

This article was published in *Boston College Law Review*, Volume XLIII, No. 5, September 2002, pp. 1035-70. Posted with permission of the publisher.

Mitchell v. Helms and the Modern Cultural Assault
on the Separation of Church and State

Derek H. Davis

Never before in U.S. history had there been so much attention on relieving the supposed malaise enveloping the nation's schools. Politicians, religious leaders, academics, even eccentric industry moguls have offered countless proposals aimed at correcting various maladies that have crept into the once vibrant American educational system, the institutions of which now are often portrayed as violent and underfunded detention centers for the nation's youth. Tragedies on public school campuses like those that occurred in Paducah, Kentucky and Littleton, Colorado have generated a sense of desperation throughout the country that something must be done. The nation particularly was staggered by the magnitude of the crime at Columbine High School in Littleton where, on 20 April 1999, classmates Eric Harris and Dylan Klebold executed 12 fellow students and 1 teacher and left 23 wounded before taking their own lives. In the weeks and months after Columbine, articles appeared in American religious journals as Christian and other spiritual leaders voiced their perception of the carnage as yet another example of American moral decay centered at the very heart of the nation—the public school system. Even advertisements in these journals addressed the tragedy. An ad in the October, 2000 issue of *Citizen*, the journal of the conservative Christian group Focus on the Family, was entitled "After Columbine What Will You Do?" and began with the statement "On November 17, 1980, the U. S. Supreme Court ordered the Ten Commandments out of schools"¹ with the obvious implication that the Court's *Stone v. Graham*

¹ Advertisement: "After Columbine What Will You Do?" *Citizen* 14 (October 2000): 29. *Stone v. Graham* 449 U.S. 39 (1980), involved a Kentucky state law that mandated that copy of the Ten Commandments be posted in all public school classrooms. The Supreme Court determined that the law was plainly religious and lacked any secular purpose and was, therefore, unconstitutional.

decision to which it referred was a contributory factor in the Columbine tragedy. Conservative religious groups, convinced of the connection between Supreme Court decisions and school violence, set about once again to find ways in which to gain official sanction for the "return" of religious practice to public school classrooms. But there is activity on other fronts as well.

Constitutional prohibitions on returning religious exercises to public schools has led many to private school alternatives. Religious schools in particular, without constitutional impediments to sectarian religious activities, increasingly are perceived by some to be the answer to the so-called moral vacuum that plagues the public schools. But religious schools often are woefully underfunded, lacking the money to adequately compensate teachers and the capital necessary to stock their institutions with equipment and materials comparable to their public school counterparts. This state of affairs has lent support to legislative efforts to provide government aid to private religious schools via vouchers and other instruments. In concert with these legislative maneuvers, the Supreme Court's recent *Mitchell v. Helms* decision erodes constitutional prohibitions against government aid to religious schools by dismantling prior tests that were developed to determine Establishment Clause violations. The plurality opinion delivered in *Helms* amplifies the call for a religious booster shot as a solution to the nation's perceived moral decline and the melancholy in American schools, both public and private.

Public fear in the wake of tragedies like Columbine and public frustration over the inadequate funding of American private schools has begun to soften our nation on one of its founding principles—the separation of church and state. For many this "softening" is a welcomed change. Advocates of the so-called "equal treatment" of parochial education have been heartened by the *Helms* decision, contending that the separationist policies of government historically have harmed private religious schools by denying them access to resources that otherwise would be at their disposal were those schools not religiously affiliated. Carl Esbeck states that "[t]o increasing numbers of Americans, strict separation presents a cruel choice between suffering funding

discrimination or forced secularization.”² These supposed coercive and discriminatory elements of church-state separation are common arguments among those favoring greater governmental accommodation of religious institutions of all kinds.³ As will be seen, however, the evidence proves that church-state separation has served to benefit rather than harm American religious vitality. Furthermore, it will be demonstrated that attempts to alleviate the alleged “harm” of separation inevitably involve the forfeiture of religion’s sacred space under the First Amendment and the ultimate denigration of religious institutions to the status of social service organizations. This essay will show how the kindly intent of bureaucrats to subsidize our parochial schools only can lead to irresolvable complexity and the despiritualization of those religious organizations that we depend upon as a cultural counterweight to the often morally deficient bureaucracies of secular society.

The arguments set forth in this essay undoubtedly will appear to some as melodrama. Many may ask how simply altering our course from a system of church-state separation to government accommodation of religion could possibly reconstitute our nation in such a way as to cause it injury? But the best intentions of government often result in its greatest blunders. It will be suggested here that the *Helms* decision and the course it sets us on—offering government aid to religion as a social good—is such a blunder that will have serious adverse consequences on the vital role that religion plays in American society.

To comprehend the potential damage to American religious vitality done by government benevolence, one first must recognize that the durability of a nation’s spirit is conditioned heavily by the maintenance of separation between its two dominant institutional forms—the political and the religious. Baron de Montesquieu, recognizing the horrors of the church-state monism of

² Carl Esbeck, “Equal Treatment: Its Constitutional Status,” in *Equal Treatment of Religion in a Pluralistic Society*, eds. Stephen V. Monsma and J. Christopher Soper (Grand Rapids, MI: William B. Eerdmans Publishing Company, 1998), 13.

³ Advocates of other governmental assistance programs such as Charitable Choice, which provides government funds and other resources to the social service organizations of religious groups, also employ this argument about the perceived discriminatory consequences of separation. For a more complete treatment of this topic, see: *Welfare Reform and Faith-Based Organizations*, eds. Derek Davis and Barry Hankins (Waco, Tx.: J. M. Dawson Institute of Church-State Studies, Baylor University, 1999).

eighteenth-century France, observed that the way to kill the vitality of religion is through government “favor.” Similarly, Alexis de Tocqueville, having surveyed the American cultural landscape a century later, expressed his insight that “[s]o long as a religion derives its strength from sentiments, instincts, and passions ... it can brave the assaults of time”; however, “when a religion chooses to rely on the interests of this world, it becomes almost as fragile as all earthly powers.”⁴ For de Tocqueville, it was not coincidental that it is in America “where the Christian religion has kept the greatest real power over men’s souls.”⁵ The potential damage of the *Helms* decision to the preservation of the unique American ethos observed by de Tocqueville and others only can be discerned through recognition that the American constitutional system is uniquely susceptible to institutional subtleties, especially those that attempt to benefit religion through favor. There is considerable irony in the fact that the American church-state structure is able to withstand sledgehammer assaults like the great cultural schisms precipitated during the Civil and Vietnam Wars, and the official attacks on liberal and pacifist denominations during the McCarthy era.⁶ Yet, in marked contrast to this resiliency there is vulnerability to the American system and to all church-state systems in modern pluralistic societies. That vulnerability is perhaps best illustrated in the church-state partnerships of modern Europe, where religion is given “equal treatment,” yet statistics on religious belief and practice reflect a pale religiosity as compared to the United States with its tradition of church-state separation. This essay will include an assessment of those systems and attempt to discern what may be learned from the experience of other modern industrialized and pluralistic societies.

The intention of aiding religion through the beneficent emasculation of traditional tests of government establishment observed in the *Helms* case is just the latest instance of our recurrent attempts to kill American religion with kindness. Perceived national crises often precipitate these

⁴ Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (Garden City, NY: Doubleday & Company, Inc., 1969; first vol. originally published in 1835, second volume in 1840), 296.

⁵ *Ibid.*, 291.

⁶ Robert S. Ellwood contends that McCarthyism not only attempted to subvert churches supposedly sympathetic to communism but tried to establish “an anti-Communist state church.” See Robert S. Ellwood, *The Fifties Spiritual Marketplace: American Religion in a Decade of Conflict* (New Brunswick, NJ: Rutgers University Press, 1997).

calls for constitutional adjustment. To date, our nation largely has resisted the temptation to alter the inherent wisdom of our system. However, recent political and judicial changes make the First Amendment and the American religious groups that depend on it more vulnerable to manipulation than has been witnessed in our lifetimes. The plurality opinion from *Mitchell v. Helms* serves as perhaps the boldest challenge yet to the traditional American understanding of the appropriate relationship between church and state.

Mitchell v. Helms

One might suggest that the *Mitchell v. Helms* decision is merely another winding curve in the Supreme Court's meandering journey through its complex set of government aid to religion cases. Indeed, scholars have been keen to observe the lack of consistency in the Court's decisions and even have noted inconsistencies among the opinions of the justices themselves. William Lee Miller in *The First Liberty: Religion and the American Republic* characterized the unpredictability in William O. Douglas's opinions in church-state cases as resembling "the homeward journey of a New Year's Eve reveler."⁷ In fact, the Court never has established an absolute separation between church and state in cases involving government aid to church-related schools. In 1930, the Court determined in *Cochran v. Louisiana State Board of Education* that a state could provide secular textbooks to parochial school students directly so long as it avoided providing aid to the religious schools themselves. This model for government aid to religious schools became known as the "child benefit theory" and has served the Supreme Court well though *Helms* now threatens to render it obsolete. Similar decisions allowing various forms of governmental aid include even the famous *Everson v. Board of Education* (1947) case that incorporated the Establishment Clause and that, ironically, in spite of its "high wall" separationist language, allowed public school districts to provide transportation to children attending private religious schools. *Everson* provides an interesting contrast to *Helms* observed in the wording of the respective opinions by which these

⁷ William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: Paragon House Publishers, 1985), 303.

and all church-state cases illumine a particular Court's disposition toward the First Amendment. In *Everson*, the Court recognized that its ruling in favor of a public program providing transportation to children attending religious schools might be misinterpreted as a blanket endorsement of all government aid not only to the students of religious schools but to the schools themselves. To make clear the true intention of the Court, Justice Black gave perhaps the most detailed, though some would claim erroneous, description of the First Amendment ever written by a member of the United States Supreme Court:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."⁸

Thus the *Everson* decision, while upholding the constitutionality of the New Jersey program that provided public transportation to parochial school students, reinforced clearly its interpretation of the First Amendment as providing for a "wall of separation" between church and state.

Whereas the *Everson* decision appears fearful of misinterpretation, the plurality decision in *Mitchell v. Helms* is fearless, even reckless, in attempting to strike down principles that have served to guide church-state jurisprudence for the past five decades. The *Helms* case involved Chapter 2 of the Education Consolidation and Improvement Act of 1981 that enabled federal funds to go to state and local education agencies that in turn lend educational materials and equipment to public and private elementary and secondary schools to implement "secular, neutral, and nonideological" programs.⁹ This case focused specifically on the distribution of Chapter 2 materials and equipment in Jefferson Parish, Louisiana, which included library books, computers, video equipment, laboratory instruments and other resources. Estimates showed that

⁸ *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947) at 15-16.

⁹ *Mitchell v. Helms*, 530 U.S. 793 (2000) at 21.

approximately 30 percent of the Chapter 2 funds allocated in Jefferson Parish went to private schools and that in the fiscal year 1986-1987, 46 private schools participated in the program, 41 of which were religiously affiliated.¹⁰ The plurality opinion, authored by Clarence Thomas, relied heavily on the establishment tests articulated in *Agostini v. Felton* (1997)¹¹ in affirming the constitutionality of the Chapter 2 program. The members of the plurality (Justices Thomas, Scalia, Kennedy, and Rehnquist) contended that *Agostini* “brought some clarity to our case law” by collapsing the three-prong *Lemon* test that declared unconstitutional any statute that: 1) has a secular purpose; 2) has the primary effect of advancing or inhibiting religion; or 3) creates an excessive entanglement between government and religion; into a simpler two-part test that evaluates statutes by whether they result in religious indoctrination or define their recipients by reference to religion.¹² Echoing *Agostini*, the members of the *Helms* plurality determined that “Chapter 2 does not result in governmental indoctrination because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content. Nor does Chapter 2 define its recipients by reference to religion.”¹³

The plurality opinion in *Helms* is unique, however, not in its determination that a government aid program that encompasses religious schools is constitutional, but for its sweeping rejection of past tests of government establishment and its almost exclusive reliance on the principle of “neutrality” as a constitutional determinant. One of the past criteria that the plurality opinion attempts to do away with is the so-called “direct/indirect” distinction that determines

¹⁰ Of the 41 private religious schools participating in the program, 34 were Roman Catholic. See: *Mitchell v. Helms*, at 23.

¹¹ *Agostini v. Felton*, 521 U.S. 203 (1997) involved Title I of the Elementary and Secondary Education Act of 1965 that stated all educationally and economically disadvantaged children in public or private schools are entitled to publicly funded remedial education services. The Court ruled the Title I program was constitutional and rejected three prior criteria for evaluating such cases, that : (1) permitting public employees to work within religious schools inevitably results in the state-sponsored indoctrination of religion; (2) permitting public employees to work within religious schools necessarily constitutes a symbolic union between church and state; and (3) any government aid that enhances the educational function of religious schools violates the separation between church and state. See First Amendment Center website at www.fac.org/legal/supcourt/96-97/agos_sum.htm; accessed 14 November 2000.

¹² *Mitchell v. Helms*, at 30.

¹³ *Ibid.* at 67.

violations of the Establishment Clause based on the nature of the recipients of government aid. Under this assessment, if a sectarian institution benefits “directly” from a government program, that program is unconstitutional. By contrast, if a student of a religious school is the direct recipient of a government provided benefit and the school that the student attends benefits only indirectly, the program is constitutional according to the direct/indirect criterion. The plurality in *Helms*, however, insists that this test, reinforced in *Grand Rapids School District v. Ball* (1985),¹⁴ merely attempts to prevent the “subsidization” of religion and that recent cases like *Agostini* better address the same issues through the principles of “neutrality” and “private choice.” According to the opinion, “[i]f aid to schools, even ‘direct aid,’ is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any ‘support of religion’”¹⁵

Justice O’Connor’s concurring opinion criticizes the plurality for its rejection of the “direct/indirect” distinction as a criterion for the determination of government establishment of religion. O’Connor notes the plurality’s use of *Witters v. Washington Department of Services for the Blind* (1986) and *Zobrest v. Catalina Foothills* (1993)¹⁶ to substantiate their claim that direct/indirect principle has been effectively replaced by the broader conceptual criterion of “private choice.” Yet, Justice O’Connor observes that “we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use.”¹⁷ Indeed, Justice Rehnquist, who authored the *Zobrest*

¹⁴ *Grand Rapids School District v. Ball* 473, U.S. 373 (1985) involved a Michigan shared time program in which public school teachers were employed by private religious schools to teach secular subjects on a part-time basis. The Supreme Court found this practice unconstitutional, citing the sectarian environment and effective subsidization of religious schools.

¹⁵ This portion of the opinion references *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) at 489, which includes the statement that “[n]or does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion.” See *Mitchell v. Helms*, at 43.

¹⁶ Justice O’Connor’s concurring opinion refers specifically to *Witters v. Washington Department of Services for the Blind*, at 487 and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) at 13.

¹⁷ *Ibid.* at 86-87.

opinion, was careful to distinguish as impermissible those “direct grants of government aid” that “relieved sectarian schools of costs they otherwise would have borne in educating their students.”¹⁸ How is it that Justice Rehnquist now concurs with the plurality opinion in *Helms* that direct government aid to a religious institution may be constitutionally permissible? Perhaps the answer is found in remembering the rather odd parenthetical comment from the plurality opinion that if aid “first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any ‘support of religion’”¹⁹ It would seem that this figurative passing of aid through the hands of private citizens has greatly broadened the reach of the private choice principle and, thus, made the direct/indirect test less relevant to constitutional inquiry. Justice Thomas's opinion effectively extends private choice to include the choices of the administrators of sectarian institutions who make the expenditure decisions under the Chapter 2 program rather than individual students. One wishes that the plurality opinion would have provided a few examples of how government aid might figuratively pass through the hands of private citizens to better understand the nature and scope of the plurality’s private choice criterion. Regardless, the development of the “private choice” test suggests a more permissive attitude by the Court in government aid to religion cases and this test undoubtedly will broaden the reach of government in its interactions with religious groups relative to the more restrictive direct/indirect distinction.

A few opening lines from Justice O’Connor’s concurring opinion testify more generally to the radical broadening of government establishment tests contributed by the plurality in *Helms*:

I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of religious mission is permissible.²⁰

¹⁸ *Larry Zobrest v. Catalina Foothills School District*, at 12.

¹⁹ Refer to note 18.

²⁰ *Mitchell v. Helms*, at 79-80.

Justice O'Connor's observation of the plurality's rejection of the divertibility of funds as a constitutional issue undoubtedly is based on a comment in the plurality opinion that "the evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry...."²¹ O'Connor noted that in *Bowen v. Kendrick* the Court determined that actual diversion of government funds is not permitted under the Constitution; yet, the plurality in *Helms* insists that divertibility of aid as an establishment test is "unworkable." The plurality rejects application of the divertibility test for the reason that it is "boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to realistic concern for preventing an 'establishment of religion.' Presumably, for example, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be included under the respondents' proposed rule."²² From these comments it appears that the Court seeks to apply and elevate a test of "triviality" above that of "content." In other words, direct government aid to a religious school or other institution seems now to be permissible even if that aid is used for religious purposes so long as it is trivial to overall operations. Comments in the opinion also reveal that a fear of using divertibility as a test in government aid to religion cases results from the fact that almost any resource supplied by government is, in a sense, divertible. The plurality opinion states that "any aid, with or without content, is 'divertible' in the sense that it allows schools to 'divert' resources."²³ Yet, this understanding that all aid is divertible was a primary motivation behind construction and use of the "direct/indirect" test of government establishment that the plurality now discards as so much baggage. The plurality sees the potential diversion of aid after disbursement to religious institutions as beyond the purview of government and, therefore, of no consequence to constitutional inquiry. As the result of *Helms*, whether government aid is channeled to religious purposes now rests solely at the discretion of the institution's administration.

²¹ *Mitchell v. Helms*, at 73-74.

²² *Ibid.* at 58.

²³ *Ibid.*

Not content with the effective eradication of the direct/indirect distinction and the divertibility principle, the plurality next takes aim at the “pervasively sectarian”²⁴ test as a determinant of Establishment Clause violations. The opinion acknowledges that there was a period in which the pervasively sectarian nature of institutions aided by government programs was a consideration; however, “that period is one that the Court should regret, and it is thankfully long past.”²⁵ The plurality states that “its relevance in our precedents is in sharp decline”²⁶ and that the Court’s upholding of aid to sectarian schools in *Zobrest* and *Agostini* established new precedents that now obviate the need for the determination of the sectarian status of recipient organizations. More ominously, the opinion articulates another reason for dispensing with the pervasively sectarian principle in that “the religious nature of the recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.”²⁷ The above comment should strike fear in the hearts of accommodationists and separationists alike in that it seems to reveal an Erastian (subordination of church to state interests) disposition of the modern Court in its church-state philosophy. Finally, the plurality opinion suggests that the origin of the pervasively sectarian principle is rooted in the nation’s ignominious history of anti-Catholicism, and it references the near passage of the Blaine Amendment in the 1870s that would have denied government aid to any sectarian group and the case of *Hunt v. McNair* (1973)²⁸ as evidence to support its claim.

This divide and conquer approach of the plurality in dismantling past tests of government establishment denies any synergistic quality to the function of those tests in determining violations of the Establishment Clause. Each of the criteria that the plurality now attempts to jettison has

²⁴ The pervasively sectarian nature of the recipient institution was used as a criterion to distinguish an unconstitutional aid to religion program in *MEEK v. PITTINGER* 421 U. S. 349 (1975) from a similar Ohio plan reviewed in *WOLMAN v. WALTER* 433 U.S. 229 (1977) where the services provided were found to be constitutional because they were performed away from the “pervasively sectarian atmosphere of the church-related school.”

²⁵ *Mitchell v. Helms*, at 61.

²⁶ *Ibid.*

²⁷ *Ibid.* at 64.

²⁸ *Ibid.* at 66. *Hunt v. McNair*, 413 U.S. 734 (1973) upheld a general revenue bond program excluding from participation facilities used for religious purposes.

never functioned in isolation from the others. The plurality opinion employs a form of reductionism to break off the piece-parts and attack them using equally small fragments of prior decisions. Almost any Supreme Court test is susceptible to this style of attack though *Helms* seems an extreme concentration of this technique, and the result is that the direct/indirect, divertibility, and pervasively sectarian principles are virtually eradicated in one fell swoop.

The methods and comments of the plurality in *Helms* demonstrate, if not hostility to, then certainly a laxity toward the First Amendment by four justices and reinforce the perception that a radically new attitude is taking shape on the Supreme Court regarding Establishment Clause jurisprudence. Justice O'Connor observes not only the plurality's dismissal of past establishment tests but the radical elevation of neutrality that "comes close to assigning [neutrality] singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs."²⁹ Further, O'Connor perceives the "overextension" of the plurality in its attempts to wipe out past tests of establishment in favor of its affection for neutrality. O'Connor states that "the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any case, unnecessary to decide the instant case."³⁰

The sweeping nature of the plurality opinion in *Helms* does imply more than simple dissatisfaction with prior methods in deciding First Amendment cases. O'Connor is correct that the implementation of the neutrality principle did not necessitate the abolishment of prior tests. Indeed, the elimination of tests such as divertibility radically conditions the nature of the neutrality that the Court now espouses. Absent the obligation to monitor the ultimate use of government aid by religious institutions, how can government agencies, or the courts for that matter, be certain that the First Amendment is not being violated in programs administered under the neutrality principle? Or, has the attitude of the Supreme Court shifted such that it no longer cares whether government funds are diverted to religious purposes? If so, it is again ironic that the most conservative members of the Supreme Court are now supportive of a neutrality principle that makes government

²⁹ *Ibid.* at 80.

³⁰ *Ibid.*

accountable only for neutral allocations and for initial assurances from recipients that aid will not be used for religious purposes.

Three justices of the Supreme Court have concluded that the integrity of the First Amendment cannot be assured in government aid to religion programs utilizing the neutrality principle in the absence of some system to monitor the ultimate use of disbursements. Justice David Souter, in a dissenting opinion concurred with by Justices Stevens and Ginsburg, observed superficiality as the prime flaw in the Court's neutrality principle:

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.³¹

Justice Souter's statement keenly recognizes the inherent contradiction in the system the Court now advocates: the greater the success of such neutrality-based programs in the absence of other safeguards, the greater will become the dependency of religious schools on government "favor." Even critics of government aid to religion programs like this author initially tend to view such programs as "supplemental" in the overall funding of parochial institutions. Yet, Justice Souter rightly suggests what is not readily apparent—that since programs enabling direct government aid to religious schools now have been constitutionally legitimized, the absence of controls to limit their growth likely means a linear progression of government funds as a percentage of the overall funding of religious institutions that take part in such programs. And, it is important to recognize that the neutrality principle will extend beyond programs involving only church-related schools. Neutrality undoubtedly will become this Court's mantra for deciding the constitutionality of government aid programs directed at all types of religious institutions. Social service programs promoting the interoperability of government and religious groups under the classification of "Charitable Choice" assuredly will become subject to this minimal criteria as well. The expansion of such programs in the absence of controls will engender greater institutional interoperability and

³¹ Ibid. at 164-65.

dependency, subject recipient institutions to increasing governmental oversight, and thereby begin to quash the independent spirit from the religious groups that society depends upon to counter the relatively soulless bureaucracies of government.

As government subsidization of religion grows via such neutral distribution programs, religion necessarily will lose its autonomy and, to some degree, its religious identity. This loss of autonomy by participant groups will result not from the specific intentions of government agencies but rather from the quite normal operations of any bureaucratic arrangement in which one organization becomes dependent upon another for funding. The assurances of politicians that government will limit its oversight to the simple guarantee of neutral disbursement in such programs can be of no comfort to those advocating responsible government. If politicians are able to keep their word and government is so limited, the potential misuse of government aid is obvious in a system with no means of monitoring the ultimate use of such resources. This perhaps best describes the “desired” outcome in the disbursement of Chapter 2 funds addressed in *Mitchell v. Helms*. However, if politicians are not able to keep their word and government oversight of aid distributed to religious groups is accomplished through audit and other invasive functions, even the advocates of neutrality theory should recognize that such programs would be constitutionally impermissible. In one instance, the formal neutrality favored by the Supreme Court in *Mitchell v. Helms* must inevitably lead to irresponsible government while, in the other instance, First Amendment violations become inevitable.

Missing the Mark: Neutrality and The Reordering of Discrimination

Ironically, it is debatable whether these dangerous alterations to the American church-state structure will achieve their desired objective—the elimination of discrimination against religious groups. In fact, it can be strongly argued that the greatest flaw in neutrality programs like the one given constitutional sanction in *Helms* is that they simply miss their stated target. Rather than achieving their purpose of eliminating discrimination against religious groups they merely rearrange the nature of discrimination, often in favor of majority religions or those groups

predisposed to receiving government subsidy. Consider the case of the Jehovah's Witnesses, for example. The Witnesses' denial of the legitimacy of the state and their prohibitions on the involvement of their membership in government activities generally restrict their participation in programs now permitted under the Court's neutrality principle. However, advocates of neutrality might argue that such exclusions are rare, self-imposed, and result from uncoerced acts of conviction. Yet, these arguments simply do not hold.

First, to address the supposition of rarity, it should be restated that there will be no constitutional means of limiting the scope of the neutrality principle to programs providing government aid to church-related schools. This means, therefore, that religious participation in government aid programs is not a dichotomous variable. Rather than simply identifying those religious groups that would and would not participate in school-aid programs, one might envision a continuum of religious participation in government aid programs across the full spectra of social services. This hypothetical continuum could be constructed using the stated positions of American churches regarding Charitable Choice and other programs advocating church-state partnerships. A broad range of social services inevitably will be opened up to potential church-state ventures under the neutrality principle. Religious groups that would fall on the "high participation" end of the continuum likely would include the Eastern Orthodox and Roman Catholic churches, while mainline Protestants and certain minority faiths like the Jehovah's Witnesses would be placed on the "low participation" end. Certain evangelical Christian groups that have moved away from their separationist traditions would fall somewhere in the middle of this hypothetical continuum. Churches undoubtedly will pick and choose to participate in those government programs that are consistent with their beliefs and practices. Roman Catholics would participate heavily in aid to religious education programs but might reject participation in a program that provides funding to churches to provide certain family planning services. Jehovah's Witnesses and Seventh-day Adventists likely would reject all government aid programs. Some evangelical groups might accept funding to support the operation of soup kitchens while rejecting aid to support child-care centers for working moms. Far from rare, every religious group in the country would fall

somewhere on this continuum of participation under any neutrality scheme, and where those religious institutions fall on this continuum would determine the level of government subsidization of the services they provide. Churches whose doctrine permits extensive participation in government programs have at the very least a financial advantage over those whose faith communities that deny such participation. The point of this construct is to illustrate that participation in the system of government subsidization of religion under the auspices of the neutrality principle is heavily conditioned by the traditions of participant faiths and that the continuum envisioned here includes all churches and undoubtedly would result in a very definite and ordered system of discrimination.

Before one dismisses the discrimination in such programs as “voluntary,” we still must ask, is it uncoerced? All institutions in the United States, including the religious, have an intense interest in their own survival. Programs distributing aid under the neutrality principle offer financial inducements for religious groups to participate in certain programs that “government” desires for the nation and that may or may not conflict with certain tenets of the nation’s faith communities. These programs easily can be seen to tempt religious groups to go against their basic principles in order to secure government funding and receive the same benefits of other faith traditions. The key here is that not all issues addressed by such programs will fall into the black and white categories that might be associated with abortion or similar issues. It will be those programs that center on social issues more “in the gray” respecting a faith community’s belief system that will begin the erosion, or perhaps more accurately the assimilation, of our nation’s religious traditions. Consider the evangelical community that falls in the middle of this hypothetical continuum of participation and believes that a woman’s role is in the home and not in the workplace; therefore, it rejects participation in the child-care program for working moms. However, this community is not impervious to the larger society and its leaders recognize that there are working mothers among its membership. The community also recognizes that many other churches do participate in this program and receive government subsidies for their participation. Does the very existence of the government aid program for working mothers not

provide a financial incentive to this evangelical community to drift away from its doctrinal position on the role of women in the family? If it buckles to popular pressure and the government-supplied financial incentive and chooses to participate, after many years of involvement in this program will the members of the community even remember the original position of their tradition regarding this issue? Consider the possibility of dozens, perhaps hundreds, of government aid to religion programs involving many of the nation's faith traditions projected out over a few decades. One might easily predict the homogenization of America's diverse faith traditions into a form of civil religion that encourages a malleability of doctrine shaped by the designs of government programs. And, one must remember Justice Thomas's ominous statement that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."³²

Public resources inevitably will flow to those programs that are popularly affirmed by a majority of the nation to the exclusion of minority faiths. The public never will accept the "nondiscriminatory" allocation of funds to some groups, such as a "Branch Davidian Child Abuse Center" or a program to aid the development of Buddhist missions in the inner cities. It will be those causes that tend toward the center, are noncontroversial and that receive the greatest popular support that will obtain the lion's share of funding from government agencies. Lost in the shuffle will be social issues of importance to minority religions and that have little popular appeal. The result will be substantial funding of programs that attract participation by "acceptable" religions with minority groups left out, an inherently discriminatory situation.

After *Mitchell v. Helms*: Complexity, Confusion, and Conflict

Beyond the reordering of discrimination and the potential growth in doctrinal plasticity among American religious communities, advocates of neutrality like that advanced in *Helms* rarely consider the enormous complexities and potential for conflict that such programs engender. An

³² Refer to note 26.

example of this complexity is reflected in a statement from Justice Brennan's opinion in *Lemon v. Kurtzman* that "when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection."³³ Religious schools applying for government aid administered under the neutrality principle doubtless will wish to retain their current hiring practices. What will happen when a Muslim teacher applies for a teaching position at a Jewish school and is denied employment because of his religion, especially when the applicant realizes that his tax money is helping to provide computers, books and other materials to the school? Certain justices have attempted to persuade us that these religious schools will be able to retain their autonomy in the face of such potential legal challenges. Yet, such assurances are of little value in the increasingly litigious maze of American society. What about the student whose application to a religious school is rejected for the same reason and whose parents come to realize that their tax money now subsidizes certain "secular" functions of the school that rejects their child? Or perhaps a school accepts government aid through one or more programs governed by the neutrality principle yet its teachers do not meet government certification standards and its students consistently fail to meet minimum standards on college entrance exams. Does the government intervene in such a case to ensure a proper return on its investment? Will the public demand such intervention? If the government does demand accountability, will the school be able to defend its policies and practices using the First Amendment or will it be forced to acquiesce to the government's will and/or popular opinion? There will indeed be challenges of many kinds as programs expand that are guided only by the principles of neutrality and private choice. Complexity will arise due to the fact that such programs can never be purely neutral and given that private choice now has been expanded in *Helms* to include institutional rather than purely individual choice.

³³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 651.

The Court's application of formal neutrality suggests that judgments will not be applied or that only minimal judgments will be applied to the doctrine or ideology of groups in determining their eligibility for government aid. Inevitably, however, there will exist some criteria by which religious groups will be forced to qualify for aid as citizens demand accountability for their public funds. If a Wiccan school or a religious school that espouses racism as religious doctrine were to receive aid under a program whose funds were distributed on a "neutral" basis, members of the public undoubtedly would challenge such disbursements much as they now challenge government aid to the National Endowment for the Arts for funding exhibits that are perceived as detrimental to public morality. Were such a challenge ultimately to end up before the Supreme Court, it would have the opportunity to tangibly display its "neutrality." The *Employment Division of Oregon v. Smith*³⁴ case serves as something of a barometer as to how the Court might rule when such challenges to the neutral disbursement of aid occur. In *Smith*, the Court determined that Oregon state law provided the necessary and sufficient neutral ground for judgments on the doctrine and practices of religious groups in determining that persons using peyote in Native American ceremonies may suffer government penalties. Peyote use violated state narcotic laws and its use in religious ceremonies did not exempt it from such law according to the courts. However, many states have laws prohibiting distribution of alcohol to minors, which would make illegal the distribution of sacramental wine to minors in Catholic, Jewish and other religious ceremonies. Yet, the justices contributing to the majority opinion in *Smith* made no reference to possible implications for the religious practices of majority faiths that also violate state laws.³⁵ The

³⁴ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

³⁵ In fact, many states do exempt religious rituals from state laws prohibiting the provision of alcohol to minors. However, these exemptions support Justice Scalia's fears from the *Smith* case: the necessity of creating positive exemptions in law to allow for specific religious practices. The problem is that the Supreme Court appears content that such exemptions are in place to accommodate the majority faiths and it is unwilling to extend legal exemptions to minority religions, reflecting the current majoritarian mood of the Court.

implication of the *Smith* case for government aid-to-religion programs is that it will be only those minority faiths that discover their practices are unacceptable if and when they seek to participate. Yet, the larger point is that the plurality in *Helms* believes it has constructed a "common sense" neutrality criteria for application in government aid to religion cases that is nondiscriminatory while ignoring the overtly majoritarian elements of that neutrality.

Given the outcome of the *Smith* case, it is likely that government will find ways to restrict funding to groups like Wiccans, snake-handling Christian sects, Scientologists, Krishnas, and other minority religions for the very reason that the public will demand it. Will the public stomach government support even of secular functions in schools that also teach the traditions of witchcraft, or Rostafarianism, or Zoroastrianism, or the Branch Davidians? Again, this system of neutrality will present critical choices as legal challenges inevitably arise. If the courts rule in favor of minority groups and allow them to participate in government programs while concurrently attempting to preserve their autonomy in belief and practice, the potential for social conflict is great. A minor example of this was observed at a recent Dallas, Texas city council meeting to which a Wiccan priest was invited to lead the opening prayer. Several audience members protested the prayer and one Christian man had to be physically restrained and led from the building when he attempted to "shout down" the Wiccan priest.³⁶ If a Wiccan prayer at a public event can generate such hostility, one can only suppose that the public's recognition that it is being forced to subsidize a Wiccan school could precipitate a similar if not more extreme response. Government-sanctioned discrimination is the more likely outcome, however. Can one honestly imagine the Supreme Court upholding the legitimacy of state aid to a religious school that

³⁶ Jacquelynn Floyd, "Why all the intolerance, pray tell?" *Dallas Morning News*, 5 October 2000, section A, p. 29.

advocates certain neo-Nazi beliefs such as the extermination of Jews?³⁷ Yet, how can the Court reject the participation of such a group in a program offered under the neutrality principle when merely holding such beliefs is not illegal?

The Supreme Court's almost exclusive reliance on the neutrality principle in conjunction with its radically broadened conception of "private choice" will enable substantial funding of private religious schools through government aid. Yet, there must certainly exist a level at which these institutions will begin to lose their religious identities and assume more secular ones based upon the level of public funding. Again, an understanding of the machinations of bureaucracy suggest this to be so; yet, tangible evidence already exists in American history that similar shifts in the funding of religious institutions have resulted in the eventual loss of religious identity. In *The Soul of an American University*, George Marsden chronicles forces that reshaped the nation's university system from a complex of sectarian colleges established as part of a "religious-cultural vision" to the largely secular system of today. One of those forces was a monetary incentive provided by one of the largest benefactors of American universities, the Carnegie Foundation, in the early twentieth century to schools in exchange for them dropping their denominational identities.³⁸ Some schools found the temptation irresistible and opted to drop their religious associations. Marsden suggests that funding constraints were a critical factor in reshaping the American university system such that students today attending schools like Harvard University, the University of Chicago, and Stanford University are rarely cognizant of the original religious affiliations of those institutions. Is it not possible that the same fading of religious identity could

³⁷ The Supreme Court case of *Bob Jones University v. United States* offers an example of how the Court might rule in cases where government aid is made contingent on the conformity of religious belief and practice to public morality. In that case, the Court ruled that the IRS could deny tax-exempt status to the university because of its racially discriminatory admissions policies, even though the school contended that such policies were a matter of deeply and sincerely held religious beliefs. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

³⁸ George M. Marsden, *The Soul of an American University* (New York: Oxford University Press, 1994), 257.

occur over time to primary and secondary religious schools as participation in government-funded programs increases?

Neutrality and the Morphing of the Church into a Secular Service Organization

A primary criticism of the neutrality principle offered in this essay has been that, in practical terms, neutral disbursements of public aid to religious institutions cannot remain purely neutral. Some criteria must exist by which government agencies determine their beneficiaries; however, establishing a minimal qualification that simply verifies that the practices of recipients conform to law will not prevent conflict over the nature of groups receiving aid. As an analogy, one can look to the social conflict resulting from attempts to implement programs offering publicly funded abortion services. Although abortion is a legal practice under the Constitution, religious groups throughout the country have protested such programs on the grounds that they force individuals who consider abortion to be immoral to fund this practice. Certain churches have advocated civil disobedience in efforts to prevent this perceived form of government coercion; and, in some cases, individual Christians have resorted to violent acts directed at publicly funded abortion clinics. One may also look to the Supreme Court case of the *Church of the Lukumi Babalu Aye v. City of Hialeah* to see the potential for conflict. In that 1993 case, the Court determined that the city council of Hialeah, Florida had improperly established ordinances to restrict the animal sacrifice practices of the Santeria religion, responding to public concerns that these practices were “inconsistent with public morals, peace or safety.”³⁹ The Court found that the ordinances were unconstitutional in targeting the practices of a particular church and it overturned the court of appeals ruling that upheld them. Given the Court’s decision in this case, is the government not obligated to allow this church or any of its affiliates such as a school to participate in programs

³⁹ *Church of the Lukumi Babalu Aye v. City of Hialeah* 508 U.S. 520 (1993) at 526.

administered under the neutrality principle? How might the public react to discovery that it is helping to fund certain functions of a church that practices animal sacrifice? The argument here is that by again forcing the public to fund religious schools or other institutions that may or may not adhere to beliefs and practices consistent with those of the larger society, an inherently contentious situation is created.

Scholars have sought to shape the nature of neutrality such that it supports the administration of programs that are truly neutral and yet less susceptible to frictions arising between the free exercise of religious groups and the values of the larger society. Stephen Monsma's conception of "substantive neutrality" attempts to add greater depth to the neutrality principle and to provide an alternative to the Court's "formal neutrality" that denies the need to acknowledge the religious identities of parties in First Amendment adjudication. This is necessary because the Court's use of formal neutrality has resulted in decisions like *Smith* where, as Professor Monsma observes, "special protections for religious minorities are not mandated by the First Amendment. It [the Court] has held that as long as regulatory policies of general application do not single out religious groups for discriminatory treatment, the Free Exercise Clause does not require special protections for the practices of religious groups."⁴⁰ Thus, the *Smith* decision was the logical consequence of the Court's application of its "formal neutrality" concurrent with its loosening of limitations on government establishment. Professor Monsma's conception of substantive neutrality is a more thoughtful accommodationist standard than the Court's current neutrality principle and is, therefore, deserving of consideration.

To begin, "substantive neutrality" differs from the Court's application of formal neutrality in the sense that substantive neutrality is concerned with the *effect* of government action rather

⁴⁰ Stephen V. Monsma, "Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground," *Journal of Church and State* 42 (Winter 2000): 23-24.

than its mere *intent*. According to Monsma, substantive neutrality questions “whether the challenged government action has the *effect* of creating either incentives or disincentives for persons to follow their sincere religious beliefs.”⁴¹ This is a nice beginning for it immediately relieves the offense of the *Smith* decision. In that case, the state’s passage of a law that made illegal the use of the hallucinogenic drug peyote without providing an exemption for its religious use had the *effect* of creating a disincentive to religious practice by threatening the arrest of persons who participate in this practice. The government’s action, therefore, would have been found unconstitutional using the substantive neutrality principle.⁴² Substantive neutrality then at the very least eliminates the lax superficiality of formal neutrality by determining that government has a responsibility to assess the effects of its actions. Presumably use of this principle would have expanded constitutional inquiry in the *Helms* case as well in that substantive neutrality would have required that a determination be made as to whether aid under the Chapter 2 program had the effect of providing incentives or disincentives to religious practice. While the Court’s decision in *Helms* under substantive neutrality might well be the same, the greater depth of substantive neutrality could potentially lead to a resurrection of the divertibility test, for example, since the effect of government aid could not be fairly determined without an assessment of the ultimate disposition of that aid.

So, if substantive neutrality can help prevent discrimination against religious groups in their provision of social services while providing greater protections of religious liberty, why is it not superior to both the formal neutrality now espoused by the Supreme Court and the separationist principles developed in prior Court decisions? In the case of the former, it is agreed that substantive neutrality is superior to the Court’s formal neutrality as applied in *Helms*. However,

⁴¹ *Ibid.*, 27.

⁴² This is the conclusion of Professor Monsma and not of this author. See *ibid.*, 29.

substantive neutrality still suffers from certain deficiencies vis-à-vis separation that have to do with the determination of the nature of services provided by religious groups, the classification of such groups, and how such decisions are made. As will be seen, these functions are critical to preservation of the autonomy of religious groups and to preservation of the rights given such groups under the First Amendment.

One of the critical provisions of Professor Monsma's substantive neutrality is that it "includes secularly based systems of belief under the scope of the First Amendment's freedom of religion provisions. To favor religious systems of belief over secular systems of belief, or vice versa, would be a violation of governmental religious neutrality."⁴³ However, a caveat is added such that not just any secular system is included but rather only "secular belief structures that serve as functional equivalents in the lives of their adherents as religious belief structures do in the lives of the devout."⁴⁴ Three criteria are introduced under substantive neutrality in the determination that a secular "belief system" should be granted protections under the First Amendment with regard to those beliefs, that: 1) they are sincerely held over a period of time; 2) they play an integrative or overarching role in one's life; and 3) they involve one in some sort of communal or shared experiences.⁴⁵ These criteria extend greatly the reach of First Amendment protections to groups of all kinds. A non-profit organization, for example, that exists to provide aid to children in Third World countries easily can be seen to meet the criteria above. It would require only that the proprietors sincerely believe over a period of time that their purpose in life is to aid poor children in underdeveloped countries. The communal experience requirement is met simply through interaction with the children themselves.

⁴³ Ibid., 28.

⁴⁴ Ibid., 29.

⁴⁵ Ibid.

Yet, this greater inclusiveness that offers First Amendment protections to secular organizations in the interest of nondiscrimination will have a corrosive effect over time in society's understanding of what is religious. Worse, in the context of government aid programs will it not be government agencies that determine recipients and thereby become the ultimate arbiters of what are sincerely held beliefs worthy of First Amendment protections? Even if government programs could be purely neutral regarding their recipients (as has been challenged above), the result would be the gradual assimilation of secular and religious groups providing social services into one indistinguishable whole. The continued association of religious and secular institutions as categorized by government agencies will lead to simplistic associations in the mind of the public and the loss of religious identity of sectarian organizations.

Professor Monsma provides a hint of this possibility in his determination that the Supreme Court “got it right in the *Rosenberger* case.”⁴⁶ In *Rosenberger v. Rector* (1995), the Court determined that a religious group at the University of Virginia had the same right as secular groups to be subsidized by the university (with student activity fees) in its publications. Monsma states that “[o]nce the University made the decision to fund student publications, it could not single out religiously based publications for the handicap or disadvantage of no-funding.”⁴⁷ Yet, again what is missed in this attempt to eliminate perceived discrimination is what James Madison and other founders recognized was essential to preservation of the identity and autonomy of religious groups in this country. In his famous *Memorial and Remonstrance*, Madison states that religion must remain beyond the “cognizance” of civil government, not merely neutral in its eyes. This statement is no mere hyperbole but rather the recognition of a critical subtlety in church-state relations that is being lost in the United States today. Once government becomes “cognizant” of

⁴⁶ *Ibid.*, 30. See also *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995).

⁴⁷ Monsma, 30.

religion and begins to treat it neutrally, it inevitably begins the transformation of religious institutions into “one among many” similar organizations by using its authority to functionally associate religious and secular groups in the same categories. In reflecting on *Rosenberger*, one observes that the religion clauses of the First Amendment are unnecessary to decide the case at all. The freedom of speech provision would suffice to enable government subsidization of the publications of religious groups alongside secular organizations. The religion clauses exist for an entirely separate purpose—to ensure that religion retains its sacred space in our society that perhaps even the founders realized would be challenged by the encroachments of liberalism and modernism.⁴⁸

The danger now posed by the concept of substantive neutrality is that religious groups will become nondescript members of a social service organization class vying for governmental aid along with their “secular equivalents.” Church-state separation, by contrast, ensures the identity of religious groups as religious so long as “they” choose to identify themselves in that way. No external authority compares them to supposed secular equivalents in identifying potential participants in government programs. Under separation, there is no need for governmental oversight or audit of religious organizations, nor is there the temptation of religious groups to stray

⁴⁸ Lack of recognition of this critical subtlety also can be noted in the arguments of those accommodationists who contend that the Establishment Clause intended only that a single religion not be established by the state. This argument is easily refuted by the historical facts of American constitutional development. The Hamilton Plan submitted on 18 June 1787, for example, clearly states that “[n]or shall any Religious Sect, or denomination, or religious test for any office or place, be ever established by law.” In fact, four of the eleven First Amendment proposals that went before the House of Representatives between 28 July 1789 and 25 August 1789 contained wording that barred only the establishment of a national religion or certain religions over others. Two versions included the wording that “[n]o religion shall be established”; one stated that “[n]o religious doctrine shall be established”; and another began “[n]o national religion shall be established....” Had the framers desired only that no single religion be established by the state, they had ample opportunity to select an amendment that reflected that position. They most assuredly had more in mind, however, because of their recognition of what such a lesser prohibition on government establishment would mean to the society. Madison particularly recognized that the interaction of political and religious institutions invariably leads to the intermixing of values and a collusive union favoring the consolidation of power and denying individual conscience. See *The Records of the Federal Convention of 1787*, ed. Max Farrand, 3 vols. (New Haven, CN: Yale University Press, 1966), 3: 599, 628 and *The Congressional Register*, 15 August 1799, 39.

from doctrine in order to qualify for government subsidization. And, as has been demonstrated, the supposed discrimination of separationism is only reordered under any system of neutrality, not eliminated. Ironically, the plurality opinion in *Helms* creates a situation where government is obligated to support certain religious groups that might not be self-sustaining in the "free market of ideas" because it must fund all groups without respect to doctrine or ideology. This grants to faith groups that are receptive to government subsidy something of an entitlement in their provision of social services that are supported by government programs—an improper entitlement under the American constitutional system. Government has the responsibility to *protect* minority ideas and the ability of proponents to articulate them, but it should not influence the *degree* of pluralism in society by subsidizing religiously or ideologically based groups, even if it claims to do so in a neutral fashion.

The potential damage done to American religion by systems of neutrality in the interest of simply reordering what inherently will be inequitable is a far greater price than can ever be justified by its marginal benefit. Many entrepreneurs in American society will testify that the cost of involvement in government programs designed to “aid” their businesses is simply not worth the benefits received. Government bureaucrats are harshly criticized as the bane of the free enterprise system, and it is illogical to conclude that those same officials can function more effectively in dealings with religious groups while juggling the additional complexity of First Amendment limitations. These obvious contradictions demonstrate the desperation of those who insist that government-aided religion is the cure for the nation’s supposed malaise.

Neutrality and the Future of American Society: The European Model

Recent political and judicial changes in the United States portend a future where church-state partnerships administered under the auspices of neutrality are likely to burgeon. The hotly contested election of George W. Bush as the forty-third president of the United States and the likelihood that the new president will be required to make at least one Supreme Court nomination during his administration are ominous signs that the country may soon change in a fundamental way. Bush's support of school vouchers and Charitable Choice and his past appointment of conservative justices in Texas suggest that the balance of power in the Supreme Court soon will shift decidedly in favor of church-state partnerships and an expanded use of formal neutrality in deciding government aid to religion cases. It is reasonable then to consider the potential ramifications of this past election to the restructuring of the traditional American church-state relationship and the reshaping of the American ethos.

Anyone reading the plurality opinion in *Helms* and speculating on the likely church-state views of any potential Bush appointee to the Supreme Court can only come to the conclusion that today's plurality will become tomorrow's majority. The omen from Justice Souter's dissenting opinion in *Mitchell v. Helms* is clear: "there is no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority."⁴⁹ And, one must remember that the plurality in *Helms* advocated the more offensive formal neutrality rather than the substantive neutrality advanced by Stephen Monsma that is more sensitive to the free exercise rights of religious minorities. Given the number of school voucher programs on state legislative dockets throughout the nation, the advocates of Charitable Choice programs in the United States Congress and other factors, there can be little doubt that church and state are soon to be joined at the hip in our culture. What will this mean for American society, and how might we predict cultural changes resulting from recent American political decisions? To assess the potential changes, it is

appropriate to examine existing countries that are close to the United States in terms of their industrialization and demographic composition, yet founded on church-state principles that enable the neutral treatment of religious institutions by government.

Proponents of neutrality often put forward their alternative to church-state separation as a new model in social theory. In fact, however, the neutral treatment of religion by government has been a standard social construct of many European countries for centuries, extending back to the Treaty of Augsburg (1555), the Edict of Nantes (1598), and other “religious rights” documents that legitimized faiths outside the Roman Catholic tradition. If neutrality is indeed good for religion and considering its well-established tradition in Europe, we should be able to identify one or more European countries that exhibit a thriving religiosity based on this church-state model. The European continent also offers a sampling of countries that are close to the United States in terms of their religious pluralism and liberal political institutions; the essential differentiator is that most are structured on principles of church-state accommodation.⁵⁰ Therefore, European societies offer perhaps the best examples of where American society is headed religiously if it continues down the path of neutral treatment.

A statistical comparison of European and American religion reveals some quite startling contrasts. Poll results from 1994 revealed that 44 percent of the American people attend at least one church service per week as compared to 10 percent in France, 14 percent in Great Britain and 18 percent in the former West Germany.⁵¹ A full 82 percent of Americans described themselves as “religious,” compared to 48 percent in France, 54 percent in West Germany, and 55 percent in

⁴⁹ *Mitchell v. Helms*, at 209.

⁵⁰ In a multitude of European nations, neutrality principles are applied to make available government money to private religious schools, church-sponsored social programs and a range of other religious-based services.

⁵¹ Statistics from *The Public Perspective* (April/May, 1995), 25; reported in Stephen V. Monsma and J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Lanham, Maryland: Rowan & Littlefield Publishers, Inc., 1997), 17.

Great Britain.⁵² It is not only the statistics but the statistical “trends” of European religiosity that demonstrate significant dissimilarities from American indicators of religious adherence. In the Netherlands, for example, between 1959 and 1986 the percentage of Roman Catholics among the general population dropped from 37 to 31 percent, the percentage professing membership in the two largest Reformed denominations dropped from 38 to 21 percent, and those stating “no religious preference” climbed from 21 to 44 percent.⁵³ England demonstrates a similar trend where the “rate of active church membership” between 1970 and 1990 dropped from 22 percent to 11 percent.⁵⁴ One researcher summarized neatly the differences between American religiosity and that of most of the rest of the industrialized world by stating, “By just about every measure that survey researchers have conceived and employed, the United States appears markedly more religious than its peers in the family of nations, the other industrial democracies.”⁵⁵

Not coincidentally, many of the statistics cited here that attempt to represent national religiosity came from *The Challenge of Pluralism: Church and State in Five Democracies*, a book by Stephen Monsma and J. Christopher Soper. The book provides an insightful evaluation of church-state policy across five industrialized countries: the United States, the Netherlands, Australia, Great Britain and Germany. Yet, the statistics contained in this book seem to lend support to the separationist cause by reflecting the anemic status of religion in the accommodationist countries relative to the United States. Do we not risk a similar decline in religiosity by adapting the same neutrality principle that has characterized much of Europe for

⁵² Statistics from Everett Carl Ladd, “Secular and Religious America,” in Richard John Neuhaus, *Unsecular America* (Grand Rapids, Mich.: Eerdmans, 1986), 16; reported in Monsma and Soper, 17.

⁵³ Statistics from G. A. Irwin and J. J. M. van Holsteyn, “Decline of the Structured Model of Electoral Competition,” in Hans Daalder and Galen Irwin, eds., *Politics in the Netherlands: How Much Change?* (Totowa, N.J.: Cass, 1989), 34; reported in Monsma and Soper, 53.

⁵⁴ Active church membership was described in this survey as attending church once or more per week. See Monsma and Soper, 122.

⁵⁵ Ladd, 16; quoted in *ibid.*, 17.

decades, even centuries? Might it be true that the dynamism and vitality of religion in America is attributable to the separation principle? Is it not true that Americans voluntarily support their religious institutions because government fails to do it for them? Monsma and Soper acknowledge this seeming contradiction in their conclusion and they explore the theories of Roger Finke, Rodney Stark and Laurence Iannoccone that contend that an American climate of vigorous competition among religious groups inspires the uniquely American spiritual vitality. However, Monsma and Soper determine that separation is not unique as a religiously invigorating form of church-state policy through its impacts on religious competition:

We see no reason to conclude, however, that a policy of strict church-state separation is the only one that would facilitate competition among the churches. Our proposal would not inhibit competition or make America more like its European counterparts in terms of religious vitality. Our policy calls for the elimination of any state-imposed monopoly—religious or secular—that is discriminatory among ideological perspectives....⁵⁶

There can be no question, however, that an American church-state system that abandons separation in favor of any form of neutrality necessarily becomes more like European models by the mere fact that government would subsidize certain activities of the American churches. If government subsidization of religious activities can contribute to a loss of spiritual vitality in the same way that political conservatives perceive government subsidy often contributes to a loss of entrepreneurial vitality in the economy, then the conclusion of Monsma and Soper is doubtful. The more serious question is the matter of degree, for it is likely that the degree to which government programs influence American religious vitality will depend on their pervasiveness. Where is the logical point at which to cap the government subsidization of religion? Will only religious schools be subsidized under the new system of neutrality and by what legal means can government be so limited? What about religious missions and soup kitchens, homes for unwed mothers, drug abuse rehabilitation centers, care programs for the aged, and so on? By what means

can the government or the churches themselves determine that it is proper to subsidize one of these services but not another? There certainly is no evidence in other areas of society that government itself can locate this optimal point of subsidization.

Conclusion

It is the futility of this unfolding and drastic alteration to the American ethos that is most disconcerting. This essay has demonstrated that the changes that advocates of neutrality—including the justices of the plurality in *Helms*—wish to impose on society cannot achieve their stated goal: the “elimination” of discrimination against religious groups. At best, neutrality will reorder discrimination such that those religious groups that are more willing to accept government aid will be subsidized to a greater degree than those groups that are less willing to accept aid. As churches become more dependent on government favor, they work their way up into the hierarchy of government favoritism. This “incentivizing” not only of dependency but of conformity to a standard that, in Justice Thomas’s words, “adequately furthers the government’s secular purpose” only can be harmful to American religious vitality. Religion with its hand out can never speak with a prophetic voice. It will acquiesce to government requirements in order to insure its continued funding, and it will become more technical in its terminology and more secular in its ideology in order to compete with the other organizations with which it is “classed” by government as providing equivalent social services. Religious groups with strict prohibitions against institutional cooperation with government will find themselves at an increasing financial disadvantage relative to other faith groups as neutrality-based programs expand.

Equally disconcerting is the fact that the Court’s approval of neutrality-based government aid to religion programs is wholly unnecessary. Current law enables religious organizations to receive government funds for the operation of certain social programs, so long as those funds are

⁵⁶ Monsma and Soper, 221.

not commingled with funds used to advance their religious messages. While there is an admitted sacrifice in religious entities not being able to deliver social services in the context of their religious motivations for doing so, this arrangement does allow religious groups to partner with government in administering social services. Programs administered under the formal neutrality now advanced by the *Helms* decision would see limitations on proselytization and religious advancement disappear, denying the religious liberty of American citizens whose receipt of benefits might be conditioned upon their willingness to first hear a religious message.

This author makes no pretense of understanding fully the dynamics that enables the church-state separation of American culture to contribute to a religious vitality far superior to the church-state accommodation of European countries, but the evidence is irrefutable. If we are willing to take a lesson from our European friends, we will know that government aid to religion is a misnomer—a wolf in sheep's clothing. Because the essence of religion deals with the sacred rather than the temporal aspects of humanity, it differs in kind rather than degree from other aspects of life which government supports. Recognition of this fact provided the architectural wisdom that contributed to the subtle but ingenious wording of the First Amendment. Members of the Supreme Court now wish to use a sledgehammer to reshape that subtle and delicate instrument. And, there is fear that once that instrument has been reshaped, the sledgehammer will be the only tool capable of molding it again to whatever coercive purpose that government or even the people desire. If the United States adopts a system of neutrality in church-state relations, it will be most difficult to return to genuine church-state separation even if it is recognized that neutrality has been harmful to the country's religious vivacity. Current political difficulties in attempting to lessen the size of the welfare state testify to this postulate.

Have Americans become so fearful of our ideological diversity and the country's perceived moral decline that we are willing to place at risk our religious vitality, perhaps the most distinctive feature of American society? Our inability to come to agreement on the importance of our founding principle of church-state separation to the nation's identity and ethos is conditioned by William Lee Miller's observation that "religious liberty was more central to the nation's original moral self-definition than is comprehended...."⁵⁷ The farther we drift in time from our nation's origin, the greater our disposition to tweak the system, to attempt to reshape our national ethos using the coercive power of government. Our nation has looked in the mirror and, disgusted, has determined that changes must take place. But what changes? Do we commit to a facelift or to a program of vigorous exercise? How do we exorcize the demons that supposedly inhabit our national soul without damaging the very spirit of the nation itself? Are we willing to settle for official programs designed to promote a civic religiosity at the likely expense of spiritual vitality? For the political conservative who laments the damage done to the spirit of the nation's underclass by government-aid programs for the poor, such questions as these should not seem hyperbolic.

It is offered here that our nation has misdiagnosed the cause of its malaise. We have determined that the constitutional denial of the "right" to have government-sponsored generic prayers bellowed out over faulty PA systems at high-school football games has produced a generation of hedonists who have no place for God in their lives. And a similar constitutional denial of government aid to religious schools only intensifies that belief. In the midst of all this "denial," Americans are afraid to confront the possibility that our affluence may contribute to our loss of spiritual vitality and, by consequence, to society's moral decay. American Christian protests over not having the Ten Commandments posted on the walls of every schoolhouse

⁵⁷ William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: Paragon House Publishers, 1985), 230.

cushions the guilt of parents who acquiesce to the increasing material desires of their children and fear the ultimate effects that such acquiescence may have on them. Is it possible that we seek relief from that guilt through attempts to have government make us once again a religious people, initially to begin in our schools but inevitably to encompass many areas of our society? However, if we sacrifice our nation's authentic spirituality for a government-sponsored civic faith, we minimize hopes for future Great Awakenings that might initiate spiritual renewals capable of reforming our increasingly materialistic culture. Church-state separation has one quality that neutrality or other forms of accommodation can never eclipse: it denies Americans a cushy, feel-good religiosity that conforms to the larger norms and values of society. Separation demands that we as individuals live our faiths often over and against the culture and it denies the right of government to attempt to live our faiths for us. The tradition of church-state separation is the one true purely American virtue. If we change it, we change the American ethos and risk jettisoning the core principle that has made America one of history's greatest achievements.

Derek H. Davis (B.A., J.D., M.A., Baylor University; Ph.D., University of Texas at Dallas) is Professor of Political Science and Director of the J.M. Dawson Institute of Church-State Studies, Baylor University, and Editor of *Journal of Church and State*. He is the author, editor, or coeditor of thirteen books, including *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* (2000 by Oxford University Press). He acknowledges his appreciation to Chuck McDaniel, a doctoral student in Church-State Studies at Baylor University, for assistance in the preparation of this essay.