

**IN PRAISE OF CONTEXTUALITY - JUSTICE O'CONNOR
AND THE ESTABLISHMENT CLAUSE**

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Among Justice Sandra Day O'Connor's lasting contributions to Supreme Court jurisprudence has been her attempt to contextualize Religion Clause jurisprudence, to move the Court in the direction of considering the circumstances surrounding government action in assessing its constitutionality. Her two decades of work in Establishment Clause law, in particular, is book ended by *Lynch v. Donnelly*, in which she introduced the "non-endorsement" test¹ and one of the Ten Commandment cases, *McCreary County, Kentucky v. American Civil Liberties Union*,² where it was most recently employed.³

The non-endorsement test, officially adopted by the Court as a doctrine in *County of Allegheny vs. American Civil Liberties Union*,⁴ has served as one of the two commonly competing tests in Establishment Clause cases not involving financial aid⁵ ever since. It requires that a reviewing court examine government action to determine whether it demonstrates a purpose to endorse or disapprove of a particular religion, or to promote religion over non-religion. Next, the Court must determine whether, regardless of its intent, the effect of the government's action endorses or approves of religion in the eyes of a "reasonable, well-informed" or

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¹ *Lynch v. Donnelly*, 465 U.S. 668, 687-88, 690-91 (1984) (O'Connor, J., concurring)

² *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, ___ U.S. ___, 125 S.Ct. 2722 (2005).

³ *Id.* at 2733. The *McCreary County* case only considered the "purpose" prong of Justice O'Connor's "non-endorsement" test, holding that the Kentucky display violated that prong of the test. By contrast, *Van Orden v. Perry*, ___ U.S. ___, 125 S.Ct. 2854, which upheld the Texas Ten Commandments monument, bypassed both the non-endorsement test and the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1972), for a review of the monument in light of the "nature of the monument and the Nation's history." *Id.* at 2860-61.

⁴ *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592-594 (1989)

⁵ *See Santa Fe Independent School Dist. v. Doe*, 530 U.S., 290, 301-309 (2000) (utilizing the "non-endorsement" test as well as the "non-coercion" test of *Lee v. Weisman*, 505 U.S. 577 (1997)). The *Lemon* test is often modified with Justice O'Connor's non-endorsement "gloss," *see, e.g., Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985). By contrast, in cases involving financial aid (particularly indirect aid) to religious schools, the Court has instead modified the *Lemon* effects prong to inquire "first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid." *Zelman v. Simmons-Harris*, 536 U.S. 639, 669 (2002).

“objective” observer;⁶ and whether the government is institutionally entangled with religion.⁷ The test itself is a symbolic variation on *Lemon*, but its importance lies in the way in which Justice O’Connor explains what endorsement or disapproval signifies: she argues that endorsement or disapproval is constitutionally problematical because:

endorsement sends a message to nonadherents [of the endorsed religion] 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, [while] disapproval sends the opposite message.”⁸

Justice O’Connor’s endorsement test has been regularly criticized by liberals and conservatives alike. Those who want to take a more traditionalist view of the Establishment Clause argue that the symbolic meaning of government action is largely irrelevant, that the courts should only consider whether government action coerces individuals to give up their religious beliefs or actions. Justice Kennedy’s version of that view, the so-called psychological coercion test that has dominated “non-coercion” jurisprudence, would prohibit non-tangible coercion by the state, such as the state’s encouragement of peers to pressure religious minorities to conform.⁹ By contrast, those embracing Justice Scalia’s view would only prohibit traditional legal coercion such as fines, imprisonment, and perhaps withdrawal of public benefits, threatened to force religious minorities to

⁶ In *Lynch v. Donnelly*, 465 U.S. 668, 687 (O’Connor, J., concurring), Justice O’Connor describes her “gloss” on *Lemon* as follows:

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

In *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000), the Court adopts Justice O’Connor’s “observer” description from *Wallace v. Jaffree*, 472 U.S. 38, 73, 76 (1985), asking “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.” See also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777, (1995) (O’Connor, J., concurring in part and concurring in judgment) (terming the person from whose standpoint endorsement is considered the reasonable, informed” observer).

⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring) (arguing that religious divisiveness, the effect of government-religious entanglement, should not be the focus of the third prong of the *Lemon* inquiry; rather, the character of government activity, i.e., whether there is excessive institutional entanglement, should be the focus).

⁸ *Id.* at 688.

⁹ 505 U.S. 577, 587-592 (1992) (discussing what Justice Kennedy terms “subtle coercive [public and peer] pressures”). See also 505 U.S. 577, 639 (1992) (Scalia, J., dissenting) (describing Justice Kennedy’s view as a “psychological coercion” test).

profess certain religious beliefs.¹⁰ Any other test, in their view, would unnecessarily suppress the religious elements of our common life.¹¹

Siding with traditionalist views that Justice O'Connor's non-endorsement principle is problematical, some separationists by contrast believe that the test permits too much religion to be visible in public space.¹² Critics of her test point to some of the actual votes she has cast, for example, permitting the city of Pawtucket to maintain a creche scene on its public property because, in her view, any religious "message" that the creche commingled with many secular Christmas symbols may have sent was too indeterminate to give comfort to any insiders or exclude any outsiders to any significant extent.¹³ At the same time, some religious freedom advocates point to O'Connor's "misreading" of contexts such as the peyote case, *Employment Division v. Smith*, to curtail Free Exercise Claims of minority religions.¹⁴

And finally, there are the lawyers. They may argue, as did Duluth City Attorney Bryan Brown on a recent Minnesota Public Radio program about the Ten Commandments cases in which I participated, that the Court's Establishment Clause jurisprudence makes it very difficult for them to advise their clients whether any particular display will be considered constitutional

¹⁰ *Id.* at 641-642 (1992) (Scalia, J., dissenting) (describing the type of coercion required by the Establishment Clause as "coercion of religious orthodoxy and of financial support by force of law and threat of penalty").

¹¹ *See id.* at 645-646; *see also* Gidon Sapir, *Religion and State—A Fresh Start*, 75 NOTRE DAME L. REV. 579, 599, 614-616, 633-34 (1999) (describing the value of religion in forming a public morality and permitting individuals a "right to culture" which includes their religion).

¹² *See, e.g.,* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 240 (1993) (arguing that non-endorsement is inconsistent with separationism because the principle "replaces the bright line of separationism with an uncertain screen, through which many symbols and practices of an obvious religious character will pass. . . [and] thus tolerates substantial governmental use of religious symbols." Lupu also argues that nonendorsement rests on a different foundation, e.g., it evidences concern for "individual alienation, or feelings of exclusion," while separationism "focuses upon the social, rather than individual, harms that a church-state merger may create." Separationism "reflects the broader social purpose of secularizing the public arena and discouraging sectarian rivalries.") *But see* Donald Beschle, *Paradigms Lost: The Second Circuit Faces the New Era of Religion Clause Jurisprudence*, 57 BROOKLYN L. REV. 457, 580 (1991) (suggesting that non-separationists are concerned that the non-endorsement test can be used toward separationist ends).

¹³ *See Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (noting that the overall holiday setting in which the creche was displayed "negates" any message of endorsement, but instead celebrates a public holiday with strong secular components). *See also* Lawrence Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L. J. 155, 171 (1984) (criticizing Justice O'Connor for affirming the Pawtucket creche display, as an example of letting the "insiders define what message the outsiders were getting").

¹⁴ *See, e.g.,* Cedric Merlin Powell, *The Scope of National Power and the Centrality of Religion*, 38 BRANDEIS L.J. 643, 685 (2000) (arguing that Justice O'Connor, concurring in *Employment Div. v. Smith*, 485 U.S. 660 (1998), misread the balance of interests in that case because she did not fully recognize the "freedom to struggle toward God" embraced in the use of peyote).

or not.¹⁵ Other commentators on the Ten Commandments cases seem to agree with this assessment.¹⁶

While I would not defend all of Justice O'Connor's contextual readings of the cases before her, it seems to me that her attempt to push the Court toward contextualization, in Establishment Clause cases in particular, is mostly to the good. First, given that government's actions in recognizing or denigrating religious citizens and their religious communities has moral dimensions embedded within the constitutional ones, it seems to me that Justice O'Connor is on the right track in identifying what the moral problem is in these cases. Her non-endorsement test recognizes that Religion Clause cases are necessarily political—and therefore moral—in nature; that is, they define who is part of our political life and on what terms, as well as setting the terms of political conversation in the American polity. Second, the non-endorsement test pushes government in the direction of a dialogical relationship with its citizens, rather than simply a regulatory “command” or hierarchical relationship. The non-endorsement test, with its lack of “hard edges,” reminds citizens that the making of law, especially at the constitutional level, is primarily a rhetorical exercise of practical wisdom that cannot be reduced to abstractions without losing much of the complexity of the human experience.¹⁷

¹⁵ Comments of Bryan Brown, City Attorney for the City of Duluth, Minnesota Public Radio, June 28, 2005. See also Beschle, *supra* note 12, at 548, suggesting that employment of the non-endorsement test, along with the non-coercion test, is problematical because:

[if] applied literally and stringently [it would] produce results that seem not only wrong but, in the case of the Free Exercise Clause, almost anarchic. In order to avoid such results the tests must be applied in a way that makes them seem too imprecise to be useful. Debate over the religion clauses may be subsumed in a larger debate over the relative value of clarity and flexibility in law.

Justice Kennedy also criticized the non-endorsement test in *County of Allegheny vs. American Civil Liberties Union*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in part and dissenting in part) (arguing that the test, inconsistent with constitutional history, would result in an “unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication” and would lead to “appalling” litigation about offense that would “trivialize” Establishment Clause law in a “jurisprudence of minutiae”).

¹⁶ See, e.g., Howard Fischer, *Ten Commandments Monument to Stay in Arizona*, ARIZONA DAILY STAR, June 28, 2005 at A1, available at 2005 WLNR 10801638 (quoting Peter Gentala, legal counsel for the pro-monument Center for Arizona Policy, as saying that the Van Orden decision “continues the situation where courts will have to divine whether such displays are designed to promote religion rather than simply acknowledge the Ten Commandments as a part of national heritage”).

¹⁷ I owe this insight, in part, to conversations with Prof. Howard J. Vogel.

Justice Scalia appears to understand the Establishment Clause as a response to the problems resulting from the use of government force. In his view of the Founding, the chief concern facing those who gave vision to the Establishment Clause was that government was using its delegated power oppressively and unwisely to force individuals to concede truths and allegiances that they did not share.¹⁸ Perhaps not surprisingly given his own background, he thus mimics the historical view of the Roman Catholic Church that it is morally wrong to coerce an individual to act against his conscience, even an erroneous one, even though he may be properly censured for an erroneous moral conclusion negligently reached.¹⁹

Yet, Justice O'Connor's grasp of the moral problem to which the Establishment Clause responds is, to my mind, much more pertinent to the dilemmas of contemporary life in a free and diverse political society such as the United States. Although we live in a highly regulated society, for the most part, modern American democracy regulates moral actions only negatively and only lightly. That is, in many areas of life which have given rise to moral problems throughout the centuries, such as the conduct of marriage and family life, the modern democracy prescribes very little. Most expressions of human sexuality are now ignored by the government; most conscious decisions about how to rear one's children are given wide berth, in part because of the Free Exercise Clause;²⁰ and most families' decisions about how to organize their economic and social lives are not directly dictated by the government.

In other areas of potential moral concern, the regulation that exists primarily prohibits individuals from acting to create a morally objectionable situation, but it does not require them to prevent or alleviate such a situation unless they have caused it. Thus, companies are prohibited from despoiling the environment and required to clean up after any mess they have created, but they have no affirmative duty to manage their businesses as "green" so that further waste of the earth's resources does not occur. Government has a duty, albeit limited, to alleviate moral messes it has caused, e.g., by taking private property, or allowing one of its workers to commit torts against others. However, it has no legal duty in most cases to affirmatively act to prevent moral or legal wrongdoing: as evidence, we might cite *DeShaney v.*

¹⁸ See *Lee v. Weisman*, 507 U.S. 577, 640 (1992) (Scalia, J., dissenting).

¹⁹ See Vatican II, *Constitution on the Church in the Modern World* ¶ 17 in CONSCIENCE 66 (Charles Curran ed., 2004). See also Charles E. Curran, *Conscience in Light of the Catholic Moral Tradition*, in *id.*, 4-5 (noting that a sincere, invincibly erroneous conscience should be followed, while a sincere but vincibly erroneous conscience should not. A vincibly erroneous conscience is one which is wrong because ignorance but whose ignorance is the fault of the individual; an invincibly erroneous conscience is not wrong through the fault of the individual).

²⁰ See, e.g., *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (invalidating state law requiring parents to send children to public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating statute prohibiting instruction in a foreign language, noting that the Due Process Clause protects, *inter alia*, the right to "establish a home and bring up children").

Winnebago County Dept. of Social Services, where the Supreme Court finds no constitutional cause of action against the state for its failure to intervene to protect a child against his cruelly abusive father.²¹

A more critical social and political problem than government intrusion for most modern Americans has been an increasing sense of lack of attachment to the American community. There are certainly some encouraging countersigns to rebut this generalization. The national response to September 11, an outpouring of national identity and compassion centered on the victims of that tragedy, is one symbolic expression of Americans' unity with each other in community. The generous private American response to the tsunami disaster²², while not focused on American victims, is another piece of evidence that Americans still consider themselves part of a community, in this case a worldwide community, rather than simply isolated individuals or families making their way in a hostile environment. Recently, commentators have noted encouraging signs that some of the social markers of isolation and social detachment, such as family violence, teen pregnancy, substance abuse, and high school dropout rates, are falling.²³ And, perhaps most importantly, the voter participation rate in the past two presidential elections is climbing, perhaps a reflection of the average citizen's realization after the 2000 election that each vote does count.²⁴

Despite these possibly encouraging signs, some laced with the danger that occurs with every rise of nationalistic feeling, the problem of healthy citizen attachment to American civic life remains. Justice O'Connor's response in the non-endorsement test—to ask government to seriously assess how its actions communicate with its citizens who they are with respect to the local and national polity—is the only one of the Religion Clause tests to take this problem seriously. It is, first, a moral problem: how do those who hold power treat those who do not? Or, more specifically,

²¹ 489 U.S. 189, 196 (1989). *See also* *Town of Castle Rock, Co. v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796, 2803-04 (2005) (following *DeShaney* in holding that Colorado had neither a substantive due process duty to protect an abused spouse against her husband, nor had it recognized a property right giving rise to a procedural due process claim).

²² *See, e.g.*, Neil Pierce, *Editorial, For Some, A Generous Nation*, CINCINNATI POST, January 5, 2005, at A9, available at 2005 WLNR 172841 (describing generous private response to tsunami disaster but questioning the generosity of Americans toward long-term problems).

²³ *See* David Brooks, *In middle of a moral revival*, STAR TRIBUNE (Minneapolis-St. Paul) August 10, 2005, at A15 (noting that the decline in family violence, violent crime, drunken driving, teen pregnancy, and families living in poverty, among other things, signals a moral revival); *but see* *Editorial, Moral revival? Not with both eyes open*, STAR TRIBUNE (Minneapolis-St. Paul), August 10, 2005, at A14, available at 2005 WLNR 12595932 (arguing that public morality signs are not as strong).

²⁴ *See, e.g.*, Stacy Forster, *Youth quake led voter surge; State's 18-to-24 turnout was second highest in nation*, MILWAUKEE J. & SENTINEL, May 27, 2005, at 1, available at 2005 WLNR 8502714 (noting the highest youth voter turnout in decades in the U.S. during the 2004 election, and a 4.3% nationwide increase in turnout among all voters).

how do those who hold sufficient social, economic and ideological power in a society to have their symbols, religious and otherwise, adopted and identified as civic symbols treat those who do not? How do the powerful communicate what they think of the powerless? For the decision to post the Ten Commandments or plant a creche in a publicly owned space is nothing less than a communication from those who have not only the ear but the imprimatur of government to everyone else.

Justice O'Connor's insight is that, in a democracy where moral and political equality is a paramount and critical value, communication of anything less than political equality among citizens by the government violates the moral fabric of the Constitution itself. Her focus on the way in which symbolic activity by the government can communicate "insider" or "favorite" status to some and "outsider" status to others hints at, but does not fully explicate, insights James Madison expressed in the *Memorial and Remonstrance*, written to encourage Virginia to adopt a robust understanding of religious freedom as part of his general concern about the dangers of concentrating social and political power.²⁵

Communication of "insider" status to some citizens not only encourages them to abuse their power, particularly on issues on which they are incompetent: Madison talked about the tyranny of the judiciary trying to make theological judgments they were ill-equipped to make.²⁶ It also encourages insiders to take for granted the validity of their values and position in American society rather than seeking actively to build a stronger social fabric in a conversation that tests their values and positions against a vision of a desired community.

Communication of "outsider" status to other citizens not only denigrates them as moral persons. It also discourages them from participating in civic life, including exercising such basic responsibilities as voting and serving on juries. Indeed, it encourages political outsiders to distrust and resist holders of civic power, whether they are cops patrolling a minority community or Presidents rallying support for a foreign mission. In capturing these concerns, Justice O'Connor's insight into the way in which the Establishment Clause operates to encourage or damage our common civic life is much keener than Justice Scalia's.

In terms of civic process, Justice O'Connor's test also proposes a more robust democratic relationship among citizens than Justice Scalia's. Scalia invites governments to engage in a "quick and dirty" analysis to determine whether any of their actions meet the distinct prohibitions of his

²⁵ See, e.g., ARLIN M. ADAMS AND CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 25-26 (1990).

²⁶ See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments* para. 2, 5, 8 (1785) reprinted in ADAMS AND EMMERICH, *supra* note 25, Appendix 1, at 105-107.

Establishment Clause test. That is, in Scalia's view, once government officials check off their list---determine that they have not fined, imprisoned or deprived any citizen of tangible public benefits---they need do no other soul-searching about whether they have enhanced or damaged the public good when they introduce religious symbols into public life.

By contrast, Justice O'Connor's non-endorsement test is not so easily applied. That alleged flaw is, to my mind, its saving grace. Any public official who, in good faith, tries to apply the test to her own conduct is going to have to ask some hard questions. First, she is going to have to be self-critical about her reasons for introducing religious symbols into public life. If she determines that her own purpose is to vindicate her own religious beliefs, or to assist other powerful groups to secure government's endorsement of their own, her course is clear.

More importantly, because of the non-endorsement test's "effect" prong, the conscientious official will need to inquire about how those who are not powerful in the community receive the symbol. While Justice O'Connor's "reasonable observer" gloss on the non-endorsement test prohibits the idiosyncratic veto, based on either a thin-skinned reading of an essentially benign and multivalent symbol or the offense of a passerby who has no real stake in that community's life, its proper application requires that those religious individuals and groups with a role in the community to be seriously consulted by the conscientious official to understand how they read such symbols.

The dialogue that ensues between religious majority citizens who want a public vindication of their religious beliefs and religious minority citizens who feel excluded from the polity by religious symbols may well be bitter and protracted. However, if it is well-managed by government officials sensitive to the important role that public dialogue can play in the illumination of diversity and committed to seeking a solution for a bitter contest of wills, such a bitter debate can set a new table for civic participation in local communities. Not only can these controversies engender a dialogical airing of civic "dirty laundry" as people come to explain how the many expressions of civic power in their community have affected their understanding of their own role as citizens. In addition, when strongly held beliefs and contested values are laid on the public table and it is clear that a traditional, clear legal solution like Justice Scalia's will render some citizens winners and others losers, new solutions that represent either compromises or new alternatives vindicating the values of all concerned, including many unheard constituencies, can emerge.

To speak concretely, the adoption of a clear and certain test for determining in advance whether a particular religiously based symbolic expression is constitutional or not simply represses a conflict that already exists in the community. In most cases, the powerful religious or secular majority will win, but its victory will be Pyrrhic since the cost of proselytizing its beliefs about religion in public life will be hostility and

resentment by those it seeks to win over. Adoption of a contextual test, like Justice O'Connor's, which forces a public dialogue on what constitutional life in a diverse political community requires, also forces public officials to seek alternative solutions in an attempt to bring the community together on the brink of a divisive moment.

To use the *McCreary County* example, such a dialogue on the wisdom of removing the Ten Commandments from the courthouse steps need not simply result in either a decision to keep the Ten Commandments or eliminate them from sight. It can result in the decision to move them to private property, for example,²⁷ where their visibility can make a much more powerful and robust statement about the values and beliefs represented by the symbol, unshackled by government's need to secularize or treat the symbol as *de minimis* or trivial in order to constitutionalize it. It can result in the decision of religious institutions in the community as well as secularists to commit themselves to efforts to understand the experience of those who differ from them, because they have been forced to know them as "other." Indeed, it can stimulate religious and secular citizens to re-dedicate themselves to finding ways to live an authentic existence before others. In being forced to take upon themselves the responsibility of these religious symbols, ordinary citizens can find their own ways to express the meaning lodged in these symbols in their private lives and on their own property, from bumper stickers to religious displays on commercial property. In doing so, they can reflect Madison's belief that religions thrive best in the works of those who believe them, and that they are enervated when they are left in the hands of government.²⁸

Of course, such a promising result for civic conflict is not inevitable. In the hands of local officials who view public conflict as a curse rather than an opportunity, or as a chance to flex their power or curry favor with the most powerful voices in the community in the controversy, for example, civic conflicts over religious symbols can leave a simmering resentment that

²⁷ See Minnesota Roundup, GRAND FORKS HERALD (N.D.), November 22, 2004, at 4, available at 2004 WLNR 5947560 (noting the placement of the Duluth monument on private property owned by the Comfort Inn); *but see* John Myers, *Mourning, rejoicing at Monument's Removal Ten Commandments Duluth Crews Took Less than an Hour Friday Morning to Remove Monument from City Hall*, DULUTH NEWS-TRIB., May 15, 2004, at 01A, available at 2004 WLNR 3205287 (describing the conflict within the Duluth community occasioned by the removal pursuant to a court settlement). In other cities, officials have tried a (sometimes unconstitutional) end-run around a ruling of unconstitutionality by selling the small parcel of ground on which the monument sits to a private group, such as the Fraternal Order of Eagles which started the Ten Commandments monument movement, *see, e.g., Commandments Monument Appealed City's Sale of Parcel Near Park Legal, Group Argues*, ST. PAUL PIONEER PRESS (Minn.), May 14, 2004, at B1, available at 2004 WLNR 3543310.

²⁸ See Memorial and Remonstrance, ¶¶ 6-7, in ADAMS AND EMMERICH, *supra* note 25, at 106-107.

will boil over in another controversy, a police shooting or a civic scandal.²⁹ Similarly, in the hands of a local media that delights in amplifying hateful responses rather than printing thoughtful ones, such conflicts can leave a sour taste in the community for years to come.

The mechanics of the application of the non-endorsement test, to be sure, will not yield clear and certain results in every case, and will thus confound lawyers' attempts to bring complete predictability to the law of the Establishment Clause. The test will confound public pundits' attempts to try to explain how the cases should come out by resort to any single physical distinction such as where a public symbol is located, how large it is, or how simple or complex the figure is. But, if such a view of law as the mechanical application of a set of rules to specific cases has any place in law, it is not with the Establishment Clause, where highly charged issues of civic interdependence and human identity, the dance of politics, law and religion, are at stake. In rejecting a simple model for Establishment jurisprudence, Justice O'Connor has done us a favor.

²⁹ See, e.g., Anonymous, *Holy Moses! Flathead goes wild over Ten Commandments*, MISSOULA INDEPENDENT, April 8, 2004, at 10, available at 2004 WLNR 15124888 (noting that the local county commissioners not only refused a request to take down their Ten Commandments monument, but had "started shining spotlights on the monument at night. One commissioner, Gary Hall, vowed to chain himself to the slab of stone if need be to save it" and that in Helena, "Gov. Judy Martz suggested that any citizen who opposes such displays must be mentally unstable").

A TRIBUTE TO SANDRA DAY O'CONNOR

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On the eve of Justice Sandra Day O'Connor's retirement from the United States Supreme Court, her legacy continues to provoke the thoughtful consideration and attention of legal scholars, commentators and politicians. As the first female ever appointed to the Supreme Court, Sandra Day O'Connor has established herself as one of the most influential Justices in the history of the Court. Justice O'Connor represented the middle of a sharply and politically divided Court and as a result, she often provided the deciding vote on decisions involving controversial questions.¹ After Justice O'Connor's near quarter of a century on the High Court, it remains clear that the jurisprudence of Justice O'Connor will continue to have a powerful impact, one that will only be understood over time.

Justice O'Connor's early career as a female attorney was marked by the discrimination that many women experienced in the legal profession at that time. Sandra Day O'Connor graduated from Stanford Law School in 1952. Despite having graduated in the top ten percent of her class and having been on the *Stanford Law Review*, she was unable to find full-time work as an attorney in a private law firm. The law firm of Gibson, Dunn and Crutcher offered her a position as a legal secretary.² Undeterred, Justice O'Connor declined the legal secretary position and eventually found work as a deputy county attorney in the San Mateo County attorney's office.³ Her career in public service continued when she accompanied her husband, John O'Connor, to Germany where he served in the army Judge Advocate General Corps and she worked as a civilian lawyer in the United States Quartermaster's Corps.⁴ When Justice O'Connor returned to the United States in 1957 she settled with her husband in Phoenix, Arizona. Justice O'Connor again found it difficult to gain employment as a female attorney in the private sector. This discrimination drove her to start her own firm with a

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¹ Carl Tobias, *From A Cattle Ranch to the Supreme Court: Lazy B: Growing Up On A Cattle Ranch In The American SouthWest*, 35 ARIZ. ST. L.J. 1385 (2003).

² JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 28 (HarperCollins Publishers) (2005). Attorney General, William French Smith, had been a senior partner in the firm of Gibson, Dunn and Crutcher. The same firm that offered O'Connor a secretarial position in 1952. In an ironic twist, Smith was the Attorney General who helped O'Connor's nomination to the Supreme Court. *Id.* at 4. When Smith called O'Connor to discuss her possible nomination he "told her that she was being considered for a 'federal position.' She knew Smith's background at the law firm of Gibson, Dunn and Crutcher, and she immediately kidded 'It must be a secretarial position, is it not?'" *Id.*

³ *Id.* at 28.

⁴ *Id.*

single partner, where they handled a wide variety of small cases.⁵ In the years to come O'Connor would become an assistant state attorney general in Arizona, a state senator for more than two terms and later a judge on the Arizona Court of Appeals.⁶ She held her position on the Arizona Court of Appeals until she was nominated as a Justice of the Supreme Court of the United States by President Reagan in 1981.⁷

During Justice O'Connor's tenure on the Court she was often regarded as the "swing vote" or deciding vote when addressing cases that dealt with divisive issues such as race, religion, gender and abortion. O'Connor intensely disliked the term "swing vote," because she saw herself as one of nine Justices and her vote had no greater value than any of the others.⁸ However, Justice O'Connor earned this designation because she frequently was the deciding vote in 5-4 decisions. She would analyze each case on its own, construing her reasoning and holding narrowly after giving thorough and careful consideration to each case.⁹ While Justice O'Connor has been considered to have conservative leanings and strong federalist beliefs, she approached each case based on the merits of the case and the relating law.¹⁰

Justice O'Connor's first major case as a Supreme Court Justice came in 1982. In *Mississippi University for Women v. Hogan*, Justice O'Connor wrote the opinion which held that a male student could not be rejected from the school of nursing at Mississippi University for Women because of his gender.¹¹ Justice O'Connor cast the deciding vote in the 5-4 decision.¹² This case demonstrated the impact that Justice O'Connor's single vote would have on the Supreme Court in the many years that would follow. However, Justice O'Connor garnered even greater attention in 1989, when the Supreme Court once again addressed the issue of abortion. In *Webster v. Reproductive Health Services*, the Court, in a 5-4 decision, upheld a Missouri law giving

⁵ *Id.* at 30.

⁶ *Biography of Sandra Day O'Connor*, at http://www.oyez.org/oyez/resource/legal_entity/102/biography (last visited Dec. 12, 2005).

⁷ JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE (HarperCollins Publishers) (2005).

⁸ Interview by Jan Crawford Greenburg with Sandra Day O'Connor, Supreme Court Justice, at http://www.pbs.org/newshour/bb/law/july-dec05/pivotat_7-1.html (last visited December 18, 2005).

⁹ *Id.*

¹⁰ See SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (Random House Trade Paperbacks 2003) (2002).

¹¹ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). In the majority opinion written by Justice O'Connor, the Court held that the state lacked the requisite "exceedingly persuasive justification" for the ban on male students in the nursing school. *Id.* at 731. However, Justice O'Connor narrowed the scope of this decision by carefully noting that this opinion did not address whether states can provide 'separate but equal' education for males or females. *Id.* n.17.

¹² *Id.*

the state the right to place some restrictions abortion practices.¹³

Conservatives had hoped that her swing vote in this case would lead to the Court overturning its 1973 decision in *Roe v. Wade*. However, O'Connor would not go this far, in her concurring opinion she stated "When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully."¹⁴ O'Connor's narrow focus in *Webster* prevented the Court from overturning *Roe v. Wade* and once again demonstrated the significance of her vote on the Court.

Justice O'Connor again carved out a middle option when the highly polarized Court addressed affirmative action in 2003. In *Grutter v. Bollinger* and *Gratz v. Bollinger* the Court addressed whether colleges and universities should be allowed to use a student's race as a factor in admissions.¹⁵ In *Gratz*, the Court struck down the University of Michigan's undergraduate admissions policy because it automatically assigned more points to minority applicants, and therefore, was not narrowly tailored to achieve the compelling state interest in diversity.¹⁶ However, in *Grutter*, the Court upheld the law school's admission policy which gave minority applicants a "plus" factor.¹⁷ O'Connor once again cast the deciding vote in the 5-4 decision, yet, the scope of her decision was limited. While Justice O'Connor affirmed the law's schools use of race as a factor in admissions, she cautioned that affirmative action programs have a limited lifespan:

[R]ace-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.¹⁸

O'Connor's decision in this case struck a delicate balance, and rather than striking down affirmative action entirely, she directly addressed her decision

¹³ See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). The law barred the use of public funds for counseling about abortion and prohibited public hospitals and public employees from performing abortions not necessary to save the mother's life. If a woman appeared to be at least twenty weeks pregnant, physicians were required to perform tests to see if the fetus was viable. *Id.* at 503.

¹⁴ *Id.* at 526.

¹⁵ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁶ *Gratz*, 539 U.S. at 275 .

¹⁷ *Grutter*, 539 U.S. at 341.

¹⁸ *Id.* at 342.

to the case at hand and indicated the limits of her endorsement of affirmative action.

Justice O'Connor's position on the Supreme Court has proven to be pivotal in addressing contentious issues such as those dealing with race, religion, gender and abortion. Her approach established equilibrium on the High Court, a balance which guided the jurisprudence of the Court for nearly a quarter of a century. The full import of Justice O'Connor's presence on the Court will only be understood over time; however, it is clear that her legacy as one of the most influential women in modern history will continue to reign long after she leaves the Supreme Court.