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GOVERNMENT MESSAGES AND GOVERNMENT MONEY:
SANTA FE, MITCHELL V. HELMS, AND THE ARC OF THE
ESTABLISHMENT CLAUSE

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As dramatically evidenced in the year 2000, the Supreme Court is engaged in a profound reshaping of the ground on which issues of religious establishment are fought. To put the matter simply, the emerging trend is away from concern over government transfers of wealth to religious institutions, and toward interdiction of religiously partisan government speech.

Begin with the question of religious messages. Prior to 1980, the Court's only decisions concerning the constitutionality of government-sponsored religious speech involved cases in which citizens were required by law or custom to participate actively. In the early 1960s, the Court decided a highly controversial series of cases involving prayer and Bible-reading in public schools.¹ Some years earlier, the Court decided a pair of cases involving cooperation between religious entities and public officials in the provision of religious instruction to students in the public schools.² All of those pre-1980 cases, however, involved legal and practical coercion of schoolchildren to participate in religious practices. It was not until the early 1980s³ that the Supreme Court entertained

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1. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

2. See *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding program of "released time" for public school students to go off-site for religious instruction during the school day); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (invalidating a program of religious instruction by sectarian school instructors on public school premises during school hours).

3. See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding publicly supported display of

a case of government religious speech unaccompanied by such coercion.

By contrast, beginning with *Everson v. Board of Education*⁴ in 1947, the case reports are thick with decisions about the permissibility of the transfer of material government resources to benefit religious causes and institutions. The issue of aid to sectarian schools dominates this line of cases, but more recent controversies have involved the provision of in-kind benefits, such as space in public buildings⁵ and the reimbursement of printing costs,⁶ to groups and organizations with a religious mission.

Most contemporary Establishment Clause controversies are about government support for religion through money or messages. Indeed, in the 1999-2000 term of the Supreme Court, the two Religion Clause decisions reflected these themes rather perfectly. In *Mitchell v. Helms*,⁷ a splintered majority of the Court upheld a program that provided federal and state government assistance to elementary and secondary schools,⁸ and in *Santa Fe Independent School District v. Doe*,⁹ the Court issued a sweeping opinion condemning a school policy that authorized student-led prayer over the public address system at public high school football games.¹⁰ *Santa Fe* effectively outlawed any official prodding in the direction of student-led prayer at school functions; *Mitchell*, despite the

Christmas crèche); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding chaplain's prayer at beginning of state legislative session); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (holding that state may not post Ten Commandments in public schools). *McGowan v. Maryland*, 366 U.S. 420 (1961), which upheld a Sunday Closing Law against an Establishment Clause attack, did involve arguments that the state symbolically had endorsed Sunday Sabbath, but it also involved coercion. *Lynch* is the first case in which the Establishment Clause claim involved a message unaccompanied by any form of coercion.

4. 330 U.S. 1 (1947).

5. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding school district violated church group's right of free speech by denying group access to school property after-hours). The Supreme Court has granted certiorari in *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000), in which similar issues are raised. See 121 S. Ct. 296 (2000).

6. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995) (holding that school's denial of reimbursement to a religious student publication violated students' free speech rights).

7. 120 S. Ct. 2530 (2000).

8. See *id.* at 2536-37.

9. 120 S. Ct. 2266 (2000).

10. See *id.* at 2278-79.

conspicuous and important disagreement between plurality Justices and concurring Justices, explicitly overruled several Burger-Era precedents on the subject of school aid¹¹ and potentially opened the door to substantial provision of in-kind benefits by government to all schools, including the most sectarian among them.

What has not been recognized sufficiently, and what this Essay will demonstrate, is that the law has been tending for the past fifteen to twenty years in the direction captured by the decisions at the end of June 2000. Cases like *Mitchell* are no longer at the center of our constitutional culture wars, and cases like *Santa Fe* have replaced them. This appraisal of comparative trends, moreover, is not limited to the legal landscape; within the political culture as well, the center of gravity of Establishment Clause controversy has shifted away from issues involving government money and toward issues of government religious messages.¹² To be sure, the fights about school vouchers and sectarian schools remain. The *Mitchell* split leaves them unresolved for now, but the constitutional issues in that conflict are for most antagonists a secondary struggle to that

11. See *Mitchell*, 120 S. Ct. at 2555-56.

12. Newspaper coverage of *Santa Fe* and *Mitchell* reflects this shift. The *Santa Fe* decision provoked prominent, front-page headlines in major newspapers. See, e.g., Linda Greenhouse, *Student Prayers Must be Private, Court Reaffirms*, N.Y. TIMES, June 20, 2000, at A1; Edward Walsh & Bill Miller, *School Prayer Is Dealt A Blow*, WASH. POST, June 20, 2000, at A1. By contrast, the same major dailies treated *Mitchell* with considerably less fanfare and interest. On the day *Mitchell* was decided, it got fourth billing in the *New York Times* coverage of the Supreme Court's activities. The Elian Gonzalez case, the partial birth abortion decision, and the case involving the Boy Scouts exclusion of an openly gay Eagle Scout all received front-page treatment, while coverage of the *Mitchell* decision was relegated to page 27. See, e.g., Linda Greenhouse, *Justices Approve U.S. Financing of Religious Schools' Equipment*, N.Y. TIMES, June 29, 2000, at A27. Similarly, the *Washington Post's* stories about the Court's rulings in the Elian Gonzalez matter, the partial birth abortion case, and the Boy Scouts case all ran on page one while the *Mitchell* case was reported on page 13. See Kenneth Cooper, *A Win for Parochial Schools*, WASH. POST, June 29, 2000, at A13. The tendency in the national newspapers to highlight stories about state-sponsored religious speech and its constitutional implications extends beyond Supreme Court decisions. See, e.g., Patricia Davis & Liz Seymour, *ACLU Challenges Virginia's Minute of Silence*, WASH. POST, June 23, 2000, at B1 (discussing ACLU's attempt to overturn Virginia law that requires public schools to begin each day with a minute of silence); Hanna Rosin & William Claiborne, *Taking the Commandments Public*, WASH. POST, Feb. 8, 2000, at A3 (discussing legislation in Indiana and elsewhere permitting public schools and other public buildings to post copies of the Ten Commandments); Craig Timberg, *Bible's Second Coming*, WASH. POST, June 4, 2000, at A1 (discussing controversy over public schools' use of the Bible as a source of history and literature).

concerning public finance, education, and the future of public schools.

What remains of the once popular notion of "separation of church and state" has little if anything to do with churches;¹³ rather, the remnants of separationism attach most doggedly to questions of state sponsorship of religious messages and themes. Religious entities are in ever-expanding political partnership with the state in the provision of public service.¹⁴ Although important issues of client access and the scope of regulatory monitoring remain in connection with such partnerships, the voices condemning these arrangements per se on classical separationist grounds are diminishing.¹⁵ By contrast, the political and cultural wars over the place of traditional Judeo-Christian values, themes, prayers, and holidays in public life have never been more strident.¹⁶

This Essay explains, chronicles, and analyzes this inversion of focus on matters of money and message in the law of the

13. The major exception to this proposition, little noticed in the popular culture, concerns issues of the legal autonomy of religious institutions. See, e.g., *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996) (holding that a church-controlled university was constitutionally and statutorily immune from a suit alleging sex discrimination for refusal to tenure a female professor).

14. See generally Stephen V. Monsma, *The "Pervasively Sectarian" Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1999) (chronicling the long-standing "partnership between government and nonprofit service organizations, including faith-based ones"). Both major party candidates for the Presidency in 2000 favored such joint ventures. See, e.g., Gail Russell Chaddock, *War on Poverty Enlists Churches*, THE CHRISTIAN SCIENCE MONITOR, June 19, 2000, at 1 (reporting that civil libertarians were stunned when Vice President Gore "staked out" grounds similar to George W. Bush on "charitable choice" programs); Glen Elsasser, *Faith-Based Charities Gain Federal Favor*, CHI. TRIB., June 18, 2000, at 3, available in LEXIS, News Library, Chicago Tribune File (describing both Gore and Bush as endorsing closer government ties to operations of faith-based groups who deal with problems such as unemployment, drug abuse and juvenile crime); Jennifer Moore & Grant Williams, *Gore Vows "New Partnership" with Religious Groups*, THE CHRONICLE OF PHILANTHROPY, June 15, 2000, at 43 (describing both Al Gore and George W. Bush as supportive of an array of charitable choice programs).

15. See Moore & Williams, *supra* note 14, at 45 (describing opposition to charitable choice programs as coming from strict separationist groups like Americans United for Separation of Church and State, and liberal, secularist groups like People for the American Way).

16. Some school districts have openly defied judicial rulings on the subject. See Sandy Louey, *Pre-Game Prayers to Continue*, THE DALLAS MORNING NEWS, Sept. 15, 1999, at 1R, available in LEXIS, News Library, The Dallas Morning News File. The U.S. House of Representatives thought the issue of pregame prayer was sufficiently important to enact a resolution on the subject. See H.R. Con. Res. 199, 106th Cong., 145 CONG. REC. H11,325 (daily ed. Nov. 2, 1999).

Establishment Clause. Part I briefly describes a set of social and political characteristics that prevailed at the time of the framing of the Constitution and Bill of Rights, and explains why material support of churches by government was a foundational concern of those in the late-eighteenth century. Part II sweeps through a series of social and political changes that the succeeding two centuries have brought and connects these changes to dynamic pressures on the law of nonestablishment. Part III attaches legal developments to the historical recitations of Parts I and II and charts with particularity the evolution of corresponding Establishment Clause controversies and norms. Part IV briefly defends the trend revealed in this evolution, and identifies issues on the cutting edge of matters of money and message.¹⁷ The piece concludes that controversies about both government money and government messages will continue with some intensity in the immediate future, but that their respective trajectories have crossed and are unlikely to recross in the foreseeable future.

I. RELIGION AND GOVERNMENT AT THE TIME OF THE FRAMING

It would not be sensible to rehash the lengthy and complex history of religious disestablishment in the early American states.¹⁸ Instead, a small number of observations that bear upon questions of government money and government messages, respectively, seems appropriate.

First, in terms of participation in, control of, and influence over government, the late-eighteenth century was clearly a time of Anglo-Saxon Protestant hegemony.¹⁹ To be sure, early America

17. For the remainder of this Essay, I will use the phrases "government money" and "government messages," without the quotation marks, to refer to the respective concerns of government support of religion by means of wealth transfer and substantive message.

18. Much good work on the subject is available. See, e.g., THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787* (1977); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed. 1994).

19. At the time of the Constitutional Convention in Philadelphia in 1787, only Protestants could hold public office in many of the states. See Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681-82 (1987).

included some Catholics, a small number of Jews, and a substantial number of non-Christian Native Americans and Africans held to slavery;²⁰ with the exception of Catholics in Maryland, however, these groups exercised little or no political influence. Indeed, the non-Christians among them either barely belonged to the political culture, as in the case of Jews, or were excluded from that culture altogether, as was true of African Americans. Pan-Protestantism did not exclude the possibility of sectarian rivalries within the Protestant tradition, and such conflicts occasionally enflamed the community.²¹ Some were essentially theological, and concerned matters of liturgy and paths to salvation. Others more directly concerned government; these included issues of incorporation of churches, control over church lands, authority to ordain ministers, control over administration of sacraments, and, of course, coercive taxation for support of religious institutions.²²

What surely was *not* an issue was the question of the appropriateness of generic theism and Christianity as themes that government officials might propound, formally and otherwise. As Steven Smith argued so persuasively a decade ago,²³ the early years of American culture reflected the predominance of religious thought, consciousness, and discourse.²⁴ Although the significance of human rationality had been elevated by the Enlightenment, the concept of "the secular," denoting a sphere separate from the

20. See generally George Dargo, *Religious Toleration and its Limits in Early America*, 16 N. ILL. U. L. REV. 341, 354-60 (discussing the experience of Catholics, Jews, Native Americans and African slaves as religious minorities in the colonial area).

21. See BUCKLEY, *supra* note 18, at 14 (recalling that the Separatist Baptists in the Virginia colony refused to obtain permits for meeting houses and licenses to preach and, as a result, were subject to fines, whippings, and imprisonments); LEVY, *supra* note 18, at 13 (describing the diverse and multiple establishments of Protestantism in the early North American colonies, while highlighting religious conflicts within these colonies, such as the dispute between the Church of England and non-Anglican Protestants over the statutorily mandated appointment of a "good and sufficient Protestant Minister" in New York).

22. See BUCKLEY, *supra* note 18, at 11-12 (describing the tithes in Colonial Virginia, which were used to support ministers of the Anglican Church, as a source of discontent and resentment for those who were not members of the church); LEVY, *supra* note 18, at 11-22 (chronicling disputes between religious groups in colonial America over appointment of ministers in New York and payment of taxes by Quakers and Baptists in predominantly Congregationalist Massachusetts).

23. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

24. See *id.* at 156-66.

influence of religious conviction and ideology, had not yet fully emerged. It is thus quite unsurprising that, in early postcolonial America, even those who might have been most skeptical of what Professor Smith describes as the religious justifications for religious freedom tended to include religious rhetoric in support of arguments for religious freedom or nonestablishment.²⁵ For example, Madison, in his famous *Memorial and Remonstrance*, invokes the allegiance of every man to the "Governor of the Universe" and the "Universal Sovereign" as superior to his obligations to the state or "Civil Society."²⁶ Yet more strikingly, the Virginia "Bill for Religious Freedom,"²⁷ authored by Thomas Jefferson, begins with a declaration that "Almighty God hath created the mind free"²⁸ and goes on in its preamble to assert that state interference with religious freedom is a "departure from the plan of the Holy Author of our religion."²⁹

It is unimaginable that any twenty-first-century enactment by government would include such explicitly theological language, and highly likely that any similarly framed enactment, whatever it otherwise contained, would be attacked as an unconstitutional "endorsement" of religion. In the late-eighteenth century, however, such an attack on legal grounds would have been equally unimaginable.

What the Virginians and others did fight about, and what then became the primary focus in our legacy of nonestablishment, was not government speech. It was government money. More precisely, it was coercive taxation of the populace to raise money that would be redistributed to the benefit of the established Anglican church, or a state-approved set of Christian churches. Coercive taxation of all Virginians to support the Anglican Church ended only after fierce quarrels in the first, postindependence legislative session in 1776.³⁰ The subsequent tale of the proposed Virginia "Bill

25. *See id.* at 153-66.

26. 1 JAMES MADISON, *Memorial and Remonstrance*, in LETTERS AND OTHER WRITINGS OF JAMES MADISON 162, 162 (1865).

27. 12 HENING'S STATUTES AT LARGE 84 (William Waller Hening ed.) (1823).

28. *Id.*

29. *Id.*

30. *See* BUCKLEY, *supra* note 18, at 8-37.

Establishing A Provision for Teachers of the Christian Religion,"³¹ against which Madison aimed his *Memorial and Remonstrance*, reveals all of the key elements of controversy. Arising as it did in an era that, compared to our own, involved far more limited government and far greater economic scarcity, the proposed Assessment played into a number of critical themes in the Virginia of its time. The Assessment involved coercive taxation for the direct support of taxpayer-designated Christian faith. The monies were to be dedicated to the salaries of teachers or ministers of Christianity, or to the construction of "places of divine [Christian] worship."³² Taxpayers were to have the option of directing their payments to "the encouragement of seminaries of learning"³³ rather than to a Christian religious denomination, but no such seminaries yet existed. As a result, the scheme contained overwhelming incentives to designate payments for the direct support of one's own (Christian) denomination.

Looked at through twenty-first-century eyes, the Virginia Assessment looks "obviously" unconstitutional by virtually any current measure of Establishment Clause validity. The scheme was limited to Christian sects and treated some differently from others.³⁴ Its benefits would have gone directly to the religious mission of these sects, including the support of pastors and the construction of houses of worship. Simply described, the scheme directly and purposefully advanced sectarian religion.

Although Madison surely saw the scheme as doing exactly that, perhaps others in the eighteenth century understood it to accomplish what we would now describe as "secular" purposes. Churches were centers of community life in general, and teachers of the gospel were "professional" educators. If notions of secular purpose and secular effects had existed at that time, the Assessment's proponents would have argued that it fell within such standards, difficult as such a conclusion may now seem to us. To

31. The full text of the Bill is set out in the Appendix to Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, 330 U.S. 1, 72-74 (1947).

32. *Id.* at 74.

33. *Id.*

34. Quakers and Menonists were to be permitted to dispose of funds designated for them "in a manner which they shall think best calculated to promote their particular mode of worship." *Id.*

put the point differently, one might say that promotion of a singular, Protestant Christian community, schooled in the Gospel and well housed for prayer, was thought by some to serve the purposes of social stability and cohesion as well as to serve God.³⁵

Whether he was mindful of any distinction between secular and religious aims of aid to sectarian institutions, Madison viewed government coercion of support for religion as an evil. He persuasively contended for rejection of the Assessment measure. Moreover, thanks to the opinions in *Everson v. Board of Education*,³⁶ the story of his success in Virginia, and the subsequent enactment in that state of Jefferson's Bill For Religious Liberty—religious preamble and all—have substantially influenced the development of contemporary Establishment Clause norms. For more than fifty years, American constitutional law has included a rock-bottom prohibition on coercive taxation for the direct support of the religious mission of sectarian institutions. For such purposes, all would now agree, government money may not be used.

II. THE RELIGIOUS TRANSFORMATION OF AMERICA

The social, cultural, religious, political, and legal landscape of America has been transformed radically from that which confronted Madison, his Virginia contemporaries, and the drafters of the Bill of Rights in the late 1780s and early 1790s. Furthermore, it is relatively easy to see how a number of these transformations have had particularized effects on the law of nonestablishment.

A. Civil War, Immigration, and the Rise of Religious Pluralism

Recall that the dominant political forces at the time of the Framing were Anglo-Saxon and Protestant. Indeed, forty years later, Justice Story could argue in his treatise on the Constitution that the purpose of the prohibition in Article VI on test oaths as a condition of federal office was not to diminish Christianity, but to ensure that "the Catholic and the Protestant, the Calvinist and the

35. See Smith, *supra* note 23, at 164-65.

36. 330 U.S. 1 (1947). Both the majority opinion and Justice Rutledge's dissenting opinion emphasized the Virginia history of anti-establishment themes.

Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship."³⁷ Moreover, according to Story, "[t]he real object of the [First Amendment] was not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalries among Christian sects."³⁸

By the middle of the nineteenth century, Catholic immigration and the rise of common schools with a decidedly Anglo-Saxon character laid the foundation for the earliest American struggles over government-sponsored religious speech.³⁹ These conflicts tended to be local and not national—because of uneven immigration patterns and the locus of authority over education—but by the 1850s, nativist, anti-Catholic sentiment had crystallized into the formation of the Native American Party, which had membership requirements of white Protestant American ancestry.⁴⁰

As a result of industrialization, the Western expansion, and the end of race slavery in America, coupled with European circumstances that made emigration an attractive option, the demography of America began to change more radically after the 1860s. Waves of immigration brought groups that did not fit the prevailing cultural norms. Catholics arrived in large numbers, Jews in smaller ones. The presence of significant numbers of Catholics, who tended to be concentrated in the northeastern industrial states, brought about conflict over government money. In particular, controversy arose over the financing of education, in common schools and Catholic schools, and over government speech, especially the use of a Protestant rather than Catholic version of the Bible as a text in the common schools. These controversies, reflecting the fracturing of Protestant hegemony in America,⁴¹ eventually found expression

37. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 634 (5th ed., Boston, Little, Brown & Co. 1891) (citation omitted).

38. *Id.* at 631-32.

39. For a good synthesis of these developments, see ROSEMARY C. SALAMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 14-20 (2000).

40. *See id.* at 20.

41. The religiously based response to Catholic immigration among nativist Protestants in turn produced a strictly separationist reaction among a group of self-consciously "secular liberals." *See* Philip Hamburger, Separation of Church and State 277-330 (Jan. 19, 2000) (unpublished manuscript, on file with author).

in the mid-1870s in a proposal by Republican presidential aspirant James Blaine.⁴² Blaine, seeking to exploit Protestant-Catholic tensions, proposed the following amendment to the federal constitution:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.⁴³

As is evident from the text, the proposal had two main thrusts. One was to accomplish what incorporation of the Religion Clauses eventually brought about—the imposition of federal constitutional norms of religious freedom on the states. Because there were literally no decided cases under the Religion Clauses at the time, the content of those norms was decidedly unclear. The other more pointed and direct aim of the Blaine Amendment was to create a constitutional obstacle to public financing of sectarian (i.e., Catholic) education. This rather blatantly anti-Catholic proposal was thus primarily about government money, and, despite its failure, set the stage for later judicially created doctrines designed to have the same effect.

The larger story of the Blaine Amendment, however, includes very prominent questions about government speech as well. As if prescient on the subject of the Warren Court's decisions of nearly a century later about prayer and Bible-reading in public schools, many who supported the Blaine Amendment were concerned that its first section might lead to the exclusion of Protestant Bible-reading from school exercises and lessons. As the proposed amendment worked its way through the legislative process prior to its ultimate failure on the floor of the Senate,⁴⁴ the question of its potential effects on government speech received considerable

42. See generally Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AMER. J. LEGAL HIST. 38 (1992) (recounting the history of the Blaine Amendment).

43. *Id.* at 53 n.96 (citing 4 CONG. REC. 205 (1875)).

44. See *id.* at 67.

attention.⁴⁵ Significant support for the amendment came from those who opposed government money to support private Catholic schools, but were explicitly in favor of public schools in which government speech could maintain a Protestant flavor.⁴⁶ Thus, in our first great national political debate about the meaning of the Religion Clauses as applied to matters of education of the young, the concern over the expenditure of government money in support of ecclesiastical institutions rose to the fore and the concern about government speech produced, if anything, a broad sentiment in favor of Protestant Bible-reading in public institutions.

That government speech might raise constitutional issues was also reflected in the comments of Thomas Cooley, the leading American constitutional scholar of the late-nineteenth century, who wrote in his treatise: "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires"⁴⁷

Cooley was expressing the consensus of Protestant cultural control, but the very fact of his assertion suggests that that consensus was under attack from those who did not share its premises. Moreover, immigration and its consequences for the religious demography of the United States did not stop with the immediate aftermath of the Civil War. The changes in immigration law and policy in the last quarter of the twentieth century have contributed substantially to the increasing religious diversity in America. One can now add to the pattern of nineteenth-century Catholic immigration and early-twentieth-century Jewish immigration from Eastern Europe, the influx of Moslems, Buddhists, and other religious groups from the Middle East, Africa, and Asia, and large numbers of Catholics from Latin America. As will be developed further below, the rise of the religious neutrality

45. *See id.* at 51-52, 61.

46. *See id.* at 61 (describing efforts of conservative evangelical Christians who supported the anti-aid efforts reflected in the Blaine Amendment while simultaneously attempting to prevent federal constitutional interference with Bible-reading in public schools).

47. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 668-69 (7th ed. 1903).

principle and its corollary requirement of equal access to government resources can be directly traced to the truly multicultural quality of America's religious pluralism.

B. Racial Justice, Civil Rights, and the Rise of the Equality Paradigm

The Civil War and its aftermath would prove to have profound consequences for the constitutional law of religion as well as that of race.⁴⁸ The Reconstruction Amendments themselves represented a form of immigration; as reflected in the first sentence of the Fourteenth Amendment and its rejection of the holding in *Dred Scott v. Sandford*,⁴⁹ these constitutional changes brought African Americans, already on our shores, into the body politic from a place outside of it.

The racial integration of the American political community in turn affected the constitutional law of religion in several ways. First, and most significantly, the rise of the Civil Rights Movement propelled a new ethos of rights adjudication. Equal protection norms, once easily dismissed as "the usual last resort of constitutional arguments,"⁵⁰ took on central significance in the corpus of constitutional law. As a result, arguments for religious equality acquired increased vitality in a variety of constitutional settings. Whether the claim is one of forbidden sectarian preferences,⁵¹ or equal access to government resources,⁵² or covert government hostility to a particular set of religious practices,⁵³ equality norms have infused Religion Clause law for the past quarter century.⁵⁴

48. For a focused discussion of the impact of the Reconstruction Amendments on religious liberty in the states, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

49. 60 U.S. (19 How.) 393 (1856).

50. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

51. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982) (invalidating statute that granted covert denominational preferences).

52. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (involving church group's claim of equal access to after-school use of school premises).

53. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (invalidating local ordinances that covertly discriminated against religious group that employed animal sacrifice as part of its religious rituals).

54. Although equality norms at times have expanded constitutional intervention against government practices, similar norms have operated to contract intervention under the Free

Second, the rise of black churches itself eventually became a phenomenon of national political import. Black churches as a political force were at the heart of the Civil Rights Movement, and the continued segregation of religious life in America has been among the explanatory causes of the push for charitable choice in federal programs to aid the disadvantaged.⁵⁵ Religion now plays a central role in identity politics, within which white and black churches alike play crucial roles.⁵⁶

C. The Rise of Secularism and the Culture Wars

As discussed briefly above, the concept of secularism as a world view had not penetrated American culture in the late-eighteenth and early-nineteenth centuries.⁵⁷ To be sure, the French Revolution had celebrated the rights of man, independent of the view of any organized religious body. Moreover, the writings of Thomas Paine and others at the time of the American Revolution had echoed related sentiments. Nevertheless, these radical notions had not yet been embraced as a respectable aspect of American life, much less a dominant one.

By the late-nineteenth century, the blossoming of science and technology, the horrors associated with the Civil War, and the alienation accompanying the Industrial Revolution had all contributed to the rise of secularism. The holocausts and mass violence in Europe in the twentieth century reinforced the trend, as

Exercise Clause by reducing claims of religious liberty or privilege to claims of no more than formal equality for religion. See *Employment Div. v. Smith*, 494 U.S. 872 (1990). For expansion of this theme, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

55. See W. Burette Carter, *Can This Culture Be Saved? Another Affirmative Action Baby Reflects on Religious Freedom*, 95 COLUM. L. REV. 473, 507-09 (1995) (book review) (suggesting that African American churches may have a different perspective on religious freedom issues than many predominantly European American churches); Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000, (Magazine), at 40 (discussing African American churches and their support for charitable choice programs).

56. The movements spawned by these groupings have included the American Center for Law and Justice (ACLJ), which has sponsored and financed a considerable portion of the Religion Clause litigation in the Supreme Court over the past twenty years. The ACLJ tends to represent the causes of conservative white Christians, and its lawyers, most notably Jay Sekulow, have participated as lead counsel in a number of Supreme Court cases. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lamb's Chapel*, 508 U.S. at 384.

57. See *supra* notes 23-29 and accompanying text.

did widespread improvement in material conditions. There can now be no doubt that American culture has a heavy, self-consciously secularist component. This of course has profoundly altered our understandings of religion, religious freedom, and religious establishment.⁵⁸ Without secularism, there can be no struggle between religion and “nonreligion” of the sort frequently invoked by courts and commentators.⁵⁹ Without secularism, the culture wars of the past thirty years⁶⁰—be they about sexuality, abortion, criminal justice, or welfare reform—could not have taken the shape they did. With secularism as a self-conscious social force, our most prominent religious conflict is no longer the struggle among Christians that plagued the West for hundreds of years, including most prominently that of Catholics pitted against Protestants. Instead, America’s religious strife emerges from the gap in world view between secularists and deeply committed religious believers. As will be elucidated below, this phenomenon has glacially shaped the law of government money and government messages alike.

D. Expanded Prosperity and Wealth, and the Changed Role of Government

The “night watchman” state constituted the prevailing model for the world of Madison and Jefferson. No public schools existed at the time of the Framing, and what we now think of as “social services” belonged to the domain of the churches. All of that has been radically transformed. *Brown v. Board of Education’s*⁶¹ dictum about the central role of education in American life in the twentieth century is now commonly accepted, and the phenomenon that

58. For an excellent analysis and discussion of the ways in which the rise of secular individualism has altered our understanding of the Religion Clauses, see FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* (1995).

59. See Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2001); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

60. See JAMES DAVISON HUNTER, *CULTURE WARS* (1991) (describing cultural conflicts between orthodox and progressive world views in the areas of family, education, media, the arts, law, and electoral politics).

61. 347 U.S. 483, 493-95 (1954).

dictum described has accelerated in the half century since it was uttered.

The rise of education as an American preoccupation has powerfully shaped the law of the Religion Clauses. Fueled by the incorporation of the Establishment Clause and its application to the states, the conflicts over public financing of Catholic schools and religious exercises in public schools commanded the stage upon which played out the first three decades of Supreme Court adjudication of Establishment Clause issues. Now that the heavy focus on the role of Catholic education has diminished as an issue for government, the highly charged question of public vouchers for private education has taken its place on the constitutional agenda. Although the vouchers question is clearly more ecumenical in its demographic contours than was the last generation's struggle over public financing of Catholic schools, the constitutional permissibility of vouchers for use at sectarian schools remains a central and unresolved issue.

Schools aside, even those among the Framers who contemplated a strong, aggressive, commercially oriented central government never could have imagined the size of the federal revenue base brought about by two centuries of economic expansion and constitutional change that created the federal power to tax incomes. A trillion-dollar federal budget, decades of federal involvement in social expenditures, and a decline in confidence in the ability of government bureaucracy on any level to administer social services have conspired successfully to create the phenomenon of, and gathering momentum toward, the regime of charitable choice.⁶² Under charitable choice arrangements—unthinkable under the constitutional and political ethos prevailing thirty years ago—religious institutions are well on their way to becoming major actors in the distribution of government funds and in-kind benefits, especially social services. That religious entities will play a communitarian role in the identification and alleviation of need is

62. The most prominent charitable choice provision in federal law is that contained in section (a)(1)(A) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2161 (codified as amended at 42 U.S.C. § 604a (Supp. 1997)), which permits states that contract with private organizations for welfare service delivery to include religious organizations among the set of contractors. See also *infra* note 214 for a listing of other charitable choice proposals.

by no means a recent phenomenon;⁶³ that such a role will be massive, government-supported and well financed, because of coercive taxation and the privatization of the delivery of social welfare services, suggests significant new circumstances within which to evaluate the force of Establishment Clause norms concerning the use of government money.

E. Mass Communication and the Rapid Transmission of Symbols

The last in the list of all-too-obvious changes in American society that bear upon Establishment Clause concerns is the rise of mass communications and the rapid transmission of pictures and symbols around the globe. Eye-catching pictures have always been worth many words, but the accuracy of renderings and the speed of their transmission have improved many times over between the Framers' time and our own.

This phenomenon of course has sweeping consequences for mass societies, far beyond its effect on law in general, or upon the small corner of Religion Clause law in particular. But its effects can be felt in those aspects of political and legal culture to which the transmission of symbols matters. If a city sponsors a voucher system for youth in its public schools, as have Cleveland and Milwaukee,⁶⁴ the story is transmitted at various times around the nation; however, it tends to be a story about relatively anonymous families and children making choices among schools, or about lawyers fussing over financing arrangements. That funds will pass, pursuant to such arrangements, from city to parents to sectarian school is evident in the story, but this triangulated financial relationship cannot be neatly captured in an image.

By contrast, Christmas birth scenes, Chanukah candleholders, Christian crosses, and plaques containing the Ten Commandments represent images familiar to a great many Americans. When these

63. The "poor laws" developed in Elizabethan England included a significant role for local parishes in the raising of monies and its distribution. See KARL DE SCHWEINITZ, *ENGLAND'S ROAD TO SOCIAL SECURITY* 25-26 (1943).

64. See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (enjoining, on Establishment Clause grounds, operation of Cleveland voucher program), *aff'd*, Nos. 00-3055/00-3060/00-3063, 2000 U.S. App. LEXIS 31367, at *1 (6th Cir. Dec. 11, 2000); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (upholding Milwaukee voucher program against federal and state constitutional attack).

images are replicated in scenes of public controversy, they are quickly transmitted through news media. Members of the public can react quickly, and viscerally, to the question of the desirability of public support for such symbols and messages. In a fast-moving political culture in which visual images dominate public focus, public controversy over matters of government speech about religion can be expected to take precedence over issues of government money in support of religion.

In sum, the social, political, ideological, and economic developments over the past two centuries have expanded and altered the commonwealth. Claims of equal access to that commonwealth, and political and judicial receptivity to those claims, have grown in proportion to those changes. By contrast, the polity exhibits far more tension over government support of religious symbols and messages, with respect to which "equality" or "neutrality" in any form is not possible. Religious pluralism and the decline of white Protestant supremacy have liberated the possibility of government financial support for the secular efforts of religious entities, while simultaneously increasing the political controversy, and constitutional constraints, associated with government religious speech.

III. MONEY AND SPEECH IN THE EVOLUTION OF ESTABLISHMENT NORMS

The forces described in Part II—pluralism, egalitarianism, secularism, prosperity, the expanded role of government, and the revolution in communications—help to explain the rising trajectory of constitutional concerns about government speech and the falling trajectory of comparable concerns about government money. The path of the law in this area, though hardly linear, has tended to conform to that description of comparative trajectories.

A. Pre-incorporation

There was little occasion for adjudication on issues of money or speech prior to the Supreme Court's ruling in 1947 that the Establishment Clause applied to the states by virtue of its

incorporation into the Fourteenth Amendment.⁶⁵ Very few federal activities implicated what we now consider to be Establishment Clause issues, and the sort of civil libertarian interest groups that might litigate such issues either did not exist or did not focus on Religion Clause questions. Only two Supreme Court decisions prior to 1947 raised Establishment Clause questions; both involved government money, and in neither did the Court directly confront the constitutional merits.

In *Bradfield v. Roberts*,⁶⁶ the Court rejected an Establishment Clause challenge to a federal appropriation for a hospital, operated under the auspices of the Roman Catholic Church in the District of Columbia. The Court held that the hospital was a secular rather than religious entity, and therefore did not reach the question of the permissibility of government grants to religious institutions.⁶⁷ In *Quick Bear v. Leupp*,⁶⁸ the Court held that expenditures out of a Sioux Indian Trust Fund for the education of Sioux children at sectarian schools did not violate federal statutory prohibitions on sectarian expenditures. The Court reasoned that although the statutory prohibitions should be construed in light of constitutional concerns, the statute simply did not apply to Indian trust funds administered by the United States under a treaty with the tribe.⁶⁹ Such funds were not “government” funds, and so prohibitions on use of government money did not apply.

B. Incorporation of the Establishment Clause and the Early Post-incorporation Cases

In 1947, the Supreme Court issued its landmark opinion in *Everson v. Board of Education*.⁷⁰ *Everson*, of course, was a government money case; it involved a decision by a municipal government to reimburse families for the cost of transporting their children on public buses to and from both public and sectarian schools. The Court in *Everson* upheld the program, even though it produced a set

65. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

66. 175 U.S. 291 (1899).

67. See *id.* at 298.

68. 210 U.S. 50 (1908).

69. See *id.* at 80.

70. 330 U.S. 1 (1947).

of highly separationist opinions—all of which strongly signaled that any program of direct governmental assistance to sectarian schools was likely doomed to invalidation under the Establishment Clause.⁷¹

There are many reasons why *Everson's* legacy has proven to be lasting. The decision was the first attempt by the Supreme Court to elaborate on the meaning of the Establishment Clause. Although the Court permitted the aid in question, its opinion was sweeping, suggesting that broad separationist principles would govern church-state controversies thereafter. The dissents were even more expansive; both the Rutledge and Jackson dissents were vehement attacks on the case outcome, and both argued that the state may give no financial assistance to sectarian enterprises, even if given indirectly through subsidies for ancillary activities like transportation.⁷² All of the opinions assumed without question that the application of the Establishment Clause to the states via the Fourteenth Amendment was appropriate, and all assumed that the Virginia history of disestablishment, capped by Madison's *Memorial and Remonstrance*⁷³ against the proposed religious assessment of 1785, should be taken as controlling background against which to read the Religion Clauses of the First Amendment.

Everson may have been driven by anti-Catholic animus. The Court opinion by Justice Black, late of the Klan, was subtle about the ideology of Catholic education; the dissent by Justice Jackson was not.⁷⁴ In any event, the Justices in *Everson* understood that application of the Establishment Clause to the states would have profound consequences for the public financing of sectarian education, almost all of which at the time was associated with, and operated by, the Roman Catholic Church. This had been the issue that had driven the Blaine Amendment,⁷⁵ and it propelled the Court to federalize the question by concluding that the Establishment Clause applied to the states.

71. See *id.* at 18-74. The case was decided by a vote of 5-4, with two strongly worded dissenting opinions by Justices Jackson and Rutledge.

72. See *id.*

73. See 1 MADISON, *supra* note 26.

74. Justice Jackson minced few words when he noted that "Catholic education is the rock upon which the whole [religion] rests." *Everson*, 330 U.S. at 24.

75. For a discussion of the Blaine Amendment, see *supra* notes 42-46 and accompanying text.

The period between World War II and the appointment of Earl Warren as Chief Justice in 1953 also witnessed a sharply drawn Establishment Clause controversy that fell along lines oblique to the distinction between government money and government speech. In *McCollum v. Board of Education*,⁷⁶ the Supreme Court invalidated a program of religious instruction conducted by sectarian teachers on public school grounds during school hours.⁷⁷ A few years later, after howls of public criticism in response to *McCollum*, the Court in *Zorach v. Clauson*⁷⁸ rejected an Establishment Clause challenge to a program in which public school students were given released time from compulsory school hours to attend religious instruction at private rather than public sites.⁷⁹

The off-site versus on-site distinction is highly questionable; *Zorach* has always seemed to me wrongly decided.⁸⁰ With respect to the money-speech dichotomy, however, the problems presented by *McCollum* and *Zorach* do not fall readily into one category or the other. Both cases involved the provision of government resources in aid of religion, and religion alone; in *McCollum*, the resources included the obvious one of space in the public schools for religious instruction,⁸¹ and both cases involved placing the force of the state's laws on compulsory attendance and truancy behind a parent's choice to have a child partake of religious instruction. At the same time, both cases also involved the symbolic and expressive force of putting coercive government power, and not government money alone, behind the project of religious instruction for children. Thus, *McCollum* and *Zorach* arguably involved government resources for religion alone, symbolic government support for religion, and proreligious government coercion—a combination that one today would expect to be fatal to any government policy challenged on Establishment Clause grounds. Perhaps the vintage of these cases, decided at an early and intense stage of the Cold War, explains the outcome in *Zorach*. Indeed, the case is perhaps best known for its

76. 333 U.S. 203 (1948).

77. *See id.* at 207-12.

78. 343 U.S. 306 (1952).

79. *See id.* at 308-10, 315.

80. *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 743-46 (1992).

81. *See McCollum*, 333 U.S. at 207-09.

propagandistic dictum that “[w]e are a religious people whose institutions presuppose a Supreme Being.”⁸² In any event, the *McCollum-Zorach* episode is an intriguing tangent story to the speech-money dichotomy being pursued in this Essay.

C. The Warren Court

Although the Warren Court is justly considered to be the institutional force behind much of the current status of the Bill of Rights, its contribution to the law of the Establishment Clause is less significant than that of its successors. The most influential Warren Court opinions are, of course, those involving religious exercises in public schools. In *Engel v. Vitale*,⁸³ the Court held unconstitutional the compulsory daily reading of the Regents’ Prayer in the New York public schools.⁸⁴ In *Abington School District v. Schempp*,⁸⁵ decided one year later, the Court ruled similarly in a case involving daily Bible-readings and recitation of the Lord’s Prayer in public schools.⁸⁶

In a way, *Engel* and *Schempp* are the germinal government speech cases; they are the Court’s first encounter with claims that government-initiated religious exercises or worship, independent of affiliation of any kind with institutional churches, violate the Establishment Clause. Moreover, the Court’s studied and explicit rejection of the argument that *Engel* and *Schempp* should be treated as involving Free Exercise problems alone, or as being in some way akin to flag salutes—with respect to which complainants are entitled to exemption but are not entitled to block the government’s power to conduct the exercise⁸⁷—makes these cases uniquely important.

Several aspects of *Engel* and *Schempp*, however, render them problematic as precedent for any broad view that the Establishment

82. *Zorach*, 343 U.S. at 313.

83. 370 U.S. 421 (1962).

84. *See id.* at 424.

85. 374 U.S. 203 (1963).

86. *See id.* at 205-07.

87. *See West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that state may not require students to salute the American flag); *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992) (holding that flag salute is not a prayer and may be recited voluntarily in public schools).

Clause interdicts official religious speech. First and foremost, their settings involved compulsion at several levels. The exercises took place in a setting in which minors were legally required to attend school, and under significant psychological pressure from teachers and peers to participate. Moreover, the participation expected was active, not passive. In *Engel*, children were obliged to recite the Regent's Prayer,⁸⁸ and in *Schempp*, they were expected to read aloud from the Bible and recite the Lord's Prayer in unison.⁸⁹ These requirements of vocal participation made the intrusion on religious autonomy far more severe than would be the case in a regime involving silent acquiescence alone; to express aloud a religious sentiment is to affirm it or to openly violate one's conscience by uttering what one believes to be a religious falsehood.

However sweeping *Engel* and *Schempp* seemed to be within the domain of official religious exercises in public schools—and they have been sweeping indeed⁹⁰—their factual settings and conceptual underpinnings narrowed their reach. Neither involved religious exercises imposed on adults, or religious exercises conducted by government in a setting in which no one was present by government compulsion, nor even exercises in which officials spoke but citizens could remain passively silent. As a result, government-sponsored religious observance in less coercive settings continued, unrestricted by any clear principles, for another two decades.

The Warren Court's contribution on the government money side was far more ambiguous in its thrust than its government speech legacy from the school prayer cases.⁹¹ In *Board of Education v. Allen*,⁹² decided at the very end of the Warren Era, a closely divided

88. See *Engel*, 370 U.S. at 422. Students could be excused from participation by explicit request of their parents. See *id.* at 430.

89. See *Schempp*, 374 U.S. at 207. Here, too, a student could be excused "upon the written request of his parent or guardian." *Id.* at 205.

90. There are numerous cases that bear the direct imprint of the school prayer decisions. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980).

91. In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court upheld Sunday Closing Laws against an Establishment Clause challenge, but did so on the theory that the "government speech" reflected in recognizing Sunday (the Christian Sabbath) as the day of rest had been washed away over time, and that the laws now advanced the secular purpose of promoting a convenient and uniform day of rest.

92. 392 U.S. 236 (1968).

Court upheld a New York program by which textbooks used or approved for use in the public schools could be loaned to the parents of children enrolled in private schools, including the sectarian variety.⁹³ If the *Everson* Court was correct when it asserted that providing reimbursement to families for transportation costs incurred by sending their children to sectarian schools "approach[ed] the verge of [constitutional] power,"⁹⁴ *Allen* must be wrong. Surely the provision of schoolbooks, nominally loaned to schoolchildren but in fact transferred to sectarian schools directly once the school adopted the books, is more substantial and direct aid to the enterprise of sectarian education than reimbursement for bus transit costs, which can be justified on safety grounds. Additionally, the interaction between public officials and sectarian school officials over which books would be "approved for use" (though not necessarily used) in public schools was fraught with the perils of "excessive entanglement" of the sort the Court had condemned in *Engel*⁹⁵ and would emphasize a few years later in *Lemon v. Kurtzman*.⁹⁶

Whatever forces account for the result in *Allen*, one can fairly conclude that the Warren Court set the stage for the separationist principles that would later ripen on matters of government speech. With respect to government money, however, the Warren Court proved to be a reticent link between the separationist rhetoric of *Everson* and the separationist doctrine and result that was soon to appear in *Lemon*.⁹⁷

D. The Burger Court—The High Water Mark of Money Separationism and the Boundaries of Message Separationism

During Warren Burger's tenure as Chief Justice, money separationism blossomed while the cause of message separationism suffered some explicit and noteworthy defeats. On the money side,

93. *See id.* at 243-44.

94. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

95. *See Engel v. Vitale*, 370 U.S. 421, 429-30 (1962).

96. 403 U.S. 602, 614-25 (1971).

97. The Warren Court's only other significant contribution to money separationism was *Flast v. Cohen*, 392 U.S. 83 (1968), which created an Establishment Clause exception to the general denial of standing to federal taxpayers to challenge the validity of federal expenditures. *See id.* at 105-06.

the leading case is *Lemon v. Kurtzman*.⁹⁸ *Lemon*, like virtually all of the Burger-Era cases about aid to sectarian schools at the elementary and secondary level, involved a large, northeastern industrial state (in this case Pennsylvania) with a substantial population of Roman Catholics and the sectarian schools to show for it.⁹⁹ Indeed, the Chief Justice's opinion for the Court in *Lemon* emphasized the predominantly Catholic character of the schools aided by the challenged programs, and highlighted the religious indoctrination the Court associated with such schools.¹⁰⁰

Lemon's machinery was simple and devastating. The requirement of secular purpose had no effect in these cases; all aid programs were found to have permissible, education-oriented purposes. Instead, the damage was done elsewhere. The Court presumed parochial schools to be "pervasively sectarian,"¹⁰¹ and created the infamous catch-22 by virtue of which such schools could not be substantially aided by the state because the aid would either significantly advance the school's religious mission, or "excessively entangle" state agents with school personnel in an effort to make sure that such religious advancement at state expense did not occur.¹⁰²

As a result, in the first few years after *Lemon*, the Supreme Court invalidated numerous programs of aid to sectarian elementary and secondary schools.¹⁰³ In all of these programs, like those in *Lemon*, an overwhelming proportion of the aided schools were Catholic. Many of the issues raised in these cases, several of which have now been overruled by *Mitchell v. Helms*,¹⁰⁴ involved the loan of instructional material, such as maps, film projectors, and the like.¹⁰⁵ The reasoning in these cases followed a predictable

98. 403 U.S. 602 (1971).

99. *See id.* at 609-10. The case also involved a statute from Rhode Island. *See id.* at 607-09.

100. *See id.* at 615-22.

101. *See id.* at 617, 620.

102. *See id.* at 619-22.

103. *See Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Meek v. Pittenger*, 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973).

104. 120 S. Ct. 2530 (2000).

105. Why such loans were constitutionally unacceptable, while the textbook loan program in *Allen* was valid, was never satisfactorily explained. *See, e.g., Wolman*, 433 U.S. at 251 n.18 (noting the inconsistency between *Allen* and *Wolman*, and choosing to preserve *Allen* by

formula: state provision of instructional material to "pervasively sectarian" schools, to be utilized in the classroom by employees of these schools, created an unacceptable risk that government aid would be put to religious use. The only way to ensure that schools and their employees did not engage in such forbidden uses was to closely monitor the use of the equipment, and that monitoring itself would constitute an "excessive entanglement."

The distinction between aid that flows to families by virtue of their choice of sectarian education, and aid that is transferred directly to sectarian schools, had seemed to matter in *Everson* and *Allen*, and would matter again near the end of the Burger years. Nevertheless, in the early 1970s, the Court's firm commitment against programs designed primarily to bail out financially troubled Catholic schools overpowered the principled force of that distinction. The Court invalidated an Ohio program involving the loan of instructional materials to families in *Wolman v. Walter*,¹⁰⁶ and also invalidated a New York program of tax credits for tuition assistance, predominantly utilized by parents of children in Catholic schools, in *Committee for Public Education v. Nyquist*.¹⁰⁷

One distinction that did matter greatly, however, was that between elementary and secondary schools, on the one hand, and higher education on the other. In a series of decisions beginning with *Tilton v. Richardson*,¹⁰⁸ decided on the same day as *Lemon*, the Court drew a boundary around higher education. Because such education involved less impressionable, older students, and because the Court presumed that such schools were unlikely to indoctrinate in an atmosphere of pervasive sectarianism, it cast the burden of proof on challengers to such programs, a burden that they typically failed to carry.¹⁰⁹

By the mid-1970s the doctrines of money separationism had become essentially a limitation on state aid to Catholic schools at the elementary and secondary levels. Aid to religiously affiliated higher education remained presumptively valid so long as the

reason of stare decisis).

106. 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

107. 413 U.S. 756 (1973).

108. 403 U.S. 672 (1971).

109. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755-59 (1976); *Hunt v. McNair*, 413 U.S. 734, 741-45 (1973); *Tilton*, 403 U.S. at 684-89.

aid was limited to secular objectives. Moreover, *Walz v. Tax Commission*,¹¹⁰ which upheld property tax exemptions for religious institutions against an Establishment Clause challenge,¹¹¹ reinforced the message of decisions like *Lemon*. In financial matters, the ideal of separationism was state and church leaving each other alone as much as possible. Whether that was accomplished by the force of constitutional principle operating to limit state aid to religious entities,¹¹² or by deference to state policy which relieved such entities of state imposed burdens, the operational result from the perspective of religious institutions was distance and disconnection from government agencies.

Near the end of the Burger years, there were small hints of weakening in the structure of money separationism. The strongest came in *Mueller v. Allen*,¹¹³ in which a narrowly divided Court upheld a state income tax deduction for the expenses of elementary and secondary education, including tuition payments.¹¹⁴ Such payments were deductible whether made at private schools, sectarian or secular, or at out-of-district public schools.¹¹⁵ *Mueller* confronted the Court, for the first time, with a scheme that aided parents of children in sectarian schools that were *not* primarily Catholic. Although *Lemon* had emphasized the demography of the schools in Pennsylvania, the Court in *Mueller* explicitly rejected the argument that, because the tuition deduction in fact operated to aid sectarian schools more than all other schools combined, it was therefore constitutionally unacceptable.¹¹⁶ Instead, the Court emphasized the formal neutrality of the state scheme and the fact that it aided families rather than the schools directly. These factors, of course, did not distinguish *Mueller* from the *Nyquist* case decided ten years earlier, in which the New York tax credit scheme that

110. 397 U.S. 664 (1970).

111. *See id.* at 672-78.

112. *See, e.g., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (holding that state may not delegate power to veto liquor licenses to churches situated near the site for which the license is sought).

113. 463 U.S. 388 (1983).

114. *See id.* at 390-91.

115. *See id.* at 395.

116. *See id.* at 401. The Court stated, "[W]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.*

primarily benefited parents of children in Catholic schools had been struck down.¹¹⁷

The second hint of the weakening of money separationism was *Witters v. Washington Department of Services for the Blind*,¹¹⁸ in which a unanimous Court upheld a vocational rehabilitation payment to a blind person who used the funds to pay tuition for a pastoral training program at a Christian college.¹¹⁹ The Court emphasized the small amount of money going to a religious institution as a result of the program,¹²⁰ but five concurring Justices also emphasized the structural similarity between the programs challenged in both *Mueller* and *Witters*; both were formally neutral, and in both cases the decision to use the aid at a religious institution was not made by the state.¹²¹ Whether *Mueller* and *Witters* depended on aid quantity, formal neutrality, intervening private choice, or the fact that Catholic elementary and secondary schools were not the primary beneficiaries, were questions left open for the future.

In the waning years of the Burger Court, a forceful application of the principles of money separationism unfortunately surfaced one last time in *Aguilar v. Felton*,¹²² which held a federal aid program unconstitutional. The program provided publicly employed teachers of remedial education in secular subjects to educationally deprived children residing in low-income areas.¹²³ Unlike the programs struck down by *Lemon* and its progeny, the program invalidated in *Aguilar* operated nationwide, and aided children in public schools to precisely the same extent and in the same ways as it aided children in private schools, sectarian and otherwise. The program therefore could not fairly be understood as one designed primarily to help Catholic schools remain afloat, or one that would pit Catholics against Protestants in a sectarian political fight. The *Aguilar* majority nevertheless concluded that the program presented dangers of unconstitutional interaction between sectarian

117. See *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 774-89 (1973).

118. 474 U.S. 481 (1986).

119. See *id.* at 482.

120. See *id.* at 486.

121. See *id.* at 490-93.

122. 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

123. See *id.* at 404-05.

schools and public employees, and therefore affirmed a judgment which prohibited the program from operating on sectarian school premises.¹²⁴

It was apparent from the moment *Aguilar* was decided that it would be an attractive target for criticism and eventual overruling by those who opposed the regime of money separationism. The program had been designed to help poor, undereducated children, not to bail out struggling sectarian schools. Its nationwide character precluded any perception that it provided advantage to any particular sect. When, in the wake of *Aguilar*, lower courts upheld the provision of the federal remedial services to sectarian schoolchildren off-site¹²⁵—that is, in trailers or other rented space in proximity to the sectarian schools in which the program could no longer be hosted—it became evident that *Aguilar* was simply a wasteful and expensive symbol of the principles of money separationism, unmoored from whatever rationale those principles had once enjoyed. When those principles began to fracture a few years later, it turned out to be no surprise that *Aguilar* was the first decision in the money separationist line to be explicitly overruled.¹²⁶

The story of message separationism in the Burger Court years is dramatically different from money separationism. In cases involving religious speech by public schools, the Burger Court expanded the legacy of its predecessor to include situations in which the school did not compel active participation by students.¹²⁷ In two other, nonschool government speech cases decided several years apart and toward the end of the Burger Era, however, the Court refused to develop a set of principles that would address the question of government support for religious messages in the way *Lemon* addressed the use of government money.

124. *See id.* at 408, 414.

125. *See, e.g.,* Committee for Pub. Educ. v. Secretary of Educ., 942 F. Supp. 842, 848-50 (E.D.N.Y. 1996) (limiting the holding in *Aguilar* to preclusion of publicly funded teaching on the premises of sectarian schools).

126. *See* Agostini v. Felton, 521 U.S. 203, 208-09 (1997).

127. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional a state law requiring a moment of silence for meditation or voluntary prayer in public schools); Stone v. Graham, 449 U.S. 39 (1980) (invalidating a state law requiring the posting of a copy of the Ten Commandments in public school classrooms).

In *Marsh v. Chambers*,¹²⁸ the Court upheld the practice of beginning each state legislative session with a chaplain's prayer, despite the fact that the state in question, Nebraska, had utilized a Presbyterian chaplain, and none from any other faith, for a number of years.¹²⁹ *Marsh* purported to justify its departure from general, separationist principles by referring to the history of the Establishment Clause and the behavior of the First Congress, which had sent the Establishment Clause to the states for ratification and almost simultaneously appropriated money to hire a congressional chaplain.¹³⁰ No such historical pedigree was available, however, to explain the outcome in *Lynch v. Donnelly*,¹³¹ in which a narrow majority rejected an Establishment Clause challenge to a city-sponsored display of a Nativity scene during the Christmas season.¹³² Chief Justice Burger's *Lynch* opinion, which was heavily criticized from both inside¹³³ and outside¹³⁴ the Court, notoriously and explicitly strayed from the Establishment Clause standards the Chief Justice himself had articulated and relied upon in *Lemon* thirteen years earlier.¹³⁵

At the time of *Lynch*, the Court's refusal to remain confined within the boundaries of its own announced standards seemed to represent the worst sort of result-orientation and willful refusal to be confined by law. Indeed, Justice Brennan argued this point in dissent,¹³⁶ and Justice O'Connor's now famous concurrence, in which her endorsement-based approach to Establishment Clause problems was born, echoed that sentiment.¹³⁷ In retrospect, however, this judgment may have been too harsh. From the bluff overlooking the divide between government money and government

128. 463 U.S. 783 (1983).

129. *See id.* at 793-94.

130. *See id.* at 786-92.

131. 465 U.S. 668 (1984).

132. *See id.* at 681-85.

133. *See infra* notes 136-37 and accompanying text.

134. *See, e.g.,* William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

135. After referring to the *Lemon* criteria, Chief Justice Burger's opinion went on to say "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679.

136. *See id.* at 696 (Brennan, J., dissenting).

137. *See id.* at 687-94 (O'Connor, J., concurring).

message, one can see that the problems of money and message are profoundly different, and thus require different solutions.

Issues involving government resources in support of religion quite frequently involve religious institutions; that is, they are truly about "church," in the sense of entities of a legal and associational character. When the state provides resources to such entities, it typically does so on the theory that churches may effectively assist in the state's secular work. After all, the state could not possibly justify aiding churches in their effort to do their own purely religious work; this would be exactly the sort of policy condemned by Madison in the *Memorial and Remonstrance* and by bedrock American church-state principles grown out of that Madisonian set of concerns.¹³⁸ The only remaining constitutional rationale for state aid to religious entities rests on the case for enlisting such entities in accomplishing indisputably secular purposes of government.

Government message cases, however, are very different in their character. Rather than representing the state as trying to enlist religious entities in doing the government's secular work, government message cases involve officials of the state doing the work of faith institutions—that is, preaching, proselytizing, teaching about religious holidays and themes, and generally spreading the Word or respect for the Word. Institutional churches may or may not be involved in such efforts by the state, but the constitutional danger of those efforts has little to do with participation by religious institutions. Government message cases are not about institutional connection between agencies of government and agencies of faith. Message cases are rather about the political misappropriation of religious themes. The dangers of such efforts are different from the dangers of which Madison spoke, but it was not until the advent of the Rehnquist Court and a series of clarifying cases that the essential difference between money cases and message cases fully crystallized.

138. See *supra* notes 26-36 and accompanying text.

E. The Rehnquist Court—The Decline of Money Separationism, and the Rise of Message Separationism

In the past fifteen years, the Supreme Court has created and accelerated the trend toward message separationism, which was only hinted at during the waning years of the Burger Court. The Court has also made significant encroachments on the doctrines of money separationism, although it surely has not rejected them altogether.

With respect to message separationism, the most important decision by far is *Allegheny County v. ACLU*.¹³⁹ *Allegheny County*, decided in 1989, moved the law one huge step forward from *Lynch*. In *Lynch*, Chief Justice Burger's opinion effectively evaded the rigors of the three-part test of *Lemon*, also authored by Burger, and failed to put in its place a metric for evaluating government's religious speech. Justice O'Connor's concurring opinion in *Lynch* introduced into Establishment Clause jurisprudence the inquiry into government endorsement of religious belief, and in *Allegheny County* her approach attracted a majority. As stated by Justice Blackmun for the Court in *Allegheny County*, "The Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"¹⁴⁰

There were disagreements within the majority over applications of that test; all within it agreed that the Nativity scene on the grand staircase of the county courthouse constituted a forbidden endorsement of Christmas, while the group disagreed about a trio of symbols, placed outside the city-county building, which included a Christmas tree, a Chanukah menorah, and a peace sign. Notwithstanding these disagreements, *Allegheny County* marked the first time that the Supreme Court had ever held that the Establishment Clause forbids a government religious message, outside the context of public elementary and secondary schools. Moreover, *Allegheny County*, by its adoption of the endorsement

139. 492 U.S. 573 (1989).

140. *Id.* at 593-94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

standard for government message cases, strongly signaled that message cases would be evaluated by criteria different from money cases, and that all government-sponsored religious messages were open to serious Establishment Clause scrutiny.

After *Allegheny County*, the Court's decision in *Lee v. Weisman*,¹⁴¹ holding unconstitutional a school sponsored prayer by an invited clergyman at a public middle-school commencement,¹⁴² came as no great surprise.¹⁴³ To be sure, the Court's opinion purported to focus on the coercive aspects of prayer at public school commencements, which the Court deemed "obligatory" events in the lives of students and their families.¹⁴⁴ Only the concurring Justices emphasized other approaches, including the newly minted inquiry into endorsement, and the older, much-maligned three-part test of *Lemon*.¹⁴⁵ What was apparent from the opinions in *Lee*, however, was that the relevant law had now come to include a battery of approaches with which to attack government religious messages.¹⁴⁶

By the early 1990s, then, the law had come to reflect fully the notion that government religious messages are of dubious constitutionality, that all such messages are subject to serious review, and that such messages in coercive settings—regardless of whether active participation is compelled, as it typically is not in the commencement context—are especially troublesome. In short, the general understanding of the late-eighteenth century that religious speech on behalf of the branches of government, whether legislative, executive, or judicial,¹⁴⁷ constituted a

141. 505 U.S. 577 (1992).

142. *See id.* at 583, 593-99.

143. The Rehnquist Court's earlier decision in *Edwards v. Aguillard*, 482 U.S. 578 (1987), invalidating a Louisiana law which required curricular treatment of "creation science" in public schools to balance the coverage given Darwinian evolution, had already signaled the Court's continuing commitment to exclude officially sponsored religious speech in the public schools.

144. *See Lee*, 505 U.S. at 598-99.

145. *See id.* at 602-04, 627, for the relevant portions of Justices Blackmun's and Souter's concurring opinions, respectively.

146. The lower courts have reacted by taking quite seriously all three approaches extant in *Lee*. *See* *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000); *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded sub nom.*, *Chandler v. Siegelman*, 120 S. Ct. 2714 (2000); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

147. Religious messages by courts still present difficulties, depending on form and context. Compare the frieze sculpture at the U.S. Supreme Court, which contains representations of

universally accepted part of the political culture, had been rather dramatically undone. Because the inquiries into government endorsement and coercion leave room for some government-sponsored religious messages, one cannot say that the recent cases have embraced a strict separationist view of such speech. Nevertheless, the tendency in the direction of separation on such issues is unmistakable.

By marked contrast, the inclination in the government money cases over the past fifteen years has been markedly away from the separationist approach marked by *Lemon* and toward a set of doctrines that gives the government substantial room to provide resources to religious entities engaged in projects of secular value. Two lines of cases buttress this trend. The first, involving government transfers to religious institutions, was inaugurated by the Court's decision in *Bowen v. Kendrick*,¹⁴⁸ which rejected an Establishment Clause attack on the Adolescent Family Life Act. The Act required local grant-seekers to include religious entities, among others, in their plans for delivering services to adolescents on matters related to teenage pregnancy and sexuality.¹⁴⁹ *Bowen* held that courts should not presume that such a program would unconstitutionally advance religion, or result in forbidden interaction between churches and government.¹⁵⁰ Rather, the Court held that Establishment Clause attacks had to be focused on particular grants, and it required proof that government money was being spent to proselytize or otherwise advance a religious mission.¹⁵¹

Bowen thus effectively refused to extend the framework of the line of cases, beginning with *Lemon*, that had presumed that financial assistance to sectarian institutions engaged in teaching

many famous lawgivers, religious and otherwise, with the conduct of Judge Roy Moore of Alabama, who posted the Ten Commandments and engaged in other acts of religious worship in his courtroom. See Joyce Howard Price, *Judge Targeted by ACLU Elected*, WASH. TIMES, June 8, 2000, at A10 (reporting Judge Moore's victory in the Republican primary for Chief Justice of the Alabama Supreme Court); Kevin Sack, *Judge Trades on Renown in Race*, N.Y. TIMES, June 5, 2000, at A22 (describing Judge Moore's practices of posting the Ten Commandments in his courtroom and opening his court session with a prayer).

148. 487 U.S. 589 (1988).

149. See *id.* at 596.

150. See *id.* at 612.

151. See *id.* at 621.

the young was likely to result in constitutional violations. Although *Bowen* held out the possibility that grants to “pervasively sectarian” institutions might trigger the same presumptions as did aid to “pervasively sectarian” schools,¹⁵² *Bowen*’s consequence was a general relaxation of the strictures on financial transfers between government and religiously controlled entities. To be sure, *Bowen* did not involve primary or secondary education, but it did involve the highly charged context of counseling teenagers on matters of sexuality and reproduction. That such a context did not trigger a presumption that faith-based institutions would use government-sponsored programs to inculcate religious values was highly significant. Indeed, *Bowen* laid the constitutional foundation for this past term’s breakthrough decision in *Mitchell v. Helms*¹⁵³ and for the charitable choice movement, discussed in the final section of this Essay.¹⁵⁴

If there were doubts after *Bowen* as to whether aid to sectarian schools might still be treated, *sui generis*, under the strict-separationist standard that developed in the 1970s, they were dispelled in *Agostini v. Felton*, in which the Court overruled *Aguilar v. Felton* and upheld the provision of remedial educational services by public employees on-site at sectarian schools.¹⁵⁵ *Agostini* purported to apply the *Lemon* criteria, but it did so with a decidedly and explicitly softer touch. The *Agostini* opinion collapsed the “forbidden effects” and “excessive entanglement” elements of *Lemon* into a single inquiry focused on the religion-promoting effects of the program.¹⁵⁶ Because public employees, not under the control of sectarian schools, delivered the instruction in the remedial program, the Court rejected the presumption that the program created a significant risk of government-sponsored religious indoctrination.¹⁵⁷ Moreover, *Agostini* emphasized the religion-neutral criteria by which the program allocated assistance. The remedial instruction available under the program went to schools

152. *See id.* at 610.

153. 120 S. Ct. 2530 (2000).

154. *See infra* notes 212-14 and accompanying text.

155. *See Agostini v. Felton*, 521 U.S. 205, 208-09 (1997).

156. *See id.* at 223-35.

157. *See id.* at 228.

public and private, sectarian and otherwise.¹⁵⁸ On a nationwide basis, this meant Catholic schools constituted a substantial, but by no means overwhelming, proportion of the schools in which the program operated.

To be sure, *Agostini* involved benefits provided in-kind and not in cash to sectarian schools. This feature of the program made it far easier to be certain that government resources were not flowing directly to the school's religious mission. But that feature had not saved the program twelve years before. In light of the overruling of *Aguilar*, *Agostini* must be read as a decision that weakens the separationist principles that had once governed the provision of in-kind resources to sectarian schools, even those in which sectarianism pervades. Moreover, *Agostini* is of a piece with another, earlier Rehnquist Court decision, *Zobrest v. Catalina Foothills School District*,¹⁵⁹ in which the Court held that the Establishment Clause did not bar the provision of a publicly employed interpreter for a hearing-impaired child attending a sectarian school.¹⁶⁰ Despite the fact that the interpreter would help translate theology lessons and daily Mass to the student, the Court in *Zobrest* was convinced by the argument that religiously motivated parents and students deserve access to public resources equal to that provided to their secularly motivated counterparts.¹⁶¹

So viewed, *Zobrest* is but one in the second line of cases that buttress the trend away from separationism in money matters—those involving claims of equal access to the provision of government resources made available for a variety of purposes. This line finds its genesis in *Widmar v. Vincent*,¹⁶² which involved a student group organized for religious purposes seeking access to meeting space on a state university campus,¹⁶³ and extends to *Board of Education v. Mergens*,¹⁶⁴ *Lamb's Chapel v. Center Moriches Union Free School District*,¹⁶⁵ and *Rosenberger v. Rector of University of*

158. *See id.* at 232.

159. 509 U.S. 1 (1993).

160. *See id.* at 3.

161. *See id.* at 8-10.

162. 454 U.S. 263 (1981).

163. *See id.* at 265.

164. 496 U.S. 226 (1990).

165. 508 U.S. 384 (1993).

Virginia.¹⁶⁶ All of these cases have a similar structure. Each one involves the government's reliance on the Establishment Clause as a shield against claims of equal access to government resources by religiously motivated groups, and judicial rejection of that shield in favor of equal access claims. Moreover, they all involve associations of religiously motivated individuals, but not corporate religious institutions, such as churches. Equal access claims of this character are of course in considerable tension with separationist philosophies; separationism presumes that organizations with a religious character must bear special disabilities by virtue of that character when the government is distributing benefits. Perhaps the principle of equal access will not be extended to religious institutions, especially sectarian elementary and secondary schools.¹⁶⁷ As the twentieth century drew to a close, these questions remained undecided. But for any observer with a sense of history and momentum, the law at century's end represented an inversion of a long-standing historical trend to disfavor government financial support to religious institutions while simultaneously tolerating government messages supportive of religious themes.

F. Money and Speech in the 1999 Term

At the millennium's turn, money separationism was under siege; message separationism was in the ascendancy. The first two Establishment Clause decisions of the twenty-first century have strikingly reinforced this trend. The Court's 6-3 decision on June 19 in *Santa Fe Independent School District v. Doe* elaborated upon and reinforced all of the themes prominent in the government message cases that preceded it. Its decision nine days later in *Mitchell v.*

166. 515 U.S. 819 (1995). The Court has granted certiorari in *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000), in which the Second Circuit rejected an equal access claim by a religious group seeking to provide religious instruction in an after-hours program, open to various instructional and social groups, for young children on public school premises. See 121 S. Ct. 296 (2000).

167. Some courts have drawn precisely this distinction and have refused to extend the benefit of voucher-type arrangements to sectarian schools even when private, nonsectarian schools may participate. See, e.g., *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), cert. denied, 120 S. Ct. 329 (1999); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999), cert. denied, 120 S. Ct. 364 (1999); *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (Vt. 1999), cert. denied, 120 S. Ct. 626 (1999).

Helms, albeit splintered into a four-Justice plurality, a two-Justice concurrence, and a three-Justice dissent, overruled two Burger Court precedents, broke new ground in a number of ways, and upheld an aid program that never would have survived at the time of either *Everson* or *Lemon*.

It is impossible to overstate the importance of the Court's opinion in *Santa Fe* as confirmation and expansion of the principles of message separationism in the public schools. *Santa Fe* involved the permissibility of student-led prayer at public high school football games. After suit was filed against the practice at Santa Fe High School of having the "student council chaplain" deliver a prayer before home football games, the school district enacted a policy that remitted the question of student-led prayer at commencement and at sporting events to student elections.¹⁶⁸ First, the students voted on whether the event should be preceded by an "invocation and/or message . . . to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."¹⁶⁹ If the students so voted, they then voted again to select which student would deliver the message.¹⁷⁰

The only real issue was whether the student speech should be viewed as private or whether it should be attributed to the state; there was little doubt that the sectarian religious messages that had been uttered immediately prior to the games for many years, would, if spoken by agents or employees of the school, have violated the Establishment Clause. The Court's opinion in *Santa Fe*, however, showed little hesitancy in disposing of the private-public question unfavorably to the school district.¹⁷¹

Relying on an elaborate history of official involvement within the district in decisions to support prayer exercises at commencement and other school functions, the Court trotted out every conceivable doctrinal impediment to the school's policy. Building upon and expanding *Lee*, the Court held that the prayer policy involved state-supported coercion of public school children to acquiesce in prayer.¹⁷² The Court gave little credence to the District's arguments

168. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2272-73 (2000).

169. *Id.* at 2273 n.6.

170. See *id.* at 2273.

171. See *id.* at 2275-79.

172. See *id.* at 2277.

that no students were coerced by such a policy. Players, cheerleaders, and band members were all required to be at the games, and other students, the Court said, should not be put to the choice between avoiding a religious exercise and attending an event of importance to the school and community.¹⁷³ Invoking the now-entrenched theory of endorsement, the Court held that the District's policy endorsed prayer at football games because the text of the policy explicitly mentioned "invocation" and "solemnization" as among the purposes of the pregame message, and because the trappings of a high school football game would make any prayer over the public address system appear to an objective listener "as stamped with [the] school's seal of approval."¹⁷⁴ Even *Lemon*, thought dead in many quarters, got its due; the school's policy, understood in local, historical context, lacked a secular purpose.¹⁷⁵

Finally, and quite significantly, the doctrine of political entanglement, thought dead since the mid-70s, reappeared. That doctrine had originally appeared in money cases,¹⁷⁶ and had typically referred to the likelihood that aid policies would lead to political strife along sectarian lines.¹⁷⁷ This was a euphemism for Protestant-Catholic division, and the idea that policies that invited sectarian political fights were constitutionally suspect seemed to have perished in the abortion funding cases.¹⁷⁸ Religious groups, like others, have rights to lobby and speak on political issues.

Nevertheless, in *Santa Fe*, the concern about political entanglement reappeared in a new and exceedingly persuasive context. The Court's opinion reasoned that the elections authorized by the district's policy "entrust[ed] the inherently nongovernmental subject of religion to a majoritarian vote,"¹⁷⁹ and therefore violated the Constitution regardless of the outcome of the vote. An election

173. *See id.* at 2280.

174. *Id.* at 2278.

175. *See id.* at 2278-79.

176. *See, e.g.,* *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794 (1973).

177. *See id.* at 794-98.

178. *See Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (concluding that abortion funding restrictions that coincide with the religious tenets of the Roman Catholic Church do not violate the Establishment Clause); *Maher v. Roe*, 432 U.S. 464, 479-80 (1977) (acknowledging the sharp division of policy and value judgments spurred by public funding for nontherapeutic abortions, while upholding state regulation limiting that funding).

179. *Santa Fe*, 120 S. Ct. at 2283.

mechanism, where all understand that the choice is focused on the possibility of prayer, "encourages divisiveness along religious lines,"¹⁸⁰ and is therefore impermissible. After *Santa Fe*, secular issues with religious overtones inevitably and appropriately will remain for resolution by the state's political processes, but issues of religious observance in public institutions may not be so resolved.

The sweeping opinion in *Santa Fe* should resolve the uncertainty, lingering in the lower courts since the decision in *Lee v. Weisman* in 1992, about the acceptability of school-enacted policies which are designed to promote student-spoken prayer at commencement or other school-sponsored events. A number of lower courts had upheld such policies on the theory that they involved voluntary student speech and that the school districts enacting them had remained sufficiently remote from the content of that speech to satisfy the Constitution.¹⁸¹ After *Santa Fe*, any system of student *election*, in which school policy promotes invocation as a message or solemnization as a purpose, is doomed. Moreover, any system of official *selection* of student speakers for such events will violate the Establishment Clause if the history and context of the selection system reveals an official desire to have or maintain prayer at the event. Given the usual history of such policies, enacted in the wake of *Lee* precisely to avoid that decision's strictures and thereby maintain a community custom of graduation prayer, few are likely to survive. Indeed, school districts' best hope is that the U.S. Courts of Appeals will stubbornly resist the teachings of *Santa Fe*.

Decided on the final day of the 1999 Term, just nine days after *Santa Fe*, *Mitchell* is the more remarkable of the two, though the absence of a majority opinion will produce some continued mystery about its portents. *Mitchell* involved a federal program which was a companion to the remedial instruction program reinstated in *Agostini*; the program challenged in *Mitchell*, long known as Chapter 2 of the Education Consolidation and Improvement Act of 1981, distributed federal money to state and local educational agencies, which used the money to purchase educational equipment

180. *Id.*

181. See *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1076 (11th Cir. 2000); *Chandler v. James*, 180 F.3d 1254, 1258-60 (11th Cir. 1999), *vacated and remanded sub nom.*, *Chandler v. Siegelman*, 120 S. Ct. 2714 (2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 968-69 (5th Cir. 1992).

for loan to private elementary and secondary schools.¹⁸² The statute limits the use of this “equipment,” which includes computers, software, library books, VCRs, films, tapes, and other audio-visual material, to programs that are “secular, neutral, and non-ideological.”¹⁸³ The program included restrictions on diversion of the loaned equipment to religious use, although these restrictions were not carefully enforced by public authorities.¹⁸⁴

The litigation in *Mitchell* involved a challenge to the program as applied in Jefferson Parish, Louisiana, in which Catholic schools were among the beneficiaries. The district judge had found a small amount of evidence of religious use of the material over a fifteen-year period.¹⁸⁵ The Court of Appeals for the Fifth Circuit, although recognizing that *Meek v. Pittenger* and *Wolman v. Walter* had been put in doubt by subsequent decisions,¹⁸⁶ nevertheless relied in part on those two cases to hold that the Establishment Clause precluded the loan of instructional materials to sectarian schools.¹⁸⁷

After holding the case under advisement for almost seven months—suggesting a long, arduous and ultimately unsuccessful struggle to keep a majority united behind a single opinion—the Supreme Court reversed. A plurality opinion, authored by Justice Thomas and joined by the Chief Justice, Justice Kennedy, and Justice Scalia, offered a bold and stunning repudiation of much of the prior law on the subject of aid to sectarian schools. The plurality opinion insisted on two criteria: the aid program must be neutral as between sectarian schools and others,¹⁸⁸ both private and public, and the government itself must not be engaged in religious indoctrination.¹⁸⁹ By these criteria, the Chapter 2 program easily passed muster. The aid went to a broad array of schools. Moreover, because the aid formula turned on per capita allocation, the

182. See *Mitchell v. Helms*, 120 S. Ct. 2530, 2536-38 (2000).

183. *Id.* at 2537.

184. See *id.* at 2554 n.15.

185. See *id.* at 2553-55.

186. See *Helms v. Picard*, 151 F.3d 347, 369 (5th Cir. 1998) (citing *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1464-69 (9th Cir. 1995) (citing *Wolman v. Walter*, 433 U.S. 229, 237 (1997); *Meek v. Pittenger*, 421 U.S. 349, 362-63 (1975); *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968))), *rev'd sub nom.* *Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

187. See *Helms*, 151 F.3d at 369-74.

188. See *Mitchell*, 120 S. Ct. at 2552.

189. See *id.* at 2552-53.

plurality found the program neutral in still another way—the amount of aid a school received was in proportion to the number of students it attracted, and the program therefore created no incentives to choose sectarian education.¹⁹⁰ Finally, the plurality rejected the argument that the possibility of diversion of the aid to religious instruction created an Establishment Clause obstacle; any such diversion, though it might violate the governing statute or regulations, would not be attributable to the government and therefore would not violate the Establishment Clause.¹⁹¹ Along the way, the plurality overruled *Meek* and *Wolman*,¹⁹² as indeed its logic required, and squarely rejected the notion that aid to “pervasively sectarian” schools should be treated under rules any different from aid to other schools.¹⁹³ Labeling such a distinction offensive, troubling, and anti-Catholic in its “pedigree,” the plurality concluded that a doctrine “requir[ing] the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . [is] born of bigotry [and] should be buried now.”¹⁹⁴

The concurring opinion by Justice O'Connor and Breyer parted company from the plurality on a number of points,¹⁹⁵ and for the moment it is the concurrence that holds the balance of power on issues of money separationism.¹⁹⁶ The concurrence described the plurality as having “announce[d] a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs.”¹⁹⁷ In particular, and quite accurately, the concurrence concluded that the plurality’s only limiting criteria, coverage neutrality and government responsibility for religious indoctrination, would impede very little, if any, aid. Government could pay for school buildings, or salaries of teachers in secular subjects, so long as the beneficiary class was broad enough to satisfy neutrality constraints.

190. *See id.*

191. *See id.* at 2547-49.

192. *See id.* at 2540.

193. *See id.* at 2550-52.

194. *Id.* at 2552.

195. *See id.* at 2556-72 (O'Connor, J., concurring).

196. The lengthy dissent by Justice Souter, *see id.* at 2572-97, joined by Justices Stevens and Ginsburg, adheres to the traditional, Burger Court view of church-state separation in aid matters.

197. *Id.* at 2556.

The concurring opinion, expressing far more caution than the plurality, refused to make neutrality and nonindoctrination by government themselves dispositive.¹⁹⁸ Nor was the concurrence willing to treat as equivalents, in the evaluation of neutrality, a direct grant to schools allocated by students per capita, and a program of benefits distributed to families in which intervening private choice arguably breaks the aid connection between the state and the sectarian school.¹⁹⁹ In particular, Justice O'Connor's concurrence reasoned that a per capita school aid program may create a public perception of government endorsement of religious education that a "true" family choice program would not.²⁰⁰ Moreover, the concurrence was especially troubled at the prospect, neither embraced nor condemned by the plurality, of grants in cash instead of kind to sectarian schools.²⁰¹

Nevertheless, the concurrence noted the tension between the 1968 opinion in *Allen*, approving textbook loans involving sectarian schools, and the mid-1970s decisions invalidating the loan of other materials.²⁰² It resolved that tension in the same way as the plurality, overruling *MEEK* and *Wolman*,²⁰³ thereby permitting the provision of instructional materials to sectarian schools if the Constitution is otherwise satisfied.

In sustaining Chapter 2, the concurrence pushed significantly beyond the prior law. *Agostini*, the 1997 decision that reinstated the remedial instruction program, had rested in large part on the fact of public employees as instructors. Under Chapter 2, that feature was absent; sectarian school administrators and teachers were entrusted with the computers, software, books, and media materials under general instructions that they be used only for secular and nonideological purposes. In the constitutional world of the mid-70s, that entrustment would have been fatal. But the concurrence read *Agostini* for the "proposition that . . . presumptions [that sectarian school teachers always and everywhere engage in] religious indoctrination are normally inappropriate when

198. *See id.* at 2556-58.

199. *See id.* at 2559.

200. *See id.*

201. *See id.* at 2559-60.

202. *See id.* at 2564.

203. *See id.* at 2567.

evaluating neutral school-aid programs under the Establishment Clause."²⁰⁴ From now on, according to the concurrence, "[t]o establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes."²⁰⁵ Moreover, without joining in the plurality's explicit condemnation of the concept of pervasive sectarianism as the product of anti-Catholic bigotry, the concurrence joined in essentially undoing the presumption attached to that concept. On the record in *Mitchell*, the concurrence concluded that the safeguards against religious uses of publicly financed materials were sufficient, and the evidence of violation of the safeguards was so sparse and distant in time as to be safely ignored.²⁰⁶

Mitchell without question leaves important questions unresolved. The concurring opinion was careful to say nothing to tip its authors' hands on the question of vouchers. Will they be viewed as neutral devices, covering sectarian and nonsectarian schools, and running through families so as to disconnect government from responsibility for how voucher funds are spent by recipient schools? Or will the perception that they involve direct transfer to sectarian schools, coupled with the very large frequency of sectarian schools on the list of eligible schools, doom voucher programs to a finding of unconstitutional endorsement or nonneutrality?²⁰⁷ Stay tuned. Would a federal program designed to wire all schools in America to the Internet survive constitutional challenge, or might the concurring Justices conclude that religious and secular uses will be so hopelessly inseparable in sectarian schools as to cast doubt on such a system? If we take Justices Breyer and O'Connor at their word, proof of religious use is required to invalidate an aid program as applied, and surely, evidence of occasional religion-oriented trips into cyberspace will not suffice; I would expect that only evidence of systematic, school-inspired, theologically sectarian journeys of this kind will be sufficient to cast constitutional doubt on particular

204. *Id.*

205. *Id.*

206. *See id.* at 2569-71.

207. The U.S. Court of Appeals for the Sixth Circuit recently affirmed an order enjoining the operation of Cleveland's voucher program on the ground that the financing formula produced a heavy tilt in the direction of sectarian schools as voucher program participants. *See Simmons-Harris v. Zelman*, Nos. 00-3055/00-3060/00-3063, 2000 U.S. App. LEXIS 31367, at *1 (6th Cir. Dec. 11, 2000), *aff'g* 72 F. Supp. 2d 834 (N.D. Ohio 1999).

applications of such a system. Moreover, recall that the O'Connor-Breyer alliance is a new one, that there is no reason to think that the two will agree on all questions in the future, and that the plurality only needs one of them for the results its members prefer. Justice O'Connor has shown before that in the really close cases she will lean with the anti-separationists.²⁰⁸

Head-counting aside, *Mitchell* unquestionably broke new ground on crucial issues of money separationism. It overruled prior law, repudiated crucial aid-blocking concepts, and reversed the presumption that sectarian schools cannot be trusted to use public aid for nonsectarian purposes. The public-private school battles will rage on over many issues. But for the first time in thirty years, those who assert constitutional grounds of opposition to aid to sectarian schools find themselves on the defensive.

When Elian flew off to Cuba, and the Justices were able to retreat to their summer vacations, what had become plain was that separationism in government money cases had been considerably weakened, and separationism in government speech cases had gained considerable strength. True enough, there are only three Justices—Kennedy, O'Connor, and Breyer—of the nine currently sitting who have shown a willingness to be strong separationists on money or speech, but not both. The other six Justices represent two camps of three full separationists and three anti-separationists, respectively. Nevertheless, given the basic coherence and appeal of the money-speech distinction, such splinterings are likely to be far more transitory than the law they produce.

IV. THE ARC'S CUTTING EDGE

The changes in America described in the early sections of this Essay account persuasively for the tendencies in the law described in Part III. The Establishment Clause was designed originally for two purposes: 1) to keep the federal government out of religious affairs, and thereby to preserve religious liberty against the threats

208. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), for example, Justice O'Connor complained about the absence of standards by which to measure the validity of religious speech by government and crafted her own "endorsement" standard which purported to be more restrictive than the Court's approach. Nevertheless, she provided the deciding vote to uphold a publicly financed display of a Christmas crèche. *See id.* at 687.

that religious establishment would represent; and 2) to limit the danger of factional religious strife over political matters. At the time of the Founding, the main source of such threats and such strife came from struggles between competing Protestant sects. Whether or not the bitterest fights are always between those of the same faith, generic Anglo-Saxon Protestantism was social glue in the late-eighteenth century only so long as government did not take sides within the genre. Accordingly, while government money might effectively favor some religious causes over others, depending on the terms and purposes of the expenditures, pro-Christian government speech did not stir up social conflict.

In the mid-twentieth century, when *Everson* began the Court's serious nonestablishment work, the major factional divide in American religious life was that between Catholics and Protestants. The Court tried to remove that struggle from politics, first by circumscribing the possibility of effective political appeals for state financing of Catholic schools, and, later, by removing religious exercises from the common schools.

Now, with religious pluralism and doctrines of equality at the center of the American ethos, and with the government more and more in the business of administering to persons in ways formerly undertaken by religious communities, nonestablishment concerns have shifted considerably. Government assistance to programs of secular value, operated by religious entities, benefits a broad array of faith groups, Christian and otherwise. And such schemes can and are organized around criteria neutral between religion and nonreligion, and among religions themselves. Although in the short run such programs surely will benefit disproportionately those faiths with existing institutional structures poised to take advantage of the opportunities created by a new political and judicial climate, in the long run a regime of equal access, nondiscrimination, and formal neutrality in the distribution of government resources may reduce tension in the culture wars and enhance the social legitimacy of all groups, faith-based or otherwise, that help administer the commonwealth.

By contrast, government-sponsored religious messages can never achieve the status of neutrality among religions. Some faiths will be heavily represented in political councils and influence; others will seem deviant and strange. While the latter may qualify for

some sort of government program as one of many, it is hard to see how they will get equal attention from government when supportive messages are launched. So the Christmas season is likely to get government support and attention in ways that Ramadan will not; Easter will trump Passover as the springtime holiday that political arms of the government must acknowledge, and so on.²⁰⁹ Having absorbed groups other than Protestant Christians into the mainstream of American society, we can no longer have government treat these faiths with toleration but something less than equal respect, encouragement, and support. Moreover, because government cannot possibly be evenhanded in its distribution of respect, endorsement, and support,²¹⁰ the only sensible constitutional solution for the twenty-first century is some form of separationist principle designed to keep government from taking positions on matters of religious faith, celebration, and observance.

All of this is not to say that our ultimate constitutional destination will be complete separation on speech matters and a complete breakdown of separation concerns on money matters. With respect to speech matters, the current trends in the Supreme Court are designed to emphatically reinforce the prohibition on official sponsorship of religious messages in the public schools. Questions will remain as to the extent to which schools will be held responsible for the religious speech of their students at school functions, but the *Santa Fe* opinion surely suggests that the Court will not give the benefit of the doubt to school districts engaged in some form of questionable quasi-sponsoring of religious exercise.

The trends seem equally likely, however, to result in preservation, not condemnation, of significant aspects of the "civil religion," by which government and its officials acknowledge a religious force in the society. The motto of "In God We Trust" will remain on the coins and currency, Presidents will continue to issue Thanksgiving Day proclamations that reference God, and Congress

209. Cases involving challenges to decisions by public schools or public employers about which religious holidays are appropriate for institutional closure are at the cutting edge of this problem. *See, e.g.,* *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (upholding, against Establishment Clause challenge, a Maryland law creating statewide public school holidays on the Friday before Easter and the Monday after Easter), *cert. denied*, 120 S. Ct. 938 (2000).

210. For example, it is difficult to imagine an elected official leading the cheers for the Branch Dividians or the Worldwide Church of God.

will keep its chaplains,²¹¹ its resolutions of National Prayer Day, and the like. The civil religion, however, will inevitably become more abstract, more generically theist, and not necessarily more monotheist at that. State-sponsored postings of the Ten Commandments,²¹² once the sort of thing it would have been unthinkable to challenge on political or legal grounds, will be perceived as Judeo-Christian, and therefore sectarian, and therefore constitutionally inappropriate.

With respect to money matters, *Mitchell* has erased some prior impediments to in-kind aid to sectarian institutions, eliminated the presumption that such aid in the hands of such institutions will inevitably and impermissibly advance religion, effectively obliterated the advancement-entanglement tension associated with the regime of *Lemon*, buried the category of "pervasively sectarian" schools, and reformulated the ground upon which programs of aid that include sectarian institutions will now be fought. Whatever else *Mitchell* may portend for systems of transfer from government for the benefit of sectarian schools, large questions remain unresolved. Chief among these on the current agenda are the constitutionality of school voucher plans that include sectarian schools among their potential beneficiaries, and the validity of a wide variety of charitable choice programs, either enacted²¹³ or

211. The ugly fight in the U.S. House of Representatives over the appointment of the first Catholic chaplain does suggest, however, that Establishment Clause concerns about religious factions and government do indeed bear upon such appointments. See, e.g., Catalina Camia, *New House Chaplain Says He's a Point of Pride for Catholics*, THE DALLAS MORNING NEWS, Apr. 15, 2000, at G1, available in LEXIS, News Library, The Dallas Morning News File (reporting that the Republicans initially backed a Protestant chaplain, which sparked protests and bitter charges of religious bias); Juliet Eilperin, *Conflict Flares Again over House Chaplain*, WASH. POST, Apr. 12, 2000, at A25 (quoting Rep. Roemer, D-Ind., as saying, "this is a very overt politicization of the chaplaincy itself, and this shouldn't be part of a political process"). As religious diversity in America as a whole, and within many states, increases, such struggles about the appointment of chaplains are likely to increase.

212. See, e.g., Rosin & Claiborne, *supra* note 12, at A3 (describing legislation in Indiana and elsewhere permitting public schools and other public buildings to post copies of the Ten Commandments).

213. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2161 (codified as amended at 42 U.S.C. § 604(a) (Supp. 1997)), contains a provision requiring states to consider religious organizations as possible contracting partners if the state chooses to engage in contracting for social services under the Act with private, nonprofit organizations. See *id.* § 604(a)(1)(A).

proposed.²¹⁴ Both major party candidates for the Presidency in 2000 expressed support for the concept of charitable choice,²¹⁵ and its accompanying delivery of government services by faith-based organizations, so the political center of gravity is quite favorably located for the future of such programs. School voucher plans and charitable choice plans (the former are but a subcategory of the latter, although the Democrats are reluctant to acknowledge that) both include religious entities as permissible distributors of government largesse and do not require a dilution of the religious identity of qualifying religious institutions as a condition of participation. The voucher plans raise very difficult questions, such as the extent to which government benefits in cash rather than in-kind may pass through the hands of parents to sectarian schools under circumstances in which government officials can clearly and completely foresee the religious tilt among participating institutions, and the extent to which a strong tilt in favor of a small number of faiths in the distribution of participating schools may undermine the religious neutrality of voucher arrangements.²¹⁶

Moreover, even if the basic transfer arrangements in such programs are constitutionally acceptable, the voucher and charitable choice arrangements alike will raise questions of the extent to which such programs may, or must, include restrictions on participating institutions to temper their commitment or zeal. For example, may or must government require that such institutions refrain from engaging in religious communication with

214. Both the Senate and the House have considered other charitable choice provisions, but none have yet become law. *See, e.g.*, The Fathers Count Act of 1999, H.R. 3073, 105th Cong. (1999) (permitting charitable choice in program to promote responsible fatherhood); Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999, S. 254, 106th Cong. (1999) (permitting charitable choice in social services related to juvenile justice); Youth Drug and Mental Health Services Act, S. 976, 106th Cong. (1999) (permitting charitable choice in substance abuse and mental health treatment); Consequences for Juvenile Offenders Act of 1999, H.R. 1501, 106th Cong. (1999) (permitting charitable choice in juvenile justice services); The Charitable Choice Expansion Act of 1998, S. 2046, 105th Cong. (1998) (providing an umbrella provision that requires consideration of faith-based providers in all programs in which the state relies on private organizations to deliver social services using federal funds).

215. *See supra* notes 14-15 and accompanying text.

216. *See Simmons-Harris v. Zelman*, Nos. 00-3055/00-3060/00-3063, 2000 U.S. App. LEXIS 31367, at *1 (6th Cir. Dec. 11, 2000) (invalidating Cleveland voucher program on the ground that it favors sectarian schools).

voucher students, or charitable choice clients, who would prefer to avoid such a message? Such regulation will help insure that government benefits are not being used to proselytize unwilling listeners, but will simultaneously constrain the expression of religious identity by participating institutions.

In a related vein, may or must government require that such institutions not discriminate on the basis of religion in selecting students or clients, or in hiring those who will teach them or otherwise minister to their needs? Such requirements of non-discrimination would similarly constrain religious institutions, but would protect equal access of potential employees and recipients to government-financed programs. Furthermore, the absence of a religious nondiscrimination requirement in hiring might be seen as double-dipping by religious institutions, which rely on their sectarian character in their quest for autonomy in selecting employees while simultaneously seeking a place as a religion-neutral dispenser of government benefits. Constitutional doctrines requiring any such limitations on the autonomy of religious entities, or permitting legislatures to impose them if so inclined, will surely dilute the appeal of such programs to many faith-based institutions.

Of course, with a set of doctrines that bends away from separationism in money matters and toward separationism on message matters, it will be crucial to know which is which. Advocates will have obvious doctrinal incentives to characterize government programs as money or speech in order to get the benefit of the rules more favorable to the outcome preferred. For example, charitable choice opponents will argue that the private religious speech of participating religious institutions should be attributed to the government, rendering the programs a form of unconstitutional endorsement of religion by the state.²¹⁷

217. Perhaps with the arc of Establishment Clause developments in mind, Dean Kathleen Sullivan has argued that sectarian schools, because they are accredited by the state and responding to state-created compulsion for children to attend school, should be taken by courts as engaging in government speech because such schools are advancing a government-mandated message. See Kathleen M. Sullivan, *Parades, Public Squares, and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996). This argument seems to me to be an attempt by an opponent of government assistance to sectarian education to treat what has long been seen as a matter of government money as instead a matter of government speech, where the chance of a successful Establishment Clause challenge has now been considerably enhanced. If Dean Sullivan is right, then accreditation

The decision in *Pinette*,²¹⁸ in which the Court refused to attribute to government an episode of private religious speech in a public forum, suggests that the attempt to convert government resources, made available in a religion-neutral way, into the equivalent of government speech in favor of religion is doomed to fail. That government may limit speech by government grantees²¹⁹ does not convert all speech by such grantees into government speech unless the government has required it as a grant condition.

To put the point more simply, the change in trajectory of the government money cases will not be easily or lightly undone. Indeed, one can hope that the expansion of participation by religious institutions in public programs, permitted by the change in standards in government money cases, will in the short run produce salutary consequences. In the broadest sense, these might go beyond efficient delivery of government benefits to include a broadly enriching peace and cooperation among diverse social traditions, faith-based and otherwise.

Because perfect religious equality, pluralism, and toleration seem inconsistent with the drive to know "Ultimate Truth" that lies at the heart of many faiths,²²⁰ it is hard to believe that such a peace can attain a stable equilibrium. Nevertheless, such a hope remains a part of constitutional faith, expressed through the gloss on the Religion Clauses, as it rewinds itself around circumstances far removed from those at the Founding. Whether the move away from money separationism and toward message separationism represents a profound nonoriginalism, or an ultimate form of

of sectarian schools, with or without government funds in support, is a constitutionally dubious venture, because accreditation alone would make the government an endorser of the school's religious message to the extent it is intertwined with required secular subjects. On this line of thinking, not likely to prevail in the near future, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), must be entirely rethought.

218. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that state does not violate Establishment Clause by permitting privately sponsored display of a Latin cross in a public forum).

219. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that government does not violate the First Amendment by restricting abortion counsels or referrals by government-financed family planning agencies).

220. This side of religious experience and its implications for constitutionalism has been explored elsewhere. *See* William P. Marshall, *Religion As Ideas: Religion As Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 388-91, 397-99 (1996); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993).

originalism in its overarching and consistent concern with civil peace as the primary end of nonestablishment, I leave to others to decide.