Why the Rehnquist Court is Wrong About the Establishment Clause

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I. INTRODUCTION

The wall that separates church and state is under assault. The initial actions of the Bush Administration show its indifference, or more accurately its hostility, to separation of church and state. At the inauguration of President George W. Bush, on January 20, 2001, the invocation and benediction were explicitly Christian prayers. In his first few days as President, Bush created an office of faith-based programs to channel federal funds to religious entities and proposed an education plan that included vouchers that could be used for parochial schools.

Increasingly, enforcing a wall that separates church and state is criticized as undue hostility to religion, rather than recognition of a constitutional mandate for a secular government. For example, in *Mitchell v. Helms*, Justice Clarence Thomas wrote for a plurality of four justices—he was joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Anthony Kennedy—and contended that a denial of aid to parochial schools was undue hostility to religion.[1] He wrote:

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. . . . [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.[2]

Similarly, in *Santa Fe Independent School District v. Doe*, in response to the majority's declaring unconstitutional student-delivered prayers at

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1. Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion).
2. *Id.* at 828 (plurality opinion).

high school football games, Chief Justice Rehnquist, writing for the dissent, saw the majority's opinion as unjustified "hostility" to religion.[3]

Most significantly, the Supreme Court seems much less committed to enforcing a wall that separates church and state. For the last thirty years, the Court has followed a test in Establishment Clause cases that was announced in *Lemon v. Kurtzman.*[4] In *Lemon*, the Court declared: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[5] A law is unconstitutional if it fails any prong of the *Lemon* test. Now, though, four justices have indicated that they want to overrule the *Lemon* test—Rehnquist, Scalia, Kennedy, and Thomas.[6] These four justices have expressed a desire for a new test that allows much more government aid to religion and much more of a religious presence in government. They call for an "accommodationist" approach where the government would be deemed to violate the Establishment Clause only if it literally creates a church, or if it favors one religion over others, or if it coerces religious participation. Very little would violate the Establishment Clause under this approach that would emphasize judicial deference to the government in its choices concerning religion.

In this paper, I want to criticize this trend and defend a wall separating church and state. Part II explains the desirability of having a secular government with religion protected in the private realm. Part III applies this to two recent issues, aid to parochial schools and charitable choice. Ultimately, my central point is that the Rehnquist Court is wrong about the Establishment Clause.

I write this with recognition that President George W. Bush's nominations to the Supreme Court are likely to change dramatically the law of the Establishment Clause. Conservatives on the Supreme Court, such as Justices Antonin Scalia and Clarence Thomas, have repeatedly urged the overruling of precedents limiting aid to parochial schools and prohibiting school prayer.[7] Currently, as evidenced by the Court's

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3. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

4. Lemon v. Kurtzman, 403 U.S. 602 (1971).

5. *Id.* at 612-13.

6. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 660-74 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

7. *See, e.g.*, *Lamb's Chapel*, 508 U. S. at 398-99 (Scalia, J., concurring).

decision in *Mitchell* in June 2000,[8] there are four justices—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—desiring a radical change in the law of the Establishment Clause. Thus, even one appointment to the Court, for example replacing Justice John Paul Stevens or Justice Sandra Day O'Connor, could bring about this shift.

There is every reason to believe that a Bush nominee to the high Court would be the needed fifth vote for a dramatic change in Establishment Clause jurisprudence. While a candidate for President, Bush explicitly said that he wanted to appoint justices like Scalia and Thomas. Even more importantly, as evidenced by his support for charitable choice and aid to faith-based programs, Bush obviously cares deeply about allowing more government aid to religion. Through his appointments to the Supreme Court, Bush can greatly increase the likelihood that his proposals will be approved.

My goal in this paper is to try to explain why the conservatives' approach to the Establishment Clause is misguided and why a separation of church and state is necessary and desirable.

II. WHY SEPARATE CHURCH AND STATE?

A. *The Futility of a Historical Inquiry*

As with all constitutional provisions, some look to history as a guide to the meaning of the religion clauses. This is particularly difficult for these provisions because there is no apparent agreement among the framers as to what they meant. Justice Brennan expressed this well when he stated:

> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons . . . . [T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.[9]

Yet, justices on all sides of the issue continue to invoke history and the framers' intent to support their position. Chief Justice Rehnquist has remarked that "[t]he true meaning of the Establishment Clause can only be seen in its history."[10] In *Rosenberger v. Rector & Visitors of the University of Virginia*, which concerned whether a public university could deny student activity funds to a religious group, both Justice

8. Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion).

9. Sch. Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

10. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

Thomas in a concurring opinion and Justice Souter dissenting focused at length on James Madison's views of religious freedom.[11]

As Professor Laurence Tribe has cogently summarized, there were at least three main views of religion among key framers.[12]

> [A]t least three distinct schools of thought . . . influenced the drafters of the Bill of Rights: first, the evangelical view (associated primarily with Roger Williams) that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained"; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.[13]

These are quite distinct views of the proper relationship between religion and the government. Roger Williams was primarily concerned that government involvement with religion would corrupt and undermine religion, whereas Thomas Jefferson had the opposite fear that religion would corrupt and undermine the government. James Madison saw religion as one among many types of factions that existed and that needed to be preserved. He wrote that

> [i]n a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.[14]

The problem of using history in interpreting the religion clauses is compounded by the enormous changes in the country since the First Amendment was adopted. The country is much more religiously diverse in the 1990s than it was in 1791. Justice Brennan observed that

> our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and

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11. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995). James Madison issued his famous Remonstrance in arguing against a Virginia decision renewing a tax to support the church. Everson v. Bd. of Educ., 330 U.S. 1, 12 (1947) (reviewing Madison's argument); *id.* at 31-34 (Rutledge, J., dissenting).

12. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-60 (2d ed. 1988).

13. *Id.* at 1158-59 (citations omitted).

14. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

> Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[15]

Also, as discussed below, a significant number of cases involving the Establishment Clause have arisen in the context of religious activities in connection with schools. But public education, as it exists now, did not exist when the Bill of Rights was ratified and it is inherently difficult to apply the framers' views to situations that they could not have imagined. Justice Brennan also remarked that "the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an 'establishment' offer little aid to decision."[16]

The reality is that the divergence of views among the framers, and the abstractness with which they were stated, makes it possible for those on all sides of the debate to invoke history in support of their positions.[17] I do not believe that the framers' intent should be controlling in constitutional interpretation, even if it could be known,[18] and in the area of religion I do not think there ever will be more than each side finding apt quotations to support its position.

B. Religion is Different

Those who oppose a separation of church and state emphasize that religion should not be treated any differently from other beliefs. For example, Justice Thomas in his plurality opinion in *Mitchell* stressed that religious schools should not be treated any differently from other schools.[19] In many cases, the Court has said that a school should not treat religious groups any differently from non-religious ones.[20]

But this ignores that under the Constitution religion is different from other beliefs. Unlike all other views, the Constitution uniquely forbids

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15. Sch. Dist. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring).

16. *Id.* at 238 (Brennan, J., concurring).

17. *Compare* Phillip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992), *with* Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (both considering the historical intent behind the Establishment Clause).

18. *See* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987).

19. Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion).

20. *See, e.g.*, Good News Club v. Milford Sch. Dist., 121 S. Ct. 2093 (2001) (excluding a religious group from using school facilities was found to be an infringement of freedom of speech when secular groups had use of the facilities); Widmar v. Vincent, 454 U.S. 263 (1981) (declaring unconstitutional a state university's policy of preventing student groups from using school facilities for religious worship or religious discussion).

the government from establishing religion. Indeed, the Court often has treated religion differently from other beliefs. For example, in *Sherbert v. Verner*, the Court held that the government cannot deny benefits to those who quit their jobs for religious reasons.[21] The Court followed this principle in many other cases.[22] But there never has been a case holding that a person must be given benefits if he or she quits a job because of secular beliefs.

There are many good reasons for treating religion differently from other beliefs. History shows the tremendous risk of intolerance, persecution, and divisiveness based on religion. There is thus a need to protect the ability of people to engage in the religion of their choice, but also a need to ensure that the government remains strictly secular. Religion is special because of the role it occupies in people's lives and it is because of this that religion is appropriately treated differently under the Constitution.

C. The Benefits of a Secular Government

There are many important values served by protecting a wall separating church and state. First, the Establishment Clause protects freedom of conscience. I believe that freedom of conscience is the central and uniting goal of the various parts of the First Amendment. One way in which the separation of church and state protects freedom of conscience is by ensuring that people are not taxed to support religions other than their own. The famous statement of Thomas Jefferson concerning the need for a wall separating church and state and James Madison's Memorial and Remonstrance Against Religious Assessments were made in the context of opposing a state tax to aid the church.[23]

Jefferson spoke of the unconscionability of taxing people to support religions that they do not believe in. The Supreme Court has described Jefferson's belief that

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21. Sherbert v. Verner, 374 U.S. 398 (1963).

22. *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (holding that a state law that required unemployed individuals to be available for work seven days a week infringed free exercise when it was applied to deny benefits to an individual who refused to work on his Sunday Sabbath); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (applying *Sherbert* and *Thomas* the Court held that the state was required to provide unemployment benefits to a woman who was fired when she refused to work on her Saturday Sabbath); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that the government could not deny unemployment benefits to an individual who quit his job rather than accept a transfer to work in an armaments section of the factory).

23. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 63 (1947).

> 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.'[24]

Madison said: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment."[25]

It is wrong to make me support a church that teaches that my religion or my beliefs are evil. It violates my freedom of conscience to force me to support religions that I do not accept. Justice Souter explained that "compelling an individual to support religion violates the fundamental principle of freedom of conscience. Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."[26]

Second, the Establishment Clause serves a fundamental purpose of inclusion in that it allows all in society, of every religion and of no religion, to feel that the government is theirs. When the government supports religion, inescapably those of different religions feel excluded. Equality does not solve this. In a society that is overwhelmingly Christian, those of minority faiths are meant to feel marginalized and unwelcome. If equality were the only constraint imposed by the Establishment Clause, a school could begin each day with a prayer so long as every religion got its due. Assuming a school reflecting America's religious diversity, the vast majority of days would begin with Christian prayers. Those with no religion would be made to feel that it was not their school, as would those of minority religions who routinely would be subjected to prayers of Christian religions.

This goal of inclusion is central, not incidental, to the Establishment Clause. Justice O'Connor has explained: Direct government action endorsing religion or a particular religion is invalid because it "'sends a message to nonadherents that they are outsiders, not full members of the

24. *Everson*, 330 U.S. at 13 (quoting the preamble to the Virginia Bill for Religious Liberty written by Thomas Jefferson).

25. *Id.* at 64-65 (quoting Madison's Remonstrance).

26. Mitchell v. Helms, 530 U.S. 793, 870 (2000) (Souter, J., dissenting).

political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[27]

Consider the most blatant violation of the Establishment Clause: a city or state declares a particular religion, say Catholicism, to be the official religion. Assuming that the government took no actions to limit free exercise by those of other faiths, why is such a declaration unacceptable? The pronouncement that Catholicism is the official religion makes all of a different faith feel unwelcome. They are made to feel that they are tolerated guests, not equal members of the community. In Justice O'Connor's words, nonadherents unquestionably are made to feel outsiders and adherents are made to feel insiders.

In other words, the very core of the Establishment Clause prevents the government from taking actions that divide people in this way. The focus of the Establishment Clause is thus very much on the effect of the message on the audience. This helps to explain why Justice Scalia is simply wrong in his dissent in *Lee v. Weisman* where he expresses the need to protect the majority in the audience who want to hear a prayer.[28] The Establishment Clause is about preventing the majority, through government power, from making those of other religions feel unwelcome. If the majority of the audience wants to hear prayers, of course it may do so; but not at an official government function, especially one where the audience is compelled to be present. The problem is much greater than it was when the First Amendment was adopted. The country is much more religiously diverse in the 1990s than it was in 1791.

Third, separating church and state protects religion from the government. If the government provides assistance, inescapably there are and should be conditions attached. For example, when the government gives money, it must make sure that the funds are used for their intended purpose. This necessarily involves the government placing conditions on the funds and monitoring how it is spent. Such government entanglement is a threat to religion. This concern is not new. Roger Williams, for example, expressed great concerns that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained."[29] Justice Souter also expressed this as a fundamental basis for the Establishment Clause:

27. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring in the judgment)).

28. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

29. TRIBE, *supra* note 12, at 1158-60.

> [G]overnment aid corrupts religion. Madison argued that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, superstition, bigotry and persecution." . . . In a variant of Madison's concern, we have repeatedly noted that a government's favor to a particular religion or sect threatens to taint it with "corrosive secularism."[30]

III. APPLYING STRICT SEPARATION ANALYSIS

A. Aid to Parochial Schools

In *Mitchell*, Justice Thomas, writing for the plurality of four, urged a major change in the law concerning the Establishment Clause and aid to parochial schools. Justice Thomas argued that aid to parochial schools should be allowed, even if it is used for religious education, so long as the government is even-handed among religions. Justice Thomas wrote: "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."[31] Those who attack the wall separating church and state often do so, as Justice Thomas did in *Mitchell*, by invoking the rhetoric of equality; they argue that the central requirement of the Establishment Clause is that the government should treat all religions equally.

The majority of the justices in *Mitchell* rejected this approach and explicitly recognized that it would be a radical and unprecedented shift in the law of the Establishment Clause. Justice O'Connor, in an opinion concurring in the judgment, observed: "[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[32] Similarly, Justice Souter in dissent wrote: "The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretative efforts."[33]

Never has a majority of the Supreme Court held, as Justice Thomas argued for in *Mitchell*, that neutrality is the sole test for government aid

30. *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting) (alteration in original) (citations omitted).
31. *Id.* at 829 (plurality opinion).
32. *Id.* at 839 (O'Connor, J., concurring in the judgment).
33. *Id.* at 884 (Souter, J., dissenting).

to religions. The fundamental change in the law proposed by Justice Thomas can be seen in many ways. First, the test which the Supreme Court has followed for the last thirty years limits the government's ability to aid or foster religion, even if it is being neutral among religions.[34] The *Lemon* test, by its very terms, does not emphasize equality among religions, but rather prohibits government aid to religion, even if it is equal, if it is with the purpose or effect of advancing religion or would entail excessive government entanglement with religion. Justice Thomas' approach in *Mitchell* obviously would mean overruling the *Lemon* test that has been controlling for the past three decades.

Second, Justice Thomas' approach would profoundly change the law because no longer would the Establishment Clause be a barrier to government aid to religion or religious presence in government. For at least a half century, the Court always has regarded the Establishment Clause as an affirmative limit on what the government may do, even if it is acting neutrally among religions. Justice Thomas would reject that entirely.

For example, the Court has said that prayer, even voluntary prayer in public schools, is unconstitutional.[35] Justice Thomas' approach would make prayer permissible so long as all religions had an equal chance to present their prayers. Likewise, when the Court has approved government aid programs outside the area of parochial schools, it has stressed that pervasively sectarian organizations must be excluded. In *Bowen v. Kendrick*, the Court deemed constitutional the Adolescent Family Life Act which provided for grants to organizations to provide counseling and care to pregnant adolescents and their parents, and also to provide counseling to prevent adolescent sexual activity.[36] The law specifically authorized receipt of grants by religious, as well as non-religious, organizations. The law prohibited the use of any federal funds for family planning services, for abortion counseling, or for abortions.

Chief Justice Rehnquist wrote for the majority in the 5-4 decision and applied the *Lemon* test to uphold the law. Rehnquist said that the law "was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems

34. Lemon v. Kurtzman, 403 U.S. 602 (1971).

35. *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engle v. Vitale, 370 U.S. 421 (1962).

36. Bowen v. Kendrick, 487 U.S. 589 (1988).

caused by teenage sexuality, pregnancy, and parenthood."[37] The Court stressed that the law was constitutional because it excluded pervasively sectarian institutions and organizations from receiving money. The Court explained that cases holding aid unconstitutional had been where the assistance was to institutions that "were pervasively sectarian and had as a substantial purpose the inculcation of religious values."[38] The Court said that "[h]ere, by contrast, there is no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be."[39]

Justice Thomas expressly declared that he wants the Court to disavow any limits on aid to pervasively sectarian institutions. Indeed, Justice Thomas' approach would allow massive aid to parochial schools, so long as all religions are treated equally. Justice Souter powerfully made this point:

> Hence, if we looked no further than evenhandedness, and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money. This is why the consideration of less than universal neutrality has never been recognized as dispositive and has always been teamed with attention to other facts bearing on the substantive prohibition of support for a school's religious objective.[40]

In other words, the Court always has seen the Establishment Clause as a barrier of government aid directly to religion, even when the government is being even-handed. Justice Thomas would completely eliminate that constraint. As Justice Souter explained: "[O]ne point [is] clear beyond peradventure: together with James Madison we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools."[41]

Third, and perhaps most significantly, the implications of Justice Thomas' approach is that the government *must* fund parochial school education, at least to the extent that it provides any aid to private secular schools. Justice Thomas' approach clearly implies that excluding

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37. *Id.* at 602.
38. *Id.* at 616 (citations and quotation marks omitted).
39. *Id.*
40. Mitchell v. Helms, 530 U.S. 793, 885 (2000) (Souter, J., dissenting).
41. *Id.* at 899 (Souter, J., dissenting).

religion is not neutral and constitutes impermissible discrimination under the Establishment Clause.

Justice Thomas argued that it is offensive for the government to even look to whether an organization is religious in character. He declares: "[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."[42] But if the government cannot consider religion in distributing money, it will be *required* to subsidize religious schools on the same terms that it funds non-religious ones. Justice Thomas acknowledges and endorses this: "[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[43]

Thus, Justice Thomas' equality approach would not simply allow massive government aid to religious institutions, it would mandate it. Never before has a justice suggested, let alone a plurality endorsed, such a radical change in the law of the Establishment Clause.

The shift to equality would be inconsistent with the values of the Establishment Clause discussed above. First, freedom of conscience would be offended because people would be forced to support and subsidize religions that they do not believe in, even if all religions are treated equally. Second, treating all religions equally does not address the need to make all feel comfortable with their government. Those who disavow any religious belief would be forced to support all religions; indeed, they would be surrounded with parochial schools supported by their tax dollars. Forcing them to hear prayers of every religion inevitably would make them feel unwelcome in their own schools and their own country. The Establishment Clause should be interpreted to forbid this. Third, nor does equality protect religions from the intrusion of government involvement. Justice Thomas' equality theory would mean that the government would be enmeshed in almost every aspect of religious schools and religious institutions. The government, as a condition for funding, could—and should—set curricula and educational requirements. The government would need to monitor to see if these mandates were met. This is a threat to religion and it is no less so because all religions are threatened equally.

42. *Id.* at 828 (plurality opinion).

43. *Id.* at 827 (plurality opinion).

For all of these reasons, Justice Thomas' equality theory is undesirable as a way of interpreting the First Amendment. The Establishment Clause should be seen as a limit on government involvement with religion and religious involvement with government, not simply a requirement for even-handedness.

What, then, is the rationale for a theory that never has been accepted in 210 years of Establishment Clause jurisprudence and that seems so at odds with what the provision is about? Two justifications seem strongest. First is the desirability of equality and the undesirability of discrimination. The rhetorical appeal of Justice Thomas' theory is that it calls for even-handedness and non-discrimination. His approach says that religion should be treated the same as secularism, no better and no worse.

But this rests on a basic misdefinition of equality. As Aristotle explained, equality is about treating likes alike and unalikes differently. Justice Thomas is assuming that religious and secular schools are alike in their relationship to the government. However, for all of the reasons explained above, they are not alike and the Constitution should be understood as commanding that religion be treated differently.

If Justice Thomas' theory were adopted by the Court's majority, a religious school could sue the government for funds claiming that the denial of money was impermissible discrimination in violation of the Equal Protection Clause. But the government should prevail by explaining the compelling interest it has in treating religion differently for the reasons explained above. Equality only is a benefit if it is desirable to treat the recipients equally.[44]

Second, the equality theory has the virtue of simplicity. No longer will lines need to be drawn between types of permissible and impermissible assistance. The only requirement would be ensuring no discrimination among religions. This would eliminate the need for line drawing of the sort that has occurred for decades concerning what the government may give to parochial schools. For example, the Court has upheld the government providing buses to take children to and from parochial schools,[45] but not buses to take parochial school students on

44. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982). Professor Westen argues that equality is unnecessary as a concept because it always is necessary to develop standards to decide which inequalities are acceptable and which intolerable. *Id.* at 537. Westen says that once these standards exist they can be the basis for decisions, making the concept of equality superfluous. *Id.* In other words, in the context of the Establishment Clause, the issue is what aid should the government be providing to parochial schools. Once this is answered, then equality is not at issue.

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

field trips.[46] The Court has allowed the government to provide parochial schools textbooks for secular subjects,[47] but not audiovisual equipment.[48] The Court has forbidden the government from paying teacher salaries in parochial schools, even for teachers of secular subjects;[49] but the Court allowed the government to provide a sign-interpreter for hearing-impaired students in parochial schools.[50] The Court has permitted the government to pay for administering standardized tests in parochial schools,[51] but not for essay exams assessing writing achievement.[52]

There are two major problems with this argument: it overstates the difficulties in line drawing, and it overstates the benefits of clarity in this regard. As to the former, the reality is that over a half century the Court had developed a workable set of standards concerning permissible government aid to religion. Although the distinctions described above often seem arbitrary, it is possible to identify several criteria that explain them. While not every case fits the pattern, in general, the Court is likely to uphold aid if three criteria are met. First, the aid must be available to all students enrolled in public and parochial schools; aid that is available only to parochial school students is sure to be invalidated. Second, the aid is more likely to be allowed if it is provided directly to the students than if it is provided to the schools. Third, the aid will be permitted if it is a type that likely cannot be used for religious instruction, but it will be invalidated if it can be easily used for religious education.

These criteria help explain the seemingly arbitrary distinctions described above. For example, buses to take children to and from school are provided to students at all schools and are not involved in education itself, but buses for field trips might be to see cathedrals or religious icons. The content of state prescribed standardized tests is secular, but teacher-written essay exams might be on religious subjects. Each of the three criteria is examined in turn.

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

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

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

49. Sch. Dist. v. Ball, 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Lemon v. Kurtzman, 403 U.S. 602 (1971).

50. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

51. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

52. Levitt v. Cmty. for Pub. Educ., 413 U.S. 472 (1973).

Second, the value of simplicity is overstated by those who support the equality theory. Line drawing is inherent to constitutional law. For the reasons described above, the equality theory is so at odds with what the Establishment Clause should be seen as being about that it should not be deemed acceptable just because it is simpler.

B. Charitable Choice

One of President Bush's first acts as President was to create an Office of Faith Based Programs in the White House. The goal is to allow religious entities to receive federal funds for providing social services. This often is called "charitable choice."

In understanding this proposal, it is important to recognize that faith-based programs already can receive government money and participate in social service programs. However, currently, they must create separate secular arms to do so. Organizations like Catholic Charities and Jewish Family and Social Services long have received government money and provided important services. Bush's proposal would change this by allowing the financial aid to go directly to the religious entity. It would be a major transfer of funds right from the federal treasury to religions.

This violates all of the principles underlying the Establishment Clause described above. First, it would require people to financially support religions. The effect of charitable choice is forcing a Jewish person to subsidize a religion that teaches that belief in Christ is the way to stay off drugs; it is forcing an atheist to subsidize a soup kitchen that engages in group prayers.

Second, charitable choice programs inherently are likely to be coercive. Imagine a person convicted of a drug crime and told that the choice is prison or drug diversion, but the only drug diversion program is a religious one. This is easy to imagine in small towns, but also in big cities where there often are not nearly enough slots to meet the demand. Charitable choice proposals say that there must be a secular alternative, but it never has been clear as to how this is possible. The result inevitably seems to be forced participation in religions.

Third, government money understandably comes with conditions of how it can be used and monitoring. This would enmesh the federal government in religious programs to an unprecedented extent. The federal government must regulate how its money is used and make sure that the conditions are being met. It is exactly for this reason that some religious leaders have opposed charitable choice.

IV. CONCLUSION

For decades, the Supreme Court followed a strict separationist philosophy. In recent years, there has been a major shift away from this approach and there is the prospect of an even greater change in the years to come as President Bush has the opportunity to make appointments to the Supreme Court. Thomas Jefferson was right over two hundred years ago when he said that there should be a wall separating church and state. The wall is under assault and there is the chance that soon nothing will be left of it but rubble.

Therefore, it is important to realize again the values served by having a wall separating church and state, of keeping government secular and protecting religion in the private realm. Unfortunately, the Supreme Court increasingly seems insensitive to these values and the need for judicial protection of them. The Rehnquist Court is just wrong when it comes to the Establishment Clause.