

“I would resurrect the ‘high and impregnable’ wall between church and state constructed by the Framers of the First Amendment.”

John Paul Stevens

Committee for Public Education and Religious Liberty v. Regan 1980

“The ‘wall of separation between church and state’ is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.”

William H. Rehnquist

Wallace v. Jaffree 1985

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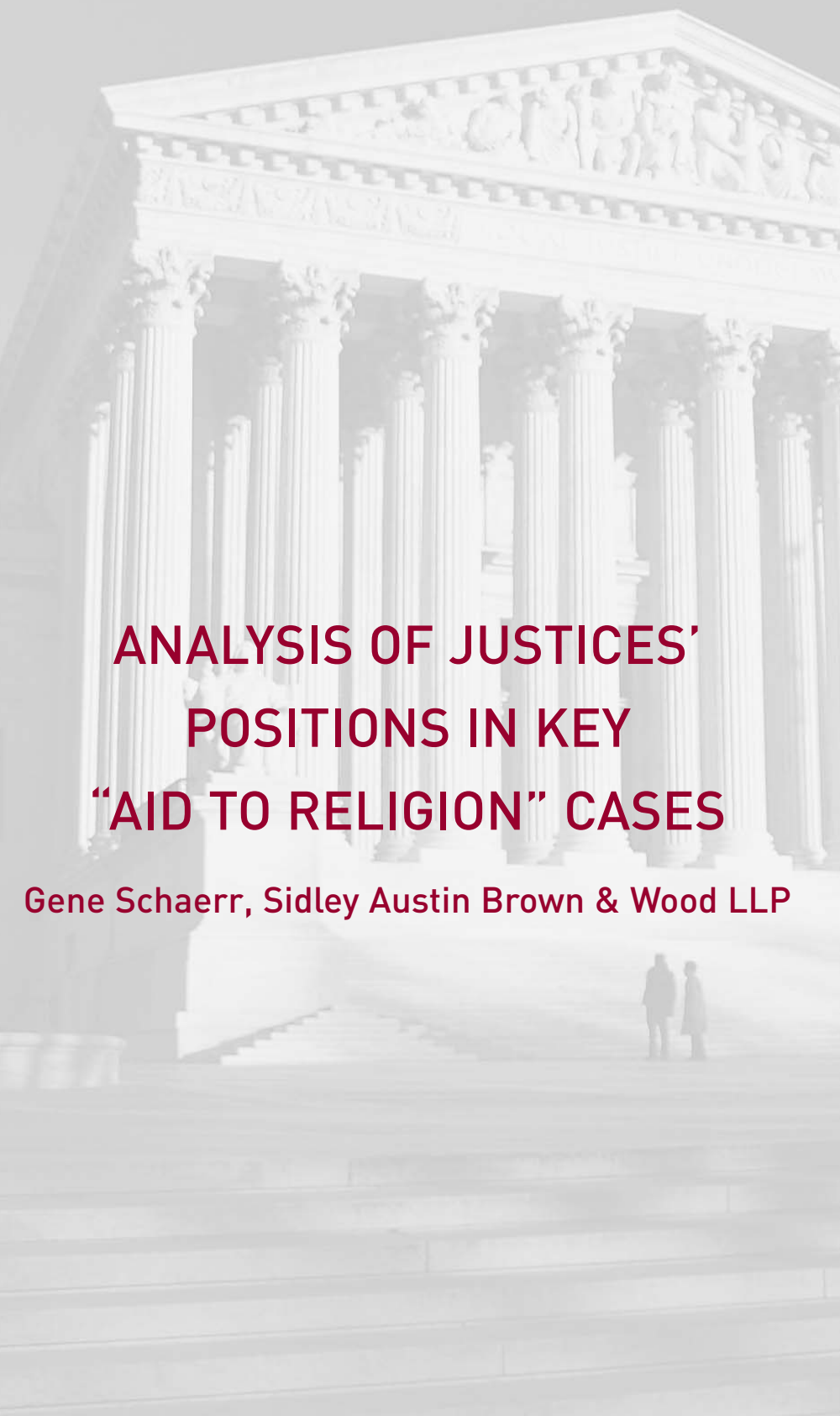
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ANALYSIS OF JUSTICES’ POSITIONS IN KEY “AID TO RELIGION” CASES

Gene Schaerr, Sidley Austin Brown & Wood LLP

“[A]s a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.”

Antonin Scalia

Capitol Square Review and Advisory Board v. Pinette 1995

**ANALYSIS OF JUSTICES’ POSITIONS IN KEY
“AID TO RELIGION” CASES**
Gene Schaerr, Sidley Austin Brown & Wood LLP

“[W]henver affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government’s part; and ... direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause.”

David Souter

Rosenberger v. Rector and Visitors of University of Virginia 1995

CASES	THOMAS (1991*)	SCALIA (1986)
<i>Wolman v. Walter</i> (1977) (invalidating lending of instructional materials but approving other services)	NOC	NOC
<i>Mueller v. Allen</i> (1983) (upholding income tax deduction for educational expenses)	NOC	NOC
<i>Aguilar v. Felton</i> (1983) (invalidating use of public teachers at religious schools)	NOC	NOC
<i>Grand Rapids v. Ball</i> (1985) (invalidating use of public teachers at religious schools)	NOC	NOC
<i>Witters v. Washington Department</i> (1986) (upholding vocational rehab to religious college students)	NOC	NOC
<i>Texas Monthly v. Bullock</i> (1989) (invalidating tax exemption for religious literature)	NOC	dissented
<i>Zobrest v. Catalina</i> (1993) (upholding sign-language interpreter at school)	joined majority opinion	joined majority opinion
<i>Rosenberger v. UVA</i> (1995) (invalidating exclusion of student-run religious publication)	joined majority opinion through separate concurrence	joined majority opinion
<i>Agostini v. Felton</i> (1997) (upholding public teachers at religious schools)	joined majority opinion	joined majority opinion
<i>Mitchell v. Helms</i> (2000) (upholding lending of instructional materials)	wrote plurality opinion overruling <i>Wolman</i>	joined plurality opinion
<i>Good News Club v. Milford</i> (2001) (rejecting EC defense to denial of equal access to school)	wrote majority opinion	joined majority opinion
<i>Zelman v. Simmons-Harris</i> (2002) (rejecting EC challenge to voucher program allowing use at religious schools)	joined majority	joined majority
<i>Locke v. Davey</i> (2004) (rejecting challenge to state law prohibiting aid to student pursuing theology degree)	dissented and joined Scalia dissent	wrote principal dissent

“[N]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs. . . . This doctrine, born of bigotry, should be buried now.”

Clarence Thomas

Mitchell v. Helms 2000

REHNQUIST (1972)	KENNEDY (1988)	O’CONNOR (1981)	BREYER (1994)
concurred in Blackmun majority to extent ruling approved aid	NOC	NOC	NOC
wrote majority opinion	NOC	NOC	NOC
dissented; joined O’Connor’s dissent in part	NOC	dissented	NOC
dissented from Brennan majority	NOC	concurred and dissented in part	NOC
joined Powell’s separate concurrence joining majority opinion	NOC	separate concurrence joining majority opinion in part	NOC
joined Scalia dissent	joined Scalia dissent	joined Blackmun concurrence: tax exemptions for religious lit only	NOC
wrote majority opinion	joined majority opinion	dissented	NOC
joined majority opinion	wrote majority opinion: EC can’t justify religious discrimination	joining majority opinion subject to separate concurrence	joined Souter’s dissent
joined majority opinion	joined majority opinion	wrote majority opinion overruling <i>Ball</i> and <i>Aguilar</i>	joined Ginsburg and Souter in part, all procedural
joined plurality opinion	joined plurality opinion	concurred	joined O’Connor’s concurring opinion
joined majority opinion	joined majority opinion	joined majority opinion	concurred in part - EC issue still open on remand
no EC violation where true private choice involved	joined majority	joined majority and concurred	joined Souter dissent and dissented: risk of conflict
wrote majority: state not required to fund devotional theological instruction	joined majority	joined majority	joined majority

Abbreviations:

EC = Establishment Clause

NOC = not on Court

* indicates date of arrival on Court

GINSBURG (1993)	SOUTER (1990)	STEVENS (1975)
NOC	NOC	dissented in part; concurred to extent aid not provided to educational mission
NOC	NOC	joined Marshall dissent
NOC	NOC	joined Brennan majority opinion
NOC	NOC	joined Brennan majority opinion
NOC	NOC	joined Marshall’s majority opinion
NOC	NOC	joined Brennan plurality opinion: harm to third parties
NOC	joined Blackmun dissent	joined O’Connor’s dissent; Blackmun in part
joined Souter’s dissent	dissented: EC prohibits funding of religion	joined Souter’s dissent
dissented and joined Souter dissent on procedural issue	dissented and joined Ginsburg dissent	joined Souter’s and Ginsburg’s dissents
joined Souter’s dissent	dissented	joined Souter’s dissent
joined Souter’s dissent	dissented from majority’s reaching of EC issue	dissented on merits of EC argument
joined Souter’s dissent	wrote principal dissent and joined Breyer	dissented and joined Souter and Breyer
joined majority	joined majority	joined majority

“[T]he aim of the Establishment Clause is genuinely to uncouple government from church.”

Ruth Bader Ginsberg

Capitol Square Review and Advisory Board v. Pinette 1995