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Their Own Prepossessions¹ The Establishment Clause, 1999–2000

Leslie C. Griffin*

I. INTRODUCTION

In 1999, the Supreme Court held out the promise of settling the disarray in First Amendment Establishment Clause jurisprudence when it accepted two cases about the role of religion in public and private schools. From *Everson*² to *Agostini*,³ the opinions in this area of the law have lacked a clear or consistent rationale. In the 1999–2000 term, in *Santa Fe Independent School District v. Doe*, the Court ruled that a public school district's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.⁴ The Court found no Establishment Clause violation, however, in *Mitchell v. Helms*, for a federal school aid program under which educational materials and equipment were loaned to private religious schools.⁵ *Mitchell* suggested a new Establishment Clause jurisprudence when the Court overruled two earlier cases, *Meek*⁶ and *Wolman*.⁷

1. Illinois *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring). There is not "one word [in the Constitution] to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions." *Id.* at 237-38 (Jackson, J., concurring).

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2. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

3. *Agostini v. Felton*, 521 U.S. 203 (1997).

4. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000). For analysis of *Santa Fe*, see *The Supreme Court—Leading Cases*, 114 HARV. L. REV. 179, 249-56 (2000) [hereinafter *Leading Cases*].

5. *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (plurality opinion). For an analysis of *Mitchell*, see *Leading Cases*, *supra* note 4, at 239-48.

6. *Meek v. Pittenger*, 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

Santa Fe and *Mitchell* demonstrate that the promise of a settled Establishment Clause jurisprudence remains unfulfilled, and that forthcoming decisions (about, e.g., vouchers and other forms of school aid and activity)⁸ may be even more disputed. Three justices (Rehnquist, Scalia and Thomas) voted for both aid and prayer⁹ while three justices (Stevens, Souter and Ginsburg) voted against both aid and prayer.¹⁰ Three swing voters (O'Connor, Kennedy and Breyer) determined the outcome of the two cases: against prayer and for aid.¹¹ (Of course, no justice voted for prayer and against private school aid.) Only a plurality (Rehnquist, Scalia, Kennedy and Thomas) agreed with the rationale for private school funding in *Mitchell*.¹² Justices O'Connor and Breyer agreed with the result of lending aid to private religious schools, but thought that the plurality's reasoning was too sweeping.¹³

The opinions themselves, moreover, confirm the intensity of disputes about religion and call into question the Court's ability to resolve them. The justices do not even agree whether an invocation before a football game is religious or secular.¹⁴ Justice Thomas complains of anti-Catholic bigotry.¹⁵ Justice Rehnquist accuses the *Santa Fe* majority of hostility to religion; he says that Justice Stevens' opinion "bristles with hostility to all things religious in public life."¹⁶ Justice Souter disputes Thomas' charges of bigotry while acknowledging the "antagonism of controversy over public support for religious causes."¹⁷ Finally, although endorsement and neutrality appear to dominate the constitutional analysis, the opinions rely upon a hodgepodge of tests, including Souter's neutrality and Thomas' neutrality and private choice, O'Connor's actual diversion and Souter's divertibility, Stevens'

7. *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000). For a review of the two new cases, see Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) and Erwin Chemerinsky, *Divided Court Grapples with Religion*, 36 TRIAL 86 (2000).

8. *See, e.g., Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 121 S. Ct. 2093 (2001).

9. *Mitchell*, 530 U.S. at 835 (plurality opinion); *Santa Fe*, 530 U.S. at 323 (Rehnquist, C.J., dissenting).

10. *Mitchell*, 530 U.S. at 910 (Souter, J., dissenting); *Santa Fe*, 530 U.S. at 317.

11. *Mitchell*, 530 U.S. at 835 (plurality opinion); *Santa Fe*, 530 U.S. at 317.

12. *Mitchell*, 530 U.S. at 801 (plurality opinion).

13. *Id.* at 837 (plurality opinion).

14. *Santa Fe*, 530 U.S. at 309, 324.

15. *Mitchell*, 530 U.S. at 828 (plurality opinion).

16. *Santa Fe*, 530 U.S. at 318 (Rehnquist, C.J., dissenting).

17. *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting).

government coercion and Thomas' diluted government endorsement. Justice Rehnquist expands the "secular purpose" test¹⁸ while Justice Thomas announces the demise of the "pervasively sectarian" standard.¹⁹

Since 1947, the Court has employed different versions of these varied tests in the Establishment Clause cases about private and public schools. The array of tests explains the widespread sentiment that Establishment Clause jurisprudence is muddled, even incoherent.²⁰ The two new cases, with their overruling of *Meek* and *Wolman*, have not added clarity to the case law, however. Indeed, new problems await us.

In the Establishment Clause cases set in schools, the litany of confusion is by now well known:²¹ that the Court permitted government funding of bus rides to private schools²² but not field trips from private schools;²³ of books²⁴ but not maps, globes and projectors;²⁵ of standardized testing in private schools but not tests written by private school officials;²⁶ of religious universities²⁷ but not religious elementary and secondary schools.²⁸ The case law allowed released time religious instruction on private school but not public school grounds²⁹ and accepted the presumption that public school teachers do not retain their secular perspective once they enter religious schools.³⁰ The Court prohibited the funding of secular subjects in religious schools³¹ while

18. *Santa Fe*, 530 U.S. at 322 (Rehnquist, C.J., dissenting).

19. *Mitchell*, 530 U.S. at 829 (plurality opinion).

20. See *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, C.J., dissenting) ("The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results."); *Leading Cases*, *supra* note 4, at 253 ("[A]n area of jurisprudence currently perceived as contradictory and unprincipled."); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117-20 (1992) ("It is a mess.").

21. See *Wallace*, 472 U.S. at 110-11 (Rehnquist, C.J., dissenting).

22. *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947).

23. *Wolman v. Walter*, 433 U.S. 229, 255 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

24. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

25. *Meek v. Pittenger*, 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

26. *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 661 (1980); *Wolman*, 433 U.S. at 240; *Meek*, 421 U.S. at 372; *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472, 480 (1973).

27. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 767 (1976); *Hunt v. McNair*, 413 U.S. 734, 749 (1973); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971).

28. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

29. *Zorach v. Clauson*, 343 U.S. 306, 311 (1952); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

30. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Aguilar v. Felton*, 473 U.S. 402, 409 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

31. *Lemon*, 403 U.S. at 620.

upholding the constitutionality of religious worship on public school grounds.³²

In this essay, I employ an analytical framework that the Court has not adopted in order to criticize and clarify Establishment Clause jurisprudence on aid to religion. Although it has deployed numerous tests about neutrality and endorsement, since 1947 the Court has in effect employed first an *institutional* and then a *speaker* analysis in order to determine when government support of religious education is constitutional.³³ Neither standard has proven adequate to protect core First Amendment values. I argue that the Court should use a *subject* standard that distinguishes between religious practice and public welfare. Government support of religious practice is unconstitutional; government provision of public welfare benefits to all citizens is constitutional.

From 1947 to 1997 the test for what was unconstitutional and constitutional in the schools was in effect an institutional spectrum. At the unconstitutional end of the line was the “church school,”³⁴ at the constitutional end the public school. Unable (or unwilling) to recognize that some education at religious schools is secular and that some religious activity occurs at public schools, the Court (with some limited, inconsistent exceptions) prohibited aid to religious schools. Instead of focusing on the type of activity, religious or secular, the decisions depended on the identity of the school. Under an institutional standard, the church school is completely religious and the public school is completely secular. The government, for example, may pay for the bus ride to religious school (the student is not yet in the building),³⁵ but not for the field trip that students take from the religious school.³⁶ Public school students may receive released-time religious instruction as long as it takes place on religious³⁷ and not public school grounds.³⁸

The institutional line of analysis reached its apex in 1985, in *Aguilar v. Felton*, when the Court ruled that it was unconstitutional for New York to send public school teachers into religious schools because they

32. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

33. For further discussion of the development of the institutional principle, see Leslie Griffin, “*We Do Not Preach. We Teach.*”: *Religion Professors and the First Amendment*, 19 QUINNIPIAC L. REV. 1 (2000).

34. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

35. *Id.* at 18.

36. *Wolman v. Walter*, 433 U.S. 229, 254 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

37. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

38. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209-10 (1948).

might indoctrinate the students once they got there.³⁹ Something about the religious school environment might infect even experienced public school teachers. Eventually the Court decided that this principle was too harsh, even hostile, toward religion, and it overruled *Aguilar* (in *Agostini v. Felton*) in 1997.⁴⁰ The legacy of the institutional principle may explain Justice Thomas' complaints in *Mitchell* about anti-Catholic bigotry. (In *Mitchell*, as in the earlier cases, the "church schools" have been predominantly Catholic.⁴¹)

Long before *Agostini*, the Court had discovered another problem with the institutional spectrum at the public school end. In the 1980s, religious speakers complained that they were unfairly excluded from public schools. Beginning in 1981, with *Widmar v. Vincent*,⁴² the Court decided a line of cases that prohibited the exclusion of religious worship and religious speech from public school grounds. The institutional spectrum—with its vision of a completely secular public school—was not equipped to handle religion in public institutions. Accordingly, the Court decided that private speech about or of religion is permitted on public school grounds while government speech (especially government endorsement or coercion of religion) is prohibited. The analysis turns on who speaks (rather than where the conduct occurs) and on whether that person's speech can reasonably be attributed to the government. The irony of the speaker standard is that the Court permitted religious practice in the public schools before it accepted secular conduct in the religious schools.⁴³

This focus on the speaker has meant that religion cases now involve Free Speech instead of Free Exercise claims. The Court has offered broad protection to religious speech while neglecting Establishment Clause considerations.⁴⁴ Under the speaker standard, the Court has

39. *Aguilar v. Felton*, 473 U.S. 402, 409 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *see also* *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 397 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

40. *Agostini*, 521 U.S. at 209.

41. *Mitchell v. Helms*, 503 U.S. 793, 803 (2000) (plurality opinion); *see also* *Aguilar*, 473 U.S. at 406; *Ball*, 473 U.S. at 379; *Wolman*, 433 U.S. at 234; *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 744 (1976); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 768 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971); *Tilton v. Richardson*, 403 U.S. 672, 676 (1971); *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947).

42. *Widmar v. Vincent*, 454 U.S. 263 (1981).

43. *Compare* *Widmar*, 454 U.S. at 277 (holding that a university cannot exclude religious groups from meeting on university property), *with* *Agostini*, 521 U.S. at 234-35 (1997) (holding that a federally funded program for a religious school is constitutional).

44. *See* *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 530 U.S. 384, 394 (1993); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 253 (1990); *Widmar*, 454 U.S. at

mischaracterized religious worship as speech and then accorded this “speech” protection that the Establishment Clause prohibits. The apex (until recently) of the speaker standard is the Court’s 1995 decision in *Rosenberger v. Rector & Visitors of University of Virginia*, in which the Court ordered the University of Virginia to fund an evangelical student newspaper whose purpose was the conversion of its readers to Christianity.⁴⁵ The rationale for the majority’s decision was that religion is a viewpoint, not a subject.⁴⁶ *Rosenberger* implied that there is no subject matter of religion and no distinction between religious and secular. Without a distinction between religious and secular the religion clauses are meaningless. Unlike *Aguilar* and the institutional principle, *Rosenberger* and the speaker standard remain good law. Indeed, the new decision in *Santa Fe* is based on the speaker test.

Although the subject standard (by which public prayer is religious practice barred by the Establishment Clause) is implicit in the majority opinion in *Santa Fe*, the speaker analysis predominates.⁴⁷ Students announce invocations over the loud speaker system before football games. To whom should their speech be attributed: the school district or the students? This question is the key dispute between majority and dissent. The majority emphasizes the government facilities, including the sound system and the team uniforms.⁴⁸ The dissent insists that the case is about the private choices of students, as determined through student elections.⁴⁹ This disagreement should remind us that the speaker distinction provides little protection against public religious practice.⁵⁰ If the students use private microphones, for example, the

277; *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *rev’d*, 121 S. Ct. 2093 (2001).

45. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 843-44 (1995). The victory for the students in the *Good News* case is a new apex. *Good News Club*, 202 F.3d 502, *rev’d*, 121 S. Ct. 2093 (2001).

46. *See Rosenberger*, 515 U.S. at 831. “Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.” *Id.*

47. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000).

48. *Id.* at 307-08.

49. *Id.* at 320-21 (Rehnquist, C.J., dissenting).

50. *See Lee v. Weisman*, 505 U.S. 577, 644-45 (1992) (Scalia, J., dissenting).

Given the odd basis for the Court’s decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may

prayer will appear more private to the Court although no different to the audience. Post-*Santa Fe*, it will not be difficult for a majority who wants public prayer in the schools to avoid any constitutional restrictions.

Mitchell's result is consistent with the subject test. The aid—books, computers, projectors—should be assessed by how analogous it is to public welfare or religious practice. Justices O'Connor and Breyer provided two potential votes for a subject standard in *Mitchell*. The plurality, however, introduced an evenhandedness neutrality test that permits direct government aid to religious practice. The plurality's constitutional standard permits direct government aid to institutions that are pervasively sectarian, i.e., not secular. Not only has Justice Thomas ignored the irony that on behalf of the Catholic Church he permits funding for pervasively sectarian schools.⁵¹ The plurality also missed the legal point. The Establishment Clause permits the government to fund secular subjects but prohibits assistance to religious activity. Again, without a distinction between religious and secular the religion clauses are meaningless.

The results of these two new cases—no prayer in public schools, some secular aid for private schools—are probably correct,⁵² but they are based on faulty reasoning. The results depend upon the justices' case-by-case analysis of the facts. Although facts always decide cases, the facts are unrelated to any standard that understands religious practice. The prayer case depends on how much school equipment and how many school teachers support the prayer. The aid case depends on what number of religious books is enough to constitute a constitutional violation. Combined with the Court's sweeping decision in *Rosenberger*, *Mitchell* threatens an Establishment Clause without limits.

In an early schools case, the 1948 decision in *McCullum v. Board of Education*, the Court ruled that it was unconstitutional for Illinois to

proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

Id. (Scalia, J., dissenting); see also David Firestone, *South's Football Fans Still Stand Up and Pray*, N.Y. TIMES, Aug. 27, 2000, at A1 ("Handbills had been distributed by a Christian ministry active in southern Mississippi urging people to pray just before the game, but no loudspeaker was used, and there was no official leader.").

51. See generally 2 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 993, 1007 (Olive Wyon trans., The MacMillan Co. 4th ed. 1956) (1911) (contrasting church with sect). "Roman Catholicism is the pure and logical form of the Church-type. . . . The sect is a voluntary society, composed of . . . believers [who] . . . live apart from the world, are limited to small groups, emphasize the law instead of grace." 2 *id.*

52. I say "probably correct" instead of "correct" because of the different readings of the facts of *Mitchell*.

permit released time religious instruction on public school grounds.⁵³ Justice Jackson concurred, but warned that there is not “one word [in the Constitution] to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions.”⁵⁴ In 2001, the law of the schools is a law of their own prepossessions, precisely because the Court has ignored the distinction between the secular and the sectarian. Once again the Court has opted for confusion and inconsistency in Establishment Clause jurisprudence in service of their own prepossessions about religion.

The Court should employ a subject spectrum—with religious practice at one end and public welfare at the other. The government may (or must) provide public welfare benefits to all its citizens, but it must not aid religious practice. Under the subject standard, *Santa Fe* is a case “about prayer,”⁵⁵ i.e., about religious worship, not speech. *Santa Fe* should be the easy case under the First Amendment, not because of who speaks but due to the nature of the activity. Prayer is a quintessential religious practice. It is the benchmark for assessing constitutional violations under the core Establishment Clause principle: no-aid-to-religious-practice. Aid includes any use of public facilities.

In contrast, public welfare may be given to religious schools. Public welfare consists of neutral, secular benefits—such as police and fire protection—to which all citizens are entitled.⁵⁶ The aid in *Mitchell* should be assessed by its similarity and difference to prayer and public welfare. Most of the books were secular. Public welfare aid must not be diverted to religious practice. For that reason, the use of the projectors for theology classes was unconstitutional. When public welfare aid is divertible, the government must closely monitor the aid to ensure that diversion to religious practice does not occur.⁵⁷ The quality of the monitoring in Jefferson Parish was uncertain.⁵⁸

A subject-matter standard that bars religious practices from public schools and public funding is adequate to protect the religious schools and to correct prior Establishment Clause excesses. It avoids hostility to religion by acknowledging that many activities in religious schools are not religious practices. It also recognizes Establishment Clause

53. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

54. *Id.* at 237-38 (Jackson, J., concurring).

55. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000).

56. *Mitchell v. Helms*, 530 U.S. 793, 831-32 (2000) (plurality opinion).

57. *Id.* at 832 (plurality opinion).

58. *Id.* at 832-33 & n.15 (plurality opinion).

limits on public religion that are unacceptable to *Mitchell's* plurality. Finally, the subject-matter test explains why no justice voted for school prayer and against school aid. An Establishment Clause that permits public religious practices—especially prayer—is an Establishment Clause that sets few (if any) limits on government sponsorship of religion.

I turn now to a more detailed analysis of the Court's most recent Establishment Clause cases: *Santa Fe* (in Part II) and *Mitchell* (in Part III). I return to the Establishment Clause considerations that support the subject standard in my Conclusion.

II. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE

The Santa Fe Independent School District, in southern Texas, adopted numerous policies regarding prayer at public school functions.⁵⁹ Before 1995 an elected student chaplain prayed over the public address system before football games.⁶⁰ After a First Amendment challenge to that practice by students and their parents, in 1995 the school district adopted a series of guidelines that permitted student prayer.⁶¹ The May and July 1995 policies dealt with prayer at graduation.⁶² The August and October 1995 policies covered football; they were modeled on the provisions of the graduation standards.⁶³

Although the May policy included a limitation that the graduation prayer must be “nonsectarian, nonproselytizing invocations and benedictions,”⁶⁴ the July and August policies omitted the nonsectarian, nonproselytizing requirement.⁶⁵ The July and August standards, however, did include these limitations as fallback provisions that would apply only if the district court enjoined the “preferred policy,” which was the policy without the nonsectarian, nonproselytizing requirement.⁶⁶

The school district's August policy, entitled “Prayer at Football Games,” called for two elections.⁶⁷ First, students vote whether to have

59. *Santa Fe*, 530 U.S. 295-300 & n.6.

60. *Id.* at 294.

61. *Id.*

62. *Id.* at 296.

63. *Id.* at 296-99 & n.6.

64. *Id.* at 296 (citing *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 811 (5th Cir. 1999)).

65. *Id.* at 297-98.

66. *Id.* at 298.

67. *Id.* at 297.

an invocation.⁶⁸ If the students voted for an invocation, in a second election they chose the student speaker.⁶⁹ In August 1995, under this policy, students voted for prayer before football games.⁷⁰

The final October policy had some revisions.⁷¹ Its title was "Student Activities: Pre-Game Ceremonies at Football Games."⁷² It mentioned "messages" and "invocations," not prayers.⁷³ The "nonsectarian" and "nonproselytizing" requirement was omitted, except as a fallback provision.⁷⁴ "Prayer" is not included in the text of the October policy, which stated that:

[t]he board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.⁷⁵

The October policy maintained the two-stage election.⁷⁶ A new election was not conducted in October 1995, however; the pro-prayer results of the August election stood unchanged.⁷⁷

The district court enjoined the preferred policy as a violation of the Establishment Clause under *Lee v. Weisman*,⁷⁸ but upheld the alternative fallback provisions under *Jones v. Clear Creek Independent School District*.⁷⁹ On appeal, the Fifth Circuit then reversed the district court on the fallback provisions, ruling that *Clear Creek*, which permitted nonsectarian and nonproselytizing prayers at high school graduation ceremonies, does not apply to football games.⁸⁰ Accordingly, the Fifth Circuit ruled that both the preferred and the fallback policies for prayer at football games were unconstitutional.⁸¹

68. *Id.*

69. *Id.*

70. *Id.* at 297-98.

71. *Id.* at 298.

72. *Id.* at 298 n.6.

73. *Id.*

74. *Id.*

75. *Id.* at 298 & n.6.

76. *Id.* at 298 n.6.

77. *Id.* at 298 n.5.

78. *Id.* at 299; *Lee v. Weisman*, 505 U.S. 577 (1992).

79. *Santa Fe*, 530 U.S. at 299; *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

80. *Santa Fe*, 530 U.S. at 300 (citing *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999)).

81. *Id.* at 299.

The Supreme Court granted certiorari on the question “whether the policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.”⁸² The Court concluded that the October policy was unconstitutional⁸³ over a dissent that the Court’s ruling was premature.⁸⁴ The dissent argued that the Court should await the October policy’s implementation to see if there was a constitutional violation, particularly to see if students actually voted to have speakers or if students were elected, not to pray, but due to “public speaking ability or social popularity.”⁸⁵

It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation.⁸⁶

According to the dissent, the majority’s act of deciding the case before the policy was implemented displayed the majority’s “hostility to all things religious in public life.”⁸⁷

The majority and the dissent disagreed about the timing of the facial challenge to an October policy that had not been implemented. In terms of Establishment Clause analysis, they disputed the application of the government coercion/endorsement test and the secular purpose test.

The Court relied on the speaker standard. First Amendment case law distinguishes “*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”⁸⁸ The majority concluded that the school district policy was unconstitutional because the government endorsed the religious practice of prayer and

82. *Id.* at 301.

83. *Id.* at 314.

84. *Id.* at 326 (Rehnquist, C.J., dissenting).

85. *Id.* at 321 (Rehnquist, C.J., dissenting).

86. *Id.* (Rehnquist, C.J., dissenting)

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

88. *Id.* at 302 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990)).

coerced participation in it.⁸⁹ The dissent argued that the case involved the private speech of students.⁹⁰

In order to support his argument that this case was about government speech, Justice Stevens emphasized the facts that illustrated the school district's involvement.⁹¹ The school district implemented the policies.⁹² The invocations were given over the school's public address system, on government property, at games sponsored by the school, before games in which the teams wore school uniforms.⁹³ Santa Fe did not create a public forum in which individual students spoke.⁹⁴ There was no forum, with a range of student opinions; only one student was chosen for the entire football season to speak on a confined topic.⁹⁵

The same facts supported a conclusion of government endorsement of prayer and government coercion of religious practice. The school was involved in the selection of the religious speaker through school policies and elections. "[T]he policy, by its terms, invites and encourages religious messages."⁹⁶ The invocation language did not negate the endorsement of religion; by definition, invocation "describes an appeal for divine assistance."⁹⁷ Moreover, by using government facilities at a school function, the policy "coerces student participation in religious events."⁹⁸ The majority rejected the school district's two contentions about coercion: first, there is no coercion because the prayers arise from student choices; and second, attendance at football games is voluntary and so attendees cannot be coerced.⁹⁹

The first claim merely reiterates the district's private speech argument (rejected by the majority, but persuasive to the dissent) that the student, a private speaker, is a "circuit-breaker"¹⁰⁰ who distances the prayer from the government. As for voluntary attendance at football games, "[t]o assert that high school students do not feel immense social

89. *Id.* at 312.

90. *Id.* at 324 (Rehnquist, C.J., dissenting).

91. *Id.* at 305-08.

92. *Id.* at 306.

93. *Id.* at 307-08.

94. *Id.* at 304.

95. *Id.*

96. *Id.* at 306.

97. *Id.* at 306-07.

98. *Id.* at 299 (quoting Petitioner's Appendix of Petition for Certiorari).

99. *Id.* at 310.

100. *Id.* at 305; see also John P. Cronan, Comment, *A Political Process Argument for the Constitutionality of Student-Led, Student-Initiated Prayer*, 18 YALE L. & POL'Y REV. 503 (2000) (defending distinction between student-led, student-initiated prayer and government prayer).

pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'"¹⁰¹

In the dissent, Justice Rehnquist interpreted the facts differently.¹⁰² The policy permits students to vote, to select a speaker, to give the invocation or not.¹⁰³ The students, not the government, decide whether the invocation will be religious or secular.¹⁰⁴ The elections are not only about prayer and religion: "It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity."¹⁰⁵ According to Justice Rehnquist, the haste of the majority to invalidate the statute before there was a record of student elections confirmed its hostility to religion.¹⁰⁶ The case is about students. Without government endorsement of religion, Rehnquist concluded, there is no violation of the First Amendment.¹⁰⁷

The majority and the dissent also disagreed about the policy's purpose: "Under the *Lemon* standard, a court must invalidate a statute if it lacks 'a secular legislative purpose.'"¹⁰⁸ For the majority, "this policy is about prayer,"¹⁰⁹ a particular religious practice that is not secular. Although courts usually defer to the government's characterization of its purpose, "it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'"¹¹⁰ For the majority, the text and history of the policy supported the conclusion that it is about prayer only.¹¹¹ Prayer does not have a secular purpose.

The dissent urged deference to the government, arguing that the school policy has "plausible secular purposes: to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for competition."¹¹² Moreover, the school district made repeated efforts to comply with the First Amendment and

101. *Santa Fe*, 530 U.S. at 311 (quoting *Lee v. Weisman*, 505 U.S. 577, 595 (1992)).

102. *Id.* at 320-23 (Rehnquist, C.J., dissenting).

103. *Id.* at 320-21 (Rehnquist, C.J., dissenting).

104. *Id.* at 321 (Rehnquist, C.J., dissenting).

105. *Id.* (Rehnquist, C.J., dissenting).

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

107. *Id.* at 321 (Rehnquist, C.J., dissenting).

108. *Id.* at 314 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

109. *Id.* at 315.

110. *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring) (alteration in original)).

111. *Id.* at 315.

112. *Id.* at 322 (Rehnquist, C.J., dissenting) (quoting Petitioner's Appendix of Petition for Certiorari).

the district court rulings.¹¹³ According to the dissent, the efforts to act constitutionally, i.e., with a secular purpose, entitled the district to deference by the Court.¹¹⁴

III. *MITCHELL V. HELMS*

At issue in *Mitchell* was Chapter 2 of the Education Consolidation and Improvement Act of 1981.¹¹⁵ Under the challenged provisions of the statute, the federal government provided funds to state and local government agencies, which then loaned educational materials and equipment to local private and public primary and secondary schools.¹¹⁶ The materials, which included library services, media materials, computers and computer software, were distributed according to school enrollment on a per capita basis.¹¹⁷ The Act required that these materials supplement, not supplant, the private school budgets from non-federal sources.¹¹⁸ The law also required that the materials be “secular, neutral and non-ideological.”¹¹⁹ Materials are loaned to private schools, which may not acquire control of or take title to them.¹²⁰

In Jefferson Parish, Louisiana, private schools received a variety of materials under the provisions of the Act.¹²¹ “Among the materials and equipment provided have been library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR’s, projection screens, laboratory equipment, maps, globes, filmstrips, slides and cassette recordings.”¹²² In 1986–87, forty-six private schools in Jefferson Parish received aid: thirty-four Roman Catholic schools, seven other religious schools and five non-religious schools.¹²³

The litigation history of the case reflects the confusion of the Establishment Clause cases. The lawsuit was first filed in 1985.¹²⁴ In

113. *Id.* at 323-24 (Rehnquist, C.J., dissenting).

114. *Id.* (Rehnquist, C.J., dissenting).

115. *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality opinion); *see also* Innovative Education Program Strategies, 20 U.S.C. §§ 7301 to 7373 (1994).

116. 20 U.S.C. §§ 7301 to 7373.

117. 20 U.S.C. § 7372(a)(1).

118. 20 U.S.C. § 7371(b).

119. 20 U.S.C. § 7372(a)(1).

120. 20 U.S.C. § 7372(c)(1).

121. *Mitchell v. Helms*, 530 U.S. 793, 803 (2000) (plurality opinion).

122. *Id.* (plurality opinion).

123. *Id.* (plurality opinion).

124. *Id.* (plurality opinion).

1990, a district court concluded that Chapter 2 was unconstitutional under *Meek* and *Wolman*.¹²⁵ In 1997, a second district court opinion upheld Chapter 2 because of intervening case law,¹²⁶ including *Rosenberger* and *Zobrest v. Catalina Foothills School District*,¹²⁷ as well as the Ninth Circuit's decision in *Walker v. San Francisco Unified School District*.¹²⁸ The Supreme Court then decided *Agostini* while an appeal of the second district court order was pending in the Fifth Circuit.¹²⁹ Faced with conflicting precedents, the Fifth Circuit invalidated Chapter 2 under *Meek* and *Wolman*.¹³⁰ The Supreme Court finally upheld Chapter 2, overruling *Meek* and *Wolman*.

A. Endorsement/Neutrality

As in *Santa Fe*, the government endorsement test is central to the Court's analysis.¹³¹ There is unquestionably government conduct in *Mitchell*—school funding. Thus the plurality opinion did not question the application of this standard in the school funding context.¹³² Step-by-step, however, it unlinked government funding from government endorsement and weakened the test so that it retains little bite.

First, the plurality identified “indoctrination” as the specific practice that the endorsement rule prohibits.¹³³ Then the indoctrination test became one of attribution. “[T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools *could reasonably be attributed* to governmental action.”¹³⁴ On its face, the attribution test should be easy to meet, especially in a case in which federal legislation explicitly provided labeled equipment to private schools. Nonetheless, Justice Thomas concluded that *this* aid cannot be attributed to the government for two reasons: private choice and neutrality.¹³⁵ These steps, from endorsement to indoctrination to

125. *Id.* at 804 (plurality opinion) (citing *Helms v. Cody*, No. 85-5533, 1990 WL 36124 (E.D. La. Mar. 27, 1990)).

126. *Helms v. Cody*, No. 85-5533, 1997 WL 35283, at *16 (E.D. La. Jan. 28, 1997), *rev'd*, *Mitchell v. Helms*, 530 U.S. 793 (2000).

127. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

128. *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995).

129. *Mitchell*, 530 U.S. 793 (plurality opinion); *Agostini v. Felton*, 521 U.S. 203 (1997).

130. *Helms v. Picard*, 151 F.3d 347, 374 (5th Cir. 1998).

131. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-10 (2000).

132. *Mitchell*, 530 U.S. at 807-14 (plurality opinion).

133. *Id.* at 809 (plurality opinion).

134. *Id.* (plurality opinion) (emphasis added).

135. *Id.* at 809-14 (plurality opinion).

attribution to private choice and neutrality, provide great latitude for the government to provide aid to religion.

On private choice, the plurality concluded that Chapter 2 is constitutional because the government money is spent according to the private choices of the parents.¹³⁶ Although the materials go directly to the schools, the per capita provision, which allots total aid based on the number of students who attend each school, converts the program into one of voluntary choice. If the aid is given to religious schools because of the private choices of parents, there is no government endorsement of religion.¹³⁷ Private choice avoids the “imprimatur of state approval.”¹³⁸ On neutrality, the plurality concluded that there is no indoctrination as long as the aid is distributed neutrally “to a broad range of groups or persons without regard to their religion.”¹³⁹

“If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”¹⁴⁰

Oddly enough, this neutrality *permits* religious indoctrination with government aid. “If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.”¹⁴¹ Such a broad neutrality standard deflects attention from the content of the aid and the activity of the recipient—considerations that form the core of the Establishment Clause.

Justice O’Connor’s concurrence proposed a stricter government endorsement test than the plurality’s. Justice O’Connor stated that the government may not endorse religious practice. Accordingly, she criticized the plurality’s private choice and neutrality as inadequate

136. *Id.* (plurality opinion).

137. *Id.* at 810 (plurality opinion).

138. *Id.* at 813 (plurality opinion).

139. *Id.* at 809 (plurality opinion).

140. *Id.* (plurality opinion).

141. *Id.* at 809-10 (plurality opinion). *But see* *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring). According to Justice Souter in *Lee*:

Nor does it solve the problem to say that the State should promote a “diversity” of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each.

Id. (Souter, J., concurring).

constitutional standards.¹⁴² Per capita funding conveys government endorsement to the reasonable observer; “true private-choice” does not.¹⁴³ Students have no control over their money under the per capita standard.

That the amount of aid received by the school is based on the school’s enrollment does not separate the government from the endorsement of the religious message. The aid formula does not—and could not—indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made.¹⁴⁴

Moreover, Justice O’Connor complained that, as interpreted by the plurality, neutrality is “a rule of unprecedented breadth”¹⁴⁵ which “foreshadows the approval of direct monetary subsidies to religious organizations . . . [for] religious objectives.”¹⁴⁶ Such neutrality violates the Establishment Clause prohibition against public financing of religious purposes.¹⁴⁷

O’Connor supported the majority result because, *on the facts* of *Mitchell*, she concluded that the Jefferson Parish schools did not use the educational materials to endorse or inculcate religion. Thus, while refusing to join the *Mitchell* plurality in eviscerating the endorsement test, she and Justice Breyer parted company with their *Santa Fe* colleagues over a factual determination of whether government endorsement occurred in Louisiana.

According to dissenting Justice Souter, “[t]he plurality would break with the law. The majority misapplies it.”¹⁴⁸ The law is no-aid-to-religion. The misapplication is that the materials were diverted to religious use.¹⁴⁹ For Justice Souter, no aid is a better test than endorsement because the constitutional violation occurs when the aid is given, not when it is noticed.¹⁵⁰ He concluded that:

While perceived state endorsement of religion is undoubtedly a relevant concern under the Establishment Clause, it is certainly not the only one. *Everson* made this clear from the start: secret aid to religion

142. *Mitchell*, 530 U.S. at 837-44 (O’Connor, J., concurring).

143. *Id.* at 842-43 (O’Connor, J., concurring).

144. *Id.* at 843 (O’Connor, J., concurring).

145. *Id.* at 837 (O’Connor, J., concurring).

146. *Id.* at 844 (O’Connor, J., concurring).

147. *See id.* at 837-40 (O’Connor, J., concurring).

148. *Id.* at 911 (Souter, J., dissenting).

149. *Id.* at 910 (Souter, J., dissenting).

150. *See id.* at 900-01 (Souter, J., dissenting).

by the government is also barred. State aid not attributed to the government would still violate a taxpayer's liberty of conscience, threaten to corrupt religion, and generate disputes over aid.¹⁵¹

The plurality's test is far too permissive for the dissent.¹⁵² Justice Thomas has taken one account of neutrality, evenhandedness neutrality, and converted it to the sole test of constitutionality.¹⁵³ This position is unrepresentative of the case law, which includes three accounts of neutrality.¹⁵⁴ "Neutrality' has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it."¹⁵⁵ Although Souter conceded that, in the 1980s, with *Witters* and *Zobrest*, the Court moved toward the third definition of neutrality, he insisted that evenhandedness has never provided a sufficient test of constitutionality.

Hence, if we looked no further than evenhandedness, and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money.¹⁵⁶

The two concurring justices, O'Connor and Breyer, accepted many aspects of Souter's dissent, but disputed his interpretation of the facts about the use of school materials in Jefferson Parish.¹⁵⁷ The factual disputes among plurality, concurrence and dissent over the outcome—to fund or not—revolved around the question of the divertibility of aid to religion.

B. Actual Diversion/Divertibility

The diversion question is whether government funds subsidize religious practice. *Mitchell* offers three different resolutions of diversion—no diversion, actual diversion, and divertibility.¹⁵⁸ First, the plurality rejected any diversion test entirely because it is "unworkable"

151. *Id.* (Souter, J., dissenting) (citations omitted).

152. *Id.* at 900 (Souter, J., dissenting).

153. *Id.* (Souter, J., dissenting).

154. *Id.* at 878 (Souter, J., dissenting).

155. *Id.* (Souter, J., dissenting).

156. *Id.* at 885 (Souter, J., dissenting); see also *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

157. *Mitchell*, U.S. at 853-57 (O'Connor, J., concurring).

158. *Id.* at 793 (plurality opinion).

and “boundless.”¹⁵⁹ “The issue is not divertibility of aid but rather whether the aid itself has an impermissible content.”¹⁶⁰ This content is not the subject standard proposed in this essay, however, which looks to the nature of the aid. The plurality’s content is assessed by asking if the same aid is given to nonreligious, areligious and religious groups.¹⁶¹ How the aid is actually used in religious schools is ignored. For example, chalk, crayons, pens, computers and paper are divertible (i.e., they may be used to teach religion) but they do not indoctrinate because they do not have impermissible religious content and because they are given to everyone. Oddly enough, the plurality’s indifference to diversion suggests that its content standard is empty, as the plurality accepted that anything, even Shakespeare, can be diverted to religious instruction.¹⁶² Nonetheless, such actual diversion to religious indoctrination is no bar to government aid.

O’Connor contested the plurality’s argument that “actual diversion” to religious mission is permissible.¹⁶³ Establishment Clause precedent, including *Agostini* and *Allen*, prohibits the actual diversion of government funds to support religion.¹⁶⁴ “Although ‘[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,’ our decisions ‘provide no precedent for the use of public funds to finance religious activities.’”¹⁶⁵ On the facts, O’Connor found insufficient actual diversion of government funds to religious mission for a constitutional violation.¹⁶⁶ Diversion did occur. For example, 191 religious books were purchased at the religious schools’ request.¹⁶⁷ When public officials later noticed the violation, the books were recalled.¹⁶⁸ Justice O’Connor noted, however, that this

159. *Id.* at 820, 824 (plurality opinion).

160. *Id.* at 822 (plurality opinion).

So long as the governmental aid is not itself unsuitable for use in the public schools because of religious content, and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. And, of course, the use to which the aid is put does not affect the criteria governing the aid’s allocation and thus does not create any impermissible incentive under *Agostini*’s second criterion.

Id. at 820 (plurality opinion) (citation omitted).

161. *Id.* at 809 (plurality opinion).

162. *Id.* at 823-24 (plurality opinion).

163. *Id.* at 840 (O’Connor, J., concurring).

164. *Id.* (O’Connor, J., concurring).

165. *Id.* (O’Connor, J., concurring) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995)).

166. *Id.* at 861-67 (O’Connor, J., concurring).

167. *Id.* at 866 (O’Connor, J., concurring).

168. *Id.* (O’Connor, J., concurring).

was less than one percent of the total allocation of books.¹⁶⁹ There was also persuasive evidence that government projectors were used more regularly in theology classes than in science classes.¹⁷⁰ O'Connor concluded that this too was *de minimis*, insufficient to create a constitutional violation.¹⁷¹

This aid is constitutional even though the oversight mechanisms in Jefferson Parish were apparently poor.¹⁷² There was no systematic record-keeping or labeling. Religious schools requested the materials they wanted and agreed to comply with the government standards. Inspections were usually announced in advance and occurred only once a year. The inspections depended upon the word of the private schools and not on thorough investigation by public officials. The books, for example, were reviewed by title. One of the 191 books recalled as a religious book was *The Saints Go Marching In*—about the New Orleans Saints football team.¹⁷³ Nonetheless, the Constitution, according to Justice O'Connor, does not require fail-safe mechanisms. Any actual diversion was “minuscule” and so not unconstitutional.¹⁷⁴ *De minimis* and minuscule are vague constitutional standards with questionable Establishment Clause application. In *Lee v. Weisman*, for example, the Court rejected the argument that a “brief” graduation ceremony prayer was *de minimis* and so constitutional.¹⁷⁵

169. *Id.* (O'Connor, J., concurring).

170. *See id.* at 864 (O'Connor, J., concurring).

171. *Id.* (O'Connor, J., concurring). *But see* *Lee v. Weisman*, 505 U.S. 577, 594 (1992). The graduation prayer was,

we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character.

Id.

172. *Mitchell*, 530 U.S. at 832-34 (plurality opinion).

173. Brief for Respondents at 42, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648).

174. *Mitchell*, 530 U.S. at 865 (O'Connor, J., concurring) (stating that, “[there is] no case in which [the Court has] declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on the minuscule scale of those at issue here”).

175. *Lee*, 505 U.S. at 594.

But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

Id.

The actual diversion in Jefferson Parish was an Establishment Clause violation to the dissent.¹⁷⁶ “[W]e have long held government aid invalid when circumstances would allow its diversion to religious education.”¹⁷⁷ Given the difficulties of monitoring, and the inadequacy of the oversight in Jefferson Parish, possible diversion (divertibility) of aid is also unconstitutional.

The divertibility standard is consistent with Souter’s no-aid-to-religion principle. Because the risk of diversion is highest in financial aid cases, the Court has not allowed direct monetary aid to private schools.¹⁷⁸ The Court permitted loans of textbooks but not projectors and other equipment because “[w]hile the textbooks had a known and fixed secular content not readily divertible to religious teaching purposes, the adaptable materials did not.”¹⁷⁹ The Establishment Clause prohibits divertibility.

O’Connor and Souter disagreed about the facts. For him, all actual diversion is unconstitutional;¹⁸⁰ for her, this actual diversion was de minimis.¹⁸¹ They also disagree about the law: divertibility v. actual diversion. Her opposition to divertibility is its presumption that religious schools will indoctrinate. As in *Agostini*, in *Mitchell* she opposed a presumption of bad faith by religious schools.¹⁸² Yet she did not impose a constitutional requirement of government monitoring and she accepted some violation of the actual diversion standard.¹⁸³

C. Pervasively Sectarian

In *Mitchell*, the trial court concluded that the Catholic schools were pervasively sectarian and so not entitled to aid under Supreme Court precedent.¹⁸⁴ The plurality denounced this “offensive” test, with its “shameful pedigree,” and concluded that “[t]his doctrine, born of bigotry, should be buried now.”¹⁸⁵ What bigotry? “‘Sectarian’ was

176. *Mitchell*, 530 U.S. at 903-10 (Souter, J., dissenting).

177. *Id.* at 890 (Souter, J., dissenting).

178. *Id.* at 890-93 (Souter, J., dissenting).

179. *Id.* at 893-94 (Souter, J., dissenting).

180. *Id.* at 908-10 (Souter, J., dissenting).

181. *Id.* at 864 (O’Connor, J., concurring).

182. *Id.* at 863-64 (O’Connor, J., concurring).

183. *Id.* (O’Connor, J., concurring).

184. *Id.* at 904-05 n.23 (Souter, J., dissenting). For a discussion of pervasively sectarian, see *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 19-20 (1993) (Blackmun, J., dissenting) and *Bowen v. Kendrick*, 487 U.S. 589 (1988).

185. *Mitchell*, 530 U.S. at 829 (plurality opinion).

code for Catholic.”¹⁸⁶ The renunciation of the “pervasively sectarian” test is consistent with evenhandedness neutrality: Catholic and public schools should receive the same aid.

Justice Souter has never abandoned the premise of the institutional principle, which holds that everything in the religious schools is religious. “Pervasively sectarian” are Catholic and other religious schools in which “the overriding religious mission . . . is not confined to a discrete element of the curriculum.”¹⁸⁷ In pervasively sectarian schools, one cannot distinguish secular teaching from religion. Pervasively sectarian “is simply a matter of common sense: where religious indoctrination pervades school activities of children and adolescents it takes great care to be able to aid the school without supporting the doctrinal effort.”¹⁸⁸ No aid to religion means no aid to religious mission.¹⁸⁹ Souter’s dissent provides the starkest statement of the institutional principle in First Amendment jurisprudence: “In fact, religious education in Roman Catholic schools is defined as part of required religious practice; aiding it is thus akin to aiding a church service.”¹⁹⁰ A religious school is a church. Aid to such schools “inevitably and impermissibly support[s] religious indoctrination.”¹⁹¹

The dissent established that the Jefferson Parish Catholic schools were pervasively sectarian by reference to the Code of Canon Law and to the schools’ mission statements.¹⁹²

Based on record evidence and long experience, we have concluded that religious teaching in such schools is at the core of the instructors’ individual and personal obligations, cf. Canon 803 § 2, Text & Commentary 568 (“It is necessary that the formation and education given in a Catholic school be based upon the principles of Catholic doctrine; teachers are to be outstanding for their correct doctrine and integrity of life”), and that individual religious teachers will teach religiously.¹⁹³

186. *Id.* at 828 (plurality opinion) (stating, “it was an open secret that ‘sectarian’ was code for ‘Catholic’”).

187. *Id.* at 885 (Souter, J., dissenting).

188. *Id.* at 912 (Souter, J., dissenting).

189. *Id.* at 913 (Souter, J., dissenting).

190. *Id.* at 886 (Souter, J., dissenting); *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); John Courtney Murray, *Law or Prepossessions?*, 14 *LAW & CONTEMP. PROBS.* 23 (1949).

191. *Mitchell*, 530 U.S. at 887 (Souter, J., dissenting).

192. *Id.* at 886 n.6 (Souter, J., dissenting).

193. *Id.* at 886 (Souter, J., dissenting); *see also id.* at 886-87 n.7 (Souter, J., dissenting). “Although the Court no longer assumes that public school teachers assigned to religious schools for limited purposes will teach religiously, *see Agostini v. Felton*, we have never abandoned the

Mission statements and Canon Law, however, do not tell us how secular aid is used or how secular subjects are taught in religious schools. “[F]ormal normative teachings discussed under headings such as ‘Catholic medical ethics,’ ‘Jewish bioethics,’ or ‘Hindu bioethics’ often have little connection with the actual beliefs and practices of millions of people who call themselves Catholic, Jewish, or Hindu.”¹⁹⁴ The legal test should not be whether the institution is pervasively sectarian according to administrative or mission statements. The test is what occurs within the institutions. Thus actual diversion to religious practice is unconstitutional, and divertibility requires government monitoring of actual use of equipment in the schools. Such monitoring does not violate the Establishment Clause by creating an “excessive entanglement” between church and state.¹⁹⁵

IV. CONCLUSION

The institutional principle and the speaker standard avoid the constitutional question whether government aid supports religious practice. Since 1947, the justices have used the institutional presumption and the government/private speech distinction in support of their own theological prepossessions instead of assessing the conduct of the public and the private schools.

The First Amendment requires a distinction between the secular and the sectarian. If the government cannot distinguish between the secular and the religious, then it has no basis upon which to build a public school system or other government institutions.

The Establishment Clause forbids the government to support religion. Since 1947, the Court has struggled to draw the line between church and

presumption that religious teachers will teach just that way.” *Id.* (Souter, J., dissenting) (citations omitted).

194. Ronald M. Green, *Religions’ ‘Bioethical Sensibility’: A Research Agenda*, in NOTES FROM A NARROW RIDGE: RELIGION AND BIOETHICS 165, 166 (Dena S. Davis & Laurie Zoloth eds., 1999).

195. *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

Id.; *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (permitting government monitoring of religious adolescent counseling programs); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764-65 (1976) (allowing state audits to ensure that grants to religious colleges are not used to teach religion).

state, religious and secular. In the schools cases, the institutional spectrum has been inadequate because it denied support to secular activity in religious schools while permitting religious practice in the public schools.¹⁹⁶ The Establishment Clause prohibits government support of religious practice wherever it occurs, and allows the provision of public welfare to all citizens, religious, irreligious and areligious.

The speaker spectrum has been no more satisfactory. It offers no protection to the speech of private school students. It does shelter the practice of religion in public institutions and with public funding. The Court's casuistry of private and government speech should not obscure the practical reality: that the speech standard permits government-supported religious practice by the majority religion. Although Christian students lost in *Santa Fe*, only Christians have been victorious in the Court's mixed Free Speech and Establishment Clause cases.¹⁹⁷

Under the subject test, the result in *Santa Fe* is correct. The Establishment Clause bars government support or funding of religious practices. The world's religions have many dimensions, one of which is the ritual or practical dimension.¹⁹⁸ Prayer is a quintessential religious

196. Compare *Widmar v. Vincent*, 454 U.S. 263 (1981) (permitting religious activity in a state school), with *Aguilar v. Felton*, 473 U.S. 402 (1985) (denying the use of state funds to pay parochial school employees), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

197. See *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 121 S. Ct. 2093 (2001) (upholding Christian Bible study group's use of school facilities); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826 (1995) (requiring the University of Virginia to fund the magazine "Wide Awake: A Christian Perspective at the University of Virginia," which has "a two-fold mission: 'to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means'"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-89 (1993) (requiring school district to give school access to "an evangelical church" in order to display a film series advocating "returning to traditional, Christian family values," a "[f]amily oriented movie—from a Christian perspective." In Film 5, "Mrs. Dobson recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help."); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 232 (1990) (requiring school district, on statutory grounds, without reaching the free speech question, to provide access to a "Christian club . . . to read and discuss the Bible, to have fellowship, and to pray together"); *Widmar*, 454 U.S. at 267 (requiring university to permit access to student group Cornerstone, and invalidating a university regulation prohibiting use of facilities for "religious worship and religious teaching"); *id.* at 265 n.2 (describing Cornerstone as "an organization of evangelical Christian students from various denominational backgrounds. . . . A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences"). *But see Lee v. Weisman*, 505 U.S. 577 (1992) (holding Jewish rabbi not permitted to offer nonsectarian prayer at graduation ceremony).

198. NINIAN SMART, *THE WORLD'S RELIGIONS* 10-22 (1989). These dimensions include the *ethical and legal dimension* (which guide the conduct of a religion's adherents, principles and precepts about how to live); the *social and institutional dimension* (what kinds of group structures religious people inhabit); the *narrative or mythic dimension* (religious traditions possess

practice,¹⁹⁹ and practiced religion is particular. Although dictionaries offer general definitions of prayer,²⁰⁰ the content of prayer is determined by the specific beliefs of particular religions, whether Christianity, Islam, Shinto, Hinduism, Judaism, Sikhism, or Zoroastrianism.²⁰¹ Prayer is particular.

What about common prayer, or the prayer of civil religion?²⁰² There is reason to be skeptical about the concept. Even at the intellectual, academic or philosophical level, it is difficult to find a common descriptive or analytical account of all the world's religions. Despite great strides in ecumenism in the twentieth century, there is no unity of the world's religions on questions of faith and belief. A common intellectual or ecumenical account of religion has not developed; a common religious ritual is even less likely to emerge.²⁰³ Indeed,

foundational stories of meaning that explain life and origins); the *doctrinal or philosophical dimension* (which provides the intellectual explanation of a religion's belief system, the intellectual statement of the basis of the faith) and the *ritual or practical dimension*. *Id.*

199. *Lee*, 505 U.S. at 587 (stating graduation prayer is an "overt religious exercise"); *Marsh v. Chambers*, 463 U.S. 783, 797 (1983) (Brennan, J., dissenting). "That the 'purpose' of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. 'To invoke Divine guidance on a public body entrusted with making the laws,' . . . is nothing but a religious act." *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting).

200. One dictionary defines prayer as a "direct address to the god[s], especially in the form of petition . . ." THE HARPER COLLINS DICTIONARY OF RELIGION 852 (Jonathan Z. Smith ed., 1995). Another defines prayer as "the relating of soul or self to God in trust, penitence, praise, petition . . ." THE OXFORD DICTIONARY OF WORLD RELIGIONS 762 (John Bowker ed., 1997).

201. THE HARPER COLLINS DICTIONARY OF RELIGION, *supra* note 200, at 852-54.

202. *See generally Lee*, 505 U.S. at 589.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

Id. (citations omitted).

203. The Court has made some observations acknowledging civic recognition of religion. *Id.* at 589; *Marsh*, 463 U.S. at 783. In *Lee* the Court stated: "There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not [citations omitted]." *Lee*, 505 U.S. at 589. Further, in *Marsh* the Court recognized "the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view,' [citation omitted]. Rather, the Founding Fathers looked at invocations as 'conduct whose . . . effect . . . harmonize[d] with the

Americans are moving from institution-centered to more individual forms of spirituality.²⁰⁴ As Justice Kennedy explained in the graduation prayer case: “The suggestion that government may establish an official or civil religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.”²⁰⁵

With more diversity of religious ritual, without a common prayer for adherents of all religions, the default public religion may well become the religion of the majority, “the faith with the most votes”²⁰⁶—as the case law demonstrates.²⁰⁷ The Establishment Clause does not permit a default religion in public institutions.²⁰⁸

Prayer is a benchmark for Establishment Clause cases, an activity against which other practices should be judged.²⁰⁹ Current

tenets of some or all religions.” *Marsh*, 463 U.S. at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

204. See generally ROBERT WUTHNOW, *AFTER HEAVEN* 169 (1999) (discussing complex social realities that influence American spirituality).

205. *Lee*, 505 U.S. at 590.

206. See *id.* at 617-18 (Souter, J., concurring).

Nor does it solve the problem to say that the State should promote a “diversity” of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that. As Madison observed in criticizing religious Presidential proclamations, the practice of sponsoring religious messages tends, over time, “to narrow the recommendation to the standard of the predominant sect.” We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.

Id. (Souter, J., concurring) (citations omitted).

207. See *supra* note 197 and accompanying text (discussing Christian victories in Establishment Clause cases).

208. See generally *Lee*, 505 U.S. at 616-17 (Souter, J., concurring).

In many contexts, including this one, nonpreferentialism requires some distinction between “sectarian” religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.

Id. (Souter, J., concurring).

209. See *Widmar v. Vincent*, 454 U.S. 263, 284 (1981) (White, J., dissenting). The argument accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment. Not only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.

Establishment Clause case law would require revision if activities in public schools were judged by their similarity to prayer and ritual. Under the speaker standard, the Court has permitted funding of “Wide Awake: A Christian Perspective at the University of Virginia,” which has “a two-fold mission: ‘to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.’”²¹⁰ It has required a school district to give access to “an evangelical church” for display of a film series advocating “returning to traditional, Christian family values.”²¹¹ In another school district, the Court mandated equal access for a “Christian club . . . to read and discuss the Bible, to have fellowship, and to pray together.”²¹² The University of Missouri was not allowed to deny Cornerstone, “an organization of evangelical Christian students from various denominational backgrounds,”²¹³ the use of school facilities for religious worship, even though, “[a] typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.”²¹⁴ None of these religious practices should survive constitutional scrutiny. The “speech” that the Court protects in these cases is really the practice of religion.²¹⁵

In the Missouri case, dissenting Justice White argued for a distinction between “verbal acts of worship and other verbal acts.”²¹⁶ Although he agree[d] that the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn. If that were the case, the majority would have to uphold the University’s right to offer a class entitled “Sunday Mass.” Under the majority’s view, such a class would be—as a matter of constitutional principle—indistinguishable from a class entitled “The History of the Catholic Church.”²¹⁷

The cases ignore the religious reality that in some religious traditions (especially evangelical Christianity) speech, i.e., preaching the Gospel,

Id. (White, J., dissenting).

210. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826 (1995).

211. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-88 (1993).

212. *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 232 (1990).

213. *Widmar*, 454 U.S. at 265 n.2.

214. *Id.*

215. See Mark Tushnet, *The Redundant Free Exercise Clause*, 33 LOY. U. CHI. L.J. 71, 75 n.21 (2001) (expressing concern about assimilating prayer to speech).

216. *Widmar*, 454 U.S. at 285 (White, J., dissenting).

217. *Id.* at 285-86 (White, J. dissenting).

is a quintessential religious practice. Like Sunday Mass, it should not have government sponsorship.

A bus ride, a biology textbook, remedial mathematics classes, even *The Saints Go Marching In*, are different. Religious practices also provide the benchmark for aid to religious schools. Aid should be assessed by analogy to religious practice and public welfare. "Government provision of such paradigms of universally general welfare benefits as police and fire protection does not count as aid to religion."²¹⁸

Three members of the *Mitchell* plurality dissented in *Santa Fe*;²¹⁹ it is not surprising that they permitted unlimited aid to pervasively sectarian schools in *Mitchell*. "[T]he plurality's notion of evenhandedness neutrality . . . would be the end of the principle of no aid to the schools' religious mission."²²⁰ The plurality has no spectrum.

Because of the constitutional distinction between public welfare and religious practice, the actual diversion of aid to religious practice is unconstitutional. Divertible aid also poses the risk of constitutional violations. Accordingly, divertible aid may be given to religious institutions if its divertibility is monitored by the government. The divertibility assessment should focus on the use of the aid, however, and not on the nature of the institution. Secular books are permitted, as the Court has properly held since 1968.²²¹ Computers, projectors and other equipment must be monitored so that they are used for secular purposes. Because of the difficulties of such monitoring, the government may be wise to provide (and the churches to accept) *Agostini*-style aid, in which public personnel bring their secular experience into the private schools. It is a matter of free exercise for churches to accept or reject the strings attached.

218. *Mitchell v. Helms*, 530 U.S. 793, 877 (2000) (Souter, J., dissenting).

Whether a law's benefit is sufficiently close to universally general welfare paradigms to be classified with them, as distinct from religious aid, is a function of the purpose and effect of the challenged law in all its particularity. The judgment is not reducible to the application of any formula. Evenhandedness of distribution as between religious and secular beneficiaries is a relevant factor, but not a sufficiency test of constitutionality. There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms.

Id. (Souter, J., dissenting).

219. See also *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Rehnquist, C.J., White, Scalia & Thomas, JJ., dissenting) (rejecting the "holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies").

220. *Mitchell*, 530 U.S. at 911 (Souter, J., dissenting).

221. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

The Establishment Clause serves three ends: “to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.”²²² A subject standard can protect these ends.

On public support, citizens should not be required to provide their tax dollars for the benefit of religious practices, whether in public or private institutions.²²³ Religious practices are particular. The ideal of a common prayer or a common theology is illusory, and the government may not establish a civil religion.²²⁴ It is not hostile to religion to conclude that religion can be divisive. Religions are not shared by all citizens; the Establishment Clause bars government and tax support of them, which inevitably leads to controversy. Tax dollars, however, are regularly spent on the public welfare, for which religious groups may qualify.

The Court has identified a second Establishment Clause concern: that religion(s) may be corrupted if they accept support from the state.²²⁵ The courts may not be arbiters of corrupt religion, however. Nor may the states deny desired public welfare aid because they believe that churches will be corrupted by it. Religious groups may accept government aid as a matter of free exercise. Religions divide over their interpretation of the corruption of this world. Not every Christian is

222. *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting).

223. *Id.* at 872 (Souter, J., dissenting).

224. *Lee*, 505 U.S. at 590. “The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.” *Id.*

225. *Agostini v. Felton*, 521 U.S. 203, 243 (1997) (Souter, J. dissenting). The flat ban on subsidies to religion

expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. “When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even favored religion may fear being ‘taint[ed] . . . with corrosive secularism.’ The favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation.”

Id. (Souter, J., dissenting) (quoting *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (citation omitted)); see also *Memorial and Remonstrance against Religious Assessments 1785*, in *THE COMPLETE MADISON* 299, 309 (S. Padover ed., 1953) (“Religion flourishes in greater purity, without than with the aid of Gov[ernment]”); M. HOWE, *THE GARDEN AND THE WILDERNESS* 6 (1965) (noting Roger Williams’ view that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”).

Roger Williams.²²⁶ Free exercise protects these internal theological disputes, and courts have no jurisdiction to resolve them.²²⁷ The subject standard permits the church to accept secular aid according to its own vision of corruption, and leaves to state and court the definition and enforcement of secularity and public welfare. The government may appropriately monitor its aid without creating an “excessive entanglement” between church and state.²²⁸

Finally, both Establishment and Free Exercise protect “the right of *individual* conscience against compulsion.”²²⁹ The First Amendment warns of the power of both government and organized religion. When spiritual and temporal institutions join forces, they may circumscribe the freedom of the individual. Madison’s and Jefferson’s “radical solution to the religion problem was to recognize that every individual retains a sovereign right to accept or reject the claims of religion, entirely free of the coercive authority of the state or community.”²³⁰

Majority religious practice in public institutions—prayer and worship in the public schools—threatens “the right of individual conscience against compulsion.”²³¹ The unlimited aid of religious practice in pervasively sectarian institutions, allotted on a per capita basis, is more likely to protect the decisions of school administrators than the rights of individual conscience. With their prospect of more student prayer and more aid to religious practice, *Santa Fe* and *Mitchell* have given us more prepossessions instead of a constitutional standard that protects core First Amendment values.

226. See HOWE, *supra* note 225, at 6-9.

227. *United States v. Ballard*, 322 U.S. 78, 86 (1944).

228. *Agostini*, 521 U.S. at 234; *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764-65 (1976) (allowing state audits to ensure that grants to religious colleges are not used to teach religion).

229. *Mitchell v. Helms*, 530 U.S. 793, 868 (2000) (Souter, J., dissenting) (emphasis added).

230. Jack Rakove, *A Nation Still Learning What Madison Knew*, N.Y. TIMES, Mar. 11, 2001, at D15.

231. *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting).