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"Context Matters": The Free Speech Legacy of Sandra Day O'Connor

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ARTICLES

"CONTEXT MATTERS":[1] THE FREE SPEECH LEGACY OF SANDRA DAY O'CONNOR

By Emily Buchanan Buckles

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1. Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (stating, in an equal protection case setting, the phrase that could be considered her theme for free speech cases).

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I. INTRODUCTION

Some scholars have described Justice O'Connor's decision-making as being in the tradition of Chief Justice Marshall, engaging in "reasoned elaboration of the law in light of its purposes and history, fidelity to precedent, and respect for consistent executive or legislative practice."[2] Others describe it simply as balancing.[3] Whatever the label, Justice O'Connor's decision-making made her "the most powerful woman in America."[4] Extensive studies have been done of her jurisprudence in the areas of women's rights, federalism, and separation of church and state.[5] However, surprisingly little has been written about her free speech jurisprudence. In the area of free speech, as with most

2. Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915, 918–19 (2001). Professors Kelso and Kelso identify four styles of decision-making on the Court today. *Id.* at 918. According to them, Justices Scalia and Thomas are classified as formalists, Chief Justice Rehnquist exemplified the tradition of Justice Holmes, Justice Kennedy follows Chief Justice Marshall along with Justice O'Connor, and finally Souter, Ginsberg and Stevens mainly use a style called instrumentalism. *Id.*

3. C. Lincoln Combs, Note, *A Curious Choice:* Hibbs v. Winn *As a Case Study of Justice Sandra Day O'Connor's Balancing Jurisprudence*, 37 ARIZ. ST. L.J. 183, 192–93 (2005).

4. Fed. Bar Ass'n, *Hon. Sandra Day O'Connor Associate Justice, U.S. Supreme Court*, 48-SEP FED. LAW. 18, 18 (2001).

5. Molly McDonough, *O'Connor: A Trailblazer Who Defies Labels*, 4 NO. 28 A.B.A. J. E-REPORT 1 (2005) (quoting Professor Douglas Kmiec of Pepperdine).

constitutional law, she has shaped many of the tests used by the Court.[6]

One of the first cases that Sandra Day O'Connor heard as a newly appointed Supreme Court Justice was *Widmar v. Vincent*, arguably one of the more important free speech forum cases.[7] Voting in the majority on *Widmar*, she began a journey during which she would author over fifty free speech opinions, including some of the most influential.[8] If, as she tells us, context matters, then a look at Justice O'Connor's rugged roots will reveal the foundation of the many themes that move through her free speech jurisprudence, as indeed through all of her decisions.

Part II looks at those roots from growing up on a ranch in the southwest to being the first woman to sit on the Supreme Court of the United States. Part III reviews the basic steps and tests the Court uses in free speech cases. Part IV surveys Justice O'Connor's work in the area of forum analysis. Parts V and VI examine the other variables in the analysis: content-selectivity and government interest. Part VII gives a broader look at her influence at the intersection of free speech and other doctrines, such as intellectual property. Part VIII concludes that Justice O'Connor's influence on free speech has been significant, reflecting her background, and proving that context does indeed matter.

II. PUTTING SANDRA DAY O'CONNOR IN CONTEXT

In March of 1930, Ada Mae Day traveled to her mother's house in El Paso to give birth to Sandra Day on March 26th.[9] In mid-April, mother and baby daughter returned home to the Lazy B ranch in an unforgiving part of Arizona near the New Mexico and Mexico borders.[10] In that harsh environment, young Sandra learned the values and skills that would serve her in good stead both in life and in law. Her family, the cowboys, and the ranch itself were her earliest teachers.[11] Some of these lessons would provide the underpinnings of her jurisprudence: a love of history, practicality, and a strong sense of balance. Along with a keen intellect and a strong sense of humor, these traits would shape Sandra Day and later her jurisprudence.

6. Erwin Chemerinsky, *The O'Connor Legacy*, 41-SEP TRIAL 68, 68 (2005).

7. Widmar v. Vincent, 454 U.S. 263 (1981).

8. For more on her forum analyses, please see *infra* Part IV (looking at the free speech tests as they have evolved during O'Connor's tenure).

9. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST 95 (2002).

10. *Id.*

11. *See generally id.* (dedicating chapters to each of her parents, several of the cowboys, and the ranch itself).

A. *Living on the Lazy B and Going to School*

"It was not until I grew up and moved away from the Lazy B that I learned just how unusual my early life was."[12]

Life on the Lazy B Ranch could not be called easy. The Day family had no electricity or plumbing until Sandra was seven years old.[13] Water was scarce, and a broken windmill or pump was no laughing matter.[14] Life on the Lazy B took "planning, patience, skill, and endurance."[15] Justice O'Connor has since described the ranch as an island—a place of serene desolation.[16] She speaks of the Lazy B as if it were a person who shaped her character as she grew.[17] And yet, for all that she paints a harsh picture of the Lazy B, the portrait seems to be drawn by a respectful and loving hand.[18]

As an only child for her first nine years, Sandra spent a great deal of time out on the ranch with her father.[19] Their relationship was especially strong.[20] She watched as he checked on cattle, dug new wells, fixed pumps on the old wells, and made sure everything kept running with his own combination of intelligence and practicality.[21] When the ranch finally got plumbing, he made a solar-powered water heater system before the device had been invented.[22] He worked hard and expected perfection.[23] Although he never went to college, he was well-read regarding world events.[24] Dinner time often turned into an enjoyable debate with his family about the world.[25] He always had to have the last word—a trait O'Connor says she learned from him.[26] The things she admired in her father were his practicality, industry, intellectual curiosity, inventiveness, and warmth.[27] She learned those virtues from him too.

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12. *Id.* at 111.
13. *Id.* at 97.
14. *Id.* at 7.
15. *Id.* at 10.
16. *Id.* at 317.
17. *Id.* at 315.
18. *See id.* at 311 (describing the sorrow she experienced when the ranch was finally sold).
19. *Id.* at 29.
20. *Id.*
21. *Id.* at 28.
22. *Id.* at 97.
23. *Id.* at 23. O'Connor describes her father's reaction to her job repainting a screen door. *Id.* at 33–34. She started over several times when he pointed out problems with her methodology. *Id.* Although she got no effusive thanks from him, she knew she had done well. *Id.*
24. *Id.* at 29.
25. *Id.*
26. *Id.*
27. *See generally id.* at 23–35 (describing her father and his personality).

Her mother, MO, taught lessons of grace and poise under pressure.[28] "She made a hard life look easy."[29] She also taught Sandra to read at the age of four.[30] MO had a great curiosity which she instilled in Sandra at an early age.[31] An energetic woman, MO worked hard, but managed to maintain her sense of style in the wilderness.[32] Generally polite, MO would occasionally speak out.[33] Once, when asked how many head of cattle she had, she replied, "If you will tell me how much money you have in your bank account, I will tell you how many cows we have on the ranch."[34] MO certainly passed this quick wit on to her daughter. Later in O'Connor's life, an angry committee chairman told her that if she were a man he would punch her in the mouth.[35] She replied, "If you were a man, you could."[36]

With the exception of one year, Sandra spent her school years with her grandmother in El Paso—a four hour train ride away.[37] Her parents felt she would receive a better education in El Paso.[38] Although her descriptions of school in El Paso reflect her love of learning, she admits that she was horribly homesick the whole time.[39] Sandra may have learned a great deal in school, but without a doubt she learned just as much living in the beautiful desolation of the Lazy B.

B. *Law School and Shortly Thereafter*

"I guess I was naïve—because when I entered law school, I didn't even think about the future."[40]

Graduating high school at just sixteen, Sandra had her heart set on going to Stanford.[41] Her father wanted to go to Stanford too, but had to give up his own dream to come home and run the Lazy B.[42] At Stanford, Sandra majored in economics and, as part of that curriculum, had her first exposure to law.[43] Interest sparked, and she en-

28. *Id.* at 49.
29. *Id.*
30. *Id.* at 44.
31. *Id.* O'Connor recalls her mother taking them on walks and looking at plants, rocks, and bugs for hours. *Id.*
32. *Id.* at 45.
33. *Id.* at 48.
34. *Id.*
35. PETER HUBER, AMERICAN WOMEN OF ACHIEVEMENT: SANDRA DAY O'CONNOR 40 (1990).
36. *Id.*
37. O'CONNOR & DAY, *supra* note 9, at 115.
38. *Id.* at 116.
39. *Id.* at 116–17.
40. Veronica Sainz, *Frontier Justice*, 25 BRIEFCASE: U. OF HOUS. L. CENTER 10, 13 (2005) (describing a speech given by the Justice in Houston on March 10, 2005).
41. HUBER, *supra* note 35, at 28.
42. O'CONNOR & DAY, *supra* note 9.
43. HUBER, *supra* note 35, at 28.

rolled in Stanford's law school.[44] She did extremely well, becoming a member of the Stanford Law Review.[45] Law school was a man's world then. Even so, she graduated third in her class from Stanford—her classmate and friend, William Rehnquist, graduated first in their class.[46] While cite checking materials for the law review, she met John O'Connor.[47] They began dating, and six months after she graduated, they married.[48]

Although she graduated with distinction, O'Connor had an extremely difficult time finding a job.[49] Not only was law school a man's world, but the legal field as a whole was dominated by men.[50] She got an interview with a law firm, but the only job offer she received was for a position as a legal secretary.[51] Finally, she went to work for very little pay for the San Mateo, California county attorney's office.[52] She would later say that job had greatly influenced her life because it introduced her to working in the public sector, about which she was passionate for the rest of her legal career.[53] After John graduated from Stanford they moved to Germany where he was posted by the army.[54] She had to pay for her own plane ticket because they were so newly married.[55] There she worked as a lawyer for the U.S. government in the Judge Advocate General's Corps.[56] When John was released from service, the O'Connors moved back to Arizona.[57]

Even in the Wild West, Sandra could not find a job with a law firm.[58] So, showing the practicality instilled in her from her Lazy B years, she started her own.[59] The firm employed two attorneys total, and they took every case that walked in the door.[60] She stopped working at the law office for a while to raise their three children, but that did not slow her down.[61] That period of her life can best be de-

44. *Id.* at 29.
45. *Id.* at 31.
46. *Id.* at 32–33. John O'Connor started law school after Sandra Day did. *Id.* at 33.
47. *Id.* at 32.
48. *Id.* at 32–33.
49. *Id.* at 33.
50. *See id.*
51. *Id.* One has to wonder if the man who offered her the secretarial position made the connection when O'Connor became the first woman on the Supreme Court. And, if so, what his reaction was.
52. Sainz, *supra* note 40, at 13.
53. HUBER, *supra* note 35, at 33.
54. *Id.* at 35.
55. Sainz, *supra* note 40, at 13.
56. HUBER, *supra* note 35, at 35.
57. *Id.*
58. Sainz, *supra* note 40, at 13.
59. *Id.*
60. *Id.* at 14.
61. HUBER, *supra* note 35, at 37. She did stop work for several years. Although she did not mind being at home with the children, she knew that she would go back to law.

scribed as industrious.[62] Like her energetic mother before her, O'Connor was never idle. She organized a lawyer-referral service, volunteered for various organizations, served as both a bankruptcy trustee and juvenile court referee, and participated in local and national Republican Party politics.[63]

C. *The Beginning of Life in the Public Eye*

"I learned to try to get bipartisan support for the things I cared about. I think you do that by making friends on both sides of the aisle."[64]

In 1966, the governor of Arizona appointed O'Connor to fill a state senate seat that had fallen vacant.[65] Her colleagues described her as a perfectionist, and in 1972 they rewarded her by selecting her as their senate majority leader.[66] O'Connor was the first female senate majority leader in any state.[67] She worked tirelessly.[68] She later said,

> [The] state legislatures are closest to the people and reflect their will in the most direct manner . . . The independence of the states . . . helps to protect one of our most cherished liberties: the right to govern ourselves.[69]

Her understanding of local governments and her respect for their capabilities—or disappointment at their inabilities—is apparent throughout all of her jurisprudence.

Eventually the law called to her again. She left politics, ran for judge, and was elected in 1974.[70] Lawyers who had been in her courtroom said she ran her court in a tough but merciful fashion, frequently knowing the cases better than did the lawyers themselves.[71] Four years later, the Arizona governor appointed her to a seat on the Arizona Court of Appeals.[72] Here she thought she was destined to stay and was content with the idea.[73]

O'Connor spent eighteen months on the court before her life changed dramatically.[74] In July 1981, President Reagan requested a meeting with her.[75] She went to Washington and met the President,

62. *See id.*
63. *Id.* All of this was done while raising three small sons.
64. Sainz, *supra* note 40, at 14.
65. HUBER, *supra* note 35, at 38.
66. *Id.* at 38–39.
67. *Id.* at 38.
68. *Id.* at 41.
69. *Id.* at 43.
70. *Id.* at 45.
71. *Id.* at 46.
72. *Id.* at 49.
73. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE xii (2003).
74. HUBER, *supra* note 35, at 50.
75. O'CONNOR, *supra* note 73.

his staff, and advisors.[76] Justice Powell later described for O'Connor the surprise he felt when he was appointed to the Supreme Court as rather like being hit by lightning.[77] O'Connor describes her own sensation in her book, *The Majesty of the Law*:[78]

> The metaphysical lightning bolt suddenly seemed as if it might head in my direction, and I was about as astonished, though slightly less frightened, as if I had seen a real bolt of lightning making its way straight for me.[79]

After three days of hearings in front of the Senate Judiciary Committee, O'Connor was approved.[80] A week later, the entire Senate approved her without a single dissenting vote.[81]

D. *Showing Her Context*

If people bring their context with them throughout their lives, then the Lazy B went to Washington with Justice O'Connor. Her jurisprudence reflects the character that the Lazy B and the Wild West built in her. She perceives everything, to a greater or lesser extent, through the filter of her life there. She brings a sense of balance from her early days on the ranch, where life was precarious and water was precious. Her father taught her to be practical and inventive. Her mother taught her to love learning, be poised and gracious, and to speak her mind when necessary. Going to school in El Paso taught her to value education and time with her family. Trying to find a job in a world where people did not hire women as lawyers taught her to be persistent and unflinching. Her time in the Arizona Senate gave her a sense of the strengths and weaknesses of local government. And finally, her family gave her strength. All of these characteristics and more can be seen in her opinions. Her free speech jurisprudence is no exception.

III. Posing the Questions: The Modern Free Speech Analysis

To understand O'Connor's impact on free speech jurisprudence, a short, simple look at the modern free speech paradigm is helpful. The calculus for analyzing free speech principles involves the manipulation of three main variables: the speech, the forum, and the rule. The speech itself makes up the threshold question. Certain categories of speech, such as child pornography and violence advocacy, are considered unprotected speech and may be regulated by the government

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Huber, *supra* note 35, at 59.
81. *Id.*

under rational basis review.[82] Commercial speech sits in between protected and unprotected speech, receiving slightly less protection than protected speech.[83] Most other speech is considered protected speech.[84] While certain types of speech, like political and religious speech, are recognized as central to the First Amendment, the Court has declined to use a speech value inquiry within the protected speech category.[85] If the speech at issue is protected speech, then the inquiry moves to the forum.

In 1983, Justice White wrote an opinion in *Perry v. Perry* laying out the forum variable in clear hornbook style.[86] Essentially, there are two fora: the traditional public forum and the non-traditional public forum.[87] Traditional public fora are places that throughout time immemorial have been open for public assembly and communication, such as parks and streets.[88] Speaker's Corner at Hyde Park in London embodies the idea of a traditional public forum.[89] Every Sunday beginning in 1872, people have brought their soapboxes, both literally and figuratively, and spoken their minds without restraint.[90] Non-traditional public fora, although still government owned, have traditionally had purposes other than communication.[91] Good examples of government owned-properties that are not traditional public fora are jails, schools, and military bases—in fact, communication may be at odds with these fora's purposes altogether.[92] A non-traditional public

82. Chaplinsky v. N.H., 315 U.S. 568, 571–72 (1942).

83. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (establishing the modern commercial speech test).

84. R.A.V. v. City of St. Paul, 505 U.S. 377, 400 (1992) (White, J., concurring in the judgment).

85. Although the Court has not adopted Justice Stevens's hierarchy of protected speech concept, it is still useful to note the type of speech at issue. *See* Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 68–70 (1976) (suggesting that certain types of speech may be of lower value and therefore not due the same protections as higher value speech); *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 142–43 (2d ed. 2003). Political and religious speech are examples of speech that the Court has found to be at the core of the First Amendment. *See* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995); Boos v. Barry, 485 U.S. 312, 318 (1988). Regulations burdening these types of speech have essentially a rebuttable presumption of invalidity. *Id.*

86. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). Justice O'Connor joined the majority in this opinion, perhaps supplying the fifth vote. *See id.* at 55.

87. *Id.* at 45. There is also a private forum, but we will not address it here, as it is generally not part of a traditional forum analysis.

88. *Id.*

89. *See generally* Wikipedia, Speakers' Corner, http://en.wikipedia.org/wiki/Speaker%27s_Corner (last visited Jan. 24, 2010).

90. *See id.*

91. *Perry*, 460 U.S. at 46.

92. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (allowing the city to ban demonstrations outside a school because the noise would be disruptive to the classes being held there); Adderley v. Fla., 385 U.S. 39 (1966) (upholding the arrests of thirty-two students whose silent protest blocked the entrance to a jail).

forum may be transformed into a traditional public forum for a limited duration or for a specific class of speakers.[93] For example, a university can designate funds for all student organizations that wish to publish newsletters, creating a designated or limited public forum for all students of that university.[94] The question of whether a public forum is traditional or non-traditional, although seemingly straightforward, can be very complex. Justice O'Connor has written opinions on some of the trickiest forum questions the Court has seen.[95]

Once the forum is identified, the last question involves the nature of the regulation at issue. Generally, regulations may be classified as content-neutral, content-selective, or viewpoint-selective.[96] Content-neutral regulations may incidentally burden speech, but their focus is not on regulating expression.[97] For example, a content-neutral regulation would prohibit men from destroying their draft cards.[98] Burning a draft card in protest of the draft would be a regulation burdening expression incidental to the purpose of the rule.[99] Content-neutral regulations may also be time, place, and manner regulations—like noise ordinances. "[A] prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising."[100]

Content-selective and viewpoint-selective regulations seek to prevent a certain type of expression.[101] A content-selective regulation might prohibit an after-school program discussing child-rearing, whereas in the same setting, a viewpoint-selective regulation might prohibit discussions of child-rearing from a religious standpoint.[102]

93. *Id.*; *see also* Widmar v. Vincent, 454 U.S. 263, 267–68 (1982) (ruling that a university had created a limited public forum for its students and as such could not deny speakers access on the basis of content). This case would have been one of the first that Justice O'Connor heard since it was submitted on October 6, 1981. She joined the majority. *Widmar*, 454 U.S. at 265.

94. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995).

95. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985) (examining a charity campaign held in federal buildings). For an in depth look at Justice O'Connor's forum cases, see *infra* Part IV.

96. SULLIVAN & GUNTHER, *supra* note 85, at 212.

97. *See id.* at 225.

98. United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (upholding the conviction of a man who burned his draft card in protest, because the regulation furthered a substantial government interest unrelated to speech).

99. *Id.*

100. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993) (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

101. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (finding that the "Son of Sam" laws co-opting proceeds from true crime books made by the criminals they feature was a content selective regulation).

102. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that the First Amendment would not allow regulations denying access to speakers based on the speakers' points of view).

Having addressed all three variables, the free speech analysis can begin. Manipulation of these factors produces some basic combinations that recur with some frequency.

IV. DEFINING THE FORUM: WHEN A SIDEWALK IS NOT A SIDEWALK

Of the threshold questions described above, Justice O'Connor has influenced the forum analysis the most. In her first four years on the bench, the Court issued three of its arguably most influential forum cases in modern First Amendment jurisprudence: *Widmar*, *Perry* and *Cornelius*.[103] First, *Widmar* stands for the proposition that a non-traditional public forum may be converted to a traditional public forum for a time period and/or for a class of people.[104] In *Perry*, the Court supplied us with a hornbook discussion of the forum analysis.[105] And, *Cornelius* fully introduced the concept that the forum need not be a physical place.[106] Even though O'Connor was new to the bench, she supplied the crucial fifth vote in *Perry* and wrote the majority opinion in *Cornelius*.[107] At the time that *Perry* was decided forum analysis was not universally used.[108] Some members of the Court felt that focusing on the forum issue deflected the Court from the real questions demanded by the First Amendment.[109] But forum analysis provides a logical framework for approaching otherwise tricky questions. By supplying the fifth vote in *Perry,* O'Connor demonstrated both her practicality and foreshadowed her influence on the modern forum analysis.

A. *The Contours of the Traditional Public Forum*

"Even protected speech is not equally permissible in all places and at all times."[110]

The Supreme Court has defined traditional public fora as those places that have traditionally been used for expression, such as streets,

103. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985) (defining the reasonableness requirement for regulations in the non-public forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (laying out the forum analysis in hornbook style); Widmar v. Vincent, 454 U.S. 263 (1981) (explaining the concept of the designated public forum).

104. *See, e.g.*, Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 234–35 (1990).

105. *See Perry*, 460 U.S. at 45.

106. *Cornelius*, 473 U.S. at 801.

107. *Id.* at 790; *see Perry*, 460 U.S. at 38. *Cornelius* is singular in that the Court sat as a seven justice panel because neither Powell nor Marshall took part in the case. So, O'Connor's four justice majority delivers the opinion of the Court.

108. *See Perry*, 460 U.S. at 57 (Brennan, J., dissenting).

109. *Id.*

110. *Cornelius*, 473 U.S. at 799.

parks, and sidewalks.[111] But what about airports, jails, libraries, or even charity drives?

1. Is the Forum the Place or the Access? *Cornelius v. NAACP Legal Defense & Educational Fund*

One of Justice O'Connor's first forum opinions, *Cornelius,* is a subtle and elegant examination of the forum question. In *Cornelius* the Court reviewed a charity campaign, the Combined Federal Campaign, (CFC) run in the federal workplace.[112] The question before the Court essentially became whether the forum was the workplace or the CFC.[113] The President created the CFC to allow nonpartisan groups to solicit donations from federal employees in a way that minimized disruption of the federal workplace.[114] President Reagan later "limited participation to 'voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families.'"[115] Several organizations that participated in the past, but no longer fit the amended criteria for participation, filed suit alleging that the new rule abridged their First Amendment rights to solicit funds.[116]

Justice O'Connor began her analysis by affirming that noncommercial solicitation is protected speech.[117] Her next step was to determine the forum. She looked at the types of access speakers had historically requested.[118] First, she examined requests for general access to a place, like a military base.[119] "When speakers seek general access to public property, the forum encompasses that property."[120] Then, she discussed cases in which the speaker sought limited access, such as the teachers' mail system in *Perry* or the advertising space on buses in *Lehman.*[121] Taking the analysis one step further, she pointed out that the teachers' mail system in *Perry* was a non-physical point of access to the teachers, not the mailboxes themselves. Similarly, she found that the CFC was a means of accessing federal employees rather than a physical presence in a federal building.[122] She therefore concluded that the forum in *Cornelius* was the CFC itself rather than the public workplace.[123] The concept that the forum could be the access point

111. *Perry*, 460 U.S. at 45.
112. *Cornelius*, 473 U.S. at 801.
113. *Id.*
114. *Id.* at 790–92.
115. *Id.* at 795 (quoting Exec. Order No. 12,404, 3 C.F.R. 151 (1983)).
116. *Id.*
117. *Id.* at 799.
118. *See id.* at 801.
119. *Id.* (citing Greer v. Spock, 424 U.S. 828, 804 (1976)).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* Justice O'Connor cited *Perry* for the proposition that a forum could be intangible. *Id.* While it is undoubtedly true the language in *Perry* referred to the

rather than the physical location of the speech came fully into being in O'Connor's analysis of the CFC. This subtle distinction shows the precision with which Justice O'Connor approached her forum analyses.

Based on the type of select access historically granted to the CFC, O'Connor classified it as a non-traditional public forum.[124] She then considered the reasonableness of the regulation in light of the circumstances and found that it was a reasonable regulation of speech in the non-traditional public forum.[125] Having rendered this decision, Justice O'Connor reiterated her dedication to speech-protective values by adding that the reasonableness of the regulation could not be used as a smoke-screen for viewpoint discrimination and suggested that the issue could be pursued on remand.[126] In reaching this conclusion she followed the forum analysis path laid down by *Perry* and further established herself in that school of thought. Further, she illustrated the flexibility of the forum analysis. As time has passed, this paradigm has become the bedrock principle for deciding free speech issues.[127]

2. Is an Airport a Traditional Public Forum?

In our post-9/11 world, it defies logic that any group would argue that an airport should be a traditional public forum. Today we readily, though perhaps with ill grace, run the gamut of checkpoints, metal detectors, and random searches, allowing perfect strangers to rummage through our suitcases. But, in the 1980s a friend could walk out to your gate to bid you goodbye. Back then, airports in the United States had a different atmosphere, and as a result, the Court faced the question of whether an airport could be a traditional public forum.

In the first instance, the Court reviewed an airport resolution so patently unconstitutional that hints of Justice O'Connor's sense of humor peeked through the opinion at every turn. In *Board of Airport Commissioners v. Jews for Jesus*, Justice O'Connor wrote the opinion for a unanimous court.[128] The absurdity of the case became clear when Justice O'Connor phrased the issue in the case as "whether a resolution banning all 'First Amendment activities' at Los Angeles International Airport (LAX) violated the First Amendment."[129] To ask the question is to answer it. The lower court struck down the resolu-

"school mail system" as well as the "school mail facilities" and "school mailboxes," it is also true that the *Perry* court made no mention as to the physicality of the system or boxes. *Id.*

124. *Cornelius*, 473 U.S. at 804.

125. *Id.* at 810–11.

126. *Id.* at 811.

127. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (analyzing a public nudity regulation using basic forum analysis).

128. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

129. *Id.* at 570.

tion based on the premise that LAX was a traditional public forum.[130] Justice O'Connor expressly withheld ruling on whether the airport was a traditional public forum, and decided the case on other grounds.[131] Instead, she invalidated the resolution as substantially overbroad.[132] Wryly, she observed that such a rule would forbid "talking and reading," affecting virtually every individual who entered LAX.[133]

Five years later, in *International Society for Krishna Consciousness v. Lee*, the Court finally ruled on whether an airport is a traditional public forum. In that case, the Port Authority of New York and New Jersey banned solicitation of funds and distribution of printed or written materials within the airport terminal.[134] The majority struck down both of those bans as unconstitutional.[135] Justice O'Connor concurred with the majority that the airport was not a traditional public forum.[136] She pointed out that airports were not traditional places of expression and debate.[137] Somewhat prophetically, she observed that airports could, in fact, be "closed to all except those that have legitimate business there."[138] Justice O'Connor then characterized the Port Authority as operating what was essentially a shopping mall inside of the airport.[139] As such, she felt that the reasonableness of the regulation should have been measured against the purposes of a "multipurpose environment" rather than a space made for air travel.[140] She opposed the total media ban on pamphleting because the activity did not seem incompatible with the use of the space.[141] As a result of this analysis, airports have remained non-traditional public fora that may be regulated under a reasonableness test.

The question of soliciting in both the traditional public forum and the non-traditional public forum has come before the Court many times.[142] Solicitation engenders problems of congestion and fraud.[143]

130. *Id.* at 572.

131. *Id.* at 573–74.

132. *Id.* at 577. For an explanation of First Amendment overbreadth doctrine, please see *infra* Part IV.C. *See also* SULLIVAN & GUNTHER, *supra* note 85, at 346–59.

133. *Jews for Jesus*, 482 U.S. at 575.

134. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 675, 685–86 (1992) (O'Connor, J., concurring in No. 91-155 and concurring in the judgment in No. 91-339).

135. *Id.* at 685.

136. *Id.* at 686.

137. *Id.*

138. *Id.*

139. *Id.* at 689.

140. *Id.* at 692.

141. *Id.*

142. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); United States v. Kokinda, 497 U.S. 720, 733–34 (1990).

143. *Lee*, 505 U.S. at 690.

The recognition that solicitation disrupts the flow of traffic resurfaces in one of Justice O'Connor's sidewalk cases.[144]

B. *The Sidewalk Cases*

"[T]he location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum."[145]

Within the span of one decade, the Court addressed the question of sidewalks in four different cases, three of which were written by Justice O'Connor.[146] Although not all cases that define the traditional public forum use the word "sidewalks" in addition to parks and streets, sidewalks have long been considered public fora.[147] The problem becomes the expansion of the word sidewalk to include non-traditional public sidewalks. Are all sidewalks created equal?

1. *United States v. Grace* and *Boos v. Barry*: Sidewalks are a Traditional Public Forum

In 1988, the Court heard *United States v. Grace*, a case that hit close to home—somewhat humorously.[148] Mary Grace was threatened with arrest for being on the sidewalk surrounding the Supreme Court building while holding a picket sign imprinted, ironically, with the text of the First Amendment.[149] She left peaceably, but later filed suit claiming a First Amendment right to hold her sign.[150] Justice White found that the sidewalk outside the courthouse was in no way distinguishable by marking or separation of any kind from any other sidewalk in Washington D.C.[151] He further stated that "[t]raditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to use other than as a forum for public expression."[152] The sidewalk, he emphatically held, was clearly a traditional public

144. *Kokinda*, 497 U.S. at 733–34.

145. *Id.* at 728–29.

146. Surprisingly, there have been other sidewalk cases too. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (involving a sidewalk on a military base).

147. SULLIVAN & GUNTHER, *supra* note 85, at 294–95. *Compare* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (defining the traditional public forum as streets and parks), *with* United States v. Grace, 461 U.S. 171, 177 (1983) (counting sidewalks as part of the traditional public fora).

148. *See Grace*, 461 U.S. at 174.

149. *Id.* at 174. The irony likely explains why the full text of the sign is generally mentioned both in the case and in texts concerning the case. *See also* SULLIVAN & GUNTHER, *supra* note 85, at 280.

150. *Grace*, 461 U.S. at 174.

151. *Id.* at 179–80.

152. *Id.* at 180.

forum.[153] However, he left room for appropriate time, place, and manner regulations of sidewalks.[154]

Five years later in *Boos v. Barry*, Justice O'Connor quoted *Grace* and reaffirmed that sidewalks were, in fact, traditional public fora.[155] *Grace* had been so emphatic and clear on the point of Washington D.C. sidewalks that analysis was not really necessary.[156] In *Boos*, O'Connor perfunctorily held that the sidewalks outside of foreign embassies were traditional public fora and moved on to analyze whether the regulation was content-based.[157] The regulation forbade the picketing of foreign embassies if the signs were critical of the foreign government in question.[158] The court struck down the regulation as impermissibly content-based in a traditional public forum.[159] O'Connor's opinion did little to further the analysis of sidewalks as traditional public fora, as after *Grace,* analysis of a sidewalk seemed superfluous. One month after the opinion in *Boos* was issued, the Court found itself on the path to a different sidewalk—however, it would stay the course.

2. *Frisby v. Schultz*: Reasonable Time, Place, and Manner Regulations on the Sidewalk

In *Frisby*, a city in Wisconsin prohibited picketing "before or about any residence" or targeted picketing.[160] Although invited to define the streets and sidewalks of a residential community as a non-traditional public forum, Justice O'Connor declined the offer.[161] Without much analysis of the nature of the sidewalk, she reasserted that sidewalks in general were traditional public fora.[162] Moving on to the next step in the inquiry, she examined the government interest and held that protecting the privacy of the home was compelling.[163] "There is simply no right to force speech into the home of an unwilling listener."[164] Further, she found that the statute was narrowly tailored enough to allow ample avenue for the expression elsewhere.[165] Rather than reclassify the forum, she relied on an analysis of the inter-

153. *Id.* The emphatic nature of his ruling was perhaps in direct proportion to the irony of the fact pattern.
154. *Id.* at 183–84.
155. Boos v. Barry, 485 U.S. 312, 318 (1988).
156. *Grace*, 461 U.S. at 180.
157. *Boos*, 485 U.S. at 318.
158. *Id.* at 315. For more discussion of the case please see *supra* Part III.A.
159. *Boos*, 485 U.S. at 329.
160. Frisby v. Schultz, 487 U.S. 474, 476 (1988).
161. *Id.* at 480.
162. *Id.*
163. *Id.* at 485.
164. *Id.*
165. *Id.* at 483–84.

est.[166] Sidewalks, it seemed, were indisputably traditional public fora.[167]

3. *United States v. Kokinda*: There Are Sidewalks And Then There Are Sidewalks

No sooner had the Court established a solid line of cases consistently identifying a sidewalk as a traditional public forum, than a case came along to knock that classification off the path. Justice O'Connor had the unenviable task of explaining why the sidewalk at issue in this case was not really a sidewalk for forum purposes. *United States v. Kokinda* clearly demanded a common sense answer, so Justice O'Connor drew a finer line on which sidewalks constituted the traditional public forum. O'Connor began by comparing the sidewalks in two earlier cases: the public sidewalk outside the Supreme Court building in *Grace,* and the sidewalk located on a military base in *Greer v. Spock*.[168] In *Greer* the Court commented that the general characterization of streets and sidewalks as a traditional public forum did not transform the streets and sidewalks inside a closed military base into a traditional public forum.[169] The public purpose of the sidewalk in *Grace* made it a traditional public forum as opposed to the completely internal purpose of the sidewalk in *Greer*.[170] Therefore, O'Connor reasoned, it is not the physical characteristics of the sidewalk that determine the forum, but the location and purpose.[171]

In *Kokinda*, the sidewalk at issue led from the Post Office's parking lot to its building and lay entirely on Post Office property.[172] This sidewalk, O'Connor determined, was intended to facilitate business traffic in and out of the Post Office.[173] The regulation itself was content-neutral, since the Post Office prohibited all solicitation equally.[174] Therefore, the analysis became a reasonableness analysis in a non-public forum.[175] Thus was the sidewalk not a sidewalk, by location and purpose.

166. *Id.*
167. *Id.*
168. United States v. Kokinda, 497 U.S. 720, 727–29 (1990).
169. *Id.* at 727 (citing Greer v. Spock, 424 U.S. 828, 835–37 (1976)).
170. *Id.*
171. *Id.* at 727–29.
172. *Kokinda*, 497 U.S. at 722–23.
173. *See id.* at 727. Moreover, as will be discussed *infra* Part VI.B., government was acting in its role of proprietor rather than regulator. *Id.* at 725. As such, its business decisions deserved more deference. *Id.*
174. *Id.* at 736.
175. *Id.* at 730.

C. *The Internet and the Forum*

"The electronic world is fundamentally different."[176]

With the rise of the Internet the courts have faced a completely new forum. Certainly, the Internet cannot be described as having been for time immemorial a place where people gather to express themselves; furthermore its reach and form do not automatically make it either a private or non-public forum.[177] Moreover, the Internet recognizes no boundaries, making it ubiquitous and amorphous at the same time. For example, the medium presents special difficulties with regards to pornography and children's ability to access pornography online.

The Court ended much of the forum speculation in *Reno v. ACLU.* Justice Stevens distinguished the Internet from other broadcast media.[178] Unlike television and radio, the Internet had no long history of regulation, or in fact, any history of regulation at all.[179] Additionally, he explained that it was not invasive in nature like regular broadcast media.[180] He applied strict scrutiny to the regulation at issue, and in essence treated the Internet like a traditional public forum.[181] As a result, the Communications Decency Act (CDA) at issue in the case failed the majority's strict scrutiny.[182]

Justice O'Connor, in her concurrence, took the analogy a step further. She compared the Internet to a city, saying that rules attempting to prevent Internet pornography from reaching children were akin to zoning laws used in many cities.[183] Justice O'Connor's grasp of the medium was evident in her analysis as she discussed gateway technology and cyberspace.[184] She understood that the law would like to "segregate indecent material on the Internet into certain areas that minors cannot access."[185] However, she also understood that technology could not yet achieve that result with any precision;[186] inevitably, some adults would be barred from accessing materials they were constitutionally entitled to access.[187] In addition to failing the majority's strict scrutiny, the CDA also failed the zoning test as applied by Jus-

176. Reno v. ACLU, 521 U.S. 844, 889 (1997) (O'Connor, J., concurring in the judgment in part, dissenting in part).

177. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (describing the traditional public forum).

178. *Reno*, 521 U.S. at 868. People choose to connect to the Internet and which content to read.

179. *Id.*

180. *Id.*

181. *Id.* at 868–71 (1997); *see also* SULLIVAN & GUNTHER, *supra* note 85, at 493.

182. *Reno*, 521 U.S. at 888.

183. *Id.* at 886.

184. *See id.* at 891.

185. *Id.* at 886.

186. *Id.* at 891.

187. *Id.* at 888.

tice O'Connor.[188] Her facile appreciation of the technology involved illustrated her adaptability and intellectual curiosity.

A few years later, Justice O'Connor would again show her willingness to embrace new technology and the Internet in *Ashcroft v. Free Speech Coalition*.[189] The case addressed two provisions of the Child Pornography Prevention Act of 1996 that reached beyond unprotected child pornography and into protected speech.[190] Specifically the Act prohibited pornography that mimicked child pornography through the use of young-looking actors or virtual technology.[191] The majority opinion struck down both provisions—young-looking actors and virtual imaging—as overbroad.[192]

Justice O'Connor, joined by Rehnquist and Scalia, dissented from the invalidation of the provision regarding virtual pornography.[193] The main distinction that O'Connor drew between the two provisions was the advances in technology that would soon allow real child pornographers to hide behind the shield of virtual child pornography.[194] The burden on law enforcement to distinguish between virtual and real children was a serious concern to the Justice.[195] She felt that the virtual pornography provision as worded was sufficiently narrow because the language of the statute would allow it to reach only those child pornographers whose virtual pornography was *basically indistinguishable* from the real thing.[196] Recognizing the speed at which technology advances, she would have allowed law enforcement to address virtual child pornography in a preemptive and logical manner.

In addition to understanding the technology involved, Justice O'Connor foresaw the effect of the Internet on older free speech tests as they would need to be applied in cyberspace. In her concurrence in *Ashcroft v. ACLU*, Justice O'Connor urged Congress to adopt "a national standard for obscenity for the Internet."[197] The test for obscenity under *Miller* uses a community standard.[198] However, the Internet

188. *Id.* at 886.

189. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

190. *Id.* at 239–40.

191. *Id.* Child pornography is unprotected speech as set forth by Justice O'Connor in the majority opinion in *New York v. Ferber*, 458 U.S. 747, 758 (1982).

192. *Free Speech Coal.*, 535 U.S. at 258. The overbreadth doctrine invalidates those regulations that on their face reach more protected speech than is necessary. *See* Bd. of Airport Comm'ns of L.A. v. Jews for Jesus, 482 U.S. 569, 574 (1987).

193. *Free Speech Coal.*, 535 U.S. at 261.

194. *Id.* at 263–64.

195. *Id.*

196. *Id.* at 265.

197. Ashcroft v. ACLU, 535 U.S. 564, 586 (2002) (O'Connor, J., concurring in part and concurring in the judgment).

198. *See* Miller v. Cal., 413 U.S. 15, 24–25 (1973). The *Miller* obscenity test asks (1) if the average person using community standards finds it in total to be prurient, (2) whether the work depicts sexual conduct as specifically defined by the state in a patently offensive way, and (3) whether the work taken as a whole lacks serious literary, artistic, political, or scientific value. *Id.*

has no community as such, and to impose community standards from a town such as Waco, Texas, on a speaker in San Francisco, California, would present significant problems.[199] She strongly recommended that a national standard be adopted, lest we all be held to the level of the least tolerant community in America.[200] In this case and others, Justice O'Connor brought to the bench the intellectual curiosity that started in her childhood. Her willingness and ability to adapt to change and understand new technology may be attributed in part to that very curiosity.

V. OPINING ON VIEWPOINT: THE REQUIREMENT OF MOUNT OLYMPIAN NEUTRALITY[201]

"[C]ontent-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others."[202]

Deciding whether a regulation is content-neutral is one question in which context can be a hindrance rather than a help. Often, the Justices are called upon to review rules that prevent hate speech or ordinances that affect sexually explicit businesses.[203] It is here where their natural inclinations must give way to Mount Olympian neutrality.[204]

Although Justice O'Connor has not left her imprimatur on the neutrality inquiry in the same manner as she did on the forum analysis, her opinions in this area demonstrate both her understanding of the state legislative process and her ability to achieve balance in the law. She has argued that the rule of adjusting the level of scrutiny based on whether the regulation is content-based "is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests."[205] Furthermore, she wrote that although the results can occasionally seem unreasonable, this system is the best that we have so far.[206] In the end, she believed that application of the rule has "generally led to seemingly sensible results."[207] Although in other circumstances she preferred a fact-specific balancing, she recognized that when it comes to free speech, the very neutrality of the test con-

199. *ACLU*, 535 U.S. at 587.
200. *Id.*
201. Professor G. Sidney Buchanan, Lectures on First Amendment Law, at the University of Houston Law Center, Houston, Tex. (Nov. 18, 2005). Professor Buchanan describes First Amendment law as requiring Mount Olympian neutrality, because so often the expression at issue is offensive. Judges often find themselves protecting the rights of speech they abhor in order to protect speech as a whole.
202. City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).
203. *See, e.g.*, Va. v. Black, 538 U.S. 343 (2003) (reviewing a regulation of hate speech); City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (ruling on a city ordinance preventing multiple sexually oriented businesses from sharing the same property).
204. *See* Buchanan, *supra* note 201.
205. *Gilleo*, 512 U.S. at 60.
206. *Id.*
207. *Id.*

tributes to its validity.[208] When looking at the forum, one question is whether the government intended for the forum to be a public forum.[209] However, the neutrality inquiry is informed not by the intent of government, but by the effect of the rule.

A. *Motive Does Not Matter:* Simon & Schuster

One of the aspects of Mount Olympian neutrality is the recognition that content-based regulations in the public forum are automatically suspect regardless of the reasons the law was enacted. Justice O'Connor addressed this concept early in her tenure on the bench in *Minneapolis Star & Tribune*.[210] The state of Minnesota crafted a use tax on paper and ink that fell disproportionately on a small group of newspapers.[211] O'Connor held the law unconstitutional despite the good intentions of the legislature:[212]

> We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of [free speech] rights.[213]

Her years in the Arizona Legislature led to an understanding of the motivations behind such legislation.[214] However—as Justice O'Connor's colleagues from that period in Arizona could have told the hapless Minnesotans—regardless of their best intentions nothing less than perfection would do.[215]

Many years later, in *Simon & Schuster* she would revisit this issue.[216] In the late 1970s, the state of New York enacted what has become known as the Son of Sam law.[217] In short, the law required that any proceeds earned by a person convicted of a crime from the depiction of that crime must be held in escrow by the Board to pay any civil

208. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (reiterating that a fact-based balancing approach was crucial to Establishment Clause inquires).

209. *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 728–29 (1990) (finding that whether a sidewalk was a public forum was a matter of intent and purpose).

210. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 591–92 (1983).

211. *Id.* at 591.

212. *Id.* at 591–92.

213. *Id.* (citations omitted).

214. HUBER, *supra* note 35, at 38.

215. *Id.*

216. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 111 (1991).

217. *Id.* at 111. David Berkowitz, the Son of Sam killer, was offered a lucrative book deal, prompting the law. *Id.* at 108. Oddly, the law never reached Berkowitz because his incompetence kept him from being tried and convicted. *Id.* at 111.

judgments to the victims.[218] The law was challenged when the book about convicted "Wiseguy" Henry Hill became a bestseller and later a Hollywood film, *Goodfellas*.[219] Justice O'Connor's opinion gives us another look not only at her careful legal analysis of the law in question, but also at her sense of humor.

> Looking back from the safety of the Federal Witness Protection Program, Henry Hill recalled: "At the age of twelve my ambition was to be a gangster. To be a wiseguy was better than being president of the United States." Whatever one might think of Hill, at the very least it can be said that he realized his dreams.[220]

She began the analysis of the law by explaining what a content-based regulation was and why it should be presumptively invalid.[221] Content-based regulations "impose a financial burden on speakers because of the content of their speech" and allow government to "drive certain ideas or viewpoints from the marketplace."[222] She further explained that it did not matter whether the legislature actually intended to suppress certain speech.[223] Quoting an earlier case, she reiterated that "Simon & Schuster need adduce 'no evidence of an improper censorial motive.'"[224] It was enough that the burden was placed only on speakers whose expression contained certain content, even if the content was unpleasant.[225] Although she recognized the government's compelling interest in compensating the victims of crime, the law was not narrowly tailored enough to justify its content-selective basis.[226] Even in the face of a compelling interest and good legislative intent, Justice O'Connor held firm to the level of scrutiny demanded by content-selective regulations and the neutrality that scrutiny requires.[227]

B. *Secondary Effects and Content:* City of Los Angeles v. Alameda Books

In addition to protecting political expression, First Amendment protections extend to sexually explicit expression that is not ob-

218. *Id.* at 109.
219. *Id.* at 112–15.
220. *Id.* at 112 (citation omitted).
221. *Id.* at 115–18.
222. *Id.* at 115–16.
223. *Id.* at 117. Certainly the Board did not want to suppress the speech because it generated funds for an escrow account allowing victims to receive some monetary recompense for their losses. *See id.*
224. *Id.* at 117 (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)).
225. *Id.* at 116.
226. *Id.* at 123.
227. She would repeat her position later, saying "benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 677 (1994).

scene.[228] Although many businesses have tried, Justice Burger in *Arcara Books* forbids them from

> us[ing] the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."[229]

Justice O'Connor concurred with Burger that the nuisance statute in question did not raise First Amendment issues. In *Arcara*, though, she tempers Burger's position with the proviso that the government may not use content-neutral regulations as a "pretext" to target unwanted expression.[230] If that were the case, then a seemingly content-neutral law could implicate the First Amendment.[231] So, although benign motivation cannot make a content-selective law neutral, base intentions can strip a regulation of its superficial neutrality.

The Court has shown a willingness to uphold content-neutral laws that target sexually oriented businesses, provided they do not target the expression itself.[232] In *Renton v. Playtime Theaters*, it introduced the concept of laws aimed at the secondary effects of the presence of sexually explicit businesses in a neighborhood.[233] Laws addressing secondary effects, such as the rise in crime and loss of property value, are considered content-neutral because they "are *justified* without reference to the content of the regulated speech."[234] Therefore they are regarded as content-neutral time, place, and manner regulations.[235] However, some commentators feel the concept of secondary effects may become so broad as to be all encompassing.[236] Certainly all speech has some type of secondary effect: anger, discontent, love, or joy, to name a few.[237] Justice O'Connor, while upholding the secondary effects concept, has carefully defined the parameters of its scope. In *Boos v. Barry*, she limited the holding in *Renton*.[238]

> We spoke in [*Renton*] only of . . . regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech.

228. SULLIVAN & GUNTHER, *supra* note 85, at 138–39; For a review of the Supreme Court's test for obscenity, see the *Miller* test *supra* note 198.

229. Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986).

230. *Id.* at 708 (O'Connor, J., concurring).

231. *Id.*

232. *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

233. *Id.* at 48.

234. *Id.* (emphasis added) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

235. *See id.*

236. *See, e.g.*, SULLIVAN & GUNTHER, *supra* note 85, at 146 (discussing the implications of secondary effects).

237. Professor G. Sidney Buchanan, Lectures on First Amendment Law, at the University of Houston Law Center, Houston, Tex. (Feb. 14, 2005) (asking students whether the concept of secondary effects was not a bit troubling).

238. Boos v. Barry, 485 U.S. 312, 320–21 (1988).

> . . .
>
> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" [to which] we referred in *Renton*.[239]

The limitation garnered only a plurality.[240] Later, in another plurality decision, O'Connor further limited the scope of *Renton* using different means.

Secondary effects as a concept is extremely practical and, in some sense, carefully crafted. However, it is not entirely settled as the split court in *Cloud Books* demonstrates.[241] There, Justice O'Connor faced the question of whether Los Angeles could actually prove that multiple sexually oriented businesses in one place increased crime.[242] The argument centered around whether the city could reasonably have felt that there was a correlation between the crime rate and the establishments based on the data they had.[243] The city relied on a twenty-five-year-old study that examined, among other things, the effects of adult establishments on property values and city crime patterns.[244] Justice O'Connor held that as long as the data was not shoddy, then the city need not prove the efficacy of an untried solution.[245] "[M]unicipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of the protected speech."[246] Justice Kennedy, concurring in the judgment, agreed with O'Connor regarding the level of proof required.[247] With Kennedy's agreement on that issue, Justice O'Connor limited the level of proof required to a reasonableness inquiry.

The end result was that Justice O'Connor upheld the ordinance as constitutional. She applied intermediate review scrutiny due to a content-neutral time, place, and manner regulation.[248] The regulation served the substantial government interest of reducing crime, and it left ample alternative opportunities for expression.[249] *Cloud Books* limited the secondary effects doctrine to instances where the government could present enough data to demonstrate that it could have reasonably believed the causal relationship between the adult estab-

239. *Id.*
240. *Id.* at 314.
241. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (plurality decision).
242. *Id.* at 435–36.
243. *Id.* at 438–39.
244. *Id.* at 435.
245. *Id.* at 439.
246. *Id.* (internal quotations omitted).
247. *Id.* at 449.
248. *Id.* at 441.
249. *Id.* at 435–36.

lishments and the secondary effects.[250] O'Connor's efforts to retain secondary effects as a manageable justification for regulations have been fairly successful, if hard fought.

Justice O'Connor wrote the majority opinion in another secondary effects case that is worth mentioning because it provides an opportunity to view her sense of humor. In *City of Erie v. Pap's A.M.*, the secondary effects argument was used to support a city ordinance banning public nudity.[251] The Court held that the ordinance was constitutional because it was a content-neutral regulation furthering a substantial government interest unrelated to expression, and was no greater than necessary.[252] The humor came in Justice O'Connor's discussion of justiciability. The owner of Pap's, a nude dancing establishment, closed his club before the case was submitted to the Supreme Court.[253] Justice Scalia felt that rendered the case moot.[254] In arguing his view, Scalia asserted that "given [Pap's owner's] advanced age [of 72], it seems to me that there is 'no reasonable *expectation*,' even if there remains a theoretical possibility, that Pap's will resume nude dancing operations in the future."[255] Justice O'Connor believed that Pap's owner, having won his case at the appeals court level, wanted to have the case declared moot.[256] She speculated that once the case was dismissed, Pap's owner would begin operation again.[257] As for Justice Scalia's contention that Pap's owner was too old to re-open his nude dancing establishment, O'Connor responded with humor. "Several Members of this Court can attest, however, that the 'advanced age' of Pap's owner (72) does not make it 'absolutely clear' that a life of quiet retirement is his only reasonable expectation."[258] Even though she uses humor, the statement rings true for her. Always energetic and industrious—remember she raised three sons, ran volunteer operations and her own law firm all at once—her retirement has not been quiet.[259]

C. *Hate Speech and Content Neutral Regulations:* Virginia v. Black

"[W]hen a cross burning is used to intimidate, few if any messages are more powerful."[260]

250. *Id.*
251. City of Erie v. Pap's A.M., 529 U.S. 277 (2000).
252. *Id.* at 302.
253. *Id.*
254. *Id.* at 302 (Scalia, J., dissenting).
255. *Id.* at 303–04.
256. *Id.* at 288.
257. *Id.*
258. *Id.*
259. Justice O'Connor has sat by designation with many, if not all, of the circuits. Also, she has written articles and given speeches, especially regarding the downsides of judicial elections. *See supra* Part II.B (outlining the significant number of activities she did, and did well, all at once).
260. Va. v. Black, 538 U.S. 343, 357 (2003).

Another challenge to Mount Olympian neutrality comes in the form of regulations on unprotected speech. Even in this realm, the government may not regulate with abandon. Regulations on hate speech have presented the Court with the question of how much content may be regulated under the rubric of unprotected speech.

True threats, which encompass hate speech, may be found under the penumbra of unprotected speech.[261] They are considered a type of violence advocacy[262] because they "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[263] In 1992, in *R.A.V. v. St. Paul*, the Court heard a case reviewing a city ordinance prohibiting hate activities.[264] The ordinance prohibited acts including cross burning that aroused alarm in people "on the basis of race, color, creed, religion, or gender."[265] Justice Scalia issued the opinion of the Court, holding that content-based regulations of unprotected speech would be subjected to strict scrutiny.[266] Prior to *R.A.V.*, all regulations of unprotected speech were reviewed under a rational basis analysis regardless of whether the regulation was content-neutral.[267] Four members of the Court, including Justice O'Connor, concurred in the judgment only.[268] They argued that the content of unprotected speech is precisely what prompted the Court to declare it unprotected in the first place. As such, content was a legitimate way to regulate those categories.[269] The *R.A.V.* decision caused some confusion in the lower courts, prompting Justice Rehnquist in *Wisconsin v. Mitchell* to quickly confine the holding to viewpoint-selective laws.[270] Even so, Justice O'Connor's tact and innate sense of balance were necessary to clarify the rule on hate speech, tidying up ambiguities left by *R.A.V.*

261. *Id.* at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969)).

262. Violence advocacy includes such speech as "fighting words" and "incitement to lawless action." *See* SULLIVAN & GUNTHER, *supra* note 85, at 50–60 (outlining the modern tests for these types of unprotected speech).

263. *Id.*

264. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).

265. *Id.*

266. *Id.* at 391.

267. *Id.* at 406 (White, J., concurring in the judgment); *see also* Chaplinsky v. N.H., 315 U.S. 568, 571–72 (1942) (finding that prevention and punishment of certain types of speech presents no constitutional problem).

268. *R.A.V.*, 505 U.S. at 397 (White, J., concurring in the judgment).

269. *Id.*

270. SULLIVAN & GUNTHER, *supra* note 85, at 104–06 (discussing the fallout from the *R.A.V.* decision). Viewpoint selective law is content-selective law that further narrows its restrictions to a particular viewpoint. SULLIVAN & GUNTHER, *supra* note 85, at 305 (discussing viewpoint selectivity); *see, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (reviewing a rule allowing school property "to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint").

In *Virginia v. Black*, the Court reviewed a law prohibiting cross burning with the intention of intimidating a person or persons.[271] Justice O'Connor began the opinion by recounting the history of cross burning and the Ku Klux Klan.[272] She concluded that while cross burning was not automatically intended to intimidate, it was often used very effectively for that purpose.[273] She then discussed the areas of unprotected speech that fall under the rubric of violence advocacy: fighting words, incitement, and true threats.[274] Intimidation, she concluded, was the type of expression contemplated in the true threat category.[275] As such, cross burning with intent to intimidate was unprotected by the First Amendment.[276]

Then she attempted the messy task of unraveling *R.A.V.* As clearly as possible she explained the ruling.[277] According to O'Connor, *R.A.V.* stood for the proposition that unprotected speech was proscribeable based on content, provided that the proscription was based on the same justification that originally caused the Court to label that entire category of speech as unprotected.[278] In other words, the state could regulate a subset of the unprotected speech category, but not a subset of the speech.[279] A state could prohibit fighting words as a subset of violence advocacy, but could not prohibit fighting words offensive to women.[280] Deciding which speech would be offensive to women would require examining the content of the speech itself and suppressing disfavored content.[281] Content-selectivity would be constitutional when regulating unprotected speech as long as the regulation did not "impose special prohibitions on those speakers who express views on disfavored subjects."[282]

Applying the now-clearer rule, Justice O'Connor found that a law prohibiting cross burning with intent to intimidate a person or persons was constitutional, as distinguished from the law in *R.A.V.*, covering only cross burning that offended people based on their race, color, creed, or gender.[283] While the ruling in *Black* still left some questions unanswered, it was a definite improvement.

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271. Va. v. Black, 538 U.S. 343, 347 (2003).
272. *Id.* at 352–57.
273. *Id.* at 357.
274. *Id.* at 359.
275. *Id.* at 360.
276. *Id.*
277. *Id.* at 361–62.
278. *Id.*
279. *See id.*
280. *See id.* at 362 (observing that the State could not ban "only obscenity based on offensive political messages") (internal quotations omitted).
281. *See id.*
282. *Id.* at 361 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).
283. *Id.* at 361–62. Although the law in general passed constitutional muster, the Court invalidated one of the provisions. *Id.* at 367. That provision stated that burning a cross was prima facie evidence of intent to intimidate. *Id.* As written, it essentially allowed the state to convict anyone based solely on the cross burning. *Id.* at 365.

Several facets of Justice O'Connor's personality are quite visible in this case. First, it is a gracious opinion. Although the *R.A.V.* opinion caused some confusion, and in spite of the fact that she did not join the *R.A.V.* majority, she explained *R.A.V.* rather than criticize it.[284] She never suggested that *R.A.V.* was wrongly decided or poorly written.[285] Instead, she explained the holding in clear, concise terms, casting light in a murky area.[286] Second, her love of history is evident as she recounts the horrible story of cross burnings and the Ku Klux Klan.[287] Her storytelling compels both fascination and sympathy from her readers, leading them to the conclusion with her that "the burning of a cross is a symbol of hate."[288] Finally, she demonstrated the basic fairness for which she is known as she analyzed the regulation, applying the rule impartially without regard for the fact that the speech at issue is ugly in the extreme.[289] Mount Olympian neutrality finds its place alongside context in Justice O'Connor's *Virginia v. Black* opinion.

VI. Changing Focus: The Tricky Question of the Government's Interest

The last variable in the free speech analysis is the government's interest. It is difficult to generalize about the Court's view in this area. However, Justice O'Connor's experience as an Arizona legislator supplies the base from which she works. She is neither more nor less lenient on government because of this experience, but brings a very practical knowledge to her decisions.[290]

A. *No Possible Interest Could Justify Such a Tax:* Minneapolis Star & Tribune v. Minnesota

Justice O'Connor can be a tough critic when it comes to state legislation. Her years in the Arizona legislature gave her a respect for the states' right to legislate in their own areas.[291] She is willing to allow them to be creative in their attempt to fight crime, but is quick to spot impracticalities.[292] In *Minneapolis Star & Tribune v. Minnesota Com-*

Since cross burning could, in some circumstances, be an expression of something other than intimidation, the provision was unconstitutionally overbroad. *Id.*

284. *See id.* at 361.

285. *See id.*

286. *Id.*

287. *See id.* at 352–57.

288. *Id.* at 357 (internal quotations omitted).

289. *See id.* at 363–68.

290. *See, e.g.*, City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (holding that the city of Los Angeles could reasonably base its zoning of sexually explicit businesses on the information it had gathered).

291. Huber, *supra* note 35, at 43.

292. *Compare Alameda Books*, 535 U.S. at 439 ("[M]unicipalities must be given a reasonable opportunity to experiment with solutions.") (internal quotations omitted), *with* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, 482 U.S. 569, 575 (1987) ("We

missioner of Revenue, Justice O'Connor showed her practicality in evaluating a special tax imposed on the press.[293] Although exempt from sales tax, publications in Minnesota were subject to a use tax on paper and ink.[294] However, the first $100,000 expended for paper and ink was exempted, leaving only the largest 11 publishers out of a total of 388, owing taxes each calendar year.[295] Minnesota attempted to justify the rule by arguing that the use tax complemented the sales tax in its function.[296] Justice O'Connor disagreed.[297] First she pointed out that the tax fell disproportionately on one segment of the press, and as such was presumptively unconstitutional.[298]

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that *no interest suggested by Minnesota can justify the scheme.*[299]

Then, she asked rather pointedly why Minnesota did not just impose a sales tax on newspapers if that had been its real aim all along.[300] This question struck right at the heart of the problem. The tax was invalidated as unconstitutional.[301]

B. *The Role of the Government and Its Interplay with Interest*

The government wears many hats: proprietor, employer, and even speaker.[302] The role it plays with respect to the regulation being analyzed can change the weight of its interest. Justice O'Connor recognized the subtle distinctions in the hats the government wears.[303]

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think it obvious that [a sweeping ban on all First Amendment activities] cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition of speech.").

293. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev., 460 U.S. 575, 576 (1983).

294. *Id.* at 577–78.

295. *Id.* at 578. The numbers she cites are from 1974 tax documents. *Id.*

296. *Id.* at 586.

297. *See id.* at 586–87.

298. *See id.* at 585.

299. *Id.* at 591–92 (emphasis added).

300. *Id.* at 587–88.

301. *Id.* at 593.

302. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193 (1991) (finding that government may make a value judgment to fund programs without being obliged to fund alternatives); United States v. Kokinda, 497 U.S. 720, 725 (1990) (holding that when government is operating as proprietor, regulations that burden speech need only be reasonable); Connick v. Myers, 461 U.S. 138, 142 (1983) (establishing the test for government's ability to fire employees for speech).

303. *See, e.g.*, City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (recognizing that government in its police role has a compelling interest in the safety of its people).

1. Government as Educator: *Pico* and *Mergens*

In *Board of Education v. Pico*, the Board of Education removed a number of books from school libraries because they were "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[304] The majority held that the school board could not remove books simply because they objected to their contents.[305] In her dissent, Justice O'Connor argued the impracticality of that position when the government is acting as educator.[306] Essentially, when government is acting in its role as educator it may choose the curriculum.[307] It is the school board and not the courts that should decide which books to keep in the library.[308] Government is not withholding books from students or forbidding them to read the listed books.[309] Simply because the books are not available in the library does not keep students from reading and discussing those books.[310] She concluded by saying she did not agree personally with the decisions of the school board with regards to the books.[311] However, she noted it was not her decision but the school board's to make.[312] In keeping with her belief that local government can deal best with local problems, she argued that running schools needed local governance. In this case, she further reasoned, the school could not possibly keep every book ever written on the library shelves so it had to make choices as to which to keep.

2. Government as Employer: *Waters v. Churchill*

Another hat that government often wears is that of employer. What are the limitations that the First Amendment puts on the government's ability to fire employees as a result of speech? Imagine having employees that could say absolutely anything they wanted at work with complete impunity. There must be some limits on free speech in the government workplace. In *Waters*, Justice O'Connor explains that the government, in its position as employer, must have the ability to restrain an employee who detracts from its effective operation.[313]

> The key to First Amendment analysis of government decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the

304. Bd. of Educ. v. Pico, 457 U.S. 853, 857 (1982) (internal quotations omitted).
305. *Id.* at 872.
306. *Id.* at 921 (O'Connor, J., dissenting).
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. Waters v. Churchill, 511 U.S. 661, 674–75 (1994).

> speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[314]

The case asked whether the government could fire an employee based on what it reasonably believed she said, or whether it had to ascertain what she actually said.[315] To decide how much and what kind of procedure should be due the employees, Justice O'Connor examined the differences between the government as regulator and as employer.[316] One of the main distinctions is that the basic concepts of free speech—open and robust debate, and a tolerance for opposing views—conflict with an effective work environment.[317] Additionally, as employer, the government needs to be able to make broad rules, like "do not be rude to customers."[318] Such a rule might fail the constitutional overbreadth test.[319] And yet, the rule must be broad to be effective.[320] Finally, the legislature charges government to carry out certain tasks in an efficient manner.[321] The mission of the government in discharging its duties as employer differs significantly from its mission as regulator.[322]

Justice O'Connor's explanations of the government's duties as an employer speak of practicality and a deep understanding of what makes the government run. Accordingly, this setting is also another instance in which the Justice believes that a *per se* rule will not work.[323] Here, she refused to state a "general test to determine when a procedural safeguard is required by the First Amendment."[324] The test, she held, depends on the context.[325]

3. Government as Benefactor: *NEA v. Finley*

One of the more controversial roles of the government arises when it contributes money to fund projects. The National Endowment for the Arts has provoked a significant amount of disagreement as is evident in *NEA v. Finley*.[326] In *Finley*, a group of performance artists argued that the advisory language in a provision of the National Foundation on the Arts and Humanities Act constituted viewpoint discrim-

314. *Id.* at 675.
315. *Id.* at 668.
316. *Id.* at 671.
317. *Id.* at 672. The Justice explained that debate was fine, but the employer must be able to limit where and when at the very least. *Id.*
318. *Id.* at 672–673.
319. *Id.* at 673.
320. *Id.*
321. *Id.* at 674–75.
322. *Id.* at 675.
323. *Id.* at 671.
324. *Id.*
325. *Id.*
326. Nat'l Endowment for the Arts v. Finley, 524 U.S. 566, 569 (1998).

ination, rendering it constitutionally invalid on its face.[327] Justice O'Connor found that the provision was constitutional based on the language of the statute itself as well as the government's role as subsidizer.[328] Reviewing the statute, she commented that the provision was clearly hortatory because some of the factors were not applicable to every medium; "decency" and "respect" could hardly be considerations when judging a symphony.[329] Furthermore, she pointed out that the provision's suggestion that the NEA take into consideration decency and respect when funding grants did not seem likely to "introduce any greater element of selectivity than the determination of 'artistic excellence' itself."[330]

Additionally, when government stepped into the role of subsidizer the weight of its interest changed. Much like choosing which library books could be on the shelf in *Pico*, when government chose to fund or not to fund, its decisions were entitled to deference.[331] Competitive funding does not implicate First Amendment rights like direct regulation of speech.[332] When government endows, it may use criteria not permitted in its role as legislator.[333] "In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of others."[334]

Justice O'Connor exhibits a sense of balance when the government needs to do its job and when it needs to leave people well enough alone. Perhaps the independence of growing up on the ranch, tempered by her days as a legislator, account for this balance. Whatever the reason, she analyzes the government in context when weighing the strength of its interest.

VII. Free Speech Analyses in Other Contexts

Free speech values and issues touch many areas. Many cases are a mixture of free speech analysis and something else. Of these areas, Justice O'Connor has been especially influential at several main intersections.

327. *Id.* at 580–81. Facially challenges, as opposed to as applied challenges, always carry a heavier burden. *Id.* at 580. They are considered "strong medicine" by the Court and prevail only on a demonstration that the "provision will lead to the suppression of speech." *Id.*

328. *Id.* at 590.

329. *Id.* at 583.

330. *Id.* at 584.

331. Bd. of Educ. v. Pico, 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting); *accord* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that government could choose to fund speech on one side of an issue without funding the opposing view).

332. *Finley*, 524 U.S. at 587–88.

333. *Id.*

334. *Id.* at 588 (quoting *Rust*, 500 U.S. at 193).

A. *Free Speech and Attorney Advertising*

"[S]pecial ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power they inevitably wield in a political system like ours."[335]

Justice O'Connor has held the law and a legal career in special esteem. Even when she was the senate majority leader in Arizona, she knew that she wanted to go back to practicing law.[336] She has always expected a great deal from people in the legal profession, including herself.[337] Her attitude toward the legal profession has left its stamp on the crossroads of free speech and attorney ethics. When speech intersects attorney ethics questions, Justice O'Connor has generally recognized the state's interest in regulating attorneys.[338]

Beginning with *Zauderer* she set the tone for her expectations of the legal profession and the states regulating it: lawyers shall be held to a higher standard.[339] In *Zauderer*, Justice O'Connor disagreed with the majority holding that a state could not discipline an attorney for soliciting business through advice given in truthful and non-deceptive advertising.[340] In her view, the commercial speech doctrine, allowing for partial protection of commercial speech, called for an entirely different view of the state's interest as it applied to professional services.[341] Professional services could not be readily evaluated by the average layperson.[342] The free sample concept that worked so well for products did not translate to legal services.[343] More importantly, the attorney may slant the free advice, consciously or not, to convince the potential client of the need for the attorney's services.[344] At this point, she had only Justices Burger and Rehnquist in her corner.[345] But the fight was still young.

1. The Basic Premise of Our Attorney Advertising Cases is Wrong: *Shapero*, *Peel*, and *Went For It*

In her dissent in *Shapero*, Justice O'Connor left no doubt that she believed the *Central Hudson* test for reviewing commercial speech

335. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting).
336. HUBER, *supra* note 35, at 45.
337. *Id.* at 46.
338. *See, e.g.*, *Shapero*, 486 U.S. at 490 (arguing that "it is improper for any member of this profession to regard it as a trade or occupation like any other).
339. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 676–77 (1985) (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part).
340. *Id.* at 675.
341. *Id.* at 677.
342. *Id.* at 674.
343. *Id.* at 673–74.
344. *Id.* at 674.
345. *Id.* at 673.

was being misapplied.[346] The *Central Hudson* test consists of four basic questions.[347] It requires first that the speech concern a lawful activity and not be misleading.[348] If the regulation passes that threshold question, then the state may still "regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose."[349] Additionally under *Central Hudson,* the regulation should be no more than necessary to serve that interest.[350] In the context of attorney advertising, O'Connor interpreted that concept to mean that the state may ban advertising that is either (1) potentially misleading; or (2) truthful, but adverse to "the substantial government interest in promoting the high ethical standards that are necessary in the legal profession."[351] O'Connor felt that the Court was not according enough weight to the state's interest.[352] "Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest."[353] She felt the battle was better left to the states.[354]

In *Shapero,* the advertisement at issue was a truthful, non-deceptive direct mailing to people known to be facing foreclosure.[355] The letter further offered free information on how these people could keep their homes.[356] The majority found that the regulation forbidding the letter was more extensive than necessary.[357] It felt that the few "opportunities for isolated abuses or mistakes [did] not justify a total ban on that mode of protected commercial speech."[358] Justice O'Connor was joined by Rehnquist and Scalia in her strongly worded dissent.[359] She believed that such targeted letters had great potential for abuse.[360] She equated attorney advertising to solicitation and argued that restricting both would serve the same substantial government interest.[361] Her view, however, was still a minority on the Court.

Two years later, Justice O'Connor, joined again by Rehnquist and Scalia in dissent, would decry the Court's "rote application" of the

346. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 486 (1988).
347. *Id.* at 485.
348. *Id.* (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).
349. *Id.*
350. *Id.* Please note that this is not a least restrictive alternative test. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995).
351. *Shapero*, 486 U.S. at 485.
352. *Id.* at 487.
353. *Id.* at 490.
354. *Id.* at 487.
355. *Id.* at 468–69.
356. *Id.* at 469.
357. *Id.* at 475.
358. *Id.* at 476.
359. *Id.* at 480.
360. *Id.* at 482–83.
361. *Id.* at 490.

Central Hudson test.[362] The issue in *Peel v. Attorney Registration and Disciplinary Commission* was whether a state could ban an attorney from printing his board certification on his letterhead.[363] The State of Illinois prohibited attorneys from holding themselves out as certified or a specialist.[364] The Illinois Supreme Court was concerned about confusion as to who was certifying the attorney and what that entailed.[365] The Supreme Court majority described the regulations as paternalistic.[366] The Court held the regulations unconstitutional because they reached more speech than necessary to prevent the perceived evil.[367]

O'Connor again pointed to the misuse of the *Central Hudson* test in evaluating the strength of the state's interest, and most especially the fit required between the means and the ends.[368] She felt that the state had a substantial interest in ensuring that potential clients have all the information they need in as unbiased a format as possible.[369] For her, the advertising need not be actually misleading, but only potentially misleading.[370] She still had only two Justices who joined her dissent. However, it was clear that her argument was beginning to have some effect. Both Justice White, in a separate dissent, and Justice Marshall, concurring in the judgment, expressed concern that the advertising might be misleading.[371] A shift had begun in the Court's attitude toward attorney advertising, an indication that Justice O'Connor's arguments had not been in vain.

Five years later, not only had attitudes shifted, but the personnel on the Court had changed.[372] Justice O'Connor now garnered five total votes to apply *Central Hudson* the way she felt was correct in *Florida Bar v. Went For It*.[373] In *Went For It*, the Court examined a Florida regulation preventing attorneys from engaging in direct mail solicitation of injured people and their families for a 30-day period after the injury in question.[374] O'Connor walked step by step through the *Central Hudson* test.[375] Assuming the speech was truthful, she reviewed

362. Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting).
363. *Id.* at 99–100.
364. *Id.*
365. *Id.* at 98.
366. *Id.* at 105.
367. *Id.* at 97–102. The evil, as in almost all attorney advertising cases, is that the potential client will be misled. *Id.* at 100.
368. *Id.* at 119.
369. *Id.* at 122.
370. *Id.* at 120–21.
371. *Id.* at 92, 111, 118.
372. *Compare id.* at 93 (in interim Justices White, Brennan, Blackmun and Marshall had left the Court to be replaced by Thomas, Breyer, Souter and Ginsburg), *with* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 619 (1995).
373. *Fla. Bar*, 515 U.S. at 619.
374. *Id.* at 620.
375. *Id* at 623–24.

the government's interest and the fit of the rule.[376] Citing a privacy interest in the tranquility of the home, Justice O'Connor had "little trouble crediting the [Florida] Bar's interest as substantial."[377] When regarding the relationship of the means to the ends, Justice O'Connor defined the fit requirement under *Central Hudson* as something more than a rational basis fit, but not a least restrictive alternative inquiry.[378] The Court upheld the regulation as a constitutional restriction on attorney solicitation under *Central Hudson*.[379] Justice O'Connor had succeeded in shaping the test, as applied to attorney advertising, to reflect the higher level of conduct she expected from attorneys.

2. Electing Judges Impairs Their Ability To Be Impartial: *Republican Party v. White*

No discussion of Justice O'Connor's views on attorney ethics would be complete without a brief look at her opinions on judicial elections. In *Republican Party v. White* she had an opportunity to explain the difficulties of popularly electing an impartial judiciary.[380] The State of Minnesota holds partisan elections for its judges.[381] The Supreme Court of Minnesota had a judicial cannon that prohibited judicial candidates and sitting judges from stating their views on disputed legal or political issues.[382] The lower court found that the state interests in "preserving the impartiality of the state judiciary and preserving the appearance of impartiality of the state judiciary" were sufficient to uphold the rule.[383] The majority, in which Justice O'Connor joined, found that the rule was impermissibly content-based and in violation of the First Amendment.[384] In her concurrence, Justice O'Connor discussed the Missouri Plan for appointing judges.[385] She explained that judges who are elected would never be truly impartial, because of the pressures put on them to raise campaign money and be reelected.[386] In her opinion, states that elect judges voluntarily opened themselves to problems of a partial judiciary, or at least the appearance of such.[387]

376. *Id.*
377. *Id.* at 625. O'Connor cited a study done by the Florida Bar showing that people who received attorney's letters in the first 30 days after their injury, or the injury of a loved one, regarded the legal profession as a whole on a lower level than before the letters. *Id.* at 627.
378. *Id.* at 632.
379. *Id.* at 635.
380. Republican Party of Minn. v. White, 536 U.S. 765, 788–93 (2002) (O'Connor, J., concurring).
381. *Id.* at 768.
382. *Id.*
383. *Id.* at 775.
384. *Id.* at 788.
385. *Id.* at 791–92.
386. *Id.* at 788–90.
387. *Id.* at 792.

> [T]he State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.[388]

Justice O'Connor has long considered that the judicial pool could be significantly improved by appointing judges.[389] In fact, she successfully spearheaded a drive in Arizona to amend the state constitution.[390] She may not have directly affected the law on this point, with the exception of Arizona, but her cogent explanation of the pitfalls of an elected judiciary cannot help but have some impact.

B. *Free Speech and Intellectual Property*

"The tension between the desire to freely exploit the full potential of our inventive resources and the need to create an incentive to deploy those resources is constant."[391]

The intersection between First Amendment free speech rights and intellectual property is a complicated dance. Where do copyright and patent rights stop and free speech rights begin? In protecting a company's right to trademark a word, phrase, or symbol, have we curtailed a person's ability to express himself? The Court has achieved a balance between these competing rights, helped in no small part by Justice O'Connor's jurisprudence.

1. Fact or Idea/Expression Dichotomy: *Harper & Row*

Justice O'Connor's opinions have done nothing less than impose "a considered, structural approach" to copyright and patent.[392] One of her earliest opinions dealing with this dichotomy was *Harper & Row*.[393] At issue in this case were excerpts from Gerald Ford's memoirs published without his consent, prior to the release of his book.[394] The *Nation* magazine—that had printed parts of his book without permission—argued that it had a First Amendment right to print the news, and the fact of the book itself was "news."[395] *Nation* claimed that Section 107 of the Copyright Act, allowing fair use of an

388. *Id.*
389. Sainz, *supra* note 40, at 14 (describing a speech given by the Justice in Houston on March 10, 2005).
390. *Id.*
391. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152 (1989).
392. William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 380 (1999) (discussing the Court's demarcation of the end of Congress's power to legislate protections for unoriginal works).
393. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).
394. *Id.* at 542.
395. *Id.* at 555–56.

author's copyrighted material, sanctioned their use of the memoirs.[396] Additionally, *Nation* argued that the First Amendment allowed for a broader vision of fair use when the copyrighted work concerned issues of public concern.[397]

Justice O'Connor first reviewed the question of the fair use doctrine under Section 107.[398] Fair use is "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[399] The bundle of rights conveyed by Section 106 of the Copyright Act is subject to the fair use exception codified in Section 107, serving the "constitutional policy of promoting the progress of science and the useful arts."[400] She identified the right of first publication as differing from other Section 106 rights, because logically only one person could be first.[401] She further observed that history indicated that Section 107 had not been contemplated as a defense for use of unpublished materials.[402] She therefore held that the unpublished nature of a work, although not dispositive, would generally negate the fair use doctrine as a defense for its use.[403]

Turning to *Nation*'s constitutional argument, O'Connor found that the First Amendment did not widen the fair use doctrine to include first publication rights.[404] The constitutional requirement of free expression under the First Amendment created a fact/expression dichotomy, allowing for copyright only on expression and never facts.[405] However, the First Amendment encompassed a concomitant right to be free to be silent.[406] The concept of the right of first publication "served this countervailing First Amendment value."[407] As such, the Copyright Act incorporated First Amendment values and balanced them with the need to protect an author's creative efforts.[408] O'Connor ruled that to allow the First Amendment right to free expression to abrogate the Copyright Act to the extent demanded by the magazine would eviscerate the concept of copyright entirely.[409] She made it clear that this balance between the two must be maintained.

396. *Id.* at 544.
397. *Id.* at 555–56.
398. *Id.* at 549.
399. *Id.* at 549 (quoting H.BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).
400. *Id.*
401. *Id.* at 553.
402. *Id.* at 551.
403. *Id.* at 554.
404. *Id.* at 560.
405. *Id.* at 556–57.
406. *Id.* at 559.
407. *Id.* at 560.
408. *Id.*
409. *Id.* at 557.

This assertion would be the bedrock principle driving a pair of decisions in the early 1990s that came as a surprise to many.[410]

2. Curtailing Congress's Commerce Clause Sneak: *Bonito Boats* and *Feist*.

Described as a foray into constitutional copyright structuralism, O'Connor's opinion in *Feist* together with *Bonito Boats* drew the boundary beyond which Congress could not go without infringing on rights assured by the Copyright and Patent Clauses.[411] In *Bonito Boats*, Florida enacted a statute that prohibited a "direct molding process to duplicate unpatented articles"—in this case, boat hulls.[412] The law was challenged under the Supremacy Clause because it allegedly conflicted with federal patent law.[413] O'Connor and a unanimous Court agreed.[414] She reiterated the purpose of the Copyright and Patent Clauses.

> [T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure. . . . To a limited extent, the federal patent laws must determine not only what is protected, but also *what is free for all to use*.[415]

Once a design or technology passed into the public domain, either by expiration of a patent, or by not being patented or patentable in the first place, the states could not offer patent-like protection to those designs or technologies.[416] Expiration of a patent, or non-patentability created a federal right to copy and use.[417] Although the holding related to a state's ability, at least one commentator extrapolated it to apply also to Congress's ability to enact laws conveying property interests in unprotected or unprotectable work.[418] Indeed, O'Connor's analysis of the "bargain" struck between the federal patent system and the applicant clearly contemplates that no legislative body may interfere with the people's right to free use after the expiration of a patent.[419]

Adding to the limitation of patent rights articulated in *Bonito Boats*, Justice O'Connor next corrected an overly broad interpretation of the Copyright Act. *Feist* concerned the most extreme version of a "sweat

410. Patry, *supra* note 392, at 375.
411. *Id.*
412. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 144 (1989) (internal quotations omitted).
413. *Id.* at 145.
414. *Id.* at 168.
415. *Id.* at 151 (emphasis added).
416. *Id.* at 164–65.
417. *Id.* at 165.
418. Patry, *supra* note 392, at 381 n.131.
419. *See Bonito Boats*, 489 U.S. at 150–51.

of brow" copyright, a telephone book.[420] "Sweat of brow" is the concept that a person who assembles information in a compilation, like a researcher, owns a copyright in the assembled form of the information.[421] *Feist*'s remarkable ruling held that for a work to be copyrighted, the constitution required that it must be original.[422] Justice O'Connor defined original as the independent work of the author "that possesses at least some minimal degree of creativity."[423] Minimal could be merely the originality of the arrangement of the facts.[424] Even so, only the arrangement and not the facts themselves would be copyrightable.[425] "The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."[426] O'Connor held that the alphabetical compilation of names and phone numbers in a telephone book did not meet even the minimal amount of creativity required by the constitution.[427] The fact/expression distinction is not unfair or unfortunate.[428] "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"[429] She held that the "sweat of brow" doctrine was adverse to the constitutional purposes of copyright.[430] This reexamination of copyright surprised many commentators because the constitutional issues were not raised in the briefing, the oral arguments, or the lower court proceedings.[431] Justice O'Connor used *Feist* to reset boundaries of copyright to the constitutional baseline.[432] O'Connor writes in her book, *The Majesty of the Law*, that "the Court occasionally starts a fire of its own."[433] Although she cites *Brown v. Board of Education* as her example, perhaps she should add *Feist* as well.[434]

420. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 342 (1991) (unanimous). *See also* Patry, *supra* note 392, at 379.

421. Patry, *supra* note 392, at 379. With telephone books the sweat of brow copyright literally required aspiring telephone book writers to contact each and every telephone owner in the area before they could list their numbers. *Id.*

422. *Feist,* 499 U.S. at 347 (citing L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 n.155 (1989)).

423. *Id.* at 345.

424. *Id.* at 348.

425. *Id.*

426. *Id.* at 347.

427. *Id.* at 363.

428. *Id.* at 350.

429. *Id.* at 349 (quoting U.S. CONST. art. I, § 8, cl. 8).

430. *Id.* at 354.

431. Patry, *supra* note 392, at 375.

432. *Id.* (quoting Marci A. Hamilton, Copyright, Capitalism, and Commodification 12–13 (unpublished manuscript, on file with the George Washington Law Review)). Professor Hamilton is one of Justice O'Connor's former law clerks. *Id.*

433. O'CONNOR, *supra* note 73, at 15.

434. *Id.*

With the holdings in *Feist* and *Bonito Boats* Justice O'Connor clearly identified two boundaries in copyright. First, only those works that are original may be copyrighted.[435] She defined original so that compilations may only be copyrighted if their arrangement is somehow original, and then only insofar as they relate to the arrangement itself, not the facts.[436] Second, the constitution requires free access to those works that are unpatented or unpatentable, either through expiration of a patent or ineligibility for a patent.[437] Taken in conjunction with her ruling regarding the fair use doctrine, Justice O'Connor's opinions in the area of copyright and patent law have been extremely influential.

3. Trademark: The Road Less Perilous

The balance between First Amendment free speech and trademark values is more easily achieved. In an archetypal case, the Court examined Congress's grant of exclusive use of the word Olympic for certain commercial and promotional uses to the United States Olympic Committee (USOC).[438] In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* the SFAA wanted to use the word Olympic for a series of games modeled after the international Olympic Games.[439] Justice Powell held that the Amateur Sports Act constitutionally conveyed exclusive use of the word Olympic to the USOC.[440] In its First Amendment argument, SFAA claimed that the use of the word Olympic was political expression to which they had a constitutional right.[441] The Court disagreed.[442] It held that the commercial value with which the word became imbued could not be disentangled from its expressive use in this context.[443] Further, the Court stated that restricting the use of the word Olympic did not prevent SFAA from expressing its message.[444] Justice O'Connor concurred in this part of the decision.[445]

435. *Feist*, 499 U.S. at 348.

436. *Id.* at 350 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547–48 (1985)).

437. Patry, *supra* note 392, at 380–81. Patry explains that although *Bonito Boats* concerns the Supremacy Clause preempting a state's right to legislate patent-like protection for unpatented items, the case may be read to recognize a constitutional right in the public's free access to unpatented items. *Id.* at 381 n.131.

438. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 524 (1987).

439. *Id.* at 525. The games were to be called the "Gay Olympic Games." *Id.*

440. *Id.* at 530.

441. *Id.* at 535.

442. *Id.* at 341.

443. *Id.*

444. *Id.* at 536.

445. *Id.* at 548. She would have allowed SFAA to argue its equal protection issue because she believed the USOC was so entangled with the government that it had become a state actor. *Id.*

C. *Free Speech and Religious Speech*

"When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified."[446]

Inevitably, government's competing values of allowing freedom of expression in its public forum and not appearing to endorse religion come into conflict. Without reviewing Justice O'Connor's jurisprudence on the Establishment Clause, her influence in this area must be acknowledged. As with any free speech inquiry, the threshold question is whether religious speech is protected speech.[447] The Court has answered affirmatively, stating that "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince."[448] The Court also answered the forum question: when government opens a forum to a group of people, for example college students, then it may not bar speech in that forum using content-selective means.[449]

However, the answer to the next question divides the Court. May a public institution ban religious speech in a public or designated public forum because to allow it would unconstitutionally endorse religion?[450] That the rule is content-selective is not in contention.[451] Whether that content-selectivity is mandated by the Establishment Clause is another question entirely. Justice O'Connor strongly believes, and until now has held the Court to the proposition, that the endorsement test is the proper inquiry at the intersection of the two sides of the First Amendment.[452] Furthermore, she argues the endorsement test must be an in-depth look at the history and circumstances in each case, and may not be coalesced into a bright line rule.[453]

Her influence appears in two cases published on the same day: *Capital Square Review and Advisory Board v. Pinette* and *Rosenberger v. Rector and Visitors of the University of Virginia. Capital Square* addressed the issue of an unattended private religious display in a public forum.[454] The city of Columbus, Ohio, allowed groups to use, upon approval, the square adjacent to the statehouse for events, including

446. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 852 (1995) (O'Connor, J., concurring).
447. *See supra* Part III (discussing the types of speech that are protected).
448. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (Scalia, J.).
449. Widmar v. Vincent, 454 U.S. 263, 265 (1981).
450. *See, e.g., Rosenberger*, 515 U.S. at 839.
451. *Id.* at 832.
452. *Capitol Square*, 515 U.S. at 772 (O'Connor, J., concurring in part and concurring in the judgment).
453. *Id.* at 778.
454. *Id.* at 757.

rallies.[455] At issue was the state's decision to deny requests to erect unattended religious displays in the square.[456] The Ku Klux Klan sued based on free speech rights when their application was rejected.[457] The Board argued that to allow such displays would violate the Establishment Clause of the First Amendment.[458] The majority held that the display did not violate the Establishment Clause.[459]

Justice Scalia proposed a new test for Establishment Clause speech in a public forum.[460] "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[461] He was unable to keep a majority for his new test.[462] Justice O'Connor's dissent on that part of the opinion drew Justices Souter and Breyer away from the majority, thereby preserving the endorsement test as the standard in Establishment Clause cases.[463] The endorsement test requires the Court to hold a practice unconstitutional if "the reasonable observer would view the government practice as endorsing religion. . . ."[464] The perception may arise due to many factors, for all of which a case-by-case fact intensive inquiry accounts.[465] O'Connor admitted that such a test "may not always yield results with unanimous agreement at the margins."[466] However, the flexibility of deciding each case in context protects against the "subtle ways in which Establishment Clause values can be eroded."[467]

The same day that it issued *Capital Square*, the Court issued its ruling in *Rosenberger v. Rectors and Visitors of the University of Virginia*. In *Rosenberger*, a student group challenged a university policy reimbursing student organizations for publication printing costs.[468] The University refused to reimburse this group because its publication was

455. *Id.* at 757–58. The groups holding rallies in the past had varied greatly, including a homosexual rights organization, the Ku Klux Klan, and the United Way. *Id.* at 758.

456. *See id.* at 758–59.

457. *Id.*

458. *Id.*

459. *Id.* at 770.

460. *Id.*

461. *Id.*

462. *Id.* at 756.

463. *Id.*

464. *Id.* at 776.

465. *Id.* at 778. The factors may include the history and administration of the practice, the proximity to government buildings, the treatment of similar groups' requests, the request process, and the presence or absence of a disclaimer. *Id.* at 775–78.

466. *Id.* at 783 (quoting County of Allegany v. ACLU, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment)).

467. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

468. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822–23 (1995).

religious in nature.[469] It argued that because it was a state school, to reimburse the group would be impermissible under the Establishment Clause.[470] Further, the University argued that funding an activity did not equate to creating a forum.[471] The Court disagreed, stating that censorship of publications violated a vital principle of the First Amendment.[472] It found the University had indeed created a limited public forum for use by its students.[473] Having defined the forum the Court then reviewed the regulation under an Establishment Clause inquiry. Using the fact specific endorsement test that O'Connor championed in *Capital Square*,[474] it held that the Establishment Clause did not justify withholding funding based on viewpoint-selective criteria.[475] "There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."[476]

In concurrence, Justice O'Connor commented acerbically on attempts to fit the endorsement test into a *per se* rule.[477] This time she chastised the other side of the bench for its dogmatic adherence to the idea that public funds can never finance religion.[478]

> Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.
>
> . . .
>
> [E]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test.[479]

Justice O'Connor, in her years on the bench, has maintained the endorsement test as standard for cases at the crossroads between speech and religion.[480] With her retirement, it remains to be seen whether the new Court will continue "the hard task of judging" in this area.

VIII. CONCLUSION

Free speech strikes near and dear to the heart of every American. The founders made it the very first amendment. Free speech has a champion to keep it unbowed, if not unbloodied. Justice O'Connor

469. *Id.* at 822–23.
470. *Id.* at 827–29.
471. *Id.* at 835.
472. *Id.*
473. *Id.* at 830.
474. *Id.* at 837–44.
475. *Id.* at 845.
476. *Id.* at 846.
477. *Id.* at 847.
478. *Id.* at 846–47.
479. *Id.* at 847, 852 (O'Connor, J., concurring).
480. *See* SULLIVAN & GUNTHER, *supra* note 85, at 563 (citing O'Connor's endorsement analysis as the "general approach to establishment clause adjudication").

has fought well in its cause. She helped create and define the backbone upon which the forum analysis of free speech rights depends. Under her influence, the practical fact-based approach has become the standard for the areas in which it is needed. Her legislative experience has been invaluable in assessing the government's interest from an understanding, but exacting point of view.

The character instilled in O'Connor by growing up on the Lazy B is apparent in the qualities she brings to the bench. She is practical, industrious, intellectually curious, inventive, and warm. Her father would be proud, even if he would have expected no less. Her poise and keen wit bring a graciousness to her writing that strikes the right balance between accessible and intellectual. She is greatly missed on the Court, but her influence will be there for many decades to come.