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RELIGION IN THE PUBLIC SCHOOLS AFTER *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE*: TIME FOR A NEW STRATEGY

Steven W. Fitschen*

In this Essay, Steven Fitschen, President of the National Legal Foundation, argues against the Supreme Court's ruling in Santa Fe Independent School District v. Doe, *and calls for a new strategy in litigating similar cases. Fitschen proposes a "thirty-year plan" because he believes that the current Court composition, which he sees as driven by personal predilections rather than by precedent, was partly responsible for the outcome of* Santa Fe. *Fitschen argues that the current Court has largely ignored Establishment Clause precedent, and that any new, effective strategy will be slowly implemented. The thirty-year plan calls for less perfunctory reliance on free-exercise-as-free-speech strategy, and asserts that the Establishment and Free Exercise Clauses are really two sides of the same coin, rather than in tension with each other. Fitschen also draws upon historical arguments that although establishment of religion is prohibited by the First Amendment, acknowledgment, accommodation, and even encouragement of religion is not. The thirty-year plan will be successful when everything short of establishment passes constitutional muster, and when mere acknowledgment, accommodation, and encouragement are not falsely characterized as establishment by opponents. Fitschen is hopeful that a reminder of "historical reality," as articulated by Justice Story, will make the thirty-year plan a feasible new strategy for the future.*

* * *

INTRODUCTION

I thoroughly enjoyed participating in William and Mary's Institute of Bill of Rights Law's Student Symposium on February 21, 2000. A particularly enjoyable part of the Symposium was playing the part of a Supreme Court Justice in the hypothetical jurisdiction of Wythe as we judged the final round of the Moot Court Competition for first-year law students. The problem the students argued was based upon a football prayer fact pattern. This fact pattern, in turn, was based loosely upon the then-pending *Santa Fe Independent School District v. Doe*[1] case.

Of course, since the Symposium, the Supreme Court has handed down its

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[1] 530 U.S. ___, 120 S. Ct. 2266 (2000).

decision in *Santa Fe*. From the point of view of my organization, the National Legal Foundation, the decision was an unmitigated disaster. Explaining why we disagree with the opinion will serve as a good vehicle to explain some of the National Legal Foundation's views on Free Exercise and Establishment Clause jurisprudence.

Before I begin this explanation, however, I would like to mention one other aspect of the Symposium that will help the reader understand the National Legal Foundation's approach to these issues. After the Symposium concluded, I had several opportunities to interact with students who had attended. Perhaps the most frequent sentiment I heard was amazement that the speakers representing each side of the debate were not in full agreement with each other. In other words, students were surprised that Steve Aden, of the Rutherford Institute, and I did not always agree, and that Ellen Johnson, of American Atheists, and Elliot Mincberg, of People for the American Way, did not always agree. In this age of polarized public debates, both the "Religious Right" and the "Secular Left" are assumed to be monolithic. The students found out otherwise.

Of course, those of us in these two camps know this about ourselves and our opponents. However, it was refreshing to see students get a glimpse behind the stereotypes and understand, at least in a small way, the different perspectives, not only among opponents, but also among allies.

This point is also germane to my comments in this Essay. The view of the National Legal Foundation on Free Exercise and Establishment Clause jurisprudence matches that of many, if not all, of the other Religious Right public interest law firms in some regards but also deviates from those views in other regards. Thus, to return to the *Santa Fe* case, the National Legal Foundation would agree with most Religious Right groups that one reason the case came out the wrong way (from our perspective)[2] stemmed from the current composition of the Court. However, I also believe that, to a large extent, *Santa Fe* was a self-inflicted wound.

First, I will briefly address the issue of the current Court composition affecting the outcome in *Santa Fe*. I believe that there can be no serious doubt that this decision was driven by the personal predilections of the Justices. We cannot say that the *Santa Fe* decision was driven by precedent. First, the Supreme Court, during the last two terms, has shown no intention of being bound by Establishment Clause precedent. During the October 1996 term, in *Agostini v. Felton*,[3] the Court

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[2] One of the nice things about participating in a symposium and writing an essay is the greater linguistic freedom these formats offer over law review articles. As was obvious to all who attended the Symposium, the panel was composed of two members of the "Religious Right" and two members of the "Secular Left." All four of us represent "movement" organizations. Therefore, it should go without saying that when I describe a case as coming out the "wrong way" or make similar statements of judgment, I am representing the institutional position of my organization.

[3] 521 U.S. 203 (1997).

overruled *Aguilar v. Felton*,[4] in whole, and *School District of Grand Rapids v. Ball*,[5] in part.[6] In the October 1999 term, the same term in which *Santa Fe* was decided, the Court in *Mitchell v. Helms*[7] overruled, in part, *Meek v. Pittenger*,[8] and *Wolman v. Walter*.[9] This should be no surprise, because the Court and various individual Justices have routinely and roundly criticized their own Establishment Clause jurisprudence.[10]

However, even if the Court was not willing to overturn any more of its precedents—namely, *Lee v. Weisman*,[11] the graduation prayer case—it easily could have decided *Santa Fe* correctly. While this Essay is not the place to pursue an in-depth case analysis, it suffices to say that *Santa Fe* was easily distinguishable from *Lee*, and the Court could have accepted Santa Fe's argument that the Does' facial challenge should have failed.[12] Finally, we must wonder why the Court reached out for the football prayer issue, when the opinion in the case below dealt almost exclusively with graduation prayers.[13]

I. THE SELF-INFLICTED WOUND

The National Legal Foundation would agree with most Religious Right groups that under a proper Establishment Clause jurisprudence, *Santa Fe* would have come out the other way. We would also agree that with the current makeup of the Court, we are not likely to get a proper jurisprudence. However, I also believe that in other respects, *Santa Fe* was a self-inflicted wound. This is where the National Legal Foundation parts company with some of our allies. This is just one example of how, as the students observed, the Religious Right is not monolithic.

In particular, I think it has been a mistake to posture free exercise claims and defenses as free speech cases. This was a deliberate tactic on the part of some of my colleagues. The idea was this: the Court was composed of Justices such as Brennan, Marshall, and Blackmun. Both these Justices and the holdings of free

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[4] 473 U.S. 402 (1985).

[5] 473 U.S. 373 (1985).

[6] *Agostini*, 521 U.S. at 236.

[7] 530 U.S. ___, 120 S. Ct. 2530, 2555 (2000).

[8] 421 U.S. 349 (1975).

[9] 433 U.S. 229 (1977).

[10] As just one example of the Court's self-criticism, see Justice Scalia's concurrence in *Lamb's Chapel v. Center Moriches Union Free School District.*, 508 U.S. 384, 397-401 (1993) (summarizing much of the criticism to that date).

[11] 505 U.S. 577 (1992).

[12] See Chief Justice Rehnquist's dissent in the case for an able discussion of both of these points. *See Santa Fe*, 120 S. Ct. at 2285-87 (2000).

[13] *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 811 (5th Cir. 1999), *aff'd*, 530 U.S. ___, 120 S. Ct. 2266 (2000).

exercise cases were against us. However, these Justices saw themselves as champions of free speech. Therefore, we should litigate under the Free Speech Clause. The theory has a natural attraction. After all, much of the exercise of religion does involve speaking.

However, the fly in the ointment was that these Justices would never go near anything that smacked of establishment. This would prove a special problem in the context of religion in the public schools. Therefore, the strategy that was advanced drew a distinction between student-led, student-initiated speech and all other types of speech. Inherent in this strategy—at least some versions of it—was to throw in the towel on school board members', superintendents', teachers', administrators', and support staff's religious speech.

This strategy seemed to work at first. In fact, this strategy was given a boost by a case that the National Legal Foundation won at the United States Supreme Court. In her opinion in the Bible club case, *Board of Education of the Westside Community Schools v. Mergens*,[14] Justice O'Connor wrote that

> there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.[15]

In the *Mergens* case, the constitutionality of the Equal Access Act was upheld.[16] This victory has led to the formation of thousands of Bible clubs on public school campuses throughout the United States.[17] In *Mergens*, we made free speech arguments. However, we made those arguments because the Equal Access Act itself spoke in terms of free speech. The entire case revolved around the Act's

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[14] 496 U.S. 226 (1990).

[15] *Id.* at 250.

[16] *See id.* at 253.

[17] Letter from Doug Tegner, National Coordinator, Challenge 2000, to Steven W. Fitschen, President, National Legal Foundation 1 (Nov. 9, 2000) (on file with author). In his letter, Tegner documents 14,268 clubs that have voluntarily registered with Challenge 2000 and been added to its database. He also explains that approximately 1,000 more clubs need to be added from hard copy records. In addition, Tegner estimates, based upon the work of his organization over the past four years, that between 20,000 and 23,000 additional clubs have not yet registered with Challenge 2000. Tegner also estimates that as many as fifty percent of all clubs have been created in the past two years alone. *See id.*; *see generally* EverySchool Alliance, *available at* http://www.christianity.com/everyschool (last visited Jan. 25, 2001) (an online database that contains a national listing of student-led Bible clubs).

phrase "limited open forum."[18]

The strategy achieved its most common form after *Lee v. Weisman*[19] and the *Jones v. Clear Creek Independent School District*[20] cases. After the Supreme Court held that a graduation prayer delivered by a member of the clergy under the direction of a school policy was unconstitutional in *Lee*, the Court dealt with the case of *Jones v. Clear Creek Independent School District* (*Clear Creek I*).[21] This case, which came out of the Fifth Circuit, involved a policy that permitted student-led, student-initiated prayers at graduation. The Supreme Court granted certiorari and remanded the case for further proceedings consistent with *Lee*.[22] In the second hearing of the case (*Clear Creek II*),[23] the Fifth Circuit distinguished *Lee* and upheld the policy under both *Lemon v. Kurtzman*[24] and *Lee*.[25] When the plaintiffs appealed the decision on remand, the Court refused to grant certiorari,[26] thus preserving what looked like a victory for the free-exercise-as-free-speech strategy.

However, the seeming victory actually contained the seeds of several other problems. First, the policy upheld in *Clear Creek II* required any student-led, student-initiated prayers to be "nonsectarian, nonproselytizing."[27] This requirement was problematic from several points of view. To many religious groups, including the National Legal Foundation, the requirement itself seemed unconstitutional. From our point of view, no school had any business telling a student he could not pray in Jesus' name[28] and the words "nonsectarian, nonproselytizing"[29] certainly had the potential to be interpreted to mean that. Of course, there was always the possibility that a court would some day say that praying in Jesus' name was, in fact, nonsectarian, nonproselytizing. After all, simply because someone acknowledges Jesus as his Lord does not mean that he is proselytizing. Similarly, there was

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[18] *Mergens*, 496 U.S. at 234-47.

[19] 505 U.S. 577, 599 (5th Cir. 1992).

[20] 930 F.2d 416 (5th Cir. 1991); 977 F.2d 963 (5th Cir. 1992).

[21] 930 F.2d 416 (5th Cir. 1991) (*Clear Creek I*).

[22] *See* Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 1215 (1992).

[23] 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*).

[24] 403 U.S. 602 (1971).

[25] *See Clear Creek II*, 977 F.2d at 963.

[26] *See* Jones v. Clear Creek Indep. Sch. Dist., 508 U.S. 967 (1993).

[27] *Clear Creek II*, 977 F.2d at 963.

[28] I use the example of praying in Jesus' name for several reasons. First, in addition to being a public interest law firm, the National Legal Foundation is a Christian ministry. This does not mean that we accept only Christians as clients. However, the vast majority of our clients are Christians. We do what we do because we are interested in furthering the Gospel. However, for purposes of this Essay, there are two other reasons why prayers in Jesus' name are a more appropriate example. First, these are the types of prayers at issue in the cases I will discuss. Second, I will be interacting with a view of the Establishment Clause that specifically addresses the relationship between the state and Christianity.

[29] *Clear Creek II*, 977 F.2d at 963.

always hope that some court somewhere would declare that prayers in Jesus' name were not sectarian. While this did not seem likely in the current judicial climate, there were certainly historical and linguistic arguments that would support such a conclusion.[30]

Thus, absent such a court declaring that prayers in Jesus' name were nonsectarian, nonproselytizing, we were concerned about the precedent. However, we were also concerned that schools all across the country were voluntarily using the *Clear Creek II* policy as a model. While we were glad to see that many schools were trying to do the right thing by instituting policies permitting graduation prayers, we were concerned about the nonsectarian, nonproselytizing requirement.

Furthermore, *Clear Creek II* contained the germ of a second problem. So long as the Supreme Court refused to overturn *Lemon*, one had to question whether the nonsectarian, nonproselytizing requirement could pass *Lemon's* excessive entanglement prong if such a case ever made it to the Supreme Court. True, the Fifth Circuit said the *Clear Creek II* policy did pass the prong. And, true, the Supreme Court denied certiorari. Still, one had to wonder about a potential future case. The *Clear Creek II* court's analysis did not seem convincing on this point, even to those of us who were friends of graduation prayer. After all, how could a school enforce a nonsectarian, nonproselytizing requirement—of either the type that allowed or that disallowed prayers in Jesus' name—without evaluating student prayers? Very conceivably, a court could hold such an evaluation to be an excessive entanglement.

The putative free-exercise-as-free-speech "victory" in *Clear Creek II* contained yet another potential pitfall. The *Mergens-Lee-Clear Creek II* trilogy of cases handed the opponents of student-initiated, student-led prayers their answering argument on a silver platter. *Clear Creek II* quoted the language from the National Legal Foundation's *Mergens* case that I mentioned earlier:

> There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.[31]

The obvious argument is to persuade courts that students are state actors.

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[30] For plausible historical argument, see *infra* notes 55-58 and accompanying text. For plausible linguistic arguments, see *infra* text accompanying note 33 for a modern court noting that, even with the mention of a specific deity, a prayer could be nonproselytizing.

[31] Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (quoting Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*)).

While the student-as-state-actor argument is the obvious way to proceed in light of the *Mergens-Lee-Clear Creek II* trilogy, the argument, to people on my side of this issue, is both ludicrous and offensive. Speaking from a personal perspective, four of my five children are school-aged and attend public schools. Without trying to be melodramatic, I find the proposition that my children could be considered state actors simply because they utter a prayer over a school-owned public address system to be nothing less than outrageous. Nonetheless, we have to deal with what we know the other side will argue. Thus, at the Symposium, all of the speakers—on both sides of the issue—concurred that the *Santa Fe* case would turn on whether the Court characterized the prayers that might occur under the school district's policy as private speech or government speech. Now, with the advantage of hindsight, we know that the Court did characterize the prayers as government speech.[32]

In sum, for someone like me (who believes that graduation prayers and other religious expression in the public schools are constitutionally sound but does not like the free-exercise-as-free-speech strategy), there were two issues. First, would any court ever allow prayers in Jesus' name under the nonsectarian, nonproselytizing standard? Second, what would happen if the Supreme Court accepted the student-as-state-actor argument? Amazingly enough, *Santa Fe* represented, initially, the best possible scenario and, ultimately, the worst possible scenario.

First, let us examine the best case scenario. Given the fact that the free-exercise-as-free-speech strategy as applied to the public school setting deliberately drew the line between student speech and all other speech, the best case scenario would be a decision that allowed prayers in Jesus' name, and did not allow the school to examine the prayer for content. This scenario would get us past the nonsectarian, nonproselytizing requirement, and it would pass muster under *Lemon*'s excessive entanglement prong. This is exactly what the district court did in the *Santa Fe* case. As I mentioned earlier, before this case reached the Supreme Court, it also involved graduation prayers. As summarized by the Fifth Circuit:

> the district court ruled that, consistent with SFISD's [Santa Fe Independent School District's] October Policy and our decision in Clear Creek II, student-selected, student-given, nonsectarian, nonproselytizing invocations and benedictions would be permitted, and that such invocations and benedictions could take the form of a "nondenominational prayer." Although cautioning that SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions, the district court went on to note gratuitously that "generic prayers to the 'Almighty,' or to 'God,' or to 'Our Heavenly Father (or Mother),' or the like, will of course be

[32] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. ___, 120 S. Ct. 2266, 2275 (2000).

> permitted. ***Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, will likewise be permitted,*** as long as the general thrust of the prayer is nonproselytizing, as required by [Clear Creek II]."[33]

From the National Legal Foundation's perspective, this was as good as it could get.[34] Although we believe that the strategy was wrong as a matter of first principles, the district court had arrived at the right result: prayers in Jesus' name were permissible at graduation and sporting events.

However, by the time the Supreme Court finished with the case, we had moved from the best case scenario to the worst case scenario. After a brief description of the factual and procedural history of the case,[35] Justice Stevens delivered a devastating blow to the free-exercise-as-free-speech strategy. However, I must add that *Santa Fe* held the school district's *policy* unconstitutional.[36] It did not address individual student prayers that may be uttered outside the mechanism of a policy. Thus, some of my colleagues may continue to pursue the old strategy. However, I would hope that some, at least, will begin to realize that we should switch to a more principled, less pragmatic strategy.

Whether or not Justice Stevens' opinion persuades any of my colleagues to switch strategies, we must at least note just how thorough a repudiation of this strategy he delivered. Early in the opinion, Justice Stevens clearly articulated which side of the private speech/government speech divide he would come down on:

> In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.). We certainly agree with that distinction, but

[33] Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 811 (1999) (emphasis added) (second alteration in original).

[34] Actually, at an earlier point, the school district had tried to abandon the "nonsectarian, nonproselytizing" requirement as well. *See id.* at 812.

[35] Because Justice Stevens found the policy unconstitutional on other grounds, he never addressed what types of prayers might be nonsectarian and nonproselytizing. However, he did make the effort to point out that many of the prayers were prayed in Jesus' name. *Santa Fe*, 530 U.S. ___, 120 S. Ct. 2266, 2272-73, n.2, 7 (2000).

[36] *See id.* at 2283.

> we are not persuaded that the pregame invocations should be regarded as "private speech."[37]

Next, he laid out another buzz saw that the free-exercise-as-free-speech strategy would run into. Because *Santa Fe* was being postured as a speech case, the policy had to stand up to forum analysis. In Justice Stevens' view, it could not: "The Santa Fe school officials simply do not evince either by policy or by practice, any intent to open the [pregame ceremony] to indiscriminate use, . . . by the student body generally."[38]

If Justice Stevens' opinion did not mark the beginning of the end for the free-exercise-as-free-speech strategy, it certainly severely limited its range of applicability when he wrote that

> in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee*, 505 U.S., at 596.
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> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S., at 688 (1984) (O'Connor, J., concurring). The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech.[39]

At this point, I note that the National Legal Foundation is not glad that the case turned out as it did. Quite to the contrary, we believe that the prayer policy at issue was absolutely constitutional. In fact, we filed an amicus brief in support of the school district on behalf of twenty-one United States Senators and Congressmen. Although we have believed for years that the free-exercise-as-free-speech strategy was flawed, we derive no satisfaction from now being able to say, "We told you so."

Furthermore, I agree with the Justices who dissented in *Santa Fe* that the

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[37] *Id.* at 2275.

[38] *Id.* at 2276 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988)) (quotation marks omitted) (alteration in original).

[39] *Id.* at 2279.

majority opinion "bristles with hostility to all things religious in public life."[40] As Justice Rehnquist wrote for the dissenters:

> Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God."[41]

This is the same hostility, I might add, that was displayed by the "Secular Left" members of our Symposium. Although I could point to comments made during the Symposium, I refer instead to comments that are easily available to any reader of this Essay through the People for the American Way and American Atheists' websites. In the section of the American Atheists' site entitled "Schoolhouse,"[42] Ellen Johnson's organization makes it abundantly clear that they would not be happy if only teacher and administrator prayers were eliminated. Rather, every form of student prayer must also be wiped out. Of course, no legal arguments are advanced in support of this radical agenda.

Elliot Mincberg's approach at least pays lip service to the fact that the Establishment Clause is a prohibition on government, not private citizens. Thus, the People For the American Way approach is the one discussed above: cast students as state actors.[43] For example, in a press release issued after the *Santa Fe* decision was handed down, People For the American Way Foundation President Ralph G. Neas stated, "[t]he Santa Fe school district tried to promote religion by disguising it as neutral free speech, but the Court has unmasked the district's policy for what it is—unconstitutional, school-sponsored, captive-audience prayer."[44]

An additional example of People For the American Way's hostility does not particularly implicate what this Essay has previously addressed. However, it bears directly on the topic of religion in the public schools. It seems especially ironic in light of Chief Justice Rehnquist's criticism of the *Santa Fe* majority's hostility. People For the American Way is opposing the Lumpkin County, Georgia, School Board's plan to teach respect for the Creator. In a press release, People for the

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[40] *Id.* at 2283 (Rehnquist, C.J., dissenting).

[41] *Id.* at 2283-84 (quoting PRESIDENTIAL PROCLAMATION, 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1787-1897 64 (J. Richardson ed. 1897)).

[42] American Atheists, *Prayer in Schools, available at* http://www.atheists.org/schoolhouse/#intro (last modified Sept. 24, 2000).

[43] *See supra* note 31-32 and accompanying text.

[44] People for the American Way, *Supreme Court Narrowly Upholds First Amendment in Texas Football School Prayer Case, available at* http://www.pfaw.org/news/press/show.cgi?article=961437937 (June 19, 2000).

American Way quote, in its entirety, a demand letter that Elliot wrote to the Lumpkin County School Board.[45]

In his letter Elliot admits that Georgia's new character education law, Title 20, section 2-145(a) of the Georgia Code,[46] requires each public school district to begin teaching students certain character traits, specifically including "respect for the creator."[47] Nonetheless, Elliot goes on to tell the school board why, according to his lights, the Lumpkin County plan would be unconstitutional. He writes:

> The Constitution prohibits not only government practices that "aid one religion . . . or prefer one religion over another," but also those practices that "aid all religions" and therefore endorse religion over nonreligion. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15 (1947). *Accord, Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481, 2487 (1994).
>
> There can be no legitimate question that teaching students to have "respect for the creator" endorses religion over nonreligion and crosses the required line of government neutrality toward religion. Such teaching assumes and promotes the existence of a single "creator," an inherently religious belief."[48]

The fact of the matter is that the Constitution does not ban practices that endorse religion over irreligion—as Chief Justice Rehnquist's quotation of President Washington's proclamation demonstrates.[49] Rather, it is the Supreme Court's opinion in *Everson* (which Elliot quoted) that seeks to prohibit practices that endorse religion over irreligion. I would simply remind Elliot that Supreme Court opinions can be overruled.

In particular, Elliot demanded that the Georgia school board not post the national motto, "In God We Trust." This is hostility at its most ludicrous.

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[45] *See* People for the American Way, *Georgia School Board Urged to Respect the Constitution by Cancelling Plans to Teach "Respect the Creator" in Public Schools*, *available at* http://www.pfaw.org/news/press//show.cgi?article=963861980 (June 19, 2000).

[46] GA. CODE. ANN. § 20-2-145(a) (Supp. 1997-2000).

[47] *Id.*

[48] People for the American Way, *Georgia School Board Urged to Respect the Constitution by Cancelling Plans to Teach "Respect the Creator" in Public Schools*, *available at* http://www.pfaw.org/news/press//show.cgi?article=963861980 (June 19, 2000).

[49] I recognize that a simple quotation from Washington does not "prove" the non-preferentialist position. In fact, the literature is replete with arguments both for and against this position. I feel quite certain that I could marshall all the best arguments and still not persuade my co-panelist. I simply offer Rehnquist's recent comment here because it sets, in strikingly stark contrast, the view of George Washington against that of People For the American Way.

Finally, I hasten to add that I do not think, given the current Court composition and current precedent, *Santa Fe* would have been decided correctly under the position that I am about to advocate. If, over the last fifteen years or so, more free exercise cases had been litigated under the Free Exercise Clause rather than the Free Speech Clause, the story might have been different. Of course, one cannot prove what might have been. Even after fifteen years of what I would consider to be a proper strategy, the school district still may have lost in *Santa Fe*. But we would have been fifteen years closer to proper Establishment Clause and Free Exercise Clause jurisprudence.

II. A NEW STRATEGY

I do not believe that the National Legal Foundation's approach would have "saved the day" in the *Santa Fe* case. Rather, my appeal to my colleagues that have preferred the free-exercise-as-free-speech strategy would be simply this: if this strategy was adopted because other strategies were not working, is it not time to recognize that, after *Santa Fe*, the free-exercise-as-free-speech strategy is no longer working? I would abandon it in favor of something that will bear long-term fruit.

I would recommend a strategy that would protect the free exercise rights, not only of students, but of all people involved with schools. Indeed, the strategy works beyond the school setting and implicates both the Free Exercise and the Establishment Clauses. In some ways, it is not a new strategy. It is actually a strategy that the National Legal Foundation and some of our colleagues have been employing for years. However, it has been the minority approach.

As I had originally conceived of this Essay, its purpose was quite simple and modest: to articulate the institutional positions of the National Legal Foundation on the issue of religion in the public schools, as a follow up to the Symposium. However, because *Santa Fe* has been decided in the interim between the Symposium and the publication of this journal, and because the case compellingly illustrates our fears about the free-exercise-as-free-speech strategy, this journal is a fortuitous place to discuss the problems with that approach. The preceding portion of this Essay has set the context for why we have adopted an approach that is different from some of our colleagues. Hopefully, it has also been of more interest to readers on both sides of this debate than the Essay would have been as originally conceived.

Let me clarify that our strategy is what we refer to, in-house, as a "thirty-year plan." Quite frankly, we call our approach a thirty-year plan out of admiration for many of our opponents. They have been willing to lose repeatedly in an effort to somehow shift the legal thinking on a topic. What may be a great piece of rhetoric in a dissenting opinion today and for years to come, may become great rhetoric in a concurrence in ten years, which may become great dicta in twenty years, which

may become the holding in the case that reverses years of bad precedent in thirty years.

Right now, groups on our side of these issues should be heartened. As I mentioned earlier in this Essay, the Supreme Court recently has overturned, in whole or in part, *Aguilar v. Felton,*[50] *Grand Rapids v. Ball,*[51] *Meek v. Pittenger,*[52] and *Wolman v. Walter.*[53]

Because this is a thirty-year plan, our approach always tries to take into account, as we phrase it, both "what is and what ought to be." The what is/what ought to be distinction works itself out in various ways in our practice of law. First, it can result in making arguments in the alternative. There are times when we will make both free speech and free exercise arguments. However, there are times when we will forego the free speech argument altogether. This points to another practical outworking. We believe that, in some ways, our amicus work is as important as our litigation. There are arguments that parties simply cannot emphasize or sometimes make at all. Parties have less liberty to ignore the "what is" in favor of emphasizing the "what ought to be."

We also often argue that the particular practice that is under attack in a case passes muster under any of the up to five Establishment Clause tests which may be applicable, including those we do not think are jurisprudentially sound.[54] So, for example, while we might not be able to ignore *Lemon*, we would also argue that the *Marsh* test or the coercion test should be applied.

These first two points really go hand-in-hand. The thirty-year plan is our way of getting from what is to what ought to be. However, our approach is also jurisprudentially driven. It is not just that we do not like the current state of affairs and believe that any other state of affairs would have to be better. Rather, we have strong feelings about "what ought to be."

First of all, we believe that the Establishment Clause and the Free Exercise Clause are simply two sides of the same coin. They are in no way in tension with each other. Thus, we believe that one of the most important ways to protect the free exercise of religion is to reverse the current, wrong-headed Establishment Clause jurisprudence.

I will take as a given for this discussion the existence of the incorporation

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[50] 473 U.S. 402 (1985).

[51] 473 U.S. 373 (1985).

[52] 421 U.S. 349 (1975).

[53] 433 U.S. 229 (1977).

[54] These tests are familiar to any student of Establishment Clause jurisdiction: the *Lemon* test (Lemon v. Kurtzman, 403 U.S. 602 (1971)), the *Marsh* test (Marsh v. Chambers, 463 U.S. 783 (1983)), the endorsement test from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), the coercion test from Justice Kennedy's dissent in *County of Allegheny v. ACLU*, 492 U.S. 573, 662 (1989), and the psycho-coercion test from *Lee v. Weisman*, 505 U.S. 577 (1992).

doctrine. I will also take as my primary example the public school setting. Thus, the question becomes, what may a school district do, for example, without violating the Establishment Clause.

We believe that Justice Joseph Story was correct in his oft-quoted description of the purpose of the religion clauses:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[55]

Story went on to explain:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[56]

This is the historical reality, much to the dismay of the "Secular Left" members of our Symposium panel.

Of course, if the state may encourage religion generally and Christianity specifically, clearly the state may also acknowledge and accommodate religion. This is the heart of the National Legal Foundation's position. Establishment of religion was rightly prohibited by the First Amendment, but acknowledgment, accommodation, and yes, even encouragement of religion was not prohibited. Quite the contrary, these practices are a "duty" of governments according to Story.[57]

Although these duties are not stated in the Constitution, they are not prohibited either; indeed, a prohibited duty is oxymoronic. It is the people's prerogative to elect public officials who will act on these duties. Any law or (if we accept a constitutional gloss) any action by a state actor that acknowledges, accommodates, or encourages religion should pass constitutional muster. Only those that go beyond encouragement to establishment should be held unconstitutional. Establishment,

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[55] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833).

[56] *Id.* § 1871.

[57] *See id.* § 1870.

of course, had a specific meaning under the First Amendment. Three variations of establishment were known to Story and his contemporaries:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.[58]

This is establishment. This is prohibited. Prayers by a student at a football game are not.

We do not need to go through the gyrations about whether a student somehow is transformed into a state actor, or what kind of forum exists. It does not matter that the state owns the stadium or the public address system. The simple fact of the matter is that no religion has been established.

Of course, because this is the historically correct position, the Secular Left has to attack Story's view. The attack usually takes one of two forms: first, that this is an antiquated idea, and second, that Story's is a view that only those in the majority religion would expound. The first view is represented by the recent Sixth Circuit panel decision in *ACLU of Ohio v. Capitol Square Review and Advisory Board*.[59] In this case, the ACLU of Ohio sued the state of Ohio to enjoin the use of its motto, "With God all Things are Possible."[60] Judge Cohn writing for the majority relegated Joseph Story to a footnote and summarily dispatched his view:

> We have come a long way from when . . . Justice Joseph Story could say: "it is impossible for those, who believe the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects," Joseph Story, *Commentaries of [sic] the Constitution of the United States* 723 (Vol. III, 1833) . . . .[61]

The second objection, or something very close to it, was voiced during the Symposium by Ellen Johnson.[62] Ellen expressed concern that I was only advocating

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[58] *Id.* § 1866.

[59] 210 F.3d 703 (6th Cir. 2000).

[60] *See id.* at 704.

[61] *Id.* at 725 n.17.

[62] *See* Unofficial Transcript Record of the Institute of Bill of Rights Law Student

acknowledgment, accommodation, and encouragement of the majority religion.[63]

Let us look at each objection in turn. First, Judge Cohn undercuts his own argument. In the same footnote in which he makes it seem that Story's view is a mere relic of the past, he quotes an Oklahoma Supreme Court case from as recent as 1959: "it is well settled and understood that ours is a Christian Nation, holding the Almighty God in dutiful reverence."[64]

In fact, while courts may have backed away from explicitly stating that Christianity can be favored, they have never backed away from the idea that monotheism generally can be acknowledged, accommodated, and encouraged. Even Supreme Court Justices have been unabashed in this regard. Just two of the many available quotations will make the point. To start with the point most offensive to the Secular Left—encouragement—Justice Douglas wrote:

> We are a religious people whose institutions presuppose a Supreme Being . . . . When the state *encourages* religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and *accommodates* the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[65]

In *Marsh*, the Court held that "[t]o invoke Divine guidance on a public body . . . is not . . . an 'establishment' of religion or a step toward establishment; [but] simply a tolerable *acknowledgment* of beliefs widely held among the people of this country."[66]

I turn now to the second objection, the one voiced by Ellen about majority and minority religions. As the quotations from Justice Story demonstrate, the religion clauses were designed to allow acknowledgment, accommodation, and encouragement, but not establishment of Christianity.

Two points are relevant here. First, some may object that Story only wrote as he did because he was "part of the club." *His* religion was protected. Nothing could be further from the truth. Joseph Story was a Unitarian, not an orthodox Christian;[67] however, he was intellectually honest enough to tell the truth about the

Division Symposium, *Religion in Our Schools: A Debate on Freedom*, at 36, lines 17-21.

[63] *See id.*

[64] *See Capitol Square*, 210 F.3d at 725 n.17 (quoting Oklahoma v. Williamson, 347 P.2d 204, 207 (1959)).

[65] Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (emphasis added).

[66] Marsh v. Chambers, 463 U.S. 783, 792 (1983) (emphasis added).

[67] R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE

meaning of the religion clauses. Today, members of minority religions and atheists would serve the debate well by following Story's example. Be honest about the meaning of the clauses, and, if you do not like what the Constitution says, try to amend it.

The second relevant point is this: many people, even some members of religious right groups, do not feel comfortable with the historic position embraced by the National Legal Foundation. They believe that we should not ask for any special status, but merely equal treatment. Interestingly enough, if we pursue special treatment and lose, we may be able to hold the line at equal treatment. If we start by asking for equal treatment and lose, we could end up with unequal treatment and religious discrimination.

However, we would never advocate seeking special treatment for the reason just mentioned. Rather, we advocate it because there is a very specific reason why the drafters of the Bill of Rights drew the line where they did. These men, like the Framers of the Constitution, were concerned about the interaction between majorities and minorities in the body politic.

Today, we hear much about protecting the minority from the tyranny of the majority. In support of this concern, *The Federalist Papers* are often invoked. This, of course, is quite proper. *The Federalist* was concerned about the tyranny of the majority over the minority. For example, in *Federalist 51* we read, "[i]f a majority be united by a common interest, the rights of the minority will be insecure."[68] The problem however, is that *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22* we read that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail."[69]

Thus, we must never safeguard against the one tyranny at the expense of safeguarding against the other tyranny. It must be "both and," not "either or." While the majority may seek to have its religion established, this would clearly trample upon the minority. However, to insist that the majority—which sincerely believes that governments and not just men should honor God—must voluntarily violate that belief would just as clearly trample upon the majority. Drawing the line at establishment protects each from the tyranny of the other.

At bottom, we believe that anyone, individual or government actor, can participate in any religious activity, whether speech or action, as long as it does not constitute an establishment of religion of the type described by Justice Story. The only remaining question is how to get from what is to what ought to be. As

OLD REPUBLIC 180 (1985).

[68] THE FEDERALIST No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

[69] THE FEDERALIST No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

mentioned above, there are five establishment clause tests,[70] and the Supreme Court has attacked its own Establishment Clause jurisprudence. What are we to make of this jumbled mess and how do we fix things?

In light of the foregoing discussion, it should be obvious that the National Legal Foundation has little use for the *Lemon* test. Ultimately, we would like to see the Supreme Court revert to a test that simply examines whether one of the three types of establishments described by Justice Story exists. Is it unrealistic to think that we will ever get to that point? I don't think so. While Justice Kennedy's coercion test from his opinion in *Allegheny* was in dissent and while he did not ever get quite to the "pure" Story position, he got awfully close. Because I want to be fair with Justice Kennedy's words, I will quote him at greater length than might otherwise be warranted. This is especially important since many of us have wondered how one man could have written as Kennedy did in *Allegheny* and as he did in *Lee*:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval.[71]

Justice Kennedy then went on to quote Justice Goldberg in *Abington School District v. Schempp*:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the

[70] The Supreme Court has recently treated *Agostini v. Felton's*, 521 U.S. 203 (1997), variation of the *Lemon* test as a separate and sixth test to be applied in school-aid cases. Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530, 2540 (2000).

[71] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (citations omitted).

> significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .[72]

Picking up on Justice Goldberg's comments about the significance of religion to the American people, Justice Kennedy went on to address how the government should interact with religion:

> The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.[73]

Justice Kennedy went on to further discuss coercion:

> It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups. The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object. See *McGowan v. Maryland*, *supra*, at 441 quoting 1 Annals of Congress 730 (1789) (James Madison, who proposed the First Amendment in Congress, "apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce

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[72] 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

[73] *Id.* at 659-60 (citations omitted; alterations in the original).

> the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience"); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (the Religion Clauses "forestal[l] compulsion by law of the acceptance of any creed or the practice of any form of worship").[74]

Justice Kennedy then added comments that in some ways may be his most direct departure from the "pure" Story view:

> As Justice Blackmun observes, *ante*, at 597-598, n. 47, some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation. . . . That may be true if by "coercion" is meant *direct* coercion in the classic sense of an establishment of religion that the Framers knew. But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion.[75]

However, after discussing the hypotheticals that concerned him, Justice Kennedy returned to his earlier line of reasoning by quoting Chief Justice Burger in *Walz v. Tax Commissioner of New York*:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[76]

Justice Kennedy concluded his views as follows:

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[74] *Id.* at 660 (some citations omitted; alterations in the original).

[75] *Id.* at 660-61 (some citations omitted)

[76] 397 U.S. 664, 669 (1970).

> This is most evident where the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. Our cases reflect this reality by requiring a showing that the symbolic recognition or accommodation advances religion to such a degree that it actually "establishes a religion or religious faith, or tends to do so."[77]

While Justice Kennedy no longer seems to hold to his own prior approach and while this approach is not currently embraced by a majority of the Court, we remember that ours is a thirty-year plan. In the meantime, we try to bring as many cases as possible under *Marsh*, both in our litigation and in our amicus work. This is a viable strategy in that *Marsh* is every bit as much a binding precedent as is *Lemon*. Of course, *Marsh* does not help in situations that, under our view, are clearly constitutional and yet have no long historical pedigree. However, we believe that *Marsh* does have great applicability in contexts beyond legislative prayer. For example, we believe that *Marsh* can be used effectively in religious display cases. We have filed many briefs documenting a long-standing tradition of inscribing religious texts and symbols on public buildings as a form of acknowledgment, accommodation, and encouragement.

Having decided what an establishment of religion looks like, it becomes clear that a large part of a proper approach to protecting religious liberty is to vigilantly guard against mere acknowledgment, accommodation, and encouragement being falsely characterized as establishment. Once the out-of-control false concept of establishment is trimmed back to a proper understanding of establishment, any law or policy that seeks to trample Free Exercise rights will tend to be glaringly obvious.

For example, no longer will schools have to enact policies that they don't really want but feel they must adopt for fear of somehow violating the Establishment Clause.[78] In the environment of proper Establishment Clause jurisprudence, in which Free Exercise violations stick out, there will be no need for a free-exercise-as-free speech strategy. Indeed, I believe that had Establishment Clause jurisprudence been true to the text of the Constitution fifteen years age, the strategy would never have been employed.

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[77] *Id.* at 662 (citation omitted).

[78] This was the position, for example of the University of Missouri at Kansas City in *Widmar v. Vincent*, 454 U.S. 263, 280 (1981).

CONCLUSION

In the proper environment, it is possible that the only remaining interesting question would be the *Smith II*/RFRA/compelling state interest/hybrid right question.[79] But that would be another essay! Since this issue did not come up during the Symposium, I will not address it here.

Rather I will end my comments where I began. I would like to thank William and Mary's Institute of Bill of Rights Law for sponsoring a very enjoyable Symposium. I know, based upon student comments, that the interaction between the four panelists provided food for thought to those who attended. As I mentioned at the outset, they were especially interested in the differences between those of us who were seen as being "on the same side" of the religion in school issue. I can only hope that these written comments will provide additional food for thought to those who might read them.

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[79] *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990).