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Justice Sandra Day O'Connor: Trends Toward Judicial Restraint

NOTES

JUSTICE SANDRA DAY O'CONNOR: TRENDS TOWARD JUDICIAL RESTRAINT

Sandra Day O'Connor began her tenure on the United States Supreme Court without an extensive record as a jurist.[1] The substantive impact O'Connor would make on Supreme Court decisions was uncertain when she took the bench. Prior to her nomination in 1981 to serve as an Associate Justice of the Supreme Court, however, O'Connor favored limiting the jurisdiction of federal courts and enhancing the states' role in the federal system.[2] During her confirmation hearings before the United States Senate Committee on the Judiciary, O'Connor testified without reservation concerning her judicial philosophy.[3] In the confirmation hearings, O'Connor confirmed her support of federal judicial restraint.[4] According to O'Connor, the Court should not function as a policy making body, but rather should interpret and apply the law.[5] In O'Connor's view, the Court should decide cases on narrow grounds[6] and avoid unnecessarily deciding questions of constitutional law.[7] O'Connor's testimony on the proper role of the federal judiciary, however, was not limited to the role of the Court as a branch of the federal government, but extended to the relationship of the federal court system to state courts. In response to questions regarding an article[8] written by O'Connor in which she explored the relationship between the state and federal courts, O'Connor clarified her belief in the capacity of state courts

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1. *See Nomination of Sandra Day O'Connor: Hearings Before the Comm. on the Judiciary United States Senate,* 97th Cong., 1st Sess. 57, 115 (1981) (statement of Sen. Grassley) (noting O'Connor's lack of written record on major judicial issues), *reprinted in* R. MERSKY & J. JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1981, at 107 (Supp. 1983) [hereinafter cited as *Hearings*]; *see also* Matheson, *Justice Sandra D. O'Connor,* 1981 ARIZ. ST. L.J. 649, 649-50 (O'Connor served brief 21 months as state appellate judge); Schenker, *"Reading" Justice Sandra Day O'Connor,* 31 CATH. U.L. REV. 487, 491 (1982) (O'Connor had little experience with federal constitutional and statutory issues as state appellate judge).

2. *See generally* 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 (1981) (discussing federal review of state court judgments and federal courts' exercise of jurisdiction).

3. *See generally Hearings, supra* note 1, at 57-255 (1981) (testimony of Hon. Sandra Day O'Connor, nominated to be Associate Justice of United States Supreme Court).

4. *Id.* at 60.

5. *Id.* at 57, 60.

6. *Id.* at 108. During the confirmation hearings, in addition to urging judicial restraint in deciding constitutional cases, O'Connor stressed that in deciding a dispute a court may not look beyond the record and briefs at hand to consider social concerns of the country. *Id.* at 111, 131, 132.

7. *Id.* at 60.

8. *See generally* O'Connor, *supra* note 2.

to adjudicate federal constitutional issues.[9] O'Connor urged that federal courts should accord finality to state court judgments when the defendant in the state action has had a full and fair opportunity in state court to litigate a federal constitutional claim.[10] She encouraged the use of the state courts as the forum of choice, rather than continuing to provide litigants with an increasing choice of state or federal forums.[11] Moreover, in O'Connor's view, the states always have had significant rights under the tenth amendment that, despite a lack of strong precedent, the states could assert to manage their own affairs within the federal system.[12] Although O'Connor spoke openly in the hearings concerning her judicial philosophy, she declined to address particular substantive questions for fear of prejudicing the disposition of cases that might come before the Court in the future.[13] O'Connor's testimony during her confirmation hearings, however, left no doubt that O'Connor advocated a limitation of the federal judiciary and an expansion of the role of the states in the federal system. Otherwise, O'Connor's impact on the direction that the Court would take was an open question at the time of her confirmation.

In the first three years of her tenure on the Court, Justice O'Connor has filed over one hundred opinions addressing a wide variety of issues. The overriding trend emerging from O'Connor's opinions is her exercise of judicial restraint.[14] Although O'Connor clearly expressed her views during the confirmation hearings on limiting the scope of the federal judiciary, her testimony provided no basis to predict the great extent to which judicial restraint has played a dispositive role in varying substantive contexts. O'Connor has viewed the role of the federal judiciary as limited by the constitutional powers and duties given Congress and the executive branch,[15] by self-imposed restrictions,[16] and by the countervailing force of state sovereignty.[17] More importantly, however, this clear trend in O'Connor's opinions toward limitation of the scope of federal judicial power reflects O'Connor's sensitivity to the separation of powers doctrine and her commitment to the principles of federalism.

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9. *Hearings, supra* note 1, at 90, 136, 158.

10. *Id.* at 73, 209.

11. *Id.* at 92.

12. *Id.* at 85-86, 121-22.

13. *Id.* at 57-58, 116-18; *see id.* at 80, 84, 107, 199 (O'Connor declined to discuss her opinions on exclusionary rule, affirmative action, or abortion).

14. *See* Riggs, *Justice O'Connor: A First Term Appraisal,* 1983 B.Y.U. L. REV. 1, 44-45 (finding trend toward judicial restraint in O'Connor's first term decisions); *see also* Cromwell, *Federalism and Due Process: Some Ruminations,* 42 MONT. L. REV. 183, 183-84 (1981). Professor Cromwell suggests that judicial restraint implies an understanding that clear constitutional standards limit the federal judiciary. Cromwell, *supra,* at 184.

15. *See infra* notes 80-98 and accompanying text (discussing deference to Congress).

16. *See infra* notes 22-63, 99-109, 191-201 and accompanying text (discussing standing law and limits on equitable remedies).

17. *See infra* notes 121-90 and accompanying text (discussing role of state courts and support for state legislative judgments).

The separation of powers doctrine is implicit in the constitutional framework that allocates power among the judicial, executive, and legislative branches of the federal government.[18] By fragmenting governmental power, the framers of the Constitution intended to prevent a concentration of power in any one branch.[19] Additionally, the separation of powers indirectly would ensure the protection of individual constitutional rights.[20] A potential conflict arises when the separation of powers doctrine imposes restrictions on the judiciary that result in limitations on the ability of the judiciary to safeguard individual rights effectively.[21]

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18. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 135-37 (2d ed. 1983) (separation of powers is political doctrine intended to prevent concentration of power in one branch) [hereinafter cited as NOWAK]; Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine,* 25 ARIZ. L. REV. 805, 806 (1983) (separation of powers is implicit in Constitution); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U.L. REV. 881, 881 (1983) (separation of powers exists only in structure of Constitution); *see also* A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 38-47 (1963) (tracing history of separation of powers doctrine before incorporation into Constitution).

19. NOWAK, *supra* note 18, at 136.

20. *See* J. CHOPER, Y. KAMISER & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 73 (1979) (separation of powers indirectly secures individual rights); Dorsen, *Separation of Powers and Federalism—Two Doctrines with a Common Goal: Confining Arbitrary Authority,* 41 ALB. L. REV. 53, 53-54 (1977) (drafters of Constitution chose to secure individual liberties through separation of powers and federalism); Lee, *supra* note 18, at 807 (Constitution protects individual liberties either by explicit provision or by allocation of power). In *The Federalist Papers,* James Madison claimed that the Constitution afforded protection to personal liberties by preventing the accumulation of power in the same hands through the separation of powers, even if the branches were not totally separate and distinct. THE FEDERALIST No. 47 (J. Madison). In the view of a modern commentator, the Constitution protects individual rights through the separation of powers to the extent that the judicial branch remains separate, independent, and free from legislative or executive control. Conant, *Introduction* to A. VANDERBILT, *supra* note 18, at vi.

21. *See* A. VANDERBILT, *supra* note 18, at 98 (independence of Court as separate branch of government protects individual freedoms); Bodensteiner, *The Role of Federal Judges: Their Duty to Enforce the Constitutional Rights of Individuals When the Other Branches of Government Default,* 18 VAL. U.L. REV. 1, 1-19 (1983) (defending judicial activism to protect individual rights). Justice Vanderbilt and Professor Bodensteiner view protection of individual constitutional rights as a necessary function of the judiciary under separation of powers doctrine. *See* A. VANDERBILT, *supra* note 18, at 98 (strength of judiciary lies in its development as independent coordinate branch of government); Bodensteiner, *supra,* at 3 (separation of powers does not bar judicial activism in protecting individual constitutional rights if executive and legislative branches fail to enforce rights of politically powerless). Vanderbilt sees the independence of the federal judiciary as essential for protecting individual rights. A. VANDERBILT, *supra* note 18, at 98. In Vanderbilt's view, judicial inaction is as threatening to the independence of the judiciary as legislative or executive interference in the judicial branch. *Id.; see id.* at 128-40 (discussing judicial deference to other branches and limited judicial review of constitutional questions as impairing enforcement of individual constitutional rights). Vanderbilt questions whether judicial restraint threatens the constitutional balance of power. *Id.* at 129.

Similarly, Professor Bodensteiner relies on the premise that a democratic system of government that values individual rights needs a strong and active judiciary. Bodensteiner, *supra,* at 3. As the legislative and executive branches become less accessible to persons without

Justice O'Connor, in writing for the Court in *Allen v. Wright,*[22] rested the Court's decision denying standing and dismissing the plaintiffs' complaint on separation of powers concerns.[23] O'Connor's conclusion in *Allen* that the plaintiffs lacked standing reveals O'Connor's view of the power of the federal judiciary itself and of the judiciary's relationship to the executive branch.[24] Article III of the Constitution, in O'Connor's view, fundamentally limits the

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political influence, in Bodensteiner's view, it becomes increasingly important for the judiciary, as a separate branch of government, to provide a forum for politically powerless individuals. *Id.* at 3, 6-7. Bodensteiner concedes his assumption that all three branches should be responsive to the governed. *Id.* at 6. Bodensteiner views self-imposed restrictions on judicial review such as abstention, standing, and deferential review of state legislation as limiting the power of the judicial branch to protect constitutional rights. *Id.* at 5. Bodensteiner suggests that the unwillingness of the courts to hear the claims of the politically powerless raises equal protection and due process concerns because of the continuing access of the politically influential segment of the population to the legislative and executive branches. *Id.* at 19.

In *Minnesota State Bd. for Community Colleges v. Knight,* Justice O'Connor rejected, in part, Bodensteiner's assumption that all three branches of government must be open to the governed. *See* Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058, 1065 (1984) (O'Connor, J.) (public employees not represented on policy committee have no constitutional right to require government to listen to their views). In *Knight,* O'Connor found that individuals have no constitutional right of access to legislative or executive bodies when those public bodies decide only matters of general policy. *Id.; see infra* notes 64-77 and accompanying text (discussion of *Knight).*

22. 104 S. Ct. 3315 (1984) (O'Connor, J.).

23. *See infra* notes 33-63 and accompanying text (discussion of *Allen v. Wright); see also* Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058, 1066 (1984) (O'Connor, J.) (judicial enforcement of constitutional right to be heard in legislative and executive policy making sessions implicates separation of powers considerations); INS v. Phinpathya, 104 S. Ct. 584, 592-93 (1984) (O'Connor, J.) (separation of powers requires Congress, not judiciary, to revise statutory provisions governing deportation of aliens). In *INS v. Phinpathya,* O'Connor, writing for the majority, declined to increase through judicial decision the discretion of the Attorney General to suspend the deportation of deportable aliens who failed to meet the continuous presence requirement under § 244(a)(1) of the Immigration and Nationality Act. *Phinpathya,* 104 S. Ct. at 592-93; *see* Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982) (providing that Attorney General may suspend deportation of otherwise deportable alien who has been physically present in United States for not less than seven years preceding alien's application). In *Phinpathya,* the Immigration and Naturalization Service (INS) determined that Phinpathya had failed to meet the continuous presence requirement of § 244(a) and denied her application to suspend deportation. 104 S. Ct. at 587-88. The Board of Immigration Appeals (BIA) affirmed the INS decision, but the United States Court of Appeals for the Ninth Circuit reversed, finding that the BIA had overemphasized the statutory continuous presence requirement. *See id.* at 588. The Supreme Court granted certiorari to consider the meaning of the continuous presence requirement in § 244(a)(1). *Id.* Justice O'Connor, writing for the Court, held that § 244(a) established threshold requirements that a deportable alien must meet before the Attorney General may exercise his discretion to suspend deportation. *Id.* at 589. O'Connor rejected the Ninth Circuit's more generous reading of § 244(a) that relaxed the continuous presence requirement. *Id.* at 590-91. In O'Connor's view, the constitutional allocation of power among the three branches of government requires that only Congress, and not the courts, may revise existing law. *Id.* at 592-93.

24. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7, at 52-53 (1978) (justiciability requires Court to assess its role within federal government).

power of the federal courts.[25] Within the constitutional framework of separation of powers, article III provides that the power of the federal courts extends to cases or controversies.[26] The development of standing doctrine in response to the article III case or controversy limitation on the Court's subject-matter jurisdiction[27] is relatively new.[28] The Supreme Court has construed the article III case or controversy language to require a plaintiff to demonstrate that the plaintiff sustained direct and specific injury, that the defendant caused the injury, and that judicial relief will remedy the plaintiff's injury.[29]

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25. *Allen,* 104 S. Ct. at 3324.

26. U.S. CONST. art. III, § 2.

27. *See* L. TRIBE, *supra* note 24, § 3-7, at 52-53 (article III grants subject matter jurisdiction over cases and controversies).

28. *See generally* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?,* 78 YALE L.J. 816 (1969) (injury-in-fact requirement did not exist when authors of Constitution drafted article III). The requirement that a plaintiff must allege injury to achieve standing before a federal court was unknown when the authors of the Constitution drafted article III. *Id.* at 827, 829-30. Eighteenth century English courts permitted a "stranger," an uninjured plaintiff, to contest any unauthorized governmental action through a writ of prohibition. *Id.* at 819-27. The only discernible debate among American colonial lawyers was whether the granting of a writ of prohibition was of right or discretionary. *Id.* at 838-39. Standing doctrine was not a factor in American jurisprudence until the Supreme Court's 1923 decision in *Frothingham v. Mellon. Id.* at 818-19; *see* Frothingham v. Mellon, 262 U.S. 447, 488-89 (1923) (requiring that plaintiff must have suffered direct injury to litigate dispute in federal court). One commentator has observed that the Court did not link standing to article III until 1968 in *Flast v. Cohen.* Comment, *Standing, Separation of Powers, and the Demise of the Public Citizen,* 24 AM. U.L. REV. 835, 840-41, 841 n.20 (1975); *see* Flast v. Cohen, 392 U.S. 83, 101 (1968) (holding that article III requires plaintiff to have personal stake in outcome and parties to have adverse legal interests).

29. *See, e.g.,* Heckler v. Mathews, 104 S. Ct. 1387, 1394 (1984) (article III standing doctrine requires that plaintiff must show he suffered threatened or actual injury that defendant caused and that relief requested will remedy); City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983) (article III standing doctrine requires that plaintiff show he suffered threatened or actual injury caused by challenged governmental conduct and that plaintiff establish basis for equitable relief); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (article III standing doctrine requires as minimum that plaintiff must show he suffered threatened or actual injury that defendant caused and that requested relief will remedy). Commentators have criticized the restrictive effect of the particularized injury and causation requirements for article III standing. Critics regard the particularized injury requirement as an effective bar to citizen protests of unconstitutional governmental conduct because such citizen complaints generally reflect a shared grievance rather than an individual specific injury. *See* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis,* 1984 WIS. L. REV. 37, 49 (injury-in-fact requirement bars generalized constitutional claims). *See generally* Nichol, *Rethinking Standing,* 72 CALIF. L. REV. 68 (1984) (criticizing standing law's reliance on particularized harm requirement); Comment, *supra* note 28 (tracing development of citizen standing in federal court). *But see* Scalia, *supra* note 18, at 894-95 (approving requirement that plaintiff must suffer concrete and specific injury to contest governmental action). Observers have noted that the Supreme Court varies its application of the injury-in-fact requirement depending on the source of the right asserted. The commentators claim that the Court will defer to a legislative grant of standing, but will be more reluctant to

Notwithstanding the Court's earlier rejection in *Flast v. Cohen*[30] of the separation of powers principle as a basis of the developing article III standing requirements,[31] commentators agree that the Court's application of standing law under article III increasingly reflects separation of powers concerns.[32] In *Allen,* Justice O'Connor, writing for a five-member majority, squarely rested standing law on separation of powers considerations.[33]

In *Allen,* the Supreme Court considered whether a class of black parents whose children attended nominally desegregated public schools had standing to challenge the Internal Revenue Service's (IRS) failure to deny tax exempt

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grant standing when the plaintiff's claim rests on a constitutional right. *See* L. TRIBE, *supra* note 24, § 3-18, at 80 (article III injury-in-fact requirement limits courts' ability, but not Congress' ability, to grant standing); Logan, *supra,* at 59 (Court demonstrates deference to legislative definitions of injury); Nichol, *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C. L. REV. 798, 816-17 (1983) (statute can provide basis to assert generalized grievance) [hereinafter cited as Nichol, *Standing on the Constitution]; see also* Logan, *supra,* at 48-49, 48 n.54 (present Court has granted standing in higher percentage of cases when plaintiff raises statutory rather than constitutional claim).

O'Connor, however, writing for an unanimous Court in *Bread Political Action Comm. v. Federal Election Comm'n,* construed a statutory grant of standing narrowly by refusing to expand the class of designated plaintiffs. Bread Political Action Comm. v. Federal Election Comm'n, 455 U.S. 577, 584 (1982) (O'Connor, J.). In *Bread,* the Federal Election Campaign Act (FECA) granted the Federal Election Commission, the national committee of any political party, and any individual eligible to vote in a national election standing to challenge the constitutionality of FECA through expedited procedures. *Id.* at 578. The petitioners in *Bread,* two trade associations and three political action committees, sought expedited review of FECA provisions restricting their solicitation of funds for political purposes. *Id.* at 578-79. The *Bread* Court refused to enlarge the three statutory classes of plaintiffs entitled to seek expedited review of FECA provisions in order to include the petitioners. *Id.* at 584. O'Connor, however, stressed the availability of a federal forum to litigate the petitioners' claim under other alternative provisions of FECA or under 28 U.S.C. § 1331 without deciding whether the petitioners in fact had standing under the alternative provisions. *Id.* at 584-85; *see* 28 U.S.C. § 1331 (1982) (granting district courts original jurisdiction of all civil actions arising under Constitution, laws, or treaties of United States).

In addition to attacking judicial reliance on the particularized injury requirement, commentators also have criticized the Court's inclusion of causation as an element of standing analysis when the plaintiff's failure to satisfy the causation component deprives the plaintiff of access to the federal courts. *See* L. TRIBE, *supra* note 24, § 3-21, at 94-97 (independent causation requirement had no basis in case law prior to *Warth v. Seldin); see also* Warth v. Seldin, 422 U.S. 490, 507, 509 (1975) (dismissing plaintiff's action because facts set out in complaint did not establish causal link between challenged zoning practices and alleged injuries). *See generally* Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint,* 69 KY. L.J. 185 (1980) (criticizing Burger Court's development of causation component).

30. 392 U.S. 83 (1968).

31. *See id.* at 100-01 (separation of powers considerations not involved in standing inquiry whether plaintiff is proper party to present dispute to federal court); Nichol, *Standing on the Constitution, supra* note 29, at 810 (noting Court's rejection in *Flast* of separation of powers as basis for standing law).

32. *See* L. TRIBE, *supra* note 24, § 3-7, at 52-53 (article III limitations on subject matter jurisdiction define role of judicial branch). *See generally* Logan, *supra* note 29 (examining standing law from separation of powers perspective).

33. *Allen,* 104 S. Ct. at 3325, 3329-30, 3330 n.26.

status to allegedly discriminatory private schools.[34] The class, comprising several million persons, complained that the IRS regulations and procedures were not sufficient to implement the IRS policy of denying tax-exempt status to discriminatory private schools.[35] The class requested the federal court to declare the IRS practices unlawful, to enjoin the IRS from granting tax-exempt status to a class of private schools larger than the class described under existing law, and to revise agency regulations to comply with the new standards requested in the injunction.[36] O'Connor, writing for the majority, recited the standing requirements constitutionally mandated under the present Court's construction of the case or controversy language in article III.[37] In the Court's view, standing law required the plaintiff-class in *Allen* to allege that the class was injured, that the IRS had caused the class' injury, and that judicial intervention in the implementation of IRS policy would redress the plaintiffs' injury.[38] According to O'Connor, the federal courts could not intrude into the activities of another branch of government unless the complaint provided a sufficient factual basis to justify such an intrusion.[39] In O'Connor's view, the determination of standing is not a "mechanical exercise," but rather requires the Court to examine the pleadings to determine whether the plaintiff has satisfied the article III standing requirements.[40] Any requirement that a plaintiff plead specific factual allegations before discovery to satisfy the injury and causation components of standing, however, conflicts with the liberal notice pleading standard embodied in rule 8(a) of the Federal Rules of Civil Procedure[41] and adopted by the Court in *Conley v. Gibson*.[42]

The plaintiff-class in *Allen* alleged two injuries.[43] First, the plaintiff-class alleged that the government had harmed the plaintiff-class by providing

34. *Id.* at 3319; *see* Note, *Leading Cases of the 1983 Term: Standing—Injury-in-Fact Requirements,* 98 HARV. L. REV. 236, 237-38 & nn.7-17 (1984) (briefly tracing background of *Allen* lawsuit). *See generally* McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools,* 52 FORDHAM L. REV. 441 (1984) (examining taxpayer standing law immediately prior to *Allen* decision).

35. *Allen,* 104 S. Ct. at 3319, 3321.

36. *Id.* at 3322-23. In *Allen v. Wright,* the plaintiffs requested that the IRS deny tax exempt status to all private schools with few or no minority students located in desegregated public school districts that demonstrated either growth in enrollment during the period of public school desegregation or practices of racial segregation, or that failed to establish that the school did not provide educational facilities for children who wanted to avoid desegregated public schools. *Id.*

37. *Id.* at 3325.

38. *Id.*

39. *Id.* at 3325, 3329.

40. *Id.* at 3325.

41. *See* FED. R. CIV. P. 8(a) (providing that pleading shall contain short and plain statement of claim showing that pleader is entitled to relief).

42. *See* 355 U.S. 41, 47-48 (1957) (endorsing rule 8(a) standard for notice pleadings). *See generally* Roberts, *Fact Pleading, Notice Pleading, and Standing,* 65 CORNELL L. REV. 390 (1980) (discussing developing conflict between standing law and notice pleading).

43. *Allen,* 104 S. Ct. at 3325-26.

financial aid in the form of tax exemptions to discriminatory private schools.[44] The *Allen* plaintiffs also alleged that the IRS' failure to deny tax-exempt status to discriminatory private schools had impaired the right of the children in the plaintiff-class to desegregated public education.[45] The Court held that the plaintiffs' first claim, that the agency's granting tax-exempt status to certain private schools harmed the plaintiffs, did not allege a judicially cognizable injury regardless of whether the Court construed the first claim as a demand for lawful government or as a claim of stigmatic injury shared by all members of a race.[46] The *Allen* Court, therefore, dismissed the first claim as not satisfying the particularized injury requirement.[47] The Court's disposition of the plaintiffs' first claim in *Allen* strengthens the present Court's controversial position that a shared public grievance stemming from the government's violation of the law is not an injury within the meaning of article III.[48]

The *Allen* plaintiffs' second claim, that the IRS' failure to deny tax-exempt status to certain schools affected the rights of minority children to desegregated public education, according to the Court, did present a judicially cognizable injury.[49] In O'Connor's view, however, the second claim failed to meet the causation component of the standing requirements.[50] O'Connor treated the requirements that the plaintiff show that the defendant caused the plaintiff's injury and that the judicial relief requested will remedy that injury as two distinct aspects of the causation component.[51] O'Connor noted that the causal link between the conduct of the IRS and the class' alleged injury must be clear and direct to overcome separation of powers concerns.[52] The Court, however, found that the plaintiffs in *Allen* did not satisfy either aspect of causation.[53] O'Connor found that the pleadings did not establish

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44. *Id.*

45. *Id.*

46. *Id.* at 3326-27.

47. *Id.* at 3327.

48. *See id.* at 3326-27 (citizens have no standing to complain simply of unlawful government); *cf. supra* note 29 (noting recent criticism of injury-in-fact requirement).

49. *Allen*, 104 S. Ct. at 3328.

50. *Id.*

51. *Id.* at 3326 n.19.

52. *Id.* at 3329, 3330 n.26.

53. *Id.* at 3328-29. *But see* Watt v. Energy Action Educ. Found., 454 U.S. 151 (1981) (O'Connor, J.). Writing for the majority in *Watt v. Energy Action Educ. Found.*, O'Connor reached a different result from the result that the Court had reached in *Allen* on the issue of redressability. *See* 454 U.S. at 162 (granting California standing to sue Secretary of Interior). In *Watt*, the state of California complained that the Secretary of the Interior had failed to experiment with more competitive bidding systems in awarding leases for oil and gas exploration on the Outer Continental Shelf as required by statute. *Id.* at 161. The federal government argued that even if the Secretary were to have experimented with alternative bidding systems, California could not be certain that the system the state preferred would have been applied to California tracts. *Id.* The United States Court of Appeals for the District of Columbia Circuit had ordered the Secretary of the Interior to experiment with certain bidding systems. *Id.* at

that the IRS' allegedly ineffective administration of tax regulations directly caused the failure of desegregated public schools to attract significant numbers of white children nor that judicial enforcement of the tax laws would result in an improved racial mix in the public schools.[54] The Court, therefore, refused to grant standing to the plaintiff-class.[55]

Justice O'Connor's denial of standing in *Allen* resulted in a dismissal of the suit and a clear signal to Congress and the executive branch that the enforcement of IRS regulations is not the role of the judiciary.[56] In *Allen,* O'Connor relied on *Chicago & Grand Trunk Railway Co. v. Wellman*[57] to support her view that article III courts may act only under certain limited circumstances.[58] The dispute in *Grand Trunk* centered on the constitutionality of a state statute regulating freight rates.[59] The litigants had challenged the statute in a friendly lawsuit tried on stipulated facts.[60] The *Grand Trunk* Court warned that litigants could not turn to the judiciary, absent a genuine controversy, to challenge legislation after the parties' earlier attempts to defeat the passage of the statute had failed in the legislature.[61] Likewise, in O'Connor's view, individuals unhappy with an agency's implementation of agency policy may not use the judiciary to enforce the policy absent a direct,

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159. O'Connor, writing for the Court, however, ignored any separation of powers considerations implicated by a federal court of appeals ordering the executive branch to implement the Outer Continental Shelf Lands Act Amendment absent California's showing that the court's action would provide certain relief. *See id.* at 160-62 (O'Connor did not address separation of powers considerations). O'Connor instead relied on the presumption that the agency, if compelled to experiment with alternative bidding systems, would employ the most competitive bidding system in a good faith effort to ensure the state of California the greatest return on leased tracts. *Id.* at 162.

Despite an arguably more relaxed application of standing law in *Watt,* O'Connor generally has opposed relaxation of standing requirements, prior to *Allen,* when standing was an issue before the Court. *See, e.g.,* Secretary of State of Md. v. Joseph H. Munson Co., 104 S. Ct. 2839, 2857 (1984) (Rehnquist, J., dissenting) (O'Connor joined dissent, which protested plaintiff's inappropriate use of overbreadth doctrine to establish standing); City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (O'Connor joined majority to deny plaintiff standing to seek injunctive relief because plaintiff failed to show likelihood of future injury); Larson v. Valente, 456 U.S. 228, 264 (1982) (Rehnquist, J., dissenting) (O'Connor joined dissent, which argued that plaintiff had burden to establish that judicial relief would remedy injury); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 482, 483, 486-87 (1982) (O'Connor joined majority to deny plaintiff standing to bring either taxpayer's or citizen's suit against allegedly unconstitutional governmental action).

54. *Allen,* 104 S. Ct. at 3328-29, 3333.

55. *Id.* at 3333.

56. *Id.* at 3330; *see* McCoy & Devins, *supra* note 33, at 468-71 (describing congressional inaction in face of judicial activism on tax-exempt issue).

57. 143 U.S. 339 (1892).

58. *Allen,* 104 S. Ct. at 3325; *see Chicago & Grand Trunk Ry.,* 143 U.S. at 345 (plaintiffs may challenge constitutionality of statute in federal court only as last resort).

59. *Chicago & Grand Trunk Ry.,* 143 U.S. at 342.

60. *Id.* at 344.

61. *Id.* at 345.

specific, and remediable injury.[62] To the extent that Justice O'Connor relied on separation of powers considerations to deny an aggrieved individual access to the judiciary, O'Connor's opinion undercuts the premise that the separation of powers doctrine implicitly protects individual freedoms.[63] Under O'Connor's rule, plaintiffs who complain of unlawful governmental conduct but who cannot meet the substantive and procedural requirements that the *Allen* Court set forth must seek a remedy through the political process.

Effectively, the *Allen* decision shifted the plaintiffs' complaint from a judicial forum into the political arena. Justice O'Connor, however, had limited individual access to the political forum to influence policy matters in her opinion for the majority in *Minnesota State Board for Community Colleges v. Knight.*[64] In *Knight,* the Court considered the constitutionality of a state statute that allegedly prevented nonunion college faculty members from participating in the selection of representatives to faculty committees advising the state community college board on policy matters.[65] The plaintiffs

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62. *Allen,* 104 S. Ct. at 3330. O'Connor stated in *Allen* that the Constitution delegated the duty to enforce the laws to the executive branch, and not to judiciary. *Id.* In *Allen,* O'Connor refused to intrude into the daily operations of the Internal Revenue Service to enforce administrative agency policies toward discriminatory private schools. *See id.* at 3329-30 (general oversight of executive branch is not proper role for judiciary). O'Connor, however, has not waived judicial control over administrative agencies. According to O'Connor, the function of judicial review of administrative agencies is to determine whether an agency's action falls within the agency's statutory powers. *See* Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983) (O'Connor, J.) (Congress assigned courts only limited role of reviewing agency action to determine whether action is authorized by statute). Moreover, O'Connor will assert the Court's power to check any administrative action that, in her view, Congress did not intend. *See, e.g.,* ICC v. American Trucking Ass'ns, Inc., 104 S. Ct. 2458, 2468-72 (1984) (O'Connor, J., dissenting) (judicial precedent and legislative history provide no basis for doctrine of inherent agency power); EEOC v. Shell Oil Co., 104 S. Ct. 1621, 1643 (1984) (O'Connor, J., concurring in part and dissenting in part) (EEOC's failure to provide informative notice to employer of charges filed with EEOC defeated congressional purpose of fostering voluntary compliance with Title VII); NLRB v. City Disposal Sys. Inc., 104 S. Ct. 1505, 1517 (1984) (O'Connor, J., dissenting) (NLRB exercised undelegated legislative power by extending its jurisdiction in effort to enforce individual contract rights secured by collective bargaining agreements); Commissioner v. Engle, 104 S. Ct. 597, 608-09 (1984) (O'Connor, J.) (Commissioner's interpretation of statute governing tax deductions for income from oil and gas leases was unreasonable in light of congressional intent to encourage further production); Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582, 612-15 (1983) (O'Connor, J., concurring) (agency regulations to implement Title VI were invalid in O'Connor's view because regulations did not require showing of purposeful discrimination intended by Congress).

63. *See supra* note 21 and accompanying text (suggesting that potential conflict may arise from restricting individual access to federal courts on separation of powers grounds).

64. 104 S. Ct. 1058 (1984).

65. *Id.* at 1060. In *Minnesota State Bd. for Community Colleges v. Knight,* certain faculty members challenged the constitutionality of a Minnesota labor law that limited the plaintiffs' participation in policy-making meetings within the state community college system. *Id.* at 1063. In Minnesota, the Public Employment Labor Relations Act (PELRA) governed the relationships between all public employers and their employees. *Id.* at 1060. PELRA provided that each

in *Knight* claimed that the state of Minnesota had created a forum for faculty advice and input regarding the administration of the Minnesota community college system through enactment of the Public Employment Labor Relations Act (PELRA).[66] The plaintiffs further alleged that the Minnesota Community College Faculty Association (MCCFA), the exclusive bargaining agent for all community college faculty, and the Minnesota State Board for Community Colleges (the Board), the governing agency for the Minnesota community college system, had denied the plaintiffs access to this forum based solely on the plaintiffs' failure to join MCCFA.[67] The plaintiffs argued that although the state had no obligation to create a forum for debate, once the state in fact had created such a forum, discriminatory application of the statute to limit access to that forum for certain public employees violated the equal protection clause of the fourteenth amendment.[68]

The *Knight* Court, in its statement of the issue presented, did not clarify the specific constitutional provision that provided the basis for the plaintiffs' challenge,[69] but proceeded to consider the complaint under the first and

bargaining unit must choose an exclusive bargaining agent who also would serve as the unit's only representative in informal policy meetings. *Id.* The statute barred employers from meeting with any other employee representatives. *Id.* at 1061. The Minnesota State Board for Community Colleges (Board) managed the Minnesota community college system and was a public employer within the meaning of PELRA. *Id.* The Minnesota Community College Faculty Association (MCCFA) was the exclusive bargaining agent for all faculty within the Minnesota community college system. *Id.* Because not all faculty members belonged to the MCCFA, a controversy arose when the MCCFA selected only its own members to participate in committee meetings designed to negotiate collective bargaining agreements and to advise the Board on policy matters. *Id.* at 1062. The faculty members who were not members of the MCCFA filed suit to challenge the constitutionality of the MCCFA's exclusive representation of the faculty in collective bargaining sessions and in policy discussions. *Id.* at 1063. The district court upheld the constitutionality of PELRA's provisions requiring exclusive representation in the collective bargaining negotiations. *See* Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1, 3-7 (D. Minn. 1982) (rejecting plaintiffs' arguments that MCCFA properly may not negotiate labor contract on behalf of state employees), *aff'd,* 460 U.S. 1048 (1983). The district court, however, determined that PELRA as applied by the MCCFA infringed the first amendment rights of faculty members who were not members of the MCCFA. 571 F. Supp. at 9-10 & n.20. In a modified remedial decree, the district court ordered the MCCFA to permit cumulative voting to afford non-member faculty an increased opportunity to represent their views on the MCCFA's advisory policy committees. *See* 104 S. Ct. at 1063 n.5 (acknowledging remedy ordered by district court). The Board appealed from the remedial order. *See* Brief for Appellees, No. 82-898, at i, Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058 (1984) (question presented to Court endorsed propriety of cumulative voting remedy) [hereinafter cited as Brief for Appellees]. *But see Knight,* 104 S. Ct. at 1063 n.5 (no need to reach question of remedy since PELRA upheld as constitutional).

66. Brief for Appellees, *supra* note 65, at 3-4.

67. *Id.*

68. *Id.* at 5.

69. *See Knight,* 104 S. Ct. at 1060 (O'Connor stating question presented as whether limitations on certain employees' participation in policy discussions violated their constitutional rights); *id.* at 1063 (O'Connor stating issue before lower federal court without reference to any specific constitutional provision).

fourteenth amendments.[70] O'Connor, writing for the Court, construed the plaintiffs' complaint as advancing a constitutional right to be heard by state officials.[71] O'Connor rejected the district court's reasoning that Minnesota must afford a fair opportunity to non-MCCFA members to participate in a state-created forum intended to encourage debate.[72] O'Connor held that neither the first amendment nor any other constitutional provision could support a right to participate in governmental policy making.[73] From the perspective of separation of powers, enforcement of a constitutional right to be heard, in O'Connor's view, would require impermissible intrusion into the executive and legislative branches of government.[74] According to O'Connor, the state may choose to whom it listens, if it chooses to seek advice at all.[75] Moreover, in O'Connor's view, neither the exclusive representation provisions of PELRA nor PELRA's implementation by MCCFA violated the plaintiffs' first amendment rights of free speech or association.[76] Having found no fundamental value at stake, O'Connor reviewed the contested PELRA provisions under the rational basis test in light of the plaintiffs' equal protection challenge and found that the PELRA provisions requiring the selection of exclusive representatives for informal policy discussions

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70. *Id.* at 1064-70.

71. *Id.* at 1065. In *Knight,* the plaintiffs had argued that their right to participate in the selection of representatives to PELRA advisory policy committees arose under PELRA, not the Constitution. Brief for Appellees, *supra* note 65, at 5.

72. *Knight,* 104 S. Ct. at 1065; *see* Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1, 9-10 (D. Minn. 1982) (holding that state must provide fair opportunity for all faculty to participate in selection of faculty representatives to advisory committees).

73. *Knight,* 104 S. Ct. at 1066, 1068 n.10. In *Knight,* O'Connor relied on *Bi-Metallic Inv. Co. v. State Bd. of Equalization* to support her stringent rejection of a constitutional right to be heard. *Id.* at 1065-66; *see* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that no individual has right to be heard in state administrative hearing).

74. *Knight,* 104 S. Ct. at 1066.

75. *Id.* at 1066-67, 1068.

76. *Id.* at 1068. In *Knight,* although the plaintiffs did not argue that informal committee meetings were a public forum, O'Connor foreclosed any future claim that such committee meetings are a public forum or a non-public forum deserving first amendment protection. *Id.* at 1064-65; *see* Brief for Appellees, *supra* note 65, at 3-4 (conceding that, absent PELRA, Constitution does not require Minnesota to maintain public forum for policy discussion). Professor Farber and Nowak note that a traditional public forum is a sidewalk or park, whereas a nonpublic forum may include government property not normally open to the public. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication,* 70 VA. L. REV. 1219, 1220-21, 1221 n.12 (1984); *see* Note, *The Public Forum and the First Amendment: The Puzzle of the Podium,* 19 NEW ENG. L. REV. 619, 628 & n.60, 631-32 (1984) (referring to public property like schools, jails, libraries, and courthouses as nontraditional rather than nonpublic forums). Farber and Nowak point out that the Supreme Court has classified the type of forum to which a plaintiff desires access in analyzing first amendment challenges to content regulation of speech. Farber & Nowak, *supra,* at 1220. Farber and Nowak claim that the degree of scrutiny will vary depending upon the nature of the forum. *See id.* at 1220-21 (regulation of speech in public forum more closely scrutinized than regulation in nonpublic forum). These commentators, however, claim that use of public forum analysis displaces a discussion of the particular first amendment values involved

served legitimate state interests.[77] Implicitly, therefore, O'Connor found no first amendment rights attaching to a statutorily created forum. Furthermore, O'Connor found that those who are denied access to the forum have no enforceable equal protection claim when the limitations on access serve legitimate state interests.

Justice O'Connor's sensitivity to separation of powers considerations, which compelled the dismissal of the plaintiffs' complaint in *Allen*[78] and supported her refusal to recognize a constitutional right to be heard in *Knight*,[79] is also implicit in O'Connor's deference to Congress' power to limit the jurisdiction of the lower federal courts.[80] For example, in *South*

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in a case. *Id.* at 1224. Farber and Nowak have criticized O'Connor's public forum analysis in *Knight*, in particular, as failing to consider the possible first amendment implications of PELRA. *Id.* at 1257-61.

In *Knight*, however, O'Connor implicitly found that the first amendment tolerated government preferring one voice over another in the context of governmental policy making. *See Knight*, 104 S. Ct. at 1068 (amplification of single official voice is result of government's freedom to listen to whomever it chooses). Additionally, O'Connor found that MCCFA's ability to exclude dissenting voices did not threaten any constitutional values. *Id.* Under the rule in *Knight*, government violates no constitutional principles in affording individuals little or no access to policy making bodies. *See id.* at 1066-67 (O'Connor noting that persons may express disapproval of public policy at polls); *cf.* Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring). In *Lynch v. Donnelly*, decided one month after *Knight*, O'Connor concurred in the majority's determination that the City of Pawtucket did not violate the establishment clause by displaying a creche during the Christmas season. 104 S. Ct. at 1366; *see id.* (majority holding creche display did not violate establishment clause). In considering the dangers of governmental involvement in religion, O'Connor claimed that government endorsement of a particular religious view conveyed to the public that the government preferred the views of certain citizens over others. *Id.* In O'Connor's view, such preference violated the establishment clause. *Id.* The appearance of preferring one view over another seemed less troubling to O'Connor in *Knight* in the context of a statutorily created forum to debate policy. *See Knight*, 104 S. Ct. at 1068 (government's preference of MCCFA view did not violate first amendment because, in O'Connor's view, excluded persons still could exercise freedom of speech). In *Knight*, however, religious entanglement was not a factor. *See Knight*, 104 S. Ct. at 1064-70 (Court addressing access to political policy making organs of government only).

77. *Knight*, 104 S. Ct. at 1069-70.

78. *See supra* notes 22-63 and accompanying text (discussion of separation of powers concerns in *Allen).*

79. *See supra* note 74 and accompanying text (discussion of separation of powers concerns in *Knight).*

80. *See, e.g.*, Block v. Community Nutrition Inst., 104 S. Ct. 2450, 2458 (1984) (O'Connor, J.) (federal court had no jurisdiction to review agency action because Congress precluded judicial review); Justices of Boston Mun. Court v. Lyon, 104 S. Ct. 1805, 1829-30 (1984) (O'Connor, J., concurring) (Court should have found that federal court lacked jurisdiction to hear habeas petition because defendant was not in custody within meaning of federal statute); California v. Grace Brethren Church, 457 U.S. 393, 396 (1982) (O'Connor, J.) (Tax Injunction Act deprived federal court of jurisdiction to enjoin collection of state taxes); *cf.* South Carolina v. Regan, 104 S. Ct. 1107, 1118-19 (1984) (O'Connor, J., concurring) (Court should hold that Anti-Injunction Act deprived district court of jurisdiction to hear all suits for injunctive relief from collection of federal taxes).

Article III provides, in part, that federal judicial power shall be vested in the Supreme

Carolina v. Regan,[81] O'Connor, writing separately, affirmed Congress' constitutional authority to deprive federal courts of the power to enjoin the collection of federal taxes.[82] The dispute in *Regan* arose over the application of the federal Anti-Injunction Act[83] to South Carolina's claim that an amendment to the Internal Revenue Code (Code) affecting South Carolina's issuance of bonds violated the tenth amendment.[84] The *Regan* majority construed the Anti-Injunction Act as barring only the suits of those plaintiffs who could seek relief through means other than a suit for an injunction such as a taxpayer refund suit.[85] Because the state of South Carolina itself did not become liable for any taxes as a result of the Code amendment, the state of South Carolina had no means other than a suit for injunctive relief by which to challenge the provision. The *Regan* Court, therefore, held that the Anti-Injunction Act did not bar South Carolina's lawsuit.[86] In a separate concurrence, O'Connor disagreed with the majority's construction of the

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Court, and in lower federal courts as Congress may create from time to time. U.S. CONST. art. III, § 1. Congress' exercise of its power to limit the jurisdiction of lower federal courts is well-established. NOWAK, *supra* note 18, at 46-47; Bator, *Congressional Power Over the Jurisdiction of the Federal Courts,* 27 VILL. L. REV. 1030, 1030-38 (1982). Additionally, Article III grants Congress the power to limit the appellate jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2. Controversy has arisen, however, concerning Congress' power to withdraw the Supreme Court's appellate jurisdiction over a particular subject matter. *See* Bator, *supra,* at 1038-41 (arguing that although Congress has power to withdraw Supreme Court's appellate jurisdiction to give state courts original jurisdiction over constitutional issues, such removal of appellate jurisdiction would violate spirit of Constitution). *See generally* Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate,* 36 STAN. L. REV. 895 (1984) (describing debate over extent of congressional power to withdraw Supreme Court's appellate jurisdiction over entire classes of cases).

81. 104 S. Ct. 1107, 1118 (1984) (O'Connor, J., concurring).

82. *Id.* at 1118-19, 1123-24; *see* 26 U.S.C. § 7421(a) (1982) (Anti-Injunction Act) (providing in relevant part that no person may maintain suit in any court to restrain assessment or collection of any tax). Federal courts generally enforce the federal Anti-Injunction Act to bar taxpayer suits to enjoin tax collection when the aggrieved taxpayers have an alternative remedy. *See* NOWAK, *supra* note 18, at 48. The dispute in *South Carolina v. Regan* arose when the Treasury Department invoked the Anti-Injunction Act to bar a suit for injunctive relief by a nontaxpayer who had no alternative forum in which to seek relief. 104 S. Ct. at 1110; *see* 26 U.S.C. § 7421(a) (applying by its terms to all persons regardless of availability of alternative remedy).

83. 26 U.S.C. § 7421(a) (1982).

84. *Regan,* 104 S. Ct. at 1110-11; *see* U.S. CONST. amend. X (providing that powers not delegated to federal government are reserved to states or to people). In *Regan,* the challenged amendment to the Internal Revenue Code permitted the Internal Revenue Service (IRS) to tax the interest earned on certain bonds issued by the states in bearer form. 104 S. Ct. at 1110-11. South Carolina challenged the constitutionality of the taxing provision under the tenth amendment as infringing on South Carolina's borrowing power. *Id.* at 1111; *see* U.S. CONST. amend. X. South Carolina argued that the state no longer had an option to issue bearer bonds because South Carolina would have to pay a higher rate of interest to holders of bearer bonds than to holders of registered bonds to defray the tax liability that the bond holders would incur under the challenged taxing provision. 104 S. Ct. at 1111.

85. *Regan,* 104 S. Ct. at 1111-15.

86. *Id.* at 1116.

Anti-Injunction Act.[87] In O'Connor's view, the explicit language of the Act barred suits by taxpayers and nontaxpayers alike.[88] O'Connor recognized no due process problem in barring South Carolina's suit under the Anti-Injunction Act because the state was not a person and did not have a property right at stake within the meaning of the due process clause of the fifth amendment.[89] O'Connor, however, construed the Act to allow the Supreme Court to exercise its original jurisdiction to provide a forum for South Carolina's claim.[90]

Justice O'Connor in her *Regan* concurrence addressed the serious constitutional issue raised by the government whether the Anti-Injunction Act limited the original jurisdiction of the Court.[91] O'Connor differentiated Congress' power to regulate lower federal courts from its power to affect the appellate and original jurisdiction of the Supreme Court.[92] Although the Constitution permits Congress to impose restrictions on the appellate jurisdiction of the Supreme Court,[93] O'Connor noted that the Constitution is silent concerning the power of Congress to revise the Supreme Court's original jurisdiction.[94] By construing the Act's failure to limit specifically the Supreme Court's original jurisdiction as congressional acceptance of the Supreme Court's power to provide a forum through exercise of the Court's original jurisdiction, O'Connor avoided the important constitutional issue she had raised.[95] Considering the Court's role in relation to congressional prerogatives, O'Connor respected in the federal Anti-Injunction Act a clear legislative limitation on the jurisdiction of the federal district courts.[96] In the course of her concurrence in *Regan,* however, O'Connor acknowledged due

87. *Id.* at 1118 (O'Connor, J., concurring).

88. *Id.* at 1118-19; *see* 26 U.S.C. § 7421(a) (1982) (statute applies whether or not plaintiff is one against whom government assessed tax).

89. *Regan,* 104 S. Ct. at 1122-23.

90. *Id.* at 1126-27.

91. *Id.* at 1123.

92. *Id.* at 1123-24.

93. U.S. CONST. art. III, § 2. Article III provides, in part, that the Supreme Court shall have appellate jurisdiction except as Congress shall limit. U.S. CONST. art. III, § 2.

94. *Regan,* 104 S. Ct. at 1124; *see* U.S. CONST. art. III, § 2 (granting Supreme Court original jurisdiction to hear cases affecting ambassadors, other public ministers and consuls, and cases in which state is party).

95. *Regan,* 104 S. Ct. at 1125-26.

96. *See id.* at 1118-22 (Congress intended to bar all suits to enjoin collection of federal taxes whether initiated by taxpayers or nontaxpayers); *see also* California v. Grace Brethren Church, 457 U.S. 393, 417 (1982) (O'Connor, J.). In *California v. Grace Brethren Church,* religious schools unaffiliated with any church claimed that federal and state statutes requiring religious schools to make contributions to state unemployment compensation funds violated the establishment and free exercise clauses of the first amendment. 457 U.S. at 396-98. O'Connor, writing for the majority in *Grace,* held that the Tax Injunction Act deprived the federal court of jurisdiction to hear the dispute. *Id.* at 407-11. The Tax Injunction Act prohibited any district court from enjoining, suspending, or restraining the assessment or collection of state taxes when the taxpayer had a plain, speedy, and efficient remedy in state court. Tax Injunction Act, 28

process[97] and original jurisdiction[98] as two potential constitutional limitations on Congress' power to deny plaintiffs access to a federal forum.

In addition to Justice O'Connor's recognition of the restraints that standing doctrine and Congress' power to limit jurisdiction impose on the federal judiciary, signs of judicial restraint also are appearing in O'Connor's view of the proper exercise of remedial discretion when plaintiffs seek equitable remedies in federal court. O'Connor's attempts to limit the discretionary remedial power of federal courts have occurred primarily in cases in which plaintiffs seek relief under federal statutes for discriminatory practices in the workplace.[99] In particular, O'Connor has favored restraint when allegedly discriminatory em-

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U.S.C. § 1341 (1982). In *Grace,* the Court extended the prohibition against injunctions to include the issuance of declaratory judgments that state taxing laws were unconstitutional. 457 U.S. at 408-11, 409 n.22. Moreover, O'Connor writing for the Court found that the California state court had afforded Grace Brethren an opportunity to litigate its constitutional claim. *Id.* at 411-17. The *Grace* Court, therefore, refused to permit Grace Brethren to raise its first amendment claim in federal court because to permit such an exception, in O'Connor's view, would defeat Congress' purpose of sharply curtailing federal court disruption of state tax administration when state remedies were available. *Id.* at 416-17. The dissent in *Grace* complained that dismissal of the suit for lack of jurisdiction was unwarranted because Grace Brethren sued the Department of Labor in addition to the state taxing authorities to challenge a federal-state cooperative program established under federal law. *Id.* at 419-21 (Stevens, J., dissenting). Although the *Grace* dissent criticized the majority's expansive construction of the Tax Injunction Act to prohibit declaratory judgments as judicial legislating, at least one commentator has viewed O'Connor's strict enforcement of the Tax Injunction Act as further support for the present Court's commitment to federal judicial restraint. *Id.* at 421-22; *see* Note, *Supreme Court Decisions in Taxation—1981 Term: Prohibition of Federal Declaratory Relief Regarding State Tax Under Tax Injunction Act:* California v. Grace Brethren Church, 36 TAX. LAW. 485, 486, 494-95 (1983) (enforcement of Tax Injunction Act furthers policy of judicial restraint).

97. *See Regan,* 104 S. Ct. at 1122-23 (O'Connor, J., concurring) (due process prevents Congress from wholly denying forum to taxpayer with property interests at stake). One scholar has observed that the due process clause of the fifth amendment limits congressional restrictions on federal court jurisdiction. NOWAK, *supra* note 18, at 46-47. Professors Bator and Gunther, however, have noted that the availability of a state forum to litigate federal constitutional rights satisfies the due process safeguard. *See* Bator, *supra* note 80, at 1033-34; Gunther, *supra* note 80, at 915-16. *But cf.* Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager,* 77 NW. U.L. REV. 143, 161-66 (1982) (acknowledging capacity of state courts to litigate federal constitutional claims, but noting lack of independence of state court judges as possible basis for due process challenge to congressional attempts wholly to withdraw jurisdiction from federal courts). In alluding to due process considerations arising from congressional withdrawal of federal court jurisdiction, Justice O'Connor in *Regan* did not address the extent to which the availability of state courts alone would satisfy due process. *See* 104 S. Ct. at 1122-23 (O'Connor, J., concurring) (noting only that Congress may not deprive person with property interest access to judicial forum).

98. *Regan,* 104 S. Ct. at 1125. Although O'Connor in *Regan* did not decide the extent of congressional power over the Court's original jurisdiction, she cast doubt on the authority of Congress to deprive states of a federal forum. *See id.* (Congress may not withdraw express constitutional grant of original jurisdiction).

99. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2567, 2592-94 (1984) (O'Connor, J., concurring) (concurring in majority's decision to limit discretion of district court

ployers voluntarily comply with federal standards[100] and when the rights of in-

to modify Title VII consent decree entered into between minority-plaintiffs and allegedly discriminatory employer); Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3511-13 (1983) (O'Connor, J., concurring) (disapproving retroactive award of retirement benefits to female employees who had successfully challenged, under Title VII, insurance industry practice of distributing less per month to women in retirement benefits than paid to men based solely on longer average life span of women); Ford Motor Co. v. EEOC, 458 U.S. 219, 238-39 (1982) (O'Connor, J.) (limiting discretion of district court to grant back pay awards when employer charged with violating Title VII voluntarily offered discriminatee job initially denied); *cf.* Sure-tan, Inc. v. NLRB, 104 S. Ct. 2803, 2812-16 (1984) (O'Connor, J.) (limiting discretion of courts of appeals to alter NLRB remedial order); Heckler v. Blankenship, 104 S. Ct. 966, 967 (O'Connor, Circuit Justice 1984) (approving grant of certiorari to consider propriety of district court's ruling placing time limits on administrative agency adjudication and appeals process). *But see* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 403 (1982) (O'Connor, J., concurring). In *General Bldg. Contractors Ass'n v. Pennsylvania,* the state of Pennsylvania and several black individuals brought suit against trade associations, employers, and a union that allegedly followed a pattern and practice of discriminatory hiring. 458 U.S. at 380. The employers and trade associations appealed a lower court finding that the employers were liable for the discriminatory practices of the union under § 1981. *Id.* at 381-82; *see* 42 U.S.C. § 1981 (1982) (providing for equal rights under law for all persons). The Supreme Court reversed the district court's determination that the employers were vicariously liable for the discriminatory practices of the union. 458 U.S. at 382. The *General Bldg. Contractors* Court held that, absent a showing that an employer was liable, a federal court could not require the employer to share in the costs and administration of a remedial program. *Id.* at 398-400. The Court stated, however, that a party not liable for unlawful conduct could be required to implement minor ancillary provisions of an injunction. *Id.* at 399. O'Connor concurred in the majority's opinion but wrote separately to address the scope of the equitable powers of the Court. *Id.* at 404 (O'Connor, J., concurring). O'Connor stressed the Court's concession that, in certain circumstances, a federal court could require an employer, not liable for discriminatory practices, to help the court determine the effects of an injunction. *Id.* at 404-05. O'Connor relied on the Supreme Court's use of rule 19(a) of the Federal Rules of Civil Procedure in *International Bhd. of Teamsters v. United States. Id.* at 405 n.3; *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 356 n.43 (1977) (retaining union in lawsuit to provide complete relief to victims of discriminatory practices despite finding that union was not liable); *see also* FED. R. CIV. P. 19(a). Rule 19(a) provides, in relevant part, that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction shall be joined if in his absence complete relief is not possible. FED. R. CIV. P. 19(a). Prior to *General Bldg. Contractors,* however, the lower federal courts had used rule 19(a) to join only a union whose collective bargaining agreement with a discriminatory employer would be affected by the outcome of litigation. *See, e.g.,* EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1096 (6th Cir. 1974) (cited by *Teamsters* Court as authority for use of rule 19(a)) (joinder of union based on union's contractual ties to discriminatory employer); Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364, 366 (S.D. Fla. 1979) (joining labor organization based on its contractual relationship to violating employer), *aff'd,* 645 F.2d 69 (5th Cir.), *cert. denied,* 454 U.S. 818 (1981); Coker v. Marmon Group, Inc., 455 F. Supp. 398, 401 (D.S.C. 1978) (EEOC may join union because litigation might affect collective bargaining agreement); Braxton v. Virginia Folding Box Co., 72 F.R.D. 124, 127 (E.D. Va. 1976) (joinder of nonparticipating union was permissible because union had signed collective bargaining agreement that might be affected by litigation). O'Connor's reliance on rule 19(a) to retain an employer rather than a union in *General Bldg. Contractors* draws attention to the potential use of a procedural rule to require litigants who have not violated the law to participate in an ancillary way in the federal court's fashioning of equitable relief.

100. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 228-29 (1982) (tolling discriminatory

nocent third parties may be affected by equitable remedies.[101] For example, in *Ford Motor Co. v. EEOC,*[102] O'Connor, writing for the majority, stated that federal courts must respect the remedial policies behind federal legislation and must limit a plaintiff's relief if the judiciary's grant of complete retroactive relief would undermine Congress' purposes in enacting the statute.[103] In *Ford,* the Supreme Court considered whether Ford Motor Co. (Ford) had tolled its backpay liability under Title VII by making an offer of employment without retroactive seniority to women against whom Ford allegedly had discriminated.[104] O'Connor reasoned that because an award of backpay is an equitable discretionary remedy and because the Court may exercise its discretion only in accordance with the policies behind the remedial legislation, the Court first must set out the objectives of Title VII as guidelines for the award of back pay.[105] In O'Connor's view, Congress' primary purpose in enacting Title VII was to end discrimination in the workplace,[106] and an award of backpay,

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employer's backpay liability provides incentive for discriminatory employer to hire Title VII plaintiff).

101. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2593 (1984) (O'Connor, J., concurring) (federal courts may provide preferential treatment for discriminatees only after balancing interests of discriminatees, employers, and innocent third-party employees); Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3512 (1983) (O'Connor, J., concurring) (rejecting retroactive award of retirement benefits because such awards might jeopardize funds owed to innocent third parties); Ford Motor Co. v. EEOC, 458 U.S. 219, 239-40 (1982) (O'Connor, J.) (federal courts should not endorse any rule that requires innocent workers to sacrifice seniority to complainants before complainants prove actual discrimination).

102. 458 U.S. 219 (1982) (O'Connor, J.).

103. *Id.* at 226-30.

104. *Id.* at 220. In *Ford Motor Co. v. EEOC,* three women, Judy Gaddis, Rebecca Starr, and Vettie Smith, unsuccessfully had applied for jobs in Ford Motor Co. (Ford) warehouse. *Id.* at 221-22. Gaddis filed charges with the Equal Employment Opportunity Commission (EEOC), claiming that Ford had refused to hire her solely because of her sex. *Id.* at 222. Six months after Gaddis and Starr had accepted employment with General Motors Corp. (GM) in a GM warehouse, Ford offered Gaddis and Starr, in turn, a job in the Ford warehouse without retroactive seniority. *Id.* Each refused Ford's offer. *Id.* GM subsequently laid off both Gaddis and Starr. *Id.* Unable to find new jobs, Gaddis and Starr eventually entered a government training program. *Id.* Smith, the third woman Ford initially had refused to hire, worked elsewhere following Ford's refusal to hire her but did not earn wages comparable to those Ford generally offered. *Id.* at 222-23. In 1975, the EEOC sued Ford for violating Title VII in its hiring practices. *Id.* at 223. The EEOC requested, among other concessions, that Ford provide backpay to various claimants including Gaddis, Starr, and Smith. *Id.* at 223 & n.5.

105. *Id.* at 226-28.

106. *Id.* at 228. In *Ford,* O'Connor relied on *Albemarle Paper Co. v. Moody* for the proposition that the primary purpose of Title VII was to end discrimination. *Id.; see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (primary objective of Title VII is to achieve equality in work place). The *Albemarle* Court, however, identified another objective, the remedial goal of providing complete relief for the victim of discrimination. 422 U.S. at 418. The Supreme Court in addressing Title VII often has recognized that the compensatory goal of Title VII is as important as the goal of ending discrimination. *See, e.g.,* General Tel. Co. of

therefore, must serve that purpose.[107] According to O'Connor, allowing employers to toll back pay liability by offering discriminatees the employment initially denied is consistent with the legislative objective of Title VII.[108] O'Connor rejected the Equal Employment Opportunity Commission's argument that any subsequent offer of employment must include retroactive seniority.[109] By relegating to a secondary position Title VII's purpose of providing complete relief to victims of discrimination, O'Connor limited the federal district courts' discretion to grant comprehensive back pay awards when employers charged with violations of Title VII subsequently offered employment opportunities to the discriminatees.

Although Justice O'Connor has resisted expansion of the role of the federal judiciary as a coordinate branch of government, O'Connor's efforts to restrain the scope of the federal judiciary are evidenced most clearly in her approach to judicial review of state court judgments and of state legislation. O'Connor commonly relies on the principles of federalism to justify judicial restraint.[110] Federalism encompasses respect for the individual interests of the states and of the federal government, and is implicit in the Constitution's division of power between the federal government and the states.[111] For example, the Constitution delegates certain enumerated powers to Congress[112] and reserves all undelegated powers to the states through the

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the Northwest, Inc. v. EEOC, 446 U.S. 318, 332 (1980) (noting strong congressional intent to provide complete make-whole relief under Title VII); City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 719 (1978) (statutory purposes of Title VII are to end discrimination and to make victims whole); International Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977) (equally important purpose of Title VII is to provide complete relief). Under the rule in *Albemarle,* a court could deny backpay awards only when the denial would not frustrate either of the dual purposes of Title VII. *Albemarle,* 422 U.S. at 421. In *Ford,* however, O'Connor relegated the compensatory goal of Title VII to a secondary position. *Ford,* 458 U.S. at 230. *But cf.* Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3502 (1983) (per curiam) (*Norris* plurality continued to advocate equally important compensatory goal of Title VII).

107. *Ford,* 458 U.S. at 228.

108. *Id.* at 228-29.

109. *Id.* at 229.

110. *See, e.g.,* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1033-34 (1985) (O'Connor, J., dissenting) (essence of federalism is that states have legitimate interests that federal government must recognize); Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058, 1066 (1984) (O'Connor, J.) (judicial enforcement of constitutional right to be heard impermissibly threatens federalism); Michigan v. Long, 103 S. Ct. 3496, 3474-77 (1983) (O'Connor, J.) (construing independent and adequate state grounds rule with attention to state-federal relations); FERC v. Mississippi, 456 U.S. 742, 787-91 (1982) (O'Connor, J., concurring in part and dissenting in part) (forcing states to consider federal standards undercuts federalism).

111. *See* THE FEDERALIST Nos. 45-46 (J. Madison) (recognizing significant powers remaining in states under Constitution).

112. U.S. CONST. art. I; *see* L. TRIBE, *supra* note 24, § 5-2, at 225 (Constitution created federal government of limited powers).

tenth amendment.[113] One such enumerated power that the Constitution grants to Congress is the authority to regulate interstate commerce.[114] Congress' exercise of the commerce power often has drawn national and state interests into sharp conflict.[115] Since the 1930's, the Supreme Court has permitted increased federal regulation of state activity under the commerce clause.[116] In the 1976 decision of *National League of Cities v. Usery,*[117] however, the Supreme Court recognized a constitutional limitation on Congress' exercise of its broad commerce power to regulate state activity.[118] The *National League of Cities* Court held that any federal legislation that displaced the states' management of traditional governmental functions exceeded Congress' power under the commerce clause.[119] Commentators generally have regarded *National League of Cities* as invoking the tenth amendment as the source of a judicially enforceable limitation protecting the states from unwarranted federal interference.[120]

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113. U.S. CONST. amend. X; *see supra* note 84 (noting text of tenth amendment).

114. U.S. CONST. art. I, § 8, cl. 1, 3. Article I provides, in part, that Congress shall have the power to regulate interstate commerce. U.S. CONST. art. I.

115. *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1009 (1985) (municipal transit authority seeks to avoid federal regulation of pay scale); FERC v. Mississippi, 456 U.S. 742, 752-53 (1982) (state utility commission challenged federal requirement that state agencies consider proposed federal standards and implement certain regulations).

116. *See* L. TRIBE, *supra* note 24, § 5-4, at 233-36 (briefly tracing Court's approach to commerce power from 1824 to present); Note, *The Historical Struggle Between the Commerce Clause and the Tenth Amendment Continues:* EEOC v. Wyoming, 11 OHIO N.U. L. REV. 231, 231 n.5 (1984) (contrasting earlier Court decisions limiting commerce power with more recent Court decisions expanding Congress' power under commerce clause).

117. 426 U.S. 833 (1976).

118. *Id.* at 842-45. In *National League of Cities v. Usery,* the Fair Labor Standards Act of 1938 (FLSA) provided that certain employers comply with minimum wage and overtime provisions. *Id.* at 835-36, 835 n.1. In 1974, Congress amended the FLSA to include most state employers. *Id.* at 836. Various cities, states, the National League of Cities, and the National Governors' Conference filed suit against the Secretary of Labor, alleging that the amended FLSA provisions exceeded the power of Congress to regulate states under the commerce clause. *Id.* at 836-37. The *National League of Cities* Court recognized the plenary power of Congress under the commerce clause to regulate the private sector. *Id.* at 840. The Court, however, viewed regulation of states as implicating constitutional principles of state sovereignty that limited the otherwise proper exercise of the commerce power. *Id.* at 842-45. The Court, therefore, held that the application of the wage and overtime provisions of the FLSA to states exceeded Congress' power under the commerce clause to the extent that the wage and overtime provision affected the states' performance of traditional governmental functions. *Id.* at 852.

119. *Id.* at 852. The Court's decision in *National League of Cities* has been subject to widespread criticism. *See* Comment, *When the Walls Come Tumbling Down: What Remains of* National League of Cities?, 53 U. CIN. L. REV. 625, 625 & n.2 (1984) (exhaustive listing of critical commentary concerning *National League of Cities* decision). *See generally* Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENTARY 123 (1985) (calling for Court to overrule *National League of Cities* in then pending case of *Garcia v. San Antonio Metropolitan Transit Auth.).*

120. *See National League of Cities,* 426 U.S. at 842-43 (tenth amendment limits Congress' commerce power). Commentators generally regard *National League of Cities* as designating the tenth amendment as the textual source of enforceable judicial limitations on Congress' exercise

Justice O'Connor's view of state sovereignty within the federal system has emerged in her dissents from the Court's decisions in *FERC v. Mississippi*[121] and *Garcia v. San Antonio Metropolitan Transit Authority,*[122] in which the Court upheld federal regulations challenged under the principles articulated in *National League of Cities.* In *FERC,* the state of Mississippi and the Mississippi Public Service Commission filed suit against the Secretary of Energy and the Federal Energy Regulatory Commission (FERC), alleging that certain provisions of the Public Utility Regulatory Policies Act (PURPA) exceeded Congress' authority under the commerce clause and violated the tenth amendment.[123] The *FERC* Court found that federal regulation of electric and gas utilities was a proper exercise of the commerce power and that no challenged provision of PURPA unduly threatened state sovereignty

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of it commerce power. *See, e.g.,* NOWAK, *supra* note 18, at 170-71, 172-73 (*National League of Cities* relied on tenth amendment to limit Congress' power); Note, National League of Cities v. Usery *to* EEOC v. Wyoming: *Evolution of a Balancing Approach to Tenth Amendment Analysis,* 1984 DUKE L.J. 601, 603 (*National League of Cities* relied on tenth amendment to limit delegated powers).

Justice Rehnquist, in the course of his opinion for the majority in *National League of Cities,* however, referred only once to the tenth amendment. 426 U.S. at 842-43. Rehnquist instead relied on more general principles of state sovereignty underlying the Constitution as the basis for limiting the reach of federal legislation under the commerce clause. *Id.* at 843 n.14, 844-45, 849, 852; *see* L. TRIBE, *supra* note 24, § 5-22, at 308 n.9 (finding *National League of Cities* unclear on basis of limitation). *See generally* Engdahl, *Sense and Nonsense About State Immunity,* 2 CONST. COMMENTARY 93 (1985) (necessary and proper clause provides constitutional basis for state immunity doctrine). Professor Tribe argues that reliance on the tenth amendment does not support the distinction drawn in *National League of Cities* between federal regulation of the private and public sectors. L. TRIBE, *supra* note 24, § 5-22, at 308 n.9. Professor Engdahl argues that *National League of Cities* was a case involving the necessary and proper clause, not the tenth amendment. Engdahl, *supra,* at 93. In Engdahl's view, the tenth amendment grants no immunity to state government, but rather acknowledges that the people have granted governing powers to state and national governments within a federal system. *Id.* at 99.

121. 456 U.S. 742 (1982).

122. 105 S. Ct. 1005 (1985).

123. *FERC,* 456 U.S. at 752. In *FERC v. Mississippi,* the Public Utility Regulatory Policies Act of 1978 (PURPA) required, in part, that state utility regulatory commissions and private nonregulated utilities consider various proposed standards regulating rates and delivery of service. *Id.* at 746-48. PURPA required the state commissions and nonregulated utilities to hold public hearings to consider the proposed federal standards, to provide a written explanation of any failure to adopt one or more of the proposed federal standards, and to submit certain information to the Secretary of Energy at prescribed intervals. *Id.* at 748-49. PURPA, however, did not require adoption of any of the specific standards considered. *Id.* at 749-50. In addition, PURPA provided that the Federal Energy Regulatory Commission (FERC) should develop rules to encourage the development of certain production facilities using alternative sources of energy and that state commissions and nonregulated utilities should implement the regulations in some prescribed manner. *Id.* at 750-51. Congress, furthermore, gave the FERC power to pre-empt existing state and federal law governing alternative-source production facilities. *Id.* at 751. The state of Mississippi and the Mississippi Public Service Commission filed suit against the Secretary of Energy and the FERC, alleging that the provisions of PURPA affecting utility regulation exceeded Congress' power under the commerce clause and violated the tenth amendment. *Id.* at 752. The *FERC* Court found that federal regulation of electric and gas utilities was a proper

under the tenth amendment.[124] Justice O'Connor, however, rejected the majority's evaluation of the intrusiveness of the challenged provisions requiring state consideration of proposed federal standards.[125] In O'Connor's view, federal legislation mandating that state agencies consider federal standards tends to displace local agendas and interferes with the states' responsibility to address local needs.[126] In *FERC,* in addition to the general principle of federalism[127] and the intent of the authors of the Constitution to reject congressional control over state legislatures,[128] O'Connor relied explicitly on the tenth amendment[129] to support her view that federal intrusion into the operation of state administrative agencies was impermissible.[130]

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exercise of the commerce power. *Id.* at 758. The Court, however, proceeded to consider the impact of PURPA on state independence. *Id.* at 758-71. Justice Blackmun, writing for the Court, did not find that any contested provision unduly threatened state sovereignty. *Id.* at 769-70.

124. *Id.* at 753-71. Commentators have viewed *FERC* as limiting the applicability of *National League of Cities. See* Rotunda, Usery *in the Wake of* Federal Energy Regulatory Commission v. Mississippi, 1 CONST. COMMENTARY 43, 54-55 (1984) (Court's approval in *FERC* of power of Congress to condition continued state regulation of pre-emptible area on state consideration of federal proposals limits *National League of Cities);* Note, *supra* note 120, at 612 n.57 (*FERC* is inconsistent with spirit of *National League of Cities*); Note, *The Supreme Court, 1981 Term—Federal Regulation of State Institutions,* 96 HARV. L. REV. 186, 186-87 (1982) (*FERC* limits extent to which *National League of Cities* protects state sovereignty) [hereinafter cited as Note, *Supreme Court, 1981 Term*].

125. *FERC,* 456 U.S. at 775 (O'Connor, J., concurring in part and dissenting in part). In *FERC,* the state of Mississippi challenged not only the provision in PURPA requiring a state agency to consider federal standards in publicly held hearings but also the requirement that state agencies implement federal regulations issued by the FERC concerning alternative-source energy production facilities. *Id.* at 752; *see supra* note 123 (discussing basis of Mississippi's challenge to provisions of PURPA). The *FERC* Court approved the PURPA provisions requiring the Mississippi Public Service Commission to implement the FERC regulations concerning alternative-source energy producers by construing the requirement as merely affording complainants a state forum in which to assert federal rights. 456 U.S. at 759-61. O'Connor concurred in the Court's decision to uphold the provision requiring implementation of the federal regulations on the basis that states must provide a nondiscriminatory forum for state and federal rights. *Id.* at 775 n.1. One constitutional scholar, however, has claimed that the degree to which Congress can utilize state agencies to implement federal statutes remained an open question after *FERC. See* NOWAK, *supra* note 18, at 180-81 (finding difficulty in assessing how Court would respond to federal statute requiring state to afford more than judicial forum for assertion of federal right).

126. *FERC,* 456 U.S. at 779, 781, 787. In *FERC,* O'Connor asserted that pre-emption in the field of utility regulation would be less intrusive than mandating that state utility commissions must consider federal proposals. *Id.* at 786-87. According to O'Connor, requiring state agencies to consider proposed federal standards involves considerable time, effort, and resources on the part of state agencies that more properly should be directed toward local needs. *Id.*

127. *Id.* at 787-91.

128. *Id.* at 791-96.

129. *Id.* at 778.

130. *See id.* at 796-97 (Court should invalidate provisions of PURPA requiring state regulatory agencies to consider federal standards). One commentator has suggested that federal legislation requiring state agencies not only to consider but to enforce federal standards gives

In *Garcia,* the issue dividing the Court was whether the tenth amendment permitted the judiciary to limit Congress' exercise of the commerce power to protect state interests as the Supreme Court had done in *National League of Cities.*[131] In a 5-4 decision, the *Garcia* Court overruled *National League of Cities*[132] and rejected the notion that the Constitution places any substan-

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rise to a claim that Congress improperly has delegated its lawmaking powers to the states. *See* Note, *Supreme Court, 1981 Term, supra* note 124, at 190-91 (Congress properly may not rely on state implementation of federal standards that Congress was unable to enact as national legislation).

131. 105 S. Ct. 1005, 1010 (1985). In *Garcia v. San Antonio Metropolitan Transit Auth.,* the controversy that precipitated the Supreme Court's reconsideration of *National League of Cities* centered on whether the Fair Labor Standards Act (FLSA) covered the employees of the San Antonio Metropolitan Transit Authority (SAMTA). *Id.* at 1007. Although Congress had amended the FLSA to include nearly all municipal and state employees, in *National League of Cities v. Usery* the Court held that application of the FLSA to states and municipalities in a way that interfered with traditional functions of state and local government was unconstitutional. *National League of Cities,* 426 U.S. at 852. In 1979, the Department of Labor determined that the operation of SAMTA was not protected from federal regulation as a traditional governmental function under *National League of Cities,* and the Department, therefore, ordered SAMTA to pay overtime premiums to its employees. *See* 105 S. Ct. at 1009. SAMTA filed suit against the Secretary of Labor in the United States District Court for the Western District of Texas, seeking a declaratory judgment that the application of FLSA overtime provisions to SAMTA was unconstitutional under *National League of Cities. See id.* SAMTA did not challenge the minimum wage provisions because SAMTA traditionally had paid its employees wages in excess of the federal minimum wage. *Id.* at 1009 n.3. On the same day that SAMTA filed suit, Garcia and several other employees of SAMTA filed suit against SAMTA, claiming overtime pay under the FLSA. *See id.* at 1009. The district court stayed the employees' lawsuit, but permitted Garcia to intervene as a defendant in SAMTA's suit against the Secretary of Labor. *See id.* The district court subsequently held that the operation of a local public mass transit system was a traditional governmental function under *National League of Cities. See id.* The Secretary and Garcia appealed directly to the Supreme Court under 28 U.S.C. § 1252. *Id.; see* 28 U.S.C. § 1252 (1982) (providing for direct appeals from decisions invalidating acts of Congress). The Supreme Court vacated the judgment of the district court and remanded the case to the district court for reconsideration in light of *United Transp. Union v. Long Island R.R. Co.* 105 S. Ct. at 1009; *see* United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 690 (1982) (upholding federal regulation of state-operated railroad based on history of federal regulation of state railways). On remand, the district court again rejected the FLSA's applicability to SAMTA. *See* 105 S. Ct. at 1009 (noting disposition of case in district court). The district court found considerable state involvement in the operation of SAMTA, no persistent pattern of federal regulation, and a similarity to governmental functions deemed immune from federal regulation under *National League of Cities. See id.* at 1009-10 (noting district court decision). Again, the Secretary and Garcia appealed directly to the Supreme Court. *Id.* at 1010. On reargument the Court requested the parties to brief and argue whether the Court should reconsider its holding in *National League of Cities. Id.; see supra* note 118 (discussing *National League of Cities).*

132. *Garcia,* 105 S. Ct. at 1021. The *Garcia* majority rejected the criteria established in *National League of Cities* to determine whether state activities were immune from federal regulation under the commerce clause. *Id.* at 1015-16. The Court focused on the difficulty that federal courts had experienced in classifying state activities as traditional or nontraditional governmental functions, a distinction drawn in *National League of Cities* to protect certain state activities from federal regulation. *Id.* at 1011-12; *see* Comment, *supra* note 119, at 638-44 & nn.86-118 (documenting inconsistent results reached by federal courts in applying traditional

tive limitations on Congress' power under the commerce clause.[133] The *Garcia* Court found no textual basis in the Constitution to support an independent, judicially enforceable theory of state sovereignty.[134] Rather, the *Garcia* Court held that the Constitution protects state interests through provisions requiring state representation within the federal government.[135] In the majority's view, the states' power to challenge federal regulation of state activity under the commerce clause lies in the political process, not in the courts.[136]

Justice O'Connor dissented from the *Garcia* Court's view of the duty of the judiciary in safeguarding state interests.[137] O'Connor claimed that, notwithstanding the opinion of the Court, state autonomy continues to be an essential consideration of the federal system.[138] O'Connor stressed that states have legitimate interests that the federal judiciary has a duty to protect.[139]

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governmental function test of *National League of Cities).* The *Garcia* Court, therefore, rejected any limitation of the commerce power based on a judicial determination that the state activity represents the exercise of traditional or integral state governmental functions. 105 S. Ct. at 1016.

133. *Garcia,* 105 S. Ct. at 1017-18.

134. *Id.*

135. *Id.* at 1018-20.

136. *Id.* at 1020; *see id.* at 1023, 1026-27, 1030 (Powell, J., dissenting) (dissenting from majority's holding that Congress' exercise of commerce power is no longer reviewable).

137. *Id.* at 1033 (O'Connor, J., dissenting).

138. *Id.* at 1034, 1037-38. Although a strong advocate of state independence, O'Connor in *Garcia* did not deny the need for congressional authority to deal with the problems of a complex, industrialized nation. *See id.* at 1034 (authors of Constitution intended federal government to have authority to deal with national problems); *see also* McElroy v. United States, 455 U.S. 642, 648-56 (1982) (O'Connor, J.) (O'Connor broadly construed provision of National Stolen Property Act, enacted under Congress' commerce power, to sustain conviction of defendant without requiring proof that crime occurred before defendant crossed state lines).

139. *Garcia,* 105 S. Ct. at 1034, 1037, 1038. In *Garcia,* Justice O'Connor viewed the majority's treatment of the states as equivalent to private parties to be a departure from precedent and inconsistent with the Constitution. *Id.* at 1037-38. The majority had determined that Congress had acted within its powers in applying the FLSA equally to both the public and private sectors. *Id.* at 1020 (Blackmun, J.). O'Connor, however, has been a strong voice supporting the special rights of state sovereigns. *See* Block v. North Dakota *ex rel.* Bd. of Univ. & School Lands, 461 U.S. 273, 293-94 (1983) (O'Connor, J., dissenting) (arguing that statute of limitations in Quiet Title Act did not bar untimely lawsuit initiated by state to protect property held in public trust). In *Block,* the federal government and North Dakota disputed ownership rights to the riverbed of the Little Missouri River. *Id.* at 277. Under the Quiet Title Act of 1972 (QTA), the federal government consented to be sued to determine title to real property in which the federal government claimed an interest. *Id.* at 275-76; *see* 28 U.S.C. § 2409a(a) (1982) (providing that person may name United States as defendant in quiet title action except as noted). The *Block* Court considered whether the twelve year statute of limitations in the QTA barred North Dakota's action. 461 U.S. at 277; *see* 28 U.S.C. § 2409a(f) (providing for twelve year statute of limitations). The Court noted that § 2409a(f) was silent concerning the effect of the statute of limitations on states. 461 U.S. at 288; *see* 28 U.S.C. § 2409a(f) (making no reference to actions initiated by states). Justice White, writing for the Court, held that the twelve year statute of limitations applied to state actions. 461 U.S. at 290. Justice O'Connor joined the Court's decision in *Block* that the QTA was North Dakota's exclusive

Unlike her opinion in *FERC,*[140] however, O'Connor's opinion in *Garcia* did not rely directly on the tenth amendment to limit Congress' power under the commerce clause.[141] Rather O'Connor noted that the modern expansion of the commerce power had occurred under the necessary and proper clause.[142] O'Connor recognized *McCulloch v. Maryland*[143] as the source of Congress' increasingly broad commerce power. O'Connor, however, relied in part on the *McCulloch* Court's construction of the necessary and proper clause to provide a constitutional basis to limit congressional authority under the commerce clause.[144] In *McCulloch,* the state of Maryland had argued that the necessary and proper clause restricted Congress' choice of legislative means to those means indispensable to the exercise of a particular enumerated power.[145] The *McCulloch* Court, however, construed the term "necessary" more permissively. In order to afford Congress greater latitude to respond to changing national needs, the Court interpreted "necessary" to include any means calculated to permit Congress to exercise its constitutional powers.[146] The *McCulloch* Court held that the sole consideration in reviewing the constitutionality of federal legislation is whether Congress had a legitimate purpose in enacting the legislation and whether the means selected by Congress are consistent with the letter and spirit of the Constitution.[147]

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remedy. *Id.* at 293 (O'Connor, J., dissenting). She refused, however, to apply the QTA's statute of limitations to North Dakota. *Id.* at 294. Justice O'Connor invoked the common law doctrine that time does not bar a sovereign. *Id.* at 294-97. In O'Connor's view, Congress did not intend to limit, through legislative silence, a state's power to protect rights in property held in trust for the public. *Id.* at 299.

140. *See supra* note 129 and accompanying text (observing O'Connor's reliance on tenth amendment to limit Congress' authority under commerce clause).

141. *See Garcia,* 105 S. Ct. at 1035-37 (O'Connor arguing that necessary and proper clause requires that Congress not contravene values recognized in tenth amendment).

142. *Id.* at 1035-36.

143. 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch v. Maryland,* the directors of a national bank, incorporated by Congress, established a branch bank in Baltimore, Maryland, without permission from the state of Maryland. *Id.* at 317-18. The state of Maryland sued the cashier of the branch bank for failing to comply with a Maryland law that imposed a tax on all banks not chartered by the Maryland legislature. *Id.* at 319-22. Chief Justice Marshall, in writing for the Court, found that incorporation of a national bank was an appropriate means by which Congress could exercise its delegated powers and that Maryland's tax law as applied to the Bank of the United States was unconstitutional. *Id.* at 424-25, 436.

144. *Garcia,* 105 S. Ct. at 1036.

145. *McCulloch,* 17 U.S. (4 Wheat.) at 412-13; *see* L. TRIBE, *supra* note 24, § 5-3, at 228 n.5. Professor Tribe has noted that Marshall, in *McCulloch,* did not regard the necessary and proper clause as essential to uphold Congress' exercise of an implied power, but reached a construction of that clause only after the state of Maryland argued that the necessary and proper clause restricted Congress' power under the commerce clause. L. TRIBE, *supra* note 24, § 5-3, at 228 n.5.

146. *McCulloch,* 17 U.S. (4 Wheat.) at 413-15, 418-21.

147. *Id.* at 421. Commentators have construed *McCulloch's* test of constitutionality as a standard of review that requires only a rational relationship between the challenged legislation and the enumerated power that Congress seeks to exercise. *See* NOWAK, *supra* note 18, at 127-

According to O'Connor, no federal legislation that contravenes the spirit of the Constitution can withstand constitutional attack,[148] despite the broad authority that the necessary and proper clause affords Congress. Because the tenth amendment, in O'Connor's view, recognizes the integrity of the states, federal regulation under the necessary and proper clause that threatens state sovereignty can be challenged as violating the spirit of the tenth amendment.[149]

As Justice O'Connor ardently argued in *FERC* and *Garcia,* the principle of federalism cautions against unwarranted federal intrusion into the administration of state government.[150] O'Connor's support for the integrity of the states has played a significant role in her response to questions concerning the proper scope of federal review of state court judgments.[151] For example, writing for the Court in *Michigan v. Long,*[152] O'Connor articulated a new test based on respect for the dual system of state and federal courts to govern the Supreme Court's review of state court judgments in cases in which plaintiffs have raised federal constitutional claims.[153] In the proper exercise of its appellate jurisdiction over state courts, the Supreme Court has refused to review state court judgments that rest on independent and adequate state grounds.[154] In *Long,* O'Connor recounted the various approaches the Court had taken to determine whether a state court judgment rested on state or federal law.[155] The *Long* Court held that the Supreme Court would not

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29 (*McCulloch* established deferential test to permit congressional exercise of delegated powers); *cf.* L. TRIBE, *supra* note 24, § 5-3, at 230 & n.12 (describing *McCulloch* test as establishing minimum standard of review).

148. *Garcia,* 105 S. Ct. at 1036.

149. *Id.*

150. *See supra* notes 121-49 and accompanying text (discussing O'Connor's dissent in *FERC* and *Garcia).*

151. *See* McKaskle v. Vela, 104 S. Ct. 736, 737-38 (1984) (O'Connor, J., dissenting from denial of certiorari) (Court should grant certiorari to clarify that exhaustion rule requires dismissal of habeas petition containing specific factual allegations not raised in state court in support of federal constitutional claim); Michigan v. Long, 103 S. Ct. 3469, 3476 (1983) (O'Connor, J.) (Supreme Court will not review state court judgment if state court furnishes plain statement that its judgment rests on independent and adequate state ground); Engle v. Isaac, 456 U.S. 107, 135 (1982) (O'Connor, J.) (procedural default in state court precluded state prisoner from asserting federal constitutional claim in habeas proceeding when prisoner failed in federal court to establish cause of his default); Rose v. Lundy, 455 U.S. 509, 518-19, 522 (1982) (O'Connor, J.) (comity requires federal district court to dismiss habeas petition when petition contains claim not exhausted in state courts).

152. 103 S. Ct. 3469 (1983) (O'Connor, J.).

153. *Id.* at 3474-76.

154. *See* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4019, at 661-62 (1977) (Supreme Court will refuse to exercise its jurisdiction if state court judgment rests on substantive state law regardless of how state court decides federal claim, or if state relied on adequate procedural law to bar plaintiff's federal claim) [hereinafter cited as C. WRIGHT, FEDERAL PRACTICE].

155. *Long,* 103 S. Ct. at 3474-75. In *Michigan v. Long,* O'Connor noted that the Supreme Court, faced with the task of determining whether a state court judgment rested on state or

review a state court judgment, despite the presence of federal constitutional claims, if the state court asserted in a plain statement that its decision rested on an independent and adequate state ground.[156] Under the plain statement rule, a federal court could exercise jurisdiction to review the state court's decision only if the state court did not indicate clearly that the state court's decision rested on state law.[157] O'Connor's rule in *Long,* therefore, provides the state court with an ability to defeat federal jurisdiction.[158]

O'Connor's earlier advocacy of the state courts' capacity to litigate federal constitutional issues[159] has found expression since her confirmation in two opinions in which she has restricted the right of state prisoners to bring federal constitutional claims in federal habeas proceedings when the prisoner had failed to raise the constitutional claims during the course of criminal proceedings in the state courts.[160] In *Rose v. Lundy,*[161] O'Connor, writing for the majority, held that a federal district court, out of respect for a state court, must dismiss a petition for a writ of habeas corpus that

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federal law, alternatively would dismiss the case, vacate the judgment, continue the case pending clarification by the state court of the grounds on which it relied, or attempt to construe state law on its own. *Id.* O'Connor found this case-by-case evaluation unsatisfactory. *Id.* at 3475.

156. *Id.* at 3476.

157. *Id.*

158. *See* Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges,* 59 NOTRE DAME L. REV. 1079, 1095 (1984) (state court reliance on independent and adequate state ground after *Long* will preclude federal judicial review).

159. *See supra* notes 3-12 and accompanying text (discussing O'Connor's judicial philosophy before confirmation as Associate Justice).

160. *See* Engle v. Isaac, 456 U.S. 107, 135 (1982) (O'Connor, J.) (failure of state prisoner to demonstrate cause for procedural default that barred federal constitutional claim in state court resulted in dismissal of claim in habeas proceeding); Rose v. Lundy, 455 U.S. 509, 522 (1982) (O'Connor, J.) (district court must dismiss habeas petition of state prisoner when petition includes unexhausted federal constitutional claim); *see also* Justice of Boston Mun. Court v. Lyon, 104 S. Ct. 1805, 1828-30 (1984) (O'Connor, J., concurring) (concurring in dismissal of habeas petition on grounds that court did not have jurisdiction under federal habeas statute to hear complaint of state defendant not in physical custody following state conviction). Commentators have criticized the procedural hurdles created in *Lundy* and *Isaac* as restricting access for state prisoners to a federal forum. *See, e.g.,* Reinhardt, *Limiting Access to the Federal Courts: Round Up the Usual Victims,* 6 WHITTIER L. REV. 967, 973-75 (1984) (criticizing procedural hurdles for federal habeas review because personal liberty is involved); Wright, *Habeas Corpus: Its History and its Future,* 81 MICH. L. REV. 802, 807-10 (1983) (questioning trend toward creating procedural hurdles through judicial rather than legislative decision making); Note, *The Supreme Court, 1981 Term—Habeas Corpus,* 96 HARV. L. REV. 217, 222-26 (1982) (questioning Court's focus on performance of trial counsel in failing to raise properly federal claims in state court as basis for restricting plaintiff's access to federal court). *See generally* Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint,* 32 CATH. U.L. REV. 169 (1982) (judicially created procedural hurdles in *Lundy* and *Isaac* restrict access to federal forum for state prisoners).

161. 455 U.S. 509 (1982). In *Rose v. Lundy,* the Court considered whether the exhaustion rule required dismissal of a habeas corpus petition containing federal claims that had not been exhausted in state courts. *Id.* at 510; *see* 28 U.S.C. § 2254(b)-(c) (1982) (applicant for writ of

contained a federal constitutional claim not exhausted in the state court.[162] O'Connor argued that the total exhaustion rule adopted in *Lundy* is not a jurisdictional prerequisite for the exercise of federal habeas corpus review,

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habeas corpus must exhaust state remedies unless applicant can show absence of effective state process). A jury had convicted Lundy of rape and crimes against nature. 455 U.S. at 510. Lundy appealed his conviction without success through the Tennessee state court system. *Id.* Lundy then petitioned for a writ of habeas corpus in federal district court, alleging four grounds for relief, two of which he had not raised in the state appeals. *See id.* at 511. Although the district court held that it could not review the unexhausted claims, the district court did consider the unexhausted claims in reviewing the atmosphere of the entire state proceeding. *See id.* at 511-13. The district court independently reviewed the state trial transcript and considered events that occurred at trial to which the defendant had not objected at trial, in his state appeal, or in his habeas petition. *See id.* at 511-13, 513 n.3. The district court concluded that the trial was not fair and had violated the defendant's sixth amendment rights. *See id.* at 512-13. The court ordered the release of the defendant pending timely retrial by the state. *See id.* at 513 n.4. The Sixth Circuit affirmed the district court order, rejecting the state's argument that the district court should have dismissed the petition because it contained unexhausted claims. *See id.* at 513.

162. *Lundy,* 455 U.S. at 522. O'Connor began her analysis in *Rose v. Lundy* by stressing that the rule requiring a petitioner seeking habeas corpus relief to exhaust all federal claims in state courts was a matter of comity. *Id.* at 515-16. Professor Tribe has described comity as the foundation of the federal-state court system. L. TRIBE, *supra* note 24, § 3-29, at 147-48. Although Congress codified the exhaustion rule in 28 U.S.C. § 2254(b)-(c) by requiring a petitioner to present only exhausted claims in a federal habeas petition, O'Connor found that § 2254(b)-(c) gave no guidance to the federal courts when a petition contained both exhausted and unexhausted claims. 455 U.S. at 516; *see* 28 U.S.C. § 2254(b)-(c) (1982) (providing that court will not grant writ unless petitioner in custody has exhausted state remedies or has shown no effective state process available and providing that petitioner will not have exhausted state remedies if petitioner has right to raise "question presented" in state court). O'Connor, therefore, looked to the policies behind § 2254 to determine the scope of the statute. 455 U.S. at 517. Relying on case law rather than congressional records, O'Connor stated that the function of the exhaustion rule was primarily to protect the state court's role in enforcing federal law and to check interference in state court proceedings. *Id.* at 518. According to O'Connor, comity required that federal courts provide state courts with the first opportunity to rule on federal claims, which in turn would increase the state courts' ease in dealing with federal questions and would result in a more highly developed factual record if the petitioner sought review in federal court. *Id.* at 518-19. Furthermore, in O'Connor's view, strict application of the exhaustion rule to mixed petitions would encourage more effective federal judicial review because petitioners would present a single petition to the reviewing federal court. *Id.* at 520. *But see* Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles,* 44 OHIO ST. L.J. 393, 424-27, 429-31 (1983) (any goal to create better factual record for federal review or to avoid piecemeal litigation serves federal interest in efficiency rather than comity). O'Connor concluded that because, in her view, the total exhaustion rule strengthened the basis of comity and did not burden unreasonably the state prisoner, the district court must dismiss mixed petitions. 455 U.S. at 522.

Only three justices, however, joined O'Connor's consideration in *Lundy* of the impact of rule 9(b) governing dismissal of successive petitions on the petitioner's initial decision to delete unexhausted claims, to present exhausted claims, and then, if necessary, to refile a second petition containing the previously unexhausted claims at a later date. *Id.* at 520-21; *see* 28 U.S.C. § 2254, Rule 9(b) (1982) (federal judge may dismiss successive petition as abuse of writ if petitioner delays presenting additional grounds for relief). O'Connor raised the possibility that if a petitioner failed to present all grounds for habeas relief in one petition, rule 9(b) may

but rests on comity,[163] a principle of federalism which assumes that no constitutional basis exists for preferring a federal over state forum for litigating federal constitutional claims.[164] Similarly, in *Engle v. Isaac,*[165] O'Connor, again writing for the majority, held that in a habeas proceeding a state prisoner could not raise a federal constitutional claim barred in state court by procedural default unless the prisoner could show cause for and

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permit dismissal of all subsequent petitions. 455 U.S. at 521.

Professor Yackle has criticized O'Connor's decision in *Lundy* as changing the exhaustion rule from a discretionary rule of timing, encouraging district court judges to refrain from federal review before prisoners presented their federal claims to state court, to a preclusive prerequisite for habeas review. *See* Yackle, *supra,* at 438. Yackle, however, concedes that total exhaustion may be appropriate when the exhausted and unexhausted claims are very closely related. *Id.* at 445. A second commentator has pointed out that the general rule requiring dismissal of all mixed petitions adopted in *Lundy* was stricter than any exhaustion rule being followed by any of the circuits. 17 C. WRIGHT, FEDERAL PRACTICE, *supra* note 154, § 4264, at 176 (Supp. 1983).

163. *See Lundy,* 455 U.S. at 515-16, 518-20 (exhaustion rule codified in 28 U.S.C. § 2254 rests on comity); *see also McKaskle v. Vela,* 104 S. Ct. 736, 737 (1984) (O'Connor, J., dissenting from denial of certiorari) (exhaustion rule serves comity and reduces federal-state friction).

164. *See* L. TRIBE, *supra* note 24, § 3-39, at 147-48 (because both federal and state courts must uphold the Constitution, comity urges that no constitutional basis exists to prefer federal court over state court as protector of federal constitutional rights unless state judicial process is inadequate).

165. 456 U.S. 107 (1982). In *Engle v. Isaac,* the Supreme Court consolidated the review of three individual petitions for writs of habeas corpus on grounds that Ohio had tried and convicted each petitioner after the effective date of Ohio's new criminal code, but before the Ohio Supreme Court construed certain relevant code provisions allocating the burden of production to the defendant to raise affirmative defenses. *Id.* at 111-12; *see* OHIO REV. CODE ANN. § 2901.05(A) (1975) (amended 1978) (providing that burden of going forward is on the accused). Defendants Hughes, Bell, and Isaac pled self-defense as an affirmative defense to charges in their respective Ohio criminal proceedings. 456 U.S. at 112, 113, 114. In each case, the trial judge had instructed the jury that the defendant had the burden of proof to establish self-defense by a preponderance of the evidence. *See id.* Neither Hughes, Bell, nor Isaac had objected at trial to the jury instruction on burden of proof. *See id.* Hughes and Bell both appealed their subsequent convictions, but never raised any objection to the self-defense jury instruction. *See id.* at 113, 114. Following Issac's conviction, however, the Ohio Supreme Court construed § 2901.05(A) to provide that, although the defendant has the burden to come forward with some evidence of self-defense, the prosecution has the burden of persuasion to show that the defendant did not act in self-defense. *See id.* at 111, 115. Isaac, therefore, did raise an objection to the self-defense jury instructions in his state appeal based on the state supreme court ruling. *See id.* at 115. The state appeals court, however, held that Isaac had waived his claim because he had not made a contemporaneous objection to the jury instruction at trial. *See id.* The Ohio Supreme Court dismissed Isaac's claim for failure to present a substantial constitutional question. *See id.* at 116.

Each of the three defendants petitioned in federal district court without success for a writ of habeas corpus. *See id.* In the cases of Hughes and Isaac, the district court found, in part, that the defendants had not satisfied the requirements of *Wainwright v. Sykes* that permitted a state prisoner to raise in federal court a federal constitutional claim barred by procedural default in state court only if the petitioner could explain the cause of his procedural default and could demonstrate resulting prejudice. *See id.* at 116, 118; *see* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (waiver of federal constitutional claim at trial bars habeas review unless

actual prejudice resulting from his default.[166] The ease with which state prisoners may seek habeas review, in O'Connor's view, undercuts the finality of state court judgments, reduces the significance of a trial and often results in the defendant's freedom from prosecution.[167] Furthermore, according to O'Connor, easily invoked habeas review may interfere with the state's sovereign power both to prosecute defendants and to uphold federal constitutional rights.[168] Although the Supreme Court has not exercised its jurisdic-

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state prisoner can show cause for and prejudice resulting from waiver). In Bell's case, although the district court cited *Wainwright,* among other cases, in its decision to deny Bell's petition, the district court made no inquiry whether Bell had satisfied the cause and prejudice standard of *Wainwright. See* 456 U.S. at 117. The Court of Appeals for the Sixth Circuit, however, reversed the lower federal court orders. *See id.* at 118. In Isaac's case, the court of appeals ruled that Isaac had satisfied the cause and prejudice requirements of *Wainwright,* and a majority of the en banc court found that the jury instructions had violated the defendant's due process rights under the fourteenth amendment. *See id.* (Court noting Sixth Circuit disposition of case). The Sixth Circuit subsequently ordered Bell and Hughes released from custody, subject to timely efforts by the state to retry them. *See id.* at 119 (Court noting action taken by Sixth Circuit). The United States Supreme Court granted certiorari to review the decisions of the Sixth Circuit. *Id.*

166. *Engle,* 456 U.S. at 135. Acknowledging the presence of a federal constitutional claim, the *Engle* Court considered whether the defendants had preserved their claim and, if not, whether the provisions in *Wainwright* barred their claim in a habeas proceeding. *Id.* at 121-23. O'Connor, writing for the majority, first established that the defendants had forfeited their federal constitutional claim in state court under state law by failing to make a contemporaneous objection to jury instructions at trial. *Id.* at 124-25. In O'Connor's view, therefore, the issue became whether the defendants could litigate that federal claim despite their procedural default in state court. *Id.* at 125. O'Connor reaffirmed the standard established in *Wainwright* that a state prisoner seeking habeas corpus relief after procedural default in state court must demonstrate cause and actual prejudice to avoid dismissal of his petition in federal court. *Id.* at 129. To show cause for their default at trial, the defendants claimed that they were unaware that allocating the burden of proof to the defendant to establish self-defense implicated the due process clause and that, in any event, any objection to the state's practice of placing the burden on the accused would have been futile. *Id.* at 130. O'Connor rejected both arguments, claiming that the due process implications of placing the self-defense burden on the defendant were not unknown at the time of the defendants' trials. *Id.* at 131-33 & 133 n.41. Furthermore, O'Connor stated that a defendant may not foreclose as futile the possibility of raising a federal constitutional claim in state court simply because other parties had appealed the issue unsuccessfully in the past. *Id.* at 130. Quickly dismissing the defendant's final argument attacking the cause and prejudice standard, O'Connor on behalf of the majority held that, based on a need for finality in state court judgments and considerations of comity, the Court would not disturb the cause and prejudice standard. *Id.* at 134-35.

In *United States v. Frady,* O'Connor, writing for the majority, also required federal prisoners attacking federal convictions under 28 U.S.C. § 2255 to demonstrate cause and prejudice resulting from procedural default in federal proceedings. *See* United States v. Frady, 456 U.S. 152, 167-68 (1982) (O'Connor, J.) (following unsuccessful direct appeal, federal prisoner may challenge his conviction based on trial error to which he made no contemporaneous objection only by demonstrating cause for default and actual prejudice resulting from error); 28 U.S.C. § 2255 (1982) (providing that federal prisoner may move in court that sentenced him to vacate his sentence at any time on any grounds that sentence is unlawful).

167. *Engle,* 456 U.S. at 126-28.

168. *Id.* at 128 & n.33.

tion to review directly a state court judgment involving federal questions when the state court relied on adequate procedural grounds in refusing to address the federal claim,[169] the Supreme Court had not in the past required federal district courts to accord the same deference to state procedural law in the exercise of habeas corpus review.[170] O'Connor's opinions in *Lundy* and *Isaac,* however, exemplify the current Court's recognition of adequate state procedures as a bar to federal claims in habeas proceedings[171] and the Court's apparent attempt to bring federal habeas review into parity with the Supreme Court's direct review of state court judgments.[172]

Another significant example of Justice O'Connor's exercise of judicial restraint based on her respect for federalism is her decided deference to state legislative judgment when litigants challenge the constitutionality of state statutes.[173] O'Connor has dissented vigorously when the Court has struck

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169. 16 C. WRIGHT, FEDERAL PRACTICE, *supra* note 154, § 4019, at 661-62.

170. *See* Fay v. Noia, 372 U.S. 391, 426-35 (1963) (rejecting application of independent and adequate state ground rule to federal habeas review of prisoner complaints of unconstitutional detention).

171. *See* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (rejecting *Fay* as failing to accord in federal habeas review sufficient deference to state's refusal to hear federal constitutional claim waived in state court); *see also* Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role For Federal Courts; An Increasingly Important Role for State Courts,* 44 OHIO ST. L.J. 287, 299 (1983) (*Lundy* and *Isaac* rest on assumption that adequate state procedures protect constitutional rights of state criminal defendants).

172. *See* 16 C. WRIGHT, FEDERAL PRACTICE, *supra* note 154, § 4020, at 297-98 (Supp. 1983) (noting that *Wainwright* brought habeas review more closely in line with direct review by requiring increased deference in habeas proceeding to adequate state procedural bar to federal claim).

173. *See, e.g.,* Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54, 104 S. Ct. 3179, 3190 (1984) (O'Connor, J.) (finding no pre-emption because state law providing for disqualification of certain labor union officials from serving as elected representatives actually did not conflict with federal law guaranteeing union members right to elect whomever they wish); Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2324, 2330-32 (1984) (O'Connor, J.) (upholding against challenge under public use clause state law providing for involuntary transfer of title with compensation from lessor to lessee); Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058, 1068-70 (1984) (O'Connor, J.) (upholding state law restricting participation of nonunion public employees in selection of exclusive representatives to advisory committees as not violative of first amendment or equal protection clause); Southland Corp. v. Keating, 104 S. Ct. 852, 855, 864-65 (1984) (O'Connor, J., dissenting) (finding that Federal Arbitration Act is federal procedural law unenforceable in state court under supremacy clause); Rice v. Rehner, 103 S. Ct. 3291, 3293, 3298, 3302-03 (1983) (O'Connor, J.) (finding no pre-emption of state law requiring federally licensed Indian trader to have state liquor license when Indians had enjoyed no prior immunity from state liquor regulation and when Congress intended state law to apply to liquor traffic); Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706, 2712-17 (1983) (O'Connor, J., dissenting) (finding Court improperly upheld mortgagees' interest against state interest by requiring state to notify mortgagees by particular means concerning pending tax sale of mortgaged property despite mortgagees' superior position to protect their own property interest); Brown v. Thomson, 103 S. Ct. 2690, 2699-700 (1983) (O'Connor, J., concurring) (joining majority in upholding popular representation plan in Wyoming despite overall 89% maximum deviation from one man-one vote standard because issue before Court was whether representation in one particular county

down state legislation challenged under the due process clause of the fourteenth amendment.[174] Similarly, O'Connor has urged more careful consideration of state interests when the Court has invalidated state statutes under

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created any additional deviation from statewide overall deviation); City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2512, 2515, 2516 (1983) (O'Connor, J., dissenting) (criticizing majority's invalidating as violative of due process clause city ordinances regulating abortions, in part, because, in O'Connor's view, several challenged ordinances did not burden unduly women's decision to have abortion); New York v. Ferber, 458 U.S. 747, 774-75 (1982) (O'Connor, J., concurring) (upholding state interest in banning distribution of child pornography against first amendment challenge); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 331-32 (1982) (O'Connor, J., dissenting) (criticizing majority's decision to strike down under due process clause state efforts to apportion and tax intangible investment income of interstate corporations); Greene v. Lindsey, 456 U.S. 444, 459-60 (1982) (O'Connor, J., dissenting) (Court should not invalidate under due process clause state law providing for posted notice of eviction from public housing project on basis of inadequate record); *cf.* Lynch v. Donnelly, 104 S. Ct. 1355, 1366-67 (1984) (concurring in decision upholding city's display of Christmas creche as not violating first amendment, but writing separately to clarify three-part *Lemon* test used by majority by focusing establishment clause analysis on governmental entanglement with religious institutions and government endorsement or disapproval of religion); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting) (Court should not hold decision of local elected school board to remove certain books from school library as violative of first amendment so long as board does not interfere with student rights to read and discuss books). *But see* Kolender v. Lawson, 461 U.S. 352, 361-62 (1983) (O'Connor, J.) (finding state statute unconstitutional under due process clause for failure of legislature to define with particularity what action taken by suspect would satisfy California stop-and-identify statute); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-93 (1983) (O'Connor, J.) (holding invalid under first amendment state law imposing differential tax on press); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (O'Connor, J.) (holding invalid under equal protection clause state law limiting admissions to state supported nursing school to women only); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 171-72 (1982) (O'Connor, J., concurring) (joining majority to uphold federal pre-emption of certain state laws governing federal savings and loan associations, but writing separately to note limits on federal agency power to pre-empt state law); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) (joining Court to invalidate under first amendment state law that required judge to close criminal trial during testimony of minor who was victim of sex offense based on long tradition of open criminal trials and on state's failure to justify mandatory exclusion of public); Zobel v. Williams, 457 U.S. 55, 71-74 (1982) (O'Connor, J., concurring) (would strike down Alaska's plan to distribute funds from oil resources to residents based on length of residency under privileges and immunities clause rather than equal protection clause on which majority relied); Mills v. Habluetzel, 456 U.S. 91, 102-06 (1982) (O'Connor, J., concurring) (concurring in majority's decision to strike Texas' one-year statute of limitations for paternity suits as violative of equal protection clause, but wrote separately to stress that longer statutory period likewise may be unconstitutional).

174. *See* Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706, 2712-17 (1983) (O'Connor, J., dissenting) (finding Court improperly upheld mortgagees' interest against state interest by requiring state to notify mortgagees by particular means concerning pending tax sale of mortgaged property despite mortgagees' superior position to protect own property interest); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 331-32 (1982) (O'Connor, J., dissenting) (criticizing majority's decision to strike down under due process clause state efforts to apportion and tax intangible investment income of interstate corporations); Greene v. Lindsey, 456 U.S. 444, 459-60 (1982) (O'Connor, J., dissenting) (Court should not invalidate under due

the equal protection clause.[175] O'Connor also has upheld a state's exercise

process clause state law providing for posted notice of eviction from public housing project on basis of inadequate record). In *ASARCO Inc. v. Idaho State Tax Comm'n,* the Court considered whether Idaho constitutionally could tax a portion of intangible investment income received by a nonresident parent corporation doing business in Idaho. 458 U.S. at 308-09. The intangible income at issue in *ASARCO* included dividends, interest payments, and capital gains from stock sales. *Id.* at 309. Under state law, Idaho apportioned to itself a share of the investment income earned by ASARCO from foreign subsidiaries. *Id.* at 309 n.2, 310 n.4, 310-14. The *ASARCO* Court found that ASARCO had not exercised sufficient control over the foreign subsidiaries to permit Idaho to apportion and tax ASARCO's investment income from those sources. *Id.* at 322-24, 327. The *ASARCO* Court invalidated the Idaho statute as violative of the due process clause. *Id.* at 328-29, 330. Unwilling to join the majority, O'Connor found that ASARCO's investments in the foreign subsidiary were an integral part of ASARCO's business, and that income derived from those investments, therefore, was subject to state apportionment and taxation. *Id.* at 339. Moreover, O'Connor noted that the Court's decision raised serious questions whether any state constitutionally could tax the contested investment income after *ASARCO. Id.* at 344. Additionally, in O'Connor's view, the Court's reliance on the due process clause to invalidate state tax law hindered state efforts within Congress to create a uniform national system of taxation for intangible investment income of interstate corporations. *Id.* at 331, 350 n.14. O'Connor complained that the judiciary had pre-empted Congress in the complicated field of taxation of multijurisdictional business, an area in which Congress is more qualified to act than the judiciary. *Id.* at 350-53.

In *Mennonite Bd. of Missions v. Adams,* the Court considered whether notice by publication and posting as required by Indiana law was constitutionally adequate to inform a mortgagee that the county intended to sell the mortgaged property for nonpayment of taxes. 103 S. Ct. at 2708-09. The Court held that notice by publication and posting violated the due process rights of mortgagees. *Id.* at 2712. In the majority's view, the state must inform by mail or comparable means any person whose name and address are reasonably discoverable of any proceeding that adversely affects his property interests. *Id.* O'Connor criticized the Court's decision as an unwarranted extension of *Mullane v. Central Hanover Bank & Trust Co.,* which permitted the trustee of a common fund to notify beneficiaries of proceedings affecting their property rights by publication under certain circumstances. *Id.* at 2713; *see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950) (notice by publication is permissible when whereabouts or identity of persons is unknown or when person's interests are speculative or remote). O'Connor observed that the effort required of a state to discover the identity and whereabouts of parties entitled to notice of state proceedings was not clear from the Court's opinion. *Id.* at 2715. O'Connor found that state interests outweighed those of individual mortgagees, who are able to protect their interests easily by checking the public record or by requiring the mortgagors to provide proof of payments of property taxes or to deposit monies in escrow with the mortgagee for tax payments. *Id.* at 2716-17.

In *Greene v. Lindsey,* the Court considered whether a Kentucky statute provided adequate notice of eviction proceedings against tenants who lived in public housing projects. 456 U.S. at 445. Relying on the constitutional standard that notice must be reasonably calculated to apprise interested parties of the pendency of an action, the Court found that notice by posting summons on the tenant's door in a public housing project was constitutionally deficient. *Id.* at 449-50, 453; *see Mullane,* 339 U.S. at 314 (due process requires notice reasonably calculated to alert persons of pending action and to provide them opportunity to be heard). In a strongly worded dissent, however, O'Connor found the testimony concerning the reliability of posted notice conflicting and criticized the Court for overturning state law based on an inadequate record. *Id.* at 459-60 (O'Connor, J., dissenting).

175. *See* Zobel v. Williams, 457 U.S. 55, 71-73 (1982) (O'Connor, J., concurring) (Court should not declare state interest illegitimate without careful analysis).

of eminent domain challenged under the public use clause.[176] Moreover, O'Connor has resisted challenges under the supremacy clause to state laws that conflict with existing federal statutes.[177] For example, in *Southland Corp. v. Keating,*[178] O'Connor dissented from the Court's recognition of the Federal Arbitration Act (FAA)[179] as a substantive federal right to which conflicting state law must yield under the supremacy clause. In *Southland,* various California franchises of 7-Eleven convenience stores sued Southland Corporation, the franchisor, in California state court, alleging that Southland had violated various provisions of the California Franchise Investment Law.[180] Southland's standard franchise agreement had contained an arbitration clause requiring arbitration of all disputes arising under the contract.[181] Southland, therefore, moved to compel arbitration of all claims, including the claims arising under the California law protecting franchisees.[182] The California Supreme Court refused to enforce the arbitration clause of the franchise agreement and held that the California Franchise Investment Law afforded the plaintiffs access to a judicial forum, notwithstanding the parties' prior agreement to arbitrate commercial contract disputes.[183] The *Southland* Court reversed the decision of the California Supreme Court, finding that the FAA created a substantive federal right to enforce arbitration agreements in federal or state courts.[184] In her *Southland* dissent, Justice O'Connor

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176. *See* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2324, 2330-32 (1984) (O'Connor, J.) (upholding against challenges under public use clause state law providing for involuntary transfer of title with compensation from lessor to lessee). *See generally* Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem For the Public Use Limitation on Eminent Domain?,* 60 NOTRE DAME L. REV. 388 (1985) (criticizing *Midkiff* as establishing minimum scrutiny of state seizure of private property for private use).

177. *See, e.g.,* Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union Local 54, 104 S. Ct. 3179, 3190 (1984) (O'Connor, J.) (finding no pre-emption because state law providing for disqualification of certain labor union officials from serving as elected representatives actually did not conflict with federal law guaranteeing union members right to elect whomever they wished to serve as officials); Southland Corp. v. Keating, 104 S. Ct. 852, 855, 864-65 (1984) (O'Connor, J., dissenting) (Court should not invalidate conflicting state law under supremacy clause to enforce federal procedural law in state court); Rice v. Rehner, 103 S. Ct. 3291, 3293, 3298, 3302-03 (1983) (O'Connor, J.) (finding no pre-emption of state law requiring federally licensed Indian trader to have state liquor license because Indians had enjoyed no prior immunity from state liquor regulation and because Congress intended state law to apply to liquor traffic); *cf.* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 171-72 (1982) (O'Connor, J., concurring) (O'Connor concurred in Court's opinion that federal agency regulations concerning practices of federal savings and loan associations may pre-empt conflicting state law under supremacy clause, but wrote separately to emphasize limits on pre-emption power of federal agencies).

178. 104 S. Ct. 852 (1984).

179. 9 U.S.C. § 2 (1982).

180. *Southland,* 104 S. Ct. at 855.

181. *Id.*

182. *Id.*

183. *Id.* at 856.

184. *Id.* at 858, 861. *See generally* Note, *A Controversial Settling of a Settlement Contro-*

argued that Supreme Court precedent limited the power of the federal judiciary to require state courts to enforce federal law.[185] O'Connor contended that Congress did not intend to create a federal right enforceable in state courts by enacting the FAA.[186] Rather, in O'Connor's view, Congress intended to create either general federal common law or a procedural right to compel arbitration.[187] O'Connor noted that following the passage of the FAA the Court, in *Erie Railroad Co. v. Tompkins,* had abolished general federal common law.[188] O'Connor concluded, therefore, that any federal right to compel arbitration under the FAA was strictly procedural in nature and unenforceable in state courts.[189] Justice O'Connor's dissent is not antagonistic to the policies behind arbitration, but rather is an attempt to limit the federal judiciary's power to invalidate state law under the supremacy clause without a clear congressional intent to create substantive federal law.[190]

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versy: The Supreme Court Declared the Federal Arbitration Act Preemptive of State Laws and Applicable in State Courts, 36 ALA. L. REV. 273 (1984) (discussing ambiguity of FAA's applicability to state courts settled by *Southland);* Note, *Resolving the Conflict Between Arbitration Clauses and Claims Under Unfair and Deceptive Practices Acts,* 64 B.U. L. REV. 377 (1984) (discussing conflict between state and federal arbitration statutes and state legislation designed to protect certain parties to commercial contracts by providing judicial forum despite arbitration agreement).

185. *Southland,* 104 S. Ct. at 864-65, 871 (O'Connor, J., dissenting); *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that absent constitutional provision or act of Congress federal courts must apply state substantive law in diversity suit); *see also* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202-05 (1956) (holding that right to compel arbitration is substantive right governed by local law).

186. *Southland,* 104 S. Ct. at 864-67.

187. *Id.* at 864.

188. *Id.; see Erie,* 304 U.S. at 78 (declaring that federal courts may not establish substantive common law binding on state courts).

189. *Southland,* 104 S. Ct. at 865-68 (O'Connor, J., dissenting).

190. *See id.* at 871 (arbitration is valuable alternative to litigation). Justice O'Connor joined the Court's unanimous decision in *Dean Witter Reynolds, Inc. v. Byrd,* which enforced a private arbitration agreement under the Federal Arbitration Act (FAA). *See* Dean Witter Reynolds, Inc. v. Byrd, 53 U.S.L.W. 4222, 4223-24 (1985) (Court enforced arbitration agreement at expense of bifurcating proceeding to deal separately with arbitrable and unarbitrable claims presented together in one lawsuit); Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982). In *Byrd,* an investor sued Dean Witter Reynolds, a securities broker-dealer, under the Securities Exchange Act of 1934 ('34 Act) and under state law for losses incurred in his securities account. 53 U.S.L.W. at 4222. The agreement between the plaintiff and the brokerage firm contained an arbitration clause requiring arbitration of all claims arising out of the broker-client relationship. *Id.* The defendant moved to compel arbitration of the state law claims under the FAA. *Id.* The Court noted that the defendant had assumed that § 10(b) claims under the '34 Act were not arbitrable and, therefore, the defendant did not move to compel arbitration of the federal claims. *Id.* The *Byrd* Court then considered whether the presence of arbitrable and nonarbitrable claims in one lawsuit required a denial of the motion to compel arbitration in order to resolve all the claims in one proceeding in federal court or required a bifurcation of the proceeding in federal court to permit arbitration of the arbitrable state claims. *Id.* at 4223. The *Byrd* Court supported the policy of the FAA to enforce private arbitration agreements at the expense of piecemeal litigation and held that the California district court had erred in denying the defendant's motion to compel arbitration of the state claims. *Id.* at 4223-24, 4225.

Another dimension of Justice O'Connor's restraint in granting equitable relief also appears when the relief requested involves federal judicial intervention into state government.[191] Intrusion into state government immediately implicates federalism considerations. In considering the proper role of the federal courts in *Allen v. Wright,*[192] O'Connor supported the heightened standing requirements that the Court demanded of the plaintiffs in *O'Shea v. Littleton,*[193]

The differences between *Southland Corp. v. Keating* and *Byrd* sharpen the basis of O'Connor's dissent in *Southland.* In *Southland,* the plaintiffs filed suit in California state court under state law that, in effect, circumvented the plaintiff's arbitration agreement with Southland by providing a judicial forum for resolution of the parties' claims. 104 S. Ct. at 856. In *Byrd,* however, the plaintiff filed suit in a California federal district court, which exercised diversity and pendent jurisdiction over the state law claims. 53 U.S.L.W. at 4222. O'Connor conceded in *Southland* that any party in a diversity action in federal court could compel arbitration under the FAA whereas O'Connor objected to requiring state courts to enforce the FAA as substantive federal law binding on state courts. 104 S. Ct. at 865, 870, 871.

191. *See supra* notes 99-109 and accompanying text (discussion of O'Connor's tendency to limit equitable discretion of federal courts under Title VII).

192. *See Allen,* 104 S. Ct. at 3330 (citing *O'Shea, Rizzo,* and *Lyons* as demonstrating proper role of federal judiciary). In *Allen v. Wright,* O'Connor refused to open the courthouse doors to plaintiffs who were unable to show direct and specific injury, but rather complained only generally of improper governmental practices or sought to restructure an agency of the federal government. *Id.* at 3329-30. By citing *O'Shea, Rizzo,* and *Lyons* as cases reflecting the proper role of the federal courts, O'Connor has implied that the plaintiff seeking to enjoin government action may not rely on a single discrete injury, but must show a continuing predictable pattern of harm. *Id.* at 3330; *see infra* notes 193-201 and accompanying text (discussing plaintiffs' failure to gain standing to enjoin allegedly illegal governmental practices in *O'Shea, Rizzo,* and *Lyons).* In *Kolender v. Lawson,* O'Connor, writing for the majority, however, noted that the defendant had satisfied the standing requirement of continuing threatened injury. Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983) (O'Connor, J.). In *Kolender,* local police had detained the defendant some fifteen times under a stop-and-identify statute. *Id.* at 354. O'Connor found a sufficient likelihood that the defendant would continue to be detained under that statute in the future. *Id.* at 355 n.3.

193. 414 U.S. 488 (1974). In *O'Shea v. Littleton,* a plaintiff-class consisting primarily of blacks and indigents alleged discriminatory practices in the administration of the local criminal justice system of Cairo, Illinois. *Id.* at 490-91. The plaintiff-class charged that the local magistrate and judge had set bond arbitrarily in criminal cases, had imposed harsher sentences on members of the plaintiff-class than on other defendants and had required members of the plaintiff-class to pay jury fees. *Id.* at 492. The *O'Shea* Court held that the plaintiff class did not meet the requirements of article III standing. *Id.* at 493. The Court noted that the complaint did not allege any specific injury committed by the defendants against the named plaintiffs, did not allege the unconstitutionality of any state statutes, and did not demonstrate the probability of future harm to the plaintiff class. *Id.* at 495-97. In seeking a proper balance between state and federal courts, Justice White, writing for the majority, refused to intervene in the state administration of state criminal laws without a more immediate threat of irreparable injury. *Id.* at 499. The presence of § 1983 as a basis for federal intervention, in the Court's view, did not remove the principles of comity and federalism from the Court's consideration. *Id.; see* 42 U.S.C. § 1983 (1982) (providing that every person who under color of law deprives another of any lawful right, privilege, or immunity shall be liable in civil action).

Rizzo v. Goode,[194] and *City of Los Angeles v. Lyons.*[195] The *O'Shea, Rizzo,* and *Lyons* decisions severely restrained the discretion of district court judges to

194. 423 U.S. 362 (1976). In *Rizzo v. Goode,* two plaintiff-classes, representing the citizens of Philadelphia and a class of minority residents, sued the Mayor, City Managing Director, and Police Commissioner of Philadelphia in the United States District Court for the Eastern District of Pennsylvania, alleging a pattern of police mistreatment of the public. *Id.* at 364-65 & 364 n.1. The district court found evidence that individual police officers had mistreated members of the public in violation of the citizens' constitutional rights, but the court noted that the plaintiff-classes had not joined the individual policemen as party-defendants. *See id.* at 367-68, 371. The lower federal court further noted that the plaintiff-classes had developed no evidence to establish that the named defendants had authorized or encouraged the violations. *See id.* at 368, 371. The district court, however, did find that police procedures for handling citizen complaints discouraged the filing of such complaints. *See id.* at 368-69. The district court, therefore, entered a detailed final order revising the reporting procedures and reserving the power to review the new procedures and to intervene if the revisions were not effective. *See id.* at 364-65, 365 n.2. The *Rizzo* defendants appealed from the district court's intrusion into the internal operation of the police department. *Id.* at 366. The Supreme Court in *Rizzo* approached the exercise of remedial discretion from the perspectives of standing, liability under § 1983, and federalism. *Id.* at 371-81; *see* 42 U.S.C. § 1983 (1982) (providing that every person who under color of law deprives another of any lawful right, privilege, or immunity is liable in civil action). Relying on its decision in *O'Shea v. Littleton,* the *Rizzo* Court found that the plaintiff-classes had no standing to request injunctive relief because an injunction against the police department would have only a speculative effect on the likelihood of the plaintiffs' being abused in the future. 423 U.S. at 372-73. The Court further held that the plaintiffs could not maintain their suit under § 1983 because the defendants acting in their capacity as local government administrators had not deprived the plaintiffs of their constitutional rights. *Id.* at 377; *see* 42 U.S.C. § 1983 (providing that every person who under color of law deprives another of any lawful right, privilege, or immunity is liable in civil action). The *Rizzo* Court, in the view of the dissent, had narrowed the reach of § 1983 by refusing to impute the acts of employee-officers to agency officials. *See* 423 U.S. at 384-85 (Blackmun, J., dissenting) (rejecting majority's view that officials were not responsible for acts of subordinates under § 1983). Additionally, the *Rizzo* majority was persuaded that the principles of federalism required the Court to refrain from interfering in the internal operation of the executive branch of a state government. *Id.* at 380.

195. 461 U.S. 95 (1983). In *City of Los Angeles v. Lyons,* the Supreme Court considered whether a plaintiff could seek injunctive relief from a local police practice of administering chokeholds to arrestees without provocation. *Id.* at 97-98. The plaintiff in *Lyons* complained that, in the course of stopping the plaintiff for a traffic violation, an officer had grabbed the plaintiff and applied a chokehold around his neck, leaving the plaintiff unconscious and causing injury to his larynx. *Id.* In a suit against the City of Los Angeles and four city policemen, the plaintiff asked for injunctive relief against the unjustified use of chokeholds. *Id.* at 98. The *Lyons* Court held that the plaintiff did not have standing to seek injunctive relief because of the unlikelihood that city police would subject the plaintiff to chokeholds in the future. *Id.* at 105, 109. The Court noted that standing to sue for damages would not provide a basis to request injunctive relief in every case. *Id.* at 111. Justice White, writing for the Court, moreover, found that concerns of federalism are at stake whenever the federal judiciary contemplates equitable intrusion into the administration of a state criminal justice system. *Id.* at 112. The *Lyons* Court held that although state courts may relax requirements for injunctive relief, the federal judiciary would not intervene in the operation of state administrative agencies without a compelling and continuing threat to a complainant. *Id.* at 113.

provide injunctive relief against state and local governments.[196] The Court had granted certiorari in *O'Shea, Rizzo,* and *Lyons* to consider whether the district court judges had abused their discretion in granting remedies that interfered in the daily operations of state agencies.[197] In each case the Supreme Court, however, considered whether the plaintiff had standing to request injunctive relief, regardless of the plaintiffs' standing to request damages.[198] The Court held in each case that an injured plaintiff does not have standing to request injunctive relief unless the plaintiff can show that the unlawful governmental practice will continue to injure him specifically in the future.[199] The current Court's limitations on judicial power to enjoin unconstitutional state action on behalf of an injured plaintiff has sparked increasing controversy.[200] This trend toward judicial restraint in the exercise of equitable discretion differs from the far-reaching use of remedial discretion by the Warren Court.[201] Although O'Connor's approval of the Court's narrow approach to remedial standing is indirect, O'Connor's support of the controversial doctrine of remedial standing in *Rizzo, Lyons,* and *O'Shea* is consistent with her general reluctance to intrude in the affairs of state governments.

Justice O'Connor's exercise of judicial restraint, however, is not tantamount to an abdication of the Court's role as defender of individual constitutional rights. The overwhelming trend in O'Connor's opinions, motivated by both separation of powers and considerations of federalism, is to limit access to federal courts and to infuse state government with increased independence to maintain the health of a federal system. Although O'Connor would limit the sphere in which the Court may act, O'Connor has not diminished the power of the Court to function within that sphere. For example, O'Connor has exercised the full powers of the federal court to strike down, in the face of constitutional challenge, state laws burdening the institutional press[202] or perpetuating

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196. *See generally* Note, *No Holds Barred in* City of Los Angeles v. Lyons: *Standing to Seek Injunctions in Federal Court Against Municipalities,* 15 COLUM. HUM. RTS. L. REV. 183 (1984) (*Lyons* limits injunctive relief against municipalities).

197. *Lyons,* 461 U.S. at 100; *Rizzo,* 423 U.S. at 366; *O'Shea,* 414 U.S. at 492-93.

198. *Lyons,* 461 U.S. at 101-05, 111; *Rizzo,* 423 U.S. at 371-73; *O'Shea,* 414 U.S. at 493-99.

199. *Lyons,* 461 U.S. at 101-02; *Rizzo,* 423 U.S. at 372; *O'Shea,* 414 U.S. at 496-97.

200. *See generally* Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984) (criticizing *Lyons* Court's consideration of effectiveness of remedy sought in initial standing decision).

201. *See* Note, *supra* note 196, at 198 (*Lyons* decision reverses earlier trend in Supreme Court to provide forum for injunctive relief). *See generally* Fiss, *Forward: The Forms of Justice,* 93 HARV. L. REV. 1 (1979) (exploring unique character of structural lawsuit and Warren Court's use of injunction to direct change within organizations that challenged constitutional values).

202. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-93 (1983) (O'Connor, J.) (invalidating differential state taxation of certain newspapers); *see also* Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) (concurring in invalidation of state law mandating exclusion of public from criminal trials during testimony of minor who was victim of sex offense).

gender discrimination.[203] Moreover, O'Connor has not been unwilling to invalidate state sentencing proceedings imposing the death penalty when the state court has failed to give sufficient consideration to mitigating circumstances.[204] In the area of gender discrimination, Justice O'Connor would manipulate the standards of federal judicial review of state laws to lower the standard of review of state legislation prohibiting gender discrimination in the workplace[205]

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203. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (O'Connor, J.) (invalidating under equal protection clause state statute limiting admission to state-supported nursing school to women).

204. *See* Arizona v. Rumsey, 104 S. Ct. 2305, 2311 (1984) (O'Connor, J.) (double jeopardy clause bars resentencing capital defendant to death when court in trial-like proceeding initially had sentenced defendant to life imprisonment); Enmund v. Florida, 458 U.S. 782, 827-31 (1982) (O'Connor, J., dissenting) (finding that state court had violated eighth amendment in refusing to consider mitigating evidence in death sentencing decision); Eddings v. Oklahoma, 455 U.S. 104, 117-19 (1982) (O'Connor, J., concurring) (stressing eighth amendment protection in requiring state court to consider all mitigating circumstances in death sentencing decision); *cf.* California v. Ramos, 103 S. Ct. 3446, 3459-60 (1983) (O'Connor, J.) (state legislature may determine factors that sentencing jury may consider in death sentencing decisions as long as statutory instructions do not violate eighth amendment); Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (O'Connor, J.) (holding that state court's decision to revoke defendant's probation automatically and to imprison defendant for failure to pay fine or make restitution without considering reasons for nonpayment and possible alternative punishments other than imprisonment was fundamentally unfair and, therefore, violated due process clause).

205. *See* Roberts v. United States Jaycees, 104 S. Ct. 3244, 3259 (1984) (O'Connor, J., concurring). In *Roberts v. United States Jaycees,* the Supreme Court addressed the first amendment associational rights of the U.S. Jaycees (Jaycees), a nonprofit membership corporation, to limit full membership to men. *Id.* at 3246-47. Two chapters of the Jaycees in Minnesota opened membership to women in contravention of the national organization's bylaws. *Id.* at 3247. Following threats by the president of the national organization to revoke the chapters' charters, the members of the Minnesota chapters filed charges against the national organization with the Minnesota Department of Human Rights under the Minnesota Human Rights Act, claiming that the bylaw provisions excluding women from regular membership were discriminatory. *See id.* at 3248. A Minnesota state examiner found that the Jaycees came within the reach of the statute and ordered the national organization to stop its discriminatory policy against women and to end sanctions against the Minnesota chapters. *See id.* The Jaycees then pursued an action in federal court, alleging that Minnesota state officials had violated the Jaycees' first amendment rights of free speech and association and that the Human Rights Act as applied to the Jaycees was unconstitutionally vague and overbroad. *See id.* at 3348-49. Writing for the Court, Justice Brennan distinguished two associational rights, the freedom of intimate association and the freedom of expressive association. *Id.* at 3250. A commentator has noted that, in *Roberts,* the freedom of intimate association flows from the privacy interest protected by the due process clause while the first amendment protects the right of expressive association. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1884 (1984). Brennan held that the Jaycees could not assert any rights based on the freedom of intimate association because the Jaycees were a large group and were unselective in membership recruitment. 104 S. Ct. at 3251. Furthermore, although the majority recognized that Minnesota's order requiring the Jaycees to admit women to regular membership implicated the Jaycees' freedom of expressive association, the Court found Minnesota's interest in prohibiting gender discrimination compelling and held that the inclusion of women did not affect the content of the Jaycees' expressive activity. *Id.* at 3252, 3254-55.

Justice O'Connor rejected the *Roberts* majority's use of a balancing test to weigh state interests against the Jaycees' associational rights. *Id.* at 3258 (O'Connor, J., concurring). In

and to increase the burden on the states to justify statutes perpetuating discrimination.[206] O'Connor's willingness to increase the power of the states to

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O'Connor's view, the threshold issue in such cases is whether an association seeking first amendment protection is involved predominantly in expressive activities or is engaged primarily in commercial activity. *Id.* at 3259. According to O'Connor, characterizing an association as a commercial association would limit the constitutional protection the association could claim. *Id.* at 3258-59. O'Connor would apply a rational basis test rather than a balancing test as the standard of review of state legislation infringing on the associational rights of commercial associations. *See id.* at 3259 (commercial association should be subject to rationally related state regulation of membership). Although *Roberts* involved a challenge to gender discrimination, no language in O'Connor's opinion limits the opinion's applicability to gender discrimination. *See id.* (discussing only discrimination in general).

206. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (O'Connor, J.) (invalidating state statute that limited admissions to state-supported nursing school to women). In *Mississippi Univ.for Women v. Hogan,* the Supreme Court considered whether a Mississippi statute limiting admissions to the Mississippi University for Women School of Nursing (MUW), a state-supported nursing school, to women violated the equal protection clause. *Id.* at 719. Traditionally, claims arising under the equal protection clause have been subject to either the strict scrutiny test or the rational basis test. *See* Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny,* 45 OHIO ST. L.J. 161, 161-63 (1984) (explaining development of strict scrutiny and rational basis test from 1930's). To survive the rational basis test, a statute merely must bear a rational relationship to a state interest. *Id.* at 161-62. To survive strict scrutiny, on the other hand, the challenged statute necessarily must reflect a compelling state interest. *Id.* at 162. The Court developed strict scrutiny to protect fundamental rights threatened by legislation, although Shaman claims that the Court's classification of rights as fundamental has been somewhat inconsistent. *Id.* at 162, 176-77. The courts rarely have nullified a statute under the rational basis test, whereas a statute rarely has survived strict scrutiny. *Id.* at 161-62, 168, 173. In *Hogan,* O'Connor, writing for a 5-4 majority, however, applied an intermediate level of review. 458 U.S. at 723-24. For a facially discriminatory statute to survive the intermediate level of review, the discriminatory means must bear a substantial relationship to important state objectives. *Id.* at 724; *see, e.g.,* Kirchberg v. Feenstra, 450 U.S. 455, 459 (1981) (gender discrimination must be substantially related to important state purpose); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (gender discrimination must be substantially related to important governmental objectives); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (gender discrimination must bear substantial relationship to important state goal). Although the Court had not employed the intermediate level of review consistently to gender discrimination, the substantially-related standard was not new when the Court decided *Hogan. See* Shaman, *supra,* at 169 & n.90 (citing cases prior to *Hogan* in which Supreme Court established intermediate level of judicial review). Commentators, however, generally have regarded *Hogan* as strengthening the intermediate standard of review for gender discrimination. *See* Note, *The End of an Era for Single-Sex Schools?:* Mississippi University for Women v. Hogan, 15 CONN. L. REV. 353, 363, 371 (1983) (claiming that *Hogan* reaffirmed intermediate level of review of gender discrimination); Note, Mississippi University for Women v. Hogan: *Gender Discrimination—Establishing a Consistent Standard of Review,* 10 OHIO N.U. L. REV. 159, 159 & n.4, 163-64, 168 (1983) (claiming that *Hogan* clarified intermediate level of review as appropriate standard for gender discrimination).

A primary dispute between the parties in *Hogan* focused on which party had the burden of proof. *See* Brief for Respondent at 8-9, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (arguing that MUW had failed to establish substantial relationship between affirmative action and discriminatory admissions policy); Reply Belief for Petitioner at 1, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (arguing that Hogan had burden of establishing that discriminatory admission policies bore no relation to state interests and that he had presented

prohibit discrimination is particularly significant because of her narrow construction of federal anti-discrimination legislation.[207]

Although Justice O'Connor has upheld state statutes in the face of first amendment challenges,[208] O'Connor has been less consistent in deferring to state legislative judgment when the institutional press challenges the constitutionality of state law under the first amendment.[209] In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,*[210] for example, O'Connor considered whether a state use tax on paper and ink levied on a limited number of newspapers violated first amendment rights.[211] O'Connor recognized at the outset that states may tax the press in a manner generally applicable to all businesses.[212] O'Connor raised the level of scrutiny, however, by increasing the burden on the state to justify selective taxation of the press.[213] O'Connor, writing for the majority, held that Minnesota's objective to raise revenue did not justify special tax treatment of the press because the state easily could have raised revenues by a tax evenhandedly applied to all businesses.[214] Moreover, O'Connor presumed that no state interest could justify

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little evidence to support his claim). Conflicting case law did not resolve the burden of proof issue. *Compare* Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (party seeking to uphold discriminatory statute bears burden of proof) *and* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980) (party defending discrimination bears burden of proof) *with* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 276, 281 (1979) (burden of proof rests with plaintiff challenging statute). O'Connor, writing for the Court in *Hogan,* placed the burden of proof on the state. 458 U.S. at 724. By coupling the intermediate level of review with a shift of the burden of proof to the defendant state, O'Connor's opinion in *Hogan* structured judicial review to give the plaintiff a decided advantage in challenging sex discrimination under the equal protection clause. The *Hogan* majority subsequently found that Mississippi was unable to justify the discriminatory admissions practices at MUW. *Id.* at 727-33.

207. *See* Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 103 S. Ct. 3221, 3237 (1983) (O'Connor, J., concurring) (discriminatory intent is necessary for relief under Title VI); General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 403 (1982) (O'Connor, J., concurring) (concurring in holding that cause of action under 42 U.S.C. § 1981 requires proof of intent to discriminate); Patsy v. Board of Regents of Florida, 457 U.S. 496, 516-17 (1982) (O'Connor, J., concurring) (relief under § 1983 does not require finding of discriminatory intent, but Congress should revise statute to require intent); *see also* Ford Motor Co. v. EEOC, 458 U.S. 219, 238-39 (1982) (O'Connor, J.) (discriminatee's refusal of employment offered by employer charged with Title VII violation tolls employer's backpay liability).

208. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 107, 109-12 (1982) (O'Connor, J., concurring in part and dissenting in part) (Court should weigh more heavily state interests in disclosure when individuals who seek first amendment protection are recipients rather than contributors of political funds); New York v. Ferber, 458 U.S. 747, 774 (1982) (O'Connor, J., concurring) (concurring in Court's recognition of compelling state interest in banning distribution of child pornography).

209. *See supra* note 202 (noting cases in which O'Connor has protected institutional press).

210. 460 U.S. 575 (1983) (O'Connor, J.).

211. *Id.* at 576-79.

212. *Id.* at 581.

213. *Id.* at 583, 585.

214. *Id.* at 586.

Minnesota's decision to limit the special tax to a small group of papers.[215] The state of Minnesota argued that the special use tax in fact favored the press by taxing the cost of wholesale supplies rather than imposing a tax on general sales.[216] O'Connor, however, regarded tax laws that permit differential taxation of the press to give state legislatures potential censorship power.[217] Moreover, O'Connor felt that the Court was ill-prepared to evaluate the relative tax burdens implicit in state taxation schemes.[218] O'Connor's stated concern for the limitations of the Court in tax matters, however, is unpersuasive in light of her own straightforward approach on several occasions to complex tax issues.[219] Although O'Connor invalidates state efforts to tax the press in a differential manner, she preserves the valuable right of the state to tax the press as a member of the business community.

Justice O'Connor also has invoked the power of the Court to protect individuals from what she perceives as unconstitutional state sentencing processes. O'Connor has demonstrated a willingness to intrude on state courts to protect the threatened constitutional rights of state criminal defendants in sentencing proceedings under the double jeopardy clause,[220] the due

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215. *Id.* at 591-92.

216. *Id.* at 588.

217. *Id.*

218. *Id.* at 589-90.

219. *See* Commissioner v. Engle, 104 S. Ct. 597, 603-10 (1984) (O'Connor, J.) (construing Internal Revenue Code provisions allowing deductions for percentage depletion on income received from oil and gas leases); Commissioner v. Tufts, 461 U.S. 300, 304-17 (1983) (O'Connor, J., concurring) (assessing tax liability from sale of partnership property subject to nonrecourse mortgage greater in amount than fair market value of property); Hillsboro Nat'l Bank v. Commissioner, 460 U.S. 370, 377-91 (1983) (O'Connor, J.) (determining applicability of tax benefit rule to deductions claimed by two corporate taxpayers challenged by Internal Revenue Service due to subsequent events).

220. *See* Arizona v. Rumsey, 104 S. Ct. 2305, 2311 (1984) (O'Connor, J.) (double jeopardy clause bars resentencing capital defendant to death when court in trial-like proceeding initially had sentenced defendant to life imprisonment). In *Arizona v. Rumsey,* a jury convicted the defendant of armed robbery and first degree murder. *See id.* at 2307. The trial judge held a separate sentencing hearing to consider mitigating and aggravating circumstances bearing on the sentencing decision. *See id.* Arizona law defined murder for pecuniary gain as an aggravating circumstance. *Id.; see* ARIZ. REV. STAT. ANN. § 13-703(F)(5) (Supp. 1984) (commission of offense as consideration for anything of pecuniary value is aggravating circumstance). The trial judge construed the statutory language to include only murder for hire, not murders committed during a robbery. *See* 104 S. Ct. at 2307-08. Because the trial judge found no other aggravating circumstances, the judge concluded that state law prevented the court from imposing the death penalty. *See id.* at 2308. On appeal, the Arizona Supreme Court held that a robbery committed during a murder would be an aggravating circumstance under the statute in question. *See id.* On remand, the trial court adopted the state supreme court's construction of murder for pecuniary gain and sentenced the defendant to death. *See id.* at 2308-09. The Arizona Supreme Court on review found that the imposition of the death sentence on remand had violated the double jeopardy clause, and the state supreme court, therefore, reduced the sentence to life imprisonment. *See id.* at 2309. The state of Arizona petitioned for certiorari to the United States Supreme Court. *Id.* The *Rumsey* Court held that when a state sentencing hearing

process clause,[221] and the eighth amendment.[222] In particular, O'Connor is sensitive to the constraints that eighth amendment jurisprudence has placed on the states in reaching a decision whether to sentence a state criminal defendant to death.[223] For example, in *Eddings v. Oklahoma,*[224] O'Connor, concurring with the majority, wrote separately to stress the federal courts' duty to remand for resentencing any case in which the state sentencer failed

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resembles a trial, protection from double jeopardy attaches to the criminal defendant. *Id.* at 2309-10, 2311. O'Connor, in writing for the majority, found that the failure of the prosecution to persuade the sentencer to impose the death penalty was an acquittal on the merits that barred the court from resentencing the defendant to death, even if the first sentencing decision was based on errors of law. *Id.* at 2310-11.

221. *See* Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (O'Connor, J.) (holding that state court's decision to revoke defendant's probation automatically and to imprison defendant for failure to pay fine or make restitution without considering reasons for nonpayment and possible alternative punishments other than imprisonment was fundamentally unfair and, therefore, violated due process clause).

222. *See* Enmund v. Florida, 458 U.S. 782, 827-31 (1982) (O'Connor, J., dissenting) (state court violated eighth amendment in refusing to consider mitigating circumstances in sentencing defendant to death); Eddings v. Oklahoma, 455 U.S. 104, 117-19 (1982) (O'Connor, J., concurring) (stressing eighth amendment protection requiring state court to consider all mitigating circumstances in death sentencing decisions).

223. *See* California v. Ramos, 103 S. Ct. 3446, 3451-53 (1983) (O'Connor, J.) (outlining eighth amendment constraints on states' use of death penalty); *supra* note 222 (remanding death penalty cases for resentencing because of state procedural error). In *California v. Ramos,* O'Connor, writing for the majority, discussed in dictum the constraints the eighth amendment placed on the states. 103 S. Ct. at 3451-53. According to O'Connor, procedural constraints require that juries not exercise unguided discretion in imposing the death penalty. *Id.* at 3451-52. Substantively, the Supreme Court, in O'Connor's view, has disfavored vague sentencing standards, which might lead to arbitrary decision making. *Id.* at 3452 (citing Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976)). Furthermore, O'Connor noted that the Court has required the sentencer to consider the individual characteristics of the defendant and has prohibited any efforts to bar the sentencer from considering mitigating circumstances. *Id.* at 3452-53 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). The Court, moreover, has excluded use of a presentence report as a basis for imposing the death sentence when the defendant had no opportunity to respond to the content of the report. *Id.* at 3453 (quoting Gardner v. Florida, 430 U.S. 349 (1977)). *See generally* Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances,* 69 CALIF. L. REV. 317 (1981) (discussing eighth amendment jurisprudence as limit on state legislatures and state courts); Radin, *Cruel Punishment and Respect for Persons: Super Due Process For Death,* 53 S. CAL. L. REV. 1143 (1980) ("super due process" under the eighth amendment requires discretion in death sentencing to avoid risk of error in execution).

224. 455 U.S. 104 (1982). In *Eddings v. Oklahoma,* an Oklahoma jury convicted Eddings, a sixteen year old youth, of first degree murder for killing a highway patrolman during a traffic stop. *Id.* at 105-06. Oklahoma law required the sentencing court to consider both mitigating and aggravating circumstances, but did not define what might constitute a mitigating circumstance. *Id.* at 106. The trial judge sentenced Eddings to death, refusing as a matter of law to consider Eddings' troubled and violent background as a mitigating circumstance. *See id.* at 107-09. The state appeals court affirmed the death sentence. *See id.* at 109. On appeal to the United States Supreme Court, the *Eddings* Court held that, as a matter of law, the state court must consider all mitigating circumstances. *Id.* at 113-15. Specifically, the Court found that evidence of a turbulent childhood would be evidence of a mitigating circumstance. *Id.* at 115-16.

to consider all mitigating circumstances offered by the defendant.[225] The duty to remand to allow consideration of mitigating circumstances, in O'Connor's view, rests on the fear that if the courts did not require consideration of such evidence there would be a greater risk that a state might execute a defendant by mistake.[226] Similarly, in *Enmund v. Florida,*[227] O'Connor would have remanded the case for resentencing because of a procedural error by the state courts in refusing to consider mitigating evidence presented by the defendant.[228] In *Enmund,* the majority did not examine the procedural errors that had occurred in the state proceedings, but rather disallowed the death penalty itself as disproportionate punishment for felony murder when the defendant had no intent to kill.[229] O'Connor, writing for the dissent, upheld the proportionality of the death penalty for felony murder and rejected the

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225. *Id.* at 117-19, 117 n.* (O'Connor, J., concurring). In *Eddings,* O'Connor relied on the plurality opinion in *Lockett v. Ohio,* in which the plurality concluded that the sentencer must consider any aspect of the defendant's character, record, or offense offered by the defendant as a mitigating factor. *Id.; see* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (sentencer must consider any aspect of defendant's character, record, or offense as mitigating circumstance). One commentator has suggested that the plurality in *Lockett* mandating discretionary sentencing to afford mercy to capital defendants may conflict with the prohibition against arbitrariness in death sentencing. Radin, *supra* note 223, at 1150, 1153-55, 1180-81.

226. *Eddings,* 455 U.S. at 117-19, 117 n.*.

227. 458 U.S. 782 (1982). In *Enmund v. Florida,* Enmund had been tried under Florida law for first degree murder and robbery following the deaths of an elderly couple that occurred during the robbery. *Id.* at 783-84. The trial judge had instructed the jury that an unpremeditated murder committed during a robbery was murder in the first degree. *See id.* at 784-85. The trial judge also had instructed the jury that finding the defendant actually present and actively assisting in a robbery during which another person had committed murder would support a first degree murder conviction. *See id.* at 785. The jury convicted Enmund of first degree murder, and the trial judge, finding no mitigating circumstances, sentenced Enmund to death. *See id.* The Florida Supreme Court affirmed Enmund's conviction and his death sentence, rejecting Enmund's argument that the eighth amendment prohibited imposition of the death penalty absent proof of intent to kill. *See id.* at 786-87. Additionally, the state supreme court rejected the trial court's findings that Enmund had planned the robbery and had killed the victims, but the court, nevertheless, affirmed the death sentence. *See id.* at 786-87, 786 n.2. Confusion persisted on appeal to the United States Supreme Court, concerning the extent of Enmund's participation in the robbery. *Id.* at 786 n.2; *see id.* at 824 n.40 (O'Connor, J., dissenting) (United States Supreme Court ignored statement by Enmund's counsel at sentencing hearing that Enmund had planned robbery). The United States Supreme Court granted certiorari to consider whether the eighth and fourteenth amendments barred a state court from imposing the death penalty when the defendant had killed no one, had made no such attempt and had lacked the intent to kill. *Id.* at 787.

228. *Id.* at 827-31 (O'Connor, J., dissenting).

229. *Id.* at 788-801 (White, J.). The majority in *Enmund* focused on the death penalty itself, rather than the procedures followed in sentencing. *Id.; see* Note, *The Felony Murder Rule and the Death Penalty:* Enmund v. Florida*—Overreaching by the Supreme Court?,* 19 NEW ENG. L. REV. 255, 272 (1983-1984) (majority ignored procedural errors committed by state courts); Note, *Jurisprudential Confusion in Eighth Amendment Analysis,* 38 U. MIAMI L. REV. 357, 366, 370 (1984) (majority focused on death penalty itself rather than procedures followed in sentencing). The *Enmund* Court recognized a trend among state legislatures and sentencing juries to reject the death penalty as an appropriate punishment for participation in a robbery

majority's attempt to create a federal constitutional level of intent that would limit substantively the state's ability to impose the death penalty.[230] O'Connor, however, challenged the procedures by which the state courts had upheld

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during which another committed murder. 458 U.S. at 789-96. The Court, arriving at its own determination of proportionality, found that the record as interpreted by the state supreme court did not support a finding of an intent-to-kill and that the eighth amendment barred the state from assigning the same degree of culpability to Enmund as to an actual murderer. *Id.* at 798, 801. The Court also found that the use of the death penalty for felony murder did not serve the deterrent and retributive purposes that justified imposing the death penalty. *Id.* at 798-801.

230. *Enmund,* 458 U.S. at 810-26 (O'Connor, J., dissenting). In *Enmund,* Justice O'Connor vigorously dissented from the majority's decision to disallow the death penalty for felony murder and criticized the Court's interference with state definitions of legal guilt. *Id.* at 801-02, 824-25. In determining whether the death sentence was proportionate punishment, O'Connor examined the practices of legislatures and juries, and the relationship of the punishment to the harm actually caused and to the blameworthiness of the particular defendant. *Id.* at 815. Unlike the majority, O'Connor found persuasive signs of legislative and jury acceptance of the death penalty for felony murder. *Id.* at 816-23. In O'Connor's view, Enmund's death penalty was proportionate to the harm caused by Enmund's participation in the robbery-murders because under Florida law he was responsible for the deaths that ensued. *Id.* at 824. In considering whether the death penalty was proportionate to the defendant's blameworthiness, O'Connor deferred to the judgment of the state sentencer who, in O'Connor's view, is in the better position to evaluate the blameworthiness of a particular defendant. *Id.* at 825, 826. O'Connor rejected the majority's displacement of a sentencer's determination of blameworthiness based on less than an intent to kill with a constitutionally-mandated level of intent to kill that, according to the majority, a sentencer must find before imposing the death penalty. *Id.* at 824-25; *see id.* at 801 (White, J.) (death penalty inconsistent with eighth amendment absent proof of intent to kill).

The *Enmund* Court was sharply divided in finding intent to kill a substantive constraint on state courts in the imposition of the death penalty. Justice O'Connor's refusal to support a constitutionally based minimum level of intent in *Enmund* resurfaced in her opinion for the majority in *California v. Ramos. See California v. Ramos,* 103 S. Ct. 3446, 3451-53 (1983) (O'Connor, J.) (failing to include intent to kill as substantive or procedural limit on states' right to impose death penalty). In *Ramos,* O'Connor, joined by four justices, cited *Enmund* only for the proposition that a sentencer must consider mitigating circumstances before sentencing a defendant to death. *See* 103 S. Ct. at 3453 & n.14 (failing to include any reference to constitutionally required level of intent).

In *Enmund,* O'Connor would have deferred to state legislative judgments concerning a defendant's eligibility for the death penalty despite her retention of control over the procedures by which the state court subsequently could invoke the death penalty. *See* 458 U.S. at 824-25 (state law is best able to define legal guilt). In *Ramos,* O'Connor demonstrated a similar deference to state legislative judgment concerning factors which did not threaten eighth amendment values that a sentencing jury may consider before imposing a death sentence. 103 S. Ct. at 3453, 3459-60. In *Ramos,* O'Connor reversed a state supreme court decision, which held that a statutory jury instruction violated the federal constitution. *Id.* at 3450. In *Ramos,* a California jury had convicted a criminal defendant of first degree murder, attempted murder, and robbery. *See id.* at 3449. In reaching a decision on sentencing, California law had provided that the trial judge must instruct a capital sentencing jury that the governor could commute a sentence of life imprisonment without parole to a lesser sentence with the possibility of parole. *See id.* at 3449-50. The jury sentenced Ramos to death, but the California Supreme Court reversed, finding the statutory jury instruction commonly known as the Briggs Instruction unconstitutional. *See id.* at 3450. O'Connor, writing for the Court, upheld the constitutionality

Enmund's death sentence.[231] In O'Connor's view, the state supreme court had erred in affirming the death sentence without requiring the trial court to reconsider mitigating evidence concerning Enmund's ancillary role in the robbery and his relative lack of intent to kill after the state supreme court had overturned the factual basis on which the trial court's sentencing decision rested.[232] Although both the majority and the dissent in *Enmund* regarded Enmund's death sentence as unconstitutional, O'Connor departed from the reasoning of the majority by blending her support for legislative determinations of legal guilt with her support for eighth amendment constraints on process.

Although Justice O'Connor is not unwilling to use the power of the federal court to vindicate individual constitutional rights, considerations other than the plaintiff's bare allegations of deprivation have provided a basis for O'Connor's decision whether to invoke the remedial power of the Court. Separation of powers considerations have focused O'Connor's attention on the substantive and procedural standing hurdles that a plaintiff complaining of unlawful government must overcome before the federal court may sanction judicial action against a coordinate and separate branch of government[233] and the extent to which the federal court must defer to Congress' constitutional authority to curtail judicial power.[234] Additionally, O'Connor has considered the legislative purpose behind Congress' enactment of remedial legislation to guide the federal courts in fashioning equitable relief for plaintiffs who prevail under the federal statute.[235] O'Connor's

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of the jury instruction. *Id.* at 3453, 3459-60. O'Connor rejected Ramos' first claim that the Briggs Instruction was irrelevant and speculative. *Id.* at 3453. O'Connor construed the Briggs Instruction as permitting the jury to consider the future dangerousness of the capital defendant, a consideration the Supreme Court had found permissible. *Id.* at 3453-54; *see* Jurek v. Texas, 428 U.S. 262, 274-76 (1976) (joint opinion by Stewart, J., Powell, J., and Stevens, J.) (although difficult to make, predictions of future criminality are essential and commonly are made in criminal justice system). Likewise, O'Connor rejected Ramos' second claim that the Briggs Instruction diverted the jury's attention from the defendant to possible actions a governor might take in the future, finding rather that the instruction merely provided additional accurate information to the sentencing jury. 103 S. Ct. at 3455-57. O'Connor also rejected Ramos' third claim that the Briggs Instruction unduly influenced the jury to choose the death penalty. *Id.* at 3457-59. O'Connor did not find that informing the jury of the governor's power to commute a death sentence would balance the impact of the Briggs Instruction describing the governor's power to commute a life sentence, nor did she find that the challenged instruction impermissibly biased the jury's sentencing decision. *Id. See generally* Hertz & Weisberg, *supra* note 223, at 346-49 (arguing that capital defendant has right under eighth amendment and due process clause to draw attention in jury instructions to mitigating circumstances). Although the *Ramos* Court held that the eighth amendment tolerated the Briggs Instruction, O'Connor noted that state legislatures are free to offer greater protection to state criminal defendants by prohibiting such an instruction. 103 S. Ct. at 3459-60.

231. *Enmund,* 458 U.S. at 827-31 (O'Connor, J., dissenting).

232. *Id.* at 830-31, 831 n.46.

233. *See supra* notes 22-63 and accompanying text (discussing standing issue in *Allen).*

234. *See supra* notes 78-98 and accompanying text (discussing jurisdictional issue in *Regan).*

235. *See supra* notes 99-109 and accompanying text (discussing exercise of equitable discretion under Title VII in *Ford).*

opinions reflect even greater attention to concerns of state sovereignty,[236] the presence of independent state legislative judgments,[237] and the relationship between the state and federal court systems.[238] Furthermore, the integrity of state government appears to present to O'Connor a need for restraint when plaintiffs challenge state governmental practices and seek injunctive relief that would require the federal courts to restructure or monitor state agencies.[239] Faced with a threat to the principles of federalism, O'Connor repeatedly has been an outspoken Justice on behalf of protectible state interests. This early trend toward judicial restraint during the first three years of O'Connor's tenure appears strong and consistent, and forms the beginning of Justice O'Connor's record as an American jurist.

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236. *See supra* notes 121-49 and accompanying text (discussing challenges to state autonomy in *FERC* and *Garcia).*

237. *See supra* notes 173-90 and accompanying text (discussing constitutional challenges to state law).

238. *See supra* notes 151-72 and accompanying text (discussing federal review of state court judgments in *Long, Lundy,* and *Isaac).*

239. *See supra* notes 191-201 and accompanying text (noting O'Connor's indirect support of remedial standing doctrine).