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JUSTICE SOTOMAYOR AND ESTABLISHMENT CLAUSE JURISPRUDENCE: WHICH ANTIESTABLISHMENT STANDARD WILL JUSTICE SOTOMAYOR ENDORSE?

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"*Congress shall make no law respecting an establishment of religion*"

FIRST AMENDMENT, U.S. CONSTITUTION

I. INTRODUCTION

Over a decade ago Justice Antonin Scalia caricatured the *Lemon* test as a "late night ghoul that refuses to die."[2] The *Lemon* test is the legal standard used to determine whether a government action runs afoul of the Establishment Clause of the First Amendment to the United States Constitution. For years Justice Scalia and his allies on the highest court have worked to

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[2] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Scalia, J., concurring).

build a large enough coalition to overrule the *Lemon* test, and establish a new standard for determining the constitutionality of a government act under the Establishment Clause of the First Amendment.

Justice Byron White famously observed that every time a new justice comes to the Supreme Court of the United States "it's a different court."[3] So the 2009 appointment of Justice Sonia Sotomayor to the Supreme Court raises the question of how will the Court's Establishment Clause jurisprudence be affected. Will Justice Sonia Sotomayor, a left of center Catholic, provide the all-powerful fifth vote and finally put to death Justice Scalia's ghoul?

To explore this question, this article will (1) summarize and review Establishment Clause jurisprudence, (2) examine Justice Sotomayor's Establishment Clause record, and (3) identify characteristics of Justice Sotomayor's jurisprudence that might suggest how her appointment will affect the evolution of Establishment Clause jurisprudence.

II. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE

There is a long running dispute about the appropriate legal standard for determining when a government act violates the Establishment Clause of the First Amendment. This section will (1) briefly review historical background of the Establishment Clause, (2) examine the three theories of the antiestablishment principle, and (3) the current state of Establishment Clause jurisprudence.

A. The Historical Context of the Establishment Clause

The First Amendment's antiestablishment principle was a novel idea for its time, especially in light of how religion permeated seventeenth-century American life.[4] Because of its novelty, the antiestablishment principle spawned a variety of competing interpretative theories. While the Founders recognized the principle of separation of church and state, they approached

[3] Linda Greenhouse, *Every Justice Creates a New Court*, N.Y. TIMES, May 25, 2009, *available at* http://www.nytimes.com/2009/05/27/opinion/27greenhouse.html.

[4] JEROME BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 421 (West Publishing Co. 2008); *see, e.g.*, Rupal M. Doshi, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L. J. 559, n.41 (Jan. 2010) ("The most telling evidence of how the Framers and ratifiers originally understood the Establishment Clause is states' maintenance of state-sanctioned religious establishments for more than fifty years following the framing of the Constitution.").

this principle with very different assumptions.[5] These divergent interpretations eventually distilled into three schools of thought, each championed by a founding father:

> [F]irst, the evangelical *view* (associated with Roger Williams) that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained"; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power as to assure competition among sects rather than dominance by any one.[6]

Contemporary jurisprudence still runs through these same channels, and the modern schools of thought seek to define the antiestablishment principle through their respective champions on the Supreme Court.[7]

B. The Separation Standard

The first antiestablishment theory is the "strict separation" approach. The strict separation approach, with its *Lemon* test, has been the dominant understanding of the antiestablishment principle during the second half of the twentieth century.[8] This theory advocates for as much separation of government and religion as possible. Proponents believe religion should be limited to the private realm because religious liberty can only be guaranteed by the strict separation of government and religion.[9]

Thomas Jefferson, an original proponent of strict separation, contended that there should be a wall of separation between church and state.[10] This 1801 Jeffersonian metaphor of an impenetrable partition between religion and government formed the basis of the rationale in

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[5] BARRON & DIENES, *supra* note 4, at 422.
[6] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 1184, 1192 (Aspen Publishers 2006) *citing* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-1160 (West Publishing Co. 1988); *see also* BARRON & DIENES, *supra* note 4, at 422 (Jefferson, Madison, and Williams are the Founders who had the most profound impact on the American conception of freedom of religion).
[7] CHEMERINSKY, *supra* note 6, at 1192.
[8] Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).
[9] *See* Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 708 (1968).
[10] Thomas Jefferson, *Letter to Messr. Nehemiah Dodge and others, a Comm. of the Danbury Baptist Assoc., Writings* 510 (1984).

Everson v. Board of Education.[11] The *Everson* Court was considering the constitutionality of a statute that provided government reimbursement for the transportation costs of parents, including those who sent their children to Catholic schools. While the *Everson* Court upheld the statute, it also concluded that "the wall between church and state . . . must be kept high and impregnable."[12] The *Everson* Court supported its conclusion with a historical analysis of the Establishment Clause:

> The Amendment's purpose was not to strike merely at the official establishment of a single [religion], outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create *a complete and permanent separation of the spheres of religious activity and civil authority* by comprehensively forbidding every form of public aid or support for religion.[13]

Justice William Brennan, a modern proponent, explained the public policy concerns that underpin the strict separation approach. In his dissent to *Marsh v. Chambers*,[14] he explained that the purpose of the Establishment Clause is to ensure

> [s]eparation and neutrality [which are] essential to autonomy of religious life . . . to prevent the trivialization and degradation of religion by too close an attachment to . . . government . . . [and to] assure essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.[15]

Towards these ends, the Court developed, in *Lemon v. Kurtzman*,[16] a three-prong test to determine whether a government act breached Jefferson's high and impregnable wall of separation. Under the *Lemon* test, in order for a statute to comport with the Establishment Clause (1) the statute must have a secular purpose, (2) its primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive government entanglement with religion.[17]

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[11] 330 U.S. 1 (1947).
[12] *Id.* at 18.
[13] *Id.* at 31-32 (emphasis added).
[14] 463 U.S. 783 (1983).
[15] *Id.* at 803-05.
[16] 403 U.S. 602 (1971).
[17] *Id.* at 612.

The function of the first prong is to ensure the government's *purpose* is not acting to advance religion. For instance, under the secular purpose prong the Court has invalidated a state law that required Ten Commandments to be posted in every high school,[18] a state law that authorized teachers to lead students in a one-minute voluntary prayer or meditation,[19] and a state law requiring public schools that teach evolutionary science to also teach "creation science."[20] By contrast, the Court has upheld a blue law that required businesses to close on Sundays despite the law's religious origin and significance because "the [law's] present purpose . . . [was] to provide a uniform day of rest for all citizens."[21]

Under the second prong of *Lemon*, the analysis turns to the *effect* of a government act. If a law has the primary effect of advancing or inhibiting religion, then it violates the Establishment Clause. Thus, the Court struck down a state law that created an employee right to not work on the Sabbath because the law went "beyond having an incidental or remote effect of advancing religion."[22] By contrast, the Court invoked the second prong to uphold an exemption for religious organizations to Title VII's antidiscrimination requirements, observing that "a law is not unconstitutional simply because it *allows* churches to advance religion . . . [A law has a] forbidden 'effect' . . . [when] the *government itself* has advanced religion through its own activities and influence."[23]

Under the final prong a law is unconstitutional when a law results in excessive entanglement with religion. The *Lemon* Court characterized entanglement as a law which would result in "comprehensive, discriminating, and continuing state surveillance."[24] Accordingly, that Court held that a state cannot pay teacher's salaries at a religious school, even those who teach secular subjects, because it would need to monitor what the teachers were teaching and become entangled in religious education.[25]

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[18] Stone v. Graham, 449 U.S. 39 (1980).
[19] Wallace v. Jaffre, 472 U.S. 38 (1985).
[20] Edwards v. Aguillard, 482 U.S. 578 (1987).
[21] McGowan v. Maryland, 366 U.S. 420, 445 (1961).
[22] Estate of Thorton v. Caldor, 472 U.S. 703, 710 (1985).
[23] Corp. of Presiding Bishop of the Church of Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) (emphasis in the original).
[24] *Lemon*, 403 U.S. at 619.
[25] Grand Rapids v. Ball, 473 U.S. 373 (1985).

While the *Lemon* test is still considered the official legal standard for analyzing whether a government action comports with the Establishment Clause, its influence has waned during the last twenty years.[26]

C. The Neutrality Standard

The second antiestablishment theory is the "neutrality" approach. Under this approach the antiestablishment principle prohibits the government from "using religion as a standard for action or inaction" or using a religious "classification . . . to confer a benefit or impose a burden."[27] In order to determine whether a government act comports with this neutrality requirement the Court developed the "symbolic endorsement" test, purportedly an adaption of the *Lemon* test. This endorsement test requires courts to focus on the "unique circumstances" of the case to determine whether the government act in question would be perceived by a reasonable observer to be an endorsement or disapproval of religion (i.e. was the government act "neutral").[28] [29] For example, the *Pinette* Court plurality applied the endorsement test when it concluded that a Ku Klux Klan cross erected in a park directly across from a state courthouse did not violate the Establishment Clause because a reasonable observer was unlikely to conclude that the cross was endorsed by local government where a sign near the cross disclaimed any government endorsement of the cross.[30]

Justice O'Connor, a principal proponent of the neutrality standard, understood the antiestablishment principle as a guarantee of political and social inclusion:

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[26] Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).
[27] Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961); *see also* JESSE CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 28-29 (Univ. of Chicago Press 1995).
[28] 465 U.S. 668, 694 (1984).
[29] There is some dispute over what constitutes a "reasonable observer" under the endorsement test. *Compare* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring) ("[a reasonable observer is] aware of the history and context of the community and forum in which the religious display appears . . . [and it an] informed member of the community [who knows] how the public space in question has been used in the past.") *with Pinette*, 515 U.S. at 799-800 (Stevens, J., dissenting) (a reasonable observer is the reasonable passerby without specific knowledge of the local context).
[30] *Pinette*, 515 U.S. at 776-77 (O'Connor, J., concurring).

> [The endorsement] test captures the essential command of the Establishment Clause . . . that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred . . . If government is to be *neutral* in matters of religion . . . government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.[31]

Thus, proponents of the neutrality theory believe the core purpose of the Establishment Clause, equal political standing despite religious or nonreligious affiliation, is best achieved by evaluating how a citizen will perceive and react to a particular government act.[32]

In 2005, the majority of Supreme Court Justices were using the endorsement test to apply the neutrality approach to the Establishment Clause.[33] However, with the retirement of Justices Sandra Day O'Connor and David Souter, and the looming retirement of Justices Stevens, the durability of the neutrality theory is unclear.

D. The Accommodation Standard

The final antiestablishment theory is the "accommodation" approach. This approach overtly rejects the *Lemon* test, calibrating a generous line of separation between church and state. Under this interpretation of antiestablishment, a government act does not run afoul the Constitution unless it overtly founds a religion, coerces belief, or explicitly favors one religious belief.[34] Proponents of accommodation believe the antiestablishment principle requires the government to treat religious groups equal to nonreligious groups.[35] Thus, when the government offers some accommodation or benefit to a nonreligious group, the Establishment Clause would not prevent the government from offering the same affirmative benefit to a religious group.[36] In accordance with the accommodation theory, the *Rosenberger* Court rejected the argument that

[31] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) (internal quotations omitted) (emphasis added).
[32] CHEMERINSKY, *supra* note 6, at at 1195.
[33] Van Orden v. Perry, 545 U.S. 677 (2005) (holding that a cross and Ten Commandments monument located in between the Texas State Capitol and Supreme Court violated the Establishment Clause).
[34] Lee v. Weisman, 505 U.S. 577, 587 (1992).
[35] Mitchell v. Helms, 530 U.S. 793 (2000).
[36] Allegheny County, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part).

the antiestablishment principle required a public university to not fund religious student publication even though it was funding nonreligious student publications.[37]

Thus, government conduct is only excessively entangling when it is "coercive" (i.e. compels religious participation).[38] For example, the *Lee* Court held that clergy-lead prayer at a high school graduation was coercive because students were *indirectly* compelled to attend graduation ceremonies and could not leave for the prayer.[39] However, true proponents of accommodation, like Justice Scalia, believe that only *direct* government coercion is sufficient to violate the Establishment Clause: "[the] coercion that was a hallmark of historical establishment[] of religion was coercion of religious orthodoxy and of financial support by *force of law and threat of penalty*."[40] Thus, the accommodationist would tear down high and impregnable wall between church and state, welcoming religion into a pluralistic public sphere.[41] Moreover, proponents argue their jurisprudence most accurately reflects the dominant role of religion in American life.[42]

E. The Status Quo of Establishment Clause Jurisprudence

Allegheny County v. Greater Pittsburgh ACLU encapsulates the convoluted state of contemporary Establishment Clause jurisprudence.[43] In this case the plaintiff challenged the constitutionality of a nativity crèche in a courthouse and a 45' Christmas tree and 18' menorah in front of another government building. In a 5-4 ruling, the *Allegheny* Court held that the nativity crèche violated the Establishment Clause while finding that the tree and menorah did not. However, there was no consensus on the basis for the Court's holding. Three Justices relied on a strict separation theory, two Justices used the neutrality theory, and the remaining four Justices dissented under an accommodation theory.

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[37] Rosenberger v. Univ. of Virginia, 515 U.S. 819 (1995).
[38] CHEMERINSKY, *supra* note 6, at 1197.
[39] *Lee*, 505 U.S. at 593-95 (majority opinion).
[40] *Id.* at 640 (Scalia, J., dissenting) (emphasis added).
[41] *See* Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14.
[42] *Id.*
[43] 492 U.S. 573 (1989).

While the accommodation theory did not prevail in *Allegheny*, it had several dedicated champions in Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas. Further, the appointment of Chief Justice John Roberts and Justice Samuel Alito, both likely to join the trio of stalwart accommodationists,[44] suggests that the *Lemon* test may be ripe for the picking.[45]

III. JUSTICE SOTOMAYOR'S ESTABLISHMENT CLAUSE JURISPRUDENCE

Despite Justice Sonia Sotomayor extensive judicial record, after seventeen years on the federal bench, the Justice has only penned a handful of Establishment Clause cases. This section will (1) examine five Justice Sotomayor Establishment Clause cases and (2) explore patterns in Justice Sotomayor's judicial sensibilities that provide insight into how she may influence the development of Establishment Clause jurisprudence.

A. Justice Sotomayor's Judicial Record

1. U.S. District Court for the Southern District of New York

Justice Sotomayor first tackled the Establishment Clause in *Flamer v. City of White Plains*.[46] In *Flamer* an orthodox rabbi sued a city to enjoin the enforcement of a city council resolution that was promulgated to prevent the Hasidic rabbi from displaying a nine-foot electric menorah in a city park during Chanukah.[47] After a detailed analysis of the plaintiff's religious affiliation, the political and religious backlash that animated the City's conduct, and the park's location and historical usage,[48] Justice Sotomayor rejected the City's argument that allowing

[44] Kris Bryant, *Take a Knee: Applying the First Amendment to Locker Room Prayers and Religion in College Sports*, 36 J. OF COLLEGE AND UNIV. LAW 329, 353 (2009) ("Roberts and Alito . . . Thomas and Scalia would make up a conservative block less likely to object to religious practices and more inclined to allow accommodations of religion in public arenas"); Paul Forster, *Separating Church and State: Transfers of Government Land as Cures for Establishment Clause Violations*, 85 CHI. KENT L. REV. 401, 409-10 (2010) (noting that J. Alito's tenure on the Third Circuit suggests he would be open to the "coercion" test, and, as a Deputy Solicitor General, CJ. John Roberts lobbied against the *Lemon* test in favor of the "coercion" test).

[45] CHEMERINSKY, *supra* note 6, at 1206; *see, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free School District, 508 U.S. 384 (1993) (Scalia, J., concurring).

[46] 841 F. Supp. 1365 (S.D.N.Y. 1993).

[47] *Id.* at 1367, 1369-70.

[48] *Id.* at 1368-70.

rabbi's religious display would result in an unconstitutional government endorsement of religious expression.[49]

While Justice Sotomayor was "sympathetic" to the risk of a government endorsement of religion,[50] most of her opinion emphasized the overriding importance and breath of the constitutional protections of religious freedom, especially religious speech, and free exchange of diverse speech.[51] In her Establishment Clause analysis, Justice Sotomayor reluctantly turned to the *Lemon* test.[52] She quickly concluded that privately sponsored religious symbols in traditional public fora do not offend the first or third prongs of the *Lemon* test,[53] and then devoted a larger part of her Establishment Clause analysis to unpacking the second prong. Justice Sonia Sotomayor relied on Justice O'Connor's Endorsement test twice, as laid out in *Allegheny*,[54] to define the second prong of the *Lemon* test.[55] Consequently, she spent the lion share of her first Establishment Clause opinion analyzing whether a reasonable observer would construe rabbi's menorah to be a religious endorsement by the city.

In her next Establishment Clause case, Justice Sotomayor rejected the plaintiff's requested relief: compel the U.S. Post Office to include the Islamic crescent and star along with Christmas and Chanukah decorations or compel the U.S. Post Office to take down all holiday decorations.[56] In *Mehdi v. United States Postal Service*,[57] a Muslim activist, and the secretary-general of the National Council on Islamic Affairs, sued the Post Office after he was unable to persuade it to include the "secular symbols of Muslim people" in the Post Office's winter holiday display, which included a Christmas tree and menorah.[58]

In *Mehdi*, Justice Sonia Sotomayor declared that "the heart" of the antiestablishment principle is "that government should not prefer one religion to another, or religion to

[49] *Id.* at 1367.
[50] *Id.* at 1376.
[51] *Id.* at 1366-67.
[52] *Id.* at 1376, n.11.
[53] *Id.* at 1377.
[54] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 598-600, 626 (1989) (plurality opinion) (O'Connor, J., concurring).
[55] *Id.* at 1377, n.13.
[56] Mehdi v. U.S. Postal Service, 988 F. Supp. 721, 723 (S.D.N.Y. 1997).
[57] *Id.*
[58] *Id.* at 723.

irreligion,"[59] and, like *Flamer*, she again emphasized the "pluralistic" nature of our society.[60] Unlike the *Flamer* opinion, Justice Sonia Sotomayor does not mention the *Lemon* test. Instead she applied the Endorsement test, noting the *Lemon* test's "tenuous . . . status"[61] and focusing heavily on what constitutes a reasonable observer. In her reasonable observer analysis, Justice Sonia Sotomayor turned to Justice Sandra Day O'Connor's work, citing to *Allegheny*,[62] *Pinette*[63] and *Mergens*,[64] in concluding that the reasonable observer is presumed to have awareness of the history and context of the community and the forum.[65]

2. Second Circuit of the United States Court of Appeals

After Justice Sonia Sotomayor's 1998 appointment to the Second Circuit, the first Establishment Clause case she heard was *Rosario v. John Does 1-10*.[66] In *Rosario*, a public school teacher sued for wrongful termination, claiming the school board violated her rights under the Free Exercise Clause of the First Amendment.[67] The school terminated the plaintiff after she led her sixth grade class in prayer and shared her religious views on death in an attempt to console her students, who were mourning the loss of a classmate.[68] In a short opinion, the *Rosario* court affirmed the dismissal of the teacher's claims, noting that the school board was justified in terminating Rosario because it had a "compelling interest in avoiding Establishment Clause violations."[69] Further, the *Rosario* court remarked that "introducing religious matter into the classroom" is precisely the type of conduct that "animates the antiestablishment principle."[70]

A year later, in *Okwedy v. Molinari*,[71] Justice Sotomayor sat on the panel that rejected Reverend Okwedy's Establishment Clause claim. In *Okwedy*, the plaintiff stated that he was

[59] *Id.* at 728.
[60] *Id.* at 722, 728.
[61] *Id.*
[62] *Allegheny*, 492 at 635 (O'Connor, J., concurring).
[63] *Pinette*, 515 U.S. at 756-66 (1995) (O'Connor, J., concurring).
[64] Board of Educ. v. Mergens, 496 U.S. 226 (1990).
[65] *Id.* at 724.
[66] 36 Fed. Appx. 25 (2d Cir. 2002).
[67] *Id.* at 26.
[68] *Id.*
[69] *Id.* at 26.
[70] *Id.* at 27.
[71] 69 Fed. Appx. 482 (2d Cir. 2003) (affirming dismissal of Establishment Clause and Free Exercise claims).

compelled by a religious "duty" when he contracted a billboard company to display a sign of Leviticus 18:22, a biblical prohibition against homosexuality, at a location near an LGBT[72] neighborhood on Staten Island.[73] Okwedy's sign generated public controversy, and as a result the President of the Borough of Staten Island sent a letter, on borough letterhead, to the billboard company, stating that the sign's contents were "intolerant" and "unwelcome" and referring the company to the President's attorney.[74] In response to the President's letter, the billboard company removed Okwedy's sign, causing reverend Okwedy to sue the Borough President for violating various First Amendment rights, including the Establishment Clause.[75]

The *Okwedy* Court issued a bifurcated opinion. In a published *per curiam* opinion[76] the panel reversed and remanded Okwedy's free speech claim, while in an unpublished summary order[77] affirming the dismissal of his other claims. In the unpublished summary order, the *Okwedy* court rejected the plaintiff's Establishment Clause claim because he failed to demonstrate that the Borough's policy against intolerance and discrimination on the basis of sexual orientation violated the antiestablishment principle.[78] The *Okwedy* Court was "convinced that the district court correctly concluded that [the President's] conduct comports with the requirements of the [*Lemon*] test, which we apply in situations where a facially-neutral policy is challenged on Establishment Clause grounds."[79] The District Court analysis, upon which the Second Circuit relied, emphasized the "neutrality" theory of the antiestablishment principle (i.e. the Endorsement test) and that a government message of "tolerance of diverse views" comports with the Establishment Clause.[80]

Several months after *Okwedy*, Justice Sotomayor was on the Second Circuit panel that rejected another Establishment Clause claim. In *Friedman v. Clarkstown Central School*

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[72] LGBT is the abbreviation for lesbian, gay, bisexual, and transgender. MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS (Merriam-Webster May 2007), *available at* http://www.merriam-webster.com/dictionary/lgbt.
[73] *Okwedy*, 333 F.3d at 341.
[74] *Id.*
[75] *Id.* at 342.
[76] 333 F.3d 339 (2d Cir. 2003) (*per curiam*) (reversing and remanding free speech claim)
[77] 69 Fed. Appx. 482.
[78] *Okwedy*, 69 Fed. Appx. at 485.
[79] *Id.* at 484.
[80] *See* Okwedy v. Molinari, 150 F. Supp. 2d 508, 519 (E.D.N.Y. 2001).

District,[81] a student's parent sued the school district when the district denied the plaintiff's application for a religious exemption to mandatory immunizations.[82] The Second Circuit affirmed the dismissal of the parent's Establishment Clause claim because the mother failed to demonstrate a nexus between her "sincerely held religious belief" and a basis for her refusal to immunize her son.[83] Instead, the *Friedman* Court emphasized that the judiciary lack of expertise assessing which beliefs are to be protected under the First Amendment.[84]

Hankins v. Lyght[85] is the last and probably the most significant of Justice Sonia Sotomayor's Establishment Clause cases. In *Lyght*, a retired minister sued his former employer, the United Methodist Church, for age discrimination, pursuant to the Age Discrimination in Employment Act (ADEA), because of the Church's policy that forced its ministers to retire at the age of seventy.[86] In defense of its forced retirement policy, the Church invoked the Establishment Clause, arguing that the ministerial exception precludes church liability under the ADEA.[87] The *Lyght* Court vacated the District Court's dismissal and remanded the case to determine whether Religious Freedom Restoration Act (RFRA) effectively amended the ADEA.[88]

In response, Justice Sotomayor penned a forceful ten-page dissent, in which she argues that the majority conflated the scope of religious freedom provided under RFRA and the Religion Clauses and overstepped its judicial authority by unnecessarily reaching a constitutional question.[89] In making her arguments, Justice Sotomayor provides several glimpses into her perspective on the Establishment Clause. First, she states without qualification that in order to "satisfy the Establishment Clause" a statute must comport with the *Lemon* test.[90] Second, like in *Okwedy*, she categorically states the she is "unaware of any application of the Establishment Clause . . . that would invalidate a neutral, generally applicable law imposing an incidental but

[81] 75 Fed. Appx. 815 (2d Cir. 2003).
[82] *Id.* at 817.
[83] *Id.* at 818-19.
[84] *Id.*
[85] 441 F.3d 96 (2d Cir. 2006) (Sotomayor, J., dissenting).
[86] *Id.*, 441 F.3d at 99.
[87] *Id.*
[88] *Id.*, 441 F.3d at 109.
[89] *Id.* at 111.
[90] *Id.* at 112-13.

substantial burden on religion."[91] Third, like in *Flamer*, she demonstrates a sensitivity and nuanced understanding of religious practice, acknowledging that for a religious institution the selection of clergy is a "core matter," "the most spiritually intimate grounds," and at the "heart of the church's religious mission."[92] Finally, she demonstrates an approach that emphasizes balancing compelling government interests, like antidiscrimination and inclusion, with the promise of religious freedom.[93]

B. The Characteristics of Justice Sotomayor's Establishment Jurisprudence

Despite Justice Sotomayor's limited record, the abovementioned cases do suggest patterns that are useful in analyzing the potential impact of Justice Sotomayor on Establishment Clause jurisprudence.

First, an overview of Justice Sotomayor's jurisprudence demonstrates openness to religion. In her opinions, she deliberately takes the time to explain the intricacies of a party's religious belief. Further, she makes unqualified declarations, such as freedom of religion is one of "our nation's most cherished values."[94] For example, in *Flamer* Justice Sotomayor was not persuaded by the City of White Plains' fear that allowing a menorah in the park would constitute an unconstitutional entanglement with religion, and characterized the city's argument as an embellishment: "religious zealots were storming the city's gates."[95]

Second, Justice Sotomayor seems frustrated with the uncertainty of Establishment Clause jurisprudence. Throughout her opinions she describes the various legal tests and precedents as

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[91] *Id.* at 113, n.6; *see also* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding under a rational basis review that neutral laws of general applicability do not violate the Free Exercise clause even when the law unintentionally interferes with religious practice). Congress promulgated the Religious Freedom Restoration Act of 1993 ("RFRA") in response to *Smith* in order to restore strict scrutiny review for free exercise claims against neutral laws of general applicability; however, in the wake of City of Beorne v. Flores, 521 U.S. 507 (1997), courts only apply strict scrutiny to Free Exercise claims arising under federal law, not state law. *See, e.g.*, Gonzales v. O Centro Espiritu Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (holding that federal drug importation laws substantially burdened the free exercise of fringe religious group that uses a banned hallucinogenic drug in religious rites).
[92] *Id.* at 117.
[93] *Id.* at 116-17.
[94] Flamer v. City of White Plains, 841 F. Supp. 1365, 1366-67 (S.D.N.Y. 1993).
[95] *Id.* at 1379.

"badly fractured,"[96] "no clear rationale,"[97] "divergent outcome,"[98] "sharply divided,"[99] "shifting majorities and conflicting approaches,"[100] and "a morass of competing and conflicting rationales."[101] This frustration, taken in light of Justice Sotomayor's pragmatism, suggests the Justice Sotomayor may be amendable to a joining other moderates on the Supreme Court, if it would yield more certainty for lower courts.

Third, it is unclear which of the three antiestablishment theories Justice Sotomayor finds most persuasive. As described above, as a District Judge, her antiestablishment analysis emphasized the Endorsement test. By contrast, her Second Circuit opinions invoke the *Lemon* test. Nevertheless, the depth of analysis and space she has devoted to the Endorsement test suggests that Justice Sotomayor prefers the neutrality theory of the antiestablishment principle.

Fourth, the five cases analyzed above consistently refer to pluralism, diversity, inclusion, and tolerance. This theme suggests that Justice Sonia Sotomayor's understanding of the Establishment Clause is closely linked with her perception of the nature and design of the American social system, and that she believes there is room in the public sphere for religious voices and institutions. Thus, an advocate who can demonstrate how a particular ruling or precedent will further the values of diversity, inclusion, and tolerance will be more likely to persuade Justice Sonia Sotomayor.

Fifth, Justice Sonia Sotomayor appears to be cut from the mold of Justice Byron White. She prefers a fact-intensive analysis and narrow rulings that avoid unnecessarily reaching constitutional questions. Therefore, while Justice Sotomayor may prefer the Endorsement test, her judicial temperament indicates that she is more likely to pursue an incremental approach to clarifying Establishment Clause jurisprudence, instead of a decisive rejection of the *Lemon* test.

Sixth, to some extent Justice Sotomayor's position on Establishment Clause cases will be unpredictable. Justice Sotomayor's opinions demonstrate a pattern of intensive factual analysis and fact-specific holdings. For example, in *Flamer* she emphasized "that context is highly

[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Flamer*, 841 F. Supp. at 1379.
[101] *Id.* at 1378.

important in determining" whether there was a violation of the Establishment Clause.[102] This suggests that factual idiosyncrasies of a particular case may trump any desire to rewrite the *Lemon* test.

V. CONCLUSION

Therefore, in light of the analysis above, it is unlikely that Justice Sotomayor will provide the fifth vote Justice Scalia needs to overrule the *Lemon* test. On the other hand, Justice Sotomayor may be open to joining a moderate majority, especially if the opinion is based on the neutrality approach to the Establishment Clause and invokes values of tolerance and inclusion. Until Justice Sotomayor's influence on Establishment Clause jurisprudence is clarified,[103] the patterns distilled above should assist prognosticators and jurists in predicting how Justice Sotomayor will affect the evolution of the Establishment Clause.

[102] *Id.*

[103] Postscript: on April 28, 2010, Justice Sonia Sotomayor joined Justice John Paul Steven's dissent in *Salazar*. In *Salazar* the federal government allowed the display of a Latin cross in Mojave National Preserve, but excluded similar access to Buddhists. Salazar v. Buono, -- U.S. --, 129 S. Ct. 1313 (2010). The dissent relied on the endorsement test to interpret the scope of the Establishment Clause, citing to Justice O'Connor's analysis in *Allegheny* and *Pinette*, while not mentioning the *Lemon* test. The opinion also emphasized that cross constituted a sectarian or intolerant symbol. *Id.* ("the Establishment Clause, at the very least, prohibits the government from appearing to take a position on questions of religious belief or [making religion relevant to political standing]").