

# **SUPREME COURT “MAJORITIZING”: WHAT JUSTICE O’CONNOR AND JUSTICE KENNEDY CAN TELL US ABOUT THE NEAR FUTURE**

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## **I. INTRODUCTION**

The number five is one of the most important numbers in the United States: the number of votes needed for a majority on the United States Supreme Court. Few justices in recent history have more frequently been, or are more adept at becoming the fifth vote than Justice O’Connor. Even fewer justices have found their vote to be as impactful on American life and law as Justice O’Connor. This paper will examine her legacy in that role by comparing her to another “frequent fifth,” Justice Kennedy, and in so doing, attempt to reveal some insight, however small, as to how a justice becomes “the fifth vote.”

## **II. BIOGRAPHICAL BACKGROUND**

The back-story of a justice can yield insights into the possible origins of their jurisprudential inclinations, such as Justice Scalia’s father’s academic career as translator and linguist<sup>1</sup> being a source of his originalist and text-centric approach to constitutional interpretation. Though such biographical explorations risk caricaturizing a justice’s jurisprudence as primarily the product of circumstance, and belittles the slow formation of complex legal theories. Examining a justice’s biographical background can give valuable insight into how he or she maneuvers the interpersonal landscape of the Court in order to further their substantive jurisprudence. The pursuit of a majority is more the product of one’s upbringing, experience, and worldview than the substantive jurisprudence end a particular justice is working toward.

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<sup>1</sup> JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 199 (2008).

### A. Justice O'Connor's Biography

Justice O'Connor never foresaw herself on the Supreme Court.<sup>2</sup> Not only had she not been admitted to practice before the Court,<sup>3</sup> she had not seen an argument before the Court until she was a member of it.<sup>4</sup> Indeed, her path to the Court was hardly a traditional one and was lined with equal parts hard work, determination, and serendipity. The fact that Justice O'Connor travelled a winding path is remarkable. The fact that she did so as a trailblazer while maintaining the utmost in composure, civility, and dignity makes her journey a truly great piece of American history.

Justice O'Connor's path to the Court began in El Paso, Texas in 1930.<sup>5</sup> Born to a ranching family based along the Arizona-New Mexico border, her early upbringing was defined by the hard work and harsh terrain of ranch life. Her father, Harry, desired to study at Stanford, but that never happened.<sup>6</sup> Harry was sent by his father to check on the Arizona ranch, the Lazy-B, and had no interest in staying.<sup>7</sup> But his intentions succumbed to circumstance. Ultimately, Harry would run the ranch in a patriarchal fashion, turning it into one of the largest and most successful ranches in the Southwest.<sup>8</sup> While ranch life was difficult, Harry's management style, at times strong, enabled him to survive the Depression debt free.<sup>9</sup>

If Harry was like that frugal and rugged survivor of the desert, the cactus, then Justice O'Connor's mother, Ada Mae, was like an oasis. Like an oasis, she was a rare breed, at least among the women of her time. She was working as a school teacher in El Paso when she met Harry. Married life on the ranch was harsh and isolating. As Justice O'Connor would recount in *Lazy-B*, "MO [pronounce 'em-ooh'], as she was called, was the only woman among a crew of men."<sup>10</sup> She had an incredible ability to define herself in spite of her circumstances. She maintained her appearance and style with the same zealotry of any urbane woman in a major metropolitan area.<sup>11</sup> She was ahead of her time in many ways, including her crafting of a lifestyle not

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<sup>2</sup> SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 1* (2004).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

<sup>5</sup> SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* 95 (2002).

<sup>6</sup> *Id.* at 23.

<sup>7</sup> *Id.* at x.

<sup>8</sup> *Id.* at 23.

<sup>9</sup> *Id.* at 26.

<sup>10</sup> *Id.* at 45.

<sup>11</sup> *Id.* at 43.

bound by her location. It was to these strong individuals that their first child, Sandra Day, was born on March 26, 1930 in El Paso, Texas.<sup>12</sup>

The lessons instilled in her by her parents made a lasting impression. From her father, Justice O'Connor learned the Stoic persistence required to "get the job done," regardless of what it was or how one felt about it. From her mother, Justice O'Connor learned the value of maintaining grace under harsh circumstances and not letting one's situation define who one is. From both parents, she learned the value of education. This emphasis on education placed on Justice O'Connor the tremendous burden of spending part of the year away from her family to attend school in El Paso.<sup>13</sup> This sacrifice paid off, and Justice O'Connor was admitted to Stanford University in 1946 at the age of sixteen.<sup>14</sup> She was later admitted to Stanford Law School, graduating third in her class.<sup>15</sup>

Her exceptional academic performance did not result in any job offers.<sup>16</sup> This was the price of blazing a trail. When one reads Justice O'Connor's accounts of her time on the ranch, one gets the distinct impression that her place in the ranch transcended her gender. One can imagine what the future Justice must have felt when faced with blatant gender discrimination.

As with any other obstacle Justice O'Connor faced, she did not become discouraged or resentful, but instead she charted an alternative route. This route traversed many public sector legal positions, and later a small private practice.<sup>17</sup> Her appointment to a vacant Arizona State Senate seat in 1969 marked the beginning of a remarkable career in public service in which the Justice served in the executive, legislative, and ultimately the judicial branches.

## B. Justice Kennedy's Biography

Justice Kennedy shares some traits with Justice O'Connor. Like Justice O'Connor, he, too, was from the West and a graduate of Stanford (as an undergraduate).<sup>18</sup> Also like Justice O'Connor, he had spent a portion of his practice prior to the Court overseas.<sup>19</sup> And like Justice O'Connor, he was nominated by President Reagan.

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<sup>12</sup> *Id.* at 95.

<sup>13</sup> *Id.* at 115.

<sup>14</sup> *Id.* at 283.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 285.

<sup>17</sup> Craig Joyce, *A Tribute to Justice O'Connor on the Occasion of Her Retirement from the Supreme Court of the United States*, 119 Harv. L. Rev. 1257, 1261-62 (2006).

<sup>18</sup> *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES (Oct. 21, 2016) <http://www.supremecourt.gov/about/biographies.aspx>.

<sup>19</sup> TOOBIN, *supra* note 1, at 182.

For all of their superficial similarities, Justice O'Connor and Justice Kennedy differed in some key ways. While the Days were highly respected members of their rural community, the Kennedys were connected lawyers and lobbyists in Sacramento.<sup>20</sup> Another key difference was that Justice Kennedy had federal court experience prior to joining the Court,<sup>21</sup> while Justice O'Connor did not. In addition, Justice Kennedy had legal academic experience prior to joining the Court, and his time in the Academy played a central role in how he sees himself,<sup>22</sup> while Justice O'Connor did not. In sum, Justice Kennedy's path to the Court was a far more traditional path than Justice O'Connor's.

### III. THE POSITION OF THE FIFTH VOTE

In order to understand what it means to be the "fifth vote," one must have some understanding of how the Supreme Court develops its opinions. After oral arguments are heard, the justices meet in conference where they exchange their thoughts on how the case should be resolved.<sup>23</sup> After the conference, opinion-writing assignments are made with either the Chief Justice making the assignment (if he or she is in the majority) or the most senior justice in the majority doing so.<sup>24</sup> Thus, the drafter of the majority opinion must perform the task in a way that maintains the majority since any justice could switch his or her vote at any time prior to announcement of the decision. The authoring justice must take into account a host of factors solidifying the majority.

For the purposes of this paper, the process of convincing at least four other justices of one's approximate jurisprudential position and crafting opinions that both reflect a justice's jurisprudence and are capable of winning four other votes will be referred to as "majoritizing." A justice's majoritizing approach is highly idiosyncratic. It is also a product of a justice's worldview, their jurisprudence, and their reading of the Court's current and future dynamic, and where they fit within it. A justice's majoritizing efforts often play out over a long period of time and can be traced in both majority and dissenting or concurring opinions authored by the justice. Thus, a justice's majoritizing approach, much like their jurisprudence, is not a fixed constant but instead has a degree of fluidity. In no two justices is this inquiry more important or interesting than with Justice Kennedy and Justice O'Connor.

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<sup>20</sup> *Id.*

<sup>21</sup> *Biographies of Current Justices of the Supreme Court*, *supra* note 18.

<sup>22</sup> TOOBIN, *supra* note 1, at 182.

<sup>23</sup> O'CONNOR, *supra* note 2, at 5-6.

<sup>24</sup> *Id.*

## IV. THE OPINION SETS

A valuable way to see how a justice “majoritizes” is to analyze the difference between their solo opinions and their majority opinions, on the theory that a solo opinion by a justice is a more authentic expression of their true jurisprudence of the issue. Since a non-majority justice is free to join any solo opinion, or author his or her own, there is presumably less “politicking” involved in crafting one’s concurrence or (especially) dissent. Although this method could be applied to a host of topics, this paper will concentrate on three of the most controversial: abortion, the scope of the Commerce Clause, and racial equal protection issues. These topics were chosen for several reasons. The most important is that, because of the fundamental questions they turn on, they are among the hardest to compromise on, and thus are more effective in highlighting a justice’s “majoritizing” style. These questions offer no easy answers and little room to compromise. The analysis of each topic will begin by looking at the state of law when Justice O’Connor entered the Court, then her opinions prior to Justice Kennedy joining the Court, followed by their opinions during their tenure together, and finally Justice Kennedy’s opinions after Justice O’Connor retired.

## V. ABORTION

The first topic this paper will analyze is abortion. The analysis of how Justice O’Connor profoundly influenced this highly charged area of the law will proceed in four parts.

### A. *The Pre-Justice O’Connor Baseline*

Few topics in the history of the Court have generated more controversy than the topic of abortion. The conflagration of public opinion began in 1973 with *Roe v. Wade*.<sup>25</sup> In a striking irony, *Roe* was intended to be a compromise solution. Contrary to today’s hyper-politicization of the issue, the vote was not along appointing-party lines but rather had three of the four President Nixon appointees voting for it, and a President Kennedy appointee (Justice White) joining Justice Rehnquist in voting against it.<sup>26</sup> But its trimester framework and fundamental “right to privacy” reasoning almost ensured that it would be a highly controversial opinion.

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<sup>25</sup> *Roe v. Wade*, 410 U.S. 113 (1973) *modified*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>26</sup> TOOBIN, *supra* note 1, at 12.

The case brought by an unmarried, pregnant woman seeking an abortion, challenging a Texas statute that prohibited abortion except when the mother's health was threatened by continuation of the pregnancy.<sup>27</sup> The District Court ruled in favor of the plaintiffs regarding the statute<sup>28</sup> and set in motion the defining Supreme Court cases of recent history.

The Supreme Court's opinion began with an acknowledgement this case was not an ordinary case and implicated philosophical questions that themselves were beyond the scope of justiciability.<sup>29</sup> One gets the distinct impression that the *Roe* Court is anticipating the controversy it is about to become ensnared in and is seeking to show every step of its precedential analysis.

The Court held that right of privacy, whether found in the Ninth or Fourteenth Amendments, included within it the right of woman to choose whether or not to continue her pregnancy,<sup>30</sup> but this right was qualified by the state's interest in regulating the medical procedure (which began after the first trimester)<sup>31</sup> and the state's interest in the potential of human life (which began at "viability").<sup>32</sup> This trimester-based framework was the *Roe* Court's solution to a seeming intractable issue. Justice Rehnquist, in a lone dissent, took issue with the Court's evocation of "privacy,"<sup>33</sup> and thus provided one of the main jurisprudential criticisms of *Roe*.

### B. *Abortion During the Justice O'Connor Only Years*

The abortion controversy had shown no signs of abatement when Justice O'Connor joined the Court. From the time before her appointment, she expressed less than one hundred percent approval of the implications of *Roe*, telling President Regan that she was personally against abortion.<sup>34</sup> There was some anti-abortion opposition to Justice O'Connor's appointment,<sup>35</sup> but it failed to stop her nomination and even elicited a defense of her nomination from Senator Barry Goldwater.<sup>36</sup> Perhaps tellingly of the evolution of the political aspects of the abortion issue, Justice O'Connor's main backers did

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<sup>27</sup> *Roe v. Wade*, 410 U.S. at 120.

<sup>28</sup> *Id.* at 122.

<sup>29</sup> *Id.* at 116.

<sup>30</sup> *Id.* at 153.

<sup>31</sup> *Id.* at 163.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 172 (Rehnquist, J., dissenting).

<sup>34</sup> JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 76 (2005).

<sup>35</sup> *Id.* at 78-79.

<sup>36</sup> *Id.* at 85.

not view abortion as make or break issue.<sup>37</sup> The fact that she was the first female nominee to the Supreme Court may have had a tempering effect.

Justice, O'Connor took an independent stance on abortion from the start of her time on the Court.<sup>38</sup> When she joined the Court, Justice Blackmun tried to lay down an ultimatum of either being with him on *Roe* or anti-abortion.<sup>39</sup> To him there was no compromising.<sup>40</sup> History would show that there was a third path, and Justice O'Connor was its cartographer.

Her opportunity to articulate this alternative approach came 1983 in a companion set of abortion cases. The first, *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*,<sup>41</sup> the case involved the constitutionality of, *inter alia*, hospitalization for later term abortions, a pathology reporting, parental consent (or the judicial bypass) in cases involving a minor seeking an abortion.<sup>42</sup> The Court (joined by Justice Stevens and Justice O'Connor in part), seemed to look at the statute in a more siloed, provision-by-provision basis. This was unlike the dissenting liberals and the District Court who both appeared to do a wholesale constitutional analysis of the statute.<sup>43</sup>

In Justice O'Connor's partial concurrence and partial dissent, she does more than a simple fact pattern analysis that the Court itself did. Instead, she uses her opinion to articulate how the Court's analysis of the provisions comports with the "undue burden" standard she is advocating for. More importantly, she uses her concurrence as an opportunity to articulate how her standard would work in the case at hand. Namely, when discussing the second physician requirement, she indicated that she would uphold the provision because the state's interest in potential life exists throughout the entire pregnancy<sup>44</sup> and that the trimester framework had no bearing on the undue burden analysis.<sup>45</sup>

In *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*,<sup>46</sup> she more directly announced her problem with *Roe*'s trimester framework.<sup>47</sup> In particular, she was concerned with the arbitrariness of the trimester framework which she viewed as having no connection to law or science. Further, she saw the rigidity of the trimester framework as being incapable of

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<sup>37</sup> *Id.* at 84-85.

<sup>38</sup> TOOBIN, *supra* note 1, at 50.

<sup>39</sup> BISKUPIC, *supra* note 34, at 218.

<sup>40</sup> *Id.*

<sup>41</sup> *Planned Parenthood Ass'n of Kansas City Inc. v. Ashcroft*, 462 U.S. 476 (1983).

<sup>42</sup> *Id.* at 480-81.

<sup>43</sup> *Id.* at 480.

<sup>44</sup> *Id.* at 504 (O'Connor, J., dissenting).

<sup>45</sup> *Id.*

<sup>46</sup>  *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled by* *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833 (1992).

<sup>47</sup>  *Akron Center* 462 U.S. at 455 (O'Connor, J., dissenting).

compatibility with the fluidity of technology.<sup>48</sup> This led her to write one of her most famous and prophetic sentences: “The *Roe* framework, then, is clearly on a collision course with itself.”<sup>49</sup> One of the most notable parts of her dissent is the way she ties the “undue burden” standard into the abortion precedents of the Court. She first notes that several members of the Court (especially Justice Powell), have been using something similar to the “undue burden” standard in previous abortion cases.<sup>50</sup> She also details why the undue burden standard is an attractive one compared to *Roe*’s trimester framework: undue burden is not dependent on the rapid evolution of medical technology at any given time.<sup>51</sup> Finally, and perhaps most persuasively, she notes that the Court has, in prior cases, used essentially the undue burden standard in its opinion, since it is weighing an “obstacle” against the reasonableness of a given regulation.<sup>52</sup> These two cases, *Akron* and *Kansas City*, marked Justice O’Connor’s announcement to her colleagues of where she felt the Court’s abortion jurisprudence had to go if it was to be coherent and sustainable.

### C. Abortion During the Justice O’Connor and Justice Kennedy Years

Abortion cases continued their prominent role on the Court’s docket once Justice Kennedy joined. It was not long until she was presented with another opportunity to further articulate what an “undue burden” meant and why it was the superior framework. One such opportunity came in the form of *Hodgson v. Minnesota*.<sup>53</sup> The case involved a dual parental notification requirement for a minor seeking an abortion, and that in the event of judicial injunction against that provision, a judicial bypass would also meet the requirement.<sup>54</sup> Justice Stevens, writing for the majority in the parts of his opinion that Justice O’Connor joined, held that the dual parental notification was unconstitutional.<sup>55</sup> This held that by requiring the involvement of both parents, the state had inserted itself into an area which it had no legitimate interest.<sup>56</sup>

In her partial concurrence in *Hodgson v. Minnesota*,<sup>57</sup> she argued that a judicial bypass provision saved the minor notification statute. She also joined

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<sup>48</sup> *Id.* at 456-57.

<sup>49</sup> *Id.* at 58.

<sup>50</sup> *Id.* at 461.

<sup>51</sup> *Id.* at 458.

<sup>52</sup> *Id.*

<sup>53</sup> *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

<sup>54</sup> *Id.* at 422-23.

<sup>55</sup> *Id.* at 450.

<sup>56</sup> *Id.* at 452.

<sup>57</sup> *Id.* at 458 (O’Connor, J., concurring in part and concurring in judgment).

Justice Stevens' analysis upholding the minor waiting period provision.<sup>58</sup> Justice Kennedy reached the same conclusions but seemed to do so in a less fact-dependent way than did Justice Stevens. Justice Kennedy's concurrence<sup>59</sup> is heavily focused on the perspective of the parent, noting that, in his view, "...parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children."<sup>60</sup> Unlike other members of the Court, Justice Kennedy appeared to want to balance the interest of the child with the interest of either parent, who potentially might not be notified.<sup>61</sup> However, *Hodgson* is most significant because it was the first time that Justice O'Connor ever stated that an abortion restriction was unconstitutional.<sup>62</sup> The dual parent notification requirement with a judicial bypass thus served a calibrating role for determining what state regulations would amount to an undue burden and why. It was an important step in building a majority. It was a step that was strategically taken, as Minnesota's dual parental notification rule was, as Justice O'Connor noted, the most stringent in the country.<sup>63</sup>

The seminal abortion case during the years in which Justice Kennedy shared the bench with Justice O'Connor was *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>64</sup> The case involved a Pennsylvania statute that placed several restrictions and conditions on women seeking an abortion. To understand the significance of the case and Justice O'Connor's majoritizing effort in it, one must bear in mind the context which it arrived before the Court. The debate over abortion had escalated, in part because of the impending 1992 Presidential election.<sup>65</sup> Moreover, the plaintiff's attorney wanted to use the case to make *Roe's* future a political issue.<sup>66</sup> Further, as the opinion notes, there were members of the Court who desired to use the case as an opportunity to overturn *Roe*.<sup>67</sup>

It was in this environment that the "undue burden" seed that Justice O'Connor had planted in *Akron* and watered in *Hodgson* sprouted into a majority holding. In *Casey*, authored by Justices O'Connor, Kennedy, and Souter in a collaborative and careful manner,<sup>68</sup> the trio adopted Justice O'Connor's logic from the *Akron* and *Kansas City* cases and replaced *Roe's*

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<sup>58</sup> *Id.* at 459.

<sup>59</sup> *Id.* at 480 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>60</sup> *Id.* at 484.

<sup>61</sup> FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 43 (2009).

<sup>62</sup> BISKUPIC, *supra* note 34, at 236.

<sup>63</sup> *Hodgson*, 497 U.S. at 459 (O'Connor, J., concurring).

<sup>64</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>65</sup> BISKUPIC, *supra* note 34, at 266.

<sup>66</sup> TOOBIN, *supra* note 1, at 41.

<sup>67</sup> *Casey*, 505 U.S. at 845.

<sup>68</sup> BISKUPIC, *supra* note 34, at 269.

trimester framework<sup>69</sup> with the undue burden test.<sup>70</sup> The case then applied the test to certain provisions of the Pennsylvania statute. Although the case paid rhetorical homage to *Roe*, and stated that it was protecting the essential holding of *Roe*,<sup>71</sup> it effectively supplanted the underlying *Roe* framework and set out the current judicial framework for abortion. The state now had a license to promote its interest in the potential life of the fetus throughout the pregnancy, so long as doing so did not create an undue burden.<sup>72</sup> The *Roe* trimester framework that Justice O'Connor had marked as unworkable was gone. From its inception until *Casey*, Justice O'Connor was the primary definer of what kind of state action amounted to an undue burden. Most importantly, the undue burden standard could accommodate Justice Kennedy's complex views on the subject and house some of his previous writings on the subject,<sup>73</sup> which neither *Roe* nor those seeking an effective overturn of *Roe* appeared capable of doing,<sup>74</sup> despite some earlier indications otherwise.<sup>75</sup>

The case marked one of Justice O'Connor's greatest "majoritizing" efforts on the Court. The opinion meant that Justice Stevens and company could rest assured that *Roe* would not be wiped of the legal map. More impressively, her jurisprudential framework was also able to simultaneously attract Justice Kennedy, who had once called *Roe* the *Dred Scott* of our time<sup>76</sup> and allowed him to exercise his sprawling rhetoric with greater latitude than usual.<sup>77</sup> However, Justice O'Connor was the real winner in *Casey*.<sup>78</sup> On the most political, emotional, and (for many) existential question of modern history, Justice O'Connor delivered a definitive answer. Moreover, on an issue that Justices Blackmun and Scalia, and countless others viewed as essentially binary, she had proven otherwise.

Justice O'Connor's accomplishments in *Casey*, both jurisprudentially and as a majoritizer, would become clear in the "partial birth" abortion case of *Stenberg v. Carhart*.<sup>79</sup> In that case Nebraska had passed a statute that restricted the manner in which an abortion could be conducted, and contained only a life, and not health, of the mother exception.<sup>80</sup> The law then went on to

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<sup>69</sup> *Casey*, 505 U.S. at 873.

<sup>70</sup> *Id.* at 877.

<sup>71</sup> *Id.* at 864.

<sup>72</sup> *Id.* at 873.

<sup>73</sup> COLUCCI, *supra* note 61, at 43.

<sup>74</sup> *Id.* at 49.

<sup>75</sup> TOOBIN, *supra* note 1, at 53.

<sup>76</sup> BISKUPIC, *supra* note 34, at 269.

<sup>77</sup> TOOBIN, *supra* note 1, at 53.

<sup>78</sup> *Id.* at 57.

<sup>79</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>80</sup> *Id.* at 921-22.

define the proscribed procedure as a “partial birth abortion.”<sup>81</sup> The Court, per Justice Breyer (who was assigned to write the majority opinion by Justice Stevens because of his good working relationship with Justice O’Connor<sup>82</sup>) held that the lack of a health exception made the law unconstitutional under *Casey*.<sup>83</sup>

Justice O’Connor concurred with the Court, but wrote separately.<sup>84</sup> Her opinion began by outlining why the lack of a health exception was fatal to the Nebraska statute and that the “necessary to save the life” language did not amount to a health exception.<sup>85</sup> She notes that Nebraska could have achieved the same goal it claims it wants to achieve by writing its proscription more narrowly.<sup>86</sup> She explicitly states that such a change would very likely change the outcome of the case.<sup>87</sup>

Her concurrence was as technical and practical as Justice Kennedy’s was passionate and emotional. He began by chastising the majority as viewing the procedure “through the eyes of the abortionist” and describing the procedure in a “clinically cold”<sup>88</sup> manner. He then goes on to explain the procedure in even more graphic detail than the majority did. He concludes his dissent by arguing that Nebraska was within its rights under *Casey* to completely proscribe a procedure that it found “so abhorrent as to be among the most serious crimes against human life.”<sup>89</sup> To Justice Kennedy, this procedure raised serious questions of morality, and democratic determinations regarding such procedures were entitled to far more respect than the Court (in his opinion) gave.<sup>90</sup> While Justice Kennedy’s views did not carry the day and save the statute in *Stenberg*, they also did not go unnoticed. In Justice O’Connor’s last case, she crafted a unanimous opinion remanding a constitutionally deficient parental consent statute’s emergency provision back to the lower court for consideration of a narrowed holding rather than invalidating the entire statute.<sup>91</sup> The episode highlighted the majoritizing skills of both Justices: Justice Kennedy for conveying his intentions in *Sternberg* regarding how *Casey* should be applied, and Justice O’Connor for not exposing her under burden standard to the potentially fatal re-airing of *Sternberg*’s broader implications for *Casey*.

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<sup>81</sup> *Id.*

<sup>82</sup> BISKUPIC, *supra* note 34, at 275.

<sup>83</sup> *Stenberg*, 550 U.S. at 938.

<sup>84</sup> *Id.* at 947.

<sup>85</sup> *Id.* at 948.

<sup>86</sup> *Id.* at 950 (O’Connor, J., concurring).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 957 (Kennedy, J., dissenting).

<sup>89</sup> *Id.* at 979.

<sup>90</sup> COLUCCI, *supra* note 61, at 58.

<sup>91</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

### D. Abortion During the Post-Justice O'Connor Years

It would not be long before Justice Kennedy could address the issues in Sternberg again. In *Gonzales v. Carhart*,<sup>92</sup> the federal ban on partial birth abortions was very similar to the Nebraska prohibition, and the degree to which they differed was not dispositive to the outcome.<sup>93</sup> Justice Kennedy's opinion also was very similar in its use of moralistic concepts and language.<sup>94</sup> What had changed was the composition of the Court. Justice Alito's presence in Justice O'Connor's former seat meant that Justice Kennedy now had a majority where none existed before.<sup>95</sup> The mere presence of an alternative to the prohibited procedure, albeit with a possible risk differential, allowed for approval under Casey for the prohibition.<sup>96</sup> Thus, one can assume that the differential in risk between the prohibited procedure and the alternative would need to be very significant for Justice Kennedy to conclude that a state's prohibition went too far. Such a conclusion is a significant departure from Justice O'Connor's health centric opinion in *Sternberg*.

## VI. SCOPE OF COMMERCE CLAUSE

The scope of the Commerce Clause is controversial. The question is how much license does the Commerce Clause<sup>97</sup> give Congress to regulate a wide range of issues which would otherwise be left for the states to regulate. The question has become more complicated as a singular national market place developed. Justice O'Connor and Justice Kennedy have played an important role in shaping the Court's answer to this extremely important question.

### A. The Commerce Clause Baseline Before Justice O'Connor

The issue of Commerce Clause expansiveness came to a head during the New Deal when President Franklin Delano Roosevelt's legislative agenda was at (or beyond) the limits of what the Court then understood the Commerce Clause to mean. This led to an inter-branch showdown in which

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<sup>92</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>93</sup> B. Jessie Hill, *A Radically Immodest Judicial Modesty: The End of Facial Challenges to Abortion Regulations and the Future of the Health Exception in the Roberts Era*, 59 CASE W. RES. L. REV. 997, 1012 (2009).

<sup>94</sup> COLUCCI, *supra* note 61, at 65.

<sup>95</sup> *Id.*

<sup>96</sup> *Gonzales*, 550 U.S. at 166-67.

<sup>97</sup> U.S. CONST. art. I, § 8, cl. 3.

the Supreme Court ultimately relented. The result was *Laughlin Steel*,<sup>98</sup> which said that activities, even if intrastate, which had an effect on interstate commerce were fair game for Congressional regulation under the Commerce Clause.<sup>99</sup> The case involved a challenge to the ability of the National Labor Relations Board, a prominent component of the New Deal, to regulate intrastate workers, and more generally the federal government's power to regulate labor under the Commerce Clause.<sup>100</sup> The decision laid the groundwork for the modern federal regulatory state in which Congress could exercise almost police-power-like regulatory muscle. The high water mark was *Wickard*,<sup>101</sup> in which the federal government was allowed to regulate wholly intrastate (and in fact intra-property<sup>102</sup>) wheat production on the basis of the interstate market effect of such domestic wheat production.<sup>103</sup> While such regulation played an important role in the nation's ascent from the Great Depression, to many it marked a breach of the fundamental boundaries between state and federal sovereignty.

### B. *The Commerce Clause During the Justice O'Connor Only Era*

While undoubtedly and openly a strong believer in the "nearly equal" sovereignty of the states,<sup>104</sup> in *F.E.R.C. v. Mississippi*, Justice O'Connor appears to accept, at least in a vacuum, much of the *Laughlin* based analysis.<sup>105</sup> Like her abortion jurisprudence, she was able, through her careful majoritizing efforts, to significantly impact the Court's jurisprudence on this issue. *F.E.R.C. v. Mississippi* is a prime example of her Commerce Clause jurisprudence. In that case, Congress sought to encourage power production by small producers and co-generators. Congress sought to use the state power regulators to further the legislative goal<sup>106</sup> including, *inter alia*, federal exemption of certain producers from state regulation<sup>107</sup> and for states to "consider" adoption of FERC promulgated regulations.<sup>108</sup> The Court, per Justice Blackmun, held that these provisions were consistent with Congress's interstate commerce power, and that because of the pre-emptible subject area

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<sup>98</sup> N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>99</sup> *Id.* at 37.

<sup>100</sup> *Id.* at 25.

<sup>101</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>102</sup> *Id.* at 114.

<sup>103</sup> *Id.* at 127.

<sup>104</sup> O'CONNOR, *supra* note 2, at 58.

<sup>105</sup> *F.E.R.C. v. Mississippi*, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part).

<sup>106</sup> *Id.* at 758-59 (majority opinion).

<sup>107</sup> *Id.* at 759.

<sup>108</sup> *Id.* at 764.

of power generation, the states could not complain about the federal governments conditions for continued regulatory involvement.<sup>109</sup>

Justice O'Connor, in a partial dissent, begins by agreeing with the Court's Commerce Clause analysis itself.<sup>110</sup> Her analysis then turns to Tenth Amendment implications of the statute, noting that the act appears to be quite taxing on the states that choose to adopt the FERC's promulgated regulations.<sup>111</sup> In concluding that the statute violates the Tenth Amendment, she says that governmental power is a wider concept than the authority to implement, and it includes the ability to consider and prioritize different proposals, which this act infringes upon.<sup>112</sup>

Justice's O'Connor's Tenth Amendment centric Commerce Clause analysis continued in her dissent in *American Trucking Associations Inc. v. Scheiner*<sup>113</sup> where she refused to join the Court in finding a state user based high way tax unconstitutional. In that case, a trucking association challenged a Pennsylvania flat rate axle tax that applied to all motorists, but if the taxed vehicle was registered in the state, the tax was considered included in local residents' registration fee.<sup>114</sup> The Court found that the tax was unconstitutional because it imposed a heavier tax burden on out of state business competing within the state.<sup>115</sup> Justice O'Connor's dissent was heavily precedent oriented, and criticized the precedential foundations on which the Court articulated its "internal consistency" test.<sup>116</sup> She then moves on to her broader point, which is that Pennsylvania, in her view, was relying on the Court's precedent in crafting its highway tax regime, and the Court has essentially changed the rules of game midstream, to the state's significant burden.<sup>117</sup> Her dissent, which is rather short and technical, nonetheless reiterates her deferential view of state sovereignty and her sensitivity to the infringement of it, especially on dormant commerce clause grounds.

### C. The Commerce Clause During the Justice O'Connor and Justice Kennedy Era

During the years that Justice O'Connor shared the bench with Justice Kennedy, no majority case articulated her analytical approach to the

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<sup>109</sup> *Id.* at 765-66.

<sup>110</sup> *Id.* at 775 (O'Connor, J., concurring in part and dissenting in part).

<sup>111</sup> *Id.* at 776-77.

<sup>112</sup> *Id.* at 779 (O'Connor, J., concurring in part and dissenting in part).

<sup>113</sup> *Am. Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 298 (1987) (O'Connor, J., dissenting).

<sup>114</sup> *Id.* at 275-76 (majority opinion).

<sup>115</sup> *Id.* at 282.

<sup>116</sup> *Id.* at 303 (O'Connor, J., dissenting).

<sup>117</sup> *Id.* at 300 (O'Connor, J., dissenting).

Commerce Clause more than *New York v. U.S.*<sup>118</sup> The case involved federal incentives to encourage the states to develop sites for hazardous waste, which said that when the states failed to meet the program's requirements it would have to take title to any waste they still possessed.<sup>119</sup> In an illuminating preface to her Commerce Clause analysis, she succinctly sums up her Commerce Clause approach. She says while the Commerce Clause may allow Congress to regulate a given area, that license is subject to the other provisions of the Constitution, which must necessarily set the parameters of Congress's actions done under the auspices of the Commerce Clause.<sup>120</sup> Moreover, since the Tenth Amendment is a mere tautology of the nature of federalism, one had to look beyond its text to see if "an incident of state sovereignty is protected by a limitation on an Article I power."<sup>121</sup> It was with this analytical framework that she proceeded to evaluate the provisions of the statute. While concluding that the financial<sup>122</sup> and access<sup>123</sup> provisions were constitutional, she determined that the take-title provision was not.<sup>124</sup> This was because, despite Congress's strong Commerce Clause interests, it could not constitutionally present the states with a binary choice in which both alternatives involved federal involvement.<sup>125</sup> Such a commandeering, regardless of its interstate commercial importance, was simply beyond what the Constitution would allow.<sup>126</sup> And thus Justice O'Connor, joined by Justice Kennedy, set out for the Court a Commerce Clause jurisprudence in which state's rights were a central element.

One could reasonably argue that Justice O'Connor's state centric opinion in *New York* set the stage for seminal Commerce Clause opinion of the era, *U.S. v. Lopez*.<sup>127</sup> In that opinion, the Court, per Chief Justice Rehnquist, struck down a federal prohibition of carrying firearms in a school zone as beyond the scope of the Commerce Clause since it lacked any commercial nexus.<sup>128</sup> The case seemed to mark a new era in Commerce Clause jurisprudence.

Justice *Kennedy's concurrence in U.S. v. Lopez*, joined by Justice O'Connor, offered a more detailed history into the evolution of the Commerce Clause.<sup>129</sup> It noted that Commerce Clause jurisprudence has thus

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<sup>118</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>119</sup> *Id.* at 175.

<sup>120</sup> *Id.* at 156-57.

<sup>121</sup> *Id.* at 157.

<sup>122</sup> *Id.* at 174.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 175.

<sup>125</sup> *Id.* at 177.

<sup>126</sup> *Id.* 178.

<sup>127</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>128</sup> *Id.* at 560.

<sup>129</sup> *Id.* at 567 (Kennedy, J., concurring and O'Connor, J., joining).

far taken place in the context of an ever-unifying national market, and thus the court should be cautious in making absolute prohibitions on how it is exercised.<sup>130</sup> Throughout his concurrence, he emphasizes the importance of the national market place. With that being said, he moves on to his main point: that federalism's split of sovereignty is about clear dual lines of authority and accountability,<sup>131</sup> which this law muddies.<sup>132</sup> Although the opinion makes a final reference to New York and to the inherent importance of state sovereignty irrespective of the degree to which it has been affronted,<sup>133</sup> one is left with the impression that Justice Kennedy generally approves of the post New Deal Commerce Clause cases.

Justice Kennedy and Justice O'Connor would soon find themselves on opposite sides of a Commerce Clause question. *Granholm v. Heald*<sup>134</sup> involved state laws regulating the direct shipment of wine that placed various burdens or prohibitions on out of state wineries but not on in state wineries. The legal issue was, "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?"<sup>135</sup> Indeed, the case provided a perfect situation to compare and contrast the Commerce Clause jurisprudence of Justice Kennedy and Justice O'Connor, in that the Twenty-first Amendment could be read as either returning alcohol to its previous status as a regulatable item, or as granting the states special regulatory powers over alcohol that kept their restrictions beyond the reach of the dormant Commerce Clause. Justice Kennedy concluded the Twenty-first Amendment provided no license to the states to violate the dormant commerce clause.<sup>136</sup> Such a view of the Twenty-first Amendment necessitated that states' regulation of out-of-state wine shipping was a patent violation of the dormant Commerce Clause. Justice O'Connor did not author a dissenting opinion but joined the separate dissents of both Justice Thomas and Justice Stevens. Both dissenting opinions focused heavily on the historically unique deference give to state regulation of alcohol and the circumstances of the Nineteenth and Twenty-first Amendments.

In *Gonzales v. Raich*,<sup>137</sup> marijuana, not alcohol, was the target of the state's experimental legislation. Specifically, the case asked whether those growing intrastate marijuana under California's medicinal marijuana law

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 576-77.

<sup>132</sup> *Id.* at 583.

<sup>133</sup> *Id.*

<sup>134</sup> *Granholm v. Heald*, 544 U.S. 460 (2005).

<sup>135</sup> *Id.* at 471.

<sup>136</sup> *Id.* at 484-85.

<sup>137</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

were nonetheless subject to, and in violation of, the federal Controlled Substances Act.<sup>138</sup> The Court, per Justice Stevens and joined by Justice Kennedy, held that Congress had the power under the Commerce Clause to regulate intrastate marijuana, and thus the Federal Controlled Substances act could be applied against the patient-plaintiffs in this case.<sup>139</sup> The majority relied heavily on *Wickard*.<sup>140</sup> In Justice O'Connor's dissent, she began by noting that one of the key benefits of federalism is that it allowed the states to engage in legislative experimentation.<sup>141</sup> This even more so when the experimentation involves the state's use of its police powers. While acknowledging the value of the aggregate effect component of the typical Commerce Clause analysis,<sup>142</sup> she notes that the Court's holding invites Congress to craft police-power like legislation as broadly as possible so as to place the intrastate police power component of the regulation within the larger commercially oriented interstate regulatory scheme.<sup>143</sup> In her view, this is an invitation to a national police power and is antithetical to *Lopez*.<sup>144</sup>

#### D. *The Commerce Clause During the Post Justice O'Connor Era*

While Justice O'Connor's state oriented approach does not seem to be at philosophical odds with Justice Kennedy, who views federalism as a matter of morality,<sup>145</sup> the fact remains that he has voted to strike the actions of local and state governments more than any other justice.<sup>146</sup> This jurisprudential style, and how it has affected his majoritizing style, is illustrated nicely in *Department of Revenue of Ky. v. Davis*.<sup>147</sup> The case dealt with the constitutionality of Kentucky's granting of tax exempt status to income from local governmental bonds. Justice Souter, writing for a majority that included both Justice Ginsberg and Justice Scalia, concluded that a taxing scheme furthered the traditional (and perhaps most traditional) government interest of raising revenue, and thus was exempt from the reach of the dormant Commerce Clause.<sup>148</sup>

Justice Kennedy, joined by Justice Alito, took a different viewpoint in their dissent. Justice Kennedy begins by reaffirming his approval of the

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<sup>138</sup> *Id.* at 7.

<sup>139</sup> *Id.* at 9.

<sup>140</sup> *Id.* at 22.

<sup>141</sup> *Id.* at 42 (O'Connor, J., dissenting).

<sup>142</sup> *Id.* at 47.

<sup>143</sup> *Id.* at 46.

<sup>144</sup> *Id.* at 43.

<sup>145</sup> COLUCCI, *supra* note 61, at 136.

<sup>146</sup> *Id.* at 171.

<sup>147</sup> *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008).

<sup>148</sup> *Id.* at 352-53.

unifying effect of the Court's previous Commerce Clause rulings on the national marketplace.<sup>149</sup> He then states that an important issue is the fact that Kentucky bonds compete in a national market place.<sup>150</sup> He concludes that this competition is being stifled by a local government for protectionist purposes, and thus cannot be permitted under the dormant commerce clause.<sup>151</sup> Thus, where both Justice Scalia and Justice Ginsberg both see some element of state sovereignty and function implicated in this case, Justice Kennedy sees almost none. This reasoning typifies Justice Kennedy's Commerce Clause analysis. This makes his jurisprudence different from Justice O'Connor's. Justice O'Connor believed that the states are as dignified a sovereign as the federal government and Tenth Amendment serves to enforce that principle.

## VII. RACIAL EQUAL PROTECTION

Questions concerning the meaning and appropriate application of the Constitutional guarantee of equal protection as it relates to race are vexing. Justice O'Connor and Justice Kennedy played a major role in formulating the Court's answers.

### *A. Racial Equal Protection Baseline Before Justice O'Connor*

The state of racial equal protection was at an inflection point in the period immediately preceding Justice O'Connor's appointment. The Civil Rights era was over and the new contours of racial equal protection jurisprudence were being drawn. *Washington v. Davis*,<sup>152</sup> a racial discriminatory impact case, was emblematic of the times. In that case, African-American firefighters who had sued over the lack of diversity in promotions due to an allegedly discriminatory personnel test lost because the Court held that a facially neutral law that merely happened to have a racially disproportionate effect did not violate equal protection.<sup>153</sup>

Racial preferences also represented an important component of the racial equal protection jurisprudence of the day. *Regents of University of California v. Bakke*<sup>154</sup> was an important case on the topic of racial preferences in college admissions. The case involved a white applicant to medical school who was denied admission challenging the school's policy of

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<sup>149</sup> *Id.* at 362 (Kennedy, J., dissenting).

<sup>150</sup> *Id.* at 368.

<sup>151</sup> *Id.*

<sup>152</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>153</sup> *Id.* at 242.

<sup>154</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

reserving a fixed number of seats to certain minority groups.<sup>155</sup> The Court, per Justice Powell, began by stating the Fourteenth Amendment was framed in universal terms and applied to all races.<sup>156</sup> The Court ultimately struck down the quota system used by the university as a violation of the Fourteenth Amendment due to the fact an applicant's race was the critical factor in determining which admission track was used.<sup>157</sup> However, in an equally noteworthy portion of the opinion, Justice Powell said that racial diversity could be one of many acceptable factors for a university to consider in the admission process.<sup>158</sup>

The Court's tolerance of some form of affirmative action was also evident in its jurisprudence on the awarding of contracts. Specifically, in *Fullilove v. Klutznick*,<sup>159</sup> the Court approved of a federal regulation that required that a certain amount of subcontracts to be awarded minority firms.<sup>160</sup> The opinion stated that it was not necessary to show that prime contractors subject to the regulation had been involved in past discrimination,<sup>161</sup> and that the loss of contracting to nonminority firms was "incidental" to the program<sup>162</sup> and not fatal. As the three cases demonstrate, the state of the Court's racial equal protection jurisprudence in the time preceding Justice O'Connor's appointment, while defying a simple explanation, seemed to approve of some kind of affirmative action measures in addressing racial inequality. However, cases like *Washington* demonstrate that there was also a judicial viewpoint more rooted in a colorblind Constitution.

### B. Racial Equal Protection During the Justice O'Connor Only Era

One of the cases that painted a clear picture of Justice O'Connor's racial equal protection jurisprudence was *Wygant v. Jackson Board of Education*.<sup>163</sup> In that case, African-American teachers had been given preferential status in lay-off allocations, and other teachers claimed this violated equal protection and lost, with the trial court reasoning that such a labor arrangement remedied past societal discrimination.<sup>164</sup> The Court, per Justice Powell and joined in part by Justice O'Connor, held that strict scrutiny applied regardless

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<sup>155</sup> *Id.* at 277-78.

<sup>156</sup> *Id.* at 265.

<sup>157</sup> *Id.* at 320.

<sup>158</sup> *Id.* 314.

<sup>159</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>160</sup> *Id.* at 490 (Burger, J., plurality).

<sup>161</sup> *Id.* at 475.

<sup>162</sup> *Id.* at 484.

<sup>163</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

<sup>164</sup> *Id.* at 272 (Powell, J., plurality).

that the purpose of the racial classification<sup>165</sup> and the “role model” justification provided were an unworkable attempt to remedy past societal discrimination.<sup>166</sup> The departure from *Fullilove* would be even greater than that. Justice Powell’s opinion would then go on to state that the remedying of societal discrimination alone could never be the basis of a compelling state interest to impose any racial classification regime.<sup>167</sup> Much of Justice O’Connor’s concurrence was concerned with highlighting the value and basis of the application of strict scrutiny to all racial classifications. She noted that all of the members of the Court had articulated, at some point, a standard of review approximately resembling strict scrutiny.<sup>168</sup> She also sought to minimize the difference with the dissent, noting that “the distinction between a “compelling” and an “important” governmental purpose may be a negligible one.”<sup>169</sup> Moreover, she emphasized that strict scrutiny did not mean fatal in fact, and that specific remediation was possible under the Court’s ruling.<sup>170</sup> The case marked an important moment in the Court’s racial jurisprudence and for Justice O’Connor’s role as a majoritizer. It would not, however, mark the end of the close jurisprudential relationship between Justice O’Connor and Justice Powell on the issue of racial equal protection.

However, a close jurisprudential relationship does not mean strict correlation. In *U.S. v. Paradise*,<sup>171</sup> an Alabama police department had been sued by African-American police officers for discriminatory practices and agreed to a consent decree to remedy the situation, which it had by all accounts spent several years avoiding. To compel compliance, the district court ordered that fifty percent of all new promotions made by the department had to be awarded to African-American candidates until a certain percentage was met or the department complied with the previous agreements. Justice Brennan, joined by Justice Powell in delivering the judgment of the Court, stated that since not all remedial plans had to be the least restrictive means necessary,<sup>172</sup> the trial court judge’s promotional order was justified.<sup>173</sup>

Justice O’Connor dissented. First, she noted that there could be no compelling purpose for the trial court’s imposition of the quota, since it was done not as a remedial measure but as a form of punishment on the

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<sup>165</sup> *Id.* at 273.

<sup>166</sup> *Id.* at 275.

<sup>167</sup> *Id.* at 276.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 285-86 (O’Connor, J., concurring).

<sup>170</sup> *Id.* at 286.

<sup>171</sup> *United States v. Paradise*, 480 U.S. 149 (1987).

<sup>172</sup> *Id.* at 184 (Brennan, J., plurality).

<sup>173</sup> *Id.* at 185-86.

department.<sup>174</sup> Such a retaliatory order lacked both the measured consideration<sup>175</sup> and factual grounding<sup>176</sup> required for a valid exercise of strict scrutiny. Just as *Wygant* caused the liberals to fear that strict scrutiny would be fatal in fact, *Paradise* seems to have caused Justice O'Connor to fear that strict scrutiny would be nominal in fact.

### *C. Racial Equal Protection During the Justice O'Connor and Justice Kennedy Era*

The Court's approach towards racial equal protection was far from settled when Justice Kennedy joined Justice O'Connor on the Court. In time they would speak for the Court and provide a clearer answer. But *Metro Broadcasting, Inc. v. F.C.C.*<sup>177</sup> was not that time. In that case, two separate FCC provisions were being challenged: one that favored minorities in the granting of broadcast licenses, and another that favored the sale of distressed licenses to minorities. The Court, per Justice Brennan, stated that provisions were constitutional and did not violate equal protection because the provisions in question were not based on a remedial effort per se, but rather a governmental interest in diversity.<sup>178</sup> More importantly, the court did not use strict scrutiny to analyze the provisions, opting instead for an "intermediate" level that asked if the governmental interest was "important" and the measures taken were "substantially related."<sup>179</sup>

It is thus not surprising that Justice O'Connor wrote a rather strong dissent. It was also very telling that Justice Kennedy joined it. She began by attacking the underlying foundations of the Court's reasoning, that racial classification could be benign.<sup>180</sup> To her, any time the government classified individuals based on race, there was the potential for great harm to those classified one way or another. As such, a tremendous amount of caution and care was required when the governmental set out to implement racial classifications, and thus the need for strict scrutiny. It was as if she viewed racial classifications by the government akin to open-heart surgery: when the situation clearly called for it, it was imperative that it be performed and performed with the utmost care. Alternatively, if it there were questions about its necessity, it should be avoided. To her, the situation in this case fell

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<sup>174</sup> *Id.* at 197 (O'Connor, J., dissenting).

<sup>175</sup> *Id.* at 201.

<sup>176</sup> *Id.* at 199.

<sup>177</sup> *Metro Broad. Inc. v. F.C.C.*, 497 U.S. 547 (1990) *overruled by* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>178</sup> *Id.* at 566.

<sup>179</sup> *Id.* at 564-65.

<sup>180</sup> *Id.* at 609 (O'Connor, J., dissenting).

in the latter category<sup>181</sup> and even then based on dubious assumptions.<sup>182</sup> Justice Kennedy's own dissent was equally as forceful. In it he asserted that policies of racial preference are always couched in "benign" terms. To illustrate that point, he cited an Apartheid South African government document detailing the need for racial separation as "[fitting] well among those offered to uphold the Commission's racial preference policy."<sup>183</sup> After echoing Justice O'Connor's point, his rhetorical flare continued with the quote: "I regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from "separate but equal" to "unequal but benign."<sup>184</sup>

*Metro* would be short lived, as would Justice O'Connor and Justice Kennedy's time in the minority. The case which would be the catalyst was *Adarand Constructors, Inc. v. Pena*.<sup>185</sup> The case involved a familiar subject, highway subcontracting, and a provision that required a certain percentage of subcontractor contracts to be awarded to minority owned firms. Justice O'Connor held that strict scrutiny applied to all governmental classifications based on race, and *Metro* was overruled.<sup>186</sup> Where there had once been lingering doubt and a clouded jurisprudence, Justice O'Connor constructed and implemented a clearly articulated standard. Justice O'Connor seemed to deliver the epitaph for *Metro* and jurisprudential view point from which is grew: "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*" [emphasis original].<sup>187</sup> Joined by Justice Kennedy, she also devoted a portion of the majority opinion to addressing the dissent's concerns, stating that strict scrutiny is perfectly capable of differentiating between a "welcome mat" and a "keep out" sign, and acting accordingly based on the situation.<sup>188</sup> Therefore, it appeared that when the law was in need of majoritization, Justice O'Connor's and Justice Kennedy's votes delivered.

This was largely the status quo until the University of Michigan cases came before the court. The two cases concerned the (differing) admissions program of a law school (*Grutter v. Bollinger*)<sup>189</sup> and a liberal arts college (*Gratz v. Bollinger*).<sup>190</sup> Each faced an equal protection challenge by white applicants who were denied admission and claimed that denial had been on

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<sup>181</sup> *Id.* at 613.

<sup>182</sup> *Id.* at 618-19.

<sup>183</sup> *Id.* at 635 (Kennedy, J., dissenting).

<sup>184</sup> *Id.* at 637-38.

<sup>185</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>186</sup> *Id.* at 227.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 228.

<sup>189</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>190</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

the basis of their race, given the each school's respective applicant evaluation process. In *Grutter*, *certiorari* was granted on the core jurisprudential issue of both cases: "Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities?"<sup>191</sup> The answer to this question had the potential to play a dramatic role in shaping the strict scrutiny analysis for racial equal protection. Justice O'Connor, with significant reliance on *Bakke*<sup>192</sup> concluded that the University did have a compelling interest in the education benefits of diverse student body.<sup>193</sup> In reaching this conclusion, she noted the application of strict scrutiny does not foreclose the analysis of the state's motives and its sincerity.<sup>194</sup> Moreover, she noted that the law school's utilization of race was not as mechanical application, but rather took into account the individual as a whole.<sup>195</sup> Justice Kennedy was not convinced of these distinctions and nuances. His dissent in *Grutter* instead said that precedent called for the application of strict scrutiny, and that the Court in *Grutter* had not done so.<sup>196</sup> While the Court upheld the law school's holistic racial considerations, it struck down the undergraduate system by which applicants of a certain race automatically received a certain amount of points in the admission process. In Justice O'Connor's view, the automatic points were a purely mechanical "consideration" of race beyond what *Grutter*'s articulation of "strict scrutiny" would allow. By having companion cases that had different outcomes and explicitly saying that universities occupy "a special niche in our Constitutional tradition,"<sup>197</sup> Justice O'Connor sought to limit the degree to which Justice Kennedy's strict scrutiny criticism would cast both the case and the standard in an unattractive light. To further that end, she reiterated that racial consideration had to be temporary to remain consistent with the spirit of the Fourteenth Amendment.<sup>198</sup>

#### D. Racial Equal Protection in the Post Justice O'Connor Era

In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*<sup>199</sup> the Court addressed whether primary school districts that were not legally segregated or in the process of remediating such condition could

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<sup>191</sup> *Grutter*, 539 U.S. at 322.

<sup>192</sup> *Id.* at 322-23.

<sup>193</sup> *Id.* at 318-19.

<sup>194</sup> *Id.* at 327.

<sup>195</sup> *Id.* at 333.

<sup>196</sup> *Id.* at 388 (Kennedy, J., dissenting).

<sup>197</sup> *Id.* at 329 (majority opinion).

<sup>198</sup> *Id.* at 341-42.

<sup>199</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

nonetheless classify and assign students based on race.<sup>200</sup> Chief Justice Roberts, writing for a majority that Justice Kennedy partially joined, differentiated this case from *Grutter*,<sup>201</sup> and held that the racially influenced assignments were nothing more than furtherance of an unconstitutional racial quotas system.<sup>202</sup> In the part of the opinion not joined by Justice Kennedy, Chief Justice Roberts crafts and delivers the apothegm for the modern advocates of a colorblind Constitution: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>203</sup>

Despite Justice Kennedy’s spirited discussion of the meaning of strict scrutiny in *Grutter*, Chief Justice Roberts appears to be trying to draw Justice Kennedy one-step further than he could go, or that Justice O’Connor would have been able to go. A moment’s reflection shows why this is. True strict scrutiny, under which only narrowly tailored remedial racial classifications are allowed, turns on the premise that that the best place to correct past racial wrongs is the “venue” in which they happened. Thus, where specific discrimination has happened, a narrowly tailored racially based solution can be crafted and implemented within that “venue.” Alternatively, the generalized societal wrong of racial inequality can only be corrected in that “venue,” society itself. To implement a correction in a specific venue would be to unfairly infringe upon those on the receiving end of the solution’s externalities. This construct underlies Justice O’Connor’s strict scrutiny approach and acknowledges that there are still racial wrongs can be remedied within that approach. Chief Justice Robert’s colorblind approach simply presumes that all a post racial society needs to exist is a statement that it already does exists. Neither Justice Kennedy nor Justice O’Connor has ever said such.

## VIII. ANALYSIS

If any contemporary justice comes close to Justice O’Connor in terms of influence on the Court and in shaping its jurisprudence, it is Justice Kennedy. Each has played a critical role as not only a fifth vote, but also as crafters of many of the Court’s current jurisprudential viewpoints. Yet each Justice occupied this position in very different manners, both jurisprudentially and as majoritizers. This section of the paper will begin with a jurisprudential comparison of the Justices’ opinions on the topics discussed in the preceding sections, and then analyze the majoritizing styles displayed in the above

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<sup>200</sup> *Id.* at 711.

<sup>201</sup> *Id.* at 726.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 748.

referenced cases. Finally, this section will theorize what the Court will be like with only Justice Kennedy as the “fifth vote.”

### A. *Jurisprudential Comparison*

Justice O’Connor’s abortion jurisprudence has been seminal. The “undue burden” standard that she first articulated in *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>204</sup> is still the controlling lens through which an abortion restriction is analyzed. Her abortion jurisprudence has always rested on the premise that the protected right to an abortion in some form should not be extinguished. While never suggesting that this central tenant of *Roe* was problematic, she also consistently held that it is never completely free from a countervailing state interest regarding the manner and implications of the procedure.<sup>205</sup> Thus, her jurisprudence on abortion never wavered in its balance: it was a unique act to which some right would always exist, but due to its unique nature, that right would never exist in a vacuum and free of state and societal interests. Undue burden was the singular scale that would at all times weigh these two interests. Her abortion jurisprudence could be criticized by some as less informative to future litigants than the *Roe* standard it replaced. But, Justice O’Connor, through the consistent application of the underlying principles, painted a road map that today provides a coherent picture of when the state steps too far in exercising its interest, and ultimately provided a mostly definitive answer to one of the most contentious question of modern constitutional law.<sup>206</sup>

Justice Kennedy’s abortion jurisprudence is more difficult to succinctly describe. His jurisprudential conception of the issue is bound in moralistic terms in which the liberty of the woman and the need to respect fetal life weigh heavily on him.<sup>207</sup> It is in this balancing that the core of *Roe* precariously hung.<sup>208</sup> Yet at the critical moment, he concluded that “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>209</sup> Such a determination required abstaining from mandating one’s own moral code<sup>210</sup> and instead upheld the recognized right

<sup>204</sup> *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 463 (1983) (O’Connor, J., dissenting).

<sup>205</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

<sup>206</sup> Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 *Yale L.J.* 1318, 1336-37 (2009).

<sup>207</sup> COLUCCI, *supra* note 61, at 170-71.

<sup>208</sup> TOOBIN, *supra* note 1, at 53.

<sup>209</sup> *Casey*, 550 U.S. at 851.

<sup>210</sup> *Id.* at 850-51.

for individuals to make these determinations themselves.<sup>211</sup> In later cases, Justice Kennedy seemed to take a different approach.<sup>212</sup> As his dissent in *Stenberg* shows, there is a limit to the amount of distance one can place between himself and his moral code.<sup>213</sup> That his critical vote in *Casey* has provided the basis for a ruling he so strongly disagreed with only compounded the matter.<sup>214</sup> His language about an individual's right to make one's own determinations about the "mystery of life" was replaced with discussions about the motivations of "abortionists."<sup>215</sup> His writings on the topic have covered both ends of the spectrum, and it appears that he has yet (as of *Gonzales*) to settle his jurisprudential approach on this topic.<sup>216</sup> This internal debate is the differentiating factor between him and Justice O'Connor. Justice O'Connor has had one consistent jurisprudential approach, while it appears Justice Kennedy is still searching.

The scope of the Commerce Clause has also been an area of the law where both Justices have had a major impact. For Justice O'Connor, the Commerce Clause is intertwined with the principles of federalism. For her, the Commerce Clause is almost a threshold question, for the manner in which Congress exercises its Commerce Clause power must comport with the rest of the Constitution. And to Justice O'Connor, few parts of the Constitution are more implicated in a Commerce Clause situation than the Tenth Amendment. This is because the states are "nearly equal" as sovereigns to the federal government.<sup>217</sup> Thus, to the extent the post-*Laughlin* cases have provided the basis for encroachment on the independent role of the states, those cases have, according to Justice O'Connor, created one "...of the *most* important challenges facing Americans today" [emphasis in original].<sup>218</sup> Cases like *F.E.R.C* and *Granholt* are perfect examples of this jurisprudential approach. There was little room in her Commerce Clause jurisprudence, regardless of the interstate commerce interest in question, for federal commandeering, coercion, or blurring of state and federal lines of governmental responsibilities and decision-making.

Justice Kennedy's conception of the Commerce Clause has produced a jurisprudence that is different from Justice O'Connor's. Conceptually, Justice Kennedy views the Commerce Clause and other federalism issues through the lens of personal liberty and its moral implications.<sup>219</sup> In practice, he has

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<sup>211</sup> *Id.* at 851.

<sup>212</sup> COLUCCI, *supra* note 61, at 8.

<sup>213</sup> *Id.* at 64.

<sup>214</sup> *Id.* at 58.

<sup>215</sup> *Id.* at 65.

<sup>216</sup> *Id.* at 65-66.

<sup>217</sup> O'CONNOR, *supra* note 2, at 58.

<sup>218</sup> *Id.* at 57.

<sup>219</sup> COLUCCI, *supra* note 61, at 139.

regularly given the federal government significant latitude. In his telling concurrence in *Lopez* (joined by Justice O'Connor), Justice Kennedy says that the emergence of a singular national market since the founding of the nation means that the Court should be careful when restricting the Commerce Clause.<sup>220</sup> Thus, while some may have hoped *Lopez* marked the start of a broad counter-revolution against *Laughlin* and its progeny, Justice Kennedy's concurrence counseled otherwise.<sup>221</sup> To Justice Kennedy, the post-*Laughlin* cases were important factors in creating the national marketplace that is vital to our society.<sup>222</sup> Thus, while the "atom of sovereignty"<sup>223</sup> may have been split between the states and the federal government, Justice Kennedy, unlike Justice O'Connor, believes that should not be extended to the states at the expense of a national market place.<sup>224</sup> Nowhere is this view truer than in *Davis*, where even the sale of local governmental debt, in Justice Kennedy's eyes, has a national market implication. Such a position could not be further from Justice O'Connor's inclinations.

Each Justice also played a major role in the evolution of Court's jurisprudence on racial equal protection. On the broadest level, they shared some core beliefs that informed their respective jurisprudential approaches to the issue. Both believed that any kind of racial classifications by the government was a very serious issue fraught with dangers. Yet both also appeared to acknowledge that we have yet to achieve a truly post-racial society and remedial efforts may at times be needed.

Justice O'Connor's jurisprudence on racial equal protection is defined by her race-neutral application of strict scrutiny in all cases. Such a viewpoint put her at odds with the jurisprudence of the Court she joined, which had given some endorsement of race conscious affirmative action measures.<sup>225</sup> Even more problematic for Justice O'Connor, these measures did not need to be correlated to a specific instance of racial discrimination, but instead appeared to be a remedy for general societal discrimination.<sup>226</sup> To Justice O'Connor, this is not consistent with the principles of equal protection, as there (in her mind) is no such thing as benign racial classification,<sup>227</sup> for equal protection, as she famously stated, exists to

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<sup>220</sup> *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring and O'Connor, J., joining).

<sup>221</sup> *COLUCCI*, *supra* note 61, at 146.

<sup>222</sup> *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 362 (2008) (Kennedy, J., dissenting).

<sup>223</sup> *COLUCCI*, *supra* note 61, at 147.

<sup>224</sup> *Id.* at 152.

<sup>225</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1980) (Burger, J., plurality).

<sup>226</sup> *Id.* at 475.

<sup>227</sup> *Metro Broad. Inc. v. F.C.C.*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting).

“protect *persons*, not *groups*” [emphasis in original].<sup>228</sup> As such, individuals of all races are injured when their race, whatever it is, is a burden to them because of government classification.<sup>229</sup> Accordingly, truly strict scrutiny of any racial classification was required under both the Fifth and Fourteenth Amendments and a key component of that analysis would be the source of the discrimination remedied. If the source of the targeted discrimination was merely general past societal discrimination, that classification based remedy could not survive strict scrutiny. Yet such scrutiny did not have to be fatal in fact, and legitimate uses for properly narrow racial classification existed.<sup>230</sup>

This principal is most notable in the higher education cases. Justice O’Connor was significantly influenced by Justice Powell’s opinion in *Bakke*, and the Michigan cases together demonstrated this clearly. Justice O’Connor stated that universities had a compelling interest in a diverse student body,<sup>231</sup> which it could achieve through a non-mechanical consideration of race in the admission’s process. Justice O’Connor emphasized this kind of application of strict scrutiny existed because of the unique nature of higher education,<sup>232</sup> and that the purpose was not remedial in nature<sup>233</sup> and hopefully temporary.

Justice Kennedy’s inherent suspicion of racial classifications is very similar to Justice O’Connor’s. So much so that he did not join her in *Grutter*, arguing that her holding was not a true application of strict scrutiny.<sup>234</sup> Justice Kennedy’s equal protection framework has been dubbed by some as “neutral individualism,” and it centers on the idea that a classification system turning on sex, race, religion, and sexual orientation does harm.<sup>235</sup> The harm done by such classification systems is not limited to those classified, but corrosive on a society as a whole.<sup>236</sup> Yet the Justice is no believer in the viability of a “colorblind” Constitution,<sup>237</sup> however appealing an ideal it may be.<sup>238</sup> Until the day that racial consciousness is no longer a part of national consciousness, Justice Kennedy’s approach to racial equal protection is one in which first and foremost the individual is always treated as such, even as the law recognizes that there still exists compelling state interests regarding race.

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<sup>228</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>229</sup> *Id.* at 230.

<sup>230</sup> *Id.* at 228.

<sup>231</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>232</sup> *Id.*

<sup>233</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278, 1299 (2011).

<sup>234</sup> *Grutter*, 538 U.S. at 388 (Kennedy, J., dissenting).

<sup>235</sup> COLUCCI, *supra* note 61, at 103.

<sup>236</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring).

<sup>237</sup> COLUCCI, *supra* note 61, at 103.

<sup>238</sup> *Parents Involved in Cmty. Sch.* 551 U.S. at 788 (2007) (Kennedy, J., concurring).

## B. Justice O'Connor's Majoritizing Style

When it comes to articulating a jurisprudential view and working to make it the majority view of the Court, Justice O'Connor has no contemporary rivals. On many of the major issues of the day, her jurisprudential view, through her careful and skilled majoritizing efforts, became the view of the Court. This monumental achievement was accomplished through the practical application of consistent principles.

One of the critical hallmarks of Justice O'Connor was that she stated early and clearly where she thought the law should go and why. She used the early dissents and concurrences to articulate her position. Often her early concurrences and dissents read less like the explanation or justification of her vote in that particular case, but rather like a reference guide for future opinions. They tend to be less centered on the particulars of the case, and more concerned with the future development of the law. In short, they were often groundwork opinions that would provide the foundations on which future majorities could rest. As she said herself: "dissents play an important role in the future course of the law."<sup>239</sup>

This element of her majoritizing style was on clear display in *Akron*. There, her dissent was rooted in the fact the *Roe* formulation had an inherent flaw.<sup>240</sup> Her dissent then went on to explain why this flaw was significant and needed to be addressed by the Court.<sup>241</sup> She then went on to articulate the alternative she believed to be better than the Court's current jurisprudence and how it was consistent with the Court's broader precedent on the issue.<sup>242</sup> Indeed, *Akron* is a perfect setup for her opinion in *Casey* in which she majoritized the undue burden standard as it was laid out in *Akron*. Her inclination to lay clear groundwork early was not limited to her announcements from the bench. Within the halls of the Court, she liked to get her opinions out early so they could have an influence on the Court's deliberations.<sup>243</sup>

Of course, the articulation of a groundwork is of little value to the rest of the Court if there are doubts about whether the articulator will adhere to what has been said. When Justice O'Connor offered a jurisprudential view, her eight colleagues could rest assured that it was what she believed in and that it would be the jurisprudential viewpoint through which she would analyze future issues. Her word (or in this case opinion) was her bond. This

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<sup>239</sup> O'CONNOR, *supra* note 2, at 120.

<sup>240</sup> *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456-57 (1983) (O'Connor, J., dissenting).

<sup>241</sup> *Id.* at 458.

<sup>242</sup> *Id.* at 461.

<sup>243</sup> BISKUPIC, *supra* note 34, at 228.

strong fidelity to her principles is in large part why she was able to majoritize her views on so many key issues. Few cases illustrate this better than *Raich*. *Raich* implicates largely the same questions as posed in *Wickard*. Yet some justices who are presumed to question (or flatly disagree with) *Wickard* voted in favor of expansive federal power in *Raich*. One can certainly argue that the key differences may have been factual, not legal – that Bush administration drug agents enforcing federal laws against California medical marijuana growers was a more sympathetic fact pattern to the conservatives than Roosevelt price regulators telling a farmer he could not eat his own wheat. Regardless, while other justices needed to use pretzelled language to explain their position,<sup>244</sup> Justice O’Connor’s dissent was eloquently clear – *Lopez* said Congress did not have the police power to regulate intrastate activities. That she did not particularly approve of the intrastate activity was irrelevant. The application of her principles did not turn on the identity of the litigants or the political climate in which the case arose.

The final and equally important element of her majoritizing style was the relationship she maintained with her colleagues. On an interpersonal level, even when faced with a difficult colleague,<sup>245</sup> Justice O’Connor made it a point to keep the interaction positive.<sup>246</sup> Moreover, she operated in an open and transparent manner,<sup>247</sup> at least by the institutional standards of the Supreme Court. On the jurisprudential level, she tended to write narrowly, especially when laying groundwork.<sup>248</sup> She also tended to present her jurisprudential conclusion in a manner closely tied to the context of the case. Her opinions on racial equal protection illustrate this point. In *Wygant*, she made her case for the race neutral application of the strict scrutiny standard by casting it as being in accord with general agreement of the Court regarding the state interest in remedying specific discrimination,<sup>249</sup> and that the specific program of the case at hand was outside of that general agreement.<sup>250</sup> Further, she argued that the differences between the blocs were not as great as they seemed.<sup>251</sup>

This was her classic approach: explain the precedential basis and practical benefits of her advocated jurisprudence, and do so by staying close to the facts and demonstrating opportunity within her position for the (often divergent) views of the other Justices. Her majoritizing approach was about attracting and keeping votes. To do so, she had to make sure that no justice

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<sup>244</sup> *Gonzales v. Raich*, 545 U.S. 1, 34-35 (2005) (Scalia, J., concurring).

<sup>245</sup> BISKUPIC, *supra* note 34, at 160.

<sup>246</sup> *Id.* at 161.

<sup>247</sup> *Id.* at 160-61.

<sup>248</sup> *Id.* at 174.

<sup>249</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O’Connor, J., concurring).

<sup>250</sup> *Id.* at 294.

<sup>251</sup> *Id.* at 285-86.

felt as if he or she was going out on a limb, or venturing into the unknown, when casting a vote in favor of the position she advocated.

### C. Justice Kennedy's Majoritizing Style

In recent years, Justice Kennedy has been a prolific fifth voter. In the 2006 to 2007 term, one in three cases before the Court were decided 5-4.<sup>252</sup> Justice Kennedy was the fifth vote every time.<sup>253</sup> It is a majority-making record unmatched in history.<sup>254</sup> Yet Justice Kennedy has operated as fifth voter in a very different manner than Justice O'Connor used in the role.

One of dominant characteristics in Justice Kennedy's role as a majoritizer is his use of very broad language. For example, in *Dep't of Revenue of Ky. v. Davis*, Justice Kennedy's dissent passionately argued that the dormant Commerce Clause analysis of a state tax provision implicated "the national, free market within our borders [that] has been a singular force in shaping the consciousness and creating the reality that we are one in purpose and destiny."<sup>255</sup> His rhetoric was also particularly airy in *Casey*,<sup>256</sup> noting that "liberty finds no refuge in a jurisprudence of doubt"<sup>257</sup> and that the case implicated "one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>258</sup> Justice Kennedy's use of such language maybe in part because of his belief that justices are charged with delineating the lines of "liberty," which is a broad concept with unclear boundaries,<sup>259</sup> or it may be merely the product of a professorial personality.<sup>260</sup> Regardless, it has been a defining feature of his opinions.

More substantively, Justice Kennedy's role as a majoritizer has been characterized by the speed at which his jurisprudence on an issue can shift focus. No pair of cases demonstrate this more clearly than *Casey* and *Stenberg*. In *Casey*, Justice Kennedy's writing focuses heavily on the liberty implications of an overturn of *Roe*.<sup>261</sup> In *Stenberg*, his focus could not be more opposite. After graphically detailing the procedure in question,<sup>262</sup> he goes on to say that *Casey* never stood for allowing "an abortionist" to

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<sup>252</sup> TOOBIN, *supra* note 1, at 331.

<sup>253</sup> COLUCCI, *supra* note 61, at 1.

<sup>254</sup> TOOBIN, *supra* note 1, at 333.

<sup>255</sup> *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 362 (2008) (Kennedy, J., dissenting).

<sup>256</sup> TOOBIN, *supra* note 1, at 56.

<sup>257</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, *supra* note 64, at 844.

<sup>258</sup> *Id.* at 51.

<sup>259</sup> COLUCCI, *supra* note 61, at 10.

<sup>260</sup> TOOBIN, *supra* note 1, at 183.

<sup>261</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

<sup>262</sup> *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting).

perform any procedure he feels like.<sup>263</sup> His discussion of the lack of a health exception is *de minimis* when compared to the strong moralistic language contained elsewhere in the opinion. Justice Kennedy's opinions in the two cases do not seem to be authored by the same person.<sup>264</sup> Given the exploratory nature of Justice Kennedy's jurisprudential quest to define contours of "liberty," jurisprudential shifts in focus like the one seen in *Casey* to *Stengberg* are to be expected. Such shifts can also be even more problematic when one considers the third important element of Justice Kennedy's jurisprudence – his willingness to use harsh language against his opponents. A prime example of this was the suggestion in his *Metro* dissent that the majority was using the same justification as Apartheid South Africa.<sup>265</sup>

#### D. *The Similarities and Differences in Majoritizing Styles*

The largest similarity in their majoritizing styles is that they both placed great emphasis on precedent. Moreover, they each presented their positions as the logical implication or product of the Court's earlier pronouncements on the given issue. When an element of precedent was fundamentally incongruent with their proposal, both generally tried to make a "surgical strike" against that element that tried to be no broader than necessary. The reasons for this could be several of many, such as an institutionalism that always commanded some respect for what had come before, their own "conservative" sense of themselves, and the strategic need to leave jurisprudential doors open and win votes. It is also possible that each realized that they were, given their position, open to a charge of "legislating" from the bench, and thus sought to "show their work."

That is about the extent of the similarities. Justice O'Connor is the consummate tortoise racing against the hare. After she has clearly laid out where she wants to go, she slowly and plottingly builds the majority necessary to get there, careful not to lose the ground she has already gained. Justice Kennedy on the other hand is fond of grand pronouncements. This stems in part from his romantic notion of the judge.<sup>266</sup> Whereas Justice O'Connor preferred to stay close to the facts, Justice Kennedy often uses the facts of a case as a mere segue towards a broad discussion. Most fundamentally, Justice O'Connor seems to have sought to build majorities consisting of members of two differing blocs she found herself between, using consensus, negotiation, and incrementalism. Justice Kennedy, on the

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<sup>263</sup> *Id.*

<sup>264</sup> TOOBIN, *supra* note 1, at 135.

<sup>265</sup> *Metro Broad. Inc. v. F.C.C.*, 497 U.S. 547, 635 (1990) (Kennedy, J., dissenting).

<sup>266</sup> TOOBIN, *supra* note 1, at 52.

other hand, appears to view the two blocs as vying suitors to whom he owes no placation and who must convince him that they can offer more room in their bloc for his unique jurisprudence.

## IX. CONCLUSION: O'CONNOR'S LEGACY

As a majoritizer, Justice O'Connor has no modern competitors. Writing a majority opinion, even a simple one, is often a difficult task.<sup>267</sup> Writing one that implements one's jurisprudential approach to a divisive issue of the day is an incredible feat that few justices rarely accomplish in a tenure. That Justice O'Connor accomplished this several times on some of the most critical and highly charged issues of our time is historical.<sup>268</sup> Her jurisprudential framework is controlling in abortion. Her Tenth Amendment based analysis of Commerce Clause issues is an ascending school of thought, both on the Court and in the Academy. Her jurisprudence on racial equal protection has helped foster an America more integrated than ever and one in which citizens are viewed as individuals first.

The Justice was a steady hand who helped navigate the Court through a period of realignments. She was able to do so in large part because of the way she was able to present her principles and jurisprudence to her colleagues. By being patient and principled, but not dogmatic, and by being a coalition builder rather than a holdout, she was able to shape the law as much as any of the great justices that came before her.

Justice O'Connor began her tenure in a time when the nation was at an inflection point on several fronts. She was, herself, an embodiment of some of those changes. At a time when the questions before the Court seemed to implicate an increasingly binary choice between two mutually exclusive visions of America, Justice O'Connor refused to be reduced to being a member of one bloc or another.

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<sup>267</sup> BISKUPIC, *supra* note 34, at 113.

<sup>268</sup> TOOBIN, *supra* note 1, at 7.