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SANDRA DAY O'CONNOR, ABORTION, AND COMPROMISE FOR THE COURT

INTRODUCTION

The abortion controversy is the product of many issues. Legally, is there a fundamental right to privacy for a woman; is the fetus a person within the meaning of the fourteenth amendment due process clause; legally and morally, is abortion murder; socio-economically, should federal funds be used for abortions; if the abortion right is overturned, is it unjust that the rich will be able to secure safe, illegal abortions, while the poor will again be forced into back-alley abortions?

These are all important questions; however, the most controversial aspects of the abortion right may be the medically based criteria set down in *Roe v. Wade*,¹ establishing the right and standards for abortion.

Justice Sandra Day O'Connor, in a scathing dissent to *Akron v. Akron Center for Reproductive Health, Inc.*,² said, "The *Roe* framework . . . is clearly on a collision course with itself."³ It is her opinion that the guidelines for regulation of abortions and the parameters of the right were illogically and improperly decided. Because of her views, she has become the hope of the factions that vow to overturn *Roe v. Wade* and the right to choose abortion.⁴

But where does Sandra Day O'Connor really stand on this point? As the most articulate dissenter on abortion and the only woman on the Court, her position is unique. By reason of these distinctions, as the abortion right struggles to remain alive, she will become the focal point in this issue. Will Justice O'Connor satisfy the pro-life factions and join the Court if it attempts to overrule *Roe*; will she satisfy the pro-choice factions with an affirmation of *Roe* in the realization that women cannot secure equality without reproductive autonomy;⁵ or will she choose some middle ground, modifying the abortion right as she proposed in *Akron*?

1. 410 U.S. 113 (1973).

2. 462 U.S. 416 (1983).

3. *Id.* at 458 (O'Connor, J., dissenting).

4. See *infra* note 64.

5. See Miller, *Justice Sandra Day O'Connor: Token or Triumph From a Feminist Perspective*, 15 GOLDEN GATE U.L. REV. 493, 524 (1985).

This Comment first looks at the right to choose abortion as formulated in *Roe* and *Akron* and discusses Justice O'Connor's dissent in *Akron*, where she criticized the standard of review for abortion and postulated an alternative analysis. It then discusses whether O'Connor's views are the result of her abhorrence of abortion or the product of her beliefs in judicial restraint, federalism, and bright lines. This Comment takes the position that her dissent was prompted by the three latter considerations. Finally, it hypothesizes the fate of the upcoming Supreme Court case, *Webster v. Reproductive Health Services*,⁶ at the hands of the O'Connor standard of review, which this author believes will replace the *Roe* formulation as the basis for the right to abortion in the United States.

I. BACKGROUND

Roe v. Wade is the tempest around which the abortion issue has centered for the past sixteen years. While pro-choice advocates are determined to keep *Roe v. Wade* alive, pro-life forces, calling *Roe* another *Plessy v. Ferguson*⁷ or *Dred Scott* decision,⁸ are just as adamant in their desire to see abortion proscribed.⁹

Roe, a 7-2 decision,¹⁰ struck down a Texas statute making it a criminal offense to perform, receive, or attempt to produce an abortion¹¹ unless its purpose was to save the life of the mother.¹²

The Court found the woman's right to secure an abortion to be a fundamental right of privacy, grounded in the fourteenth amendment's principle of personal liberty.¹³ However, the Court, recognizing the state's interests in maintaining health standards, safeguarding maternal health, and protecting potential life,¹⁴ concluded that

6. 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 780 (1989).

7. ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 17, 24 (D. Horan, E. Grant & P. Cunningham ed. 1987) [hereinafter ABORTION AND THE CONSTITUTION] (referring to *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *see also* *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 788 (1986) (White, J., dissenting).

8. *The Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 282 (1981) [hereinafter *Hearings*] (testimony of Dr. John Willke, Pres., Nat'l Right to Life Comm., referring to *Scott v. Sandford*, 60 U.S. 393 (1856)).

9. *See* ABORTION AND THE CONSTITUTION, *supra* note 7, *passim*.

10. The Justices joining the majority and concurring in the judgment were Blackmun, Brennan, Marshall, Douglas, Stewart, Powell, and Chief Justice Burger; dissenting were Justices White and Rehnquist.

11. *Roe*, 410 U.S. at 117.

12. *Id.* at 118.

13. *Id.* at 153.

14. *Id.* at 154.

the woman's fundamental right is not absolute but subject to regulation where one of these compelling state interests exists.¹⁵

These compelling state interests gave rise to the "trimester system"¹⁶ test. Under this system, the state may not regulate abortions in the first trimester of pregnancy. Due to the safety of the first trimester abortions, there is no health hazard to the pregnant woman, thus no compelling state interest in maintaining health standards.¹⁷ After the first trimester, because abortion becomes a more hazardous procedure, states have a compelling interest in maternal health and may regulate abortion to the extent that the regulation is reasonably related to the health of the pregnant woman.¹⁸ For the final stage of the pregnancy, beginning at viability, the point at which the fetus "has the capability of meaningful life outside the womb,"¹⁹ the state also has a compelling state interest in potential life. To the extent that the regulation is reasonably related to the state's compelling interest in this potential life, but does not jeopardize the mother's life or health by a continued pregnancy, the state may regulate or proscribe abortion.²⁰

Finally, the Court held that a fetus is not a person within the meaning of the fourteenth amendment.²¹ With no fundamental liberty right for the fetus, all regulations are to be strictly scrutinized to determine whether they are a reasonable means of safeguarding health, or, in fact, an unconstitutional attempt at hindering abortion.²²

The Court meant *Roe* to be read in conjunction with its companion case,²³ *Doe v. Bolton*,²⁴ in which the Court rendered its first insight into the constitutionality of particular state procedural require-

15. *Id.*

16. This is the common phrase utilized to denote the "bright lines" associated with the Court's decision. The Court spoke in words such as "stages" and "first trimester," but did not coin the phrase "trimester system" in the opinion.

17. *Roe*, 410 U.S. at 163.

18. *Id.*

19. *Id.*

20. *Id.* at 163-64.

21. *Id.* at 158. In his concurring opinion, Justice Douglas quoted former Justice Thomas Clark, noting, "When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed." *Id.* at 217-18 (Douglas, J., concurring) (quoting Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 LOY. L.A.L. REV. 1, 9-10 (1969)).

22. J. NOWAK & R. ROTUNDA, CONSTITUTIONAL LAW § 14.29 (3d ed. Supp. 1988).

23. *Roe*, 410 U.S. at 165.

24. 410 U.S. 179 (1973).

ments in light of the newly recognized right and permissible compelling state interests.²⁵

The furor over a woman's right to choose an abortion was immediate. Justice White, in his dissent, argued that the Court had overstepped its bounds by basing the right to abortion in the Constitution. Such a sensitive issue, he felt, "should be left with the people and to the political processes the people have devised to govern their affairs."²⁶ Likewise, Justice Rehnquist, in his dissent, called the Court's decision "judicial legislation," in that it broke pregnancy down into categories and outlined the parameters of regulation at each stage, rather than interpreting the legitimacy of the statute through the Framers' intent regarding the fourteenth amendment.²⁷

Because strict scrutiny requires a statute-specific determination of the validity of each provision, the controversy over the *Roe* holding became more heated and confusing as each new case brought provisions that would be validated or condemned, based on the Court's perceptions of the rational relationship of the provision to the state's compelling interest versus the woman's right to privacy.²⁸

It was against this backdrop of confusion over the constitutional basis for *Roe*, the medical formulation on which it was predicated,

25. In *Bolton*, three provisions, held to be unduly restrictive, were struck down: a requirement that all abortions be done in a specially accredited hospital, where such accreditation is not necessary for non-abortion surgery, *id.* at 193-94, and where there is no hospital exception for first trimester abortion, *id.* at 195; a requirement that the abortion procedure be approved by a committee of the hospital's medical staff, *id.* at 198; and a requirement that the doctor's decision to abort be confirmed by two other physicians; *id.* at 199.

26. *Roe*, 410 U.S. at 222 (White, J., dissenting).

27. *Id.* at 175 (Rehnquist, J., dissenting).

28. The major abortion cases of the era were: *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding a parental notification statute, as applied on the facts, to a minor child living with her parents, with no showing of child maturity or other pertinent details); *Harris v. McRae*, 448 U.S. 297 (1980) and *Williams v. Zbaraz*, 448 U.S. 358 (1980) (Title XIX does not require states to pay for medically necessary abortions that are not federally reimbursed under the Hyde Amendment); *Bellotti v. Baird*, 443 U.S. 622 (1979) (parental consent statutes must make provision for procedure by which minor can show she is mature enough to make the abortion decision on her own, in consultation with her physician); *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating, for vagueness, a statute requiring the physician, upon penalty of criminal sanction, to determine if the fetus is viable); *Beal v. Doe*, 432 U.S. 438 (1977), *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977) (funding for non-therapeutic abortions is not required by Title XIX); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (invalidating a statute forbidding distribution of contraceptives to minors under age sixteen); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) and *Bellotti v. Baird*, 428 U.S. 132 (1976) (invalidating statutes requiring the written consent of the spouse of a pregnant woman seeking an abortion).

and the proper method of analysis and scrutiny, that both Justice O'Connor²⁹ and *Akron* found their way to the Supreme Court.

II. THE JUSTICE AND HER DISSENT

As Sandra Day O'Connor stepped into the limelight as the first female nominee to the United States Supreme Court, both pro-choice and pro-life factions were vocal in their reactions. While the National Organization for Women touted President Reagan's choice as "a major victory for women's rights,"³⁰ the National Right to Life Committee vehemently opposed O'Connor's nomination on the basis of what they perceived to be her pro-abortion voting record.³¹ O'Connor countered that her votes were reflections of other considerations, peripheral to the right of abortion³² but essential to her judicial philosophy.

29. At the time of O'Connor's confirmation hearings, one writer, commenting on O'Connor's lack of personal examples of sex discrimination, noted that either O'Connor "has not suffered enough or she does not know how much she has suffered." Kerr, *Supreme Court Justice O'Connor: The Woman Whose Word is Law*, Ms., Dec. 1982, at 52. When O'Connor graduated third in her class from Stanford Law School in 1952 and was offered a job at a law firm as a legal secretary, she instead sought a post as deputy county attorney in San Mateo, California. Mook, *Justice O'Connor Old Dominion and Legal Dominion*, THE VIRGINIAN, Sept.-Oct. 1987, at 63-64. When her husband was drafted and sent to Frankfurt, Germany, as an army attorney, O'Connor followed him, serving as a civilian lawyer for the Quartermaster Corps from 1954 to 1957. 2 WHO'S WHO IN AMERICA 2323 (45th ed. 1988-1989). In 1957, back in Arizona, she was again unable to secure a position with a law firm, so O'Connor began a private practice. Soon the O'Connors had two of their three children and O'Connor retired from professional life for five years to raise her family and become an active volunteer. Mook, *supra*, at 65. When she returned to the work force in 1965, it was as assistant attorney general with the State of Arizona; from there to the Arizona State Senate; judge for Maricopa County Superior Court; and, finally, judge for the Arizona Court of Appeals. It was from this position that she was tapped for appointment to the United States Supreme Court. 2 WHO'S WHO IN AMERICA, *supra*.

30. Magnuson, *The Brethren's First Sister*, TIME, July 20, 1981, at 9 (statement of Eleanor Smeal, Pres., Nat'l Org. for Women). Ms. Smeal also recommended O'Connor's confirmation during the Senate Confirmation Hearings, stating, "We do not contend that the National Organization for Women agrees with all of the legal and political views of Judge O'Connor. . . . However . . . we believe that there has been overall a commitment to an understanding of discrimination." *Hearings*, *supra* note 8, at 396.

31. *Hearings*, *supra* note 8, at 281 (testimony of Dr. Carolyn F. Gerster, Vice Pres. in charge of Int'l Affairs, Nat'l Right to Life Comm.); *id.* at 283 (testimony of Dr. John C. Willke, Pres., Nat'l Right to Life Comm.).

32. *Id.* at 60-63 (testimony of Hon. Sandra Day O'Connor, Nominee for Assoc. Justice of the United States Supreme Court). As an Arizona senator, O'Connor voted in committee to repeal an Arizona statute which made it a felony to aid in the procurement of a miscarriage unless it was necessary to save the life of the mother. *Id.* at 61. She also voted to adopt a bill that would make contraceptive information readily available to the public. *Id.* at 62. O'Connor voted against an Arizona House Memorial that would have urged Congress to amend the United States Constitution to include unborn children within the meaning of "person" for

These considerations may be seen at work in Justice O'Connor's first major writing on the topic of abortion, her famous *Akron* dissent.³³ At issue in *Akron* were a variety of provisions which the Court, dictated by *Roe*'s formulation, found invalid as not rationally related to the state's permissible compelling interests in maternal health or safety of the viable fetus.

First, the Court examined a provision requiring all post-first trimester abortions to be performed in a general hospital or specially accredited hospital for gynecology or obstetrics.³⁴ In somewhat ambiguous terms, the Court spoke of the need for retaining the *Roe* trimester delineations,³⁵ while at the same time recognizing that medical technological advances had made D & E (dilatation and evacuation) abortions safe during part of the second trimester.³⁶ The Court held that states must now limit their hospital requirements to the *portion* of the trimester to which they are applicable.³⁷ Secondly, the Court scrutinized a provision which required written parental consent or court order before permitting abortion for minors.³⁸ The Court held the provision unconstitutional because it was not rationally related to the compelling state interest in protecting minors in the tradition of past Supreme Court decisions.³⁹ Next, the Court looked at the "informed consent" provision.⁴⁰ The Court found the ordinance to be beyond acceptable bounds of informed consent and an impermissible attempt to dissuade consent.⁴¹ Thus, while not serving any compelling state interest, it placed an undue burden on

purposes of the fifth and fourteenth amendments. *Id.* Finally, O'Connor supported a bill that only would provide medical funds for abortions to save the life of the mother or where pregnancy had resulted from incest, rape, or criminal action. *Id.* at 63.

33. During the years between *Roe* and *Akron*, Justice Douglas left the Court and was replaced by Justice Stevens, who voted in Douglas' tradition. O'Connor replaced Justice Stewart, but O'Connor joined the *Roe* minority of White and Rehnquist, thus changing the overall vote from 7-2 in *Roe* to 6-3 in *Akron*.

34. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 432 (1983).

35. *Id.* at 429 n.11.

36. *Id.* at 435-36.

37. *Id.* at 434.

38. *Id.* at 439.

39. *Id.* at 439-40. The Court has held protection of immature minors to be a permissible state activity, *id.* at 439, but the regulation must conform to standards set by the Court in its consent cases. *See supra* note 28.

40. *Id.* at 442. In addition to obtaining the informed written consent of the woman, the physician also was obliged to explain the abortion procedure and the risks attendant to it; the status of her pregnancy, with details of the fetal development and likely date of viability; the possible emotional and physical complications that may follow an abortion; and, finally, the availability of resources regarding birth control, childbirth, and adoption. *Id.*

41. *Id.* at 444.

women obtaining abortions.⁴² Finally, the ordinance required a twenty-four hour waiting period between consent and abortion.⁴³ The Court found the provision arbitrary and not related to any legitimate state interest.⁴⁴

Justice O'Connor, in her dissent, attacked the Court's analysis on several fronts. She initially addressed what she saw as the inherent problem of *Roe*: the dilemma resulting from the Court's determined adherence to "accepted medical practice"⁴⁵ when such technology is ever-changing. Not only did this create problems for the Court when holding the second trimester hospital requirement invalid,⁴⁶ but it continually creates problems for states, which must constantly keep abreast of evolutionary medical techniques as they legislate, and for the judicial system, which, without the resources available to legislatures, must also deal competently with the subject matter.⁴⁷

However, Justice O'Connor believes that the ultimate handicap of the *Roe* formulation is that it is "on a collision course with itself."⁴⁸ As medical technology makes abortions safer further in the pregnancy, carrying with it the woman's unrestricted right to choose abortion, and viability moves backward in pregnancy toward conception, carrying with it the state's compelling interest in potential life, the trimester approach will self-destruct.⁴⁹ When that happens, there will be no test by which to balance the competing interests of individual and state.

Justice O'Connor would also hold that the state's compelling interests in maternal health and potential life exist throughout pregnancy.⁵⁰ A state's interest in maternal health is no less real simply because, during the first trimester, abortion is a safer procedure than childbirth.⁵¹ Similarly, "[a]t any stage in pregnancy, there is the *potential* for human life."⁵² Accordingly, the *Roe* formulation is artificial in its determination that a state's interests take compelling root at some arbitrary point in the pregnancy.

42. Additionally, it put demands upon the physician who personally had to counsel the woman. *Id.* at 448.

43. *Id.* at 449.

44. *Id.* at 450.

45. *Akron*, 462 U.S. at 454 (O'Connor, J., dissenting) (quoting the majority opinion, *id.* at 431).

46. *Id.* at 454-55, 454 n.2.

47. *Id.* at 456, 458.

48. *Id.* at 458.

49. *Id.*

50. *Id.* at 460.

51. *Id.*

52. *Id.* at 461.

Justice O'Connor articulated an alternative standard of review for scrutinizing state abortion regulations. Under her guidelines, because the right to abortion is not absolute,⁵³ a provision would have to "unduly burden" the woman in her right to choose abortion before heightened scrutiny would be employed.⁵⁴ Thus, a regulation that significantly burdened the woman's right would be upheld upon identification of a compelling state interest and a regulation reasonably related to protecting that interest.⁵⁵ Absent a substantial or undue burden on the abortion right, the provision would be subject to the more deferential analysis of whether it rationally related to some legitimate state purpose.⁵⁶ Additionally, O'Connor pointed out that, even when probing the provision for evidence of substantial impairment of the woman's right to abortion, the Court would "do well to pay careful attention to how the other branches of Government have addressed the same problem,"⁵⁷ noting that, although courts must not always defer to the legislatures, legislatures are also equipped to explore such problems and do not come upon their decisions lightly.⁵⁸ Applying this standard to the specific ordinance at issue in *Akron*, Justice O'Connor would have found the provisions valid because none unduly burdened a woman's right to secure an abortion. The hospitalization restrictions,⁵⁹ the informed consent statute,⁶⁰ and the twenty-four hour waiting period did not have the effect of prohibiting abortions;⁶¹ they merely placed legitimate limits on obtaining abortions. Without undue burden, there would be no need for heightened scrutiny, and, since the provisions were rationally related to legitimate state interests, they would be upheld.⁶²

O'Connor chided the Court for passing on the constitutionality of the parental consent provision when it had not been construed by the

53. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 464 (1983). See *Maier v. Roe*, 432 U.S. 464, 473 (1977) ("Roe did not declare an unqualified 'constitutional right to an abortion.'") (citation omitted).

54. *Akron*, 462 U.S. at 461. "Undue burden" has been associated with "absolute obstacles or severe limitations on the abortion decision." *Id.* at 464. O'Connor cited abortion cases that have utilized or advocated the "unduly burdensome" test: *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Beal v. Doe*, 432 U.S. 438 (1977); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976).

55. *Akron*, 462 U.S. at 463.

56. *Id.* at 464.

57. *Id.* at 465.

58. *Id.*

59. *Id.* at 467.

60. *Id.* at 471.

61. *Id.* at 473-74.

62. *Id.* at 467-74.

state. Guided by the jurisprudential rationales of restraint and federalism, she felt the Court should have abstained from declaring the provision invalid.⁶³

The dissent in *Akron* was followed by countless articles in law reviews, journals, and newspapers contemplating the effect of Justice O'Connor's stance on the future of the trimester system and the abortion right.⁶⁴ But, to fully understand her dissent, it is necessary to acknowledge the three basic judicial beliefs stressed by O'Connor. First, she emphasized the need for clarity and bright lines in judicial decisions in order to give guidance to legislatures and other court systems.⁶⁵ Secondly, she noted the capabilities of state legislatures in promulgating regulations.⁶⁶ Finally, she recognized that deference and restraint by the judiciary are appropriate when other branches of government are in a better position to have studied the issue and devised suitable measures.⁶⁷ Justice O'Connor would prefer that the

63. *Id.* at 468-70.

64. One commentator lamented the hopes of the feminists who thought O'Connor would realize that a woman cannot reach her full and equal participation in society until she is given reproductive autonomy. Miller, *supra* note 5, at 524. On the other hand, anti-abortionist factions that had attempted to block O'Connor's confirmation at the hearings were now looking to O'Connor's dissent as the beginning of the end for the abortion liberty. Duncan, *Justice O'Connor, the Constitution, and the Trimester Approach to Abortion: A Liberty on a Collision Course with Itself*, 29 CATH. LAW. 275, 276 (1984). That author, noting that the dissents of one era are often the basis of majority opinions of the future, agreed with the principles of O'Connor's dissent and saw its potential as an effective tool for permitting states to proscribe abortion without a formal renunciation of the abortion right. That author would apply the following reasoning: is the legislation unduly burdensome? If not, then the regulation stands. If the regulation is unduly burdensome, is it supported by a compelling state interest? Under the O'Connor formula, the state has a compelling state interest in maternal health and potential life throughout pregnancy; therefore, any proscription of abortion that is related to maternal health or potential human life is a valid regulation, as long as the mother's health is not threatened by the continued pregnancy. Duncan, *supra*, at 282.

Commentators for the pro-choice argument also saw O'Connor's dissent as the possible end to the abortion right, regardless of whether *Roe* was expressly overturned. They noted that, by eliminating the *Roe* standard and adopting a test that would give much more weight to state interests while lowering the threshold of state regulation, the abortion right would disappear. Miller, *supra* note 5, at 522. Arguably, the constitutional standard on abortion could change to the point where states set up so many "substantial hoops for women to jump through" in order to secure abortions that such regulations would ultimately deter abortions. Reidinger, *Will Roe v. Wade Be Overruled?*, A.B.A. J., July 1, 1988, at 70 (quoting Jennifer Pizer, legal director of Nat'l Abortion Rights League). Some commentators suggested the possibility that the reasoning for O'Connor's decision was grounded in her perspective of federalism and judicial restraint. Miller, *supra* note 5, at 525; Shea, *Sandra Day O'Connor—Woman, Lawyer, Justice: Her First Four Terms on the Supreme Court*, 55 UMKC L. REV. 1, 16-17 (1986).

65. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 455-56 (1983) (O'Connor, J., dissenting).

66. *Id.* at 458.

67. *Id.* at 456, 465.

Court put rights and regulations in perspective and realistically view them in relation to the three principles she sees as paramount to a properly functioning government: judicial restraint, federalism, and bright lines. These views are fundamental to her legal philosophy. They are themes present throughout her writings and not an isolated anomaly within her *Akron* dissent.

III. JUDICIAL RESTRAINT AND FEDERALISM

The first indication that these themes would transcend her *Akron* dissent in the abortion controversy came in Justice O'Connor's dissent to *Thornburgh v. American College of Obstetricians*.⁶⁸ At issue were provisions of the Pennsylvania Abortion Control Act of 1982. Utilizing strict scrutiny, the Court, as it did in *Akron*, struck down the provisions as unconstitutional because the regulations were not reasonably related to any identifiable compelling state interest.⁶⁹

Justice O'Connor restated her stances on the abortion issue, federalism, and restraint. First, she admonished the Court for reviewing the case. The district court had heard a motion for a preliminary injunction.⁷⁰ The court of appeals, rather than addressing the appeal on the denial of the preliminary injunction, had made a determination on the merits without benefit of a full record.⁷¹ She felt the Supreme Court furthered the error by affirming the decision below⁷² when it should have concerned itself only with the legitimacy of the grant or denial of the preliminary injunction.⁷³ Next, she refused to comment on the question of overruling *Roe* since the issue had not been raised by the State of Pennsylvania.⁷⁴ Finally, she reiterated her view on abortion as stated in *Akron*.⁷⁵

These tenets of judicial restraint and federalism have been ever-present in Justice O'Connor's ideology. For O'Connor, the proper

68. 476 U.S. 747 (1986). While *Roe* was decided by a 7-2 margin and *Akron* was decided by a 6-3 margin, *Thornburgh* was decided by a 5-4 vote, with Chief Justice Burger joining the *Akron* dissenters.

69. See *Thornburgh*, 476 U.S. at 759. Justice White, in his dissent to the majority's decision, recognized a woman's liberty interest in her choice for abortion subject to due process protection; however, he did not find that liberty in any way fundamental nor entitled to "more than the most minimal judicial scrutiny." *Id.* at 790. He "would return the issue to the people by overruling *Roe v. Wade*." *Id.* at 797.

70. *Id.* at 818 (O'Connor, J., dissenting).

71. *Id.*

72. *Id.* at 825-26.

73. *Id.* at 827.

74. *Id.* at 828.

75. *Id.*

role of the judiciary is to interpret the law.⁷⁶ It is not the duty of the Court to react to the social climate and enact change.⁷⁷ The judiciary was designed so it would "not [be] directly responsive to public pressure, and rightly so."⁷⁸ In its role of interpreting the law, the judge should decide the case on "appropriately narrow grounds."⁷⁹

Blending judicial restraint with federalism, Justice O'Connor refers to "judicial federalism"⁸⁰ where she likens the state and federal court system to a marriage that requires respect, an attempt to get along, and acknowledgment of the boundaries of each partner.⁸¹ Applauding our bifurcated judicial system and deriding those who feel the state court system is in any way inferior to the federal system, she argues, "State judges do in fact rise to the occasion when given the responsibility and opportunity to do so."⁸²

As a former state judge and legislator,⁸³ her respect for the state system transcends the judicial arena and is especially notable in the deference O'Connor gives to the state legislative branch. Her opinions are replete with the view that federalism and judicial restraint should be employed in order that our federalist system can work.

Justice O'Connor displayed her respect for federalism in *Federal Energy Regulatory Commission v. Mississippi*,⁸⁴ when the Court allowed the federal government to impose regulations on the states in an effort to ease the oil and natural gas crisis. O'Connor took issue with the Court's tenth amendment analysis, calling it "antithetical to the values of federalism and inconsistent with our constitutional history."⁸⁵ O'Connor noted three valuable facets of federalism: the inroads state legislatures have made in our historical development that were later adopted nationally, such as women's suffrage and minimum wages for women and minors;⁸⁶ the opportunity for citizens to participate in government on a local level, which requires the power to govern, not merely the rote administration of federal law;⁸⁷ and,

76. *Hearings*, *supra* note 8, at 57 (testimony of Hon. Sandra Day O'Connor, Nominee for Assoc. Justice of the United States Supreme Court).

77. *Id.* at 67.

78. *Id.* at 127.

79. *Id.* at 108.

80. O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. 1, 3 (1984).

81. *Id.* at 12.

82. O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814 (1981).

83. See *supra* note 29 for biographical information.

84. *FERC v. Mississippi*, 456 U.S. 743 (1982).

85. *Id.* at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).

86. *Id.* at 788-89.

87. *Id.* at 789.

finally, the check that federalism exerts on unbridled governmental power.⁸⁸ Justice O'Connor also noted the Framers' intent, observing that they expressly rejected a system where the federal government would have a wide open veto over state legislation and, instead, enacted the supremacy clause, giving the federal government judicial review over state law.⁸⁹

In *Hawaii Housing Authority v. Midkiff*,⁹⁰ Justice O'Connor, writing for the majority, again expressed her views in upholding an enactment of the Hawaiian legislature. At issue was whether condemnation of land with compensation, with the purpose of eliminating the problems of oligopoly, is a proper exercise of eminent domain.⁹¹ She noted that rational basis scrutiny is the appropriate mode of deciding this question,⁹² thus limiting the role of the Court to resolving disputes where the legislature has no legitimate purpose. O'Connor observed that "judicial deference is [no] less appropriate. . . . [since] State legislatures are as capable as Congress of making such determinations within their respective spheres of authority."⁹³

In *Garcia v. San Antonio Metropolitan Transit Authority*,⁹⁴ the Court held that state transit authorities were subject to the minimum wage and overtime requirements of the Fair Labor Standards Act,⁹⁵ thus overruling *National League of Cities v. Usery*,⁹⁶ which had provided a bastion for federalists by holding "traditional governmental functions" of a local nature to be exempt from commerce clause regulation.⁹⁷ Justice O'Connor dissented from the majority's view that a state's tenth amendment power lies within the state's participation in the political process. She remarked that, in her understanding of federalism, states as States have legitimate interests

88. *Id.* at 790.

89. *Id.* at 791. One author hoped that O'Connor would analogize her own reasoning from *FERC*, where she attempted to uphold state autonomy in the face of federal interference, and adopt a similar posture in the abortion area, by attempting to uphold women's autonomy in the face of state interference. Kerr, *supra* note 29, at 84. However, O'Connor completely disappointed pro-choice factions with her dissent in *Akron* the next term, leaving them to look again at O'Connor's views, hoping to find another reason to believe she would not overturn *Roe* altogether.

90. 467 U.S. 229 (1984).

91. *Id.* at 241-42.

92. *Id.* at 242.

93. *Id.* at 244.

94. 469 U.S. 528 (1985).

95. *Id.* at 555-56.

96. 426 U.S. 833 (1976).

97. *Id.* at 852.

that must be respected by Congress even though national laws are supreme.⁹⁸ Noting the development of problems in federalism that paralleled the expansion and industrialization of the national economy,⁹⁹ Justice O'Connor chastised the Court for "retreat[ing] rather than reconcil[ing] the Constitution's dual concerns for federalism and an effective commerce power."¹⁰⁰ The majority in *Garcia* found the *Usery* test of "traditional governmental function" to be unworkable,¹⁰¹ a consideration that O'Connor usually would find vital.¹⁰² In this instance, though, the workability of the test was secondary to Justice O'Connor. She saw *Garcia* as federal usurpation of state power, with Congress' "undeveloped capacity for self-restraint" becoming the only remaining remnant of state sovereignty.¹⁰³

Recently, in *South Carolina v. Baker*,¹⁰⁴ the Court validated a federal provision which compelled states to issue bonds in registered form since there would no longer be a tax immunity for bonds in unregistered form.¹⁰⁵ Justice O'Connor dissented, noting that the tenth amendment and principles of federalism prevent the federal government from taxing state or municipal bonds.¹⁰⁶ She also revealed her concern about these inroads because "erosion of state sovereignty is likely to occur one step at a time."¹⁰⁷ Quoting Laurence Tribe,¹⁰⁸ O'Connor observed, "Congress will nibble away at State sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."¹⁰⁹

IV. BRIGHT LINES

It is evident that Justice O'Connor's views on judicial restraint and federalism comprise the foundation of her philosophy and, thus, impact on her decisions in the abortion field.¹¹⁰ However, another equally important consideration in O'Connor's analysis is her quest

98. *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting).

99. *Id.* at 583.

100. *Id.* at 581.

101. *Garcia*, 469 U.S. at 531.

102. See *infra* section IV of text.

103. *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting).

104. 108 S. Ct. 1355 (1988).

105. *Id.* at 1358.

106. *Id.* at 1370 (O'Connor, J., dissenting).

107. *Id.* at 1372.

108. *Id.* (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 381 (2d ed. 1988)).

109. *Id.* at 1372.

110. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986).

for bright lines, to set the constitutional parameters for legislatures and lower courts.

In *New York v. Quarles*,¹¹¹ the Court carved out a "public safety" exception to the admissibility of evidence obtained prior to a *Miranda* warning.¹¹² The majority held that, when an officer obtains information from the accused regarding a matter of public safety, such information may be used as evidence against the accused, even though gleaned in violation of the *Miranda* right.¹¹³ In her dissent, Justice O'Connor noted that the "exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda's* requirements more difficult to understand. . . . [It will result in] hair-splitting distinctions."¹¹⁴

In *Attorney General of New York v. Soto-Lopez*,¹¹⁵ the majority invalidated a statute that gave preference points on civil service examinations to honorably discharged war-time veterans who were residents of New York when entering the armed forces.¹¹⁶ O'Connor again dissented, upbraiding the Court for acting in the absence of a textually based constitutional right.¹¹⁷ Without a textually demonstrable constitutional right, it is impossible to assign an appropriate level of scrutiny. In the face of such an occurrence, Justice O'Connor is extremely hesitant to give anything but deferential treatment to the statute.

Justice O'Connor's call for clarity has most recently been evident in her writings on affirmative action, where her search for a proper standard of review is analogous to the struggle she sees in the arena of the abortion liberty. The history of the Court has been one of disagreement and confusion over the level of scrutiny to be applied in the area of affirmative action. Three cases have given O'Connor the opportunity, or perhaps have compelled her, to try to articulate a clear and appropriate standard in this realm.

In *Wygant v. Jackson Board of Education*,¹¹⁸ Justice Powell, writing for a plurality, utilized strict scrutiny analysis to overturn a plan that had allowed the school board to lay off tenured non-minority employees while retaining minority employees in order to increase

111. 467 U.S. 649 (1984).

112. *Id.* at 655; see *Miranda v. Arizona*, 384 U.S. 436 (1966).

113. *Quarles*, 467 U.S. at 657-58.

114. *Id.* at 663-64 (O'Connor, J., dissenting).

115. 476 U.S. 898 (1986).

116. *Id.* at 900.

117. *Id.* at 920 (O'Connor, J., dissenting).

118. 476 U.S. 267 (1986).

the percentage of minority persons in the school system. The Marshall/Brennan faction would have employed a less stringent test.¹¹⁹ The thrust of Justice O'Connor's entire concurrence was "to define and apply the standard" appropriate for such cases.¹²⁰ O'Connor attempted to mediate by stressing the similarities in the different standards offered by the Justices and by noting that the dissimilarities between Justice Powell's "compelling" interest and Justice Marshall's "important" purpose may be insignificant.¹²¹ O'Connor seemed to take the lead in trying to compromise and bring the Court together in order to give guidance in this area.

In *United States v. Paradise*,¹²² Justice O'Connor dissented from the plurality decision written by Justice Brennan which upheld a temporary one-for-one promotion requirement for blacks and whites for the purpose of eradicating the racial discrimination in the Alabama Department of Public Safety.¹²³ Brennan commented that the Court had "yet to reach consensus on the appropriate constitutional analysis. . . . [but] need not do so in this case . . . because . . . the relief ordered survives even strict scrutiny analysis."¹²⁴ O'Connor rejected the decision because "[t]he plurality . . . purport[ed] to apply strict scrutiny . . . [but] adopt[ed] a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny."¹²⁵ She called for the Court to articulate and utilize guidelines with substance,¹²⁶ rather than merely reciting buzz words that lack meaning to legislatures and lower courts.

Recently, in *City of Richmond v. J. A. Croson Co.*,¹²⁷ Justice O'Connor wrote for a plurality, invalidating a plan to remedy the effects of racial discrimination that required contractors on city-awarded jobs to subcontract at least thirty percent of the work to "Minority Business Enterprises."¹²⁸ O'Connor utilized strict scrutiny but, as she had urged in *Wygant* and *Paradise*, employed an analysis slightly lower than the Court's usual perfunctory strict scru-

119. *Id.* at 301-03 (Marshall, J., dissenting).

120. *Id.* at 284 (O'Connor, J., concurring).

121. *Id.* at 286.

122. 480 U.S. 149 (1987).

123. *Id.* at 153.

124. *Id.* at 166-67.

125. *Id.* at 196-97 (O'Connor, J., dissenting).

126. *Id.* at 199-201. O'Connor criticized the Court for affirming the plan although alternative methods for achieving the goal of eradicating discrimination were never discussed by the courts. In her opinion, there cannot be a determination that the means are narrowly tailored if alternatives are not explored. *Id.*

127. 109 S. Ct. 706 (1989).

128. *Id.* at 712-13.

tiny analysis, probably as an accommodation to the Marshall/Brennan faction, in an attempt to bring the Court together on this issue. Though she outwardly rejected Justice Marshall's standard as too "relaxed,"¹²⁹ Justice O'Connor, herself, proclaimed that strict scrutiny will be "searching,"¹³⁰ in other words, a true analysis of the purpose and means for regulations.

There are two major criticisms of the Supreme Court's standards of review. The first condemnation is that there should not be bright-lined, tiered levels of scrutiny.¹³¹ The other major concern is that the standards are superficial labels attached to issues in a result-oriented manner.¹³² Justice O'Connor's goal is to take the standards of review and give them meaning; give the bright lines true clarity. I find at least four reasons for such a rationale. First, it legitimizes the importance of certain rights over other less important rights; second, it lends uniformity to the guidance of lower courts and legislatures; third, it aids in uniformity of decisions; fourth, it aids attorneys and litigants in determining the probability of success or failure of their cause of action. In such a complex society, with so many competing rights, there must be judicially manageable and comprehensible standards.

Thus, with her philosophy of judicial restraint, federalism, and bright lines, Justice O'Connor is attempting to set standards by which competing interests in any dispute can be weighed consistently and fairly. I believe that the course she is trying to forge in the affirmative action field will be followed by similar steps in the area of the abortion right. Justice O'Connor may be the "great compromiser" of today's Court, and, as such, her standard of review for abortion probably will be adopted by the Court¹³³ as it struggles to find the proper balance in this tension-filled arena.

129. *Id.* at 721-22.

130. *Id.* at 721.

131. Justice Stevens would have us believe that there is no tiered system. "[O]ur cases have not delineated three—or even one or two—such well defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (footnote omitted).

132. As Justice Marshall has said, "If a statute invades a 'fundamental' right or discriminates against a 'suspect' class, it is subject to strict scrutiny. . . . [and] always, or nearly always . . . is struck down. . . . [But in] the bottom tier . . . measured by the mere rationality test. . . . the challenged legislation is always upheld." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (citation omitted).

133. There remain on the Court three majority votes from *Roe*: Blackmun, Brennan, and Marshall, with Stevens, another recent majority vote, replacing Douglas. Of the dissenters

V. REPRODUCTIVE HEALTH SERVICE V. WEBSTER

*Reproductive Health Service v. Webster*¹³⁴ reviewed several provisions of Missouri's 1986 abortion statute¹³⁵ that the district court had declared unconstitutional and permanently had enjoined.¹³⁶

Section 188.025 of this statute required any abortion performed at sixteen weeks gestational age¹³⁷ or later to be performed in a hospital.¹³⁸ The court of appeals, relying on the district court's reasoning, found this provision unconstitutional because it burdened the woman by "causing delay, increasing costs and health risks, and decreasing accessibility"¹³⁹ of an abortion, and, moreover, the state was unable to establish that the provision was reasonably related to the state's interest in maternal health.¹⁴⁰

Under Justice O'Connor's standard, this provision should be upheld. The hospital requirement does not impose an undue burden on the woman's right to *choose* an abortion; it merely limits the permissible facilities at which she may exercise her choice. Even assuming the provision did create an undue burden, it still would be reasonably related to the state's compelling interests in maternal health and pro-

from *Thornburgh*, three of the four remain: O'Connor, Rehnquist, and White. New to the Court are Scalia, replacing Burger, and Kennedy, replacing Powell. Thus, there are only four known majority voters to uphold the *Roe* decision. Three of these four men are octogenarians. Thus, the composition of the Court could change rapidly and the fate of *Roe v. Wade* is uncertain.

There are fears that Justices Scalia and Kennedy will not support the right to abortion. Some authors feel that Scalia will follow in the footsteps of Burger and call for a re-examination of *Roe*. See ABORTION AND THE CONSTITUTION, *supra* note 7, at 254. When Kennedy was confirmed in 1988, his biggest asset seemed to be that he was not identified with any particular ideology. No one has any idea how he will vote on sensitive topics and neither pro-choice nor pro-life organizations feel confident of his support. Williams, *The Opinions of Anthony Kennedy, No Time for Ideology*, A.B.A. J., Mar. 1, 1988, at 56, 61. Justice Blackmun, author of *Roe*, in commenting on *Roe* and the new Justice Kennedy, stated he, Blackmun, would not change much of *Roe* were it to be decided today; but Blackmun did express his fear that *Roe* may be overturned soon, noting the well-known axiom, "One never knows what a new justice's attitude" will be. *Justice Fears for Roe Ruling*, N.Y. Times, Sept. 14, 1988 at A24, col. 4.

134. 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 780 (1989). Please note that, at the court of appeals level, the case is cited in the singular, i.e., Reproductive Health Service, rather than Reproductive Health Services.

135. *Id.* at 1073.

136. *Id.*

137. *Id.* at 1074. Gestational age is usually two weeks older than fetal age, i.e., 16 weeks gestational age translates into 14 weeks fetal age. *Id.* at 1074 n.3.

138. *Id.* at 1074.

139. *Id.*

140. *Id.*

tection of potential life, both of which exist at all stages of the pregnancy.¹⁴¹

Section 188.029 requires the physician to determine gestational age, weight, and lung capacity of the fetus of all patients believed to be twenty or more weeks pregnant, in an attempt to determine whether the fetus is viable.¹⁴² The court of appeals struck down this provision as an illegitimate attempt by the Missouri legislature to invade the province of medical judgment.¹⁴³

Justice O'Connor should uphold these requirements. This provision is necessary for an informed decision by the woman under any standards, including *Roe*. The requirements do not impermissibly interfere with the physician's medical judgment, since any competent doctor would perform tests at this stage to determine viability and section 188.029 requires nothing more.¹⁴⁴ Though the provision might unduly burden the woman due to the increased cost of the procedures, it is rationally related to the state's compelling interests in maternal health and potential life.

Section 188.205 of the Missouri statute prohibits the expenditure of public funds on abortion.¹⁴⁵ The court of appeals upheld this provision as controlled by Supreme Court decisions,¹⁴⁶ and Justice O'Connor should affirm the decision.

This case also presents the question of whether the state can prohibit public employees or public facilities from being utilized for abortions¹⁴⁷ where the woman is seeking medical advice or assistance and will *pay* for the services.¹⁴⁸ The court of appeals struck down these provisions as the product of the illegitimate state purpose of discouraging abortions.¹⁴⁹

Justice O'Connor might agree with the court of appeals' decision, though not with its logic. Here, the undue burden might outweigh

141. See, e.g., *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 466-67 (1983); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 505 (1983).

142. *Webster*, 851 F.2d at 1074.

143. *Id.* at 1074-75. The court of appeals, in making its determination, relied upon the Supreme Court's decision in *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). *Webster*, 851 F.2d at 1074.

144. This is also the reasoning articulated by the state of Missouri in defense of §188.029. See *Webster*, 851 F.2d at 1075 n.5.

145. *Id.* at 1077 n.9.

146. *Id.* at 1084. The court of appeals relied upon Supreme Court decisions such as *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); and *Poelker v. Doe*, 432 U.S. 519 (1977). *Webster*, 851 F.2d at 1081.

147. *Webster*, 851 F.2d at 1077 n.9.

148. *Id.* at 1083.

149. *Id.* at 1082-83.

the compelling state interest. Though O'Connor has found a state's interest in promoting childbirth over abortion to be permissible,¹⁵⁰ she also has acknowledged that an undue burden might exist where hospitals refuse to perform abortions.¹⁵¹ Her decision might actually hinge on whether there are private hospitals in the area willing to perform abortions. If there are other accessible alternatives, O'Connor might uphold the provisions as not unduly burdensome.

The three provisions regarding public funds, employees, and facilities each contain sections prohibiting a public employee from encouraging or counselling a woman to have an abortion.¹⁵² The court of appeals invalidated these sections on the grounds that they were void for vagueness,¹⁵³ in their failure to give proper notice of impermissible conduct and consequences of physician/patient action,¹⁵⁴ and as an obstacle to the right of privacy of an informed choice.¹⁵⁵

Justice O'Connor should not find these provisions void for vagueness since the state is only declaring its preference of childbirth over abortion, a permissible state activity.¹⁵⁶ Nor would she find these provisions violative of a woman's right to an informed consent since the state has nowhere prohibited the dissemination of relevant information on the abortion; rather, it has only proscribed public employees from *encouraging* women to have abortions.

Finally, the court of appeals addressed the section of the statute that held life begins at conception.¹⁵⁷ The court of appeals first disposed of the question of standing. Rejecting the state's arguments that this proclamation does not involve abortion and has no substantive effect, the court held that the plaintiffs had standing¹⁵⁸ and, then, invalidated the proclamation on the merits as an impermissible determination of when life begins.¹⁵⁹

Should the Supreme Court decide to address this issue, Justice O'Connor would hesitate to recognize the belief that life begins at conception. She has continually referred to the "potential" for life as being a compelling state interest throughout pregnancy,¹⁶⁰ but the

150. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 466 (1983).

151. *Id.*

152. *Webster*, 851 F.2d at 1077 n.9.

153. *Id.* at 1079.

154. *Id.* at 1077-78.

155. *Id.* at 1080.

156. *Id.* See *Akron*, 462 U.S. at 466.

157. *Webster*, 851 F.2d at 1075.

158. *Id.* at 1076.

159. *Id.* at 1077.

160. *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

acknowledgement of fundamentally protected life from the moment of conception has such far-reaching consequences that it would cause more turmoil than was created by the *Roe* decision itself. O'Connor's main interests in changing the *Roe* formulation are to establish clear guidelines for the rights of the woman and state, and to allow a true analysis of the competing interests. Additionally, her belief in judicial restraint would keep her from recognizing another fundamental right, especially one not textually demonstrable. Such a recognition would not further any of her objectives and could open the floodgates for the end of the abortion right, as well as initiate countless substantive rights and speculative causes of action on behalf of unborn children. I do not believe Justice O'Connor, nor a majority of the Court, is willing to do this.

CONCLUSION

The abortion issue is one of the most controversial and heated concerns that the Court is currently addressing. It encompasses not only legal precepts but deeply rooted philosophical, moral, ethical, and religious beliefs.

Most factions are adamant in their position on abortion. Pro-choice groups feel that the law, as it now exists, allows all women freedom of autonomy regarding their bodies and lives. "The present policy allows both sides to exercise freedom of choice in an area entangled with emotion and considerable uncertainty."¹⁶¹ Pro-life factions refer to abortion as "discrimination on the basis of the place of residence."¹⁶²

Groups that tried to block her confirmation as Supreme Court Justice now see Justice O'Connor as a vote to overturn *Roe*, while pro-choice groups hope she will support the right to choose abortion, realizing that "every state will become a civil war battleground" if *Roe* is overturned and the issue is returned to the states.¹⁶³

In reviewing Justice O'Connor's writings, the common threads are her belief in capable state government, her fear that states are losing all autonomy, her notions of judicial restraint and deference to the legislative branches, and her desire for judicially manageable "bright lines" upon which cases will be decided and precedent will rest.

161. P.J. SHEERAN, *WOMEN, SOCIETY, THE STATE, AND ABORTION* 133 (1987).

162. *Hearings*, *supra* note 8, at 307 (testimony of Dr. John Willke, Pres., Nat'l Right to Life Comm.) ("residence" refers to the mother's womb).

163. N.Y. Times, Jan. 10, 1989, at B5, col. 1 (quoting Eleanor Smeal, Pres. of the Fund for the Feminist Majority).

These concerns, more than any abhorrence of abortion, have molded her abortion dissents.

Justice O'Connor does see a problem with abortion because it is not demonstrably entrenched in the Constitution's text,¹⁶⁴ but she, unlike Justices White and Rehnquist, has not openly called for the delegatization of abortion. She is willing to uphold the right to secure an abortion if it is rooted in legal principle, rather than medical terms, and if state legislatures are given some amount of leeway in its regulation. That may be less than what pro-choice factions desire, but it may be all that is possible in the changing Court.

Justice O'Connor is becoming the "great compromiser" of this Court. With no clear majority on the Court either to uphold or overturn *Roe*, and a natural hesitancy on the part of most Justices to return to the pre-*Roe* state of affairs, O'Connor's standard of review, one that makes concessions to both sides, will become the yardstick by which we measure the right to choose an abortion.

Susan M. Halatyn

ADDENDUM

On July 3, 1989, while this Comment was in publication, the Supreme Court handed down its decision in *Webster v. Reproductive Health Services*.¹

Briefly, the Court reversed the decision below, upholding all provisions that were before it. Thus, in order to determine viability, physicians must perform tests on any fetus believed to be at least twenty weeks gestational age.² The state can prohibit the use of public facilities and employees in abortions not necessary to save the life of the mother.³ The preamble of the statute was held to be only precatory, not substantive, and, consequently, the Court declined to pass on its constitutionality.⁴ The State of Missouri did not challenge the court of appeals' invalidation of the hospitalization requirement for abortions attempted at sixteen weeks or later,⁵ and the prohibition on

164. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting).

1. 109 S. Ct. 3040 (1989).

2. *Id.* at 3057.

3. *Id.* at 3053.

4. *Id.* at 3050.

5. *Id.* at 3049.

expenditure of public funds was mooted when appellees accepted the state's interpretation of the provision.⁶ The reasoning of the Court was, in many ways, similar to that utilized in this Comment, but O'Connor's formulation was not formally adopted.

However, the relevance of *Webster* is not in the particular holdings of the Court. *Webster* is significant because it did not settle the abortion controversy. Note three critical observations: Chief Justice Rehnquist wrote the opinion, the Court is in a virtual stalemate alignment, and the Court has accepted three abortion cases for the fall term.

The first consideration is whether Chief Justice Rehnquist would have written the opinion if he felt the Court would eventually adopt O'Connor's formulation as a resolution to the abortion issue. Would it not have been judicial courtesy to allow Justice O'Connor to write the opinion if *Webster*, modifying *Roe*, were to be the final word on abortion? Having signed on to write the opinion himself, he must have felt that total victory and the end of *Roe* were at hand. Justice Scalia was ready. Openly critical of O'Connor's posture, Scalia was primed to overturn *Roe* and angry that the Court was postponing the inevitable total re-examination and death of *Roe*.⁷

The alignment of the Court in this decision is extremely important. There is no middle ground on the Court, save O'Connor's stance. The Brethren have dug trenches: Chief Justice Rehnquist, with Justices White, Kennedy, and the bugle-sounding Scalia, on one side, ready to put an end to the right, and the veterans, Justices Blackmun, Brennan, Marshall, and Stevens, on the other horizon. The old men may be weary, but they will never vote to overturn the right to abortion; Blackmun was openly hostile and sarcastic in his dissent.⁸ At the center of the pandemonium stands Justice Sandra Day O'Connor. Had she wanted to overrule *Roe*, this would have been her opportunity. But she chose to stick to *her* guns: judicial restraint and bright lines. Sandra Day O'Connor, at this point in time, is the only moderate on the Court and she cannot garner any interest in her "unduly burdensome" scheme. Justice Scalia openly criticized the formula,⁹ however, Justice Blackmun, at one point, did allude favorably to the method.¹⁰

6. *Id.* at 3053.

7. *Id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment).

8. *Id.* at 3067-79 (Blackmun, J., concurring in part and dissenting in part).

9. *Id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment).

10. *Id.* at 3074 (Blackmun, J., concurring in part and dissenting in part).

Finally, the Court announced that it will hear three abortion cases next term.¹¹ The stage is set for further battle. The Rehnquist coterie senses victory. If they refuse to yield, will the Blackmun faction sign on with Justice O'Connor? If the Blackmun alliance feels that O'Connor is about to side with Rehnquist in overturning *Roe*, they may join her in order to preserve the right, though diminished, to abortion. Conversely, if the Rehnquist contingent cannot sway Justice O'Connor with any of these upcoming Supreme Court cases, knowing the Blackmun bloc will never vote to overturn *Roe*, Rehnquist's coalition may adopt O'Connor's scheme just to gain a majority in many sensitive abortion areas.

O'Connor, the Justice, woman, moderate, and compromiser will have her mettle tested once again next term. I still believe that she will try to persuade her Brethren that *her* way is the only method by which to resolve the abortion issue.

Susan M. Halatyn

11. See *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 3240 (1989); *Turnock v. Ragsdale*, 841 F.2d 1358 (7th Cir. 1988), *cert. granted*, 109 S. Ct. 3239 (1989); *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 3239 (1989).

