1. Государство не должно вторгаться во внутренние дела религиозных организаций.

2. Государство должно удовлетворять религиозные потребности тех, кто живет в его границах, за исключением тех случаев, когда оно имеет неоспоримые причины ограничивать религиозную деятельность и при этом не имеется менее обременительных средств, чтобы обойти эти ограничения.

3. Никто не может быть признан политическим аутсайдером в результате своих религиозных верований и практик.

Религия без религиозной свободы способна привнести разногласия и разделение наций. Религиозная свобода способна принести стране единство и уважение к ней всех ее граждан.

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AN UPDATE ON THE CONFLICTED FIRST AMENDMENT JURISPRUDENCE OF THE UNITED STATES SUPREME COURT

Introduction

Near the end of its 1999-2000 Term, the United States Supreme Court, in a pair of unrelated cases involving the Establishment Clause of the First Amendment to the Constitution,[1] revealed its polarization involving Church-State relations. In *Sante Fe Independent School District v. Doe (Sante Fe),*[2] the Court affirmed that a board policy permitting student led prayers prior to the start of high school football games violated the Establishment Clause. Subsequently, in *Mitchell v. Helms* (*Helms*),[3] with the majority and dissent basically changing sides, the Court held that a federal statute that permits states to loan educational materials and equipment to public and religiously affiliated non-public schools did not run afoul of the Establishment Clause.

In light of the impact that *Sante Fe* and *Helms* may have on elementary and secondary education, this column is divided into two parts. The first section briefly reviews *Sante Fe* and *Helms* while the second part reflects on their meaning for the future of the Supreme Court's Establishment Clause jurisprudence.

The Cases

Sante Fe Independent School District v. Doe

The Board of Trustees of the Santa Fe Independent School District, near Galveston, Texas, following *Lee v. Weisman*[4] and *Jones v. Clear Creek Independent School District*,[5] adopted policies permitting student volunteers to deliver prayers at graduations and football games. In April, 1995, students and their parents challenged the prayer policies seeking injunctive relief and money damages under the theory that they violated the Establishment Clause. A federal trial court upheld both policies as long as the prayers were nonsectarian and nonproselytizing. Moreover, since the board had fall-back policies in place, adopted in the event that they were struck down, requiring the prayers to be nonsectarian and nonproselytizing, the court refused to grant prospective injunctive relief, damages, or attorney fees. Both parties appealed, the plaintiffs because the policies had not been found to violate the Establishment Clause and the defendants since the board had to use its fall-back policies. The Fifth Circuit affirmed that prayer at graduation had to be nonsectarian and nonproselytizing, reversed and struck down the policy permitting prayers at football games, affirmed the denial of injunctive relief and damages, and reversed the denial of attorney's fees.

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

2 120 S. Ct. 2266 (2000).

3 120 S. Ct. 2530 (2000).

4 502 U.S. 577 (1992).

5 Following *Lee*, the Supreme Court vacated and remanded *Jones v. Clear Creek Indep. Sch. Dist.*, a case from Texas that permitted student-initiated graduation prayer, 930 F.2d 416 (5th Cir. 1991), *cert. granted, vacated, and remanded*, 505 U.S. 1215 (1992). On remand, the Fifth Circuit, following Justice Scalia's dissent in *Lee*, upheld student-initiated graduation prayer, 977 F.2d 963 (5th Cir. 1992), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

Supreme Court Majority Decision

The Supreme Court reviewed the limited question of the football prayer policy. A fractured Court, in a six to three vote,[1] affirmed that the policy was unconstitutional. Writing for the majority, Justice Stevens found that just as in *Lee*, prayer at a school sponsored event, whether a football game or a graduation ceremony, violated the Establishment Clause. However, in *Santa Fe*, Stevens relied on the endorsement test rather than the psychological coercion test enunciated in *Lee*. Put another way, Stevens reviewed the status of prayer from the perspective of whether its being permitted at football games was an impermissible governmental approval or endorsement rather than as a form of psychological coercion which subjected fans to values and/ or beliefs other than their own. In vitiating the prayer policy, Stevens rejected the district's three main arguments. First, he disagreed with the district's position that the policy furthered the free speech rights of students. Second, he disagreed with the district's stance that the policy was neutral on its face. Third, Stevens rebuffed the district's defense that a legal challenge was premature since prayer had not been offered at a football game under the policy.

Supreme Court Dissent

Chief Justice Rehnquist's dissent began by declaring that Justice Stevens' opinion "bristles with hostility to all things religious in public life."[2] What Rehnquist apparently considered most disturbing was, since policy was never implemented, Stevens' refusal to defer to the district's purposes as other than religious and dismissing them as a sham.

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

Mitchell v. Helms

Mitchell v. Helms originally involved three issues, only the third of which reached the Supreme Court. In the parts of the case that were not accepted on appeal, the Fifth Circuit held that following *Agostini v. Felton*,[3] wherein the Court upheld the on-site delivery of federally funded remedial programs in religious schools for poor students in New York City, a Louisiana statute that allows the on-site delivery of special education services in religious schools was constitutional. Also, the Fifth Circuit affirmed that a nonprofit corporation that paid for transporting children to and from their religious schools was constitutional. The most contentious part of the case, at issue before the Supreme Court, involved the Fifth Circuit's striking down Chapter 2 of Title I, now Title VI, of the Elementary and Secondary Education Act,[4] a federal law that permits the loan of instructional materials such as library books, computers, television sets, tape recorders, and maps to nonpublic schools.

Supreme Court Majority Opinion

In a six to three vote, a splintered Court, in a plurality opinion authored by Justice Thomas,[5] reversed the judgment of the Fifth Circuit and upheld the constitutionality of Chapter 2. Although not explicitly naming it, Thomas expanded the parameters of the Child Benefit Test, under which governmental aid, in the forms of books, transportation, and now, instructional materials, including computers, is available to students who attend religious schools. Thomas acknowledged that *Agostini* modified the seemingly ubiquitous tripartite *Lemon v. Kurtzman*[6] test, used in more than thirty cases in this area, which asks whether governmental aid has a secular legislative purpose, has a principle or primary effect that neither advances nor inhibits religion, and does not create excessive entanglement, by reviewing only its first two parts while recasting

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1 Justice Stevens' majority opinion was joined by Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer.

2 *Sante Fe*, *supra* note 2 at 2283, (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent was joined by Justices Scalia and Thomas.

3 521 U.S. 203 (1997).

4 20 U.S.C. §§ 7301-73.

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

6 403 U.S. 602, 612-13 (1971).

entanglement as one criterion in determining a statute's effect. Further, since the purpose part of the test was not challenged, Thomas found it necessary only to consider Chapter 2's effect.

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

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

Supreme Court Concurrence

In her lengthy concurrence, Justice O'Connor[1] agreed with the result but was concerned that Justice Thomas went too far since he might have upheld any form of aid to students in religious schools a long as it is secular and offered on a neutral basis.

Supreme Court Dissent

Justice Souter's lengthy,[2] strident dissent voiced his fear that Justice Thomas' opinion was a radical departure from the Court's precedent. He was also concerned that Thomas' opinion violated the prohibition against governmental establishment of religion by providing substantial aid to religious schools.

Reflections

Sante Fe Independent School District v. Doe and *Mitchell v. Helms*, although addressing different issues in the wide range of Church-State relations, evidenced an internal consistency as the dissenters in *Sante Fe* who would have permitted prayer, in turn, favored aid in *Helms* while the Justices who struck down the prayer policy largely opposed Chapter 2 aid to students who attended religious schools. In viewing *Helms* and *Sante Fe* synoptically, it is fascinating to observe the split among the Supreme Court Justices. At present, the Justices fit into three fairly consistent categories as accommodationists who would permit state aid to students in religious schools and prayer in public schools, separationists who would opposed both of these, and the moderate, or swing, votes. The three accommodationists are Chief Justice Rehnquist and Justices Scalia and Thomas. At the other end of the bench, Justices Stevens, Souter, Ginsberg, and Breyer are the separationists. The two moderates, Justices O'Connor and Kennedy, tip the Court's balance by joining the accommodationists or separationists.

Of the two cases, *Helms* appears to be more far-reaching than *Sante Fe* for two reasons. First, *Helms* is likely to have a greater impact than *Sante Fe* not only because estimates are that more than one million children in the United States benefit from Chapter 2 but also since it may open the door to other forms of governmental aid such as vouchers. Proponents posit that vouchers would afford parents greater choice in selecting where to educate their children since they would have funds to be used to pay for tuition at a nonpublic school. Combined with the Court's having issued a stay of a preliminary injunction granted by a federal trial court judge concerning the voucher program in Cleveland, Ohio, an argument can be made that *Helms* might

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

[2] Justice Souter's dissent was joined by Justices Stevens and Ginsburg.

pave the way for a favorable ruling on vouchers. Although such a result is certainly speculative at this time, Justice Thomas' opinion added fuel to the fire because he relied on the principles of neutrality and the private choices of parents in deciding where to send their children to school, buzz words that are often used by supporters of vouchers.

The second reason why *Helms* appears to be of greater significance is that *Sante Fe* essentially follows an almost unbroken forty year line of Supreme Court cases prohibiting prayer in public schools that began with *Engel v. Vitale.*[1] Conversely, *Helms*, continues to expand the boundaries of permissible state aid to religious schools in striking down cases to the contrary.[2] At the same time, as important as *Helms* appears to be, it is worth noting that as a plurality, with less than the requisite majority of five Justices joining the opinion of the Court, questions can be raised about its applicability as binding precedent in similar situations.

An interesting dynamic emerged in the interplay of the opinions written by Chief Justice Rehnquist and Justice Thomas. Rehnquist's fears aside in *Sante Fe*, even separationists have not clearly evidenced the hostility to religion that he feared. Yet, since separationists have not been receptive to aid to students in religious schools or prayer in public schools, an interesting question can be raised. In light of the second prong of *Lemon*, which prohibits the government from advancing or inhibiting religion, one can only wonder why Rehnquist has not raised this question sooner since, in many cases, an argument can be made that some strict separationists might harbor hostility to religion. Perhaps Rehnquist has only now reached his breaking point. Justice Thomas highlighted a latent hostility to religion, or at least Roman Catholicism, in discussing the Blaine Amendment.[3] The Blaine Amendment, which was prominent in the 1870s, would have amended the Constitution to bar any aid to sectarian institutions, using the term "sectarian," an open code word for Catholic, at a time of wide spread hostility to the Catholic Church and its members. In fact, it was not until about one hundred years later, in *Hunt v. McNair*,[4] a case involving aid in higher education that the Court eliminated this confusion by coining the term "pervasively sectarian" in referring to all religious schools. Hence, even if there is a lack of overt hostility to religion, given the role that it has played, and continues to occupy, in shaping American life, perhaps the Court needs to find a way to afford religion and religious schools, a greater voice.

As the Court's First Amendment jurisprudence evolves, and given its current delicate balance, with one vote often making the difference, perhaps the most significant factor that will influence its direction will be the Presidential election in November 2000. Insofar as several Justices are likely to retire over the next few years due to age and potential health problems, the new President will have the opportunity to shape the Court's future based on his own philosophy. In other words, even if there is no way of knowing for certain how future Justices might rule, if George Bush is elected, he is expected to appoint accommodationist Justices while if Al Gore wins the election, he is likely to name separationists to the Court. One thing is for sure that if these new Justices hold true to form, then the Court will move in a different direction.

Conclusion

Insofar as the Supreme Court has addressed more cases involving the Establishment Clause than any other topic involving education, it is not likely that either *Helms* or *Sante Fe* is the final word involving aid or prayer. Thus, it will be fascinating to observe how expected changes in the composition of the Court over the next few years will influence its First Amendment jurisprudence.

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1 370 U.S. 421 (1962).

2 In *Helms* the Court reversed those parts of *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 220 (1977) that struck down programs providing many of the same types of materials as Chapter 2. *Meek* and *Wolman* were resolved during the high water mark of the Court's limiting state aid to religious schools.

3 *See Helms*, *supra*, note 3, at 2551-52 for Thomas' full discussion.

4 413 U.S. 734 (1973).