

An hourglass-shaped graphic with a globe in the top bulb and a smaller globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*The Law of Church and State: Selected Opinions of Justice  
O'Connor*

Angie A. Welborn, American Law Division

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**Abstract.** An examination of Justice O'Connor's opinions interpreting the Establishment Clause reveals that she employed different tests depending on the type of government activity at issue. She often and rather consistently applied the so-called "endorsement test" in cases involving government speech on religious topics, but tended to use hybrid approaches incorporating both the test set forth in *Lemon* and a neutrality test in cases involving government aid programs. The decisions show that O'Connor believed that these cases should all be examined carefully with particular attention given to the facts of each, and that the Court should refrain from tying itself to a single test for evaluating Establishment Clause cases.

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## The Law of Church and State: Selected Opinions of Justice O'Connor

Angie A. Welborn  
Legislative Attorney  
American Law Division

### Summary

An examination of Justice O'Connor's opinions interpreting the Establishment Clause reveals that she employed different tests depending on the type of government activity at issue. She often and rather consistently applied the so-called "endorsement test" in cases involving government speech on religious topics, but tended to use hybrid approaches incorporating both the test set forth in *Lemon* and a neutrality test in cases involving government aid programs. The decisions show that O'Connor believed that these cases should all be examined carefully with particular attention given to the facts of each, and that the Court should refrain from tying itself to a single test for evaluating Establishment Clause cases.

Justice O'Connor noted in one of her concurring opinions that "[e]xperience proves that the Establishment Clause . . . cannot easily be reduced to a single test," and that different cases "may call for different approaches."<sup>1</sup> In cases involving "government actions targeted at particular individuals or groups, imposing special duties or giving benefits," O'Connor seemed to indicate that the neutrality test should be used, while the endorsement test would more appropriate in cases involving government speech on religious topics.<sup>2</sup> However, she cautioned the Court against using a single unified test for evaluating all Establishment Clause claims, stating that such a test could "do more harm than good" and that a single test "risks being so vague as to be useless."<sup>3</sup> An examination of her opinions reveals that she viewed all of the cases as very fact-specific and required careful consideration by the Court to determine whether an improper relationship existed between the government and religion. The two types of cases discussed below provide an overview of the evolution of O'Connor's reasoning in cases involving government and religion and is specifically focused on those interpreting the Establishment Clause.<sup>4</sup> This

<sup>1</sup> *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 720 (1994).

<sup>2</sup> *Id.* at 720.

<sup>3</sup> *Id.* at 718.

<sup>4</sup> Justice O'Connor wrote many opinions, mostly concurrences, in Establishment Clause cases  
(continued...)

discussion is not exhaustive, nor should it be construed as wholly representative of the Court's jurisprudence regarding the relationship between government and religion.

## Public Display of Religious Symbols

In *Lynch v. Donnelly*, the Court found that a city's Christmas display did not violate the Establishment Clause.<sup>5</sup> In reaching its decision, the Court applied the three-prong test first articulated in *Lemon v. Kurtzman*,<sup>6</sup> finding that the city had a secular purpose for the display, it did not impermissibly advance religion and it did not create an excessive entanglement between religion and government.<sup>7</sup> Justice O'Connor joined with the majority, but wrote a separate concurrence criticizing the Court's reliance on *Lemon*.<sup>8</sup> In her concurrence, O'Connor observed that "[i]t has never been entirely clear, . . . , how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause," and instead proposed to clarify *Lemon* by focusing "on institutional entanglement and on endorsement or disapproval of religion."<sup>9</sup> Rather than asking whether a particular action has a secular purpose, as under the first prong of the *Lemon* test, O'Connor submitted that "the proper inquiry under the purpose prong of *Lemon*, . . . , is whether the government intends to convey a message of endorsement or disapproval of religion."<sup>10</sup> O'Connor also questioned the Court's prior interpretation of the "primary effect" prong of the *Lemon* test, stating that it is "clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion," focusing instead on whether the practice in question has the "effect of communicating a message of government endorsement or disapproval of religion."<sup>11</sup>

Later in *County of Allegheny v. American Civil Liberties Union*, the Court found that the display of a creche inside a county courthouse did violate the Establishment Clause because it had "the effect of promoting or endorsing religious beliefs."<sup>12</sup> In *Allegheny*, the Court appears to have abandoned the test set forth in *Lemon* in favor of the approach

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<sup>4</sup> (...continued)

and often provided the swing vote in 5-4 decisions. Each decision discussed herein was 5-4, unless otherwise noted. This report focuses on the Establishment Clause cases simply because most of her significant writings on religion were in that context. The Establishment Clause of the First Amendment to the United States Constitution reads as follows: "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I.

<sup>5</sup> 465 U.S. 668 (1984).

<sup>6</sup> 403 U.S. 602 (1971).

<sup>7</sup> 465 U.S. at 685.

<sup>8</sup> *Id.* at 687-694.

<sup>9</sup> *Id.* at 688-689.

<sup>10</sup> *Id.* at 691.

<sup>11</sup> *Id.* at 691-692.

<sup>12</sup> 492 U.S. 573, 622 (1989).

that O'Connor took in her concurrence in *Lynch*.<sup>13</sup> Justice Blackmun delivered the opinion of the Court stating that “[s]ince *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’”<sup>14</sup> Justice O'Connor again joined the majority, but wrote a separate concurrence to further articulate her so-called “endorsement test.”<sup>15</sup> In her concurrence, she wrote that “in *Lynch*, [she] suggested a clarification of [the Court’s] Establishment Clause doctrine to reinforce the concept that the Establishment Clause ‘prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community,’” and that “government violates this prohibition if it endorses or disapproves of religion.”<sup>16</sup> Here, in *Allegheny*, she found that “[t]he display of religious symbols in public areas of core government buildings runs a special risk of ‘making religion relevant, in reality or public perception, to status in the political community.’”<sup>17</sup>

Continuing her concurrence, O'Connor responded to criticism of the endorsement test. Justice Kennedy criticized the test, saying that it was “inconsistent with [the Court’s] precedents and traditions because . . . ‘if it were ‘applied without artificial exceptions for historical practice,’ it would invalidate many traditional practices recognizing the role of religion in our society.’”<sup>18</sup> O'Connor responded by clarifying that “[u]nder the endorsement test, the ‘history and ubiquity’ of a practice is relevant not because it creates an ‘artificial exception’ from that test. On the contrary, 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.”<sup>19</sup> Justice O'Connor concluded her defense of the endorsement test with the declaration that “no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement.”<sup>20</sup>

In *Capital Square Review and Advisory Board v. Pinette*, the Court addressed the question of whether a private, unattended display of a religious symbol in a public forum

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<sup>13</sup> The Court did not in this case nor in subsequent cases expressly overrule *Lemon*. While the Chief Justice has questioned the “fate of the *Lemon* test,” the Court has continued to apply the principles set forth in *Lemon* in some recent cases while rejecting it in others. See *Van Orden v. Perry*, 545 U.S. \_\_\_\_ (2005), No. 03-1500, Slip Op. at 6 (June 27, 2005).

<sup>14</sup> 492 U.S. at 598, citing *Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

<sup>15</sup> 492 U.S. at 623-637.

<sup>16</sup> 492 U.S. at 625, citing *Lynch* at 687.

<sup>17</sup> *Id.* at 626, citing *Lynch* at 692.

<sup>18</sup> *Id.* at 630.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 631.

violates the Establishment Clause.<sup>21</sup> O'Connor joined the majority in finding that the display of a cross by a private group in the statehouse plaza did not violate the Establishment Clause, but wrote a separate concurrence explaining how the endorsement test applies not only to expression by the government itself, but also to private speech that takes place in a public forum created by the government.<sup>22</sup> Justice O'Connor acknowledged that "there is . . . 'a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protects,'"<sup>23</sup> but went on to say that the Establishment Clause "imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message."<sup>24</sup> With respect to religious speech in a public forum, the main point of contention appears to be "the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry."<sup>25</sup> Justice O'Connor rejected the notion that the endorsement test should focus on the actual perception of individual observers and contended that the test "creates a more collective standard to gauge 'the objective meaning of the government's statement in the community.'"<sup>26</sup> She also stated that the "reasonable observer" "must be deemed aware of the history and context of the community and forum in which the religious display appears."<sup>27</sup>

Justice O'Connor's final application of the endorsement test in this context came in her concurring opinion in *McCreary County v. American Civil Liberties Union*.<sup>28</sup> The Court, applying *Lemon*'s three-prong test, determined that the display of the Ten Commandments in several McCreary County courthouses violated the Establishment Clause. The Court primarily focused on the "secular purpose" prong of the *Lemon* test, declining the counties' request to abandon the "secular purpose" prong of the test based on the assertion that true "purpose" is unknowable.<sup>29</sup> Justice O'Connor joined the majority, but in her concurrence wrote that "[t]he purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer."<sup>30</sup>

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<sup>21</sup> 515 U.S. 753 (1995). The Court's decision was 8-1 with O'Connor joining the majority in part, but writing a separate concurrence.

<sup>22</sup> 515 U.S. at 772-783, 774.

<sup>23</sup> *Id.* at 774, citing *Board of Ed. Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990).

<sup>24</sup> *Id.* at 777.

<sup>25</sup> *Id.* at 779.

<sup>26</sup> *Id.*, citing *Lynch* at 690.

<sup>27</sup> *Id.* at 780.

<sup>28</sup> 545 U.S. \_\_\_\_ (2005), No. 03-1693, (June 27, 2005).

<sup>29</sup> *Id.* Slip Op. at 11-15.

<sup>30</sup> *Id.* Slip Op. at 3 (Justice O'Connor, concurring).

## Religion and Education

In *Board of Education of the Westside Community Schools v. Mergens*, the Court held that the Equal Access Act, which requires schools to make space available to all student groups, including those with a religious message, after regular school hours, did not violate the Establishment Clause.<sup>31</sup> Justice O’Connor wrote for the majority and upheld the act based on what appears to have been a hybrid test incorporating both *Lemon* and the endorsement test that she advocated in the cases discussed above. O’Connor first noted that “the act’s prohibition of discrimination on the basis of ‘political, philosophical, or other’ speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test.”<sup>32</sup> She also noted that Congress’ stated purpose – “to prevent discrimination against religious and other types of speech” – was also “undeniably secular.”<sup>33</sup> The second prong of the *Lemon* test was addressed not in terms of “primary effect,” but rather in terms of endorsement. O’Connor stated that “secondary school students are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”<sup>34</sup> With respect to the third prong of the *Lemon* test, O’Connor rejected the argument that allowing the assignment of a teacher or administrator to attend the meetings creates an “excessive entanglement” with the group’s religious activities.<sup>35</sup>

The Court, in *Board of Education of Kiryas Joel Village School District v. Grumet*, struck down a special state statute that carved out a separate school district for the village of Kiryas Joel, a religious enclave of Satmar Hasidim.<sup>36</sup> In so doing, the Court did not apply the *Lemon* test, but determined that the statute violated the Establishment Clause because it violated the “requirement of government neutrality.”<sup>37</sup> O’Connor wrote a concurring opinion approving of the Court’s use of the neutrality test, calling the “emphasis on equal treatment . . . an eminently sound approach.”<sup>38</sup> Justice O’Connor went on to espouse the dangers of setting forth a “unitary test” for deciding all Establishment Clause cases, stating that such a test could “do more harm than good” and that a single test “risks being so vague as to be useless.”<sup>39</sup> Concluding her concurrence, she noted that “[e]xperience proves that the Establishment Clause . . . cannot easily be reduced to a single test,” and that different cases “may call for different approaches.”<sup>40</sup>

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<sup>31</sup> 496 U.S. 226 (1990).

<sup>32</sup> 496 at 248.

<sup>33</sup> *Id.* at 249.

<sup>34</sup> *Id.* at 250.

<sup>35</sup> *Id.* at 253.

<sup>36</sup> 512 U.S. 687 (1994). The Court’s decision was 6-3 with Justice O’Connor joining the majority in part, but writing a separate concurrence.

<sup>37</sup> 512 U.S. at 705.

<sup>38</sup> *Id.* at 715.

<sup>39</sup> *Id.* at 718.

<sup>40</sup> *Id.* at 720.

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court rejected the University's argument that it could not provide funds to a student newspaper written from a Christian perspective because doing so would violate the Establishment Clause.<sup>41</sup> The Court based its determination on the fact that the funds were to be distributed through the University's Student Activities Fund (SAF), a program that distributes funds on a religiously neutral basis, and that neutrality is a "significant factor in upholding programs in the face of Establishment Clause attack."<sup>42</sup> In a concurring opinion, Justice O'Connor wrote that "[n]eutrality, in both form and effect, is one hallmark of the Establishment Clause," and that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."<sup>43</sup> However, she went on to note that this case presented a special conflict between neutrality and the prohibition on state funding of religious activities, the resolution of which may not be possible with a single unified test.<sup>44</sup> Justice O'Connor concluded her concurrence with the observation that the Court did in this case "what courts must do in many Establishment Clause cases – focus on specific features of a particular government action to ensure that it does not violate the Constitution."<sup>45</sup>

In *Mitchell v. Helms*, the Court upheld a program that provided educational materials to both public and private elementary and secondary schools rejecting the argument that the provision of such materials to private religious schools violated the Establishment Clause.<sup>46</sup> Because the lower court had determined that the program had a secular purpose and did not create an excessive entanglement, the Court only addressed the primary effect prong of the *Lemon* test.<sup>47</sup> In determining the primary effect, the Court focused on the "neutrality principle" whereby the Court has upheld aid that is offered to a broad range of groups or persons without regard to their religion.<sup>48</sup> O'Connor concurred in the judgment, but wrote a separate opinion denouncing what she called "a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs."<sup>49</sup> Justice O'Connor interpreted the plurality's approach to mean that "government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content," and stated her contention that while neutrality should be considered in an Establishment Clause analysis, it should not be the sole criteria employed by the Court in making constitutional determinations.<sup>50</sup>

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<sup>41</sup> 515 U.S. 819 (1995). The Court's decision was 5-4 with both O'Connor and Thomas joining the majority, but filing separate concurring opinions.

<sup>42</sup> 515 U.S. at 839.

<sup>43</sup> *Id.* at 846.

<sup>44</sup> *Id.* at 852.

<sup>45</sup> *Id.*

<sup>46</sup> 530 U.S. 793 (2000).

<sup>47</sup> 530 U.S. at 809.

<sup>48</sup> *Id.* at 810.

<sup>49</sup> *Id.* at 837.

<sup>50</sup> *Id.* at 838-839.