the Fifth Circuit's striking down of Chapter 2 of Title I, now Title VI, of the Elementary and Secondary Education

72. *Id.* at 2283 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent was joined by Justices Scalia and Thomas.

73. *Id.* at 2287.

74. Helms v. Cody, 856 F. Supp. 1102 (E.D. La. 1994), *aff'd in part and rev'd in part sub nom.* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *opinion amended and reh'g denied by* Helms v. Picard, 165 F.3d 311 (5th Cir. 1999), *cert. granted sub nom.* Mitchell v. Helms, 119 S. Ct. 2336 (1999).

75. The programs in *Helms* addressed the use of public funds in religious schools beginning in the early 1980s. For a background story on the litigation, *see* Mark Walsh, *A Parish Offering*, EDUC. WEEK, Nov. 10, 1999, 37-40. The originally named plaintiff, Mary Helms, had a daughter in the Jefferson Parish School District; the named defendant/respondent has changed with each new State Superintendent of Education.

76. 521 U.S. 203 (1997).

Act,[77] a comprehensive federal statute that permits the loans of instructional materials such as library books, computers, television sets, tape recorders, and maps to nonpublic schools.

1. Supreme Court Majority Opinion

In a six to three vote, a splintered Court, as expected,[78] in a plurality opinion authored by Justice Thomas,[79] reversed the judgment of the Fifth Circuit and upheld the constitutionality of Chapter 2. Although not explicitly naming it, Thomas expanded the parameters of the Child Benefit test, under which governmental aid, in the forms of books, transportation, and now, instructional materials, including computers, is available to students who attend religious schools. Thomas acknowledged that *Agostini* modified the seemingly ubiquitous tripartite *Lemon*[80] test, used in more than thirty cases in this area, (which asks whether governmental aid has a secular legislative purpose, has a principle or primary effect that neither advances nor inhibits religion, and does not create excessive entanglement) by reviewing only its first two parts while recasting entanglement as one criterion in determining a statute's effect. Further, since the purpose part of the test was not challenged, Thomas found it necessary only to consider the effects of Chapter 2.

As a threshold concern, Justice Thomas decided that Chapter 2 did not foster impermissible religious indoctrination since the aid was allocated on the basis of neutral, secular criteria that neither favored nor disfavored religion and was available to all schools on a nondiscriminatory basis. Thomas next rejected two rules that the dissent would have relied on governing Chapter 2-type aid—that direct, nonincidental assistance was impermissible and that aid to religious schools was unconstitutional if it could be diverted to sectarian purposes—as inconsistent with the Court's recent holdings. In the process, Justice Thomas reversed those parts of *Meek v. Pittenger* and

77. 20 U.S.C. §§ 7301-73.

78. For a discussion of the Fifth Circuit's ruling and possible outcomes, *see* Charles J. Russo & Ralph D. Mawdsley, *Giving with One Hand and Taking with the Other: State Aid to Religiously Affiliated NonPublic Schools*,140 EDUC. L. REP. 807 (2000).

79. Justice Thomas's opinion was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

80. *Lemon,* 403 U.S. 602, 612 (1971) (internal citations omitted).

Wolman v. Walter that struck down programs that delivered many of the same types of aid as Chapter 2.

After rebuffing Justice Souter's fears that aid would lead to political divisiveness, Thomas applied two principles from *Agostini* in holding that Chapter 2 did not have the effect of advancing religion. First, he noted that Chapter 2 recipients are not defined by reference to religion in reiterating that the aid is available on a nondiscriminatory basis to all schools on the basis of neutral, secular criteria that neither favor nor disfavor religion. Second, he maintained that Chapter 2 did not foster governmental indoctrination of religion since eligibility was not only determined on a neutral basis, using a broad array of criteria, without regard to whether a school was religious, but also because parents made private choices in selecting where their children would be educated. Thomas thus held that Chapter 2 did not have the effect of advancing religion even though the aid could be described as "direct" since it was "nonideological"[81] and there was no evidence that any of the equipment was diverted to religious purposes.[82]

2. Supreme Court Concurrence

In her lengthy concurrence, Justice O'Connor[83] agreed with the result but was concerned that Justice Thomas went too far, since his position might uphold any form of aid to students in religious schools that is secular and offered on a neutral basis. More specifically, while acknowledging that neutrality is an important reason for upholding government-aid programs in the face of Establishment Clause challenges, she added that, "we have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid."[84] Moreover, in agreeing with the dissent to the extent that the Court never upheld an evenhanded approach to aid as the sole basis for satisfying the

81. Mitchell v. Helms, 120 S. Ct. 2530, 2553 (2000) (quoting 20 U.S.C. §7372).

82. For a recent case involving issues similar to Helms, *see* Freedom from Religion Found. v. Bugher, 55 F. Supp. 962 (W.D. Wis. 1999) (upholding a state subsidy of an Internet link to assist schools, some of which were religiously affiliated, but striking down direct cash grants to the religious schools as there were no restrictions on the use of the funds).

83. To the surprise of many, Justice O'Connor's concurrence was joined by Justice Breyer, ordinarily a separationist.

84. *Helms*, 120 S. Ct. at 2557.

Establishment Clause, Justice O'Connor refused to discount the importance of determining whether aid directly aids religious schools. To this end, she found it necessary to distinguish programs where the aid is based on private choice from those with a per-capita basis such as Chapter 2 programs. In adopting this line of analysis, Justice O'Connor found cases such as *Witters* and *Zobrest* acceptable because aid based on the private choice of students or parents makes them look less like a direct subsidy. On the other hand, she was concerned that per-capita aid programs create a public perception that, if the religious school uses the aid to inculcate religion, the government has sent a message of endorsement. Yet, she offered that, if private-choice and per-capita programs are treated the same, there is no reason to preclude the government from providing direct money payments to religious organizations, including churches, based on the number of persons who belong to each organization.

In sum, while she was concerned with Justice Thomas's approval of diversion of government aid for religious indoctrination, she was satisfied that the Chapter 2 aid, which supplemented rather than supplanted federal aid, neither resulted in government indoctrination nor defined recipients by reference to religion. Further, Justice O'Connor was content not only that there were sufficient monitoring procedures in place to avoid the risk of diverting government funds to religious purposes, but also that over four years of discovery covering fifteen years of aid to religious schools revealed only "de minimis" instances of "actual diversion."[85]

3. Supreme Court Dissent

Justice Souter's lengthy and strident dissent voiced his fear that Justice Thomas's opinion was a radical departure from the Court's precedent that risked "compelling an individual to support religion [which] violates the fundamental principle of freedom of conscience."[86] He was also concerned that Thomas's opinion violated the prohibition against governmental establishment of religion by providing substantial aid to religious schools, and "government establishment of religion is inextri-

85. *Id.* at 2562.

86. *Id.* at 2574. As anticipated, Justice Souter's dissent was joined by Justices Stevens and Ginsburg. *Helms*, 120 S. Ct. at 2572 (Souter, J., dissenting).

cably linked with conflict."[87]

IV. REFLECTIONS

Santa Fe Independent School District v. Doe and *Mitchell v. Helms*, although clearly addressing different issues in the wide range of Church-State relations, evidenced not only the ongoing deep divide within the Court but also a kind of internal consistency among the Justices as the majority and dissent essentially changed sides in *Santa Fe* and *Helms*. In viewing *Helms* and *Santa Fe* together, it is fascinating to observe the split among the Supreme Court Justices, especially as the potential near-term vacancies based on the age and or health concerns of several Justices may lead to very different results in this closely-contested arena. At present, the Justices fit into three fairly consistent categories. Chief Justice Rehnquist along with Justices Scalia and Thomas[88] are accommodationists who would permit state aid to students in religious schools and prayer in public schools. At the other end of the bench, Justices Stevens, Souter, Ginsberg, and Breyer[89] are separationists.[90] The two moderates, Justices O'Connor and Kennedy, typically tip the Court's balance by joining either the accommodationists or the separationists.

Of the two cases, *Helms* appears to be more far-reaching than *Santa Fe* for two reasons. First, *Helms* is likely to have a greater impact than *Santa Fe* because estimates are that more than one million children in the United States benefit from

87. *Id.* at 2575.

88. During Justice Thomas's first five years on the High Court, he and Justice Scalia voted together 80% of the time. At the same time, Justice Breyer voted with Justice Souter 84% of the time, while Justice Ginsberg voted with Justice Souter 80% of the time. Daniel E. Troy, *The Court's Mr. Right*, NATIONAL REV., Aug. 9, 1999 at 39-41.

89. Perhaps the biggest surprise in *Helms* was that Justice Breyer joined Justice O'Connor's concurrence.

90. For a discussion of the attitudes of the Justices with regard to their ideological stances, *see* Charles J. Russo & Allan G. Osborne, Agostini v. Felton*: Is the Demise of the Ghoul at Hand?* 116 EDUC. L. REP. 515 (1997). Predicting the results in a Supreme Court case can be risky business because the Justices do not always follow through on their word. *See e.g.*, Lee v. Weisman, 505 U.S. 577 (1992), wherein even though a majority of Justices had voiced their displeasure with the *Lemon* test, Justice Kennedy's opinion struck down prayer at public school graduation ceremonies on the basis that it was psychologically coercive, thus allowing *Lemon* to survive. For a discussion of the perspectives of the Justices prior to *Lee*, *see* Ralph D. Mawdsley & Charles J. Russo, *High School Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?* 69 EDUC. L. REP. 189 (1991).

Chapter 2. Further, combining Justice Thomas's discussion of the importance of the private choices of parents with the Court's having issued a stay of a preliminary injunction granted by a federal trial court judge concerning the voucher program in Cleveland, Ohio,[91] an argument can be made that *Helms* might pave the way for a favorable ruling on vouchers and additional forms of aid to religious schools. Although such a result is certainly speculative at this time in light of Justice O'Connor's concurrence, Justice Thomas's plurality opinion added fuel to the fire because he relied on the principles of neutrality and the private choices of parents in deciding where to send their children to school, buzz words that are often used by supporters of vouchers.

The second reason why *Helms* appears to be of greater significance is that *Santa Fe* essentially follows a virtually unbroken line of almost forty years of Supreme Court cases prohibiting prayer in public schools that began with *Engel v. Vitale.*[92] Conversely, *Helms* continues to clarify the Court's First Amendment jurisprudence by expanding the boundaries of permissible state aid to religious schools.

In light of the potential impact of *Santa Fe* and *Helms*, the

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91. *See* Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (generally upholding the constitutionality of a school voucher program against an Establishment Clause challenge since the offending provision, which gave priority to students whose parents belonged to a religious group that supported a sectarian school was severable from the rest of the statute). *But see* Simmons-Harris v. Zelman, 54 F. Supp.2d 725 (N.D. Ohio 1999) (enjoining the same statute on the basis that since the majority of schools that received aid were religiously affiliated, the moving party demonstrated the likelihood of prevailing on the merits), *stay granted in part*, Simmons-Harris v. Zelman, 1999 WL 669222 (N.D. Ohio Aug 27, 1999), *stay granted*, Zelman v. Simmons-Harris, 120 S. Ct. 443 (1999) (pending final disposition by the Sixth Circuit); Simmons-Harris v. Zelman, 72 F. Supp.2d 834 (N.D. Ohio 1999) (holding that the statute, by which the state paid a portion of participating students tuition at nonpublic schools or public schools adjacent to a city school district violated the Establishment Clause). *See also*, Bagley v. Raymond Sch. Dept., 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999) (affirming that a state tuition statute that excluded religious schools from receiving state funds did not violate the Establishment Clause); Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 329 (1999) (affirming that a state statute that authorized direct grants to nonsectarian high schools as reimbursement for the cost of educating students who did not have a public school available did not violate the Establishment Clause); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *motion for reconsideration withdrawn*, 588 N.W.2d 635 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998) (holding that a parental choice program that afforded parents the opportunities to select the schools that their children attended, and which included religiously affiliated nonpublic schools violated neither the Establishment Clause of the First Amendment nor the state constitution's religious establishment provisions).

92. 370 U.S. 421 (1962).

next two sections of this article reflect on whether there is any legitimate basis for the Chief Justice's concerns and the interplay between the opinions of Justices Thomas and O'Connor on whether the Court may, in fact, be moving toward fashioning a new standard out of the increasingly weak *Lemon* test. The article wraps up with a brief consideration of the future make-up of the High Court bench.

A. Hostility to Religion

An interesting dynamic emerged in the interplay between Chief Justice Rehnquist's dissent in *Santa Fe*, joined by Justice Thomas, and Justice Thomas's plurality opinion in *Helms*, which, in turn, was joined by the Chief Justice. Rehnquist's assertions that Justice Stevens's majority opinion in *Santa Fe* "bristles with hostility to all things religious in public life"[93] and that it was "openly hostile"[94] are not entirely without merit, given Stevens's almost summary rejection of the board's stated purpose regarding the pregame invocation/message, "to solemnize the event [football game],"[95] as a "sham."[96] If a stated purpose "to solemnize [an] event" by having an invocation or benediction at a graduation is unacceptable under the Establishment Clause, it should not be too surprising that the same result would apply to a similar pronouncement before a football game. In defense of Stevens's position, the question becomes whether the Court was hostile to religion in refusing to permit the school district to allow student-initiated and led graduation invocations/benedictions where no secular counterpart to the prayers was present or whether it was merely maintaining a necessary separation of Church and State.

The Chief Justice's concerns aside, it is not clear that separationists have evidenced the hostility to religion that he feared. Yet, since separationists have neither been receptive to prayer in public schools nor aid to students in religiously affiliated nonpublic schools, an interesting question can be raised. In light of the second prong of *Lemon*, which prohibits the government from advancing or inhibiting religion, one can only wonder why Rehnquist has not raised this question sooner

93. Doe v. Santa Fe Indep. Sch. Dist., 120 S. Ct. 2266, 2283 (2000).
94. *Id.* at 2286.
95. *Id.* at 2273.
96. *Id.* at 2278.

since, in many cases, an argument can be made that some strict separationists, if not harboring outright hostility to religion, have handed down rulings that have had a chilling effect on religion.[97] Perhaps Rehnquist has only now reached his breaking point.

Justice Thomas's opinion in *Helms* also highlighted a latent hostility to religion, or at least Roman Catholicism, in his brief discussion of the Blaine Amendment.[98] The Blaine Amendment of 1875 would have amended the Constitution to bar any aid to sectarian institutions, using the term "religious sect," an open code word for Catholic, at a time of wide-spread hostility to the Catholic Church and Catholics.[99] In fact, it was not until almost a century later, in *Hunt v. McNair*,[100] a case involving federal aid in higher education, that the Court eliminated this confusion by coining the term "pervasively sectarian" in referring to all religious schools.

Chief Justice Rehnquist's and Justice Thomas's concerns

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97. *See, e.g.*, Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (preventing a teacher from reading the Bible during class time and removing *The Bible in Pictures* and *The Story of Jesus* from his classroom library while books on Greek gods and goddesses and American Indian religions remain on the shelves); Washegesic v. Bloomingdale Pub. Schs., 33 F.3d 679 (6th Cir. 1994), *cert. denied* 514 U.S. 1095 (1995) (upholding the removal of a portrait of Christ, painted by a graduate of the school, that had been posed on the wall of a public high school for thirty years); and C.H. v. Oliva, 990 F. Supp. 341 (D.N.J. 1997) (holding that a board of education did not violate the First Amendment rights of a first grade student when school officials changed the location of his poster of Jesus and prevented him from reading Bible stories to his classmates).

98. *See* Mitchell v. Helms, 120 S. Ct. 2530, 2551 (2000).

99. The Blaine Amendment, introduced by Representative James G. Blaine of Maine, which passed the House by an overwhelming majority of 180 in favor to 7 opposed, failed to receive the necessary two-thirds vote in the Senate, as 28 Senators favored it while 16 were opposed to it, read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised, or lands so devoted be divided between religious sects or denominations.

Available on line at <http:www.baylor.edu/~Church-State/Blaine_Amendment.html>. For additional background, *see* Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATHOLIC HISTORICAL REV. 15 (1956).

100. 413 U.S. 734 (1973) (upholding a South Carolina statute that provided aid to colleges and universities, including ones that were religiously affiliated, by permitting them to issue revenue bonds for projects, excluding facilities for sectarian study or religious worship, where the institutions conveyed the projects to the state authority which would lease them back and reconvey them on payment of the bonds with limitations being placed on their use before and after reconveyance).

notwithstanding, the Court has never clearly endorsed hostility to religion. For example, in *Board of Education of Westside Community Schools v. Mergens*,[101] Justice O'Connor applied the effects prong of *Lemon* in interpreting the Equal Access Act[102] as meaning that the statute's "message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[103] The notion that the Establishment Clause requires neutrality when government deals with religion has gained acceptance with the present Supreme Court under both the Free Speech[104] and Free Exercise[105] Clauses.

The concept of neutrality can take on different shades of meaning depending on the applicable criteria. In only one case, *Corporation of The Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos*,[106] has the Supreme Court

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101. 496 U.S. 226 (1990). For a discussion of *Mergens*, *see* Charles J. Russo & David L. Gregory, *The Return of School Prayer: Reflections on the Libertarian-Conservative Dilemma*, 20 J. L. AND EDUC. 164 (1991). For an update on the status of the Equal Access Act, *see* Ralph D. Mawdsley, *Noncurriculum Related Student Groups Under the Equal Access Act*, 137 EDUC. L. REP. 865 (1999).

102. The Equal Access Act, in the relevant section, provides that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

103. *Mergens*, 496 U.S. at 248.

104. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995) ("requir[ing] public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. . .[would be] a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.").

105. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeh, 508 U.S. 520 (1993) (in striking down four city ordinances that had the sole effect of prohibiting animal sacrifice by Santaria, a syncretistic religion, the Court declared that, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.")

106. 483 U.S. 327, 337-38 (1987) (upholding a statutory amendment for religious organizations from the prohibition against discrimination in employment under Title VII on the basis of religion):

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the gov-

upheld, against an Establishment Clause challenge, a governmental accommodation of religion that did not also benefit secular entities. However, in *Amos*, an expanded exemption for religious organizations under Title VII served to eliminate judicial need to determine whether the activities of employees were related to their employer's religious mission. In any event, in *Amos* the Court did not claim that Congressional refusal to expand the Title VII exemption would have evidenced hostility towards religion.

The question has thus become whether a court is hostile to religion if it looks beyond the expressed purposes for government action and searches past practices for the real intent of officials. Put another way, one can wonder whether Chief Justice Rehnquist's dissent in *Santa Fe* is correct; that the majority demonstrated hostility toward religion by refusing to accept facially the school officials' stated purpose for the pregame invocation/message. An alternative way of addressing this question considers whether the search for intent by looking at past practice runs the risk of looking to, and/or impugning, the motives of school officials who are responsible for creating and enforcing school policies. The Supreme Court has frequently expressed concern that the constitutionality of government action should not depend entirely on the motives of public officials.[107] For example, in *Mergens*, regarding the passage of the Equal Access Act, the Court observed:

> 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 possible religious motives of the legislators who enacted the law.[108]

Yet, the Court went on to note that "the Act on its face grants equal access to both secular and religious speech,"[109] a

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> ernment itself has advanced religion through its own activities and influence. . .Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

107. For one noticeable exception where a legislator's motives came into play, *see* Wallace v. Jaffree, 472 U.S. 38 (1985).

108. *Mergens*, 496 U.S. at 249.

109. *Id.*

comparison that is difficult to make with a graduation "invocation/ benediction" policy that allows only for prayer.[110]

In the end, one can question whether past practice or intent of school officials is relevant in *Santa Fe* in terms of whether the Court is hostile toward religion. Perhaps equally significant is to consider whether the process that the district official sought to use to permit students to determine, by means of two separate secret votes, whether to have an invocation/benediction was only window dressing, a subterfuge to mask its own goal. One must consider whether the process by which a decision is reached, whether by school officials in *Lee* or by students in *Santa Fe*, matters if the end result is the same, namely the use of prayer. If a policy that permits either an invocation or message before a football game violates the Establishment Clause where, at least theoretically, a nonreligious message is possible, then a policy permitting only an invocation and/or benediction would seem to be even more in jeopardy.

It is important to consider whether refusal to permit students to elect to have a prayer at graduation represents hostility toward religion. Justice Stevens's perspective regarding prayer at football games seems to suggest that graduation prayers would be unconstitutional if they were based on a past practice of prayer. For school districts with such a past practice, *Santa Fe* offers no constitutional hope. When students are not even provided with the opportunity to cast a secret ballot, which, in effect, determines whether they wish to continue a past practice, one wonders whether such a decision, on its face, evidences opposition to religion. The question becomes how one defines neutrality if one eradicates a secret ballot process simply because it allows for the possibility of a religious message. At the same time, it is unclear which may be more threatening to the interpretation of the Establishment Clause, the intent of school officials, community members, and a majority of students to make a minimal religious statement, or the intent of a majority of the Supreme Court to eliminate an event simply because it might be religious. While it is true that constitutional rights are not, and should not be subject to a majority vote, the Court needs to address the clear tension that has arisen as activist judges at all levels seek to interpret the Constitution

110. *See also* Wallace v. Jaffree, 472 U.S. 38 (1985).

based on their own judicial philosophies almost without regard for the will of the people.

If *Santa Fe* represents hostility, despite the desire of school officials and voters in a school district to have invocations or benedictions at graduation, then, perhaps, the result represents the hostility of equality. An impressive uphill battle in the Supreme Court over the past decade has assured that religious individuals and/or organizations will have access, equal to claimants with secular reasons, to public school facilities[111] and resources.[112] However, the reliance on equality to reach this point seems to have its price. To permit prayers at graduation where no secular counterpart is available seems, arguably, to be changing the rules.[113] Having been forced onto a playing field where neutrality is defined by the presence of a secular counterpart, school districts will continue to find use of graduation invocations/benedictions difficult to defend. In sum, even if the separationists lack overt hostility to religion, given the role that it has played, and continues to occupy, in shaping American life, perhaps the Court needs to move beyond mere neutrality and find a way to afford religion a greater voice in the marketplace of ideas. The role of neutrality also continues to play a central role in cases where state aid, rather than prayer, is at issue as the Court struggles to define an appropriate measure for evaluating the constitutionality of programs which provide

111. *See, e.g.*, *Mergens*, 496 U.S. at 226; Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (upholding, essentially as an extension of *Mergens*, a religious group's right to show a film on family values and child-rearing on the basis that the school district's refusal to grant them access to facilities was impermissible viewpoint discrimination against religion). The Supreme Court recently agreed to hear an appeal in a similar case wherein the Second Circuit upheld a ban against permitting a nondenominational children's club to engage in religious instruction and prayer in a public school. The Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 2000 WL 838152 (Oct 10, 2000).

112. To *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 846 (1995) can be added a genre of Supreme Court cases upholding access to government aid on the premises of religious schools against an Establishment Clause challenge, but where that aid was the same as that available to students in public schools. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Agostini v. Felton, 521 U.S. 203 (1997); and, Mitchell v. Helms, 120 S. Ct. 2530 (2000).

113. Arguably, a school district's selecting students based on academic performance to speak at graduation with the possibility that some, or all, might incorporate religious messages would not run afoul of the Establishment Clause as long as students are free to select their own content. *See* Doe v. Madison Sch. Dist. No. 321, 7 F. Supp.2d 1110 (D. Idaho 1997), *aff'd* 147 F.3d 832 (9th Cir. 1998), *reh'g granted, opinion withdrawn*, 165 F.3d 1265 (9th Cir. 1999), *vacated*, 177 F.3d 789 (9th Cir. 1999).

public funds that assist students who attend religiously-affiliated nonpublic schools.

B. Establishment Clause Test

Prior to *Santa Fe* and *Helms*, the Court has relied on essentially three tests when interpreting the Establishment Clause, most commonly the *Lemon* test. Although not supported by all current members of the Court,[114] the *Lemon* test has demonstrated a remarkable resiliency, often coming back from the edge of oblivion.[115] Even though Justice O'Connor's endorsement test, suggested as a standard to replace *Lemon*[116] in disputes where state aid was not at issue and enunciated in her concurrence in *Lynch v. Donnelly*,[117] has been applied with some frequency,[118] prior to *Santa Fe* it had not been followed by the majority opinion in any education case.[119] The most recent

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114. Over the years, no fewer than five of the currently sitting Justices have voiced concerns over the *Lemon* test. *See Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring, joined by Thomas, J.); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., joined by, Rehnquist, C.J., and Thomas, J.); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring); *Jaffree*, 472 U.S. at 107-13 (Rehnquist, J., dissenting).

115. In one of his more colorful metaphors, Justice Scalia, in his concurring opinion in *Lambs Chapel*, 508 U.S. at 398, mused that, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."

116. *See Jaffree*, 472 U.S. at 68 (in concurring with invalidation of Alabama statute permitting prayer along with moment of silence at beginning of school day, Justice O'Connor observed that, "[d]espite its initial promise, the Lemon test has proved problematic.").

117. 465 U.S. 668, 688 (1984), (O'Connor, J., concurring) (upheld the display of a creche among secular symbols).

118. Even though Justice O'Connor's endorsement test in *Lynch* was formulated in a nonschool setting, the Court applied it in the next four cases involving the Establishment Clause in disputes surrounding K-12 education. *See* Edwards v. Aguillard, 482 U.S. 578 (1982) (striking down a state law requiring balanced treatment of creation science and evolution as violating the Establishment Clause); School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); *Jaffree*, 472 U.S. 38. Surprisingly, the test was ignored in subsequent cases not involving K-12 education. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding the Adolescent Family Life Act even though it aided public and nonpublic organizations that provided services related to the care of pregnant adolescents and the prevention of sexual relationships in this age group); *Amos*, 483 U.S. 327; Witters v. Washington Dep't of Services for Blind, 474 U.S. 481 (1986).

119. *See Lamb's Chapel*, 508 U.S. at 395 (where, in addition to upholding a reli-

test, psychological coercion, created by Justice Kennedy, has only appeared as controlling in *Lee v. Weisman*.[120]

Justice Stevens's express language[121] and reliance on Supreme Court precedent[122] in *Santa Fe* initially suggested that the two-part endorsement test is increasingly being relied on rather than *Lemon*. While Chief Justice Rehnquist is correct that Justice Stevens, in assessing the facial constitutionality of the pregame policy, did refer to "the three factors first articulated in *Lemon v. Kurtzman*,"[123] the latter actually considered only the secular purpose prong in concluding that the policy

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gious group's right of access to public school facilities, the Court, in refuting the district's Establishment Clause defense using endorsement language also inexplicably cited to *Lemon*: "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed. . ."). For a noneducation case where the endorsement test represented the majority view, see *Allegheny*, 492 U.S. at 573 (holding, *inter alia*, that the erection of a creche on steps inside of a courthouse violated the Establishment Clause as it resulted in the endorsement of Christianity).

120. 505 U.S. 577. However, four justices in *Lee* also held that the use of a graduation prayer violated the endorsement test. *Id.* at 577.

> [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

(Blackmun, J., concurring) (quoting from *Jaffree*, 472 U.S. at 69 (O'Connor, concurring in judgment)).

See also 505 U.S. at 618 (Souter, concurring) ("Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement.").

121. The majority's conclusion that the district's policy "has the purpose and creates the perception of encouraging delivery of prayer at a series of important school events," Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2283 (2000), seems to be the logical result of such language in the decision as "[t]he actual or perceived endorsement of the message," and "our objective student's perception that the prayer is, in actuality, encouraged by the school." *Id.* at 2278.

122. Justice Stevens's majority opinion, in seeking authority for interpretation of the Establishment Clause looked to three of Justice O'Connor's concurrences which relied on the endorsement test. *Id.* at 2278. Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (upholding the right of the Ku Klux Klan to erect an unattended cross on grounds at a state capitol); *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 688 (1984)(1984) (O'Connor, J., concurring). The number of references, and prominence, given that Justice Stevens gives to Justice O'Connor's views on endorsement, albeit only in concurring opinions, seems more than a coincidence.

123. *Santa Fe*, 120 S. Ct. at 2282.

had "an unconstitutional purpose."[124] If the endorsement test has a purpose part, it is unclear whether its reliance on *Lemon* represents a redundancy or a substantive difference in meaning between the purpose parts of the two tests.

The endorsement test enunciated by Justice O'Connor sought to modify *Lemon* by creating a two-part test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[125]

In further explaining her stance on the governmental endorsement of religion, Justice O'Connor called for modifications to both the purpose and effect tests in *Lemon*:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.[126]

Justice O'Connor subsequently added that, in measuring perception, the relevant issue is "how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the [government action]."[127] Justice O'Connor has also attempted to provide definition to purpose

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124. *Id.*

125. *Lynch*, 465 U.S. at 687-88. (internal citations omitted).

126. *Id.* at 690.

127. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring).

under the endorsement test. For example, in *Wallace v. Jaffree*,[128] she pointed out that what is required is that "the legislature manifest a secular purpose and omit all sectarian endorsements from its laws."[129] Adding that a review of legislative purpose requires "a deferential and limited"[130] inquiry, she noted that "our courts are capable of distinguishing a sham secular purpose from a sincere one."[131] Further, she cautioned that courts have "no license to psychoanalyze the legislators . . . [or to] denigrate an expressed secular purpose due to postenactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute."[132] Relying on a statute's "history, language, and administration,"[133] O'Connor observed "there can be little doubt that the purpose and likely effect of this [moment of silence] enactment is to endorse and sponsor voluntary prayer in the public schools."[134]

Another uncertainty is whether the use of the purpose prong of the endorsement test would have produced the same result in *Santa Fe* as *Lemon's* purpose test did. Even so, it is worth acknowledging that in *Wallace*, Justice O'Connor suggested caution in finding a nonsecular purpose under the endorsement test while also cautioning that her concern can apply in a case not involving a facial challenge to a moment of silence statute. Using *Lemon's* purpose prong to mount a facial challenge to the policy in *Santa Fe* may have far-reaching implications for student choice and Establishment Clause litigation. As Chief Justice Rehnquist declared, the Court "applie[d] *Lemon's* factors stringently"[135] in determining not only whether the school district's policy would inevitably violate the Establishment Clause even though it was never put into effect, but

128. 472 U.S. 38, 75 (1985) (O'Connor, J., concurring).

129. *Id.* at 68. In invalidating the moment of silence statute, the Court noted that the state legislature had created a nonsecular purpose by the addition of the words "or voluntary prayer."

130. *Id.* at 75.

131. *Id.*

132. *Id.*

133. *Id.* Part of the past history of the moment of silence statute involved prior statutes that had permitted teachers to lead students in group prayers. The moment of silence statute, by adding "or voluntary prayer" was perceived as an attempt to express prayer as a state-favored manner of using the silence.

134. *Id.* at 67.

135. Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2284 (2000) (Rehnquist, C.J., dissenting).

whether it may be applied in violation of the Establishment Clause.

Justice Stevens's position in *Santa Fe* suggests that, even in the absence of direct action by school officials, courts are free to make their own "worst-case" assumptions about what might occur, with the potential for chilling effects.[136] Thus, in presenting a facial challenge to a school district policy, this position holds that student choice will result in three cascading decisions: a majority vote to have a pregame invocation/message; a vote to select a person who is likely to present a religious message; and, a pregame message that is, in fact, religious. If, as Chief Justice Rehnquist's dissent suggested, the majority relied on the *Lemon* purpose test because the purpose part of the endorsement test has never been used in a facial challenge to a government action,[137] it is interesting to consider whether one can reasonably assume that the endorsement purpose test will take on the same strict definition as *Lemon* and be used in future facial challenges. As noted, Chief Justice Rehnquist feared that while this was so, this convergence of definition may eliminate the endorsement test altogether.

In light of Justice Thomas's neutrality test in *Helms* and Chief Justice Rehnquist's dissent in *Santa Fe*, which addressed endorsement as "the most rigid version of the oft-criticized test of *Lemon v. Kurtzman*,"[138] the status of Justice O'Connor's test is unclear. That is, given *Lemon's* resiliency and the Court's inability, or unwillingness, to adopt the endorsement test, future litigation may focus on whether there is need for a separate endorsement test or if meaning must be drawn from *Lemon*. If anything, *Lemon's* resiliency was evident in *Helms*, wherein Justice Thomas's plurality opinion enunciated a neutrality test that retained *Lemon's* purpose and effects prongs while relegat-

136. For a similar line of judicial decision-making, Justice Brennan's majority opinion in *Aguilar v. Felton*, 473 U.S. 402 (1985), struck down New York City's practice of delivering Title I services on site in religiously affiliated nonpublic schools even though there were no allegations of impropriety based on his fear that such a relationship might have created excessive entanglement between the schools and the government.

137. Ironically, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the first school-related case involving the Establishment Clause wherein Justice O'Connor authored the opinion of the Court, she relied on *Lemon* rather than the endorsement. In any event, *Mergens* did not involve a facial challenge to the Equal Access Act since the litigation involved a school district's refusal to recognize a request for a religious club under the Act.

138. *Santa Fe*, 120 S. Ct. at 2284.

ing excessive entanglement as one of three factors to be considered in determining effect. The other two factors under Thomas's revised effects test are whether an action results in governmental indoctrination and whether it defines its recipients by reference to religion.

Justice Thomas's neutrality test, distilled from a combination of Establishment Clause cases involving various forms of government aid[139] and free speech claims,[140] presents a simple measure. Under this test, government aid that benefits religious schools is constitutional as long as it is neutral and results from private choice. The benefit of this test to religious schools is obvious: private choice is an intrinsic feature of all religious schools since a student's presence can be accounted for only by a parent and/or student choice to attend. The down side is, as discussed below, the apparent relative ease with which a challenge can be mounted against the constitutionality of aid.

Neutrality, which may provide religious schools access to resources that are available to public school students, gives religious institutions broad access to a wide range of instructional equipment and materials. The only monitoring necessary for public school officials is to evaluate whether print and visual materials such as videotapes have religious content. Under the neutrality test, concerns as to how a religious school chooses to use its Chapter 2 equipment or materials are no longer relevant. However, Justice Thomas's plurality opinion appears to lack the votes to change the Establishment Clause test across the board. Thus, the courts remain in limbo, lacking a clear standard because Justice O'Connor's concurrence retains some elements of the older Establishment Clause analysis. Religious schools might become ineligible for benefits under per-capita aid programs such as Chapter 2, which is based on student enrollments, as opposed to private-choice programs, represented by individual applications for benefits in such

139. *See* Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Washington Dep't of Services for Blind, 474 U.S. 481 (1986) (*reh'g denied*, Witters v. Washington Dep't of Servs. for the Blind, 475 U.S. 1091 (1986)); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Agostini v. Felton, 521 U.S. 203 (1997).

140. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (prohibiting viewpoint discrimination in permitting a religious group to use of public school facilities) Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819 (1995) (prohibiting viewpoint discrimination in requiring a university to fund a student publication with religious content).

cases as *Zobrest* and *Witters*. Justice O'Connor would find government assistance constitutionally suspect if benefits were not supplemental to resources already available in religious schools, if the aid supplanted funds available to the school from nonfederal sources, and/or if there was evidence that the assistance had been, or was being, diverted to religious uses.

For many religious schools, Justice O'Connor's endorsement test, at least in its present version in *Helms*, would be difficult, if not impossible, to meet. For example, limiting the use of a VCR and monitor, purchased through Chapter 2, to play only nonreligious tapes may be neither feasible nor practicable. Similarly, restricting an overhead projector to use only for instruction in nonreligious subjects may be all but impossible in a pervasively religious school that integrates the Bible into all instruction. Even though Justice O'Connor placed the burden of proof on the one challenging the diversion of government funds, the relative ease by which this burden can be met through discovery is evident in *Helms*.[141]

One can argue that Justice O'Connor's distinction between private-choice and per-capita programs is no longer viable after *Agostini*, wherein her majority opinion upheld the use of publicly-paid teachers on-site in religious schools to provide Title I remedial instruction in reading and mathematics for students in a low-income area, even though the children, who were selected to receive the assistance, were individually identified by their teachers and never made application for the help. By providing publicly funded services to large numbers of students who were eligible without personally requesting help, and where all but fifty-eight of the 22,000 eligible students in New York City who attended nonpublic schools attended ones that were religiously affiliated,[142] *Agostini* arguably represented a break from *Zobrest* and *Witters*, wherein the recipients of aid sought it out. In *Zobrest*, the student received the services of a sign language interpreter due to the active participation of his parents in the educational process, while in *Witters,* the blind student was initially able to participate in the program at issue because he had to make an individual application for assis-

141. Mitchell v. Helms, 120 S. Ct 2530 (2000) (Souter, J., dissenting) (highlighting documentation demonstrating that Title I equipment was used in the classrooms for religious indoctrination and that a computer purchased with Title I funds was used to back-up a school's master computer when it failed).

142. *Agostini*, 521 U.S. at 252 (Souter, J., dissenting).

tance. It is unclear how far this analysis can go since Justice Souter's dissent in *Agostini* reads very much the same as Justice O'Connor's concurring opinion's concerns in *Helms*:

> [S]tudents eligible for such [remedial] programs may not apply directly for Title I funds. The aid, accordingly, is not even formally aid to the individual students (and even formally individual aid must be seen as aid to a school system when so many individuals receive it that it becomes a feature of the system).[143]

At least for the present, the distinction between assistance to individual students in religious schools, even if a large number of students as in *Agostini*, and resources to a religious school for use with all children, as in *Helms*, represents an important dividing line. While States may choose to follow the *Helms* plurality and provide assistance to religious schools, they would be well advised to not ignore Justice O'Connor's concerns.

Their limitations aside, the plurality and concurring opinions in *Helms* offer a ray of hope to parents who lack resources to send their children to religious schools. Subject to any changes on the High Court Bench, it appears that a majority exists to uphold a voucher plan under the Establishment Clause, as long as the program provides benefits to students in both public and nonpublic schools. Presumably, as long as voucher funds could be used to attend public or nonpublic schools, the plurality's evenhandedness test is likely to be satisfied. Likewise, a voucher program dependent on individual applications should allay Justice O'Connor's concerns about per-capita programs. Whether most parents choose to use voucher funds to send their children to religious schools rather than other public schools or nonsectarian nonpublic schools, seems to be irrelevant as long as the opportunity exists for parents to make those decisions.[144]

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143. *Id.*

144. The Court does not seem influenced by the percentage of sectarian religiously affiliated nonpublic schools or percentage of students in them who are affected by government assistance, in comparison to nonsectarian nonpublic schools. *See Agostini*, 521 U.S. at 251 (Souter, J., dissenting), upholding the on-site delivery of aid to students in nonpublic schools even though all but 52 of the 22,000 students who received Title I aid attended schools that were religiously affiliated. *See also* Jackson v. Benson, 578 N.W.2d 602 (Wis 1998), *motion for reconsideration withdrawn*, 588 N.W.2d 635 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998) where even though the aid was available for students in only nonpublic schools, the court reasoned that it was constitutional under

As the Court and the Nation debate the future of public education in light of various reform initiatives such as vouchers,[145] and the reinvigorated Child Benefit test, educational leaders and policy makers face an important question. This inquiry asks whether future deliberations on state aid will focus on the broader question of where students can best be educated, thereby perhaps necessitating the adoption of Justice Thomas's neutrality test, or the narrower question of worrying about which forms of aid to students in religiously-affiliated nonpublic schools are acceptable based on the fear of avoiding endorsement or the ability to divert aid to religious purposes, which might favor the adoption of Justice O'Connor's endorsement test. The way in which this question is resolved will certainly go a long way toward shaping the future of American K-12 education. Yet, questions linger over the direction that the Court might take as the future of several members is uncertain.

C. The Court's Future

As the Court's First Amendment jurisprudence continues to evolve, or devolve, and given the delicate balance that exists between and among its various factions, with one vote often making the difference, perhaps the most significant factor that will influence its direction will be the presidential election of November 2000. Insofar as several Justices are likely to retire over the next few years due to age and potential health problems, President George W. Bush will have the opportunity to shape the Court's future well into the next century based on his own philosophy. The change will be all the more interesting if the retirements include Chief Justice Rehnquist. Keeping in mind that, to date, there have only been sixteen Chief Justices but more than forty different Presidents, it should be clear the extent to which a presidential legacy can be shaped by judicial appointments.

Even while acknowledging that there is no way of knowing for certain how future Justices might rule,[146] with Republican

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the Establishment Clause and similar provisions in the state constitution because children attended these schools and were thus eligible to participate in the program based on the private choices of their parents.

145. *See supra,* note 83.

146. As an example of how Supreme Court Justices have minds of their own that often surprise the Presidents who appoint them, the remarks of President Dwight D.

George W. Bush of Texas as President, he is expected to appoint strict constructionist Justices who may be open to accommodation. On the other hand, had Vice-President Al Gore, the Democratic standard-bearer, won the election, he would have been likely to name judicial activists and others who would have interpreted the Constitution based on their own ideological perspectives and would have been apt to favor separation of Church and State.[147] One thing is for sure, that if President Bush appoints the kind of Justices expected of him, and avoids his father's pitfall of appointing the likes of liberal Justice David Souter, and if these new Justices hold true to form, then the Court will move in a different direction, both with regard to prayer and state aid to students who attend religiously-affiliated nonpublic schools.

V. CONCLUSION

The place of religion in public education, in all of its manifestations, most notably as discussed in terms of prayer in school and governmental aid to religiously affiliated nonpublic schools, continues to occupy a central role in the Supreme Court's evolving First Amendment jurisprudence. At this, the dawn of the new Millennium, the Justices need to walk a fine line between providing too much aid to religion and religious institutions while avoiding hostility to religion. The way in which the Court resolves these thorny issues will go a long way in shaping both the quality of education that American children receive, regardless of where they attend classes and, just as importantly, in determining what the face of the Nation will look like.

Eisenhower come to mind. In light of the Warren Court's role in revolutionizing the face of American constitutional law and society, "Eisenhower later called his appointment of [Earl] Warren 'the biggest damn-fooled mistake' he had ever made." DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 81 (1986).

147. The attitudes of Governor George W. Bush of Texas and Vice-President Al Gore, the Democratic standard-bearer, were plainly evident in their first Presidential debate. *See, e.g.*, ". . .Mr. Bush did say that he wanted Supreme Court justices who 'look at the Constitution as sacred' and that he believed in 'strict constructionists.'" Alison Mitchell, *Bush and Gore Clash Over Tax Cuts in First Debate: Candidates Cite Differences on Priorities*, N.Y. TIMES, Oct. 4, 2000, at A1, 16. *See also* Stuart Taylor Jr., *The Supreme Question*, NEWSWEEK, July 10, 2000, at 30 (discussing how possible appointees of Gore or Bush might influence the direction of the Court).