Justice O'Connor is seen by many as one of the most influential justices in recent Supreme Court history. Her decisions have usually been regarded as politically moderate, and many saw her as the key swing vote when the Court was divided. Ultimately, O'Connor's general moderation was a result of her attempts to remain consistent with her earlier analyses, while being driven by broader concepts of justice and fairness, as demanded by the facts of any particular case. The problem is, while O'Connor was consistent to her own perceptions of justice and fairness, she was often unable to develop or adopt a consistent analysis that would give a just result according to the facts of a case. In attempting to balance the principles of overall fairness and consistent judicial approach, she often adopted rigorous and complicated analyses, in an attempt to avoid outright contradicting her past reasoning. As a result, what is described as O'Connor's moderation was illustrated by opinions which are often confusing, appearing to come down on opposite sides of an issue in different cases, or employing confusing reasoning. She was often consistent in the outcomes according to overall themes of justice, and strove to create consistent approaches that would reach those results. Some of her opinions are complicated and confusing in their narrowness, and the ways that they introduce elements to existing frameworks, attempt to factually distinguish other cases, and carve out exceptions.

In 1984, early in her time on the Court, J. O'Connor wrote a majority opinion for the Court in *Hawaii Housing Authority v. Midkiff*. Midkiff upheld Hawaii's use of eminent domain to dismantle an oligopoly that existed in Hawaii. For the past quarter century, other eminent domain cases, such as...
Kelo v. City of New London, Connecticut, have relied heavily on Midkiff. However, J. O'Connor vigorously dissented to Kelo, appearing to come down on the opposite side of the eminent domain issue than in her Midkiff decision. Within a year of Kelo, she wrote a majority opinion for a regulatory takings case, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005). In Chevron, she redirected regulatory takings jurisprudence by overruling a case which was the foundation for two earlier cases in which she joined the majority opinion.

This paper will trace O'Connor's jurisprudence in several areas of constitutional law, with Midkiff and Kelo as bookends marking the beginning and end of her term, illustrating a stark example of two opinions reaching seemingly opposite conclusions on the issue of eminent domain. As an example of adherence to concepts of justice in the area of protections for individual property owners, which also resulted in confusing opinions, it is useful to compare her opinion in Chevron to earlier regulatory takings jurisprudence. Finally, some of her choices in the areas of equal protection and substantive due process also illustrate this idiosyncrasy of O'Connor's jurisprudence. This paper will describe how O'Connor's attempts to develop thorough and rigid analyses which are sensitive to factual differences, while adhering to particular themes of fairness for individuals, resulted in decisions that may be confusing or hard to understand without careful reconstruction.

I. Dissecting Midkiff and Kelo

A. Midkiff and Kelo

Berman v. Parker can be seen as the cornerstone of modern principles of eminent domain. Congress, which holds the same legislative power over the District of Columbia which a state may exercise over its affairs, used its powers of eminent domain to condemn blighted property for use in

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public and private redevelopment. In his opinion, Justice Douglas stated that “the power of eminent domain is merely the means to the end.” He reasoned that if the end goal fell within a legislative body’s powers, that legislative body also had the power to determine how to accomplish that goal, as long as it did so within the bounds of the Constitutional limitations of the 5th Amend. Berman deferred substantially to the legislative body for determination of a public purpose to justify the exercise of eminent domain. Congress determined that the effects of blight were “injurious to the public health, safety, morals, and welfare,” and the Court held that it was not for the Court to reappraise that position. Finally, Berman recognized that since exercise of eminent domain was an exercise of the police power, tracing its outer limits would be “fruitless, for each case must turn on its own facts.” This sensitivity to factual context informed Justice O’Connor’s opinion in Midkiff, and was in keeping with her general judicial approach of being responsive to facts.

Justice O’Connor was appointed to the Court in 1981, and wrote the Midkiff opinion in 1984. Midkiff involved a Hawaii statute which allowed the state to use eminent domain to dismantle the vestiges of an oligarchical system, which had resulted in large tracts of land being held by only a few individuals. The legislation created a mechanism for condemning residential tracts, held by a small concentration of landowners, and transferring the ownership to the lessees currently living on those tracts. O’Connor relied heavily on Berman in her analysis, particularly the Berman decision’s sensitivity to the facts underlying the legislative decision to use eminent domain. O’Connor quoted Berman at length to support her holding that, “The ‘public use’ requirement is thus coterminous with the

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6 Id. at 29.
7 348 U.S. at 33.
8 Id.
9 Id.
10 Id. at 33.
11 Id. at 32.
12 467 U.S. at 232.
13 Id. at 233.
scope of a sovereign's police powers,” deferring to legislative determination to use eminent domain.\textsuperscript{14} However, she also expressly approved of the reasons behind the use of eminent domain: “Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.”\textsuperscript{15} One of the concerns O'Connor addressed in \textit{Midkiff} was the expansion of the definition of “public use.”\textsuperscript{16} She justified upholding the distribution of the land to private individuals because the Hawaii Legislature did not intend to “benefit a particular class of identifiable individuals, but to attack certain perceived evils of concentrated property ownership.”\textsuperscript{17} Although she could have upheld the statute merely by relying on \textit{Berman} and focusing on deference to the legislature, she made a point of tying her analysis to the underlying facts of the case and her concepts of justice. In doing so, she allowed herself the flexibility to disagree with \textit{Midkiff}'s reasoning as applied to a different set of facts, as she later did in \textit{Kelo}.

Justice Stevens relied heavily on \textit{Midkiff} in writing the majority opinion in \textit{Kelo}. In \textit{Kelo}, like \textit{Midkiff} and \textit{Berman}, addressed two aspects of the eminent domain issue, the public use requirement of the 5th Amend., and the degree that a judicial body should defer to legislative determinations about whether the use of eminent domain satisfies the public use requirement. In addressing whether the use of eminent domain to enable development of a shopping center satisfied the public use requirement, Justice Stevens directly likened the plan in \textit{Kelo} to the \textit{Midkiff} statute, in that “the City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'”\textsuperscript{18} He also relied on \textit{Midkiff} for the proposition that a court should not second guess a legislature's determination about when to use eminent domain: “When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical over the wisdom of

\begin{itemize}
\item \textsuperscript{14} 467 U.S. at 240.
\item \textsuperscript{15} \textit{Id.} at 242.
\item \textsuperscript{16} \textit{Id.} at 243.
\item \textsuperscript{17} \textit{Id.} at 245.
\item \textsuperscript{18} 545 U.S. at 478.
\end{itemize}
takings ... are not to be carried out in the federal courts.”19

In *Kelo*, five justices joined the majority opinion, and four justices joined Justice O'Connor's dissent.20 Unlike in many decisions, O'Connor was not the swing fifth vote for the majority.21 Instead, her vociferous dissent condemned the decision as exposing all private property to transfer to another private owner, “so long as it might be upgraded - *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public.”22 She also demonstrated a skepticism of too much judicial deference, saying that if the political branches were the “sole arbiters of the public-private distinctions, the Public Use Clause would amount to little more than hortatory fluff.”23 Both these stances are a step back from the deference *Midkiff* advocated.

In both *Midkiff* and *Kelo*, property was taken from private individuals and given to other private entities, but only *Kelo*, where private property was redistributed for economic development, provoked O'Connor's concern about the vulnerability of private property. She returned to the facts underlying *Midkiff* and *Berman*, citing detailed percentages demonstrating unequal land distribution and blight respectively to distinguish *Kelo* from those earlier decisions.24 She focused on the fact that in both *Midkiff* and *Berman*, the “precondemnation use of the targeted property inflicted affirmative harm on society,”25 even though *Midkiff*’s analysis did not introduce affirmative harm as a requirement for the exercise of eminent domain. Additionally, she noted in her *Kelo* dissent that since the properties at issue in *Midkiff* and *Berman* were harming society prior to condemnation, the simple act of taking the

19 Id. at 488, quoting *Midkiff*, 467 U.S. at 242-243.
20 Stevens, J., delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Kennedy, J., filed a concurring opinion. O'Connor, J., filed a dissenting opinion, in which Rehnquist, C.J., and Scalia and Thomas, JJ., joined. Thomas, J., filed a separate dissenting opinion.
21 See Chemerinsky, supra, note 1 p. 877.
22 Id. at 494.
23 Id. at 497.
24 Id. at 498-499.
25 Id. at 500. Justice O'Connor distinguished *Kelo* from the earlier cases by noting that the single family homes which were condemned in *Kelo* caused no harm to society.
property ceased the harm and so caused a direct benefit.\textsuperscript{26} In her eyes, economic developments could not meet the definition of public use, because in an economic development, the incidental public benefit and the private benefit are merged.\textsuperscript{27} This deeper analysis of the relationship between the taking and the benefit was also absent in \textit{Midkiff}.

O'Connor acknowledged that the \textit{Kelo} majority may have been misled by “errant language” in \textit{Berman} and her own \textit{Midkiff} opinion, which indicated that powers of eminent domain and the police powers could be equated.\textsuperscript{28} She observed that the statement in \textit{Midkiff} that, “[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers,” was unnecessary to \textit{Midkiff}'s holding, since the use in that case was truly a public use.\textsuperscript{29} The facts in \textit{Kelo} demonstrated to her why that seemingly clear statement could not always be applied to uphold an expansive definition of “public use.”\textsuperscript{30}

Finally, she was concerned that \textit{Kelo}'s holding would result in property being taken from average private individuals and being given to those who had “disproportionate influence and power in the political process, including large corporations and development firms.”\textsuperscript{31} The concern about property ownership being commanded by those with “disproportionate influence and power” is reminiscent of the imbalance of power in \textit{Midkiff}, though structured in the opposite way. In \textit{Kelo}, eminent domain was used to take land from single family homeowners and give it to private corporate entities; in \textit{Midkiff}, eminent domain was used to take land from private entities holding disproportionately large amounts of real property to be distributed to single family homeowners. This indicates that O'Connor was sensitive not only to what she perceived as the injustice of taking land causing no affirmative harm for a purpose with no direct benefit, but also to the broader issues of

\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 502.
\textsuperscript{28} \textit{Id.} at 501-502.
\textsuperscript{29} \textit{Id.} at 501.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.} at 505.
overall power and injustice in land ownership.

O'Connor's introduction in her *Kelo* dissent of the requirement of an affirmative harm, and that the taking have a direct benefit to society, illustrated her responsiveness to the facts of situation, and her attempts to adapt existing legal analysis to focus on the distinguishing factual characteristics of each case. Though in a “bigger picture” sense the opinions are consistent by favoring individual homeowners over a more powerful entity, it resulted in somewhat confusing conclusions. Her reliance in her *Kelo* dissent on the absence of two factors that she did not highlight in *Midkiff*, the “affirmative harm” and the “direct benefit,” is also confusing. Although in *Midkiff* she recognized the evils of the oligopoly, she did not indicate that for the statute to be constitutional, those evils needed to be “extraordinary,” as she reasoned in her *Kelo* dissent. If it were so important that eminent domain be employed only in extraordinary situations of affirmative harm, it would seem that O'Connor would have introduced that concept in *Midkiff*, if only in dicta. Perhaps it is understandable that a justice new to the court may not have the expertise to anticipate every conceivable future factual scenario to which an opinion may be applied. Nevertheless, the weight she seems to give to the “affirmative harm” and “direct benefit” in her *Kelo* dissent seem confusing since they were not introduced in her *Midkiff* analysis. Her responsiveness to overarching issues of justice is an illustration of how her analysis was often driven by the outcome, rather than the other way around.

**II. Regulatory Takings Jurisprudence**

Tracing some of Justice O'Connor's regulatory takings jurisprudence throughout her time on the bench, it is clear that her decisions which put her on opposite “sides” of *Midkiff* and *Kelo* do not demonstrate a substantial change in either her analytical approach or her political and philosophical response to the issue of individual property protections. Rather, her dissent in *Kelo* illustrates O'Connor's continued attempt to remain consistent with her earlier opinions or precedent, her attraction to rigorously structured analysis, and her responsiveness to factual differences and context. Attempting
to balance these interests caused her to introduce new elements into existing analytical frameworks or
distinguish cases in ways that made for overly detailed, nit-picky, and opinions which may initially be
confusing. Her other regulatory takings and eminent domain jurisprudence provides additional
examples.

A. Chevron, Nollan, and Dolan

Eminent domain is constrained by the Takings Clause of the 5th Amend., which provides that
no person shall be “deprived of life, liberty, and property, without due process of law; nor shall private
property be taken for public use, without just compensation.”32 Regulatory takings are also limited by
the Takings Clause, where the effects of regulation “are so complete as to deprive the owner of all or
most of his interest in the subject matter, to amount to a taking.”33 When a property owner asserts that
a regulatory taking has occurred, a state or local body has not affirmatively exercised its police powers
by using eminent domain.

Comparing three particular regulatory takings decisions demonstrates ways that while O'Connor
was consistent in overall themes and her own concepts of justice, in attempting to do so the resulting
analyses can be confusing. O'Connor joined the majority in two opinions, Nollan v. California Coastal
Com'n,34 and Dolan v. City of Tigard,35 both of which dealt with local regulations on private property of
single family homeowners, and determined that those particular restrictions constituted regulatory
takings.36 In her last year on the court, the same year Kelo was decided, J. O'Connor wrote the opinion
for Lingle v. Chevron U.S.A. Inc., which held that rental restrictions on property owned by oil
companies was not a regulatory taking. In doing so, the Chevron opinion reiterated a new test for the

32 U.S. Const. Amend. V
Takings Clause as applied to regulatory takings. The opinion emphatically rejected a test employed in *Nollan* and *Dolan*. In doing so, *Chevron* did not overrule those earlier decisions, but O'Connor distinguished them on a narrow technicality and somewhat overstated just how different their analyses were from the present decision. Although in *Chevron* she strove towards consistency with *Nollan* and *Dolan*, since she was unwilling to overrule them, it is confusing that she so vociferously disclaims a test which she accepted in the earlier cases. *Nollan* and *Dolan* dealt with restrictions on individual property owners, like *Midkiff* and *Kelo*, and this fact appears to have influenced her analysis.

In *Nollan*, decided in 1987, homeowners challenged a restriction introduced by the California Coastal Commission. As a condition for approval of a rebuilding permit, the Commission required that condominium owners allow for beachgoers to pass and repass over their property while on the beach. In *Dolan*, decided in 1994, the Court reviewed actions of the Oregon Land Use Board with regards to an individual business owner. The Board conditioned approval of redevelopment plans on the dedication of a portion of the property to flood control and traffic improvements. In both cases, the property owners claimed that the regulation so restricted the owners’ property rights as to constitute a taking without just compensation, in violation of the 5th Amendment. In both cases, the Court stated that the regulations would certainly be a taking if the governing bodies had merely required that the private land be dedicated to public use. The Court instead addressed whether the fact that the restrictions were land-use regulations in connection with redevelopment changed that premise. In both cases, the Court concluded that there was not a sufficient connection between the public purpose

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38 483 U.S. at 827.
39 *Id*.
40 512 U.S. at 377.
41 *Id*.
42 483 U.S. at 827; 512 U.S. at 383-384.
43 483 U.S. at 827, 512 U.S. at 383-384.
44 483 U.S. at 834; 512 U.S. at 384.
of the dedication and the proposed redevelopments to constitute a permissible taking.\textsuperscript{45} J. Scalia wrote the majority opinion for \textit{Nollan}, and C.J. Rehnquist wrote the majority opinion in \textit{Dolan}. In both cases, O'Connor joined 5-4 “conservative” majorities, with more traditionally liberal justices in dissent.\textsuperscript{46}

Both \textit{Nollan} and \textit{Dolan} applied a test for whether a regulatory taking had occurred drawn from \textit{Agins v. Tiburon}, which held that a taking does not occur where the regulations “substantially advance legitimate state interests” and “do not deny an owner economically viable use of his land.”\textsuperscript{47} In \textit{Nollan}, the Court acknowledged that the state interest of preserving the public's access to a view of the ocean was legitimate, and would have justified use of the state's police power to deny a construction permit altogether.\textsuperscript{48} The problem was that the regulation in question “utterly fail[ed] to further the end advanced as the justification.”\textsuperscript{49} If the Nollans wanted to add to their home, the permit was conditioned on them providing an easement for beachgoers to walk laterally across their beachfront property.\textsuperscript{50} The Court reasoned that it was “impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.”\textsuperscript{51} This analysis engaged in in-depth discussion of the legitimacy of the state interest, and an inquiry into how that purpose was achieved. \textit{Nollan} expanded on the \textit{Agins} “substantially advances a legitimate state interest” test, holding that there must be an “essential nexus” between the dedication and the proposed development.\textsuperscript{52} Ultimately, the Court concluded that if the

\textsuperscript{45} 483 U.S. at 841; 512 U.S. at 396.
\textsuperscript{48} 483 U.S. at 836.
\textsuperscript{49} \textit{Id.} at 837.
\textsuperscript{50} \textit{Id.} at 838.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 837.
Commission wanted the easement, it could employ eminent domain to take the property, and then pay for the property.\textsuperscript{53}

In \textit{Dolan}, the Court expanded further on this “essential nexus” test, reasoning that once the “essential nexus” has been determined to exist, a court must then further inquire into the connection between the conditions placed on permit approval and the impact of the proposed development.\textsuperscript{54} As in \textit{Nollan}, the Court acknowledged that the stated interest, the prevention of flooding and reduction of traffic connection, would be legitimate state purposes which would justify some use of police power.\textsuperscript{55} But the \textit{Dolan} Court failed to see a sufficient connection between the stated purposes of flood prevention and traffic control, and the dedication of a recreational bicycle and pedestrian easement as a condition for Dolan receiving a permit to expand her commercial space.\textsuperscript{56} The \textit{Dolan} Court resolved that a city or state demonstrate that a “rough proportionality,” in both nature and extent, exists between the required dedication and the impact of the proposed development.\textsuperscript{57} The Court acknowledged that had the expansion encroached on an existing public space, then perhaps the regulation would be permissible.\textsuperscript{58}

In \textit{Chevron}, O'Connor determined that the statute at issue did not result in a violation of the Takings Clause. In her opinion, she changed regulatory takings precedent by redirecting the inquiry about whether a taking has occurred away from whether the regulation “substantially advances a legitimate state interest” and towards the burden imposed on an owner's property right.\textsuperscript{59} Although the decision removed the “substantially advances” test from the takings analysis, O'Connor's new test did not expand what would be a permissible taking. In fact, her \textit{Chevron} holding broadened the definition

\textsuperscript{53} \textit{Id.} at 842.
\textsuperscript{54} 512 U.S. at 386.
\textsuperscript{55} \textit{Id.} at 387.
\textsuperscript{56} \textit{Id.} at 395.
\textsuperscript{57} \textit{Id.} at 391.
\textsuperscript{58} \textit{Id.} at 394.
\textsuperscript{59} 544 U.S. at 544.
of those takings which would require compensation and comportment with due process, providing
greater individual property protections consistent with the *Nollan* and *Dolan* analyses. However, her
unwillingness to overrule those opinions resulted in a confusing attempt in *Chevron* to distinguish
*Nollan* and *Dolan*.

*Chevron* involved a Hawaii statute intended to protect market independence by limiting the
amount of rent oil companies could charge for stores owned by the oil companies, thus protecting
independent dealers.60 The District Court and the Ninth Circuit both found that the statute amounted to
an unconstitutional taking because the regulation did not substantially advance a legitimate government
interest.61 The lower courts relied on *Agins*, the same test used in *Nollan* and *Dolan*. O'Connor held in
*Chevron* that the test set forth in *Agins* was not appropriate in a takings analysis, but was more properly
an inquiry into another 5th Amend. protection, whether a person has been deprived of property without
due process of law.62 She opined that the *Agins* “substantially advances” language had found its way
into the takings jurisprudence through simple repetition and that *Agins* drew the language from due
process precedent rather than takings precedent.63 In doing so, O'Connor returned to pure takings
precedent to derive a test more precisely tailored to takings analysis, a test which asked only how much
a property was burdened by the regulation If it was burdened too much, a taking had occurred.64 By
employing this new test, she was also able to support a regulation which would result in greater
 protections for individual service station owners, against the most powerful oil companies. While
distinguishing between takings and due process was a thoughtful and careful observation, in attempting
to preserve *Nollan* and *Dolan* under *Chevron*, she engaged in some muddy explanation to distinguish
the cases.

60 Id. at 533.
61 Id. at 535.
62 544 U.S. at 542.
63 Id. at 540.
64 Id. at 541.
O'Connor's separation of takings inquiries and due process inquiries protected fundamental property rights in two ways. First, she noted that the most traditional example of a taking is when the government actually possesses private property, thus depriving the owner of many or all of the essential aspects of his property rights bundle.65 She recognized that this definition has been expanded over the years to include government intrusion or burdens placed on property such that an owner is deprived of his rights to such a degree that the intrusion is tantamount to physical possession.66 By refocusing the takings inquiry on the “magnitude or character of the burden a particular regulation imposes upon private property rights,”67 O'Connor made an owner's use and enjoyment of property central to the analysis. Furthermore, this emphasis properly dealt with the problem that a taking may occur, requiring compensation, whether a regulation substantially advances a legitimate public interest or not. As O'Connor hypothesized, “The owner of a property subject to a regulation that effectively serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an ineffective regulation. It would make little sense to say that the second owner has suffered a taking while the first has not.”68

The second way that Chevron's refocused takings test protects private property ownership is by making the due process inquiry a separate and crucial analysis. Whether a taking is permissible at all is “logically prior to and distinct from the question whether a regulation effects a taking.”69 By separating the two 5th Amend. limitations on government use of private property, O'Connor was able to emphasize, “if a government action is found to be impermissible -- for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process -- that is the end of the inquiry.

65 Id. at 537.
66 Id.
67 Id. at 542 (emphasis in original).
68 Id. at 543 (emphasis in original).
69 Id.
No amount of compensation can authorize such action.”70 O'Connor's adroit reformulation of the inquiries in *Chevron* attempted to strengthen protection of individual property owners, in keeping with her *Kelo* dissent and the judgments in *Nollan* and *Dolan*.

However, in attempting to distinguish *Nollan* and *Dolan* so as not to overrule them, O'Connor's *Chevron* opinion overstated the important of one of the technical aspects of the *Nollan* and *Dolan* cases that those opinions did not themselves acknowledge or distinguish. O'Connor claimed that while the *Nollan* and *Dolan* opinions drew on the *Agins* test, they did not apply the same *Agins* test as the one before the Court in *Chevron*.71 It is true that *Nollan* and *Dolan* involved a similar type of regulation, factually distinguishable from the regulation in *Chevron*. But the *Nollan* and *Dolan* opinions do not indicate that their “essential nexus” and “rough proportionality” analyses be limited to situations where a government demands dedication of an easement for public use. O'Connor stated that the “rule [Nollan and Dolan] established is entirely distinct from the 'substantially advances' test we address today,” because in those cases the Court “began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”72 While the *Nollan* and *Dolan* opinions do begin with that premise, neither opinion limited application of their analyses to situations where this was the case.

In *Chevron*, O'Connor reasoned that the *Nollan* and *Dolan* opinions were only concerned with whether the state interest advanced by the regulation was the same interest that would justify the governing bodies in denying the permit altogether.73 *Nollan* did acknowledge that the California Coastal Commission could deny a building permit in the interest of preserving an oceanview,74 and *Dolan* also acknowledged that the Oregon Land Use Board could deny a building permit in the interest

70 Id. at 544.
71 Id. at 546.
72 Id. at 546-547.
73 Id. at 547.
74 483 U.S. at 836.
of flood prevention and traffic control. However, those cases then continued into lengthy analyses that focused on the relationship between the interest and the effects of the regulation as compared to the impact of the development. It is difficult to see how those discussions were not directly rooted in the Agins requirement that to avoid a regulatory takings problem, a regulation must “substantially advance a legitimate state interest.” When O'Connor's Chevron opinion stated that the Nollan and Dolan rules are “worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest,” she ignored the degree that Nollan and Dolan rely on that very reasoning. In fact, both Nollan and Dolan indicated that had the proposed regulations achieved the state interest more effectively, they might survive the takings analysis. While preserving Nollan and Dolan was consistent with Chevron's overall expansion of individual property protections, Chevron would have introduced a very clean and straightforward approach if O'Connor had been willing to overrule those decisions, replacing them entirely with her new Chevron test. As it stands, Chevron carved out a land-use exaction exception to its regulatory takings test, where under the preserved Nollan/Dolan analysis, the Agins “substantially advances” test would still apply. But even had Nollan and Dolan been overruled, under Chevron's new test which focused only on the burden to property, the types of regulations at issue in Nollan and Dolan would still constitute takings, since those dedications would have so burdened the property as to constitute per se physical takings. It was unnecessary to preserve the Nollan/Dolan analysis to preserve their protections, so by preserving them, it appears that O'Connor was attempting to remain consistent to her earlier decisions. Although her choice to create an exception for a particular set of circumstances was consistent with O'Connor's sensitivity to factual differences, it did not result in the most clear or thorough approach to regulatory takings.

75 512 U.S. at 387-388.
76 544 U.S. at 547-548.
77 483 U.S. at 836; 512 U.S. at 394.
B. Other Confusing Regulatory Takings Decisions in Light of *Chevron*

Some of O'Connor's other regulatory takings decisions also are confusing in light of *Chevron*. At times she implicitly endorsed the Agins test she overruled in *Chevron*. However, she was consistent in upholding overall protections for individual property owners, as seen in her opinions in *Midkiff*, *Kelo*, *Nollan*, *Dolan*, and *Chevron*.

In *Hodel v. Irving*, decided just a few years after *Midkiff*, O'Connor struck down a federal statute which restricted the manner in which persons could devise portions of tribal land which had been distributed in the late 18th century to American Indians.\(^78\) Although the original properties themselves were held in trust and could not be subdivided, interests in the parcels had multiplied with successive generations, so that by the 1980s, some parcels as small as forty acres had hundreds of owners.\(^79\) Therefore, Congress enacted the Indian Land Consolidation Act of 1983 (“ILCA”),\(^80\) which prevented people who had earned less than $100 from their fraction in the year prior to their death from devising their interest to heirs.\(^81\) Instead, the land would escheat to the decedent's tribe.\(^82\) There was no provision for compensation for land which escheated under the ILCA.\(^83\) Although the facts appear similar to those in *Midkiff*, in that a legislative body attempted to solve problematic land use by restrictions on redistribution, O'Connor struck down the statute. However, although the outcome may seem to contradict *Midkiff*, her reasoning in *Hodel* was ultimately consistent with that in *Midkiff*. First, in *Hodel* she recognized that the fractionation problem on Indian reservations “is extraordinary and may call for dramatic action” and that consolidation of the lands was “a public purpose of the highest order.”\(^84\) She also affirmed that Congress was acting pursuant to its “broad authority to regulate the

\(^{79}\) *Id.*
\(^{80}\) Pub.L. 97-459.
\(^{81}\) 451 U.S. at 709.
\(^{82}\) *Id.*
\(^{83}\) *Id.* at 709.
\(^{84}\) *Id.* at 712.
descent and devise of Indian trust lands.”85 She included many lengthy and detailed facts supporting the recognition of this “disastrous” harm.86 To O'Connor, this harm seemed to parallel the harm she recognized as a justification for upholding the *Midkiff* statute, that land was being used inefficiently and often wasted, in contravention of positive free market principles. This holding was therefore consistent with *Midkiff's* protection of individual property owners against a more powerful entity, the government or the individual's tribe.

She then addressed whether the regulation by Congress constituted a taking which required just compensation, which was the basis for O'Connor striking down the escheat portion of the ILCA. First, she recognized that the Court had been “unable to develop any 'set formula’” when justice and fairness required that limitations on individual property be compensated.87 She then weighed the manner of restrictions on the property, which are examples of the burdens on property which she later emphasized must be the focus of a regulatory takings analysis in *Chevron*. Noting that under the ILCA, the rights to descent and devise are “completely abolished,” she determined that “a total abrogation of these rights cannot be upheld.”88 However, throughout her analysis, she left the door open to other factual contexts where regulations might be permissible. She used the phrases total or virtual abrogation and complete abolition several times each,89 suggesting that regulations which limited these rights, but did not result in their complete abolition, may be permissible. When first introducing her conclusion, she conditioned it by stating, “Since the escheatable interests are not, as the United States argues, necessarily *de minimus*, nor, as it also argues, does the availability of *inter vivos* transfer obviate the

85 *Id.* at 711.
86 *Id.* at 707-708, 712-713.
87 *Id.* at 714, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Although she did not take this opportunity to refine the regulatory takings test, that was likely because the Court of Appeals had not applied the *Agins* test in the way that was so problematic to her in *Chevron*, nor had many of the problems she addressed in *Chevron* presented themselves at the time of *Hodel*.
88 *Id.* at 717.
89 *Id.* at 717-718.
need for descent and devise, a total abrogation of these rights cannot be upheld." This sentence structure suggests that, in another situation, if the economic interests are of little value, or there are other exercises of property rights which were analogous to the rights which may be restricted, then the regulation may be permissible. Emphasizing the burdens to the regulated property foreshadowed her refinement of the regulatory takings test in *Chevron*, demonstrating adherence over her time on the Court to overarching principles of justice, even though *Hodel* struck down a state's regulation, and *Chevron* did not. However, since cases relying heavily on *Agins*, like *Nollan* and *Dolan*, had not yet been decided, she was not forced to rearticulate the regulatory takings test until *Chevron*, after it had proven increasingly problematic.

O'Connor addressed takings again in *Yee v. City of Escondido, California.* The local ordinance at issue in *Yee* regulated the rents mobile home park owners could charge. The ordinance also placed a number of other restrictions on mobile home park owners, including a limitation that when a mobile home was sold, the park owner could not disapprove of the new owner, as long as that owner could pay the rent, and the park owner could not require that the mobile home be removed upon sale. Mobile home park owners argued that in light of these restrictions, a limit on rent charges essentially allowed home owners to be permanent tenants, and to occupy the pad for a rent below market value, which would allow them to charge a higher price should they choose to sell. The mobile home park owners did not challenge all such regulations as takings, nor did they properly raise the issue of whether the regulations were in fact regulatory takings. Although they argued in their brief to the Court that the regulations constituted regulatory takings, Justice O'Connor held that because they had not argued the issue to the lower courts, nor had they petitioned for certiorari on the issue, the Court would only

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90 *Id.* at 717.
92 *Id.* at 524.
93 *Id.*
94 *Id.* at 527.
95 *Id.* at 527, 535.
decide whether the regulations constituted a physical taking. Since the lower courts had only ruled on whether the taking constituted a physical taking, had only relied on physical takings law, and there was no conflict among lower courts as to how to interpret relevant regulatory takings law, she declined to expand the Court's analysis. This allowed her to narrow her holding in some significant ways.

The basis for Yee's holding that the ordinance did not constitute a compensable taking, and was therefore permissible, rested on the fact that the land was not physically invaded by virtue of the regulation. Defining the physical takings analysis so narrowly created just the kind of jurisprudence O'Connor liked: it presented a clearly delineated question of fact that directly addressed the relevant constitutional mandate that land not be physically invaded or appropriated without just compensation. This inquiry was also sensitive to and focused on facts -- was the land physically invaded or not? -- but left the door open for additional outcome determinative factual inquiries. If land has been physically invaded, then a court will proceed to decide what compensation is just under the circumstances. Without knowing what sort of factual scenarios might arise in the future, O'Connor was able to create what she considered to be a single perfect piece of the analysis, while later situations would determine the contours of the remaining pieces. This piecemeal approach illustrates why O'Connor is described as moderate, but this approach also resulted in narrow, complicated, and often confusing opinions that require a lot of dissection to understand fully.

O'Connor's narrow holding in Yee was also implicated in her later decision in Chevron, and demonstrated how her unwillingness to stray beyond the immediate demands of the case at hand, and her attention to the immediate factual context required that she distinguish her earlier decisions. In Yee, she dismissed, without addressing, the park owners' argument that the ordinance did not effectively achieve its purpose, noting that “[t]his effect might have some bearing on whether the ordinance causes

\[96 \text{ Id. at 536.}\]
\[97 \text{ Id.}\]
\[98 \text{ Id. at 530.}\]
a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objective it is supposed to advance.”99 This was the very language from Nollan which she stated in Chevron “has no proper place in our takings jurisprudence.”100 In Yee, it could certainly be read as an implicit endorsement, albeit in dicta, of the test she explicitly tossed out in Chevron. In fact, in making the above statement in Yee, she signaled support from Nollan, but did not make any mention of what she considered to be the limited context of that case, which played so heavily into her Chevron holding.

She also chose not to acknowledge the Yee language in her Chevron holding, perhaps because it was impossible to explain away the confusion of her reliance on Nollan in Yee, when in Chevron she so emphatically insisted that Nollan was obviously only applicable to land-use exactions. It is true that both Chevron and Yee are generally sound and do not logically require her to account for her use of the Nollan language in Yee, since the Yee holding was limited to physical takings. But it is easy for the casual reader to be confused by her use of that language in Yee, given her holding in Chevron, unless that reader engages in some fairly thorough analysis of the distinctions O'Connor drew between physical takings, regulatory takings, and regulations which constitute per se physical takings outside of the land-use exactions context. These rigorous analytical distinctions are driven by facts and outcome, which is typical of the approach O'Connor was attracted to and integrated into her jurisprudence.

Several years before Chevron, O'Connor was presented with both a due process and a regulatory takings challenge where she relied on existing jurisprudence. The resulting muddled approach may have added to the frustration that prompted her to expressly refine regulatory takings jurisprudence in Chevron. In Eastern Enterprises v. Apfel, a coal mine challenged the requirements placed on it under the Coal Industry Retiree Health Benefit Act of 1992 (“Coal Act”) as constituting a regulatory taking

100 544 U.S. at 548.
for which it was not justly compensated.\textsuperscript{101} Ultimately, she concluded that challenged provisions of the Coal Act violated the takings clause, and so did not address the due process challenge. In applying the existing regulatory takings jurisprudence, she addressed many of the issues that would have formed the basis for a due process inquiry, namely the retroactive nature of the Coal Act.\textsuperscript{102} She therefore noted that it was unnecessary to address those issues under the due process claim. She acknowledged that the current regulatory takings jurisprudence required an inquiry into “justness and fairness” of the governmental action, and that such an analysis did not lend itself to any set formula.\textsuperscript{103}

When addressing the justness and fairness of the Coal Act in her regulatory takings analysis, she declined to ask whether the legislation “substantially advanced” a legitimate government objective, the inquiry which she found so improper in a regulatory takings inquiry in \textit{Chevron}. Instead, she noted that “Congress has considerable leeway to fashion economic legislation,” and focused her justness and fairness inquiry on the “retroactive nature of the liability on a limited class of parties that could not have anticipated the liability, and that liability is substantially disproportionate to the parties' experience.”\textsuperscript{104} Her choice not to address the “substantially advances a legitimate government interest” under a justness and fairness inquiry foreshadowed and was in keeping with her holding five years later in \textit{Chevron}. However, in \textit{Apfel}, she concluded, “When, however, that [legislative] solution singles out certain employees to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they cause, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.”\textsuperscript{105} Like her use of the \textit{Nollan} language in \textit{Yee}, this implies support for a broader regulatory takings stance

\textsuperscript{101} 524 U.S. 498, 504 (1998). The Coal Act required that current operating coal mines contribute to a retirement fund, regardless of whether the mine had ever employed any persons who would eventually receive benefits, or what expectations they had when the mine was opened about such contributions.
\textsuperscript{102} Id. at 538.
\textsuperscript{103} Id. at 523.
\textsuperscript{104} Id. at 528-529.
\textsuperscript{105} Id. at 537.
than one that focuses only on the burden to the property, by indicating that there should be a relationship between the burden to the property owner and the effects of the regulation. This implication is entirely inconsistent with her stance in *Chevron*, and provides yet another example of O'Connor's consistency in her overall interests of justice, but inconsistency in analytical approach.

**III. Equal Protection and Substantive Due Process: Similarly Confusing and Consistent**

O'Connor's commitment to her overall sense of justice and her struggle to shape a consistent analytical framework that would generate just results are reflected in her approach to other areas of the law as well. In two areas of equal protection jurisprudence, and one substantive due process issue, she ended up on seemingly different sides of the issues. These sets of cases demonstrate her intricate analysis and sensitivity to facts. Additionally, these cases show how she attempted to shape judicial analysis into a complex framework that was as responsive to facts and outcome as she was. In two cases about government measures adopted to remedy racial inequities, *City of Richmond v. J.A. Croson*,\(^\text{106}\) and *Adarand Constructors, Inc. v. Pena*,\(^\text{107}\) she penned opinions striking down statutes giving preference to racial minorities, holding that the Equal Protection Clause required that all racial considerations satisfy strict scrutiny. Later, she upheld affirmative action in the area of higher education in *Bollinger v. Grutter*,\(^\text{108}\) by determining that the measures adopted satisfied strict scrutiny.

In the area of gay rights, in *Bowers v. Hardwick*\(^\text{109}\) she joined the majority in concluding that a Georgia statute criminalizing sodomy was not unconstitutional, but in *Lawrence v. Texas*,\(^\text{110}\) she struck down a similar statute because it violated the Equal Protection Clause. Her adherence to the strict scrutiny standard in the area of Equal Protection allowed for judicial sensitivity to facts; applying the standard requires a court to distinguish between a compelling governmental interest and a merely

\(^{109}\) 478 U.S. 186 (1986).
significant one, and to determine whether an approach is narrowly tailored or reasonably tailored, all very fact intensive inquiries.

In the area of substantive due process and the right to make medical decisions, in Planned Parenthood of Southeastern Pennsylvania v. Casey\textsuperscript{111} and Stenberg v. Carhart\textsuperscript{112}, O'Connor elected to strike down certain state restrictions on abortions, declining to overrule Roe v. Wade and restating that a state could not impose an undue burden on a woman's right to have an abortion before fetal viability, seeming to support individual medical decision making. However, in Cruzan v. Director, Missouri Dep't of Health, she upheld a state regulation which would impose a high standard on termination of life support for individuals who could not live without such support. These opinions, which are complicated and whose conclusions may appear to conflict, ultimately adhere to O'Connor's overall concept of fairness in that particular context.

In Croson, the Richmond, VA city council passed an ordinance requiring that the percentage of minority subcontractors working on government projects reflect the minority percentage in the general population.\textsuperscript{113} Although O'Connor ultimately held that the ordinance did not survive strict scrutiny, she did not align herself firmly with the position of either party to the case, stating that “neither of these two rather stark alternatives can withstand analysis.”\textsuperscript{114} Instead, she adopted a more delicate approach. First, she distinguished earlier precedent which had upheld a federal set aside program.\textsuperscript{115} In doing so, O'Connor narrowed the scope of her holding as well as the earlier precedent, relegating to each branch a separate and identifiable methods of analysis.\textsuperscript{116} This reflects a respect for federalism that runs

\textsuperscript{111} 505 U.S. 833 (1992).
\textsuperscript{112} 530 U.S. 914 (2000).
\textsuperscript{113} 488 U.S. at 477.
\textsuperscript{114} Id. at 486. The contractors argued that the city had to limit its race-based remedial efforts to eradicating only the effects of its own prior discrimination. The city argued that it enjoyed sweeping legislative power to define and attack the effects of prior discrimination.
\textsuperscript{115} Fullilove v. Klutznick, 448 U.S. 448 (1980).
\textsuperscript{116} 488 U.S. at 490-491.
throughout her jurisprudence, but also ensured that factual and legal differences between the state and federal governments would be acknowledged in the foundation of the analysis itself. She also carefully dissected the 14th Amend. to distinguish § 1, which placed a limitation on state powers, from § 5, which broadened Congress' ability to address racial inequality. This then allowed her to conclude that Richmond's use of its subcontractor quota could infringe on rights which were granted to individuals in § 1 of the 14th Amend. -- “personal rights' to be treated with equal dignity and respect.” Given this danger, she reasoned that strict scrutiny was necessary to “smoke out' illegitimate uses of race,” and a mere assertion on the part of an adopting body that animus was benign or remedial was not enough. She described the two prongs of strict scrutiny, that a restriction on constitutional rights must be “narrowly tailored” and serve a “compelling government interest” as “an examination of the factual basis for its enactment and the nexus between its scope and that factual basis.” This description reflects her understanding that strict scrutiny, as an analysis, should be responsive to context.

Turning to the facts of Croson, O'Connor twice mentioned the rigidity of the rule employed by Richmond to conclude that it was not narrowly tailored. She relied extensively on Justice Powell's opinion in University of California Regents v. Bakke, using it as a justification for criticizing the use of a strict quota, indicating that perhaps a less rigid rule would have survived her analysis. She also quoted Bakke to conclude that societal discrimination on its own was not enough justify measures

117 See Chemerinsky, supra note 1, p. 878.
118 488 U.S. at 491; see U.S. Const. Amend. XIV.
119 488 U.S. at 493.
120 Id. at 493, 499.
121 448 U.S. at 495.
122 Id. at 493, 499.
123 438 U.S. 265 (1978). A white male who was rejected from California's state medical school was rejected challenged the school's special admissions program, which reserved 16 of the 100 positions in the class for “disadvantaged” minority students. Justice Powell held that the special admissions program was illegal, but race could be used as one of a number of factors considered by school in passing on applications.
based on racial classifications.\textsuperscript{124} She noted that classifications based on race should be strictly reserved for remedial settings, because of the possibility that they could further exacerbate racial tensions or reinforce notions of racial inferiority.\textsuperscript{125} She pointed to Richmond's lack of evidence that there was any systematic failure to award minority subcontractors contracts as undermining a finding that Richmond had a compelling reason to award minority subcontractors a share of contracts in a proportion reflecting the minority percentage of the population as a whole.\textsuperscript{126} Still looking to \textit{Bakke}, she ruled that remedial measures must be triggered by specific judicial, legislative, or administrative findings of constitutional or statutory violations,\textsuperscript{127} leaving the door open for future measures to survive the strict scrutiny analysis if the underlying facts demonstrated a severe enough problem. Unlike in her regulatory takings and eminent domain jurisprudence, where O'Connor advocated a fairly deferential stance to legislative determinations, in the area of Equal Protection, she noted that “simple legislative assurance of good intentions cannot suffice.”\textsuperscript{128} She indicated that in the Equal Protection arena, searching judicial inquiry was necessary to assure all citizens their individual rights of equal treatment on the basis of race.\textsuperscript{129}

Six years after \textit{Croson}, O'Connor expanded on \textit{Croson} in \textit{Adarand}. She explained that because \textit{Croson} distinguished state and local obligations under the 14th Amend. from federal obligations rooted in the 5th Amend., \textit{Croson} did not declare which standard the 5th Amend. required for federal measures employing racial classifications.\textsuperscript{130} She then engaged in a lengthy discussion overruling \textit{Metro Broadcasting, Inc. v. FCC},\textsuperscript{131} which held that for “benign” remedial measures, federal statutes need

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  \item \textsuperscript{124} 448 U.S. at 497.
  \item \textsuperscript{125} \textit{Id.} at 493.
  \item \textsuperscript{126} \textit{Id.} at 499.
  \item \textsuperscript{127} \textit{Id.} at 497.
  \item \textsuperscript{128} \textit{Id.} at 500.
  \item \textsuperscript{129} \textit{Id.} at 510.
  \item \textsuperscript{130} \textit{Adarand}, 515 U.S. at 222.
  \item \textsuperscript{131} 497 U.S. 547 (1990).
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only satisfy intermediate scrutiny. In *Adarand*, O'Connor concluded that *Metro Broadcasting*
undermined important principles of the Court's equal protection jurisprudence by repudiating the
principle that “it would be unthinkable that the same Constitution would impose a lesser duty on the
Federal Government' than it does on a State.” For those reasons, she overruled *Metro Broadcasting*
and held that “all racial classifications, imposed by whatever federal, state, or local governmental actor,
must be analyzed by a reviewing court under strict scrutiny.” This approach requiring searching
inquiry into legislative decisions is initially confusing in light of many of her eminent domain cases of
the same time period which were willing to defer to legislative determinations of public use. This
contradictory stance is likely a result of O'Connor's hallmark sensitivity to factual differences: perhaps
to her, equal protection violations simply posed greater threats than takings violations, and so might
require more extensive judicial review.

O'Connor addressed affirmative action a final time in *Bollinger*, dealing with the University of
Michigan's use of race as a “soft variable” in assessing a student's application to its law school, and in
that case upheld the use of affirmative action. Because *Bakke* was such a landmark case in education
affirmative action programs, O'Connor relied on it heavily in *Bollinger*, as she did in *Croson*. The
*Bakke* holding also upheld the use of affirmative action, but used language indicating that a more
intermediate standard of scrutiny might be appropriate: a “State has a substantial interest that
legitimately may be served by a properly devised admissions program involving the competitive
consideration of race and ethnic origin.” However, in *Bollinger*, as in *Croson*, O'Connor applied
strict scrutiny to answer the question: “whether diversity is a compelling interest that can justify the

132 497 U.S. at 564-565.
134 *Id.* at 227.
135 539 U.S. at 314.
136 *See id* at 322.
137 438 U.S. at 320.
narrowly tailored use of race in selecting applicants for admission to public universities.” 138 Although she looked to Bakke for guidance as to both the weight of the government interest and the narrowness of the remedy, 139 she did not interpret it to support application of an intermediate standard, and in this way reserved more searching judicial authority. 140

In engaging in the strict scrutiny analysis for Bollinger, O’Connor also relied on Adarand to reinforce the notion that “strict scrutiny must take ‘relevant differences’ into account.” 141 Again, her responsiveness to the factual differences between the world of construction contracting and the world of education is likely what accounts for her conclusions in Croson and Adarand that the use of racial classifications did not serve a compelling interest, while it did in Bollinger. In Bollinger she upheld a use of affirmative action which might protect the interests of young minority students, which is similar to the protections she extended to relatively powerless property owners in Midkiff and Kelo. The entities which would benefit from the use of affirmative action in Croson and Adarand were businesses, and she might not have considered their stance as sympathetic as that of the individuals in Bollinger, Midkiff, and Kelo.

O’Connor began her analysis in Bollinger by noting that although Croson stated that unless classifications based on race be “strictly reserved for remedial settings, they may in fact promote motions of racial inferiority and lead to a politics of racial hostility,” 142 the Court had also never held “that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.” 143 O’Connor thus drew a confusingly fine line in making the distinction between what she thought “might be read” as a requirement from that Croson language 144 and what the Court

138 539 U.S. at 322.
139 Id. at 325, 334.
140 Id. at 326.
141 Id. at 327.
142 488 U.S. at 493.
143 539 U.S. at 328.
144 Id.
expressly held. However, it would have been difficult for her to justify her conclusion in *Bollinger* to permit the University of Michigan's use of race as a soft variable without in some way distinguishing the analysis from *Croson* and *Adarand*. By indicating that the *Croson* language only meant to warn against a danger that could occur when affirmative action programs are not used as remedial measures, she then felt unconstrained in *Bollinger* to could conclude that the government interest was compelling.

She also deferred to the Law School's judgment in *Bollinger*, in a way that she was unwilling to do in *Croson*. While in *Croson* she was unwilling to accept Richmond's assurances that the racial classifications were necessary, in *Bollinger* she deferred to the Law School's “education judgment that such diversity is essential to its educational mission.”\(^{145}\) O'Connor justified her deference to that judgment with an acknowledgement that “we have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”\(^{146}\) She found that universities' educational autonomy was rooted in the First Amendment, and quoted *Bakke* in support of a university's freedom to select a student body. She found no corresponding history, Constitutional implications, and important purpose of city's choice of construction contractors in *Croson*. She also relied on factual findings presented in amicus briefs to approve the overall importance of diversity in education, nothing that the benefits of student body diversity are “not theoretical, but real” in preparing students for leadership in the global marketplace.\(^{147}\) After presenting extensive precedent and the facts uncovered through use of the strict scrutiny analysis, O'Connor's own philosophy or judgment about this particular context was finally revealed. She concluded the section of the compelling interest prong by nothing that, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race

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145 Id.
146 Id. at 329.
147 Id. at 330.
and ethnicity.”\textsuperscript{148} These are the very factual differences that her adherence to strict scrutiny in the Equal Protection context allowed courts to make, but make \textit{Bollinger} confusing when compared to \textit{Croson} and \textit{Adarand}.

Turning to the narrowly tailored prong of her analysis, she reemphasized the important factually based reasoning necessary in a strict scrutiny analysis, again quoting \textit{Adarand} to explain why taking “relevant differences” into account was the only way to ensure that there was no illegitimate motives behind use of the racial classification.\textsuperscript{149} She was persuaded by the fact that the University of Michigan's Law School did not employ a quota in striving for diversity,\textsuperscript{150} unlike the rigid plan she criticized in \textit{Croson}. She rejected the argument that because race-neutral means might exist to ensure diversity in the student body, the Law School's use of race as a factor was impermissible.\textsuperscript{151} The argument was rooted in language from \textit{Croson}, which she distinguished by saying that alternatives need not be used if they would undermine other important concerns, like maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.\textsuperscript{152}

Finally, she concluded that another part of the narrowly tailored nature of any such measures enacted would be that they would be used for only a limited time.\textsuperscript{153} Although the University of Michigan's plan did not expressly include an ending date, her emphasis on the necessity of durational limitations acknowledged the existence of another factual inquiry which could have outcome determinative effects. She quoted \textit{Croson} for the conclusion that it was necessary that citizens be assured that “the deviation from the norm of equal treatment of all racial and ethnic groups is a

\begin{footnotesize}
\begin{enumerate}
\item[148] \textit{Id.} at 332.
\item[149] \textit{Id.} at 333-334.
\item[150] \textit{Id.} at 338.
\item[151] \textit{Id.} at 339.
\item[152] \textit{Id.} Some of the race-neutral alternatives proposed by the Petitioner were use of a lottery or lowering admissions standards overall.
\item[153] \textit{Id.} at 342.
\end{enumerate}
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temporary matter.”\textsuperscript{154} However, in fulfilling this requirement, she was willing to “take the Law School at its word” (which she was unwilling to do in \textit{Adarand}), that it would terminate its race-conscious admissions program as soon as practicable, demonstrating that her attempts to develop an analysis consistent with her earlier jurisprudence could not always provide a framework to support what she felt was a desirable conclusion in every case.

In addition to the area of race relations under the equal protection clause, another area where O'Connor appeared to end up on two different “sides” of the issue is that of personal privacy, with respect to the right to engage in homosexual sex. In \textit{Bowers v. Hardwick}, she joined with the majority to uphold a statute criminalizing sodomy in Georgia.\textsuperscript{155} Seventeen years later, in \textit{Lawrence v. Texas}, she struck down a similar Texas statute, penning a separate opinion concurring in the judgment.\textsuperscript{156}

The Court was split 5-4 on \textit{Bowers}, where two justices in the majority chose to write concurring opinions.\textsuperscript{157} However, O'Connor remained silent and merely joined the majority opinion, penned by Justice White. The majority opinion relied very little on facts, and expressly disavowed making a judgment on the fundamental justice or fairness of the law.\textsuperscript{158} Instead, Justice White engaged in a highly formalistic and rigid due process analysis to answer the narrow question of whether the Constitution “confers a fundamental right upon homosexuals to engage in sodomy.”\textsuperscript{159} Justice White first looked to existing precedent for guidance as to whether earlier opinions had extended protection to homosexuals to engage in sodomy.\textsuperscript{160} Looking to recent landmark substantive due process opinions such as \textit{Eisenstadt v. Baird},\textsuperscript{161} \textit{Griswold v. Connecticut},\textsuperscript{162} and \textit{Roe v. Wade},\textsuperscript{163} all of which had been

\begin{itemize}
\item \textsuperscript{154} \textit{Id.} at 342.
\item \textsuperscript{155} 478 U.S. 186.
\item \textsuperscript{156} 539 U.S. 558.
\item \textsuperscript{157} 478 U.S. at 187; Burger and Powell, J.J., both filed concurring opinions.
\item \textsuperscript{158} \textit{Id.} at 190.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 190-191.
\item \textsuperscript{161} 405 U.S. 438 (1972).
\item \textsuperscript{162} 381 U.S. 479 (1965).
\end{itemize}
argued to extend general concepts of privacy to protect consensual adult sex in general, Justice White concluded that those cases had in fact protected only “family, marriage, or procreation,” none of which were implicated in sodomy, homosexual or otherwise. This rather narrow interpretation allowed Justice White to rely very safely on precedent. Since the Constitution does not expressly grant any individuals a right to engage in any form of sexual relations, the inquiry then took the form of a substantive due process analysis. The majority opinion then turned to whether the Court should extend substantive due process protection to homosexual sodomy. The Court applied substantive due process precedent, which held that where a right is not expressly addressed in the Constitution, that right should nevertheless be protected if it is “‘implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.” Citing the number of states that currently had anti-sodomy statutes similar to Georgia's, the opinion concluded that the right to homosexual sodomy could not be fundamental to a concept of ordered liberty if so many states saw fit to criminalize it.

Justice White's brief opinion applied former opinions and substantive due process analysis so rigidly that it reads as passionately reliant on precedent. Justice O'Connor, though sensitive to facts, was also very respectful of a rigorous and well-ordered analysis. It is likely that Justice White's narrow and strict application of substantive due process analysis was attractive to O'Connor, who had only been on the Court five years when Bowers was decided. Although substantive due process analysis, by its nature sensitive to context, might be attractive to a judge sensitive to facts, there are drawbacks to

163 410 U.S. 113 (1973).
164 478 U.S. at 191.
165 Id.
166 Id. at 192.
167 Id. at 195.
168 Substantive Due Process analysis requires that a court determine what sort of rights are considered to be fundamental to concepts of ordered liberty. The approach recognizes that societal norms will change over time, and thus, what is fundamental to concepts of liberty will also change. Substantive Due Process analysis is often used to extend Constitutional protections to rights not expressly mentioned in the Constitution, as ideas of what are fundamental rights
embracing substantive due process wholeheartedly. Because substantive due process analysis asks judges to read new rights into existing Constitutional jurisprudence, it can be unlinked to well-established precedent. Often, precedent can only be applied to substantive due process inquiries by analysis. Although substantive due process may have offered a sensitivity to context and fundamental justice that O'Connor would have found attractive, its lack of grounding in precedent would have been a big deterrent to someone who also strove for a consistent analytical approach. Since Justice White's Bowers opinion shied away from addressing facts, and instead relied entirely on a rigid due process analysis, O'Connor atypically chose to join in an opinion that ignored the facts entirely. Since she later advocated that restrictions on homosexual activity posed an equal protection rather than a due process problem, perhaps this choice, made early in her time on the Court, proved unsatisfactory as time went on.

This is one way to explain her concurrence in Lawrence, which is confusing when contrasted with her willingness to accept a due process analysis in Bowers.169 The majority opinion overruled Bowers' substantive due process analysis to conclude that homosexual choice of expressions of sexuality was a “liberty protected by the Constitution.”170 The opinion in Lawrence is an example of the flawed nature of substantive due process: it seems to stand for the proposition that the Supreme Court will uphold or strike down laws according to its opinion as to what societal norms are or should be. However, equal protection jurisprudence is much more comprehensive and better explored, and Justice O'Connor's concurrence in Lawrence's judgment rests on an equal protection analysis. As demonstrated in her opinions in the area of equal protection in the arena of race, she embraced Equal Protection as being rigorously analytical but also providing for a sensitivity to context and facts, and was likely much more comfortable addressing the facts of Lawrence under this framework.

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169  539 U.S. at 579.
170  Id. at 567.
In doing so, she applied rational basis scrutiny and in *Lawrence* held that the law did not even survive this deferential standard,\(^\text{171}\) indicating that under the facts she believed the law was fairly obviously unjust. Rational basis review can be applied to any statute in an equal protection challenge, regardless of the type of conduct that is being regulated. Therefore, O'Connor did not have to justify that, years of precedent to the contrary, the right to engage in choice of expressions of sexuality was in fact a right fundamental to concepts of ordered liberty. Because the Texas statute criminalized homosexual sodomy without criminalizing sodomy between members of opposite sexes, she concluded that the statute was intended merely to disadvantage homosexuals.\(^\text{172}\) She cited equal protection precedent to reason that mere moral disapproval for a law is not enough to justify a law under rational basis review.\(^\text{173}\) However, the equal protection framework still allowed her to focus on what she saw as the fundamental injustice of the law: that it appeared to be adopted for no other justification than “a bare ... desire to harm a politically unpopular group,”\(^\text{174}\) and in that way reach a conclusion opposite to the *Bowers* majority.

The equal protection framework could not be applied to issues of medical decision making, and so O'Connor did engage in substantive due process analysis when faced with questions about restrictions on abortions and restrictions on the right to refuse medical treatment. Some of her conclusions in this area seem to conflict, but as always demonstrate enormous sensitivity to facts and can be read as adhering to her general concepts of fairness in this area. In this context, O'Connor seemed to accept greater state intrusion on individual liberty when the state interest at stake was protecting life. This stance conflicts with her approach in the areas of eminent domain, regulatory takings, gay rights, and affirmative action, which generally protected individual rights from

\(^{171}\) *Id.* at 579.  
\(^{172}\) *Id.* at 583.  
\(^{173}\) *Id.*.  
\(^{174}\) *Id.* at 580 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).
government intrusion or threats from more powerful entities. And yet again, this contradiction can be attributed to the effect of factual differences on her concepts of fairness. To O'Connor, the extreme danger of threats to life appear to be important enough to justify some government intrusion which might not stand in other contexts. *Casey* and *Carhart* struck down some legislative restrictions on a woman's right to make the medical decision to have an abortion, but upheld others, balancing and weighing individual rights against the state interest of protecting fetal life. The *Cruzan* holding can be read as upholding state restrictions on the medical decision to terminate life support, in contravention of principles upheld in *Casey* and *Carhart*, but O'Connor's opinions in all these cases incorporate a careful balancing of individual rights against a state interest she acknowledged was legitimate.

In *Casey*, a judgment including complicated splits, concurrences in part, and dissents in part, O'Connor wrote a joint judgment for the Court with Kennedy and Souter.\textsuperscript{175} That judgment itself was split into several different parts, striking down or upholding different portions of a challenged Pennsylvania statute placing limitations on abortions.\textsuperscript{176} The judgment expressly declined to overrule *Roe*, relying on the weight of stare decisis.\textsuperscript{177} The judgment also weighed a woman's right to choose to have an abortion and a state's interest in protecting life as fairly equal considerations. Although the judgment proclaimed that some restrictions on a woman's right to choose would be unconstitutional, only those that would place an “undue burden” on a woman's right to choose an abortion prior to fetal viability would be unconstitutional.\textsuperscript{178} The Court then turned to which particular provisions of the Pennsylvania legislation would impose such a burden. It held that a 24-hour waiting period and mandatory counseling prior to having an abortion would not impose an undue burden, the exception for

\textsuperscript{175} 505 U.S. at 833. Justice Stevens filed an opinion concurring in part and dissenting in part. Justice Blackmun filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part, in which Justices White, Scalia and Thomas joined. Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Rehnquist and Justices White and Thomas joined.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 869.

\textsuperscript{178} Id. at 877.
medical emergencies was broad enough so as not to be an undue burden, but required spousal notification would constitute an undue burden on a woman's choice. This portion of the decision envisioned the possible situations that could arise from upholding each portion of the statute, and based determinations on these factual considerations. While the Court upheld some legislative restrictions on a woman's ability to choose, the fact that the Court declined to overrule Roe can be read as protective of the right to make medical decisions, a decision which was echoed in Carhart and O'Connor's concurrence in that case.

In Carhart, a Nebraska statute targeting a particular type of abortion procedure was challenged as posing an “undue burden” under the Casey test. The Court held that the statute in question was overly broad, and could apply not only to the intended procedure, but also to another procedure, the most common procedure for performing abortions. It then reasoned that the statute would cause such fear of prosecution among medical professionals who performed the most common method of abortion, that it would pose an undue burden on a woman's right to choose. The Court also noted that the statute was problematic because it applied to both pre and post-viability, reaffirming that portion of the Casey test, and reaffirming that a state's interest in protecting a fetus pre-viability was weaker than post-viability. O'Connor concurred in the opinion, which was generally protective of individual rights to make medical decisions, but wrote separately to anticipate a factual situation with a different result. She reasoned that a statute which was more narrowly tailored to address the procedure which was the impetus for the Nebraska regulation might be constitutional. Since O'Connor recognized both an individual right to choose and the state interest as fairly equal

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179 Id. at 880-881, 888.
180 Id.
181 530 U.S. at 921.
182 Id. at 938.
183 Id. at 945-946.
184 Id.
185 Id. at 950.
186 Id.
considerations, this is an example of how she strived to remain consistent to her *Casey* opinion while leaving the door open for facts which could lead to a different outcome.

In *Cruzan*, the state of Missouri was administering and paying for artificial nutrition and hydration for a woman who was injured in a car accident, and was rendered unconscious and brain damaged.\(^\text{187}\) When it was clear she would never recover, the woman's parents requested that her life support be terminated, in accordance with what they asserted were the woman's wishes.\(^\text{188}\) The Court held that Missouri's requirement that the parents demonstrate that this was the woman's wish by clear and convincing evidence was a constitutional regulation of the substantive due process right to refuse medical treatment.\(^\text{189}\)

The majority opinion acknowledged the liberty interest of the individual, but focused on the legitimacy of the state interest in continuing treatment and prolonging life as justification for the intrusion.\(^\text{190}\) Since the clear and convincing standard was not met by Cruzan's prior oral statements which merely “suggested” she would not want her life to be prolonged under such circumstances, the decision can initially be read as forcing an individual to meet a very high standard to demonstrate her wishes, in case she is someday rendered incompetent. This reading seems inconsistent with *Casey* and *Carhart*'s protection of individual rights to make choices about medical treatment without government intrusion. However, O'Connor's concurrence clarified that in concurring in the judgment, she supported a stance which was more closely aligned with *Casey* and *Carhart*. Whereas the majority opinion focused on the state's interest, O'Connor's concurrence balanced an individual's right to make decisions about more equally with a state's interest in preserving life. She wrote separately to reaffirm that the “liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's

\(^{187}\) 497 U.S. at 261.
\(^{188}\) *Id.*
\(^{189}\) *Id.* at 284.
\(^{190}\) *Id.* at 281.
deeply personal decision to reject medical treatment, including the artificial delivery of food and water.191 This language highlighted the individual liberty interest which is also protected by the clear and convincing evidence standard, rather than the state's interest in preserving life which justified use of such a high standard.192 When viewed from this perspective, it is easy to see how requiring surrogate decision makers to demonstrate an incompetent individual's wishes about treatment by clear and convincing evidence is consistent O'Connor's goals in this area, seen first in *Casey* and *Carhart*, of more equally balancing state and individual interests.

Like her regulatory takings and eminent domain jurisprudence, O'Connor's equal protection and substantive due process analysis shows that she was consistent in overarching concepts of justice, but often reached conclusions or judgments that seemed contradictory. Additionally, her jurisprudence in the areas of affirmative action, personal privacy, and medical decisionmaking demonstrated how her attempts to employ a consistent analysis to reach just results could be confusing.

**Conclusion**

One of the things which O'Connor is praised for is her moderation, and rightfully so. By remaining responsive to the factual context and the implications of overall themes of justice, she was a flexible and reasonable justice who did not make decisions based on applications of abstract doctrines which were untethered to reality. She was generally consistent in concepts of fairness and justice which protected the interest of powerless individuals against the government or more powerful entities. However, one of her weaknesses was that in an attempt to be consistent to her own jurisprudence and being unwilling to make decisions based simply on what she determined was right or just, she wrote or joined in opinions which are confusing without careful deconstruction. Her attempts to narrow holdings, distinguish earlier opinions, and develop detailed and complicated analytical frameworks

191 *Id.* at 289.
192 *Id.*
which were as responsive to facts as she was resulted in jurisprudence which actually seems inconsistent, or unclear. Ultimately, her adherence to her own sense of justness and fair outcomes undermined another of her seeming goals, development of a consistent, clear, and thorough jurisprudence.