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## THE CONSTITUTIONAL JURISPRUDENCE OF SANDRA DAY O'CONNOR: A REFUSAL TO "FORECLOSE THE UNANTICIPATED"

*Wilson Ray Huhn\**

*I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.<sup>1</sup>*

Sandra Day O'Connor

Earlier this year, Justice Sandra Day O'Connor retired from the Supreme Court of the United States after 25 years of service.<sup>2</sup> It would be difficult to overstate the impact that Justice O'Connor has had on the interpretation of the Constitution during her tenure on the Court. Her importance to the development of American constitutional law stems from her central position on the Supreme Court. Professor Erwin Chemerinsky has described her role in these terms:

O'Connor is in control. In virtually every area of constitutional law, her key fifth vote determines what will be the majority's position and what will be the dissent. Lawyers who argue and write briefs to the Court know they are, for all practical purposes, arguing to an audience of one.<sup>3</sup>

In order to understand the influence that Justice O'Connor has wielded within the Court and in order to appreciate the specific

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1. *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989).

2. *See O'Connor Slips Into Retirement*, PHILADELPHIA INQUIRER, February 1, 2006 at A14. Twenty-five years ago, President Ronald Reagan made history when he nominated Sandra Day O'Connor to be the nation's first female Supreme Court justice. On the court, as the deciding vote in some of its most closely watched cases, she was sometimes called the most powerful woman in America. [On January 31, 2006], with little of the fanfare that marked her Supreme Court rise, O'Connor, 75, ended her tenure.

*Id.*

3. Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 877 (2001).

contributions that she has made to American law, it is appropriate to examine her judicial philosophy and to review the substantive principles that she has helped to create. The purpose of this essay is to briefly summarize the jurisprudence of Justice O'Connor in the field of Constitutional Law.<sup>4</sup>

Over the course of her term on the Supreme Court of the United States, Justice Sandra Day O'Connor has progressed from being a diligent and competent legal technician to becoming one of the leading expositors of the Constitution. In her early years on the Court, Justice O'Connor was frequently concerned with legal technicalities such as procedural barriers to access to the Court, but by the end of her career she had confronted and dealt with the most important questions of law that face us as a Nation. Over time she became an eloquent author of judicial opinions expressing fundamental truths about American values in clear, concise language that will stand the test of time. Justice O'Connor has been faithful to precedent and attentive to detail, while at the same time demonstrating a constant willingness to rethink her position on matters of fundamental importance. Beyond her contributions to our understanding of the Constitution, Sandra Day O'Connor has also enlarged our understanding of human potential. Her most enduring lesson for us all is that throughout all stages of life we are capable of remarkable growth.

Part I of this essay covers an early period on the Court when Justice O'Connor seemed principally concerned with questions of jurisdiction and appellate process, during which she was frequently inclined to dispose of cases on technical or procedural grounds. Part II discusses Justice O'Connor's attention to detail and consideration of factual context and her tendency to adjust the traditional standards of review in light of the circumstances of the case. Part III outlines Justice O'Connor's respect for precedent and commitment to the principle of *stare decisis* particularly as it relates to her refusal to overrule *Roe v. Wade*.<sup>5</sup> Part IV describes how her judicial philosophy evolved during her tenure on the Court to the point where she achieved a deep understanding and formulated a nuanced articulation of the fundamental American values embodied by the Constitution.

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4. This essay is largely confined to examining the civil law aspects of Justice O'Connor's constitutional jurisprudence, including decisions under the Commerce Clause, First Amendment, Due Process Clause, and Equal Protection Clause. It does not address her writings on the criminal law aspects of Constitutional Law, such as decisions interpreting the Fourth, Fifth, Sixth, and Eighth Amendments.

5. 410 U.S. 113 (1973) (recognizing woman's constitutional right to terminate a pregnancy).

## I. EARLY OPINIONS

Justice O'Connor ascended to the high court in 1981, and the opinions she wrote during the first few years of her tenure frequently dismissed constitutional claims on jurisdictional or procedural grounds. For example, in *I.N.S. v. Lopez-Mendoza*,<sup>6</sup> when the respondent appealed a ruling ordering his deportation on the ground that an unlawfully obtained admission had been admitted at his deportation hearing, Justice O'Connor dismissed his claim on the ground that he failed to make the proper objection in the administrative proceeding. Specifically, she ruled that the respondent's motion to dismiss the proceeding on the ground that he had been the subject of an unlawful arrest could not be construed as an objection to the admission of his statement that was unlawfully obtained as a result of that arrest.<sup>7</sup> Justice O'Connor focused on minutiae in support of her position that the Court of Appeals had erred in reaching the merits of the respondent's constitutional claim. For example, she took pains to point out, and apparently found it significant, that the Court of Appeals had changed the wording of a footnote in its opinion between the time that it issued the slip opinion and the time that the lower court opinion was bound.<sup>8</sup> Justice O'Connor characterized this passage as "an apparently unsettled footnote of [the lower court's] decision,"<sup>9</sup> and reversed the decision of the Court of Appeals on the procedural point that was discussed in the footnote.<sup>10</sup>

In *Allen v. Wright*<sup>11</sup> the Court considered a claim brought by African-American parents challenging the unlawful action of the Internal Revenue Service in extending tax-exempt status to racially discriminatory schools in clear violation of the mandate of federal law.<sup>12</sup> Writing for a majority of the Court, Justice O'Connor dismissed the case on the ground that the parents lacked standing.<sup>13</sup> Even though the dissent cited compelling evidence that these racially segregated

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6. 468 U.S. 1032 (1984) (dismissing respondents' claims challenging the constitutionality of their deportation proceedings).

7. *See id.* at 1040 (O'Connor, J.) ("At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him.")

8. *See id.* at 1040 n.1.

9. *Id.*

10. *See id.*

11. 468 U.S. 737 (1984) (dismissing civil rights claim for lack of standing).

12. *See id.* at 739-40 (O'Connor, J.) (summarizing facts of case and nature of the claim).

13. *See id.* at 740 ("The issue before us is whether plaintiffs have standing to bring this suit. We hold that they do not.")

academies were causing the local public schools to become resegregated,<sup>14</sup> Justice O'Connor concluded that there was insufficient evidence that the actions of the Internal Revenue Service had in fact caused the flight of white children from the public schools.<sup>15</sup> Accordingly, Justice O'Connor dismissed the plaintiffs' claim for lack of subject matter jurisdiction.<sup>16</sup>

*Engle v. Isaac*<sup>17</sup> is another early case of O'Connor's in which she disposed of a constitutional claim on technical grounds. In that case, the criminal defendants claimed that under the Due Process Clause the State bore the burden of proving that the defendants had not acted in self-defense.<sup>18</sup> Justice O'Connor ruled that because the defendants had failed to object to the jury instructions in the trial court, and because they had failed to demonstrate sufficient "cause" justifying this omission, that they were barred from seeking *habeas corpus* relief in the federal courts.<sup>19</sup>

In *Strickland v. Washington*,<sup>20</sup> a death penalty case, Justice

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14. See *id.* at 775 (Brennan, J., dissenting). Justice Brennan stated:

With all due respect, the Court has either misread the complaint or is improperly requiring the respondents to prove their case on the merits in order to defeat a motion to dismiss. For example, the respondents specifically refer by name to at least 32 private schools that discriminate on the basis of race and yet continue to benefit illegally from tax-exempt status. Eighteen of those schools—including at least 14 elementary schools, 2 junior high schools, and 1 high school—are located in the city of Memphis, Tenn., which has been the subject of several court orders to desegregate. Similarly, the respondents cite two private schools in Orangeburg, S.C. that continue to benefit from federal tax exemptions even though they practice race discrimination in school districts that are desegregating pursuant to judicial and administrative orders. At least with respect to these school districts, as well as the others specifically mentioned in the complaint, there can be little doubt that the respondents have identified communities containing "enough racially discriminatory private schools receiving tax exemptions . . . to make an appreciable difference in public school integration."

*Id.* (footnote, internal citations, and citations to briefs and the record omitted).

15. See *id.* at 759 (O'Connor, J.) ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.")

16. See *id.* at 766 (reversing Court of Appeals, thereby reinstating judgment of district court dismissing claim for lack of constitutional standing).

17. 456 U.S. 107 (1982) (barring *habeas corpus* relief for constitutional claims that were not raised before the state courts, in the absence of sufficient cause justifying failure to raise claims).

18. See *id.* at 121-22 (O'Connor, J.) (setting forth respondents' constitutional claim that the state bore the entire burden of disproving self-defense beyond a reasonable doubt).

19. See *id.* at 124-34 (finding that respondents had failed to demonstrate sufficient cause justifying defense counsels' failure to object to the jury instructions on allocation of the burden of proof as to self-defense).

20. 466 U.S. 668 (1984) (denying claim of ineffective assistance of counsel during sentencing phase of capital case).

O'Connor implicitly invoked the doctrine of "harmless error."<sup>21</sup> She ruled that even if the condemned man's attorney had rendered ineffective assistance of counsel during the sentencing hearing, the defendant's death sentence would not be reversed unless the defendant could prove that there was a "reasonable probability" that the errors and omissions of his attorney had affected the outcome.<sup>22</sup> Because the defendant was unable to meet this standard, his sentence was affirmed.<sup>23</sup>

This early tendency of Justice O'Connor to dismiss claims on technical grounds extended to non-constitutional cases as well. In *Block v. Community Nutrition Institute*,<sup>24</sup> a group of consumers challenged an order of the Secretary of Agriculture raising the price of milk that processors must pay producers.<sup>25</sup> Justice O'Connor did not even reach the question of whether the consumers had "standing,"<sup>26</sup> but instead invoked the administrative law doctrine of "preclusion."<sup>27</sup> Although the federal statute governing this matter was silent as to the right of consumers to appeal milk market orders,<sup>28</sup> Justice O'Connor inferred from the statute that Congress had intended to preclude consumers from challenging these orders.<sup>29</sup>

There is one remarkable aspect about Justice O'Connor's disposition of these cases on procedural grounds, however, and that is the depth of her analysis. In each case she devotes considerable attention to developing a clear and precise outline of the relevant doctrine. For example, Justice O'Connor's opinion in *Allen v. Wright* has become a landmark case because of how thoroughly she explained

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21. *See id.* at 693-96, 699-701 (O'Connor, J.) (setting forth and applying standards for evaluating whether defendant was prejudiced by ineffective assistance of counsel).

22. *See id.* at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

23. *See id.* at 699-700 ("The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge.").

24. 467 U.S. 340 (1984) (dismissing consumers' challenge of milk market orders).

25. *See id.* at 341-44 (O'Connor, J.) (describing milk market orders in general and the order being challenged in particular).

26. *See id.* at 353 n.4 ("Since congressional preclusion of judicial review is in effect jurisdictional, we need not address the standing issues. . . .").

27. *See id.* at 345-53 (discussing and applying doctrine of preclusion).

28. *See id.* at 347 ("Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding.").

29. *See id.* at 348 ("[W]e think it clear that Congress intended that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers [and not consumers].").

the constitutional underpinnings,<sup>30</sup> the underlying purpose,<sup>31</sup> and the multiple elements<sup>32</sup> of the law of standing. Two decades later her opinion is still the definitive statement of the law of constitutional standing.<sup>33</sup>

During this early period on the Court, Justice O'Connor did not always avoid reaching the merits of the constitutional cases that came before her. One of the most significant decisions by O'Connor during this period was *Mississippi University for Women v. Hogan*,<sup>34</sup> where the Court declared a state university's policy admitting only women to its nursing program was a violation of the Equal Protection Clause.<sup>35</sup> Justice O'Connor also reached the merits of the "takings" claim in *Hawaii Housing Authority v. Midkiff*<sup>36</sup> in spite of the State's contention that the federal courts should have abstained from deciding the case.<sup>37</sup> Both of these decisions were followed by the Court and the substantive principles that she recognized in those cases were reaffirmed. *Hogan* laid the groundwork for the Court's decision in *United States v. Virginia*<sup>38</sup> while *Midkiff* was the principal case that the Court relied upon when it decided *Kelo v. City of New London*.<sup>39</sup>

Justice O'Connor also decided other constitutional claims on the merits during this early period,<sup>40</sup> but on the whole it must be admitted

30. See *Allen*, 468 U.S. at 750 (tracing standing doctrine to "case or controversy" requirement of Article III).

31. See *id.* at 750-51 (O'Connor, J.) (citing separation of powers concerns and pragmatic considerations that justify the law of standing).

32. See *id.* at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.") (citation omitted).

33. See, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11-12 (2004) (Stevens, J.); *Miller v. Albright*, 523 U.S. 420, 451 (1998) (Stevens, J.); and *Raines v. Byrd*, 521 U.S. 811, 818-819 (1997) (Rehnquist, C.J.) (all citing *Allen* for various aspects of the law of standing).

34. 458 U.S. 718 (1982) (striking down policy of excluding men from admission to nursing program at state university as violation of Equal Protection Clause).

35. See *id.* at 733 (O'Connor, J.) (concluding that gender-based admissions policy violates Equal Protection).

36. 467 U.S. 229 (1984) (denying claim that state land redistribution program was a "public use" within the meaning of the Eminent Domain Clause).

37. *Id.* at 236-39 (O'Connor, J.) (discussing abstention doctrine and deciding that abstention was not required in this case).

38. 518 U.S. 515 (1996) (striking down males-only admissions policy at public military college).

39. 125 S. Ct. 2655 (2005) (city's exercise of power of eminent domain for private development complied with "public use" requirement of Fifth Amendment).

40. See, e.g., *Kolendar v. Lawson*, 461 U.S. 352 (1983) (O'Connor, J.) (invalidating loitering statute as void for vagueness); *Michigan v. Long*, 463 U.S. 1032 (1983) (O'Connor, J.) (upholding protective search of passenger compartment during traffic stop); *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (O'Connor, J.) (striking down state

that she frequently helped to bar the courthouse door to litigants with constitutional claims. In contrast, two decades later at the close of her career we did not find Justice O'Connor so often splitting hairs in order to avoid adjudicating constitutional claims.<sup>41</sup> Instead, she authored a number of significant decisions interpreting the substantive provisions of the Constitution and explicating the fundamental rights of all persons. In the last two terms alone Justice O'Connor has written movingly of the necessity for affirmative action in students' admission to educational institutions,<sup>42</sup> the rights of homosexuals under the Equal Protection Clause,<sup>43</sup> the separation of church and state as required by the Establishment Clause in the Ten Commandments cases,<sup>44</sup> and the rights under the Due Process Clause of persons who are being detained as part of the "war on terror."<sup>45</sup>

Before turning to a review of these and other major cases, however, it is appropriate to consider two other general themes that have emerged as consistent markers of Justice O'Connor's jurisprudence. These are her sensitivity to the precise factual context of the cases before her and her respect for the principle of *stare decisis*.

## II. ATTENTION TO FACTUAL CONTEXT

Few justices of the Supreme Court have been more faithful to Oliver Wendell Holmes' maxims that "[g]eneral propositions do not decide concrete cases"<sup>46</sup> and "[t]he life of the law has not been logic; it has been experience."<sup>47</sup> Justice O'Connor devoutly believes that "context matters" in constitutional interpretation.<sup>48</sup> For example, in *City of Richmond v. J.A. Croson Co.*<sup>49</sup> she ruled that the legal standard of "strict scrutiny" applies whenever the government treats people

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tax on paper and ink products under First Amendment).

41. *But see* O'Sullivan v. Boerckel, 526 U.S. 838 (1999) (O'Connor, J.) (dismissing claim for *habeas corpus* relief on ground that prisoner had failed to present claim to highest court of state for discretionary review).

42. *See infra* notes 131-36 and accompanying text.

43. *See infra* notes 120-27 and accompanying text.

44. *See infra* notes 154-59 and accompanying text.

45. *See infra* notes 160-69, 174 and accompanying text.

46. *Lochner v. New York*, 198 U.S. 45, 76 (Holmes, J., dissenting).

47. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

48. *See* Tracy Carbasho, *Justice O'Connor Leaves Stellar Legacy Through Distinguished Service on Supreme Court*, 7 *LAWYERS J.* 6 (2005) (quoting Professor John Burkoff to effect that "O'Connor's biggest contribution to the court was her pragmatism and her willingness to look at the actual effect the court's decisions had on real people, rather than focusing on doctrinal niceties").

49. 488 U.S. 469 (1989) (striking down municipal minority set-aside program for public contracting).



differently on account of race, and therefore, strict scrutiny applied to an affirmative action program used to ensure that minority contractors would participate in municipal public works contracts.<sup>50</sup> She repeated this requirement in *Adarand Constructors, Inc. v. Peña*<sup>51</sup> where she stated: “[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>52</sup> Under strict scrutiny, the government has the burden of proving that the law in question is necessary for achieving a compelling governmental interest.<sup>53</sup> Because the City of Richmond was unable to prove that the minority contracting set aside program was the least restrictive means for accomplishing a compelling governmental interest, Justice O’Connor ruled that the program was unconstitutional.<sup>54</sup> However, fourteen years after *Croson* and eight years after *Adarand* Justice O’Connor ruled that the strict version of strict scrutiny that she had applied in those two government contracting cases should not apply to affirmative action in admissions to public colleges and universities. In *Grutter v. Bollinger*,<sup>55</sup> Justice O’Connor wrote an opinion holding that an affirmative action program in college admissions was constitutional, and although she paid lip service to the proposition that strict scrutiny applies to all racial distinctions that are drawn by the law, she applied a very relaxed version of strict scrutiny in *Grutter*; instead of requiring the university to prove that affirmative action in admissions served compelling governmental purposes, Justice O’Connor deferred to the judgment of university

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50. See *id.* at 494 (O’Connor, J.) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”).

51. 515 U.S. 200 (1995).

52. *Id.* at 227 (O’Connor, J.).

53. See *Grutter v. Bollinger*, 539 U.S. 306, 391 (2003) (Kennedy, J., dissenting) (“The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way.”).

54. See *Croson*, 488 U.S. at 505 (“In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.”). In *Adarand* the Court did not reach the question of whether the minority contracting set-aside program would survive strict scrutiny review, but instead remanded this question to the lower courts. See *Adarand*, 515 U.S. at 237 (O’Connor, J.) (“Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced.”).

55. 539 U.S. 306 (2003) (upholding law school’s race-based affirmative action admissions program).

officials on this core question.<sup>56</sup> She stated: “Context matters when reviewing race-based governmental action under the Equal Protection Clause.”<sup>57</sup> In the following passage she explained why the strict scrutiny standard must be applied differently in different cases:

Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.<sup>58</sup>

*Grutter* is not the only case where Justice O'Connor has adjusted a legal standard in light of the factual context. In *Lawrence v. Texas*<sup>59</sup> Justice O'Connor found it would be inappropriate to apply the traditional form of the “rational basis test” to evaluate the constitutionality of a law that was directed against homosexuals.<sup>60</sup> Noting that this law had the effect of “stigmatizing” gays and lesbians,<sup>61</sup> Justice O'Connor declared, “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”<sup>62</sup> Employing this “more searching form of rational basis review,” Justice O'Connor voted to strike down the state law criminalizing homosexual conduct.<sup>63</sup>

Justice O'Connor's willingness to adjust the traditional standards of review according to the factual context of a case is essentially a balancing approach,<sup>64</sup> and it is consistent with the approach of many

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56. See *id.* at 328 (O'Connor, J.) (“Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.”).

57. *Id.* at 327.

58. *Id.* at 327.

59. 539 U.S. 558 (2003) (invalidating Texas statute making homosexual sodomy a crime).

60. See *infra* text accompanying note 62.

61. See *Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring) (“The Texas sodomy statute subjects homosexuals to ‘a lifelong penalty and stigma.’”) (citation omitted).

62. *Id.* at 580.

63. *Id.* at 585 (“I therefore concur in the Court's judgment that Texas' sodomy law banning ‘deviate sexual intercourse’ between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.”).

64. See C. Lincoln Combs, *A Curious Choice: Hibbs v. Winn as a Case Study of Sandra Day O'Connor's Balancing Jurisprudence*, 37 ARIZ. ST. L.J. 183, 192 (2005) (“Justice O'Connor's jurisprudential style has been called many things: accommodationist, marginalist, pragmatic, inconsistent, and unpredictable. Perhaps the best way to describe her judicial analysis is ‘balancing.’”) (footnotes omitted).

other thoughtful justices. Justice John Harlan, for example, expressed the idea that questions of constitutional law essentially require us to balance competing considerations. He described this balance in the following terms:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.<sup>65</sup>

Balancing tests have been devised and employed by a number of other justices, including Thurgood Marshall,<sup>66</sup> John Paul Stevens,<sup>67</sup> and Steven Breyer.<sup>68</sup> Each of these judges implicitly recognized that standards of review such as "strict scrutiny" and "rational basis" are not constituent parts of the Constitution, but rather are useful tools for interpreting and applying the Constitution. These standards are not constitutional doctrine in the same sense as "freedom of speech" or "liberty" or "equality." They are instead judicially-created frameworks useful for explaining the underlying principles of constitutional law by

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65. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (dissenting from denial of certiorari in case challenging the constitutionality of a Connecticut law prohibiting the use of contraceptives). *See also* Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 80 ("The *Casey* joint opinion authors' defection to Harlanism enraged Justice Scalia . . .").

66. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98-99 (Marshall, J., dissenting):

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

67. *See Cleburne v. Cleburne Living Centers, Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process.")

68. *See Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 741 (1996) (Breyer, J.). "[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Id.*

identifying all of the elements that enter the constitutional calculus and by assigning the burden of proof as to each of those elements.<sup>69</sup>

The fact-based approach of Justice O'Connor releases her from ideology and makes possible her role as the "moderate" justice between the liberal and conservative wings of the Supreme Court.<sup>70</sup> She inherited the mantle of "swing justice" from Justice Lewis Powell<sup>71</sup> and it is noteworthy that in key cases she has closely followed his rulings which employed the use of flexible legal standards. In *Grutter*, Justice O'Connor expressly adopted Justice Powell's reasoning which applied strict scrutiny but which deferred to educational institutions on the question of admissions.<sup>72</sup> Similarly in *Casey*, she and the other members of the plurality expressly adopted Justice Powell's "undue burden" test in abortion cases.<sup>73</sup> Justice O'Connor admires Lewis Powell,<sup>74</sup> and like him she has attempted to avoid being confined by doctrine in order to give full expression to the constitutional conflict that arises from the factual context of the case.

Professor Ken Gormley, a friend of Justice O'Connor, has been quoted to the effect that "[Justice O'Connor's] experience as Senate majority leader in Arizona gave her the ability to build consensus on the

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69. See generally Wilson Huhn, *Assessing the Constitutionality of Laws That Are Both Content Based and Content Neutral*, 79 IND. L. J. 801 (2004); Wilson Huhn, *Scienter, Causation, and Harm: The Right-Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125 (2004) (describing a balancing approach to determining the constitutionality of laws under the First Amendment).

70. See *supra* note 3 and accompanying text.

71. See Erwin Chemerinsky, *The O'Connor Legacy*, 41 TRIAL 68 (September, 2005) ("Since 1987, when Justice Lewis Powell retired, Sandra Day O'Connor has been considered the decisive vote in countless areas of constitutional law. Most years, she was in the majority in 5-4 decisions more often than any other justice.").

72. See *Grutter*, 539 U.S., at 330. Justice O'Connor stated:

In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.' From this premise, Justice Powell reasoned that by claiming 'the right to select those students who will contribute the most to the 'robust exchange of ideas,' a university 'seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.'

*Id.* at 330 (quoting *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 312-13 (1978) (Powell, J.)).

73. See *Maher v. Roe*, 432 U.S. 464, 473-474 (1977) (Powell, J.) ("Roe did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.").

74. See generally SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE*, 147-50 (2003) (chapter on Lewis Powell, one of six justices earning a separate chapter in Justice O'Connor's judicial memoir).

court even when the most divisive issues were being discussed.<sup>75</sup> However, her ability to seek compromise is not universally admired; Justice O'Connor's nuanced approach and moderate views have been criticized in some quarters.<sup>76</sup> For example, conservative columnist Charles Krauthammer has stated: "Unlike a principled conservative such as Antonin Scalia, or a principled liberal such as Ruth Bader Ginsburg, O'Connor had no stable ideas about constitutional interpretation."<sup>77</sup> Justice Scalia, on the other hand, apparently finds Justice O'Connor to be *too* ideological!<sup>78</sup> Justice O'Connor has never responded to her critics in kind. The dignified tone of her judicial opinions reflects the same level of professionalism that is evident in her attention to detail and her thorough legal analysis.<sup>79</sup>

### III. RESPECT FOR PRECEDENT

During her tenure on the Court Justice O'Connor has demonstrated her commitment to precedent and her devotion to the principle of *stare decisis*.<sup>80</sup>

Justice O'Connor set forth a comprehensive approach to precedent in the plurality opinion that she co-authored with Justice Kennedy and Justice Souter in *Casey v. Planned Parenthood of Southeastern*

75. Carbasho, *supra* note 48, at 11.

76. See Combs, *supra* note 64 (citing authorities characterizing Justice O'Connor's reasoning as "accommodationist," "marginalist," "inconsistent," and "unpredictable").

77. Charles Krauthammer, *Philosophy for a Judge*, WASH. POST, July 8, 2005, at A23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/07/AR2005070701898.html> (last visited Dec. 14, 2005).

78. See *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 981 (Scalia, J., dissenting) (where he accuses the majority of the justices of the Court of succumbing to the temptation of "systematically eliminating checks upon its own power"); *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting). Scalia criticized:

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.

*Id.*

79. See O'CONNOR, *supra* note 74, at 228 ("Ranting and raving probably do little to convince. A more persuasive technique is to present yourself as a reasonable person who wants to see justice done . . .") (from her chapter on *Professionalism*).

80. See, e.g., *New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., dissenting) (refusing to join majority opinion altering the application of the *Miranda* rule, and stating, "Were the Court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures."); see also George C. Thomas, III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 33 (describing Justice O'Connor as "reluctant to overrule precedent").

*Pennsylvania*.<sup>81</sup> In that case, the plurality carefully explained why they believed that it was not justified to overrule *Roe v. Wade*. Here are the central paragraphs of that opinion summarizing the four factors that a Justice of the Supreme Court should take into account in deciding whether to follow or to overrule constitutional precedent:

[I]t is common wisdom that the rule of *stare decisis* is not an “inexorable command,” and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>82</sup>

Justice O'Connor and her colleagues in the *Casey* plurality did not simply articulate the factors that should influence the Court to follow or to overturn judicial precedent; rather, they engaged in an extended discussion of constitutional history in order to demonstrate how these principles had been applied in the past. In order to illustrate the meaning and the importance of the *Casey* factors, the plurality thoroughly discussed and carefully distinguished two occasions when the Supreme Court had found it necessary to overrule significant constitutional doctrine. The plurality painstakingly explained why it was appropriate for the Court to overturn the principle of “economic substantive due process” in 1937 in *West Coast Hotel v. Parrish*<sup>83</sup> and why it was appropriate to overturn the principle of “separate but equal” in *Brown v. Board of Education*<sup>84</sup> in 1954.<sup>85</sup> The plurality in *Casey* applied the four factors that they had previously identified in showing that the Court in

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81. 505 U.S. 833 (1992) (reaffirming *Roe* but upholding some regulations of abortion).

82. *Id.* at 854-55 (Kennedy, O'Connor, and Souter, JJ., concurring) (citations omitted).

83. 300 U.S. 379 (1937) (upholding Washington State statute setting minimum wage for women).

84. 347 U.S. 483 (1954) (striking down State laws and policies requiring separation of the races in the public schools).

85. See *Casey*, 505 U.S. at 863-64 (Kennedy, O'Connor, and Souter, JJ., concurring) (discussing Court's decision to overrule precedent in *Parrish* and *Brown*).

those cases had been justified in overruling *Plessy v. Ferguson*<sup>86</sup> and *Adkins v. Children's Hospital*.<sup>87</sup> The plurality argued that *Roe* was different from either *Plessy* or *Adkins*.<sup>88</sup>

Applying the four elements of *stare decisis*, Justice O'Connor and the other two members of the *Casey* plurality concluded that *Roe v. Wade* should not be overruled because the central holding of *Roe* – that a woman has a fundamental right to terminate a pregnancy prior to viability – had not proven to be unworkable for the courts to apply, it could not be removed without inequity to individuals or instability to a society which had come to rely upon it, it had not been undermined by subsequent cases, and it was not based upon facts or understandings of fact which had proven false.<sup>89</sup>

The question at the heart of the *Casey* decision – whether *Roe* should be overruled – has remained the principal constitutional question facing this Nation. Even thirteen years after *Casey* and thirty-two years after *Roe*, this issue has proven to be the single greatest constitutional concern in the minds of the American people. This was amply demonstrated at the recent Senate hearings on the candidacy of John Roberts, Jr., for the Supreme Court, where Senator Arlen Specter, Chairman of the Senate Judiciary Committee, reportedly said, “The hearing has dealt extensively with . . . a woman’s right to choose. . . . It

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86. 163 U.S. 537 (1896) *overruled by* *Brown v. Board of Education*, 347 U.S. 483 (1954) (upholding Louisiana statute requiring separation of the races on passenger trains).

87. 261 U.S. 525 (1923) *overruled in part by* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (striking down law establishing minimum wage for women).

88. *See Casey*, 505 U.S. at 864-65 (Kennedy, O'Connor, and Souter, JJ., concurring).

In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. Because the cases before us present no such occasion it could be seen as no such response.

*Id.*

89. *See id.* at 860-61 (Kennedy, O'Connor, and Souter, JJ., concurring).

The sum of the precedential inquiry to this point shows *Roe's* underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's* central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

*Id.*

boiled down really to Judge Roberts' statement that he felt he could not speak to that issue."<sup>90</sup>

In evaluating candidates for the High Court, I recommend that they be asked, not "Would you vote to overrule *Roe v. Wade*?" but rather, "What are the factors that militate in favor of or against overruling major cases?" Interested citizens and our Senators should attempt to determine whether candidates will follow in the footsteps of Justice Sandra Day O'Connor in her respect for the principle of *stare decisis*. They should attempt to determine whether the candidate accepts the relatively strict formula that Justice O'Connor and the other members of the plurality developed in *Casey*.

The plurality's opinion in *Casey* transcends the question of abortion and touches upon a question that lies at the heart of the American constitutional experiment. In light of the fact that the meaning of the Constitution changes over time, is our Constitution a law or simply a collection of political principles? This is a critically important question for any society that considers itself to be a government of laws, not of men. As Justice John Marshall explained in *Marbury v. Madison*,<sup>91</sup> the Constitution is not only a law, it is a supreme and paramount law,<sup>92</sup> and the power of the Supreme Court to interpret the Constitution stems from the premise that the Constitution is law.<sup>93</sup> If the Constitution is a law, how is it possible that the meaning of that law changes over time?

Justices who do not respect precedent – Justices who would

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90. See, e.g., Jan Crawford Greenburg, *How Focus on Roe Pushes Aside Other Court Issues*, CHI. TRIB., December 29, 2005, at C1.

After days of testimony, dozens of witnesses and hundreds of questions, the Senate hearings for John Roberts Jr.'s Supreme Court nomination ended exactly as they began, focused on one case and one issue. "The hearing has dealt extensively with . . . a woman's right to choose," Judiciary Committee Chairman Arlen Specter (R-Pa.) said in the waning minutes on Sept. 15. "It boiled down really to Judge Roberts' statement that he felt he could not speak to that issue." Throughout his testimony, Roberts—like every other Supreme Court nominee in recent decades—confronted and deflected scores of questions aimed at whether he would vote to overturn *Roe vs. Wade*, the court's landmark decision that gave women a constitutional right to an abortion. *Roe* is certain to be the central issue in hearings, scheduled to start Jan. 9, on federal Judge Samuel Alito's nomination, as well.

*Id.*

91. 5 U.S. 137 (1803) (establishing the primacy of the Constitution and the principle of judicial review).

92. *Id.* at 177 (Marshall, C.J.) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.").

93. *Id.* ("It is emphatically the province and duty of the judicial department to say what the law is.").



overrule doctrine and decisions that they disagree with, without giving any weight to the considered judgment of their forebears – are not being faithful to the Constitution because they are conducting themselves as if the Constitution were not a law. If *stare decisis* has no independent weight – if precedent can be freely overruled whenever a majority of the Court agrees – then in confirming nominees it would make perfect sense to demand to know how they intend to rule in specific cases. On the other hand, if *stare decisis* is an important constitutional principle – if we continue to appoint Justices who respect precedent – then it becomes much less necessary to ascertain a candidate’s personal views about specific cases. While the Constitution changes over time, it is not acceptable that the Constitution should be expected to change with every Presidential election, like foreign policy<sup>94</sup> or administrative law.<sup>95</sup> The concept of the Constitution as law is preserved precisely because of the four factors set forth in the *Casey* plurality opinion. Furthermore, as the *Casey* plurality explained, questionable interpretations of the Constitution which are unworkable, which are not being relied upon, which have been undermined, or which are based upon false premises may be justifiably overruled – in fact they *should* be overruled. We may thank Justices O’Connor, Kennedy, and Souter for this important

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94. See David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1440 (criticizing judicial deference to President’s interpretation of treaties, and stating, “there is very real cause for concern in unbridled judicial deference to executive branch decision making in the foreign relations area”).

95. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984) (Stevens, J.) (upholding regulation reversing environmental policy of previous administration). Justice Stevens stated:

an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Id.* See also *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, C.J., dissenting).

The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

*Id.* (footnote omitted).

insight.

We also owe a debt of gratitude to Justices O'Connor, Kennedy, and Souter for their candid description of the toll that dedication to the rule of law exacts from its devotees. Justice O'Connor and the other members of the *Casey* plurality described the moral strength that the principle of *stare decisis* demands:

Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.<sup>96</sup>

#### IV. FUNDAMENTAL CONSTITUTIONAL VALUES

Over the past quarter-century Justice O'Connor has played a key role in defining our fundamental rights. She has made substantial contributions to our understanding of constitutional principles such as the right to privacy, gay rights, affirmative action, the separation of church and state, and federalism. Furthermore, in all of these areas her views have evolved as her insight into these subjects broadened and deepened over the years.

##### A. *Abortion and the Right to Privacy*

Sandra Day O'Connor saved *Roe v. Wade*. In 1992 four justices, including the Chief Justice, stood ready to overrule *Roe*.<sup>97</sup> In what

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96. *Casey*, 505 U.S. at 867-68 (O'Connor, Kennedy, and Souter, JJ.).

97. *See id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (joined by White, Scalia, and Thomas, JJ.) ("We believe that *Roe* was wrongly decided, and that it

Justice Blackmun called “an act of personal courage and constitutional principle[.]”<sup>98</sup> Justice O’Connor, along with Justices Anthony Kennedy and David Souter, voted to reaffirm *Roe*.

Justice O’Connor had announced her personal opposition to abortion at her confirmation hearing in 1981, although she appropriately refused to answer how she would rule if the question of abortion were to come before the Court again.<sup>99</sup> Over the next decade a number of abortion cases were accepted for certiorari, but Justice O’Connor steadfastly refused to vote to say whether she would overturn *Roe*.<sup>100</sup> Finally, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>101</sup> Justice O’Connor made up her mind. In that case, Justices O’Connor, Kennedy, and Souter declared in ringing terms that a woman’s right to terminate a pregnancy before the point of fetal viability is a constitutional right.<sup>102</sup> In the plurality opinion that they jointly authored they explained why the Constitution protects a woman’s right to make this decision:

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the

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can and should be overruled . . .”).

98. *Id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

99. See Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 918 n.11 (1983) (quoting Justice O’Connor as giving the following personal opinion regarding abortion, “[I]t is something that is repugnant to me. . . .”); see also *id.* at 918 (noting that she declined to answer questions of constitutional law).

100. See, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490, 526 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“When the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.”).

101. 505 U.S. 833 (1992) (reaffirming *Roe* while upholding some regulations of abortion).

102. See *id.* at 901 (O’Connor, Kennedy, and Souter, JJ.).

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.

*Id.*

State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>103</sup>

The significance of the plurality opinion in *Casey* was not limited to abortion. As previously mentioned, the three justices comprehensively examined the concept of *stare decisis* in constitutional cases.<sup>104</sup> In addition, Justices O'Connor, Kennedy, and Souter delivered the clearest and strongest statement to date of the Right to Privacy generally. Referring to decisions protecting constitutional rights involving "marriage, procreation, contraception, family relationships, child rearing, and education,"<sup>105</sup> the plurality stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>106</sup>

This statement of the Right to Privacy was expressly endorsed by a majority of the Supreme Court in *Lawrence v. Texas*.<sup>107</sup>

Just as Justice O'Connor saved a woman's right to terminate an early pregnancy, she was also instrumental in saving the Right to Privacy generally. Prior to *Casey* Justice Antonin Scalia, in footnote six of his opinion in the case of *Michael H. v. Gerald D.*,<sup>108</sup> had declared that our fundamental rights arise from two sources, and two sources only – specific constitutional text and specific American traditions.<sup>109</sup> In refusing to recognize concepts such as "parenthood" or "family

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103. *See id.* at 852.

104. *See supra* notes 81-89, and accompanying text.

105. *Casey*, 505 U.S. at 851.

106. *Id.* (Kennedy, J., O'Connor, J., and Souter, J., plurality opinion).

107. *See Lawrence*, 539 U.S. at 574 (Kennedy, J.) ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.")

108. 491 U.S. 110 (1989) (upholding California statute preventing biological father from establishing paternity of child born to a woman married to another man).

109. *Id.* at 127 n.6 (Scalia, J.).

relationships” as embodying constitutional rights, Justice Scalia stated broadly that “a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”<sup>110</sup> By limiting constitutional rights to those expressly set forth in the Bill of Rights<sup>111</sup> and to those which have been traditionally recognized, Justice Scalia would have cut off the constitutional claims of any groups who have been traditionally oppressed. Traditional notions of justice or morality, no matter how irrational or unfair, would by definition be constitutional under Justice Scalia’s crabbed interpretation of American liberty.

In *Michael H.*, Justice O’Connor, joined by Justice Kennedy, refused to agree to this portion of Justice Scalia’s opinion. In a concurrence that is just four sentences long, she rejected the concept of equating “liberty” with “tradition.”

I concur in all but footnote 6 of Justice Scalia’s opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be “the most specific level” available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.<sup>112</sup>

In refusing to “foreclose the unanticipated,” Justice O’Connor demonstrated the wisdom and restraint that are the hallmarks of her jurisprudence. This concurring opinion by the two moderate members of the Supreme Court effectively blocked efforts to limit the right to privacy to those rights which have been traditionally recognized.

After *Casey*, Chief Justice Rehnquist made one more effort to limit the scope of our fundamental rights to traditional rights in *Washington v. Glucksberg*,<sup>113</sup> which dealt with the right of assisted suicide.<sup>114</sup> In upholding a state statute that prohibited assisted suicide in all circumstances, the Chief Justice stated in his majority opinion that our fundamental rights consist of those which are “deeply rooted in our legal

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110. *Id.*

111. *Compare* U.S. Const., amend. 9 (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

112. *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring) (citations omitted).

113. 521 U.S. 702 (1997) (upholding Washington statute forbidding assisted suicide).

114. *See id.* at 705-06 (Rehnquist, C.J.) (“The question presented in this case is whether Washington’s prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offends the Fourteenth Amendment to the United States Constitution.”).

tradition.”<sup>115</sup> While concurring that there is no general constitutional right to commit suicide, Justice O'Connor wrote separately and reserved judgment upon the question of whether such a right might accrue to “a mentally competent person who is experiencing great suffering.”<sup>116</sup> In this instance, as in *Michael H.*, Justice O'Connor once again refused to “foreclose the unanticipated” in defining the sources of law from which our fundamental rights are thought to originate.

Justice O'Connor's decision to recognize that our fundamental rights are not defined solely by reference to tradition has a broader implication as well. The corollary to the idea that tradition does not utterly encompass all fundamental rights is the principle that traditional notions of right and wrong – moral traditions – are not sufficient to justify laws that treat people differently. This corollary was brought to fruition in *Lawrence v. Texas*<sup>117</sup> which is the subject of the next portion of this essay.

### B. *Gay Rights – From Bowers to Lawrence*

In the field of gay rights, Justice O'Connor has moved from being an instrument of oppression to becoming an exponent of toleration and equality.

In 1986, Justice O'Connor concurred in the majority opinion authored by Justice Byron White in *Bowers v. Hardwick*.<sup>118</sup> In that decision, Justice White upheld a Georgia statute that on its face made all acts of sodomy – homosexual and heterosexual – a crime. However, the Court's ruling was limited to a finding that *homosexual sodomy* could lawfully be proscribed, and it did not reach the question of whether the law could be applied against a heterosexual couple.<sup>119</sup> The Court did not

115. *Id.* at 722 (“[T]he outlines of the ‘liberty’ specially protected by the Fourteenth Amendment . . . have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”).

116. *Id.* at 736 (O'Connor, J., concurring).

117. 539 U.S. 558 (2003) (striking down Texas law criminalizing homosexual sodomy).

118. 478 U.S. 186 (1986) *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (upholding Georgia sodomy statute as applied to homosexual behavior).

119. *See id.* at 188 n.2 (White, J.). The Court noted:

John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by [the Georgia statute] in the privacy of their home, and that they had been “chilled and deterred” from engaging in such activity by both the existence of the statute and Hardwick's arrest. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, and the Does do not challenge that

consider whether the Georgia statute, so construed, constituted a violation of Equal Protection.

In 2003, in her concurring opinion in *Lawrence v. Texas*, Justice O'Connor addressed the issue that had been left open by the Court seventeen years previously in *Bowers*, and she concluded that a State law could not criminalize homosexual sodomy without also criminalizing the same conduct by heterosexual couples.<sup>120</sup> In accordance with her reluctance to overrule precedent, she did not join the majority opinion in *Lawrence*, overruling *Bowers* on Due Process grounds.<sup>121</sup> However, her separate concurrence on Equal Protection grounds contains a vigorous defense of the rights of gay and lesbian individuals, and it does so in a manner that extends constitutional protection to all oppressed, unpopular groups. She makes three key points in reaching the conclusion that this law was unconstitutional.

First, Justice O'Connor rejected the notion that this law was aimed at *conduct* and not a *class of people*, stating: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual."<sup>122</sup>

The second pivotal holding of Justice O'Connor's opinion in *Lawrence* is that "moral disapproval" of a group of people or their behavior is not a sufficient basis to justify a law that criminally penalizes that conduct. Indeed, Justice O'Connor went beyond this point, and added that "moral disapproval" is not even a *legitimate* governmental

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holding in this Court.

The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

*Id.* at 188 n.2 (White, J.) (citations omitted).

120. See *Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring in the judgment).

121. See *id.* at 582. Justice O'Connor stated:

In *Bowers* we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers* whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.

*Id.* at 582 (citations omitted).

122. *Id.* at 583.

interest, in effect equating “moral disapproval, without any other asserted state interest” with irrational prejudice:

Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.”<sup>123</sup>

Justice O'Connor's decision to protect non-traditional behavior in *Lawrence* is consistent with her refusal to agree with the position of Justice Scalia and Chief Justice Rehnquist defining constitutional rights solely by reference to tradition.<sup>124</sup> In my opinion, the *Lawrence* case firmly entrenches the proposition that constitutional rights are not circumscribed by tradition, but rather encompass broader principles that transcend tradition.

The third important aspect of Justice O'Connor's concurring opinion in *Lawrence* is that it identifies the real reason that this law was enacted, and in doing so, it cut to the heart of the question of gay rights. Justice O'Connor objected to the Texas law because it “brands all homosexuals as criminals” thus justifying discrimination against them.<sup>125</sup> She noted that the real purpose and function of this law may not have been to prosecute people for consensual homosexual conduct, but rather that the law served as “a statement of dislike and disapproval against homosexuals.”<sup>126</sup> She concluded:

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123. See *id.* at 582-83 (citations omitted); see also *id.* at 582 (“This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not.”).

124. See *supra* notes 108-16 and accompanying text.

125. See *Lawrence*, 539 U.S. at 581.

[T]he effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law “legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,” including in the areas of “employment, family issues, and housing.”

*Id.* (citations omitted).

126. See *id.* at 583 (“[A]s applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.”).



A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.<sup>127</sup>

Justice O'Connor's final point is of great significance to the ongoing debate over gay rights. In my opinion, homosexuals were scapegoated in the 2004 Presidential election by many politicians and political organizations.<sup>128</sup> Homosexuals are the bogeymen who are no longer in the closet, but who are rather emerging from it to claim equal rights to health care, to employment, and to marriage.<sup>129</sup> The criminal law that was struck down in *Lawrence* was the foundation for all of the other discrimination heaped upon homosexuals.<sup>130</sup> By exposing the bias against homosexuals as nothing more than bigotry, Justice O'Connor helped to shatter the philosophical cornerstone of societal discrimination against homosexuals to such an extent that it cannot be rebuilt.

### C. Affirmative Action – The Effect on Society

I described above how Justice O'Connor changed the application of the strict scrutiny rule from what it had been in *Croson*, where the burden of proof was on the government, to *Grutter*, where the

127. *Id.* at 585.

128. See, e.g., Steve Hoffman, *Blackwell Rising, Where is Ohio Headed? Ken's Prescriptions Sound More Appealing Than They Are*, AKRON BEACON JOURNAL, September 29, 2005, B3 ("The 2004 presidential election also worked in [Ohio Secretary of State Kenneth] Blackwell's favor. The Republicans relied on their conservative base to win, and Blackwell helped by supporting a mean-spirited (and wildly successful) amendment banning gay marriage that bolstered turnout."); Philip Morris, *Blackwell Puts His Prejudice on Display*, CLEVELAND PLAIN DEALER, October 26, 2004, Forum B9 (quoting Blackwell at a rally before a Toledo church group as saying, "But I can tell you right now that the notion [gay marriage] even defies barnyard logic . . . the barnyard knows better.").

129. See, e.g., Wilson Huhn, *Ohio Issue 1 Is Unconstitutional*, 28 N.C. CENT. L.J. 1 (citing reports of the thousands of gay couples who attempted to marry across the United States in the fall of 2004).

130. See *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) ("This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.").

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as 'discrimination' which it is the function of our judgments to deter.

*Id.*

government was given the benefit of the doubt.<sup>131</sup> But there is another more significant reason why Justice O'Connor concluded that affirmative action programs in public contracting were unconstitutional while affirmative action programs in admission to institutions of higher education were constitutional. Justice O'Connor recognized that the reasons justifying affirmative action in education are far more compelling than the reasons supporting affirmative action in contracting.

In *Croson* Justice O'Connor had vowed that non-remedial purposes – essentially social engineering – cannot be used to justify affirmative action programs. Her language on this point was seemingly comprehensive and unambiguous. She stated that “[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”<sup>132</sup>

In light of this ruling, it appeared that non-remedial affirmative action was dead.<sup>133</sup> But when Justice O'Connor was faced with the same question that had confronted Justice Lewis Powell in *Regents of University of California Regents v. Bakke*<sup>134</sup> she came to the same conclusion that Justice Powell had that affirmative action in admissions to colleges and universities could be justified by the importance of diversity within the educational environment.<sup>135</sup> However, she went even farther than Justice Powell had in identifying the policy justifications that support affirmative action in higher education. She added the observation that affirmative action in admission to colleges and universities is necessary to serve *societal* goals as well as *pedagogical* ones. She stated:

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131. See *supra* notes 49-58 and accompanying notes.

132. *Croson*, 488 U.S. at 493 (O'Connor, J.).

133. See Charles Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989) (“The principal, perhaps the only, state interest sufficiently compelling to meet this burden [of strict scrutiny] is the remedying of identified acts of discrimination.”) (footnote omitted).

134. 438 U.S. 265 (1978) (invalidating use of racial quotas for admission to medical school but upholding use of race as a factor that may be considered).

135. See *id.* at 314 (Powell, J.).

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

*Id.*; *Grutter*, 539 U.S. at 308 (O'Connor, J.) (“[T]he Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes.”).

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.<sup>136</sup>

This aspect of Justice O'Connor's opinion greatly strengthens the foundation supporting affirmative action programs. Her reasoning looks to the future, not to the past, to evaluate the usefulness or necessity for these programs, and it considers all of the consequences of affirmative action upon our society – not merely the consequences that occur within the walls of academia, but what kind of society we will live in if minority groups do not have the opportunity to earn advanced degrees from the nation's more prestigious institutions. Justice O'Connor's analysis takes into account not merely how the individuals and educational institutions in question are affected by affirmative action, but also how society as a whole is affected. Justice O'Connor's comprehensive approach enabled the Court to evaluate all of the factors that bear upon the constitutionality of affirmative action.

#### *D. Establishment Clause – The “No Endorsement” Test*

In 1984, in *Lynch v. Donnelly*,<sup>137</sup> Justice O'Connor produced a concurring opinion setting forth her understanding of the Establishment Clause.<sup>138</sup> *Lynch* involved the question of whether a nativity scene could be included in a town-sponsored holiday display that included Santa Claus and other secular elements,<sup>139</sup> and Justice O'Connor supplied the

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136. *Grutter*, 539 U.S. at 332 (O'Connor, J.) (citations omitted).

137. 465 U.S. 668 (1984) (upholding inclusion of nativity scene in municipal display as one element in a secular holiday display).

138. *See id.* at 687-94 (O'Connor, J., concurring).

139. *See id.* at 671 (Burger, C.J.).

The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads “SEASONS GREETINGS,” and the crèche at

fifth vote upholding the inclusion of the nativity scene.<sup>140</sup> However, in her separate concurrence she declared the principle that the Establishment Clause prohibits “government endorsement or disapproval of religion.”<sup>141</sup> At this time the leading case on the Establishment Clause was *Lemon v. Kurtzman*<sup>142</sup> where the Court had stated that in order to pass constitutional muster a law must have a secular purpose, it must have a primary secular effect, and there must be no excessive entanglement with religion.<sup>143</sup> In the following passage from *Lynch* Justice O'Connor explained how to reconcile the *Lemon* test with the rule against “endorsement” of religion:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>144</sup>

Justice O'Connor adhered to the “no endorsement” test throughout her tenure on the Court,<sup>145</sup> and during most of that time the “no endorsement” test has been the moderate position between the “no coercion” test of the conservative wing of the Court and the “purely secular purpose” test of the liberal wing.<sup>146</sup>

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issue here.

*Id.*

140. *See id.* at 687 (O'Connor, J., concurring).

141. *Id.* at 687-88.

142. 403 U.S. 602 (1971) (striking down state statutes providing funds directly to parochial schools as violation of Establishment Clause).

143. *See id.* at 612-13 (Burger, C.J.) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”) (citation omitted).

144. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

145. *See, e.g.,* *McCreary County, Kentucky, v. A.C.L.U.*, 125 S. Ct. 2722 (2005) (O'Connor, J., concurring) (utilizing endorsement test).

146. *See, e.g.,* *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down prayers at public school graduations); *id.* at 599 (Kennedy, J.,) (using “no coercion” test and stating, “No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise.”); *id.* (Blackmun, J., concurring) (“Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution.”); *id.* at 618-26 (Souter, J., concurring) (contending that the Establishment Clause forbids government endorsement of religion in addition to coercive laws or policies); *id.* at 640-41 (Scalia, J., dissenting) (contending that the Establishment Clause prohibits only government coercion “by force of law and threat of penalty” as well as endorsement of the views of a particular religious sect).

In another hard-fought and important Establishment Clause case, *Zelman v. Simmons-Harris*,<sup>147</sup> the school voucher case,<sup>148</sup> Justice O'Connor voted with the 5-4 majority to uphold the school voucher program, but once again she wrote separately, and once again she exhibited her hallmarks of respect for precedent and careful attention to factual context.<sup>149</sup> Justice O'Connor's concurring opinion thoroughly reviews the factual record regarding the numbers of students attending religious, community, and magnet schools, as well as the level of governmental support for each type of institution in determining whether parents truly had a choice of religious and nonreligious institutions at which to spend their voucher dollars.<sup>150</sup> For Justice O'Connor, it was significant that the decision of the Court in *Zelman* was not a departure from precedent: "I do not believe that today's decision, when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, marks a dramatic break from the past."<sup>151</sup>

Just as Justice O'Connor had refused to join the conservative plurality in overruling *Roe v. Wade*, she also declined to overrule *Lemon v. Kurtzman*.<sup>152</sup>

The year 2005 brought to the Court two cases challenging displays of the Ten Commandments on government property. In *Van Orden v. Perry*<sup>153</sup> the Court upheld the longstanding placement of a monolith in a park-like setting on the Capitol grounds in Austin, Texas,<sup>154</sup> but in *McCreary County, Kentucky v. A.C.L.U.*,<sup>155</sup> the Court struck down the order of the County Commissioners ordering the display of the Ten

147. 536 U.S. 639 (2002) (upholding Cleveland school voucher program).

148. *See id.* at 643-48 (Rehnquist, C.J.) (describing school voucher program).

149. *See id.* at 663-76 (O'Connor, J., concurring).

150. *See id.*

151. *Id.* at 663.

152. *See id.* at 668 ("Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence.")

153. 125 S. Ct. 2854 (2005) (upholding longstanding placement of Ten Commandments monolith on grounds of Texas Statehouse with other statuary dedicated to Texas history).

154. *See id.* at 2864 (Rehnquist, C.J.).

Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

*Id.*

155. 125 S. Ct. 2722 (2005) (striking down order requiring displays of Ten Commandments in every public school building of County).

Commandments in every courthouse.<sup>156</sup> Both cases were decided by a vote of 5-4, but for once Justice O'Connor was *not* the swing vote – Justice Breyer was.<sup>157</sup> Justice O'Connor considered both displays of the Ten Commandments to be unconstitutional under the Establishment Clause because she believed that they were both erected for religious purposes, not for secular ones.<sup>158</sup> Justice O'Connor's concurring opinion in *McCreary County* commences with one of the most eloquent discourses on religious freedom ever to have issued from the Court. She stated:

The First Amendment expresses our Nation's fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendents of people who had come to this land precisely so that they could practice their religion freely. Together with the other First Amendment guarantees—of free speech, a free press, and the rights to assemble and petition—the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails,

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156. *See id.* at 2728-45 (Souter, J., dissenting) (“Given the ample support for the District Court’s finding of a predominantly religious purpose behind the Counties’ third display, we affirm the Sixth Circuit in upholding the preliminary injunction.”).

157. *See Van Orden*, 125 S. Ct., at 2871 (Breyer, J., concurring in the judgment) (“This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them.”).

158. *McCreary County*, 125 S. Ct., at 2747 (O'Connor, J., concurring) (“The purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”); *Van Orden v. Perry*, 125 S. Ct., at 1891 (O'Connor, J., dissenting) (“For essentially the reasons given by Justice Souter, as well as the reasons given in my concurrence in *McCreary County v. American Civil Liberties Union*, I respectfully dissent.”) (citation omitted).

while allowing private religious exercise to flourish.<sup>159</sup>

By steering a middle course on Establishment Clause questions, Justice O'Connor exemplified the ideal of government neutrality towards religion.

#### *E. Procedural Due Process and the War on Terror*

One of the most significant decisions of the Supreme Court to date arising out of the War on Terror is *Hamdi v. Rumsfeld*.<sup>160</sup> Hamdi, a United States citizen, allegedly fought for the Taliban before surrendering to Afghan forces.<sup>161</sup> He was turned over to American authorities who confined him to a military brig in the United States, where he was held without trial as an "enemy combatant."<sup>162</sup> A petition for *habeas corpus* was filed on his behalf contending that he was being denied due process of law.<sup>163</sup> A principal question before the Court concerned the procedure that would be used to determine the legality of his detention.<sup>164</sup> Not surprisingly, Justice O'Connor steered a middle course among the justices.<sup>165</sup>

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159. *McCreary County*, 125 S. Ct. at 2746 (2005) (O'Connor, J., concurring).

160. 542 U.S. 507 (2004) (ruling that American citizen being held as an enemy combatant must be given meaningful opportunity to contest his detention).

161. *See id.* at 510 (O'Connor, J.).

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born an American citizen in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military.

*Id.*

162. *See id.* at 510-11.

In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

*Id.*

163. *See id.* at 511 ("In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus . . . . It argues that, "[a]s an American citizen, Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution").

164. *See id.* at 524 ("Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.").

165. *See id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the

Justice O'Connor, writing for the plurality, held that the detention and trial of suspected unlawful combatants was subject to constitutional dictates, but she ruled that the model of due process that had been established in *Mathews v. Eldridge*<sup>166</sup> should govern the proceedings.<sup>167</sup> The *Mathews* test was developed in an administrative law setting, and it identified three factors to be balanced in determining "what process is due" under the Fifth Amendment – the strength of the private interest that the government was seeking to deprive the claimant of, the risk of error in the proceeding and the likelihood that the requested procedural safeguard would reduce the risk of error, and the strength of the governmental interest in withholding the procedural safeguard.<sup>168</sup> In

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judgment) (joined by Justice Ginsberg) (ruling that Hamdi's detention was not authorized by the Authorization for Use of Military Force, and stating, "If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released."); *id.* at 554 (Scalia, J., dissenting) (joined by Justice Stevens).

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the decision below.

*Id.*; *see id.* at 579 (Thomas, J., dissenting).

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision.

*Id.*

166. 424 U.S. 319, (1976) (upholding administrative procedure for terminating eligibility for Social Security Disability).

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.*

167. *See Hamdi*, 542 U.S. at 528-29 (O'Connor, J.) ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const., Amend. 5, is the test that we articulated in *Mathews*." (citation omitted)).

168. *See Mathews*, 424 U.S. at 334-35 (Powell, J.) (1976).

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that



balancing these elements in *Hamdi*, Justice O'Connor concluded that detainees could be tried before military tribunals, that they might bear the burden of proving their innocence, and that hearsay evidence might be admitted against them.<sup>169</sup>

Whether Justice O'Connor's solution to trying detainees will stand the test of time is yet to be determined. In my opinion, the United States has suffered incalculable moral and political damage arising from the Bush administration's mistreatment of prisoners in the war on terror,<sup>170</sup> and it is as yet unclear whether or not Justice O'Connor's "third way" of dealing with detainees will be sufficient to stem the mistreatment and restore the world's faith that America is devoted to the rule of law. I agree with the position taken by the four dissenting justices in *Hamdi* who argued that citizens such as Hamdi should be charged with crimes, not brought before military tribunals.<sup>171</sup> On the other hand, Justice O'Connor's compromise solution is more consistent with American ideals than kidnapping and "rendering" foreign citizens,<sup>172</sup> torturing detainees,<sup>173</sup> and developing a system of gulags around the world.<sup>174</sup>

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will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.*

169. See *Hamdi*, 542 U.S. at 533-34, 538 (O'Connor, J.).

170. See *infra* notes 172-74.

171. See *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."); see *supra* note 165 (citing dissenting opinions of Justice Scalia and Justice Souter).

172. See John Crewdson, *CIA 'Renditions' of Terror Suspects Cause Furor in European Nations*, CHI. TRIB., Dec. 30, 2005, at C4.

The cases of Abu Omar, a radical Muslim snatched by the CIA under the noses of the Milan police and flown secretly to Egypt, and Khalid el-Masri, a German national forcibly transported by that same agency from Macedonia to an Afghan prison by mistake, have propelled what once seemed a settled debate over human rights to the center of the European political stage.

It is difficult to name a Western European nation that has not announced some kind of investigation into whether the United States has been using its airports or airspace to ferry terrorist suspects to countries such as Egypt, Syria and Jordan for interrogations.

*Id.*

173. See, e.g., Lisa Takeuchi Cullen, *Pushing the Limits*, TIME, Jan. 9, 2006, at 26.

While insisting that the U.S. does not practice torture, the Administration fought a congressional effort to ban U.S. forces anywhere from "cruel, inhuman or degrading" treatment of detainees. That, plus an aborted Administration effort to limit the definition of torture to that which inflicts agony just short of the pain of organ failure or death, and photographic evidence that U.S. troops abused prisoners at Iraq's Abu Ghraib prison,

But there is one line from Justice O'Connor's opinion in *Hamdi* that will be remembered and cited for generations. She declared that "a state of war is not a blank check for the President. . . ." <sup>175</sup> Indeed it is not, and we shall continue to depend upon the federal judiciary and above all the Supreme Court to safeguard our fundamental rights.

#### F. Federalism and Civil Rights

Because the Supremacy Clause makes federal law "the supreme law of the land" preempting state law, <sup>176</sup> many questions of federal-state relations revolve around the scope of federal power. The broader the scope of federal power, the narrower room there is for the exercise of state sovereignty. As the only member of the current Supreme Court to have held elective office in state government, <sup>177</sup> Justice O'Connor has a unique perspective on this matter and she has been a strong voice on the Court in favor of protecting state prerogatives. On the other hand, she has also voted to uphold federal laws in some civil rights cases on the theory that federal protection of civil rights in some contexts outweighs the interests of the States. Justice O'Connor's stance on federalism can be summarized by describing the positions that she has carved out in a series of five dissenting opinions.

The first of these dissenting opinions was handed down in *F.E.R.C. v. Mississippi* <sup>178</sup> where Justice O'Connor objected to the ruling of the majority upholding a federal law imposing certain duties on state utility

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have created the image of a government tolerant of the practice.

*Id.*

174. *See id.*

It had already been made public that certain captured al-Qaeda leaders were held by the U.S. in undisclosed locations, but when the Washington Post reported in November that the CIA had kept suspected terrorists in secret prisons in as many as eight countries, including some in Eastern Europe, a global scandal erupted.

*Id.*

175. *Hamdi*, 542 U.S. at 536 (O'Connor, J.).

176. U.S. Const. art. VI cl. 2. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.")

177. *See* The Justices of the Supreme Court, online at the official website of the United States Supreme Court, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited January 5, 2006) ("[O'Connor] was appointed to the Arizona State Senate in 1969 and was subsequently reelected to two two-year terms. In 1975 she was elected Judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals.")

178. 456 U.S. 742 (1982) (upholding provisions of Public Utility Regulatory Policies Act against challenge under Commerce Clause and Tenth Amendment).

regulators. She stated:

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.<sup>179</sup>

Justice O'Connor's dissent in *F.E.R.C.* foreshadowed her opinion for the Court in *New York v. United States*<sup>180</sup> where she persuaded a majority of the Court to adopt the rule that Congress may not commandeer state officials in the enforcement of federal law.<sup>181</sup> The principal policy reason offered by Justice O'Connor in support of this principle is the necessity for accountability in government:

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.<sup>182</sup>

The second significant dissenting opinion authored by Justice O'Connor on this topic came in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>183</sup> where she delivered an impassioned defense of federalism. In that case the majority of the Court had upheld provisions of the Fair Labor Standards Act as applied to a metropolitan transit authority, while Justice O'Connor and three other justices contended that Congress lacked authority to set minimum wages and maximum hours for state employees. Although Justice O'Connor conceded that the Constitution did not expressly forbid the Congress from using its power under Commerce Clause to regulate entities of the State<sup>184</sup> – she later characterized the Tenth Amendment as a

179. *Id.* at 777 (O'Connor, J., dissenting).

180. 505 U.S. 144 (1992) (striking down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985).

181. *See id.* at 162 (O'Connor, J., dissenting) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

182. *Id.* at 169.

183. 469 U.S. 528 (1985).

184. *See id.* at 582 (O'Connor, J., dissenting) ("The text of the Constitution does not define the

“tautology”<sup>185</sup> – she asserted that the concept of state sovereignty was implicit in the *spirit* of the Constitution.<sup>186</sup> From an examination of historical sources and previous cases, Justice O'Connor discerned that federalism was an important independent consideration in determining the scope of federal power.<sup>187</sup> Although the Supreme Court has not overruled *Garcia* as Justice O'Connor had called for,<sup>188</sup> in the “state sovereign immunity” cases the Court has essentially adopted Justice O'Connor’s vision of the source and the importance of the principle of

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precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States.”)

185. See *New York*, 505 U.S. at 156-57 (O'Connor, J., dissenting).

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

*Id.* See also *United States v. Darby*, 312 U.S. 100, 123 (1941) (Stone, J.). The Court stated:

The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

*Id.* at 124.

186. *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528, 585 (O'Connor, J., dissenting) (“The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.”); *id.* at 588 (“It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution.”)

187. See *id.* at 586 (“[S]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers.”); *id.* at 588 (“[A]ll that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint.”). “It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution.” *Id.*

188. See *id.* at 589 (“I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist’s belief that this Court will in time again assume its constitutional responsibility.”); see also *New York*, 505 U.S. at 159 (O'Connor, J.).

In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.

*Id.*

federalism.<sup>189</sup>

The third dissenting opinion that reveals Justice O'Connor's commitment to federalism was issued in *South Dakota v. Dole*,<sup>190</sup> where the State had challenged a federal law requiring the States to adopt a minimum drinking age of twenty-one years old. Under the federal law, States that failed to raise the minimum drinking age would suffer a five percent reduction in federal highway funds. The majority of the Court in an opinion by Chief Justice Rehnquist voted to uphold the federal law under the "conditional spending clause," but Justice O'Connor argued that the federal law amounted to a regulation rather than a condition determining how the federal money was to be spent, and that it was therefore beyond Congress' power under the Spending Clause to enact.<sup>191</sup> This case demonstrates that Justice O'Connor's commitment to federalism is at least as strong if not stronger than that of other members of the conservative bloc on the Court.

The fourth of Justice O'Connor's dissenting opinions in the field of federalism was in response to the decision of the majority in *City of Boerne v. Flores*.<sup>192</sup> In that case the majority developed a novel theory of Congressional power under Section 5 of the Fourteenth Amendment. The Court pled that any laws adopted by Congress pursuant to that provision of the Constitution must be congruent with the rights that are created under Section 1 of the Amendment and proportionate to any claimed violation of these rights that Congress is seeking to remedy or prevent.<sup>193</sup> In other words, when Congress invokes its power to enact legislation under the Fourteenth Amendment, it may protect existing rights, but may not create new ones.<sup>194</sup> Applying this standard in

189. See *infra* notes 198-201 and accompanying text (citing cases ruling that the principle of state sovereign immunity is implicit in the Constitution).

190. 483 U.S. 203 (1987) (upholding federal law conditioning states' receipt of highway funds upon adoption of 21-year minimum drinking age).

191. *Id.* at 218 (O'Connor, J., dissenting).

[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

*Id.*

192. 521 U.S. 507 (1997) (striking down federal Religious Freedom Restoration Act (RFRA)).

193. See *id.* at 508 (Kennedy, J.) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

194. See *id.* (Kennedy, J.).

The Amendment's design and § 5's text are inconsistent with any suggestion that Congress has the power to decree the substance of the Amendment's restrictions on the

*Boerne*, the majority of the Court voted to strike down the federal Religious Freedom Restoration Act.<sup>195</sup> In a telling decision, Justice O'Connor agreed with the majority as to the standard for limiting Congressional power to enact legislation under the Enforcement Clause,<sup>196</sup> but she disagreed with the majority's limited understanding of the meaning of the right to Free Exercise of Religion.<sup>197</sup> In this case, Justice O'Connor demonstrated that she is just as devoted to the principle of federalism as the other conservative justices, but that she is more devoted than they are to protecting fundamental rights.

The position that Justice O'Connor took in *Boerne* explains her votes in another set of federalism cases. Over the last decade the conservative majority, with Justice O'Connor supplying the necessary fifth vote, has resurrected the doctrine of "state sovereign immunity," based loosely upon the language of the Eleventh Amendment.<sup>198</sup> In a

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States. Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.

*Id.*

195. *See id.* at 532 ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

196. *See id.* at 545 (O'Connor, J., dissenting).

Indeed, if I agreed with the Court's standard in *Smith* I would join the opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the "power to decree the *substance* of the Fourteenth Amendment's restrictions on the States." Rather, its power under § 5 of the Fourteenth Amendment extends only to *enforcing* the Amendment's provisions. In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute. Accordingly, whether Congress has exceeded its § 5 powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

*Id.* (internal citations omitted).

197. *See id.* at 544-45.

I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith* it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

*Id.*

198. *See* Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (and How Not to)*, 79 TEX. L. REV. 1037, 1046 (2001). ([T]he key to understanding state sovereign immunity doctrine is to

number of decisions, the Court has fashioned a rule that the principle of state sovereign immunity is implicit in the Constitution, thus making it unconstitutional for Congress to subject the States to civil suit for money damages when it acts pursuant to the Commerce Clause.<sup>199</sup> However, this rule does not apply when Congress enacts legislation under the authority conferred by Section 5 of the Fourteenth Amendment perhaps because the Fourteenth Amendment controls over the Eleventh Amendment.<sup>200</sup> Accordingly, in a number of cases it has been necessary for the Supreme Court to determine whether Congress was acting pursuant to the Commerce Clause or pursuant to Section 5 of the Fourteenth Amendment when it subjected the states to civil liability for money damages.<sup>201</sup> In this line of cases, as in *Boerne*, Justice O'Connor has proven more likely than other members of the conservative majority to uphold Congressional legislation that is protective of civil rights. In 2003, she joined Justice Rehnquist's opinion for the Court in *Nevada Department of Human Resources v. Hibbs*<sup>202</sup> upholding the federal

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realize that the Eleventh Amendment's text actually has very little to do with it."); *id.* ("The Court's present majority thus views state sovereign immunity as a pre-constitutional principle, implicit in the constitutional structure, that bars suits against states for money damages.").

199. *See, e.g.*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expenses Board*, 527 U.S. 666 (1999) (holding that state sovereign immunity precludes bank's claim against state agency under federal Trademark Remedy Clarification Act); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that state sovereign immunity precludes Indian tribe's suit against State to compel negotiations under the Indian Gaming Regulatory Act).

200. *See id.* at 1049-50 (proposing three reasons why state sovereign immunity does not apply when Congress acts pursuant to Section 5 of the Fourteenth Amendment). The authors state:

Some disagreement exists concerning why the Section Five power is special. One explanation asserts that the Reconstruction Amendments were broadly intended to create a general exception to federalism limitations on federal power. The Fitzpatrick Court, for example, explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."

A different account relies on the fact that the Fourteenth Amendment was later in time than the Eleventh Amendment, and therefore "amends" the preceding amendment. Finally, one of us has argued more narrowly that Congress's power to "enforce" federal rights should be understood, as a textual matter, to include the power to impose a damages remedy notwithstanding sovereign immunity.

*Id.* at 1049-50 (footnotes omitted).

201. *See Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that state sovereign immunity precludes claims for employment discrimination brought by disabled individual against the state university under federal Americans with Disabilities Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (holding that state sovereign immunity precludes claims for employment discrimination under federal Age Discrimination in Employment Act).

202. 538 U.S. 721 (2003) (upholding provision of federal Family Medical Leave Act).

Family Medical Leave Act. The following year, she provided a crucial fifth vote to Justice Stevens in *Tennessee v. Lane*,<sup>203</sup> upholding Title II of the federal Americans with Disabilities Act as applied to an individual who was denied reasonable access to the local courts. In both cases the Court upheld the federal laws as properly adopted pursuant to Congress' power under Section 5 of the Fourteenth Amendment, and therefore ruled that the civil damages remedies afforded by these laws were not foreclosed by the state sovereignty implications of the Eleventh Amendment.<sup>204</sup>

The fifth important dissenting opinion authored by Justice O'Connor on federalism was handed down in 2005 in the "medical marijuana" case, *Gonzales v. Raich*.<sup>205</sup> In that case the Supreme Court upheld the federal Controlled Substances Act as applied to persons growing and using marijuana for personal medical use.<sup>206</sup> The State of California had legalized the use of marijuana for medical purposes, and the question before the Court was whether the State law was preempted by federal law.<sup>207</sup> Justice O'Connor would have upheld the State statute on the ground that it was the prerogative of the State, not the federal government, to regulate the activity in question.<sup>208</sup> She commenced her

203. 541 U.S. 509 (2004) (upholding application of Title II of Americans with Disabilities Act).

204. See *Hibbs*, 538 U.S. at 735 (Rehnquist, C.J.) ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."); *Lane*, 541 U.S. at 531 (Stevens, J.) ("[W]e find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services. . .").

205. 125 S. Ct. 2195 (2005) (upholding federal Controlled Substances Act as applied to persons growing and using marijuana for personal medical purposes against attack under Commerce Clause).

206. See *id.* at 2215 (Stevens, J.)

[T]he case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.

*Id.*

207. See *id.* at 2198-99.

The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

*Id.*

208. See *id.* at 2229 (O'Connor, J., dissenting).

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal



opinion with these words:

We enforce the “outer limits” of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>209</sup>

In two previous Commerce Clause cases, Justice O’Connor had supplied a crucial fifth vote in favor of containing the power of Congress and thus preserving the power of the States. She had voted with the majority in both *United States v. Lopez*,<sup>210</sup> and *United States v. Morrison*,<sup>211</sup> which struck down federal laws regulating gun possession and sexual assault in part because these activities have traditionally been regulated by the States.<sup>212</sup> In these cases, the Court restricted Congress’ authority under the “affectation doctrine” to regulating activities which are “economic” in nature<sup>213</sup> and the Court found that gun possession and

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use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

*Id.*

209. *Id.* at 2220 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995) and *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) and quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

210. 514 U.S. 549 (1995) (striking down federal Guns Free School Zone Act as beyond Congress’ power to adopt under the Commerce Clause).

211. 529 U.S. 598 (2000) (striking down federal Violence Against Women Act as beyond Congress’ power to adopt under the Commerce Clause).

212. *Lopez*, 514 U.S. at 557 (Rehnquist, C.J.)

In *Jones & Laughlin Steel* the Court warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

*Id.* (citation omitted); *Morrison*, 529 U.S. at 617-18 (Rehnquist, C.J.) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

213. *Lopez*, 514 U.S. at 560 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”); *Morrison*, 529 U.S. at 611

sexual assault were not economic in nature.<sup>214</sup> A majority of the justices, however, have taken the position that the principal question before the Court in these cases was not whether the activity being regulated was “economic” or “noneconomic,” but rather whether the principle of federalism should operate as an affirmative check on the power of Congress to enforce the Commerce Clause.<sup>215</sup> Similarly, Justice O'Connor's analysis in *Raich* reveals that the principal reason that she believed that the federal law was unconstitutional in that case was because the people of the State of California had deliberately chosen to decriminalize the medical use of marijuana. She stated:

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal

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(“*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”).

214. *Lopez*, 514 U.S. at 549.

[The federal law] is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

*Id.* (footnote omitted); *Morrison*, 529 U.S. 617 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.”); see also *Raich*, 125 S. Ct. at 2195 (Stevens, J.) (“Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act] are quintessentially economic.”).

215. See *Lopez*, 514 U.S. at 575 (Kennedy, J. concurring) (joined by O'Connor, J.) (“This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.”); *Morrison*, 514 U.S. at 644-645 (Souter, J., dissenting) (joined by Stevens, Breyer, and Ginsberg, JJ.).

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power.

*Id.*

law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering.<sup>216</sup>

Justice O'Connor took a similar position in the recently-decided case of *Gonzales v. Oregon*,<sup>217</sup> in which she joined the majority of the Court in invalidating the "Ashcroft Directive," an interpretive rule issued by the Attorney General which prohibited physicians from prescribing medications to assist a suicide.<sup>218</sup> This federal directive had the effect of nullifying Oregon's Death With Dignity Act,<sup>219</sup> which legalized assisted suicide.<sup>220</sup> One of the reasons given by the Court for deciding that the federal Controlled Substances Act does not authorize the Attorney General to issue this directive was because the directive interferes with the power of the States to regulate the practice of medicine, and therefore, violates principles of federalism.<sup>221</sup>

## V. CONCLUSION

Sandra Day O'Connor has performed her duties as Justice of the Supreme Court with dedication and vigor and she has contributed substantially to the development of American constitutional law. She will be remembered as an extremely able justice and in future times her

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216. *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting) (citations omitted).

217. 126 S.Ct. 904 (2006) (holding that the federal Controlled Substances Act did not authorize the Attorney General to prohibit the use of regulated prescription drugs in assisted suicides as authorized by the Oregon Death With Dignity Act).

218. See 66 Fed. Reg. 56608 (2001) (stating that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 C.F.R. 1306.04 92001"), and that "prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act").

219. OR.REV.STAT. § 127.800-897 (2003).

220. OR.REV.STAT. § 127.805 (2003).

An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner . . .

*Id.*

221. *Gonzalez*, 126 S.Ct. at 923 (Kennedy, J.).

[T]he [federal Controlled Substances Act] manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

*Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 475 (1996), quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U. S. 724, 756 (1985)).

name will also be linked with that of Thurgood Marshall for having integrated the Supreme Court.

Perhaps Justice O'Connor's greatest contribution to our jurisprudence and to our lives has been, in her own words, her refusal to "foreclose the unanticipated."<sup>222</sup> She values both precedent and tradition, but in deciding the cases that have come before her she has not blindly followed either. Instead she has helped to articulate precisely when a justice of the Supreme Court is justified in overruling precedent and she has helped to distinguish valued traditions which must be followed from discredited traditions which should be discarded. She carefully reviewed the facts of every case with new eyes, she thoroughly examined the multiple factors that might be relevant to every legal determination, and she thoughtfully considered the continued vitality of received doctrine and the authoritative weight to be given to the sources of law that create doctrine. Over the course of her career she turned her attention from the consideration of the technicalities of appellate process to the articulation of fundamental American values, and as she did so she became an eloquent writer. In all of these ways, Justice O'Connor has exhibited an impressive level of open-mindedness and capacity for growth.

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222. *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989).