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### May 3, 2009: Justice Souter's Replacement and the Future of the Establishment Clause

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Title: Justice Souter's Replacement and the Future of the Establishment Clause

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5/3/2009--The current Supreme Court majority on matters of Church and State consists of Chief Justice John Roberts (age 54), and Justices Antonin Scalia (73), Anthony Kennedy (72), Clarence Thomas (60), and Samuel Alito (59). This majority can even be joined by Justice Stephen Breyer, as it was in upholding a public Ten Commandments display in Texas in 2005. This majority is doctrinally incoherent but chronologically stable. It is going to uphold most instances of public religious symbols and it is going to uphold vouchers for private schools. It is not going to advance Establishment Clause doctrine, by which I mean that it is not going to tell us why religion and politics can be mixed, and it is not going to let government go overboard in endorsing religion. Prayer, for example, will not return to public schools. As you can tell by their ages, this majority is probably not going away any time soon. Justice Kennedy might retire before the end of President Obama's second term, or might pass away, but Justice Scalia would presumably like to be replaced by a more conservative President. In any event, there will not be any immediate change. It is in this light that one must evaluate President Obama's first choice of Supreme Court Justice. He can change the dynamics on the Court by choosing a more ideological Justice than was David Souter, but he cannot move the Court to the left—in this case meaning toward a more stringent separation of Church and State—by replacing Justice Souter with a younger but comparable version of himself. This suggests that the Court will stay away from religion cases for now, no matter whom President Obama selects.