

HARVARD LAW REVIEW

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IN MEMORIAM: JUSTICE SANDRA DAY O'CONNOR

The editors of the *Harvard Law Review* respectfully dedicate this issue to Justice Sandra Day O'Connor.

*Chief Justice John G. Roberts, Jr.**

In a bench statement delivered when the Supreme Court convened on December 4, 2023, Chief Justice Roberts offered a tribute to Justice O'Connor. We are grateful to the Chief Justice for contributing a version of those remarks to this collection.

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I note that memorial drapery has been placed on the door of our courtroom to signify mourning for Justice Sandra Day O'Connor, who died on Friday, December 1.

Justice O'Connor was born on March 26, 1930. From the start, her home was the Lazy B Ranch in Arizona. Her birth itself was in El Paso, Texas, only because that was the closest full hospital to Lazy B, a mere four hours by train. She was, in her own words, a cowgirl from the Arizona desert. In 1952, she married John Jay O'Connor III by the fireplace in the Lazy B living room.

By then, she had received her B.A. and LL.B. from Stanford University. Although she graduated third in her law school class, just two places from her friend and future colleague William H. Rehnquist, no law firm would offer an interview — let alone a job — to a female lawyer. Instead, she took an unpaid position working for the county attorney of San Mateo, California.

In 1954, John O'Connor was commissioned in the Judge Advocate Corps (JAG) of the Army and went to JAG school in Charlottesville, Virginia. One day, the O'Connors drove up to Washington to see the

* Chief Justice of the United States.

Supreme Court. John commented, erroneously, that “this is the first and last time we’ll ever see the place.”

He was posted to Frankfurt, Germany, where she worked as a civilian attorney for the quartermaster market center. Upon returning to the United States, the O’Connors settled in Phoenix. They welcomed three sons between 1957 and 1962. Future Justice O’Connor opened a law practice and began taking an active role in local politics.

In 1965, Sandra Day O’Connor became an assistant attorney general for Arizona. In 1969, she was appointed to fill a vacant seat in the Arizona State Senate. After winning a full term and then reelection, she was chosen to be Senate Majority Leader, the first woman in the country to hold that position.

In 1975, then-Majority Leader O’Connor left the legislature to become judge of the Maricopa County Superior Court. In 1979, the governor of Arizona elevated then-Judge O’Connor to the Arizona Court of Appeals. She was a founder of both the Arizona Women Lawyers Association and the National Association of Women Judges.

In August 1981, President Reagan nominated Sandra Day O’Connor to the Supreme Court of the United States. She won unanimous confirmation — ninety-nine to zero — thus becoming the first woman on the Supreme Court.

Always putting one foot in front of the other — “just do it,” she would say — she changed the world. Skiing, tennis, golf, bridge, ballroom dancing were all passions she brought to her broad circle of friends. Participants in the morning aerobics class Justice O’Connor founded at the Supreme Court would hear about it if they missed a session. Lunch together for the Justices was in her view mandatory to promote collegiality. With irresistible force of will and constant motion, she yoked the Justices together — and pressed forward.

Justice O’Connor served as a sitting Associate Justice for more than twenty-four years. During her time on the Court, she authored 645 majority, concurring, and dissenting opinions. She retired from the Court on January 31, 2006. For many years, she remained active as a jurist, sitting by designation on several courts of appeals, and in tirelessly promoting civic education.

Our condolences go to her children, extended family, and countless admirers. Justice O’Connor made our country better by her work and her example.



*Justice Stephen G. Breyer**

Some years ago, I was in Paris with Sandra Day O'Connor. We meandered into a gift shop, where she noticed a postcard that featured a Renaissance-era Medici nobleman donning a robe with striped sleeves. She pointed to it and told me we had to send it to Chief Justice Rehnquist, who had recently added five gold stripes to his robes in homage to the Lord Chancellor from Gilbert and Sullivan's *Iolanthe*. Sandra had a sense of humor. She loved traveling and was insatiably curious. And most importantly, she was thoughtful.

Over our decades as colleagues on the bench and friends off of it, I saw her curiosity and thoughtfulness time and time again. Several years after she retired, we were in Luxembourg visiting the Court of Justice of the European Union. One of the European delegates got into a discussion with Sandra about the wisdom of expanding the EU while giving it more power over its constituent countries, something he supported. Sandra listened patiently and then asked him how the EU could both expand and thicken its authority at the same time — why would a country agree to join and then immediately relinquish its authority? He said he didn't see a problem. She replied, "I wouldn't be so sure." This was quintessential Sandra: open minded and respectful, but constantly aware of the importance of balancing competing interests in pursuit of a workable government.

Sandra sought out lessons from abroad but remained a child of the American West. She grew up on the Lazy B Ranch in Arizona with a mélange of animals, including a sparrow hawk named Sylvester. During our time together on the Court, she invited me to come with her to Arizona to visit officials from the Navajo Nation. She eagerly showed me her favorite museums in Tucson. And when she and I visited the Navajo courts, we learned a great deal about the Tribe's unique methods of settlement and dispute resolution. Here, again, her humility and curiosity were at work, as she searched for insights into how the myriad people in our vast country live in harmony.

These traits came through in Sandra's travels around the nation and abroad, of course, but they were most visible in her opinions for the Court. There, she repeatedly emphasized a distinct vision of the Constitution as a pragmatic document — one that lays down a framework for governing a diverse citizenry with profoundly different values and worldviews. In *McCreary County v. ACLU of Kentucky*,¹ for instance, she was part of a 5–4 majority that invalidated displays of the Ten Commandments in two government buildings under the Establishment

* Associate Justice (Ret.), Supreme Court of the United States; Byrne Professor of Administrative Law and Process, Harvard Law School.

¹ 545 U.S. 844 (2005).

Clause.² Explaining her vote, Sandra wrote that the displays sent an “unmistakable message of endorsement” of religion, which risked excluding members of the political community who did not share those beliefs.³ To make sense, she said, the Religion Clauses had to be read as protecting “adherents of all religions, as well as those who believe in no religion at all.”⁴ Otherwise, the Constitution would not “preserv[e] religious liberty to the fullest extent possible in a pluralistic society.”⁵

In *McConnell v. FEC*,⁶ Sandra was part of the coalition that voted to uphold various provisions of the Bipartisan Campaign Reform Act against a constitutional challenge.⁷ Writing with Justice Stevens, she highlighted the importance of corporate campaign donation limits, which prevented “the eroding of public confidence in the electoral process” by ensuring that wealthy entities did not have an outsized influence on elected officials at the expense of the average voter.⁸ “Just as troubling to a functioning democracy as classic *quid pro quo* corruption,” she explained, “is the danger that officeholders will decide issues . . . according to the wishes of those who have made large financial contributions valued by the officeholder.”⁹ This sort of influence, she understood, undermined the diverse interests of the electorate, damaging the public’s faith in our political system — and thus the system’s legitimacy itself.

Sandra’s concerns about legitimacy led her to approach the task of judging with humility: with a preference for incremental rulings over broad pronouncements, a keen sense of the nation’s pulse on contested national issues, and a commitment to the idea that when it comes to judicial opinions, less is often more. When she retired from the Court eighteen years ago, I wrote in these pages that she:

has brought to the Court’s work . . . a particularly strong practical understanding of the institutional role that courts must play in America’s system of government. She has been able to translate that understanding into decisions that help to maintain the kind of nation that the Constitution foresees: a democracy, protective of basic human liberty, equally respectful of each citizen, with power dispersed among different levels and among different branches.¹⁰

² See *id.* at 858.

³ *Id.* at 883 (O’Connor, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)); see also *id.* at 884.

⁴ *Id.* at 884.

⁵ See *id.* at 882.

⁶ 540 U.S. 93 (2003).

⁷ See *id.* at 224.

⁸ *Id.* at 136 (quoting *FEC v. Nat’l Right to Work Comm’n*, 459 U.S. 197, 208 (1982)) (citing *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 440–41 (2001)).

⁹ *Id.* at 153.

¹⁰ Stephen G. Breyer, *A Tribute to Justice Sandra Day O’Connor*, 119 HARV. L. REV. 1242, 1243 (2006).

These words are salient today. It is this practical understanding that made Sandra a sound Justice, and it is what helped her leave the country a better place than she found it.

I will end with another brief anecdote. When Sandra was working on an opinion for a case on which we were in agreement, she would sometimes become worried that I would come to see the issues differently. When this happened, she would march down the hallway to my chambers and tell me, "Stephen Breyer, I hope you are not going to change your mind!" I didn't. I could not have asked for a better colleague or friend, and I miss her dearly.

IN PRAISE OF JUSTICE SANDRA DAY O'CONNOR

*Justin Driver**

When I entered Justice O'Connor's chambers to interview for a position as her law clerk in early 2006, I was initially struck by its surprising decor — less starched Washington, more relaxed southwestern. The Justice warmly welcomed me and invited me to have a seat on the sofa, where I noticed what was then, and surely remains today, the most famous pillow in Supreme Court history. A few years earlier, the Justice's friends had given her the renowned item, embroidered with the following personalized message: MAYBE IN ERROR BUT NEVER IN DOUBT.¹¹ Although the pillow was intended as a gag, it came over time to assume almost totemic significance. Some jaundiced observers viewed the pillow as reflecting Justice O'Connor's own self-applied jurisprudential motto, one that they deemed rather long on certitude and painfully short on reflection.¹²

Upon careful consideration, though, this caricature by pillow bears scant resemblance to the Justice herself. Yes, Justice O'Connor exuded a sort of preternatural self-confidence in both her personal and professional lives. She was, moreover, anything but neurotic, consistently

* Robert R. Slaughter Professor of Law, Yale Law School; former law clerk to Justice Sandra Day O'Connor.

¹¹ See EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* 340 (2019).

¹² See, e.g., Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAG. (June 3, 2001), <https://www.nytimes.com/2001/06/03/magazine/a-majority-of-one.html> [<https://perma.cc/JRC4-FLZD>]. Jeffrey Rosen's *New York Times Magazine* profile popularized the existence of Justice O'Connor's pillow and its totemic meaning. To his credit, Rosen himself demonstrated his willingness to rethink his views of Justice O'Connor. See Jeffrey Rosen, *Why I Miss Sandra Day O'Connor*, NEW REPUBLIC (July 1, 2011), <https://newrepublic.com/article/91146/sandra-day-o-connor-supreme-court-alito> [<https://perma.cc/ABT4-CZ3Y>].

urging that you should do your best on any given task and not squander valuable time agonizing about paths not taken. Armchair psychologists may speculate that her formative years on the Lazy B Ranch instilled the necessity of focusing on the tasks at hand — perhaps one on the horizon — and never those in the rearview mirror.

But Justice O'Connor's quarter-century tenure on the Supreme Court was marked by an admirable willingness to revisit and even to cast doubt on her earlier judicial commitments. For Justice O'Connor, the first thought was not in fact always the best thought. She demonstrated this willingness to reflect and to shift not only in cases involving arcane questions, but in some of the most inflammatory, divisive legal disputes of our time — including abortion and affirmative action.

During Justice O'Connor's confirmation hearings in 1981, eight years after the Court's decision in *Roe v. Wade*,¹³ she spoke of her "own abhorrence of abortion."¹⁴ Her early tenure appeared to reflect that abhorrence, as in 1983 she wrote a sharp dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.*¹⁵ that cast serious aspersions on *Roe*.¹⁶ Less than one decade later, however, Justice O'Connor reversed course to preserve *Roe*. She joined with two other Republican-appointed Justices — Kennedy and Souter — to issue a joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁷ even though many lawyers had firmly believed that *Roe* was marked for extinction. The most familiar line of that trio's controlling opinion in *Casey* does not, truth be told, seem much like it flowed from Justice O'Connor's pen. "Liberty finds no refuge in a jurisprudence of doubt," the *Casey* joint opinion thunderously opened.¹⁸ Not only does the prose sound a bit highfalutin for Justice O'Connor's style, her own vote in *Casey* can be construed as a testament to the importance of doubt. In this sense, Justice O'Connor's vote in *Casey* captured Judge Learned Hand's celebrated notion of liberty. "The spirit of liberty," Judge Hand instructed, "is the spirit which is not too sure that it is right."¹⁹ Justice O'Connor was not too sure that she was right in *City of Akron*, and her pivotal vote in *Casey* preserved not only *Roe* but also the nation's liberty.

To her great credit, Justice O'Connor was also not excessively certain that her initial views regarding affirmative action were correct. In 1989,

¹³ 410 U.S. 113 (1973).

¹⁴ *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 98 (1981) [hereinafter *Nomination of Judge Sandra Day O'Connor*] (statement of then-Judge O'Connor).

¹⁵ 462 U.S. 416 (1983).

¹⁶ *Id.* at 452 (O'Connor, J., dissenting).

¹⁷ 505 U.S. 833 (1992).

¹⁸ *Id.* at 844.

¹⁹ LEARNED HAND, *The Spirit of Liberty*, reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (2d ed. 1953).

she wrote an opinion for the Court condemning an affirmative action business program in Richmond, Virginia, as a violation of the Equal Protection Clause's colorblindness mandate.²⁰ Less than fifteen years later, Justice O'Connor had second thoughts. In 2003, her majority opinion in *Grutter v. Bollinger*²¹ provided a moving testament to the importance of racial diversity in elite strata of American society. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry," she explained, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."²² Justice O'Connor also soundly repudiated the notion that all acts of race-consciousness were indistinguishable. "*Context matters* when reviewing race-based governmental action under the Equal Protection Clause," she explained.²³

It is hardly accidental that in both *Casey* and *Grutter*, Justice O'Connor's second thoughts brought her — and the Supreme Court — into line with long-standing precedents. Adhering to notions of stare decisis, she believed that it would be wrong to eliminate *Roe* and *Regents of the University of California v. Bakke*²⁴ when those decisions had become so deeply embedded in American law and life. Though she rejected any judicial impulse to peddle a grand unified theory of anything, it would be sorely mistaken to view her jurisprudence as an elaborate exercise in ad hocery. To the contrary, Justice O'Connor's veneration of precedent — even though she may well have disagreed with the earlier underlying opinions — marks her as a common law constitutionalist of the first order.²⁵ Justice O'Connor deeply appreciated that one of the Supreme Court's most important functions is to serve as a stabilizing force in American society. She consistently evinced judicial humility by exhibiting profound commitments to both incrementalism and institutionalism.

Candor requires acknowledging that neither *Casey* nor *Grutter* remains good law.²⁶ But it would be misguided to conclude that the recent decisions overturning some of her most important opinions indicate that her achievements have been erased. Rather, Justice O'Connor's lived dedication to the tenets of stare decisis and judicial humility provides a significant model that will long endure. History will remember her as

²⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–99 (1989).

²¹ 539 U.S. 306 (2003).

²² *Id.* at 332.

²³ *Id.* at 327 (emphasis added) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343–44 (1960)).

²⁴ 438 U.S. 265 (1978).

²⁵ See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

²⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overturning *Roe* and *Casey*); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (overturning *Bakke* and *Grutter*).

one of the Supreme Court's preeminent stewards, one who selflessly elevated institutional continuity above individual consistency.

When a senator asked during her confirmation hearings what Justice O'Connor hoped would one day be her legacy, she responded with both humor and insight. "Ah, the tombstone question," she quipped.²⁷ "I hope it says, 'Here lies a good judge.'"²⁸ Note the humility — a *good* judge, not a *great* judge. Paradoxically, though, Justice O'Connor's humble aspiration to be only good enabled her to become great. And on that score, there can be no doubt.

A PERMANENT PLACE FOR JUSTICE O'CONNOR

*Cristina Rodríguez**

I began teaching Constitutional Law in 2005, not long after my clerkship with Justice O'Connor in October Term 2002. At the time, her presence loomed large for Court watchers and law students; she remained a "swing" Justice whose vote litigants and other Justices worked hard to secure. In my early years of teaching, many of her opinions helped anchor course assignments and class discussions. Almost twenty years later, however, much of her jurisprudence has receded into history, her pragmatic and compromising approach to decisionmaking overtaken not only by events, but also by a far more ideological and mission-driven style of judging. Her passing in late 2023 poignantly underscored this evolution I had been sensing for several years, prompting this question: What place ought Justice O'Connor's *oeuvre* have in the long and winding narrative of Supreme Court judging and constitutional history?

During her time on the Court, she shaped numerous doctrinal domains. Her presence on the Court instantly informed its abortion jurisprudence (though not necessarily in the ways many conservatives hoped for when she was appointed),²⁹ culminating in the reaffirmation of *Roe v. Wade*³⁰ in *Planned Parenthood of Southeastern Pennsylvania*

²⁷ Joshua Nevett, *Sandra Day O'Connor: A Ranch Girl Who Became "Queen of the Court,"* BBC NEWS (Dec. 1, 2023), <https://www.bbc.com/news/world-us-canada-54937286> [<https://perma.cc/66TY-EWM2>].

²⁸ *Id.*

* Leighton Homer Surbeck Professor of Law, Yale Law School. Law Clerk to Justice O'Connor, October Term 2002.

²⁹ THOMAS, *supra* note 11, at 135–37 (detailing the machinations during the nomination process surrounding the question of whether she supported abortion rights).

³⁰ 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

v. Casey.³¹ The plurality opinion she coauthored not only solidified the fundamental right to access an abortion, it also offered a rule-of-law account of the Court's relationship to the churning of the political process meant to speak far beyond the specifics of the case.³² These contributions arose from the same voice that repudiated the law's instantiation of stereotypes about gender roles. Both she and Justice Ginsburg made the eradication of outmoded assumptions about women central to our conception of equal protection.³³

Together with Chief Justice Rehnquist, Justice O'Connor revitalized attention to federalism, in opinions that extolled the crucial role of the states within our system of government.³⁴ Her belief in federalism even became a kind of lore. Prospective clerks were advised when asked during interviews — “Which of our cases would you say was wrongly decided?” — to choose anything but a case that came out on the side of the states. Her two major affirmative action opinions — *City of Richmond v. J.A. Croson Co.*³⁵ and *Grutter v. Bollinger*³⁶ — together counseled circumspection about race-conscious state action and appreciation for a central objective of the Fourteenth Amendment: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”³⁷ Her plurality opinion in *Hamdi v. Rumsfeld*³⁸ forcefully rejected the Bush Administration's request for constitutional carte blanche in its waging of the then-called war on terror, even as she left

³¹ 505 U.S. 833, 845–46 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

³² *Id.* at 865–66 (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.”).

³³ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (“Rather than compensate for discriminatory barriers faced by women, MUW’s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”); see also *Nguyen v. INS*, 533 U.S. 53, 89–90 (2001) (O’Connor, J., dissenting) (“This Court has long recognized, however, that an impermissible stereotype may enjoy empirical support and thus be in a sense ‘rational.’ . . . But in numerous [such] cases . . . ‘the Court has rejected official actions that classify unnecessarily and overbroadly by gender’” (citations omitted) (quoting *Miller v. Albright*, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994); *Craig v. Boren*, 429 U.S. 190, 201–02 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975))).

³⁴ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (arguing that interpretation of federal statute should be governed by respect for state sovereignty and the federal-state balance); *New York v. United States*, 505 U.S. 144, 149 (1992) (articulating anticommandeering doctrine and striking down federal statute in light of burdens it imposed on states).

³⁵ 488 U.S. 469 (1989) (announcing application of strict scrutiny to city affirmative action policy and striking it down, noting “[t]he Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race” and “their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking,” *id.* at 493).

³⁶ 539 U.S. 306 (2003).

³⁷ *Id.* at 332.

³⁸ 542 U.S. 507 (2004).

the government flexibility through the application of a balancing test to detainees' due process rights, at a moment of great uncertainty and fear.³⁹

Though many of these precedents still occupy pages in Constitutional Law casebooks, most of them will continue to be whittled down by editors or will go unassigned because they now form a backdrop rather than a foreground. Most dramatically, today's Court has vehemently overruled *Casey* (and *Roe*) in an opinion suggesting that no good arguments existed for those precedents in the first place.⁴⁰ Indeed, that Justice O'Connor's influence over this line of cases might not last became immediately apparent when she was replaced by Justice Alito and the Court upheld a late-term federal abortion law nearly identical to a state law the Court had struck down just a few years before, in an opinion by Justice O'Connor emphasizing the constitutional necessity of protections for the life and health of the mother.⁴¹ Similarly, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,⁴² the current Court has toppled the unsteady balancing act Justice O'Connor sought to strike on affirmative action, denigrating the diversity interest she had declared constitutionally compelling in *Grutter*.⁴³

Others of her important precedents have just lost steam; Justice O'Connor's willingness to significantly curtail Congress's regulatory authority under the Commerce Clause could not even sustain a majority in the Rehnquist days,⁴⁴ and the unrelenting efforts to undermine the Affordable Care Act through the mobilization of various federalism doctrines have not meaningfully blunted the federal government's power. Still other precedents have been supplanted by events; *Hamdi*, for example, emanates from a set of facts and power clashes that are matters of history to today's Constitutional Law students, and the most important questions about the scope of executive power either remain

³⁹ *Id.* at 520–23 (plurality opinion).

⁴⁰ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022) (“*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”).

⁴¹ Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000), with *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁴² 143 S. Ct. 2141 (2023).

⁴³ *Id.* at 2166 (“Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately ‘train[ed]’; whether the exchange of ideas is ‘robust’; or whether ‘new knowledge’ is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?” (alteration in original) (citation omitted) (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173–74 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141)).

⁴⁴ See *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting) (“[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause — nestling questionable assertions of its authority into comprehensive regulatory schemes — rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions . . .”).

largely outside the courts' domain or revolve around the President's authority over the executive branch in the domestic sphere.

The passage of time makes these sorts of developments inevitable. The political nature of constitutional law means that the issues of concern and the law that structures them evolve along with the polity and the other institutions of government. In some sense, foundational principles are always up for grabs. What is more, Justice O'Connor had been retired from the Court for nearly twenty years when she passed away — two decades in which the very idea of a centrist, compromising Justice had become an anachronism to the partisans who dominate the nomination and confirmation processes.

And yet, even as time passes and constitutional regimes turn over, certain Justices remain central figures in the constitutional imagination or the case law canon, either for what they contributed during their time, or because they embodied a particular approach to judging that can be stylized in service of pedagogical or political ends.⁴⁵ Justice O'Connor's opinions and time on the Court offer an opportunity for precisely this sort of rethinking of our recent past, to make it relevant to our ongoing debates, in the classroom and the public sphere, about the role courts should play in enforcing the Constitution. She will always be a visible part of history by virtue of having been the first woman to sit on the Court, and her challenge to stereotypes embedded in law should always be taught. But she should also occupy a place in history as one of the last lawmakers (at least for now) to wear the judicial robe at the High Court. The connection between her political service and her much-vaunted pragmatism as a jurist should indeed be stylized and emphasized as a way of underscoring the fundamentally political nature and challenge of constitutional law.

One way to fashion this legacy would be to emphasize the ways Justice O'Connor constantly sought to reconcile precedent with social change. The passage on *stare decisis* in the *Casey* opinion can be taught time and again, across generations, to stand for one particular conception of the judge's role in relation to politics — that the Court should not blithely do all that it has the power to do, because the settled understandings of any given Court's forebearers, on which people have relied, count for something important in judging. Better to reconcile political conflict across time — as the Court sought to do in *Casey*, or as Justice O'Connor did between *Croson* and *Grutter* — than to throw off old regimes wholesale.

And yet, this understanding of what courts are for and what they do existed in some tension with another aspect of Justice O'Connor's judging: her willingness to pay heed to the social consequences of the Court's decisions and remain attuned to changes in social mores and

⁴⁵ Think Justices Frankfurter and Robert Jackson from the mid-twentieth century; Justices Brennan and Scalia from the late twentieth century.

fundamental values. The *Casey* plurality laid out criteria for determining when past precedent could be overruled — criteria that resisted changes in values as justification for overruling and focused instead on changes in facts or knowledge. But Justice O'Connor did pay attention to changes in values and policy, and her efforts to do so show that the reconciliation of precedent and change need not depend on a grand theory — it can come through creative judging that embraces rather than ignores the tension she herself could not escape.

One of Justice O'Connor's opinions from October Term 2002 reflects precisely this dynamic. In her concurrence in *Lawrence v. Texas*,⁴⁶ she stated at the outset that she had joined *Bowers v. Hardwick*⁴⁷ and would not join the majority opinion resoundingly overruling it.⁴⁸ She instead recognized the dignitary interest being championed in the case through the Equal Protection Clause, fashioning a perhaps less encompassing but still innovative rationale for striking down state bans on same-sex intimacy. In this way, without saying so directly, Justice O'Connor seemed to acknowledge that she had been wrong before, and that she could find a way to admit it, recognizing that times simply had changed. In *Grutter*, too, despite the great skepticism of affirmative action she had expressed in her *Croson* opinion (which led some observers to believe she would vote against the University of Michigan), she grasped the social vision that undergirded the university's policy, linked it to the purposes of the Equal Protection Clause, and sought to make equal protection doctrine consistent.

This approach can be criticized all around. It can be derided by scholars and judges as balancing or freelancing by judges who have no business attending to public opinion or the consequences of their actions.⁴⁹ Obedience to precedent, too, can seem opportunistic or like lip service in the face of pragmatic judging. The virtue of humility is not necessarily associated with a Justice famous for her throw pillow announcing: MAYBE IN ERROR BUT NEVER IN DOUBT. But the effort to reconcile precedent with the realities of the world to which it applies reflects precisely that — the humility of an otherwise self-confident human being to recognize the institutional limits of judging while never allowing the role to exceed a well-calibrated place in our larger social order.⁵⁰

⁴⁶ 539 U.S. 558 (2003).

⁴⁷ 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. 558.

⁴⁸ *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) ("The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional." (citation omitted)).

⁴⁹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part)) (emphasizing that public opinion has no bearing on the Court's decisions).

⁵⁰ See THOMAS, *supra* note 11, at 403–04 (describing the Justice's humility and confidence as borne out in her life).

JUSTICE O'CONNOR AS THE GOOD JUDGE

*Stewart J. Schwab**

Justice O'Connor famously hoped her tombstone could read, modestly but accurately: "Here lies a good judge."⁵¹ Of course, she was much more than that. Justice O'Connor will forever be remembered as the first woman Supreme Court Justice. She fulfilled that role brilliantly, becoming an inspiration for countless women breaking into the law and a role model on treating others with respect and civility, even when disagreeing on policy issues. Justice O'Connor had smarts, grit, poise, boundless energy, and the rare ability to look forward rather than back at past disappointments. She could be stern and rarely revealed her inner thoughts, but she was also fun-loving and generous, and she knew how to connect with and inspire others. Especially in her early years on the Court, Justice O'Connor was under tremendous scrutiny.⁵² Her grace under pressure was phenomenal.

Despite all this praise of Justice O'Connor as a role model, some have been frustrated by her style of judging. She stuck close to the facts, rarely used sweeping prose, and generally favored balancing tests over sharp rules. In this brief remembrance, I reflect on Justice O'Connor's style of judging and whether she passed the good-judge test.

Like every judge, Justice O'Connor had policy instincts that influenced her decisions. Perhaps because of her work in all three branches of Arizona state government (including as majority leader of the State Senate, the first woman anywhere in the country to hold such a position),⁵³ she jealously protected the role of state governments in our federal system. Water rights, a niche issue for most, were important to her. And she was especially attentive to women's rights. She also believed in balance. As the Court turned rightward, it appeared that her decisions became more liberal.

But policy priors are distinct from a style or philosophy of judging. I clerked for Justice O'Connor in her second year on the Court and was

* Jonathan & Ruby Zhu Professor, Cornell Law School. Law Clerk to Justice O'Connor, October Term 1982. I thank Emad Atiq, Michael Dorf, and Norma Schwab for comments on a prior draft.

⁵¹ THOMAS, *supra* note 11, at 404.

⁵² One factoid: one hundred million people watched her confirmation hearings, about as many as watched the 2020 Super Bowl. Lisa Kern Griffin, *Sandra Day O'Connor's "First" Principles: A Constructive Vision for an Angry Nation*, 120 COLUM. L. REV. 2017, 2018 (2020) (reviewing THOMAS, *supra* note 11).

⁵³ *Sandra Day O'Connor: First Woman on the Supreme Court*, SUP. CT. U.S., <https://www.supremecourt.gov/visiting/exhibitions/SOCExhibit/Section2.aspx> [<https://perma.cc/LL9H-MA9L>].

privileged to see her feeling her way in those early years. Her votes aligned most often with then-Justice Rehnquist, whom she knew well since law school and their Arizona days. But temperamentally and in judging style, she was closer to Justice Powell — and later, perhaps Justice Breyer. She prized narrow opinions that emphasized the facts and left wiggle room in subsequent cases. Often she created a balancing test for other judges to implement. Above all, she wanted the Court's decisions to be practical and help society — as distinct from decisionmaking that purports to come solely from the logic of the law, consequences be damned.

Even in those early years, Justice O'Connor showed an independent streak that made her hard to label. One example is her majority opinion in *Bearden v. Georgia*.⁵⁴ In that case, a state court convicted Danny Bearden of burglary and theft and sentenced him to probation with a fine and restitution.⁵⁵ Bearden, who left school in the ninth grade and was illiterate,⁵⁶ then lost his job and could not pay, so the trial judge revoked probation and sentenced him to prison.⁵⁷ The Georgia courts upheld the prison sentence,⁵⁸ but the Supreme Court, in a 5–4 decision authored by Justice O'Connor, reversed and remanded for a more nuanced consideration.⁵⁹ The Constitution, Justice O'Connor declared, does not allow a judge automatically to revoke probation for failure to pay a fine.⁶⁰ The trial judge must consider whether the probationer made bona fide attempts to pay, such as by trying to find work, and whether nonprison alternatives, such as extending the time for payment, might sufficiently serve the state's interests.⁶¹ Justice O'Connor brushed off whether her analysis came from due process or equal protection, reasoning that the underlying principles of these majestic clauses were similar. As she said: "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis."⁶² The resulting task for lower court judges was attention to facts and nuanced balancing.

As part of the scrutiny of Justice O'Connor, many have examined whether she had a distinctively feminine approach to law. For example, Professor Suzanna Sherry highlights the *Bearden* passage quoted above as exemplifying a feminine approach by eschewing hard lines and formulas.⁶³ Justice O'Connor bristled at assertions that women used a

⁵⁴ 461 U.S. 660 (1983).

⁵⁵ *Id.* at 662.

⁵⁶ *Id.*

⁵⁷ *Id.* at 663.

⁵⁸ *Id.*

⁵⁹ *Id.* at 674.

⁶⁰ *Id.* at 668–69.

⁶¹ *Id.* at 672.

⁶² *Id.* at 666.

⁶³ Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 604–05, 608 (1986).

distinctive style of judging, while staunchly pushing for more women on the bench. On the specific passage in *Bearden*, I have always smiled at its feminine label. While the decision and framework were undoubtedly those of Justice O'Connor, the first draft of that passage came from a male clerk.

As *Bearden* and many other cases show, Justice O'Connor was skeptical of labels and abstract theories. She employed a variety of approaches in her judicial opinions and was not wedded to any label, be it textualism, originalism, purposivism, or doctrinalism. Pragmatism might be more accurate, but only in the sense of being practical rather than a follower of William James⁶⁴ or Judge Posner.⁶⁵ Justice O'Connor basically hated isms. Indeed, she didn't understand why so many of her clerks were attracted to academia, where theories of law and distinctive methodological approaches are the coin of the realm. Another anecdote here: Justice O'Connor was one of the first persons I telephoned when, after twenty years as a pointy-headed professor whose scholarship emphasized economic and empirical analysis of law, I was appointed Dean of Cornell Law School. She congratulated me warmly. I always felt she approved of the move because a dean is closer to a practicing lawyer, managing partner, or judge — that is, closer to doing useful work in the real world.

In approaching a case, Justice O'Connor wanted to weigh all arguments and perspectives, make a decision, write an opinion explaining what facts and factors justified the decision, and move on. "Don't look back" was a favorite admonition. With usefulness as her measuring rod, her goal was a patient, incremental march toward a more just and good society. Justice O'Connor had a remarkable ability to assess the country's mood and capacity for change — and her decisions captured that mood. In doing so, she was modest rather than doctrinaire. While she knew the Supreme Court was a powerful institution, she also recognized that the Court was engaged in a long-term dialogue with other actors in the system, and the Court's goal should not be to reframe the law on its own.

Justice O'Connor's approach to judging has always struck me as embracing the rather messy common law method. She started not with a theory but with facts. A rule came much later, if at all. She admired Justice Holmes, who famously declared, "The life of the law has not been logic: it has been experience,"⁶⁶ and "The law did not begin with a theory. It has never worked one out."⁶⁷ I think she would also endorse

⁶⁴ See generally WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907).

⁶⁵ See generally RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

⁶⁶ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Harvard Univ. Press 2009) (1881).

⁶⁷ *Id.* at 72.

Justice Cardozo's emphasis on the multifaceted, balancing approach to judging:

[The judge] must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales. If this seems a weak and inconclusive summary, I am not sure that the fault is mine.⁶⁸

But for the repeated use of the male pronoun, Justice O'Connor would endorse Justice Cardozo's description of the good judge, perhaps emphasizing that the particular facts of a case are paramount.

Some are impatient with this style of judging, and prefer a single method, clearer pronouncement, and sharper rule-based outcome. It is important to separate, however, what a Justice looks to in reaching a decision (the inputs to her analysis) from the resulting outcome for others to apply. I share a frustration with outcomes that are multifaceted balancing tests for innumerable lower court judges and lawyers to apply. They can create unpredictability, if not chaos. But as to inputs, I am comforted by a judge who carefully listens to all perspectives and weighs multiple factors before deciding. While the fact-oriented, cautious judge may generate frustration or impatience, she is preferable to the single-minded, damn-the-consequences judge too arrogant in his approach.

I miss Justice O'Connor, as a mentor, role model, friend, and judge. I wish we had more like her. Her epitaph is well earned.

JUSTICE O'CONNOR'S CONSERVATISM, THROUGH THE LENS OF HER PUNITIVE DAMAGES OPINIONS

*Eugene Volokh**

Much has been written about Justice O'Connor's remarkable, trail-blazing career, and about both the force and the warmth of her character. I enthusiastically agree with all the praise that she has received, and have little to add to it. Instead, in this essay I'd like to briefly consider her jurisprudential approach. And to do that, I use one strand of cases in which she took the lead—the cases dealing with

⁶⁸ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 162 (1921). For an insightful analysis of Justice Cardozo, Judge Posner, and other pragmatists, see Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. U. L. REV. 1003 (2018).

* Thomas M. Siebel Senior Fellow, Hoover Institution (Stanford University); Distinguished Research Professor, UCLA School of Law. Law Clerk to Justice O'Connor, October Term 1993.

constitutional limits on punitive damages — to try to illuminate her broader attitudes.

Justice O'Connor's work on this area began in the late 1980s and early 1990s. In *Bankers Life & Casualty Co. v. Crenshaw*,⁶⁹ she signaled (together with Justice Scalia) that “the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.”⁷⁰ She then argued in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁷¹ that the Excessive Fines Clause limits punitive damages.⁷² There she was in dissent, joined only by Justice Stevens; she likewise dissented, this time alone, in *Pacific Mutual Life Insurance Co. v. Haslip*,⁷³ arguing that the Due Process Clause requires that trial courts “provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously.”⁷⁴

Undaunted, she continued in the 1990s to call for constitutional constraints on punitive damages, shifting in part to the then-unresolved question of quantitative limits on the size of such damages. In *TXO Production Corp. v. Alliance Resources Corp.*,⁷⁵ she argued that the “award’s size” and “the procedures that produced it” violated the Due Process Clause;⁷⁶ there too she was in dissent, but this time both Justices White and Souter joined her.

And, starting in 1994, the Court did indeed begin to reverse punitive damages awards on constitutional grounds. In *Honda Motor Co. v. Oberg*,⁷⁷ the Court held that the Due Process Clause requires judicial review of the amount of punitive damages; Justice O'Connor was in the majority.⁷⁸ In *BMW of North America, Inc. v. Gore*,⁷⁹ the Court struck down a two-million-dollar punitive award in a commercial failure to disclose case where the actual damages were only four-thousand dollars; Justice O'Connor, together with Justice Souter, joined both the majority and Justice Breyer's concurrence.⁸⁰ And in *State Farm Mutual Automobile Insurance Co. v. Campbell*,⁸¹ she joined a majority opinion that even more explicitly limited punitive award sizes, famously concluding that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due

⁶⁹ 486 U.S. 71 (1988).

⁷⁰ *Id.* at 88 (O'Connor, J., concurring in part and concurring in the judgment).

⁷¹ 492 U.S. 257 (1989).

⁷² *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

⁷³ 499 U.S. 1 (1991).

⁷⁴ *Id.* at 43 (O'Connor, J., dissenting).

⁷⁵ 509 U.S. 443 (1993).

⁷⁶ *Id.* at 472 (O'Connor, J., dissenting).

⁷⁷ 512 U.S. 415 (1994).

⁷⁸ *Id.* at 418.

⁷⁹ 517 U.S. 559 (1996).

⁸⁰ *Id.* at 586 (Breyer, J., concurring).

⁸¹ 538 U.S. 408 (2003).

process.”⁸² *BMW* and *State Farm* continue to be the leading constitutional constraints on punitive damages.

Justice O’Connor’s consistent position in these cases exemplifies well, I think, some facets of her judicial philosophy. To begin with, these cases remind us that Justice O’Connor was a conservative, but also tell us a bit about the sort of conservative she was.

1. The cases exhibit Justice O’Connor’s traditional conservative respect for businesses’ property rights. She certainly didn’t endorse attempts to revive economic substantive due process generally,⁸³ or to use the Takings Clause to condemn a broad range of regulations.⁸⁴ But she believed, here as in various other cases,⁸⁵ that the Constitution did meaningfully protect property as a facet of liberty.

2. At the same time, she resisted a more populist conservative vision, which would have rejected constraining juries on policy grounds, or Justice Scalia’s and Justice Thomas’s originalist vision, which focused on the broad latitude given to juries at the time the Fourteenth Amendment was enacted.⁸⁶

3. She was also comfortable with the necessarily case-by-case totality-of-the-circumstances approach that the Court ultimately adopted with regard to the size of punitive damages. In this she rejected Justice Scalia’s rule-of-law-as-law-of-rules critique that the *BMW* approach is unduly vague, unconstraining, ad hoc, and “insusceptible of principled application.”⁸⁷

4. Justice O’Connor was known as one of the Court’s broadest supporters of constraining federal power, in the interest of reserving various policy decisions to states.⁸⁸ Yet she recognized the importance of limiting state power to protect what she saw as federal constitutional rights — and indeed, in cases such as *Browning-Ferris*, of reading federal constitutional rights more broadly than past cases had endorsed.⁸⁹

5. The centrist feature of her conservatism became more broadly evident in the coalition that she ultimately joined, and helped build. Though Justice Scalia at first shared her views in *Bankers Life*, and

⁸² *Id.* at 425.

⁸³ See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993).

⁸⁴ See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992).

⁸⁵ See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part, joined by O’Connor, J.); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994); *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting).

⁸⁶ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1994) (Scalia, J., dissenting); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26–27 (1991) (Scalia, J., concurring in the judgment).

⁸⁷ *BMW*, 517 U.S. at 599 (Scalia, J., dissenting); see also *id.* at 606; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

⁸⁸ See, e.g., *United States v. Lopez*, 514 U.S. 549, 567 (1995); *United States v. Morrison*, 529 U.S. 598, 639 (2000); *Gonzalez v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting).

⁸⁹ Cf. *BMW*, 517 U.S. at 607 (Ginsburg, J., dissenting, joined by Rehnquist, C.J.) (faulting the Court for “ventur[ing] into territory traditionally within the States’ domain”).

Justices Scalia and Thomas shared her views in *Honda Motor*, eventually they joined Justice Ginsburg (along with Chief Justice Rehnquist, in one case) in routinely dissenting in later cases. It was a coalition of Justices O'Connor and Kennedy on the center right, and Justices Stevens, Souter, and Breyer on the center left, that ended up securing the substantial restrictions on punitive damages in *BMW* (with the addition of the conservative Chief Justice Rehnquist in *State Farm*).

6. Finally, after her early dissents in *Browning-Ferris*, *Pacific Mutual*, and *TXO*, Justice O'Connor stopped writing separately in the cases where limits on punitive damages were imposed: *Honda Motor*, *BMW*, and *State Farm*. She also appeared content with the limits that the majority adopted, and didn't continue arguing for her earlier positions in *Browning-Ferris* and *Pacific Mutual*. But that too, I think, fit Justice O'Connor's temperament well: So long as things were going basically correctly, she felt no need to personally speak out further, or to demand that the cases be recast on grounds that she thought to be theoretically better.

All this, I think, illustrates Justice O'Connor's pragmatic conservatism, and also connects to her views in other areas, such as federalism. I leave to others to evaluate what in her approach should be admired and what should be disapproved of. But her punitive damages cases show the particular brand of moderate conservatism that she adopted, and how it temperamentally and jurisprudentially differed from the conservatism of some of her formalist and originalist colleagues.