

In Search of an Establishment Principle: The Original Understanding, Pre-Game Prayers, and Aid to Religious Schools*

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Two cases decided during the 1999-2000 term of the United States Supreme Court addressed a question that has perplexed the Court for more than 50 years: what constitutes an establishment of religion? In *Santa Fe v. Doe*,¹ the Court ruled that student-led prayers at high school football games violated the Establishment Clause. *Mitchell v. Helms*² held that a federal program placing computers and other instructional equipment in parochial school classrooms did not violate the clause. The decisions in both of these cases were accompanied by dissenting opinions that presented alternative interpretations of the Establishment Clause.³

In *Santa Fe*, the majority of the Court reasons that even if the decision to have a pre-game prayer is made by students, the prayer has the effect of coercing those attending the game to participate in an act of religious worship. In his dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, characterizes the Court's opinion as hostile to religion. Rehnquist recalls that George Washington proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God," thereby setting a precedent for the support of religion.⁴ In addition to straying from the original understanding of *establishment*, the dissenters also believe that because the policy in question has not yet been implemented, the decision is beyond the proper reach of the Court.

In addition to Washington's proclamation of a day of thanksgiving and prayer, other statements from that era support the view that at the time of the founding, religion was regarded as an important aspect of the nation's political life. In his Farewell Address, Washington stated: "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."⁵ Thomas Jefferson made this statement in his writings: "I consider . . . religion a supplement to law in the government of man."⁶ Both of these statements recognize the

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importance of religion to our political well-being and run counter to the view that the state should be disinterested in religion.

Contemporary arguments regarding the proper role of government toward religion are in some respects reflections of the concerns reflected in the above quotations from Washington and Jefferson. Some critics of the Supreme Court's decisions regard the Court as antagonistic toward religion, a sentiment reflected in Chief Justice Rehnquist's dissent in *Santa Fe v. Doe*. Other critics regard the Court's ban on religion and prayer in the schools, even a moment of silence,⁷ as a cause of moral breakdown and unlawful behavior among young people.

At a more fundamental level, there are good reasons to conclude that religion is important to American political life and should be encouraged by government because it yields political benefits and contributes to the elevation of the citizenry. As Jeffrey Poelvoorde observes, "civil religion exists as a part of the larger regime or constitution, in fact, because for two centuries the American people have viewed the Constitution as flexible enough to permit public religious support and expression." Religion and the multiplicity of religious sects complement the natural rights philosophy that has fostered liberal democracy, tolerance and equality in the United States.⁸ Public expression and support of religion have clearly been a part of the American tradition and are arguably an important element of liberal democracy. As Poelvoorde recognizes:

Religion gives people an experience of human life and consciousness according to which they are not full human beings unless they restrain their bodily desires, care for their fellows, guide themselves by the light of the eternally important, and seek their fulfillment in participation in a community of common purpose, purpose not simply reducible to the agglomeration of private desires or interests of its members.⁹

It is unclear whether the political well-being that Americans have experienced could have been perpetuated without the benefits of religion and its moderate political encouragement or accommodation. Religion also provides a standard, blended with the other traditions of American political life, that elevates decency and concern for others. This standard is sorely needed in a political order driven by self-interest.

Tocqueville regards religion as an important restraint in a political order in which liberty is the primary political principle: "Despotism may govern without faith, but liberty cannot." He believes that religion is important

to American democracy insofar as it facilitates the use of freedom: “How is it possible that society should escape destruction if the moral tie is not strengthened in proportion as the political tie is relaxed?”¹⁰

The importance Tocqueville accords religion in politics counsels against dismissing religion as politically irrelevant and suggests caution in erecting an impenetrable and high wall of separation between church and state. Yet, Tocqueville himself attributes the salutary influence of religion in America to the “complete separation of church and state.”¹¹ Exemplary of this separation is that American priests hold no public appointments and are not represented in the assemblies; religions do not ally themselves with any political power and restrict themselves to their own resources.¹² However, Tocqueville also refers to a state trial in New York in which a judge refused to swear in a witness because the witness declared he “did not believe in the existence of God” or the “immortality of the soul.” In the judge’s view, the witness had destroyed any confidence in the veracity of his testimony.¹³ In spite of Tocqueville’s statement regarding the complete separation of church and state, he does not criticize the refusal to swear in this witness as a violation of that doctrine, suggesting a balance in the density and height of the wall that must be sought.

Tocqueville praises the practice of trade and business suspending their activities on Sunday. Given the importance he attributes to religion as a restraining and elevating influence in a democratic regime of liberty, Tocqueville describes the “essence of the lawgiver’s art” as that of knowing “where the citizens’ efforts need support and where there is more need to hold them back.”¹⁴ Tocqueville believes it is particularly important in democracy “to make spiritual conceptions prevail,” but in a statement that seems prescient of the Supreme Court’s Religion Clauses cases, he observes that “it is far from easy to say what those who govern democratic peoples should do to make them prevail.” He dismisses state religions as undesirable because they will be fatal for the church and he also rejects the inclusion of ministers in political affairs.¹⁵ Tocqueville’s conception of separation of church and state rests on the importance of religion to the political order insofar as religion is necessary to counteract the excesses of democracy and liberty. It embraces the need for public acknowledgment of religious beliefs and the necessity for government to encourage religion.

Proponents of strict separation of church and state, a position that would support many Court decisions in the prayer cases, including the decision in the *Santa Fe* case, may draw some support from the Framer’s desire to create a political order in which religious division would not undermine the new nation’s unity and development.¹⁶ The history of the Establishment Clause makes it entirely clear that the First Congress intended to prohibit

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the establishment of a national religion. As James Madison said in the First Congress, “Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”¹⁷ The modern judicial formulation of *establishment* is exemplified in the *Santa Fe* case where the Court characterizes a student’s pre-game prayer as an endorsement of religion and apparently equates endorsement with compulsion. The Court regards the prayer as putting students in the position of not attending the football games or attending at the risk of facing a personally offensive religious ritual. It believes the school district has empowered a majority of the student body to subject students of minority views to constitutionally improper messages.¹⁸

Leonard Levy, a respected constitutional historian, is one of many commentators who endorse Jefferson’s metaphor of a “wall of separation” between church and state. Levy argues that history and Supreme Court decisions have transformed the wall of separation from metaphor to reality and have ensured both the individual’s religious liberty and the “government’s freedom from religion.” He believes that the wall of separation embodies good public policy.¹⁹ The next section of this analysis will attempt to recapture the constitutional principle underlying the Establishment Clause in order to apply this principle to *Santa Fe* and *Mitchell*.

The Structure of Government, Democracy and Establishment

The Constitution provides for private rights quite independent of the Bill of Rights, which was appended to the body of the Constitution in 1791. The original theory of the body of the Constitution becomes critical when the meaning of the Establishment Clause seems unclear and produces such disagreement in judicial opinions. The Constitution’s fundamental feature is its republican form, through which an intricate structure controls the actions of government. In addition to this democratic foundation, *The Federalist* explains the auxiliary mechanisms that secure the public good and private rights. One of these leading auxiliary mechanisms is the multiplicity of religious sects and economic interests:

Whilst all authority [in the proposed republic] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights

must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.²⁰

At an earlier point, *The Federalist* treats the problem of religious factions as being susceptible to solution through an extended republic in a manner wholly consistent with the republican theory of the Constitution: “A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.”²¹ This theory rests on the right of the majority to rule and to balance the public good against private rights. Sensitive to the potential of majorities to enact measures destructive of both private rights and the public good, the Framers constructed complex structures including bicameralism, staggered elections, separation of powers, checks and balances, a division of authority between the states and the national government, and a scheme of multiplicity of economic interests and religious sects throughout an extended republic. They understood self-government through majority rule to be the fundamental principle and designed these auxiliary precautions in a manner consistent with this principle. Where religion was concerned, the concerns were preventing a religious sect from degenerating into a political faction and a preservation of both the public good and private rights. This was to be achieved through the majoritarian process and the auxiliary precautions embodied in the Constitution.

Adam Smith, whose *The Wealth of Nations* was published in 1776, offers further insight into the role of the multiplicity of sects and the public importance of religion when he states that “times of violent religious controversy have generally been times of equally violent political faction.” He argues that if the political order deals impartially and equally with all different sects, preferring no one religious sect over another, there will be a multitude of religious sects. The result of this multitude is toleration, moderation, and the minimizing of religious fanaticism. Paramount to Smith’s theory is that all sects be treated equally under the law.²²

Smith’s insights are helpful in analyzing the role of government and the preservation of religious liberty. Under the American Constitution, the separation of powers is the leading institutional mechanism through which representative majorities govern. Separation of powers and other structural mechanisms were designed to provide for a strong government and to protect individual rights. It is important to understand the place of the judiciary within these structures if the proper role of the courts is to be preserved. The judiciary was not by itself entrusted with the solemn task of

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preserving individual rights, but rather the complex system of government as a whole was designed to secure the public good and private rights.

One of these structural mechanisms is exemplified by the original Constitution's protection of religious freedom, prior to the passage of the Bill of Rights, through the Union's encompassing a multiplicity of religious sects. *Federalist* No. 10 addresses this issue when it argues that the "variety of sects" spread across the proposed Union will prevent the formation of a sectarian political faction.²³ But the separation of powers can work only when the majority political faction is broken at the level of the society itself. If a religious sect captures the spirit and support of a majority, this majority can all too soon become a political faction by electing favored candidates to the House, the presidency, and the Senate. This leaves just the judiciary and the First Amendment's religion clauses to prevent denials of religious freedom. But this same majority, if sufficiently sustained, can indirectly affect the makeup of the Supreme Court or change the First Amendment through the constitutionally required mechanism. Thus, the success of the separation of powers depends on the social and political foundations explained in *Federalist* No. 10.

The familiar explanation of the separation of powers emphasizes that it prevents any singular ruling body from denying the citizens' liberty. Separation of powers protects the liberty of the individual in ways that led Locke to recommend separating legislative and executive power.²⁴ In the context of discussing Montesquieu and the separation of powers, *The Federalist* equates "the accumulation of all powers, legislative, executive, and judiciary, in the same hands" with "the very definition of tyranny."²⁵ In addition to his balancing of social factions in a bicameral legislature, Montesquieu advocates a tripartite separation of powers. He regards the judicial power as potentially a "terrible" one because it tries the causes of individuals and deprives them of liberty.²⁶ Under the American Constitution, as the role of the Supreme Court has developed, Montesquieu might add that the judicial power may be "terrible" because it is so often final. This finality may be particularly problematic because the Court proceeds from constitutional provisions that lend themselves to absolutism as opposed to the legislative process, the hallmark of which is compromise. It is relatively unproblematic for the Congress to approve of the motto "In God We Trust" on our coins and currency. If the Court authoritatively imposes the Constitution on the compromises of the legislative process even in cases when the meaning of the provision is in question, one of two things may result: the Court may interpret the Constitution's provisions in an absolutist manner counter to the understanding of those who enacted these provisions; or the Court may engage in a balancing process that imposes the justices' own views of what is reasonable.

In light of the democratic foundations of the Constitution, the solution to the religious factions *The Federalist* and Adam Smith fear, which takes into account Montesquieu's insight into judicial power, is to delimit the power of the judiciary. Because of *The Federalist's* insight that men (including judges) are not angels,²⁷ a characterization that includes the love of power, it is misguided to trust the important goal of religious life and religious liberty to the policy that a Court majority prefers. The task becomes one of squaring the power of the Court with the democratic theory of the Constitution. Admittedly, this is not easy. It requires taking seriously not only the democratic theory of the Constitution, but the democratically enacted provision of the Bill of Rights at issue, in this case the Establishment Clause. The text, the understanding of those who enacted the Establishment Clause, and the status of the Bill of Rights as law present difficult problems of interpretation. The alternative to this task is to set the Court free from these delimiting sources and put it in the position of making law—of going from one of its own precedents to another in what seems a misguided effort to achieve doctrinal consistency and the result a majority of the Court desires.

The Bill of Rights and the Establishment Clause

One of the primary objections articulated by Anti-Federalists against the Constitution was its lack of a Bill of Rights. Hamilton defends the Constitution's omission of a Bill of Rights in *Federalist* No. 84. Among his observations, and certainly the one most frequently reiterated by commentators, is that a Bill of Rights may be dangerous because it would "contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"²⁸ One might object to his defense on the grounds that an enumerated power might be exercised in a manner that would interfere with private rights. Hamilton addresses this issue:

To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation . . . It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press, will

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give it no greater security than it will have without them. . . . It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.²⁹

Hamilton's discussion of freedom of the press points toward his most basic defense of the Constitution's omission of a Bill of Rights. The Constitution's fundamental reliance on the people is the primary protection of liberty. The essence of Hamilton's position regarding a Bill of Rights is that rights depend on public opinion, elevated and refined through the representative process and its auxiliary mechanisms. He believes that parchment barriers will not resolve the difficult problem of reconciling the public good and private rights.

Hamilton's arguments, of course, did not prevail. He failed to persuade the ratifying conventions and the First Congress—particularly the Anti-Federalists who were jealous of national power. John Marshall provides a good reading of this history in his conclusion that the Bill of Rights was adopted out of a concern that the expansive powers of the new national government might be abused and was not intended to apply to the states.³⁰

Adoption of the Establishment Clause

The Anti-Federalists' persistent opposition to a consolidated or truly national government emerged again in the First Congress's debate over a Bill of Rights and religious freedom. James Madison, a leading Federalist, suggested that if the Bill of Rights prohibited the establishment of a "national" religion, it would accomplish the objectives of those pressing for protection of religious freedom. The issue of federalism in this debate is fundamental to an understanding of the meaning of the Establishment Clause. The desire to preserve state powers is reflected in the background leading to the adoption of the Establishment Clause.

Proposals of State Ratifying Conventions

Madison did not convince the delegates to the Virginia Ratifying Convention that an amendment to the national Constitution concerning religion was unnecessary. Among the twenty amendments proposed by the Virginia Convention to the First Congress of the United States was the following:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and there-

fore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.³¹

The ban on establishment here clearly refers to the national government's favoring one sect over another. The conventions of Rhode Island, North Carolina, South Carolina and New York also proposed amendments that equated establishment with preferential treatment of one particular sect over another.³² Delaware, New Jersey, Georgia, and Connecticut ratified the Constitution without proposing amendments although some of the Connecticut delegation expressed regret that there was no mention of God in the Constitution. Massachusetts did not demand an amendment dealing with religion; there was some apprehension expressed that the Constitution was perhaps too tolerant in not requiring religious tests. It is instructive that the Massachusetts Constitution of 1780 had empowered the legislature to require towns and religious societies to provide for public worship and religious instruction and to force attendance. Objection to this article was based not upon public support of religion, but upon the compulsion to instruct in religion and to force attendance, i.e., government encouragement and accommodation of religion was accepted insofar as there was no compulsion to attend or instruct.³³ Although the Maryland and Pennsylvania Conventions were dissatisfied with the protection given religious liberty in the Constitution, they did not demand an amendment. The discussion in the two latter states' conventions centered around concern that a national religion might be established.³⁴

The evidence available from the various ratifying conventions indicates that the action the states wanted to prevent was the national government's preferential treatment of one particular religious sect over others. There was apparently not a desire on the part of the various ratifying conventions to erect a wall of separation that would prevent government's encouraging or accommodating religion.

Debate in the First Congress over the Establishment Clause

On June 8, 1789, James Madison recommended a list of constitutional amendments to the First Congress of the United States that included the following:

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The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.³⁵

The House did not pursue these amendments on June 8, but delayed such discussion until after more work in organizing the new government could be completed.³⁶ On July 21, the subject of amendments was referred to a committee that included James Madison. On July 28, after the committee read its report, the question of amendments was tabled. It is surely indicative of the attitude of the First Congress that it reenacted the Northwest Ordinance, which provided that “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”³⁷

On August 15, the House went into a committee of the whole and considered the fourth proposition: “no religion shall be established by law, nor shall the equal rights of conscience be infringed.”³⁸ Peter Sylvester was the first to speak regarding the proposed amendment. He feared that it was liable to a construction different from that made by the committee and that “it might be thought to have a tendency to abolish religion altogether.” Elbridge Gerry suggested that it would read better if it were changed to “no religious doctrine shall be established by law.” Madison then spoke on the subject, saying,

He apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.³⁹

Benjamin Huntington feared, as had Sylvester, that “the words might be taken in such latitude as to be extremely hurtful to the cause of religion.” He understood the amendment to mean what Madison had expressed, but thought “others might find it convenient to put another construction upon it.” Huntington concluded by saying that he hoped “the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.”⁴⁰ Madison spoke again on the amendment:

If the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.⁴¹

Samuel Livermore thought the amendment should be amended to read: “Congress shall make no laws touching religion, or infringing the rights of conscience.” Gerry then voiced objection to the use of the word “national” suggested by Madison. Gerry said that the word “national” brought to his mind the concern of those called Anti-Federalists, “that this form of government consolidated the Union; the honorable gentleman’s motion shows that he considers it in the same light.” Madison then withdrew his motion, but observed that “the words ‘no national religion shall be established by law,’ did not imply that the Government was a national one.” Livermore’s motion passed.⁴²

On August 17, the House considered the following proposed amendment that was directed to the states: “no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.” In response to a comment that it would be better not to interfere with the states any more than had already been done, Madison said that he regarded this amendment as the most valuable of all those proposed. Livermore then proposed that the amendment be made an affirmative proposition: “the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any state.” The House adopted this proposal.⁴³

The amendment proposed by Livermore, “Congress shall make no laws touching religion, or infringing the rights of conscience,” was debated on August 21, and changed to read: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of con-

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science be infringed.”⁴⁴ This is the form of the amendment that was presented to the Senate.⁴⁵

In the Senate, several forms of what was to become the First Amendment were proposed during debate on the amendment presented by the House.⁴⁶ The Senate abandoned the amendment prohibiting the states from infringing the rights of conscience. On September 21, the House informed the Senate it desired a conference on the subject of the amendment⁴⁷ and on September 24, the House agreed to the committee’s recommended form: “Congress shall make no law respecting an establishment of religion, or prohibiting a [*sic*] free exercise thereof.”⁴⁸ On September 25, the Senate concurred in the resolution of the House.⁴⁹ On the same day the Senate concurred in this resolution, a resolution was passed in the House that proposed a day of thanksgiving and prayer to acknowledge “the many signal favors of Almighty God.” Roger Sherman, who had served on the conference committee drafting the final proposal of the religion amendment, voiced his approval of the resolution establishing a day of thanksgiving.⁵⁰ The following day, the Senate concurred in the resolution establishing a day of thanksgiving.⁵¹

Several observations concerning the Establishment Clause’s history in the First Congress are relevant to a valid interpretation of this clause. Amendments were introduced in the First Congress because the state ratifying conventions demanded them, the apparent reason being a fear that the national government would interfere with state powers. The First Congress’s Re-enactment of the Northwest Ordinance and its provision for a day of thanksgiving and prayer to acknowledge the favors of Almighty God are indicative of its understanding of proper governmental action.⁵² Members of this Congress also expressed fears that the amendment might be construed in a manner that would abolish religion altogether. Mr. Sylvester expressed this reservation, and Mr. Huntington feared that the words might be taken to be extremely hurtful to the cause of religion or to patronize those who professed no religion at all. These comments indicate historical support for Chief Justice Rehnquist’s concern that Court decisions not express hostility toward religion.

During debate in the First Congress, Madison’s understanding of the purpose of the amendment, to prevent Congress from establishing a national religion and enforcing the legal observation of it by law or compelling individuals to worship in any manner contrary to their conscience, was not contradicted. It appears from the debates that the primary reason for excluding the word “national” from the amendment was quite unrelated to the substance of the amendment. The exclusion arose out of Mr. Gerry’s suggestion that the word “national” brought back the conflict between the

Federalists and the Antifederalists during the Constitutional Convention. Whatever Madison regarded as wise policy in the area of church-state relations, his statement concerning the proposed amendment summarizes his understanding of the Religion Clauses and of the desires of the various ratifying conventions that requested the amendment.

Another occurrence in Congress helps illuminate the meaning and purpose of the First Amendment. The abandonment of the amendment prohibiting the states from infringing the rights of conscience probably indicates the Senate's concern that such an amendment interfered too much with the various states' powers to form their own policies on church-state relations, including the discretion to establish a church. This potential interference with the states explains the objection to the addition of this amendment during debate in the House.⁵³ Since the Senate sat in executive session until the Second Session of the Third Congress, the records do not show debate relevant to this issue.⁵⁴

The Wall of Separation and Non-preferentialist Positions

Division within the Court in recent cases is rooted in the dispute over whether the Establishment Clause establishes a wall of separation between church and state or merely prohibits preferential aid. Chief Justice Rehnquist is a leading proponent of the view that government may aid religion generally. He believes the history of the Establishment Clause does not require an impregnable wall and government neutrality between religion and irreligion; it does prohibit preferential aid.⁵⁵

Leonard Levy, an advocate of the wall of separation, defends the doctrine by observing that there is no enumerated power in the Constitution empowering the national government to legislate on the subject of religion. He acknowledges that the First Amendment left the states free to regulate religion and that a proposed amendment that would have restricted state powers over religion failed in the First Congress.⁵⁶ Levy also believes that the framers of the Fourteenth Amendment did not intend it to incorporate the particular provisions of the Bill of Rights nor to restrict the states in the same manner that the national government had been restricted by the First Amendment.⁵⁷ Nonetheless, he believes the language of the Fourteenth Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law,"⁵⁸ allows "for the possibility that the Constitution prevented the states, as well as the United States from violating the First Amendment."⁵⁹ Levy observes that since the Court ruled in 1947 that the Fourteenth Amendment incorporates the Establishment Clause and thereby makes it applicable to the states,⁶⁰ the incorporation doctrine now has "a history so aged and fixed" that it will not be reversed.⁶¹

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Levy's argument has this progression. First, the Constitution did not empower the national government to legislate on the subject of religion. The First Amendment was a limitation on, not an empowerment of the national government; but it did not apply to the states in any manner. Second, the "liberty" provision of the Fourteenth Amendment allows for the possibility that the states are prevented from violating the provisions of the First Amendment, including the Establishment Clause.

In regard to the first element of Levy's argument, that the national government had no authority over religion, examples of Congressional action are instructive. The First Congress recommended a day of national thanksgiving and prayer and reenacted the Northwest Ordinance.⁶² Levy acknowledges that delegated powers have been exercised in a manner that benefits religion. In regulating the armed Forces, Congress has funded military chaplains. It has also provided for legislative chaplains under its power to govern its own proceedings, and prison chaplains under its power to punish those who violate federal law. Exercising its power to administer federal property, government closes federal buildings on Sunday and on religious holidays. In exercising its power to coin money, Congress has placed a religious motto on currency and coins. Other examples of national support of or accommodation to religion under its delegated powers include tax exemptions for churches, exemptions for conscientious objectors, and provision for religion in treaties with Indian nations. In the context of enumerating these historical examples, Levy cautions that the same power that benefits religion might also be used to harm religion, for example by taxing church property or drafting conscientious objectors.⁶³ Be this as it may, the fact remains that from the time the Establishment Clause was introduced in the First Congress, Congress has acted many times to benefit or accommodate religion. This accommodation indicates a Congressional understanding that runs counter to the wall of separation metaphor. These actions seem consistent with the sentiment of Sylvester's admonition in the First Congress that the Establishment Clause not be hurtful to the cause of religion and Madison's suggestion, rejected on federalism grounds, that the purpose of the Establishment Clause was to prevent the establishment of a *national* religion.⁶⁴

Levy believes that we should want the Establishment Clause to mean more than it meant in 1789. This view is fraught with difficulty insofar as it enlarges the judicial power beyond administering the law of the Constitution and gives the judiciary power to enact its policy preferences into constitutional law. Levy acknowledges that many Establishment Clause decisions are not applications of constitutional limitations but rather pronouncements in which justices determine the policy most desirable for the na-

tion.⁶⁵ He counsels forbearance in bringing lawsuits under the Establishment Clause in light of his view that “a faulty political compromise may be better than judicial dictation.”⁶⁶ Thus, he believes it would be better if staunch separationists did not bring lawsuits to challenge the constitutionality of such matters as the words “under God” in the pledge of allegiance or the motto “In God We Trust” on coins and currency.⁶⁷

While Levy’s counsel may be sound, it is clear that staunch separationists will not heed it. A more realistic policy is for the Court to respect the judgments of Congress and the states where accommodation of the competing values of the Establishment and Free Exercise Clauses are concerned. In pursuance of this policy, the Court would leave matters that are not clearly violative of the Establishment Clause to the political compromise that has characterized much of the history of church-state relations. A first step in this process is adherence to the original understanding and historical practice. Prior to the Court’s articulation of the “wall of separation” metaphor, this compromise had been based on respect for democratic compromise and the desire for non-preferential encouragement of religion.

The second element in Levy’s progression, shared by other strict separationists who would apply the wall of separation metaphor to the states, is that under the liberty provision of the Fourteenth Amendment, the Establishment Clause restricts state governments in the same manner that it restricts the national government. Levy acknowledges that the framers of the Fourteenth Amendment did not intend to restrict the states in the same manner that the Establishment Clause restricts the national government. In spite of this acknowledgment, he regards the wall of separation metaphor as sound policy that should be imposed on both the national and state governments.⁶⁸ It is difficult to square Levy’s position with the defeat of the Blaine Amendment. This amendment was proposed shortly after the adoption of the Fourteenth Amendment, and if passed, would have amended the Constitution to bar any aid to sectarian institutions.⁶⁹

It is clear that fear of the national government’s interference with state powers was one of the primary reasons for the Bill of Rights, including the Religion Clauses. The wording of the Establishment Clause, “Congress shall make no law respecting an establishment of religion,” embraces this view insofar as Congress is prohibited from interfering with state laws that might constitute an establishment of religion. It is ironic that without clear constitutional support, a constitutional provision intended to protect states from national interference is transmogrified into a means for that same national government’s Supreme Court to supervise every aspect of church and government within the individual states. With this historical background of Establishment Clause principles, we now turn to two Establishment Clause cases decided in 2000.

Pre-game Prayer: Santa Fe Independent School District v. Doe⁷⁰

Santa Fe (Texas) High School empowered the student body to vote annually whether to have a student speaker preceding football games and to select the speaker from the student body. Respondents filed a suit challenging this policy under the Establishment Clause. While the suit was pending, the school district adopted a modified policy authorizing the two student elections. Following the elections, which authorized the invocation and selected the speaker, the U.S. District Court issued an order that permitted only nonsectarian, nonproselytizing prayer. The Fifth Circuit held that the policy, even as modified, violated the Establishment Clause. The Supreme Court, in an opinion delivered by Justice Stevens, held that this student-led, student-initiated invocation prior to football games did not amount to private speech; the policy of permitting such invocations was impermissibly coercive; and the challenge was not premature because the policy was invalid on its face.⁷¹

The Court regards the invocation at football games as encouraging public prayer and rejects the argument that the pre-game prayers are constitutionally protected private speech: the invocation takes place on school property at a school event, is delivered over the school's public address system by a speaker representing the student body, is supervised by school faculty and is the result of a school policy that encourages public prayer. The Court believes that this invocation sends a message to those in the audience who are nonadherents that they are outsiders relative to the political community and to adherents that they are favored members of the community.⁷²

The Court rejects the school district's argument that the pre-game policy is not coercive. The district supported its argument on two grounds: first, the pre-game messages are the product of student choices; second, attendance at extracurricular events, unlike a graduation ceremony for example, is voluntary. The Court observes that this majoritarian election and the ensuing lawsuit make clear that students are not unanimous on the issue, and one of the purposes of the Establishment Clause is to remove debate over issues such as this from governmental control. Although this policy is the result of student choice, the Court believes that ultimately the choice is attributable to the state. The Court rejects the school district's argument that, unlike a graduation ceremony, coercion is not present because this is an extracurricular event that students are not required to attend. It observes that cheerleaders, members of the band, and team members are expected to attend the games, and that other students feel immense social pressure to do so. The pre-game prayer exerts social pressure and, therefore, coerces those in attendance to participate "in an act of religious worship."⁷³

The final issue addressed by the Court is whether the facial challenge to the policy is premature since no student has yet spoken under the revised policy, and it is not clear that the statements or invocations will be religious. The Court asserts that it must guard against constitutional injuries and that the mere passage of the school district's policy embodies a religious purpose and creates a perception of an establishment of religion. In the Court's view, the policy imposes a majoritarian viewpoint on those students who do not wish to participate in the pre-game invocation and encourages divisiveness among those holding differing views about religion.⁷⁴

Chief Justice Rehnquist wrote a dissenting opinion in this case in which Justices Scalia and Thomas joined. The dissent asserts that the majority opinion "bristles with hostility to all things religious in public life" and runs counter to practices such as George Washington's thanksgiving proclamation.⁷⁵ The dissenters object to the Court's declaring the policy unconstitutional before it has been put into practice. The students might not vote to have a pre-game speaker, and if they do, the election of the speaker might not focus on prayer, but on speaking ability or popularity; furthermore, the dissenters observe that if students campaigned on the issue of prayer, the school might impose reasonable campaign restrictions.⁷⁶

The dissent criticizes the three-pronged test of *Lemon v. Kurtzman*. This test requires laws to have a "secular legislative purpose", to have a primary effect that "neither advances nor inhibits religion," and prohibits "excessive government entanglement with religion."⁷⁷ The dissenting opinion characterizes the majority as applying a most rigid version of the *Lemon* test, a test that has "a checkered career" in constitutional law and that is based on "a historically faulty doctrine."⁷⁸ In regard to its "checkered career," Rehnquist observes that in a number of cases the Court has not regarded the *Lemon* test as binding.⁷⁹ In explaining the faulty doctrine on which *Lemon* rests, he cites another of his dissenting opinions in *Wallace V. Jaffree*, the moment of silence case, where he criticizes the wall of separation metaphor that requires strict separation between church and state. He believes the First Amendment, rather than requiring strict separation between church and state, prohibits the establishment of a national religion and may prohibit discrimination among sects as well.⁸⁰ Even if the Court applied the *Lemon* test in this case, Rehnquist believes that the school policy should not be invalidated on its face, i.e., until it has been enforced.⁸¹

The dissent distinguishes the pre-game prayer from the graduation prayer, delivered by a rabbi under the direction and control of a school official, that was declared unconstitutional in *Lee v. Weisman*.⁸² Because the pre-game message or invocation is selected or created by a student, the dissenters believe it constitutes private speech protected by the Free Exer-

cise and Free Speech Clauses and is distinguishable from the graduation prayer in *Lee v. Weisman*.

The majority in *Santa Fe* case adopts a “wall of separation” theory of the Establishment Clause and the tests of *Lemon v. Kurtzman*. The Court’s majority was eager to declare the policy unconstitutional, as had the Court of Appeals, despite the fact that it had not yet gone into effect and the District Court had modified the policy to permit only nonsectarian, nonproselytizing prayer. The Court’s opinion raises two fundamental questions. The first question is whether the most recent Santa Fe policy violates the “no preference” doctrine by favoring one sect over another. The second is whether the policy favors believers over non-believers.⁸³

The text of the pre-game prayer delivered by Marian Ward in September, prior to the Supreme Court’s ruling, is as follows:

Welcome to the game tonight. Since a very good judge that was using a lot of wisdom this afternoon ruled that I have freedom of speech tonight, I am going to take it. So I have chosen to pray to solemnize this game. And if you want to participate, bow your heads and give thanks to the Lord. Lord, thank you for this evening. Thank you for all the prayers that were lifted up this week for me. I pray that you watch over each and every person here tonight, especially those involved in the game, that they will demonstrate good sportsmanship, Lord, and that we’ll have safety. Just be with the fans, that they will exemplify good behavior as well, Lord. And just be with each and every one of us as we go home to our respective places tonight. In Jesus’ name I pray. Amen.⁸⁴

The District Court’s rule, rejected by both the Court of Appeals and the Supreme Court, permitted nonsectarian, nonproselytizing prayer. The District Court’s nonsectarian or no preference rule has substantial support from the history of the First Amendment and from the theoretical sources cited above. At the core of the Establishment Clause’s origins is the doctrine of “no preference” or “nonsectarianism” and an understanding that religion exerts an elevating influence on politics. Marian Ward’s prayer was not composed by school authorities as was the prayer invalidated in *Engel v. Vitale*, which read: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.”⁸⁵

Composing a prayer for a football game is not so simple as writing an essay about one’s summer vacation. Marian Ward’s prayer is sectarian in-

so far as it is offered “in Jesus’ name” and invokes the name of the Lord (although in some contexts *Lord* refers to the Supreme Being). Apart from these references, it is difficult to see her prayer as proselytizing. Instead it is a prayer for good sportsmanship and behavior from fans and players alike and seemingly for the safety of all attending the game. These petitions of prayer are remarkably like those of “In God We Trust” on our currency or “God save this Honorable Court.” While Marian Ward’s prayer is within the context of school activities, it is a private prayer that does not have the imprimatur of government as does the currency and the courtroom. It is difficult to see this prayer as “coercion” (as the Supreme Court’s majority characterizes it) or as the compulsion Madison thought the First Amendment prohibited.

Santa Fe is an illuminating case study of the Court’s adding precedent upon precedent to reach a conclusion without going back to the source of these precedents, the Constitution itself. The meaning of the Constitution should come from the Constitution, not from what the justices have said about the Constitution. *Wallace v. Jaffree*,⁸⁶ for example, ruled that Alabama’s provision for a “moment of silence” in the schools was unconstitutional. It is difficult to see a clearer case of the “no preference” doctrine lying at the root of the Establishment Clause than a moment of silence. *Wallace* and other school prayer cases reflect the “wall of separation” metaphor that has been influential in the precedents leading to *Santa Fe*.

Without question, the issue of prayer in schools or at school events is difficult. It may have the effect of introducing religious divisiveness into the public schools. On the other hand, it has been argued that non-sectarian prayers and other expressions of religious belief serve important political and human purposes. Some would object that it is improper for government to become involved with the form of a prayer to insure its nonsectarian character. If there are standards for such a prayer, as the District Court announced in this case, such involvement seems no more intrusive than a general prohibition on a student prayer. It is a longstanding tradition in the United States that appeals are made to a Supreme Being within a context of tolerance for a wide diversity of religious beliefs and without attempting to proselytize, even when the affected constituency includes those of diverse sects or nonbelievers. One is reminded of Washington’s statement that we cannot expect national morality without the influence of religion, Jefferson’s characterization of religion as supplementing law in the government of men, and Tocqueville’s observation that religion is an important restraint in a political order grounded in liberty. Non-preferential public expressions and public support of religion have been an important part of our political tradition.

Public Funding of Computers and other Instructional Materials in Parochial Schools: Mitchell v. Helms⁸⁷

Mitchell addresses a federal statute⁸⁸ under which funds were distributed to state and local government agencies. The funds enabled these agencies to purchase and then lend educational items, such as library and media materials and computer software and hardware, to public and private schools. The Court ruled that this statute did not violate the Establishment Clause. Justice Thomas announced the judgment of the Court and delivered a plurality opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justice O'Connor, joined by Justice Breyer, concurred in the judgment. Justice Souter filed a dissenting opinion, joined by Justices Stevens and Ginsburg.

The plurality opinion accords central importance to its view that the aid in this case is allocated on a neutral, secular basis that neither favors nor disfavors religion and is available to both religious and secular schools on a non-discriminatory basis. This principle is not violated by the fact that aid is given directly to schools rather than placed in schoolchildren's hands; the plurality rejects the argument that this aid violates the Establishment Clause because the aid is divertible to religious use (for example, that computers may be used for secular as well as religious purposes).⁸⁹

Because of an unchallenged lower court holding that the aid law had a secular purpose, the plurality focuses on the effects of the aid in question. Relying on *Agostini v. Felton*, a case upholding governmental aid in the form of supplying public remedial education teachers to parochial schools, the plurality addresses "whether any religious indoctrination that occurs in those [religious] schools could reasonably be attributed to governmental action."⁹⁰ In determining whether or not indoctrination is attributable to the state, the plurality turns to the principle of neutrality that has been used in previous cases. If eligibility is neutral, that is "[I]f the religious, irreligious, and areligious" are all eligible for the aid that furthers a secular purpose, "indoctrination" on the part of a particular recipient is not "at the behest of government."⁹¹

The plurality's second criterion for assessing the effect of state aid, that of whether the recipients of aid are defined by reference to religion, is related to the first and is also drawn from *Agostini*. This second criterion also focuses on neutrality, but addresses the question of whether the aid creates financial incentive to choose religious schools. The plurality believes that if aid does not provide an incentive for parents to choose religious schools, then the private choice of which school to attend is independent. Further-

more, the fact that the cost of a religious education is reduced by aid is not itself dispositive, for any aid religious schools receive will have that effect.⁹²

The plurality rejects the argument that “‘direct, nonincidental’ aid to the primary educational mission of religious schools is always impermissible.” While it acknowledges that some earlier cases had emphasized the distinction between indirect and direct aid, more recent cases have emphasized the principle of private choice: “If aid to schools, even ‘direct aid,’ is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any ‘support of religion’ . . .” The plurality adds that while private choice is more obvious when the aid passes through individuals’ hands rather than going directly to the schools, the Establishment Clause does not require it to do so.⁹³ In *Zobrest*, for example, an interpreter funded by government was allowed to interpret at a Catholic school “‘even though she would be a mouthpiece for religious instruction,’ because the interpreter was provided according to neutral eligibility criteria and private choice.”⁹⁴

The plurality also rejects the argument that the Establishment Clause prohibits aid that may be diverted to religious use and characterizes the “‘no divertibility rule’” as inconsistent with recent case law and unworkable in principle. It explains that the “divertibility” criterion not only fails to explain the types of aid allowed in previous cases but it is also boundless, “enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an ‘establishment of religion.’”⁹⁵

The plurality criticizes the dissent for serving “up a smorgasbord of 11 factors that, depending on the facts of each case ‘in all its particularity,’” but should be considered in the context of school-aid programs. It emphasizes one of these factors, the “pervasively sectarian school,” to show its objections to the incoherency and defects of the “smorgasbord” approach. The plurality observes that in recent case law, the relevancy of the “pervasively sectarian” factor has sharply declined. More fundamentally, it believes this subtext perpetuates hostility toward religious schools, particularly Catholic schools, and is inconsistent with previous Court decisions that prohibit government from withholding aid to schools on the basis of religious status or sincerity of beliefs. The plurality believes that if an aid program is otherwise permissible, the Establishment Clause does not require that “pervasively sectarian schools” be excluded from receiving this aid.⁹⁶

In summary, the plurality believes the aid program at issue in *Mitchell* neither advances nor endorses religion. Insofar as earlier cases striking

down similar programs are concerned, they are overruled.⁹⁷ Justice O'Connor, joined by Justice Breyer, concurs in the judgment, but objects to the plurality's emphasis on "neutrality" because that emphasis comes close to assigning neutrality singular importance in future Establishment Clause challenges to school-aid programs. O'Connor and Breyer believe that *Agostini v. Felton*⁹⁸ should control in *Mitchell*. *Agostini's* three criteria are: "(1) whether the aid results in governmental indoctrination, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." These same criteria, according to the concurring opinion, can be reviewed to determine whether a program constitutes an endorsement of religion.⁹⁹ The concurrence regards the program at issue in *Mitchell* as consistent with *Agostini*: it is allocated on the basis of neutral, secular criteria; it does not replace non-federal funds, and the funds are not placed in the coffers of religious schools; furthermore, the aid is secular and there is no evidence of substantial diversion of the government aid to religious purposes. Thus, the concurring justices believe the government funding in *Mitchell* is constitutional, but they adhere to the standards for this determination that were announced in *Agostini*. The concurring justices believe that to establish a First Amendment violation, the rule should be that developed in the context of lending programs, *viz.*, that the aid is or has been used for religious purposes.¹⁰⁰

Justice Souter's dissenting opinion is joined by Justices Stevens and Ginsburg. Souter relies on *Everson v. Board of Education's* "wall of separation" doctrine as well as *Everson's* statement that no tax can "be levied to support any religious activities or institutions."¹⁰¹ The dissenters believe the plurality's test of neutrality eliminates inquiry into a law's unconstitutional effects. They rely on precedent to support the view that both secular intent and effect are necessary to the constitutionality of any governmental aid.¹⁰²

Souter accepts what he describes as the plurality's "evenhandedness" definition of neutrality, but believes it is an insufficient test of constitutionality in aid cases such as *Mitchell*. He thinks that the more fundamental and dispositive test remains the one stated in *Everson*: "there may be no public aid to religion or support for the religious mission of any institution."¹⁰³ He emphasizes that it is necessary to look beyond "evenhandedness" because without inquiry into the type of activities evenhanded government aid to schools might 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." In light of this fact, Souter reviews the criteria that the Court has

used to complement the test of “evenhandedness neutrality.” These criteria heighten Establishment Clause concerns when schools are pervasively religious or where primary or secondary religious schools are involved. The Court has also placed importance on whether the aid is directly given to religious schools or is given to individuals who benefit from this aid through independent choice; under this criterion, direct aid to parents or students as scholarships or tax deductions has withstood constitutional challenge. The third criterion includes characteristics of the aid itself: the religious content of the aid (e.g., textbooks have a fixed content and benefit students and parents, while religious teachers are of variable religious and ideological character); its cash form and whether the aid is divertible to religious support (e.g., outright cash grants to religion are among programs that have been barred because of the danger of diversion to religious purposes); whether the aid supplants traditional school expenses that are religious in nature, and the substantiality of the aid.¹⁰⁴ Under this last test, aid that supplants religious expenditures is barred, but substantial aid has been held unconstitutional even though it was not clearly shown that such aid “supplants a specific item of expense a religious school would have borne.”¹⁰⁵

Souter’s dissenting opinion reviews these tests in order to show that “[e]venhandedness neutrality is one, nondispositive pointer toward an intent and (to a lesser degree) probable effect on the permissible side of the line between forbidden aid and general public welfare benefit.” In harkening back to the rule that support of the religious mission of an institution is unconstitutional, Souter enumerates further criticisms of the plurality opinion. He asserts that the plurality errs in assuming that equal aid to sectarian and secular schools will “have exclusively secular and equal effects,” and “that per capita distribution rules safeguard the same principles as independent, private choices.” Souter believes that the plurality test allows “compelled support for religion” and violates the right of conscience.¹⁰⁶

Turning from his general critique of the plurality opinion and the Court’s holding in *Mitchell*, Souter focuses on the issue of divertibility in the sectarian school involved in this case. He believes that the Chapter 2 program in Jefferson Parish shows divertibility and specific diversion of government funds in religious schools. The type of equipment provided under Chapter 2 included projectors, television sets, maps, computers and computer software and other equipment, much of which was not provided for individual students. Souter points out that much of this equipment could easily be used for religious purposes. He is particularly concerned about what he characterizes as ineffective safeguards to prevent religious use (diversion) of the funded equipment and materials; absent effective safeguards, government aid violates the Establishment Clause. In addition to the risk of

diversion, Souter cites instances of actual diversion in Jefferson Parish. He disagrees with Justice O'Connor who regards the diversion as of only limited significance and he rejects the plurality opinion because he believes it approves "aid to the schools' religious mission."¹⁰⁷

Conclusion

Mitchell reveals important divisions among the justices. The plurality clearly imposes fewer restrictions on government aid to religious schools than the dissenters would like. In assessing the tests and the decision in *Mitchell*, it is useful to put the aid provided by chapter 2 of the Education Consolidation and Improvement Act of 1981 in perspective. The statute limited government aid to elementary and secondary schools to materials that "implement 'secular, neutral, and nonideological' programs."¹⁰⁸ This limitation, as the plurality recognized, applied both to public and private schools. Religious schools were not singled out for special treatment. Both religious and secular schools received aid on a per capita basis. The multiplicity of religious sects argument of *The Federalist* and a long tradition of toleration for different religions seem evident in the legislative judgment that produced this inclusive act. Relying on evidence that supports the "no preference" theory of the Establishment Clause, for example the proposals of the state ratifying conventions, Congress might have passed an act that gave aid to all religious schools or, more inclusively, to all private schools, but it did not choose to do so. The Congress acted with what Souter refers to as "evenhandedness" and certainly not with the effect of giving public support to one religious sect in preference to others, or in preference to other private or public schools, for that matter. Even Leonard Levy, an enthusiastic proponent of the "wall of separation" metaphor, supports giving relief from "the burden of so-called double taxation on those who pay to send their children to private school" through public support for secular expenses in religious schools.¹⁰⁹

The aid in *Mitchell* seems far removed from Madison's understanding expressed in the First Congress that the purpose behind the Religion Clauses was "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."¹¹⁰ If *Mitchell* had denied aid to religious schools when it is given to other schools, it would seem like the sort of penalty Madison referred to in saying that no one "ought on account of religion be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities . . ."¹¹¹ Jefferson regarded religion as a supplement to law in the task of governing, and Washington believed that

religious principle is necessary to national morality. These statements, and the arguments of Poelvoorde and Tocqueville that emphasize the importance of spirituality to American life, support the judgment Congress made in providing the aid to education at issue in *Mitchell*.

Deferring to congressional judgment when there is no clear violation of the Constitution, as the majority did in *Mitchell*, also has support from Hamilton in *The Federalist*. In his discussion of whether or not any tax on newspapers would abridge the liberty of the press, he argues the best defense against abuses of the taxing power is sound legislative discretion that is “regulated by public opinion.”¹¹² Given the inconsistent Supreme Court precedents¹¹³ in school aid cases and the difficulty of arriving at a coherent principle to adjudicate these cases, Hamilton’s view has much to recommend it. *Mitchell* presents a case of balancing prohibited aid to religious schools against penalties on religious school that denials of aid may entail. Balancing and compromise are hallmarks of the legislative process; the judiciary should respect such compromise if it is not clearly prohibited by the Constitution. The plurality test in *Mitchell* allows more latitude for legislative accommodation of religion than do the dissenters. The dissenters’ primary criticism of the plurality is that under the latter’s doctrine, there is nothing to prevent massive aid to religious schools and this amounts to compelling support for religion in violation of the Establishment Clause. The plurality observes that the “divertibility” criterion of the dissenters is boundless; it would prohibit any aid to parochial schools. The plurality is particularly concerned that another criterion, whether a school is “pervasively sectarian,” has the effect of penalizing religious beliefs and embodies hostility toward religious schools.

Instead of the “smorgasbord” of criteria employed by the dissenters, the plurality sets forth its own, less complex, criteria for determining violations of the Establishment Clause: whether religious indoctrination can reasonably be attributed to governmental action, whether the aid serves a secular purpose, whether recipients of aid are defined by reference to religion, and whether the aid creates financial incentive to choose religious schools. The plurality has good reason to believe that its tests will be less susceptible to merely personal judgment of the justices than will the many criteria suggested by the dissent. The plurality believes that the principle of neutrality is fundamental in determining whether government is involved in indoctrination and whether recipients are defined by reference to religion. If the aid supports a secular purpose and is available regardless of the recipients’ religious beliefs, it will be difficult to show an Establishment Clause violation. Unconstitutionality will also be more difficult to establish if the aid passes through the hands of private citizens who make an independent judg-

ment as to which school receives the aid. In *Mitchell*, the plurality believes that the “per capita” distribution of aid results from a private choice of which school the student will attend, and thereby meets this criterion.

The dissenters are concerned that the plurality would allow massive aid to religious schools. It seems clear that under the plurality’s criterion, direct and general grants to religious schools are not allowed because they would involve the government in religious indoctrination, even if such grants were available to schools generally. As long as aid is available to all schools, religious schools are eligible if that aid is linked to private choice, i.e., if the aid goes with the student. If aid is to individuals, it will be difficult to show government indoctrination or that recipients are defined by reference to religion. The plurality in *Mitchell*, supported by two concurring justices, seems to adopt a middle ground between favoring religion and penalizing religion. Justices O’Connor and Breyer, in their concurring opinion, emphasize the importance of whether government funds have been diverted to religious purposes. The nature of their opinion makes capturing its essence difficult, for it depends on “balancing” the facts of a particular case. Nonetheless, if aid were linked to private choice, it would likely meet their criteria.

The wall of separation metaphor is clearly at the foundation of the *Santa Fe* case, as it has been in earlier school prayer cases. In *Mitchell*, a majority of the justices favor greater accommodation of Establishment Clause constraints where religious schools are concerned. This contrast is ironic. The Establishment Clause was intended to protect the states from national interference, yet in regard to the state action in *Santa Fe*, the Court employs the wall of separation metaphor to declare the policy unconstitutional. The clause’s prohibitions were clearly pointed toward the national government, but in *Mitchell*, the Court takes an accommodationist stance and upholds national aid to religious schools.

In spite of this irony, the accommodation in *Mitchell* avoids exacting a penalty on religious schools and is consistent with the origins of the Establishment Clause. The Court will probably continue to enforce a wall of separation where school prayer is concerned. It will likely be much more concerned with evenhandedness and avoiding the appearance of penalizing religious schools where secular aid to all schools and schoolchildren is concerned. Another important element of these cases is that Congress authorized the aid in *Mitchell*. The Court did not say that Congress must include religious schools in any aid program; it simply held that if the representative branches of government include religious schools in general aid programs, it will likely not prohibit such aid under the Establishment Clause. The Court seems to acknowledge the structural safeguards examined ear-

lier that the Constitution imposes on the representative branches of government. In *Mitchell*, the Court allowed Congress and the Executive room to reach compromise between the important values of encouraging religion in an evenhanded manner and preserving the goals of the Establishment Clause, a balance between the public good and private rights.

Notes

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1. *Santa Fe Independent School Dist. v. Doe*, 120 S.Ct. 2266 (2000).
2. *Mitchell v. Helms*, 120 S.Ct. 2530 (2000).
3. In *Santa Fe*, Chief Justice Rehnquist, and Justices Scalia and Thomas dissented. In *Mitchell*, Justices Souter, Stevens and Ginsburg dissented.
4. 120 S.Ct. at 2283-84 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).
5. George Washington, "Farewell Address," *Washington: Writings*, ed. John Rhodehamel (New York: Literary Classics of the United States, 1997), 971.
6. Thomas Jefferson, a letter to Mr. Woodard, quoted in John P. Foley, ed., *The Jefferson Encyclopedia* (New York: Funk and Wagnalls, 1900), 743. Jefferson also invoked the benefit of religion in the following statement regarding slavery: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just." *Notes on the State of Virginia*, ed. William Peden (Chapel Hill, North Carolina, 1955), 159, 163.
7. *Wallace v. Jaffree*, 472 U.S. 38 (1985) struck down an Alabama law authorizing schools to set aside one minute at the start of the schoolday "for meditation or voluntary prayer." The Court asserted that Alabama characterized prayer as a favored practice and thereby violated the constitutional requirement of complete neutrality toward religion. State officials in Colorado regard the mass killings at Columbine High School as symbolic of the moral breakdown of American society. Subsequent to the prohibition in *Santa Fe*, the Colorado State Board of Education considered a resolution that would encourage public schools to display "In God we trust," in the public schools. *New York Times*, A9, July 3, 2000.
8. Jeffrey James Poelvoorde, "The American Civil Religion and the American Constitution," in *How Does the Constitution Protect Religious Free-*

dom?, ed. by Robert A. Goldwin and Art Kaufman (Washington: American Enterprise Institute for Public Policy Research, 1987), 145-46, 156.

9. *Ibid.*, 160-61.

10. Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, ed. Phillips Bradley (2 vols.; New York: Alfred A. Knopf, 1945), I, 318.

11. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer and Max Lerner (New York: Harper & Row, 1966), 272.

12. *Ibid.*, 272-75.

13. *Ibid.*, 269-70.

14. *Ibid.*, 514-15.

15. *Ibid.*, 517.

16. "A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good." Alexander Hamilton, John Jay, and James Madison, *The Federalist: A Commentary on the Constitution of the United States*, ed. Henry Cabot Lodge, with an introduction by Edward Mead Earle (New York: Modern Library, 1941), No. 10, pp. 55-56.

17. Joseph Gales, Sr., *The Debates and Proceedings in the Congress of the United States*, vol. i (Washington: Gales and Seaton, 1834), 451-52.

18. 120 S.Ct. 2266 at 2280-81.

19. Leonard W. Levy, "The Establishment Clause," in *How Does the Constitution Protect Religious Freedom?*, ed. by Robert A. Goldwin and Art Kaufman (Washington: American Enterprise Institute for Public Policy Research, 1987), 91-92 (footnote omitted).

20. Alexander Hamilton, John Jay, and James Madison, *The Federalist: A Commentary on the Constitution of the United States*, ed. Henry Cabot Lodge, with an introduction by Edward Mead Earle (New York: Modern Library, 1941), No. 51, pp. 339-40.

21. *Ibid.*, No. 10, pp. 61-62.

22. Edwin Cannan, ed., (New York: Random House, 1937), 744-45.

23. *Federalist* No. 10, pp. 61-62.

24. John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), sec. 159.

25. *Federalist* No. 47, p. 313.

26. Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (New York: Hafner, 1949), 1:153.

27. *Federalist* No. 51, p. 337.
28. *Ibid.*, No. 84, p. 559.
29. *Ibid.*, 560, asterisked n.
30. *Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833).
31. Jonathan Elliot, ed., *Elliot's Debates*, vol. iii (2d ed.; Washington: Taylor and Maury, 1963), 330.
32. *Ibid.*, vol. i, 334; vol. iv, 244.
33. Chester James Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom From Federal Establishment* (Milwaukee: Bruce Publishing Company, 1964), 119-20
34. *Ibid.*, 112-15. The religion amendment proposed by the New Hampshire Convention is not as unequivocal as are those proposed by many other states. The proposal reads, "Congress shall make no laws touching religion, or to infringe the rights of conscience." *Ibid.*, 326.
35. Joseph Gales, Sr., *The Debates and Proceedings in the Congress of the United States*, vol. i (Washington: Gales and Seaton, 1834), 451-52.
36. *Ibid.*, 440-68.
37. Antieau, 126.
38. Gales, 757.
39. *Ibid.*, 758.
40. *Ibid.*, 757-58.
41. *Ibid.*, 758-59.
42. *Ibid.*, 759.
43. *Ibid.*, 783-84.
44. Antieau, 129.
45. Gales, 809.
46. Antieau, 128-30.
47. *Ibid.*, 30-31.
48. Gales, 948.
49. *Ibid.*, 90.
50. *Ibid.*, 949.
51. *Ibid.*, 59.
52. James Madison issued at least four "Thanksgiving Day" proclamations while he was President. He justified these in a private letter as merely appointing particular days for worship without any penal sanction to enforce such worship. Madison was a member of the committee that recommended the Congressional Chaplain system. In Madison's "Detached Memoranda," believed to have been written after he was President, Madison writes against both the practice of Thanksgiving Proclamations and against the chaplaincy system; however, his previous practice plainly contradicts the opinions he expressed in the "Detached Memoranda" and a

private letter contradicts his criticism of Thanksgiving Proclamations in the memoranda. Robert L Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), 23-31 (footnotes omitted).

53. Representative Tucker voiced this objection. Gales, 783-74.

54. Bennett B. Patterson, *The Forgotten Ninth Amendment* (Indianapolis: Bobbs-Merrill, 1955), 94.

55. Leonard W. Levy, *The Establishment Clause* (New York: Macmillan, 1986), 91-92. (Levy's book is hereinafter cited as *The Establishment Clause*; his article by the same title is cited as "The Establishment Clause).

56. *Ibid.* at 76.

57. *Ibid.* at 122.

58. U.S. Constitution, amend. 14, sec. 1.

59. Levy, *The Establishment Clause*, *Ibid.*, 122-23.

60. *Everson v. Board of Education*, 330 U.S. 1 (1947).

61. Levy, "The Establishment Clause," 86.

62. Levy, *The Establishment Clause*, 172-73. Levy recognizes that the First Congress "did not reenact the provision of 1787 by which one lot in each township was to be set aside 'perpetually for the purposes of religion.'" *Ibid.*, 173.

63. *Ibid.*, 174

64. Gales, 757-59.

65. Levy, *The Establishment Clause*, 175, 181.

66. *Ibid.*, 179.

67. *Ibid.*, 177.

68. *Ibid.*, 185.

69. 120 S.Ct. at 2551-52 (Thomas, J., announcing the judgment of the Court and delivering an opinion joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

70. 120 S.Ct. 2266 (2000).

71. *Ibid.* at 2267-69.

72. *Ibid.* at 2279.

73. *Ibid.* at 2279-80.

74. *Ibid.* at 2281-83.

75. *Ibid.* at 2283-84 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).

76. *Ibid.* at 2285.

77. 403 U.S. 602 (1971).

78. 120 S.Ct. at 2284.

79. *Ibid.*

80. *Ibid.*, citing *Wallace v. Jaffree*, 472 U.S. 38, 108-14 (1985) (Rehnquist, J., dissenting).

81. 120 S.Ct. at 2285.
82. 505 U.S. 577 (1992)
83. A related issue is whether the Establishment Clause is applicable to the states through the “Liberty” Clause of the Fourteenth Amendment. Leonard Levy, one of the most respected commentators on the Constitution and a strong advocate of the “wall of separation” metaphor, believes that those who framed the Fourteenth Amendment did not intend to limit the states in the same manner that the national government is restricted by the First Amendment. He believes tht the “Liberty” Clause strikes the balance in favor of the liberty to exercise one’s religious freedom. He adds that the line of cases making the Establishment Clause fully applicable to the states are so firmly entrenched that they will not be reversed. Levy, “Establishment Clause,” 86-88.
84. Marian Ward delivered the prayer after a U.S. District Judge granted a temporary order restraining school administrators from subjecting Marian to any discipline if she prayed at the football game. *Fort Worth Star-Telegram*, 2 April 2000.
85. 370 U.S. 421 (1962).
86. 472 U.S. 38 (1985).
87. 120 S.Ct. 2530 (2000).
88. 20 U.S.C. secs. 2911-2976 (1988 ed.).
89. 120 S.Ct.2530, 2541-44, 2547-49 (2000) (Thomas, J., announcing the judgment of the Court and delivering an opinion joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).
90. *Ibid.* at 2540-41, citing *Agostini v. Felton*, 521 U.S. 203 (1997).
91. *Ibid.* at 2542-43.
92. *Ibid.* at 2543-44.
93. *Ibid.* at 2544-45 (citations omitted).
94. *Ibid.* at 2545, quoting *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).
95. *Ibid.* at 2547.
96. *Ibid.* at 2550-52.
97. The opinion specifies that insofar as *Meek v. Pittenger*, 421 U.S. 349 (1975) [*Meek* struck down material and equipment loan program to nonpublic schools] and *Wolman v. Walter*, 433 U.S. 229 (1977) [*Wolman* struck down fieldtrip aid to a sectarian school] conflict with its holding, these cases are overruled. *Ibid.* at 2555.
98. 521 U.S. 203 (1997), cited at 120 S.Ct. 2556. In *Agostini*, the Court upheld a federally funded program providing remedial instruction to disadvantaged children on a neutral basis when the instruction is given on the premises of sectarian schools by government employees.

99. 120 S.Ct. at 2560-62.
100. *Ibid.* at 2567-68.
101. *Ibid.* at 2575 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting), quoting *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).
102. *Ibid.* at 2572-73, 2577.
103. *Ibid.* at 2581.
104. *Ibid.* at 2582.
105. *Ibid.* at 2592-96 (citations omitted).
106. *Ibid.* at 2589-91.
107. *Ibid.* at 2591-96.
108. *Ibid.* at 2531.
109. Levy, *The Establishment Clause*, pp. 179-80.
110. Gales, p. 758.
111. Madison made this comment in his proposal, made prior to the enactment of the Virginia Declaration of Rights. G. Hunt, "James Madison and Religious Liberty," 1 *Annual Report of the American Historical Association* 163, 166-67 (1901), quoted in *City of Boerne v. Flores*, 117 S.Ct. 2157, 2181 (O'Connor, J., dissenting in part, joined by Breyer, J.).
112. *The Federalist* No. 84, p. 560, asterisked n.
113. Examples of this inconsistency in previous cases are given in William H. Rehnquist, "The True Meaning of the Establishment Clause: A Dissent," in *How Does the Constitution Protect Religious Freedom?*, ed. by Robert A. Goldwin and Art Kaufman (Washington: American Enterprise Institute for Public Policy Research, 1987), 111.