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A FIXTURE ON A CHANGING COURT: JUSTICE STEVENS AND THE ESTABLISHMENT CLAUSE

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ABSTRACT—Throughout his time on the Supreme Court, Justice John Paul Stevens consistently took the "strict separationist" approach to the Establishment Clause. This led him to write and join opinions that stated that the Establishment Clause is violated by religious activity in public schools, by religious symbols on government property, and by government support for parochial schools that could be used for religious education. Justice Stevens adhered to these views throughout his thirty-five years on the Court. Although the strict separationist approach was the dominant view on the Court for several decades, those appointed after Justice Stevens rarely held this view. Some, like Justices Sandra Day O'Connor and Stephen Breyer, believe that the government violates the Establishment Clause only if it symbolically endorses religion or a particular religion. Others, like Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas, believe that little violates the Establishment Clause: the government acts unconstitutionally only if it *literally* establishes a church or coerces religious participation. The result is that, while Justice Stevens remained consistent, the Justices around him became much more conservative on this issue. Justice Stevens's approach to the Establishment Clause has great virtues in protecting freedom of conscience and providing inclusiveness in a religiously pluralistic society.

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INTRODUCTION

In March 2005, I argued *Van Orden v. Perry*[1] before the Supreme Court. The case involved the constitutionality of a six-foot high, three-foot wide monument of the Ten Commandments that sits exactly at the corner between the Texas State Capitol and the Texas Supreme Court.[2] As I prepared for the oral argument, I knew that Justice John Paul Stevens would likely vote to declare the monument unconstitutional as violating the Establishment Clause. Throughout his time on the Supreme Court, Justice Stevens had been a consistent vote and voice for a wall separating church and state. I also knew that, no matter what, Justice Stevens would treat every advocate with decency and respect. Although he had a laser-like ability to get to the heart of the case and ask the most difficult questions, he always did so without rancor or sarcasm and in the best possible tone of intellectual engagement.

The argument went as I expected, but the ultimate result surprised me. The Court voted 5–4 to uphold the monument, which I certainly regarded as possible, but with Justice Breyer concurring in the judgment and providing the critical fifth vote.[3] As I, and everyone, predicted, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas voted to uphold the monument.

Had the case been argued when Justice Stevens came on the bench in 1975, I have no doubt that it would have come out the other way. At that time, a majority of the Court continued to believe in the strict separation of church and state. It was just four years after the Court decided *Lemon v. Kurtzman*,[4] which has been described as embodying this strict separationist approach to the Establishment Clause.[5] On the other hand, if the case were argued today, I think I would have little chance of prevailing. The

[1] 545 U.S. 677 (2005) (permitting Ten Commandments display at the Texas State Capitol).

[2] *Id.* at 681.

[3] *Id.* at 681, 698 (Breyer, J., concurring in the judgment).

[4] 403 U.S. 602 (1971).

[5] *See, e.g.*, Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 236–37 (1994) (describing strict separation as the dominant theory of the Establishment Clause until 1980).

replacement of Justice O'Connor with Justice Alito means that there now are five Justices who are likely to find that little violates the Establishment Clause.[6]

Justice Stevens came on to the Court as a moderate Republican and was perceived as a moderate justice, but by the time he retired he was perceived as a strong liberal voice.[7] Upon his retirement, there was much discussion as to whether Justice Stevens changed over his thirty-five years on the Supreme Court or whether the Court changed around him. Undoubtedly, it was some of both. In some areas, such as affirmative action, Justice Stevens changed over time.[8] But in the area of the Establishment Clause, it was not Justice Stevens who changed, but the Justices around him. From the time he came on to the Court, Justice Stevens always voted to enforce a strict separation of church and state. This was the majority view when he arrived as a Justice and the dissenting view when he retired.

This Essay proceeds in three Parts. Part I describes Justice Stevens's strict separationist approach to the Establishment Clause. Part II explains how the Court shifted during Justice Stevens's tenure there. Finally, Part III briefly argues that Justice Stevens's interpretation of the Establishment Clause was right and expresses hope that someday the Court will return to his views on the important and recurring issue of how the Establishment Clause should be interpreted.

I. JUSTICE STEVENS AS A STRICT SEPARATIONIST

The strict separationist approach to the Establishment Clause holds that, to the greatest extent possible, government and religion should be separated. Government should be, as much as possible, secular; religion should be entirely in the private realm of society. This theory is perhaps best described by Thomas Jefferson's metaphor that there should be a wall separating church and state.[9] As the Supreme Court declared in *Everson v.*

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[6] There have been two Establishment Clause cases during the Roberts Court Era and both have ruled in favor of the government by 5–4 margins. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (rejecting taxpayer standing to challenge a tax credit program that benefited religious schools); Salazar v. Buono, 130 S. Ct. 1803 (2010) (reversing lower court decision that held a large cross in the Mojave Desert violated the Establishment Clause).

[7] *See* Robert Barnes, *Justice Stevens to Step Down*, WASH. POST, Apr. 10, 2010, at A1; Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 50.

[8] *Compare* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 475, 485–86 (1989) (invalidating an affirmative action program with Justice Stevens in the majority), *with* Grutter v. Bollinger, 539 U.S. 306, 311, 343–44 (2003) (upholding an affirmative action program with Justice Stevens in the majority).

[9] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *in* THOMAS JEFFERSON, WRITINGS 510, 510 (Merrill D. Peterson ed., 1984) ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation

Board of Education: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[10]

Justice Brennan articulated the justifications for this approach when he wrote:

> The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to conscience. . . .
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> . . . .
>
> The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.
>
> The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. . . .
>
> Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.[11]

In every case, Justice Stevens adhered to the strict separationist approach.[12] Interestingly, he wrote relatively few majority opinions, but was a consistent vote in the many Establishment Clause cases during his long tenure on the Supreme Court. To be more specific, there were three key tenets to Justice Stevens's approach to the Establishment Clause. He consistently voted and expressed the views that the Establishment Clause is violated by religious activities in public schools, by religious symbols on government property, and by government aid to parochial schools that can be used for religious education.

A. Religious Activities in Public Schools

First, Justice Stevens espoused the belief that government-sponsored religious activities in public schools violate the Establishment Clause. Thus, in *Stone v. Graham*, the Supreme Court, in a per curiam opinion with Justice Stevens in the majority, declared unconstitutional a state law that required the Ten Commandments to be posted on the walls of every public

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between church and State.").

[10] 330 U.S. 1, 18 (1947).

[11] Marsh v. Chambers, 463 U.S. 783, 803–05 (1983) (Brennan, J., dissenting) (footnotes omitted).

[12] One possible exception to this is *Elk Grove Unified School District v. Newdow*, where Justice Stevens wrote the majority opinion dismissing a challenge to the words "under God" in the Pledge of Allegiance as violating the Establishment Clause in public schools. 542 U.S. 1, 17–18 (2004). The Court dismissed the challenge, however, for lack of standing. *Id.*

school classroom.[13] The Court concluded that the law "had no secular legislative purpose" and therefore violated the Establishment Clause.[14]

Similarly, in *Wallace v. Jaffree*, the Court invalidated a state law that authorized public school teachers to hold a one-minute period of silence for meditation or voluntary prayer.[15] Justice Stevens wrote for the majority and concluded that the purpose behind the law was to reintroduce prayer into public schools and deemed the law unconstitutional because it "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."[16]

In *Edwards v. Aguillard*, the Court followed this reasoning and ruled unconstitutional a state law that required that public schools that teach evolution also teach "creation science."[17] The Court explained that "creation science" is a religious theory explaining the origin of human life, and concluded: "[B]ecause the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause."[18] Justice Stevens joined the majority opinion written by Justice Brennan.

In *Lee v. Weisman*, the Court declared unconstitutional clergy-delivered prayers at public school graduations.[19] Justice Kennedy, writing for the Court, held that such prayers are inherently coercive because there is great pressure on students to attend their graduation ceremonies and not to leave during the prayers.[20]

Justice Stevens also joined Justice Blackmun's concurring opinion that emphasized that the Establishment Clause can be violated even without coercion. Justice Blackmun remarked that "it is not enough that the government restrain from compelling religious practices[;] [i]t must not engage in them either."[21] Justice Stevens joined Justice Souter's concurring opinion as well. That opinion stressed that coercion is sufficient for a finding of an Establishment Clause violation, but it is not necessary; Establishment Clause violations exist without coercion if there is symbolic government endorsement of religion.[22]

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[13] 449 U.S. 39, 41, 42–43 (1980) (per curiam).

[14] *Id.* at 41.

[15] 472 U.S. 38, 40, 61 (1985).

[16] *Id.* at 56.

[17] 482 U.S. 578, 582 (1987).

[18] *Id.* at 593–94.

[19] 505 U.S. 577, 580–81 (1992); *id.* at 599 ("The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where . . . young graduates who object are induced to conform.").

[20] *Id.* at 593. Justice Stevens joined Justice Kennedy's opinion, though he also joined Justice Blackmun's concurring opinion.

[21] *Id.* at 604 (Blackmun, J., concurring).

[22] *Id.* at 618–19 (Souter, J., concurring).

Justice Stevens wrote the majority opinion in *Santa Fe Independent School District v. Doe*, which held that student-delivered prayers at high school football games violated the Establishment Clause.[23] A public high school in Texas had a tradition of having a student deliver a prayer before varsity football games. The school claimed that the student prayers were private speech but the Court emphatically disagreed. Justice Stevens explained: "[W]e are not persuaded that the pregame invocations should be regarded as 'private speech.' These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[24] Justice Stevens, writing for the Court, emphasized that the school had encouraged and facilitated the prayer at an official school event.[25] The Court noted that the school encouraged the delivery of prayers, both in its official policies and in its traditional support for prayer at football games.[26] The result was both actual and likely perceived government endorsement of religion.

Justice Stevens also noted the coercive aspect of the school's policy: many students—football players, band members, and cheerleaders—were required to be present in order to receive academic credit.[27] He wrote that forcing students to choose between attending the game and avoiding religion itself violated the Establishment Clause:

> The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[28]

It is notable that Justice Stevens's majority opinion avoided choosing among the theories of the Establishment Clause; he explained why the prayers failed scrutiny under any of the leading tests.[29] Justice Stevens obviously was aware that there was no consensus among the Justices as to the appropriate theory of the Establishment Clause, so he wrote the opinion in a manner that explained the result under each of the major approaches to the provision.

B. Religious Symbols on Government Property

Second, Justice Stevens consistently voted to find that religious symbols on government property violate the Establishment Clause. In

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[23] 530 U.S. 290, 315–17 (2000).

[24] *Id.* at 302.

[25] *See id.* at 297–98, 302.

[26] *Id.* at 309.

[27] *See id.* at 311–12.

[28] *Id.* at 312 (alteration in original) (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

[29] *Id.* at 310–17.

Lynch v. Donnelly, Justice Stevens dissented from a decision that upheld the constitutionality of a municipal-sponsored nativity scene in a park.[30] Justice Stevens joined two dissenting opinions, one by Justice Brennan and one by Justice Blackmun.[31]

In *County of Allegheny v. ACLU*, the Court considered the constitutionality of a nativity scene put in a stairway display case of a county courthouse and of a menorah placed in front of a city building.[32] The Court ruled 6–3 that the menorah was constitutional, but 5–4 that the nativity scene was unconstitutional. Justice Stevens, together with Justices Brennan and Marshall, concluded that both symbols on government property violated the Establishment Clause.[33] Four of the Justices—Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy—would have upheld both symbols.[34] The key to the outcome was that Justices Blackmun and O'Connor saw the nativity scene as violating the Establishment Clause because the display of a religious symbol of only one religion on government property was an impermissible symbolic endorsement, while they allowed the menorah because it was part of an overall holiday display.[35]

In *Capitol Square Review & Advisory Board v. Pinette*, Justice Stevens wrote a powerful dissent to a decision that upheld the Ku Klux Klan's placing of a large Latin cross in a public park across from the Ohio State Capitol.[36] The Supreme Court, without a majority opinion, held that the state government's attempt to exclude the cross was unconstitutional discrimination against religious speech.[37] Justice Scalia wrote the plurality opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas. He emphasized that the First Amendment's protection of speech includes religious expression and concluded that excluding the cross was impermissible content-based discrimination.[38] Justice O'Connor concurred in part and concurred in the judgment, joined by Justices Souter and Breyer. Justice O'Connor wrote that the key question was whether allowing the

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[30] 465 U.S. 668, 726 (1984) (Blackmun, J., dissenting); *see also id.* at 695 (Brennan, J., dissenting) ("The Court's decision implicitly leaves open questions concerning the constitutionality of the *public* display on *public* property of a crèche standing alone, or the *public* display of other distinctively religious symbols such as a cross." (emphasis added)). *But see id.* at 671 (majority opinion) ("The display [was] situated in a park owned by a nonprofit organization and located in the heart of the shopping district.").

[31] *Id.* at 694–95 (Brennan, J., dissenting); *id.* at 726 (Blackmun, J., dissenting).

[32] 492 U.S. 573, 578 (1989).

[33] *Id.* at 637 (Brennan, J., concurring in part and dissenting in part).

[34] *Id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[35] *Id.* at 620–21 (Blackmun, J.); *id.* at 627, 635–36 (O'Connor, J., concurring in part and concurring in the judgment).

[36] 515 U.S. 753, 797 (1995) (Stevens, J., dissenting).

[37] *Id.* at 760–63 (Scalia, J.) (plurality opinion).

[38] *Id.*

cross would be perceived, by the reasonable observer, as government symbolic endorsement of religion.[39]

Justices Stevens and Ginsburg dissented. Justice Stevens, in his dissent, argued for a strong presumption against allowing such religious symbols on government property.[40] He also criticized Justice O'Connor's focus on the reasonable observer and said that the Establishment Clause was violated because "[t]he 'reasonable observer' of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message."[41]

Pinette is illustrative because it reveals the divisions on the Court regarding the Establishment Clause. Justice Scalia and the plurality do not see a constitutional problem with religious symbols on government property, so they saw the exclusion of the cross as a content-based restriction of speech. Justice O'Connor focused on whether the religious symbol was a government endorsement of religion. But Justice Stevens saw all religious symbols on government property as an affront to the Establishment Clause and used his dissent in *Pinette* to reject the Court's movement towards a symbolic endorsement test.

In 2005, the Court considered two cases concerning Ten Commandments displays on government property: *McCreary County v. ACLU*[42] and *Van Orden v. Perry*.[43] In *McCreary County*, the Court, in a 5–4 decision, ruled that Ten Commandments displays in Kentucky county courthouses were unconstitutional because the government had the impermissible purpose of advancing religion.[44] The counties were clear that they wanted the Ten Commandments posted because of the religious content and significance of the Decalogue.[45] Justice Stevens joined Justice Souter's majority opinion holding this unconstitutional.

As discussed in the Introduction above, in *Van Orden*, the Court, in a 5–4 decision without a majority opinion, upheld the constitutionality of a six-foot high, three-foot wide Ten Commandments monument that sits between the Texas State Capitol and the Texas Supreme Court.[46] Chief Justice Rehnquist wrote a plurality opinion joined by Justices Scalia, Kennedy, and Thomas and declared that a government may place religious

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[39] *Id.* at 773 (O'Connor, J., concurring in part and concurring in the judgment).

[40] *Id.* at 799–802 (Stevens, J., dissenting).

[41] *Id.* at 801–02.

[42] 545 U.S. 844 (2005).

[43] 545 U.S. 677 (2005).

[44] 545 U.S. at 868–70.

[45] *Id.* at 870.

[46] 545 U.S. at 681, 691–92.

symbols on government property.[47] Justice Breyer concurred in the judgment and stressed that the presence of the monument for over forty years, the surrounding secular displays and monuments, and the fact that the monument was donated by the Fraternal Order of Eagles all convinced him that the state government was not impermissibly symbolically endorsing religion.[48]

Justice Stevens wrote a powerful dissenting opinion: "In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property."[49] He wrote: "If any fragment of Jefferson's metaphorical 'wall of separation between church and State' is to be preserved—if there remains any meaning to the 'wholesome "neutrality" of which this Court's [Establishment Clause] cases speak'—a negative answer to that question [of whether the monument is allowed] is mandatory."[50]

Justice Stevens concluded his dissenting opinion by declaring:

> The judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to "have no other gods before me," it is difficult to conceive of any textual display that would run afoul of the Establishment Clause.[51]

Justice Stevens's last opinion in an Establishment Clause case was also a dissent. In *Salazar v. Buono*, the Court, in a 5–4 decision without a majority opinion, reversed a Ninth Circuit decision that held a large cross in a federal park in the Mojave Desert as violative of the Establishment Clause.[52] After a federal district court and the Ninth Circuit held the cross to be unconstitutional, Congress passed a law transferring ownership of the small parcel of land where the cross is located to a private veterans' group.[53] The district court concluded that this was a sham transfer, and the Ninth Circuit affirmed.[54] Justice Kennedy announced the judgment of the Court in an opinion joined by Chief Justice Roberts and Justice Alito. Justice Kennedy held that the lower courts had not adequately considered whether the federal statute transferring ownership was a basis for modifying the injunction to remove the cross.[55] Justices Scalia and Thomas concurred in the judgment and would have concluded that no one had standing to

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[47] *Id.* at 691–92.

[48] *Id.* at 701–02 (Breyer, J., concurring in the judgment).

[49] *Id.* at 708 (Stevens, J., dissenting).

[50] *Id.* (first alteration in original) (footnote omitted) (citation omitted).

[51] *Id.* at 735.

[52] 130 S. Ct. 1803, 1811 (2010).

[53] *Id.* at 1813.

[54] *Id.* at 1814.

[55] *Id.* at 1819–20.

challenge the cross on government property.[56]

Justice Stevens wrote a dissenting opinion joined by Justices Ginsburg and Sotomayor. He explained:

> "The Establishment Clause, if nothing else, prohibits government from 'specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.'" A Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ. In my view, the District Court was right to enforce its prior judgment by enjoining Congress' proposed remedy—a remedy that was engineered to leave the cross intact and that did not alter its basic meaning. I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.[57]

Over the last thirty-five years, the Supreme Court has become increasingly willing to allow religious symbols on government property. Justice Stevens, however, was consistent throughout his time on the Court in believing that religious symbols on government property violate the Establishment Clause.

C. Government Aid to Parochial Schools

Third and finally, Justice Stevens believed that government aid to parochial schools should be limited and that the government should not be able to provide aid to parochial schools that could be used for religious instruction. The shift in the Court on this issue during Justice Stevens's tenure is clearly evidenced in the Court's decisions in *Aguilar v. Felton*[58] and *Agostini v. Felton*.[59] In *Aguilar*, Justice Stevens joined Justice Brennan's majority opinion, which held that it violates the Establishment Clause for a government to send remedial education teachers on to parochial school premises to provide instruction.[60] But twelve years later, in *Agostini*, a 5–4 decision in which Justice Stevens joined Justice Souter's dissenting opinion, the Court overruled *Aguilar* and eliminated the rigid rule preventing government subsidies of teachers in religious schools.[61]

In *Mitchell v. Helms*, another case indicative of the Court's shift in views as to the Establishment Clause, the Court held that the government could give instructional equipment to parochial schools so long as it was

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[56] *Id.* at 1824–25 (Scalia, J., concurring in the judgment).

[57] *Id.* at 1828 (Stevens, J., dissenting) (citation omitted) (quoting Van Orden v. Perry, 545 U.S. 677, 718 (2005) (Stevens, J., dissenting) (quoting Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting))).

[58] 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[59] 521 U.S. 203 (1997).

[60] 473 U.S. at 404–06, 414.

[61] 521 U.S. at 208–09, 240.

not used in religious education.[62] Earlier, in *Meek v. Pittenger*, the Court declared unconstitutional a state law that provided instructional materials, including "maps, charts, and laboratory equipment" to parochial schools.[63] But in *Mitchell*, the Court expressly overruled *Meek*.[64]

Mitchell involved Louisiana's providing instructional equipment, including "computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings" to parochial schools.[65] Justice Thomas, writing for a plurality of four, said that the aid should be allowed because it is provided equally to all schools, religious and nonreligious.[66] Justice Thomas emphatically rejected the view that a government cannot give aid that is actually used for religious education. He also sharply criticized the traditional law preventing the government from giving aid to "pervasively sectarian" institutions.[67] He said that this phrase was born of anti-Catholic bigotry and wrote that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[68]

Justice O'Connor wrote an opinion concurring in the judgment, joined by Justice Breyer, in which she sharply disagreed with Justice Thomas's approach. Justice O'Connor said that equality never had been the sole measure of whether government action violated the Establishment Clause: "[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[69] She continued: "I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[70] Justice O'Connor wrote that the test should be whether aid actually is used for religious instruction, in which case the Establishment Clause is violated.[71]

Justice Souter's dissenting opinion, joined by Justices Stevens and Ginsburg, urged the Court to adhere to its precedents and find that aid is impermissible when it is of a type, like instructional materials, that can be used for religious education. Justice Souter began by observing:

> The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against

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[62] 530 U.S. 793, 829–32 (2000) (Thomas, J.) (plurality opinion).

[63] 421 U.S. 349, 365–66 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[64] 530 U.S. at 808 (Thomas, J.) (plurality opinion).

[65] *Id.* at 803.

[66] *Id.* at 829–32.

[67] *Id.* at 828.

[68] *Id.*

[69] *Id.* at 837–39 (O'Connor, J., concurring in the judgment).

[70] *Id.* at 840.

[71] *Id.* at 837–38, 845–44.

> compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.[72]

He strongly disagreed with the plurality's view that equality is the sole test for a violation of the Establishment Clause and identified a number of factors that prior cases require to be considered in determining whether aid is impermissible.

Although Justice Stevens did not write this dissent, it was consistent with the position that he had taken throughout his time on the Supreme Court concerning limits on government aid to parochial schools and, more generally, on the need for a wall separating church and state.

Indeed, it is striking that throughout his time on the Court, Justice Stevens was consistent in adhering to a strict separationist approach to the Establishment Clause. He always voted that the Establishment Clause is violated by religious activities in public schools, by religious symbols on government property, and by government aid to parochial schools.

II. THE SHIFTING COURT

From 1975, when Justice Stevens joined the Court, until 2010, when he retired, the Court's views on the Establishment Clause changed greatly. In 1947, when the Court held in *Everson v. Board of Education* that the Establishment Clause applied to the states, all nine Justices expressed belief in the idea of a strict separation of church and state and the wall of separation articulated by Thomas Jefferson.[73] As Professor Ira Lupu has persuasively explained, this was the dominant theory of the Establishment Clause from 1947 until 1980.[74] With Justice O'Connor's arrival and her opinion in *Lynch v. Donnelly*, an alternative theory developed: A government violates the Establishment Clause only if it symbolically endorses religion or a particular religion.[75] Justice Scalia's arrival introduced a forceful voice for rejecting any notion of a wall separating church and state and finding that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation.[76]

Thus, in 1989, when the Court decided *County of Allegheny v. ACLU*,[77] the Justices were divided among these three views. Three Justices—Justices

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[72] *Id.* at 868 (Souter, J., dissenting).

[73] *See* 330 U.S. 1 (1947).

[74] *See* Lupu, *supra* note 5.

[75] 465 U.S. 668, 694 (1984). For an early criticism of this approach, see William P. Marshall, *"We Know It when We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

[76] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

[77] 492 U.S. 573 (1989).

Brennan, Marshall, and Stevens—took the strict separationist view. Two Justices—Justices Blackmun and O'Connor—used the symbolic endorsement test. Four Justices—Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy—took the accommodationist approach. This explained the 4–2–3 split on the Court as to the constitutionality of two religious symbols on government property that it considered.

Two years later, Justice Clarence Thomas replaced Justice Thurgood Marshall, providing a fifth vote for the accommodationist approach. However, in *Lee v. Weisman*, in 1992, the Court failed to produce a majority opinion for this view of the Establishment Clause, although five of the Justices took this approach.[78] Justice Kennedy, joined by Justices Blackmun, Stevens, O'Connor, and Souter, found that clergy-delivered prayers at public school graduations violated the Establishment Clause.[79] Although Justice Kennedy focused on the inherently coercive nature of the prayers, the other Justices in the majority joined separate concurring opinions, stating that an Establishment Clause violation could exist even without a finding of coercion.[80]

In 1993, Justice Ginsburg, a strict separationist, replaced Justice Byron White, who had always taken the accommodationist approach.[81] In 1994, Justice Breyer, who has taken the symbolic endorsement approach, replaced Justice Blackmun, who also took this approach.[82] Thus, in 2000, when *Mitchell v. Helms* came before the Court, it was not surprising that the Court split 4–2–3[83] as it had in *County of Allegheny*. Justice Thomas, joined by the other accommodationists—Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy—voted to allow government aid to parochial schools to be used for religious education.[84] Justices O'Connor and Breyer would have allowed the state government to give instructional equipment to parochial schools so long as the equipment was not used in religious instruction.[85] Justices Stevens, Ginsburg, and Souter dissented and would

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[78] *See* 505 U.S. at 577.

[79] *Id.* at 580–81, 599.

[80] *Compare id.* at 599 ("No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise."), *with id.* at 604 (Blackmun, J., concurring) ("It is not enough that the government restrain from compelling religious practices: It must not engage in them either. The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion." (citation omitted)), *and id.* at 618 (Souter, J., concurring) ("Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement.").

[81] *See, e.g., id.* at 631 (Scalia, J., dissenting) (joining Justice Scalia's dissent); *Cnty. of Allegheny*, 492 U.S. at 655 (joining Justice Blackmun's majority opinion).

[82] *See, e.g., Cnty. of Allegheny*, 492 U.S. at 578 (plurality opinion) (writing the plurality opinion of the Court).

[83] 530 U.S. 793 (2000).

[84] *See id.* at 801.

[85] *Id.* at 836–37 (O'Connor, J., concurring in the judgment).

have adhered to prior decisions holding that such instructional equipment is not allowed because it could be used for religious instruction.[86]

The departures of Chief Justice Rehnquist in 2005 and Justice O'Connor in 2006 moved the Court further to the right, both on the Establishment Clause and more generally. Chief Justice John Roberts, replacing Chief Justice Rehnquist, did not alter the Court's ideology; it is hard to identify any case where Chief Justice Roberts voted differently from how Chief Justice Rehnquist likely would have voted. But Justice Alito replacing Justice O'Connor is crucial on a host of issues, including the Establishment Clause. There are likely now five votes for the accommodationist position that Justice Scalia long has championed[87] and that Justice Stevens vehemently rejected. The simple reality is that Justice Stevens remained consistent in views of the Establishment Clause over his thirty-five-year tenure on the Court, but the Justices around him changed and moved the Court significantly further to the right and away from viewing the Establishment Clause as creating a wall separating church and state.

III. JUSTICE STEVENS WAS RIGHT

Obviously, this Essay does not allow space for a full development of a defense of Justice Stevens's view that the Establishment Clause provides a wall that separates church and state. But I would be remiss if I were purely descriptive and did not attempt to briefly defend his position.

There are many reasons why separating church and state is so vital. First, the Establishment Clause protects freedom of conscience by ensuring that the government is not aligned with a particular religion, or even with religion generally. A government identified with a specific faith inevitably causes people to feel pressure, sometimes subtle and sometimes overt, to conform their religious beliefs and practices.

Separating church and state means that people will not be not be taxed to support religions other than their own. The famous statement of Thomas Jefferson concerning the need for a wall separating church and state, and James Madison's *Memorial and Remonstrance Against Religious Assessments*, were made in the context of opposing a state tax to aid the church.[88] It is wrong to make me support a church that teaches that my religion or my beliefs are wrong or even evil. It violates my freedom of conscience to force me to support religions that I do not accept. Justice Souter explained that "compelling an individual to support religion violates

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[86] *Id.* at 867–69 (Souter, J., dissenting).

[87] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

[88] *See Mitchell*, 530 U.S. at 870–73 (Souter, J., dissenting) (referencing Jefferson's and Madison's views).

the fundamental principle of freedom of conscience. Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."[89]

Second, the Establishment Clause serves a fundamental purpose of inclusion in that it allows all in society, those of every religion and those of no religion, to feel tied to a representative government. When government practices support religion, inescapably those of different religions feel excluded. When a government is overtly aligned with religion, those of different faiths, or those who do not identify with particular beliefs, inevitably feel that they are in the wrong place—that they are outsiders with regard to their government.

Treating all religions equally does not solve this. In a society that is overwhelmingly Christian, those of minority faiths feel marginalized and unwelcome when religion is overtly a part of government practice. If treating all religions equally were the only constraint imposed by the Establishment Clause, a school could begin each day with a prayer so long as every religion got its due. If a school reflected America's religious diversity, the vast majority of days would begin with Christian prayers. Those with no religion would be made to feel that it was not their school, as would those of minority religions who routinely were subjected to prayers of Christian faiths.

This goal of inclusion is central, not incidental, to the Establishment Clause. Justice O'Connor has explained: "Direct government action endorsing religion or a particular religious practice is invalid . . . because it 'sends a message to non-adherents 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.'"[90]

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

The very core of the Establishment Clause prevents government actions that divide people in this way. The Establishment Clause is about preventing the majority, through government power, from making members

[89] *Id.* at 870 (footnote omitted).

[90] Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment).

of other religions feel unwelcome. The Establishment Clause does not prevent people from praying; it merely prevents the infusion of religion in government events and on government property. People, of course, have the right to pray and listen to prayers, but not at an official government function, especially one where the audience is compelled to be present.

The problem is much more significant than it was when the First Amendment was adopted because the country is far more religiously diverse in the twenty-first century than it was in 1791. Justice Brennan observed:

> [O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[91]

This explains why religious symbols do not belong on government property. A city hall with a large cross on its roof makes those of different religions feel unwelcome, or feel that it is not their government. At the oral argument in *Van Orden v. Perry*,[92] Justice Kennedy asked me why those who do not like the Ten Commandments monument at the seat of the Texas state government cannot simply avert their eyes. My response was that this has no stopping point—a city could put a large Latin cross atop its roof, or many crosses, and simply proclaim that those who do not like it should avert their eyes. Not looking does not make the constitutional problem go away. A cross atop city hall violates the Establishment Clause even if people remember to avert their eyes.

This, of course, is only a partial defense of a wall separating church and state. But it explains why I believe that Justice Stevens was correct and why I hope that someday his view will again be accepted by a majority of the Court.

CONCLUSION

Much is written in this symposium about Justice Stevens's views of the Constitution and his approach to specific issues. In this Essay, I have focused on one particular topic: his views about the Establishment Clause.

But one crucial aspect of what he brought to the Court must not be overlooked: his tremendous decency. It is reflected in how he treated every lawyer who appeared before him. It is reflected in the way in which he interacted with his colleagues on the bench, never displaying the slightest

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[91] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring). And, of course, the country has become even more religiously diverse in the past half century since this was written.

[92] 545 U.S. 677 (2005).

anger or rancor, no matter how much he disagreed or even was provoked. It is reflected in his opinions, which never resorted to the sarcasm or ridicule that has become all too prevalent in recent years.

At a time in which in our nation seems so bitterly divided and nasty rhetoric is present everywhere, including in Supreme Court opinions, Justice Stevens is truly a role model for all of us.