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Essay

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Why Separate Church and State?

In 1947, when the Supreme Court first considered the issue of government aid to religion, it echoed the words of Thomas Jefferson and declared that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[1] For several decades after this, a majority of the Court unquestionably was committed to strict separation of religion and government.[2] The Court thus developed Establishment Clause doctrines that limited religion's presence in govern-

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[1] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[2] Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233-37 (1994) (stating that strict separation was the dominant theory from 1947 to 1980).

ment—such as in forbidding prayers in public schools[3]—and government's presence in religion—such as in limiting aid to parochial schools.[4]

Now, however, we are on the verge of a radical change in the law of the Establishment Clause. Of all the areas of constitutional law, the Establishment Clause seems the one where significant change is most likely. There now are five Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—who seem ready and even eager to overrule decades of precedent with regard to the Establishment Clause.

For example, in the most recent Supreme Court decision enforcing the Establishment Clause—*McCreary County v. ACLU of Kentucky*[5]—the majority was comprised of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. With Justice O'Connor replaced by Justice Alito, there will likely be a major change in the law of the Establishment Clause.

In this Essay, I make two points. First, I describe how the law is likely to change. Second, I argue that these changes are undesirable and address the basic question of why the Establishment Clause should be interpreted as creating a wall separating church and state.

In March 2005, I argued *Van Orden v. Perry*[6] in the United States Supreme Court, a case that involved a challenge to a six-foot-high Ten Commandments monument that sits between the Texas State Capitol and the Texas Supreme Court. I was startled, both before and after the argument, at the number of liberals who criticized bringing this lawsuit. Time and again, I heard the refrain, "What difference does it make if this monument is there? Challenging the monument just provides a rallying point for the religious right and hurts progressives." I vehemently disagree with this view. I deeply believe that our government must be secular and that the presence of sectarian religious symbols on

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[3] *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962) (banning prayer in public schools).

[4] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

[5] 125 S. Ct. 2722 (2005) (holding that the posting of the Ten Commandments in government buildings for the purpose of advancing religion violates the Establishment Clause).

[6] 125 S. Ct. 2854 (2005) (holding that a six-feet-high, three-and-one-half-feet-wide Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court does not violate the Establishment Clause).

government property is incompatible with the Establishment Clause. In Part II, I seek to explain why.

I

The Coming Revolution in Establishment Clause Jurisprudence

Conservatives long have lamented the Supreme Court's decisions that interpret the Establishment Clause as limiting aid to parochial schools and prohibiting prayer in public schools. Now it appears that they have a majority to reverse these decisions.

For the last thirty years, the Court has followed a test in Establishment Clause cases that was announced in *Lemon v. Kurtzman*.[7] In *Lemon*, the Court declared, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[8] A law is unconstitutional if it fails any prong of the *Lemon* test.[9]

Although there have been many cases where the Court decided Establishment Clause cases without applying this test,[10] it has been frequently used. And while several Justices have criticized the test and called for it to be overruled, this has not occurred.[11] Indeed, Justice Scalia, the primary advocate for overruling the *Lemon* test, colorfully lamented its survival and analogized it to:

> [a] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . . It is there to scare us . . . when we wish it to do so,

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[7] 403 U.S. 602 (1971).

[8] *Id.* at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[9] *Id.* at 612.

[10] *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (finding that creating a school district contiguous with a religious community violates the Establishment Clause); Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing nativity scene on government property); Marsh v. Chambers, 463 U.S. 783 (1983) (allowing government payment of a legislative chaplain because of the practice's history).

[11] Justice Scalia has expressly called for the overruling of the *Lemon* test. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting). For a recent case where the majority approvingly cited to and used the *Lemon* test, see *Lamb's Chapel*, 508 U.S. at 395-97 (majority opinion) (applying the *Lemon* test and concluding that the Establishment Clause was not violated by allowing religious groups to use school facilities during evenings and weekends).

> but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely.[12]

In recent years, four Justices have indicated that they want to overrule the *Lemon* test—Rehnquist, Scalia, Kennedy, and Thomas.[13] These four Justices have expressed a desire for a new test that allows much more government aid to religion and much more of a religious presence in government. They call for an "accommodationist" approach where the government would be deemed to violate the Establishment Clause only if it literally creates a church, favors one religion over others, or coerces religious participation. Very little would violate the Establishment Clause under this approach, which would emphasize judicial deference to the government in its choices concerning religion. Although Chief Justice Rehnquist is no longer on the Court, there is every reason to believe that Chief Justice Roberts and Justice Alito take this position. If a majority adopts the accommodationist approach, what will it mean for the law of the Establishment Clause?

A. Religious Symbols on Government Property

In *County of Allegheny v. ACLU*, the Court considered two different religious displays. One was a creche (a representation of the nativity of Jesus) that was placed in a display case in the stairway of a county courthouse. The other display was in front of a government building and included a large Christmas tree, a large menorah (a candleholder used as part of the Hanukkah celebration), and a sign saying that the city saluted liberty during the holiday season.[14] Four Justices—Kennedy, Rehnquist, Scalia, and White—took an accommodationist approach and would have allowed both displays. Justice Kennedy wrote that "the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgement of holidays with both cultural and religious as-

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[12] *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring in the judgment) (citations omitted).

[13] *See, e.g.*, *id.* at 399-400; *Lee*, 505 U.S. at 644 (Scalia, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 660-74 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

[14] *Allegheny*, 492 U.S. at 579-81 (Blackmun, J., opinion).

pects."[15] Under this approach, any religious symbol on government property would be permissible.

The majority, however, did not take this approach. Three Justices—Stevens, Brennan, and Marshall—took a strict separation approach and argued that both displays should be deemed unconstitutional as violating the Establishment Clause. Justice Stevens wrote that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."[16]

Justices Blackmun and O'Connor used a neutrality approach—specifically the symbolic endorsement test—finding the menorah constitutional and the nativity scene unconstitutional.[17] From their perspective, the menorah was permissible because it was accompanied by a Christian symbol (a Christmas tree) and a secular expression concerning liberty.[18] In contrast, the nativity scene was alone on government property and thus was likely to be perceived as symbolic endorsement of Christianity.[19] Justice O'Connor concluded that "the city of Pittsburgh's combined holiday display had neither the purpose nor the effect of endorsing religion, but that Allegheny County's creche display had such an effect."[20] Thus, the result was five to four that the nativity scene was unconstitutional but six to three that the menorah was permissible.

In the Court's most recent decisions concerning religious symbols on government property—*McCreary County v. ACLU of Kentucky*[21] and *Van Orden v. Perry*[22]—four Justices voted to allow two different Ten Commandments displays to remain on government property. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas were clear in expressing their view that religious symbols on government property do not violate the

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[15] *Id.* at 679 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[16] *Id.* at 650 (Stevens, J., concurring in part and dissenting in part).

[17] *Id.* at 620 (Blackmun, J., opinion).

[18] *Id.* at 621 (plurality opinion joined by Justice O'Connor); *see id.* at 620 (Blackmun, J., opinion) ("[T]he city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."); *id.* at 636 (O'Connor, J., concurring in part and concurring in the judgment).

[19] *Id.* at 601 & n.51 (Blackmun, J., opinion).

[20] *Id.* at 637 (O'Connor, J., concurring in part and concurring in the judgment).

[21] 125 S. Ct. 2722 (2005).

[22] 125 S. Ct. 2854 (2005).

Establishment Clause. Indeed, at oral argument in the case, Justice Kennedy, with obvious frustration in his voice, said to me that he did not understand why people who did not like the Texas Ten Commandments display did not simply look away. Of course, by this view, the government could put any religious symbol anywhere on government property. Even a large cross atop a city hall would not violate the Establishment Clause.

McCreary was a five-to-four decision with Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer in the majority holding that two Ten Commandment displays within Kentucky courthouses were unconstitutional.[23] *Van Orden* was also five to four but allowed a Texas Ten Commandments monument outside the Texas State Capitol.[24] Justice Breyer concurred in the judgment and provided the fifth vote to permit this. Justice Breyer did not see a six-feet-high, three-feet-wide Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court as symbolically endorsing religion. He was clear that he accepted the test adopted by the four dissenting justices—Stevens, O'Connor, Souter, and Ginsburg—that the government may not place religious symbols on government property if they have the effect of endorsing religion.[25] But Justice Breyer concluded by saying that while he agreed with Justice O'Connor's statement of principles, he did not agree with her application in this case.[26]

Now, though, with Justice O'Connor replaced by Justice Alito, there likely are five votes to allow any and all religious symbols on government property.

B. Aid to Religious Institutions

In *Mitchell v. Helms*,[27] a case decided in June 2000, four Justices called for altering the law of the Establishment Clause to allow much more aid to parochial schools. In an opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, Justice Thomas argued that the Establishment Clause is violated by aid to religion only if the government favors some religions over others.[28] This, in itself, would be a radical change in the Estab-

[23] *McCreary*, 125 S. Ct. at 2740-41.
[24] *Van Orden*, 125 S. Ct. at 2864.
[25] *Id.* at 2871 (Breyer, J., concurring in the judgment).
[26] *Id.* at 2872.
[27] 530 U.S. 793 (2000).
[28] *Id.* at 809-14.

lishment Clause because it would allow an unprecedented amount of aid to religious schools, with the only limit being that the government may not discriminate among religions.

Justice Thomas, though, went even further and suggested that precluding parochial schools from receiving aid was impermissible:

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. . . . [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.[29]

Following this approach would mean that denying religious schools funding available to other schools, as has always been required by the Establishment Clause, violates the Constitution.

Mitchell v. Helms involved the issue of whether it violated the Establishment Clause for the government to provide instructional equipment to religious schools.[30] In earlier cases, the Court had ruled that the government may not give instructional equipment to parochial institutions if it is a type that likely could be used for religious instruction.[31] In *Mitchell*, six Justices rejected this limitation, though they did not agree on an alternative test.

Justice Thomas's plurality opinion, joined by Rehnquist, Scalia, and Kennedy, could not be clearer in its call for allowing aid to parochial schools so long as the government is evenhanded among religions. Justice Thomas wrote, "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."[32]

The majority of the Justices in *Mitchell* rejected this approach and explicitly recognized that it would be a radical and unprecedented shift in the law of the Establishment Clause. Justice O'Connor, in an opinion concurring in the judgment, observed, "[W]e have never held that a government-aid program passes

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[29] *Id*. at 828 (citations omitted).

[30] *Id.* at 801.

[31] *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

[32] *Mitchell*, 530 U.S. at 829.

constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[33] Similarly, Justice Souter in dissent wrote, "The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretative efforts . . . ."[34]

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

Even more significantly, the implication of Justice Thomas's approach is that the government *must* fund parochial school education, at least to the extent that it provides any aid to private secular schools. Justice Thomas's approach clearly implies that excluding religion is not neutral and constitutes impermissible discrimination under the Establishment Clause.

In fact, Justice Thomas argued that it is offensive for the government to even look to whether an organization is religious in character.[35] But if the government cannot consider religion in distributing money, it will be *required* to subsidize religious schools on the same terms that it funds nonreligious ones. Justice Thomas acknowledges and endorses this: "[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[36]

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

In future years the Supreme Court is likely to face major issues concerning aid to religion. These include the constitutionality of school voucher programs and charitable choice programs that allow faith-based groups to receive government money to provide

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[33] *Id.* at 839 (O'Connor, J., concurring in the judgment).
[34] *Id.* at 884 (Souter, J., dissenting).
[35] *Id.* at 828 (plurality opinion).
[36] *Id.* at 827.

social services. There are now five Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—who are willing to allow such aid so long as it does not discriminate among religions.

C. Prayer in Schools

For almost forty years, the Supreme Court has said that prayer, even voluntary prayer in public schools, is unconstitutional.[37] Most recently, in the June 2000 case *Santa Fe Independent School District v. Doe*,[38] the Supreme Court declared unconstitutional student-delivered prayers at high school football games.[39] This case was decided by a six-to-three margin, with Chief Justice Rehnquist and Justices Scalia and Thomas dissenting. Chief Justice Rehnquist, writing for the dissent, saw the majority's opinion as unjustified "hostility" to religion.[40]

However, and quite significantly, Justice Kennedy has been unwilling to join the three most conservative Justices on the issue of school prayer. In addition to being in the majority in *Santa Fe*, Justice Kennedy wrote the opinion for the Court in *Lee v. Weisman*, which declared that clergy-delivered prayers at public school graduations are unconstitutional.[41] In *Lee*, Justice Kennedy emphasized the coercion inherent to such prayers.[42] He did not join Justice Scalia's biting dissent that stressed accommodating those who desired to pray.[43] Although Justice Kennedy joins with the other conservatives in taking an accommodationist approach to the Establishment Clause, he is far more willing to find coercion in the school context as evidenced by his opinion in *Lee* and his position with the majority in *Santa Fe*.

Therefore, before the Court could overrule the many precedents limiting prayer in public schools, likely another Justice would have to be replaced from among Justices Stevens, Kennedy, Souter, Breyer, and Ginsburg.

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[37] *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[38] 530 U.S. 290 (2000).

[39] *Id.* at 301.

[40] *Id.* at 318 (Rehnquist, C.J., dissenting).

[41] 505 U.S. 577, 599 (1992).

[42] *Id.* at 592-94.

[43] *Id.* at 645 (Scalia, J., dissenting). Scalia's opinion was joined by Chief Justice Rehnquist and Justices White and Thomas.

II

WHY THERE SHOULD BE A WALL SEPARATING CHURCH AND STATE

As described above, the conservative Justices on the Court over the last two decades—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—have argued that the Establishment Clause should be interpreted to accommodate religion. The government would violate the Establishment Clause only if it literally established a church, coerced religious participation, or favored one religion over another. The government would be acting constitutionally by giving religion and secular activities equal treatment and equal aid; disfavoring religion would violate the Establishment Clause.

The fundamental flaw in this argument is that it fails to recognize that religion is different from other beliefs under the Constitution. For example, Justice Thomas's approach in *Mitchell v. Helms* is premised on the idea that religious schools should be treated the same as secular ones and, more generally, that the government should treat religion and nonreligion equally.[44] But this ignores the Constitution's text and history as well as the social need for separating church and state.

The text of the Constitution expressly treats religion differently from any other set of beliefs in its prohibition of government enacting a law respecting the establishment of religion or abridging its free exercise. This text is based on historical experience as to how religion often is used as a basis for discrimination and persecution.[45] Religion also is treated differently because of a recognition of the profound role that religious beliefs play in a person's life. Thus, the First Amendment should properly be interpreted as requiring the government to stay out of religion and religion to stay out of government. Justice Thomas would obliterate this fundamental principle and mandate that religion be treated the same as all other beliefs and that government treat religious institutions the same as all others.

The Establishment Clause serves many important purposes that would be undermined by the approach likely to be taken by the five conservative Justices. First, the Establishment Clause

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[44] *See* 530 U.S. 793, 809 (2003).

[45] *See* Engel v. Vitale, 370 U.S. 421, 432-33 (1962); Everson v. Bd. of Educ., 330 U.S. 1, 8-15 (1947).

protects freedom of conscience by ensuring that people are not taxed to support religions other than their own. The famous statement of Thomas Jefferson concerning the need for a wall separating church and state and James Madison's *Memorial and Remonstrance Against Religious Assessments* were written in the context of opposing a state tax to aid the church.[46]

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

> to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. . . .[47]

Similarly Madison said, "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment . . . ."[48]

It is wrong to make people support a church that teaches that their religion or beliefs are evil. It violates their freedom of conscience and forces them to support religions that they do not accept. Likewise, Justice Souter has explained that "compelling an individual to support religion violates the fundamental principle of freedom of conscience. Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."[49]

But this is exactly what the conservative Justices' approach to the Establishment Clause would do. It would *mandate* that the government subsidize parochial schools and religious social services any time the government is providing aid for secular schools and social services. People would be required, through their tax dollars, to pay for religious indoctrination, even religious teaching of hatred and intolerance.

Second, the Establishment Clause serves a fundamental purpose of inclusion in that it allows all in society—of every religion

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[46] Madison's *Remonstrance* is reprinted in *Everson*, 330 U.S. at 63-72 app. (1947).

[47] *Everson*, 330 U.S. at 13 (second omission in original) (quoting the *Virginia Bill for Religious Liberty*).

[48] *Id.* at 65-66 app. (reprinting Madison's *Remonstrance*).

[49] *Mitchell*, 530 U.S. at 870 (Souter, J., dissenting) (footnote omitted).

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

This goal of inclusion is central, not incidental, to the Establishment Clause. Justice O'Connor has explained, "Direct government action endorsing religion or a particular religion is invalid . . . because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[50]

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. The very core of the Establishment Clause prevents the government from taking actions that divide people in this way. The focus of the Establishment Clause is thus very much on the effect of the message on the audience. This helps to explain why Justice Scalia is simply wrong in his dissent in *Lee v. Weisman*, where he expresses the need to protect the majority in the audience who want to hear a prayer.[51] The Establishment Clause is about preventing the majority, through government power, from making those of other religions feel unwelcome. If the majority of the audience wants to hear prayers, of course it may do so, but not at an official government function, especially one where the audience is compelled to be present.

The potential for this problem is much greater now than when the First Amendment was adopted. The country is much more

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[50] Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

[51] 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

religiously diverse today than it was in 1791. Justice Brennan observed in 1963 that

> our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[52]

Equality does not cure this. Those who disavow any religious belief are forced to support all religions; indeed, they will be surrounded with parochial schools supported by their tax dollars. Forcing them to hear prayers of every religion inevitably makes them feel unwelcome in their own schools and their own country. The Establishment Clause should be interpreted to forbid these practices.

This reasoning, of course, also 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—that it is not their government. *Van Orden v. Perry* was important, and wrongly decided, because it allowed Texas to display a profoundly sectarian religious message at the seat of its government. Between the Texas State Capitol and the Texas Supreme Court is a six-feet-high, three-feet-wide monument with a passage from the Bible that many religions regard as particularly sacred.[53] The monument has, in large letters, the words "I AM the LORD thy God."[54] The first four Commandments listed—"Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images," "Thou shalt not take the Name of the Lord thy God in vain," and "Remember the Sabbath day, to keep it holy"—are religious mandates.[55] There are many versions of the Ten Commandments, and the one in Texas is the Protestant version.[56] The Texas monument, like others donated around the country by the Fraternal Order of Eagles, "[w]ith the exception of some minor word changes in the fourth and fifth line of the text, dealing with graven images, . . . is ex-

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[52] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring).

[53] 125 S. Ct. 2854, 2858 (2005).

[54] *Id.* at 2873, 2891 app. (Stevens, J., dissenting) (photograph depicting monument).

[55] *Id.* at 2873-74, 2891 app.

[56] *Id.* at 2879-80 & n.15.

actly the same as in the King James Version of the Bible. . . . [T]he structuring of the Commandments is identical to the Lutheran Catechism."[57]

A person entering the Texas State Capitol or the Texas Supreme Court who is of a religion that does not view the Ten Commandments as sacred text, or who is not Protestant, is made to feel unwelcome. She is made to feel an outsider. This is exactly what the Establishment Clause and the separation of church and state were meant to prevent.

Third, the Establishment Clause protects religion from the government. If the government provides assistance, inescapably there are and should be conditions attached. For example, when the government gives money, it must make sure that the funds are used for their intended purpose. This necessarily involves the government placing conditions on the funds and monitoring how they are spent. Such government entanglement is a threat to religion.

This concern is not new. Roger Williams, for example, expressed great concern that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained."[58] Justice Souter also expressed this as a fundamental basis for the Establishment Clause:

> [G]overnment aid corrupts religion. Madison argued that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, superstition, bigotry and persecution." In a variant of Madison's concern, we have repeatedly noted that a government's favor to a particular religion or sect threatens to taint it with "corrosive secularism."[59]

Justice Thomas's equality theory would mean that the govern-

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[57] Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1493 (2005). Indeed, "there are at least five distinctive versions of the Decalogue. In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471, 474 (1998) (footnote omitted). For example, the Jewish version of the First Commandment is "I the Lord am your God who brought you out of the land of Egypt, the house of bondage." The Catholic version of the Second Commandment does not prohibit graven images, whereas the Jewish version does prohibit them. *See* Finkelman, *supra*, at 1488-90.

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

[59] Mitchell v. Helms, 530 U.S. 793, 871 (2000) (Souter, J., dissenting) (second alteration in original) (citations omitted).

ment would be enmeshed in almost every aspect of religious schools and religious institutions. The government, as a condition for funding, could—and should—set curricula and educational requirements. The government would need to monitor to see if these mandates were met. Thomas's approach is a threat to religion and it is no less so because all religions are threatened equally.

Fourth, coercion is inherent without a separation of church and state. If supervisors in a government office hold prayer breakfasts, even if they are voluntary, employees feel the pressure to attend. If schools have prayers, students feel pressure to participate.

Government support for faith-based organizations has exactly this effect. For example, across the country, criminal defendants increasingly are being placed in drug and alcohol rehabilitation programs that are operated by religious institutions.[60] Moreover, many states have created drug courts where participation in drug rehabilitation programs is an alternative to incarceration.[61] Thus, because of the federal government's emphasis on allowing faith-based programs to receive government funding, criminal defendants increasingly are being placed in drug and alcohol rehabilitation programs conducted by pervasively religious institutions. For example, in recent years, the federal government has significantly increased the availability of funds for drug and alcohol rehabilitation programs and has expressly authorized faith-based organizations to receive government money to provide these ser-

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[60] *See, e.g.*, Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 786-89 (1998) (citing American Community Renewal Act of 1997, S. 432, 105th Cong. (1997)).

[61] *See* DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 7 (1997) ("The mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity. Drug courts offer a compelling choice for individuals whose criminal justice involvement stems from AOD [Alcohol and Other Drug] use: participation in treatment. In exchange for successful completion of the treatment program, the court may dismiss the original charge, reduce or set aside a sentence, offer some lesser penalty, or offer a combination of these."); U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO-02-434, DRUG COURTS: BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS 27 (2002) (stating that forty-eight states have drug court programs); U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 1 (2005) ("Drug court programs have become popular nationwide in the criminal justice system. As of September 2004, there were over 1,200 drug court programs operating in addition to about 500 being planned.").

vices.[62] Similarly, criminal defendants who have abused alcohol, such as in drunk-driving cases, are increasingly being diverted to treatment and rehabilitation programs commonly conducted by religious groups.[63] For example, a criminal defendant often must participate in programs such as Alcoholics Anonymous and Narcotics Anonymous, programs in which faith and God play a central role in treatment.[64]

All of this inevitably pressures criminal defendants to participate in religious activities, frequently of religions different from their own. To avoid prison, a defendant will have to go to a religious treatment program that includes indoctrination in a specific religion. And within prison, inmates are placed in programs that are completely sectarian. For example, recently a federal district court in *Americans United for Separation of Church and State v. Prison Fellowship Ministries*[65] invalidated such a program as violating the Establishment Clause.[66] The court found that it violated the Establishment Clause for an organization to provide prerelease rehabilitation services to inmates through a program based on Evangelical Christianity.[67] Inevitably, inmates were pressured to participate in religions they did not accept or believe in.[68]

A separation of church and state prevents coercion. The Su-

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[62] *See* Press Release, The White House, Fact Sheet: Providing Help to Heal Americans Struggling with Addiction (Jan. 30, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/20030130-22.html. ("In his State of the Union Address, President Bush announced a three-year, $600 million federal treatment initiative to help addicted Americans find needed treatment from the most effective programs, including faith-based and community-based organizations.").

[63] *See* Rachel F. Calabro, Comment, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565, 565-67 (1998); Michael G. Honeymar, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 437-38 (1997).

[64] *See, e.g.*, NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY 24 (2001) ("Twelve-Step programs such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) rely on spiritual concepts and methods to support individuals seeking to abstain from substance use. . . . The spiritual basis of a 12-Step program is apparent in its tenets which begin with an acknowledgment of God or a higher power.").

[65] 432 F. Supp. 2d 862 (S.D. Iowa 2006).

[66] *Id.* at 925.

[67] *Id.* at 922.

[68] *See id.* at 891-914 (describing the benefits enjoyed by inmates participating in Christian-based rehabilitation program).

preme Court long has held that coercing a person into participating in religious activities violates the core of both the Free Exercise and the Establishment Clauses.[69] Yet, without a separation of church and state, coercion—whether in schools, prisons, or elsewhere—is inevitable.

Conclusion

I have no doubt that when historians look back at the end of the twentieth century and the early years of the twenty-first, they will point to the rise of fundamentalism as the most important development across the world. This has manifested itself in the United States, as in other nations, in those who want religion to be much more a part of government.

It now appears that there are five Justices on the Supreme Court who will allow this to happen. I believe that this is terribly misguided and at odds with the Establishment Clause's mandate for a wall separating church and state. Justice O'Connor expressed this eloquently when she wrote:

> Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?[70]

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[69] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (stating that religious coercion violates Establishment Clause); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (stating that religious coercion violates Free Exercise Clause).

[70] McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2746 (2005) (O'Connor, J. concurring).