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Selected Opinions of Justice O'Connor

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Summary

The retirement of Justice O'Connor from the Supreme Court and her replacement by a nominee of President Bush provoke numerous questions about the impact of the change in Court membership in a wide variety of issues, both constitutional and statutory. The purpose of this report is to identify significant opinions of Justice O'Connor, opinions of the Court, concurrences, and dissents, which could assist interested parties to assess possible changes in Court jurisprudence that may be anticipated over the next several years. This report does not attempt to be comprehensive but rather suggestive and selective.

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Introduction

The surprise retirement from the United States Supreme Court of Justice Sandra Day O'Connor, announced on July 1st, immediately stimulated speculation about the impact of her leaving the Court and of her replacement by a nominee of President George W. Bush, speculation that has only grown in the days since. Justice O'Connor has for years been perceived as a "swing" vote in the center of the Court and the key to the creation of majorities in many of the most contentious issues that have reach the Court. While this perception may not be wholly accurate, in large part it does reflect a picture a picture that helps enable interested parties to assemble a helpful assessment of her role and the parts of it that could be changed by a successor of a markedly different philosophy of judging and interpretation. In this report, we identify a significant number of opinions authored by Justice O'Connor, opinions of the Court, concurrences, and dissents, as well as opinions of others that she joined or dissented from, which may be useful in evaluating possible areas of future change in the Court's jurisprudence.

Justice O'Connor began serving as Associate Justice in 1981, and she has written thousands of opinions and joined many thousands more that have been written by other Justices. Obviously, our selection can cover only a portion of the opinions she has authored, a selection that we have arranged by general categories. Although we refer from time to time to her position with respect to an opinion that she did not write, we have not attempted to be comprehensive. While we are aware that numerous stories in the press, opinion pieces on Weblogs, and other assessments have discussed her opinions and the various issues covered, and I have read many of these, I have sought not to be influenced by these but to use my judgment with respect to selections. My colleagues and I who are responsible for preparing the **Constitution Annotated**, that is, **The Constitution of the United States of America - Analysis and Interpretation**, S. Doc. No.108-17 (2002 & 2004 supp.)(also available on the CRS website), have included in the latest volume the constitutional cases cited herein and a number of the statutory-interpretation decisions, with the exception of those from the 2004-2005 Term. The reader may find the listed cases discussed more fully therein.

Church - State

Lynch v. Donnelly, 465 U.S. 668 (1984). In this, her first religion case, Justice O'Connor wrote an important concurrence arguing for the displacement of the reigning but often disparaged test for determining violations of the establishment clause, the so-called *Lemon* test. The Justice advocated the use of an endorsement test, that is, the establishment clause is violated if the government intended its action either to endorse or disapprove of religion or of one religion as against another, so as to create classes of citizens on the basis of religion. This case upheld the display of a creche on public property during the Christmas season, and the 5-to-4 Court relied heavily on the inclusion

in the display of several secular items, the so-called "plastic reindeer" motif. Her test has been influential and has been used by the Court, although it has never been formally adopted as the accepted test. See also *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)(display of creche violates establishment clause, but display of menorah in context does not)(Justice O'Connor joining majority on creche and concurring as to menorah).

McCreary County v. ACLU of Kentucky, 125 S.Ct. 2722 (2005); *Van Orden v. Perry*, 125 S.Ct. 2854 (2005). In this, her final church-state case before she retired, Justice O'Connor joined in making a 5-to-4 majority to hold (*McCreary*) that the display of a Ten Commandments plaque in the hallways of two courthouses violated the establishment clause because it was evident that the county commissioners intended to endorse and foster a particular religion by the displays (the Court also recurred to the *Lemon* test) and that subsequent additions to the displays did not remove the taint. In her concurrence, she revisited her endorsement test and the reasons she thought it served society best. By a different 5-to-4 majority, without a majority opinion, the Court sustained the display of the Ten Commandments among numerous monuments and displays on the Texas statehouse grounds in Austin. Justice O'Connor dissented, simply pointing to her *McCready* concurrence.

Lee v. Weisman, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). Justice O'Connor joined the Court well after the invalidation of officially composed prayers in the public school, but she did join the majority in these two cases, without writing separately, finding an establishment clause violation in the inclusion of clergy-led prayers at public school graduation (*Lee*) and at public school football games (*Santa Fe*).

Wallace v. Jaffree, 472 U.S. 38 (1985). The Court held that a statutory provision for a moment of silence each day in the public schools of the State violated the establishment clause because the record showed that it was enacted solely to officially encourage prayer during the moment of silence. Justice O'Connor did not join the opinion of the Court, but she did submit a concurrence that agreed fully with the Court, except that she also dwelt on her endorsement test.

Elk Grove Unified School District v. Newdow, 124 S.Ct. 2301 (2004). The Court did not reach the merits of this case, in which was challenged the policy of California public schools to have the Pledge of Allegiance, including the words "under God," recited in class each day, finding that the plaintiff lacked standing. Justice O'Connor, in a concurrence, did not agree with the standing resolution, but on the merits would have found no establishment clause violation, using her endorsement test to formulate her analysis.

Agostini v. Felton, 521 U.S. 203 (1997). In the 1970s and 1980s, the Court drew a fairly hard line with respect to public funds going to religious schools and other religious institutions. In many of these cases, Justice O'Connor either dissented or entered limited concurrences. The movement in recent years has been toward judicial acceptance of many programs in which public moneys could be spent in religious settings. In this case, Justice O'Connor, writing for the majority, either limited earlier cases or in some instances overruled them. The decision approved a program under which public school

employees provided instructional services on parochial school premises to educationally deprived children.

Zelman v. Simmons-Harris, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000). These two cases substantially expand the opening for governmental provision of financial assistance to religious schools. Building on *Agostini*, the Court's opinion, in *Zelman*, finds that so long as assistance is provided to parents and so long as they freely choose where to send their children to school, the fact that a great amount of the money provided through vouchers goes to religious schools does not condemn the program under the establishment clause. Justice O'Connor joined the opinion of the Court and submitted a concurrence that explored some of the legal issues involved. *Helms* involved a federal program that channels money through state agencies to local educational agencies, which lend educational materials and equipment, such as library and media materials and computer software, to public and private elementary and secondary schools to implement secular, neutral, and nonideological programs. The plurality in upholding the program would have removed many of the restraints on the use of public moneys, but Justice O'Connor's concurrence disagreed with the plurality in several respects and reiterated that money must be given indirectly and not be diverted to religious uses.

Goldman v. Weinberger, 475 U.S. 503 (1986). The Court sustained the application of a military regulation denying the petitioner, an Orthodox Jewish officer, the opportunity to wear a yarmulke while he was in uniform and on duty. Justice O'Connor dissented, arguing that the free exercise of religion clause required the Court to scrutinize the governmental need for the policy and balance it against Goldman's interests. And she further argued that the Government should accommodate Goldman's interests. Congress by statute subsequently changed the policy, permitting wearing of the yarmulka.

Employment Division, Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990). In a case challenging the dismissal of two Native American employees because they used peyote as a sacrament in their church, the Court withdrew from the principle of a whole line of cases, though not from the results in many of them, under which government was required to exempt persons from the application of general laws that incidentally forbid or require the performance of an act that their religious beliefs require or forbid. Only laws that ban or require acts solely because of the religious beliefs of the actors violate the free exercise clause. Justice O'Connor concurred in the result, because she thought it comported with precedent, but she rejected the Court's departure from a well-settled line of precedent requiring accommodation of religious beliefs. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held unconstitutional as applied to the States the Religious Freedom Restoration Act, a law *Smith* had prompted Congress to pass. Justice O'Connor dissented, although she agreed that if RFRA were truly before them it should be held unconstitutional, but stressing she still thought *Smith* was wrongly decided and ought to be reconsidered and overruled.

Federalism

New York v. United States, 505 U.S. 144 (1992). This case is one of the earliest in which the Court asserted the federalism principle as a measure of protection of the States from the exercise of federal power. The Court sometimes has cited the Tenth Amendment as the embodiment of this principle. For the Court, Justice O'Connor found that federal imposition of obligations on the States respecting nuclear-waste disposal

constituted a "commandeering" of state resources for federal purposes. The case has been either asserted or followed a number of times, notably in the striking down of the imposition of duties on state and local officials under the Brady Handgun law. *Printz v. United States*, 521 U.S. 898 (1997). Justice O'Connor briefly concurred.

United States v. Lopez, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). In these cases, a 5-to-4 Court struck down two federal statutes, a law prohibiting the possession of a firearm within 1,000 feet of a school, and a provision of the Violence Against Women Act that created a civil cause of action by abused individuals against private parties, as exceeding Congress' commerce clause powers. The Court essentially held that with respect to intrastate acts that were noneconomic, it was impermissible to aggregate a class of individual acts in order to establish a substantial effect on interstate commerce. Justice O'Connor joined both opinions for the Court but also joined Justice Kennedy's concurrence, which to some extent limited the scope of the two decisions. These cases were a second venture in attempting to cabin Congress' commerce powers, after *National League of Cities v. Usery*, 426 U.S. 833 (1976)(holding Congress could not apply federal wage and hour laws to the States "in areas of traditional governmental functions") was overruled, 5-to-4, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Justice O'Connor submitted a strong dissent in *Garcia*, asserting her "belief that this Court will in time again assume its constitutional responsibility."

Gonzales v. Raich, 125 S.Ct. 2195 (2005). The Court drew back from its federalism limitations on Congress' commerce powers in this case, holding that Congress had validly enacted drug laws that applied to intrastate, noncommercial cultivation, exchange, possession, and use of marijuana by persons with a doctor's prescription for the drug in order to ameliorate the pain of serious diseases. Justice O'Connor filed a lengthy dissent, arguing that principles of federalism and comity for state decisions respecting the practice of medicine made the unlimited reach of federal drug laws as interpreted by the Court unacceptable.

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004). These cases reflect simultaneously an arcane area of federal judicial jurisdiction and federalism concerns that seek to articulate a delineation between national and state powers. The Eleventh Amendment, as construed by the Court, limits the jurisdiction of the federal courts (and, it seems, of the state courts) over the States and the power of Congress to use its powers to abrogate state immunity. Congress may not abrogate pursuant to its Article I powers, but it can under its power to enforce the Fourteenth Amendment. However the Court has over the last few years imposed tougher and tougher burdens on Congress' exercise of its power to abrogate. *Kimel* and *Garrett* struck down attempted abrogations under age discrimination and disability discrimination laws, but the latter two cases sustained abrogation under the Family and Medical Leave Act, on the theory that it prevented sex discrimination, and under the disability law with respect to the fundamental right of access to the courts. The significance of these cases is that Justice O'Connor was the only Justice who was in the majority in all four cases, creating problems of defining consistency, although one can reconcile them. Justice O'Connor contributed the opinion in *Kimel*, which spells out much of her construction of the opposing powers here.

South Dakota v. Dole, 483 U.S. 203 (1987). The Court upheld the validity of a restriction Congress placed on federal highway funds, that is, the States must impose and enforce a drinking age of 21. The Court applying a long line of precedents sustained this exercise of power and set out an understanding of the limitations on this power. Justice O'Connor dissented, not disagreeing much with the Court's understanding of the power to condition funds, but on the basis that fixing the drinking age is a power reserved to the States by § 2 of the Twenty-First Amendment, the provision that repealed national Prohibition.

Abortion

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). The Justice had dissented from earlier elaborations of and expansions of abortion rights, and when this case arrived at the Court it was commonly assumed that there were sufficient votes to overrule *Roe v. Wade*, 410 U.S. 113 (1973). Instead Justice O'Connor, Justice Kennedy, and Justice Souter formed a three-Justice plurality and jointly authored an opinion that purported to retain the core holding of *Roe*. Actually, in a number of respects, the opinion, joined with that of dissenters, modified in several respects *Roe's* approach to and impact on state restrictions on access to abortion. The plurality dispensed with the "fundamental rights" approach requiring strict scrutiny of state laws and policies, and instead it adopted the "undue burden" approach advocated in previous O'Connor dissents. The test is more flexible than the standard previously in effect. For instance, the Court struck down a requirement that a woman desiring an abortion notify her husband before having it, but it sustained a state law imposing a mandatory waiting period between the time the woman applies for an abortion and the time she actually receives it. See also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). But the plurality also significantly modified a jurisdictional rule that made the litigation of the validity of abortion restrictions easier. In *United States v. Salerno*, 481 U.S. 739 (1988), the Court established the principle that "facial" challenges to the constitutionality of laws could proceed only if under no conceivable set of circumstances could the law be applied in a valid way. Most such litigation must therefore be brought on an "as applied" basis, which means that each person affected by a law must bring a separate suit. Instead, the plurality provided that facial challenges could be brought to abortion restrictions under the undue burden test as long as the restriction would affect a significant minority of people.

Stenberg v. Carhart, 530 U.S. 914 (2000). The most recent abortion case to be decided by the Court held invalid a state law criminalizing a "partial-birth abortion" method under which the fetus would be partially delivered into the vaginal tract and then aborted, a method used generally but not exclusively in third-trimester abortions. Justice O'Connor joined the 5-to-4 majority and also submitted a concurrence of her own in which she reiterated the majority rationale, that the law in its definition included earlier-term abortions and that while it contained a life-endangerment exception for the woman it contained no health exception for her. (It should be noted that one of the *Casey* plurality, Justice Kennedy, was in dissent in this case, contending the standard there adopted did not condemn this law). Congress has since enacted a national law barring such abortions, and the law is in litigation.

Rust v. Sullivan, 500 U.S. 173 (1991). Before the Court were regulations implementing a federal statute. The law provided that no federally-funded family-

planning services could be used in a program in which abortions were a method of family planning. The regulations prohibited family-planning clinics from engaging in counseling, referrals for, and activities advocating abortion as a method of family planning. A 5-to-4 Court held that the regulations were a permissible construction of the statute and as so construed were constitutional. Justice O'Connor dissented in a separate opinion and joined part of another dissent. She did not reach the constitutional issue, but she contended that the regulations did not faithfully construe the statute.

Affirmative Action

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). The Justice's position on affirmative action has been generally nuanced but restrictive. But all her opinions do not point in the same direction. In this case, in which she authored the opinion of the Court, she wrote that affirmative action for minorities was valid if "narrowly tailored" to correct a demonstrable wrong, but she voted to invalidate the particular plan, a city set-aside of a fixed percentage of public contracts for minority businesses, in the absence of an identifiable wrong.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Justice O'Connor also wrote the opinion for a 5-to-4 Court in this case, except that the Justices in the majority were not entirely in agreement with each other. At issue in the case was a federal policy that awarded highway construction contracts on a basis that encouraged prime contractors to give subcontracts to companies preferring those that were certified as being controlled by socially and economically disadvantaged individuals. A company that lost a contract it had bid on to a minority firm sued. The Court did not reach the actual merits of the dispute, but it sent the case back to the lower courts with express instructions to evaluate the constitutional issue under the same "strict-scrutiny" standard that applied to actions that disadvantaged racial minorities. The case has been up-and-down several times, but it has never been finally decided on the merits.

Grutter v. Bollinger, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). Not since the decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), had the Court decided a case involving the permissibility of affirmative action in admissions of applicants to institutions of higher learning. It was something of a surprise, therefore, that after the passage of so much time, the Court, but especially Justice O'Connor, recurred to Justice Powell's singular opinion in *Bakke* as providing the key to resolution of these two cases. Justice Powell insisted that racial preferences in education must be evaluated under a strict-scrutiny standard and that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. Both Michigan cases here were 5-to-4 decisions, and Justice O'Connor was the only Justice in the majority in both cases. She wrote the opinion in *Grutter*, in which admission applications to the University of Michigan Law School were individually considered and decided, using all the educational and other components standards for admission, but also considering the racial and ethnic diversity of the potential students. That individualized consideration was sufficient for the majority, although not for the dissent. *Gratz* concerned admission to the University of Michigan undergraduate school, and it did not involve individualized consideration. Rather, of the 150 points obtained by evaluating many factors, the school awarded 20 points based solely upon membership in an underrepresented racial or ethnic minority group, and generally 100 points were sufficient to gain admission. This method, the five

Justice majority held, failed strict scrutiny. Much more is involved in the two cases, and there was a multitude of concurrences and dissents.

Shaw v. Reno, 509 U.S. 630 (1993)*; Miller v. Johnson*, 515 U.S. 900 (1995)*; Shaw v. Hunt*, 517 U.S. 899 (1996)*; Bush v. Vera*, 517 U.S. 962 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001). These cases brought to bear on legislative and congressional districting the standards developed by the Justices to evaluate the constitutionality of affirmative action. That is, they concerned district lines that were drawn at least in part to enhance the opportunities of minority voters to either elect candidates of their choice or to play a significant role in influencing the choices made. The decisions were complicated by the existence of the Voting Rights Act, which was interpreted by the Justice Department to mandate the greatest representation of minorities possible. Justice O'Connor played a significant role in these cases, the first four of which found equal-protection violations in the degree to which racial and ethnic factors were relied on by legislators. She wrote the opinion of the Court in *Reno*, heavily critical of the "bizarre" lines that had been drawn, and she contributed both the majority opinion and a separate concurring opinion in *Bush v. Vera*. Significant points made in the third and fourth cases are that drawing lines to comply with the Voting Rights Act is not a compelling governmental interest that will save a racial gerrymander, but that the creation of "reasonably compact" majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act would probably survive strict scrutiny. In the *Easley* case, Justice O'Connor switched to join the four dissenters in the other four cases to hold that a somewhat modified version of the plans voided in the two *Shaw* cases was constitutional when the predominant purpose of drawing lines advantaging African-Americans served a permissible partisan purpose because blacks voted heavily Democratic.

Georgia v. Ashcroft, 539 U.S. 461 (2003). Not a constitutional decision, the case marks a substantial reinterpretation of the Voting Rights Act that should be noted. In an opinion by Justice O'Connor, a 5-to-4 Court held that the "effective exercise of the electoral franchise" could be promoted not only by a rule of "nonretrogression" in the position of racial minorities through redistricting, but it could also be achieved by the reduction of racial strength in some districts, so that they were no longer "safe" for the minorities, if at the same time the legislature moved minority voters into other districts where they became sufficiently numerous that they could influence the choice of candidates in those districts.

Separation of Powers

Hamdi v. Runsfeld, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). Although it was the position of the Bush Administration that the President, in the exercise of his war powers, the commander-in-chief authority, and the inherent powers of his office, had plenary and exclusive power to treat the prisoners captured in Afghanistan and Iraq as he chose and to imprison them and other persons apprehended elsewhere, including American citizens, without any interference by the courts, the Supreme Court disagreed. In *Hamdi*, Justice O'Connor wrote a plurality opinion for the Court, which was in effect agreed to generally by all but one Justice, in which she held that due process requires that a United States citizen being held as an "enemy combatant" be given a fair opportunity in some tribunal to object to his detention. And she was in the majority in

Rasul in which the Court held that federal courts had *habeas* jurisdiction over alien prisoners being held at Guantanamo Bay in Cuba.

Campaign Finance Regulation

McConnell v. FEC, 540 U.S. 93 (2003). Justice O'Connor, in tandem with Justice Stevens, authored the primary opinion of the Court in sustaining the Bi-Partisan Campaign Reform Act (McCain-Feingold), the major provision of which imposed a ban on "soft money" campaign contributions by individuals and organizations. The First Amendment implications of regulations that limit both contributions and expenditures to and for political purposes, the former of which the Court has recognized as constitutional and the latter of which the Court has invalidated, have been explored throughout much case law for a lengthy period, mostly since *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Court adopted the contribution-expenditure distinction. For other cases, see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)(in which Justice O'Connor joined Justice Kennedy's dissent objecting to the expenditure limitation), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)(concurring in part and in the judgment, on the impermissibility of limiting fundraising for groups engaged in campaigning).

First Amendment Speech

Reno v. ACLU, 521 U.S. 844 (1997); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004). In all these cases, Justice O'Connor dissented, in whole or in part, from decisions striking down governmental regulations of "indecent" materials, at least sexually explicit materials, in the electronic context. *Reno* voided the first Internet indecency statute enacted by Congress, and *Ashcroft v. ACLU* invalidated the follow-up Child Online Protection Act. The *Playboy* case struck down a law that mandated "adult" channels to scramble cable channels in order to prevent "bleeding" of "offensive" materials that would enable the materials to be seen by unwilling viewers and children. And *Free Speech Coalition* held unconstitutional a statute criminalizing the creation and broadcasting of "virtual" child pornography, that is, material not produced with the use of real, live children. In the first case, the Justice offered the view that Congress could create "adult zones" on the Internet, like municipalities have been upheld in zoning those areas in which adults-only businesses could operate.

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). Justice O'Connor has frequently joined opinions upholding restrictions on commercial speech, but in this case she wrote the opinion of the Court upholding a state bar association in prohibiting attorneys from soliciting accident victims within 30 days of an accident.

Property Rights

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). Cases brought under the Fifth and Fourteenth Amendments claiming a taking of property are of two different kinds. The first, of which these two are exemplifications, concern an actual physical appropriation of property by government, which is permissible so long as it is for a "public use" and "just

compensation" is paid to the dispossessed owners. Both of these cases tested what is a "public use." *Midkiff* involved a state land-reform plan in Hawaii in which the State took, with compensation, land from the few big landowners on the islands and transferred it to their tenants. Justice O'Connor wrote for a unanimous Court sustaining the use of the eminent-domain power as a way to remedy the ill effects of the land oligopoly in the State. "Public use" was generally construed to mean "public benefit" as in the due-process standard for exercise of the police power. See *Berman v. Parker*, 348 U.S. 26 (1954). In *Kelo*, Justice O'Connor wrote the principal dissent protesting the Court's validation of the city's exercise of eminent domain to take private property, with compensation, from homeowners and businesses in an area, that was not flourishing but certainly was not blighted, for purposes of stimulating economic development and enlargement of the tax base through the functioning of a private nonprofit instrumentality in cooperation with a major corporation. The Justice complained that taking property and turning it over to a private entity for purposes of economic growth was not a "public use," but she was hampered by her need to distinguish *Midkiff* and *Berman*, a necessity that did not bother Justice Thomas in dissent who wanted to overturn the conflation of "public use" and "public benefit" that the Court had adopted for more than a hundred years.

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). The other branch of takings jurisprudence is the so-called "regulatory takings" cases; that is, the Court long ago developed the principle that if regulation goes too far, in the sense of reducing too much the value of the regulated property, courts can treat it as a taking and invalidate it. Justice O'Connor has been generally with those Justices who are very protective of property in regulatory takings cases, joining the opinions but not writing any. E.g., *Lucas v. South Carolina Coastal Coun*cil, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and sometimes in the majority denying a taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Illustrative of her singular voice is the *Eastern Enterprises* case in which Justice O'Connor in a plurality opinion insisted that the uncompensated taking of funds from coal operators to pay miners for the work-related ravages of the mines violated the Fifth Amendment. Justice Kennedy provided the fifth vote for invalidating the Act, but he relied instead on due-process grounds.

Sexual Liberty

Lawrence v. Texas, 529 U.S. 558 (2003). In this case, Justice Kennedy wrote the opinion of the Court finding that laws criminalizing homosexual sodomy violated the liberty guaranteed by the substantive due-process clause. Justice O'Connor joined the result of the case but did not agree with the rationale, instead finding that the law violated the equal-protection clause of the Fourteenth Amendment, inasmuch as the law applied to sodomy engaged in by homosexuals but not by heterosexuals. In this respect, she followed *Romer v. Evans*, 517 U.S. 620 (1996), another Kennedy opinion that she joined, striking down a law that discriminated against homosexuals, which the Court said failed even the rational-basis test. Her concurrence in *Lawrence* noted that she would not overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), which she had joined, in which the application of a sodomy law to both homosexuals and heterosexuals was upheld.

Criminal Law and Procedure

Penry v. Lynaugh, 492 U.S. 302 (1989). The Justice has attempted to follow a nuanced standard in capital cases, supportive of the constitutionality of the death penalty itself with respect to the execution of a convicted murderer, but in individual cases closely scrutinizing the administration of the punishment in the States. This case illustrates her general support for the penalty. She wrote the opinion of the Court finding that no national consensus existed to justify preclusion of the execution of a mildly or moderately retarded person. The Justice also provided the critical vote and rationale in refusing to find that the execution of persons for capital crimes committed while they were 16- or 17-years old was not cruel and unusual, *Stanford v. Kentucky*, 492 U.S. 361 (1989), although she agreed, on more limited grounds than the plurality, that execution of persons who were younger than 16 at the time they committed the offense was not permitted. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Subsequently, she silently joined the opinion of the Court overruling *Lynaugh* and holding that a national consensus existed that the execution of the retarded was impermissible. *Atkins v. Virginia*, 536 U.S. 304 (2002). But Justice O'Connor dissented from a narrowly-divided Court's holding that the execution of persons who were 16- or 17-years old at the time of their offense was unconstitutional, both because of a national consensus and because of the Justices' own evaluation of the standards of human decency. *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

Kyllo v. United States, 533 U.S. 27 (2001). The effect of new technology upon what constitutes a "search" for Fourth Amendment purposes has frequently divided the Court, as it did in 1928 when the Court held that wiretapping of telephones, without invading the property of the person listened to, was not a search (which has since been overruled). A recent example is this case, in which Justice Scalia, speaking for the Court, held that the utilization of a thermal imaging device to measure the heat given off in a home in order to ascertain that marijuana was being grown there was a search requiring a warrant supported by probable cause. Justice O'Connor dissented, joining another Justice's dissent.

Vernonia School District 471 v. Acton, 515 U.S. 646 (1995); *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822 (2002). In its jurisprudence dealing with drug testing that is not supported by probable cause or reasonable suspicion, the Court has developed a "special needs" doctrine permitting random testing of various classes of persons, with which the Justice generally agreed. These two cases concern an expansion of that standard to approve, in the first case, mandatory testing of school athletes, and, in the second case, testing of all students engaging in extracurricular activities. Justice O'Connor dissented from both decisions, protesting that the policy permitted intrusive searches of schoolchildren, most of whom are innocent.

United States v. Booker, 125 S.Ct. 738 (2005). An upheaval has taken place in the Court, and thus in federal and state sentencing schemes, respecting the necessary role of juries in finding facts and factors by proof beyond a reasonable doubt as against the trial judge's permissible finding by less than proof beyond a reasonable doubt, after the jury has returned a guilty verdict for a basic crime, of additional facts and factors authorizing her to enhance the sentences to be given for the offenses that the jury had convicted the defendant of committing. The Court in the past had generally found sentencing schemes empowering the judge to act to be valid. But, in *Apprendi v. New Jersey*, 530 U.S. 466

(2000), in which it held that after the jury had convicted a defendant of a basic offense, his Sixth Amendment jury rights were violated when the judge by a preponderance found the defendant's act constituted a hate crime, thus justifying an increased sentence, the premise of these cases was swept aside. See also *Ring v. Arizona*, 536 U.S. 584 (2004)(judge finding aggravating facts in capital cases). In *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the Court invalidated a guidelines-sentencing scheme of a State that used judge-found factors for enhancements. Justice O'Connor dissented in opinions in all three of those cases. The decisions raised the question whether the federal sentencing guidelines were affected or invalidated as a result, and in *Booker* the Court answered "yes" and "no." In two 5-to-4 decisions by different line-ups of the Justices, the Court complicated federal sentencing considerably. By the same majority and dissenting line-ups that prevailed in the earlier three cases, the Court found that the federal sentencing guidelines were covered by the precedents and could not operate as intended. Justice O'Connor dissented. But by a different majority, one of the Justices switching, the Court held that it would be permissible to retain the guidelines if they were advisory rather than mandatory, and it struck from the federal sentencing act the provisions that made the guidelines mandatory. Trial judges should consider the guidelines, but they were not bound to follow them. Appellate courts were to review the sentences imposed for "reasonableness," one element of which was the guidance of the guidelines. Justice O'Connor concurred with the majority on this remedial part