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## Justice Stevens, Religious Freedom, and the Value of Equal Membership

### Cover Page Footnote

Provost and Laurance S. Rockefeller Professor of Public Affairs and the University Center for Human Values, Princeton University. Law Clerk for Justice John Paul Stevens, October 1989 Term. I wish to thank Professor Abner Greene and Fordham Law School for including me in the conference honoring Justice Stevens, and Larry Sager for comments on an earlier draft of this essay. It is a pleasure to acknowledge here my deep personal gratitude to Justice John Paul Stevens for his mentorship and the privilege of working in his chambers, and to express my admiration for the extraordinary service he has rendered to the law and to the country.

## PANEL V: FIRST AMENDMENT/VOTING RIGHTS

### JUSTICE STEVENS, RELIGIOUS FREEDOM, AND THE VALUE OF EQUAL MEMBERSHIP

*Christopher L. Eisgruber\**

For many years now, the United States Supreme Court has divided over major issues of religious freedom under both the Free Exercise and Establishment Clauses of the United States Constitution. With the turnover this year of two seats on the Court, the future of its jurisprudence in this domain, as in so many others, hangs in the balance. In this Essay, I want to draw attention to a key constitutional value—the value of equal membership<sup>1</sup>—that, I argue, has guided the jurisprudence of both John Paul Stevens and the recently retired Sandra Day O'Connor, despite the very significant discrepancies in their doctrinal conclusions. Their shared commitment to the value, I argue, is more important than their disagreements about its implications—especially now, when the value itself seems to be freshly contested.

Even a careful student of the Supreme Court might be tempted to classify John Paul Stevens and Sandra Day O'Connor as adversaries on issues of religious freedom. They seem to disagree about the biggest issues in the field. In Establishment Clause cases, Justice Stevens interprets the Constitution to forbid the state from subsidizing religious institutions or practices. Justice O'Connor, by contrast, would permit the state to benefit religion so long as it does not favor religion over non-religion or one sect over another. For example, Justice Stevens believes that tuition voucher programs are unconstitutional if they support religious schools and institutions; Justice O'Connor believes that such subsidies are constitutional

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1. "Equal membership" is not the terminology used by either Justice Stevens or Justice O'Connor. It is the terminology used by my frequent coauthor, Lawrence G. Sager, in his elegant book, *Justice in Plainclothes* 145-46 (2004), and I follow his usage in employing the concept here.

provided that they are even handed.<sup>2</sup> Likewise, Justice Stevens maintains that the state must sometimes prohibit private parties from erecting religious displays on public property; Justice O'Connor, on the other hand, would allow such displays, provided that the state treats religious messages the same way that it treats all other messages.<sup>3</sup>

On the free exercise side, Justice Stevens believes that, in general, the state has no constitutional obligation to provide an exemption when neutral and generally applicable laws burden religious conduct.<sup>4</sup> Justice O'Connor has vigorously criticized this position, arguing that the Constitution sometimes requires the government to provide special accommodations for religiously motivated conduct.<sup>5</sup> She has also been on the opposite side from Justice Stevens in a pair of free speech cases about the rights of religious groups to organize and function within the public schools.<sup>6</sup>

To be sure, there is a series of hotly contested decisions about religious liberty in which Justice O'Connor and Justice Stevens have joined forces. Most prominent among these are cases about public sponsorship of religious symbols and rituals (for example, crèches in town squares and prayers at school ceremonies).<sup>7</sup> Justices O'Connor and Stevens also voted together in three other cases where the state arguably favored religion over non-religion: *Wallace v. Jaffree*, the Alabama moment-of-silence case,<sup>8</sup> *Edwards v. Aguillard*, the Louisiana "creation science" case,<sup>9</sup> and the curious case of *Board of Education of Kiryas Joel Village School District v. Grumet*, where New York deliberately created a religiously homogenous

2. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting), with *id.* at 663 (O'Connor, J., concurring); compare *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 863 (1995) (Souter, Stevens, Ginsburg, and Breyer, JJ., dissenting), with *id.* at 846 (O'Connor, J., concurring).

3. Compare *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting), with *id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment).

4. Justice Stevens joined the majority opinion in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring), Justice Stevens maintained that the Religious Freedom Restoration Act was an unconstitutional establishment of religion because it accommodated religious needs without accommodating analogous secular ones.

5. *Boerne*, 521 U.S. at 544 (O'Connor, J., dissenting); *Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment).

6. In *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (construing Equal Access Act), Justice Stevens dissented from an opinion by Justice O'Connor that compelled a school to allow a religious club to meet during its activity period. Likewise, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (allowing a religious club to meet at an elementary school), Justice O'Connor joined the majority while Justice Stevens dissented.

7. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (Ten Commandments outside state capitol); *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (Ten Commandments in courthouse); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at public school football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at public school graduation); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (crèche display); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (town crèche display).

8. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

9. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

school district for an Orthodox Jewish sect.<sup>10</sup> These cases could be considered “the exception that proves the rule.” But I think that the reverse is true: These cases are windows upon a core of principled agreement, and they show that the jurisprudential differences between the two Justices are much less dramatic than one might suppose.

Cases about crèches and other religious symbols have generated some unusually rich debates on the Court about both methodologies of constitutional interpretation (in particular, the role of the framers’ intent) and the moral principles that underlie the Constitution’s treatment of religion. Justice O’Connor and Justice Stevens have agreed in these cases that the Constitution’s religion clauses express a principle of equal membership. In a pivotal passage composed almost twenty years ago, Justice O’Connor wrote,

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition . . . [by its] endorsement or disapproval of religion. Endorsement 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.<sup>11</sup>

Justice Stevens has quoted this passage with approval, and he has added that “[a] paramount purpose of the Establishment Clause is to protect . . . a person from being made to feel like an outsider in matters of faith, and a stranger in the political community.”<sup>12</sup>

In my view, equality-based principles of this kind animate the jurisprudence of both Justices not only in this run of cases but more generally. Consider, for example, Justice Stevens’s position about when states may restrict religiously motivated conduct. Justice Stevens is sometimes regarded as hostile to the idea that the Free Exercise Clause sometimes requires the state to exempt such conduct from otherwise applicable legal burdens and regulations. That is a misunderstanding of his position. In *United States v. Lee*,<sup>13</sup> Justice Stevens articulated an equality-based rationale for cases in which the Court had held that exemptions were constitutionally mandatory. He said that treating a “religious objection . . . as though it were tantamount to a physical impairment that made it impossible for the employee to continue work . . . could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect.”<sup>14</sup>

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10. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

11. *Lynch*, 465 U.S. at 687-88 (O’Connor, J., concurring).

12. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

13. 455 U.S. 252 (1982).

14. *Id.* at 264 n.3 (Stevens, J., concurring); see also *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 147 (1987) (Stevens, J., concurring).

Stevens offered this analysis to explain the Court's jurisprudence, which, at that time, gave lip service to a broad right of exemption for religiously motivated conduct but then rejected almost every such claim brought before it. The claims that prevailed, Stevens observed, were generally those needed to ensure that religious needs were treated as well as comparable secular ones. Lawrence G. Sager and I have argued that Stevens was exactly right about that point, and we have also shown how a Stevens-like equality-based exemptions jurisprudence could lead to more robust protection for religious conduct than the Court has ever provided.<sup>15</sup>

As a result, the disparities between the views of Justices Stevens and O'Connor about the Free Exercise Clause are smaller than one might suppose from reading the opinions in *Smith*—or, especially, from reading the academic commentary about those opinions. On the one hand, Justice Stevens's view is consistent with a constitutional obligation on the part of the government to provide exemptions for religiously motivated conduct in some cases (namely, those where it would provide such exemptions to accommodate comparably serious secular needs). On the other hand, Justice O'Connor's apparently demanding presumption in favor of exemptions turns out to be flexible in practice—a feature manifest in *Smith* itself, where Justice O'Connor concurred rather than dissented (and likewise manifest in other cases, including *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>16</sup> where Justices O'Connor and Stevens voted the same way).<sup>17</sup> Undoubtedly there is a gap between the two approaches, but it is narrower than it first appears, and both approaches are reasonably regarded as rooted in the kind of equality-based values articulated in the cases about religious symbols (though to his credit, Justice Stevens has been more clear about this connection).

The practical differences are more substantial on the Establishment Clause side, where the two Justices reach quite different results in cases about whether religious institutions can share in non-preferential subsidy schemes, such as voucher programs. Justice O'Connor's views in these cases are based upon a straightforward conception of equality: Religious

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15. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1281-1315 (1994); see also Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 S. Ct. Rev. 79, 129-31.

16. 485 U.S. 439, 442 (1988) (rejecting a free exercise claim by Native Americans who complained that a planned logging road would desecrate their cemetery; Justice O'Connor wrote the opinion, which Justice Stevens joined).

17. Justice O'Connor's approach was sometimes more protective of free exercise rights than was Justice Stevens's. For example, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), Justice Stevens joined the majority, which denied the free exercise claim of an Orthodox Jewish Air Force officer who wanted permission to wear a yarmulke; Justice O'Connor dissented. However, sometimes Justice Stevens's approach could be more favorable to free exercise claims than Justice O'Connor's. Thus, in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), Justice Stevens joined a dissent that would have upheld a free exercise claim by a prisoner who sought to attend religious services, whereas Justice O'Connor joined the majority, which denied the claim.

viewpoints ought to be able to compete in the political process along with secular ones, so long as they receive no special privilege.<sup>18</sup> Justice Stevens's Establishment Clause views, as we have already seen, also include a prominent equality-based strand. Yet he supplements his attention to equality with an additional concern about the harms of religious factionalism and strife. So, for example, he says in *Zelman* that his conclusions were influenced by

my understanding of the impact of religious strife on the decisions of our forebears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.<sup>19</sup>

Likewise, in *Van Orden v. Perry*, he writes that “[g]overnment’s obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state.”<sup>20</sup>

People sometimes suppose that equal membership and avoiding religious strife are two sides of the same coin. Certainly they are related goals; often, religious strife emerges out of the effort of one religious group to insist on unequal membership—to insist, in other words, on its superiority to (rather than equality with) one or many rivals. Religious persecution is a severe form of both unequal membership and religious strife. But equal membership and religious strife are not the same thing. One can have either without the other. One can have strife amongst equals (think of the rivalry among political parties or interest groups, for example). One can also have inequality without strife, if one group accepts certain indignities, either because it has come to regard them as legitimate or because it feels powerless to eliminate them (so, for example, before the 1960s, non-Christian religious minorities in the United States might have tolerated school prayers and town crèche displays simply because they had little chance of removing them).

Quelling public strife has been the Holy Grail or, perhaps more aptly, the siren song of religious liberty jurisprudence. It has captivated Justices and law professors alike. It leads to a wide variety of disparate and sometimes surprising suggestions, because it is exceedingly unclear what could stop religious groups from sniping at one another or competing for political

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18. See, e.g., *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (“‘The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.’ Neutrality, in both form and effect, is one hallmark of the Establishment Clause.” (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring))).

19. *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

20. *Van Orden v. Perry*, 125 S. Ct. 2854, 2875 (2005) (Stevens, J., dissenting) (emphasis added).

power. For example, a number of different jurists and scholars—including Justice Stephen Breyer,<sup>21</sup> Steven Smith,<sup>22</sup> and Noah Feldman<sup>23</sup>—have all suggested that we should be more accommodating about public displays of religious symbols in order to produce peace. The proposals vary, but the basic idea is that since nobody is out-and-out coerced by such displays, we should litigate less and try to get along more (for Justice Breyer, this idea applies only in borderline cases;<sup>24</sup> for Feldman, it seems to apply more globally<sup>25</sup>).

I submit that suggestions of this kind are both misplaced and quixotic: They are misplaced because we betray our constitutional aspirations if we compromise our commitment to equal membership in exchange for a bit more serenity, and they are quixotic because no Establishment Clause doctrine will stop religious groups from bickering with one another in the public sphere. The United States is home to a wide variety of religious (and nonreligious) groups; these groups are often well organized and intense in their convictions; and the United States is divided into a huge number of legal jurisdictions, ensuring that different groups will score successes and exercise control in different places and at different levels of government. These factors ensure that religiously inflected political conflict will remain part of the American political landscape. Religious groups clash, and will inevitably clash, over abortion, gay rights, school prayer, and lots of other topics regardless of what the Court does in its Establishment Clause cases. And, for that matter, they will get upset about crèche displays and Ten Commandment monuments and the Pledge of Allegiance, whether or not we wish it were otherwise (and, like Justice Breyer, I often do wish exactly that!).

This persistent, religiously tinged factionalism would be a huge concern if it threatened to degenerate into the kind of violent religious wars that have plagued other parts of the globe. To be sure, the United States has witnessed incidents of home-grown, religiously motivated violence, such as

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21. *Id.* at 2871 (Breyer, J., concurring) (arguing in favor of upholding the constitutionality of a religious display partly because “a contrary conclusion . . . would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”).

22. Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 110-17 (1995).

23. Noah Feldman, *Divided by God: America’s Church-State Problem—and What We Should Do About It* 16 (2005) (“Once a shift to symbolic inclusion occurs, the fevered pitch of debate should tone down.”); *id.* at 243 (recommending abandonment of restrictions on public display of religious symbols because “[e]vangelicals’ perceived exclusion fuels resentment and a reactionary attempt to impose brand-new symbols, like the Ten Commandments in courthouses, where none existed before”).

24. *Van Orden*, 125 S. Ct. at 2871 (indicating that community reactions are “critical in a borderline case such as this one”).

25. Feldman, *supra* note 23, at 15-16, 237-44.

attacks on abortion clinics.<sup>26</sup> But, for the most part, the Constitution successfully tames religious conflict not through the details of Establishment Clause doctrine, but through the strategy brilliantly laid out by James Madison in *Federalist 10*: The large size of the country, and the sheer diversity of religious groups, make it impossible for any one group to acquire majority status, giving each an incentive to cooperate with the others.<sup>27</sup>

To be sure, some policies may dampen religious tensions and others may inflame them. It is better to dampen them, of course, and it is quite possible that the best way to do that is to avoid sending tax dollars to religious institutions, whether through tuition vouchers, faith-based social services, or any such program. Yet the question whether such programs will heighten or diminish religious tensions (and whether, if they heighten them, that cost is worth bearing), seems to me precisely the sort of large-scale, speculative, all-things-considered prudential judgment best left to legislators.<sup>28</sup> Justice Stevens made this point very effectively with regard to racial equality in his opinions about affirmative action and race-conscious political reapportionment.<sup>29</sup> Those opinions recognize that race-sensitive policy making might have bad consequences, but they rightly insist that we must respect the discretion of legislators to make pragmatic judgments about how best to achieve racial harmony. I would say the same about religious harmony—the legislature ought to have some discretion about how to pursue that goal, subject to the restriction, rightly asserted by both Justices Stevens and O'Connor, that government has no business preferring a particular religion, or a group of religions, or religion in general.

This argument leaves me sympathetic to Justice Stevens's position in *Mergens* and *Good News*, where he sought to protect the discretion of school administrators to decide whether to permit organized proselytizing in their schools.<sup>30</sup> Yet, for the same reason, I am more sympathetic to Justice O'Connor's views about the constitutionality of vouchers—though I hasten to add that, as a policy matter, I am no fan of them.

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26. The Mormon conflict of the nineteenth century is an example of a much larger, and quite bloody, conflict. See generally Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (2002).

27. *The Federalist* No. 10, at 77, 83 (James Madison) (Clinton Rossiter, ed., 1961).

28. Christopher L. Eisgruber, *Constitutional Self-Government 170-74* (2001).

29. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 925 (1996) (Stevens, J., dissenting) (“I know of no workable constitutional principle, however, that can discern whether the message conveyed [by race-conscious districting] is a distressing endorsement of racial separatism, or an inspiring call to integrate the political process.”).

30. In both cases, the question was whether school administrators, by allowing some clubs to meet on school grounds, had created a “public forum” open to religious grounds. *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 270-91 (1990) (Stevens, J., dissenting) (Equal Access Act case involving groups that would meet during the school day); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 130-34 (2001) (Stevens, J., dissenting) (Free Speech case involving an after-school group sponsored by a religious organization).

What strikes me as most important to the future of the Court and the Constitution, however, is not anything about the divergence between the religious freedom jurisprudence of Justices Stevens and O'Connor, but rather the shared value of equal membership that unites them. Until last Term's cases about the Ten Commandments, I had thought that the Court was on a trajectory leading toward a more or less uniform embrace of the value of equal membership. As we have seen, the Justices disagreed about what that value entailed, but their disagreements were reasonable ones. Moreover, we might plausibly hope that their shared commitment to work out the meaning of equal membership through case-by-case adjudication would, over time, lead the Court as a whole to a point of reflective equilibrium about its requirements.<sup>31</sup>

Last Term's opinions, however, provided reason to worry that this vital project is in jeopardy. The plurality opinion in *Van Orden*<sup>32</sup> and, especially, Justice Antonin Scalia's dissent in *McCreary County v. ACLU* included passages that disparaged the importance of equal membership. In *McCreary*,<sup>33</sup> Justice Scalia declared that "[t]hose who wrote the Constitution believed that morality was essential to the well-being of our society and that encouragement of religion was the best way to foster morality."<sup>34</sup> He went on to argue that "[w]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits the disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."<sup>35</sup>

These bluntly inegalitarian statements were quite gratuitous. In Justice Scalia's view, the result in the case should have been no different under the more egalitarian principles applied by the majority;<sup>36</sup> there was, accordingly, no need for him to repudiate the idea that all manner of believers (and nonbelievers) are entitled to equal concern and respect under the Constitution.

It is distressing that a Court, which has for the past decade divided about how to pursue equality in the domain of religious freedom, should now divide about whether to pursue that goal. The United States is home to a

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31. Sager, *supra* note 1, at 75.

32. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

33. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

34. *Id.* at 2749 (Scalia, J., dissenting).

35. *Id.* at 2753. In *Van Orden*, Justice Rehnquist described the Establishment Clause as "Januslike," with one face looking "toward the strong role played by religion and religious traditions throughout our Nation's history" and the other face looking "toward the principle that governmental intervention in religious matters can itself endanger religious freedom." 125 S. Ct. at 2859. Justice Rehnquist went on to collect various quotations (unrepresentative, in my view, of the Court's recent and better jurisprudence) about how "[o]ur institutions presuppose a Supreme Being . . ." *Id.* It is disturbing that Rehnquist would suggest that such overtly religious ideas ought to compete with, or temper, the constitutional prohibition upon "governmental intervention in religious matters," but his opinion is nevertheless mild compared to Scalia's *McCreary* dissent.

36. *McCreary*, 125 S. Ct. at 2758-64.

thriving and vibrant spiritual pluralism, and our commitment to the project of religious freedom requires that we strive to identify fair terms of cooperation for a religiously diverse people. Justices O'Connor and Stevens have both been leaders in that effort. With Justice O'Connor's retirement, and in light of the sentiments expressed in the *McCreary* dissent, the continuation of that project now seems doubtful.

## *Notes & Observations*