

January 01, 1999

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### Recommended Citation

Brown, Judith Olans; Parmet, Wendy E.; and O'Connell, Mary E., "The rugged feminism of Sandra Day O'Connor" (1999). *School of Law Faculty Publications*. Paper 43. <http://hdl.handle.net/2047/d20001237>

## THE RUGGED FEMINISM OF SANDRA DAY O'CONNOR

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“Is she or isn't she?” Since Sandra Day O'Connor's nomination to the Supreme Court in 1981, scholars have been unable to resist debating the existence and/or extent of her feminist credentials.<sup>1</sup> Although lively at times, ultimately this discussion is sterile. Focusing on whether Justice O'Connor is a “true” feminist inevitably overemphasizes a particular delineation of feminist orthodoxy<sup>2</sup> and neglects the nature of her contributions to issues that matter to women.<sup>3</sup> In our view the more significant question is the one less often asked: What does Sandra Day O'Connor do when issues that affect the lives of women come before her? Does her gender inform her approach to what Professor

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1. See, e.g., Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?* 78 JUDICATURE 232 (1995); Susan Behuniak-Long, *Justice Sandra Day O'Connor and the Power of Maternal Legal Thinking*, 54 REV. POL. 417 (1992); Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134 (1993); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995); Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L. REP. 129 (1991); Margaret A. Miller, Note, *Justice Sandra Day O'Connor: Token or Triumph From a Feminist Perspective*, 15 GOLDEN GATE U. L. REV. 493 (1985); Barbara Palmer, Note, *Feminist or Foe? Justice Sandra Day O'Connor, Title VII Sex-Discrimination, and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159 (1991). For O'Connor's own views on the subject, see Sandra Day O'Connor, *Portia's Progress*, in *Centennial Celebration: A Tradition of Women in the Law, Madison Lecture*, 66 N.Y.U. L. REV. 1546 (1991).

2. There are many “feminisms” or schools of feminist thought including: radical feminism, cultural feminism, Marxist feminism, liberal feminism, lesbian feminism, and difference feminism. See JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* (1992); *MODERN FEMINISMS: POLITICAL, LITERARY, CULTURAL* (Carolyn G. Heilbrun & Nancy K. Miller eds., 1992).

3. In saying this, we do not claim that any one issue matters to all women or that all women agree about these issues, or indeed, that all women identify themselves as feminists. See THE ESSENTIAL DIFFERENCE (Naomi Schor & Elizabeth Weed eds., 1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

Katharine Bartlett calls “the Woman Question?”<sup>4</sup>

In this Article we explore Justice O’Connor’s response to the woman question by looking at her opinions on matters traditionally perceived to be of interest to women or matters historically recognized as women’s issues. This leads us to consider cases about women as physical and sexual beings and cases about women as nurturers and caretakers. In addition, we look at cases about individuals who, like women, have been traditionally perceived as dependent, vulnerable, and economically insecure. We do not claim that these are the only issues that matter to women. Clearly, the range of issues that matter to women is as broad as the Court’s docket.<sup>5</sup>

### I. A BRIEF BIOGRAPHY

We believe that Justice O’Connor’s own life experiences profoundly color her jurisprudence.<sup>6</sup> The story of Justice O’Connor graduating third in her class at Stanford Law School but unable to obtain a position at a law firm other than as a legal secretary is well known.<sup>7</sup> Less often recounted are her other early experiences. Justice O’Connor was simultaneously a victim of gender discrimination and an extraordinarily sheltered and privileged woman. Brilliant, hard-working, and clearly ambitious, she overcame her initial (and probably never-ending) encounters with workplace discrimination. Her rise was meteoric.

Born in 1930, Justice O’Connor grew up during the Great Depression on a 260 square-mile cattle ranch that straddled the Arizona-New Mexico border.<sup>8</sup> Her life on the ranch was not the typical childhood of a young girl of that era: She drove tractors, branded cattle, and fixed fences, activities that helped to

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4. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990). The first use of the term “woman question” may have been Simone De Beauvoir’s in *The Second Sex* xxvi (1957).

5. Issues such as sex discrimination, reproductive rights, sexual harassment, affirmative action and domestic violence are traditionally considered of particular concern to women. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* (2d ed. 1996); KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (2d ed. 1998).

6. As Justice Holmes reminded us, “The life of the Law has not been logic: it has been experience.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

7. See, e.g., NANCY MAVEETY, *JUSTICE SANDRA DAY O’CONNOR: STRATEGIST ON THE SUPREME COURT* 13 (1996); HAROLD WOODS & GERALDINE WOODS, *EQUAL JUSTICE: A BIOGRAPHY OF SANDRA DAY O’CONNOR* 19-20 (1985); O’Connor, *supra* note 1, at 1549.

8. See Ed Magnuson, *The Brethren’s First Sister*, TIME, July 20, 1981, at 8. The size of the ranch varies with the source: WOODS & WOODS, *supra* note 7, at 8 (242 square miles); Carl Cannon, *Sandra Day O’Connor: 1981 The First Woman Justice on the U.S. Supreme Court*, WORKING WOMAN, Nov. 21, 1996, at 56 (300 square miles); Peter William Huber, *Sandra Day O’Connor*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1995*, at 506-10 (Clare Cushman ed., 1995) (309 square miles). Three hundred square miles is approximately one-quarter the size of Rhode Island.

instill a belief that individual action can solve almost any problem.<sup>9</sup> Perhaps less apparent to O'Connor as a young girl was the fact that New Deal programs were critical to saving the ranch from the economic devastation of the Depression.<sup>10</sup>

Because there was no school near the ranch, Justice O'Connor lived with her grandmother in El Paso during the school year to attend a private school.<sup>11</sup> She was an exceptional student, graduating from high school at the age of sixteen.<sup>12</sup> She went on to Stanford University and then to Stanford Law School, where she befriended the young William Rehnquist.<sup>13</sup> While at Stanford she also met her future husband, John Jay O'Connor III.<sup>14</sup>

Despite her distinguished law school career, O'Connor did not receive a single offer to associate with a law firm after graduation. Her first job was as deputy attorney for San Mateo County, California.<sup>15</sup> One year later, she followed her husband when he was drafted and posted to West Germany. There she worked as a civilian attorney for the United States Army.<sup>16</sup>

In 1957, after returning to the United States, Justice O'Connor gave birth to her first child.<sup>17</sup> As a new mother, she opened a law practice in a suburban shopping center.<sup>18</sup> She left the practice two years later when her second child

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9. See Joan S. Marie, *Her Honor: The Rancher's Daughter*, SATURDAY EVENING POST, Sept. 1985, at 42. O'Connor's sister and brother, Ann and Alan, were born in 1938 and 1939. See Huber, *supra* note 8, at 506. O'Connor thus spent most of her first eight years as an only child on a remote ranch. Her early childhood friends were her parents, ranch hands, a bobcat, and a few javelina hogs. By the age of eight, Justice O'Connor was mending fences, riding with the cowboys, firing her own .22 rifle, and driving a truck. See WOODS & WOODS, *supra* note 7, at 10-11; Huber, *supra* note 8, at 507.

10. See WOODS & WOODS, *supra* note 7, at 8. For a compelling description of the impact of rural electrification on the lives of women, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 502-15 (1982).

11. See WOODS & WOODS, *supra* note 7, at 13; Marie, *supra* note 9, at 43. Except for summer vacations, O'Connor lived with her grandmother from kindergarten through high school, with a one-year interruption at age thirteen, when homesickness drew her back to Arizona. See Huber, *supra* note 8, at 507; Marie, *supra* note 9, at 43.

12. See MAVEETY, *supra* note 7, at 13; WOODS & WOODS, *supra* note 7, at 16; Magnuson, *supra* note 8, at 12.

13. See Cannon, *supra* note 8, at 56; Beverly B. Cook, *Justice Sandra Day O'Connor: Transition to a Republican Court Agenda*, in *THE BURGER COURT* 238 (Charles M. Lamb & Stephen C. Halpern eds., 1991); Magnuson, *supra* note 8, at 12.

14. See MAVEETY, *supra* note 7, at 13; WOODS & WOODS, *supra* note 7, at 17.

15. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 20; Magnuson, *supra* note 8, at 12.

16. See WOODS & WOODS, *supra* note 7, at 21; Magnuson, *supra* note 8, at 12; Marie, *supra* note 9, at 44.

17. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 22; Magnuson, *supra* note 8, at 12.

18. See WOODS & WOODS, *supra* note 7, at 22. Sources variously describe her office as a "neighborhood law practice," MAVEETY, *supra* note 7, at 14; "her own law firm in a Phoenix

was born.<sup>19</sup> Her third and last child was born in 1962.<sup>20</sup> According to O'Connor:

I found that there was more work than I could do—to go to the office every day and take care of the children. I had a lovely woman who babysat for me with my first child, but she moved to California . . . . It made it impossible at that time to continue my law practice. I was out of the workforce as a regular paid employee for about five years, although I did a lot of volunteer work and other activities.<sup>21</sup>

Indeed, to characterize O'Connor as a “stay-at-home mom,” would be quite misleading. During the five years when she did not practice law, she was extremely active in the Arizona Republican Party and in Barry Goldwater's 1964 presidential campaign.<sup>22</sup>

In 1965, O'Connor was appointed an Assistant Attorney General for the State of Arizona.<sup>23</sup> Four years later she was appointed to fill a vacant state senate seat, to which she was twice re-elected.<sup>24</sup> After co-chairing Richard Nixon's Arizona re-election campaign, she became the first woman in the country to be elected majority leader of a state senate.<sup>25</sup>

In 1974, running on a “law and order” platform, O'Connor was elected a Maricopa County Superior Court trial judge. Five years later, she was appointed to the Arizona Court of Appeals, where she served for less than two years before being nominated by President Reagan to the United States Supreme Court.<sup>26</sup>

suburb,” Magnuson, *supra* note 8, at 12; and a “small-town type of practice,” Marie, *supra* note 9, at 44.

19. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 23.

20. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 23.

21. WOODS & WOODS, *supra* note 7, at 23.

22. See MAVEETY, *supra* note 7, at 14; Andrew Ferguson, *Trust Us*, WASHINGTONIAN, Feb. 1994. “Two things were clear to me from the onset,” O'Connor has said about that period: [O]ne is, I wanted a family, and the second was that I wanted to work—and I love to work . . . . I was very fortunate in my life to have some opportunities to do work which was particularly interesting. I might not have felt the same way if the work hadn't been so interesting, but for me it always was.

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. . . I think our children grew up expecting me to be working. Because I wasn't always available to them, they had to learn to manage some things on their own and to be a bit more independent than they might otherwise have been. I think in the long run that's an advantage.

Marie, *supra* note 9, at 45.

23. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 24-25; Cannon, *supra* note 8, at 56; Magnuson, *supra* note 8, at 17.

24. See MAVEETY, *supra* note 7, at 15; WOODS & WOODS, *supra* note 7, at 34-35; Cannon, *supra* note 8, at 56; Cook, *supra* note 13, at 239.

25. See WOODS & WOODS, *supra* note 7, at 40; Cannon, *supra* note 8, at 56.

26. See MAVEETY, *supra* note 7, at 15; Cook, *supra* note 13, at 239; Marie, *supra* note 9, at 46. As a trial judge, O'Connor had a reputation for toughness. She prepared thoroughly and

Seldom (at least in its modern history) has anyone risen so rapidly to the nation's highest court.

## II. O'CONNOR'S OPINIONS: AN INTRODUCTION

Since joining the Court, Justice O'Connor has become a prolific opinion writer. Her interests are wide-ranging, including topics as diverse as federalism,<sup>27</sup> church-state relations,<sup>28</sup> and affirmative action.<sup>29</sup> In this Article, we make no attempt to assess Justice O'Connor's contributions to all of these

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expected others to do the same. See *MAVEETY*, *supra* note 7, at 15; *WOODS & WOODS*, *supra* note 7, at 48-49; *Magnuson*, *supra* note 8, at 17. At least twice, colleagues recall, she advised defendants to obtain new counsel because their lawyers were unprepared. See *Magnuson*, *supra* note 8, at 17.

One anecdote from O'Connor's years as a trial judge seems particularly telling. A Scottsdale mother of two young children (ages three weeks and 16 months) pleaded guilty to passing bad checks totaling \$3500. She begged Judge O'Connor for mercy, claiming the children would become wards of the state if she went to prison because their father had abandoned the family. O'Connor sentenced the well-educated real estate agent to five to ten years in prison, saying "[s]omeone with all of your advantages should have known better." Returning to her chambers, Justice O'Connor burst into tears. See *WOODS & WOODS*; *supra* note 7, at 45-46; *Magnuson*, *supra* note 8, at 17-18.

Among those who brought O'Connor to President Reagan's attention were Justice William Rehnquist and Senator Barry Goldwater. See *WOODS & WOODS*, *supra* note 7, at 53; *Ferguson*, *supra* note 22; *Magnuson*, *supra* note 8, at 9-11. Before her nomination, Attorney General William French Smith, a former partner at the firm that had offered O'Connor a secretarial position 29 years earlier (Gibson, Dunn & Crutcher), sent his chief counselor, Kenneth Starr, to interview O'Connor. Reporting back, Starr cited her experience as a legislator, state government attorney and judge, noting that these experiences made her aware of the powers and limitations of each branch of government. She was seen as tough on law and order and reluctant to rule against police on technicalities. Smith liked her judicial inclination to defer to the legislative and executive branches. See *Magnuson*, *supra* note 8, at 10-12.

27. O'Connor's opinions have been notable for their emphasis on states' rights. See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 791-795 (1982) (O'Connor, J., concurring in part and dissenting in part).

28. O'Connor's Free-Exercise Clause jurisprudence is characterized by a careful balancing of state interests and individual religious claims. See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990); Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247 (1997). Although O'Connor may be more sensitive to religious exemption claims than certain other Justices, one could argue that her sensitivity does not extend to groups to which she does not belong. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

29. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See also *infra* notes 162-70 and accompanying text.

fields. Our goal is more limited: To consider that body of Justice O'Connor's work that addresses issues of particular importance to the lives of women qua women. We do not pretend to be exhaustive; our approach is neither mathematical nor statistical.<sup>30</sup> Rather, we review some of the Justice's key writings in the areas that we have identified to consider her approach to those subjects, to evaluate her analysis, and to raise questions about the significance of her presence on the Court. We hope to identify Justice O'Connor's particular contributions to women's issues, and to offer our observations about the impact of a judge's individual life experiences on her jurisprudence.<sup>31</sup>

### III. O'CONNOR ON WOMEN'S SEXUALITY AND REPRODUCTIVE POTENTIAL

The so-called women's issue for which Justice O'Connor is best known is abortion. Indeed, her first decade on the Court was dominated to a large degree by the controversy surrounding *Roe v. Wade*.<sup>32</sup> Although she noted her personal distaste for abortion during her confirmation process,<sup>33</sup> O'Connor was unwilling to promise to overrule *Roe*. Once on the Court, however, O'Connor's opposition to *Roe*'s doctrinal approach became clear. For example, dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>34</sup> Justice O'Connor criticized *Roe*, arguing that it "cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests."<sup>35</sup> Nevertheless, O'Connor did not advocate abolishing all constitutional protections for abortion. Instead, she proposed a new standard: Whether regulations "throughout the entire pregnancy without reference to the particular 'stage' of pregnancy" are "unduly burdensome."<sup>36</sup>

In fashioning this new test, O'Connor focused more on the nature of

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30. Some commentators have attempted to analyze the impact of women judges statistically. See, e.g., Davis, *supra* note 1 (examining O'Connor's voting record on certain "liberal" issues, concluding that her decisions have little to do with her gender); Solimine & Wheatley, *supra* note 1.

31. Interestingly, in her own writings, O'Connor has challenged the notion that women adjudicate differently than men. She disputes gender generalizations such as "[w]omen attorneys are more concerned with public service or fostering community than with individual achievement. Women judges are more likely to emphasize context and deemphasize general principles. Women judges are more compassionate." O'Connor, *supra* note 1, at 1553. She has stated: "This 'New Feminism' is interesting, but troubling, precisely because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long." *Id.* In response to the question: "Do women judges decide cases differently by virtue of being women?," O'Connor offers the answer "a wise old man and a wise old woman reach the same conclusion." *Id.* at 1558.

32. 410 U.S. 113 (1973). See EDWARD LAZARUS, CLOSED CHAMBERS (1998).

33. See Linda Greenhouse, *Abortion Foes Assail Judge O'Connor*, N.Y. TIMES, Sept. 12, 1981, at 6.

34. 462 U.S. 416 (1983) (reaffirming the validity of *Roe v. Wade*, 410 U.S. 113 (1973)).

35. *Id.* at 454 (O'Connor, J., dissenting).

36. *Id.* at 453.

pregnancy and its medical implications than the abstract constitutional debates that had swirled around *Roe*. She chose not to examine the precise nature of substantive due process nor to consider whether judicial limitations on states' power to regulate reproductive rights were appropriate. Instead, O'Connor reflected upon the process of pregnancy and *Roe*'s trifurcation of that unitary process into artificially discrete categories.<sup>37</sup> She also suggested that new techniques in obstetrics and neonatal medicine had moved fetal viability to an earlier stage of pregnancy,<sup>38</sup> making *Roe*'s original reliance upon viability in the third trimester obsolete.<sup>39</sup>

In many ways O'Connor's opinion in *Akron* exemplified a classic "feminist" analysis.<sup>40</sup> It was highly contextual and fact driven, lacking overarching analytic abstractions.<sup>41</sup> Moreover, the facts O'Connor looked to were more physiological than social. In a sense, the opinion looked inward. Her discussion of pregnancy and fetal development drew upon the perspective of a woman who had born a child. At the same time, however, O'Connor's analysis forswore other equally contextual, equally feminist considerations.<sup>42</sup> While she considered the biology of pregnancy, she did not reflect on its economic or social implications. The impact of her proffered abandonment of the trimester doctrine on the lives of women with unwanted or dangerous pregnancies did not seem to interest her.

O'Connor's opinion in *Akron* led many to believe that she would ultimately vote to reject *Roe* completely.<sup>43</sup> However joining Justices Souter and Kennedy in *Planned Parenthood v. Casey*,<sup>44</sup> O'Connor took an approach that would characterize much of her judicial style. Rather than clearly overruling *Roe*, she worked to form a centrist consensus that eschewed both the status quo and the rescission of the right to abortion. Along with Kennedy and Souter, O'Connor drafted a "joint opinion" that claimed to preserve *Roe*'s "core" while undermining much of its detail.<sup>45</sup> This cautious reluctance to rule broadly or to

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37. *Id.* at 454.

38. *Id.* at 457-58. This is medically debatable. See LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 220-23 (1990).

39. *Akron*, 462 U.S. at 458-59.

40. Feminist analysis has frequently been described as contextual. See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Behuniak-Long, *supra* note 1; Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573 (1987). O'Connor herself has criticized the contention that an emphasis on context is a gender attribute. O'Connor, *supra* note 1, at 1553, 1557.

41. Ironically, O'Connor's approach could be characterized as post-modernist, in that it rejects universality and the validity of grand theories. See Charles Jencks, *The Post Modern Agenda*, in THE POST-MODERN READER 10-39 (Charles Jencks ed., 1992).

42. *Akron*, 462 U.S. at 466-67, 473-74.

43. See Robert J. Giuffra, Jr., *The Rehnquist Court After Five Terms*, N.Y. L.J., July 30, 1991, at 1; *Roe v. Wade: The Court Decision at the Center of the Abortion Furor*, SEATTLE TIMES, Jan. 22, 1985, at A3.

44. 505 U.S. 833 (1992).

45. *Id.* at 846.

adhere to an absolutist position caused her fellow conservative, Antonin Scalia, to castigate the joint opinion as having “no principled or coherent legal basis.”<sup>46</sup>

Perhaps equally telling are the internal inconsistencies in the joint opinion’s approach to particular parts of the Pennsylvania abortion law before the Court. For example, in reviewing the spousal consent requirement, Justice O’Connor was able to appreciate the indignity of being forced to ask one’s husband for permission to have an abortion.<sup>47</sup> Indeed, the joint opinion’s sensitivity to the possibility that women needing abortions may be threatened with physical and psychological violence is quite remarkable. After a lengthy review of the prevalence and potency of family violence, the joint opinion concluded: “We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”<sup>48</sup>

At the same time, however, the joint opinion seemed blind to other social phenomena, such as child abuse and economic hardship, that could interact with the state’s regulations to create equally insurmountable burdens upon a women’s choice. Most telling was the opinion’s consideration of Pennsylvania’s twenty-four hour waiting rule, a type of regulation previously held unconstitutional in *Akron*. Seemingly oblivious to the very principle of *stare decisis* they had celebrated in discussing the “core” of *Roe*,<sup>49</sup> on this issue the joint opinion overruled *Akron* with barely a nod to the importance of precedent.<sup>50</sup> In so doing, the joint opinion also summarily dismissed facts found by the lower court demonstrating that the twenty-four hour waiting period created an undue burden for poor women.<sup>51</sup>

The stark contrasts in the opinion’s approach to various provisions of the Pennsylvania law suggest the limits of contextualism. Some facts appear more relevant than others.<sup>52</sup> Perhaps not surprisingly, the data that resonated with the

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46. *Id.* at 987 (Scalia, J., dissenting in part and concurring in part). Despite Scalia’s criticism, the effect of the joint opinion was largely to overrule *Roe*. The changes dictated by the joint opinion’s approach critically undermined the right protected in *Roe*, which was left far more insecure and difficult to vindicate after *Casey*. See, e.g., Agota Peterfy, Comment, *Fetal Viability as a Threshold to Personhood*, 16 J. LEG. MED. 607, 613-14 (1995).

47. *Casey*, 505 U.S. at 887-99 (O’Connor, Souter & Kennedy, JJ.).

48. *Id.* at 894.

49. *Id.* at 846.

50. *Id.* at 884-85.

51. *Id.* at 885-86. See also *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1351-52 (E.D. Pa. 1990) (noting that the 24-hour waiting period required women to “make a minimum of two visits to an abortion provider,” which might include double travel time, an overnight stay, or increased costs).

52. As Professor Sylvia Law put it: The opinion’s approach “hits hardest those women who are most vulnerable, i.e. the poor, the unsophisticated, the young, and women who live in rural areas.” Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 931.

authors was that which was closest to their own experiences. While the point is unprovable, it seems quite likely that Justice O'Connor, an upper middle class, highly educated, married woman who had experienced gender discrimination, could appreciate the indignity of having to ask her husband for permission to have an abortion. She could much less readily understand the problems poor women face when they must take two days off from work to undergo the procedure.<sup>53</sup>

O'Connor's opinion in *Bray v. Alexandria Women's Health Clinic*<sup>54</sup> is less well-known, but echoes similar themes. In *Bray* the issue was whether 42 U.S.C. § 1985(3)<sup>55</sup> could be used against persons obstructing access to abortion clinics. According to the majority, the answer to that question turned in part upon whether § 1985 protected gender-based conduct.<sup>56</sup> In a complex and lengthy opinion, Justice Scalia found that it could not and denied relief.<sup>57</sup>

In a dissent joined by Justice Blackmun (with whom she had disagreed strongly in *Casey*),<sup>58</sup> Justice O'Connor concluded that women are a protected class under § 1985 and, further, that "their ability to become pregnant . . . and their ability to terminate their pregnancies [are] characteristics unique to the class of women."<sup>59</sup> Coming to the issue from the inescapable reality of pregnancy, rather than the abstractions of deductive reasoning, Justice O'Connor found it absurd to conclude that conspiracies to deny access to abortion clinics had

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53. Justice O'Connor also failed to recognize the economic consequences of pregnancy in *Wimberly v. Labor & Industrial Relations Commission*, 479 U.S. 511 (1987). *Wimberly* involved a Missouri statute that denied unemployment compensation to those who left work "voluntarily." The question before the Court was whether the state statute conflicted with a federal statute barring the denial of compensation "solely" because of pregnancy. Characterizing the Missouri law as "neutral," O'Connor held that its disqualification of pregnant applicants was only incidental. *Id.* at 517. For a full treatment of *Wimberly*, see Brown et al., *supra* note 40, at 601-04; *but see infra* note 62.

54. 506 U.S. 263 (1993).

55. 42 U.S.C. § 1985(3) (1994) (imposing liability on those who conspire to deprive a person of "having and exercising any right or privilege of a citizen of the United States").

56. *Bray*, 506 U.S. at 269-74.

57. *Id.* at 274. For lengthier analyses of *Bray*, see Lisa J. Banks, Comment, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449 (1993); Sherri Snelson Haring, Note, *Bray v. Alexandria Women's Health Clinic: "Rational Objects of Disfavor" as a New Weapon in Modern Civil Rights Litigation*, 72 N.C.L. REV. 764 (1994). See also Tracey E. Higgins, "By Reason of Their Sex:" *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1555-60 (1995) (analyzing the selective and inconsistent use of the sex of the parties).

58. Compare *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (O'Connor, Souter & Kennedy, JJ.), with *id.* at 922-44 (Blackmun, J., dissenting in part and concurring in part) (arguing that the Court should apply strict scrutiny and maintain the trimester framework and that the informed consent provision, the 24-hour waiting period, parental consent, and the reporting provisions were unconstitutional).

59. *Bray*, 506 U.S. at 350 (O'Connor, J., dissenting).

nothing to do with gender. As a woman who had been pregnant and had seen pregnancy affect her career, Justice O'Connor could understand, as Justice Scalia could not, that actions aimed at limiting abortions are aimed at women qua women.<sup>60</sup>

In order to conclude that § 1985 was applicable in *Bray*, Justice O'Connor had to see beyond gender discrimination. She had to appreciate the ways in which the activities of abortion protesters limited women's ability to exercise reproductive choices. A comparison with the joint opinion in *Casey* is revealing. In *Casey*, O'Connor did not view the state's imposition of a twenty-four hour waiting period as unduly burdensome, although that requirement might well increase women's exposure to abortion protesters.<sup>61</sup> In *Bray*, by contrast, O'Connor focused on the threatening behavior of the demonstrators. Although protesting abortion is legitimate, O'Connor likened the protesters' activities to "mob violence," unworthy of legal sanction.<sup>62</sup> She could see the particular vulnerability of any woman, no matter her class or station in life, to the vitriol of the clinic protesters. She could not, however, appreciate the burdens experienced by women in economic distress who are forced to wait and to travel long distances for their health care.<sup>63</sup>

A similar pattern emerges in other cases that deal with women's sexuality and reproductive potential. For example, in *Bragdon v. Abbott*,<sup>64</sup> Justice O'Connor dissented from the majority's conclusion that a woman who is infected with HIV has a disability within the meaning of the Americans with Disabilities Act ("ADA")<sup>65</sup> because the virus substantially limits her in the major life activity of reproduction. In a brief opinion, O'Connor questioned whether reproduction is properly considered a major life activity. "In my view," she wrote, "the act of

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60. Rejecting the argument that animus against women seeking abortions was gendered animus or animus against women as a class, Justice Scalia relied on the holding in *Geduldig v. Aiello*, 417 U.S. 484, 494-96, 497 n.20 (1974). That case held that health insurance coverage that excluded the "disability" of pregnancy was not gender based but, rather, distinguished between pregnant and non-pregnant people. Similarly, Justice Scalia argued in *Bray* "the disfavoring of abortion . . . is not ipso facto sex discrimination." *Bray*, 506 U.S. at 273.

61. *Casey*, 505 U.S. at 886-87.

62. *Bray*, 506 U.S. at 349.

63. At first glance, O'Connor's dissent in *Rust v. Sullivan*, 500 U.S. 173, 223 (1991) (O'Connor, J., dissenting), might seem to evidence an appreciation for the economic hurdles facing poor women who are dependent on government subsidized family planning clinics. At issue in *Rust* was a regulation barring the clinic staff from discussing abortion with clients. But Justice O'Connor's dissent is in fact entirely characteristic. Nowhere does she consider the plight of the clinic patients. Rather, she is troubled by the potential First Amendment problems posed by the regulation's limit on the speech of health care providers. *Id.* at 223-34. Even so, Justice O'Connor refused to join Justice Blackmun's dissent insofar as he found the regulation substantively unconstitutional. Instead, O'Connor found the regulation was not authorized by the governing statute, again avoiding the difficult constitutional issue presented. *Id.*

64. 118 S. Ct. 2196 (1998).

65. 42 U.S.C. §§ 12101-188 (1994 & Supp. I 1995 & Supp. II 1996).

giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons—'caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working'—listed in [the ADA regulations.]”<sup>66</sup> From a Justice who recognized the importance of pregnancy in *Casey* and the relationship between pregnancy and gender discrimination in *Bray*, that is a remarkable statement. Perhaps, however, it is not altogether surprising when one contrasts the different posture of the abortion cases and *Abbott*. In *Casey* and *Bray*, O'Connor considered the plight of women who seek to control their reproduction and, therefore, free themselves from what early feminists termed “biological tyranny.”<sup>67</sup> To a successful career woman like O'Connor, the importance of reproductive controls might be self-evident. In *Abbott*, by contrast, the plaintiff was not seeking control over her biology in order to function in the workplace just like any career man. Instead, she was arguing that HIV had deprived her of the experience of giving birth. This experience, according to O'Connor, was simply less “major” than the experience of going to work every day. The fact that *Abbott* had HIV, a stigmatized, sexually transmitted disease, undoubtedly made her even less sympathetic in O'Connor's eyes.<sup>68</sup> Like the poor women in *Casey*, *Abbott* faced barriers outside the realm of O'Connor's experiential understanding.

O'Connor is clearly quite engaged with issues of reproduction and sexuality. She writes often, commonly crafting separate dissents and concurrences when she is not authoring the main text. Almost uniformly, her approach is contextual and incremental. The only “doctrine” she has formulated is the highly particularistic, almost non-doctrine, of *Casey*. Unlike many of her colleagues, O'Connor avoids general rules and grand theories. Indeed, although she celebrated *stare decisis* in *Casey*, O'Connor's opinions rely more on her perception of the facts than on a parsing of prior cases.<sup>69</sup>

In many ways, O'Connor's contextualization epitomizes the feminist legal

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66. *Abbott*, 118 S. Ct. at 2217 (O'Connor, J., dissenting).

67. LYNDA BIRKE, *WOMEN, FEMINISM AND BIOLOGY: THE FEMINIST CHALLENGE* (1986); De Beauvoir, *supra* note 4, at 3-60.

68. This is not the only opinion that evidences O'Connor's moral distaste for the parties. For example, although she issued a separate opinion divorcing herself from Justice Scalia's insistence that only those interests that have historically been recognized are entitled to due process protection, Justice O'Connor did not object to Scalia's snide condemnation of the “unconventional lifestyle” of the parties in *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). Likewise, O'Connor joined the majority's highly moralistic opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Michael H.* and *Bowers*, like *Abbott*, are not about control of reproduction but rather about the right to exercise one's sexuality or reproductive potential.

69. Indeed, in *Bray*, O'Connor explicitly condemned the parsing process. Turning to the precedent being examined in *Bray* she remarked: “I would not parse *Griffin* so finely . . .” *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 347 (O'Connor, J., dissenting) (citations omitted). For a discussion of the complexities of precedent-based arguments, see JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* 153-83 (1994).

inquiry.<sup>70</sup> But the context she invariably and almost unwittingly relies upon bears a striking resemblance to the experiences and circumstances of an upper middle class, married, white woman who has managed to combine family with a brilliantly successful career.<sup>71</sup> The experiences of poor women, those who cannot bear children, or those who cannot manage “to have it all,” seem distant and largely irrelevant to her decision-making process.

#### IV. JUSTICE O’CONNOR AND CHILDREN

Sandra Day O’Connor is not only the first woman on the Court, she is the first mother. In a sense this is not surprising: Some 82.5% of U.S. women become mothers in their lifetimes.<sup>72</sup> In our culture, women are the primary nurturers and caretakers, largely responsible for children, the elderly, and the infirm.<sup>73</sup> Indeed, Justice O’Connor’s own life has reflected this pattern. After the birth of her second child, it was she, not her husband, who interrupted a legal career and spent five years out of the paid workforce.<sup>74</sup>

For most women, motherhood is a defining experience<sup>75</sup> that intensifies their perceptions of children and childhood. As the first mother on the Supreme Court, Justice O’Connor might have been expected to show a heightened interest in and concern for children and those who depend upon the care of others. To some extent, she has. But despite O’Connor’s considerable enthusiasm for cases involving children, people with disabilities, and others who are to some degree dependent, her treatment of children is complex and seemingly inconsistent. At times her response to children is warm and engaged, but at other times she has been cool and indifferent. Justice O’Connor’s opinions in *Casey*<sup>76</sup> and in *Hodgson v. Minnesota*,<sup>77</sup> two cases about minors’ access to abortion, illustrate some of the paradoxes.

The statutes challenged in *Casey* and *Hodgson* both placed additional burdens on a woman seeking an abortion if she happened to be a minor. Each statute required that the minor notify her parent(s) of her intent to undergo an

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70. See Jencks, *supra* note 41.

71. With her appointment to the Supreme Court, O’Connor became not only the first woman on the Court, but also the second wealthiest justice. See WOODS & WOODS, *supra* note 7, at 14-15.

72. See Amara Bachu, *Fertility of American Women*, in UNITED STATES BUREAU OF THE CENSUS REPORT (June 1995). In another sense, however, it is most surprising. Even today, in the upper echelons of economically successful women, a disproportionate number are childless. U.S. BUREAU OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 81, tbl. 103 (117th ed. 1997). This was more likely to be the case with women of Justice O’Connor’s generation.

73. See ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* 271-78 (1989).

74. See WOODS & WOODS, *supra* note 7, at 23.

75. See SHEILA KITZINGER, *OURSELVES AS MOTHERS: THE UNIVERSAL EXPERIENCE OF MOTHERHOOD* (1995).

76. 505 U.S. 833 (1992).

77. 497 U.S. 417, 458 (1990) (O’Connor, J., concurring in part and concurring in the judgment in part).

abortion procedure.<sup>78</sup> The Minnesota statute in *Hodgson* required that *both* parents be notified of their daughter's decision while the Pennsylvania statute challenged in *Casey* allowed the abortion to proceed if one parent consented. Justice O'Connor voted to strike down the two-parent rule of *Hodgson* while upholding the parental consent requirement of *Casey*.<sup>79</sup>

These positions seem paradoxical because, from the perspective of the young woman seeking an abortion, it is the mandatory participation of a parent—not the number of parents participating—that is the problem. But Justice O'Connor does not focus on the minor. In both cases, her gaze is firmly directed elsewhere, to an entity she sometimes fails to name but frequently defends—the family.<sup>80</sup> What is strikingly different about *Hodgson* and *Casey* is the family Justice O'Connor envisions for the young women involved.

In *Casey*, it is very clear that O'Connor views the parental consent requirement as a medium for delivering a troubled girl into the arms of her waiting family. She writes: “[M]inors will benefit from consultation with their parents and . . . children will often not realize that their parents have their best interests at heart.”<sup>81</sup> The image is of comfort, care, and support. This is in sharp contrast to the violent and dangerous family vividly depicted in O'Connor's discussion of the spousal notification provisions of the same Pennsylvania statute. There, spousal notification does not deliver a woman to loving arms. Instead, it threatens her with serious harm.<sup>82</sup>

O'Connor's inconsistent treatment of adult women and minors in *Casey* is jarring.<sup>83</sup> So too is her seemingly inconsistent treatment of the minors seeking abortions in *Casey* and *Hodgson*. But the paradox resolves itself if the underlying image of family can be surfaced. In criticizing the two-parent notification requirement of *Hodgson*, Justice O'Connor notes the unrealistic vision of family in the Minnesota statute. Only half of teenagers, she writes, reside in a household with both of their biological parents.<sup>84</sup> Most striking in *Hodgson*, although not in *Casey*, is Justice O'Connor's fear that a parent may have abused his child or may pose a threat to her safety. Indeed, O'Connor is sharply critical of the statute in *Hodgson* for its response to the possibility that the pregnant minor may have been abused.<sup>85</sup> If the minor claims she has been

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78. Both statutes also allowed the minor to argue to a judge that she was sufficiently mature to make the abortion decision without her parents' participation. See *Casey*, 505 U.S. at 844, 899 (explaining the statutory “judicial bypass” procedures); *Hodgson*, 497 U.S. at 426. This “judicial bypass” process is, however, not relevant to the present discussion.

79. Compare *Hodgson*, 497 U.S. at 424-26, with *Casey*, 505 U.S. at 899.

80. See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

81. *Casey*, 505 U.S. at 895.

82. See *id.*

83. As O'Connor says in *Casey*: “We cannot adopt a parallel assumption about adult women.” *Id.*

84. *Hodgson*, 497 U.S. at 460.

85. *Id.*

abused, the parental notification requirement in the abortion statute can be waived. However, the parent must be notified that the child has made the claim of abuse! In short, under the statute, avoiding notification will result in notification.<sup>86</sup>

In the minors' abortion cases the wishes of children and the interests of their parents arguably collide. In *Hodgson*, O'Connor saw this potential clash and protected the minor, while in *Casey*, unpersuaded that a conflict existed, O'Connor chose the family. In so doing, she echoed the position she had taken just one year prior to *Hodgson*, when she joined Justice Scalia's controversial opinion in *Michael H. v. Gerald D.*<sup>87</sup> In that case, the Court upheld a California statute that barred absolutely a man's claim that he was the father of a child born to a married woman. Neither the mother nor her husband chose to contest the child's paternity, and under California law that ended the matter. Rejecting both the man's assertion of paternity and claims made on behalf of the child, the plurality concluded that Michael H. and the child he said was his had no liberty interest in a relationship with each other.<sup>88</sup> O'Connor wrote a brief concurrence, rejecting the plurality's holding that only "interest[s] that historically [have] received . . . attention and protection"<sup>89</sup> fall within the Due Process Clause. However, she expressed no discomfort with the plurality's decision that California may protect the integrity of a marital family by completely foreclosing the claims of a putative father. For O'Connor as well as Scalia, the child's interests were identical to those of her mother and her mother's husband.<sup>90</sup>

But focus on family cannot and does not explain all of Justice O'Connor's rulings in cases involving children. The abortion cases and *Michael H.* present scenarios where it is either acknowledged or arguable that child and parent have competing interests. Many other cases, however, do not place parent and child in opposition. Although the Justice herself has eschewed any search for a Grand Unified Theory,<sup>91</sup> a recurring theme illuminates O'Connor's view of children: autonomy. Indeed, this is a concept central to all of O'Connor's jurisprudence. Both Justice O'Connor's strongly pro-child opinion in *Vernonia School District v. Acton*<sup>92</sup> and her seeming callousness in upholding the Immigration and

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86. For a further discussion of abused children and their duty to give notice of their abuse, see *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). See also *infra* notes 115-22 and accompanying text.

87. 491 U.S. 110 (1989). See also Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 624-42 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-98 (1990).

88. *Michael H.*, 491 U.S. at 131.

89. *Id.* at 127 n.6 (quoting *id.* at 139 (Brennan, J., dissenting)).

90. The dissent in *Michael H.* clearly felt that the child's interests were aligned with those of the putative father rather than with those of the mother's husband. *Id.* at 143-47 (Brennan, J., dissenting).

91. See *Board of Educ. v. Grumet*, 512 U.S. 687, 718 (1994).

92. 515 U.S. 646 (1995).

Naturalization Service's right to detain children in *Reno v. Flores*<sup>93</sup> demonstrate that it is children's autonomy, not their humanity, that sparks Justice O'Connor's interest.

*Vernonia* challenged a school district policy that required drug testing as a condition of participation in interscholastic sports. Students who wished to play a sport had to consent to drug testing and obtain the written consent of their parents as well.<sup>94</sup> Each athlete was tested at the beginning of the season for her sport. In addition, each week, all the athletes' names were placed in a "pool." Ten percent of the names in the pool were drawn at random and those students were required to undergo additional testing.<sup>95</sup> The Court upheld the school district's rule, but Justice O'Connor authored a scathing dissent.

Writing for the majority, Justice Scalia described the students in the Vernonia public schools as having been "committed to the temporary custody of the State as schoolmaster."<sup>96</sup> He noted that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will."<sup>97</sup>

Justice O'Connor disagreed with a passion and vehemence missing from many of her opinions. She began by noting that among the eighteen million students in American public schools are millions of schoolboy and schoolgirl athletes, "an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school."<sup>98</sup> Yet, as a result of the majority's opinion, these youngsters "are open to an intrusive bodily search."<sup>99</sup> O'Connor's identification with and empathy for the "good kids" who are being subjected to embarrassing urine screenings as a condition of playing a school sport is palpable. She viewed the petitioner's demand as a simple request to be treated with dignity. Toward the end of her dissent, O'Connor shifts her focus from the Fourth Amendment's prohibition of suspicionless searches to the rights of schoolchildren. Schools, she admits, "have substantial constitutional leeway in carrying out their traditional mission of responding to particularized wrongdoing."<sup>100</sup> However, "blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise."<sup>101</sup>

O'Connor's opinion is striking both for its animation and for her intense affinity with the students who, in her view, were subjected to humiliation and

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93. 507 U.S. 292 (1993).

94. See *Vernonia*, 515 U.S. at 650.

95. See *id.*

96. *Id.* at 654.

97. *Id.*

98. *Id.* at 667 (O'Connor, J., dissenting).

99. *Id.*

100. *Id.* at 682 (citation omitted).

101. *Id.*

intrusion solely because they are students. O'Connor ignored the fact that persuaded her sister on the bench, Justice Ginsburg, to vote with the majority: Drug testing applies only to those students who voluntarily opt to participate in interscholastic athletics. Instead, O'Connor viewed the case as an assault on the integrity of young people, and she defended their autonomy quite fiercely.

*Vernonia* is in sharp contrast to the position Justice O'Connor took just two years earlier in another case involving a large group of young people—juveniles detained by the Immigration and Naturalization Service (“INS”) pending deportation hearings. The issue in *Reno v. Flores*<sup>102</sup> was whether the INS could hold children suspected of being in the United States illegally (but not suspected of a crime) in a detention facility when there was a responsible adult willing to assume the child’s care pending the deportation hearing. As in *Vernonia*, the majority opinion in *Flores* was written by Justice Scalia. In his hands, the issue took on a rather odd cast, becoming “the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.”<sup>103</sup> Dissenting, Justice Stevens offered a somewhat different definition: “The right at stake in this case is not the right of detained juveniles to be released to one particular custodian rather than another, but the right not to be detained in the first place.”<sup>104</sup>

Staking out a position in the middle, Justice O'Connor rejected Scalia’s assertion that “‘juveniles, unlike adults, are always in some form of custody.’”<sup>105</sup> Instead, she argued that “[c]hildren, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child’s constitutional ‘[f]reedom from bodily restraint’ is no narrower than an adult’s. . . . [W]e consistently have rejected the assertion that ‘a child, unlike an adult, has a right not to liberty but to custody.’”<sup>106</sup>

Justice O'Connor admitted that children have far less autonomy in their personal decision-making than adults. However, this did not push her into

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102. 507 U.S. 292 (1993).

103. *Id.* at 302.

104. *Id.* at 341 (Stevens, J., dissenting). Justice Scalia’s elaborate and narrow definition of the right asserted is reminiscent of his reasoning in *Michael H.*, where he defined the plaintiff’s claim as the right “of an adulterous natural father” to a relationship with his child. *Michael H. v. Gerald D.*, 491 U.S. 110, 126-27 & n.6, 130 n.7 (1989).

105. *Flores*, 507 U.S. at 302 (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)). Scalia went on to assert that because children are always in custody, “where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.” *Id.* at 303. He made it quite clear that the conditions of the child’s confinement need only meet “[m]inimum standards.” *Id.* at 304. “[T]o give one or another of the child’s additional interests priority over other concerns that compete for public funds and administrative attention is a policy judgment rather than a constitutional imperative.” *Id.* at 305.

106. *Id.* at 316 (O’Connor, J., concurring) (quoting *In re Gault*, 387 U.S. 1, 17 (1967)).

Justice Scalia's camp. It does not mean that for children any form of custody, so long as it meets "minimum standards,"<sup>107</sup> is constitutionally permissible. Instead, as Justice O'Connor explained: "[I]n our society, children normally grow up in families, not in governmental institutions."<sup>108</sup> It is the *institutionalization*, not the custody, to which O'Connor objects.<sup>109</sup>

However, having restored the children in *Flores* to their full status, O'Connor proceeded to concur in their continued detention. Unlike the dissenters, who focused on the special needs and vulnerabilities of children,<sup>110</sup> O'Connor treated the children in *Flores* as she did those in *Vernonia*, i.e., like similarly situated adults. Unfortunately for the children in *Flores*, this meant treatment as aliens—a class whose rights have traditionally received only limited constitutional protection.<sup>111</sup>

In his seminal work *Centuries of Childhood*, Philippe Ariès, the father of family history, argued that one does not need official records to piece together a history of childhood.<sup>112</sup> Perceptions of children are all around us. One of Ariès's favorite sources was painting, because children were frequently the subjects. It was Ariès who first commented on the Medieval tradition of painting children as miniature adults.<sup>113</sup> How could it be, he asked, that the greatest painters in human history painted children with adult proportions? Obviously, the great painters of the Medieval period did not lack skill in depicting the human form. What they lacked was a vision of childhood. Those artists merely documented a culture in which there was no sense that a child was anything other than a small adult. Notions of a timetable for human development, particularly psychological development, are creatures of a much later era.<sup>114</sup>

It is perhaps simplistic, but also revealing to suggest that like a Medieval

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107. *Id.* at 305.

108. *Id.* at 318 (O'Connor, J., concurring).

109. *Id.*

110. Interestingly, the dissent's analogies were not to other INS rules, but to other rules affecting children, most particularly the Justice Department's "Standards for the Administration of Juvenile Justice." These standards require that strenuous efforts be made to locate an appropriate adult to take custody of a juvenile offender so that he or she may be released from detention. *See id.* at 332 nn.19-20 (Stevens, Blackmun, JJ., dissenting).

111. *See, e.g.,* *Sugarman v. Dougall*, 413 U.S. 634 (1973) (suggesting alienage is a suspect class); *compare Plyler v. Doe*, 457 U.S. 202 (1982) (applying somewhat heightened scrutiny for undocumented alien children denied access to public schools).

112. PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 33-34 (1962).

113. *Id.*

114. Developmental psychology, so much a part of the legal treatment of children today, would not become a distinct field until Piaget's work was published in the early Twentieth Century. JEAN PIAGET, *THE CHILD'S CONCEPTION OF PHYSICAL CAUSALITY* (Margorie Gabain trans., 1966). *See also* *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1438-39 n.12 (5th Cir. 1983) (Politz, C.J., dissenting); *State v. Wright*, 775 P.2d 1224, 1227 (Idaho 1989); *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 641 N.E.2d 1228, 1233-34 (Ill. App. Ct. 1994).

painter, O'Connor paints children as miniature adults. Unlike some of her colleagues, she refuses to disenfranchise, dismiss, or burden children simply because they are children. She sees them as worthy and deserving—but not as *especially* deserving. It is their autonomy she champions, not their vulnerability. So, O'Connor insists that children incarcerated by the INS be treated no worse than adults incarcerated by the INS, but she will not join the *Flores* dissent to argue that because they are children, the petitioners in *Flores* in fact need different treatment. O'Connor would not allow schools to engage in blanket drug testing of athletes, but she would also not exempt children from the death penalty.<sup>115</sup>

O'Connor's recent disquisition on sexual harassment in the schools is the latest example of her complex view of children and the law. *Gebser v. Lago Vista Independent School District*<sup>116</sup> considered the liability of a school district for a teacher's sexual harassment of a student. The tone of O'Connor's opinion bespeaks sympathy, not disdain. However, while recognizing that a school may sometimes be liable for a teacher's misconduct, O'Connor was unwilling to read Title IX<sup>117</sup> as imposing respondeat superior liability.<sup>118</sup> Instead, she held that a Title IX plaintiff must demonstrate that a school had actual knowledge of misconduct and responded with deliberate indifference.<sup>119</sup> Justice O'Connor seemed concerned that Ms. Gebser had not followed the school's established procedures for vindicating her rights. Had Ms. Gebser been as self-sufficient and competent as the young Sandra Day undoubtedly was, she could have reported her teacher's conduct up the chain of command.<sup>120</sup> Then, if those in authority knew of the teacher's conduct and failed to act, Ms. Gebser might have had a Title IX remedy.<sup>121</sup> But Ms. Gebser did not report the teacher and Justice

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115. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J. concurring). In *Thompson*, O'Connor, in characteristic fashion, attempted a compromise, stating that age is an appropriate mitigating factor in capital sentencing. See also *Johnson v. Texas*, 509 U.S. 350, 376 (1993) (O'Connor, J., dissenting) ("The vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime.").

116. 118 S. Ct. 1989 (1998).

117. 20 U.S.C. §§ 1681-88 (1994 & Supp. I 1995 & Supp. II 1996).

118. *Gebser*, 118 S. Ct. at 1999.

119. *Id.* Cf. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) (where O'Connor joined the majority in instructing lower courts on how to proceed in assessing an employer's vicarious liability for sexual harassment by employees).

120. That an eighth grader may not have felt sufficiently empowered to notify authorities does not seem to have entered into the Justice's thinking. Nor does she focus on the portion of the record where Ms. Gebser states that her teacher was "the person in Lago administration . . . who I most trusted. . . ." *Gebser*, 118 S. Ct. at 2004 n.10 (citation omitted). To Ms. Gebser, her teacher was the administration. He was the chain of command to whom her grievance might be reported. O'Connor fails to consider that an adolescent facing seduction and rape by a teacher might see the world in a very different way than an adult.

121. See *id.* at 1997.

O'Connor concluded that her hands were tied until Congress explicitly created a remedy.<sup>122</sup>

#### V. O'CONNOR ON DEATH AND DYING

In the 1980s Justice O'Connor had a very personal reason to contemplate mortality. Between 1984 and 1989 she buried both of her parents.<sup>123</sup> In 1988, she was diagnosed with breast cancer and treated with a mastectomy and chemotherapy.<sup>124</sup> Throughout this period, she displayed a remarkable, but for her characteristic, stoicism, scheduling her chemotherapy sessions on Fridays so that the unpleasant side-effects would not keep her from work.<sup>125</sup>

Just two years after these experiences, the Supreme Court decided its first case addressing the rights of the dying. In *Cruzan v. Director, Missouri Department of Health*,<sup>126</sup> the Supreme Court reviewed the constitutionality of Missouri's requirement of clear and convincing evidence of an incompetent individual's wish to terminate life support. Justice Rehnquist wrote the majority opinion, holding that the Constitution did not impose any particular standard of proof upon a state in determining an incompetent individual's prior intentions.<sup>127</sup> In a separate concurrence, O'Connor asserted that the Constitution allows competent individuals to have their wishes respected if they become incompetent.<sup>128</sup> In characteristic fashion, O'Connor focused less on the abstract constitutional issues, like the nature and source of a constitutional right to die, and more on the practical implications of end-of-life decision-making. As in the abortion cases, O'Connor emphasized the biological and medical realities of the

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122. O'Connor's choice of language suggests that she believes the sexual "relationship" was not altogether unwelcome. *Id.* at 1993. "Gebser did not report the relationship to school officials, testifying that while she realized [the teacher's] conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher." *Id.* O'Connor seems to miss the point that sexual contact between adults and children is criminalized not to prevent forcible contact, which is already criminal, but to outlaw and punish just this sort of seduction of a lonely and confused adolescent.

123. O'Connor's father, Henry "Harry" Alfred Day died at the age of 86 on April 9, 1984. *See* John McPeck, *Deaths*, SAN DIEGO UNION-TRIB., April 12, 1984 at A2. O'Connor's mother, Ada Mae Day, died on March 3, 1989 at the age of 85. *See* *Ada M. Day, Mother of Justice*, ARIZ. REPUBLIC, Mar. 5, 1989.

124. Released from the hospital five days after the surgery, *see* *Justice O'Connor Goes Home*, N.Y. TIMES, Oct. 27, 1988, at A16, O'Connor described the chemotherapy as "lousy." *Justice O'Connor Says Work, Resiliency Aided Cancer Fight*, ST. LOUIS POST-DISPATCH, Nov. 5, 1994, at 2A.

125. *See* Cannon, *supra* note 8, at 56. As Justice Harry Blackmun observed, "Sandra's tough." *Id.*

126. 497 U.S. 261 (1990).

127. *Id.* at 286.

128. *Id.* at 287-92 (O'Connor, J., concurring).

situation before her.<sup>129</sup>

Much of O'Connor's discussion in *Cruzan* was about how individuals can and ought to plan their own ends. O'Connor commended the "practical wisdom" of state laws that enabled individuals to appoint surrogate medical decision-makers.<sup>130</sup> Her ideal is the individual who, fearing a painful and undignified death, has the foresight and competence to execute the appropriate legal documents. While states can function as a "laboratory,"<sup>131</sup> experimenting with various ways to regulate end-of-life decision-making, in O'Connor's world, the Constitution demands that the state allow the individual some leeway in planning for her end. This opinion reflects an almost *Lochnerian*<sup>132</sup> concern for autonomy, here applied to questions of mortality rather than questions of the market. Unfortunately, Nancy Cruzan lacked the legal sophistication (not to mention the funds) to have all her documents in order. She had left no written direction before her tragic accident.<sup>133</sup> Thus, O'Connor agreed with Justice Rehnquist that the state could impose hydration and feeding over the opposition of Ms. Cruzan's family.

O'Connor's support for a dignified death was further articulated in two cases that came before the Court in 1997: *Washington v. Glucksberg*<sup>134</sup> and *Vacco v. Quill*.<sup>135</sup> Each addressed the constitutionality of a state ban on physician-assisted suicide. In both cases, a unanimous Court upheld the state law.

O'Connor's concurrence in *Glucksberg* emphasized the painful realities of the dying process: "Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies

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129. *Id.* at 287-89.

130. *Id.* at 290.

131. *Id.* at 292 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). See also *supra* note 27 and accompanying text (reflecting O'Connor's state-centered federalism).

132. *Lochner v. New York*, 198 U.S. 45 (1905) (rejecting protective labor legislation as unconstitutional interference with workers' freedom of contract). Criticizing *Lochner* in his famous dissent, Justice Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. . . . The [Fourteenth] Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.

*Id.* at 75 (Holmes, J., dissenting).

133. See *Cruzan*, 497 U.S. at 268-69. Cf. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (concerning the family of a disabled child that pulled the child from the public school, appealed the school's determination that a private placement was unnecessary, and paid for private education in the interim; O'Connor held that the school board must compensate the parents for the costs of the private education). Left unanswered by O'Connor's opinion in *Carter* is the fate of a child whose family lacks the resources to pay for the private education *pendente lite*.

134. 521 U.S. 702 (1997).

135. 521 U.S. 793 (1997).

physical deterioration and a loss of control of basic bodily and mental functions.”<sup>136</sup>

Despite this poignant recognition of human suffering (especially the suffering that accompanies an individual's loss of agency), O'Connor was willing to accept the majority's decision denying a constitutional right to assisted suicide because the states did not prohibit individuals from obtaining sufficient medication to alleviate their suffering, even if the medication would hasten death.<sup>137</sup> Thus, rather than decide the abstract and absolute question of a constitutional right to assisted suicide, O'Connor narrowed the question—and thereby avoided it.<sup>138</sup>

O'Connor's opinions in these cases demonstrate her intense interest in the predicaments of those who through no fault of their own have lost the good health and fortune to which they had been accustomed. She seems less concerned, however, with the fate of those who were born with their predicament, or who can be deemed responsible for what befell them.<sup>139</sup>

Once again, O'Connor relies upon a contextualized approach, but one limited by her own life experiences. At times she is deeply empathetic, seeming to embody the feminist ideal of an ethic of care.<sup>140</sup> At other times, she is

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136. *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring).

137. *Id.* at 737-38.

138. *Id.* at 736. In his concurrence, Justice Breyer suggested that Justice O'Connor's opinion went further, holding that there *would* be a constitutional right to assisted suicide in the absence of palliative care. *Id.* at 792 (Breyer, J., concurring). Given O'Connor's reluctance to consider abstract questions, however, his interpretation seems somewhat optimistic.

139. O'Connor's harsh stance towards individuals who have strayed is perhaps most evident in her criminal opinions and in her responses to petitions for federal habeas corpus relief. As a former state prosecutor and one time “law and order” candidate, *see supra* notes 23-26 and accompanying text, it is perhaps not surprising that O'Connor has typically sided with the state against the claims of criminal defendants. Here too, however, O'Connor's cases reveal an interesting pre-occupation with process and a concern for those individuals—but only those individuals—who can navigate complex procedural mazes. Like *Hodgson*, *Gebser*, and *Cruzan*, O'Connor's habeas cases simultaneously display a reluctance to deny petitioners any access to redress and an insistence that individuals demonstrate the foresight and competence to raise all claims in the correct manner. Those petitioners who cannot master the rigors of O'Connor's habeas jurisprudence (or afford an attorney sufficiently competent to do so) seem not to merit her sympathy. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (denying habeas relief to any federal claims defaulted in state court “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law”); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (O'Connor J., plurality opinion) (refusing to review “new” claims on habeas corpus unless the rule applies to matters “implicit in the concept of ordered liberty” or places “primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”) (quoting *Mackey v. United States*, 401 U.S. 667, 692-93 (1971)); *Rose v. Lundy*, 455 U.S. 509 (1982) (holding that a court must dismiss any habeas petition containing unexhausted claims).

140. *See* GILLIGAN, *supra* note 40.

experientially myopic, unable to grasp the realities of those whose lives lie beyond her imagination.

#### VI. O'CONNOR ON THE MARKETPLACE

As we move from questions of human relationships and physical vulnerabilities to cases about economic relationships and financial dependencies, similar patterns emerge. Again, O'Connor appears unable to understand individuals who lack her own remarkable stamina<sup>141</sup> and accomplishments. Those who are poor, it seems, have only themselves to blame.

This harsh, almost merciless, attitude toward those who have not managed to prosper is starkly portrayed in O'Connor's opinion in *Kadrmas v. Dickinson Public Schools*.<sup>142</sup> In *Kadrmas*, the plaintiff challenged a \$97 per year service fee charged by the public school district to bus her daughter to school. She claimed that the statute unconstitutionally placed a greater obstacle in the path of poor families than wealthy families. O'Connor denied the claim, finding that the statute "discriminates against no suspect class and interferes with no fundamental right."<sup>143</sup> In reaching this conclusion, O'Connor did not consider the disturbing consequences of allowing the state to erect economic barriers to education. O'Connor's focus was instead on the choices available to the self-reliant family. "North Dakota," she wrote, "does not maintain a legal or a practical monopoly on the means of transporting children to school."<sup>144</sup> The fact that the so called private alternatives would cost more than ten times the school district's fee<sup>145</sup> was irrelevant to O'Connor, who noted that the family could try to "adjust" their debts.<sup>146</sup> After all, when O'Connor was growing up in a rural area during the Great Depression, her family managed (with the help of her grandmother) to send her to private school.<sup>147</sup> The *Kadrmas* family, O'Connor seems to believe, should have shown the same self-reliance.<sup>148</sup>

O'Connor's other side, her empathy for those who strive to be self-sufficient, is evident in her opinion in *Bearden v. Georgia*.<sup>149</sup> As a condition of Danny

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141. "Sandra is driven and can outwork them all," says a lawyer friend. *Sandra Day O'Connor: Up at 4 A.M. to Read Briefs, She Learns That A Woman Justice's Work is Never Done*, PEOPLE, Dec. 28, 1981, at 84.

142. 487 U.S. 450 (1988).

143. *Id.* at 465.

144. *Id.* at 460-61.

145. *See id.* at 455.

146. *Id.* at 461.

147. *See supra* note 11 and accompanying text.

148. Indeed, O'Connor is seldom sympathetic to plaintiffs seeking economic assistance from the government. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412 (1988) (finding no relief available to plaintiffs suing the Department of Health and Human Services for wrongful termination of disability benefits).

149. 461 U.S. 660 (1983).

Bearden's probation,<sup>150</sup> a Georgia court ordered him to pay a \$500 fine and \$250 in restitution. Bearden initially borrowed the money from his parents. When he lost his job, Bearden tried to find new employment, but with only a ninth grade education, he had no success. Bearden told his parole officer that his next payment would be late. When it was, his probation was revoked.<sup>151</sup>

O'Connor's opinion in *Bearden* is a particularly clear example of her attitude toward the poor:

If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. . . . But if the probationer has made *all reasonable efforts* to pay the fine or restitution, and yet cannot do so through *no fault of his own*, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.<sup>152</sup>

In O'Connor's world, those who show initiative and effort are entitled to judicial support; those who merely complain, however, are unworthy of judicial intervention.

Her respect, even admiration, for the ruggedly self-reliant individual is strikingly evident in O'Connor's famous concurrence in *Price Waterhouse v. Hopkins*.<sup>153</sup> Ann Hopkins was aggressive and one of the accounting firm's best rainmakers. But she was denied partnership because she was not conventionally feminine in her dress and demeanor. To O'Connor, this was the essence of gender discrimination. Departing from established Title VII doctrine,<sup>154</sup> O'Connor, as is her wont, approached the case from the facts, to ensure that a woman as obviously talented as Ann Hopkins (or Sandra Day O'Connor perhaps?) could obtain relief under Title VII. Justice O'Connor struggled to distinguish the case from the disparate treatment construct that would have required Hopkins to prove the firm's subjective sexist animus, an almost

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150. Bearden pleaded guilty to burglary and theft in the Georgia state courts. *See id.* at 662.

151. *See id.* at 663.

152. *Id.* at 668-69 (emphasis added) (citations and footnote omitted).

153. 490 U.S. 228 (1989) (O'Connor, J., concurring).

154. An examination of the abstruse complexities of Title VII, 42 U.S.C. § 2000 (1994 & Supp. II 1996), is beyond the scope of this Article. For our purposes, it is sufficient to note that Justice O'Connor altered the evidentiary framework by imposing a far more onerous burden than is usual on the defendant: "[O]n the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender." *Id.* at 261.

insurmountable burden given the rigidity of the relevant case law.<sup>155</sup>

O'Connor's majority opinion in *Ford Motor Company v. EEOC*<sup>156</sup> is in stark contrast. That case was brought by a group of women with blue collar, factory jobs who had previously prevailed in a Title VII sex discrimination claim against Ford. Ford sought to toll the accrual of backpay liability by offering the plaintiffs the jobs they had originally been denied, but without retroactive seniority. The women testified that they had rejected the offer because they were worried about layoffs, which were then prevalent in the automobile industry.<sup>157</sup>

In considering the nature and extent of the damages owed by Ford, O'Connor displayed an almost *Lochnerian*<sup>158</sup> disregard for the plaintiffs' job security concerns. According to O'Connor, requiring Ford to offer retroactive seniority would hurt those "innocent" male employees who had accrued seniority during the pendency of plaintiffs' litigation.<sup>159</sup> O'Connor was willing to force the successful plaintiffs to choose between a lower backpay award and job security in order to protect the seniority of non-parties to the litigation.<sup>160</sup> Interestingly, O'Connor imposed this choice in the absence of any statutory language mentioning the so-called innocent victims.<sup>161</sup>

The differences and similarities in O'Connor's approaches to *Price Waterhouse* and *Ford* are revealing. In both cases, O'Connor is willing to deviate from strict statutory text and from the dictates of prior precedent. In both cases, the reader senses that O'Connor's sensitivity to the facts drives the doctrine. Yet, her perception of the two scenarios is quite different. O'Connor, the successful career woman, can understand and empathize with Ann Hopkins and the humiliation she suffered.<sup>162</sup> But O'Connor has little appreciation of the

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155. O'Connor acknowledged that the rule she and the majority adopted was "at least a change in direction from some of our prior precedents." *Id.* at 270. For a full discussion of the case, see Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 514-516 (1996). The holding of *Price Waterhouse* was significantly modified by section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1202 (1994 & Supp. II 1996).

156. 458 U.S. 219 (1982).

157. *Id.* at 256-57 (Blackmun, J., dissenting).

158. *Lochner v. New York*, 198 U.S. 45 (1905). See also *supra* note 132 and accompanying text.

159. *Ford*, 458 U.S. at 239-41.

160. *Id.* at 237-41. See *infra* notes 162-70 and accompanying text for a discussion of other "innocent victims" whose rights trump those of plaintiffs burdened by discrimination.

161. For other examples of this type of reasoning, see Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C.L. REV. 211, 268-83 (1992) (explaining how this approach hurts plaintiffs).

162. Cf. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). That case involved a man who asked to be admitted to the state's all-female nursing program. In a majority opinion, O'Connor found for the plaintiff, stating: "[E]xcluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729. O'Connor's empathy for the hardworking, would-be professional confronting gender

economic vicissitudes faced by the women working at Ford and their concerns for job security are foreign to her. Once again, her experiential reasoning is bounded by the scope of her own life experiences.

A similar myopia is evident in Justice O'Connor's decisions on affirmative action. Since joining the Court, O'Connor has played a pivotal role in fashioning the Court's affirmative action jurisprudence, developing the doctrinal attack on race conscious remedies.<sup>163</sup> Echoing her concern for "innocent victims" in *Ford*, O'Connor's opinions in *City of Richmond v. J.A. Croson Co.*<sup>164</sup> and *Adarand Constructors, Inc. v. Peña*<sup>165</sup> have become the definitive analysis of the Court's elevation of the interests of white contractors who might be treated less favorably because of affirmative action policies over the interests of African American contractors who had been competitively disadvantaged by historically segregated markets.<sup>166</sup>

O'Connor's methodology in the affirmative action cases is entirely consistent with her approach in other areas. She shows little concern for precedent. Indeed, in *Adarand* she was willing to overrule an opinion that was barely five years old.<sup>167</sup> Moreover, although O'Connor is widely known for championing states' rights,<sup>168</sup> her concern in *Croson* that African Americans might exercise power unfairly trumped her characteristic deference to the states and showed little respect for their legislative processes.<sup>169</sup>

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stereotypes is again palpable.

163. Interestingly, while affirmative action often includes consideration of gender, neither O'Connor nor the Court has explicitly critiqued the use of gender conscious remedies to the extent that they have condemned race dependent remedies. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (noting the "anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can . . . against African Americans . . .").

164. 488 U.S. 469 (1989).

165. 515 U.S. 200 (1995).

166. For further discussion, see Michael L. Manuel, *Adarand Constructors, Inc. v. Peña: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs?*, 31 NEW ENG. L. REV. 975 (1997); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 258-63 (1997); Margaret A. Sewell, *Adarand Constructors, Inc. v. Peña: The Armageddon of Affirmative Action*, 46 DEPAUL L. REV. 611, 624-39 (1997).

167. See *Adarand*, 515 U.S. at 226-27 (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), which adopted intermediate scrutiny when federal government employs benign racial classifications).

168. See *supra* note 27 and accompanying text; see also Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493 (1993); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

169. *Croson*, 488 U.S. at 498-99. In *Croson*, O'Connor observed that "a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature." *Id.* at 496. But see *New York v. United States*, 505 U.S. 144 (1992) (expressing concern for state

O'Connor's opinions in the affirmative action cases also reflect her discomfort with absolutist positions. After ruling in *Adarand* that strict scrutiny must always be applied to race conscious remedies,<sup>170</sup> she backed away from the obvious implications of that holding, making the remarkable statement that strict scrutiny is not necessarily "fatal in fact."<sup>171</sup> One wonders, therefore, what all the fuss was about.

#### CONCLUSION

Sandra Day O'Connor's ascension to the Supreme Court fulfilled a campaign promise. While courting the female vote in 1980, Ronald Reagan pledged to appoint a woman to the Supreme Court.<sup>172</sup> When a vacancy appeared, he obliged.

The question remains: Did it make a difference? Does it matter that women now sit on the high court? Of course it does. It matters politically<sup>173</sup> and it matters symbolically. While the impact is not quantifiable, it is no doubt important to young women entering the legal profession to see the absence of a glass ceiling at the Supreme Court.

And it likely matters in other ways as well. Our review of O'Connor's opinions demonstrates that to a large degree she does ask the woman question. In her writings we see a particular concern for and engagement with issues that have historically affected women's lives. While, no doubt, some male justices have also been deeply involved with these issues,<sup>174</sup> O'Connor's absorption is likely not coincidental. As a woman who has had children and experienced discrimination in the workplace, she has particular empathy and concern for one important subset of the cases before her.

Moreover, O'Connor often does speak in a "different voice," from her male

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legislation). See also Judith Olans Brown & Phyllis Tropper Baumann, *Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell's America*, 15 VT. L. REV. 49, 63 (1990) (criticizing O'Connor's analysis in *Croson*).

170. *Adarand*, 515 U.S. at 236.

171. *Id.* at 237.

172. See DAVID M. O'BRIEN, *JUDICIAL ROULETTE* 48 (1988); Cannon, *supra* note 8.

173. Presidents have always felt it important to select Supreme Court nominees with an eye to different constituencies. In the Nineteenth Century, the constituencies were defined geographically. See O'BRIEN, *supra* note 172, at 44. More recently, diversity of religion, race and gender have become important. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 61-65 (3d ed. 1992); BARBARA A. PERRY, *A REPRESENTATIVE SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS* 11-14 (1991).

174. Clearly Justice Blackmun had a deep commitment to women's reproductive rights. See *Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part) ("Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life.").

colleagues.<sup>175</sup> A survey of her corpus shows a particular fondness for contextual analysis, experiential reasoning, and incremental decision-making. In general she avoids grand theories.<sup>176</sup> As she herself has stated, “[i]t is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases. . . . But the same constitutional principle may operate very differently in different contexts . . . . And setting forth a unitary test for a broad set of cases may sometimes do more harm than good.”<sup>177</sup> In recognizing the dominance of context, O’Connor often seems to bring the doctrine to the facts, instead of forcing the facts to fit the doctrine.

But to conclude from this that Justice O’Connor is a *feminist* is to conflate feminist methodology with feminist results.<sup>178</sup> While O’Connor’s approach to judging may incorporate feminist reasoning, those very techniques often lead her to conclusions that seem quite at odds with the feminist agenda.<sup>179</sup> Ironically, O’Connor’s reliance upon contextual and experiential reasoning is often the source of her disagreement with recognizably feminist goals.

The scholarly focus on O’Connor’s experiences as a woman has often obscured the many ways in which her experiences are more similar to than different from those of her male colleagues. Supreme Court Justices have traditionally been white, Anglo-Saxon Protestants from the middle or upper classes, with law degrees from prestigious institutions.<sup>180</sup> Justice O’Connor fits this mold perfectly.

Thus, if it is true that Justice O’Connor frequently employs experiential reasoning, it should not be surprising that the experiences that resonate with her are those typical of educated, upper middle class, white women. Her experiences may give her an acute understanding of some plaintiffs’ circumstances, but they

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175. GILLIGAN, *supra* note 40.

176. Justice O’Connor may, however, be developing a relatively consistent “grand theory” about state sovereignty. Since joining the bench, Justice O’Connor has been a firm supporter of the view that states qua states have sovereign rights. *See, e.g.,* *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). For a discussion of Justice O’Connor’s views on this subject, see Levy, *supra* note 168; Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. (1999) (forthcoming); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

177. *Board of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring).

178. *See* Bartlett, *supra* note 4, at 887.

179. *See* Behuniak-Long, *supra* note 1.

180. *See* ABRAHAM, *supra* note 173, at 61. There has been little religious diversity on the Court. It was not until 1836 that a Catholic, Justice Roger B. Taney, was appointed. *See id.* at 63. Since then, there has usually been one Catholic on the Court, although there were none between 1949 and 1956, *see id.*, and there have been two since the Reagan era. *See* O’BRIEN, *supra* note 172, at 45. The first non-Christian to be appointed was Louis D. Brandeis in 1916. *See* ABRAHAM, *supra* note 173, at 63. After Brandeis’ appointment, there was one and only one Jew on the high court until 1969, when Justice Fortas resigned. *See id.* at 64. No non-Christians were on the Court from that date until the appointment of Justice Ginsburg in 1993. No justices have been Muslim, Buddhist, Hindu, or adherents of any non-Western religion.

simultaneously isolate her from many others. O'Connor's experiential reasoning offers little foundation for understanding the lives of African Americans,<sup>181</sup> the poor,<sup>182</sup> blue collar workers,<sup>183</sup> aliens,<sup>184</sup> criminal defendants,<sup>185</sup> individuals who have made or have been forced into choices outside the boundaries of conventional morality,<sup>186</sup> and, more generally, those who seem to lack the self-sufficiency and toughness<sup>187</sup> that have characterized O'Connor's own life.

In O'Connor's jurisprudence, we see both the strengths and the limitations of choosing judges for their cultural or demographic identities. If we select a judge because of her gender, race, religion, or ethnicity, we are implicitly stating that those experiences are relevant to the process of judging. Clearly they are, and by diversifying the bench, we no doubt enrich the decision-making process. But, in legitimating reliance upon experience and identity, we risk validating the way in which a judge's experiences also serve to narrow her perceptions. O'Connor brings her femininity to the bench, but she also brings her Protestantism, her wealth, her western heritage, her careerism, and her personal courage. Her particular feminism is rugged and self-reliant. The experiences she draws upon, like the experiences any judge draws upon, are as limiting as they are enlightening.

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181. *See supra* notes 162-70 and accompanying text.

182. *See supra* notes 141-43, 150-52 and accompanying text.

183. *See supra* notes 155-60 and accompanying text.

184. *See supra* note 111 and accompanying text.

185. *See supra* note 139 and accompanying text.

186. *See supra* notes 87-90 and accompanying text.

187. *See supra* notes 115-22, 126-33, 149-52 and accompanying text.