Resolutions of the Bar of the Supreme Court of the United States In Gratitude and Appreciation for the Life, Work, and Service of Justice Sandra Day O'Connor

March 19, 2026

Today the bar of the Supreme Court of the United States gathers to pay tribute to Sandra Day O'Connor, who made history as the first woman appointed to this Court, and who served the nation for twenty-four years as an Associate Justice, from September 1981 to January 2006.

Life Before the Court

From Cowgirl to State Senator

Sandra Day O'Connor was born on March 26, 1930, in El Paso, Texas. Within weeks of her birth, she arrived at the Lazy B Ranch, a 250-square-mile expanse straddling the Arizona-New Mexico border. The small ranch house—with no plumbing or electricity—stood eight miles from the main road. Cowboys slept on the screened-in porch. Scorpions, coyotes, spiders, snakes, and other creatures abounded. It was, as O'Connor would later recall, "no country for sissies."[1]

The rigors of ranch life forged O'Connor's distinctive character. The Lazy B was its own land, where every challenge required immediate problem-solving with no higher authority to consult. When windmills broke during droughts or cattle needed managing during roundups, the work had to get done. Success depended on everyone working together regardless of personal differences—an understanding that would prove invaluable in O'Connor's later political career.

O'Connor learned these and other lessons from her parents early on. Her father, Harry Day, spoke to her as an adult from childhood and taught her to fire a rifle, brand calves, and drive a truck at a young age. He was demanding and his teachings were often harsh. When, during a mini-roundup, O'Connor arrived late with lunch for the cowboys after changing a flat tire—jacking up the truck, removing the lug nuts, and replacing the blown-out wheel herself—he offered no sympathy, only the observation that she was late and "you need to expect anything out here."[2] These experiences taught her that competence,

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[1] EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR 5 (2019).
[2] *Id*. at 23.

not sentiment, earned respect. Her mother, Ada Mae Day, modeled dignity in the face of Harry's occasional harshness, refusing to let it get under her skin—a skill that the future Justice would rely on repeatedly as she made her way in a male-dominated world. Both parents also inculcated in the young O'Connor a thirst for knowledge and an interest in the world beyond the ranch.

O'Connor's parents were determined to give their inquisitive daughter a proper education. When she was six, they sent O'Connor to El Paso to live with her maternal grandmother during the school year. O'Connor attended a local public school in El Paso, the Radford School for Girls, and then Austin High School. She excelled academically, skipping a grade and absorbing lessons in Latin and Greek. But she missed the expanse and freedom of the ranch and its no-nonsense way of life, and she never felt like she fit in.

In September 1946, O'Connor entered Stanford University as a 16-year-old freshman. She finished Stanford and then Stanford Law School in six years. They were years that, like her time at the Lazy B, had a profound impact on her life. "College just gets better and better," she wrote her parents during her first year. "I think it is the Utopia that the philosophers we studied about in history dreamed of."[3] At Stanford Law School, she met John O'Connor, a fellow *Stanford Law Review* editor whom she later married. The couple shared a love of dancing that would become legendary among their friends—they would take to the floor with such skill and obvious joy that other dancers would stop to watch them move together. O'Connor graduated from law school in 1952 near the top of her class.[4]

Starting her job search, O'Connor immediately encountered discrimination against women. Despite her record, she could not secure an interview at any of the major California firms. Some told her outright they did not hire women; one finally granted her an interview only to offer her a position as a secretary. Undeterred, O'Connor shifted her focus to the public sector, seeking an interview for an at-

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[3] *Id*. at 31.

[4] Michelle T. Friedland, *Why You Should Hire Sandra Day, in Her Own Words*, 76 STAN. L. REV. 1873, 1873 (2024).

torney position in the District Attorney's Office in San Mateo, California. When she did not hear back after three weeks, she followed up with a letter, stressing her background and ability and emphasizing that a "woman can be a valuable asset in a District Attorney's office."[5] She got the job, working initially without pay at a desk in the outer office alongside the secretary.

For the next seventeen years, O'Connor's legal career took twists and turns as she balanced marriage, family, and limited professional opportunities for women. In 1955, she and John moved to Germany for John's military service, where O'Connor secured a legal job with the U.S. Government's Quartermasters Corps. They returned to the States and settled in Phoenix, where O'Connor again was rejected by law firms because she was a woman. She opened a small law practice with a partner but left to focus on raising her and John's three sons after their babysitter moved away. As O'Connor's family grew, she wrote questions for the state bar exam, volunteered in juvenile court, and did bankruptcy work on the side. She also became extensively involved in civic organizations—a passion and commitment that would grow throughout her life. In 1965, she took a job as a State Assistant Attorney General, quickly building both her reputation and her political connections in state government.

O'Connor entered the Arizona State Senate in 1969. Three years later she was elected Senate Majority Leader, becoming the first female leader of any state legislative upper house. The Arizona statehouse was a notoriously rough environment, with heavy drinking, crude behavior, and an aggressively male-dominated culture. O'Connor's response was characteristically tough and no-nonsense: she maintained strict professionalism while using her mastery of parliamentary procedure and meticulous preparation to establish authority through competence.

Her work during this time demonstrated the kind of pragmatic leadership that defined her entire career and which she had first learned on the ranch. She understood that effective governance required finding common ground across ideological differences and that personal conflicts had to be set aside in the interest of getting things

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[5] *Id*. at 1874.

done. Her approach to the Equal Rights Amendment exemplified this. While personally supporting women's rights, she saw that the political climate made passage unlikely, so she focused instead on achieving concrete reforms through state legislation. Working with Representative Diane McCarthy, her effort culminated in legislation that eliminated sex-based discrimination from more than 400 state statutes, addressing everything from property rights to employment law. She brought the same commitment to balancing principle and practicality to other issues throughout her legislative career, supporting measures to modernize state government and eliminate corruption while carefully choosing her battles and building coalitions to get the job done.

Sandra Day O'Connor on the Bench

In the mid-1970's, O'Connor moved into the third branch of Arizona's government, the judiciary. As a legislator, she had worked to replace Arizona's elected judges with appointed ones. But those efforts did not bear fruit until O'Connor had already campaigned for and won her own seat on the Superior Court for Maricopa County. The distastefulness of campaigning for judicial office strengthened O'Connor's commitment to merit selection of judges, a cause she continued to champion throughout her career.

As a new trial judge, O'Connor exhibited the same determination and eagerness to learn that marked all her career moves. She enrolled in the National Judicial College's course for new judges and visited the courtrooms of other Arizona judges. This preparation shaped her own courtroom style, one in which she ruled decisively, thoughtfully, and evenhandedly. Judge O'Connor was always prepared and on time; she expected the same from the lawyers appearing before her.

In the trial courtroom, Judge O'Connor witnessed the immediate impact of her judgments. In one case, she suppressed incontrovertible evidence of a murderer's guilt because the evidence stemmed from an illegal search. The murderer went free. In another, she sentenced the single mother of two very young children to several years in prison, leaving the children's fate uncertain. The rule of law could be harsh, but Judge O'Connor knew that it formed the essential backbone of a just society. She did not shy away from rulings that displeased the public or her own sensibilities.

In 1979, Arizona's Governor Bruce Babbitt elevated Judge O'Connor to the Arizona Court of Appeals. Rumors circulated that Babbitt, a Democrat, chose Judge O'Connor for the seat to discourage her from challenging him in the next gubernatorial election. Babbitt himself acknowledged the rumors, joking that "the fact that Sandra Day O'Connor was 20 points ahead of me in the polls had nothing to do with" her appointment.[6]

Judge O'Connor spent less than two years on the Arizona Court of Appeals, but those years introduced her to the process of collegial judging and writing appellate opinions. She also vigorously advocated for strong, independent, and well-trained judges in both state and federal courts. Writing in the *William & Mary Law Review*, she urged continued "efforts . . . to improve the judicial selection process, and to provide adequate and appropriate training for those selected."[7]

Then, in O'Connor's words, "lightning" struck.[8] On June 25, 1981, Attorney General William French Smith called Judge O'Connor and invited her to interview for a "federal position." French had been a partner in the Los Angeles law firm that once offered O'Connor a secretarial position, so she responded playfully. "I assume," she joked, "you're calling about secretarial work?"[9]

But O'Connor knew that she was on a very short list of candidates for the Supreme Court seat recently vacated by Justice Potter Stewart. President Reagan had pledged to appoint a woman to the Supreme Court, and few women could match O'Connor's legal accomplishments, record of government service, and commitment to judicial restraint. As she toured Capitol Hill and aced her nomination hearings, Senators and the public learned that few women *or* men could match her brilliance and poise.

In the eyes of some, O'Connor's nomination was affirmative action. She was not a partner in a prestigious law firm or a federal judge,

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[6] THOMAS, *supra* note 1, at 113.

[7] Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 815 (1981).

[8] SANDRA DAY O'CONNOR, MAJESTY OF THE LAW xii (2004) (Craig Joyce, ed.).

[9] THOMAS, *supra* note 1, at 124.

as many of the men who preceded her had been. But she lacked those credentials because of overt discrimination earlier in her career. O'Connor had mustered extraordinary intelligence and determination to overcome those obstacles. And in doing so, she had compiled a unique record of experience in all three branches of state government.

The Senate confirmed O'Connor's nomination 99-0, with one Senator (who supported her) out of town. The public greeted her even more enthusiastically. Letters and invitations poured into the new Justice's chambers. Men and women of all ages wrote about their pride in Justice O'Connor's appointment and the hope that her appointment inspired for their own futures. As Justice O'Connor later reflected in a commencement address at her beloved alma mater, her appointment wasn't just about her. "[I]t was about women everywhere. It was about a nation that was on its way to bridging a chasm between genders that had divided us for too long."[10]

Justice's O'Connor's remarkable early life, her unwavering persistence in the face of discrimination, and her pragmatic, coalition-building approach to difficult social issues all informed her tenure on the Supreme Court. She soon found herself to be the controlling vote on difficult constitutional questions, often recognizing that an incremental approach best served the Court and the law. And across a range of doctrines, her opinions shaped the Court's jurisprudence for decades to come.

Federalism and Separation of Powers

As a former state legislator and state court judge, Justice O'Connor brought to the Court an acute appreciation for the position of the states in our constitutional system. President Reagan's inaugural address established an administration priority to recognize "the distinction between the powers granted to the Federal Government and those reserved to the States or to the people" because "the Federal Govern-

[10] Sandra Day O'Connor, Commencement Address, Stanford University (June 13, 2004), available at https://library.oconnorinstitute.org/speeches-writings/commencement-speech-at-stanford-university/.

ment did not create the States; the States created the Federal Government."[11] Justice O'Connor's federalism jurisprudence echoed these same themes, reinvigorating the role of the courts in policing the line between the states and the federal government.

In *Gregory v. Ashcroft*, Justice O'Connor wrote the opinion for the Court rejecting statutory and constitutional challenges to a provision of the Missouri Constitution that set a mandatory retirement age of 70 for state court judges.[12] She emphasized that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front,"[13] and that "[i]n the tension between federal and state power lies the promise of liberty."[14] With the benefit of her own experience as a state court judge, she framed the state's imposition of judicial qualifications as "a decision of the most fundamental sort for a sovereign entity."[15] "Through the structure of its government, and the character of those who exercise government authority," she explained, "a State defines itself as a sovereign."[16] Thus, in addressing claims that the Missouri provision violated the Age Discrimination in Employment Act, she concluded that "[c]ongressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers," and therefore "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance."[17] *Gregory* marked the creation of a clear statement rule—or what Justice O'Connor called a "plain statement rule"[18]—requiring that Congress speak clearly if it wishes to disrupt the usual balance of federal and state power.[19]

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[11] President Ronald Reagan, Inaugural Address 1981 (Jan. 20, 1981), available at https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981.
[12] 501 U.S. 452 (1991).
[13] *Id*. at 458.
[14] *Id*. at 459.
[15] *Id*. at 460.
[16] *Id*.
[17] *Id*. (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)).
[18] *Id*. at 461.
[19] *See, e.g.*, Bond v. United States, 572 U.S. 844, 858–59 (2014).

Building on *Gregory*, Justice O'Connor pioneered another federalism doctrine—the so-called anti-commandeering doctrine—in *New York v. United States* the following year.[20] Writing for the Court, Justice O'Connor explained that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[21] The Court acknowledged that Congress can encourage or incentivize states to regulate in particular ways, and, on that basis, it upheld two provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that incentivized states to address disposal of radioactive waste. It deemed a third provision, however, unconstitutional. That provision gave states the choice between regulating the disposal of radioactive waste according to Congress' direction or taking title to and possession of such waste.[22] But, she said, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution."[23] Picking up on a theme from *Gregory*, Justice O'Connor explained: "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."[24]

Justice O'Connor recognized the potential for the federal government's enormous spending power to dictate state policy and overwhelm federalism limits. In her dissent in *South Dakota v. Dole*, she argued that "Congress may condition grants under the spending power

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[20] 505 U.S. 144 (1992).
[21] *Id*. at 162.
[22] *Id.* at 175.
[23] *Id*. at 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)).
[24] *Id*. at 181.

only in ways reasonably related to the purpose of the federal program" and that "establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose."[25] "If the rule were otherwise," she wrote, "the Congress could effectively regulate almost any area of a State's social, political, or economic life."[26] Justice O'Connor saw an important role for the Court in ensuring that "[t]he immense size and power of the Government of the United States" does not "obscure its fundamental character" as "a Government of enumerated powers."[27]

Justice O'Connor's sensitivity to federalism concerns did not, however, mean that she reflexively voted in favor of state power in every case. *Bush v. Gore* was one of the Court's most notable decisions during Justice O'Connor's tenure, and she joined the *per curiam* majority opinion that ended the Florida recount and settled the 2000 presidential election.[28] The Court determined that the "standardless manual recounts" ordered by the state supreme court violated the Equal Protection Clause because, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[29] On the surface, Justice O'Connor's vote may seem inconsistent with her typical solicitude for state courts. In 2023, however, the Library of Congress released a Memorandum to the Conference that Justice O'Connor had circulated during the *Bush v. Gore* deliberations to explain her thinking.[30] "While principles of federalism embedded in our Constitution ordinarily militate against review of a state court's disposition of questions of state law," she explained, "Article II requires a different approach" given the "uniquely national interests at stake" in presidential elections. She wrote that "crude appeals to federalism as a

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[25] 483 U.S. 203, 213–14 (1987) (O'Connor, J., dissenting).
[26] *Id*. at 215.
[27] *Id*. at 218.
[28] 531 U.S. 98 (2000).
[29] *Id*. at 103–05 (per curiam).
[30] Sandra Day O'Connor, Memorandum to the Conference 1 (Dec. 10, 2000), available at https://embed.documentcloud.org/documents/23795611-sandra-day-oconnor-bush-v-gore-memo/?embed=1.

reason for non-intervention in this case are of little avail when the Constitution expressly demarcates the allocation of power."[31]

Justice O'Connor also recognized the role of the judiciary in policing the Constitution's separation of powers among the federal branches, and particularly in guarding against overreach by the Executive Branch. In *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, Justice O'Connor's opinion for the Court rejected the FDA's asserted authority to regulate use of tobacco products by minors.[32] "Regardless of how serious the problem an administrative agency seeks to address," she wrote, "it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"[33] The decision has been most influential as the progenitor of what is now called the major questions doctrine. Noting that "FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy,"[34] Justice O'Connor concluded—during the height of the *Chevron* deference era—that "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[35] In a passage the Court has quoted many times since, Justice O'Connor reasoned that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[36] The Court adopted the term "major questions doctrine" in *West Virginia v. EPA*, noting that "it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting a highly consequential power beyond what Congress could reasonably be understood to have granted." [37] In keeping with Justice O'Connor's

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[31] *Id*.
[32] 529 U.S. 120 (2000).
[33] *Id*. at 125 (quoting ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988)).
[34] *Id*. at 159.
[35] *Id*.
[36] *Id*. at 160.
[37] 597 U.S. 697, 724 (2022).

opinion in *Brown and Williamson*, the Court requires Congress expressly to authorize agency actions with major economic or political impact.

Justice O'Connor's concern for the separation of powers also extended to the role of the judiciary in reviewing presidential national security actions. In *Hamdi v. Rumsfeld*,[38] the Court considered a habeas petition filed by a U.S. citizen who was captured in Afghanistan following the 2001 U.S. invasion and subsequently detained in the United States as an "enemy combatant." The United States argued that it could detain Hamdi "in the United States indefinitely—without formal charges or proceedings—unless and until it [made] the determination that access to counsel or further process is warranted."[39] In a plurality opinion, Justice O'Connor struck a nuanced middle ground. Although she acknowledged that Congress had authorized the detention of enemy combatants in passing the 2001 Authorization for the Use of Military Force, she concluded that due process required that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[40] More broadly, Justice O'Connor's opinion affirmed that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[41] She emphasized that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[42]

Affirmative Action

Justice O'Connor's influence on structural constitutional issues mirrored her thoughtful, context-specific approach to the protection of individual constitutional rights, particularly on questions of racial

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[38] 542 U.S. 507 (2004).
[39] *Id*. at 510–11 (plurality opinion).
[40] *Id.* at 533.
[41] *Id*. at 536.
[42] *Id*.

preference. She wrote the majority opinion in three major decisions that set the parameters for permissible race-based affirmative action across three decades. She approached race consciousness by the government with great skepticism, even as she remained attuned to the particular facts, institutional contexts, and social realities presented by each of the cases. Though her opinions made it more difficult for actors in the political process to justify and therefore adopt race-conscious measures, she nonetheless left decisionmakers with a degree of freedom in determining how best to address racial inequalities through policies that took race into account.

In *City of Richmond v. Croson*, the Supreme Court struck down an affirmative action program adopted by the city council of Richmond, Virginia, concluding that it violated the Fourteenth Amendment's Equal Protection Clause.[43] The city's plan required prime contractors on city construction projects to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs), then defined as businesses at least fifty-one percent owned and controlled by minority group members.[44]

The most important doctrinal element of Justice O'Connor's opinion on behalf of the Court was its conclusion that all racial classifications enacted at the state or local level must be subjected to strict scrutiny, regardless of whether the classification was intended to help or harm racial minorities. No majority of the Court in prior affirmative action decisions had embraced this position, though justices had advocated the use of strict scrutiny for supposedly benign policies in important plurality opinions. At least with respect to laws and policies at the state and local level, *Croson* clarified the analytical lens.

In her opinion, Justice O'Connor justified the application of strict scrutiny on the ground that "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[45] On the latter point, she expressed concern that the majority of Richmond's City Council (5 of 9 members) was

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[43] 488 U.S. 469 (1989).
[44] *Id*. at 478.
[45] *Id*. at 493.

Black, and that the city of Richmond was itself fifty percent Black, implying that a racial spoils system rather than a genuine remedial impulse was at work.[46] For Justice O'Connor and the majority, strict scrutiny of affirmative action was justified because of the inherent danger of race-conscious decision-making—namely, that it could impose stigmatic harm or foment racial hostility.

The other critical contribution of *Croson* was its clarification of the government interests the Court would accept as sufficiently compelling to justify affirmative action. In previous cases, pluralities of the Court had rejected the interest in creating minority role models and the interest in alleviating the effects of societal discrimination. In *Croson*, Justice O'Connor's opinion made clear that these types of justifications would not suffice. In the case of remedying societal discrimination, the Court worried that there would be no "logical stopping point" to affirmative action, at least until the institution or industry in question perfectly mirrored the racial composition of the surrounding society.[47] This temporal concern with affirmative action would eventually form a leitmotif in Justice O'Connor's jurisprudence. The Court did acknowledge that a state or city *could* have a compelling interest in remedying past discrimination, but it concluded that Richmond had fallen short of demonstrating that its plan served this remedial purpose.

Justice O'Connor dissented a year later in *Metro Broadcasting v. FCC*, when a majority of the Court left open the possibility that the federal government had greater latitude than the states to adopt affirmative action plans.[48] There, the majority applied intermediate scrutiny to a federal program that gave preferences to minority-owned businesses in the distribution of broadcasting licenses, concluding that the program advanced an important government interest in promoting viewpoint diversity on the airwaves.[49] Just five years later, however, Justice O'Connor's views prevailed when the Court overruled *Metro Broadcasting* in *Adarand Constructors v. Peña.*[50] Speaking for the

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[46] *Id*. at 495–96.
[47] *Id*. at 499 (citation omitted).
[48] 497 U.S. 547 (1990).
[49] *Id*. at 584.
[50] 515 U.S. 200, 227 (1995).

Court, Justice O'Connor held that all racial classifications must be subjected to strict scrutiny, extending to the federal government *Croson*'s skepticism of even supposedly benign racial classifications.

In *Adarand*, the Court had before it a provision of the Small Business Act (SBA), which awarded compensation to prime contractors doing business with the federal government if they hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," which were presumed to include racial minorities.[51] Justice O'Connor's opinion made clear that the Fifth and Fourteenth Amendments protected the rights of individuals, not groups, which meant that the federal government had to demonstrate that the racial classifications it adopted were necessary to further a compelling government interest.[52] Notably, the Court did not strike down the program adopted by the SBA; it sent the case back to the lower courts for application of strict scrutiny.[53]

The Rehnquist Court, through opinions written by Justice O'Connor, thus substantially narrowed the constitutional parameters for affirmative action policies in contracting. When the Supreme Court granted certiorari to review race-conscious admissions policies at the University of Michigan, it remained an open question whether universities could continue to justify their various affirmative action policies in admissions on the ground that they sought to promote a diverse student body—the rationale Justice Powell credited in his solo but controlling opinion in *Regents of the University of California v. Bakke*.[54] The combination of *Croson* and *Adarand*, and Justice O'Connor's role in both, gave observers ample cause to believe that the Court would eliminate most, if not all, affirmative action policies in higher education, too, with Justice O'Connor providing the fifth vote for that result. And yet, for the Justice, context made all the difference.

In her majority opinion in *Grutter v. Bollinger*,[55] Justice O'Connor began from the unassailable premise established by *Croson* and

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[51] *Id*. at 204.
[52] *Id* at 227.
[53] *Id*. at 237.
[54] 438 U.S. 265 (1978).
[55] 539 U.S. 306 (2003).

Adarand: that race-conscious policies regardless of their purpose must be subjected to strict scrutiny. In finding that the University of Michigan Law School's policy of including race as one factor in a holistic assessment of each applicant met that high bar, Justice O'Connor showed herself to be attuned to the special role that universities play in American public life.[56] She noted that Justice Powell's opinion announcing the judgment of the Court in *Bakke* had "served as the touchstone for constitutional analysis of race-conscious admissions policies," and concluded with the full force of a majority that "the Law School has a compelling interest in attaining a diverse student body."[57]

Her articulation of the diversity interest began with Justice Powell's observations about the value of diversity to the learning environment, which the district court in *Grutter* had found to be "substantial." But her opinion delved into a broader social conception of racial diversity in important public institutions, linking the legitimacy of those institutions to their openness to people from all backgrounds.[58] She famously cited amici from the business community and the military, who emphasized the link between racial diversity and successful pursuit of their various missions.[59] Highlighting *Brown v. Board of Education*'s notion that schools help shape the citizenry, she noted that the nation's law schools serve as the training ground for "our Nation's leaders," such that it is "necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[60] The possibility that the end to affirmative action might compromise each of these elements of diversity ultimately led the Justice and the Court to affirm the constitutionality of the law school's policies.

And yet, her opinion famously ended on a note of skepticism—a lament that race-conscious decision-making remained relevant to the achievement of these independently compelling objectives.[61] She

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[56] *Id*. at 343.
[57] *Id*. at 323, 328.
[58] *Id*. at 328–33.
[59] *Id*. at 330–31.
[60] *Id*. at 332
[61] *Id*. at 342–43.

highlighted the law school's commitment to finding a race-neutral means of achieving its objectives as soon as practicable. "It has been 25 years since Justice Powell first approved of the use of race to further an interest in student body diversity in the context of public higher education," Justice O'Connor wrote. "Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[62]

In sum, Justice O'Connor's affirmative action jurisprudence revealed deep sensitivity to context, helping to shape the nation's approach to vexing questions involving racial egalitarianism in contemporary America. Her writings in this domain evinced notable ambivalence about race-conscious decisionmaking—a feeling that many of her fellow Americans doubtless shared. Two years ago, when the Supreme Court eliminated affirmative action in *Students for Fair Admissions v. Harvard*, both the majority opinion and a concurrence acknowledged the significance of the quarter-century expectation that Justice O'Connor articulated in *Grutter*.[63]

Voting Rights

Justice O'Connor likewise left a large and lasting imprint on the Supreme Court's voting rights jurisprudence. Her influence reflected her characteristic emphasis on balancing competing concerns rather than adopting bright-line rules, and on developing case law in a modest, incremental fashion. While federal law was given a primary role, her opinions expressed a deep respect for federalism and a need to provide space for local politics. This approach reflected her time in all three branches of Arizona government before joining the Court, which made her pragmatic and circumspect about the judiciary's role in governance.

Her most important legacy was the framework she established for adjudicating racial gerrymandering cases. Here she illustrated her

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[62] *Id*. at 343.

[63] 600 U.S. 181, 213 (2023); *id*. at 312 (Kavanaugh, J., concurring).

knack for finding a principled compromise between seemingly conflicting legal duties. Section 5 of the Voting Rights Act of 1965[64] requires covered jurisdictions to pre-clear redistricting plans to avoid retrogression in minority voting rights, authorizing states to take race into account. At the same time, the Equal Protection Clause of the Fourteenth Amendment bars discrimination on the basis of race.

Justice O'Connor addressed the tension between these obligations in her majority opinion in *Shaw v. Reno*.[65] After the U.S. Attorney General objected to North Carolina's original redistricting plan during preclearance review, the state revised its plan to include a bizarrely shaped, majority-Black district that followed a highway for much of its length.[66] When the plan was challenged under the Equal Protection Clause, Justice O'Connor wrote that when racial classifications play a predominant role in a redistricting plan, the plan warrants strict scrutiny. A map that cannot be explained by any factor other than race certainly qualifies for such scrutiny.[67] While *Shaw* provided a test for when strict scrutiny applies, Justice O'Connor—in her typical incremental approach—deferred the practical question of how that scrutiny should be applied in redistricting cases.

She returned to that question in her plurality opinion in *Bush v. Vera*.[68] At issue was a pre-cleared redistricting plan in Texas. Because race predominated, strict scrutiny was appropriate.[69] The Court stated that § 5's requirement of maintaining minority voting rights is a compelling state interest[70] and assumed without deciding that a state's interest in complying with the prohibition on minority vote dilution in § 2 of the Voting Rights Act[71] was also compelling.[72] Justice O'Connor clarified, however, that a state's plan must be narrowly tailored to address these compelling interests. Because the state went

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[64] 52 U.S.C. § 10304.
[65] 509 U.S. 630 (1993).
[66] *Id*. at 635.
[67] *Id*. at 642–44.
[68] 517 U.S. 952 (1996).
[69] *Id*. at 973, 976 (plurality opinion).
[70] *Id.* at 983.
[71] 52 U.S.C. § 10301.
[72] *Vera,* 517 U.S. at 983 (plurality opinion).

beyond what was required to avoid retrogression under § 5, and because the state could have complied with § 2 without drawing two irregularly shaped districts, Texas's plan violated the Equal Protection Clause.[73]

Justice O'Connor was also responsible for key cases interpreting the Voting Rights Act itself. In *Voinovich v. Quilter*,[74] her majority opinion addressed the discretion states retain in satisfying § 2's nondilution requirement, demonstrating her respect for state sovereignty. *Voinovich* concerned an Ohio reapportionment plan that created several districts in which minorities formed a majority of the population. Democratic members of the apportionment board who had opposed the plan argued that the majority-minority districts reduced "the total number of districts in which black voters could select their candidate of choice," and that dispersing minority voters across more districts would enhance their electoral influence.[75] Justice O'Connor stated that § 2 contains "no per se prohibitions against particular types of district."[76] A state has flexibility in designing districts so long as they do not have "the effect of denying a protected group equal access to the electoral process."[77]

Justice O'Connor also authored landmark opinions on § 5 of the Voting Rights Act. Writing for the Court in *Reno v. Bossier Parish School Board*,[78] she drew a careful boundary between § 2 and § 5. While redrawing its districts, a Louisiana parish rejected a plan proposed by the NAACP that would have created two majority-minority districts.[79] The U.S. Attorney General withheld preclearance under § 5 because the parish's plan risked dilution under § 2.[80] Writing for the majority, Justice O'Connor clarified that § 2 and § 5 serve distinct purposes. She explained that making "compliance with § 5 contingent upon compliance with § 2" would "replace the standards for § 5 with

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[73] *Id*. at 981–83.
[74] 507 U.S. 146 (1993).
[75] *Id*. at 149–50.
[76] *Id.* at 155.
[77] *Id.*
[78] 520 U.S. 471 (1997).
[79] *Id*. at 475.
[80] *Id*.

those for § 2."[81] A plan's dilutive impact under § 2 may inform but not control the § 5 inquiry.[82] With this holding, the Court preserved each provision's distinct role.

Her final § 5 majority opinion, *Georgia v. Ashcroft*,[83] reaffirmed her respect for federalism. Georgia proposed a plan that "unpacked" some majority-Black districts to create more minority-influence districts. Although ten of eleven Black legislators in Georgia voted for the plan, the U.S. objected to preclearance on the ground that the plan did not create as many majority-minority districts as possible.[84] Justice O'Connor explained that states have leeway in determining how to avoid retrogression. Section 5, she wrote, requires courts to examine a state's plan as a whole rather than focus on individual districts; minority gains in one area may offset losses in another.[85] This conclusion captured her conviction that constitutional and statutory interpretation should respect both federal objectives and the autonomy of the states.

The Religion Clauses

Justice O'Connor's context-specific and pragmatic vision was also evident in her work on the Religion Clauses, the part of the First Amendment on which she most left a distinctive stamp. She viewed religious freedom and religious equality as central features of the American constitutional order, while acknowledging the difficulty of granting those values unqualified protection in a pluralistic society.

Justice O'Connor's approach to the Free Exercise Clause is best captured by her concurring opinion in *Employment Division v. Smith*.[86] There the Court held that a neutral, generally applicable law that burdens religious exercise—in *Smith*, the state's conclusion that its ban on controlled substances applied to sacramental use of peyote—is not subject to strict scrutiny. Justice O'Connor disagreed,

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[81] *Id*. at 477.
[82] *Id*. at 487.
[83] 539 U.S. 461 (2003).
[84] *Id*. at 471–72.
[85] *Id*. at 479–82.
[86] 494 U.S. 872 (1990).

arguing in her concurrence that the Free Exercise Clause presumptively guarantees a right to religious exemptions from generally applicable laws.[87] In dissent in *City of Boerne v. Flores*, in which the Court held that Congress could not rely on its enforcement power under Section 5 of the Fourteenth Amendment to overturn *Smith*, she reaffirmed her position at length and elaborated on why she thought the original meaning of the Free Exercise Clause supported her thinking.[88] She believed that religious objectors should have an opportunity to live out their felt religious obligations in America without being unduly penalized by secular authorities. As she explained in *Smith*, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[89]

At the same time, Justice O'Connor did not view the right to an exemption as absolute. She acknowledged in *Smith* that the government could deny exemptions to religious minorities when necessary to serve the government's sufficiently important interests, such as fighting drug abuse. Indeed, her respect for federalism led her to reach this conclusion even when only some states denied religious exemptions from drug laws for sacramental peyote use, while other states and the federal government allowed such exceptions.[90] And she concluded in *Lyng v. Northwest Indian Cemetery Protective Association* that religious minorities could not dictate to the government how government property was to be used, rejecting tribal members' claims that the government should be prohibited from harvesting timber or constructing a road through a portion of a National Forest that had been traditionally used for religious purposes.[91]

Justice O'Connor's views did not prevail on the religious accommodation question in *Smith* and *Boerne*, but over time the Court has shifted her way. In *Fulton v. City of Philadelphia*, the Court considered whether Philadelphia could refuse to contract with a foster care

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[87] *Id*. at 893 (O'Connor, J., concurring in the judgment).
[88] 521 U.S. 507, 548–64 (1997) (O'Connor, J., dissenting).
[89] *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).
[90] *Id*. at 905–07.
[91] 485 U.S. 439, 441–42, 453 (1988); *see also* Bowen v. Roy, 476 U. S. 693, 724 (1986) (O'Connor, J., concurring in part and dissenting in part).

agency unless the agency agreed, contrary to its religious beliefs, to certify same-sex couples to be foster parents. The Court concluded that the contract was not a generally applicable rule under *Smith*, and thus could not escape strict scrutiny, which it failed. Although the Court saw no reason to revisit *Smith,* five Justices generally endorsed Justice O'Connor's *Smith* position that religious exemptions to generally applicable laws should be presumptively available.[92] Likewise, in *Tandon v. Newsom*, a majority of the Court held that California had failed to show that the public health goals purportedly served by its restrictions on at-home religious exercise during the COVID-19 pandemic could not be served by the use of less restrictive measures, a holding that was in many ways closer to Justice O'Connor's concurrence than to the *Smith* majority.[93]

On the Establishment Clause, Justice O'Connor was likewise concerned about protecting both religious minorities and the majority. Her view was that government action—and especially government speech—ought to neither endorse nor disapprove of religion. The government should not, she argued, "mak[e] adherence to a religion relevant in any way to a person's standing in the political community."[94] Government endorsement of particular religions or particular religious views, she reasoned, would have that forbidden effect.

At the same time, Justice O'Connor recognized that the United States has a long history of using religious symbols for a wide range of reasons. In *Elk Grove Unified School District v. Newdow*, a father objected to a school district's requirement that classes recite the Pledge of Allegiance, claiming that, because the Pledge contains the words "under God," the requirement constituted religious indoctrination of his daughter.[95] Although the Court ruled that the father lacked

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[92] 593 U.S. 522, 543 (2021) (Barrett, J., concurring, joined by Kavanaugh, J., as to the relevant paragraph); *id*. at 545–618 (Alito, J., concurring, joined by Thomas, J. and Gorsuch, J.); *id*. at 618–627 (Gorsuch, J., concurring, joined by Thomas, J., and Alito, J.).

[93] 593 U.S. 61, 64 (2021) (ruling on application to stay Ninth Circuit decision pending appeal).

[94] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[95] 542 U.S. 1, 4 (2004).

standing to sue, Justice O'Connor explained in a concurrence why recitation of the Pledge does not offend the Establishment Clause:

> It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.[96]

Removing longstanding examples of government speech—"[e]radicating such references"[97]—may be seen as more sharply disapproving religion than maintaining such references would be seen as endorsing religion. Dealing with this reality required, she reasoned, "careful and often difficult line-drawing" that "is highly context specific."[98] Stand-alone crèches in public buildings and graduation prayers, she thus concluded, are unconstitutional.[99] But "under God" in the Pledge of Allegiance is permissible,[100] as are "longstanding . . . practices such as opening legislative sessions with legislative prayers or opening Court sessions with 'God save the United States and this honorable Court,'" "the celebration of Thanksgiving as a public holiday, despite its religious origins," and displays of Christmas trees together with menorahs and other emblems of the winter holiday season.[101]

Finally, Justice O'Connor felt strongly that the Establishment Clause did not preclude the government from giving parents who sent children to religious schools the same benefits—including funding—given to parents who sent children to secular schools. When Justice O'Connor came to the Court in 1981, the Court's Establishment

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[96] *Id*. at 35–36 (O'Connor, J., concurring in the judgment) (footnote omitted).
[97] *Id*. at 36.
[98] County of Allegheny v. ACLU, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring in part and concurring in the judgment).
[99] *Id*. at 626; Lee v. Weisman, 505 U.S. 577 (1992) (holding graduation prayers unconstitutional).
[100] *Elk Grove Unified School Dist.*, 542 U.S. at 35–36 (O'Connor, J., concurring in the judgment).
[101] *Allegheny County*, 492 U.S. at 631, 635 (O'Connor, J., concurring in part and concurring in the judgment).

Clause jurisprudence made it difficult for the government to financially assist parents who sent their children to religious schools. The law permitted scholarships to send students to colleges of their choice, including public ones, private secular ones, and private religious ones.[102] But the government could not give K-12 students similar assistance, with the exception of a narrowly limited set of benefits (such as providing transportation and loans of secular schoolbooks).[103] The Court's Establishment Clause cases forbade such benefits, even when the benefits flowed to all private schools equally and were much less costly than the comparable benefits given to public schools.[104]

By the time Justice O'Connor left the Court in 2006, the law had changed dramatically, with Justice O'Connor at the forefront of the change. The Court had broadly accepted private choice programs, in which families could bring benefits—including general tuition scholarships—with them from public schools to private schools.[105] Equal treatment in this situation, she concluded, was not establishment. Providing such parental choice, she reasoned, both protected poor religious families (as well as other poor families who sent their children to religious schools) and gave the political process the necessary latitude to decide which schools to fund.[106]

At the same time, there too Justice O'Connor took a middle position. She stressed the importance of careful attention to the details of the school choice program, to make sure that it provided parents with true choice.[107] And she concluded that direct aid programs, in

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[102] *See, e.g.*, Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973) (noting that the Court's decision striking down a form of school choice program for K-12 students did not affect the constitutionality of the "G.I. Bill"); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488–89 (1986) (upholding a program giving blind students scholarships to study at a wide range of colleges, including seminaries).

[103] *See* Everson v. Bd. of Ed., 330 U.S. 1, 17 (1947) (transportation); Bd. of Ed. v. Allen, 392 U.S. 236, 238 (1968) (schoolbooks).

[104] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971); *Comm. for Pub. Ed. & Religious Liberty*, 413 U.S. at 777–78.

[105] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (O'Connor, J., concurring).

[106] *Id*. at 680–83.

[107] *See, e.g.*, *id*. at 670–71.

which money flowed to private schools without such immediate private choice, would be constitutional only if the direct aid was used solely for secular purposes.[108]

Abortion

Justice O'Connor's decisions about abortion epitomized her desire to find a practical middle path through social and political disputes, as well as her allegiance to stare decisis.

Justice O'Connor was personally uncomfortable with abortion and did not agree with the reasoning in *Roe v. Wade*.[109] At her Senate confirmation hearing, she discussed her "own abhorrence of abortion."[110] And in her dissent in her first abortion case at the Supreme Court, *City of Akron v. Akron Center for Reproductive Health, Inc.*,[111] she expressed her view that *Roe*'s trimester framework was both inconsistent with principles of federalism—principles that she held dearly—and judicially unadministrable. The Court in *Akron* invalidated state laws relating to parental consent requirements, informed consent requirements, a mandatory 24-hour waiting period, and restrictions on disposal of fetal remains.[112] In dissent, Justice O'Connor argued that the Court should defer "to the judgments made by state legislatures" about abortion restrictions unless they posed an "undue burden" on the right to abortion, which she concluded none of the challenged restrictions did.[113] She also expressed her views that "[t]he state interest in potential human life is . . . extant throughout pregnancy" and that the *Roe* trimester framework "is clearly on a collision course with itself," because "[j]ust as improvements in medical technology inevitably will move *forward* the point at which the State may

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[108] *See* Mitchell v. Helms, 530 U.S. 793, 840–41 (2000) (O'Connor, J., concurring in the judgment); *see also* Agostini v. Felton, 521 U.S. 203, 231-32 (1997) (O'Connor, J., for the majority) (taking a similar view).

[109] 410 U.S. 113 (1973).

[110] *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) (testimony of then-Judge O'Connor).

[111] 462 U.S. 416 (1983).

[112] *Id*. at 452.

[113] *Id*. at 463–66 (O'Connor, J., dissenting).

regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions."[114] She expressed similar thoughts in *Thornburgh v. American College of Obstetricians & Gynecologists*, where she dissented from the Court's decision to strike down a Pennsylvania law imposing informed consent and reporting requirements, among other abortion restrictions.[115]

In the years that followed, Justice O'Connor joined the majority in two cases where the Court upheld state abortion restrictions: *Webster v. Reproductive Health Services*,[116] and *Hodgson v. Minnesota*.[117] In *Webster*, she signaled in her concurrence that although she thought the case could be resolved consistent with existing precedent, she might be open to further narrowing or even overruling *Roe* in a future case: "When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully."[118]

Ultimately, however, when faced with a case in which state restrictions on abortion could not be upheld without overturning *Roe*, Justice O'Connor's allegiance to precedent overcame her own moral views, her disagreements with *Roe*, and her commitment to deference to state legislatures. She joined Justices Kennedy and Souter in forging a middle path in the plurality opinion in *Planned Parenthood v. Casey*,[119] which enshrined abortion rights for another three decades.

The Pennsylvania law at issue in *Casey* had several elements: requiring a woman to give informed consent before an abortion; imposing a 24-hour waiting period; mandating parental consent for minors but providing a judicial bypass option; imposing reporting requirements on providers; and requiring married women to notify their husbands before seeking abortions.[120]

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[114] *Id*. at 456–58, 460 (O'Connor, J., dissenting).
[115] 476 U.S. 747, 778, 772 (1986); *see id.* at 828-32 (O'Connor, J., dissenting).
[116] 492 U.S. 490 (1989).
[117] 497 U.S. 417 (1990).
[118] *Webster*, 492 U.S. at 526 (O'Connor, J., concurring in part).
[119] 505 U.S. 833 (1992).
[120] *Id*. at 844 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

The plurality opinion reaffirmed many of the essential aspects of *Roe*: "First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State," and the conclusion that the State's interest before viability is "not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[121] Second, the plurality affirmed "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."[122] Finally, the plurality affirmed "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[123]

The plurality then went on to modify *Roe* by adopting the "undue burden" standard that Justice O'Connor had been advancing since her dissent in *City of Akron*.[124] Under that standard, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[125] Applying that test to the Pennsylvania law, the plurality upheld most of it, but struck down the spousal-notice requirement on behalf of the Court in a section that focused particularly on the potential domestic-violence consequences of that requirement.[126] That part of the opinion, which was surely informed by Justice O'Connor's understanding of the practical realities of women's lives, recognized that there are "millions of women in this country who are the victims of . . . abuse at the hands of their husbands" and that "[s]hould these women become pregnant, they may have very good reasons for not wishing to inform their husbands of

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[121] *Id*. at 846.
[122] *Id*.
[123] *Id*.
[124] *Id.* at 876–79.
[125] *Id*. at 878.
[126] *Id*. at 888–95.

their decision to obtain an abortion"—such that the spousal notice requirement would "deter[] [them] from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[127]

The *Casey* plurality explained its approach in words that will forever capture Justice O'Connor's understanding of stare decisis and its role in maintaining public trust in the Court:

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.
>
> Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.[128]

The Constitution and Criminal Procedure

Justice O'Connor also left a lasting mark on the intersection of the Constitution and criminal procedure. Her jurisprudence, developed over the course of 25 years on the Supreme Court, is marked by some of the most consequential cases that govern the rights of criminal defendants to this day.

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[127] *Id*. at 893–94.
[128] *Id*. at 864.

Justice O'Connor authored *Strickland v. Washington*, [129] which remains one of the Court's most important—and most cited[130]—criminal law cases. In *Strickland*, a capital case from Florida which reached the Court on habeas corpus review, Justice O'Connor wrote the majority opinion recognizing a defendant's Sixth Amendment right to the effective assistance of counsel. Building on the decisions of the lower federal courts, she first explained that the purpose of the Sixth Amendment's guarantee of counsel was ensuring a fair trial.[131] Then she articulated what has now become a familiar standard: in order to obtain relief on ineffective assistance of counsel grounds, a defendant must show that her counsel's representation fell below an "objective standard of reasonableness" and that the deficient performance resulted in prejudice—that is, a trial whose result was not "reliable."[132]

Justice O'Connor characteristically left some play in the joints to make the standard flexible and workable, including by emphasizing that not every error by counsel is of constitutional magnitude. *Strickland* explained that judicial scrutiny of counsel's performance has to be "highly deferential" and highly contextualized: it must be based "on the facts of the particular case, viewed as of the time of counsel's conduct."[133] With respect to prejudice, a defendant must generally demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with a reasonable probability meaning "a probability sufficient to undermine confidence in the outcome."[134] This pragmatic standard ensures that state convictions are not needlessly overturned while simultaneously protecting defendants whose counsels' incompetence deprived them of the right to a fair trial.

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[129] 466 U.S. 669 (1984).
[130] *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading*, 69 VAND. L. REV. 333, 390 (2016) (showing that *Strickland* is the criminal case most often cited by federal courts).
[131] *Strickland*, 466 U.S. at 689–92.
[132] *Id*. at 687, 688.
[133] *Id*. at 689–90.
[134] *Id*. at 694.

Justice O'Connor also authored a plurality opinion in *Teague v. Lane*,[135] a habeas corpus case that addressed the difficult question of retroactivity in collateral proceedings and that subsequently guided Congress' overhaul of the habeas statutes in 1996. Speaking for herself and three other Justices, she laid out the problems caused by the Court's ad hoc retroactivity determination in criminal cases. One such problem was the disparate treatment of defendants on collateral review. For example, Justice O'Connor explained, the Court did not decide until 1984 in *Solem v. Stumes*[136] that the rule of *Edwards v. Arizona*,[137] limiting police access to a defendant once the defendant invokes the right to counsel, was not retroactive. But in the three years between the *Edwards* decision and the Court's retroactivity determination in *Stumes*, "several lower federal courts had come to the opposite conclusion and had applied *Edwards* to cases that had become final before [*Stumes*] was announced. Thus, some defendants on collateral review whose *Edwards* claims were adjudicated prior to *Stumes* received the benefit of *Edwards*, while those whose *Edwards* claims had not been addressed prior to *Stumes* did not."[138]

Justice O'Connor concluded that, given the purposes served by habeas corpus, retroactivity had to be decided as a threshold question, and that the standard earlier articulated by Justice Harlan was the appropriate one. Under that standard, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced" unless one of two exceptions apply.[139] These exceptions, generally stated, were for new rules that placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or that constituted "watershed rules of criminal procedure."[140] A majority of the Court soon thereafter adopted *Teague* as the governing standard for retroactivity in collateral proceedings.[141]

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[135] 489 U.S. 288 (1989).
[136] 465 U.S. 638 (1984).
[137] 451 U.S. 477 (1981).
[138] *Teague*, 489 U.S. at 305 (plurality opinion) (citations omitted).
[139] *Id*. at 310.
[140] *Id*. at 311 (internal quotation marks and citation omitted).
[141] *See* Penry v. Lynaugh, 492 U.S. 302, 313 (1989).

Teague proved to have a significant long-term impact on federal habeas corpus. In *Teague*, Justice O'Connor quoted with approval Justice Harlan's view that a court on collateral review should generally analyze a conviction by "apply[ing] the law prevailing at the time [the] conviction became final" rather than looking to "intervening changes in constitutional interpretation."[142] Congress followed Justice O'Connor's lead: when Congress overhauled the habeas corpus statutes through the Antiterrorism and Effective Death Penalty Act of 1996, it instructed federal courts not to grant relief to defendants convicted in the state courts unless the state court decision on the merits of the particular issue was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[143]

Court Life

Justice O'Connor began making her mark on the Court and the country almost immediately after joining the Court, casting tie-breaking votes in important cases, taking a pragmatic and context-specific approach to the most difficult issues, and authoring key opinions that set the course for the Court's jurisprudence for decades. But her influence extended far beyond the cases she decided. As a public figure, she blazed a path for women to become leaders in the law and other professions. And to those who knew her personally, she imparted her belief that life was *always* to be lived to the fullest.

Reflecting, perhaps, the ranching lifestyle at the Lazy B, Justice O'Connor was early to rise. Three days a week, her mornings at the Court began with an 8:00 a.m. aerobics class, which she founded, at the "highest court in the land"—the basketball court right above the courtroom. Justice O'Connor worked out alongside Court staff, residential neighbors, and friends from across Washington, D.C. The exercisers sported t-shirts with slogans like "Women Work Out at the

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[142] *Teague*, 489 U.S. at 306 (plurality opinion) (internal quotation marks and citation omitted).

[143] 28 U.S.C. § 2254(d)(1). Habeas relief is also available if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Supreme Court," and "Exercise Defends Your Constitution." Justice O'Connor's female law clerks understood that they were expected to attend her early-morning aerobics class—even if the Court's work kept them up past midnight the night before. In setting that expectation, Justice O'Connor imparted an important lesson: hard work is unsustainable without taking care of one's health.

Justice O'Connor's competitive spirit also shaped life inside the Supreme Court. A lifelong sports lover, Justice O'Connor maintained a particular affinity for golf and tennis. She kept a golf putting machine in her chambers, and regularly challenged visitors to sink a putt. After hiring a former collegiate tennis player as a law clerk, she once challenged Chief Justice Rehnquist, who played doubles weekly with his clerks, to a match. After the first outing ended in split sets, she took great pride in winning the rematch. But on the way back, after Chief Justice Rehnquist seemingly misidentified a pear tree, which Justice O'Connor promptly corrected, the ensuing debate was nearly as hard-fought as the tennis match itself.

Never content to stay still, Justice O'Connor would regularly interrupt her workday for impromptu field trips across the D.C. area. Without any apparent concern for her clerks' looming deadlines, she would load them into a van and take them to a Washington must-see. One day, it might have been a Smithsonian exhibit. The next month? The top of the Washington Monument, or the opening of a new memorial. In the springtime, a picnic under the cherry blossoms was always in order. She capped each clerkship term with a longer outing such as a day of fly fishing or a trip to Baltimore for seafood and a baseball game.

These outings gave Justice O'Connor an opportunity to interact with the public, separate from her role as a Supreme Court justice. Sometimes, she was recognized. Frequently, she was not. And it made little difference to her. Justice O'Connor loved people, preferring to hear about their lives rather than talking about her own. At restaurants, sporting events, or Washington landmarks, she would ask people about their businesses, their children, and their reasons for visiting the capital. Casually, she might mention that she was "originally from Arizona" and now living near D.C. But unless someone thought

to ask about *her* work, they might never know that they'd just had a conversation with a sitting Supreme Court justice.

Justice O'Connor's love of socializing helped build collegiality within the Court as well. She insisted that the Justices have lunch together after oral arguments and after their decision-making conferences. Justice Clarence Thomas recalled: "She was the glue! The reason this place was civil was Sandra Day O'Connor."[144] She also organized a concert series at the Court for the justices and law clerks. Her efforts to bolster collegiality played out in her writing as well—her opinions disagreed with the merits of colleagues' views but never contained anything resembling a personal attack.

Mentorship was a priority for Justice O'Connor too. Former clerks were regular guests at the Court, and the Justice would gently chide them if it had been more than a year since their last visit. No matter how busy she was, Justice O'Connor made time to serve tea on the oversized Native American drums that adorned her office and paid homage to her southwestern roots. Between visits, she kept up with her former clerks through letters and telephone calls. She took great pride not just in her clerks' professional accomplishments, but in their family lives as well. Each time a former law clerk had a baby, Justice O'Connor sent a tiny t-shirt with "SO'C GRANDCLERK" emblazoned on the front.

Justice O'Connor's commitment to the next generation was also reflected in her generosity towards young people. Throughout her career, and well into her retirement, Justice O'Connor maintained a breakneck schedule, balancing the work of the Court with a seemingly never-ending string of national engagements. But Justice O'Connor was particularly inclined to say "yes" to an event involving young people—whether that was a middle school group visiting the Court, or a lecture at a college or law school. And just as with adults, Justice O'Connor was never content to simply talk about herself. To be sure, she shared her trailblazing journey with youthful audiences. But she also took the time to listen to young people, and to ask them about their lives, ambitions, and experiences.

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[144]THOMAS, *supra* note 1, at 301.

Justice O'Connor used her podium to speak about herself when doing so could positively affect the millions of women who looked up to her as the most prominent woman in public life in America. Justice O'Connor was diagnosed with breast cancer in 1988, and later underwent a mastectomy and chemotherapy, which led to hair loss and the decision to wear a wig. Six years later, she finally spoke about her experience to a survivor-led cancer advocacy group in what observers called an "unusual" and "extraordinarily personal speech for a member of the Supreme Court."[145] During the speech, Justice O'Connor publicly revealed for the first time that she had undergone a mastectomy, casting aside her privacy to inspire fellow survivors and future cancer patients.

Retirement

Justice O'Connor's compassion for others is encapsulated most poignantly in her decision to retire early (for a Supreme Court Justice) to care for her beloved husband, John. John had made his career secondary to hers and supported her over the course of her remarkable—and increasingly high-profile—career. John had been diagnosed with Alzheimer's in 1990, and his health began to decline precipitously in the early 2000s. But Justice O'Connor insisted on juggling his care with her responsibilities on the Court—including by taking him daily to chambers with her so she could keep an eye on him, and by attending to his immediate physical needs. Eventually, Justice O'Connor could not continue to be both John's caregiver and a Supreme Court Justice. She chose John, explaining to a friend: "John gave up his position in Phoenix to come with me, so now I am giving up my job to take care of him."[146]

Life After Retirement & iCivics

In a life filled with improbable turns, Justice O'Connor's engagement with young people led to perhaps the most improbable of them

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[145] *In Unusual Remarks, Justice Tells of Her Cancer Treatment*, ASSOCIATED PRESS (Nov. 5, 1994), available at https://www.nytimes.com/1994/11/05/us/in-unusual-remarks-justice-tells-of-her-cancer-treatment.html.

[146] THOMAS, *supra* note 1, at 386.

all: her post-retirement foray into video games. By the time Justice O'Connor left the bench, she had become increasingly concerned about the lack of basic civic knowledge in America. Particularly alarming for Justice O'Connor was "how little people truly understand the so-called third branch of government."[147] Cynical "efforts to unduly and dangerously politicize our courts," Justice O'Connor remarked, had led to "unfounded and sometimes hateful attacks on judges."[148] Justice O'Connor never shied away from calling out the "severity of the situation."[149] Ultimately, she believed that the salve rested with the next generation.

The increased potency of attacks on judges, Justice O'Connor concluded, stemmed from a broader issue: "an alarming degree of public ignorance" about "the way our government is set up, how it works, the checks and balances, and the importance of an independent judiciary."[150] And Justice O'Connor identified a "lapse in civic instruction" in American schools as the cause of this "profound civic illiteracy."[151] After all, Justice O'Connor noted, civics "must be taught"—because like all of life's most important lessons, "[k]nowledge of law and government . . . is not passed down through the gene pool."[152] Yet by the time Justice O'Connor retired from the bench, many schools across the nation were not offering "courses in history, civics, or government at all."[153]

Never satisfied to simply identify a problem, the now-retired Justice sprang into action. In 2009, at the age of 79, she founded iCivics, which provides free, video-game-based civic instruction to adolescent learners. When she founded iCivics, Justice O'Connor had "never

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[147] Sandra Day O'Connor, Speech at the American Inns of Court National Symposium, (May 20, 2013), available at https://library.oconnorinstitute.org/speeches-writings/speech-at-the-american-inns-of-court-national-symposium/.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] Sandra Day O'Connor, *The Rule of Law and Civic Education*, 67 SMU L. REV. 693, 697–98 (2014).

[152] *Id*. at 698.

[153] *Id*. at 697.

played a video game in her life."[154] She frequently remarked on the irony of "a cowgirl from Arizona" becoming "involved in video games" during her later years.[155] Yet Justice O'Connor had a lifelong commitment to listening. Having identified civic education as an issue, she consulted with teachers and curriculum designers about the best way to address it.[156] And—reflecting the Justice's desire to meet Americans where they stood—she determined that a game-based curriculum was the best way to reach a generation raised on "iPads and iPods and 'i' everything."[157]

Today, iCivics is used by approximately 145,000 teachers, reaching some 9 million students annually in all 50 states.[158] The program's award-winning games allow students to role-play as legislators, presidential candidates, lawyers, jurors, and county supervisors. iCivics games have been played over 200 million times.[159] And the curriculum works. A study by Baylor University concluded that iCivics significantly improved students' civic test scores in the fourth, fifth, and eighth grades.[160]

Although many would rightly say that Justice O'Connor's jurisprudence left an indelible mark on American society, she often described iCivics as her "most important legacy."[161] "Without basic civic education," she noted, "we cannot expect to preserve or improve

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[154] *A Visual History of iCivics,* iCivics, https://vision.icivics.org/about/history/#history.

[155] Sandra Day O'Connor, *Interview at Association for Supervision and Curriculum Development (ASCD) Conference* (Feb 27, 2014), available at https://library.oconnorinstitute.org/speeches-writings/interview-association-supervision-curriculum/.

[156] *Id*.; *see also* iCivics, *supra* note 154.

[157] *Interview at Association for Supervision and Curriculum Development (ASCD) Conference*, *supra* note 155.

[158] *Impact,* iCivics, https://vision.icivics.org/impact/.

[159] *Id*.

[160] Brooke Blevins et al., *Citizenship Education Goes Digital*, 8 J. SOC. STUD. RSCH. 33–44 (Jan. 2014).

[161] Joshua Jansa & Eve Ringsmuth, *Sandra Day O'Connor Saw Civics Education as Key to the Future of Democracy*, CONVERSATION (Dec. 15, 2023), https://theconversation.com/sandra-day-oconnor-saw-civics-education-as-key-to-the-future-of-democracy-219337.

our system of government."[162] "Teaching the skills of citizenship," Justice O'Connor acknowledged, "is pretty difficult," particularly given our "very different backgrounds in this country."[163] But Justice O'Connor—always in motion—knew that the best way to address a challenge was to just "get it done."[164] In creating iCivics, she gave a new generation an opportunity to understand how America's "political processes" could "address the challenges we have now and are going to face in the future."[165]

Justice O'Connor was many things. She was a trailblazer. She was precise, thoughtful, and hard-working. She was competitive, outspoken, and never shied away from a challenge. But perhaps her most defining trait was that she *listened*. She loved people. She loved America. And she believed that the best way to resolve differences was through shared understanding and civic engagement. Her judicial legacy will live on through her words in the Supreme Court Reports. Yet more fundamentally, her life's work will be reflected every time a new generation engages in the practice of democracy.

Carrying on our tradition dating to the days of Chief Justice Marshall,[166] it is accordingly:

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our great admiration and respect for Justice Sandra Day O'Connor, our deep sense of loss upon her death, our appreciation for her contributions to the law, the Court, and the Nation, and our gratitude for her example of a life well lived; and it is further

RESOLVED that the Solicitor General be asked to present these resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

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[162] *Id*.
[163] *Interview at Association for Supervision and Curriculum Development (ASCD) Conference*, *supra* note 155.
[164] John G. Roberts, Jr., Eulogy for Justice Sandra Day O'Connor, 76 STAN. L. REV. 1863, 1863 (2024).
[165] *Interview at Association for Supervision and Curriculum Development (ASCD) Conference*, *supra* note 155.
[166] 35 U.S. (10 Pet.) vii, viii (1836).