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O’Connor: A Dual Role—An Introduction

STEPHEN J. WERMIEL *

On September 21, 1981, as the U.S. Senate voted to approve her nomination to the United States Supreme Court, Sandra Day O’Connor listened in the Capitol hideaway office of Senator Strom Thurmond, the South Carolina Republican and then chairman of the Senate Judiciary Committee. When the vote was over and the tally of 99-0 was announced, she walked the short distance to the marble steps outside the Senate wing of the Capitol, looked across the vast plaza and beyond the fiery fall foliage to the Supreme Court, and declared, “I am absolutely overjoyed at the expression of support from the Senate. My hope is that ten years from now, after I’ve been across the street at work for a while they will all be glad that they gave me that wonderful vote.”

When Justice O’Connor was nominated by President Ronald Reagan, two factors dominated both initial public reaction and subsequent statements at her confirmation hearings: her historic role as the first woman to serve on the Court, and her views on abortion. Now that ten years have elapsed, these factors still top the list in most evaluations of her. However, this emphasis often obscures a second distinctive role she has established: that of an independent conservative who influences the Court’s decisions by virtue of her position in the middle of the Court.

This Article examines these dual roles and concludes that they present sharply contrasting images of Justice O’Connor. She is proud and visible in her role as the first woman on the Supreme Court, exercising a brand of leadership that inspires many women lawyers and law students, even when they disagree with her jurisprudence. In her decision making, however, she is very cautious, adopting a narrow, case-by-case approach to the many questions of law that face the Supreme Court. Looking solely at the judgments in cases — whether the Court affirmed or reversed the lower court — her voting record closely resembles that of her most conservative colleagues, Justice Antonin Scalia and Chief Justice William Rehnquist. But her approach to cases when she writes separate opinions is a more incremental conservatism, diminutive compared to some of her bolder colleagues.

This places her in the middle of the Court where her influence is often a check on how far or how fast the Court will march. Because she

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2. See, e.g., Employment Division v. Smith, 494 U.S. 872 (1990) (First Amendment Free Exercise Clause does not prohibit a state from denying unemployment benefits to members of the Native American Church who were fired from their jobs because of their use of the hallucinogenic drug, peyote, in religious rituals).

Justice Scalia’s opinion for the Court broadly declared the State’s right to enforce generally applicable criminal laws without making special exceptions for the free exercise of religion. In a separate opinion, 494 U.S. at 891, Justice O’Connor concurred in the judgment, but on far more narrow grounds, concluding that there was no need to enunciate the broad principle spelled out by the majority opinion.

For additional discussion of this case, see infra notes 62, 63, 64 and 65 and the accompanying text.

3. For a discussion of Justice O’Connor as the “swing” vote, see Stephen J. Wermiel, Swing Vote: Sandra Day O’Connor...
takes a narrow, problem-solving view of cases, the practical effect is that she wields an influence that exceeds what would otherwise be her intellectual force. It is a moderating influence, more than a leadership quality, exercised either in separate opinions or in the Court’s internal, written drafting process. Other Justices must consider how far she may be willing to move if they have any hope of mustering a majority. Experienced Supreme Court practitioners pitch their arguments to her, seeking a jurisprudential least common denominator.

To understand these dual roles, it is essential to analyze her jurisprudence in five areas: sex discrimination, abortion, religious freedom, the death penalty and federalism. It is in cases of gender discrimination that Justice O’Connor’s dual role is most pronounced, as she demonstrates a consistent empathy for the woman claimant to a greater degree than when she reviews other forms of bias. Her innate caution and incremental approach are most apparent in cases of abortion, religious freedom and the death penalty, where she appears to be seeking narrower grounds for decision than other conservatives.

If she has articulated an overriding jurisprudential interest that is not embayed by her dual roles, it is in federalism. Some of her strongest views on federalism have been expressed in dissent, however. One facet of federalism in which there have been major changes is federal habeas corpus, where she has supported a significantly more limited system of federal review than had existed for two decades before she joined the Court. The majority’s inroads in that arena have more often been expressed in strong abuse-of-process terms than as a matter of federalism concerns for deference to state criminal courts. Beyond the issue of habeas corpus, there is no certainty that the Court’s growing conservative majority—including as it does members who are highly enamored of federal power—will rally behind her view of federalism.4

I. A BIOGRAPHICAL SKETCH

When historian and author Catherine Drinker Bowen examined the background of Oliver Wendell Holmes, she concluded that “it was the strength of these roots” that made Oliver Wendell Holmes the Justice that he was.5 It is similarly instructive to briefly examine Justice O’Connor’s background to understand her independent conservative role on the Supreme Court. Justice O’Connor’s outlook, determination and work ethic are a direct result of the early influences on her life.6

A. The Road to the Supreme Court

Born in 1930, Sandra Day O’Connor was raised on an isolated, rural cattle ranch, the Lazy B, in Arizona. She did not know the comforts of running water and electricity until she was six years old, when her parents sent her to El Paso to live with her grandmother because there were no good schools close to the ranch. By that time, she could ride, mend fences and shoot a rifle, skills she perfected on returning to the ranch during the summers.7

Although she has said she lacked self-confidence early in life, the rough and tumble atmosphere of a cattle ranch gave her a persistence and determination that are still with her. “I can remember as a young woman having a lot of feelings of uncertainty and insecurity. But, nonetheless, I wanted to try,” she said. That

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4. See South Dakota v. Dole, 483 U.S. 203 (1987) (upholding the power of Congress to require the Secretary of Transportation to withhold some federal highway funds from states that fail to pass a minimum drinking age of 21).

Chief Justice Rehnquist wrote the majority opinion upholding the exercise of federal power, and Justice Scalia joined it. Justice O’Connor wrote a dissenting opinion, rejecting the use of federal authority against the state. 483 U.S. at 212.

5. CATHERINE D. BOWEN, YANKEE FROM OLYMPUS XI (1944).

6. For a detailed examination of her life story, see Marjorie Williams & Al Kamen, Woman of the Hour, WASH. POST, June 11, 1989, (Magazine) at 21.


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This role, which she has played for much of one decade on the Court, is certain to change as new jurists join the Court. The replacement of Justice William Brennan by Justice David Souter and of Justice Thurgood Marshall by Justice Clarence Thomas increased the size of the Court’s conservative wing. It is too soon to tell whether this shift will, as seems logical, diminish the influence of any single swing vote or whether a still-emerging ideological middle of the Court will remain significant as a check on the proclivities of the other conservatives: Chief Justice Rehnquist and Justices Scalia and Anthony Kennedy.
The determination “came out of my background, growing up as I did on a cattle ranch, where one learns to work and do things for oneself.”

Despite their isolation, the Day household was well-stocked with newspapers and magazines. Justice O’Connor’s father, Harry Day, a conservative Republican, was well-read, and Justice O’Connor used her free time to read, too. At age sixteen she entered Stanford University. In 1952, at age twenty-two, she was graduated from Stanford Law School, where she was a law review editor and ranked at the top of her class, just behind William Rehnquist, now Chief Justice of the United States Supreme Court.

After graduation, Justice O’Connor applied to a number of major California law firms for a position as a lawyer. She was able to obtain only a handful of interviews, and the sole job offer was to be a legal secretary at the Los Angeles firm of Gibson, Dunn and Crutcher. Turning to the public sector instead, she worked for two years as a deputy county attorney in San Mateo County. Until 1965, she held assorted legal jobs and spent several years at home looking after three young boys and worrying that she had been away so long that she might never get back into legal practice. During this period, she engaged in many volunteer projects, becoming president of the Phoenix Junior League, and organizing her home precinct to support Arizona Senator Barry Goldwater’s Republican bid for the presidency in 1964.

In 1965, her career began anew and flourished, first as an assistant attorney general in Arizona for four years, then as a state senator from 1969 to 1975, where through her ability and determination, she rose to the influential post of majority leader. Some of the votes she cast while in the Arizona Senate raised eyebrows among Republican conservatives when she was nominated to the Supreme Court. Specifically, she voted against several anti-abortion measures, including a resolution calling for a pro-fetal-life amendment to the U.S. Constitution. Her explanation to President Reagan’s aides in 1981 was that these votes were cast largely because the various proposals were non-germane amendments to other legislation that were prohibited by the Arizona Constitution. She also supported ratification of the Equal Rights Amendment in Arizona.

In 1975, she resigned from the Senate to accept an appointment to the Maricopa County Superior Court, a general jurisdiction trial court. Her reputation was as a tough judge who expected lawyers to be well-prepared and forthcoming, foreshadowing her role as an aggressive questioner on the Supreme Court bench. In 1979, she was elevated to the intermediate appeals court, the Arizona Court of Appeals, on which she sat for eighteen months.

Her tenure on the appeals court overlapped with the 1980 presidential campaign, during which Ronald Reagan promised that, if elected, he would put a woman on the Supreme Court. Within a few months of taking office in 1981, President Reagan got his chance and fulfilled his promise, nominating Judge O’Connor on July 7, 1981. The reaction to the nomination surprised the White House staff. Conservatives, led by right-to-life leaders who strongly supported the new president, were outraged that President Reagan had chosen someone who was not clearly anti-abortion, and whose Arizona legislative record included support for the Equal Rights Amendment. “Sandra Day O’Connor: President Reagan’s First Broken Promise,” declared the cover headline in Conservative Digest.

At her confirmation hearing in September 1981, it was the “new right” that gave the nominee the most difficulty. Three members of the Senate Judiciary Committee — Republican Senators Charles Grassley of Iowa, Jeremiah Denton of Alabama and John East of North Carolina — expressed extreme frustration at Judge O’Connor’s unwillingness to discuss her view of specific Supreme Court precedents, most particularly, Roe v. Wade. She went so far as to say, “I am opposed to abortion as a method of birth con-
control or otherwise.'

That personal, rather than judicial, explanation was not enough to satisfy Senator Denton, who could not bring himself to vote for her but did not want to vote against the nominee of a Republican president. Senator Denton simply voted "present." The other seventeen committee members voted to report her nomination to the full Senate.

B. The First Woman

Even before her nomination to the Supreme Court, Justice O'Connor began to have symbolic impact. In November 1980, the Justices unceremoniously and on their own initiative dropped the time-honored and revered references to "Mr. Justice" in the U.S. Reports. Later, she played a part in rendering the Federal Rules of Civil Procedure gender neutral.

From the moment her appointment was announced, and in the ten years that have followed, Justice O'Connor has been a sensation in Washington, D.C. society and virtually everywhere else she goes. In her own usually reserved way, she has recognized and acknowledged the importance of being the first woman Justice. She told Bill Moyers, "I saw it as a symbolic change of some significance to women because they do want, I think, to feel that the opportunities are there for them at all levels of economic life and political life and social life in America."

Yet, while recognizing her role, she eschews the mantle of pioneer. "I am obviously the beneficiary of the efforts that a lot of earlier, wonderful pioneer women made. I wouldn't be here if it weren't for what those other women had done. It's not my accomplishments but theirs that made it possible," she told Moyers.

She has devoted considerable time and energy to trying to inspire women in the legal profession. She speaks every few years to the National Association of Women Judges, declaring in 1985, that "[w]omen have made enormous progress in the past decade in the legal profession, but their representation in the judiciary is disproportionately small." Although she does not make a large number of speeches, she appears with some frequency at symposia on women in the law or in other professions. "Only a short time ago, the subject of this conference would have been considered an oxymoron," she told a 1990 conference on "Women in Power" at Washington University in St. Louis. She has also been honored with women's awards: in 1990, the Bess Truman Award of the Independence, Mo., Junior Service League; in 1987, the Jane Addams Medal of Rockford College in Illinois.

Occasionally, she enjoys a good laugh, albeit a pointed one, about her role. In 1983, she complained about a reference in the New York Times to the acronym used by the "nine men" of the Supreme Court of the United States, or "SCOTUS." In a letter to the editor, she wrote:

According to the information available to me, and which I had assumed was generally available, for over two years now SCOTUS has not consisted of nine men. If you have any contradictory information, I would be grateful if you would forward it as I am sure... the SCOTUS and the undersigned (the FWOTSC) would be most interested in

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17. The Court voted to delete the references to "Mister" at the Justices' weekly conference of November 14, 1980. See J. Sup. Ct. U.S., Oct. Term 1980, at III. There was no public announcement; the reference was merely deleted from the Court's opinions and orders. First public notice of the development was reported on November 19, 1980. Linda Greenhouse, Court Dropping "Mr. Justice", N.Y. Times, Nov. 19, 1980, at A16.

18. The Federal Rules of Civil Procedure were made gender neutral in the amendments of March 2, 1987, which took effect on August 1, 1987. There is no public record of Justice O'Connor's role; she did not testify about the change or write a letter that has become part of any official record. However, numerous participants in the amendment process have said in interviews with the author that they understood at the time that they were acting at Justice O'Connor's request.

19. Interview with Bill Moyers, supra note 8 (transcript at 16).

20. Id. (transcript at 13).


23. Details of Bess Truman Award may be found in Chuck Conconi, Personalities, Wash. Post, May 9, 1987, at G3.
Nothing is more pointed than her humor about her own experience with sex discrimination. Growing up on the ranch, she told Bill Moyers in the 1987 interview, she never experienced discrimination. She experienced discrimination firsthand, however, when Gibson, Dunn & Crutcher asked her to be a legal secretary. Thirty-eight years later, at a Los Angeles celebration of Gibson, Dunn’s centennial on May 4, 1990, she took her revenge. She first roasted the firm, and then William French Smith, a senior partner who was Attorney General of the United States when Justice O’Connor was nominated to the Supreme Court. According to a transcript of her speech, she said:

I have calculated from looking at Martindale-Hubbell that had this firm offered me a job in 1952 as a lawyer, and had I accepted it, remained in the firm and progressed at the usual rate, I would now be at least the tenth ranking lawyer in the firm, which today numbers 709 attorneys. ... I want to thank Bill Smith. I can remember as if it were yesterday when he telephoned me on June 26, 1981, to ask if I could go to Washington, D.C. to talk about a position there. Knowing his former association with your firm, I immediately guessed he was planning to offer me a secretarial position — but would it be as Secretary of Labor or Secretary of Commerce? Of course, it was not. He had something else in mind. ...  

There is a paradox in this distinguished role as the first woman on the Court. Most of these speeches and public appearances are performed with little public attention. The inspiration they provide is limited to their immediate audience, for Justice O’Connor eschews publicity; she will not notify the news media when she is making such appearances, and refuses to release texts of her speeches. This may be a reaction to her early years in Washington, D.C., when her notoriety on the Supreme Court bench was nearly matched by her visibility on the social circuit. Attending one embassy dinner and cultural ball after another, she and her husband, John O’Connor, a lawyer, provided constant material for the “Style” pages of the Washington Post, which often described how proficient the O’Connors were at dancing the Charleston and other steps. Years later, she would observe, “[m]y first year on the Court made me long at times for obscurity.”

More recently, the unwanted publicity has focused on her 1988 mastectomy for breast cancer, her unwillingness to let the illness or chemotherapy slow her down, and her return to Court ten days after the surgery. To her apparent annoyance, publicity has rather ghoulishly continued to dwell on her health, fueled by annual spring rumors that she is too sick to continue and will retire at any time. In June 1990, the rumors reached a feverish pitch that she was so sick she could not possibly carry on and would retire two days before the end of the term. On the day on which this apocalyptic event was to occur, the reportedly ailing Justice was not available to deny the reports, however, because she was on a rigorous, annual hike in the mountains of western Virginia with her law clerks. Throughout 1991, she denied persistent, identical reports.

Despite these apparent justifications for eschewing publicity, the paradox remains. She is a role model for professional women, but only to those comparatively few who are fortunate enough to see or hear her in person.

Among those who regularly experience this good fortune are the Supreme Court law clerks. Female law clerks say there is a bond that develops between themselves and Justice O’Connor. Many get to know her because they attend the morning exercise class that she organized soon after she came to the Court. They have dinner with

25. Interview with Bill Moyers, supra note 8 (transcript at 11).
27. For a discussion of Justice O’Connor’s high visibility attending Washington social functions, see Lois Romano, Justice on the Party Circuit; Sandra Day O’Connor Holds Court With the Capital’s Elite, WASH. POST, May 4, 1983, at B1.
28. Id. See also Irvin Molotsky & Warren Weaver, Jr., O’Connor Cuts A Rug, N.Y. TIMES, Nov. 14, 1986, at A16, for a discussion of Justice and Mr. O’Connor dancing the Charleston.
30. Much of the material in this and the immediately following paragraphs is based on interviews from Wermiel, supra note 3.
her at least once during the term, and the evening has been described by the participants as a warm and emotional occasion. In 1989, a woman who was clerking for Justice Byron White sought Justice O'Connor's career counseling. After the clerk decided to join a small, private litigation firm, she received a surprise telephone call from Justice O'Connor who admonished her that she would need a wardrobe appropriate to the courtroom. Justice O'Connor drove her to an Alcott & Andrews store in downtown Washington and helped her make the selections.

With her own law clerks, the Court's first woman is a tough boss but is also willing to play the role of mother to a limited extent. For example, she has been known to bake them birthday cakes, host those that cannot make it home for Thanksgiving, insist that they take late afternoon breaks for popcorn, prepare them Tex-Mex lunches on some Saturdays at the Court, and take them for champagne and chocolate picnics to see the cherry blossoms.

II. JUSTICE O'CONNOR'S JURISPRUDENCE
A. Gender Discrimination Cases

Some commentators have argued that her recognition of the special role of the first woman on the Court extends to cases of sex discrimination, in which she seems more sympathetic to plaintiffs' claims than in other cases. The record is replete with examples of Justice O'Connor showing empathy for women whether the discrimination occurred in the workplace, in family matters or in other facets of society. Yet even in gender bias cases, her proposed resolution of disputes remains cautious, especially when there are other competing values at stake.

Justice O'Connor has rarely voted in favor of an affirmative action plan that was based on racial classifications. Most recently, she dissented in Metro Broadcasting v. FCC. In Metro, the Court upheld the constitutionality of two F.C.C. programs which gave preferences to minorities in the awarding of broadcast licenses, in order to further the goal of diversity in broadcast programming. O'Connor's dissenting opinion was only her latest rejection of race-conscious remedies, a position that has been consistent through a number of employment discrimination cases. On the rare occasion when she has supported a race-based affirmative action plan, her support has been equivocal and narrow. Generally, her approach to the claims of civil rights plaintiffs in race bias cases has been to join the Court's conservative wing.

On only one occasion has the Supreme Court considered an affirmative action dispute involving sex discrimination. It is also the only time Justice O'Connor has voted squarely in favor of an affirmative action plan. In Johnson v. Transportation Agency, the Court, in an opinion by Justice William Brennan, upheld Santa Clara County's affirmative action plan which encouraged the hiring and promotion of women in job categories where they were underrepresented. The Court rejected the claims of a male worker that promotion of a qualified woman who ranked third in a competitive exam instead of the male who finished first violated Title VII of the 1964 Civil Rights Act. Justice O'Connor did not join Justice Brennan's opinion, which she said was too broad, but she wrote her own separate opinion concurring in the judgment and upholding the affirmative action plan.

31. See Cheh, supra note 3, at 57.
33. Id. at 3009.
38. Id. at 640-42.
firmative action plan. She concluded that the plan merely treated gender as one permissible factor, not as a litmus test qualification and was further persuaded by the total absence of women in skilled jobs at the time the plan was adopted.

It is certainly open to debate whether it is by coincidence or by design that she viewed this gender-based discrimination case in a different light than race-based cases. The pattern of her showing empathy for the victims of gender-based discrimination holds true in numerous other decisions, as well, albeit some that do not involve affirmative action. Most recently, she joined the Court's decision in International Union, UAW v. Johnson Controls, Inc., ruling that employers' fetal protection policies that bar women from some jobs are a form of unlawful sex discrimination. There are numerous other examples, some in which she wrote her own opinions and others in which she simply joined the Court.

In cases outside the employment context, Justice O'Connor's empathy for women is even more pronounced. In Clark v. Jeter, Justice O'Connor wrote for a unanimous Court that a six-year statute of limitations for paternity lawsuits violates the Equal Protection Clause because it is not sufficiently related to the State's interest in avoiding litigation of stale or fraudulent claims. The decision reflects an unusual degree of compassion for the plight of the mother asserting a claim on behalf of an illegitimate child.

There is a consistency that extends to other issues of gender discrimination as well. In Mansell v. Mansell, the Court ruled that the Uniformed Services Former Spouses' Protection Act denies state courts the power in a divorce decree to order division of military retirement pay that has been waived by a retiree in order to receive veteran's disability benefits. Justice O'Connor wrote a dissenting opinion criticizing the majority opinion and asserting, "[I]ndeed, the one clear theme that emerges from the legislative history of the Act is that Congress recognized the dire plight of many military wives after divorce and sought to protect their access to their ex-husbands' military retirement pay."

Her sympathy for women extends to cases involving the business and professional marketplace. In Roberts v. United States Jaycees, the Court upheld application of a Minnesota law that required the Jaycees to admit women as members. Justice O'Connor wrote a separate concurring opinion, objecting to portions of the majority's test but also noting "the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society."

Her sensitivity to gender-based classifications even applies when discrimination against men is the product of sex-based stereotyping that she contends disadvantages women. In Mississippi Univ. for Women v. Hogan, Justice O'Connor wrote the Court's opinion ruling that a policy of admitting only women at a state-run nursing school violated the Equal Protection Clause by discriminating against male applicants. She warned that the "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively women's job."

B. Abortion

Perhaps the greatest paradox is the role Justice O'Connor occupies as both the first woman ever to serve on the Supreme Court and as the Court's middle chair or swing vote on the issue of abortion. For millions of American women, it is difficult to be inspired by her professional achievement when they deeply fear her position on the...
fundamental right to abortion. Her approach to this controversy is a case study of the role she plays in occupying the Court's middle ground. Her approach to abortion jurisprudence combines two themes that run through much of her Court work: her concern with federalism, and her apparent desire to find what she deems to be simpler, more workable constitutional tests. Yet, as is also often the case with Justice O'Connor, her influence on the Court is not from these themes, but from her reluctance to paint with a broad brush by reconsidering the continued validity of Roe when it is not absolutely necessary to do so.

In Webster v. Reproductive Health Serv., she wrote an opinion concurring in the Court's judgment to uphold much of the challenged Missouri abortion law. The Court upheld a ban on the use of public facilities and public employees to perform or assist in abortions. Justice O'Connor refused to reconsider the validity of Roe, as Justice Scalia urged, or to take the only slightly more modest step of abandoning Roe's trimester analysis, as Chief Justice Rehnquist proposed in the Court's principal opinion, that was joined by Justices Byron White and Anthony Kennedy. She addressed her unwillingness to reevaluate Roe, explaining that it was unnecessary to the disposition of the Missouri case. She wrote, "[w]hen the constitutional invalidity of a state's abortion statute actually turns on the constitutional validity of Roe v. Wade, there will be time enough to reexamine Roe. And to do so carefully . . . ."53

In Webster, then, she cast what may be considered the deciding vote, but her influence was as a de facto check on the majority, not as a leader who provided a jurisprudential rationale for other Justices to follow. Indeed, her effort at new jurisprudence in the abortion field in the 1983 decision of Akron v. Akron Ctr. for Reprod. Health has attracted no long-range support. In Akron, the Court in an opinion by Justice Lewis Powell struck down provisions of a local ordinance that required second trimester abortions to be performed in hospitals, required a 24-hour waiting period before all abortions and required parental approval for abortions for all minors under the age of fifteen. Justice O'Connor suggested in a dissenting opinion in Akron55 that an abortion regulation be upheld as constitutionally valid as long as it imposes no "undue burden" on a woman's ability to seek an abortion. Her view garnered two initial votes in 1983 from Justice White and then-Justice Rehnquist. It has gained no additional support, and even those two have not consistently joined Justice O'Connor's reassertion of the test in subsequent cases.

Besides the proposed "undue burden" test, another important facet of Justice O'Connor's opinion in Akron was her assertion that changing medical technology would lead to the undoing of Roe by making the point of fetal viability earlier, therefore allowing state regulation at an earlier state of pregnancy. "The Roe framework, then, is clearly on a collision course with itself," Justice O'Connor wrote.56 Like the "undue burden" test, the assertion that changing medical science would inevitably affect the legal status of the abortion right has attracted little additional support in other abortion decisions.

Justice O'Connor's most recent reprise of the "undue burden" test was in her concurring opinion in Hodgson v. Minnesota, and no other Justices joined her. The ruling in Hodgson is another example, however, of the checking function. Four Justices — Chief Justice Rehnquist and Justices White, Scalia and Kennedy — voted to uphold the simplest form of the Minnesota parental notification law, which required that a minor notify both parents in all circumstances (even if the parents were divorced and one parent had no responsibility for raising the minor) before she obtained an abortion.58 Justice O'Connor refused to make a fifth vote to uphold the law, unless it was interpreted to include a judicial bypass mechanism, which would allow minors to seek court approval for an abortion without telling their parents.59 So interpreted, the Minnesota law was upheld, with Justice O'Connor switching back and forth. Once again, she cast the deciding vote that clearly determined the outcome of the case, but her influence was as a check on the others, not as a jurisprudential persuader.

Yet despite her inability to influence jurisprudence, in abortion cases she remains poised

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53. Id. at 526.
55. Id. at 452.
56. Id. at 458.
58. Id. 110 S. Ct. at 2961 (Kennedy, J., concurring in part and dissenting in part).
59. Id. at 2949, 110 S. Ct. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part).
between two camps, one determined to overrule Roe if it gets the chance, and the other, a shrinking lot, hoping to preserve Roe as long as they can.\footnote{In recent years, Justice O'Connor has been in the middle of these two factions. On one side, Chief Justice Rehnquist and Justices White and Scalia have indicated a desire to overrule Roe. Justice Kennedy is generally regarded as wanting to overrule Roe but has never expressly said so. At the other end of the spectrum, Justices Brennan and Marshall were defenders of Roe until their retirements. Only Justices Harry Blackmun, the author of Roe, and John Stevens remain clearly in favor of reaffirming the validity of Roe. The views of Justices Souter and Thomas on Roe are unknown.}

There are signs that this demographic analysis may be in transition, but it is too soon to know for sure. In Rust v. Sullivan.\footnote{111 S. Ct. 1759 (1991).} Justice O'Connor for the first time parted company entirely with the other conservatives and joined the dissenters who would have struck down federal restrictions on abortion counseling by family planning clinics that receive federal funds. The Court's decisive vote was cast by Justice Souter, who joined the Court in October 1990, rather than by Justice O'Connor. Justice O'Connor wrote a dissenting opinion that, consistent with her prior approach,\footnote{See, e.g., Webster v. Reproductive Health Serv., 482 U.S. 490, 522 (1989) (O'Connor, J., concurring in part and concurring in the judgment).} decided the case on the narrowest possible ground.\footnote{Rust, 111 S. Ct. at 1788. (O'Connor, J., dissenting).} She argued that the Court ignored a principal canon of statutory construction: that an act of Congress cannot be construed to permit conduct which raises serious constitutional questions, and that an alternate construction must be adopted instead. Regarding the portion of the 1988 regulations which restricted abortion counseling by family planning clinics, she said the regulations promulgated by the Department of Health and Human Services raised serious First Amendment free speech issues and should, therefore, be viewed as inconsistent with an otherwise valid statute.

Rust is not a good barometer of where the votes of the individual Court member's lie with regard to overruling Roe; the Court did not need to address the question of whether Roe remains good law in order to decide the validity of the funding restrictions. Justice O'Connor's position on the ultimate fate of Roe remains an open question, and one that is still likely to be quite important to both Justice Souter's and the Court's deliberations if and when they are squarely confronted with the issue.

Thus, on the issue of abortion she has played the middle role — effectively preventing the Court from overruling Roe, while accommodating ever-expanding state interests in regulating or restricting the right to abortion.

C. Religious Freedom

Justice O'Connor has also played a middle role in the area of religious freedom, proposing her own test of what constitutes an unconstitutional establishment of religion. Once again, she is acting as a check on the Court's conservatives, but in a way that will move the Court significantly away from its established jurisprudence. Her test — that the First Amendment will tolerate a range of religious practices as long as there is no State endorsement or disapproval of religion — is set out in Lynch v. Donnelly.\footnote{465 U.S. 668, 687 (1984) (O'Connor, J., concurring).} In Lynch, the Court upheld the inclusion of a nativity scene by the city of Pawtucket, Rhode Island in a Christmas display located in a privately owned park in the center of a shopping district. The Court said that under the established three-prong test set out in Lemon v. Kurtzman twenty years ago, the creche was a permissible part of a larger holiday display.

The Lemon test mandates that to avoid a violation of the First Amendment Establishment Clause, a state or local law must: first, have a secular purpose; second, have a primary effect that neither advances nor inhibits religion; and third, avoid excessive entanglement of government with religion.\footnote{403 U.S. 602 (1971).} Justice O'Connor's test is an effort to accommodate the interests of federalism by giving the States far more breathing room to permit, or even assist, religious practices than the Lemon test allows. Her suggestion of an "endorsement" test would streamline the Lemon test into two prongs. The first and second questions of purpose and effect would combine for a single inquiry on whether government was seen as endorsing religion. The third question of government entanglement with religion would remain intact.

While accommodating State interests, her test also stops short of the more conservative
view, which would overrule Lemon and virtually dismantle what remains of the wall of separation between church and state. The more conservative view is spelled out by Justice Kennedy in his separate opinion in Allegheny County v. Greater Pittsburgh ACLU. In that decision, the Court ruled that while the display of a creche in the county courthouse violated the Establishment Clause, the display of a menorah next to a Christmas tree outside the city-county office building did not violate the First Amendment. Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, rejected Justice O'Connor's endorsement test and said both displays should be upheld. According to Justice Kennedy, the focus should be on whether government engaged in coercive practices. Justice Kennedy also wrote, "[s]ubstantial revision of our Establishment Clause doctrine may be in order but it is unnecessary to undertake that task today." Justice O'Connor held to her endorsement test and even garnered the support for the first time of Justices Brennan and Stevens.

Justice O'Connor took the same moderating, but still conservative, approach to the Free Exercise Clause in Employment Div. v. Smith. She concurred in the Court's result that the State of Oregon did not violate the Free Exercise Clause by refusing to provide unemployment benefits to two members of the Native American Church who were fired for their use of the drug peyote in religious ceremonies. The Court's decision, written by Justice Scalia, included the broad pronouncement that the First Amendment does not limit state criminal laws which infringe upon religious practices when the laws are generally applicable to everyone.

Justice O'Connor concluded that there was no need to issue this broad rule, and her opinion, which concurred in the judgment was joined to that extent by Justices Brennan, Marshall and Blackmun, although those three also joined a separate dissenting opinion.

In the peyote case, however, Justice O'Connor's attempt at moderation did not have the same effect as in other cases; she did not keep the Court from obtaining the majority needed to establish the broad rule of general applicability announced by Justice Scalia.

D. Death Penalty

There are other areas of the law where it is safe to assume from the nature and tone of her opinions that Justice O'Connor has had a narrowing influence, serving as a check on the conservative majority. Among these are Penry v. Lynaugh, upholding the death penalty for persons who are mentally retarded, and Stanford v. Kentucky, upholding capital punishment for juveniles.

In Penry, Justice O'Connor wrote the lead opinion for a deeply divided Court. She announced the conservative majority's judgment that the ban on "cruel and unusual punishment" of the Eighth Amendment does not flatly prohibit the execution of persons who are mildly retarded. In the same case, she also announced the judgment for a liberal majority that the Eighth Amendment entitled the defendant, Penry, to have the jury instructed that it could consider evidence of his retardation and background as an abused child as mitigating factors in deciding whether to impose the death sentence.

In Stanford, Justice O'Connor joined the Court's judgment that the Eighth Amendment does not prohibit the execution of sixteen or seventeen-year-olds. She wrote a concurring opinion, however, to dispute what she claimed was the plurality's overly restrictive Eighth Amendment analysis. She said the plurality casually dismissed age-of-majority provisions in other state laws as irrelevant on whether a national consensus exists on executing juveniles. These cases reflect occasional independent judgment about some of the more complex death penalty issues, especially at the margins of capital cases.

It is far more typical of Justice O'Connor to be squarely a part of the majority in decisions narrowing the rights of the accused and limiting their redress in federal court through the writ of habeas corpus.
corpus. Evidence of a moderating role in this realm is lacking. Justice O'Connor wrote the Court's opinion in *Coleman v. Thompson*\(^79\) restricting the ability of federal courts to review the habeas corpus claims of state prisoners when those claims fail to satisfy the procedural requirements of the state courts. The decision overruled *Fay v. Noia*,\(^80\) a landmark of the Warren Court, which held that federal courts should review state prisoners' habeas claims even if the prisoners did not comply with state procedural rules. *Fay* significantly expanded federal jurisdiction to review habeas petitions of state prisoners, while *Coleman* contracted federal jurisdiction in this area.

The moderating influence that Justice O'Connor exercises in death penalty cases, when contrasted with her stern approach to federal habeas corpus review, makes it uncertain which approach will prevail in her Eighth Amendment jurisprudence.

E. Federalism

If there is any unifying theme to Justice O'Connor's opinions over the past decade, it appears to be her own brand of federalism. She is strongly motivated by her abiding faith in good government at the state level and her belief that the Framers of the Constitution envisioned a genuine partnership of shared powers between the federal government and the states. Her experience as a state legislator and judge gives her a degree of trust in state government and state courts that goes well beyond that of her colleagues.

On the subject of federalism Justice O'Connor appears to feel most strongly. However, her views have been expressed in dissent opinions more often than not, with little discernible impact on the Court's thinking or direction. She also appears quite willing to cast federalism aside with nary a mention when there are paramount principles at stake.

From her earliest days on the Court, and even before she was chosen for the Court,\(^81\) she emerged as a defender of the states. In *FERC v. Mississippi*,\(^82\) the Court upheld portions of the Public Utility Regulatory Policy Act of 1978, a federal statute that required state public utility commissions to consider federal rate designs and regulatory standards and to carry out federal policies aimed at encouraging cogeneration. The Court said these congressional policies did not interfere with either the Commerce Clause\(^83\) or the Tenth Amendment.\(^84\) Justice O'Connor wrote a strongly worded separate opinion,\(^85\) arguing in considerable historical detail that Congress and the Court's majority disregarded the history of the Tenth Amendment and the intent of the Framers by making state regulatory officials subordinated to the national interest. "[O]ur notions of federalism subordinate neither national nor state interests," Justice O'Connor wrote.\(^86\)

She had similar strong expressions of views on a federal law that requires states to either register their municipal bonds or lose the tax-free status on interest,\(^87\) on a federal statute that reduces highway funds to states that fail to adopt a drinking age at twenty-one years of age,\(^88\) and on the Department of Labor's application of wage and overtime standards to municipal mass transit systems.\(^89\) Each of these convictions is in dissent, and it remains to be seen whether her advocacy of the States' interests will gain any support with the arrival of Justices Souter and Thomas.

The first evidence of Justice O'Connor's influence in the area of federalism came in 1991. In *Gregory v. Ashcroft*,\(^90\) she wrote the opinion for the Court ruling that Missouri's mandatory retirement age of seventy for state judges does not violate either the federal Age Discrimination in Employment Act\(^91\) or the Equal Protection

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82. 456 U.S. 742 (1982).
83. "The Congress shall have the power... to regulate commerce among the several states." U.S. Const. art. I, sec. 8, cl. 3.
84. "The 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." U.S. Const. amend. X.
85. *FERC*, 456 U.S. at 775 (O'Connor, J., opinion concurring in the judgment in part and dissenting in part).
86. Id. at 796.
Clause of the Fourteenth Amendment. “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign. . . . Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers,” Justice O’Connor wrote. The opinion is one of the most powerful defenses of the States’ interests in federalism in recent times. Another example of her opinion of States’ interests is Coleman v. Thompson, which significantly limited federal court review of state prisoners’ petitions for habeas corpus.

If federalism is the quickest path to Justice O’Connor’s flash point, it is remarkable how willing she is to put those concerns aside when others appear more weighty. In Richmond v. Croson Co., she wrote for a majority of the Court displacing what may well be the largest number of state and local government programs in the history of the Court. Without even a wink or a nod to principles of federalism, Justice O’Connor wrote that minority business set-aside programs, which were in place in two-thirds of the states and some 200 cities and counties, had to meet criteria so stringent to withstand the Fourteenth Amendment guarantee of “equal protection of the laws” that few, if any, could survive. Justice Marshall could not resist pointing out, in a dissenting opinion, the impact the decision would have on the States’ interests in federalism. “[C]ynical of one municipality’s attempt to redress the effects of past racial discrimination... the majority launches a grape-shot attack on race-conscious remedies in general. The majority’s unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination,” he wrote.

Another example of this willingness to abandon her first principles was her dissent in Pacific Mut. Life Ins. Co. v. Haslip. In this case she was prepared to supplant the civil justice systems of all fifty states by requiring new due process limits on jury discretion to award punitive damages. Her abiding faith in the state systems, which is strong enough to endorse wholesale cutbacks on federal court review of habeas corpus in the criminal context, is apparently too shaky when it comes to state laws giving juries discretion over punitive damages. This may be because the discretion of juries in many states is a common law matter, making it too uncertain for Justice O’Connor. Her concern coincided, however, with the continued attempts of many state legislatures at tort reform, including limits on punitive damages. The foment in the states makes it difficult to understand this departure from her fealty to federalism, because a federal due process rule would supplant precisely the political system of state governments that Justice O’Connor has so consistently defended. Her only concession to federalism is to suggest that the Court may leave some of the due process details to the States. She wrote that, “[a]s a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.”

III. INSIDE THE COURT

Justices and law clerks who have participated in the Court’s internal deliberations say that Justice O’Connor’s narrow vision and inherent caution carry over to the mechanics of the Court as well. She much prefers to have discussion of cases and draft opinions take place in written exchange with the other Justices, rather than in person, either at the Court’s conferences or in visits to or from her colleagues. This enables her to study the words before having to express an opinion about them. Before Justice William Brennan retired in July 1990, Justice O’Connor and her law clerks were especially vigilant in reading the draft opinions from Justice Brennan. The Brennan drafts were regarded with particular suspicion because it was feared that they contained hidden phrases that would serve as building blocks for future decisions. Sometimes this attitude was a product of Justice O’Connor having selected a very conservative law clerk, but it was a suspicion that she never discouraged.

92. Gregory, 111 S. Ct. at 2400-01.
95. Id. at 529.
97. “[n]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV, sec. 1.
98. Pacific Mutual, 111 S. Ct. at 1067.
99. This conclusion is based on confidential interviews with
Where her overt pride in being the Court's first woman Justice, and her caution and reserve in approaching many problems that confront the Court come together is in her demeanor on and off the bench. Friends and others who have watched her have learned that she will not be pushed around. On the tennis court or the golf course, she is a tough, determined competitor who does not easily give up and who does not like to be distracted. On the bench she is the same way. It is widely believed that she made it clear to Justice Scalia that she did not appreciate his attack on her in the *Webster* case. She had similarly conveyed that message to Justice Blackmun after a sharp exchange in *FERC v. Mississippi*, and to Justice Brennan after acerbic words were traded in *Engle v. Isaac*.

This determination is also evident in the courtroom. Lawyers who argue in the Supreme Court know only too well the pointed and precise nature of her questions from the bench. "How does a school district eliminate the last vestiges of discrimination when residential segregation remains a reality and when, at some point in the past, the segregated schools may have contributed to that residential segregation?" she asked during the oral argument of *Board of Educ. Oklahoma City v. Dowell* in October 1990. "How do you deal with that? It seems to me that may be the crux of the problem," Justice O'Connor said, signaling her view of the case in a rather direct way.

She plays the middle role in a rather different way than her demographic predecessor, Justice Lewis Powell, who occupied the Court's middle for more than a decade, until his retirement in 1987. Justice Powell more often succeeded in making the majority come to him; he could join the majority opinion because it was narrowed or altered sufficiently to accommodate his views. The need for him to write separately through concurring and dissenting opinions, although never eliminated, was often not as pressing.

Justice O'Connor has had less success at making the majority accommodate her concerns when she differs from her colleagues. This is demonstrated by her opinion-writing record. In her first nine terms, she wrote 143 opinions for the Court. During the same period, according to an opinion list maintained by her office, she wrote a surprising 115 concurring opinions—a sizeable number considering that they most often represent the author's own opinions which are not the law as announced by the Court.

It should also be remembered that Justice O'Connor's position in the ideological center of the Court is a signpost to a very different Court than the one of which Justice Powell was a member. Justice Powell's decisive vote often determined whether the Court issued a conservative or a liberal decision. When Justice O'Connor's vote is decisive, it is frequently to determine whether the Court issues a conservative ruling, or a very conservative ruling. In her first nine terms on the Court, she sided with Justice, and later Chief Justice, Rehnquist 86.2% of the time. During the six terms in which she and Justice Powell overlapped, Justice Powell joined Justice Rehnquist 80% of the time, and his disagreement might have increased as the Court began to change course on civil rights and the rights of the accused.

At times her insistence on separate opinions has a confusing result, depriving the Court of a clear majority opinion and denying lower courts the clear guidance they need to apply the Court's decisions. Yet Justice O'Connor believes that she is being pragmatic—indeed, she sometimes believes she is the only member of the Court who is seeking practical solutions. In *Johnson v. Transportation Agency*, the Court, by a 6-3 vote, upheld a voluntary affirmative action plan that promoted a woman in a public job over an equally qualified man. Justice Brennan's majority opinion continued the line of cases that began with his opinion in *United Steelworkers of America v. Weber* which upheld voluntary affirmative action in the private sector that used race as a permissible factor in creating employment training

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former law clerks to justice O'Connor conducted in preparation for Werbell, *supra* note 3.


101. 456 U.S. 742, 762 (1982). For an additional discussion of this case, see *supra* text accompanying note 82.

102. 456 U.S. 107 (1982). The dissenting opinion of Justice Brennan is at 137, and the acerbic passages are at 141-44. Justice O'Connor's response is contained in note 25 at 123.

103. 111 S. Ct. 630 (1991) (easing standards for the termination of federal court injunctions and supervisory authority in school desegregation cases).


105. 449 U.S. 616 (1987). For additional discussion of this case, see *supra* note 37 and 38, and the accompanying text.

and promotion programs. Justice Scalia's dissent in *Johnson*\(^{107}\) argued that the Court's reading of Title VII of the Civil Rights Act of 1964\(^{108}\) perpetuated an unprincipled view, since Title VII was supposed to be entirely race-neutral.

Justice O'Connor, although an extraneous member of the majority as the sixth vote, wrote her own opinion concurring in the judgment\(^ {109}\) in which she said of Justices Brennan and Scalia, "[t]he former course of action [by Brennan] gives insufficient guidance to courts and litigants; the latter course of action [by Scalia] serves as a useful point of academic discussion, but fails to reckon with the reality of the course that the majority of the Court has determined to follow."\(^ {110}\) This is the essence of her narrow, step-by-step approach — what she views as a pragmatic check on the Court's natural tendency to announce principles, not merely to decide cases.

\(^{107}\) *Johnson*, 480 U.S. at 657.


\(^{109}\) *Johnson*, 480 U.S. at 647.

\(^{110}\) Id. at 648-49.

\(^{111}\) Interview with Bill Moyers, *supra* note 8 (transcript at 22).