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Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment, A

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A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment

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TABLE OF CONTENTS

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I. INTRODUCTION

Justice O'Connor's interpretation of the religion clauses of the First Amendment presents a distinct and sophisticated understanding of these two controversial constitutional phrases. In important ways, however, there is both less and more here than initially meets the eye. Despite the conviction with which she presents her constitutional model in this area, O'Connor's religion clause jurisprudence is a work in progress. Her doctrinal approach is incomplete and continually evolving. Moreover, her analysis of certain specific questions is sometimes conclusory. Because they appear to rest so much on O'Connor's own unexplained intuitions, they are only modestly persuasive. Probably everyone familiar with her jurisprudence can identify particular religion clause cases where they would challenge her reasoning and results.

Notwithstanding these criticisms, when one steps back from the intricacies of particular cases, it is clear that there is something of very real value that Justice O'Connor has brought to this constitutional enterprise. Her opinions, taken cumulatively, present a multi-dimensional vision that sets out the parameters of the appropriate relationship between religion and government in our society. That vision has a distinctive form and content. I also believe it has great substantive merit. Indeed, although I disagree with some of her religion clause decisions, if I may be forgiven the vernacular flavor of the expression, I am very much a fan of Justice O'Connor in this area of constitutional law. Accordingly, in this brief essay, I consider it a privilege to be given the opportunity to describe and critically examine Justice O'Connor's interpretation of the Free Exercise Clause and the Establishment Clause in this Symposium issue of the *McGeorge Law Review* commemorating her twentieth anniversary as a Supreme Court Justice.

The focus of the first section of this essay will be the substance of Justice O'Connor's religion clause opinions, with particular attention directed toward the "endorsement" analysis she employs in Establishment Clause cases. A second section addresses the form of O'Connor's interpretation of the religion clauses and her predisposition to utilize standards and balancing tests in this area. Finally, the essay concludes with a brief description of how Justice O'Connor's jurisprudence fits into the history of, and continuing debate over, the meaning of the religion clauses.

II. THE SUBSTANCE OF JUSTICE O'CONNOR'S INTERPRETATION OF THE RELIGION CLAUSES

A. *Free Exercise Doctrine*

1. *A Commitment to Religious Liberty*

The core of Justice O'Connor's religion clause jurisprudence can be stated simply. She takes religious liberty and equality seriously, but she recognizes that neither of these constitutional values can receive anything like absolute protection in the highly regulated, interdependent, pluralistic society of modern America. Her understanding of the Free Exercise Clause is stated most clearly in her concurrence in *Employment*

Division v. Smith[1] in which she challenges the majority's contention that the freedom to practice one's religion receives no independent constitutional protection of any kind against neutral laws of general applicability. O'Connor insists that even neutral laws that substantially burden a person's ability to practice their faith must be justified under strict scrutiny and condemns the Court's position as clear error on two counts.

First, neutral and general laws can and do prohibit the free exercise of religion.

> [A] law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.[2]

Second, O'Connor believes that the rigorous review of such laws is constitutionally required. "The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'"[3]

To O'Connor, religious liberty means just that: it is the ability to practice one's faith without government interference. A law does not burden religious liberty only if its purpose is the suppression of religious beliefs or practices. Burdens on liberty are identified by what they do, by their effect on the protected activity.[4] Courts review laws that interfere with religious practice, even if the laws were not designed to do so, in order to determine whether the burdens they impose on the exercise of fundamental rights are adequately justified. Fundamental rights are interests of constitutionally

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1. 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in judgment).

2. *Id.* at 893-94. For a thoughtful presentation of the argument that neutral laws of general applicability substantially burdening religious practices sufficiently implicate First Amendment concerns to justify the application of some serious standard of review, although not strict scrutiny, see Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77 (2000).

3. *Smith*, 494 U.S. at 894-95.

4. In most areas, courts seem willing to protect rights against neutral laws of general applicability that "incidentally" interfere with their exercise although the rigor of the standard of review is sometimes reduced. Property rights are protected against both physical and regulatory takings that are defined exclusively in terms of their effect on the owner's interest. The government's purpose and the scope of the law are largely irrelevant to the determination that a taking has occurred. *See, e.g.*, Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7, 14-26 (1996). Freedom of expression is also protected against neutral and general laws that are not directed at the suppression of speech although the level of review provided is modest. *See* Gedicks, *supra* note 2, at 85-94. One might certainly surmise that the right to have an abortion may be infringed by a general law that substantially restricts all outpatient surgical clinics or a broad law that requires minors to obtain the consent of both parents before receiving any medical treatment, including an abortion, without providing any judicial bypass mechanism. *See generally* Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); Ragsdale v. Turnock, 625 F. Supp. 1212, 1229-30 (N.D. Ill. 1985). *But see* Hodgson v. Lawson, 542 F.2d 1350, 1358 (8th Cir. 1976); Women's Med. Ctr. of Providence, Inc. v. Cannon, 463 F. Supp. 531, 536 (D.R.I. 1978).

recognized value and only something of real value can legitimize state interference with their exercise.

O'Connor also recognizes that there is an important equality dimension to the Free Exercise Clause.[5] Religious groups are not similarly situated with regard to their religious obligations. This means that laws that correspond to the majority's needs and values will not comparably respect the needs and values of minority faiths. Therefore, in a religiously pluralistic society, formal neutrality provides no real guarantee of equal treatment. Indeed, it virtually insures disparity of treatment since people with different interests will be treated as if they are the same.[6] In particularly forceful language, O'Connor derides the majority in *Smith* as suggesting "that the disfavoring of minority religions is an 'unavoidable consequence' under our system of government and that accommodation of such religions must be left to the political process."[7] From O'Connor's perspective, the Free Exercise Clause helps to insure that the state respects the religious differences of its citizens. The *Smith* decision, by way of contrast, allows the state to close its eyes and ignore religious differences in enacting and enforcing its laws.

2. *Balancing Religious Liberty Against State Interests*

Notwithstanding O'Connor's forceful commitment to interpreting the Free Exercise Clause to protect religious liberty in its most basic sense—the ability to practice one's faith without interference—it is also clear that she will subordinate religious freedom to state interests she believes to be of sufficient importance to outweigh this right. Religious practitioners will have their day in court, but they will not always emerge victorious. In this area of law, strict scrutiny does not come close to being fatal in fact.

O'Connor's opinions give us some sense of how she evaluates state interests that conflict with religious practice although there is considerable ambiguity in the balancing process she employs. In *Smith* itself, she argued that Oregon's interest in uniformly enforcing its prohibition against the use of controlled substances, in this instance peyote, justified its refusal to exempt members of the Native American Church who used peyote in religious rituals from the application of state law.[8] It is easy to understand O'Connor's conclusions that drug abuse is a serious problem requiring stringent government regulations and that the state has a compelling interest in

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5. *See Smith*, 494 U.S. at 902 (O'Connor, J., concurring) (explaining that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility").

6. *See* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 262-65 (1999) (discussing the effect of formal neutrality on religion by comparing neutral laws that disproportionately impact racial minorities with laws that burden religious groups).

7. *Smith*, 494 U.S. at 902.

8. *See id.* at 905 (quoting U.S. v. Lee, 455 U.S. 252, 257 (1982)) (explaining that "I would conclude that uniform application of Oregon's criminal prohibition is 'essential to accomplish' ... its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance"). O'Connor has explained in other areas, such as the review of affirmative action programs, that she does not believe strict scrutiny is so inherently rigorous a standard of review that no law can survive its application; *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228-29 (1995).

prohibiting the use of a drug like peyote that has a high potential for abuse, serves no medical purpose, and may be dangerous to the health of those who use it.[9] However, several other states and the federal government allow peyote to be used for religious purposes, apparently without serious consequence, and O'Connor provided little in the way of analysis to explain why the evidence of other jurisdictions does not undermine Oregon's claim that its health and safety goals would be impaired if it provided a similar exemption. At best, O'Connor seems to suggest that where the state's health and safety interests in regulating a religious practice are clear and substantial, the fact that some states are willing to risk the sacrifice of those interests out of a commitment to religious liberty should not compel other states to follow their example.[10]

The government's interest must be real and substantial, however, if it is to justify interference with religious practices. In her partial dissent in *Bowen v. Roy*,[11] O'Connor forcefully challenged the government's claim that in order to combat welfare fraud, it must deny benefits to individuals who refuse for religious reasons to provide their social security number to welfare officials. In light of the lower court's findings that effective, alternative mechanisms for avoiding fraud were available to welfare authorities when applicants failed to tender their social security number, the state's interest in pursuing its policy amounted to nothing more than a minor administrative convenience rationale.[12] To O'Connor, this interest was completely inadequate for constitutional purposes. The "unanchored anxieties of the welfare bureaucracy" could not justify the abridgement of Free Exercise rights.[13]

Perhaps the most problematic opinion authored by Justice O'Connor in this area is her majority opinion in *Lyng v. Northwest Indian Cemetery Protective Association*.[14] At issue were certain timber harvesting practices in, and the construction of a road through, parts of a national forest that were sacred to Native American tribes and used for religious ceremonies. O'Connor recognized that "the logging and road-building projects . . . could have devastating effects on traditional Indian religious practices"[15] and accepted the conclusion of the lower courts that the completion of the road would "virtually destroy [the] Indians' ability to practice their religion."[16] Nevertheless, she rejected their Free Exercise claim on the grounds that the government's action would neither coerce anyone into violating their beliefs nor penalize them for engaging in their religious practices.[17]

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9. *Smith*, 494 U.S. at 904.

10. *See id.* at 906 (noting that "other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being *required* to do so by the First Amendment").

11. 476 U.S. 693, 724 (1986) (O'Connor, J., concurring in part and dissenting in part).

12. *See id.* at 731 (criticizing appellants for resting "their case on vague allegations of administrative inconvenience and harm to the public fisc that are wholly unsubstantiated by the record and the findings of the District Court").

13. *Id.* at 730.

14. 485 U.S. 439 (1988).

15. *Id.* at 451.

16. *Id.*

17. *Id.* at 449.

The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according

The formal and rigid nature of this analysis is difficult to understand. It is one thing to recognize that the government's organization of its operations and the uses it makes of its own resources and property are less susceptible to Free Exercise exemptions than the state's exercise of its regulatory power or its distribution of government largess. It is another thing entirely to suggest that only state action that coerces or penalizes religious individuals can ever be subject to Free Exercise review.[18]

There may be important reasons why the government would be justified in burdening religion in a case like *Lyng*. The road at issue might serve important government functions. Further, there must be some limits on exemptions that require the government to cede "*de facto* beneficial ownership of . . . spacious tracts of public property" for religious use.[19] Finally, the "ameliorative measures" taken by government to minimize the impact of the road[20] may reasonably influence a court's conclusion by demonstrating that the state is not ignoring the fact that constitutionally protected interests are at stake. O'Connor recognizes these factors in *Lyng*, but she does not base her decision on them. It is the manner in which the government interferes with religious practices that controls her decision. Making the manner of interference dispositive, however, cuts a hole in Free Exercise protection that is difficult to defend.

In other cases, O'Connor adopts a more nuanced approach that focuses on the impact as well as the form of the burden state law imposes on religious practice. In *Jimmy Swaggart Ministries v. Board of Equalization*,[21] for example, she determined that a generally applicable sales tax, equally applicable to religious and nonreligious retail goods, did not violate the Free Exercise Clause simply because it increased the cost of, and, correspondingly, lowered the demand for, religious products and reduced the funds available to the seller to be spent on religious activities. O'Connor noted, however, "that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices" and left open the question of whether such debilitating taxes should also be upheld.[22]

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to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Id.

18. The idea that conflicts between religious beliefs and practices and the government's organization of its operations and the uses it makes of its own resources and property should always be resolved in favor of the government has no intrinsic validity. Of course, it may well be that the cost and complexity of accommodating religious individuals in such circumstances is usually prohibitive and that, as a practical matter, it is much easier to structure exemptions from regulations than it is to figure out a way to change the government's internal procedures in a religion-sensitive way. That conclusion is relative, not absolute, however. There may be some cases where a change in government procedures or the use of state resources is relatively simple and others where exemptions from regulations are completely impractical.

19. *Lyng*, 485 U.S. at 453.

20. *Id.* at 454.

21. 493 U.S. 378 (1990).

22. *Id.* at 392.

B. *Establishment Clause Doctrine*

1. Endorsement and Religious Equality

In Establishment Clause cases, O'Connor is best known for her contention that the core meaning of this constitutional provision is captured by a mandate prohibiting the government's endorsement of religion or a particular faith. "Direct government action endorsing religion or a particular religious practice is invalid," O'Connor explains, "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.'"[23] Thus, the Establishment Clause exists to prohibit government action that makes a person's religion relevant to their "status" in the community.[24]

In conventional constitutional parlance, the protection of status is grounded on normative principles of equality. What is at issue is not the liberty to act, but respect for who you are.[25] Like the black children attending segregated schools whose "hearts and minds" were harmed by the state's policy of white supremacy, individuals and groups of minority faiths are injured when the state implicitly or directly disparages their religious identity while endorsing that of the majority.[26]

There is a secondary liberty dimension to the Establishment Clause just as there is a secondary equality dimension to the Free Exercise Clause. Many Establishment Clause decisions will protect religious liberty at the same time that they promote equality. However, the primary objective of antiestablishment principles that focus on endorsements and status harms is religious equality. Religious liberty is a value that is incidental to that core concern.[27]

Particularly in her earlier opinions, O'Connor was not as clear about the equality foundation of her endorsement analysis as she might have been. The analogy to equal protection doctrine was always recognized. In *Lynch v. Donnelly*,[28] for example, the first case in which she discussed the endorsement test, O'Connor wrote that the question of endorsement "is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts."[29]

In other cases, however, such as *Wallace v. Jaffree*,[30] the moment of silence case, O'Connor seemed to collapse both Free Exercise and Establishment Clause principles

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23. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).

24. *See Lynch*, 465 U.S. at 692 ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.").

25. *See* Brownstein, *supra* note 6, at 258.

26. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 134-37 (1990).

27. *Id.*

28. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

29. *Id.* at 694.

30. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in judgment).

into a common framework designed to protect religious liberty against direct or indirect coercive pressure.[31] The result was a muddled combination that hopelessly confused the issue. O'Connor recognized in *Jaffree* that the Establishment Clause must operate as a constraint on the accommodation of religious liberty at least to some extent,[32] but she failed to explain how two constitutional provisions that serve the same essential purpose can be in tension with each other.

O'Connor's specific discussion of a moment set aside for silent prayer in public school classes suffered from similar ambiguities. O'Connor argued that "the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives," and that such a purpose violates the Establishment Clause because it endorses religion.[33] But how can the state's purpose have an effect on the coercive influence of a law, particularly when students will be praying or failing to pray in complete silence with their thoughts hidden from both teachers and peers? If the state's purpose is publicly known, one can imagine a non-religious student feeling isolated and disfavored during the moment of silence.[34] How the state's legislative purpose can coerce a student's silent thoughts is much harder to understand.

By 1989, in her concurrence in *County of Allegheny v. ACLU*,[35] a case invalidating the placement of a nativity scene in the grand staircase of a county courthouse and seat of government during the Christmas holiday season, O'Connor demonstrated that her understanding of the endorsement test had developed substantially. Flatly rejecting Justice Kennedy's contention that the Establishment Clause only protects religious liberty against coercive state action, O'Connor insisted that the Establishment Clause had a broader and distinct meaning that differentiated it from the Free Exercise Clause's mandate. Religious endorsement or favoritism, not coercion, was the key concern.[36] A more limited interpretation focusing on coercion alone "would not . . . adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."[37]

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31. *See id.* at 70 (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)) ("[A]n endorsement infringes the religious liberty of the nonadherent, for '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform the prevailing officially approved religion is plain.'").

32. *See id.* at 82 ("The challenge . . . [for the Court is to determine] how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion.").

33. *Id.* at 73.

34. A good example of how legislative purpose influences the endorsing or nonendorsing effect of state action might be *Palmer v. Thompson*, 403 U.S. 217 (1971), a case involving an equal protection challenge to Jackson, Mississippi's decision to close its previously segregated public swimming pools to avoid continuing to operate them on an integrated basis. As Justice White correctly argued, unfortunately in dissent, the transparent purpose of the facially neutral act of closing the pool was to prevent Negroes and whites from swimming together. Because this was the municipality's purpose, closing the pools was understood by everyone to express the disparaging message that Negroes are unfit to associate with whites. *Id.* at 240-41.

Unlike a facially neutral act such as the closing of a swimming pool, race or religion-specific state actions may communicate messages of exclusion and disfavored status even if their actual purpose is unclear and uncertain.

35. 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

36. *See id.* at 628 (quoting Kennedy, J.) (contending that "any Establishment Clause test limited to '*direct* coercion' clearly would fail to account for forms of '[s]ymbolic recognition or accommodation of religious faith' that may violate the Establishment Clause").

37. *Id.* at 628.

2. *The Meaning of Endorsement*

While many commentators have applauded Justice O'Connor's endorsement analysis and its focus on religious equality,[38] the endorsement standard has also been subjected to serious criticism. First, whether the standard is intended to be applied in all Establishment Clause cases or only in those that involve the government's display of religious symbols is unclear.[39] Second, considerable uncertainty exists as to how a court determines whether the government's conduct constitutes an endorsement of religion.[40] How the standard is to operate in cases involving the government's funding of religious institutions or legislative accommodations of religious practices is particularly unclear.[41] Even in religious symbol cases, some of those commentators who support the endorsement standard in theory have problems with the way O'Connor has applied it in specific situations.[42] Third, and finally, there are questions about how the tension between a liberty-based Free Exercise Clause and an equality-based Establishment Clause can be reconciled.[43] In a brief essay such as this one, I can merely touch on many of these issues, but I believe there are important points that can be made on each area of concern.

a. *The Scope of the Endorsement Standard*

With regard to the scope of the endorsement test, the initial problem seems to be a striking inconsistency of O'Connor's own making. In *County of Allegheny*, she writes that

> As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely that government must not make a person's religious beliefs relevant to his or her standing in the political

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38. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 14-15, at 1293 (2d ed. 1988); BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION—THE CONSTITUTION AND AMERICAN PLURALISM 174-76, 237-38 (1997); KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION 151-54 (1993); Brownstein, *supra* note 26, at 134-37 (1990); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1050-51 (1986); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1115, 1164-82 (1988). Not all the favorable commentary evaluating Justice O'Connor's endorsement test refers to equality literally. Often writers discuss constitutional values of inclusion, protection against status harms, and political process concerns. These values correspond to equality interests to a sufficient extent that they can be grouped under the rubric of constitutional equality.

39. *See, e.g.*, Karst, *supra* note 38, at 153; Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115, 155-56 (suggesting that "[t]he indeterminacies of the endorsement test would not be so serious" if it was limited in its application to "the context of government symbols").

40. *See, e.g.*, McConnell, *supra* note 39, at 148-51; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276-302 (1987); William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533-37 (1986).

41. *See, e.g.*, McConnell, *supra* note 39, at 151-53.

42. *See, e.g.*, Karst, *supra* note 38, at 149-60 (criticizing O'Connor's application of the endorsement test in *Lynch v. Donnelly*); Brownstein, *supra* note 26, at 145-55.

43. *See, e.g.*, Conkle, *supra* note 38, at 1164-82; Brownstein, *supra* note 26, at 163-73.

> community by conveying a message 'that religion or a particular religious belief is favored or preferred.'[44]

Five years later in *Board of Education of Kiryas Joel v. Grumet*,[45] however, O'Connor eschewed any reliance on a single test or "Grand Unified Theory"[46] in interpreting the Establishment Clause. Here, she explained,

> the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context.[47]

There is less dissonance here than there appears to be. O'Connor is correct that the endorsement test captures the essential command of the Establishment Clause because the idea of religious equality which the test expresses lies at the core of the Establishment Clause's meaning.[48] This does not mean, however, that the Establishment Clause does not serve other values, such as religious liberty and autonomy, or that other interests need not be taken into account in determining what the Establishment Clause means in a particular context. Thus, an appropriate concern about endorsement may be relevant to a wide range of Establishment Clause cases, but a judicial test that focuses exclusively, or almost exclusively, on endorsement should be limited to a much narrower group of situations such as those "involving government speech on religious topics."[49] Also, as will be discussed shortly, the idea of endorsement may not capture entirely all of the relevant values subsumed under a principle of religious equality.[50] Thus, O'Connor's comments eschewing a "Grand Unified Theory" may be no different than the unexceptional argument that the core command of the Free Speech Clause prohibits government from distorting public debate to manipulate the discussion and resolution of public policy issues by the polity, but a host of other values and interests must be taken into account in developing a coherent and complete set of doctrinal rules for this constitutional provision.

O'Connor is also clearly correct in recognizing that religion, like speech, is a constitutional interest that requires far more sophisticated doctrine than a unitary test or principle provides. Indeed, I would argue that religion is a more complex constitutional interest than speech in that the religion clauses not only subsume many of the same interests as freedom of expression (since speech is an intrinsic part of a

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44. 492 U.S. at 627 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985)).
45. 512 U.S. 687, 712 (1994) (O'Connor, J., concurring in part and concurring in the judgment).
46. *Id.* at 718.
47. *Id.*
48. *See* Brownstein, *supra* note 26, at 102-12, 125-30, 145-55.
49. *Kiryas Joel*, 512 U.S. at 720.
50. *See infra* notes 127-31, 132-33 and accompanying text.

great deal of religious practice), but they also promote values supporting equality among religious groups and the liberty to engage in nonexpressive religious practices as well. A complete framework for interpreting the religion clauses must synthesize autonomy, free speech and equal protection principles as they relate to religious activities, institutions and groups.[51] The only way to simplify and condense religion clause jurisprudence into one or more simple tests is to completely ignore some of these core values by substantially limiting the goals of, and protection provided by, this multifaceted constitutional guarantee.[52] As part of a Court on which several Justices have repeatedly demonstrated their willingness to accept such a truncated version of the religion clauses,[53] O'Connor's insistent recognition of the full complexity of the religion clauses and the matrix of values they promote can hardly be overestimated in its importance.

b. Neutral Observers and Social Constructs

The problem of determining exactly what constitutes a prohibited endorsement of religion is a more difficult one to resolve. O'Connor suggests that the Court should identify an endorsement by asking whether a "neutral observer" would recognize government action as communicating a message of religious favoritism.[54] Her critics focus on this aspect of her standard and condemn it on the grounds that O'Connor's neutral observer has no substance or perspective. Without knowing more about the alleged observer, courts do not have a coherent basis for deciding how they will interpret anything that the state does.[55]

These criticisms are clearly correct. In an important sense, they are equally clearly irrelevant. O'Connor explained that identifying an endorsement involves the same kind of "judicial interpretation of social facts" the Court employs in deciding "whether racial or sex-based classifications communicate an invidious message."[56] The term "judicial interpretation" may be a bit misleading in this phrase, but the equal protection analogy O'Connor uses is a powerful one that clarifies her meaning. The idea of

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51. *See generally,* Brownstein, *supra* notes 6, 26.

52. *See* Brownstein, *supra* note 6, at 246-47, 256-78. The difficulty with interpreting constitutional requirements in a way that limits the interests furthered by a right to only a single value or a few values has been recognized as a problem for the Speech Clause of the First Amendment as well as the religion clauses. *See, e.g.,* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251-55 (1983).

53. Justices Rehnquist, Scalia, Kennedy and Stevens demonstrated their lack of commitment to protecting religious liberty against state interference by narrowly construing the scope of Free Exercise rights in *Employment Division v. Smith*, 494 U.S. 872 (1990). Rehnquist, Scalia, and Kennedy would also fundamentally restrict the scope of the Establishment Clause in religious display cases by allowing states to express the sectarian religious messages of particular faiths as long as they did not coerce nonbelievers while doing so. Allegheny County v. ACLU, 492 U.S. 573, 659-63 (1989). Rehnquist, Scalia, Kennedy and Thomas would dramatically limit the role of the Establishment Clause in funding cases by permitting pervasively sectarian religious institutions to receive state subsidies and to use that support to pursue their religious mission. Mitchell v. Helms, 530 U.S. 793, 825-29 (2000).

54. *See* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").

55. *See, e.g.,* Smith, *supra* note 40, at 291-95 ("Whose perceptions matter?"); McConnell, *supra* note 39, at 147-51.

56. Lynch v. Donnelly, 465 U.S. at 668, 694 (1984).

endorsement is grounded on cultural understandings of what government may do that makes some persons feel that they are disfavored outsiders because of their faith or lack of faith or other persons feel that they are favored insiders. This means that there are some government actions that cannot reasonably be identified as an endorsement of religion because there is no interpretative foundation in our society for believing that anyone would experience them in such a way. In this sense, the endorsement test involves an interpretation of social facts. But the Court's decision as to which government actions within the range of conduct that might convey an endorsement actually violates this constitutional requirement is normative, not factual. It is a value judgment about the kind of society we should be and the extent to which our society should respect religious liberty and equality.

Equal protection doctrine operates in exactly the same way. Government takes race or gender into account in making decisions for a variety of reasons and the state's use of race or gender classifications may be experienced in many different ways. Cultural understandings or social facts set the parameters of what kind of government conduct might reasonably be construed to convey a demeaning message, impose a brand of inferiority, or reinforce antiquated stereotypes. Determining what constitutes a violation of equal protection within those parameters, however, is a legal judgment, a question of constitutional values.

When the Court explains that a racial classification violates the Constitution because "it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities,"[57] the Court's statement involves both fact and law. Certainly, racial and ethnic classifications are capable of communicating a demeaning message and in fact may be experienced as doing so. But this does not mean that every prohibited racial classification is always intended to communicate a demeaning message or that the classification is always experienced as disparaging. Indeed, the exact same use of race may be intended to be demeaning by some government actors, but not others, and it may be experienced as disparaging by some members of a racial group and as neutral by others. The Court's conclusion about the invalidity of such classifications involves a normative calculus about the likelihood that a disparaging message might be intended or will be communicated, the degree to which that message undermines protected liberty and equality interests, and the utility to the government in employing the classification.

Some cases will be more difficult than others, but that does not mean that the Court's concerns about status harms and stigmatic messages are misplaced. Consider the line of cases dealing with the use of race-based peremptory challenges. In *Powers v. Ohio*,[58] Justice Kennedy and Justice Scalia disagree on the issue of whether being excluded from service on a petit jury because of one's race is stigmatizing or demeaning. Kennedy argues that "stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror."[59] Scalia

57. Rice v. Cayetano, 528 U.S. 495, 496 (2000). Although this case is decided on Fifteenth Amendment grounds, the discussion about race, a part of which is quoted in the text, is fully applicable to Fourteenth Amendment equal protection principles.

58. 499 U.S. 400 (1991).

59. *Id.* at 410.

contends that no stigma attaches since a race-based peremptory challenge "implies nothing more than the undeniable reality . . . that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members."[60]

In part, the argument between these two Justices reflects differing perceptions about the experience of challenged jurors. Kennedy maintains, for example, that "we do not believe a victim of the [racial] classification would endorse this view [that no stigma results]."[61] But this dispute is primarily an issue of law and values. Both Kennedy and Scalia surely understand that some prosecutors will base their use of peremptory challenges on what can only be described as invidious stereotypes of the attitudes of African-Americans while others are using the same kind of professional hunches they employ when they strike jurors because of their class, vocation, hairstyle, age, or a host of other variables. Similarly, some excluded jurors will be offended by the government basing its decision to strike them on their race, while others will be relieved to be excused from jury service and feel no disparagement whatsoever. The constitutional rule adopted will be based on a generalization that is proscriptive as well as descriptive. Thus, Kennedy concludes his argument by affirming that "the assumption that no stigma or dishonor attaches [to race based peremptory challenges] contravenes accepted equal protection principles."[62] Stigma, like endorsement, is an objective legal conclusion grounded on tendencies and inferences, but it is not dependent on anyone's actual experience.

One may agree or disagree with Kennedy's conclusion about race-based peremptory challenges, but it is difficult to challenge the importance and relevance of Kennedy and Scalia's debate. Both of these justices recognize that issues of status and stigma are appropriate matters for the Court to consider in its attempt to further the goal of racial equality. Justice O'Connor's endorsement test raises essentially the same questions about religion and religious equality.

O'Connor's use of the artifact of a "neutral observer," however, may obscure the similarity and common foundation of endorsement for Establishment Clause purposes and stigma in equal protection doctrine. One might reasonably ask whether a neutral observer would recognize the government's use of race or gender as communicating a disparaging message in the peremptory challenge context or in other cases, but equal protection cases do not employ this convention. Indeed, it is hard to explain what the addition of a neutral observer would add to the Court's equal protection analysis.

The same conclusion arguably applies to the idea of endorsement. It is the meaning of the term, endorsement, and the role that it plays in achieving the Establishment Clause's constitutional purpose that is critical. In my judgment, O'Connor might be better off if she jettisoned the neutral observer entirely and concentrated on developing the meaning of endorsement through a series of judicial decisions that flesh out the construct's content.

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60. *Id.* at 424 (Scalia, J., dissenting).
61. *Id.* at 410.
62. *Id.*

Viewed in this way, the endorsement standard is no different than a host of commonly utilized constitutional constructs that also involve the "judicial interpretation of social facts." O'Connor's acceptance of courts developing such standards is hardly unusual. Courts engage in this kind of activity at every level, from common law decisions to constitutional holdings. Constructs based on social facts such as the reasonably prudent person in tort law; expectations of privacy in Fourth Amendment doctrine; justified investment-backed expectations and economically viable uses in Takings Clause cases; fighting words, clear and present dangers, offensive speech in free speech doctrine; stigmatic messages in equal protection cases; and important or compelling state interests in the standards of review that extend throughout the constitutional protection of fundamental rights are only a small set of possible examples. These mixed fact and law conclusions in various degrees describe cultural understandings (or perceptions) derived from social behavior that are assigned specific and significant legal consequences in particular cases. In light of the frequency with which courts use constructs of this kind, it is hardly surprising that O'Connor employs them in her religion clause decisions.

I do not mean to suggest here that there are not important questions to be raised about how the Court identifies an endorsement for constitutional purposes. Clearly, that is a subject worthy of extended discussion and debate. What is disturbing about some of the criticisms of the endorsement test is the suggestion that there is something uniquely unfathomable about this principle. But many of the criticisms directed at the endorsement test are equally applicable to a host of constitutional standards.

The phrase, "fighting words," for example, describes a category of unprotected speech.[63] The core idea is that certain expressions will reasonably and predictably incite a violent response because of their insulting and vulgar message. In determining what constitutes fighting words, however, a variety of questions need to be resolved. One can reasonably wonder whether the standard should only be applied to language that is intentionally insulting or whether it is the experience of the listener alone that is controlling. If the listener knows the speaker did not intend his message to be insulting, should the fighting words doctrine still apply? Reactions among individuals will vary dramatically, of course. Some people are easily insulted while others can shrug off the most personal and disparaging language. Does the fact that some individuals would choose to ignore the language, consider it to be humorous, or respond in a variety of idiosyncratic ways preclude the recognition of the category in constitutional law? Does it matter whether the listener is physically incapable of responding with violence (because they are physically handicapped) or that they have been trained not to respond to provocation (such as a police officer)? The list of questions goes on.

63. The parallel between the test for identifying fighting words and the endorsement test is hard to avoid. Whether state action constitutes an endorsement of religion depends on the objective perceptions of a neutral observer. The basic test for fighting words is "whether or not men of common intelligence would understand the words as likely to cause the average addressee to fight." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 16-38, at 1193 (6th ed. 2000).

Or consider the meaning of a coercion test for the Establishment Clause, a standard that some of the critics of endorsement have recommended as a substitute approach.[64] Once again, we may ask whether the state must intend its action to be coercive or whether it is sufficient that people experience the state's conduct as pressuring them toward one choice or another. Similarly, there may be a variety of reactions to the same state action. Not everyone will experience the same event as coercive. Nor is it clear what kinds of consequences constitute coercion. Is a loss of social status coercive, or the loss of an opportunity to attend a recreational event, or the inability to escape a message that someone does not want to hear?[65] The parallels to endorsement can be continued at some length.

c. *Endorsements and the State Display of Religious Symbols*

What is more important and more appropriately subject to critical evaluation is not the use of an endorsement standard, but the meaning that O'Connor has assigned to it in the case law. The issue of endorsement seems particularly germane to cases involving government displays of religious symbols. Clearly, some state religious displays constitute a prohibited endorsement, but how is a court to distinguish those from constitutionally permissible displays?

Two of O'Connor's opinions stand out on this issue. In *Lynch v. Donnelly*,[66] O'Connor concluded that the public financing of a nativity scene and other traditional Christmas symbols in a private park in a commercial shopping district did not convey a message endorsing Christianity. Notwithstanding the obvious religious content intrinsic in a creche, O'Connor argued that long-standing and widespread governmental involvement in celebrating the public holiday of Christmas "changes what viewers may fairly understand to be the purpose of the display" from a message of state support of particular religious beliefs to a secular declaration of holiday festivity.[67] O'Connor analogized public funding of the creche to such other secular "'acknowledgments' of religion" as the expression of a prayer to begin legislative sessions, the public holiday of Thanksgiving, and the opening of Supreme Court sessions with the statement "God save the United States and this honorable Court."[68] Such activities "because of their history and ubiquity" do not constitute prohibited endorsements of religion.[69]

Five years later in *County of Allegheny*, O'Connor elaborated on the role of history in applying the endorsement test while writing in support of the Court's conclusion that

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64. *See, e.g.*, Michael M. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). Justice Kennedy, who has been a forceful critic of the endorsement test, has also argued for a coercion standard as an alternative. *See* Allegheny, 492 U.S. at 659-63 (Kennedy, J., concurring in part and dissenting in part).

65. Justice Kennedy, for example, concluded that the religious invocation offered in *Lee v. Weisman*, 505 U.S. 577 (1992), was unconstitutionally coercive and violated the Establishment Clause. In criticizing this analysis, Justice O'Connor argued that it would "deform the language of the test" for the Court "to find 'coercive pressure' when a school asks listeners—with no threat of legal sanctions—to stand or remain silent during a graduation prayer." Board of Ed. of Kiryas Joel v. Grumet, 512 U.S. 687, 719 (1994) (O'Connor, J., concurring).

66. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

67. *Id.* at 692.

68. *Id.* at 692-93.

69. *Id.* at 693.

the placement of an unattended nativity scene during the holiday season in a prominent location in the county courthouse violated the Establishment Clause. O'Connor explained that there are no "historical" exceptions to constitutional commands. The "historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or genderbased discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment."[70] Instead, "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."[71] Notwithstanding the history and tradition of nativity scenes at Christmas time, however, the creche placed on the grand staircase of the county courthouse was found to violate the Establishment Clause.

In these cases, O'Connor recognizes that many factors must be included in her contextual analysis. Time is important. The display of a religious symbol that coincides with the celebration of a holiday to which some secular attributes have accrued over time communicates a different message than the display of the symbol for a longer period or at a time that has no connection to any even arguable secular festivity.

Location is also relevant. In *Lynch*, the temporal congruity to the Christmas holiday seemed to be the controlling variable to O'Connor. In *County of Allegheny*, however, which also involved a Christmas display, the shift in location from a commercial setting to the seat of government seemed to be a sufficient difference to establish an endorsement in the latter case but not the former.[72] Similarly, O'Connor explained that religious paintings hung in a publicly owned museum would not be construed as conveying an endorsement of the sectarian message expressed in such works of art.[73] Paintings are chosen to be displayed in museums because of their artistic quality. No one thinks museum paintings depicting war or rape suggest state support for the subject being portrayed any more than the state endorses the subjects of the books in a public library. Religious displays of no special artistic distinction standing alone, in a prominent location in a government building, convey a different message.

Finally, the total content of a display must be considered. The state's presentation of several religious symbols in an exhibit that is clearly identified as serving a non-endorsing purpose such as the affirmation of religious liberty or the scope of religious pluralism in the community would not violate the Establishment Clause. O'Connor emphasized this factor in *County of Allegheny* in explaining why she believed a separate display outside the county courthouse containing a Christmas tree, a Menorah, and a message saluting religious liberty did not constitute an endorsement of religion, while the creche inside the courthouse was held to be unconstitutional.[74]

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70. *Allegheny*, 492 U.S. at 630.

71. *Id.*

72. *See id.* at 626 (quoting *Lynch*, 465 US at 692) ("The display of religious symbols in public areas of core government buildings runs a special risk of 'mak[ing] religion relevant, in reality or public perception, to status in the political community.'").

73. *Id.* (quoting *Lynch*, 465 US at 626) ("[D]isplay of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass', or the exhibition of literally hundreds of religious paintings in governmentally supported museums.'").

74. *Id.* at 635-36.

The utility and relevance of variables such as time and location seem self evident. The role that history and ubiquity play in the endorsement analysis is less clear.[75] O'Connor suggests that the sectarian message of common religious displays has dissipated because they have "largely lost their religious significance over time,"[76] but she does not explain why she believes that the history of such displays alters their social meaning.

No length of time, O'Connor concedes, can remove the stigmatic sting of race-based laws, such as those requiring racially segregated public facilities, or their impact on the hearts and minds of those disparaged by such laws and practices. Obviously, the invidious message of racial inferiority expressed by segregation was dramatically harsher and more pernicious than the message of religious endorsement communicated by a Christmas display.[77] Perhaps O'Connor's point is that the degree to which the challenged practice communicates a constitutionally prohibited message correlates inversely with the message's tendency to fade over time.

One may certainly question O'Connor's conclusions about the relationship between history and cultural meaning, however. Religious icons have remained powerful symbols for centuries despite their familiarity. Nor does the display of a symbol during a holiday change its meaning. Indeed, many faiths "pass their [religious] traditions on to their children through holiday celebrations."[78] Moreover, minor disparagements of status may not dissipate faster than more forceful messages of hierarchy even though they have a less pronounced impact. No one would equate the stigmatic harm caused by the flying of the confederate flag over the capital in South Carolina with the injurious effect of Jim Crow legislation, yet the continuing controversy over the flag surely demonstrates that the symbol retains its ability to communicate a message of racial exclusion.[79]

Alternatively, one comment in *Lynch* may have some bearing on this issue. In analogizing the nativity display at issue to other acknowledgments of religion that also do not constitute prohibited endorsements because of their history and ubiquity, O'Connor points to the public reaction to the Christmas display prior to the initiation of the current litigation. "It is significant," she notes "that the creche display apparently caused no political divisiveness prior to the filing of this lawsuit."[80] There is at least an

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75. *See* Tribe, *supra* note 38, at 1295-96 (noting that "some practices, although born of religion, had with time lost their religious nature" but recognizing that it is difficult to determine when that has occurred).

76. *Allegheny*, 492 U.S. at 631.

77. Indeed, the quantitative disparity between these examples is so great that it almost overwhelms their qualitative similarity in sending messages of approval or disapproval. Yet, more than one scholar has drawn an uncomfortable connection between the "status subordination" resulting from Jim Crow legislation and the consequences of government displays of the symbols of the dominant faith in a community. *See, e.g.*, Karst, *supra* note 38, at 151. Similarly, criticisms of the cavalier disdain for the sensibilities of religious minorities in Justice Burger's opinion in *Lynch* have invoked an analogy to *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 160-62 (1984).

78. John M. Hartenstein, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion*, 80 CAL. L. REV. 981, 1003 (1992).

79. *See* Scott Carlson, *NCAA Threatens to Join South Carolina Boycott*, CHRON. HIGHER EDUC., May 19, 2000, at A68 (quoting Charles T. Wethington Jr., Chairman of the NCAA's Executive Committee and President of the University of Kentucky, as stating that "the Confederate flag means many things to different individuals, but there is no question that to a significant number of our constituents, the flag is a symbol of oppression"); Kevin Sack, *Symbol of the Old South Divides the New South*, N.Y. TIMES, Jan. 21, 1996, at D5.

80. *Lynch*, 465 U.S. at 693.

inference here that the complacent reaction of the community to religious displays over time suggests the display no longer expresses explicit approval of the religious beliefs of some faith communities while implicitly disapproving the beliefs of others. A history of intense opposition to religious displays might have led O'Connor to construe continued state support as a clear endorsement of favored faiths.

This point is an important one. Indeed, several commentators have argued that it is litigation over religious displays rather than the displays themselves that fuels religious divisions and intemperance in communities.[81] The contention is fundamentally unsound, however, from both a general and a specific perspective. As a general matter, minority silence, without more, cannot and should not be viewed as acquiescence to alleged disparagements of status. There are too many other explanations for such behavior. Often minority groups tolerate what they cannot change because they realize it is futile to express opposition or are intimidated from doing so.[82] Majorities, on the other hand, will all too often choose to misinterpret resigned acceptance to unequal treatment as an indication that no real harm is being

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81. *See* Smith, *supra* note 40, at 304-05. McConnell suggests a more temperate and balanced version of the same point. McConnell, *supra* note 39, at 192-93.

It is probably true that any perceived alteration in the status quo is likely to reinforce and ignite pre-existing resentments about religious messages and displays with the group that is satisfied with current conditions expressing the greatest discontent when changes are threatened. Thus, the creation of new displays or the offering of public prayers where none had been offered previously may result in as emotional a response as a challenge to an existing display or prayer policy. *See, e.g.*, Margaret Downing, *Trying To Make Amens; If Only There Were School Prayer. If Only It Was That Simple*, HOUS. PRESS, Mar. 30, 2000 (describing how a Jewish member of a school board "wept [and told] fellow trustees and the administration she couldn't believe how insensitive they were" after the Board voted to support the principle of school prayers at school events).

The focus of inquiry for constitutional purposes, however, should not be whether an event triggers religious divisiveness. It is whether government action expresses and promotes religious differences and hierarchy. *See id.* (quoting a school board member's statement that "[t]he community is already divided as far as religion is concerned, [but] by not having prayer in the schools . . . these differences are not highlighted").

82. Protesting state support for majoritarian religious practices has often been a precarious undertaking for religious minorities. For example, in response to questions raised about the propriety of posting the Ten Commandments in schools and public buildings in South Carolina since these displays would not reflect the religion of Buddhist or Muslim residents, one education official replied, "Screw the Buddhists and kill the Muslims." Diana L. Eck, *The Mulitreligious Public Square, in* ONE NATION UNDER GOD? RELIGION AND AMERICAN CULTURE 3, 5 (Marjorie Garber & Rebecca L. Walkowitz eds., 1999). Historically, Jewish complaints about prayer or Christmas celebrations in schools have resulted in harsh and dangerous reactions. *See* STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS 208-09 (1997).

To cite a more recent example, when the Florida legislature voted down a school prayer bill in 1994, the bill's sponsor "publicly blamed its defeat on 'Jewish senators who don't believe in Jesus.'" Martin Dyckman, *Forcing Prayer on Students*, ST. PETERSBURG TIMES, Apr. 23, 1995, at 3D. Similarly, ACLU attorneys report that people are often afraid to complain openly about government displays of religious symbols because the issues are so highly charged and emotional. *See, e.g.*, Dan Mihalopoulos, *ACLU Sues Florissant Arts Agency over Nativity Display; U.S. Judge Plans Hearing Monday*, ST. LOUIS POST DISPATCH, Dec. 21, 1997, at D1.

Numerous cases note evidence of disparaging and intimidating responses that have been directed at religious minorities or nonbelievers who challenge government endorsements of the majority's religious beliefs. *See, e.g.*, Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 651 (S.D. Tex. 1996) (closing trial on damages to protect the anonymity of plaintiffs challenging school district's prayer policy in response to evidence demonstrating "the possibility of social ostracization and violence"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 n.1 (2000) (describing supplementary injunction necessitated by school district officials' attempts "to ferret out the identities of the Plaintiffs" after the District Court permitted them "to litigate anonymously to protect them from intimidation or harassment"); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 404 (5th Cir. 1995) (describing a history teacher referring to a student who protested school prayers as a "little atheist" during class followed by comments by fellow students asking "[i]sn't she a Christian?"); Doe v. Stegall, 653 F.2d 180, 182 n.6 (5th Cir. 1981) (providing plaintiffs a protective order concealing their identity in light of public responses to their constitutional claims stating that, "[t]he devil is here . . . Christians must beat the evil out of these people" and that plaintiffs' attorney "is a Jew . . . [who] wants to destroy Christianity").

done and that the system is operating fairly.[83] It was not that many years ago, after all, when Southern whites insisted that they had no "Negro" problem in their communities. Demands for change were dismissed on the grounds that were not representative of the minority community and the blame for social unrest and growing, public ill will between the races was placed on the "outside agitators" who created a sense of grievance where none actually existed.[84] Similarly, litigation may ignite the acrimony generated by state sponsored religious displays, just as civil rights activists kindled the response to racial subordination, but the quiet heat of minority resentment almost certainly predated the spark in both cases.[85] Put simply, I would be cautious in interpreting a lack of public protest by distinct minorities in a community as a lack of grievances about majoritarian overreaching.

More specifically, the attitude of members of minority religions to public support of the symbols of other religions is not hard to determine. For many non-Christians, the fact that state supported displays celebrate the Christmas holidays does not dilute their

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83. It is also true, however, that many members of the majority fully appreciate that these displays communicate a religious message, recognize that they cause offense to religious minorities and nonbelievers, endorse the former effect, and could not care less about the latter consequence. A poll by the Roper Center at the University of Connecticut, for example, asked respondents how upset they would be if Congress passed a constitutional amendment permitting prayer in public schools that is offensive to non-Christians and nonbelievers. Forty-five percent of those polled answered, "Not at all upset." The poll was conducted by Princeton Survey Research Associates, December 27-December 28, 1994 and based on telephone interviews with a national adult sample of 728. (Sponsor: Newsweek) (Data provided by The Roper Center for Public Opinion Research, University of Connecticut) [USPSR NEW.94DC27.R12D].

Another poll asked respondents to assign a rank of one to ten (one being the worst thing that could happen and ten being the best) to a situation where the courts allow religious symbols "such as Nativity scenes or crucifixes" to be displayed on public property. Forty-seven percent chose "10," indicating that this was the best thing that could happen. It is difficult to equate such enthusiasm with the belief that these symbols are devoid of religious significance and represent nothing more than casual, secular traditions associated with a public holiday. The poll was conducted by The Terrance Group & Mellman, Lazarus & Lake, March 5-March 7, 1994 and based on telephone interviews with a national registered voters sample of 1045. (Sponsor: U.S. News & World Report) (Data provided by The Roper Center for Public Opinion Research, University of Connecticut) [USMELL.032694.R57B].

84. *See, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 168-69 (Oxford Univ. Press, 1974) (noting that "until 1960... the Southern resistance had been able to persuade itself that the civil rights movement was wholly the result of 'outside agitators,' that Southern Negroes were contented and happy with the 'Southern way of life,' that they preferred segregation, and that left to themselves they would never think of protesting"); 102 CONG. REC. 4515-16 (daily ed. Feb. 20, 1956) (statement of Rep. Smith) (condemning the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), for "destroying the amicable relations between the white and Negro races that have been created through [ninety] years of patient effort by the good people of both races ... [and planting] hatred and suspicion where there had been heretofore friendship and understanding").

85. At the beginning of the Montgomery Bus Boycott, Martin Luther King described his feelings to the black community of that city:

> We are here this evening to say to those who have mistreated us for so long that we are tired—tired of being segregated and humiliated, tired of being kicked about by the brutal feet of oppression.... We come here tonight to be saved from the patience that makes us patient with anything less than freedom and justice.

DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN 99 (1990). For a longer, historic statement of the resentment against injustice that led, ultimately, to civil rights protests, see Martin Luther King, Jr., *Letter from Birmingham Jail*, *in* FREEDOM NOW! THE CIVIL RIGHTS STRUGGLE IN AMERICA 10-21 (Alan F. Westin ed., 1964).

Let me be as emphatically clear as I can be here that the point of my analogy is *not* to draw some kind of moral parallel between religious holiday displays and racial segregation. No such equivalence exists. What may be analogized is the mistaken impression that the lack of protest by religious or racial minority groups to hierarchical acts by the majority suggests acquiescence. It is also true that the idea of endorsement, grounded as it is on public acts suggesting that certain religious groups are favored or disfavored by the state, has qualitative similarities to other expressions of ethnic favoritism. These arguments, however, say nothing about the comparative impact of such practices. It should be obvious that the appropriate normative analogy to coerced racial segregation would be the kind of coerced religious segregation sometimes practiced in Europe in the not so distant past.

religious message.[86] Government involvement in religious activities is considered to be problematic for the very reason that the endorsement test suggests. When the state speaks about religion, the cacophony of private voices is replaced by an inauthentic homogenized unity that subordinates smaller faiths to the controlling tones of the majority.[87]

Part of the problem here is that members of majority faiths may have an entirely different perspective and experience than religious minorities of the same event or display. Until they are challenged, the majority will often consider symbols that resonate with their faith to be a neutral reflection of the natural order of things rather than an endorsement of their own beliefs.[88] But the social meaning of such symbols is

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86. *See, e.g.*, Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 n.52 (1986) (suggesting that "it is difficult to believe that the Lynch majority would have reached the same result had there been a Jew on the court to speak from the heart about what public displays of creches really mean to Jews"); Tribe, *supra* note 38, at 1293 n.66 (quoting N. Redlich, *Nativity Ruling Insults Jews*, N.Y. TIMES, Mar. 26, 1984: "[w]hen I see a government-supported creche, I suddenly feel as if I have become a stranger in my own home, to be tolerated only as long as I accept the dominant religious values").

87. The diversity of religious faiths in the United States virtually guarantees that no singular religious expression can effectively represent the faiths living in a community. Thus, for example:

> [I]n 1985, the National Council of the Buddhist Churches of America approved a statement . . . insisting that any form of school prayer would implicitly impose a form of religiousness privileging certain theological and religious notions of 'God' and 'prayer.' The statement reads . . . 'Prayer, the key religious component, is not applicable in Jodo Shin Buddhism which does not prescribe to a Supreme Being or God (as defined in the Judeo-Christian tradition) to petition or solicit; and allowing any form of prayer in schools and public institutions would create a state sanction of a type of religion which believes in prayer and 'The Supreme Being,' would have the effect of establishing a national religion and, therefore, would be an assault on the religious freedom of Buddhists.

Eck, *supra* note 82, at 13; *see also* J. Michael Parker, *Hindu Takes Offense to Prayer at High School Graduation*, THE PATRIOT LEDGER, June 10, 2000, at 29 (describing the objections of Hindu families to Christian prayer offered at high school graduation); Editorial, *The Diversity Grinches*, INVESTOR'S BUS. DAILY, Dec. 18, 1995, at A2 (noting that Muslims protested the failure of Grand Central Station's holiday display to include stars and crescents along with Christmas wreaths and menorahs); Michael Saul, *Prayers Invoking Christ Bother Some on Council; Pastor Resists Nondenominational Slant for Meeting*, DALLAS MORNING NEWS, Oct. 11, 1998, at 35A (quoting Jewish City council members who feel excluded when Christian prayers are offered before meetings begin).

88. Thus, the use of a religious symbol or message without having an explicit and conscious intent to endorse one's faith can not be dispositive of the issue of endorsement. The presumption that one's religious beliefs are so widely accepted that there is no one on the outside, or at least no one whose contrary understandings are worthy of respect, can constitute an endorsement in its own right. The story of a University of Colorado basketball coach who supported a policy of organized team prayer provides a good illustration of this point. When the coach was asked if he had ever offered a non-Christian prayer, he responded "'What's a non-Christian prayer?'" Mike Littwin, *In State Board We Do Not Trust*, DENVER ROCKY MOUNTAIN NEWS, July 9, 2000, at 3B.

The recurrent stories in newspapers about wishing people "Merry Christmas" illustrates the multiple meanings of messages from a slightly different perspective. Most non-Christians I know are not offended when someone wishes them a "Merry Christmas." But there is a disconnect here for the people of other faiths. Most of the time when one person wishes another a happy birthday, or anniversary, or Thanksgiving, or Fourth of July, there is an implicit recognition that the person who is spoken to is celebrating the holiday or event to which the speaker refers. We rarely extend similar wishes to people regarding holidays that are not celebrated in some formal sense. No one says Happy Lincoln's Birthday, for example. Similarly, for the most part we do not offer holiday greetings to people who do not celebrate the holiday in question. I do not wish people a happy anniversary on *my* anniversary and I do not wish my Christian friends Happy New Year on Rosh Hashanah any more than I wished my neighbors in Halifax a Happy Fourth of July during the sabbatical year I spent in Canada.

As one rabbi put it in commenting on the December dilemma, "I wish my Christian friends a merry and blessed Christmas and send them Christmas greetings. If you are a Christian, please don't wish me a Merry Christmas—it's not my holiday. Express your hopes that I have a Happy Hanukkah." Rabbi Richard Marcovitz, *Hannukkah Celebrates a Victory*, SATURDAY OKLAHOMAN, Dec. 11, 1999.

The point, of course, is not that anyone intends to be offensive when they wish someone a Merry Christmas. It is almost impossible for there to be an intent to offend because it so rarely registers in the speaker's mind that he is

more accurately reflected by the change in attitude and ensuing discomfort that results when members of majority faiths are confronted with government displays involving other faiths as opposed to the majority's experience of displays that affirm their own religious identity.[89] People expect government to speak for the people. When it expresses a message that conflicts with a group's core identity, it creates a jarring dissonance raising doubts whether the group is included and respected in the broader community that the state represents.[90]

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addressing someone who does not celebrate this holiday. But that is part of the problem. Respecting religious minorities requires some recognition that they exist and that they hold different beliefs from those of the majority. *See generally* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND THE POLITICS OF RECOGNITION 25, 38 (Amy Gutman ed., 1992) (elaborating on the idea that "the development of the modern notion of identity" and the demand for "a principle of universal equality" combine to create a politics of difference that requires respect for the unique identity of individuals and groups and sharply challenges government actions where "this distinctness . . . [is] ignored, glossed over, assimilated to a dominant or majority identity").

The other part of the problem is that Christmas Greetings often involve multiple meanings. There is the generic message of "enjoy your day off from work." But there is also a faith-based account of religious beliefs which represent the core of Christian theology and distinguish Christianity from other religions. Both messages are so intertwined that they can not easily or meaningfully be separated from each other.

Thus, one critical writer expressed profound confusion as to why anyone would prefer not to be wished a Merry Christmas: "What kind of misanthrope would refuse a wish to have a happy day?" M.D. Harmon, *A Phrase Has Dropped Out of Public Use, So Let's Put It Back; We're So Afraid of Offending A Few That We've Lost the Chance to Offer A Blessing to Multitudes*, PORTLAND PRESS HERALD, Dec. 20, 1999, at 9A. The writer then went on to explain, "[w]hat better tonic for the soul can there be? The story about God so loving the world that he sent his own son, born as a human baby, to be its redemption, has no menace in it. That's the case whether you consider it the literal truth, as Christians do, or just a pleasant story.

There is no harm in 'Merry Christmas'—only a willingness to share the good news of a love so great that It humbled Itself to become one of us." *Id.*

89. Diana Eck summarizes this response succinctly: "Not only have immigrants brought Buddhist, Sikh, and Muslim traditions of faith to these shores, but the visible markers of their religious faith often become the symbolic flashpoints of conflict in an America presumptively construed [by some] as normatively Christian or 'Judeo-Christian.'" Eck, *supra* note 82. Kenneth Karst describes the "letters of protest [that] poured in" when UCLA had the temerity to invite a Buddhist priest to give the invocation at its graduation ceremony. Karst, *supra* note 38, at 158.

See also Patt Morrison, *Playing Fair, and Giving All Gods Equal Time*, L.A. TIMES, June 25, 2000, at B1 (describing how people complained that they felt "left out, maybe even insulted" when a Zen Buddhist closing prayer was offered to end high school graduation because "[i]t wasn't a prayer of their faith or their Lord").

Certainly, there are numerous instances of members of majoritarian religions criticizing the public displays of symbols they believe are inconsistent with their faith. *See, e.g.*, Guyer v. Sch. Bd., 634 So.2d 806 (Fla. App. 1994) (challenging Halloween displays at public school as promoting the religion of "Wicca"); *Proclamation Draws Fire*, RALEIGH, N.C. NEWS & OBSERVER, Oct. 23, 1999, at A3 (noting complaints brought by Baptist ministers and others asking mayor to rescind Proclamation for Earth Religions Awareness Week and declare "Lordship of Jesus Christ Week" in its place); Joseph Perkins, *I Say They Should Go to the Devil*, SAN DIEGO UNION-TRIB., Mar. 8, 1996, at B1 (criticizing "a contemptible band of atheists" who obtained a permit to "hold their own ungodly services" on Easter Sunday on Mount Soledad because "the blasphemers [erroneously] believe they have the same rights as Christians to hold services beneath Mount Soledad's cross" on public property).

90. *See generally* Taylor, *supra* note 88, at 36 (explaining that "equal recognition is not just the appropriate mode for a healthy democratic society" but that "its refusal can inflict damage on those who are denied it . . .").

An analogy here may be helpful. The familiarity of seeing the American flag flying over government buildings is such that many Americans might not consciously experience this display as an endorsement of our country each time that they see it. The flag simply belongs there. It resonates so much with who we are and how we see ourselves that its message fades into the background. Yet no one could doubt that flying the flag is an endorsement of the United States. The jarring dissonance we would experience in seeing a foreign flag on government buildings or other public institutions confirms that reality. Our sense that the foreign flag does not belong there because it does not symbolize who we are, more than our sometimes jaded response to our own flag, establishes the message the American flag communicates. Similarly, we may evaluate the meaning of state-supported religious displays not by inquiring how the majority experiences displays that resonate with their own beliefs, but rather by considering the reaction of the majority to government support for displays that challenge the tenets of their faith. The response to these displays and events, which is often far less favorable than it is to state-sponsored expression that resonates with their own faiths, suggests that religious symbols have not lost their vitality or meaningfulness or their power to include or divide.

In addition to her attempts to take history into account, O'Connor's application of her endorsement standard in religious symbol cases seems to be influenced by the majority and minority status of religious groups. In an important sense, this is an overt and unmistakable aspect of her overall analysis. O'Connor's contention that endorsement is the core concern of the Establishment Clause recognizes that the force of this provision is directed at preventing the social and status subordination of minority faiths by a self-affirming majority.

There is a more subtle, but perhaps more distinctive, sense, in which O'Connor's analysis is influenced by this reality, however. To the consternation of her conservative colleagues, O'Connor argues repeatedly that the facial neutrality of government practices, standing alone, is not enough to satisfy constitutional commands in situations where formal rules of equal treatment might ordinarily be expected to fulfill constitutional requirements. For example, in *Capitol Square v. Pinette*,[91] a case involving a private group's placement of a cross in a traditional public forum, she argued at some length that in certain circumstances the state's decision to permit private religious speech on public property may still constitute an endorsement of religion prohibited by the Establishment Clause. The facial neutrality of the standards the state employs to determine which speakers will get access to the area for their expressive activities cannot resolve this issue.[92] The consequences resulting from the use of neutral criteria must also be taken into account.[93]

What explains or justifies O'Connor's rejection of neutral standards as the controlling factor in this case and others like it? I think her analysis must be grounded on the reality that neutral standards may have a significantly different effect on groups depending on their majority or minority status in a community. In an evenly divided, religiously pluralistic society, relatively equal access rules will result in an expressive environment where a sufficiently broad panoply of faiths are represented so that no perception of endorsement can accrue to any one religious group.[94] In a less diverse area where there is considerable religious polarization and the majority religion far exceeds the size of any minority faith, public property strongly associated with government, such as the lawn in front of city hall, may be controlled and dominated by the symbols of the majority despite the technically neutral criteria used to allocate expressive opportunities. To O'Connor, this latter result may constitute an endorsement of religion.

It should be emphasized, however, that O'Connor's recognition of the effect of majority and minority status on the application of the endorsement test to government

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91. 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in judgment).

92. *See id.* at 777 ("Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form.").

93. *See id.* ("Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result . . . the Establishment Clause is violated. . . . At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval.").

94. *See, e.g.*, Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 850 (1995) (O'Connor, J., concurring) (explaining that university support of a religious periodical published by students does not violate the Establishment Clause because the "wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, [makes] any perception that the University endorses one particular viewpoint . . . illogical").

religious displays is relatively limited. In many ways, O'Connor remains committed to formal equality for Establishment Clause purposes just as she insists on the rigorous review of affirmative action programs assisting discrete and insular minorities in equal protection cases. Thus, in *County of Allegheny*, in evaluating whether the joint display of a menorah and a Christmas tree outside of the county courthouse constituted a multiple endorsement of religion, O'Connor clearly rejected the suggestion that the display of a religious symbol of a minority faith in a community could not be construed to constitute an endorsement of that religion.[95] Indeed, as will be discussed in the next section, this commitment to formal equality is a crucial component of the way that O'Connor applies the endorsement test in other kinds of Establishment Clause cases that do not involve the state's expression of religious messages.

d. Endorsements and Legislative Accommodations of Religion

Perhaps no application of the endorsement test has been so controversial or seems so poorly developed as its use in cases involving the legislative accommodation of religion.[96] O'Connor asserts that the neutral observers whose perspective determine whether state action constitutes an endorsement must be understood to be sufficiently familiar with the Free Exercise Clause and the tension between Free Exercise and anti-Establishment principles that they will take Free Exercise values into account in determining whether religious exemptions or accommodations unconstitutionally endorse religion.[97] Having said that, however, she offers virtually no guidance on how the neutral observer is to accomplish such a synthesis of competing values. Nor does she explain how a neutral observer's understanding of Free Exercise doctrine will assist them in resolving the very different problem of determining when discretionary legislative accommodations of religion that are not constitutionally required should survive Establishment clause review. Indeed, O'Connor's opinions in these cases rarely even identify the factors a court should consider in deciding when Establishment Clause violations occur.

In *Corporation of the Church of Latter-Day Saints v. Amos*,[98] for example, O'Connor concurred in the majority's judgement that amendments to Title VII's ban on religious discrimination in hiring that permit religious organizations engaged in non-profit activities to hire only employees of the organization's faith do not violate the Establishment Clause. She explained that "government action lifting from religious organizations a generally applicable regulatory burden" does advance religion,[99] but it is the Court's job to "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations."[100] Having set out that framework, O'Connor

95. *Allegheny*, 492 U.S. at 634.

96. *See, e.g.*, McConnell, *supra* note 39, at 150-51.

97. *See Wallace*, 472 U.S. at 83 ("[I]n determining whether [a] statute conveys the message of endorsement of religion or a particular religious belief—courts should assume the 'objective observer[]'... is acquainted with the Free Exercise Clause and the values it promotes.").

98. 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment).

99. *Id.* at 348.

100. *Id.*

observes that the Title VII amendments do operate to relieve religious organizations from real burdens on the practice of their faith because it is highly probable that nonprofit activities will be "involved in the organization's religious mission." Accordingly, she concludes that the amendments should be construed to be a permissible accommodation of religion.[101]

The discussion is entirely circular and omits the crucial middle step of the analysis. Having explained that the Court must screen discretionary legislative decisions that relieve religious organizations from the burdens imposed on them by generally applicable laws to determine whether they cross the line from accommodation to endorsement, O'Connor's conclusion that the Title VII amendments will relieve religious organizations of government imposed burdens on their operation starts, but doesn't complete, the constitutional analysis. Literally nothing is said about the remaining question of how a court would distinguish this relief of a burden from an attempted accommodation that did violate the Establishment Clause.

Other opinions are also less helpful and persuasive than they need to be. In *Estate of Thornton v. Caldor*,[102] O'Connor concludes that a state law requiring private employers to give religiously observant employees an absolute preference in having their Sabbath day off from work violates the Establishment Clause. She distinguishes Title VII's requirement that employers must reasonably accommodate the religious practices of employees, in part, on the grounds that this standard is more flexible, less harmful to the interests of third parties, and therefore more likely to be perceived as serving antidiscrimination goals.[103] Again, there is an unexplained disconnect in the analysis. Since observant religious individuals will not be able to retain their jobs if they are ordered to work on their Sabbath, it is not clear why absolute protection from such a requirement cannot also be understood to further antidiscrimination goals. There may well be a link between the magnitude of the burden a religious accommodation places on third parties and the constitutionality of such state decisions, but the content of such a "harm to others" standard and its connection if any to an endorsement analysis remains to be determined.[104]

Similarly, in *Texas Monthly, Inc. v. Bullock*,[105] O'Connor joins Justice Blackmun's concurring opinion in invalidating a state law exempting religious periodicals from a generally applicable sales tax that applies to other expressive materials. Again, these justices recognize that some accommodations of religion are permissible, but fail to explain why they are convinced that this one is not. They simply proclaim that "a statutory preference for the dissemination of religious ideas offends our most basic

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101. *Id.* at 349.

102. 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

103. *Id.* at 712 ("Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti- discrimination [sic] law rather than an endorsement of religion or a particular religious practice.").

104. *See, e.g.*, Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589 (1999); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 928-29 (Cal. 1996) (discussing whether religious accommodations substantially effecting the rights of third parties are justified).

105. 489 U.S. 1, 26 (1989) (Blackmun, J., with whom O'Connor, J., joins, concurring in judgment).

understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."[106]

The one principle that emerges from O'Connor's opinions in this area is her marked reluctance to accept sect-specific and even religion-specific accommodations and her concern about religious discrimination in providing exemptions. In *Thornton v. Caldor*, O'Connor challenged the decision of the state to protect Sabbath observers "without according similar accommodation to ethical and religious beliefs and practices of other private employees."[107] In *Texas Monthly*, she joined with Justice Blackmun in suggesting that a broader exemption for both religious periodicals and philosophical materials dealing with matters of conscience and good and evil might survive constitutional review.[108]

Similarly, in *Hernandez v. Commissioner of Internal Revenue*,[109] O'Connor dissented from the Court's decision to uphold the Internal Revenue Service's refusal to allow Scientologists to deduct expenditures for "auditing," as charitable contributions. The IRS argued that a deduction was inappropriate because the followers of this religion received benefits in return from their payments to the religious organization. To O'Connor, the Scientologists' quid pro quo arrangement offering the spiritual benefits of "auditing" in return for contributions was no different than the more conventional payment of pew rents and membership dues to churches and synagogues that result in congregants receiving assignments of specific seats for worship or tickets for special services. Accordingly, she argued, all faiths must receive similar treatment from the IRS; the deductions must be disallowed for no one or for everyone.[110]

O'Connor's clearest expression, and the most dramatic example, of her concern about preferential sect accommodations is her concurring opinion in *Board of Education of Kiryas Joel v. Grumet*.[111] The New York legislature created a special school district for a village comprised entirely of members of the Sitmar Hasidim, a small Jewish sect, in order to provide this insular religious group access to publicly financed remedial educational services without their children having to leave their community to attend public school in a neighboring town. O'Connor voted to

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106. *Id.* at 28.

107. *Thornton*, 472 U.S. at 711.

108. *See Texas Monthly*, 489 U.S. at 27-28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). Perhaps it is a vain desire, but I would like to decide the present case without necessarily sacrificing either the Free Exercise Clause value or the Establishment Clause value. It is possible for a State to write a tax-exemption statute consistent with both values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.

Id.

109. 490 U.S. 680, 704 (1989) (O'Connor, J., dissenting).

110. O'Connor argued that *Hernandez* "involves the differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions. As such, it is best characterized as a case of the Government 'put[ting] an imprimatur on [all but] one religion.'... That the Government may not do." *Id.* at 712 (quoting Gillette v. United States, 401 U.S. 437, 450 (1971)).

111. 512 U.S. 687, 712 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

invalidate this accommodation on the grounds that it discriminated in favor of a particular religious group. She explained:

> I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation. The legislature may well be acting without any favoritism, so that if another group came to ask for a similar district, the group might get it on the same terms as the Satmars. But the nature of the legislative process makes it impossible to be sure of this. A legislature, unlike the judiciary or many administrative decisionmakers, has no obligation to respond to any group's requests. A group petitioning for a law may never get a definite response, or may get a 'no' based not on the merits but on the press of other business or the lack of an influential sponsor. Such a legislative refusal to act would not normally be reviewable by a court. Under these circumstances, it seems dangerous to validate what appears to me a clear religious preference. [112]

The problem with O'Connor's approach to these issues is not that she takes equality values seriously. Her concern about favoritism and discrimination in the granting of exemptions is both proper and necessary. What is lacking is an appreciation of the liberty burdens and disparate impacts that result when accommodations are rejected and an analytic approach that facilitates judicial recognition of the conflicting principles that are in play in many of these cases.

e. Endorsements and State Funding of Religious Organizations

Unlike her analysis of legislative accommodations, Justice O'Connor's constitutional evaluation of government spending programs that subsidize religious organizations is extremely detailed. It identifies a range of principles and factors that must be considered in determining the constitutionality of such financing frameworks. What is lacking here is a convincing connection to the endorsement and equality-based values which form the foundation of her Establishment Clause jurisprudence.

O'Connor remains committed to the principle that public funds can not be used for religious purposes. In *Mitchell v. Helms*,[113] the Court's most recent case involving aid to religious schools, she joined the Court's decision allowing the state to supply computers to secular and religious private schools. However, O'Connor forcefully rejected the views of the four-justice plurality that suggested state financial support can be used by religious organizations to promote their religious mission as long as funds are made available to both secular and religious organizations under neutral criteria and the state receives the secular benefit it seeks from the programs it subsidizes.[114] Here, again, O'Connor stood by her conviction that the Establishment Clause as well as the Free Exercise Clause require more than formal neutrality. Applying this understanding

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112. *Id.* at 716-17.

113. 530 U.S. 793, 836 (2000) (O'Connor, J., concurring in the judgment).

114. *Id.* at 837 ("[W]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.").

to funding cases, O'Connor acknowledged that formal neutrality may be a necessary condition for the funding of religious organizations, but she maintained that neutral allocations alone were not enough to satisfy Establishment Clause review.[115]

The principle that public funds cannot be used for religious purposes is not absolute, however. In certain situations such aid may be permissible when the context and circumstances preclude the funding being perceived as an endorsement of religion or of a particular faith. Thus, O'Connor supported holdings that accept the use of state funds for religious purposes in three cases and has elaborated on her reasons for doing so in dicta in other opinions.[116]

In *Lynch v. Donnelly*, the creche case discussed earlier, O'Connor upheld state support for a Christmas nativity display on the grounds that it would be understood to serve the secular purpose of celebrating a public holiday.[117] *Rosenberger v. Rectors and Visitors of the University of Virginia*[118] involved more complicated facts and a more sophisticated analysis. The University of Virginia provided financial support to a wide range of student groups and activities out of the mandatory fees it collected from the student body. It refused to provide support to religious activities, however, and on that basis rejected a request for funds from a student group that sought to publish a religious magazine. The students successfully challenged the University's denial of support on the grounds that it constituted viewpoint discrimination in a designated public forum and violated the First Amendment.

Justice O'Connor wrote a concurring opinion in *Rosenberger* explaining why the public financing of a religious periodical would not violate the Establishment Clause on the unique facts of this case. The University disclaimed any connection to or responsibility for the expression of the student groups that received its support. The University's funds would be paid directly to the printer of the magazine. Public funds would not even pass through the hands of the student group. Finally, the University subsidized such a wide array of activities and expression that it was extremely unlikely that anyone would think that the University itself endorsed any particular message communicated by the student groups whose activities it financed. Accordingly, in this circumstance, constitutional concerns for government neutrality toward religion superceded the constitutional principle prohibiting state support for religion.[119]

Finally, Justice O'Connor has made it clear that she distinguishes between direct financial aid to religious schools that is used for religious purposes and aid that is distributed to the religious school through the intermediary decisions of parents and students who participate in a "private choice" or voucher program. The former raises far more serious Establishment Clause concerns than the latter because of the likelihood that it will be perceived as an endorsement of religion. Thus, in *Witters v. Washington Department of Services for the Blind*,[120] she joined the Court in concluding that the Establishment Clause did not bar the state from providing vocational

115. *See id.* (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 846 (1995)) ("[N]eutrality is important, but it is by no means the only 'axiom in the history and precedent of the Establishment Clause.'").

116. *See supra* text accompanying notes 115-27.

117. *Lynch*, 465 U.S. at 691.

118. 515 U.S. 819, 846 (1995) (O'Connor, J., concurring).

119. *Id.* at 852.

120. 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

rehabilitation funds to a blind person who planned to use the support he received to attend a religious college and prepare for a career as a minister or missionary.

O'Connor later explained her position on private choice programs in more detail in her lengthy concurrence in *Mitchell v. Helms*.

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement . . . In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, '[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.'[121]

Notwithstanding her commitment to the principle prohibiting direct financial support to religious organizations for religious purposes, in a series of cases including *Zobrest v. Catalina Foothills School District*,[122] *Witters v. Washington Department of Services For the Blind*,[123] *Agostini v. Felton*,[124] and *Mitchell v. Helms*,[125] O'Connor showed little sympathy for many of the rules and presumptions previously employed by the Court to limit state aid involving secular instructional materials or state employees to "pervasively sectarian" religious organizations performing secular activities. For example, she challenged the assumption that religious schools are so likely to ignore state requirements prohibiting them from using publicly provided instructional materials for religious purposes that they must be subjected to intrusive monitoring and supervision.[126] Similarly, O'Connor saw little basis for a blanket rule prohibiting the distribution to religious schools of any instructional materials that were capable of being diverted from secular to religious purposes. The appropriate constraint in such a situation would be a clear statement from state authorities that such diversions were not permitted and modest monitoring to insure compliance with that requirement, not a complete repudiation of such support.[127] O'Connor also strongly disputed the suggestion that state employees providing secular remedial services to parochial school

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121. *Mitchell*, 530 U.S. at 842 (quoting *Witters*, 474 U.S. 481, 493 (1986)).
122. 509 U.S. 1, 24 (1993) (O'Connor, J., dissenting).
123. 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment).
124. 521 U.S. 203 (1997).
125. *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring in the judgment).
126. *Id.* at 863-64 ("I disagree with the plurality and Justice Souter on this point and believe that it is entirely proper to presume that these school officials will act in good faith. That presumption is especially appropriate in this case, since there is no proof that religious school officials have breached their schools' assurances or failed to tell government officials the truth.").
127. *See id.* at 842 (2000) (O'Connor, J., concurring in the judgment).

students in the religious school's own classrooms could not be trusted to refrain from any participation in religious programs or instruction.[128]

Whatever the merits or weaknesses of these particular funding conclusions may be, what is lacking in these cases is a clear connection between the principle denying direct aid to religious institutions for religious purposes and the core values the Establishment Clause represents. O'Connor appears to believe that direct and substantial state aid for religious schools in the form of instructional materials and state staff support does not constitute an endorsement of religion. Per capita cash grants to religious schools, on the other hand, would constitute a prohibited endorsement. Conversely, voucher programs resulting in the distribution of a similar amount of state funds to religious schools would not be an endorsement. But references to the perceptions of the "neutral observer" do not adequately explain and justify the distinctions that O'Connor draws in these cases. Much more needs to be said here about the impact of these various funding frameworks on religious equality than Justice O'Connor has offered us so far in her opinions. At least more needs to be said if O'Connor's position is going to influence other justices on the Court or, perhaps more importantly, convince the polity that these decisions reflect accepted constitutional values.

3. *Beyond Endorsement—Using Free Speech and Equality Principles to Inform the Meaning of the Establishment Clause*

While the above discussion demonstrates that there are serious problems with the application of the endorsement standard, particularly in cases involving legislative accommodation of religious practices or the funding of religious organizations, these difficulties do not mean that Justice O'Connor's endorsement approach is misguided in any sense of the term. On the contrary, it is entirely to her credit that she points Establishment Clause doctrine toward the primary values and principles at which they should be directed—values and principles related to religious equality. The problem with the endorsement standard is not its direction, but rather, that in relying on it, O'Connor does not go far enough in developing equality based Establishment Clause doctrine. The idea of endorsement is one important facet of the problem of achieving equal respect for, and equal treatment of, the diverse religious faiths represented in American society, but there is more to equality than the issue of endorsement. Put simply, there is still a great deal of work to be done in this area.

Religious equality principles can be informed by race and gender equal protection cases, but these decisions are no substitute for the very hard work of developing a framework of equality that resonates with the distinctive nature of religious groups. Justice O'Connor's instincts in this area are often well grounded. For example, her intuitive reluctance to accept a regime of formal neutrality in either Free Exercise or Establishment Clause cases reflects the reality that religious groups are not similarly

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128. *See Agostini*, 521 U.S. at 226 ("[T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination . . . .").

situated with regard to their beliefs and practices. O'Connor seems to realize that treating people of different faiths as if they shared common convictions is the very antithesis of equality. Unlike racial and gender equality where our constitutional ideal focuses on the irrelevance of race and gender differences, a rule that prohibits taking religious differences into account simply cannot do the job.

Just as formal neutrality does not necessarily promote religious equality, however, a lack of formal neutrality does not necessarily undermine religious equality. O'Connor's concern about legislative favoritism in accommodating religious practices is clearly an important one, but insisting on formally neutral accommodations may not be the most effective way to reconcile equality and liberty goals in these cases. Because of the differences among faiths, many legitimate accommodations may be sect specific in their effect. Just as the ban on the ritual slaughter of animals in *Church of Lukumi Babalu Aye v. Hialeah*[129] was correctly determined to violate the Free Exercise Clause because it was directed exclusively against the members of the Santeria faith, an exemption from certain municipal codes to accommodate the ritual slaughter of animals might only be of benefit to members of the Santeria religion. But it is not clear that such an accommodation should be held to violate the Establishment Clause because of its limited scope.

It may be that the Court must take political process concerns into account in evaluating religious accommodations. Although she is essentially a formalist in race cases with regard to the appropriate standard of review applied to racial classifications, O'Connor does recognize a difference between race-specific laws that operate as an "'engine of oppression'" and those that represent "an effort 'to foster equality in society.'"[130] That difference is even more pronounced in Establishment Clause cases involving legislative accommodations because of the inherent and legitimate differences among religious faiths (which can be contrasted with the constitutional ideal of the absence of racial differences) and the goal of promoting religious liberty through accommodations, an objective that has no racial counterpart. Thus, although there were obvious and serious sect-specific consequences of conscientious objector laws, these accommodations of religious pacifists should not be struck down as an expression of unconstitutional favoritism for the Quakers or the other minority faiths they primarily benefitted. Similarly, it may be that the New York legislature's benign objective in creating a special school district for the Sitmar Hasidim in *Grumet* and the obvious minority status of the faith community benefitted by this accommodation should have led to a different result in that case.

Developing a vision of religious equality that will help to resolve the problem of public funding of religious organizations will also require the Court to move significantly beyond the notion of endorsement. State funding of religious organizations raises difficult equality questions about religious discrimination in the hiring of staff to provide publicly financed services, discrimination in the provision of services, and the implicit inequality that results when people of one faith are directed

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129. 508 U.S. 520, 577 (1993) (Blackmun, J., with whom O'Connor, J., joins, concurring in the judgment) (holding that municipal ban on ritual slaughter of animals constituted a religious gerrymander and violated Free Exercise guarantees).

130. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995).

to public programs operated by pervasively sectarian institutions of a different religion. Problems involving the fair allocation of resources among religious communities may be accentuated by state expenditures that are paid directly to houses of worship or institutions operating under the direct control of religious authorities. There are also important concerns about the fragmentation of public life along religious lines and the isolation of minority faiths in communities where there are too few members of a religion to develop an institutional infrastructure capable of serving as a conduit for public services.[131] None of these equality issues is captured by the idea of endorsement, but they represent many of the core problems in funding cases that the Court has not yet addressed.

Religion clause cases are sometimes erroneously described as barring religion from the public square. The real issue for religious liberty and equality is different and more difficult. Religion can not be denied access to public life. The critical questions involve the terms of that access. Can religion retain the special autonomy and sphere of liberty it rightfully demands and receives in private settings when it enters the public arena? Do the statutory and constitutional protections provided to the exclusionary practices a house of worship engages in to promote its religious mission also apply to its operation as a state funded conduit for the provision of public services to a diverse community? Or, conversely, do constitutional requirements promoting inclusion and pluralism apply when religion moves from the private to the public domain and undertakes to provide state subsidized services? Publicizing private life can involve unacceptable state intrusions into the autonomy of religious institutions and impose intolerable burdens on religious liberty. Privatizing public life can involve the state in unacceptable religious discrimination and the subordination and isolation of minority faiths in public life and impose intolerable burdens on religious equality. Reconciling the constitutional interests at stake in the funding cases requires a more multifaceted response than an endorsement standard alone can provide.[132]

In addition to the further development of principles of religious equality, Justice O'Connor's interpretation of the religion clauses would benefit by more explicit recognition of the role of free speech doctrine in deciding cases involving religious expression. A case like *Texas Monthly*, for example, might be more easily and persuasively resolved by the Court's affirmation of the principle that neither Free Exercise exemptions nor legislative accommodations of religion can justify content or viewpoint discriminatory preferences for religious speech when conventionally expressive activities such as the publication and sale of periodicals are the subject of regulation. When the government regulates speech itself, free speech principles rather than free exercise autonomy rights or establishment equality mandates should control the Court's decision.[133] Similarly, O'Connor's analysis in *Rosenberger* discussing the tension between the "no aid to religion" principle and the "neutrality" principle would have been strengthened considerably if she had more carefully identified the role of free speech doctrine in informing and limiting her conclusion. In the context of a wide-

131. *See* Brownstein, *supra* note 6, at 256-67; Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality and Free Speech Matrix*, 31 CONN. L. REV. 871, 909-27 (1999).

132. *See* Brownstein, *supra* note 26, at 134-45.

133. *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999).

ranging designated public forum for expressive activities, free speech doctrine requires the conclusion that the no aid standard must be subordinate to the constitutional commitment to viewpoint neutrality. When the state supports or regulates other activities that have little to do with expression in different contexts, however, the rigorous neutrality imposed by free speech doctrine should not apply.[134] Speech cases can best be resolved if they are identified forthrightly as a distinct doctrinal area, the analysis of which will not influence free exercise or establishment decisions when expressive activities are not the focus of regulation.

III. THE FORM OF JUSTICE O'CONNOR'S INTERPRETATION OF THE RELIGION CLAUSES

A. *Correlating Terms and Meanings*

There are a variety of features of O'Connor's religion clause jurisprudence that relate more to the form than the substance of her analysis. One such feature is her contention that constitutional standards should clearly and actually express the values they are designed to promote. In *Board of Education of Kiryas Joel v. Grumet*,[135] for example, she criticizes attempts to describe Establishment Clause doctrine as employing a "coercion" test, but defining prohibited "coercion" so broadly that it applies to many activities that would not be conventionally understood as coercive in any meaningful sense.[136] Instead, O'Connor suggests that "it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them."[137]

Again, we might ask why the terminology utilized in decisions matters if the holdings of cases are clear. Obviously, precision in language may improve clarity of analysis, but the extent to which the name of a test or standard influences judicial judgments is probably limited. Whether the Court describes a religious symbol placed in front of city hall for the entire year as implicitly coercive or an endorsement of religion, the ability of lower courts to analogize this ruling to other cases is unlikely to turn on the choice between these two terms. Similarly, a state sponsored religious invocation at a high school graduation may be described as coercive or an endorsement of religion. The criteria the Court relies on to reach this conclusion provides important information to lower courts confronted with arguably analogous fact patterns, but the precise words used to describe the standard may play much less of a role in developing a consistent line of authority.

The virtue of using terms authentically may point in an entirely different direction. The primary beneficiary may be the polity and the political branches of government, not the judiciary. Part of the Court's job is to engage in a dialogue with the coordinate branches of government and, more importantly, with the people. The state and national

134. *See* Brownstein, *supra* note 6, at 268-78.

135. 512 U.S. 687 (1994).

136. *See id.* at 719 (criticizing "[a]lternatives to *Lemon* . . . [that] lead us to find 'coercive pressure' to pray when a school asks listeners—with no threat of legal sanctions—to stand or remain silent during a graduation prayer").

137. *Id.*

governments need to understand why their activities are unconstitutional. American society needs to understand the meaning and purpose of constitutional rules. Judicial credibility depends on Court decisions making sense to the people and institutions affected by the Courts' judgments. The permanence of constitutional decisions requires eventual resonance between the community and the Court on the meaning of the Constitution's requirements. When words are used in counterintuitive ways, holdings seem arbitrary and, more importantly, the persuasive force of the Court's opinions is diluted or negated.

These failings have been painfully obvious in the Court's religion clause jurisprudence. As someone who supports a rigorously enforced Free Exercise and Establishment Clause, I have often approved of holdings implementing the *Lemon* test.[138] But there is seldom anything in the opinions applying *Lemon* that explains in a meaningful and intelligible way why the Court reached the conclusions that it did. The constitutional values the Establishment Clause promotes are often lost in the pages of these opinions. No matter how much anyone may agree with the results of particular cases, constitutional jurisprudence of this kind fails one of its essential functions.

Justice O'Connor's endorsement test, on the other hand, communicates effectively and repeatedly what it is that is unacceptable about state action that violates the Establishment Clause. Citizens may fairly debate the specifics of individual cases, but there is a core idea here on which the Court can stand in explaining its decisions and in terms of which its judgments can be defended. "Government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community."[139] An important part of the merit of this standard is the accuracy with which it expresses the constitutional value of equality in those Establishment Clause cases where it can be meaningfully applied.

B. Standards and Balancing Tests

As has often been noted, Justice O'Connor is renowned for employing standards and balancing tests, a clear counterpoint to the rules, subrules, and exceptions approach of her colleague and recurrent critic, Justice Scalia.[140] O'Connor's religion clause jurisprudence fits comfortably within this pattern. It is highly contextual, often ad hoc, and resorts to subjective criteria and balancing tests to reach constitutional conclusions. There are significant virtues and pitfalls to this adjudicatory style. It is important to recognize, however, that O'Connor's reliance on contextual standards, at least in this area of the law, reflects more than a generic preference for a particular kind of decision making. It is a necessary consequence of her understanding of the structure of the

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138. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), Burger, C.J., introduced the three prongs of the now familiar *Lemon* test as follows: "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.'" (citing Walz v. Tax Commission, 397 US 664, 668 (1970)).

139. County of Allegheny v. ACLU, 492 U.S. 573, 627(1989).

140. *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

religion clauses as well as her substantive vision of their purpose and meaning.[141] That is to say, I do not believe that O'Connor could alter the form of the constitutional model she supports without fundamentally changing her structural and substantive interpretation of the Free Exercise Clause and Establishment Clause.[142]

With regard to the paradigmatic form of O'Connor's jurisprudence, her employment of context-sensitive standards and balancing tests, I have only two points to add to the considerable commentary that has already been written on this subject about this Justice. First, the indeterminacy intrinsic to standards and balancing tests is progressively reduced as lines of authority develop over time. In deciding cases involving government expression of religious messages and the public funding of social services provided by religious institutions, O'Connor has identified a variety of factors that are relevant to her constitutional analysis and demonstrated their applicability in particular circumstances.[143] These opinions do not entirely eliminate the subjectivity and uncertainty surrounding Establishment Clause review of these issues, but they reduce the scope of the problem and provide increasingly firmer ground for predicting results in a larger and larger class of cases.

Second, it may be that one of the basic criticisms of constitutional standards and balancing tests is considerably overstated. These forms of decision are challenged on the grounds that they invite—indeed, almost require—judges to use their personal values in reaching constitutional conclusions because of the unguided and subjective discretion involved in their implementation. This results in the displacement of political control from the legislative and executive branches of government, and their source of authority, the people, to unelected judges who have no legitimate basis for exercising such power.[144]

It is not clear, however, that the form of decisionmaking employed in a case determines the legitimacy of the judicial authority exercised in deciding it. An expansive and unsupported bright line rule grounded on the value proclivities of Supreme Court Justices may limit the discretion of lower court judges more than standards or balancing tests, but it is hard to see why it is any less a usurpation of the polity's authority. The only distinction is that in the former case the Supreme Court displaces political decisionmaking while in the latter lower courts are involved in doing so.

More importantly, the great majority of religion clause disputes in our society are not litigated or resolved by the judiciary. They are evaluated and resolved by bureaucrats and administrative bodies, often through informal negotiations. Judicial decisions suggest the parameters within which these essentially political determinations

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141. The connection between the form and substance of doctrine has often been noted particularly in free speech commentary. *See, e.g.*, William S. Dodge, *Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 165 (1998); Shiffrin, *supra* note 52.

142. O'Connor makes this point explicitly in her dissent in *Boerne* when she urges the Court to reexamine its holding in *Smith* because its formal virtues do not outweigh its substantive deficiencies: "Although it may provide a bright line, the rule the Court declared in *Smith* does not faithfully serve the purpose of the Constitution." City of Boerne v. Flores, 521 U.S. 507, 565 (1997) (O'Connor, J., dissenting).

143. *See supra* notes 66-80, 113-27 and accompanying text.

144. *See* Sullivan, *supra* note 138, at 64-66 (describing the argument that constitutional rules are preferable to standards because they maintain the proper relationship between the courts and the political branches of government).

will be reached, but far more often than not, the courts do not review the actual resolution of the dispute. Accordingly, in evaluating the role that different forms of judicial decisions have on the exercise of political power, it may be far more useful and relevant to consider how the Court's opinions influence nonjudicial dispute resolution, which accounts for the great majority of conflicts, rather than focusing on the relatively few cases that actually proceed to trial and judgement.

From this perspective, the use of standards and balancing tests has, I believe, an important and salutary effect on religion clause disputes. The very indeterminacy and subjectivity of the tools the Court uses are empowering to all the parties to the conflict. When no one can be sure how a court will evaluate an issue, there is a premium placed on nonjudicial resolution. The door to the negotiating table is likely to be held open in situations where it would be slammed in the face of one party or the other if the law was clear and all entitlements or lack of entitlements were uncontestable. Results are more likely to reflect a compromise in which the interests of both sides are taken into account. In these situations, when the form of judicial decisionmaking creates incentives for both government and people with grievances to discuss their problem and reach a mutually satisfactory or at least tolerable solution, I do not think that political power is displaced by the courts. One might argue that the nature of political interaction is modified in that the complete subordination of one group's interests becomes less likely in these cases. But that does not strike me as a usurpation of political authority. Indeed, one might characterize it as accentuating republican politics and dialogue in a very traditional sense.

IV. PLACING JUSTICE O'CONNOR'S RELIGION CLAUSE JURISPRUDENCE IN PERSPECTIVE

First, and perhaps most importantly, Justice O'Connor's doctrinal approach recognizes that the Constitution has a vitally important role to play in determining the relationship between church and state, between law and religious practice. While this may seem self-evident from a textual perspective in that religion is assigned two separate phrases in the text of the First Amendment, much of American constitutional history communicates a contrary message.

Freedom of religion received only anemic protection in the Court's initial decisions. *Reynolds v. United States*[145] held in 1878 that the Free Exercise Clause protected religious beliefs, but not religious practices. Government was not constitutionally constrained from adopting laws that directly prohibited conduct an individual was obligated to perform by the requirements of his faith. It was not until 1963 in *Sherbert v. Verner*[146] that the Court invalidated a state burden on religiously motivated conduct on free exercise grounds under a rigorous standard of review. The Establishment Clause was little more than a constitutional paper tiger for most of this period as well. While the Court acknowledged the existence of "'a wall of separation

145. 98 U.S. 145 (1878) (rejecting Free Exercise defense of polygamy on grounds that the First Amendment only protects religious beliefs, not practices).

146. 374 U.S. 398 (1963) (holding that denial of unemployment compensation to Sabbatarian who refused to accept employment requiring her to work on the Sabbath violated her Free Exercise Rights).

between church and [s]tate'" in *Everson v. Board of Education*[147] in 1947, it did not find that the state's reimbursement to parents of the cost of sending their children to parochial schools on public buses violated this barrier. It was not until 1962, when the Court struck down state sponsored school prayer in *Engel v. Vitale*,[148] that the Establishment Clause became a serious limit on majoritarian support and promotion of religion or specific religions.

The constitutional "Great Awakening" of the 1960s that breathed real life into both religion clauses was of relatively short duration. Contemporary constitutional doctrine for the last decade or more has been in a relatively steady decline from the invigorated Free Exercise and Establishment Clause jurisprudence of the 1960s,1970s, and early 1980s. The role of the Constitution in limiting majoritarian preferences has been significantly reduced. Under the Rehnquist Court, interference with religious practice and the promotion of religious faith has become more and more a subject of political deliberation, increasingly immunized from judicial review.[149]

O'Connor's resistance to the current Court's almost cavalier willingness to leave issues of religious liberty and religious equality to the mercies of majoritarian and administrative discretion represents a commitment to the judiciary's role in this part of the constitutional scheme of things that distinguishes her from the other conservative justices whose values she often shares. Other justices do not necessarily challenge her description of the magnitude of the burden the state may impose on religious practices through neutral laws of general applicability[150] or the cultural consequences for minority faiths of state expression that publicly celebrates and acclaims the beliefs of the majority.[151] Their refusal to aggressively defend individuals and minority groups from state interference and disparagement emanates in part from their doubts about the means and legitimacy of judicial intervention to provide such protection.[152] O'Connor,

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147. 330 U.S. 1, 16 (1947) (citing *Reynolds*, 98 U.S. at 164).

148. 370 U.S. 421 (1962). Two cases were decided between 1947 and 1962, *McCollum v. Board of Education*, 333 U.S. 203 (1948) and *Zorach v. Clanson*, 343 U.S. 306 (1952). McCollum struck down a program in which clergy were permitted to offer classes in religious education to students in public school on a voluntary basis. *Zorach* upheld a "release time" program under which students were permitted to leave school to attend religious classes at separate facilities. The combination of the two cases pointing in opposite directions did not signify a firm commitment by the court to Establishment Clause principles.

149. *See* McConnell, *supra* note 39, at 136 (noting that the "initial response of the Rehnquist Court has been to shrink the scope of both Religion Clauses and thereby to restore a significant degree of governmental discretion"); *see generally* Erwin Chemerinsky, *Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (criticizing the Rehnquist Court's commitment to majoritarianism as a substitute for substantive constitutional decision-making).

150. *See, e.g.*, Justice Scalia's comment in *Employment Division v. Smith*, 494 U.S. 872 (1990), that

> [i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id. at 890.

151. *See* County of Allegheny v. ACLU, 492 U.S. 573, 673-74 (1980) (Kennedy, J., concurring with the judgment in part and dissenting in part) (dismissing the argument that feelings of exclusion experienced by religious minorities in response to state promotion of sectarian displays are relevant to Establishment Clause analysis).

152. *See id.*, 492 U.S. at 674 (Kennedy, J., concurring in the judgment in part and dissenting in part)

> Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

See also Smith, 494 U.S. at 889 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against

on the other hand, places the constitutional cart squarely behind, rather than before, the fundamental rights horse. When fundamental rights and interests are at stake, she seems to suggest, it is the job of judges and courts to protect them in the best way they can. Other concerns can not displace this primary obligation.[153]

It is true that Justice O'Connor's opinions do not enforce either the Free Exercise Clause or the Establishment Clause with the rigor of earlier Warren or Burger Court decisions. Still, there can be no doubt that O'Connor recognizes much more of a role for the Constitution in this area than many of her contemporaries on the Court today. Her willingness to circumvent free exercise protection in cases like *Lyng* and *Jimmy Swaggart* and her less than forceful application of strict scrutiny in *Employment Division v. Smith* demonstrate a willingness to accept substantial interference with religious practice in a wider range of circumstances and for less compelling reasons than more liberal members of the Court. But in cases like *Bowen v. Roy* and in her repeated resistance to the Court's abdication of responsibility for free exercise rights in *Smith*, O'Connor makes it clear that the state is constitutionally obliged to justify many of the burdens it imposes on religious practice to the satisfaction of a reviewing court. To O'Connor, the freedom to practice one's faith must remain a protected right, not a privilege that bureaucrats, the legislature, and the majority can withdraw or ignore at their discretion.

The same can be said for O'Connor's Establishment Clause opinions. In funding cases, she is willing to tolerate far more governmental support for the secular functions of religious institutions than prior cases permitted. Her conclusions in symbolic display cases such as *Lynch v. Donnelly* allow government to promote religion and specific religions to a considerable extent.[154] Still, there can be no mistaking O'Connor's commitment to at least some core Establishment Clause values. Under the doctrinal umbrella of her endorsement analysis, O'Connor interprets the Constitution to prohibit government from either directly funding religious activities or explicitly promoting religious beliefs. The value of continuing these barriers between church and state should not be minimized or ignored because they are less formidable than the wall of separation they replace.

In addition to insisting on a distinct role for the Constitution and the judiciary in protecting religious freedom and equality, O'Connor assigns actual and independent meaning to both of the religion clauses. In *County of Allegheny*, she forcefully rejected Justice Kennedy's attempt to limit the Establishment Clause to only those cases where individuals are coerced to participate in religious rituals that are foreign to their faith on the grounds that such an interpretation would render the two clauses redundant to

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the importance of general laws the significance of religious practice.").

153. In her concurrence in *Employment Division v. Smith*, Justice O'Connor makes this point emphatically by quoting Justice Jackson's famous language from *Barnette* with approval:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

494 U.S. at 903 (quoting West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

154. O'Connor's analysis in *Allegheny*, however, can be understood as a partial retreat from her comments in *Lynch*. *See supra* notes 71-72 and accompanying text.

each other with the Establishment Clause adding little if anything to free exercise principles.[155] By focusing on endorsement and status as the cornerstone of the Establishment Clause, O'Connor grounds this constitutional mandate on equality, a separate value denoting the importance of inclusion and respect as well as freedom from interference.

Importantly, O'Connor recognizes that there is an inherent conflict as well as considerable overlapping between free exercise goals and Establishment Clause objectives under her approach. She knows that the Free Exercise Clause promotes religious equality as well as liberty by protecting individuals of all faiths from government interference. Indeed, her rejection of the system of formal neutrality adopted by the Court in *Employment Division v. Smith* is predicated on the inherent inequality its regime permits (in leaving the rights of religious minorities to the proclivities of the majority's discretion) as well as the inadequate protection of religious liberty it provides in a hyper-regulated world where the exercise of individual rights inevitably clashes with some form of social ordering. Similarly, O'Connor understands that Establishment Clause constraints on state promotion of religion are intended to insure religious independence from government and the liberty such autonomy provides in addition to requiring that government must recognize that citizens of all faiths are of equal worth and must be treated with equal respect.

While Free Exercise and Establishment Clause values reinforce each other in certain circumstances, some conflict between liberty and equality, or Free Exercise and Establishment Clause guarantees, is inevitable. By definition, free exercise exemptions facilitate and promote the exercise of religion. Depending on the context, they may promote the religion of a specific faith alone. At some point, this exceptional treatment of religion or a particular religion will violate Establishment Clause principles by providing too much of a benefit to religious individuals or institutions at too great a cost to persons who do not share their faith. O'Connor recognizes this tension in several cases, as we have seen, and requires that her "objective observer" whose perspective determines whether state action endorses religion must take "the Free Exercise Clause and the values it promotes" into account in reaching this conclusion.[156] Both values must be considered. No constitutional hierarchy necessarily subordinates one to the other in all cases.

There is a similarly inescapable tension between religious liberty and equality in public life. Religion in many contexts is absolutist, exclusive, and hierarchical. When these characteristics of religious belief and practice have a controlling influence on public life, minority faiths will be marginalized or subordinated in their participation in public programs and activities. Inclusion on equal terms for the minority requires some sacrifice of majority prerogatives.

Justice O'Connor's interpretation of the religion clauses recognizes that conflicting values create hard cases. Under her approach, there will be fewer easy decisions. Courts at all levels will have to engage in the hard work of doing justice to religious

155. *See Allegheny*, 491 U.S. at 628 ("To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy.").

156. Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment).

liberty and equality in a diverse and complex social environment. They can not pass the constitutional buck to the majority and act as if they are not surrendering important constitutional ideals. This commitment to a careful analysis of government conduct that interferes with or undermine religious liberty and equality is a powerful legacy to leave to the Court, to the Constitution, and to the American people.

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