



1-1-2001

# Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law

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## Recommended Citation

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# Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law

Charles D. Kelso\* and R. Randall Kelso\*\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	917
II. THE DECISION-MAKING STYLE THAT JUSTICE O'CONNOR BROUGHT TO THE COURT .....	917
III. 5/4 OPINIONS WHICH JUSTICE O'CONNOR WROTE FOR THE COURT .....	920
A. <i>Federalism</i> .....	920
B. <i>Due Process</i> .....	921
C. <i>Equal Protection—Affirmative Action</i> .....	921
D. <i>Equal Protection—Reapportionment</i> .....	922
E. <i>Retroactive Law as a Taking</i> .....	923
F. <i>Cruel and Unusual Punishment</i> .....	924
G. <i>First Amendment</i> .....	924
1. <i>Commercial Speech</i> .....	924
2. <i>Establishment Clause</i> .....	925
IV. IMPORTANT 5/4 CASES IN WHICH JUSTICE O'CONNOR SUPPLIED THE CRITICAL FIFTH VOTE .....	926
A. <i>Jurisdiction</i> .....	926
B. <i>Justiciability</i> .....	926
C. <i>Commerce Clause</i> .....	927
D. <i>Commerce Clause—Section Five of the Fourteenth Amendment</i> .....	928
E. <i>Dormant Commerce Clause</i> .....	929
F. <i>Due Process</i> .....	929
1. <i>Due Process—Fundamental Rights</i> .....	929
a. <i>Bowers v. Hardwick</i> .....	929
b. <i>Michael H. v. Gerald D.</i> .....	930
2. <i>Due Process—Abortion</i> .....	931
3. <i>Due Process—Right to Refuse Medical Treatment</i> .....	931
4. <i>Due Process—Liberty Interests of Prisoners</i> .....	932

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G. <i>Affirmative Action in Employment</i> .....	932
H. <i>Takings Clause</i> .....	933
I. <i>First Amendment</i> .....	933
1. <i>Defamation</i> .....	933
2. <i>Establishment Clause—Government Endorsement</i> .....	934
3. <i>Establishment Clause—Government Grants to Schools</i> .....	934
4. <i>Establishment Clause—State Coercion of Religious             Conformity</i> .....	935
5. <i>Establishment Clause—Incidental Benefit to Religion</i> .....	935
VI. 6/3 OR EVEN LESS DIVIDED CASES WHERE JUSTICE O’CONNOR WROTE THE MAJORITY OPINION .....	935
A. <i>Jurisdiction</i> .....	936
B. <i>Federalism</i> .....	936
C. <i>Equal Protection—Illegitimate Children</i> .....	938
D. <i>First Amendment—Freedom of Speech</i> .....	938
1. <i>Free Speech</i> .....	938
2. <i>The Free Exercise Clause</i> .....	939
VI. 6/3 OR EVEN LESS DIVIDED CASES WHERE JUSTICE O’CONNOR WROTE A CONCURRING OPINION .....	940
A. <i>Dormant Commerce Clause</i> .....	940
B. <i>Due Process—Physician-Assisted Suicide</i> .....	940
C. <i>The Right to Travel</i> .....	941
D. <i>Equal Protection and Peremptory Challenges</i> .....	941
E. <i>First Amendment and Child Pornography</i> .....	941
1. <i>Child Pornography</i> .....	941
2. <i>Solicitation in Airports</i> .....	942
3. <i>Regulation of Speech on Private Property</i> .....	942
F. <i>First Amendment and Commercial Speech</i> .....	943
1. <i>Establishment Clause</i> .....	943
VII. DISSENTING OPINIONS OF JUSTICE O’CONNOR .....	945
A. <i>Federalism—Conditional Spending</i> .....	945
B. <i>Equal Protection—Discrimination Against Foreign Corporations</i> ...	946
C. <i>State Action Under the Fourteenth Amendment</i> .....	947
D. <i>First Amendment—Free Exercise Clause</i> .....	947
VIII. DISSENTING VOTES OF JUSTICE O’CONNOR .....	948
A. <i>Standing to Sue</i> .....	948
B. <i>Federalism—Term Limits Imposed by States</i> .....	948
C. <i>Dormant Commerce Clause</i> .....	949
D. <i>First Amendment—Flag Desecration Laws</i> .....	949

IX. SUMMING UP ..... 950

APPENDIX ..... 951

I. INTRODUCTION

With the October, 2000 term, Justice O'Connor is serving her twentieth year on the Supreme Court, having ascended to the high bench in August, 1981, after being nominated by President Reagan as the first woman to serve on the nation's highest court. During her years on the Court, she has published many well-reasoned opinions on constitutional issues.

The difference that she has made on the Court in the realm of constitutional law is most clearly illustrated in the many cases where she has joined with four other relatively conservative Justices to restrain the more liberal instrumental jurisprudence developed during the Warren years and shortly thereafter. In recent decades, when the Court has divided 5/4, the most frequent combination of Justices in the majority has been Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy and Thomas. This group tends to weigh more heavily than do their colleagues the values inherent in federalism, the rights of individuals as distinguished from the rights of groups, the aspect of separation of powers doctrine which calls for law to be made by legislatures rather than by courts, and private property ownership. On the other hand, in cases involving gender discrimination, abortion rights, and the Establishment Clause, Justice O'Connor has been more moderate, often leaving Chief Justice Rehnquist, Justices Scalia and Thomas, and occasionally Kennedy, in dissent. As detailed in the attached Appendix, Justice O'Connor supplied a decisive vote in many of the twenty-nine cases in which the Rehnquist Court (1986-2000) struck down acts of Congress. Many of her more influential opinions for the Court were foreshadowed by her previous concurrences or dissents, as over time a majority on the Court came to reflect Justice O'Connor's views.

Exactly how much of a difference Justice O'Connor has made in constitutional law cannot be told with utter certainty since the Court deliberates in secret. Tentative conclusions can be drawn, however, by a close look at the 5/4 opinions she has written or which she has joined.

II. THE DECISION-MAKING STYLE THAT JUSTICE O'CONNOR  
BROUGHT TO THE COURT

Justice O'Connor's pattern of voting seems to have resulted from the decision-making style that she brought to the Court. She does not appear to decide cases on the basis of an elaborated substantive legal philosophy. Although certain

constitutional values, such as federalism, are given especially heavy weight in her opinions and votes, it appears that her primary loyalty is to the process of bringing reasoned judgment to bear on each case—giving some weight to precedent, to constitutional language and structure, to history, and to concerns about workability, logic and justice. Although this is a sensible and historically supported method of decision making—having been employed by Chief Justice John Marshall—it is not the only style of decision making one finds in use by today’s Justices.

The Supreme Court today has exemplars of four distinct decision-making styles.<sup>1</sup> At one extreme are two formalists, Justices Scalia and Thomas. They emphasize the literal, plain meaning of words. They prefer clear, bright-line rules that are capable of formal, logical, and predictable application. When using history as an aid, they search for views of the framers and ratifiers on specific issues. They refuse to speculate on what history may suggest about broader concepts.<sup>2</sup>

Closely related is Chief Justice Rehnquist, who follows the tradition of Justice Holmes. Holmes emphasized the need for judicial restraint and deference to the legislature and the executive, including a consistent legislative or executive practice. Holmesians consider the literal meaning of words but are willing to look beyond the words to their general purposes because, as Holmes said, “The life of the law has not been logic; it has been experience.”<sup>3</sup>

The formalist and Holmesian Justices are most often joined by two moderate conservatives, Justices Kennedy and O’Connor. Those two Justices follow the eighteenth and early nineteenth century decision-making tradition of Chief Justice Marshall, which calls for reasoned elaboration of the law in light of its purposes and history, fidelity to precedent, and respect for consistent executive or legislative practice. Words in the Constitution judged to reflect the adoption of natural law principles are interpreted in light of those principles (such as not punishing people

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1. These four variations of judicial decision making trace back to views on the nature of judicial responsibility and the nature of law. See R. RANDALL KELSO & CHARLES D. KELSO, *STUDYING LAW: AN INTRODUCTION* 113-23 (1984); Charles D. Kelso & R. Randall Kelso, *Our Nine Tribunes: A Review of Professor Lusky’s Call for Judicial Restraint*, 5 SETON HALL CONS. L.J. 1289, 1297-1316 (1995). Additional treatment of the four general styles of decision making in common-law cases, statutory interpretation, and constitutional law appears in R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 532-63 (1993) (hereinafter Kelso, *Judicial Decision-making*). An in-depth treatment of the four styles of interpretation specifically focused upon constitutional law appears in R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994) (hereinafter Kelso, *Constitutional Interpretation*).

2. See generally Kelso, *Constitutional Interpretation*, *supra* note 1, at 184-87. Justice Scalia has explained this method in detail in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton, 1997).

3. O.W. HOLMES, *THE COMMON LAW* 1 (1881). On this Holmesian mode of interpretation, see generally Kelso, *Constitutional Interpretation*, *supra* note 1, at 195-200.

for things over which they have no control, or not allowing legislation to be based on stereotypes). Other words are given their ordinary, plain meaning.<sup>4</sup>

Opinions by Justices Souter and Breyer to some extent reflect the approach of Justices O'Connor and Kennedy, but their perspectives on substantive matters more often reflect the instrumentalism that was dominant on the Court in the 1960s and which has long been present in the opinions of Justice Stevens and, today, in the Justice most often found with Stevens and Justice Ginsburg. In the instrumental style, the formulation and application of each rule is tested by its purpose and effect. Judges are willing to engage in a broad-based historical investigation to help determine overall context and purpose. The primary role of courts is to advance sound social policies where leeway exist in the law. Leeway can be created when no law exactly covers the particular situation, ambiguities exist in a particular law which clearly does apply, or two or more conflicting rules each arguably apply.<sup>5</sup>

How these four perspectives intersect on today's Supreme Court can most clearly be seen in the 5/4 cases. This article first presents ten constitutional cases decided 5/4 in which Justice O'Connor wrote the opinion for the Court. Then this article describes seventeen cases in which she supplied the critical fifth vote. Continuing, this article examines seven cases in which she wrote the majority opinion for a Court less divided than 5/4. Finally, in cases divided less than 5/4, the article presents thirteen of her concurring opinions and eight dissenting opinions. From these fifty-six cases, the article undertakes a brief appraisal of her contributions as a Justice. Within each classification according to voting patterns, the cases will be ordered according to subject matter, as follows: judicial review (standing, jurisdiction and justiciability), structural issues (Commerce Clause, federalism, and dormant Commerce Clause), due process, equal protection, taking, Eighth Amendment, and First Amendment (free speech, Establishment Clause, and free exercise).

It is apparent from our review of the cases that if Justice O'Connor had joined with the more liberal wing of the Court, a considerable body of current constitutional law would be different. As matters stand, however, she has continued the conservative perspective evidenced by the votes and opinions of the Justice she replaced—Justice Stewart.<sup>6</sup> Evaluating her work, our opinion in a nutshell is that she deserves high accolades for her reasoned judgment on both structural matters and individual rights, and that she will be remembered as well as for being the first female Justice to serve on the Court, as a dedicated, productive, and useful Justice.

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4. See generally Kelso, *Constitutional Interpretation*, *supra* note 1, at 160-61. Justice O'Connor applies the same reasoned "natural law" approach in statutory interpretation cases as in constitutional cases. See J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 S.M.U. L. REV. 81 (2000).

5. See generally Kelso, *Constitutional Interpretation*, *supra* note 1, at 213-18.

6. For an analysis of the votes of Justice Stewart in 5/4 cases and predictions about Justice O'Connor, see Charles D. Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases?*, 13 PAC. L.J. 259 (1982).

III. 5/4 OPINIONS WHICH JUSTICE O'CONNOR WROTE FOR THE COURT

A. *Federalism*

Justice O'Connor's importance as a critical fifth vote for a robust theory of federalism was again demonstrated during the 1999 term in *Kimel v. Florida Board of Regents*,<sup>7</sup> which involved whether employees of an Alabama state university fell under the Age Discrimination in Employment Act (ADEA). Writing for a 5/4 majority, Justice O'Connor stated that, under two precedents on whose doctrinal reasoning she concurred, the employees could not bring an action against the state. The first was *Seminole Tribe of Florida v. Florida*,<sup>8</sup> wherein Justice Rehnquist had held, for a 5/4 Court, that Congress could not abrogate the Eleventh Amendment immunity of a state by using Commerce Clause power to authorize lawsuits against the state. Sovereign immunity could be abrogated only by a clear expression of intent in legislation that created a remedy for violations of the Fourteenth Amendment. The second case was *City of Boerne v. Flores*,<sup>9</sup> where Justice Kennedy had held, for a 5/4 Court, that Congress can consider measures to remedy or prevent actions made unconstitutional by the Fourteenth Amendment only if there is congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Applying these standards in *Kimel*, Justice O'Connor found that the ADEA was not appropriate legislation under section five of the Fourteenth Amendment because a review of the legislative record revealed that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age, a classification of state behavior tested only by rational basis scrutiny.<sup>10</sup> Thus, to create the possibility of individual lawsuits against states pursuant to section five, it would behoove Congress to build a legislative record which shows a pattern of constitutional violations, or at least clear evidence of such a risk.<sup>11</sup>

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7. 528 U.S. 62 (2001).

8. 517 U.S. 44, 47 (1996). Justice Kennedy explained further in *Alden v. Maine*, 527 U.S. 706, 712 (1999), another 5/4 opinion that Justice O'Connor joined, that the Eleventh Amendment is merely an acknowledgment of the sovereign immunity which the states enjoyed before ratification of the Constitution, and which they retain today.

9. 521 U.S. 507 (1997).

10. 528 U.S. at 88-91.

11. *Id.* Of course, as Justice Kennedy indicated in *Alden*, 527 U.S. at 759-60, the federal government, as opposed to individuals, can sue states for violations of federal law without worrying about an Eleventh Amendment or other state sovereignty barrier. And, despite her belief in federalism, Justice O'Connor has not been reticent about finding preemption of state law if Congress has expressed preemption or preemption is implied, as where Congress has intended to subject employers and employees to only one set of safety regulations so that nonapproved state regulations were preempted when a federal standard was in effect. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-104 (1992). On the other hand, in a situation where the federal government regulates state governmental operations, as opposed to regulating individuals, Justice O'Connor has authored an opinion for the Court which requires the federal statute to contain a clear statement to that effect. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The *Gregory* opinion contains perhaps Justice O'Connor's best judicial statement on the values that

## B. Due Process

Justice O'Connor was a coauthor of the unique three-Justice opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>12</sup> That opinion, which controlled the outcome, affirmed the central holding of *Roe v. Wade*,<sup>13</sup> that a woman has the right to choose to have an abortion before viability—or even after, if necessary to preserve the life or health of the mother. However, the joint opinion went on to modify then-existing law by holding that the *Roe v. Wade* strict scrutiny analysis would only be applied to “undue burdens” on abortion rights, while less than undue burdens would be analyzed only under rational review.<sup>14</sup> This conclusion was foreshadowed in Justice O'Connor’s dissents in *Akron v. Akron Center for Reproductive Health, Inc.*<sup>15</sup> and *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>16</sup> and concurrence in *Hodgson v. Minnesota*,<sup>17</sup> where Justice O'Connor developed and applied the undue burden analysis.<sup>18</sup> The *Casey* opinion also included an extensive discussion of *stare decisis*, which concluded with the three Justices asserting that they would not overrule a case merely because they thought it wrongly decided in the first place. Additional necessary factors are necessary; that the precedent has proved unworkable in practice, that there has been an evolution in doctrine such that the precedent is inconsistent with related doctrines, that a changed understanding of the facts has undermined the precedent, or that the precedent is inconsistent with the rule of law.<sup>19</sup>

## C. Equal Protection—Affirmative Action

Justice O'Connor has arguably done more than any other Justice to establish the current standards of review regarding affirmative action based on gender or race. With respect to gender, her 5/4 opinion in *Mississippi University for Women v. Hogan*<sup>20</sup> still stands as the landmark affirmative action case. Justice O'Connor held

federalism plays in our society. *Id.* at 457-64.

12. 505 U.S. 833, 843 (1992) (joint opinion of O'Connor, J., Kennedy, J., and Souter, J.).

13. 410 U.S. 113 (1973).

14. 505 U.S. at 876-77.

15. 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

16. 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting).

17. 497 U.S. 417, 458-59 (1990) (O'Connor, J., concurring in part and concurring in the judgment).

18. In *Casey*, the joint opinion concluded that a spousal notification provision was an undue burden on abortion rights, while a twenty-four hour waiting period, informed consent provisions, reporting requirements, and parental consent with a judicial bypass option, were less than undue burdens which triggered only rational review scrutiny. 505 U.S. at 879-901.

19. On this aspect of *Casey*, see R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 995-1030 (1996). The four dissenting Justices in *Casey*, Chief Justice Rehnquist and Justices White, Scalia, and Thomas, specified that their theory of *stare decisis* did not require that any portion of *Roe v. Wade* be kept intact, and they would allow states to regulate abortion procedures in ways rationally related to a legitimate state interest. *See id.* at 990-95.

20. 458 U.S. 718 (1982).



in *Hogan* that for the state to engage in gender discrimination to benefit women, the state must meet the same intermediate standard for review for gender discrimination against women.<sup>21</sup> Under intermediate review, the state must show that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.<sup>22</sup>

With respect to race, Justice O'Connor's majority opinions in *City of Richmond v. J.A. Croson Co.*<sup>23</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>24</sup> the latter a 5/4 case, have committed the Court to strict scrutiny of all race-based affirmative action programs, whether state or federal. Thus, racial classifications even in affirmative action programs are constitutional only if they are narrowly tailored measures that further compelling governmental interests.<sup>25</sup> In explaining the underlying values at stake, Justice O'Connor stated on behalf of four Justices in *Croson*: "Classifications 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>26</sup> With regard to underlying legal principles, she explained for a five-Justice majority in *Adarand* that "the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."<sup>27</sup> She further explained that it follows from this principle that all governmental action based on race, not just governmental action against a particular racial minority group, should be subjected to strict scrutiny to ensure that the personal right to equal protection of the laws has not been infringed, and that this standard applies to federal as well as state action.<sup>28</sup>

#### D. Equal Protection—Reapportionment

In 1986, in *Davis v. Bandemer*,<sup>29</sup> the Court held that political gerrymandering was justiciable. Justice O'Connor dissented from that conclusion, expressing a fear of too-great Court intrusion into the political process of drawing legislative districts.<sup>30</sup> That fear has led Justice O'Connor to take a balanced approach to the

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21. *Id.* at 723.

22. *Id.* at 724.

23. 488 U.S. 469 (1989).

24. 515 U.S. 200 (1995).

25. 488 U.S. at 493-94; 515 U.S. at 223-27.

26. 488 U.S. at 493.

27. 515 U.S. at 227.

28. *Id.* Thus, Justice O'Connor wrote for the five-Justice majority in *Adarand* that *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had applied only intermediate scrutiny to federal race-based affirmative action, was overruled as inconsistent with the three basic premises of the equal protection clause doctrine: "skepticism" towards any racial or ethnic classification; "consistency," so that the standard of scrutiny is the same no matter which racial group is burdened; and "congruence," so that the equal protection analysis for states under the Fourteenth Amendment and the federal government under the Fifth Amendment is the same. 515 U.S. at 223-24.

29. 478 U.S. 109 (1986).

30. *Id.* at 144-46 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

question of racial redistricting. Writing for a 5/4 Court in *Shaw v. Reno*,<sup>31</sup> Justice O'Connor held that a claim of racial redistricting was stated when redistricting legislation created a district so irregular on its face that it could rationally be viewed only as the result of race being a predominant factor in drawing the district lines, instead of the state following traditional redistricting principles. She explained that race-dominated practices reinforce the belief that people should be judged by the color of their skin and threaten to carry the country farther from the goal of a political system in which race no longer matters.<sup>32</sup> Her concurrence in *Miller v. Johnson*,<sup>33</sup> which also held a redistricting plan invalid as having been based primarily on race, emphasized the importance for the result that the state had substantially disregarded customary and traditional redistricting practices. She said that the Court's standard did not throw into doubt the vast majority of the nation's 435 congressional districts even if race had been considered in the redistricting process, as long as race was not a predominant factor in the redistricting process.<sup>34</sup>

#### E. Retroactive Law as a Taking

In *Eastern Enterprises v. Apfel*,<sup>35</sup> Justice O'Connor announced the judgment of a 5/4 Court that the Coal Industry Retiree Health Benefit Act of 1992 was unconstitutional as applied to Eastern Enterprises. She also wrote an opinion joined by the Chief Justice and Justices Scalia and Thomas. Justice O'Connor's theory was that the Act, which imposed a large liability for lifetime health benefits of former employees and their dependents on a company which ceased coal mining operations in 1965 and had never agreed to make such contributions, so substantially interfered with the company's reasonable investment-backed expectations that it was a taking.<sup>36</sup>

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31. 509 U.S. 630 (1993).

32. *Id.* at 643-44.

33. 515 U.S. 900, 928 (1995) (O'Connor, J., concurring).

34. *Id.* at 928-29. Similarly, in her plurality opinion in *Bush v. Vera*, 517 U.S. 952 (1996), Justice O'Connor stated that strict scrutiny does not apply merely because redistricting is performed with consciousness of race. It applies when the plaintiff proves that other, legitimate districting principles were subordinated to race. If strict scrutiny does apply, it must be shown that racially based districting was necessary to ameliorate the effects of past discrimination. *Id.* at 958-59. Also writing a separate concurrence, she explained that compliance with the Voting Rights Act might constitute a compelling interest sufficient for strict scrutiny, thus again indicating a willingness to defer to governmental redistricting decisions and not have the Court intrude too far into second-guessing redistricting decisions. *Id.* at 990.

35. 524 U.S. 498 (1998).

36. *Id.* at 522-29. Justice Kennedy concurred in the judgment on due process grounds because of a settled tradition against retroactive laws of great severity, but he would restrict a takings analysis to situations where a specific property right or interest was at stake. *Id.* at 539.

## F. Cruel and Unusual Punishment

Joining with other conservative Justices on the Supreme Court, Justice O'Connor has been a reliable voice for balancing the rights of prisoners against the security needs of the government. For example, in *Whitley v. Albers*,<sup>37</sup> Justice O'Connor wrote for the Court that the infliction of pain in the course of a prison security measure was an Eighth Amendment violation only if the pain was inflicted unnecessarily and wantonly, and that shooting a prisoner during the quelling of a riot, without prior verbal warning, did not violate the prisoner's right to be free from cruel and unusual punishment.

Justice O'Connor's balancing of rights of prisoners versus the rights of the government is also exemplified in *Turner v. Safely*.<sup>38</sup> In that case, Justice O'Connor wrote for the Court, upholding prison surveillance of inmate mail, but striking down as unconstitutional a state regulation barring prisoners from getting married. Had Justice O'Connor not joined the four other more conservative Justices to form a five-Justice majority in both of these cases, the Warren Court's greater emphasis on prisoner's rights, at the expense of the government, would have continued into the 1980s and 1990s.

## G. First Amendment

### 1. Commercial Speech

In 1988, in *Shapero v. Kentucky Bar Association*,<sup>39</sup> the Court struck down a state's ban on direct-mail solicitations by lawyers that were targeted to recipients known to need legal services of a particular kind. For the majority, Justice Brennan held that the *Central Hudson Gas* test was not satisfied by Kentucky's desire to keep potential clients from being overwhelmed.<sup>40</sup> Justice O'Connor, dissenting with Chief Justice Rehnquist and Justice Scalia, doubted that the Court was on the right track in this aspect of commercial speech doctrine, and hoped that the Court would return to the states the legislative function which, she asserted, the Court had taken from

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37. 475 U.S. 312, 319-26 (1986).

38. 482 U.S. 78, 91 (1987). Justice O'Connor's is balancing of rights is also evidenced in *Hudson v. Millan*, 503 U.S. 1, 4 (1992), where she wrote for the Court, with Justices Scalia and Thomas dissenting, that use of excessive force against a prisoner may constitute cruel and unusual punishment even though the prisoner does not suffer serious injury.

39. 486 U.S. 466 (1988).

40. *Id.* at 474-78. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), Justice Powell had written for the Court that for commercial speech to come within First Amendment protection, it "at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

them in the context of attorney advertising.<sup>41</sup> In 1995, Justice O'Connor was able to bring about some of that return. Writing for a 5/4 Court in *Florida Bar v. Went For It, Inc.*,<sup>42</sup> she upheld a Florida Bar rule prohibiting personal injury lawyers from sending targeted direct-mail subscriptions to victims and their relatives for thirty days following an accident or disaster, and from receiving referrals from anyone who made such a contact. Justice O'Connor noted that the rule directly advanced substantial state interests in protecting privacy and the reputation of the bar. Also, the rule was narrowly tailored in that it was limited to a brief period.<sup>43</sup>

## 2. Establishment Clause

In 1985, Justice O'Connor dissented from a 6/3 opinion written by Justice Brennan in *Aguilar v. Felton*<sup>44</sup> which held that the Establishment Clause barred the City of New York from sending public school teachers into parochial schools as part of a congressionally mandated program for providing remedial education to disadvantaged children. Responding to concerns expressed by Justice Brennan that guarding against the infiltration of religious thought would require excessive entanglement, Justice O'Connor observed that this risk was greatly exaggerated because not a single incident of religious indoctrination had been identified in any of the thousands of classes offered for two decades.<sup>45</sup>

In 1997, Justice O'Connor took advantage of a 5/4 opportunity to overrule Justice Brennan's *Aguilar* opinion in *Agostini v. Felton*.<sup>46</sup> Mindful of cautions in the three-judge *Casey* opinion that cases should not be overruled merely because of a doctrinal disposition to come out differently,<sup>47</sup> Justice O'Connor took pains to show that Establishment Clause jurisprudence had changed significantly since *Aguilar* was decided. First, she said, the presumption that teachers on parochial premises must inevitably indoctrinate was abandoned in *Zobrest*,<sup>48</sup> where a deaf student was allowed to bring his state-employed sign-language interpreter to his Roman Catholic high school. Second, Justice O'Connor explained that the assumption that all direct aid to education impermissibly finances religious indoctrination was abandoned in *Witters*.<sup>49</sup> In that case the Court allowed a state to issue a vocational tuition grant to a blind person who wished to become a pastor. Third, she asserted that *Zobrest* also repudiated the assumption that the presence of Title I teachers in parochial school

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41. 486 U.S. at 487-91.

42. 515 U.S. 618, 625-32 (1995).

43. *Id.* at 632-34. Justice Kennedy, dissenting, stated that the Court should not allow restrictions on speech to be justified on the ground that the expression might offend the listener. *Id.* at 638 (Kennedy, J., dissenting, joined by Stevens, J., Souter, J., and Ginsburg, J.).

44. 473 U.S. 402 (1985).

45. *Id.* at 424.

46. 521 U.S. 203 (1997).

47. See *supra* text accompanying note 25.

48. 521 U.S. at 223 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993)).

49. *Id.* at 225 (citing *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986)).

classrooms will, without more, create the impression of a “symbolic union” between church and state.<sup>50</sup> Thus, the Title I program, which places teachers in parochial as well as public schoolrooms to teach disadvantaged children, does not result in “excessive” entanglement that advances or inhibits religion.

#### IV. IMPORTANT 5/4 CASES IN WHICH JUSTICE O’CONNOR SUPPLIED THE CRITICAL FIFTH VOTE

Justice O’Connor’s key votes in important 5/4 constitutional cases have reflected the same priority of values that may be found in her 5/4 opinions for the Court, and those values have remained consistent over time. This can be seen when a sample of the 5/4 cases in which she supplied the key vote is reviewed in chronological order.

##### A. Jurisdiction

In *Pennhurst State School & Hospital v. Halderman*,<sup>51</sup> Justice Powell wrote for a 5/4 Court that because of principles of federalism embodied in the Eleventh Amendment, federal courts do not have jurisdiction to hear cases based on an allegation that a state official has violated state law. Powell reasoned that such actions do not vindicate the supreme authority of federal law and represent an intrusion on state sovereignty. Thus, the “stripping” doctrine of *Ex Parte Young*<sup>52</sup> does not apply to allow even a prospective remedy. If Justice O’Connor had given federalism concerns less weight and had voted with the four dissenters, the federal courts today could award injunctive relief whenever they find that state officials have violated state law.

##### B. Justiciability

In *City of Los Angeles v. Lyons*,<sup>53</sup> Justice White wrote for a 5/4 Court that a case was not ripe for a preliminary injunction against police use of chokeholds where the plaintiff had in the past suffered injury from such a hold but did not show why he might realistically be threatened in the future by police officers acting within or without the department’s policy on the matter. Justice White stressed that a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of state criminal law, at least in the absence of irreparable injury both great and immediate. Justice Marshall, dissenting, wrote that this ruling made it difficult for citizens to challenge

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50. *Id.* at 227.

51. 465 U.S. 89 (1984).

52. 209 U.S. 123 (1908).

53. 461 U.S. 95 (1983).

the chokehold policy.<sup>54</sup> If Justice O'Connor had joined Justice Marshall's dissent, as did Justices Brennan, Blackmun, and Stevens, the protection of civil rights would have been weighed more heavily and past injury plus some danger of a recurrent violation would be sufficient to support a preliminary injunction. Less weight would be given to the limitations on Article III implied by its "case or controversy" language and to the precedents which call for a plaintiff to have an injury that a judicial order could remedy.

### C. Commerce Clause

*United States v. Lopez*<sup>55</sup> was the first case since 1937 in which the Court held that Congress exceeded its power under the Commerce Clause. The provision struck down made it a federal crime for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone. Chief Justice Rehnquist wrote that the precedents call for a determination that the regulated activity "substantially affects" interstate commerce. He observed, however, that the terms of the challenged law had nothing to do with commerce of any sort and there was no jurisdictional element which ensured that the firearm possession in question affected interstate commerce. He pointed to the lack of findings which might have enabled the Court to evaluate the legislative judgment that the activity in question substantially affected interstate commerce.<sup>56</sup>

Justice O'Connor joined Justice Kennedy's concurring opinion which asserted that federalism was a unique contribution of the framers to political science and political theory by recognizing that freedom would be enhanced by the creation of two governments, not one. Kennedy argued that the statute upset the federal balance as it intruded on education, an area of traditional state concern to which states lay claim by right of history and experience.<sup>57</sup>

The dissent of Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, rested on a theory that guns near a school can interfere with education and that, in turn, may ultimately affect national economic well-being.<sup>58</sup> If Justice O'Connor had joined that dissent, the Congress would today have an essentially unreviewable power to make judgments on what significantly affects interstate commerce, a power that could extend to regulating the educational process itself.

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54. *Id.* at 127-31.

55. 514 U.S. 549 (1995).

56. *Id.* at 558-66.

57. *Id.* at 574-83.

58. *Id.* at 615-25.

D. Commerce Clause—Section Five of the Fourteenth Amendment

In *U.S. v. Morrison*,<sup>59</sup> Chief Justice Rehnquist, writing for a 5/4 Court, was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. He held that the federal Violence Against Women Act, which creates a private cause of action against persons who commit a crime of violence motivated by gender, could not be sustained as an exercise of Commerce Clause power or section five power of the Fourteenth Amendment.

With respect to the Commerce Clause, the Chief Justice stated that striking down the law was merely an application of *Lopez*,<sup>60</sup> an opinion Justice O'Connor had joined. He further stated that the critical fact in that case, which supported the Court's conclusion that possessing a gun in a schoolyard was not substantially related to interstate commerce, was the noneconomic, criminal nature of the conduct. Also important, and relevant here, was the fact that the Violence Against Women Act did not express a jurisdictional element which limited its reach to interstate commerce, the lack of findings regarding effects on interstate commerce, and the attenuated link to interstate commerce. Further, Congress' method of reasoning with respect to its findings would allow it completely to obliterate the Constitution's distinction between national and local authority—even though the Constitution requires a distinction between what is truly national and what is truly local.<sup>61</sup>

With respect to section five of the Fourteenth Amendment, the Chief Justice relied primarily on precedents, including *Kimel*, authored by Justice O'Connor,<sup>62</sup> which had established that the Fourteenth Amendment creates rights only against state action. The law was not congruent and proportional to any constitutional violations by the states because it visited no consequence on any state officials. The Chief Justice also distinguished cases upholding section five action as cases involving remedies directed to the state where Congress found an evil existed. This law, in contrast, applied uniformly throughout the nation.<sup>63</sup>

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59. 529 U.S. 598, 601 (2000).

60. See *supra* text accompanying notes 82-85.

61. 529 U.S. at 606-17. Justice Souter's dissent stated that in the minds of the majority there is a new animating theory that has taken the place of the laissez-faire theory which sustained limits on Congress' Commerce Clause power prior to 1937. The new theory is federalism. Yet the Court decided in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that state sovereign interests were intended to be protected by procedural safeguards rather than by judicially created limitations on federal power. He also noted that the collective opinion of state officials presented to Congress was that the Violence Act was needed. Thus, the majority was forcing the states to enjoy the new federalism whether they wanted it or not. *Morrison*, 529 U.S. at 653. In his dissent, Justice Breyer also noted that drawing the line between economic and noneconomic interests would likely prove unworkable in practice. *Id.* at 1774-77.

62. See *supra* text accompanying notes 46-50.

63. 529 U.S. at 617-27. Justice Breyer, dissenting, stated that he thought the law could be sustained under the Commerce Clause and so it was not necessary to consider section five. However, he expressed doubts about what the majority had held regarding section five. He suggested that Congress could provide remedies against private actors in this case because that would intrude only a little on either states or private parties since the violent

E. *Dormant Commerce Clause*

In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,<sup>64</sup> Justice O'Connor joined in an opinion by Justice Stevens, together with Justices Kennedy, Souter, and Breyer. Justice Stevens found unlawful a state law exemption from property tax on property owned by charitable institutions where the exemption did not include organizations operated principally for the benefit of nonresidents. Stevens pointed out that, under the precedents, a state law which discriminated on its face against interstate commerce is virtually per se invalid.<sup>65</sup> Justice Scalia, dissenting with the Chief Justice and Justices Thomas and Ginsburg, argued for treating the exemption as a subsidy or for recognizing an additional exception to the dormant Commerce Clause.<sup>66</sup> Justice O'Connor's vote with the majority thus helped to strengthen the Court's role under dormant Commerce Clause analysis.

F. *Due Process*

1. *Due Process—Fundamental Rights*

a. *Bowers v. Hardwick*

In *Bowers v. Hardwick*,<sup>67</sup> Justice White wrote for a 5/4 majority, including Justice O'Connor, that homosexuals do not have a fundamental right to engage in acts of sodomy. He emphasized that no such right was announced in the precedents nor was it implicit in the concept of ordered liberty or deeply rooted in the nation's history and traditions. He explained that, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."<sup>68</sup>

Reflecting her balanced approach towards the substantive due process right of privacy, however, Justice O'Connor joined Justice Kennedy's opinion ten years later in *Romer v. Evans*,<sup>69</sup> which held that a state cannot impose burdens on homosexuals merely based upon animus. Thus, a state may not be able to regulate homosexual

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conduct in question is, in the main, already forbidden by state law. *Id.* at 662-66.

64. 520 U.S. 564 (1997).

65. *Id.* at 581-83. The exemption at issue was a prohibited form of protectionism since it was an attempt to give local consumers an advantage over consumers in other states. Nor was there any reason why the nonprofit character of an organization should exclude it from being protected by the negative aspect of the Commerce Clause. Finally, the exemption could not be considered as simply a subsidy for organizations that focused their activity on local concerns. *Id.* at 583-91.

66. *Id.* at 607-09 (Scalia, J., dissenting).

67. 478 U.S. 186 (1986).

68. *Id.* at 194.

69. 517 U.S. 620, 634-35 (1996).



sodomy after *Romer* unless the state can establish a legitimate interest for the regulation other than mere animus toward homosexuals.<sup>70</sup>

b. Michael H. v. Gerald D.

In *Michael H. v. Gerald D.*,<sup>71</sup> Justice Scalia announced the judgment of the Court that a biological father who had once established a parental relationship with his child did not have a constitutionally protected liberty interest in that relationship if it was opposed by the child's mother and the husband to whom she was presently married and to whom she had been married when the child was conceived. Justice Scalia quoted Justice Powell, who had written, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition."<sup>72</sup>

Justice O'Connor, with Justice Kennedy, concurred in the result and in all of Justice Scalia's opinion except footnote six, which stated that the Court should always consider the most specific level at which a relevant tradition protecting or denying protection to an asserted right could be identified. Justice O'Connor thought that this statement could not be squared with all of the cases and, expressing caution, asserted that she would "not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."<sup>73</sup> This departure is critical when applied to a case like *Casey*, where Scalia's "specific level" approach would make it difficult to find a fundamental right to an abortion, as opposed to Justices O'Connor and Kennedy's more general approach to historical traditions, which permitted a finding in *Casey* that "[a]t 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."<sup>74</sup>

If Justice O'Connor had departed further from Justice Scalia's opinion and joined dissenters Brennan, Marshall, Blackmun, and White, she would have analyzed the case in terms of parenthood, as an interest that historically has received protection. She would not have required approval from history before protecting in the name of liberty a biological link combined with a substantial parent-child

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70. Establishing such an interest may be difficult for the State, as noted in Justice Scalia's dissent in *Romer*. *Id.* at 636 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick* . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.").

71. 491 U.S. 110 (1989).

72. *Id.* at 123-24 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

73. *Id.* at 132 (O'Connor, J., concurring in part, dissenting in part).

74. 505 U.S. at 851. Note, however, that consistent with Justice O'Connor's general decision-making approach towards the Constitution, see *supra* text accompanying notes 1, 4, this broader focus on historical traditions is only one aspect of determining the existence of fundamental rights, and must be balanced against arguments of text, structure, consistent legislative or executive practice, and precedent. Thus, despite the "heart of liberty" language, Justice O'Connor agreed in *Washington v. Glucksburg*, 521 U.S. 702 (1997), discussed *infra* text accompanying notes 129-30, that there is no fundamental right to physician-assisted suicide.

relationship. If she had so reasoned, the Court would not have allowed California to deny plaintiff the chance to prove paternity because of the conclusive presumption that the husband was the father, thus constitutionalizing this aspect of state domestic relations law.<sup>75</sup>

## 2. *Due Process—Abortion*

In *Stenberg v. Carhart*<sup>76</sup> a 5/4 Court struck down Nebraska's attempt to ban partial-birth abortions, saying that it imposed an undue burden on a woman's right to make an abortion decision. The majority opinion by Justice Breyer stated that states may not ban partial-birth abortions if their laws are vague enough to prohibit most midterm abortion methods and do not contain exemptions to preserve a woman's health. Justice O'Connor, concurring, emphasized that a law banning partial-birth abortions could be constitutional under the joint opinion in *Casey* if it was limited to post-viability abortions and contained an exception regarding the life or health of the mother.<sup>77</sup> Dissenting, Justice Kennedy, joined by Chief Justice Rehnquist, argued that under the joint opinion in *Casey*, which Kennedy had joined, the Nebraska statute was constitutional as sufficiently limited to post-viability abortions and containing a valid life or health exception.<sup>78</sup>

## 3. *Due Process—Right to Refuse Medical Treatment*

Chief Justice Rehnquist wrote for a 5/4 Court in *Cruzan v. Director, Missouri Department of Health*<sup>79</sup> that a person has a constitutionally protected liberty interest in refusing unwanted medical treatment. However, a state may permissibly seek to protect its interest in the preservation of human life by adopting a "clear and convincing" standard with respect to a guardian's showing that a person now incompetent and kept alive only by machines would have wanted discontinuance of nutrition and hydration. Justice O'Connor, concurring, declared that requiring a competent adult to endure machine procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. She pointed out that the Court had not decided whether a state has the constitutional duty to give effect to the decisions of a surrogate decision maker as a protection for the

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75. *Michael H.*, 491 U.S. at 141-43. Concern about not constitutionalizing state domestic relations law was also the basis of Justice O'Connor's plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 71-74 (2000), which struck down as violating a parent's fundamental right to raise children the state of Washington's domestic relations law which permitted "any person" to seek custody of a child under a best interest standard, but which emphasized the uniqueness of the Washington law and "that the constitutional protections in this area are best elaborated with care."

76. 530 U.S. 914 (2000).

77. *Id.* at 947-52.

78. *Id.* at 956-79. Justices Scalia and Thomas also dissented. *Id.* at 853 (Scalia, J., dissenting); *id.* at 980 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

79. 497 U.S. 261 (1990).

patient's interest in refusing medical care, and added that in her view such a duty may well be constitutionally required. She concurred because she regarded procedures for decision making to be an added safeguard of the patient's interest in directing medical care.<sup>80</sup> If she had agreed with dissenting Justices Brennan, Marshall, Blackmun, and Stevens, a judicial determination regarding the best interest of the individual would have prevailed over the general state policy calling for preservation of life unless clear and convincing evidence to the contrary was made available.<sup>81</sup>

#### 4. *Due Process—Liberty Interests of Prisoners*

In *Sandin v. Conner*,<sup>82</sup> Chief Justice Rehnquist wrote for a 5/4 Court that whether a particular interest of a prisoner was a protected liberty interest would no longer be determined by whether the state had protected that interest by language of an unmistakably mandatory character. Instead, it would henceforth be tested by whether a practice or policy imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. The Chief Justice held that the prisoner in this case, although held for thirty days in segregated confinement, did not suffer an atypical significant deprivation which violated a liberty interest, because the conditions mirrored those imposed on inmates in administrative segregation and protective custody, and the State's action would not inevitably affect the duration of the prisoner's sentence. Had Justice O'Connor dissented, as did Justices Ginsburg, Stevens, Breyer, and Souter, the confinement would have been found to violate a liberty interest on the theory that a prisoner's confinement as punishment for "high misconduct" stigmatized him and diminished his parole prospects.<sup>83</sup>

#### G. *Affirmative Action in Employment*

In *Wygant v. Jackson Board of Education*,<sup>84</sup> a 5/4 Court applied strict scrutiny to strike down the dismissal of a white teacher rather than a black teacher in order to remedy general societal discrimination. Justice O'Connor, concurring, agreed that neither providing role models nor resolving general societal discrimination were compelling justifications. However, in order to ensure against discouraging voluntary affirmative action plans, she cautioned against reading Justice Powell's plurality opinion as a holding that only a finding of past discrimination by a court

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80. *Id.* at 289-92.

81. *Id.* at 302 (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting).

82. 515 U.S. 472, 484-86 (1995).

83. *Id.* at 488 (Ginsburg, J., joined by Stevens, J., dissenting); *id.* at 491 (Breyer, J., joined by Souter, J., dissenting).

84. 476 U.S. 267 (1986).

or other competent body was a constitutional prerequisite for an affirmative action plan.<sup>85</sup>

## H. Takings Clause

In *Dolan v. City of Tigard*,<sup>86</sup> Chief Justice Rehnquist wrote for a 5/4 Court that when a city conditions a building permit on deeding portions of the property to the city there is a taking unless there is a “rough proportionality” between the required dedication and the impact of the proposed development. “No precise mathematical calculation is required but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>87</sup> The Chief Justice explained that he saw no reason why the Takings Clause, which is as much a part of the Bill of Rights as the First Amendment, should be relegated to the status of a poor relation in these comparable circumstances. If Justice O’Connor had joined in dissents supported by Justices Stevens, Blackmun, Ginsburg, and Souter, there would not be a taking unless a developer could establish that a condition imposed on consent to develop is so grossly disproportionate to the proposed development’s adverse effects that it manifests motives other than land use regulation on the part of the city.<sup>88</sup>

## I. First Amendment

### 1. Defamation

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>89</sup> was another Powell opinion. At issue in the case was whether the rule of *Gertz v. Robert Welch, Inc.*<sup>90</sup> applies so that presumed and punitive damages can be recovered absent a showing of “actual malice” if defendant’s false and defamatory statements do not involve matters of public concern. The Court held that such damages can be recovered without showing “actual malice” because speech involving no matter of public concern has a reduced constitutional value. Justice O’Connor did not join with dissenters Brennan, Marshall, Blackmun, and Stevens who said that removing the *Gertz* restrictions on presumed and punitive damages violated the First Amendment even if the speech was appropriately characterized as a matter of only private concern.

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85. *Id.* at 286-87 (O’Connor, J., concurring).

86. 512 U.S. 374, 391 (1994).

87. *Id.* at 391.

88. *Id.* at 403 (Stevens, J., dissenting).

89. 472 U.S. 749 (1985).

90. 418 U.S. 323 (1974).

2. *Establishment Clause—Government Endorsement*

In *County of Allegheny v. ACLU*<sup>91</sup> a 5/4 Court ruled that a creche display on the staircase of a county courthouse violated the Establishment Clause but that was not true of a menorah placed outside a city-county building next to a Christmas tree and a sign saluting liberty. Justice Blackmun asked whether the challenged practice aided religion by asking whether it had the purpose or effect of “endorsing” religion, an idea that Justice O’Connor had proposed when concurring in *Lynch v. Donnelly*.<sup>92</sup>

This holding drew an objection from Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, that the majority was reflecting an “unjustified hostility toward religion” and endangering traditional practices that accept the role of religion in our society, such as legislative prayers and opening the Court with “God save the United States and this honorable Court.”<sup>93</sup> Replying to this objection from Justice Kennedy, with whom she usually agrees, Justice O’Connor reasoned that:

These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. Historical acceptance of a practice does not in itself validate that practice under that Establishment Clause if the practice violates the values protected by the Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment.<sup>94</sup>

3. *Establishment Clause—Government Grants to Schools*

In *Bowen v. Kendrick*,<sup>95</sup> the Court rejected a facial attack on federal grants to public and nonpublic organizations, including those with ties to religious denominations, for counseling services and research on premarital adolescent sexual relations and pregnancy. The majority, in an opinion by Chief Justice Rehnquist, applied *Lemon v. Kurtzman*,<sup>96</sup> and found that any effect of advancing religion was incidental and remote. Justice O’Connor, concurring, emphasized that any use of public funds to promote religious doctrines was unconstitutional.<sup>97</sup>

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91. 492 U.S. 573 (1989).

92. *See id.* at 593-96 (citing 465 U.S. 668, 687-94 (1984) (O’Connor, J., concurring)).

93. *Id.* at 655, 672 (Kennedy, J., dissenting).

94. *Id.* at 630 (O’Connor, J., concurring).

95. 487 U.S. 589 (1988).

96. 403 U.S. 602 (1971).

97. 487 U.S. at 622-24 (O’Connor, J., concurring).

#### 4. Establishment Clause—State Coercion of Religious Conformity

In *Lee v. Weisman*,<sup>98</sup> Justice Kennedy wrote for a 5/4 Court that a public high school which invited members of the clergy to lead prayer at graduation had violated the Establishment Clause by applying subtle coercion to participate in a religious exercise. Justice O'Connor joined with Justice Stevens in a concurring opinion by Justice Souter. Consistent with Justice O'Connor's endorsement approach, Justice Souter emphasized that state coercion of religious conformity, over and above state endorsement of religious exercise or belief, was not a necessary element of an Establishment Clause violation.<sup>99</sup>

#### 5. Establishment Clause—Incidental Benefit to Religion

In *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>100</sup> Justice Kennedy wrote for a 5/4 Court that a state university would violate freedom of speech if it paid for the publication of many student newspapers but excluded an otherwise qualified student-edited evangelical Christian magazine. He held that there was no Establishment Clause violation since any benefit to religion was incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Justice O'Connor, concurring, declared that she was convinced there was no danger that public funds were being used to endorse the magazine's religious message because of an explicit disclaimer, the disbursement of funds directly to third parties, and the vigorous nature of the forum.<sup>101</sup>

### V. 6/3 OR EVEN LESS DIVIDED CASES WHERE JUSTICE O'CONNOR WROTE THE MAJORITY OPINION

Where the vote supporting a decision by the Court is less divided than 5/4, it is not clear whether any particular Justice made a difference in the outcome. However, where Justice O'Connor has written an opinion for a relatively unified Court, she has not slacked-off in her efforts to present a well-organized and solidly supported opinion which provides underlying reasons and which logically applies the law to the facts. That methodology may well have helped to gain, as well as retain, votes. We will not review all of those opinions because, by our count, there are more than seventy of them. However, here are several of the more notable cases.

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98. 505 U.S. 577, 596-99 (1992).

99. *Id.* at 609, 623-27 (Souter, J., concurring). Justice O'Connor reached a similar conclusion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301 (2000), joining the majority opinion which found unconstitutional government endorsement of religion by student-led prayers at a school-sponsored high school football game.

100. 515 U.S. 819, 830-37, 839-44 (1995).

101. *Id.* at 846-52 (O'Connor, J., concurring).

A. *Jurisdiction*

In *Michigan v. Long*,<sup>102</sup> decided early in her Supreme Court career, Justice O'Connor wrote for the Court that where it is unclear whether a state court decision is based on an independent nonfederal ground adequate to support the judgment, the Court would no longer deny jurisdiction or ask for clarification but, instead, would assume jurisdiction on the hypothesis that the state court believed federal law required the decision. She announced that in order to promote national uniformity in what was understood to be federal law, the Court would adopt this policy:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.<sup>103</sup>

Under this rule, if a state court wants to shield its opinion from review it needs to make clear that it is deciding the case on the basis of state law.<sup>104</sup>

B. *Federalism*

As most may recall, Justice Blackmun concurred in *National League of Cities v. Usery*,<sup>105</sup> which held that states have a Tenth Amendment immunity from certain federal regulations. Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>106</sup> Justice Blackmun recanted his concurrence and, joining with the four *National League* dissenters, he wrote for the Court in *Garcia* that *National League* was overruled and that the states do not have Tenth Amendment immunity from federal regulation under the Commerce Clause.

In *Garcia*, Justice O'Connor joined a dissenting opinion by Justice Powell, who asserted that federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the states and the federal government—a balance designed to protect our fundamental liberties.<sup>107</sup> Justice O'Connor also wrote a dissent in which she argued that the states have legitimate interests which the federal government is bound to respect even though its laws are

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102. 463 U.S. 1032 (1983).

103. *Id.* at 1040-41.

104. *Id.* *Michigan v. Long* was reaffirmed in *Arizona v. Evans*, 514 U.S. 1, 7-9 (1995).

105. 426 U.S. 833 (1976) (providing Congress may not use Commerce Clause power to displace the states' freedom to structure integral operations in areas of traditional governmental functions and, thus, Congress could not impose federal wage and hour regulations for state employees).

106. 469 U.S. 528, 556-57 (1985).

107. *Id.* at 568-77.

supreme, and that the Court should weigh state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority over the states as states.<sup>108</sup> She joined Justice Rehnquist in predicting that the Court would in time once again assume its constitutional responsibilities with respect to drawing lines defining the scope of protected state autonomy.

In recent years, after the balance regarding federalism issues shifted on the Court when Justice Thomas replaced Justice Marshall in 1991, Justice O'Connor was able to participate in making the above prediction a reality. Thus, writing on behalf of a 6/3 Court in *New York v. United States*,<sup>109</sup> she distinguished from *Garcia* all cases in which Congress had not subjected a state to the same legislation applicable to private parties but, instead, had "commandeered" the legislative process of a state by directly compelling the enactment and enforcement of a federal regulatory program.<sup>110</sup> Applying that concept, Justice O'Connor wrote that:

The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.<sup>111</sup>

The Court's decision in *New York v. United States* was reaffirmed in *Printz v. United States*.<sup>112</sup> In *Printz*, Justice Scalia wrote for a 5/4 Court, over dissenting Justices Stevens, Souter, Ginsburg, and Breyer, that the Brady Act unconstitutionally directed state officers, as agents of the state, to administer and enforce a federal regulatory program (i.e., to undertake a background check of proposed handgun purchasers).<sup>113</sup> Justice O'Connor, concurring, concluded that provisions which directly compel state officials to administer a federal regulatory

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108. *Id.* at 580-89. This statement was foreshadowed by Justice O'Connor's dissent in *FERC v. Mississippi*, 456 U.S. 742 (1982), where she declared that Congress should not be able to require states to "consider" the adoption of certain federal regulatory standards because this interferes with a state's sovereign authority to set its own agenda for consideration of issues of public policy. She added that requiring consideration was as intrusive as preemption. Justice O'Connor also dissented from the holding in *South Carolina v. Baker*, 485 U.S. 505 (1988) that the federal income tax could be imposed on interest from bearer bonds issued by a state.

109. 505 U.S. 144 (1992).

110. *Id.* at 188. States which had not regulated the disposal of low level radioactive waste according to federal regulations were required by Congress to take title to such waste and become liable for all damages waste generators suffered as the result of a state's failure to take title promptly. *Id.* at 174-75.

111. *Id.* at 188.

112. 521 U.S. 898 (1997).

113. *Id.* at 933. Justice Scalia distinguished early federal statutes on extradition which imposed executive duties on state officials as a direct implementation of the Extradition Clause of the Constitution, Art. IV, section two. *Id.* at 908-09. Also, according to the majority, impositions on state judges, as opposed to state legislative, executive, or administrative officials, could be constitutional based on early specific historical practice. *Id.* at 906-07.



program utterly fail to adhere to the design and structure of our constitutional scheme.<sup>114</sup>

### C. Equal Protection—Illegitimate Children

In *Clark v. Jeter*,<sup>115</sup> the Court unanimously struck down Pennsylvania's six-year statute of limitations for support actions on behalf of nonmarital children. Justice O'Connor's opinion for the Court established that intermediate scrutiny should be applied to classifications based on illegitimacy, primarily because children are not responsible for their status as illegitimate and persons should not be punished for something which is not the product of their choice. Under intermediate scrutiny, even if a six-year period might be reasonable, it was not substantially related Pennsylvania's important interests in avoiding the litigation of stale or fraudulent claims.<sup>116</sup>

### D. First Amendment—Freedom of Speech

#### 1. Free Speech

Justice O'Connor's free speech opinions have typically reflected an attempt to balance, in a fact-sensitive way, the rights of individuals with the needs of government. For example, with Justices Brennan, Marshall, and Stevens dissenting, Justice O'Connor rejected in *Frisby v. Schultz*<sup>117</sup> a facial challenge to an ordinance that completely banned picketing before or about any residence. She found that the ordinance, interpreted narrowly, per the town's argument, was limited to picketing directed at a single home, was supported by the substantial interest of protecting residential privacy, was narrowly tailored to picketing directed at a "captive" household, and left open ample alternative channels of communication.<sup>118</sup> Justice Brennan, dissenting, thought the law was not narrowly tailored because it might apply to a lone, silent individual, walking back and forth with a sign—a situation

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114. *Id.* at 935-36 (O'Connor, J., concurring). It should be noted that Justice O'Connor recently joined in a unanimous opinion by Chief Justice Rehnquist in *Reno v. Condon*, 528 U.S. 141 (2000), which rejected a Tenth Amendment challenge directed at federal legislation that banned state sale and private resale of driver personal information obtained by a state motor vehicle department. Distinguishing *New York* and *Printz*, the Chief Justice explained that the federal law did not require states in their sovereign capacity to regulate their own citizens. Rather, it required states who wished to engage in a certain activity to comply with federal standards regulating that activity—a "commonplace that presents no constitutional defect." *Id.* at 150 (citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

115. 486 U.S. 456, 461 (1988).

116. *Id.* at 464.

117. 487 U.S. 474 (1988).

118. *Id.* at 482-84.

which in his opinion did not implicate heightened governmental interest in residential privacy.<sup>119</sup>

Another free speech opinion by Justice O'Connor, written for a 6/3 Court, was *Boos v. Barry*.<sup>120</sup> There the Court struck down a content-based restriction on displaying within five-hundred feet of a foreign embassy any sign tending to bring that foreign government into public odium or public disrepute. Justice O'Connor pointed out that the statute was aimed at the direct impact of speech and, thus, triggered strict scrutiny. The law failed this test since it was not narrowly tailored to an interest in protecting the dignity of foreign diplomats because that interest could be served by the less restrictive alternative of barring the intimidation, coercion, threatening, or harassment of such officials.<sup>121</sup>

Under precedents decided prior to Justice O'Connor joining the Court, government employees are entitled to protection against retaliation for their speech on matters of public interest,<sup>122</sup> and political affiliation can be required only where appropriate for the particular job.<sup>123</sup> In 1996, the Court extended those precedents to independent contractors in *Board of Commissioners, Wabaunsee County v. Umbehr* and *O'Hare Truck Service, Inc. v. City of Northlake*.<sup>124</sup> Writing for the majority in *Umbehr*, Justice O'Connor specified that the case applied only to terminations, pointing out that the Court did not need to address the possibility of suits by bidders or applicants for new government contracts.<sup>125</sup>

## 2. The Free Exercise Clause

Justice O'Connor wrote for a 5/3 Court in *Lyng v. Northwest Indian Cemetary Protective Ass'n*,<sup>126</sup> that the free exercise of religion was not violated by a decision of the U.S. Forest Service to build a road through and permit timber harvesting in part of a national forest traditionally used by several Indian tribes as a sacred area for religious rituals. She said that the affected individuals would not be coerced by the government action into violating their religious beliefs, nor would their religious

119. *Id.* at 495-96 (Brennan, J., dissenting).

120. 485 U.S. 312 (1988).

121. *Id.* at 321-29. Justice O'Connor also wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices White and Scalia, in *United States v. Kokinda*, 497 U.S. 720, 722-23 (1990). The Court held that a post office could bar solicitation from a table set up on the sidewalk near its entrance. Justice O'Connor reasoned that the sidewalk, which ran only from the parking lot to the front door, was not the kind that constituted a traditional public forum. The regulation was valid because it was viewpoint-neutral and reasonable. *Id.* at 727-30. Justice Kennedy supplied a fifth vote but only because in his view the regulation satisfied traditional standards for time, place, and manner regulations of protected expression in a public forum. *Id.* at 737-39 (Kennedy, J., concurring).

122. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

123. *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

124. *Umbehr*, 518 U.S. 668, 673 (1996) (*Pickering* extended to independent contractors); *O'Hare*, 518 U.S. 712, 714-15 (1996) (*Elrod* extended to independent contractors).

125. 518 U.S. at 685.

126. 485 U.S. 439 (1988).

activity be penalized by denying any person an equal share of the rights enjoyed by other citizens. The government was merely deciding how to use government property, and that did not “prohibit” anyone’s free exercise of religion, as is required by constitutional text.<sup>127</sup>

VI. 6/3 OR EVEN LESS DIVIDED CASES WHERE JUSTICE O’CONNOR  
WROTE A CONCURRING OPINION

Justice O’Connor has more often written concurring than dissenting opinions. Her concurring opinions often provide a clarifying explanation of what the Court has held or not held and, thus, what questions remain open for the future. At other times she has objected to the use of some new theory rather than making use of an analysis already supported by precedent. And she has insisted on analytical logic where possible. The following are some examples.

A. *Dormant Commerce Clause*

In *C & A Carbone, Inc. v. Clarkstown*,<sup>128</sup> the Court in an opinion by Justice Kennedy, declared invalid as discrimination against interstate commerce a town’s ordinance that required all nonrecyclable, nonhazardous waste in the town to be deposited at a transfer station scheduled to be sold to the town for one-dollar after five years. Justice O’Connor wrote a concurring opinion. Seeking analytical correctness, she noted that the law dealt evenhandedly with all competitors, be they local or nonlocal. However, it was invalid as an undue burden on interstate commerce.<sup>129</sup>

B. *Due Process—Physician-Assisted Suicide*

In *Washington v. Glucksberg*,<sup>130</sup> Chief Justice Rehnquist delivered the opinion of the court, holding that there is no fundamental right to physician-assisted suicide, even in the case of terminally ill, mentally competent adults. Justice O’Connor, concurring, noted that the respondents had raised only a facial challenge to the state law which prohibited physician-assisted suicide. She added that the Court had no need to reach the question whether a mentally competent person who is experiencing great suffering has a constitutionally protected interest in controlling the circumstances of his or her imminent death. She pointed out that there was no legal

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127. *Id.* at 452-53.

128. 511 U.S. 383 (1994).

129. *Id.* at 403-07 (O’Connor, J., concurring).

130. 521 U.S. 702 (1997).

barrier to dying patients obtaining palliative care even when so doing might hasten their death.<sup>131</sup>

### C. *The Right to Travel*

In *Zobel v. Williams*,<sup>132</sup> the Court struck down an Alaska law distributing the income from its natural resources to adult citizens in varying amounts, depending on their length of residence in the state. Chief Justice Burger wrote that rewarding contributions of various kinds which citizens have made to their state was not a legitimate state purpose. Justice O'Connor agreed that the law was invalid but, in an opinion concurring only in the judgment, noted that "A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational. Under some circumstances, the objective may be wholly reasonable."<sup>133</sup>

### D. *Equal Protection and Peremptory Challenges*

In *J.E.B. v. Alabama*,<sup>134</sup> the state had used its peremptory challenges to strike male jurors in a suit to establish paternity. A 6/3 Court held that the state's gender-based peremptory challenges were unconstitutional, reasoning that all gender-based classifications demand an exceedingly persuasive justification. Justice O'Connor, concurring, observed that because gender-based challenges are sometimes based on accurate assumptions, the Court's decision should be limited to a prohibition on the government's use of such challenges.<sup>135</sup>

### E. *First Amendment and Child Pornography*

#### 1. *Child Pornography*

Justice O'Connor filed a concurring opinion in *New York v. Ferber*,<sup>136</sup> in order to stress that the majority opinion of Justice White, which upheld a New York statute prohibiting the distribution of material depicting children engaged in sexual conduct, did not require states to exempt from such statutes all material with serious literary, scientific, or educational value. She observed that psychological, emotional, and mental harm is suffered by children in the production of such material regardless of the social value of the depictions.<sup>137</sup>

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131. *Id.* at 736-38 (O'Connor, J., concurring).

132. 457 U.S. 55 (1982).

133. *Id.* at 72 (O'Connor, J., concurring).

134. 511 U.S. 127 (1994).

135. *Id.* at 148-51 (O'Connor, J., concurring).

136. 458 U.S. 747 (1982).

137. *Id.* at 774-75.

## 2. Solicitation in Airports

In *International Society for Krishna Consciousness, Inc. v. Lee*,<sup>138</sup> a 5/4 Court, with the opinion delivered by Chief Justice Rehnquist, held that an airport owned by a public authority was not a public forum and that a regulation prohibiting solicitation in its interior did not violate the First Amendment. Justice Rehnquist reasoned that this nontraditional forum had not intentionally been opened for the promotion of expression in addition to the facilitation of passenger air travel. Therefore, it was not a public forum, the test for regulations was whether they were reasonable and not viewpoint discrimination, and solicitation regulations were reasonable in view of the dangers of duress, fraud, and pedestrian congestion. Justice O'Connor, concurring, agreed that an airport, as such, is not a public forum but she noted that the port authority here was operating a shopping mall as well as an airport. The question thus was whether the regulations were reasonably related to maintaining the multipurpose environment that was deliberately created. Even so, she agreed that the ban on solicitation was reasonable in view of the problems of congestion and fraud. With respect to handing out pamphlets, however, she joined a different majority who concluded that the problems were not serious and that there could be no complete ban, though the authorities were still free to promulgate regulations as to the time, place, and manner of leafleting.<sup>139</sup>

## 3. Regulation of Speech on Private Property

In *City of Ladue v. Gilleo*,<sup>140</sup> the Court struck down a city ordinance which barred homeowners from displaying any signs on their property except for identification, sale, or safety, but which allowed certain organizations to erect certain signs not allowed at residences. Justice Stevens, for the Court, reasoned that it should first decide whether the city could prohibit the plaintiff-owner's sign and then, only if necessary, consider whether it was proper to permit certain other signs. He answered the first question in the negative, because of the importance and unique characteristics of residential signs after assuming, *arguendo*, that the exemptions were free of impermissible content or viewpoint discrimination. Justice O'Connor, concurring, would have had the Court adhere to its normal methodology of determining whether a regulation is content-based or content-neutral and then apply the proper level of scrutiny. However, she joined the Stevens opinion because whether the restriction was content-based or content-neutral, it would be invalid. But, in an apparent attempt to confine the significance that might be attributed to the

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138. 505 U.S. 672 (1992).

139. *Id.* at 685-93 (O'Connor, J., concurring).

140. 512 U.S. 43 (1994).

Stevens opinion, she emphasized that his discussion did not cast doubt on the propriety of the Court's normal content discrimination inquiry.<sup>141</sup>

#### F. *First Amendment and Commercial Speech*

In *44 Liquormart, Inc. v. Rhode Island*,<sup>142</sup> the Court struck down a Rhode Island ban on price advertising of alcoholic beverages that was intended to reduce consumption by inhibiting price-cutting. Justice Stevens announced the judgment of the Court but could secure only four votes for his view that when a state prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, judicial review possibly should be more strict than what is required by the leading case of *Central Hudson Gas*.<sup>143</sup> Justice Thomas, concurring, called for an even higher standard, saying that whenever the government's interest is to keep legal users ignorant in order to manipulate their choices in the marketplace, the interest is per se illegitimate.<sup>144</sup> Justice O'Connor, concurring with the Chief Justice and Justices Souter and Breyer, concluded that because the law failed even the less stringent standard set out in *Central Hudson Gas*,<sup>145</sup> nothing required the adoption of a new analysis. The upshot of these divisions on the Court is that some uncertainty continues to exist with respect to the standard applicable to bans on commercial advertising.

##### 1. *Establishment Clause*

In *Lynch v. Donnelly*,<sup>146</sup> the Court held that the inclusion of a creche in a city-owned Christmas display on private grounds did not violate the Establishment Clause where the display included many other figures and decorations traditionally associated with Christmas and a banner that read, "Seasons Greetings." Chief Justice Burger, remarking that our traditions have accommodated all faiths, with hostility to none, concluded that here the principal effect of the creche was to depict the historical origins of this national holiday. It did not constitute government advocacy of a particular religious message. Justice O'Connor, concurring in the Court's opinion, declared the central question was whether the government had endorsed Christianity, and that depended on whether the government intended to convey such a message. She found that, instead, the government intended to celebrate the public holiday.<sup>147</sup>

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141. *Id.* at 59-60 (O'Connor, J., concurring).

142. 517 U.S. 484 (1996).

143. *Id.* at 501-04 (plurality opinion) (citing 447 U.S. 557, 566 (1980)).

144. *Id.* at 518-19 (Thomas, J., concurring).

145. *Id.* at 528, 532 (O'Connor, J., concurring).

146. 465 U.S. 668 (1984).

147. *Id.* at 691 (O'Connor, J., concurring).

In *Wallace v. Jaffree*,<sup>148</sup> the Court struck down an Alabama law authorizing schools to set aside one minute at the start of each day for meditation or voluntary prayer, holding that the law was not motivated by any clearly secular purpose and, thus, violated the *Lemon* test. Justice O'Connor concurred in the result, but chose to analyze the case under her "endorsement" approach rather than under the *Lemon* test. She argued that by mandating a moment of silence the state does not necessarily endorse religion. Here, however, the state had attempted to convey the message that children should use the moment of silence for prayer.<sup>149</sup>

Similarly, in *Board of Education of Kiryas Joel v. Grumet*,<sup>150</sup> the Court struck down, 6/3, a New York law which created a new school district on behalf of a community of highly religious Jews, the Satmar Hasidim. Justice Souter, writing for the Court, held that the law violated the principle that a state may not delegate its civic authority to a group chosen according to a religious criterion. Justice O'Connor, concurring, noted that accommodations may justify treating those who share a deeply held belief differently, but that this accommodation was too particular. In her view, a more generally drafted statute might survive challenge under the Establishment Clause.<sup>151</sup>

In *Capital Square Review and Advisory Board v. Pinette*,<sup>152</sup> Justice O'Connor, concurring, departed from the theory expressed in a plurality opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, which upheld a District Court's order that a state could not refuse to display on a public forum next to the statehouse a cross owned by the Ku Klux Klan where the space had traditionally been open to a variety of unattended displays during the Christmas season and otherwise. The plurality held that if a purely private display occurs in a traditional or designated public forum, publicly announced and open to all on equal terms, the religious expression in such a display cannot violate the Establishment Clause. Justice O'Connor's concurrence, joined by Justices Souter and Breyer, asserted that there was no realistic danger that a reasonably well-informed observer would think that the state was endorsing religion because of the display proposed in the case.<sup>153</sup>

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148. 472 U.S. 38 (1985).

149. *Id.* at 67-70 (O'Connor, J., concurring).

150. 512 U.S. 687 (1994).

151. *Id.* at 716-18 (O'Connor, J., concurring).

152. 515 U.S. 753, 764-70 (1995).

153. *Id.* at 772-73 (O'Connor, J., concurring). Justice O'Connor also joined in a concurrence by Justice Souter, who said the state's flat denial to the request was not narrowly tailored since the state could have conditioned a permit on attaching a disclaimer to the exhibit. *Id.* at 784 (Souter, J., concurring). Justice Stevens, dissenting, thought it was enough that some reasonable observers might attribute a religious message to the state from this unattended display. *Id.* at 801-02 (Stevens, J., dissenting). To complete the disarray, Justice Ginsburg, dissenting, said that since the display ordered by the lower court did not include a disclaimer, the question of the effect of a disclaimer should be reserved for another day. *Id.* at 817-19 (Ginsburg, J., dissenting).

The Court's most recent Establishment Clause case, *Mitchell v. Helms*,<sup>154</sup> underscores the importance of Justice O'Connor's endorsement approach to current constitutional analysis. The issue involved in *Mitchell* was whether government aid in the form of equipment and educational materials provided to public schools, private nonreligious schools, and private religious schools violated the Establishment Clause. A four-Justice plurality, authored by Justice Thomas, and joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, held that no Establishment Clause problem would exist as long as the aid is offered on a neutral basis to all schools and the aid is secular in nature, without regard to whether the aid could be diverted by a religious school to the advancement of its religious mission.<sup>155</sup> In a three-Justice dissent, Justice Souter, joined by Justice Stevens and Ginsburg, held that secular school aid presents Establishment Clause problems not only when it has actually been diverted, but also when there is the possibility of such diversion.<sup>156</sup> In contrast to these two extremes, Justice O'Connor, joined by Justice Breyer, provided the controlling vote in *Mitchell*. In her view, government endorses religion in the context of school aid only when "the aid in question actually is, or has been, used for religious purposes."<sup>157</sup>

## VII. DISSENTING OPINIONS OF JUSTICE O'CONNOR

Justice O'Connor has been in the majority far more often than she has been in dissent. Even so, she has introduced some new ideas and perspectives into the constitutional law arena via a few of her dissenting opinions. Many of these ideas have not yet been adopted in later cases although, as previously indicated, her views on federalism, affirmative action, the use of the undue burden standard in abortion cases, and endorsement as a test under the Establishment Clause, have substantially prevailed. This article provides some samples from her dissenting opinions which introduce ideas or perspectives that may be adopted by a future Court—depending, of course, upon changes in Court personnel or shifts in perspective among the current Justices.

### A. *Federalism—Conditional Spending*

In *South Dakota v. Dole*,<sup>158</sup> a 7/2 Court upheld federal withholding of 5% of federal highway funds from states which permit a person under the age of twenty-one to purchase liquor. The majority stated that this statutory provision was designed to fulfill a public purpose related to the federal interest in highway safety,

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154. 530 U.S. 793 (2000).

155. *Id.* at 809-23.

156. *Id.* at 890-94.

157. *Id.* at 856.

158. 483 U.S. 203 (1987).



did not call for the states to engage in unconstitutional activity, and did not coerce the states. Justice O'Connor, dissenting, said that the condition was not reasonably related to interstate highway construction because it stops teenagers from drinking even when they are not about to drive on a highway. She saw the situation as another manifestation of the problem of federalism, arguing that Congress is not entitled to insist, as a condition of the use of highway funds, that states must impose or change regulations in other areas of the state's social and economic life because of an attenuated or tangential relationship to highway use or safety.<sup>159</sup>

*B. Equal Protection—Discrimination Against Foreign Corporations*

Justice O'Connor championed consistency in the application of the equal protection methodology when she dissented in *Metropolitan Life Insurance Co. v. Ward*.<sup>160</sup> In that case, Justice Powell, for a 5/4 Court, wrote that a purpose to promote investment in domestic industry becomes illegitimate when furthered by tax classifications that discriminate against foreign companies. He applied this principle to invalidate an Alabama law which taxed out-of-state insurance companies at a higher rate than domestic insurance companies. Justice O'Connor dissented, with Justices Brennan, Marshall, and Rehnquist. Her thesis was that Congress had approved the kind of discrimination present here by enacting the McCarran-Ferguson Act, which suspends Commerce Clause restraints on state taxation and regulation of insurance companies. O'Connor objected to collapsing the two prongs of the rational basis test which ordinarily asks first whether the goal is legitimate and, if so, then calls for only the deferential inquiry of whether the means are rationally related thereto. Justice O'Connor warned that the majority had unleashed an undisciplined form of scrutiny under the Equal Protection Clause which threatened not only the freedom of the states but also of the federal government to formulate economic policy.<sup>161</sup>

Justice O'Connor could claim some victory for the above idea when the Court, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,<sup>162</sup> allowed Massachusetts and Connecticut to favor out-of-state bank holding corporations domiciled within the New England region over out-of-state bank holding corporations from other parts of the country. Justice Rehnquist, writing for the Court, noted that there could be no Commerce Clause objection because Congress had specifically consented to this kind of state regulation. Applying rational basis scrutiny under the Equal Protection Clause, he held that state concerns to preserve a close relationship between those in the community who need credit and those who provide credit are different than the state's interests in *Metropolitan Life*,

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159. *Id.* at 218.

160. 470 U.S. 869 (1985).

161. *Id.* at 884-87.

162. 472 U.S. 159 (1985).

and met the traditional rational basis for judging equal protection claims under the Fourteenth Amendment. Concurring, Justice O'Connor wrote that she saw no meaningful distinction for Equal Protection purposes between the statutes being upheld in the case and those at issue in *Metropolitan Life*. She noted that completely barring the banks of forty-four states from doing business is no less discriminatory than taxing insurance companies from forty-nine states at a higher rate.<sup>163</sup>

### C. State Action Under the Fourteenth Amendment

When a private attorney in a civil case makes a peremptory challenge based on race, the litigant is regarded as a state actor, wrote Justice Kennedy for the Court in *Edmonson v. Leesville Concrete Co.*<sup>164</sup> Justice O'Connor, dissenting with Chief Justice Rehnquist and Justice Scalia, said that attorneys represent their clients and their actions do not become those of the government by virtue of their location.<sup>165</sup>

### D. First Amendment—Free Exercise Clause

In *Employment Division v. Smith*,<sup>166</sup> in an opinion by Justice Scalia, the Court held that if a law of general applicability has only the incidental effect of burdening the exercise of religion, the law does not offend the First Amendment unless the exercise of religion is conjoined with another constitutional protection, such as freedom of speech or the substantive due process right of privacy. Justice O'Connor, joined by Justices Brennan, Marshall, and Blackmun, said that she could not join the opinion because, in her view, it was incompatible with our nation's fundamental commitment to religious liberty. She said that in her view "the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community."<sup>167</sup> She could agree with the judgment, however, by finding that the state had a compelling interest in prohibiting the possession of peyote by its citizens.<sup>168</sup>

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163. *Id.* at 179.

164. 500 U.S. 614 (1991).

165. *Id.* at 632.

166. 494 U.S. 872 (1990).

167. *Id.* at 891.

168. *Id.* at 893-97, 903-07. Justice O'Connor has continued to dissent from the majority's approach to the free exercise clause in *Smith*, and has continued to call for that approach to be overruled. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 544-57 (1997) (O'Connor, J., dissenting).

### VIII. DISSENTING VOTES OF JUSTICE O'CONNOR

Where a Justice merely joins in a dissenting opinion written by another Justice, there is little basis for saying that the joiner's presence on the Court has made a difference. However, from the pattern of such dissenting votes, one may be better able to appreciate the joiner's overall perspectives. Here, then, are a few examples of decisions in which Justice O'Connor joined the dissenting opinion of another Justice.

#### A. *Standing to Sue*

Justice O'Connor joined Justice Blackmun's dissent in *Lujan v. Defenders of Wildlife*.<sup>169</sup> The majority in *Lujan* held that Congress could not authorize federal lawsuits by persons who challenged procedures employed by the Secretary of the Interior under the Endangered Species Act. For the majority, Justice Scalia said that such persons had merely a generalized grievance and had not suffered the kind of injury necessary to confer Article III jurisdiction.<sup>170</sup> Justice Blackmun's dissent, with Justice O'Connor, said that courts would not violate the separation of powers doctrine if they enforced a right conferred on each person by Congress to enforce procedures enacted by Congress.<sup>171</sup> Given the broadening of citizen-suit standing in cases after *Lujan*,<sup>172</sup> Justice O'Connor's position in *Lujan* seems to have substantially prevailed.

#### B. *Federalism—Term Limits Imposed by States*

In *U.S. Term Limits v. Thornton*,<sup>173</sup> a 5/4 Court held that, for members of Congress, the states could not add term limit qualifications beyond the age, citizenship, and residency prescribed in the Constitution. Justice Stevens, for the majority, said that the states didn't have such power before the Constitution and, thus, it was not reserved by the Tenth Amendment.<sup>174</sup> Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, joined in a dissent by Justice Thomas.<sup>175</sup> He wrote that all powers to which the Constitution does not speak expressly or by

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169. 504 U.S. 555, 589 (1992) (Blackmun, J., joined by O'Connor, J., dissenting).

170. *Id.* at 564-67.

171. *Id.* at 601-06.

172. *See, e.g., Vermont Agency of Nat. Res. v. United States*, 529 U.S. 765, 769-77 (2000); *Friends of the Earth, Inc. v. Laidlaw Evt. Services (TOC)*, 528 U.S. 167, 180-88 (2000). That these cases represent a break from the analysis in *Lujan* is indicated by the dissent of Justice Scalia, who authored *Lujan*, in *Friends of the Earth. Id.* at 197-214 (Scalia, J., joined by Thomas, J., dissenting).

173. 514 U.S. 779 (1995).

174. *Id.* at 803-06.

175. *Id.* at 845-46 (Thomas, J., dissenting).

necessary implication are reserved to the state and that the people of each state share in that reserved power.<sup>176</sup>

### C. Dormant Commerce Clause

Dissenting in *South Central Timber Development v. Wunnicke*,<sup>177</sup> Justice O'Connor joined Justice Rehnquist to protest the majority's conclusion that Alaska was not released from dormant Commerce Clause scrutiny by the market participant rule because it had regulated post-sale processing of timber sold by the state rather than paying to have logs processed and then entering the market to sell processed logs. Rehnquist said it was unduly formalistic to find that the one path chosen by the state to promote its concerns was the one barred by the Commerce Clause.<sup>178</sup>

Another example of Justice O'Connor's impatience with formalism appeared in *Bacchus Imports, Ltd. v. Dias*.<sup>179</sup> There the majority struck down Hawaii's exemption of certain locally produced alcoholic beverages from its 20% excise tax on sales of liquor at wholesale. Justice O'Connor signed on with dissenting Justice Stevens and Rehnquist to say that since Hawaii could bar the import of all intoxicating liquors, it could engage in a less extreme form of discrimination that merely provides a special benefit—something like a subsidy—for locally produced beverages.<sup>180</sup>

### D. First Amendment—Flag Desecration Laws

Justice O'Connor joined the Chief Justice and Justice White, dissenting in *Texas v. Johnson*,<sup>181</sup> where a 5/4 majority struck down the Texas flag desecration statute. Justice Brennan, for the Court, said that the state's interest in preserving the flag's special symbolic value was not compelling because the government may not prohibit the expression of an idea simply because society finds the idea, itself, offensive or disagreeable. Further, there is no indication in constitutional text or the cases that a separate juridical category exists for the American flag. The Chief Justice, disagreeing, said that the American flag has occupied a unique position that

176. *Id.* at 846-50 (Thomas, J., dissenting). Justice Stevens, for the majority, and Justice Kennedy, concurring, said that the relevant people here are those of the entire United States. Thus, the people, acting through Congress, can impose term limits on Congress. *Id.* at 803; *id.* at 841-42 (Kennedy, J., concurring). Justice Thomas replied that this reasoning would be appropriate with respect to prescribing qualifications for the President, but not for the people's representatives in Congress. *Id.* at 858-60.

177. 467 U.S. 82 (1984).

178. *Id.* at 101-03 (Rehnquist, J., dissenting).

179. 468 U.S. 263 (1984).

180. *Id.* at 286-87. Similar impatience with a formalistic approach caused Justice O'Connor to dissent in *Clinton v. City of New York*, 524 U.S. 417, 468 (1998) (Scalia, J., joined by O'Connor, J., and Breyer, J., concurring in part and dissenting in part) (instead of focusing on the formal title of the Line Item Veto Act, the Court should examine the actual power given the President under the Act).

181. 491 U.S. 397 (1989).

justifies a governmental prohibition against flag burning as a form of protest. He said it was the use of a particular symbol, and not the idea the defendant sought to convey, for which defendant was punished.<sup>182</sup>

#### IX. SUMMING UP

It is apparent from the cases that Justice O'Connor is not an ideologue. However, in the structural area of constitutional law, she has been a strong supporter of federalism and the separation of powers. In the area of individual rights, she has recognized the need to protect the right of each individual to be treated equally. She has not shown eagerness to create new fundamental rights, but she has manifested an open mind to working out accommodations where strong interests collide—whether under the First Amendment freedom of speech, the Fifth and Fourteenth Amendments' equal protection and due process clauses, or the Eighth Amendment's cruel and unusual punishment clause. And, in the disarray that exists in Establishment Clause jurisprudence, she has contributed the endorsement test.

In sum, we think the nation has been well served by this thoughtful and hard working Justice.

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182. *Id.* at 421-35. Justice O'Connor similarly joined the dissent in *United States v. Eichman*, 496 U.S. 310 (1990), which involved a 5/4 striking down of a flag burning statute passed by Congress.

APPENDIX

DECISIONS OF THE REHNQUIST COURT (1986-2000)  
STRIKING DOWN ACTS OF CONGRESS

I. DECISIONS ON STRUCTURAL ASPECTS OF THE CONSTITUTION . . . . .	952
A. <i>Federalism</i> . . . . .	952
1. <i>Eleventh Amendment Immunity of States</i> . . . . .	942
2. <i>Tenth Amendment State Autonomy</i> . . . . .	953
3. <i>Outer Limits on Congress' Commerce Clause Power</i> . . . . .	953
B. <i>Separation of Powers</i> . . . . .	953
C. <i>Judicial Review</i> . . . . .	954
II. DECISIONS ON PROHIBITIONS DESIGNED TO PROTECT INDIVIDUAL RIGHTS . . . . .	954
A. <i>First Amendment</i> . . . . .	954
B. <i>The Takings Clause</i> . . . . .	955
C. <i>Miscellany</i> . . . . .	955
1. <i>Import/Export Clause</i> . . . . .	955
2. <i>Seventh Amendment</i> . . . . .	955

The Rehnquist Court, in the years 1986-2000, invalidated twenty-nine acts of Congress. As the Appendix makes clear, Justice O'Connor voted with the majority in all but four of these cases.<sup>183</sup> In the thirteen cases decided by a 5/4 vote, she was in the majority eleven times. Her presence was most strongly felt in cases involving structural aspects of the Constitution, particularly issues of federalism. For example, the vote was 5/4 (with dissents by Stevens, Souter, Ginsburg, and Breyer) in five of the six cases in which the Court invalidated recent attempts by Congress to abrogate the sovereign immunity of states by action under the Commerce Clause or section five of the Fourteenth Amendment. In the one 6/3 case, *City of Boerne v. Flores*,<sup>184</sup> Justice O'Connor dissented with Justices Souter and Breyer because she believed that the Court had erred when holding in the *Smith*<sup>185</sup> case that only rational basis review should be used in cases where a state substantially interfered with the free exercise of religion.

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183. She dissented only in *United States v. Eichman*, 496 U.S. 310 (1990) (flag desecration); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (bar on honoraria for low-level federal employees, O'Connor dissenting to limit invalidity as applied); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (standard of review in free exercise cases); and *Clinton v. City of New York*, 524 U.S. 417 (1998) (line item veto act).

184. 521 U.S. 507 (1997).

185. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

With the exception of *City of Boerne*, there were 5/4 votes in all ten of the cases in which, on federalism grounds, the Rehnquist Court invalidated an act of Congress. In nine of those cases, excepting only *City of Boerne*, Justice O'Connor voted with the majority.

In two other areas of "structural" issues, i.e., separation of powers and judicial review, the Rehnquist Court has been less divided. Justice O'Connor dissented from striking down the Line Item Veto Act,<sup>186</sup> but joined the majority in not allowing Congress to delegate to its members the executive or legislative responsibility of running an airport.<sup>187</sup> And she agreed with the majority that Congress lacks power to tell federal judges how to decide cases that have already been dismissed.<sup>188</sup>

In the sixteen cases where the Rehnquist Court has invalidated an act of Congress because of a constitutional prohibition involving individual rights, the vote was 5/4 in only four of the cases. Justice O'Connor made a difference by voting with the majority to strike down: (1) an election law provision requiring political groups to set up separate funds for independent campaign expenditures,<sup>189</sup> (2) a law barring low-level executive branch employees from accepting honoraria for speeches not pertaining to their work,<sup>190</sup> and (3) a severely retroactive law which required a company, long out of the mining business, to be liable for the health care costs of former coal miners.<sup>191</sup> In the fourth case, *United States v. Eichman*, Justice O'Connor didn't make a difference because she joined three other dissenters in an unsuccessful attempt to allow Congress to criminalize the burning of The United States flag as a symbolic gesture.<sup>192</sup>

## I. DECISIONS ON STRUCTURAL ASPECTS OF THE CONSTITUTION

### A. Federalism

#### 1. Eleventh Amendment Immunity of States

*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), 5/4. Congress may abrogate state immunity from suit in federal courts only by providing remedies under section five of the Fourteenth Amendment that are congruent and proportional with past or threatened state violations of the Fourteenth Amendment.

*City of Boerne v. Flores*, 521 U.S. 507 (1997), 6/3. The Religious Freedom Restoration Act, requiring states prove a compelling interest, supports laws

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186. *Clinton v. City of New York*, 524 U.S. 417 (1998).

187. *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991).

188. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211 (1995).

189. *Colorado Republican Fed. Campaign Comm. v. F.C.C.*, 518 U.S. 604 (1996).

190. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

191. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

192. *United States v. Eichman*, 496 U.S. 310 (1990).

burdening religious activity was not a proportional remedy under section five of the Fourteenth Amendment. (Justice O'Connor dissented with Justices Souter and Breyer).

*Alden v. Maine*, 527 U.S. 706 (1999), 5/4. State sovereign immunity was violated by a law allowing states to be liable under the Fair Labor Standards Act in private suits for damages brought in state courts.

*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), 5/4. A law subjecting states to suits under the Lanham Act was struck down for violating state sovereign immunity.

*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), 5/4. The Court struck down a law subjecting states to patent suits.

*Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), 5/4. The Court struck down, as violating sovereign immunity, a law holding states liable for age discrimination because Congress had virtually no reason to believe the states were engaged in unconstitutional discrimination on the basis of age.

## 2. Tenth Amendment State Autonomy

*New York v. United States*, 505 U.S. 144 (1992), 6/3. The Tenth Amendment was violated by a law which required states to legislate participation in a radioactive waste program or take title to all waste generated in the state.

*Printz v. United States*, 521 U.S. 898 (1997), 5/4. The Tenth Amendment was violated by a law requiring state and local police officers to enforce a federal program by conducting background checks on handgun purchasers.

## 3. Outer Limits on Congress' Commerce Clause Power

*United States v. Lopez*, 514 U.S. 549 (1995), 5/4. The Court invalidated a law criminalizing the possession of a gun in a school zone since this conduct was not substantially related to interstate commerce.

*United States v. Morrison*, 529 U.S. 598 (2000), 5/4. Congress could not provide federal remedies for victims of violent crimes motivated by gender because this was not activity substantially related to interstate commerce.

## B. Separation of Powers

*Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991), 6/3. An act transferring operating control of Washington airports to a board of review composed of members of Congress violated the separation of powers doctrine.

*Clinton v. City of New York*, 524 U.S. 417 (1998), 6/3. The Line Item Veto Act was struck down for violating the presentment clause and bicameralism. (Justice O'Connor dissented, joined by Justices Scalia and Breyer).



C. *Judicial Review*

*Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211 (1995), 6/1/3. A law requiring federal judges to reinstate certain securities suits dismissed as barred by time under a 1991 Supreme Court decision was held to violate exclusive judicial power to decide cases.

II. DECISIONS ON PROHIBITIONS DESIGNED TO  
PROTECT INDIVIDUAL RIGHTS

A. *First Amendment*

*FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), 5/4. The Court struck down a provision of federal election law requiring political groups to set up separate funds for independent corporate campaign expenditures.

*Boos v. Barry*, 485 U.S. 312 (1988), 6/3. The Court invalidated a content-based District of Columbia law barring the display of any sign within five-hundred feet of a foreign embassy if the sign brought the foreign government into “public disrepute.”

*Sable Communications of California v. F.C.C.*, 492 U.S. 115 (1989), 9/0. The Court struck down parts of the 1934 Communications Act banning “indecent” messages.

*United States v. Eichman*, 496 U.S. 310 (1990), 5/4. The Court struck down a law criminalizing the burning of a United States flag as a symbol. (Dissenting was Stevens, joined by O’Connor, Rehnquist, and White).

*Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), 9/0. The Court struck down a law prohibiting brewers from displaying the alcohol content of their beer on a label.

*United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), 5/4. The Court struck down a law prohibiting lower-level executive branch employees from accepting honoraria for speeches not pertaining to their work. (Dissenting were Justices Rehnquist, Scalia, and Thomas. Justice O’Connor, also dissenting, thought the law was invalid as applied, but not on its face).

*Colorado Republican Federal Campaign Committee v. F.E.C.*, 518 U.S. 604 (1996), 7/2. The Court struck down an election law which limited political parties’ independent spending on behalf of a congressional candidate.

*Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727 (1996), 6/3. The Court struck down a law requiring cable TV operators to block indecent programming from leased channels (and, 5/4, it struck down a provision authorizing cable TV operators to block indecency on public access channels).

*Reno v. ACLU*, 521 U.S. 844 (1997), 7/2. The Court struck down the Communications Decency Act prohibiting the knowing transmission to minors of

obscene or indecent messages via the Internet. (Partial dissent by Justice O'Connor, joined by Chief Justice Rehnquist).

*Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), 8/1. The Court struck down a law that prohibited broadcasters in nongambling states from airing casino advertisements. (Chief Justice Rehnquist concurred).

## B. *The Takings Clause*

*Hodel v. Irving*, 481 U.S. 704 (1987). The Court struck down a law designed to restore small parcels of individually owned Indian land to Indian tribes.

*Babbitt v. Youpee*, 519 U.S. 234 (1997). The Court struck down a law designed to restore small parcels of individually owned Indian land to Indian tribes, without payment to the individual owners.

*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), 5/4. The Court struck down on "takings" or due process grounds a severely retroactive law holding the petitioner liable for health care costs of former coal miners even though the petitioner had for many years had not been in the business.

## C. *Miscellany*

### 1. *Import/Export Clause*

*United States v. IBM Corp.*, 517 U.S. 843 (1996). The Court struck down as violating the export clause a federal tax on insurance premiums paid to foreign insurers.

*United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). The Court struck down a harbor maintenance tax on outgoing goods as violating the export clause.

### 2. *Seventh Amendment*

*Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998), 9/0. The Court held that an opportunity for jury trial is required by the Seventh Amendment to determine statutory copyright damages.

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