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With the exception of a presidential election few events can rival the significance for the American legal and political system of the appointment of a new Justice to the United States Supreme Court. For the President, a Supreme Court appointment offers an opportunity to reshape the Court "in his own image"[1] and perhaps to extend his influence far beyond the end of his own tenure in office.[2] For the Court, each change in membership reconstitutes the mix of experience, legal philosophy, and personality that shapes the Court's collegial interactions. Moreover, at least on those issues marked by close divisions within the Court, a new appointment enhances the possibility that the Court will reverse its prior decisions and set out in new directions.[3] Thus, it is to be expected that any appointment to the Supreme Court (or even the prospect of such an appointment) will generate intense public interest. Such interest — and the importance of the appointment — is inevitably heightened when the incumbent President was elected on a platform pledging the use of the appoint-

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1. J. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA (1973).

2. Segal & Spaeth, *If a Supreme Court vacancy occurs, will the Senate confirm a Reagan nominee?*, 69 JUDICATURE 186, 187 (1986); Teger, *Presidential Strategy for the Appointment of Supreme Court Justices*, 31 PUB. CHOICE 1 (1977).

3. L. TRIBE, GOD SAVE THIS HONORABLE COURT 32-34 (1985).

ment power to change the trend of judicial decisions.[4]

Important as Supreme Court appointments may be during the second term of the Reagan presidency, it is unlikely that any future appointment by Reagan will match the interest aroused by his selection in 1981 of Sandra Day O'Connor to fill the seat of Justice Potter Stewart. It is perhaps impossible to overestimate the symbolic importance of the appointment of the first woman to sit on the nation's highest court.[5] In the long run, though, Justice O'Connor's place in American political and legal history will be determined as much by what she does as by who she is.[6] Now that the barriers have fallen, what is crucial is how Justice O'Connor will decide the important questions raised in the Court's cases. Of particular interest is how Justice O'Connor will respond to cases that call upon the Supreme Court to give meaning to "the majestic generalities of the Bill of Rights."[7] Many such cases, particularly those involving the first amendment freedoms of speech, press, assembly, and association,[8] will have profound effects not only on the litigants, but also on the functioning of the American constitutional system itself. With constitutional issues looming large on the Court's docket,[9] it is certain that during her years on the Court, Justice O'Connor will be called upon to vote and write opinions in dozens of cases raising first amendment issues. This Article analyzes Justice O'Connor's approach to freedom of speech and related issues during her first three

4. The 1984 Republican platform declared: "We share the public's dissatisfaction with an elistist and unresponsive judiciary. . . . In his second term, President Reagan will continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint." CONG. Q. WEEKLY REP., August 25, 1984, at 2110.

5. At Justice O'Connor's Senate confirmation hearings, Kathy Wilson, chair of the National Women's Political Caucus, told the Senate Judiciary Committee: "This confirmation hearing . . . marks a historic occasion, the culmination of over 100 years work on the part of women and men to break down the barriers to equality for women and men in our system of justice." *The Nomination of Sandra Day O'Connor to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 7th Cong., 1st Sess. 279 (1981) [hereinafter cited as *Hearings*].

6. Matheson, *Justice Sandra D. O'Connor*, 1981 ARIZ. L.J. 649.

7. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (compulsory flag salute violates first and fourteenth amendments) (reversing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)).

8. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1. The Court has recognized that the guarantees of freedom of speech, the press, assembly and petition are closely intertwined. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (opinion of Burger, C.J.). Moreover, the Court has expressly recognized that the implied "freedom to engage in association for the advancement of beliefs and ideas" is closely related to the explicit guarantees of the first amendment. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

9. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1741 (1978).

terms as a Supreme Court Justice. The analysis begins with a look back at the world of Sandra Day O'Connor as lawyer, state legislator, and state judge.[10] Section II examines possible links between the justice's background and theories of first amendment interpretation.[11] Section III surveys her votes in first amendment cases in light of these theories,[12] while Section IV is devoted to an analysis of her early first amendment opinions.[13] While an analysis based on three terms and a mere handful of opinions must be regarded as somewhat tentative, the Article concludes that Justice O'Connor's first amendment votes and opinions reflect a coherent theory of constitutional interpretation broadly consistent with Alexander Meiklejohn's view that the primary purpose of the first amendment is the protection of "political speech."[14]

I. THE WORLD OF SANDRA DAY O'CONNOR

More than sixty years ago the future Justice Cardozo linked the task of judicial interpretation to the beliefs and life experiences of the interpreters. In difficult cases, Cardozo pointed out, it was inevitable that the judge would be influenced by "the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[15] In the intervening years many studies of the Supreme Court and its members have confirmed the truth of Cardozo's observation. Judicial biographers have repeatedly demonstrated the impact of unique life experiences on the behavior of individual Justices.[16] In the most thorough analysis of the effect of background factors on Supreme Court voting records, political scientist C. Neal Tate has clearly shown that a "personal attribute model"

10. *See infra* notes 15-54 and accompanying text.
11. *See infra* notes 55-83 and accompanying text.
12. *See infra* notes 84-100 and accompanying text.
13. *See infra* notes 101-155 and accompanying text.
14. A. MEIKLEJOHN, POLITICAL FREEDOM (1960).
15. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921). More recently a noted commentator has written: "The donning of judicial robes and the taking of the appointed seat are not the powerful solvents of intellectual bias that some would have us believe. The ties that bind Justices to their previous experience and attitudes are not so easily dissolved." L. TRIBE, *supra* note 3, at xviii.
16. *See, e.g.*, J. PASCAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956); P. MCGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER (1963); J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968); G. WHITE, EARL WARREN: A PUBLIC LIFE (1982).

combining both political and social background variables (*e.g.*, political party, appointing president, appointment region, extent of judicial experience, type of prosecutorial experience) can account for a substantial proportion of the variation in voting behavior among justices of the modern Supreme Court.[17] This section, therefore, will examine factors in Justice O'Connor's background which may help to explain her behavior on the Supreme Court.

When O'Connor was nominated for the Court seat vacated by Justice Stewart, the public focus was on her uniqueness with regard to gender. The *Time* cover story on her nomination proclaimed her as the "Brethren's First Sister."[18] However, despite the overwhelming interest in O'Connor as the Court's first female member, it was also recognized that she possessed other unique characteristics which were likely to be far more important than her sex in determining her actions on the Supreme Court. Justice O'Connor is the only current member of the Supreme Court with both prior judicial and legislative experience.[19] Both of these experiences were at the state level, a factor also considered potentially important in predicting her behavior on the Supreme Court.[20]

Justice O'Connor, like her Arizona colleague, Justice Rehnquist, received her undergraduate and law degrees from Stanford University. After graduating third in her law school class in 1952, she encountered overt sex discrimination when she attempted to find a job as a lawyer in the private sector.[21] These early experiences with gender-based discrimination may have had an influence on decisions

17. Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981).

18. TIME, July 20, 1981, at 8.

19. Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 B.Y.U. L. REV. 1, 6-7.

20. Justice O'Connor herself emphasized the potential importance of her experience at the state level in her opening statement before the Senate Judiciary Committee: "My experience as a State court judge and as a State legislator has given me a greater appreciation of the important role the States play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the State and the Federal levels." *Hearings, supra* note 5, at 57. *See also* Schencker, *"Reading" Justice Sandra Day O'Connor*, 31 CATH. U.L. REV. 487 (1982).

21. According to Lynn Hecht Schafran, national director of the Federation of Women Lawyers' Judicial Screening Panel: "Judge O'Connor's sensitivity to the real world experience of women and equal justice issues are perhaps traceable to her personal experience with discrimination. After graduating from Stanford Law School in 1952 near the top of her class and with every honor, Judge O'Connor was refused employment as an attorney by law firms in Los Angeles and San Francisco solely because of her sex. One firm, ironically that of Attorney General William French Smith, offered her a job as a legal secretary." *Hearings, supra* note 5, at 407-08. *See also* Schafran, *Sandra Day O'Connor and the Supremes: Will the First Woman Make a Difference?*, MS., Oct., 1981, at 72.

made by O'Connor in later years as a jurist and legislator.[22] After failing to find a suitable job in a private firm, O'Connor began her legal career as a deputy county attorney in San Mateo County, California. She held the position for two years before resigning to join her husband, who was in the Army's Judge Advocate General's Corps, in Germany. While in Germany, O'Connor worked as a civilian lawyer for the Quartermaster Corps. O'Connor briefly ran her own law firm in a Phoenix suburb after returning from Germany.[23]

Justice O'Connor's legislative experience began in 1969 when she was appointed to fill a vacancy in the Arizona Senate. She ran successfully for the Senate seat in 1970 and 1972, and was elected majority leader in 1972 by her thirteen Republican colleagues, eleven of whom were male.[24] Based on her actions in the Senate, O'Connor could be described as a conservative with liberal tendencies in some areas, notably the areas of gender discrimination and the problems of poor families. While taking a conservative stance on social issues like busing and the death penalty, Senator O'Connor led fights to remove sex-based references from state laws and to reform Arizona's community property laws.[25] She also attempted to liberalize state welfare laws with mixed results.[26]

Observers of O'Connor as a legislator found her decision making to be non-doctrinaire. The general consensus among both her colleagues and interested parties outside of the Senate would seem to be that O'Connor's conservative leanings were tempered by social reality.[27] The director of the Arizona Civil Liberties Union, who

22. For evidence of her sensitivity as a Supreme Court justice to the plight of victims of sex discrimination, see Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (state policy prohibiting admission of men to state-supported school of nursing violates equal protection clause of the fourteenth amendment).

23. H. ABRAHAM, JUSTICES AND PRESIDENTS 335-36 (2d ed. 1985).

24. TIME, July 20, 1981, at 17.

25. NEWSWEEK, July 20, 1981, at 19.

26. Schafran, *supra* note 21, at 72. Many witnesses at Justice O'Connor's confirmation hearings lauded her achievements as a state senator. Among the measures cited were her efforts to decriminalize public drunkenness, *Hearings, supra* note 5, at 268-69 (testimony of James McNulty); her key role in revising Arizona community property law and family law and in repealing protective labor laws which limited women's working hours, *Hearings, supra* note 5, at 400 (statement of Eleanor Smeal); and her success in obtaining enactment of a model mental health law, *Hearings, supra* note 5, at 402 (testimony of Lynn Hecht Schafran).

27. *Hearings, supra* note 5, at 230 (testimony of Hon. Alfredo Gutierrez, Arizona State Senate, relating O'Connor's position as "spokesman for the essentially conservative positions of the Republic caucus") and *Hearings, supra* note 5, at 225 (testimony of Hon. Art Hamilton, Arizona House of Representatives, relating O'Connor's "intuitive sensitivity to the rights, hopes, and desires of the 'have nots' . . . of our society.").

observed her as a legislator and as a judge, made the following statement prior to O'Connor's confirmation as a Justice: "I have a feeling that O'Connor may be the kind of conservative who accepts the law as it is today, rather than rush to reverse decisions and send us back to the 1940s."[28]

Along with O'Connor's non-doctrinaire stance as a legislator, two other factors may prove important in analyzing her behavior on the Supreme Court. During her five years of service in the state legislature, O'Connor demonstrated a pragmatic streak when it came to accomplishing legislative goals. She believed in issues but not in lost causes. Although an early supporter of the Equal Rights Amendment in the Arizona Senate, she distanced herself from it and its supporters when it became clear it had little chance of ratification.[29] The final characteristic commented on by O'Connor's legislative colleagues was her careful attention to detail. One famous story is that as majority leader she removed a bill from consideration on the floor until an important comma could be inserted in the right place.[30]

In 1974, O'Connor was elected as a judge on the Maricopa County Superior Court in Phoenix. As a trial judge, she became known for running a "tight courtroom." She was always well prepared and expected the same high level of performance from the lawyers appearing before her.[31] She is said to have applied the law strictly in her sentencing practices. In one now almost legendary instance, she sentenced a female defendant convicted of passing bad checks to five to ten years in prison, despite the plea of the woman that her husband had deserted her and her imprisonment would make her two infants wards of the state. After the sentencing, O'Connor is reported to have gone to her chambers and cried.[32]

O'Connor served as a trial judge for four years until she was nominated for the Arizona Court of Appeals by Governor Bruce Babbitt. According to a survey of her brief tenure as an appellate judge, she participated in 82 cases, of which only 17 involved criminal law issues. The bulk of the Court's workload was in the area of civil litigation, with the cases falling into the broad areas of general civil cases, unemployment insurance cases, and workmen's compensation cases.[33] The most notable thing about the 82 cases was their generally routine and nonfederal nature.[34] They did not involve issues

28. Schafran, *supra* note 21, at 83.
29. *Id.* at 72, 83.
30. TIME, July 20, 1981, at 17.
31. *Hearings, supra* note 5, at 276 (letter of Brooksley E. Landau, chairperson of the American Bar Association Standing Committee on the Federal Judiciary).
32. *Hearings, supra* note 5, at 225 (testimony of Hon. Donna Carlson West); TIME, July 20, 1981, at 17-18.
33. Schencker, *supra* note 20, at 492.
34. *Id.*

upon which to base a ground breaking decision.[35] Yet O'Connor's participation in appellate court decision making does give evidence of some of the qualities already noted in the discussion of her role as a legislator and trial judge. One observer summed up O'Connor's "style" on the Arizona Court of Appeals in the following manner: "It is a long way from *Marbury v. Madison* and in O'Connor's 29 written opinions there are no examples of soaring constitutional rhetoric. What the opinions do show is a careful study of precedent, ample citation and a clear, no-nonsense writing style. . . ."[36]

After less than two years on the Arizona Court of Appeals, O'Connor was chosen as President Reagan's first nominee for the Supreme Court. While her gender was certainly a crucial factor in her selection, her ideology was also a significant factor in securing the nomination.[37] Historical studies of the Supreme Court demonstrate that every President wants to appoint Justices who share his beliefs and attitudes.[38] In her past experiences as a legislator and jurist, O'Connor had not staked out a position for herself as a doctrinaire conservative, and this past "ideological impurity" aroused the only real opposition to her nomination from the New Right/Moral Majority.[39] Yet, O'Connor was considered to have enough of the "right stuff" to please conservatives like Reagan and Senator Barry Goldwater, who offered to defend O'Connor's honor (presumably as a jurist and not as a woman). Goldwater invited all those who felt his dismay over Rev. Jerry Falwell's opposition to O'Connor's nomination to "kick Falwell right in the ass."[40] O'Connor also passed muster by the American Bar Association Committee on the Judiciary which concluded that she met the "highest standards of judicial temperament and integrity" and was "qualified from the standpoint of professional competence" to serve as a Supreme Court Justice.[41] The ABA Committee's refusal to give her the highest rating in the area of professional competence apparently stemmed from the narrowness of the issues found in the cases which she decided as an Arizona state

35. The ABA Standing Committee on the Federal Judiciary noted that "the subject matter of her [state court] opinions is such that they do not involve the elaborate legal analysis or complex social issues often found in Supreme Court decisions." *Hearings, supra* note 5, at 277 (letter of Brooksley E. Landau).

36. NEWSWEEK, July 20, 1981, at 17.

37. H. ABRAHAM, *supra* note 23, at 333.

38. *Id.* at 67.

39. Riggs, *supra* note 19, at 1-2.

40. TIME, July 20, 1981, at 10.

41. *Hearings, supra* note 5, at 270.

court judge.[42]

During the Senate hearings on her confirmation, O'Connor reaffirmed the President's faith in her. Although she persistently refused to comment on specific issues that she might have to decide as a justice,[43] she revealed enough of her personal positions on salient issues to support the conclusion that her views were close to those of President Reagan. While refusing to reveal her position on *Roe v. Wade*,[44] she clearly expressed her personal opposition to abortion.[45] Her description of the exclusionary rule as a "judge-made rule," and other critical comments, were sufficient to convey a strong feeling that she supported a good-faith exception to the exclusionary rule.[46] More generally, though, the Senate hearings focused on relatively safe topics such as federalism and the proper role of the judiciary. According to O'Connor, her experiences in the state legislature and as a state judge gave her a great appreciation for the concept of federalism, particularly with regard to the importance of the states within the system.[47] She also credited her dual roles as legislator and jurist with giving her a great deal of respect for the concept of separation of powers within the federal system.[48] In her opening statement, she articulated her belief that the three branches of government have "separate and distinct roles" and that "the proper role of the judiciary is one of interpreting and applying the law, not making it."[49] In later questioning by the Senate Judiciary Committee, O'Connor was even more specific regarding her viewpoint on the issue of judicial restraint:

> In carrying out the judicial function, I believe in the exercise of judicial restraint. For example, cases should be decided on other grounds than constitutional grounds where that is possible. . . . I believe in the importance of the limited role of Government generally, and in the institutional restraints on

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42. *Id.* at 277.

43. Riggs, *supra* note 19, at 8.

44. 410 U.S. 113 (1973) (state law prohibiting all abortions except those necessary to save the life of a pregnant woman violates due process clause of the fourteenth amendment).

45. *Hearings, supra* note 5, at 79, 98, 125-27.

46. *Id.* at 80, 96. O'Connor's language reflects the position taken in majority opinions that laid the groundwork for the Court's 1984 decision allowing the admission in a criminal trial of evidence obtained in good faith reliance on a search warrant later ruled invalid. United States v. Leon, 104 S. Ct. 3405 (1984). *See* United States v. Calandra, 414 U.S. 338, 348 (1974) (allowing evidence obtained in violation of the fourth amendment to be used as the basis for questioning before a grand jury); United States v. Janis, 428 U.S. 433, 443 (1976) (allowing evidence obtained in violation of the fourth amendment by state officials to be used in a federal civil proceeding); Stone v. Powell, 428 U.S. 465, 482 (1976) (state prisoner who has had full opportunity to raise fourth amendment claims in state proceedings may not obtain federal habeas corpus relief on grounds illegally seized evidence was admitted at trial). Not surprisingly, Justice O'Connor joined the majority opinion in *Leon*.

47. *Hearings, supra* note 5, at 57.

48. *Id.*

49. *Id.*

the judiciary, in particular.[50]

This firm belief in general judicial restraint coexists with O'Connor's belief in specific restraint by federal judges in areas of state court jurisdiction. In a law review article which appeared shortly before the nomination, O'Connor suggested a reversal in the general trend of enlarging federal court jurisdiction at the expense of state courts.[51] Among the reforms suggested by O'Connor were the elimination or restriction by Congress of federal court diversity jurisdiction, a requirement of exhaustion of state remedies prior to filing civil rights cases in federal courts, and the allowance of state courts the opportunity to rule first on the constitutionality of state statutes.[52] O'Connor also suggested that state court judgments on federal constitutional issues should be safe from challenge in the federal court system "where a *full* and *fair* adjudication has been given in the state court."[53] These suggestions would appear to reflect O'Connor's experiences in state government and within a state court system.

From her testimony before the Senate Judiciary Committee and her viewpoints expressed in the law review article, it appears that the "world" of Sandra Day O'Connor may indeed have a great influence on her decisions as a Supreme Court Justice. In later sections of this Article, first amendment cases in which Justice O'Connor has participated since her confirmation by a unanimous Senate on September 21, 1981, will be examined. Through an examination of her decisions in these cases, the validity of Cardozo's assertion that the "habits and convictions, which make the man"[54] (or woman) will shape the decisions of the judge will once again be tested.

II. O'CONNOR AND THE FIRST AMENDMENT

At the time of Justice O'Connor's appointment to the United States Supreme Court, enough was known of her views on such issues as federalism, abortion, and the "exclusionary rule," to form a sound basis for predicting her likely position as a Justice in cases involving these issues. It seems clear that President Reagan and his advisers were satisfied that Justice O'Connor's votes would be broadly

50. *Id.* at 60.
51. 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).
52. *Id.* at 815.
53. *Id.* (emphasis in original).
54. B. CARDOZO, *supra* note 15, at 167.

consistent with the President's views on those issues most salient to him at the time of the appointment.[55] Furthermore, enough was known of the new Justice's background and life experiences to justify an expectation that she would be particularly sensitive to claims of gender discrimination. Preliminary indications — based on analysis of opinions and votes in selected cases — are that these predictions have been largely fulfilled.[56] Justice O'Connor's stands on federalism,[57] abortion,[58] and the exclusionary rule[59] are generally in line with the President's views. The expectation that she would be more sensitive to claims of sex discrimination than conservative male Justices also seems to have been borne out.[60]

Yet, on the first amendment issues with which this Article is primarily concerned, there was little in either O'Connor's preappointment background or the public positions of the appointing President to form a firm basis for predicting her likely approach to the freedom of speech and press cases that form a substantial portion of the Court's docket. Freedom of expression issues appeared rarely, if at all, on the docket of the Arizona Court of Appeals,[61] nor do they seem to have been particularly salient to President Reagan or Republican Party platform drafters.

Given the paucity of specific clues about Justice O'Connor's likely approach to first amendment issues, it may be useful to consider more general background factors that might have shaped her views on these constitutional questions. In a study relating the personal attributes of recent Justices to their votes, Tate found that party affiliation was the single most important variable in a model for predicting judicial voting behavior in civil liberties cases.[62] Since Republican

55. Riggs, *supra* note 19, at 7.

56. H. ABRAHAM, *supra* note 23, at 336.

57. FERC v. Mississippi, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part) (arguing that federal law requiring states to consider adopting federal standards for utility rate and regulation policies violates tenth amendment); Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1033 (1985) (O'Connor, J., dissenting) (arguing that tenth amendment prohibits application of federal wage and hour regulations to municipally-owned transit authority).

58. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (arguing that state regulations of abortions which do not impose an "undue burden" on freedom of choice should be upheld).

59. United States v. Leon, 104 S. Ct. 3405 (1984).

60. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1107 (1983) (O'Connor, J., concurring) (agreeing with Justices Brennan, White, Marshall and Stevens that Title VII of the Civil Rights Act of 1964 prohibits sex-based differences in benefits paid by state retirement annuity programs, while agreeing with Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist that the Court's decision should have prospective application only).

61. *See supra* notes 33-36 and accompanying text.

62. Tate, *supra* note 17, at 361, 362.

Justices were more likely to cast a conservative[63] vote than Democrats, it would be reasonable to predict that Justice O'Connor would take a conservative stance in civil liberties cases generally. However, other variables in Tate's model (*e.g.*, appointment region, extent of judicial experience) point in the opposite direction.[64] Even if all signs pointed unambiguously toward a prediction of conservative stance on most civil liberties issues, there would still be little hard evidence of her possible stance on first amendment issues, let alone a firm indication of a theory of constitutional interpretation underpinning her votes and opinions. How, then, has Justice O'Connor voted on these issues? Has she simply echoed the sentiments of Justice Rehnquist, her fellow Arizonan and Stanford Law School classmate? Has she adopted theories of constitutional interpretation endorsed by prominent legal thinkers?

Among the most influential theories of first amendment interpretation is the view of Alexander Meiklejohn that the primary purpose of the constitutional guarantee is the protection of "political speech."[65] In Meiklejohn's view, the first amendment conferred not an unlimited right to speak as one chooses, but rather an "unlimited guarantee of the freedom of public discussion."[66] Deriving his position from the premise that "freedom of public discussion is the rock on which our government stands,"[67] Meiklejohn argued that first amendment guarantees applied "only to speech which bears, directly or indirectly, upon issues with which voters have to deal."[68] "Private speech," particularly speech aimed at private gain, was in

63. Tate defines a "conservative" vote in a civil liberties case as a vote against the litigant asserting a civil liberties claim. *Id.* at 356.

64. *Id.* at 362. Tate found that Justices from outside the deep South and those with prior judicial experience tended to support litigants asserting civil liberties claims, although the relationship between these background variables and support for civil liberties was not as strong as for political party affiliation.

65. A. MEIKLEJOHN, *supra* note 14. On Meiklejohn's influence, see Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 247; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. One commentator has written: "This triumvirate of *New York Times v. Sullivan*, Harry Kalven, and Alexander Meiklejohn, which was formed in the mid-1960's, spawned a way of thinking and talking about freedom of speech and press that quickly came to dominate public discourse and continues to do so today." Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 439 (1983).

66. A. MEIKLEJOHN, *supra* note 14, at 37.

67. *Id.* at 77.

68. *Id.* at 79.

Meiklejohn's view outside the scope of first amendment protection.[69]

While the Court has not explicitly endorsed Meiklejohn's approach in all its details, it is clear that in *New York Times v. Sullivan*[70] the Court embraced the view that the "central meaning of the first amendment" is the protection of speech critical of government and public officials.[71] In the Burger Court, Justices have on occasion invoked the notion of the primacy of political speech, not only in decisions extending first amendment protection to political expression,[72] but also in opinions upholding government regulation of pornography and other forms of nonpolitical expression.[73]

No less a conservative stalwart than Robert Bork, former solicitor general, Reagan appointee to the U.S. Court of Appeals for the District of Columbia Circuit, and potential Supreme Court appointee,[74] has endorsed the Meiklejohn approach. In a 1971 lecture and law review article,[75] Judge Bork proposed a theory of first amendment interpretation synthesizing the Meiklejohn emphasis on political speech with Herbert Wechsler's demand for "neutral principles" in constitutional adjudication.[76] "Constitutional protection should be accorded only to speech that is explictily [sic] political," Bork declared.[77] "There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[78] In addition, Bork sought to rehabilitate the largely discredited majority opinions of Justice Sanford in *Gitlow v. New York*[79] and *Whitney v. California*[80] in support of the position that speech advocating forcible overthrow of the government or violation of the law should be lumped with unprotected expression rather than with protected political

69. In Meiklejohn's view such speech would be protected only by the less stringent standards of procedural due process. *Id.* at 36-38.

70. 376 U.S. 254 (1964) (first amendment requires public official to prove "knowing or reckless" falsity in order to win libel judgment against critic of his official conduct).

71. Kalven, *supra* note 65, at 204-10.

72. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (group boycott protesting racial discrimination protected by first amendment).

73. Miller v. California, 413 U.S. 15, 34-35 (1973) (obscenity); Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (adult movies).

74. Dworkin, *Reagan's Justice*, N.Y. REV. OF BOOKS, Nov. 8, 1984, at 27. *See also* Segal & Spaeth, *supra* note 2, at 190. Judge Bork was reportedly on a "short list" of five candidates for the Stewart vacancy filled by Justice O'Connor. H. ABRAHAM, *supra* note 23, at 341.

75. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

76. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

77. Bork, *supra* note 75, at 20.

78. *Id.*

79. 268 U.S. 652 (1925) (state criminal anarchy law constitutional).

80. 274 U.S. 357 (1927) (state criminal syndicalism law constitutional as applied).

speech.[81] While Bork's support of the *Gitlow* and *Whitney* majority opinions is flatly inconsistent with Meiklejohn's emphasis on uninhibited discussion of public affairs,[82] his endorsement of the primacy of political speech suggests the attractions of Meiklejohn's theory for the modern conservative jurist. Since Justice O'Connor is generally believed to share Judge Bork's general approach to constitutional interpretation, it would be of interest to determine whether her early first amendment votes and opinions reflect this general approach. Thus, the analysis that follows is designed to test the following expectations concerning Justice O'Connor's position in first amendment cases:

1. She would be generally conservative, supporting first amendment claims less frequently than most of her colleagues and the Court as a whole.
2. She would vote with Justice Rehnquist in a high percentage of first amendment cases.[83]
3. She would be favorably inclined toward Bork's approach to first amendment interpretation, voting to support few litigants invoking the protection of the first amendment for nonpolitical speech, while supporting a substantially higher percentage of first amendment claims involving political speech.
4. She would begin to develop in her opinions a theoretical approach to first amendment freedom expression issues generally consistent with Meiklejohn's "primacy of political speech" position without endorsing his view that the protection of political discussion is absolute.[84]

III. THE VOTING DATA

In any analysis of the votes of Supreme Court Justices, it is essen-

81. Bork, *supra* note 75, at 31-35.

82. A. MEIKLEJOHN, *supra* note 14, at 39-50.

83. A study of Justice O'Connor's early voting record encompassing her votes on all cases found that she was a member of a conservative bloc, including Chief Justice Burger, and Justices Powell and Rehnquist in each of her first three Terms on the Court. In the same study, it is reported that Justice O'Connor voted with Justice Rehnquist in 81.6 percent of the cases in which both participated during the 1981-82 term, 85.7 percent of the cases in the 1982-83 term, and 91.9 percent of the cases during Justice O'Connor's third Term on the Court. Scheb & Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 JUDICATURE 9, 11-12 (1985).

84. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

tial to begin by specifying the cases to be included in the analysis.[85] This Article is based on cases decided during the 1981, 1982, and 1983 Terms in which a litigant (usually an individual or organization challenging governmental restrictions on expressive activity) clearly raised, and the Court resolved, a first amendment freedom of speech, press, assembly, or association claim. Also included are cases which raise significant issues of access to a federal judicial forum for resolution of a substantive first amendment claim.[86] Only plenary docket cases, *i.e.*, cases in which a first amendment question was resolved after oral argument, were included.[87] Cases decided per curiam without oral argument were excluded even if printed in the front section of the *United States Reports*. An opinion resolving more than one case (multiple docket numbers) was treated as a single case. Application of these criteria led to the identification of thirty-six freedom of expression or association cases decided during Justice O'Connor's first three Terms as a member of the United States Supreme Court. These cases dealt with a wide variety of specific issues, ranging from a challenge to the constitutionality of a municipal ordinance requiring a license for merchants selling drug paraphernalia[88] to a claim that a statutory ban on editorializing by noncommercial educational broadcasting stations violates the first amendment rights of broadcasters.[89] Overall, the Court rejected the first amendment claims of litigants in a bare majority (19 of 36) of these cases, while voting to support the claimant of first amendment rights in the remaining seventeen cases.

As expected, Justice O'Connor proved more conservative[90] on first amendment issues than the Court as a whole. Her first amendment support score of 36.1 percent (13 of 36 cases) places her with Burger

85. D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 134 (1976).

86. Such cases generally involve questions of whether it is appropriate for the federal courts to pass on the first amendment issues raised by the case in a particular procedural posture. A typical access case might involve the question of whether federal court abstention is required pending state court resolution of cases raising first amendment questions. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (federal courts should not normally enjoin pending state prosecutions absent evidence of harassment or "bad faith"). The only such case decided during Justice O'Connor's first three Terms on the Court was Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (federal court abstention generally required during pendency of lawyer disciplinary proceedings in state courts). Justice O'Connor voted with the majority in this case.

87. Cases decided on other grounds are included if a parallel first amendment issue is also addressed in the Court's opinion. *E.g.*, Waller v. Georgia, 467 U.S. 39 (1984) (issue of closure of suppression hearing to press and public resolved on sixth amendment grounds, but freedom of the press question also considered).

88. Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982) (local ordinance upheld).

89. FCC v. League of Women Voters, 104 S. Ct. 3106 (1984) (federal statute held to violate first amendment).

90. *See supra* note 63.

and White in a cluster of Justices substantially less likely to favor first amendment claims than the Court as a whole (Table 1). Though she supported first amendment claims more frequently than Rehnquist, O'Connor's position clearly is located at the conservative end of the spectrum. Moreover, as anticipated, Justice Rehnquist was the new Justice's closest ally in first amendment cases (91.7 percent interagreement), followed by Powell, White, and Burger (Table 2).

TABLE 1

SUPPORT FOR FIRST AMENDMENT CLAIMS, 1981-1984

Brennan	65.7%
Marshall	60.0%
Blackmun	57.1%
Stevens	51.4%
Court	47.2%
Powell	44.4%
Burger	37.1%
White	36.1%
O'Connor	36.1%
Rehnquist	27.8%

TABLE 2

AGREEMENT RATES WITH JUSTICE O'CONNOR: FIRST AMENDMENT CASES, 1981-84

Rehnquist	91.7%
Powell	86.1%
White	83.4%
Burger	82.9%
Blackmun	74.3%
Stevens	74.3%
Brennan	68.6%
Marshall	68.5%

Significant as this data on O'Connor's general posture in first amendment cases may be, the primary concern of this Article is whether her voting record contains any clues of a coherent theoretical framework for deciding first amendment questions. To focus on this issue, it is important to separate cases in which a litigant sought protection for political expression from those involving nonpolitical speech. Although the distinction may not always be an easy one to make,[91] it is possible to categorize the thirty-six cases analyzed here by focusing on the nature of the message that gave rise to the litiga-

91. Bork, *supra* note 75, at 27-28.

tion. Cases were classified as "political speech" cases if the message involved the kind of speech essential to ensure "that debate on public issues . . . [will] be uninhibited, robust, and wide-open," including, in particular, "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[92] Also included in the "political speech" category are those cases involving access of press and public to information about the activities of all branches of government, *i.e.*, the "information necessary for the public to perform its function of holding government institutions accountable."[93] Also treated as political expression cases are those involving a claim that the first amendment guarantees the right to affiliate with others in support of candidates or policies[94] or a right to spend money in support of favored candidates or positions.[95]

Of the thirty-six first amendment cases decided during O'Connor's first three Terms on the Court, half involved "political speech."[96] In the political speech cases, the Court supported the first amendment claim in 10 of the 18 cases (55.6 percent), compared to support for the litigant invoking the constitutional guarantee in 38.9 percent of the nonpolitical expression cases. Although the Burger Court has not been converted to the Meiklejohn interpretation of the first amendment in recent years, it does appear that the Court recognizes that

92. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

93. Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 2.

94. *E.g.*, Anderson v. Celebrezze, 460 U.S. 780 (1983) (early filing deadline unconstitutionally burdens rights of supporters of independent presidential candidate).

95. FEC v. National Right to Work Comm., 459 U.S. 197 (1982) (first amendment associational rights of political committee insufficient to outweigh congressional interests in protecting integrity of electoral process).

96. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (contribution limits); Brown v. Hartlage, 456 U.S. 45 (1982) (restrictions on campaign messages); Longshoremen v. Allied Int'l, Inc., 456 U.S. 212 (1982) (secondary boycott in protest of Soviet invasion of Afghanistan); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (freedom of political association); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (access of press and public to criminal trial); Clements v. Fashing, 457 U.S. 957 (1982)) (restrictions on candidacy for public office); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycott protesting racial discrimination); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (reporting of campaign contributors and expenditures); FEC v. National Right to Work Comm., 459 U.S. 197 (1982) (freedom of political association); Anderson v. Celebrezze, 460 U.S. 780 (1983) (filing deadline); United States v. Grace, 461 U.S. 171 (1983) (picketing on sidewalks surrounding Supreme Court); Connick v. Myers, 461 U.S. 138 (1983) (questionnaire implicating job performance of elected district attorney); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (I.R.S. regulations governing tax exemptions for lobbying organizations); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (access of press and public to voir dire); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (campaign signs); Waller v. Georgia, 467 U.S. 39 (1984) (access of press and public to suppression hearing); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) ("sleep-in" to illustrate plight of homeless); FCC v. League of Women Voters, 104 S. Ct. 3106 (1984) (editorial comments on public broadcasting stations).

political expression occupies something of a proferred position in the hierarchy of first amendment values.[97]

In addition to the data for the Court as a whole, Table 3 displays the voting records of the individual Justices in political and nonpolitical expression cases. Of the nine Justices, only Justice Stevens was more likely to endorse a claim of first amendment protection for nonpolitical expression than for political expression.[98] Each of the other eight justices, including O'Connor, was more likely to favor judicial enforcement of first amendment guarantees in political than in nonpolitical speech cases.

TABLE 3

FIRST AMENDMENT SUPPORT SCORES, 1981-84

	Political Expression (N=18)	Nonpolitical Expression (N=18)
Brennan	77.8%	52.9%
Marshall	76.5%	44.4%
Blackmun	72.2%	41.2%
Stevens	44.4%	58.8%
Court	55.6%	38.9%
Powell	50.0%	38.9%
Burger	44.4%	29.4%
White	38.9%	33.5%
O'Connor	44.4%	27.8%
Rehnquist	33.3%	22.2%

For first amendment liberals Brennan, Marshall, and Blackmun, the distinctions are marked. Yet, it is also clear that O'Connor and her fellow conservatives (with the possible exception of Justice

97. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

98. To put it mildly, this finding was unexpected in light of Justice Stevens' earlier support for a "two-tier" theory of freedom of expression. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1243-62 (10th ed. 1980). In a seemingly clear endorsement of the preferred position of political expression, Justice Stevens wrote:

> "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression [i.e., adult movies] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment [I disapprove of what you have to say but I will defend to the death your right to say it]. . . . But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."

Young v. American Mini Theatres, 427 U.S. 50, 70 (1976).

White) — though less friendly to first amendment claims generally — made similar distinctions between the two kinds of cases. More specifically, Justice O'Connor supported 8 of 18 claims (44.4 percent) of first amendment protection for political speech, compared to 5 of 18 (27.8 percent) in the nonpolitical expression cases.

It would appear, that in her initial years on the Court, O'Connor accepted in pure form neither the Meiklejohn position that the first amendment is an absolute where political speech is concerned,[99] nor the Bork argument that *only* non-subversive political speech should be accorded judicial protection.[100] Her votes show that she has taken her position in the conservative wing of the Court. At the same time, her voting record does suggest sensitivity to the position that the core value of the first amendment is the protection of political speech. A closer analysis of the opinions she wrote in these cases, as well as dissenting and concurring opinions she joined, will be undertaken in a further attempt to determine whether her early voting record reflects a coherent theory of first amendment interpretation.

IV. Opinion Analysis

Of the thirty-six freedom of expression cases decided during Justice O'Connor's first three Terms on the Court, she wrote in only seven. She was the author of two majority opinions,[101] three concurring opinions,[102] one partial dissent,[103] and one brief dissenting opinion.[104] Because she wrote only a handful of opinions, it is important to examine not only her words, but also her actions in subscribing to opinions written by other Justices in order to discover clues about Justice O'Connor's first amendment jurisprudence. The analysis of these opinions points to three general conclusions:

1. Justice O'Connor recognizes the greatest degree of first amendment protection when a government regulation directly restricts the activities of the press.[105]
2. O'Connor takes a limited view of first amendment pro-

99. A. Meiklejohn, *supra* note 14, at 37.

100. Bork, *supra* note 75, at 20.

101. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (paper and ink tax held to violate first amendment); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (state law restricting right of non-union faculty members to communicate with administrators in meet and confer setting upheld).

102. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring); New York v. Ferber, 458 U.S. 747, 774 (1982) (O'Connor, J., concurring); Roberts v. United States Jaycees, 104 S. Ct. 3244, 3257 (1984) (O'Connor, J., concurring).

103. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 107 (1982) (O'Connor, J., concurring in part and dissenting in part).

104. Board of Educ. v. Pico, 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting).

105. *See infra* notes 109-130 and accompanying text.

tection accruing to groups in society other than the press. Evidence in support of this conclusion may be found in her unwillingness to grant first amendment protection to political activities which might be defined as the functional equivalent of political speech.[106]

3. O'Connor shows a marked preference for deferring to the decisions of local authorities whenever possible.[107]

In addition, analysis of freedom of association claims raised in defense of discriminatory behavior by two organizational litigants suggests a tendency to support female litigants in cases involving gender discrimination, even in the face of countervailing first amendment claims.[108] Each of these conclusions will be discussed in turn, focusing on the relevant cases.

A. The First Amendment, the Press, and Justice O'Connor

Justice O'Connor has been compared with Justice Rehnquist from the time her name was first mentioned as a contender for a seat on the Supreme Court. After all, O'Connor and Rehnquist were not only fellow Arizonans and personal acquaintances, but also shared many beliefs and experiences. There were predictions that O'Connor's confirmation as a Supreme Court Justice would produce a pair of "Arizona Twins."[109] Initial analysis of the first amendment case data would appear to confirm that Rehnquist and O'Connor have formed a solid voting bloc on the right wing of the Court. As noted above, O'Connor's level of agreement with Rehnquist on the first amendment cases was 91.7 percent (see Table 2), far higher than her level of agreement with any of the other Justices.[110] This extremely high level of agreement is what makes O'Connor's decisions in several freedom of the press cases even more interesting. Not only did O'Connor break from her generally conservative stance in these cases, but she also broke her voting bonds with Justice Rehnquist. The three cases in which O'Connor and Rehnquist split their votes all concerned government regulations which imposed what O'Connor

106. *See infra* notes 131-140 and accompanying text.
107. *See infra* notes 141-147 and accompanying text.
108. *See infra* notes 148-155 and accompanying text.
109. Lending credibility to the notion that Stanford classmates O'Connor and Rehnquist might emerge as "Arizona Twins" was Justice Rehnquist's reported endorsement of O'Connor's candidacy for the Court. *See* L. BAUM, THE SUPREME COURT 35 (2d ed. 1985). *But see* Magnuson, *The Brethren's First Sister*, TIME, July 20, 1981, at 18.
110. *See also* Riggs, *supra* note 19, at 14-15.

believed to be unacceptable restrictions on the press.[111]

In the *Globe Newspaper* case, Justice O'Connor wrote a concurring opinion endorsing a majority judgment striking down a Massachusetts statute requiring a trial judge to exclude the press and public from the courtroom during the testimony of a minor rape victim. O'Connor, however, refused to join Justice Brennan's majority opinion.[112] In her concurrence, O'Connor rejected Brennan's expansive interpretation of the Court's earlier holding that criminal trials are presumptively open to press and public,[113] but stressed the long history of open trials and the importance of public scrutiny of the criminal justice system as a proper basis for striking down the Massachusetts law.[114] Rehnquist, on the other hand, joined a Burger dissent which relied heavily on widespread acceptance of the practice of excluding the public from juvenile proceedings.[115] The dissenters also argued that the state law did not prevent the dissemination of information because the press was free to obtain information from other sources.[116]

The split between O'Connor and Rehnquist was even more pronounced in the *Minneapolis Star and Tribune* case.[117] While Justice O'Connor wrote for the Court, Rehnquist wrote the only full-fledged dissent. The issue in the case was whether the state could impose a special paper and ink tax on the press and, by enacting exemptions to that tax, limit its effect to only a few newspapers. In the majority opinion, O'Connor stressed the discriminatory burden of the tax on a handful of newspapers and said that the state must satisfy a heavy burden of proof in order to meet the constitutional requirements.[118] She termed the tax a "threat" that could "operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government."[119] As she struck down the tax, O'Connor recognized the unique status of the press in society as a channel for political speech.[120] In his dissent, Rehnquist relied

111. The three first amendment cases in which Justices O'Connor and Rehnquist were on opposite sides were Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), and FCC v. League of Women Voters, 104 S. Ct. 3106 (1984).

112. 457 U.S. at 611 (O'Connor, J., concurring).

113. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

114. Justice O'Connor concluded that "*Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness." 457 U.S. at 611 (O'Connor, J., concurring).

115. 457 U.S. at 612 (Burger, C.J., dissenting).

116. *Id.* at 615-16.

117. 460 U.S. 575 (1983).

118. 460 U.S. at 591-93.

119. *Id.* at 585.

120. Justice O'Connor cited Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)

heavily on the notion of deference to the legislature, basically concluding that a state's taxing scheme was its own business and should not be disturbed by the courts.[121]

The third case in which the "Arizona Twins" found themselves on different sides of the judicial fence was *FCC v. League of Women Voters*.[122] In this case, O'Connor joined a five-justice opinion, authored by Brennan, which struck down a congressional ban on editorializing by non-commercial educational broadcasting stations which received federal funds. The majority, including O'Connor, asserted that the goals promoted by government regulation were not "sufficiently substantial" to justify a total ban on editorializing, a ban which the Court termed a "substantial abridgement of important journalistic freedoms which the First Amendment jealously protects."[123] Justice Rehnquist's dissent in this case is notable for his references to literary figures ranging from Little Red Riding Hood to Faust.[124] The basic premise of the dissent is that the public television stations involved took government money willingly, aware of the limitations attached to the acceptance of those funds, and should therefore live up to their part of the agreement.[125]

(ordinance prohibiting non-labor picketing near schools violates fourteenth amendment) and Brown v. Hartlage, 456 U.S. 45 (1982) (statute forbidding candidates to promise to raise public officials' salaries violates first amendment) in support of the proposition that the "First Amendment has its 'fullest and most urgent' application in the case of regulation of the content of political speech." 460 U.S. at 585. On the unique status of the press under the Constitution, see Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975).

121. 460 U.S. at 596 (Rehnquist, J., dissenting).

122. 104 S. Ct. 3106 (1984).

123. *Id.* at 3129.

124. Justice Rehnquist wrote:

> "All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the government appears as the 'Big Bad Wolf,' and appellee Pacifica as 'Little Red Riding Hood.' In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood from taking to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions. . . . Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles; Pacifica, well aware of Section 399's condition on its receipt of public money, nonetheless accepted the public money and now seeks to avoid the conditions which Congress legitimately has attached to receipt of that funding."

Id. at 3129-30 (Rehnquist, J., dissenting).

125. *Id.* at 3129-30.

In these three cases, Justice O'Connor demonstrated her independence from Justice Rehnquist. Her votes not only demonstrate her ability to make independent assessments of issues, but also suggest a strong commitment to the ideal of "uninhibited, robust, and wide-open" discussion of public issues by the press.[126] However, O'Connor is clearly unwilling to grant absolute first amendment protections to the press. In *New York v. Ferber*,[127] O'Connor joined a majority opinion by Justice White which placed the judicial imprimatur on a state law which banned materials depicting sexual performances by children, whether or not these materials were obscene. In a brief concurring opinion, O'Connor added that the New York statute should not be struck down as overbroad despite the possibility that it might be applied to depictions of sexual activities by children that did not threaten the children with psychological, emotional, or mental harm.[128] Two other cases in which O'Connor opposed first amendment freedom of press claims involving nonpolitical expression were *Bose Corporation v. Consumers Union*,[129] a libel case in which the majority applied the "knowing or reckless falsity" test to suits involving false statements about commercial products, and *Regan v. Time, Inc.*,[130] in which the Court upheld application of a statute prohibiting color reproductions of U.S. currency.

B. The First Amendment and Political Action

As might be expected from O'Connor's generally conservative stance and her professed adherence to judicial restraint, she often interprets the words of the first amendment strictly and narrowly.[131] While her interpretation provides some degree of protection for expression, particularly in the freedom of the press context, it does not provide equivalent protection for political *activities* which might be referred to as the functional equivalent of free speech. Early in her Supreme Court career, O'Connor joined a Rehnquist opinion upholding a provision of the Texas Constitution which limited a public official's right to become a candidate for another public office.[132]

In *Brown v. Socialist Workers '74 Campaign Committee*,[133] the majority invalidated on first amendment grounds Ohio election disclo-

126. *New York Times*, 376 U.S. at 270.
127. 458 U.S. 747 (1982).
128. *Id.* at 775 (O'Connor, J., concurring).
129. 466 U.S. 485 (1984). Justice O'Connor joined a Rehnquist dissent. *Id.* at 515.
130. 468 U.S. 641 (1984). Justice O'Connor joined Justice White's plurality opinion.
131. For an analysis of Justice O'Connor's tendency to limit constitutional protection to what she sees as the narrow purpose underlying an amendment, see Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 438-54 (1985).
132. Clements v. Fashing, 457 U.S. 957 (1982).
133. 459 U.S. 87 (1982).

sure requirements as applied to the Socialist Workers Party. Because there was a reasonable probability that disclosure of names of contributors or recipients of funds would subject party supporters to threats and reprisals, the majority stated that the benefits of disclosure with regard to minor parties were far less than the dangers of impairing first amendment rights.[134] In an opinion joined by Stevens and Rehnquist, O'Connor concurred in part and dissented in part. She agreed that the names of party contributors should be protected. However, she said that the Socialist Workers Party had failed to demonstrate that disclosing the names of recipients of campaign expenditures would work a harm greater than the benefits of disclosure which promote the strong public interest in fair elections.[135]

The issue in *Anderson v. Celebrezze*[136] was whether a state could impose an early filing deadline on independent presidential candidates who wanted to appear on the general election ballot. In the majority opinion by Justice Stevens, the Court held that the early filing deadline placed an unreasonable burden on the voting and association rights of the candidates' supporters as well as on third party candidates themselves. Stevens wrote that the "restrictions threaten to reduce diversity and competition in the marketplace of ideas."[137] O'Connor, however, joined the Rehnquist dissent, in which he asserted that the Court should defer to the state legislature with regard to election laws so long as the "laws are rational and allow nonparty candidates reasonable access to the general election ballot."[138] In *City Council of Los Angeles v. Taxpayers for Vincent*,[139] O'Connor joined a majority opinion which upheld a city ordinance prohibiting the posting of signs, including political signs, on telephone poles. The majority opinion, written by Justice Stevens, found the city regulation to be a content-neutral application of the state's traditional police powers, even though it restricted expression directly related to choices to be made in the political arena.[140]

C. *The First Amendment and the Power of Local Authorities*

In her testimony before the Senate Judiciary Committee prior to

134. *Id.* at 91-92.
135. *Id.* at 107 (O'Connor, J., concurring in part and dissenting in part).
136. 460 U.S. 780 (1983).
137. *Id.* at 794.
138. *Id.* at 808 (Rehnquist, J., dissenting).
139. 466 U.S. 789 (1984).
140. *Id.* at 816-17.

her confirmation, Justice O'Connor strongly asserted her belief that the states should enjoy a powerful role in the federal system.[141] This belief has been translated into action by O'Connor as a Supreme Court Justice. In many instances, O'Connor has deferred to state and local authorities when presented with what she perceives as state and local issues. In addition to the cases discussed above,[142] two additional cases seem to indicate that O'Connor's words at the confirmation hearings have been translated into judicial actions even where first amendment guarantees are involved.[143]

The issue raised in *Board of Education v. Pico* was whether the first amendment applied to the decision of a local school board to remove certain books from public school library shelves. The Brennan majority opinion found in the first amendment a constitutional restriction on the "banning" of library books, relying heavily on the notion that these books were made available for "optional reading" and were not required reading like text books.[144] Therefore, in banning these books the school board was denying students "access to ideas" necessary to allow them to participate effectively as citizens, thus threatening the student's first amendment rights.[145] In her dissent, O'Connor skimmed over the "voluntary" argument made by the Court majority and instead strongly urged judicial deference to local officials. She wrote: "I do not personally agree with the Board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards."[146]

O'Connor did not voice an opinion in *Connick v. Myers*, but she did join the majority opinion which strongly stressed the autonomy of local officials in regard to personnel practices. The issue involved in the case was whether the first and fourteenth amendments protected the actions of an assistant district attorney who was fired after circulating a questionnaire concerning internal operations of the city district attorney's office. The majority opinion, written by Justice White and joined by four other Justices including O'Connor, refused to define the speech in question as protected speech on public affairs. Since the speech as defined was not constitutionally protected, the Court majority found it unnecessary to scrutinize the reasons for Meyers' dismissal. Clearly reflecting O'Connor's position, White

141. *Hearings, supra* note 5, at 57.

142. New York v. Ferber, 458 U.S. 747 (1982); Clements v. Fashing, 457 U.S. 957 (1982); Anderson v. Celebrezze, 460 U.S. 780 (1983); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

143. Board of Educ. v. Pico, 457 U.S. 853 (1982); Connick v. Myers, 461 U.S. 138 (1983).

144. 457 U.S. at 862.

145. *Id.* at 868.

146. *Id.* at 921 (O'Connor, J., dissenting).

wrote that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[147]

D. The First Amendment and Gender Discrimination

Two cases decided in the 1983-84 term brought the Justices face to face with first amendment freedom of association claims raised in the context of alleged[148] or admitted[149] discrimination on the basis of sex.[150] Although the Court unanimously rejected the first amendment claims of discriminatory organizations in both cases, a brief examination of the two cases may shed light on how the Court's first female member approached cases in which freedom of association was invoked in defense of discrimination against women by a law firm or the Jaycees.

In *Hishon*, O'Connor joined a unanimous opinion, authored by the Chief Justice, holding a law firm's partnership decisions subject to Title VII's ban on sex discrimination in employment.[151] A concurring opinion by the only Justice ever to experience gender discrimination at the hands of a law firm[152] would no doubt have added a compelling touch to the Court's decision, but no such opinion was forthcoming.

In *Roberts*, however, O'Connor did write a concurring opinion expressing her conviction that Justice Brennan's majority opinion "unadvisedly casts doubt on the power of States to pursue the *profoundly important goal* of ensuring nondiscriminatory access to commercial opportunities in our society."[153] In an opinion joined by

147. 461 U.S. at 146.

148. Hishon v. King & Spalding, 467 U.S. 69 (1984) (law firm partnership decisions).

149. Roberts v. United States Jaycees, 468 U.S. 609 (1984) (full membership restricted to males).

150. A related case is Grove City College v. Bell, 465 U.S. 555 (1984), in which the Court ruled that Title IX of the Education Act Amendments of 1972 prohibiting sex discrimination in educational programs receiving federal financial assistance is program-specific rather than institutionwide in its coverage. The case is similar to those considered here because the college claimed a violation of its first amendment rights, a claim rejected out-of-hand by the Court. Justice O'Connor joined a concurring opinion by Justice Powell castigating the Department of Education for "having taken this small independent college, *which it acknowledges has engaged in no discrimination whatever*, through six years of litigation with the full weight of the federal government opposing it." *Id.* at 576 (Powell, J., concurring) (emphasis added).

151. Civil Rights Act of 1964, Title VII, 78 Stat. 241, as amended, 42 U.S.C. §§ 2000(e) *et. seq.*

152. *See supra* note 21 and accompanying text.

153. 104 S. Ct. at 3257 (O'Connor, J., concurring) (emphasis added).

seven Justices, Brennan concluded that Minnesota could compel Jaycee chapters in the state to accept women as full members under the state's Human Rights Act. Yet, Brennan recognized that the organization and individual Jaycees enjoyed first amendment freedom of association rights which must be balanced against the state's interest in fighting discrimination. Brennan struck the balance on the side of the state on the grounds that the Jaycees could not demonstrate that admitting women would substantially change the internal structure of the organization or interfere with the dissemination of the group's message.[154] Concurring only in the judgment, Justice O'Connor wrote that the majority's test not only threatened state power to fight discrimination, but also gave short shrift to the first amendment claims of "expressive asssociations." As a predominantly "commercial association," the Jaycees' first amendment claim of a right to select its own members was entitled to little weight, while similar claims by an "expressive association" might well be compelling.[155] Such a dichotomy between "commercial" and "expressive" organizations appears to be closely related to the distinction between political and nonpolitical expression. In these cases, Justice O'Connor — with the unanimous support of her "brethren" — not only took her stand against gender discrimination, but also indicated sensitivity to the possible need for judicial protection of freedom of association claims in the political arena.

V. CONCLUSION

The foregoing analysis of Justice O'Connor's votes and opinions has confirmed for the most part the expectations set out above.[156] Moreover, the discussion here confirms the conclusion of an earlier observer who wrote that "she's conservative, but she's going to make up her own mind."[157] O'Connor's conservative views are apparent, not only in her record of rejecting a clear majority of first amendment claims, but also in her adherence to the notion of deference to state and local officials, as well as in her narrow interpretation of the first amendment in regard to political action. More often than not, O'Connor's votes reflect a conservatism that is becoming increasingly common among the Justices as the "shifting middle" of the Supreme Court shifts further to the right.[158]

But it is also clear that O'Connor's independence—her ability to "make up her own mind"—was evident in the case analyses.

154. 104 S. Ct. at 3252-55.
155. *Id.* at 3257-58 (O'Connor, J., concurring).
156. *See supra* notes 82-83 and accompanying text.
157. NEWSWEEK, July 18, 1983, at 57 (quoting Dennis Hathinson).
158. Witt, *Court Swings to the Right, Gives Reagan Major Victories*, 42 CONG. Q. WEEKLY REP. 1709 (1984).

O'Connor voted with her closest ally, Justice Rehnquist, in 91.7 percent of the first amendment cases, but she split from him in three important cases involving government restrictions on press activities. Justice Rehnquist has hardly been known as a champion of press freedoms during his first thirteen years on the Supreme Court. The press cases considered here seem to indicate that the press may have a better friend, though not an absolute supporter, in the person of Justice O'Connor. However, these liberal tendencies found in the press cases appear to be exceptions to the general rule.

Conclusions about her general theoretical approach to first amendment issues resting on her actions in her first three terms must, of necessity, be cautious. Like most of her male colleagues, she is more inclined to support "political speech" claims than those involving nonpolitical expression. Her opinions in the press cases suggest a keen awareness of the role of the press as a channel for criticism of government and public officials. Yet, her reluctance to find first amendment protection for political association and activities analogous to speech suggests a less than total commitment to the Meiklejohn approach to the first amendment.[159] At the same time, it is clear that she rejects the position that *only* nonsubversive political speech is protected by the first amendment. Despite her overall conservatism and her belief in deference to state and local authority in its proper sphere, Justice O'Connor appears in her early years on the Court to be moving in the direction of a first amendment jurisprudence that recognizes that the "core value" of the first amendment is the protection of speech on issues of public concern.[160]

159. *See supra* note 14 and accompanying text.

160. Pickering v. Board of Educ., 391 U.S. 563, 573 (1968) (teacher's criticism of school board handling of financial matters protected by first amendment).