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Justice O'Connor and the Rule of Law

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> What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. This is what prevents judges from ruling now this way, now that — thumbs up or thumbs down — as their personal preferences dictate.[1]

I. INTRODUCTION

In the wake of Justice O'Connor's retirement from the Court, there will undoubtedly be a flurry of books and articles devoted to the first female

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1. McCreary County v. ACLU, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting).

Justice and her many significant contributions. Her views on such important and contentious issues as affirmative action, abortion, federalism, and the separation of church and state often dictated the Court's resolution of those controversies. For a long time, Justice O'Connor was unquestionably the most influential judge in America, and how she did her job had a profound effect on our country. As Jeffrey Rosen has said so accurately: "We are all living now in Sandra Day O'Connor's America."[2]

The literature concerning Justice O'Connor will be mostly positive, but this Essay presents a dissenting view. Justice O'Connor's constitutional law decisions, taken as a whole, threatened rule of law values. Her reluctance to articulate principles governing cases, as well as her inconsistent treatment of legal doctrine, failed to provide enough stability, predictability, or transparency to differentiate legal rules from personal preferences. Although she may have been an effective compromiser, appealing to a cross-section of different constituencies, her judicial method led to the exercise of coercive and arbitrary governmental power.

Before I explain what I mean by rule of law standards, and demonstrate how Justice O'Connor's decisions jeopardized them, a few caveats and disclaimers are necessary to place my thesis into an appropriate context. First, my critique will not take issue with, and does not depend upon, demonstrating the weaknesses of specific results preferred by Justice O'Connor. This Essay is centered on her method of decision making, not her substantive vision.

Second, this Essay will be subject to the critique that the Court as a whole, or at least other Justices,[3] also threaten rule of law requirements. I am a legal realist who is somewhat receptive to the idea that much of the Court's constitutional law jurisprudence jeopardizes the rule of law. However, the specific intent of this piece — to make transparent the undeniable procedural failings of Justice O'Connor's constitutional law opinions — is a much easier thesis to support.

Related to this potential critique is the problem that many of Justice O'Connor's opinions this Essay criticizes were joined by other Justices. How much responsibility U.S. Supreme Court Justices should bear for the opinions they join, but do not write, is a difficult question that is beyond

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2. Jeffrey Rosen, *A Majority of One*, N.Y. TIMES, June 3, 2001, § 6, at 32. *See also* Victoria Ashley, *Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America*, 54 BAYLOR L. REV. 407, 415 (2002) (her "pragmatic approach allows her to remain not only at the center of the court, but also at the center of American politics").

3. Most notable on this list are Justices Kennedy and Breyer.

the scope of this project. It is fair to suggest, however, that Justice O'Connor's habit of deciding cases as narrowly as possible, while at the same time authoring so many opinions lacking in principle, raised more rule of law questions than the work of other Justices. The fact that other Justices joined some of her decisions does not weaken this thesis.

My final disclaimers are that the arguments in this Essay do not depend on a resolution of the recent debate in the Court and academia about the differences between clear rules and flexible standards, or the similar debate about the importance of the Court's reliance on precedent. Kathleen Sullivan has persuasively showed that the rule of law can accommodate significantly different approaches to the rules/standards controversy.[4] Open-ended balancing tests and flexible standards do not, by themselves, undermine the rule of law. But when the factors used in these tests are applied by judges mysteriously, and the weights assigned to the various elements used in the balancing tests are left unexplained, rule of law problems do emerge. Similarly, much has been written on the benefits and detriments of strict adherence to precedent,[5] and this Essay does not take a position on that debate, other than to suggest that the rule of law requires a minimum judicial commitment to treating similar cases similarly.

Part II of this Essay discusses the rule of law and its application to U.S. Supreme Court cases. Part III details a number of Justice O'Connor's constitutional law decisions and demonstrates that, collectively, they threaten rule of law standards. Part IV suggests that Justice O'Connor's failure is especially significant because she was so often the crucial swing vote. This Essay concludes that Justice O'Connor's failure to take rule of law principles seriously infected much of the Court's constitutional law jurisprudence for over twenty years and provides a poor example of how U.S. Supreme Court Justices should decide constitutional cases.

II. THE RULE OF LAW

Many academics have suggested that the rule of law is a general concept not subject to precise definition.[6] Although it is true that there are a variety of different interpretations, there are certain minimum standards

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4. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

5. *See, e.g.*, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decision Making and Theory*, 60 GEO. WASH. L. REV. 68 (1991); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

6. *See, e.g.*, Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

that governments devoted to the rule of law need to satisfy. When applied to government generally, rather than the courts specifically, the rule of law requires generality, publicity, clarity, conformability, and prospectivity.[7] The laws of the state should be general and separate from specific cases; they must be publicized so citizens are aware of them; they must be clear enough to be followed and reasonable enough to allow citizens to conform to them; and they must be prospective, meaning the rules must exist prior to the actions which implicate the state's authority.[8] This is a rather broad view of the rule of law, and all of these requirements turn on questions of degree. The general ideas, however, are not controversial. There must be pre-existing rules which are clear enough to be followed and public enough to allow compliance.

How these principles apply to U.S. Supreme Court decision making is more complicated. At the most basic level, a justice who rules for one of the parties because of a bribe would obviously violate any reasonable definition of the rule of law. Similarly, a justice who rules for one side because she wants to benefit from the outcome of the case would be acting illegitimately, even if there was no communication between the party and the justice. Further, a justice who rules for a party because of the color of her skin or her religion would violate the rule of law. I am not suggesting that Justice O'Connor would, or ever has, decided a case in the ways mentioned above, but that these examples of decision making demonstrate that the rule of law is implicated by court decisions.

Odious rules capable of consistent application may also implicate the rule of law. For example, a rule of law that red heads always win or that the party with the most money always prevails would provide fair notice of the law and could be applied consistently and transparently. Yet, these kinds of rules would be extremely troubling. These examples raise the difficult question of whether the rule of law has a minimum substantive content.

If this Essay were about a Justice who believed strongly that clear rules were an important element of the rule of law, such as Justice Scalia, this issue might have to be addressed.[9] However, Justice O'Connor does not believe these kinds of rules are necessary, or for that matter even desirable.[10] Moreover, my critique suggests that even when Justice O'Connor embraces a relatively clear rule, such as strict scrutiny for

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7. Radin, *supra* note 6, at 785.

8. *Id.*

9. Justice Scalia has said that sometimes "a bad rule is better than no rule at all." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

10. *See* discussion, *infra* Part III.

affirmative action cases, she does not apply that rule with the consistency required of the rule of law.[11] Accordingly, this Essay need not address whether consistently applied odious rules violate the rule of law.

Another important question is how important transparent legal reasoning, as opposed to specific results, is to the rule of law. If the U.S. Supreme Court announced it would no longer give any reasons for its decisions and every result would simply be announced as a judgment for a particular party, would there be a serious rule of law problem? This might be a more difficult question than it first appears because there are many instances where decision makers in our legal system do not justify their decisions.[12] Juries do not give reasons for their verdicts, the U.S. Supreme Court does not explain why it denies certiorari, and trial judges routinely rule on evidentiary motions and sentence defendants without offering explanations.[13]

Regardless of whether the rule of law would be violated if the U.S. Supreme Court did not offer any reasons for its decisions, the rule of law, at a minimum, should prevent judges from offering patently false, demonstrably incorrect, or hopelessly inconsistent reasons for their judicial decisions. For example, if a judge consistently sentenced defendants to maximum sentences in cases where the defendants pleaded guilty in open court, and the judge announced he was doing so specifically because the defendants never admitted their guilt, the rule of law might be implicated. Similarly, a judge who engages in a pattern of intentionally ignoring binding precedent or who deliberately mischaracterizes the facts or holdings of previous cases might impair rule of law values. In these instances, the government, through its judges, would be exercising its power coercively for reasons that are knowingly false and misleading.

Having demonstrated that judges giving false reasons implicates the rule of law, what about a judge who consistently offers no reasons? Although this may be a difficult question for trial judges, the highest court in the land should justify its results. Justification is the primary way the Court can influence other participants in the legal system. There is a strong connection between reasons and rules,[14] and decisions without reasons generally cannot constrain future actors. The U.S. Supreme Court must have some effect on lawyers, litigants, and judges for constitutional law to be minimally stable, consistent, and transparent, especially in a culture with a strong tradition of judicial review. How much constraint, stability

11. *See* discussion, *infra* Part III.C.2.

12. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

13. *Id.* at 634.

14. *See id. at* 641, 644-45.

and consistency are required are difficult questions, but it is enough for my thesis to suggest that a minimum amount is necessary to satisfy the rule of law.

There is another reason why giving reasons is important, at least in the Court from which there is no real appellate review.[15] The rule of law requires the government to treat similarly situated people in a similar way. The public cannot hold the Court accountable on this basis, however, unless the Court offers reasons for its decisions. So from the perspective of both stability and fairness, giving reasons is an important aspect of the rule of law. The thesis of this essay is that Justice O'Connor's constitutional law decisions, both internally within opinions, and externally across opinions, fail to provide satisfactory reasons that give rise to even minimal levels of stability, consistency, predictability, and fairness. Section III supports this argument by detailing a number of Justice O'Connor's constitutional law opinions and showing how they jeopardized the rule of law.

III. JUSTICE O'CONNOR'S DECISIONS AND THE RULE OF LAW

A. Allen v. Wright

The issue in *Allen v. Wright*[16] was whether parents of black school children had standing to file a class action challenging the way the IRS was enforcing its legal obligation to deny tax exempt status to private schools that discriminated on the basis of race.[17] The parents claimed that the government's subsidizing of these private schools made it more difficult for their children to receive a desegregated public school education.[18] Justice O'Connor, writing for the Court, held that the alleged segregation was sufficient to satisfy the injury prong of the standing test,[19] but that the plaintiffs could not show that the government caused their injuries, and thus the plaintiffs' complaint had to be dismissed.[20]

Justice O'Connor said that it was purely speculative whether the withdrawal of the tax exemptions would cause the allegedly discriminatory

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15. Although there is always the remote possibility of a constitutional amendment, this option is almost never available to the losing party.

16. 468 U.S. 737 (1984).

17. *Id.* at 739-40.

18. *Id.* at 746.

19. *Id.* at 766.

20. *Id.* at 756-57.

private schools to change their policies and/or tuition in a way that would drive white children back to the public schools.[21] The dissent charged that the plaintiffs were being improperly required to prove their case on the merits to defeat a motion to dismiss.[22]

Prior to *Allen*, another Supreme Court case raised identical standing issues. In *Coit v. Green*,[23] parents of public school children claimed that the IRS's policy of providing tax exemptions to racially discriminatory private schools made it more difficult for their children to receive a desegregated public school education.[24] Justice O'Connor tried to distinguish *Coit* partly on the basis that it involved a summary affirmance.[25] However, this was a throw-away line because standing is a matter of subject matter jurisdiction, and the Court cannot summarily affirm any decision unless the plaintiffs have Article III standing.[26] Justice O'Connor spent most of her opinion trying to distinguish *Coit* on the facts. Keeping in mind that the issue in *Allen* was whether the plaintiffs had standing to allege that tax exemptions to racially discriminatory *private* schools furthered *public* school segregation, here is what Justic O'Connor wrote:

> [T]he facts in the *Coit* case are sufficiently different from those presented in this lawsuit that the absence of standing here is unaffected by the possible propriety of standing there. In particular, the suit in *Coit* was limited to the public schools of one State. Moreover, the District Court found, based on extensive evidence before it . . . *that large numbers of segregated private schools had been established in the State for the purpose of avoiding a unitary public school system* [reference omitted]; *that the tax exemptions were critically important to the ability of such schools to succeed* [reference omitted]; *and that the connection between the grant of tax exemptions to discriminatory schools and desegregation of the public schools in the particular State was close enough to warrant the conclusion that irreparable injury to the interest in*

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21. *Id.* at 758.

22. *Id.* at 774-75 (Brennan, J., dissenting). Although the dissent has the better argument, this is not the part of the decision germane to my thesis.

23. 404 U.S. 997 (1971).

24. *Allen*, 468 U.S. at 763-64.

25. *Id.* at 764.

26. *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 98-103 (1998) (Article III standing questions implicate subject matter jurisdiction and must be resolved before a court can take any action).

desegregated education was threatened if the tax exemptions continued.[27]

There are significant rule of law problems with this analysis. First, *Coit* is directly on point, yet the Court in *Allen* reached the opposite conclusion without overturning a binding precedent. This is a problem of external consistency. Second, the reasoning of the Court lacks any transparency. Justice O'Connor suggested that the plaintiffs could not sufficiently prove, for *standing* purposes, a proposition (the granting of tax exemptions to racially discriminatory private schools threatened integrated public schools) that plaintiffs in a previous case, after being given the opportunity at trial, had proved exactly (tax exemptions to Mississippi private schools furthered public school segregation).[28] Worse, earlier in *Allen*, Justice O'Connor said the following about how the Court should decide standing issues: "In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."[29] The "allegations" in *Coit* and *Allen* were virtually the same, but the results on the standing question were completely different. As the dissent in *Allen* pointed out, the majority's discussion of *Coit* "stretches the imagination beyond its breaking point."[30] We are left unable to discern the Court's real rationale, making it impossible to predict how the next standing case will be decided or why two sets of similarly situated plaintiffs were treated differently by the Supreme Court.

It bears emphasizing that the problem with *Allen* is not just that the reasoning is unpersuasive, as that is true for many Supreme Court constitutional law decisions. What is wrong with *Allen* is that two indistinguishable cases were distinguished in a manner no different than saying that the color of the plaintiff's hair was different in one case than the other.[31] The notion that *Coit* was distinguishable from *Allen* because in *Coit* the plaintiffs proved what the *Allen* plaintiffs alleged, is in effect no more persuasive than distinguishing *Coit* on the basis of the plaintiff's hair color, a distinction that would certainly threaten the rule of law.

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27. *Allen*, 468 U.S. at 764-65 (emphasis added).

28. *See id.*

29. *Id.* at 751-52.

30. *Id.* at 781 n.9 (Brennan, J., dissenting).

31. Had that been the basis of the *Allen* decision, the rule of law would obviously be implicated.

B. New York v. United States & Printz v. United States

In *New York v. United States*,[32] the issue was whether Congress could require the states to clean up low-level radioactive waste pursuant to a statute sponsored by the National Governors Association.[33] Justice O'Connor, writing for the Court, assumed, and the plaintiffs conceded, that Congress's Commerce Clause power extended to this problem.[34] The issue was whether there was a state sovereignty limitation on that power.[35]

This particular question had a checkered history in the U.S. Supreme Court. For many years, the Court did not find a Tenth Amendment limitation on Congress's article I powers.[36] The Court reversed these earlier decisions in *National League of Cities v. Usery*,[37] before returning to its original position again just a few years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[38] In *Garcia*, the Court explicitly held that there is no *judicially* enforceable state sovereignty limitation where Congress acts pursuant to the Commerce Clause.[39] Justice O'Connor's dissent agreed with Justice Rehnquist's dissenting prediction that the *Usery* rule, in some form, would once "again command the support of a majority of this Court."[40] This statement suggests that the rule of law governing this question would change once the people on the Court changed — certainly an anti-rule of law prediction.

As predicted, when the personnel on the Court changed, so did the result. In *New York v. United States*, the Court held that Congress may not commandeer state legislatures, even when exercising Commerce Clause powers.[41] Justice O'Connor began her analysis by stating that "[i]f a power is delegated to Congress in the [U.S.] Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the [U.S.] Constitution has not conferred on

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32. 505 U.S. 144 (1992).

33. *Id.* at 149, 151.

34. *Id.* at 159-60.

35. *Id.*

36. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968) (holding that the Commerce Clause grants Congress the power to regulate wages paid to employees of state run enterprises); United States v. California, 297 U.S. 175 (1936) (finding no state sovereignty limitation on the federal government's Commerce Clause power to regulate state-run interstate railroad commerce).

37. 426 U.S. 833 (1976).

38. 469 U.S. 528 (1985).

39. *Id.* at 556-57.

40. *Id.* at 580 (Rehnquist, J., dissenting); *id.* at 588 (O'Connor, J., dissenting).

41. New York v. United States, 505 U.S. 144, 188 (1992).

Congress."[42] She also wrote that "[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . *to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.*"[43] These statements are consistent with the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."[44]

Since Justice O'Connor already conceded that Congress's Commerce Clause authority properly extended to the clean-up of radioactive waste, and that Congress could preempt state regulation in this area, one would have thought that the federalism question would be easily decided in favor of Congress.[45] However, Justice O'Connor came up with a different interpretation of the Tenth Amendment:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, *but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology.*
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> *Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.*[46]

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42. *Id.* at 156 (emphasis omitted).
43. *Id.* (quoting *Garcia*, 469 U.S. at 549) (emphasis added).
44. U.S. CONST. amend. X.
45. The Court said that:

> Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen.

New York, 505 U.S. at 159-60 (citations omitted).
46. *Id.* at 156-57 (emphasis added).

The last three sentences of this paragraph simply cannot be reconciled with Justice O'Connor's previous statements regarding the Tenth Amendment. If it is true that "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States,"[47] then it also must be true that if Congress is exercising an enumerated power (a power surrendered by the states), the Tenth Amendment does not affect the exercise of that power. Yet, Justice O'Connor later concludes that the "Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[48] Her reasoning does not make sense, and one is left with a bare conclusion inconsistent with other parts of the same judicial opinion.

In *New York*, Justice O'Connor summarily announced that "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[49] The Court returned to this issue in *Printz v. United States*,[50] where the Court held that the federal government could not require state law enforcement officials to conduct background checks on gun purchasers.[51] Writing for the majority, Justice Scalia reaffirmed that the federal government may not conscript state officials into federal service, even for a limited period of time and for non-policymaking duties.[52]

Justice O'Connor wrote a concurring opinion agreeing with the decision (which was consistent with *New York*), but also stating that the decision did not necessarily foreclose "ministerial reporting requirements," such as requiring state law enforcement agencies to report information about missing children to the FBI.[53] In light of her strongly announced rule in *New York*, and the tone of the majority opinion in *Printz* which suggested the anti-commandeering principle was absolute, it is unclear what Justice O'Connor's caveat could mean. After all, the gun law at issue in *Printz* also concerned reporting requirements.[54] The fact that she deems it more important for the government to receive information about missing

47. *Id.* at 156 (emphasis omitted).
48. *Id.* at 157.
49. *Id.* at 166.
50. 521 U.S. 898 (1997).
51. *Id.* at 932.
52. *Id.* at 935.
53. *Id.* at 936 (O'Connor J., concurring).
54. *See* Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 235 (1997).

children than information about guns does not begin to explain why Congress may coerce state sheriffs to perform one task but not the other. Certainly, there is nothing in the text, history or structure of the Tenth Amendment or the Commerce Clause to even remotely suggest such a distinction. Thus, in both *New York* and *Printz*, Justice O'Connor articulated a clear rule (no commandeering) but also suggested that rule would not apply to another indistinguishable situation. This type of decision making is the rule of personal preference, not the rule of law.

C. *Abortion, Affirmative Action, and Establishment*

Three of the most contentious issues in constitutional law are abortion, affirmative action, and the separation of church and state. If a U.S. Supreme Court Justice resolved these controversies with a simple thumbs up or thumbs down vote, without explaining why two similarly situated cases in each area were not treated alike, the rule of law would be in danger.[55] Justice O'Connor's jurisprudence in each of these three areas is the functional equivalent of a thumbs up/thumbs down vote. Her opinions are impossible to reconcile with one another, and she articulates vague legal standards that are impossible for future courts to apply in a principled manner.

1. Abortion

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[56] the joint opinion of the Court signed by Justices O'Connor, Souter, and Kennedy adopted an "undue burden" standard for judges reviewing the constitutionality of laws infringing on a woman's choice to have an abortion.[57] Justice O'Connor had articulated this standard long before *Casey* was decided and before Justices Souter and Kennedy were even on the bench.[58] Leaving aside the rule of law implications of the joint opinion's reliance on *Roe* as a matter of *stare decisis*, even as it discarded the trimester framework which formed the essential holding in *Roe*,[59] the "undue burden" standard is an excellent example of a legal rule which is the functional equivalent of a "thumbs up or thumbs down" vote in each

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55. In this circumstance, for example, there would be no way of determining whether similar cases were being treated similarly by the Court.

56. 505 U.S. 833 (1992).

57. *Id.* at 874, 877.

58. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

59. *Casey*, 505 U.S. at 993-994 (Scalia, J., dissenting).

individual case. It is no different than a legal standard that abortion restrictions are constitutional as long as they do not deter abortions too much without any explanation of when that threshold may be crossed.[60]

One issue presented in *Casey* involved the validity of a law requiring a mandatory twenty-four hour waiting period between the time a woman received state-required information regarding an abortion and the time the procedure could be scheduled.[61] The law was challenged on grounds that it placed an "undue burden" on women seeking abortions, in violation of the principles set forth in *Casey*.[62] In a joint opinion, the Court held that the requirement did not create an undue burden, although it did not disagree with the district court's finding that the rule placed "particular burdens" on women seeking abortions.[63] Thus, courts now had to distinguish "undue burdens" from "particular burdens."

Casey also involved a law that required women to notify their spouse before having an abortion, unless doing so would place them in danger.[64] The joint opinion struck down this provision mostly over concern for women who would be put in danger by notifying their husbands, *even though the law created an exception for exactly this circumstance.* The joint opinion never adequately explained why the twenty-four hour provision did not amount to an undue burden while the spousal notification requirement did. Justice Scalia discussed the rule of law problems with this type of legal reasoning:

> The shortcomings of Roe did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. . . . [T]he [undue burden] standard is inherently manipulable. . . .
>
> The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate . . . almost any abortion restriction that strikes him as "undue" — subject, of course, to the possibility of being reversed

60. *Id.* at 985-86 (Scalia, J., dissenting).

61. *Id.* at 844.

62. *See id.* at 885-86.

63. *Id.* at 886-87.

64. The contested law said that a woman did not have to notify her spouse if she "believes that notifying her husband will cause him or someone else to inflict bodily injury upon her." *Id.* at 887.

> by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.[65]

If the U.S. Supreme Court announced that it would approve those abortion regulations that did not get in the way of women "too much," and invalidate those that did, and lower courts could do the same, subject to appellate review and *stare decisis*, the law on abortion would be the rule of what each judge preferred in each individual case, not the rule of law. The "undue burden" standard first articulated by Justice O'Connor, in effect, gives us the same legal regime.

2. Affirmative Action

Justice O'Connor's affirmative action decisions present similar problems. In *City of Richmond v. J.A. Croson Co.*,[66] and *Adarand Constructors, Inc., v. Pena*,[67] Justice O'Connor held that all racial preferences, even those used for the "benign" purpose of helping traditionally disadvantaged groups, are subject to strict scrutiny under the Equal Protection Clause.[68] Thus, in the former case, the city of Richmond was not allowed to establish a set aside for city building contracts for minority-owned businesses, despite Congress's findings of widespread discrimination in the industry. As analyzed by Justice O'Connor, unless such preferences "are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[69] Similarly, in *Adarand,* Justice O'Connor wrote that "any person, of whatever race, has the right to demand that any governmental actor . . . justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[70]

In these cases, Justice O'Connor appears hostile to any affirmative action measures not designed to remedy specific instances of discrimination. The dissenting opinions consistently argued for a more deferential standard of review.[71] However, when the issue of racial preferences in university admissions came before the Court, Justice

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65. *Id.* at 985-86, 992 (Scalia, J., dissenting).

66. 488 U.S. 469 (1989).

67. 515 U.S. 200 (1995).

68. *Croson*, 488 U.S. at 493; *Adarand*, 515 U.S. at 226.

69. *Croson*, 488 U.S. at 493.

70. *Adarand*, 515 U.S. at 224.

71. *See Croson*, 488 U.S. at 534 (Marshall, J., dissenting); *Adarand*, 515 U.S. at 271 (Ginsburg, J., dissenting).

O'Connor veered away from her previous decisions and the rules she articulated therein.[72]

In *Grutter v. Bollinger,*[73] the issue was whether the University of Michigan Law School could employ racial preferences to ensure that a "critical mass" of minority students attended the school.[74] Similarly, the issue in *Gratz v. Bollinger*[75] was whether the college at the University of Michigan could use race as an automatic "plus factor" for minority applicants.[76] In both cases, educational diversity was the asserted state interest. Four Justices, who like Justice O'Connor, had previously stated that all racial classifications deserve strict scrutiny, voted to strike down the use of race in both cases.[77] Justice O'Connor, however, voted to allow the use of race in one case but not the other. Her reasons for doing so, however, were quite suspect.

The law school program passed muster under Justice O'Connor's interpretation of strict scrutiny because the use of race was done on an individualized basis,[78] whereas the undergraduate program was unconstitutional because it used race as an automatic "plus factor" for all protected minorities.[79] Justice O'Connor never explained why these different uses of racial classifications should receive different analysis under the Fourteenth Amendment. Justice O'Connor also failed to reveal why giving law school administrators *more* discretion to use race was more narrowly tailored than the circumscribed discretion exercised by the undergraduate admissions officers. Additionally, she did not explain why she applied a far more deferential version of strict scrutiny in *Grutter* than she used in *Gratz* or in any other affirmative action case.

Even more troubling, Justice O'Connor noted in *Grutter* that the law school sought to "enroll a 'critical mass' of minority students . . . . The Law School's interest is not simply to assure within its student body some

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72. *See* Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 641 n.44 (2005) ("Indeed, the reason that the Supreme Court ultimately upheld the affirmative action program at issue in *Grutter* was that Justice O'Connor, for the first time, switched sides and voted in favor of upholding a racial affirmative action program on the merits.").

73. 539 U.S. 306 (2003).

74. *See id.* at 311, 318.

75. 539 U.S. 244 (2003).

76. *See id.* at 255-56.

77. *See Grutter*, 539 U.S. at 346-86 (Justices Rehnquist, Scalia, Kennedy, and Thomas dissenting from decision upholding law school's use of race in admissions); *Gratz*, 539 U.S. at 248 (same Justices invalidating college's use of race in admissions).

78. *Grutter*, 539 U.S. at 337.

79. The college argued that it had to review too many applications to conduct the kind of individualized review performed by the law school.

specified percentage of a particular group merely because of its race or ethnic origin. . . . That would amount to outright racial balancing, which is patently unconstitutional . . . ."[80] The law school conceded that they tried to enroll a "critical mass" of minority students every year.[81] In fact, the percentage of such students enrolled was often extremely close to the percentage who applied.[82] According to Justice O'Connor, if the law school had said that it wanted twelve percent minorities or eighteen percent minorities, it would have set an unconstitutional quota. However, admitting a "critical mass" of minorities every year did not amount to such a quota,[83] a distinction very difficult to understand much less justify.

Additionally, at the end of Justice O'Connor's opinion she wrote "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[84] Regardless of whether this language is viewed as dicta or a binding part of the holding of the case, it is a completely inappropriate statement for the Court to deliver. How does Justice O'Connor know what the state of racial affairs will be in twenty-five years? Given the historical and political complexity of the affirmative action debate, it is judicial hubris for Justice O'Connor to suggest that she has some special awareness as to when race-based measures may no longer be necessary. Whether or not such hubris implicates the rule of law, it is an inappropriate and arbitrary exercise of judicial power.[85]

3. Establishment of Religion

Perhaps the area of law where Justice O'Connor has had the most significant impact, and the one that most clearly reflects the rule of law implications of her jurisprudence, is the First Amendment's Establishment

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80. *Grutter*, 539 U.S. at 333 (internal quotations omitted).

81. *Id.* at 335-36.

82. *See id.* at 384-85 (Rehnquist, J., dissenting).

83. How can it be that the purposeful goal of enrolling a critical mass of minorities every year, no matter what, and then admitting a number very close to the number who applied, is not the same as a quota or racial balancing, which Justice O'Connor says is "patently unconstitutional?" This is beyond all reason and strongly suggests that the Court is not providing the real basis for its decision.

84. *Grutter*, 539 U.S. at 343.

85. *See* Stephen B. Presser, *A Conservative Comment on Professor Crump*, 56 FLA. L. REV. 789, 795-96 (2004) ("Professor Crump is quite correct to call Justice O'Connor's pronouncement that the ruling in Grutter should expire after twenty-five years 'eye-popping' — although I prefer 'mind-boggling' — but such a sunset provision would not be surprising in a legislative act. It is, however, hardly the stuff of natural law, original understanding, or adherence to previous precedent.") (footnotes omitted).

Clause.[86] In 1984, in a concurring opinion in *Lynch v. Donnelly*,[87] she advocated a new approach to the Establishment Clause by modifying the three-part *Lemon* test that had been used (and in the opinion of many judges and scholars abused) by the Court since 1971.[88] Justice O'Connor suggested that the Court replace the "purpose" prong of the *Lemon* test with a new "endorsement test," which asks whether the government practice in question sends a message of endorsement or disapproval of religion.[89] According to Justice O'Connor, the endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[90] Under this test, the government may not endorse or favor religion, and Justice O'Connor has used those words interchangeably.[91]

An example of Justice O'Connor's endorsement analysis is found in *Lynch v. Donnelly*. The issue in *Lynch* was whether the city of Pawtucket, Rhode Island violated the Establishment Clause by paying for and erecting a Christmas display in a private park.[92] The display included a number of secular symbols of the season, but also featured a crèche depicting the infant Jesus, Mary, and Joseph.[93] It would be easy, as some scholars and judges have suggested, to conclude that because Pawtucket only displayed symbols of Christmas, the city was endorsing Christianity.[94] Furthermore,

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86. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

87. 465 U.S. 668 (1984).

88. *See id.* at 687-94. The *Lemon* test asked whether the government practice being challenged had a secular purpose, whether its primary effect was to advance religion and whether the practice caused excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

89. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

90. *See id.* at 688 (O'Connor, J., concurring).

91. *See id.* at 694 (O'Connor, J., concurring).

92. *See id.* at 670-71.

93. *Id.*

94. Jamin Raskin wrote:

> [T]he most plausible purpose for taking the reindeer, robots, dancing bears, snowflakes, and candy canes — signifiers that already amply express holiday spirit — and adding to them the Christmas nativity characters of Jesus, Mary, [and] Joseph . . . would be precisely to endorse and promote the particular religious faith and practice represented by these figures: Christianity. Even if one claims that the purpose is simply to acknowledge the religious preferences of the majority, such a selective recognition has no rational secular purpose other than to endorse the practices of a religious group. After all, why does the majority need to have its preferences honored in this way?

if the display was adjudged unconstitutional under the endorsement test, it could logically follow that numerous other governmental practices, such as "In God we Trust" on our coins, would also be held invalid.[95] Such practices seem to endorse religion over non-religion, or at least the belief in God over non-belief.[96] If endorsement were the real test, these practices would certainly be unconstitutional.

Endorsement though, is not the real test, which is why Justice O'Connor voted to uphold the crèche in *Lynch* despite its obvious symbolic approval of the Christian religion (and why she would approve other official endorsements of the belief in God).[97] The real test is whether a governmental practice endorses religion too much, just as the test in abortion cases is whether the burden is too undue. This kind of test, however, is no test at all.

In *Lynch*, Justice O'Connor argued that the city's purpose was to celebrate a public holiday, not to endorse Christianity, and that the celebration of such a holiday "is not understood to endorse the religious content of the holiday . . . ."[98] As both the district court and the dissenting Justices point out, it would have been easy for Pawtucket to celebrate the public holiday without including any religious symbols.[99] It is one thing for the government to acknowledge the reality that many Americans view Christmas as a special day,[100] but quite another for the government to sponsor specific religious symbols important only to the adherents of a particular religion.

The point here is not that the display violated the Establishment Clause (one could reasonably argue that the Clause is not violated absent governmental coercion), but that the display clearly violated the endorsement principle articulated, but then misapplied, by Justice O'Connor. Once again, there is a lack of transparency in her reasoning, and the articulation of a principle that when applied, is infinitely

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Jamin B. Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of The Establishment Clause–Commentary on Measured Endorsement*, 60 MD. L. REV. 761,770 (2001). *See also Lynch*, 465 U.S. at 699-700 (Brennan, J., dissenting).

95. Other examples that would be unconstitutional include the words "Under God" in the Pledge of Allegiance and the practice of starting legislative sessions with prayers.

96. Justice O'Connor has said that the "Religion Clauses . . . protect adherents of all religions, as well as those who believe in no religion at all." McCreary County v. ACLU, 125 S. Ct. 2722, 2747 (2005) (O'Connor, J., concurring).

97. *Lynch*, 465 U.S. at 692-94 (O'Connor J., concurring).

98. *Id.* at 692 (O'Connor, J., concurring).

99. *Id.* at 699-700 (Brennan J., dissenting).

100. For example, the government could declare it a national holiday so that families can spend time together.

manipulable. This erodes rule of law values and destabilizes legal doctrine, as demonstrated by the cases following *Lynch.*

The next case involving the interplay of religious displays and government property was *Allegheny County v. ACLU.*[101] In this case, the County placed a crèche on the staircase of a courthouse, and put a Chanukah menorah, a Christmas tree, and a sign saluting liberty outside a city-county building.[102] A majority of the Court, including Justice O'Connor, applying the endorsement test, held that the crèche, because it stood alone, violated the Establishment Clause.[103] Conversely, the display with the menorah was held constitutional because the menorah, standing among other holiday symbols, did not constitute an endorsement of religion.[104] In her concurring opinion, Justice O'Connor stated her belief that "every government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion."[105]

There can be no dispute that Justice O'Connor is sincere when she states that each Establishment Clause case must be judged by its "unique circumstances." There were many factors relevant to Justice O'Connor's decisions relating to the religious displays at issue in *Lynch* and *Allegheny County.* One important factor was whether the religious symbol was on public or private property. Whereas in *Lynch* the crèche was owned by the city but placed in a private park, the crèche in *Allegheny County* was on public property.[106] Another factor asks, if the religious symbol is on public property, is it a "core" governmental building.[107] The menorah was on government property, but apparently not "core" governmental property. A third consideration is whether the religious symbol is surrounded by secular symbols.[108] The crèche upheld in *Lynch* was surrounded by secular symbols, but the crèche invalidated in *Allegheny County* was not.[109] The menorah upheld in *Allegheny County* was also surrounded by secular symbols.[110] Another factor is the purpose behind the display of the

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101. 492 U.S. 573 (1989).

102. *Id.* at 579.

103. *Id.* at 598.

104. *Id.* at 620-21.

105. *See id.* at 624-25 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 688, 694 (O'Connor, J., concurring)).

106. *See Allegheny County*, 492 U.S. at 626 (O'Connor, J., concurring).

107. *See id.* (O'Connor, J., concurring).

108. *See id.* at 625-26.

109. *See ACLU*, 492 U.S. at 626.

110. The symbols included a sign saluting liberty and a Christmas tree, which Justice O'Connor found not to be a religious symbol. *See id.* at 633.

religious symbol. According to Justice O'Connor, the purpose behind the crèche in *Lynch* was to celebrate the holiday season, but the purpose behind the crèche in *Allegheny County* was to celebrate Christianity.[111] The purpose behind the display with the Chanukah menorah, the Christmas tree, and the sign saluting liberty was to celebrate pluralism.[112] A final factor is the history of the practice at issue. This factor, according to Justice O'Connor, helped distinguish legislative prayers and "In God We Trust" on our coins, which she would uphold, from the crèche in *Allegheny County*, which she found unconstitutional.[113] The difference is between government "acknowledgment of religion," which is permissible and government "endorsement" of religion, which is impermissible.[114]

What is perhaps most interesting, and disappointing, about this list of factors is that they are inconsistent with how Justice O'Connor actually describes her own Establishment Clause views, which again leads to a lack of transparency and inconsistency that threatens the rule of law. In *Allegheny County*, in response to Justice Kennedy's argument that actual governmental coercion should be required before a plaintiff could show an Establishment Clause violation, she wrote that "the endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others."[115] She also argued that the government must not convey "a message that religion or a particular religious belief is favored or preferred."[116]

How can it be said that the government is not endorsing certain religions over others when it pays for one and only one religious symbol like the crèche in *Lynch*? How can it be said that the government is not favoring religion over non-religion when it puts "In God We Trust" on our national currency, a practice approved by Justice O'Connor?[117] As mentioned earlier, Justice O'Connor's endorsement test does not really ask whether the government is endorsing religion (which it does routinely), but rather whether the government is endorsing religion *too much*.[118] The list of factors above[119] is relevant, but also leads to ad hoc decision making.

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111. *Id.* at 626-27 (O'Connor, J., concurring).

112. *See id.* at 635 (O'Connor, J., concurring).

113. *See id.* at 625 (O'Connor, J., concurring).

114. *See ACLU*, 492 U.S. at 625 (O'Connor, J., concurring).

115. *Id.* at 631 (O'Connor, J., concurring).

116. *Id.* at 627 (O'Connor, J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (O'Connor, J., concurring)).

117. *See supra* text accompanying note 97.

118. *See supra* text accompanying notes 97-98.

119. *See supra* text accompanying notes 106-114.

This prevents lower court judges, the states, and the people from understanding and applying the law in this area. It is no surprise that after these opinions there were legions of cases attacking the legality of religious symbols on governmental property leading to many different results.[120]

When the controversy once again returned to the U.S. Supreme Court, Justice O'Connor once again demonstrated her lack of commitment to rule of law principles. During the 2004-05 term, the U.S. Supreme Court decided two cases involving the placement of the Ten Commandments on governmental property. In one case, *McCreary County v. ACLU*,[121] the Ten Commandments were posted in a county courthouse.[122] In the other case, *Van Orden v. Perry*,[123] the Commandments were posted on a six foot high monolith on the grounds of the Texas State Capitol. The Court upheld the monolith[124] but invalidated the Commandments in the courthouse.[125]

In *McCreary County*, there was significant evidence suggesting that the Commandments were placed in the courthouse by a government official specifically to promote religion.[126] In contrast, the Commandments displayed on the monolith outside the state capitol in *Van Orden* had been there for many years along with twenty-one other historical markers and seventeen other monuments.[127] Justice O'Connor voted to invalidate both displays, though she gave her reasoning only in *McCreary County*.[128] She wrote:

> Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.

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120. *See, e.g.*, Jennifer H. Greenhalgh, *The Establishment Clause and Government Religious Displays: The Court That Stole Christmas*, 15 TOURO L. REV. 1053, 1083-84 (1999) ("As a result, we are left with a colossal number of confused lower courts left to decide if a candy cane or a poinsettia has enough secular meaning to dilute the religious component of a crèche.").

121. 125 S. Ct. 2722 (2005).

122. *Id.* at 2727.

123. 125 S. Ct. 2854 (2005).

124. *Id.* at 2858.

125. *McCreary County*, 125 S. Ct. at 2745.

126. *Id.* at 2735-41.

127. *Van Orden*, 125 S. Ct. at 2858.

128. *See id.* at 2891 (O'Connor, J., dissenting); *McCreary County*, 125 S. Ct. at 2746-47 (O'Connor, J., concurring). Her opinion reads much more like a press release or a political speech than a judicial opinion: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish." *Id.* at 2746 (O'Connor J., concurring).

> *When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. . . . . Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs.*[129]

In her concurrence, O'Connor described the reasons why government and religion must remain separate as if these general propositions could decide all the hard questions,[130] and as if she had not previously voted to uphold the government's display of a crèche, the government's display of a menorah and Christmas tree on public property, and numerous practices incorporating God into our national identity.[131] There is simply no way to reconcile her decision in these cases with her reasoning put forth in *McCreary County*. Perhaps a politician can faithfully perform her job by such painstaking focus on specific details, but a Supreme Court Justice should and, to maintain the rule of law, must do better.[132]

If Justice O'Connor had faithfully applied the factors she articulated in *Allegheny County* and *Lynch*, she should have voted to uphold the monolith that displayed the Ten Commandments on the capitol grounds. The monolith had been in place for forty years before it was challenged, it was surrounded by a number of secular monuments and historical markers, it was donated to the State by a secular organization, and there was no evidence that the state acted for religious reasons in accepting the gift.[133] In fact, Justice Breyer painstakingly went through the factors previously identified by Justice O'Connor and concluded the display was constitutional.[134] Justice O'Connor's dissent, however, made no effort to explain her vote and how it could possibly be consistent with her votes in

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129. *Id.* at 2746-47 (O'Connor, J., concurring) (emphasis added).
130. *See id.* at 2746-47 (O'Connor, J., concurring).
131. *See supra* notes 92-117 and accompanying text.
132. *See* Presser, *supra* note 85, at 795. Presser wrote:

> Justice O'Connor had considerable experience as a state legislator before serving on the Supreme Court, and it certainly appears as if her "balancing tests" are more the tools of someone engaging in the kind of policy choices characteristic of a state legislator than anyone seeking neutrally to apply a pre-existing rule of law.

Id.

133. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2870 (2005) (Breyer J., concurring).
134. *See id.* at 2868-73 (Breyer, J., concurring).

Lynch and *Allegheny* or her proffered factors.[135] The decision left the public with absolutely no idea how she would vote in the next religious symbols case, nor could any meaningful principles be gleaned from her four written opinions on the matter, other than that each case has to be decided narrowly and pursuant to its unique circumstances.[136] This type of judicial approach might be acceptable if her results were even somewhat consistent, or if her reasoning were more transparent. Unfortunately, her results are at odds with themselves, and her reasoning is obscure and internally contradictory. As both Justices Thomas and Scalia pointed out, this kind of jurisprudence threatens the rule of law.[137]

D. *A Few Other Examples*

It is not only in well publicized constitutional cases such as those involving abortion and affirmative action that Justice O'Connor fails to provide consistency and coherence. For example, she has also failed to articulate with any clarity her views on the admittedly difficult questions surrounding the judicial creation of private rights of action for damages directly under the U.S. Constitution. As a result, similarly situated and sympathetic plaintiffs have received quite different treatment from Justice O'Connor.

In *Bivens v. United States*,[138] the Court allowed the plaintiff to sue FBI agents directly under the Fourth Amendment for damages resulting from an illegal search.[139] The conservatives on the Rehnquist Court have consistently refused to extend *Bivens* to other constitutional provisions. For example, in *Schweiker v. Chilicky*, Justice O'Connor voted to refuse to allow social security disability plaintiffs to bring a *Bivens* action against federal officials accused of acting in bad faith for terminating benefits for arbitrary and capricious reasons.[140] Though the plaintiffs had their benefits restored, they sought consequential damages.[141] Justice O'Connor found, however, that Congress's design of the massive welfare system, in which it refused to create a constitutional remedy, was a "special factor" that

135. *See id.* at 2891 (O'Connor, J., dissenting).

136. *See supra* text accompanying note 105-114.

137. *See McCreary County*, 125 S. Ct. at 2751 (Scalia, J., dissenting); *See Van Orden*, 125 S. Ct. at 2866-68 (Thomas J., concurring).

138. Bivins v. Six Unknown Named Agents, 403 U.S. 388 (1971).

139. *Id.* at 389.

140. *See* Schweiker v. Chilicky, 487 U.S. 412, 414 (1988).

141. *See id.* at 417-19, 428-29.

counseled hesitation, and that the Court should not create a constitutional remedy.[142] She reached this result despite saying the following:

> We agree that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the "belated restoration of back benefits." The trauma to respondents, and thousands of others like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens. Nor would we care to "trivialize" the nature of the wrongs alleged in this case. Congress, however, has addressed the problems created by state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program.[143]

Without suggesting that the Court reached the wrong result in this case, compare it to a case raising a similar issue decided just one year before. In *United States v. Stanley*,[144] a former army officer sued the military for injuries suffered when he was secretly given LSD in the 1950s.[145] He developed a host of mental problems, and only discovered the secret testing many years later.[146] In a previous case, *Chappell v. Wallace*,[147] the U.S. Supreme Court held that it would not extend *Bivens* to suits against military officers because of the special needs of the military and Congress's creation of comprehensive rules and regulations for the armed forces.[148] Justice O'Connor cited *Chappell* with approval in *Schweiker*.[149] In *Stanley*, however, she dissented from the Court's dismissal of the plaintiff's *Bivens* action saying the following:

> In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission. The bar created by *Chappell*... surely cannot insulate defendants from liability for

142. *See id.* at 423, 428, 29.
143. *Id.* at 428-29.
144. 483 U.S. 669 (1987).
145. *Id.* at 671.
146. *Id.* at 671-72.
147. 462 U.S. 296 (1983).
148. *Id.* at 304.
149. Schweiker v. Chilicky, 487 U.S. 412, 422 (1988).

> deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent . . . and for no other reason than to gather information on the effect of lysergic acid diethylamide on human beings. No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case.[150]

In *Schweiker*, Justice O'Connor admitted that the defendants acted in bad faith and that "[t]he trauma to respondents, and thousands of others like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens,"[151] and in *Stanley* she said the government's conduct went "far beyond the bounds of human decency."[152] Yet, she found a cause of action in *Stanley*, but not in *Schweiker*, without explaining why Stanley deserved relief but the *Schweiker* plaintiffs did not. Perhaps she believed that being given LSD secretly is in some sense worse than being denied welfare benefits arbitrarily. Still, this is not deciding cases under law; it is deciding cases using personal values and subjective moral beliefs. The plaintiffs in *Schweiker* deserved a better explanation as to why their claims were dismissed.

Finally, one of the most striking examples of Justice O'Connor's failure to provide fairness, consistency, and transparency is *Rogers v. Tennessee*,[153] a case directly implicating rule of law principles. The defendant in this case stabbed his victim with a butcher knife; the victim died fifteen months later.[154] The defendant was convicted of second degree murder despite the common law rule, then applicable in Tennessee, that a defendant could not be convicted of murder if the death occurred more than a year and a day after the attack.[155] The Tennessee Supreme Court held that this rule should be abolished, and that its abolition should be applied retroactively to this case.[156]

The Ex Post Facto Clause prohibits legislatures from punishing people for crimes that were not crimes at the time of the defendant's conduct.[157] The text of the clause, however, refers only to state legislatures, not state

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150. *Stanley*, 483 U.S. at 709-10 (O'Connor, J., concurring in part and dissenting in part).

151. *Schweiker*, 487 U.S. at 428-29.

152. *Stanley*, 483 U.S. at 709 (O'Connor, J., concurring in part and dissenting in part).

153. 532 U.S. 451 (2001).

154. *Id.* at 954.

155. *Id.*

156. *Id.* at 455.

157. The ex post factor clause states that "No State shall . . . pass any . . . ex post factor Law." U.S. CONST. art. I, § 10, cl. 1.

courts.[158] Nevertheless, in *Bouie v. City of Columbia*,[159] the U.S. Supreme Court said that ex post facto principles did apply to courts through the Due Process Clause of the Fourteenth Amendment because "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving exactly the same result by judicial construction."[160]

Despite the clear holding of *Bouie*, in *Rogers* Justice O'Connor held that the Due Process Clause did not specifically incorporate ex post facto limitations. She said that *Bouie* was based on core due process concepts such as fair notice and forseeability, and that the *Bouie* Court's discussion of the Ex Post Facto Clause was dicta.[161] Extending the Ex Post Facto Clause to the courts, according to Justice O'Connor, would show too little regard for the differences between legislatures and courts.[162] She explained that courts have to balance flexibility and precedent, and applying ex post facto limitations to the courts would "unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system."[163]

In light of this holding, the question in *Rogers* was not whether the Tennessee Supreme Court violated ex post facto limitations by retroactively abolishing the "year and a day rule," but whether the defendant had fair warning that the rule might be changed. Justice O'Connor found that he did since the law had become an "outdated relic of the common law," because the rule had been abolished in most other jurisdictions, and at the time of the crime, the rule had only "a tenuous foothold" in the criminal law of Tennessee.[164] Therefore, even though the "year and a day rule" was still technically part of the Tennessee criminal law at the time of Rogers' offense, he could be convicted of murder despite the fact that his victim died fifteen months after the crime.[165]

Justice O'Connor's characterization of the *Bouie* Court's discussion of the Ex Post Facto Clause as dicta is simply wrong. The discussion was "essential to the holding of that case," and it was repeated at the end of the opinion before the holding was announced.[166] As Justice Scalia noted in

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158. *See id.*

159. 378 U.S. 347 (1964).

160. *Id.* at 353-54.

161. Rogers v. Tennessee, 532 U.S. 451, 458-59 (2001); *see Leading Case*, 115 HARV. L. REV. 316, 318 (2001).

162. *Rogers*, 532 U.S. at 460; *Leading Case*, *supra* note 161, at 318-19.

163. *Rogers*, 532 U.S. at 461.

164. *Id.* at 462-64; *Leading Case*, *supra* note 161, at 319.

165. *See Rogers*, 532 U.S. at 466-67.

166. *Leading Case*, *supra* note 161, at 321-22.

dissent, Justice O'Connor's determination that the Ex Post Facto discussion in *Bouie* was dicta could be right only if the "concept of dictum . . . includes the very reasoning of the opinion."[167]

Justice O'Connor's mangling of *Bouie* in *Rogers* violates rule of law principles on several levels. The substantive issue in these cases was whether a person can be convicted of a crime that was not an offense at the time of his action. The answer under the Ex Post Facto Clause is no, and legislatures therefore cannot make criminal laws retroactive. In *Bouie*, the Court held that it would be unfair for state courts to accomplish what state legislatures could not. In *Rogers*, not only did the Court not faithfully apply rules of precedent set forth in *Bouie*, it then went on to hold that courts may retroactively apply criminal laws as long as the defendant had fair notice, a requirement the Court diluted beyond recognition. Ironically, the reason Justice O'Connor gave for justifying this new rule was that courts are more constrained than legislatures and therefore retroactive judicial interpretations pose fewer dangers than retroactive legislative changes.[168] However, she proposed this in a case where the Court flatly misinterpreted precedent thereby depriving the defendant of fair notice. Even in cases involving rule of law questions, Justice O'Connor does not correctly apply rule of law principles.

There is a plausible explanation as to why Justice O'Connor departed from the *Bouie* rule in *Rogers*. The defendants in *Bouie* were civil rights protesters who were asked to leave a "whites only" counter during the early 1960s.[169] Their convictions for criminal trespass were upheld in the state courts even though South Carolina's trespass laws had never been interpreted to apply in similar circumstances.[170] In *Rogers*, the defendant had far less sympathy; his crime simply involved "an isolated stabbing with no socially redeeming purpose."[171] Still, the factual differences in these cases should not make a constitutional difference because no one should be convicted of a crime that was not a crime at the time the conduct occurred. The fact that the *Bouie* defendants did not receive that protection demonstrates the injustice of the *Rogers* decision, and also shows that Justice O'Connor's belief that courts are less likely than legislatures to violate rule of law principles is sometimes incorrect.

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167. *Rogers*, 532 U.S. at 469 (Scalia, J., dissenting).
168. *See id.* at 460-62.
169. Bouie v. City of Columbia, 378 U.S. 347, 348 (1964).
170. *Id.* at 350. *Leading Case*, *supra* note 161, at 323.
171. *Leading Case*, *supra* note 161, at 323.

IV. CONSTITUTIONAL DECISIONMAKING AND THE RULE OF LAW

For most of her time on the bench, Justice O'Connor served as the crucial swing vote.[172] Perhaps it is appropriate for the Justice consistently in the philosophical middle to write narrow opinions, leaving the difficult questions for another day and another court. But if a Justice is going to consistently play that role, the rule of law requires that she at least explain the reasons for her decisions and detail why she assigns importance to the values she identifies and applies. This Essay has demonstrated that the main flaw in Justice O'Connor's opinions was not the narrowness of her focus or the use of open-ended balancing tests, but the rampant internal and external inconsistency and lack of transparency in her reasoning. In yet another context, legislative redistricting, a noted Court observer said the following about Justice O'Connor's role as the swing vote:

> [Justice] O'Connor's minimalism entangles individual Justices in the political process to the most minute and confusing degree. Because O'Connor has not explicated the rules or standards that, in her view, distinguish constitutional from unconstitutional districts, the process of redistricting in the wake of the 1990 census has largely become an exercise in reading Justice O'Connor's mind. Justice Stewart's famous test for obscenity — "I know it when I see it" — was based on the conviction that there was a social consensus about what is obscene, but that it reflected too many legal and moral permutations to be captured in a single judicial rule. Justice O'Connor's focus on "oddly shaped districts," by contrast, seems to rest on no broader aesthetic than the sensibility of O'Connor herself.[173]

The rule of law requires more than the application of a Justice's "sensibility" to difficult legal questions, especially if that judge's opinion is to be the supreme law of the land. Whether the test was "undue burden,"[174] "endorsement of religion,"[175] or a not so strict scrutiny in one affirmative action case and an extremely "strict" scrutiny in every other affirmative action decision,[176] Justice O'Connor's inordinate attention to

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172. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Rogers v. Tennessee, 532 U.S. 451 (2001); Adarand Constr., Inc. V. Pena, 515 U.S. 200 (1995); Lynch v. Donnelly, 465 U.S. 668 (1984).

173. Jeffrey Rosen, *Forward*, 97 MICH. L. REV. 1323, 1331 (1999).

174. *See supra* Part III.C.1.

175. *See supra* Part III.C.3.

176. *See supra* Part III.C.2.

specific facts led to a maze of incoherent, unexplainable, and unpredictable legal doctrine.

When U.S. Supreme Court Justices decide cases with reasoning that either cannot be applied in the future, or with reasoning that is overtly arbitrary, they come much closer to dissolving the already murky line between the legal and the political process. For example, by allowing the states to require a twenty-four hour waiting period for women seeking abortion but not allowing them to require notification of the father based on the "undue burden" test, Justice O'Connor sounds more like a legislator determining what is best, rather than a Justice deciding what is constitutional. By deciding that race can be used by an elite law school to admit a "critical mass" of minorities, but denying the same tool to the City of Richmond for its city contracts and to an undergraduate institution for its students, Justice O'Connor is deciding when affirmative action can be employed not through some legal rule or balancing test, but based on factors familiar to her and other hard to identify values. By deciding that some religious symbols on governmental property illegally endorse religion but others constitutionally acknowledge religion, without consistently applying the many factors she identified as relevant, Justice O'Connor sounds more like a policymaker than a decision maker. Expensive, time consuming, and agonizing lower court litigation is normally the result of such ad hoc decisionmaking.[177]

Unlike Justice O'Connor, Justice Scalia has continually argued for bright line rules for constitutional cases.[178] I have previously suggested that Scalia undervalues the need for a more incremental approach to constitutional decision making.[179] The problem with Scalia's project is not that clear rules are ill suited for constitutional doctrine, but the rigidity of his views on the appropriate balance between those rules and flexible standards. The same can be said of Justice O'Connor, but in reverse. Her obsession with providing as little guidance as possible for the future threatened the coherence and consistency of numerous constitutional law doctrines.[180] This anti-rule philosophy posed a greater threat to the rule of law than Justice Scalia's pro-rule directives because her decisions were often impossible to understand and reconcile with her other opinions, and because she did not apply her open-ended balancing tests with consistency and transparency. The resulting morass of doctrine led to great uncertainty

177. *See* Greenhalgh, *supra* note 120 and accompanying text.

178. *See* Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1041-42 (1994).

179. *See id.*

180. *See supra* Part III.B-C.

as to what the law required, especially when the cases were often decided by Justice O'Connor's completely unpredictable fifth vote.

Justice Scalia has also made the argument that the more the Court applies open-ending balancing tests and engages in reasoning removed from the text and history of the U.S. Constitution, the more likely it is that the confirmation process will select Justices based on their politics rather than their judicial competence.[181] Although I do not find his arguments about history and text persuasive,[182] he is correct that the more the Court reaches results that depend on extremely narrow distinctions, the more the Court becomes politicized. We do not need skilled lawyers to tell us when abortion restrictions place an "undue burden" on women, or when religious symbols on government property "endorse" religion too much, or when official government behavior crosses some impossible to discern line between "what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens,"[183] versus "conduct . . . beyond the bounds of human decency."[184]

Justice O'Connor's "legal" tests are not tests at all, just simply exercises in deciding each case as if no other case matters. There are certainly times when issues should be allowed to percolate through the lower courts and the legislatures.[185] But the combination of the frequency with which Justice O'Connor refused to commit herself (and the Court) to a clear rule of decision, and her internally and externally inconsistent application of law to fact, has resulted in a confusing and contradictory body of law that makes constitutional doctrine in many areas difficult to understand and impossible to apply. This type of decision making decreases the possibility of treating similarly situated people similarly, and leads to the exercise of coercive governmental power in an arbitrary and capricious fashion. The rule of law, and the American people, deserved better than that.

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181. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1997).

182. *See* Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 428-430 (1998).

183. Schweiker v. Chilicky, 487 U.S. 412, 428-29 (1988).

184. United States v. Stanley, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring in part and dissenting in part).

185. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

V. CONCLUSION

When it came to such important and controversial decisions as abortion, affirmative action, and the separation of church and state, as well as numerous other constitutional law cases, Justice O'Connor's decisions reached inconsistent results and articulated legal standards incapable of future application. The rule of law requires judges to explain their decisions in a coherent fashion that provides litigants a fair description of the result, explains why similar cases are decided differently, and provides reasonable notice to the public of what to expect in the future. Justice O'Connor consistently failed to meet these standards in her constitutional law decisions and thus threatened the rule of law.