

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.

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