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Justice O'Connor's Religion Clauses Legacy

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The Religion Clauses are the part of the Bill of Rights with which Justice O'Connor most engaged in her opinions. Indeed, it seems to me that she viewed religious freedom and equality as a central feature of the American constitutional order; I expect she would have agreed with Justice Marshall's sentiment that "our hospitality to religious diversity" is "one of this Nation's pillars of strength,"[1] and she tried to contribute to this hospitality and strength.

In this short essay, I want to candidly assess how Justice O'Connor's legacy in this area has endured. To summarize:

1. In the Establishment Clause school choice cases, Justice O'Connor largely prevailed. Her two decades of arguing in favor of letting religious institutions participate in generally available education funding programs bore fruit in the early 2000s. And it seems to me likely that these precedents will survive, even if the Court at some point moves back to the center or center left.
2. In the Free Exercise Clause religious exemption cases, Justice O'Connor's concurrence in the judgment in *Employment Division v. Smith* seems likely to be vindicated. Today's majority-conservative Justices embrace Justice O'Connor's vision on this score rather than Justice Scalia's.
3. In the Establishment Clause government speech cases, Justice O'Connor's "endorsement test," which prevailed for a time beginning in the late 1980s, has been overruled and seems unlikely to return.

To be sure, it is hard to know what to make of these results. Perhaps they simply stem from the changing personnel on the Court, who decide what they decide based on their own jurisprudential approaches rather than the legacy left to them by others. Perhaps they suggest that little done by any of us—even

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1. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 (1977) (Marshall, J., dissenting).

a Supreme Court Justice—endures after we are gone. And in any event, none of this tells us whether Justice O'Connor or her adversaries were in the right on any of these debates. But it seems to me useful to reflect on her work in this area, which she evidently cared about so much.

I. The School Choice Cases

When Justice O'Connor came to the Court in 1981, it appeared difficult for the government to financially help parents who sent their children to religious school. Scholarships to send students to colleges of their choice, including public ones, private secular ones, and private religious ones, were constitutional.[2] But if the government wanted to give K-12 students similar assistance, it was largely forbidden from doing so, with the exception of a narrowly limited set of benefits (such as providing transportation and loans of secular schoolbooks).[3] The Establishment Clause, the Court had held, forbade such benefits, even when the benefits were given to all private schools equally and were much less costly than the comparable benefits given to public schools.[4]

By the time Justice O'Connor left the Court in 2006, the law had changed dramatically, and Justice O'Connor was at the forefront of the change. In particular:

1. The Court had broadly accepted private choice programs, in which families could bring benefits—including general tuition scholarships—with them from public schools to private schools.[5] Equal treatment in this situation, she concluded, was not establishment.[6]
2. The Court accepted even direct aid programs, in which money flowed to private schools without such immediate private choice, so long as the aid was used for secular uses.[7] This secular use limitation was *not*

2. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973) (noting that the Court's decision striking down a form of school choice program for K-12 students did not affect the constitutionality of the "G.I. Bill"); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a program giving blind students scholarships to study at a wide range of colleges, including seminaries).

3. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (transportation); Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (schoolbooks).

4. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); *Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. at 777-78.

5. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (O'Connor, J., concurring).

6. *Cf.* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

7. *See* Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring in the judgment); *see also* Agostini v. Felton, 521 U.S. 203 (1997) (O'Connor, J., majority opinion) (taking a similar view).

present for private choice programs, where the aid could be used for religious teaching as well.[8]

3. The Court allowed direct aid to student religious groups—on equal footing with student secular groups—even when the aid was used for religious purposes.[9]

On each of these points, Justice O'Connor was a swing vote (alone on the first and third, joined by Justice Breyer on the second). On each, she wrote separately to stake out her position. The result was not just a major doctrinal change but a practical change in the lives of millions. Whether or not cities can put up crèches, Christmas trees, or menorahs[10] is of modest practical significance (though it may matter symbolically). Whether the government can help parents send their children to schools of their choice, including religious schools, is tremendously practically significant.

And the bulk of the changes that Justice O'Connor helped bring about seem on track to endure. Indeed, the Court has gone beyond saying that giving equal benefits to religious private schools and secular private schools is *permissible* under the Establishment Clause: It has concluded that such equal treatment is largely *required* under the Free Exercise Clause and that excluding religious schools from benefits available to other private schools is unconstitutional.[11]

Justice O'Connor might or might not have gone so far. She joined the majority in *Locke v. Davey*, a 2004 case that upheld the selective exclusion of devotional theology majors from a university scholarship system that funded a wide range of public and private university education.[12] And while the recent cases treat *Locke* as a narrow exception to the mandatory-equal-treatment principle that the Court has adopted, supporters of *Locke* might have taken a different view, especially as to the two most recent decisions.[13] But Justice

8. *See Zelman*, 536 U.S. at 649.

9. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 846 (1995) (O'Connor, J., concurring).

10. *See infra* Part III.

11. Carson v. Makin, 596 U.S. 767 (2022); Espinoza v. Mont. Dep't of Rev., 591 U.S. 464 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017). Supporting public schools but not private schools (religious or secular) remains constitutional; it's just the preference for secular private schools over religious private schools that is now largely forbidden. *See, e.g.*, *Carson*, 596 U.S. at 779-80.

12. 540 U.S. 712 (2004).

13. None of the Justices in the *Carson* and *Espinoza* majorities were in the *Locke* majority. Justice Breyer did concur in the judgment in *Trinity Lutheran*, as did the more recently appointed Justice Kagan, but *Trinity Lutheran* is indeed quite a different case from *Locke* because it involves funding for physical safety (the resurfacing of playgrounds) rather than for religious instruction. *See Trinity Lutheran*, 582 U.S. at 470-71 (Breyer, J., concurring in the judgment) (highlighting the relevance of the government benefit involved).

O'Connor had little occasion to confront that question—*Locke* was the only such case that came before the Court during her tenure—and she does not seem to have been much engaged by the issue: She didn't write separately in *Locke*, for instance, the way she did in *Zelman*, *Mitchell*, and *Rosenberger*. On balance, the Free Exercise Clause cases noted above cement Justice O'Connor's Establishment Clause victories in the school funding cases.

One facet of Justice O'Connor's Establishment Clause school funding jurisprudence might be on shaky footing: her sharp distinction between private choice programs (such as giving parents a $5,000 voucher that they can then take with them to any school of the parents' choice) and direct aid programs (such as giving each school $5,000 per student enrolled in that school). Private choice programs that included secular schools on an even footing with religious schools, she concluded, could help support the entirety of the education in a school, including religious education[14]—but similarly evenhanded direct aid programs could only be used for the secular components of a religious education.[15]

Justice O'Connor was the only Justice to take that position, and it seems to me unlikely to win more adherents in the future. The two kinds of benefit programs seem so functionally similar that few Justices would take the view that the distinction should make a difference.[16] It is true that, in a private choice program, a "student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education"[17]—the student's family could choose to throw away the voucher and pay the school tuition itself. But it is unclear why that unlikely scenario should materially change the analysis.

Likewise, it is true that categorically approving of evenhanded direct aid programs would allow the government to "provid[e] direct money payments to religious organizations (including churches) based on the number of persons

14. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 664 (2002) (O'Connor, J., concurring). This discussion assumes the program funds can indeed be used equally at private secular schools and private religious schools (of any religion); *cf.* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007) (panel op. joined by O'Connor, J., sitting by designation) (striking down the prison's "indirect aid" voucher program where inmates could use vouchers only at a religious alternative prison unit).

15. *See* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in the judgment).

16. Justice Breyer agreed with Justice O'Connor's no-religious-uses condition on direct aid in *Mitchell v. Helms*, but of course he also believed that private-choice-based funding programs could not be used for religious education, either, see *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting).

17. *See Mitchell*, 530 U.S. at841-42 (O'Connor, J., concurring in the judgment).

belonging to each organization."[18] But voucher programs do the same thing in effect, whether at the university level or K-12 level. The cashing in of the vouchers means that, say, a religious university is being paid some amount of money based on the number of the G.I. Bill beneficiaries, Pell Grant recipients, and the like who go to that university; likewise with religious K-12 schools. If the government provides direct benefits to all institutions—public, private secular, or private religious—it is hard to see why such direct benefits should be any worse than the indirect ones. To take a politically plausible example, say the government provides reconstruction funds following a natural disaster to all nonprofit institutions. It may well be quite acceptable for the government to provide such "direct money payments to religious organizations (including churches),"[19] so long as it does so evenhandedly, regardless of whether the funds are allocated by property value, building size, or number of people who routinely use the building.

Finally, Justice O'Connor reasoned that private choice and direct aid programs sent different messages, which was important in light of her focus on endorsement: If "a government program of direct aid to religious schools based on the number of students attending each school" is used by schools to teach religion, "the reasonable observer would naturally perceive the aid program as government support for the advancement of religion."[20] But "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, no reasonable observer is likely to draw from the facts an inference that the State itself is endorsing a religious practice or belief."[21]

Yet it seems far from clear that this is indeed how observers would perceive two basically economically identical funding programs—again, especially when the direct aid funds go to schools in proportion to the number of students in the schools, a number that likewise turns on the families' "independent decisions" to send their children to the schools. And given that the Court has generally rejected the endorsement test (see Part III below) even as to government speech—where observers are going to be on the lookout for a government message—it seems unlikely that the Court will want to conjecture about the messages sent by government funding decisions.

It thus seems more likely that the newer, more conservative Supreme Court Justices would go with the *Mitchell* plurality's broad approval of

18. *Id.* at 843-44.

19. *Id.*

20. *Id.* at 842-43.

21. *Id.* at 843 (quoting Witters v. Wash. Dep't Servs. for the Blind, 474 U.S. 481, 493 (1996) (O'Connor, J., concurring in part and concurring in the judgment) (internal quotation marks omitted)).

evenhanded funding programs (accepted there by Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy) rather than with Justice O'Connor's more limited position. Nonetheless, practically speaking, Justice O'Connor's endorsement of true private choice was the most significant part of her legacy in this area: Once private-choice-based school vouchers and direct aid programs that are limited to secular uses are both allowed, direct aid programs that are open to religious uses become considerably less important.

II. Religious Exemptions Under the Free Exercise Clause

In *Employment Division v. Smith*, Justice O'Connor argued that the Free Exercise Clause secured a substantive presumptive right to religious exemptions from generally applicable laws.[22] In this, she largely joined the liberals (Justices Brennan, Marshall, and Blackmun), and rejected the position taken by the conservatives and moderates in the majority (Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy).[23] In *City of Boerne v. Flores*, she reaffirmed her position at length and elaborated on why she thought the original meaning of the Free Exercise Clause supported her thinking.[24]

To be sure, she seemed to take a somewhat narrower view in *Smith* than the liberals did: She concluded that the peyote ban in that case was narrowly tailored to a compelling government interest, which rebutted the presumption in favor of exemptions.[25] More broadly, she may have envisioned strict scrutiny as being less strict than did the *Smith* dissenters. For instance, the dissenters pointed out that other states and the federal government had granted religious exemptions from the peyote ban and that this had not caused any evident harm.[26] Justice O'Connor would not have given substantial weight to this fact.[27] Still, on balance, she was a forceful supporter of reading the Free Exercise Clause as protective of religious objectors.[28]

22. 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in the judgment).

23. In 1990, Justice Stevens was still largely seen as a centrist, though towards the end of his career he was seen as more liberal (whether because he moved, the Court moved, or a combination of both). Justice Kennedy was seen as a solid conservative, rather than the centrist conservative he was later seen as being. Justice White, appointed by President Kennedy, had long been recognized as a centrist.

24. 521 U.S. 507, 544 (1997) (O'Connor, J., dissenting).

25. 494 U.S. at 903-07 (O'Connor, J., concurring in the judgment).

26. *Id.* at 918 (Blackmun, J., dissenting).

27. *Id.* at 906.

28. Her support for religious exemptions is likewise visible in *Goldman v. Weinberger*, which was decided during the era when the Free Exercise Clause was seen as presumptively securing a right to religious exemptions, but when the presumption was in practice fairly weak. 475 U.S. 503, 529 (1986) (O'Connor, J., dissenting); *see*

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And the Court has over time shifted Justice O'Connor's way—though with the conservatives largely abandoning Justice Scalia's *Smith* majority and the liberals seemingly embracing it. In *Fulton v. City of Philadelphia*, five of the six conservatives (all but Chief Justice Roberts), joined by Justice Breyer, endorsed the view that the Free Exercise Clause mandates a presumption that religious objectors will be exempted from generally applicable laws.[29] Those Justices seemed to be split only on the strength and scope of the presumption. Justice Alito, joined by Justices Thomas and Gorsuch, seemingly endorsed a broad presumption.[30] Justice Barrett, joined by Justices Breyer and Kavanaugh, endorsed a strong but somewhat narrower version.[31] Justice O'Connor never struck me as someone who would say, "History will vindicate me!" But on this issue, it seems to be doing so.[32]

To be sure, it is easier to show vindication than is it to show influence. Did Justice O'Connor's position eventually influence Justice Thomas, though he did not join her in 1997 in *City of Boerne*?[33] Did it influence then-Judge Alito, then-appellate-lawyer John Roberts, or the considerably younger Justices Gorsuch, Kavanaugh, and Barrett? Did it help establish that religious exemptions were a legitimate conservative position and not just a liberal one? Or is it just that conservative judicial thought these days leans more towards protection of religious objectors, and less towards Justice Scalia's concern that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice"?[34]

Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994). She dissented, together with Justices Brennan, Marshall, and Blackmun, in favor of an Air Force officer's right to wear a yarmulke notwithstanding the Air Force's uniform policies, while Justice Rehnquist, Chief Justice Burger, and Justices White, Powell, and Stevens voted to reject the claim.

29. 593 U.S. 522 (2021).

30. *Id.* at 544 (Alito, J., concurring in the judgment).

31. *Id.* at 543 (Barrett, J., concurring).

32. I say this though I agree with Justice Scalia's position in *Smith*. *See* Brief of Eugene Volokh, as Amicus Curiae in Support of Neither Party, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 3078491; Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

33. Justice Thomas had taken a broad view of the Religious Freedom Restoration Act in 1994 in *Swanner v. Anchorage Equal Rights Comm'n*, suggesting that landlords that felt a religious obligation not to rent to unmarried couples would be entitled to an exemption from bans on marital status discrimination in housing. 513 U.S. 979, 982 (1994) (Thomas, J., dissenting from the denial of certiorari) But in the 1997 *City of Boerne* decision he did not seem to have yet been persuaded by Justice O'Connor's argument that RFRA was constitutional because it basically required what a proper reading of the Free Exercise Clause already mandated. 521 U.S. 507, 564-65 (1997) (O'Connor, J., dissenting).

34. Employment Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

It is impossible to know. It is likewise impossible to know whether Justice O'Connor would have endorsed the especially muscular version of strict scrutiny that the conservatives on the Court (minus Chief Justice Roberts) appear to be adopting.[35] But whatever the causal path and whatever the details of how the rule would work, it appears that on religious exemptions as on school choice Justice O'Connor's views have prevailed.

III. Government Religious Speech

Justice O'Connor also had firm opinions on government religious speech: She believed that governments were allowed to use religious wording and symbolism—but not when a reasonable observer would perceive this as endorsing or disapproving of religion or when the government intends such a message.

This was part of her broader view that government action (and not just speech) ought not endorse or disapprove of religion.[36] That broader view never won over a majority of the Justices, perhaps in part because, when the government isn't intending to send a message, it is difficult to infer what message reasonable observers would nonetheless ascribe to the government's action. For instance, would reasonable observers really perceive Title VII's religious accommodation mandate as merely endorsing religious freedom while viewing a state law that required employers to give employees their religious holy day off as endorsing Sabbatarianism?[37] Would reasonable observers really perceive a difference[38] between a direct aid program that sends *$X* to a school for each student it enrolls and a private choice program that lets each student send a *$X* voucher to the school? Maybe, but it is hard to say with confidence, in part because most people dealing with government regulation or government spending focus on what the government action does, not on what it supposedly endorses.

On the other hand, Justice O'Connor's view was for a time accepted as to government speech.[39] Its rationale seems more compelling there: Government speech is intended to send a message, and it works only to the extent that

35. *See generally* Tandon v. Newsom, 141 S. Ct. 1294 (2021); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

36. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., joined by Marshall, J., concurring in the judgment); Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 347 (1987) (O'Connor, J., concurring in the judgment); Mitchell v. Helms, 530 U.S. 793, 838-39 (2000) (O'Connor, J., joined by Breyer, J., concurring in the judgment).

37. *See Thornton*, 472 U.S. at 711-12.

38. *See supra* Part I.

39. *See* County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 883 (2005).

reasonable listeners perceive that message. It is therefore appealing to ask what that message is, whether it takes a side in favor of or against some religion (or religion generally), and whether it therefore "mak[es] adherence to a religion relevant in any way to a person's standing in the political community."[40]

Yet since Justice O'Connor's departure from the Court, the endorsement test has been overruled. Indeed, even the liberal Justices Breyer and Kagan voted to reject it in the core area in which it emerged—the evaluation of "established, religiously expressive monuments, symbols, and practices."[41] (They left open the possibility of retaining the test for "new" governmental religious speech.[42]) Since then, the conservative Justices categorically overruled the test.[43]

Why did the test lose support, not just among conservatives but also among some liberals? The majority opinion in *American Legion v. American Humanist Association* (the Bladensburg Cross case), written by Justice Alito and joined in relevant part by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh, presents the argument well.

First, consider the inquiry into a purpose to endorse religion. Government religious speech cases "often concern monuments, symbols, or practices that were first established long ago."[44] The United States has a long history (whether one approves of it or not) of using religious symbols for a wide range of reasons, some expressly devotional but others as ways of marking solemn occasions, such as memorials for those killed in a war. Identifying the primary original purpose of such historical practices "may be especially difficult."[45]

And purposes often evolve. The purpose of maintaining government religious speech today may be quite different from the purpose behind the speech at the outset. Among other things, "[a]s our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage."[46]

Second, consider the inquiry into effects. Just as purposes evolve, so do messages:

> With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their

40. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

41. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019).

42. *Id.*

43. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

44. *Am. Legion*, 139 S. Ct. at 2082.

45. *Id.*

46. *Id.* at 2083.

> religious roots. The recent tragic fire at Notre Dame in Paris provides a striking example. Although the French Republic rigorously enforces a secular public square, the cathedral remains a symbol of national importance to the religious and nonreligious alike. Notre Dame is fundamentally a place of worship and retains great religious importance, but its meaning has broadened. For many, it is inextricably linked with the very idea of Paris and France.[47]

Thus, the effect of the speech today may not primarily be to endorse religion, and the effect of removing the speech today may harm important secular values. Indeed, in her concurrence in the Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow*, Justice O'Connor foreshadowed this sort of analysis:

> It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.[48]

And relatedly, if one cares about the effect of endorsement *or disapproval* of religion (as Justice O'Connor always stressed one should[49]), removing

47. *Id.* at 2084 (footnotes omitted).

48. 542 U.S. 1, 35-36 (2004) (footnote omitted).

49. *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in the judgment) ("[E]very government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion." (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring))); Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("Cases involving government speech on religious topics . . . require an analysis focusing on whether the speech endorses or disapproves of religion." (citations omitted)); Bd. of Educ. v. Mergens, 496 U.S. 226, 249 (1990) ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'" (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985))); County of Allegheny v. ACLU, 492 U.S. 573, 620 (1989) ("[I]t is not 'sufficiently likely' that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an 'endorsement' or 'disapproval . . . of their individual religious choices.'" (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985))); *County of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in the judgment) ("The government violates [the Establishment Clause] if it endorses or disapproves of religion."); Edwards v. Aguillard, 482 U.S. 578, 585 (1987) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring))); *Sch. Dist. of Grand Rapids*, 473 U.S. at 389 ("If . . . identification [of the government with religion] conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated."); *Wallace*, 472 U.S. at 56 ("In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" (footnote omitted) (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring))); *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring in the judgment) (discussing how the Court should determine "whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion"); *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("The

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longstanding examples of government speech may send a sharper message of disapproval than maintaining it would as to a message of endorsement:

> [W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.[50]

To be sure, perhaps the Justices who rejected the endorsement test here were mistaken, and perhaps the purposes and effects even of longstanding government speech are not generally that difficult to evaluate. In dissent, Justices Ginsburg and Sotomayor forcefully argued that "when a cross is displayed on public property, the government may be presumed to endorse its religious content,"[51] and that the presumption was not rebutted as to the Bladensburg Cross:

> The cross on a grave says that a Christian is buried here, and commemorates that person's death by evoking a conception of salvation and eternal life reserved for Christians. As a commemorative symbol, the Latin cross simply makes no sense apart from the crucifixion, the resurrection, and Christianity's promise of eternal life.
>
> The cross affirms that, thanks to the soldier's embrace of Christianity, he will be rewarded with eternal life. To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning. Scarcely a universal symbol of sacrifice, the cross is the symbol of one particular sacrifice.[52]

But the very fact that Justices have such sharp disagreements about the message sent by these sorts of monuments is a reminder of the difficulty of determining what messages "reasonable observers" would perceive in such situations. Presumably all the Justices were reasonable observers. They engaged in a careful process of reasoning and discussion over the span of months. Yet they reached sharply different results. Indeed, reasonable Justices who generally see the world quite similarly (as Justices Ginsburg, Breyer, Sotomayor, and Kagan had[53]) reached different results. How are

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second and more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion.").

50. *Am. Legion*, 139 S. Ct. at 2084-85.

51. *Id.* at 2106 (Ginsburg, J., dissenting).

52. *Id.* at 2108 (Ginsburg, J., dissenting) (citations omitted) (internal quotation marks omitted).

53. *See, e.g.*, Adam Feldman, SCOTUSBlog, Final Stat Pack for October Term 2018, at 23 (2019), https://perma.cc/R9RZ-34TQ (reporting that, in the Term *American Legion* was decided, Justices Ginsburg and Breyer agreed on the bottom-line result in 82% of the

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lower courts to determine how hypothetical "reasonable observers" would perceive such matters?[54]

In *Rosenberger v. Rector*, a government funding program case, Justice O'Connor expressed her skepticism about hard-and-fast rules in Establishment Clause cases (a skepticism that extended to her jurisprudence in other fields as well):

> This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. . . .
>
> When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. As Justice Holmes observed in a different context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types."[55]

And of course sometimes the Court is indeed open to this sort of approach; as Part II discussed, the majority on the Court now appears to be ready to reject Justice Scalia's "categorical" approach to Free Exercise Clause exemptions and substitute a strict scrutiny test that "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case."[56] But one thing we often seek from law is predictability. And when "sifting through the details"[57] is likely to yield different results among different judges—let alone the government officials that are supposed to apply the law in the first instance—a categorical approach may seem more appealing.

Perhaps in the future, a more liberal Supreme Court majority will cut back on government religious speech in various ways. They might, for instance, be more willing to see certain kinds of government speech as tending to coerce

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cases, Justices Ginsburg and Kagan in 88%, Justices Sotomayor and Breyer in 85%, and Justices Sotomayor and Kagan in 88%).

54. *Cf.* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 150 (1992) (noting how various people disagreed on whether particular programs would be reasonably seen as endorsing religion); *id.* ("I know all of these people to be reasonable observers, well schooled in the values underlying the First Amendment. That does not seem to help.").

55. 515 U.S. 819, 847-48 (1995) (O'Connor, J., concurring) (citations omitted) (quoting Irwin v. Gavit, 268 U.S. 161, 168 (1925)); *see also* Mitchell v. Helms, 530 U.S. 793, 844 (2000) (O'Connor, J., concurring in the judgment).

56. *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

57. *Id.*

others to participate[58] (though this would likely be less passive speech than monuments or other displays). But I doubt they will revive the endorsement test.

Conclusion

No Justice can control what happens after she leaves the Court. Even precedents that Justices worked hard to set, laboriously constructing and building support for an opinion, may well be reversed.

Precedent does have force, at least for pragmatic reasons: The Justices could not operate effectively if every question was up for grabs. Often Justices do accept that a controversy has been resolved, even if not to their liking, and that it's time to move on. Still more often, Justices recognize that "[*s*]*tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[59]

But of course Justice Brandeis made that last statement in a case where he concluded that an earlier constitutional precedent should nonetheless be overruled. And he said this with regard to the question of when "profits derived by the taxpayer from operating some of the state's school lands under a lease" must be excluded from federal income tax.[60] It is perhaps more tempting to reconsider precedents in matters of religious freedom and establishment.

And, as noted above, the influence of one Justice's reasoning on future cases is often hard to discern. We have no double-blind study in which Control America had another Justice instead of Justice O'Connor and someone else considered how to deal with school choice cases, religious exemptions, and government religious speech.

Even so, Justice O'Connor has definitely left us with an important body of work proposing something of a middle course on Religion Clauses matters, a course that does not fully match either that of the conservative bloc or that of the liberal bloc. Students of Religion Clauses law should and doubtless will pay close attention to this work for many decades to come.

58. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (graduation prayer); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (pre-football-game prayer by students); Town of Greece v. Galloway, 572 U.S. 565, 615-16 (2014) (Kagan, J., dissenting) (city council prayer); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 545 (2022) (Sotomayor, J., dissenting) (post-football-game prayer by football coach).

59. Burnet v. Colo. Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

60. *Id.* at 411.