Justice Sandra Day O'Connor's Friends

RUTH COLKER*

This Article examines the citations of amicus briefs by Justice Sandra Day O'Connor in cases in which she authored the opinion for the Supreme Court in an effort to learn how amicus briefs might influence judicial behavior. Consistent with theories proposed in the political science literature, O'Connor was most likely to cite amicus briefs for specialized facts. She was also likely to cite briefs filed by the Solicitor General, prestigious professional associations, and the states. Surprisingly, she was more likely to cite amicus briefs when she disagreed rather than agreed with their legal position. Contrary to hypotheses found in the political science literature, O'Connor never *cited briefs authored by the American Civil Liberties Union, the NAACP Legal Defense Fund, or other organizations associated with highly liberal or conservative political perspectives. These findings might cause some public interest groups to re-think their amicus brief strategy in the Supreme Court if O'Connor is reflective of Supreme Court Justices generally. Nonetheless, O'Connor's failure to cite certain kinds of amicus briefs does not necessarily mean that she did not take their views seriously, because she frequently adopted the position of the Solicitor General despite rarely citing him with approval. Justice O'Connor portrayed herself in her opinions as only being a "friend" of moderate organizations, but, privately, one can only speculate as to what views truly influenced her judicial behavior.*

Interest groups and others often participate as amicus curiae in the United States Supreme Court. Many reasons exist for this participation. They may want to work with others to create a high quality work product. They may want the "bragging rights" for having their name appear on a Supreme Court brief. They may want to help their fundraising efforts by demonstrating that they have a significant role in policy debates.[1] Most

---

* Heck-Faust Memorial Chair in Constitutional Law, Michael E. Moritz College of Law, The Ohio State University. I would like to thank my research assistants, Ryan Conley, Megan St. Ledger, and Jeremy Young. Megan was particularly responsible for Appendix B, and I thank her for that tedious work. I also would like to thank librarian Sara Sampson for her extensive assistance, and our library page service for collecting the decisions studied in this paper. I would like to thank the participants at a Moritz College of Law faculty workshop for their helpful comments and, in particular, thank Greg Caldeira, Ed Lee, and Jim Brudney for their many helpful suggestions. This project was supported financially by a Distinguished Scholar Award from The Ohio State University.

[1] *See generally* Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997–1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823, 826–27 (1999); Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339, 340 (1993) (discussing reasons why interest groups file amicus briefs).

likely, they hope to influence the Court's decisions. How likely is that possibility?

This Article will focus on the citations of amicus briefs by Justice Sandra Day O'Connor when she authored the opinion for the Court. O'Connor's citation to amicus briefs is useful to study for two reasons. First, she has recently retired from the Court, so researchers have a complete set of opinions to examine ranging from 1981 to 2006. Second, she was often the "swing" Justice on the Court,[2] so it is likely that the authors of amicus briefs had her in mind as their audience as they sought to persuade the Court to a particular outcome. Hence, an examination of her opinions in cases in which amicus curiae filed briefs can lend insight into whether amicus briefs have much influence on the Court's decisions.

The question of influence is not easy to resolve. The mere fact that a Justice cites an amicus brief does not necessarily mean that the brief influenced the Justice.[3] The citation could be a political signal to demonstrate that various views were considered.[4] Further, a brief that is not cited might influence a Justice.[5] Finally, a Justice can cite an amicus brief to *deflect* its views rather than rely on its views.[6] Despite the subjective challenges of examining opinions written by O'Connor to determine whether amicus briefs influenced her analysis, that is the approach of this Article. I have examined

---

[2] *See generally* Erwin Chemerinsky, *The O'Connor Legacy*, TRIAL, Sept. 1, 2005, at 68; Tracy Carbasho, *Justice O'Connor Leaves Stellar Legacy Through Distinguished Service on Supreme Court*, 7 LAW J. 6 (2005). See *infra* note 56 for data on the likelihood of Justice O'Connor voting with the majority.

[3] Amicus briefs were cited in thirty-five percent of the opinions of the Court in cases in which at least one amicus brief was filed. *See* Songer & Sheehan, *supra* note 1, at 340–41.

[4] Joseph Kearney and Thomas Merrill argue that "[c]itation or quotation of a brief in the official Reports of the United States Supreme Court can lend legitimacy to a group, and may be used by the group in its publicity efforts to create the impression that it has 'access' to or 'influence' with the Court." *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 825 (2000). Hence, some organizations may file amicus briefs to increase their prestige rather than to influence the Court.

[5] For example, the Supreme Court never cited a brief written by Laurence Tribe and others in *Romer v. Evans*, 517 U.S. 620 (1996), yet the majority appeared to adopt arguments from that brief in its opinion. *See* Brief for Lawrence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, & Kathleen M. Sullivan as Amici Curiae Supporting Respondents, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008432. The Tribe brief argued that the state could not "deny selected persons access to the protection of its laws from a whole category of wrongful conduct." *Id.* at *13. The Supreme Court concluded that a state "cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635.

[6] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 717–18 (1987).

each of the opinions in constitutional law cases[7] authored by Justice O'Connor, with particular focus on her citation (or lack of citation) to amicus briefs in these opinions.[8] I have also examined the transcripts of oral

---

[7] Justice O'Connor authored more than 300 opinions during her tenure on the Court, and it was not possible to engage in a qualitative examination of each of these opinions. By limiting my focus to opinions in constitutional law cases, I was able to create a more manageable data set of approximately 100 cases. I also chose constitutional law cases because they have often received enormous public attention and therefore garnered considerable amicus activity. It is possible, however, that amicus briefs in constitutional law cases are *less* likely to influence the Court than amicus briefs in statutory cases because constitutional law cases are more ideological in nature, and Justices are perceived to have an inherent ideological bias which is not open to persuasion. I cannot prove or disprove that possibility; I can only conclude whether amicus briefs appeared to influence Justice O'Connor in constitutional law cases.

For one limited purpose, I did consider the relationship between amicus briefs and Justice O'Connor's position in statutory cases. In Appendix B, I focused on O'Connor's position in cases decided during the 1997 to 2005 terms with respect to the position taken by the Solicitor General in amicus filings. For that limited purpose, I looked at both statutory and constitutional law cases for that time period. I found that O'Connor was *less* likely to agree with the Solicitor General in statutory cases than in constitutional law cases. She disagreed with the Solicitor General in 34 of 123 (27.6%) statutory cases and in 13 of 73 (17.8%) constitutional law cases. These statistics do not support the hypothesis that the Solicitor General, as a particularly influential amicus participant, has more influence on O'Connor in statutory than constitutional law cases because she was more likely to disagree with the Solicitor General in statutory cases. But these statistics are certainly not dispositive on the question of whether statutory as compared to constitutional law amici tended to influence O'Connor. The 1997 to 2005 terms represented a time when the Solicitor General was appointed by a Republican President. On an ideological basis, one might expect O'Connor to be predisposed to agree with a Republican Solicitor General on constitutional law issues. *See generally* Rebecca E. Deen, Joseph Ignagni & James Meernik, *Individual Justices and the Solicitor General: The Amicus Curiae Cases, 1953–2000*, JUDICATURE, Sept.–Oct. 2005, at 71. They found that, in general, O'Connor was more likely to agree with the Solicitor General when he took conservative positions (81.7% congruence) than when he took liberal positions (63.1% congruence). They also found that she agreed somewhat more with the Solicitor General under Reagan and George H.W. Bush (75% and 80%, respectively) than under Clinton (70%). *Id.* at 73. There does, therefore, appear to be a modest political component to O'Connor's congruence with the Solicitor General, as well as a broad, general tendency for her to agree with the Solicitor General.

Other than in Appendix B, I only examined O'Connor's opinions in cases in which she authored the majority opinion for the Court. I did not examine her concurrences, where she may have joined the Court's decision but not its opinion. Her concurrences may better reflect her individual philosophy, whereas her majority opinions may reflect her consensus-building skills. In further research, it would be interesting to compare her citation record in cases in which she authored opinions other than the majority opinion.

[8] I have studied all of the constitutional law opinions authored by Justice O'Connor in which her opinion is the opinion of the Court. In some cases, I had to make a subjective judgment as to whether a case could be considered a "constitutional law" case.

arguments in these cases to see if they reflect influence by amici curiae.[9] These opinions can offer insight into the types of briefs and types of arguments that might have persuaded her to reach a particular conclusion, although causation rather than correlation is necessarily a matter of conjecture.[10]

Part I of this Article will trace the history of the filing of amicus briefs in the United States Supreme Court. Part II will describe how Justice O'Connor cited amicus briefs in her constitutional law decisions. Part III will conclude that the O'Connor citation pattern supports the specialized facts use of amicus briefs, and also disputes the view that the ACLU has a visible role as amicus curiae. Further, it reveals that O'Connor was most likely to cite amicus briefs with which she *disagreed*, suggesting that one should be cautious in using citations as a measure of influence.

This problem was particularly evident in cases involving pre-emption and habeas relief. If O'Connor engaged in significant constitutional analysis in her opinion, then I put the case in the constitutional category. Not more than a dozen cases required a subjective assessment, so whether those cases are characterized as constitutional should not affect the overall analysis. All the cases studied in the constitutional law category are listed in Appendix A. I have looked at whether amicus briefs were filed in these cases, how many amicus briefs were filed on each side, who were the authors of these amicus briefs, and whether, and how she cited these amicus briefs. To determine whether amicus briefs were filed in a case, I primarily looked at the results from Westlaw for each case. When it appeared that the Westlaw list was incomplete, I supplemented it with other sources. Nonetheless, I acknowledge that my records do not include every amicus brief filed in every case. The number of amicus briefs listed is only approximate but, hopefully, at least accurately reflects whether amicus briefs were filed in these cases. My records should be accurate as to whether O'Connor *cited* an amicus brief in each of her opinions.

[9] I used the transcripts as found on LEXIS for this purpose because those transcripts are word-searchable electronically. I used the search term "amic!" to determine if an amicus curiae was mentioned at oral argument. Because the transcripts do not show which member of the Court is asking a question, I could not readily focus my search on remarks by Justice O'Connor. Nonetheless, O'Connor was present at these oral arguments and would have heard a discussion of amici curiae even if she did not help focus the discussion on them. It is possible that my search term missed a few instances of references to amicus curiae in which the Court did not use the word "amicus" or "amici." I did supplement my electronic research by reading about a dozen additional cases in which I found no electronic reference to "amicus" or "amici," even though O'Connor cited amicus briefs in her opinion. I did not find any reference to amicus briefs that were not found electronically in those oral arguments.

[10] I have chosen to focus on cases in which O'Connor authored the Court's opinion because those cases offer the best evidence of her reasons for adopting the majority position. It is also a sufficiently large sample—roughly fifty cases—that can offer us the opportunity to see patterns of influence. Nonetheless, this is a subjective, qualitative analysis. I reported some quantitative results in a previous article. *See* Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1333–38 (2002).

I. THE AMICUS BRIEF AS AN INSTITUTION

The amicus curiae has ancient roots. The practice of an outside lawyer assisting the court existed in Roman law, throughout medieval England, and, in a limited manner, within the French legal system.[11] In Roman times, the amicus curiae was a judicially appointed lawyer who served to advise and assist the court in the disposition of cases.[12] Despite a long history of use of amicus curiae in the English court system,[13] the United States courts did not use the amicus curiae until 1823.[14] Although amicus curiae initially participated in United States courts as relatively neutral servants of the courts through the submission of oral advice or points of law,[15] they became advocates over time through the use of argumentative briefs.[16]

---

[11] *See* Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017, 1017 (1967).

[12] *See* Comment, *The Amicus Curiae*, 55 NW. U. L. REV. 469, 469 n.3 (1960).

[13] The amicus curiae first appears in the seventeenth century in England. *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963).

[14] Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1250 (1992). The first amicus brief was filed in Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823), when the Supreme Court requested the assistance of Henry Clay to determine the application of the Commerce Clause to a land agreement between Kentucky and Virginia. *See* Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 270 n.3 (2003).

[15] Stuart Banner reports that most of the neutral amici who participated in cases from 1790–1830 were "lawyers who happened to be in the courtroom when a case was being argued, and who made what appear to have been spontaneous oral suggestions to the court, typically in order to inform the court of precedents of which the court was unaware." Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790–1890*, 20 CONST. COMMENT. 111, 120 (2003).

[16] *See id.* at 121–22 (arguing that the seemingly neutral role of amicus curiae ended when amici began to submit written briefs rather than participate through oral advice). In more recent times, few would argue that amici act in a nonpartisan manner, but some have suggested that amici play a more neutral role when they bring factual matters to the Court's attention. *See generally* STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 151–52 (2d. ed. 1984). Nonetheless, Michael Rustad and Thomas Koenig argue that even when amicus briefs cite social science literature they do so in a shoddy manner which the authors describe as "junk social science." They therefore argue that amicus briefs act as lobbyists even when they appear to use social science data in support of their arguments. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993).

Amicus curiae participation in the Supreme Court has increased dramatically in recent years.[17] Whereas amicus brief filings were limited to 10% of the Court's cases as recently as 1920, they now constitute roughly 85% of the Court's docket.[18] Joseph Kearney and Thomas Merrill found that there has been an increase of more than 800% in the number of amicus briefs filed from 1986–1995 (4907) as compared with the period 1946–1955 (531).[19] Not surprisingly, the Court is also more likely than in the past to cite amicus briefs. While the number of amicus briefs filed increased eightfold, the likelihood of the Supreme Court citing an amicus brief merely doubled.[20] When Kearney and Merrill examined the likelihood of the Court citing an amicus brief as a ratio to the number of briefs filed, they nonetheless concluded that "the rate of citations and quotations per brief is more or less keeping pace with the increase in filings."[21]

The Supreme Court and commentators have disagreed about the influence of amicus briefs on judicial decisions. Historically, the Supreme Court has allowed widespread amicus participation, although some members of the judiciary have criticized this approach. In 1949, Justice Felix Frankfurter argued that an "easy-going hospitality" towards amicus briefs was a mistake because it allows the Court to be "exploited as a soap box or as advertising medium, or as the target, not of arguments but of mere assertion that this or that group has this or that interest in a question to be decided."[22] Frankfurter offered this criticism at a time when amicus briefs had begun to evolve into partisan efforts rather than a more neutral form of assistance. For a time, his view was also accepted by Justice Harold Burton,[23] but ultimately the Court adopted a more generous view of accepting amicus filings.[24]

---

[17] Today, the Court grants approximately 85% of the motions filed for permission to submit an amicus brief, in contrast to the 1940s and 1950s when the Court routinely denied such motions. *See* Kearney & Merrill, *supra* note 4, at 763–64.

[18] *See id.* at 744. Amicus briefs were filed in nearly 90% of the cases decided during the 1995–96 term. *See* REAGAN WM. SIMPSON & MARY R. VASALY, THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT 8 (2d ed. 2004).

[19] Kearney & Merrill, *supra* note 4, at 752.

[20] *Id.* at 757.

[21] *Id.* at 761.

[22] Felix Frankfurter, Earl Warren Papers, Library of Congress, Oct. 28, 1949, *as quoted in* Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 784 (1990).

[23] See Caldeira & Wright, *supra* note 22, at 785 n.4 (quoting Burton memo denying petition to file amicus curiae brief).

[24] Chief Judge Richard Posner shares the negative view about amicus participation, writing that "[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the

The rules for filing an amicus brief have become fairly permissive. Under Supreme Court Rule 37, governmental representatives may file an amicus brief in any case without seeking permission of the parties or the Court.[25] Nongovernmental entities may file an amicus brief if they obtain the consent of all parties or if they receive permission from the Court.[26]

In 1990, the Supreme Court amended its rule to signal that it finds amicus briefs to be "of considerable help" when they bring "relevant matter to the attention of the Court that has not already been brought to its attention by the parties."[27] But the Court also indicated that an "*amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored."[28] This commentary by the Court suggests that it favors briefs by third parties that can bring new information or arguments to the Court's attention, but does not favor "piling on" filings in which numerous organizations sign on to a brief to signal a position's

---

length of the litigants' brief. Such amicus briefs should not be allowed." Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) (denying leave to file an amicus brief). The Third Circuit, by contrast, takes a more positive view towards the filing of amicus briefs. *See* Neonatology Assocs., P.A. v. Comm'r, 293 F.3d 128, 132 (3d. Cir. 2002) (rejecting the notion that amici must be impartial as outmoded, and also rejecting the idea that amici should only be filed on behalf of unrepresented or underrepresented parties).

[25] According to Supreme Court Rule 37.4:

> No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

SUP. CT. R. 37.4.

[26] *See* SUP. CT. R. 37.2-3 (providing procedures for seeking permission to file an amicus brief if a party or parties have withheld consent).

[27] SUP. CT. R. 37.1 (1990).

[28] *See* SUP. CT. R. 37.1 (1990). *See* Tony Mauro, *Courts Gets a Tad Less Friendly to Amici*, LEGAL TIMES, Feb. 19, 1990, at 10–11 (1990) (reporting rule change). In 1997, the Court modified its amicus brief rule to require the disclosure of certain relationships between the parties to the case and any person or entity that files an amicus brief. *See* SUP. CT. R. 37.6 (1997) (requiring nongovernmental amicus curiae to "identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief . . . in the first footnote on the first page of text"). It is too early to know whether this disclosure rule may lessen amicus participation because parties do not want to disclose that certain organizations made a monetary contribution to the preparation of the brief.

political importance.[29] Justice Breyer has endorsed this view of the importance of briefs which offer new or technical information when he noted at the annual meeting of the American Association for the Advancement of Science that amicus participation in cases involving scientific and technical information can play "an important role in educating the judges on potentially relevant technical matters."[30]

Anecdotal evidence supports the hypothesis that the Court is particularly receptive to novel arguments found in amicus briefs, with commentators documenting arguments accepted by the Court that were only found in amicus briefs.[31] Although most commentators assume that amicus briefs that make novel arguments can influence the Court's decisions,[32] there are skeptics. Phillip Kurland and Dennis Hutchinson contend that most people are "wasting valuable time" by writing amicus briefs because "they are no more than a registration of the votes of a constituency on one side or other of the case, underlining the legislative rather than judicial function of the Court."[33] In a study of the 1992 term, James Spriggs and Paul Wahlbeck found that the Court was *not* more likely to cite an amicus brief because it made a novel argument not found in other briefs.[34]

---

[29] The new rule was created after eighty amicus briefs were filed in an abortion case, and the rule was understood to be discouraging such practice in the future. *See* ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 378 (7th ed. 1993).

[30] Stephen Breyer, *The Interdependence of Science and Law*, JUDICATURE, July–Aug. 1998, at 26.

[31] *See* Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 814 (2004) (providing four examples of amicus briefs shaping a brief in that way). Further, Collins argues that a larger number of amicus briefs in a case makes it more likely that a party will have litigation success because of "the greater the number of legal arguments presented, or alternatively framed, on behalf of that party." *Id.* at 815. Collins' hypothesis, however, does not take into account the possibility that Justices may share Frankfurter's view and resent the "piling on" of amicus briefs. These Justices may be influenced by particularly well written and novel amicus briefs but resent multiple submissions on a particular point of view.

[32] *See, e.g.*, Bruce J. Ennis, *Symposium on Supreme Court Advocacy: Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984).

[33] Phillip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court*, 50 U. CHI. L. REV. 628, 647 (1982).

[34] James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 374 (1997) ("[W]e find virtually no support for the proposition that the Court is more likely to utilize information contained in amicus briefs whose sole function is to make arguments not found in party briefs."). The Spriggs and Wahlbeck study has two limitations. First, they examined all the cases from a particular term, including those decided by lopsided margins. It would be interesting to know if amicus briefs have more influence when they are written to influence the

Gregory Caldeira and John Wright argue that organizations, themselves, seem to believe that amicus participation can affect judicial behavior.[35] When multiple persons or organizations share a particular perspective on a case, they observe that two approaches are possible. The individuals could join one common brief (with multiple signatories) or write more than one brief. Writing more than one brief is the more expensive option.[36] Nonetheless, Caldeira and Wright found that organizations with a shared political perspective are more likely to file multiple briefs than sign a joint brief. They concluded that "the filing by groups of separate and numerous briefs strongly indicates that those who run organizations believe that multiple briefs make a difference."[37] If organizations thought that their participation was merely a political signal then they might be more likely to employ multiple signings of individual briefs rather than file multiple briefs.

Paul Collins has explored the phenomenon of increased signatories to individual amicus briefs in the Supreme Court. He documented what he calls an "interest group *participation* explosion," whereby the increase in the number of participants on briefs was almost four times greater than the number of briefs filed.[38] He found anecdotal support for the suggestion that increasing the number of signatories, rather than the number of briefs, may influence the Court by signaling an intensity of public opinion.[39] "[T]he affected groups hypothesis holds that it is not the social, scientific, legal, or political arguments briefs contain that influence the Court, but instead the

---

"swing" Justices on the Court in close cases. Their data cannot answer that question because the Court's vote was not one of the factors in their statistical analysis. Second, the authors put amicus briefs in categories based on whether they *only* make novel arguments and do not give an amicus brief credit for helping to persuade the Court with a novel argument if it *also* made an argument located in the party briefs. However, it should not be surprising that persuasive briefs might make a combination of novel and repetitive arguments. In fact, the combination might make the briefs appear more conventional and thereby more persuasive. Their research does show, in fact, that briefs which both add new arguments and reiterate the party's arguments are more likely to be incorporated into the majority opinion than briefs which only add new arguments. *See id.* at 379–80.

[35] Caldeira & Wright, *supra* note 22.

[36] Caldeira & Wright estimate that the filing of a brief costs around $10,000 to $15,000, in part because the Court insists that the briefs be printed. Caldeira & Wright, *supra* note 22, at 800 & 785 n.5. Today, the cost of an amicus brief is probably closer to $50,000. *See* Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 58 (2004).

[37] Caldeira & Wright, *supra* note 22, at 800.

[38] Collins, *supra* note 31, at 811.

[39] Collins provides several arguable examples of that kind of influence where Justices mentioned each amicus to a brief by name, suggesting they were aware of the number of participants on a brief. *Id.* at 815.

mere presence of a large number of interests on one side of the dispute relative to the other."[40]

From an empirical perspective, Collins was able to document that increasing the number of briefs had a modest, positive effect on judicial behavior.[41] Examining the time period between 1953 and 1985 (before Rehnquist became Chief Justice), he found that the petitioner's probability of success increased when three briefs instead of one were filed on behalf of the petitioner, but that the probability of success actually declined modestly when the number of amicus filings was as high as twelve. Collins interpreted this finding to mean that "as the number of amicus briefs increases, these briefs are likely to reiterate the arguments of the supported litigant and/or of the fellow amici, and the Court seemingly takes notice of such reiteration."[42] Collins' interpretation, however, does not explain why the likelihood of success would actually *decline*. An alternative explanation is that the filings start looking like political "pilings on," which undermines their effectiveness to those members of the Court who are particularly hesitant to appear to be influenced by public opinion.

Kearney and Merrill have examined a somewhat more recent time period—extending to 1995—and confirmed that "piling on" can be ineffective. They found "no evidence to support the proposition that large disparities of amicus support for one side relative to the other result in a greater likelihood of success for the supported party."[43] Interestingly, one side appears to benefit if there is a small disparity between the number of briefs filed on each side, but when the disparity reaches three or more briefs there is no apparent benefit.[44]

Kearney and Merrill found that the most important indicator of amici influence was whether the brief was filed by "institutional litigants and by experienced lawyers."[45] Other commentators have suggested that experienced litigants such as the American Civil Liberties Union, Americans for Effective Law Enforcement, and, particularly, the Solicitor General have an effect on the Court's decisions.[46]

---

[40] *Id.* at 814.

[41] *Id.* at 822.

[42] *Id.* at 825.

[43] Kearney & Merrill, *supra* note 4, at 750.

[44] *Id.* at 795–96.

[45] *Id.* at 750.

[46] *See* Gregg Ivers & Karen O'Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982*, 9 LAW & POL'Y 161, 168–70 (1987) (noting that briefs for Americans for Effective Law Enforcement were particularly successful in the criminal context); Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL.

Although it is well established that the Solicitor General as an institutional actor earns enormous respect from the Supreme Court, the Court's rules, themselves, also suggest that amicus briefs by all branches of government are particularly welcome. Whereas nongovernmental entities must seek the parties' permission to file an amicus brief, the Solicitor General, as well as state and local government officials, do not need permission from the parties to file an amicus brief.[47] That rule has been in place for more than fifty years and may reflect a signal that the Court is particularly interested in learning about the impact of its decisions on the other branches of government, both at the federal and state level.

Commentators generally support the view that amicus briefs have a positive influence on the Court, particularly when the Solicitor General participates as an amicus. But most of the analysis is merely correlational—that the presence of an amicus brief correlates with the party prevailing who the amicus supports. Few, if any, of the existing studies include a research methodology in which the investigator actually *read* the Court's citation to the amicus brief to see if there is qualitative support for the notion that the amicus brief influenced the Court's decision.[48] Collins himself recognized

---

Q. 135 (1988) (tracing positive impact of briefs by Solicitor General on the merits); Kearney & Merrill, *supra* note 4, at 760, 805 (documenting increase in citation of Solicitor General in each decade of study; showing some favorable results when ACLU appears as amicus). *Cf.* Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference?: The Supreme Court and Judicial Review*, 57 POL. RES. Q. 131, 137–38 (2004) (finding mixed results on whether the Solicitor General as amicus influences judicial behavior by certain members of the Rehnquist Court).

[47] *See* SUP. CT. R. 37.4.

[48] Of course, it is also possible that amicus briefs influence the Court's decision yet are not cited in the Court's opinion. Kelly Lynch argues that citation frequency studies therefore potentially underestimate the impact of amicus briefs. She suggests that interviews with former Supreme Court clerks could provide more accurate information about the impact of amicus briefs on the Court's decisions. *See* Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 38 (2004). Based on her interviews, she concluded: (1) that amicus briefs were most useful when they involve highly technical and specialized areas of law, (2) that amicus briefs were more likely to be read when fewer were filed, (3) that the Solicitor General's brief was always considered more seriously than other amicus briefs, but that greater weight was also given to the briefs of certain entities such as the ACLU, NAACP Legal Defense Fund, the American Medical Association, and other professional organizations, and (4) that the briefs by prominent academics or reputed attorneys were often given more attention. *Id.* at 41–56.

In a relatively small qualitative study of amicus briefs, Andrew Morriss concluded that they "exert relatively little obvious influence on the Court." Morriss, *supra* note 1, at 826. Morriss, however, only examined four employment discrimination cases during the 1997–1998 term, a small sample from which to draw conclusions. Nonetheless, he was very critical of the quality of these briefs because he viewed them as engaging in

the value of qualitative studies of a more recent era of Supreme Court decisions.[49]

If one uses qualitative tools to assess impact, one still needs an explanation of *how* amici filings *might* influence judicial behavior so that hypotheses can be tested. Kearney and Merrill have posited three ways that amicus briefs might influence judicial behavior. First, briefs that are of high quality and "provide new, legally relevant information to the Court beyond that supplied by the parties" might influence judicial behavior if one considers Justices to be neutral arbiters searching for the most appropriate legal principles.[50] Under that model, one would expect a Justice to cite an amicus brief for a proposition not found in the main brief. Spriggs and Wahlbeck used quantitative tools to conclude that amicus briefs did not have that kind of influence during the 1992 term,[51] but researchers have not examined that hypothesis using qualitative tools for a particular Justice in close cases.

Second, amicus briefs by the Solicitor General or other institutional actors such as the states might influence judicial behavior if one believes that Justices adjust their decisions based on their perception of how other institutional actors are likely to respond to their decisions.[52] As mentioned above,[53] the Court's permissive rules with respect to filings by governmental actors suggest that the Court values amicus briefs by governmental entities. Qualitatively, to confirm or reject this hypothesis one should look for

---

lobbying activity rather than high quality legal arguments. He concluded: "[A]mici briefs will continue to pour into courts as various interest groups seek to lobby courts to gain what they cannot or choose not to seek from the political branches. Such lobbying impoverishes legal discourse and, thus, impoverishes us all." *Id.* at 911.

[49] He concludes with this observation:

> An additional limitation of this analysis is the fact that it only examines amicus activity during the Warren and Burger courts. It is possible that the recent and dramatic increases in amicus filings in the Supreme Court have resulted in a 'routinization' of how amicus briefs are considered by the Court. In other words, the fact that amicus participation is now present in almost every case heard by the Court may have changed how these briefs are taken into account. Undoubtedly, this is an area ripe for examination, and is likely to be a subject of both theoretical and empirical interest to scholars of both interest groups and the judiciary. Thus, a resurgence of quality scholarship on amicus participation may be of benefit to scholars of both the judiciary and interest groups, and will likely lead us toward a better understanding of the motivations and impact of friends of the court.

Collins, *supra* note 31, at 829.

[50] Kearney & Merrill, *supra* note 4, at 778.

[51] *See* Spriggs & Wahlbeck, *supra* note 34.

[52] Kearney & Merrill, *supra* note 4, at 778–79.

[53] *See supra* notes 25–26.

evidence that the citation to an amicus brief reflected sensitivities to the politics of other institutional actors.

Third, amicus briefs that reflect broad public opinion might influence judicial behavior if one believes that Justices decide cases in accordance with the desires of the organized groups that have an interest in the controversy.[54] One could find support for this hypothesis if a Justice was more likely to cite well-respected rather than fringe organizations, because the well-respected organization might be considered a more centrist representative of the electorate.

These issues are some of the factors that I considered as I reviewed Justice O'Connor's opinions for the Court. By reading the majority opinions closely in constitutional law cases in which she cited amicus briefs, I tried to discern: (1) whether her relatively frequent citations to the Solicitor General's briefs signal that his views *influenced* her decision, (2) whether she tended to cite briefs for *novel legal arguments*, (3) whether certain types of organizations were more likely to be cited, (4) whether briefs that were cited for specialized facts appeared to influence her decision, and (5) whether her citation of amicus briefs indicated respect or independence rather than influence.

This Article is limited to an investigation of the citation pattern of Justice O'Connor and might not generalize to other Justices. Nonetheless, it can provide us with a good snapshot of one of the most influential Justices of the last decade and, in particular, possibly give insight into the role of the "swing Justice" on the Supreme Court when that Justice authors the majority opinion of the Court.

II. CITATIONS TO AMICUS BRIEFS

A. *Introduction*

There were 106 cases in the constitutional law category in which Justice O'Connor wrote the opinion for the Court and at least one amicus brief was filed.[55] Although causation is always difficult to prove, it would appear that some amicus briefs in constitutional law cases have had an influence on Justice O'Connor consistent with the intentions of the authors of those briefs, who most likely viewed O'Connor as an important "swing vote."[56] The most

---

[54] Kearney & Merrill, *supra* note 4, at 786. Under this model, judges do not have fixed beliefs. Instead, they seek "to satisfy the political demands of the best-organized groups appearing before them." *Id.* at 783.

[55] *See* Appendix A.

[56] The *Harvard Law Review* reports statistics for the Justices each term. These statistics reflect that Justice O'Connor was more likely to vote with the majority than any

notable example is *Grutter v. Bollinger*,[57] in which nearly 100 briefs were filed.[58] Justice O'Connor delivered the opinion of the Court, citing eight amicus briefs to support arguments in her opinion. Her use of those briefs supports both the specialized facts and public support theories for amicus citations.

First, she cited the brief for Judith Areen et al. and the brief for Amherst College et al. to make the reliance argument that "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."[59] This reliance-based argument is similar to an argument she accepted in *Planned Parenthood v. Casey*[60]: that women had come to rely on the availability of abortion since *Roe v. Wade*.[61] It would have been difficult for the respondent in *Grutter* to have made that argument without the support of public and private universities across the country; the amicus briefs served that purpose.

Second, O'Connor cited five amicus briefs in support of the conclusion that the Michigan Law School had a compelling interest in diversity. She cited the brief by the American Educational Research Association et al. for the proposition that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly

---

other member of the Court. For example, in the 2003 term, Justice O'Connor voted with the majority in 45 of 53 (84.9%) non-unanimous cases, and she agreed with the disposition of the case in 48 of 53 (90.6%) non-unanimous cases. *See* 118 HARV. L. REV. 497, 502 Table I(D) (2004). Those were the highest percentages on the Court. The statistics from the 2003 term reflect her pattern throughout her tenure on the Court as reported in the *Harvard Law Review* for the previous six terms. *See The Statistics*, 117 HARV. L. REV. 480, 484 Table I(D) (2003) (83.0% joining Court's opinion; 87.2% agreeing in the disposition of the case); 116 HARV. L. REV. 453, 457 Table I(D) (2002) (74.5% joining Court's opinion; 80.4% agreeing in the disposition of the case); 115 HARV. L. REV. 539, 543 Table I(D) (2001) (81.8% joining Court's opinion; 83.6% agreeing in the disposition of the case); 114 HARV. L. REV. 390, 394 Table I(D) (2000) (84.0% joining Court's opinion; 92.0% agreeing in the disposition of the case); 113 HARV. L. REV. 400, 404 Table I(D) (1999) (82.1% joining Court's opinion; 85.7% agreeing in the disposition of the case); 112 HARV. L. REV. 366, 370 Table I(D) (1998) (75.0% joining Court's opinion; 78.8% agreeing in the disposition of the case). Prior to the 1997 term, the *Harvard Law Review* does not provide this data for individual Justices. Other than the 1997 term, in which Rehnquist and Kennedy had higher rates of voting with the majority (81.1% and 84.9% respectively), O'Connor was consistently the Justice most likely to vote with the majority.

[57] 539 U.S. 306 (2003).

[58] *See* Appendix A.

[59] *Grutter*, 539 U.S. at 323.

[60] 505 U.S. 833, 854–56 (1992).

[61] 410 U.S. 113 (1973).

diverse workforce and society, and better prepares them as professionals.'"[62] She then turned to three briefs from the private and public work sector to conclude that these theoretical arguments are "real."[63] In particular, she appears to have been influenced by the brief from "high-ranking retired officers and civilian leaders of the United States military," citing and quoting from their brief for an entire paragraph.[64] She completed her discussion of the law school's compelling interests by citing the brief for the United States as well as the Brief for the Association of American Law Schools.[65]

The citation to the brief authored by the Solicitor General is not surprising; most commentators agree that the Solicitor General is often particularly influential during Supreme Court argument.[66] In *Grutter*, however, the Solicitor General supported the petitioner, Barbara Grutter, whose position O'Connor rejected. O'Connor cited the Solicitor General's brief twice. First, she cited it in support of her compelling interest analysis, noting that the United States agreed that it was of "paramount" importance to ensure "that public institutions are open and available to all segments of American society."[67] Second, she cited the Solicitor General's brief to recognize a race-neutral alternative suggested by the United States.[68] But she then rejected that race-neutral alternative because the "United States does not, however, explain how such plans could work for graduate and professional schools."[69] Although the Solicitor General took an overall position contrary to that of O'Connor, she used his brief strategically to support part of her argument and rejected other aspects of his brief which did not support her conclusion. The Solicitor General's brief did not *influence* O'Connor's opinion in the direction desired by the Solicitor General; instead, the citation reflected her respect for his position.

The brief by the military officers, by contrast, does appear to have influenced O'Connor's position. O'Connor portrayed their position in positive terms for a paragraph of her opinion. In addition, the military amicus brief played a central role during the oral argument when Justice Ginsburg brought it to the attention of petitioner's counsel.[70] After Ginsburg's mention

---

[62] *Grutter*, 539 U.S. at 330 (quoting Brief for American Educational Research Association et al. as *Amici Curiae*).

[63] *Id.* at 330–31.

[64] *Id.* at 331 (citing and quoting from Brief for Julius W. Becton, Jr. et al. as *Amici Curiae*).

[65] *Id.* at 331–32.

[66] *See supra* note 46.

[67] *Grutter*, 539 U.S. at 331–32.

[68] *Id.* at 340.

[69] *Id.*

[70] Justice Ginsburg posed the following question to petitioner:

of the amicus brief, the Solicitor General responded to the arguments made in the military brief during his oral argument.[71] Valuable oral argument time was therefore devoted to the views expressed in the military amicus brief. Ginsburg may have mentioned the military brief strategically during oral argument in order to increase the chance that it would be considered seriously by O'Connor. The extensive citation in O'Connor's opinion suggests that Ginsburg's strategy may have been successful and that the brief did play an influential role in O'Connor's judicial behavior.

It is also interesting to consider what briefs O'Connor did *not* cite in her opinion. Sixty-nine amicus briefs were filed in *Grutter* in support of the University of Michigan.[72] Fifteen briefs were filed in support of Barbara Grutter.[73] O'Connor cited nine of these briefs. She did *not* cite any briefs that explicitly mentioned race, gender, religion, or national origin in the name of the organization represented by the brief. Instead, she cited briefs on behalf of more neutral-sounding organizations. Although most commentators recognize that amicus briefs have increasingly taken on the role of advocate, and certainly each of these briefs can be described as engaging in advocacy, O'Connor cited them for real world facts rather than political or legal arguments. These factual arguments, however, could have been found in briefs written on behalf of organizations that name themselves in explicit racial terms, like the Black Law School Graduates Committee, the Black Women Lawyers' Association of Greater Chicago, Michigan Black Law

---

> Mr. Kolbo, may I call your attention in that regard to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race. . . . What is your answer to the argument made in that brief that there simply is no other way to have Armed Forces in which minorities will be represented not only largely among the enlisted members, but also among the officer cadre?

Transcripts of Oral Argument at 7, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). Following Justice Ginsburg's question, other Justices further pursued this line of inquiry. Discussion of this issue lasts five of the eighteen pages of Mr. Kolbo's argument—more than one-fourth of his oral argument. *Id.* at 7–11. The Solicitor General also engaged in oral argument. In the first question from the Court, Justice Stevens asked him to comment on the strength of the retired military officers' brief. Justice Ginsburg then asked him an additional question about the military's position on affirmative action. Finally, Justice Kennedy asked questions about the military's position. Of the Solicitor's ten pages of oral argument, four were devoted to discussion of issues raised in the military amicus brief. *Id.* at 19–22. Hence, the retired military officer's brief played a dominant role during the *Grutter* oral argument.

[71] *Id.* at 19–22.

[72] *See* University of Michigan Admissions Lawsuits, http://www.umich.edu/~urel/admissions/legal/amicus.html (last visited Mar. 11, 2007).

[73] *Id.*

Alumni Society, NAACP Legal Defense & Educational Fund, National Coalition of Blacks for Reparations in America, and the United Negro College Fund.[74] Justice Ginsburg, by contrast, in her concurrence, cited a brief by the National Urban League,[75] which would be considered a less "neutral" authority than those cited by O'Connor.[76] Even the National Urban League, however, does not use a racial descriptor in its title. "Neutral" sounding authorities may therefore be more acceptable to many Justices, including both O'Connor and Ginsburg.

O'Connor's choice of which amicus briefs to cite would not appear to have been influenced by her consensus-building role in the case. The other Justices who joined her opinion—Ginsburg, Souter, Breyer, and Stevens—are associated with the "liberal" wing of the Court and would likely be comfortable being associated, for example, with the NAACP LDF. Indeed, Ginsburg herself cited the National Urban League in her concurrence. Thus, I conclude that it is O'Connor's temperament, rather than that of her associates, which caused her to avoid citing any of the "politicized" groups that filed amicus briefs in this case.

The *Grutter* case, however, is only one constitutional law decision in which amicus briefs appeared to play a prominent role and may have influenced a decision authored by Justice O'Connor. Do other cases reflect the role that amicus briefs played in that case? Is O'Connor more likely to cite the Solicitor General to *deflect* rather than agree with his views? Is she generally unlikely to cite well-known political groups in briefs?

B. *Other Constitutional Law Cases with Amicus References*[77]

Of the 125 constitutional law cases in which O'Connor wrote the opinion for the Court, she cited an amicus brief in 32 cases. Of these 125 cases, amicus briefs were filed in 106 of them (84%). Hence, she cited amicus briefs in 32 of the 106 cases (30.2%) in which amicus briefs were submitted.[78] She was no more likely to cite an amicus brief in a close case

---

[74] *Id.*

[75] *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring).

[76] *See* National Urban League Mission Statement, http://www.nul.org/mission.html (last visited Mar. 11, 2007) (describing the mission of the National Urban League as devoted to empowering African Americans to enter the economic and social mainstream).

[77] Appendix A describes these cases in greater detail on an individual basis. It details the Justices who joined O'Connor's opinion, the legal theory at issue, and the ways in which amicus briefs were cited in the O'Connor opinion. More detail is offered for cases that cite amicus briefs than other cases.

[78] O'Connor's citation of amicus briefs seems pretty typical for a Supreme Court Justice. One study found that approximately 35% of Supreme Court opinions written between 1985 and 1995 contained a reference to at least one amicus brief. *See* Robert W.

(one vote margin) than in a case decided by a wider margin. Of the 40 cases in which amicus briefs were filed and that were decided by a one-vote margin, she cited an amicus brief in 11 cases (27.5%)—roughly her citation rate to amicus briefs in all cases in which amicus briefs were filed. These cases can provide insight on the five issues discussed in Part I: (1) influence of the Solicitor General, (2) citations for novel legal arguments, (3) types of organizations most likely to be cited, (4) citations for specialized facts, and (5) use of briefs for purposes other than influence.

1. *Influence of Solicitor General*

Justice O'Connor cited the Solicitor General's brief in eleven cases, but she only agreed with the Solicitor General's argument in two of the cases.[79] A good example of the way O'Connor cited the Solicitor General's brief can be found in *O'Connor v. Ortega*,[80] a case involving the constitutionality of a search and seizure of an employee's desk and file cabinets. In a ruling from the bench, the district court concluded that the entry into the office was justified by the "need to secure the office" so that the search was "reasonable."[81] The court of appeals reversed and remanded the case for a determination of damages.[82] The case presented two questions: (1) whether a public employee had a reasonable expectation of privacy in his office, desk,

---

Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 883–84 (2001). That figure counts a citation by *any* Justice. Justice O'Connor, alone, cited amicus briefs in 30% of her opinions for the Court in constitutional law cases.

[79] *See* Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (citing Solicitor General but rejecting his suggestion); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 546–47 (2001) (citing Solicitor General but rejecting his view); Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 354–56 (2000) (citing Solicitor General's conflicting positions and adopting his view from an earlier case); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 676–79 (1995) (citing but rejecting legal test suggested by Solicitor General); Voinovich v. Quilter, 507 U.S. 146, 156 (1992) (citing Solicitor General and agreeing with his conclusion); Florida v. Bostick, 501 U.S. 429, 437 (1991) (citing Solicitor General and agreeing with his conclusion); Boos v. Barry, 485 U.S. 312, 327 (1988) (only cites Solicitor General in part of decision in which she disagrees with his argument); Turner v. Safley, 482 U.S. 78, 95 (1987) (citing brief of Solicitor General to deflect argument made by dissent); O'Connor v. Ortega, 480 U.S. 709, 717–18 (1987) (citing Solicitor General's legal argument but adopting a more middle-ground approach); Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (citing Solicitor General for his legal position, which she rejects); Strickland v. Washington, 466 U.S. 668, 694 (1984) (citing Solicitor General for the legal position he recommended but not adopting his argument).

[80] 480 U.S. 709 (1987).

[81] *See* Brief for the United States as Amicus Curiae Supporting Petitioners, at *4, O'Connor v. Ortega, 780 U.S. 709 (1987) (No. 85-530), 1986 WL 727381 [hereinafter Brief for the United States].

[82] *See* O'Connor v. Ortega, 764 F.2d 703, 707 (9th Cir. 1985).

and file cabinets at his place of work, and (2) the appropriate Fourth Amendment standard for a search conducted by a public employer if the employee had a reasonable expectation of privacy.[83]

The Solicitor General took a more extreme position with respect to the first issue than was adopted by the district court or the court of appeals. Solicitor General Charles Fried argued that "A Government Employee Has No Reasonable Expectation That A Supervisor Or Co-Employee Will Not Enter His Office In The Course Of Performing Employment-Related Duties."[84] Although the district court had ruled for the state hospital, it did not conclude that an employee can *never* have a reasonable expectation of privacy against a search of his office by his employer. Instead, the district court found that the need to secure the property as a part of the investigation of the employee's activities justified the search. The court of appeals also found that an employee can have a reasonable expectation of privacy and concluded that the employee had such an expectation under the circumstances of the case, reversing the district court. Thus, neither court below had taken the absolutist position of no expectation of privacy argued by the Solicitor General.

In O'Connor's opinion for the Court, she reversed the court of appeals with respect to its determination of the second issue but affirmed with respect to its determination of the first issue. She acknowledged that the Solicitor General had argued that "public employees can never have a reasonable expectation of privacy in their place of work" but disagreed with that conclusion.[85]

With respect to the second issue, the Solicitor General argued that a reasonableness, rather than probable cause, standard should apply to determining whether a search violated the Fourth Amendment. Under a reasonableness standard, the Solicitor General argued that the Ninth Circuit's decision should be reversed because the search was clearly reasonable as part of an investigation of employment-related misconduct. O'Connor did not cite the Solicitor General in this part of her opinion but did generally adopt the reasonableness standard articulated by the Solicitor General. Nonetheless, she did not apply that standard to the facts of the case, instead concluding that a remand was appropriate to the district court for it to apply the law to the facts.[86] She therefore did not provide the broad ruling in favor of the state hospital sought by the Solicitor General on this issue.

The *Ortega* opinion is reflective of how O'Connor tends to cite the Solicitor General. She cited the Solicitor General to acknowledge her

---

[83] *Ortega*, 480 U.S. at 711–12.

[84] Brief for the United States, *supra* note 81, at *8.

[85] *Ortega*, 480 U.S. at 717.

[86] *Id.* at 726, 729.

disagreement with his position but then failed to cite him when she generally agreed with his legal argument. In addition, she disagreed when he offered what may be characterized as an "extreme" view but agreed when he offered a more moderate position.

This citation pattern reflects three general trends in O'Connor's use of citations: (1) she cites the Solicitor General as a signal of respect even when she disagrees with his position, (2) she tends to agree with moderate rather than extreme positions, and (3) she rarely cites a brief to show she agrees with its legal argument.

The Solicitor General may be an unusual amicus because of the expectation that the Court will agree with his position. Although, as I will discuss below, O'Connor often cited amicus arguments to deflect them. This pattern is particularly common with respect to the Solicitor General.

Another unusual feature of the Solicitor General is that he is more likely to file as an amicus than any other entity. Although I have not been able to investigate the frequency with which the Solicitor General filed amicus briefs in comparison with the frequency with which he is cited for my entire data set, I was able to engage in that comparison for 1997 to 2005, when the Solicitor General made its briefs available electronically on its database.[87] For that time period, the Solicitor General filed amicus briefs in five cases and was cited in three of those cases in which O'Connor wrote an opinion.[88]

Because it is hard to generalize from five cases, I looked more broadly at the Solicitor General's participation in constitutional law and statutory cases for that time period. Appendix B summarizes my results for cases in which the Solicitor General filed an amicus brief and Justice O'Connor participated in the Court's decision for the 1997 through 2005 terms. This category consists of 196 cases; 123 involved statutory, copyright, or treaty issues, and 73 involved constitutional law issues.

I divided the cases into four categories: (1) those in which the Solicitor General, O'Connor, and the Court took the same position, (2) those in which the Solicitor General and the Court took the same position, but O'Connor dissented, (3) those in which the Solicitor General and O'Connor took the same position, and O'Connor dissented, and (4) those in which O'Connor and the Court took the same position, but the Solicitor General disagreed. To determine the Solicitor General's position, I primarily relied on whether he characterized his position as being for the respondent or the petitioner. There were eleven cases in which the Solicitor General did not style his brief as being on behalf of either party. Nonetheless, the content of the brief was clearly supportive of one position; hence, I categorized those cases based on

[87] *See* Appendix B.

[88] *See* Appendix B.

the substantive content of the brief rather than its appearance.[89] This was too small a subset to warrant special consideration, but it is interesting to note, as a matter of strategy, that the Solicitor General might occasionally seek to appear in the role of a neutral amicus rather than as a strong advocate. The following table summarizes the number of cases in each of these categories:

Positions of O'Connor, Solicitor General, and the Court for 1997–2005:

	Statutory	Constitutional
Category 1: O'Connor, SG, and Court agree	87 (70.7%)	56 (76.7%)
Category 2: SG & Court agree, O'Connor dissents	8 (6.5%)	1 (1.4%)
Category 3: SG & O'Connor agree, O'Connor dissents	2 (1.6%)	4 (5.5%)
Category 4: Court & O'Connor agree, SG disagrees	26 (21.1%)	12 (16.4%)
Total	123	73

These statistics reflect that O'Connor was very likely to agree with both the Solicitor General and the Court in both constitutional law and statutory cases during this time period.[90] However, she was somewhat more likely to

[89] Nonetheless, I also put these cases into a fifth category so the reader can see where I made an individualized assessment rather than relying on the Solicitor General's own characterization of his position. *See* Appendix B. Others may want to consider further why the Solicitor General chooses not to characterize his brief in some cases as being on behalf of one of the parties.

[90] Of course, the cases were filed under a Republican President. Other researchers have found a similar pattern of agreement by O'Connor with the Solicitor General under a Republican President but have found a somewhat lower agreement rate during a Democratic Presidency. *See* Rebecca E. Deen, Joseph Ignagni & James Meernik, *Individual Justices and the Solicitor General: The Amicus Curiae Cases, 1953–2000*, 89 JUDICATURE, Sept.–Oct. 2005, at 68. O'Connor's overall congruence with the Solicitor General during the Reagan administration was 75%, 80% during the George H.W. Bush administration, and 70% during the Clinton administration. *Id.* at 73. These numbers suggest that there may be a modest political component to O'Connor's tendency to agree with the Solicitor General, but the political component appears to be stronger for most of the other members of the Court. For example, Justice Thomas agreed with the George H.W. Bush administration in 83% of cases in which the Solicitor General filed as an amicus curiae but in only 62% of cases under the Clinton administration. *See id.*

agree with the Court (categories 1 and 4) than with the Solicitor General (categories 1 and 3). Despite the likelihood that O'Connor agreed with the Solicitor General (more than 80% of cases), she was most likely to cite the Solicitor General in constitutional law cases to reflect that she *disagreed* with his position. Her citations appeared to reflect her deviation from the default principle—that she agreed with the Solicitor General—so that some explanation was considered appropriate. Because of the large number of cases in which the Solicitor General and O'Connor were in agreement, it is possible that the Solicitor General did sometimes influence her position even though she rarely cited him in cases in which she authored the majority opinion.

O'Connor's citations to the Solicitor General's briefs are also unique in another sense. With respect to other amici, as I will discuss below, O'Connor tended to cite them only for specialized facts rather than legal theories. With respect to the Solicitor General, however, O'Connor cited to his legal arguments. The Solicitor General may therefore have had a higher likelihood of persuading O'Connor on legal issues because of the greater solicitude that she paid to his legal arguments. It would appear she considered his arguments carefully even when she disagreed with him. By extension, she may have also considered his legal arguments carefully in cases in which she does not cite him but agrees with his ultimate position.

This close examination of the Solicitor General's role in the Supreme Court reflects how difficult it is to measure influence. Reference to citations alone would suggest that O'Connor rarely agreed or was influenced by the Solicitor General. A broader perspective, in which one examines how frequently she agreed with a Republican Solicitor General, suggests that the Solicitor General may frequently have influenced her position. Finally, the observation that she frequently cited the Solicitor General for his *legal position* (even when she disagreed with it) suggests that she treated his legal position with considerable care and respect. Prior studies that only focused on quantitative results could not evaluate the ways in which the Solicitor General was cited or how he may have influenced the Court's decisions.

2. *Citation for Novel Legal Arguments*

O'Connor's citation record does not support the argument that a Justice is most likely to be influenced by a brief that asserts a novel legal theory.[91] In

[91] The lone exception was *Teague v. Lane*, 489 U.S. 288, 299–310 (1989), in which O'Connor discusses the legal issue of retroactivity as urged by the Criminal Justice Legal Foundation, devotes a dozen pages to the issue, and then adopts the view of Justice Harlan. By contrast, O'Connor cited an amicus brief by the Washington Legal Foundation in another case to indicate that the Court would not consider a novel argument raised by that brief but not otherwise found in the case. *See* Davis v. United

general, as discussed below, O'Connor was most likely to cite briefs in support of factual rather than legal arguments. Hence, the use of amicus briefs to support *any* legal argument was rare, let alone a *novel* legal argument.

When the Supreme Court Rules assert that amici briefs are "of considerable help" when they bring "relevant matter to the attention of the court that has not already been brought to its attention by the parties,"[92] it appears that the Court is not referring to new *legal* theories that have not already been considered in the case. Instead, as suggested by Justice Breyer, the rules may be simply contemplating new *technical* or background information that would be helpful to the Court in its deliberations.[93] It is contrary to the notion of fair advocacy for amicus briefs to raise new legal theories at the Supreme Court stage of litigation that were not considered below.[94]

3. *Organizations Most Likely To Be Cited*

O'Connor cited briefs by states in five cases, but only agreed with the state position in one of those five cases.[95] These citations could reflect respect for other branches of government but, again, they show little influence. O'Connor never cited organizations affiliated with extreme political perspectives, but cited well established organizations like the American Association on Mental Retardation in eight cases, and usually cited their briefs for specialized facts even if she disagreed with their conclusion.[96]

States, 512 U.S. 452, 457 (1993). Similarly, in Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 497 (2003), O'Connor declined to consider an issue raised in an amicus brief filed by the State of Florida because it had not been raised in petitioner's brief.

[92] *See* SUP. CT. R. 37.1.

[93] *See* Breyer, *supra* note 30, at 26.

[94] *See, e.g.*, *Hyatt*, 538 U.S. at 497 (not considering issue raised by amicus brief because it had not been raised in petitioner's brief).

[95] *See Id.* (citing brief by State of Florida but declining to consider its argument); Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 313–14 (1998) (citing brief of various states but rejecting their argument); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 308 (1990) (citing brief of Council of State Governments for result contrary to their argument); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 464 (1988) (citing brief of State of North Dakota for legislative history; O'Connor agreed with their position); Turner v. Safley, 482 U.S. 78, 93 (1987) (citing brief of State of Texas with which she agreed).

[96] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (citing brief of non-profit humanitarian relief organization and associations of international journalists and agreeing with their argument); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 125 n.13 (2003) (citing brief filed by business organizations and possibly considering their argument); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 584 (1998) (citing brief filed by

Professional organizations may even find that their work is most likely to be cited if they do not take a formal position in a case but, instead, submit an amicus brief in the posture of a neutral friend of the court. For example, in *Maryland v. Craig*,[97] the American Psychological Association filed a brief in support of neither side in which they discussed the trauma to children of testifying under stressful conditions. During oral argument, the Maryland Attorney General brought the amicus brief to the Court's attention,[98] and O'Connor cited it in her opinion in favor of the State of Maryland.[99] Although the brief was clearly in support of the State of Maryland's statute protecting children from testifying, its arguments were packaged in neutral, professional terms that may have made them more appealing to O'Connor.

This survey of citations of amicus briefs should give public interest organizations pause in using their financial resources to file amicus briefs under their own name, especially if their organization is affiliated with a comparatively extreme political perspective. Briefs by public interest organizations known for their advocacy of a particular political position received no mention by O'Connor whatsoever.[100] Although she authored many opinions dealing with free speech issues on which the ACLU, for

---

various fine arts organizations for a factual point but not adopting its reasoning); Riggins v. Nevada, 504 U.S. 127, 137 (1992) (citing brief for the American Psychiatric Association and agreeing with its conclusion); Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121–22 (1991) (citing brief of the Association of American Publishers and agreeing with its conclusion); Maryland v. Craig, 497 U.S. 836, 855 (1990) (citing brief of the American Psychological Association and agreeing with its conclusion); Penry v. Lynaugh, 492 U.S. 302, 335–39 (1989) (citing American Association on Mental Retardation several times for specialized information about mental retardation but disagreeing with its legal conclusion); Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287 (1984) (citing brief filed by the American Association of University Professors for a legal argument but then not accepting their view). *Cf.* City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000) (citing brief authored by First Amendment Lawyers for factual information but rejecting their conclusion); E. Enter. v. Apfel, 524 U.S. 498, 535 (1998) (citing briefs by labor unions but not accepting their argument).

[97] 497 U.S. 836 (1990).

[98] *See* Transcript of Oral Argument at *18–19, *Craig*, 497 U.S. 836 (No. 89–478), 1990 U.S. TRANS LEXIS 192.

[99] *Craig*, 497 U.S. at 855, 857.

[100] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987) (not citing briefs by ACLU and AFL-CIO on privacy issue); City of Richmond v. J.A. Croson, 488 U.S. 469, 486 (1989) (describing briefs on both sides as offering "rather stark alternatives" that could not "withstand analysis"); Maryland v. Craig, 497 U.S. 836 (1990) (not citing brief by People Against Child Abuse); Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (not citing brief filed by ACLU); Voinovich v. Quilter, 507 U.S. 146 (1993) (not citing brief filed by NAACP Legal Defense and Education Fund); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (not citing briefs filed by ACLU and Planned Parenthood).

example, had a strongly held position, she *never* cited a brief authored by the ACLU.[101] Thus, commentators who have suggested that well-respected organizations like the ACLU or the NAACP LDF can expect to have their briefs seriously considered by the Court can find little support for that view in O'Connor's opinions.

4. *Citations of Specialized Facts*

Citation for specialized facts was by far the most frequent way in which O'Connor used amicus briefs.[102] As discussed above, Justice Breyer has approved of this use of amicus briefs in cases involving scientific or technical information.[103] However, Judge Posner has questioned the legitimacy of this use of amicus briefs in a recent law review article.[104]

The evidence available from oral arguments also supports the specialized facts theory of reliance on amicus briefs. For example, in *Hodel v. Irving*,[105] the Court was presented with the question of the constitutionality of a federal statute that barred inheritance of highly fractionated Indian land. O'Connor cited the brief by one of the tribes for background on the operation of this statute.[106] During the oral argument, there was discussion of how inheritance operated with respect to the fractionated heirship problem. The appellee's attorney referred to the briefs of the Yakima Nation and the Oglala Sioux Tribe to help answer these questions.[107] Although O'Connor did not cite either of those amicus briefs in her opinion for the Court, she did cite another amicus brief by an Indian tribe,[108] signaling that such briefs may have been

---

[101] Twenty-seven of the cases in the study involved First Amendment issues. *See* Appendix A.

[102] *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984) (citing Hawaiian organizations on both sides for specialized facts); Hodel v. Irving, 481 U.S. 704, 712, 718 (1987) (citing brief of tribe for specialized facts but rejecting its legal argument); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 163–64 (1989) (citing brief by well respected litigant whom the Court had invited to participate in the case for specialized facts); Massachusetts v. Oakes, 491 U.S. 576, 580 (1989) (citing brief of Law & Humanities Institute in statement of facts).

[103] *See* Breyer, *supra* note 30, at 26.

[104] *See* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 48 (2005) (criticizing citation of amicus briefs "to fill empirical gaps" because they are "not subject to peer review or other processes for verification").

[105] 481 U.S. 704 (1987).

[106] *Id.* at 712.

[107] *See* Transcript of Oral Argument at *33–34, *Hodel*, 481 U.S. 704 (No. 85–637), 1986 U.S. TRANS LEXIS 12.

[108] *See Hodel*, 481 U.S. at 712 (citing brief by Sisseston-Wahpeton Sioux Tribe).

helpful in bringing specialized facts to the Court's attention.[109] She appears to have been particularly interested in specialized facts in cases involving historical land use issues, as she also cited an amicus brief in a case involving Hawaiian land use history.[110]

The claim against the use of amicus briefs to develop specialized facts is that the arguments may have not been subjected to sufficient cross-examination.[111] O'Connor may have avoided that problem by using briefs whose legal arguments she rejected to develop specialized facts. Proponents of specialized facts may therefore need to be on notice that they may be most likely to see their brief used to support a contrary position.[112]

5. *Citations of Briefs Signaling Something Other Than Influence*

As Appendix A reflects, O'Connor was more likely to disagree than agree with an amicus curiae cited in her opinion. This tendency was not limited to citations to the Solicitor General, as discussed above. In seven cases, she cited amicus curiae other than the Solicitor General but disagreed with their legal positions.[113] In all but one of these cases, the amici she cited

---

[109] During oral argument, the Court has discussed briefs for specialized facts in other cases as well, even if those briefs did not get cited in the Court's opinion. *See* Massachusetts v. Oakes, 491 U.S. 576 (1989) (Massachusetts Attorney General bringing the Riceman Report, which was discussed in various amici briefs, to the Court's attention. *See* Transcript of Oral Argument at *10, *Oakes*, 491 U.S. 576 (No. 87–1651), 1989 U.S. TRANS LEXIS 137).

[110] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

[111] Judge Posner criticized the way O'Connor cites an amicus brief in her dissent in *Kelo v. City of New London*, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J. dissenting). *See* Posner, *supra* note 104, at 96–97. He criticized her for citing a "single study" to justify her position which, in his words, "she made no attempt to evaluate despite its being an advocacy document of questionable objectivity." *Id.* at 96. The study she cited was authored by the Institute for Justice, a conservative public interest firm. *See id.* at 96 n.193. It is interesting to note that O'Connor cited a conservative organization's work in a *dissent* to support a position that they advocated, although I found that she never cited such organizations in her opinions for the Court. She may therefore have been more cautious with such citations when writing an opinion for a majority of the Court than when she authored a dissent for herself alone.

[112] Whether other Justices similarly cite amicus briefs for specialized facts, but reach contrary legal conclusions, is beyond the scope of this Article but warrants further investigation.

[113] *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287 (1984) (citing and rejecting legal argument made by American Association of University Professors); Penry v. Lynaugh, 492 U.S. 302, 335–39 (1989) (citing specialized facts from the American Association on Mental Retardation but disagreeing with its legal conclusion); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 308 (1990) (citing brief for Council of State Governments to support the opposite conclusion); Lunding v. N.Y. Tax

were prestigious, mainstream organizations who she may have wanted to respect through citation. In the one case where the amicus curiae was a labor union, she generically referred to "amici" and did not specify that it was a labor union.[114] Even though she disagreed with its position, she did not appear to feel a sufficient need to demonstrate respect for a labor union by naming it.

Rather than measuring influence, citations to amicus briefs might reflect who a Justice wants to signal is her "friend." Even if O'Connor was influenced by a brief authored by the ACLU, she did not appear to want to signal to the outside world that the brief influenced her decision. Citations may be an effort to control image, and the image chosen by O'Connor was one of a moderate who would not be affiliated with briefs by either end of the political spectrum. Because she often sought middle-ground, pragmatic positions, the briefs by proponents of either side may have failed to persuade her. Nonetheless, it is possible that O'Connor's citations genuinely reflected substantive influence.

Public interest organizations, such as the ACLU, which frequently author amicus briefs, might wonder if my findings suggest that they are wasting their resources on such efforts. Despite O'Connor's failure to cite the ACLU, I cannot conclude their efforts are wasted because they may have focused their efforts primarily on developing legal theories which O'Connor was unlikely to cite. Although arguments that are "far left" or "far right" were not likely to be adopted by O'Connor, they could have helped frame the middle-ground position that she ultimately adopted. The middle might appear to be in a different place if both poles are not discussed in the briefing process. Hence, it might be a risky strategy for public interest organizations not to continue their political advocacy, even if those arguments are unlikely to be cited by a moderate such as O'Connor.

The *Grutter* case appears to be fairly unique with respect to the degree of influence of an amicus brief. Nonetheless, *Grutter* does share some elements found in these other cases. First, O'Connor relied on a mainstream brief, not a brief filed by a public interest organization known for its extreme views in either ideological direction. Second, the brief offered specialized facts or experiences that were relevant to the resolution of the case. Finally, it was filed by a prestigious group of people—retired military officers.

Appeals Tribunal, 522 U.S. 287, 313–14 (1998) (citing brief by states but rejecting their legal argument); E. Enters. v. Apfel, 524 U.S. 498, 535 (1998) (citing generally to amici labor unions but not naming them; disagreeing with their position); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 584 (1998) (citing brief of fine arts organization for facts but not adopting its legal position); City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000) (citing First Amendment Lawyers Association but disagreeing with facts asserted through empirical study).

[114] *See* E. Enters. v. Apfel, 524 U.S. 498, 535 (1998).

III. CONCLUSION

Prior studies have examined the role of amicus briefs in Supreme Court litigation primarily through quantitative tools. Those studies have been valuable in giving the reader a sense of the scope of amicus filings and the relationship between amicus participation and judicial decisions. Quantitative assessments, however, could not capture how Justices rely on amicus briefs in their opinions. Do the opinions themselves provide evidence that these amicus briefs were influential? How are amicus briefs used—to advance legal or factual arguments?

An examination of Justice O'Connor's opinions for the Court in constitutional law cases suggests that amicus briefs are most likely to be cited if they offer specialized facts that support the majority's legal theory. Citation, however, does not necessarily correlate with influence. O'Connor was more likely to cite a brief when she disagreed with its legal conclusion than when she agreed with it. In fact, in some instances she apparently cited a brief for its specialized facts *because* she disagreed with its legal conclusion.[115] The citation to specialized facts could therefore constitute a signal of respectful disagreement rather than influence.

Like quantitative tools, qualitative tools have their limitations. It may be the nature of judicial decision-making that amicus briefs are only likely to be cited in support of facts rather than legal arguments, because precedent is the traditional way to establish legal principles. Further, the failure to cite controversial organizations may be prudent for a Justice in political terms, but may not reflect what arguments ultimately persuaded her to a particular position.

Nonetheless, a qualitative investigation can help confirm some of the theories on amicus briefs. In the case of Justice O'Connor, at least, it confirms both the specialized facts and prestigious filer theories. Her citation of amicus briefs is also consistent with the portrayal of O'Connor as someone searching for middle-ground positions. Her citations to legal arguments from amicus briefs were consistent with her middle-ground approach. Extreme political arguments were not cited. If O'Connor is reflective of the Court in general, then authors of amicus briefs who wish to be cited by the Court might want to focus more of their attention on factual development. They also might want to affiliate themselves with a neutral-sounding professional organization.

---

[115] *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984) (citing briefs on both sides for specialized facts); Hodel v. Irving, 481 U.S. 704, 712 (1987) (citing brief of Sisseton-Wahpeton Sioux Tribe for specialized facts but disagreeing with its legal conclusion).

Although O'Connor's middle-ground approach and avoidance of affiliation with politically extreme groups may have served her well as a Supreme Court Justice, it will be interesting to see if that path is useful for future members of the Court. Such an approach may have harmed Harriet Miers' consideration for the Supreme Court. Harriet Miers stated in 1989 that she "tried to avoid memberships in organizations that were politically charged with one viewpoint or the other."[116] She then went on to state that she would not join the Federalist Society because "it's better to not be involved in organizations that seem to color your view one way or the other for people who are examining you."[117] Miers' lack of "friends," however, appeared to harm her nomination to the Court. By contrast, the strong support that Samuel Alito received from political conservatives may have paved the way for his successful confirmation as an Associate Justice. Politically influential friends may be necessary to a successful confirmation even if, once appointed, a Justice needs to distance herself from those friends. It will be interesting to monitor the use of amicus briefs by Alito to see if he, too, seeks to avoid association with extreme political groups in his opinions for the Court. Citations to amicus briefs can give us a sense of evolving friendship patterns.

[116] Richard W. Stevenson, *White House Dismisses Idea of Withdrawal by Nominee*, N.Y. TIMES, Oct. 14, 2005, at A19.

[117] *Id.*

Appendix A: Constitutional Law Opinions Authored by Justice O'Connor[1]

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Engle v. Isaac, 456 U.S. 107 (1982)	Criminal due process	7–2	2	1	No	
Tibbs v. Florida, 457 U.S. 31 (1982)	Double Jeopardy Clause of Fifth Amendment	5–4	1	0	No	
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	Equal protection	5–4	1	1	No	Dissent cites petitioner amicus brief of alumnae association for "emphatically" supporting single-sex education from which they benefited. *See id.* at 736 n.1 (Powell and Rehnquist dissenting)
South Dakota v. Neville, 459 U.S. 553 (1983)	Fifth Amendment privilege against self-incrimination	7–2	2	1	No	

[1] More detail is offered for cases in which O'Connor cited an amicus brief.

[2] The votes are only approximate because the Court was sometimes split on the issues within a case.

[3] To determine whether amicus briefs were filed in a case, I primarily looked at the results from Westlaw for each case. When it appeared that the Westlaw list was incomplete, I supplemented it with other sources. Nonetheless, I acknowledge that my records do not include every amicus brief filed in every case. The number of amicus briefs listed is only approximate but, hopefully, at least accurately reflects whether amicus briefs were filed in these cases. My records should be accurate as to whether O'Connor *cited* an amicus brief in each of her opinions.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983)	Freedom of the press	8–1 (with White dissenting on one issue)	2	0	No	
Kolender v. Lawson, 461 U.S. 352 (1983)	Due process	7–2	5	1	No	
United States v. Eight Thousand Eight Hundred and Fifty Dollars, 461 U.S. 555 (1983)	Due process	8–1	0	0	No	
Bearden v. Georgia, 461 U.S. 660 (1983)	Equal protection	9–0	0	0	No	
United States v. Place, 462 U.S. 696 (1983)	Fourth Amendment	9–0	1	1	No	
Michigan v. Long, 463 U.S. 1032 (1983)	Fourth Amendment	6–3	2	0	No	
California v. Ramos, 463 U.S. 992 (1983)	Criminal due process	7–2	0	0	No	
McKaskle v. Wiggins, 465 U.S. 168 (1984)	Sixth Amendment	6–3	0	0	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271 (1984)	Free speech and freedom of association rights regarding university employees' rights to "meet and confer" over terms and conditions of employment	6–3 (joined by Burger, White, Blackmun and Rehnquist; Marshall concurred)	1	1	Yes	Cites and rejects legal argument by American Association of University Professors that faculty have a constitutional right to participate in policymaking in academic institutions. *Id.* at 287. Supports tendency to cite mainstream organizations.
Strickland v. Washington, 466 U.S. 668 (1984)	Sixth Amendment right to effective assistance of counsel in death penalty case	7–2 (joined by Burger, White, Blackmun, Powell, Rehnquist and Stevens)	1	3	Yes	Cites and rejects standard proposed by Solicitor General because it "is not quite appropriate." *Id.* at 694. Rules in favor of S.G.'s position but adopts more middle-ground legal test. Supports tendency to cite S.G. and seek middle-ground positions.
Arizona v. Rumsey, 467 U.S. 203 (1984)	Double Jeopardy Clause	7–2	1	0	No	
Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)	Fifth Amendment issue of whether a state land reform act violated the "public use" requirement during an eminent domain proceeding	8–0 (Marshall did not participate)	3	1	Yes	Two citations to briefs from local organizations with expertise on Hawaiian land use history for specialized facts. *Id.* at 232. Supports specialized facts theory.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Allen v. Wright, 468 U.S. 737 (1984)	Article III standing	5–4	1	1	No	Cites amicus brief from another case. *Id.* at 778 n.7.
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)	Fourth Amendment	5–4	0	0	No	
United States v. Hensley, 469 U.S. 221 (1985)	Fourth Amendment	9–0	0	0	No	
Oregon v. Elstad, 470 U.S. 298 (1985)	Fifth Amendment	6–3	0	2	No	
Black v. Romano, 471 U.S. 606 (1985)	Due process	8–0 (Powell did not participate)	0	1	No	
Maryland v. Macon, 472 U.S. 463 (1985)	Freedom of expression	7–2	2	1	No	
Superintendent v. Hill, 472 U.S. 445 (1985)	Due process	6–3	0	2	No	
United States v. Albertini, 472 U.S. 675 (1985)	First Amendment	6–3	0	0	No	
Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985)	Article III	9–0	1	2	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985)	First Amendment	4–3	4	1	No	
Heath v. Alabama, 474 U.S. 82 (1985)	Double Jeopardy Clause	7–2	0	0	No	
New York v. Class, 475 U.S. 106 (1985)	Fourth Amendment	6–3	0	1	No	
Whitley v. Albers, 475 U.S. 312 (1986)	Eighth Amendment	5–4	1	1	No	
Moran v. Burbine, 475 U.S. 412 (1986)	Fifth Amendment privilege against self-incrimination and right to counsel	6–3	3	1	No	But cited ACLU brief from a previous case: *Miranda*. *Id.* at 426.
Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)	First Amendment	5–4	1	4	No	
Crane v. Kentucky, 476 U.S. 683 (1986)	Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment	9–0	0	0	No	

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986)	Indian sovereignty	6–3	1	2	No	
Smith v. Murray, 477 U.S. 527 (1986)	Sixth Amendment right to counsel	6–3	0	3	No	
Cal. Coastal Comm'n. v. Granite Rock Co., 480 U.S. 572 (1987)	Pre-emption issue: whether federal Mining Act of 1872 pre-empted an action by California Coastal Commission	7–2 (joined by Rehnquist, Brennan, Marshall, Blackmun, Powell, and Stevens)	3	3	Yes	Cites Solicitor General; describes brief as making same arguments as the appellee; ruled in favor of appellant. *See id.* at 581. Supports respect for S.G. theory. United States appeared as amicus curiae.

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
O'Connor v. Ortega, 480 U.S. 709 (1987)	Search and seizure: whether Dr. Ortega had a reasonable expectation of privacy in his office	5–4 (joined by Rehnquist, White and Powell; Scalia concurred separately)	3	1	Yes	Cites Solicitor General, *see id.* at 717-18, but disagrees. Court requested Joel Klein to argue the case and file an amicus brief but did not cite his brief except to note an issue was not in the case. *Id.* at 729. Did not cite briefs filed by ACLU or AFL-CIO. Supports respect for S.G. theory. Supports tendency not to cite politicized groups.
Tison v. Arizona, 481 U.S. 137 (1987)	Eighth Amendment	5–4	0	0	No	
Hodel v. Irving, 481 U.S. 704 (1987)	Takings: whether federal statute barring inheritance of highly fractionated Indian land allotments violated Takings Clause	9–0 (Stevens and White concurred separately)	2	1	Yes	Cites brief by Sisseton-Wahpeton Sioux Tribe but uses specialized facts to reach opposite outcome. *See id.* at 712. Did not cite specialized facts found in brief of Yakima Indian Nation which would have supported Court's decision. *See* 1985 WL 670275 (Yakima Indian Nation brief). Supports specialized facts theory.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Turner v. Safley, 482 U.S. 78 (1987)	Free speech and right to marry in prison	5–4 on free speech issue (joined by Rehnquist, White, Powell, and Scalia); 9–0 on marriage issue	0	3	Yes	Texas amicus brief for free speech issue. *Id.* at 93; Solicitor General on impact on federal prison. *Id.* at 93. Supports specialized facts theory; also supports interest in separation of powers and prestigious filers.
Miller v. Florida, 482 U.S. 423 (1987)	Ex Post Facto Clause of Article I	9–0	0	1	No	
Tanner v. United States, 483 U.S. 107 (1987)	Sixth Amendment	5–4	0	0	No	
Forrester v. White, 484 U.S. 219 (1988)	Equal Protection Clause of the Fourteenth Amendment	8–1	1	0	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Boos v. Barry, 485 U.S. 312 (1988)	Free speech: display and congregation issues	5–3 on display issue (joined by Stevens, Scalia, Brennan, and Marshall); 4 vote plurality (joined by Rehnquist, White, and Blackmun) on congregation issue	1	3	Yes	Cites Solicitor General on display clause but disagrees with his conclusion. *Id.* at 327. Although she agrees with S.G. on second issue, does not cite his brief in that part of opinion. Supports respect for S.G. theory. Assistant to the Solicitor General argued on behalf of United States as amicus curiae.
Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)	Free Exercise Clause	5–3 (Kennedy did not participate)	4	3	No	
Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988)	Due Process Clause of the Fourteenth Amendment	8–1	0	0	No	

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Satterwhite v. Texas, 486 U.S. 249 (1988)	Sixth Amendment	8–0 (Kennedy did not participate)	0	1	No	
Clark v. Jeter, 486 U.S. 456 (1988)	Equal Protection and Due Process Clauses of the Fourteenth Amendment	9–0	0	2	No	
Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988)	Equal protection issue: whether state law could permit a nonreorganized school district to charge a fee for transporting students to school	5–4 (joined by Rehnquist, White, Scalia, and Kennedy)	2	2	Yes	North Dakota brief for specialized facts regarding legislative history. *See id.* at 464; reflects respect for another branch of government and use of specialized facts. Attorney General of North Dakota argued as amicus curiae.
Frisby v. Schultz, 487 U.S. 474 (1988)	First Amendment	6–3	4	3	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	Equal protection: constitutionality of city's set-aside ordinance	5–4 (joined by Rehnquist, White, Kennedy, and Stevens but only Rehnquist and White joined part of opinion in which she cites amici)	13	11	Yes	Cites amici generally on both sides of one issue and picks middle-ground, rejecting arguments on both sides. See *id.* at 492. With respect to amici, she said: "We find that neither of these two rather stark alternatives can withstand analysis." *Id.* at 486. Does not refer to political amici by name in opinion. Supports tendency to avoid discussing politicized groups.
Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)	Pre-emption clause: whether state patent statute conflicted with federal patent policy	9–0	2	5	Yes	Cites amicus Charles Lipsey's brief for specialized facts. *Id.* at 163–64; prestigious filer requested by Court to file brief; brief cited for specialized facts. Supports specialized facts and prestigious filers theories.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Teague v. Lane, 489 U.S. 288 (1989)	Sixth Amendment retroactivity of prior ruling about prosecution's use of peremptory challenges during jury selection	7–2 (joined by Rehnquist, Scalia and Kennedy with respect to retroactivity of a Sixth Amendment issue)	1	2	Yes	Cites amicus of Criminal Justice Legal Foundation to raise retroactivity issue. *Id.* at 300; does have significant influence on decision and supports novel argument thesis. Supports novel argument theory.
Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989)	Delegation doctrine	9–0	0	3	No	
Massachusetts v. Oakes, 491 U.S. 576 (1989)	Free speech: constitutionality of statute which prohibited adults from posing or exhibiting nude minors	Plurality opinion (joined by Rehnquist, White, and Kennedy)	2	2	Yes	Cites brief of Law and Humanities Institute for recitation of facts. *Id.* at 580; no sign of influence; use of specialized facts. Supports specialized facts theory.

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Penry v. Lynaugh, 492 U.S. 302 (1989)	Eighth Amendment: whether jury must be permitted to consider evidence of an accused's mental retardation or background of childhood abuse at the time of the imposition of the death sentence	5–4 on two holdings (joined by Brennan, Marshall, Blackmun, and Stevens); 5–4 on three other holdings (joined by Rehnquist, White, Scalia, and Kennedy); unanimous on issue of retroactivity	0	5	Yes	Cites American Association on Mental Retardation for specialized facts. *See id.* at 335, 336, 338–339; but disagrees with their argument. Supports specialized facts and prestigious filer theories.
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)	First Amendment	Various votes	5	2	No	
Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378 (1990)	Religion Clauses of the First Amendment	9–0	1	7	No	

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Balt. City Dep't of Social Servs. v. Bouknight, 493 U.S. 549 (1990)	Fifth Amendment privilege against self-incrimination	7–2	0	6	No	
Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990)	Sovereign immunity: whether PATH had sovereign immunity from suits by private parties to recover damages from injuries incurred during employment	9–0	2	1	Yes	Cites Brief for Council of State Governments to support the opposite legal conclusion. *Id.* at 308. Supports respect for other branches of government.
Bd. of Educ. of the Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226 (1990)	Establishment Clause	8–1	11	4	No	
Am. Trucking Ass'ns. v. Smith, 496 U.S. 167 (1990)	Commerce Clause	5–4	3	5	No	
United States v. Kokinda, 497 U.S. 720 (1990)	First Amendment	5–4	7	0	No	
Lewis v. Jeffers, 497 U.S. 764 (1990)	Eighth Amendment	6–3	0	1	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Idaho v. Wright, 497 U.S. 805 (1990)	Confrontation Clause	5–4	2	2	No	
Maryland v. Craig, 497 U.S. 836 (1990)	Confrontation Clause: whether state's invocation of a procedure for eliciting a child's testimony through a one-way closed circuit television violated confrontation clause	5–4 (joined by Rehnquist, White, Blackmun, and Kennedy)	4	8 and brief by American Psychological Association supported neither party but its arguments clearly supported petitioner	Yes	Cites specialized facts from American Psychological Association. *Id.* at 855; some influence; supports prestigious filer and specialized facts theory.
Parker v. Dugger, 498 U.S. 308 (1991)	Criminal due process	5–4	0	0	No	
Michigan v. Lucas, 500 U.S. 145 (1991)	Sixth Amendment	7–2	0	1	No	
Touby v. United States, 500 U.S. 160 (1991)	Delegation doctrine	9–0	0	0	No	

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Florida v. Bostick, 501 U.S. 429 (1991)	Fourth Amendment: whether police practice of routinely boarding buses to ask for permission to search luggage violated Fourth Amendment	6–3 (joined by Rehnquist, White, Scalia, Kennedy, and Souter)	2	1	Yes	Cites to Solicitor General's brief for the observation that "an individual may decline an officer's request without fearing prosecution." *Id.* at 437. Possible influence; supports specialized facts and prestigious filers theories. Solicitor General argued as amicus curiae.
Gregory v. Ashcroft, 501 U.S. 452 (1991)	Equal protection	5–4	4	2	No	
Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)	First Amendment: constitutionality of a state law which limited profits from the sale of a book about a crime	6–2 (joined by Rehnquist, White, Stevens, Scalia and Souter) (Thomas did not participate)	4	3	Yes	Cites to brief of the Association of American Publishers. *Id.* at 121, for specialized facts rather than to ACLU for that information. Supports specialized facts theory as well as tendency not to cite ACLU.
Hudson v. McMillan, 503 U.S. 1 (1992)	Eighth Amendment	7–2	1	4	No	
Gen. Motors Corp. v. Romein, 503 U.S. 181 (1992)	Contract Clause and Due Process Clause	9–0	2	3	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Yee v. City of Escondido, 503 U.S. 519 (1992)	Fifth Amendment's Takings Clause	9–0	10	10	No	
Riggins v. Nevada, 504 U.S. 127 (1992)	Sixth Amendment: whether the state violated the Constitution by involuntarily administering medication to defendant while on trial	7–2 (joined by Rehnquist, White, Blackmun, Stevens, and Souter)	1	4	Yes	American Psychiatric Association for specialized facts. *Id.* at 137. Supports specialized facts and prestigious filers theories.
Parke v. Raley, 506 U.S. 20 (1992)	Criminal due process	9–0	2	0	No	
Richmond v. Lewis, 506 U.S. 40 (1992)	Eighth Amendment	8–1	0	0	No	
Voinovich v. Quilter, 507 U.S. 146 (1992)	Fourteen and Fifteenth Amendments: constitutionality of a reapportionment plan which resulted in several majority-minority districts	9–0	2	1	Yes	Cites Solicitor General's legal argument. *Id.* at 156; appears to influence. Does not cite brief filed by NAACP Legal Defense and Education Fund. Supports prestigious filer and separation of powers theories; also continues trend of not citing NAACP LDF. Assistant to the Solicitor General argued as amicus curiae on behalf of the United States.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Arave v. Creech, 507 U.S. 463 (1992)	Eighth and Fourteenth Amendments	7–2	0	0	No	
Schiro v. Farley, 510 U.S. 222 (1993)	Double Jeopardy Clause	7–2	0	0	No	
Caspari v. Bohlen, 510 U.S. 383 (1993)	Double Jeopardy Clause	8–1	1	3	No	
Victor v. Nebraska, 511 U.S. 1 (1993)	Criminal due process	9–0 & 7–2	3	0	No	
Waters v. Churchill, 511 U.S. 661 (1993)	Free speech	7–2 (but only 3 joined O'Connor opinion)	4	2	No	
Davis v. United States, 512 U.S. 452 (1993)	Right to counsel: right to counsel in military criminal prosecution	9–0 (Rehnquist, Scalia, Kennedy and Thomas joined O'Connor opinion)	1	2	Yes	Cited brief of Washington Legal Foundation to note Court was not considering their argument because it was an issue of "first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position." *Id.* at 457. Refutes novel argument theory.
Reich v. Collins, 513 U.S. 106 (1994)	Due process	9–0	2	2	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Harris v. Alabama, 513 U.S. 504 (1995)	Eighth Amendment	8–1	0	0	No	
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	Equal protection	5–4	9	7 (& 1 for neither party)	No	
Witte v. United States, 515 U.S. 389 (1995)	Double jeopardy	9–0	0	0	No amicus briefs filed	
Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)	Free speech	5–4	0	0	West-law lists no amicus briefs filed but dissent cites one amicus brief	

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
United States v. Hays, 515 U.S. 737 (1995)	Equal protection	9–0	0	0	No amicus briefs filed	
Bush v. Vera, 517 U.S. 952 (1996)	Equal protection	5–4	4	1	No	
Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996)	Free speech: whether First Amendment protects independent contractors from government retaliation against their speech	7–2 (joined by Rehnquist, Stevens, Kennedy, Souter, Ginsburg & Breyer)	4	1	Yes	Cites Solicitor General but does not adopt his proposed legal standard. *Id.* at 676-78. Does not cite briefs filed by ACLU and Planned Parenthood. Supports prestigious filer theory and supports trend not to cite political organizations. Assistant to the Solicitor General argued as amicus curiae on behalf of the United States.
Agostini v. Felton, 521 U.S. 203 (1997)	Establishment Clause	5–4	4	8	No	

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998)	Privileges and Immunities Clause: whether a state tax code provision discriminated against nonresidents	6–3 (Stevens, Scalia, Souter, Thomas and Breyer)	1	0	Yes	Cites brief by states but rejects their legal argument because "[t]here is no basis for such an assertion in the record before us." *Id.* at 313–14. Supports respect for another branch of government theory.
California v. Deep Sea Research Inc., 523 U.S. 491 (1998)	Eleventh Amendment	9–0	4	2	No	
Eastern Enters. v. Apfel, 524 U.S. 498 (1998)	Takings Clause: constitutionality of a federal statute which had the effect of requiring a coal mining company to pay medical benefits that were not previously required	Plurality opinion (joined by Rehnquist, Scalia and Thomas)	8	5	Yes	Cites to amici, but disagrees. *Id.* at 535; no influence. Does not provide name of amici. Amici were labor unions. Supports view that O'Connor does not name authors who might be seen as political.
Monge v. California, 524 U.S. 721 (1998)	Double jeopardy	5–4	3	1	No	
Dep't of Commerce v. United States House of Representatives, 525 U.S. 316 (1998)	Census Clause	5–4	7	11	No	

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998)	Free speech: constitutionality of a federal statute which allowed NEA to consider standards of "decency"	8–1 (opinion joined by Rehnquist, Stevens, Kennedy and Breyer)	8	3	Yes	Cites brief of fine arts organizations for facts but does not adopt its reasoning. *Id.* at 584. Does not cite ACLU in First Amendment case, continuing trend of not citing political organizations. Citation supports specialized facts theory.
Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)	Sovereign immunity	5–4	4	1	No	No S.G. brief filed
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	Free speech: constitutionality of an ordinance making it illegal to knowingly or intentionally appear in public in a "state of nudity"	Plurality opinion (joined by Rehnquist, Kennedy and Breyer)	5	5	Yes	Cites First Amendment Lawyers Association but disagrees with the facts it asserts through empirical study. *Id.* at 300. Does not cite ACLU in free speech case. Citation supports specialized facts theory. No S.G. brief filed.

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000)	Pre-emption: whether state law could pre-empt federal law in establishing safety standards at railway crossings	7–2 (joined by Rehnquist, Breyer, Kennedy, Scalia, Souter and Thomas)	3	3	Yes	Relies heavily on Solicitor General's amicus brief from an earlier case; disagrees with amicus brief filed in this case. *Id.* at 354–55. Citation supports respect for S.G. but, ironically, O'Connor values opinion of earlier S.G. Assistant to the Solicitor General argued as amicus curiae on behalf of the United States.
Troxel v. Granville, 530 U.S. 57 (2000)	Substantive due process	6–3	11	4	No	No S.G. brief filed.
Miller v. French, 530 U.S. 327 (2000)	Separation of powers	5–4	2	6	No	No S.G. brief filed.
City of Indianapolis v. Edmond, 531 U.S. 32 (2000)	Fourth Amendment	6–3	2	4	No	S.G. brief filed but not cited.
Daniels v. United States, 532 U.S. 374 (2000)	Sentencing	5–4	1	0	No	No S.G. brief filed.
Rogers v. Tennessee, 532 U.S. 451 (2001)	Criminal due process	5–4	0	1	No	No S.G. brief filed.
Penry v. Johnson, 532 U.S. 782 (2001)	Eighth Amendment	6–3	3	3	No	No S.G. brief filed.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	Free speech and pre-emption: constitutionality of Mass. regulations governing advertising and sale of cigarettes, smokeless tobacco and cigars	5–4 (joined by Rehnquist, Scalia, Kennedy and Thomas)	4	7	Yes	Cites Solicitor General but rejects his view. *Id.* at 497. Supports respect for S.G. theory. Acting Solicitor General argued as amicus curiae on behalf of the United States.
Raygor v. Regents of the Univ. of Minnesota, 534 U.S. 533 (2002)	Sovereign immunity	6–3	2	0	No	No S.G. brief filed.
Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002)	Free speech	5–4	4	0	No	No S.G. brief filed.
City of Los Angeles v. Alameda Books Inc., 535 U.S. 425 (2002)	Free speech	3 joined opinion; 5–4 vote	3	5	No	No S.G. brief filed.
Ewing v. California, 538 U.S. 11 (2003)	Eighth Amendment	2 joined opinion; 5–4 vote	4	1	No	S.G. brief filed but not cited.
Lockyer v. Andrade, 538 U.S. 63 (2003)	Eighth Amendment	5–4	5	2	No	No S.G. brief filed

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003)	Equal protection and due process	9–0	3	3 (2 for neither party)	No	No S.G. brief filed.
Virginia v. Black, 538 U.S. 343 (2003)	Free speech	Various votes	3	5	No	S.G. brief filed but not cited.
Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003)	Full faith and credit: whether state court was required to extend full faith and credit on choice of law issue.	9–0	1	3	Yes	Cites brief of states but declines to reach issue discussed in their brief. *Id.* at 497. Disputes novel argument theory. Reflects respect for other branches of government. No S.G. brief filed.
Grutter v. Bollinger, 539 U.S. 306 (2003)	Equal Protection: constitutionality of affirmative action in university admissions	5–4 (joined by Souter, Ginsburg, Breyer and Stevens)	67	15 (4 for neither party)	Yes	Cites brief by retired military officers extensively; cites Solicitor General; cites corporate executives. Solicitor General argued as amicus curiae on behalf of the United States.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)	Free speech: constitutionality of campaign finance rules	Joint opinion with Stevens, 5–4 on two issues (joined by Souter, Ginsburg and Breyer)	16	6	Yes	Cites amici curiae committee for economic development and various business leaders for description of problem. *Id.* at 125 n.13. Supports specialized facts theory. Also supports tendency to cite mainstream rather than politicized groups. No S.G. brief filed.
Fellers v. United States, 540 U.S. 519 (2003)	Sixth Amendment right to counsel	9–0	1	1	No	No S.G. brief filed.
Dretke v. Haley, 541 U.S. 386 (2004)	Sixth Amendment effective assistance of counsel	6–3	2	1	No	No S.G. brief filed.
Nelson v. Campbell, 541 U.S. 637 (2004)	Eighth Amendment	9–0	2	1	No	No S.G. brief filed.
Tennard v. Dretke, 524 U.S. 274 (2004)	Eighth Amendment	6–3	3	0	No	No S.G. brief filed.

APPENDIX A, CONT.

Case Name	General Issue	Vote[2]	Resp. Br.[3]	Pet. Br.	Amicus Br. Cite	Type of Influence, if Any
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)	Due process	6–3 (joined by Rehnquist, Kennedy and Breyer; Souter and Ginsburg concurred separately)	7	10	Yes	Cites brief of media and relief organizations ("AmeriCares") to support argument that "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real." *Id.* at 530. Supports specialized facts theory. Also supports tendency to cite mainstream organizations. No S.G. brief filed.
Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528 (2005)	Fifth Amendment taking	9–0	7	6	No (cited to amicus brief from an earlier case)	No S.G. brief filed.
Bradshaw v. Stumpf, 545 U.S. 175 (2005)	Criminal due process	9–0	1	0	No	No S.G. brief filed.

Appendix B: Agreement Among O'Connor, Solicitor General and Court[4]

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Cedar Rapids Cmty. Sch. Dist. v. Garret F.	1997	526 U.S. 66	stat.	"as amicus curiae" (respondent)	respondent	7–2; with majority, for respondent	Category 5 (and 1)
Roberts v. Galen of Virginia Inc.	1997	525 U.S. 249	stat.	petitioner	petitioner	unanimous; for respondent	Category 2
Humana Inc. v. Forsyth	1997	525 U.S. 299	stat.	respondent	respondent	unanimous; for respondent	Category 1
El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng	1997	525 U.S. 155	treaty	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Pfaff v. Wells Elec.	1997	525 U.S. 55	stat.	respondent	respondent	unanimous; for respondent	Category 1
City of West Covina v. Perkins	1997	525 U.S. 234	const.	for petitioner (city)	petitioner	7–2; with majority, for petitioner	Category 1

[4] This table is complete as of November 29, 2005. Cases that were argued but not yet decided as of that date are not included in this table. Briefs were obtained from the Department of Justice website.

[5] Categories are (1) SG, Court, and O'Connor agree; (2) SG & Court agree; (3) SG & O'Connor agree; (4) Court & O'Connor agree; (5) SG neutral

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Hughes Aircraft Co. v. Jacobsen	1997	525 U.S. 432	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Haddle v. Garrison	1997	525 U.S. 121	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Ariz. Dep't of Revenue v. Blaze Construction Co., Inc. Ltd.	1997	526 U.S. 32	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Kumho Tire Co. v. Carmichael	1997	526 U.S. 137	rules of evidence	petitioner	petitioner	unanimous; for petitioner	Category 1
Davis v. Monroe County Bd. of Educ.	1998	526 U.S. 629	stat.	petitioner	petitioner	5–4; with majority; for petitioner	Category 1
Cleveland v. Policy Mgmt. Sys. Corp.	1998	526 U.S. 795	stat.	petitioner	Vacated & remanded	unanimous, for petitioner	Category 1
Bank of Am. Nat'l Trust & Savings Assoc. v. 203 N. LaSalle St. P'ship	1998	526 U.S. 434	stat.	petitioner	petitioner	6–1 (other concur); with majority, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Unum Life Ins. Co. of America v. Ward	1998	526 U.S. 358	stat.	petitioner in part; respondent in part	Affirmed in part; reversed in part	unanimous	Cannot categorize
Sutton v. United Airlines, Inc.	1998	527 U.S. 471	stat.	petitioner	respondent	7–2; with majority, for respondent	Category 4
Murphy v. United Parcel Serv., Inc.	1998	527 U.S. 516	stat.	petitioner	respondent	7–2; with majority, for respondent	Category 4
Am. Mfrs. Mut. Ins. Co. v. Sullivan	1998	526 U.S. 40	const.	for petitioner	petitioner	with majority on parts I, II; concurrence part II, for petitioner	Category 1
El Paso Natural Gas Co. v. Neztsosie	1998	526 U.S. 473	stat.	supporting reversal (petitioner)	respondent	unanimous	Category 4

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Jefferson County v. Acker	1998	527 U.S. 423	stat.	petitioner	petitioner	Part I & III unanimous; joins 5 on Part II; Part IV not part of 5 votes	Category 1
NCAA v. Smith	1998	525 U.S. 459	stat.	respondent	Vacated & remanded	unanimous	Category 4
Hunt v. Cromartie	1998	526 U.S. 541	const.	petitioner	appellants	5–4; with majority for appellant	Category 1
Wyoming v. Houghton	1998	526 U.S. 295	const.	for petitioner	petitioner	6–3; with majority, for petitioner	Category 1
Kolstad v. Am. Dental Ass'n	1998	527 U.S. 526	stat.	petitioner	Vacated & remanded	Part I unanimous; Part IIA 7 votes (including); Part IIB 5 votes (including)	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Florida v. White	1998	526 U.S. 559	const.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Grupo Mexicano de Desarollo v. Alliance Bond Fund, Inc.	1998	527 U.S. 308	Jurisdic-tion	respondent	petitioner	Part II unanimous; 5 votes (including) Parts I, III, IV	Category 4
Olmstead v. L.C.	1998	527 U.S. 581	stat.	respondent	affirmed in part (for respondent) vacated in part	5 votes (including) Parts I, II, III–A; Part III–B 4 votes (including)	Cannot categorize
Albertson's, Inc. v. Kirkingburg	1998	527 U.S. 555	stat.	respondent	petitioner	unanimous Parts I & III; Part II 7 votes (including)	Category 4

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Los Angeles Police Dep't v. United Reporting Publ'g Corp.	1998	528 U.S. 32	const.	petitioner	petitioner	7–2 with majority; joins Ginsburg's concurrence, for petitioner	Category 1
Friends of the Earth, Inc. v. Laidlaw Env'l. Servs., Inc.	1998	528 U.S. 167	stat.	petitioner	petitioner	7–2 with majority; for petitioner	Category 1
Nixon v. Shrink Mo. Gov't PAC	1999	528 U.S. 377	const.	petitioner	petitioner	6–3; with majority, for petitioner	Category 1
Portuondo v. Agard	1999	529 U.S. 61	const.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1
Rice v. Cayetano	1999	528 U.S. 495	const.	respondent	petitioner	5–4; with majority, for petitioner	Category 4
Illinois v. Wardlow	1999	528 U.S. 119	const.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Christensen v. Harris County	1999	529 U.S. 576	stat.	petitioner	respondent	5 votes, with majority, for respondent	Category 4
Village of Willowbrook v. Olech	1999	528 U.S. 562	FRCP	respondent	respondent	per curiam, for respondent	Category 1
New York v. Hill	1999	528 U.S. 110	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Roe v. Flores Ortega	1999	528 U.S. 470	const.	petitioner	vacated & remanded	6–3; with majority, for petitioner	Category 1
Geier v. American Honda	1999	529 U.S. 861	stat.	respondent	respondent	5–4; with majority, for respondent	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Hill v. Colorado	1999	530 U.S. 703	const.	respondent	respondent	6–3; with majority; joined Souter's concurrence, for respondent	Category 1
Pegram v. Herdrich	1999	530 U.S. 211	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Florida v. J.L.	1999	529 U.S. 266	const.	petitioner	respondent	unanimous; for respondent	Category 4
Slack v. McDaniel	1999	529 U.S. 473	stat.	"as amicus curiae" (respondent)	petitioner	7 votes concur in judgment; with majority, for petitioner	Category 5 (and 4)
Carmell v. Texas	1999	529 U.S. 513	const.	respondent	petitioner	5–4; with dissent, for respondent	Category 3
Wal-Mart Stores, Inc. v. Samara Bros., Inc.	1999	529 U.S. 205	stat.	petitioner	petitioner	unanimous, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Norfolk S. Ry. Co. v. Shanklin	1999	529 U.S. 344	stat.	respondent	petitioner	7–2; with majority, for petitioner	Category 4
Raleigh v. Ill. Dep't of Revenue	1999	530 U.S. 15	stat.	respondent	respondent	unanimous; for respondent	Category 1
Apprendi v. New Jersey	1999	530 U.S. 466	const.	respondent	petitioner	5–4; with dissent, for respondent	Category 3
Reeves v. Sanderson Plumbing Prods., Inc.	1999	530 U.S. 133	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.	1999	530 U.S. 238	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Stenberg v. Carhart	2000	530 U.S. 914	const.	respondent	respondent	5–4; with majority; filed concurrence for respondent	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n	2000	531 U.S. 288	const.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1
City of Indianapolis v. Edmond	2000	531 U.S. 32	const.	petitioner	respondent	6–3; with majority, for respondent	Category 4
Zelman v. Simmons-Harris	2001	536 U.S. 639	const.	"as amicus curiae" (petitioner)	petitioner	5–4; with majority; wrote concurrence, for petitioner	Category 5 (and 1)
Buckman Co. v. Plaintiffs' Legal Comm.	2000	531 U.S. 341	stat.	petitioner	petitioner	7–2; with majority opinion	Category 1
Cook v. Gralike	2000	531 U.S. 510	const.	respondent	respondent	no clear majority; joined Rehnquist's concurrence for respondent	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
E. Associated Coal Corp. v. United Mine Workers of Am.	2000	531 U.S. 57	stat.	respondent	respondent	7–2; with majority, for respondent	Category 1
Illinois v. McArthur	2000	531 U.S. 326	const.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Circuit City Stores, Inc. v. Adams	2000	532 U.S. 105	stat.	respondent	petitioner	5–4; with majority, for petitioner	Category 4
Atwater v. City of Lago Vista	2000	532 U.S. 318	const.	respondent	respondent	5–4; with dissent, for petitioner	Category 2
Egelhoff v. Egelhoff ex rel. Breiner	2000	532 U.S. 141	stat.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Traffix Devices, Inc. v. Mktg. Displays, Inc.	2000	532 U.S. 23	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Shaw v. Murphy	2000	532 U.S. 223	const.	petitioner	petitioner	unanimous; for petitioner	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
City News Novelty, Inc. v. City of Waukesha	2000	531 U.S. 278	const.	respondent	respondent	unanimous; for respondent	Category 1
Texas v. Cobb	2000	532 U.S. 162	const.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1
Great-West Life & Annuity Ins. Co. v. Knudson	2001	534 U.S. 204	stat.	petitioner	respondent	5–4; with majority, for respondent	Category 4
Dir. of Revenue of Mo. v. CoBank ACB	2000	531 U.S. 316	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Buckhannon v. W. Va. Dep't of Health & Human Servs.	2000	532 U.S. 598	stat.	petitioner	respondent	5–4; with majority, for respondent	Category 4
Booth v. Churner	2000	532 U.S. 731	stat.	respondent	respondent	unanimous; for respondent	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Nevada v. Hicks	2000	533 U.S. 353	stat.	respondent	petitioner	6–3; filed concurrence in judgment and concurred in part, for petitioner	Category 4
Palazzolo v. Rhode Island	2000	533 U.S. 606	const.	respondent	affirmed in part; reversed in part	5–4; with majority	Cannot categorize
PGA Tour, Inc. v. Martin	2000	532 U.S. 661	stat.	respondent	respondent	7–2; with majority; for respondent	Category 1
Lujan v. G & G Fire Sprinklers, Inc.	2000	532 U.S. 189	const.	petitioner	petitioner	unanimous; for petitioner	Category 1
C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Ok.	2000	532 U.S. 411	stat.	respondent	petitioner	unanimous; for petitioner	Category 4

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Wharf Holdings Ltd. v. United Int'l Holdings	2000	532 U.S. 588	stat.	respondent	respondent	unanimous; for respondent	Category 1
Atkinson Trading Co. v. Shirley	2000	532 U.S. 645	tax	respondent	petitioner	unanimous; for petitioner	Category 4
Alabama v. Bozeman	2000	533 U.S. 146	stat.	petitioner	respondent	7–2; with majority, for respondent	Category 4
Cedric Kushner Promotions, Ltd. v. King	2000	533 U.S. 158	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Lorillard Tobacco Co. v. Reilly	2000	533 U.S. 525	const.	respondent	affirmed in part; reversed in part	5–4, with majority	Cannot categorize
Correctional Servs. Corp. v. Malesko	2001	534 U.S. 61	const. (primarily)	petitioner	petitioner	5–4; with majority, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
TRW Inc. v. Andrews	2001	534 U.S. 19	stat.	respondent	petitioner	7–2; with majority, for petitioner	Category 4
Toyota Motor Mfg., Ky., Inc. v. Williams	2001	534 U.S. 184	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Tyler v. Cain	2000	533 U.S. 656	stat.	respondent	respondent	5–4; with majority, filed concurrence, for respondent	Category 1
JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.	2001	536 U.S. 88	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Conn. Dep't of Pub. Safety v. Doe	2002	538 U.S. 1	const.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Porter v. Nussle	2001	534 U.S. 516	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Wis. Dep't of Health & Family Servs. v. Blumer	2001	534 U.S. 473	stat.	petitioner	petitioner	6–3; with dissent, for respondent	Category 2

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Rush Prudential HMO, Inc. v. Moran	2001	536 U.S. 355	stat.	"as amicus curiae" (respondent)	respondent	5–4; with majority, for respondent	Category 5 (and 1)
Edelman v. Lynchburg Coll.	2001	535 U.S. 106	stat.	petitioner	petitioner	7–2; filed concurrence, for petitioner	Category 1
Owasso Indep. Sch. Dist. No. I-011 v. Falvo	2001	534 U.S. 426	stat.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency	2001	535 U.S. 302	const.	respondent	respondent	6–3; with majority, for respondent	Category 1
McKune v. Lile	2001	536 U.S. 24	const.	petitioner	petitioner	5 votes concur in judgment; filed concurrence, for petitioner	Category 1
Thomas v. Chicago Park Dist.	2001	534 U.S. 316	const.	respondent	respondent	unanimous; for respondent	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Chevron U.S.A. Inc. v. Echazabal	2001	536 U.S. 73	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.	2001	535 U.S. 722	stat.	petitioner	vacated & remanded	unanimous; for petitioner	Category 1
Nat'l. R.R. Passenger Corp. v. Morgan	2001	536 U.S. 101	stat.	petitioner	affirmed in part; reversed in part	5–4; filed concurrence in part, dissented in part	Cannot categorize
Swierkiewicz v. Sorema N. A.	2001	534 U.S. 506	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Ragsdale v. Wolverine World Wide, Inc.	2001	535 U.S. 81	stat.	petitioner	respondent	5–4, with dissent, for petitioner	Category 3
Mickens v. Taylor	2001	535 U.S. 162	const.	respondent	respondent	5–4; joined Kennedy's concurrence, for respondent	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Yellow Transp., Inc. v. Michigan	2001	537 U.S. 36	stat.	petitioner	petitioner	8–1, with majority, for petitioner	Category 1
Lapides v. Bd. of Regents of Univ. Sys. of Ga.	2001	535 U.S. 613	const.	petitioner	petitioner	unanimous; for petitioner	Category 1
Hope v. Pelzer	2001	536 U.S. 730	const.	petitioner	petitioner	6–3; with majority, for petitioner	Category 1
Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls	2001	536 U.S. 822	const.	petitioner	petitioner	5–4; with dissent, for respondent	Category 2
Christopher v. Harbury	2001	536 U.S. 403	const.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Bell v. Cone	2001	535 U.S. 685	stat.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
City of Columbus v. Ours Garage & Wrecker Serv., Inc.	2001	536 U.S. 424	stat.	petitioner	petitioner	7–2; with dissent, for respondent	Category 2
JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.	2001	536 US 88	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Gonzaga Univ. v. Doe	2001	536 U.S. 273	stat.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1
Barnes v. Gorman	2001	536 U.S. 181	const.	petitioner	petitioner	6–3; with majority, joined Souter's concurrence, for petitioner	Category 1
Barnhart v. Peabody Coal Co.	2002	537 U.S. 149	stat.	petitioner	petitioner	6–3, with dissent, for respondent	Category 2
Sprietsma v. Mercury Marine	2002	537 U.S. 51	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Norfolk & W. Ry. Co. v. Ayers	2002	538 U.S. 135	stat.	petitioner	respondent	5–4; joined Rehnquist's concurrence in part and dissent in part, for respondent	Category 4
Moseley v. V Secret Catalogue, Inc.	2002	537 U.S. 418	stat.	petitioner in part	petitioner	8–1, with majority, for petitioner	Category 1
Conn. Dept. of Public Safety v. Doe	2002	538 U.S. 1	const.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Price v. Vincent	2002	538 U.S. 634	const.	petitioner	petitioner	unanimous for petitioner	Category 1
Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP	2003	540 U.S. 398	stat.	"as amicus curiae" (at the petitioner stage); for petitioner (at merits stage)	petitioner	6–3; with majority, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Ky. Ass'n. of Health Plans, Inc. v. Miller	2002	538 U.S. 329	stat.	respondent	respondent	unanimous; for respondent	Category 1
Dole Food Co. v. Patrickson	2002	538 U.S. 468	stat.	respondent	affirmed in part; dismissed in part	unanimous Part I, II–A, II–C; Part II–B concurred in part & dissented in part	Category 1
Hillside Dairy Inc. v. Lyons	2002	539 U.S. 59	const.	petitioner	vacated & remanded	Parts I & III unanimous; joins 8 on Part II	Category 4
Virginia v. Black	2002	538 U.S. 343	const.	petitioner	affirmed in part; vacated in part and remanded	5–4 on Parts I, II & III; 4 votes & concurrence on Parts IV–V, for petitioner	Category 5 (and 1)

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Scheidler v. Nat'l Org. for Women, Inc.	2002	537 U.S. 393	stat.	"as amicus curiae" (affirm in part; reverse in part)	petitioner	8–1; with majority, for petitioner	Category 5 (cannot categorize)
Meyer v. Holley	2002	537 U.S. 280	stat.	supporting affirmance (respondent)	vacated & remanded	unanimous	Category 4
City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.	2002	538 U.S. 188	const.	petitioner	petitioner (& vacated)	unanimous; with petitioner	Category 1
Archer v. Warner	2002	538 U.S. 314	stat.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Wash. State Dept' of Soc. and Health Servs. v. Keffeler	2002	537 U.S. 371	stat.	petitioner	petitioner	unanimous	Category 1
Clackamas Gastroenterology Assoc., P.C. v. Wells	2002	538 U.S. 440	stat.	supporting petitioner "in part"	petitioner	7–2; with majority, for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Branch v. Smith	2002	538 U.S. 254	stat.	appellees	appellees	unanimous Part I, II; concur in part, dissent in part	Category 1
Chavez v. Martinez	2002	538 U.S. 760	const.	petitioner	petitioner	Joins majority on Parts I & II–A, for petitioner	Category 1
Cook County, Ill. v. United States *ex rel.* Chandler	2002	538 U.S. 119	stat.	respondent	respondent	unanimous	Category 1
Stogner v. California	2002	539 U.S. 607	const.	respondent	petitioner	5–4; with majority, for petitioner	Category 4
Illinois *ex rel.* Madigan v. Telemktg. Assocs., Inc.	2002	538 U.S. 600	const.	petitioner	petitioner	unanimous; for petitioner	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Ewing v. California	2002	538 U.S. 11	const.	respondent	respondent	3 votes with majority; 2 concur in judgment	Category 1
Sattazahn v. Pennsylvania	2002	537 U.S. 101	const.	respondent	respondent	5–4 majority on Part I, II, IV, V; joins on Part III, for respondent	Category 1
Overton v. Bazzetta	2002	539 U.S. 126	const.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Grutter v. Bollinger	2002	539 U.S. 306	const.	petitioner	respondent	5–4; with majority, concurrences/ dissents, for respondent	Cannot categorize
Inyo County, Cal. v. Paiute-Shoshone Indians	2002	538 U.S. 701	stat.	petitioner in part; respondent in part	Vacated & remanded	8 vote majority;1 concur, with majority	Cannot categorize

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Entergy La., Inc. v. La. PSC	2002	539 U.S. 39	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Beneficial Nat'l Bank v. Anderson	2002	539 U.S. 1	stat.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Wiggins v. Smith	2002	539 U.S. 510	const.	respondent	petitioner	7–2; with majority, for petitioner	Category 4
Breuer v. Jim's Concrete of Brevard, Inc.	2002	538 U.S. 691	stat.	respondent	respondent	unanimous; for respondent	Category 1
Virginia v. Hicks	2002	539 U.S. 113	const.	petitioner	petitioner	unanimous; for petitioner	Category 1
Dastar Corp. v. Fox	2002	539 U.S. 23	stat.	petitioner	petitioner	unanimous (Breyer did not participate); for petitioner	Category 1
Black & Decker Disability Plan v. Nord	2002	538 U.S. 822	stat.	petitioner	Vacated & remanded	unanimous	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Gratz v. Bollinger	2002	539 U.S. 244	const.	petitioner	petitioner (in part)	5–4; with majority; filed concurrence as well, for petitioner	Category 1
Frew v. Hawkins	2002	540 U.S. 431	stat.	"as amicus curiae" (petitioner)	petitioner	unanimous; for petitioner	Category 5 (and 1)
Desert Palace, Inc. v. Costa	2002	539 U.S. 90	stat.	petitioner	respondent	unanimous; for respondent	Category 4
Fitzgerald v. Racing Ass'n of Cent. Iowa	2002	539 U.S. 103	const.	petitioner	petitioner	unanimous; for petitioner	Category 1
Am. Ins. Ass'n v. Garamendi	2002	539 U.S. 396	stat.	petitioner	petitioner	5–4, with majority, for petitioner	Category 1
Raytheon Co. v. Hernandez	2002	540 U.S. 44	stat.	petitioner	Vacated & remanded	7 vote majority (Breyer & Souter did not participate)	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Maryland v. Pringle	2002	540 U.S. 366	const.	petitioner	petitioner	unanimous; for petitioner	Category 1
Groh v. Ramirez	2002	540 U.S. 551	const.	petitioner	respondent	5–4; with majority, for respondent	Category 4
Norfolk S. Ry. Co. v. Kirby	2002	543 U.S. 14	admiralty law	"as amicus curiae" (at Petition stage); supporting petitioner (at merits stage)	petitioner	unanimous; for petitioner	Category 1
Kontrick v. Ryan	2002	540 U.S. 443	stat.	respondent	respondent	unanimous; for respondent	Category 1
Household Credit Servs. v. Pfennig	2002	541 U.S. 232	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Till v. SCS Credit Corp.	2002	541 U.S. 465	stat.	"as amicus curiae" (petitioner)	petitioner	4 majority, 1 concur, 4 dissent; with dissent, for respondent	Category 5 (and 2)

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Arizona v. Gant	2002	540 U.S. 963	const.	petitioner	Vacated & remanded	unanimous	Category 1
Illinois v. Lidster	2002	540 U.S. 419	const.	petitioner	petitioner	6 majority votes; concur/dissent in parts, for petitioner	Category 1
Gen. Dynamics Land Sys. v. Cline	2002	540 U.S. 581	stat.	respondent	petitioner	6–3; with majority, for petitioner	Category 4
Cooper Indus. v. Aviall Servs.	2002	543 U.S. 157	stat.	"as amicus curiae" (petitioner)	petitioner	7–1; with majority, for petitioner	Category 5 (and 1)
Jones v. R.R. Donnelley & Sons Co.	2002	541 U.S. 369	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Locke v. Davey	2002	540 U.S. 712	const.	respondent	petitioner	7–2; with majority, for petitioner	Category 4
Engine Mfrs. v. S. Coast Air Quality	2002	541 U.S. 246	stat.	"supporting reversal"	Vacated & remanded	8–1; with majority	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Olympic Airways v. Husain	2002	540 U.S. 644	stat.	respondent	respondent	6–2; with dissent, for petitioner	Category 2
Missouri v. Seibert	2002	542 U.S. 600	const.	petitioner	respondent	4 majority; 1 concur; with dissent, for petitioner	Category 3
Iowa v. Tovar	2002	541 U.S. 77	const.	petitioner	petitioner	unanimous; for petitioner	Category 1
Blakely v. Washington	2002	542 U.S. 296	const.	respondent	petitioner	5–4; with dissent for respondent	Category 3
Yarborough v. Alvarado	2002	541 U.S. 652	const.	petitioner	petitioner	5–4; with majority; filed concurrence as well, for petitioner	Category 1
Hibbs v. Winn	2002	542 U.S. 88	stat.	petitioner	respondent	5–4; with majority, for respondent	Category 4

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Dretke v. Haley	2002	541 U.S. 386	const.	petitioner	Vacated & remanded	6–3; with majority, for petitioner	Category 1
Aetna Health, Inc. v. Davila	2002	542 U.S. 200	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Crawford v. State of Washington	2002	541 U.S. 36	const.	"as amicus curiae" (respondent)	petitioner	9 in judgment; joined Rehnquist's concurrence, for petitioner	Category 5 (and 4)
Republic of Austria v. Altmann	2003	541 U.S. 677	stat.	petitioner	respondent	6 vote majority; with majority, for respondent	Category 4
Pa. State Police v. Suders	2003	542 U.S. 129	stat.	"as amicus curiae" (petitioner)	Vacated & remanded	8–1; with majority	Category 5 (and 1)
KP Permanent Make-Up, Inc. v. Lasting Impression	2003	543 U.S. 111	stat.	petitioner	Vacated & remanded	7 vote majority; with majority	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Yates v. Hendon	2002	541 U.S. 1	stat.	petitioner	petitioner	7 vote majority; with majority, for petitioner	Category 1
Schriro v. Summerlin	2003	542 U.S. 348	const.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1
Johnson v. California	2004	545 U.S. 162	const.	petitioner	petitioner	8–1; with majority, for petitioner	Category 1
Devenpeck v. Alford	2003	543 U.S. 146	const.	petitioner	petitioner	8 vote unanimous; for petitioner	Category 1
Stewart v. Dutra Constr. Co.	2003	543 U.S. 481	stat.	petitioner	petitioner	unanimous (Rehnquist did not participate); for petitioner	Category 1
Florida v. Nixon	2003	543 U.S. 175	const.	petitioner	petitioner	8 vote unanimous; for petitioner	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Hiibel v. Sixth Judicial Dist. Court	2003	542 U.S. 177	const.	respondent	respondent	5–4; with majority, for respondent	Category 1
Jackson v. Birmingham Bd. of Educ.	2002	544 U.S. 167	stat.	petitioner	petitioner	5–4; with majority, for petitioner	Category 1
Bates v. Agrosciences L.L.C.	2003	544 U.S. 431	stat.	respondent	Vacated & remanded	7 vote majority; with majority	Category 4
City of Sherrill v. Oneida Indian Nation of N.Y.	2003	544 U.S. 197	const.	respondent	petitioner	8–1; with majority, for petitioner	Category 4
Illinois v. Caballes	2003	543 U.S. 405	const.	petitioner	Vacated & remanded	6–3; with majority, for petitioner	Category 1
Dura Pharm., Inc. v. Broudo	2003	544 U.S. 336	stat.	petitioner	petitioner	unanimous; for petitioner	Category 1
Am. Trucking Assn's v. Mich. Pub. Serv. Comm'n	2003	545 U.S. 429	const.	respondent	respondent	9 in judgment; with majority, for respondent	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Mid-Con Freight Sys. v. Mich. Pub. Serv. Comm'n	2003	545 U.S. 440	stat.	petitioner	respondent	6–3; with dissent, for petitioner	Category 3
Merck v. Integra Lifesciences	2003	545 U.S. 193	stat.	petitioner	Vacated & remanded	unanimous	Category 1
Spector v. Norwegian Cruise Line	2003	545 U.S. 119	stat.	petitioner	petitioner	5 votes Part I, IIa1, IIb2; no majority IIa2, IIb1, IIb3, IIIb; dissents	Category 2
Muehler v. Mena	2003	544 U.S. 93	const.	petitioner	Vacated & remanded	9 in judgment; with majority, for petitioner	Category 1
Van Orden v. Perry	2003	545 U.S. 677	const.	respondent	respondent	4 majority; 1 concur; dissents, for respondent	Category 1
City of Rancho Palos Verdes v. Abrams	2003	544 U.S. 113	stat.	petitioner	petitioner	8 vote majority; with majority, for petitioner	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
McCreary County, Ky. v. ACLU	2003	545 U.S. 844	const.	petitioner	respondent	5–4; with majority; filed concurrence as well, for respondent	Category 4
Smith v. Massachusetts	2003	543 U.S. 462	const.	respondent	petitioner	5–4; with majority, for petitioner	Category 4
Exxon Mobile Corp. v. Allapattah Servs., Inc.	2004	545 U.S. 546	stat.	respondent	Affirmed in part; reversed in part	5–4; with dissent	Cannot categorize
Ortega v. Star-Kist Foods, Inc.	2004	545 U.S. 546	stat.	petitioner	Affirmed in part; reversed in part	5–4; with dissent	Cannot categorize
Lingle v. Chevron U.S.A. Inc.	2004	544 U.S. 528	const.	petitioner	petitioner	unanimous; for petitioner	Category 1

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Graham County Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson	2004	545 U.S. 409	stat.	respondent	petitioner	6 vote majority (incl.), for petitioner	Category 4
Town of Castle Rock, Colo. v. Gonzales	2004	545 U.S. 748	const.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Wilkinson v. Austin	2004	545 U.S. 209	const.	petitioner	Affirmed in part reversed in part	unanimous	cannot categorize
Mayle v. Felix	2004	545 U.S. 644	const.	petitioner	petitioner	7–2; with majority, for petitioner	Category 1
Grable & Sons Metal Prods., Inc. v. Darue Eng'g and Mfg.	2004	545 U.S. 308	stat.	respondent	respondent	unanimous; for respondent	Category 1
Schaffer v. Weast	2004	546 U.S. 49	stat.	respondent	respondent	6 votes for respondent	Category 1

APPENDIX B, CONT.

Case Name	Term	Cite	Type	SG Support?	Who Prevailed?	O'Connor Vote?	Category[5]
Rompilla v. Beard	2004	545 U.S. 374	const.	respondent	petitioner	5–4; with majority, for petitioner	Category 4
Gonzalez v. Crosby	2004	545 U.S. 524	stat.	respondent	respondent	7–2; with majority, for respondent	Category 1
IBP, Inc. v. Alvarez	2004	546 U.S. 21	stat.	respondent	Affirmed in part; reversed in part	unanimous	Cannot categorize
Lockhart v. United States	2004	546 U.S. 142	stat.	respondent (U.S.)	affirmed	unanimous	Category 1
Ayotte v. Planned Parenthood of N. New Eng.	2004	546 U.S. 320	stat.	petitioner	petitioner	unanimous	Category 1