

Chapter One

The Swing Justice

As the day of reckoning for race-conscious university admissions approached, no one on either side doubted that the issue's fate would rest ultimately with the conscience, the analysis, and the vote of Justice Sandra Day O'Connor. On this issue, as on others such as abortion, states rights, and the *Bush v. Gore* struggle for Florida,¹ O'Connor would find herself neatly positioned between four-justice blocs of liberals and conservatives. This had been substantially true throughout the 1980s, but it was set in concrete in 1991, when the liberal Justice Thurgood Marshall retired and his replacement, the right-wing intellectual Clarence Thomas, was sworn in. During the 1990s, personalities would change as Justices William Brennan and Byron R. White retired, but their liberal replacements, Ruth Bader Ginsburg and Andrew Breyer, preserved the balance. Rarely was Justice O'Connor in the minority on any case. In any given year, scholars could count on the fingers of a single hand the number of times her position in 5-4 splits had failed

1. *Bush v. Gore*, 531 U.S. 98 (2000).

to prevail. Now, in anticipating her direction on race-conscious admissions as well as other key issues, commentators would refer to her as the swing vote, the “most powerful woman in America,”² or, in the title of a *New York Times Magazine* essay, “A Majority of One.”³

O’Connor’s record on race preference cases produced a good deal of foreboding, even anticipatory anger, among defenders of the approach. “Justice O’Connor is not a swing vote on the Court in matters of racial affirmative action plans as some believe,” complained Mercer University law professor Joan Tarpley. “To the contrary, she is the chief architect in dismantling these plans. No less deleterious than Bull Connor’s Alabama helmet police and savage dogs were to the 1960s Civil Rights Movement, O’Connor’s opinions have dismantled affirmative action programs intended to provide equal economic opportunity to African Americans.”⁴

Much of the anger had been initially triggered by O’Connor opinions that had been interpreted at the time as rejecting minority set-asides in government contracting. As early as 1994, Jerome McCristal Culp, Jr., a black law professor at Duke University, complained that by imposing a standard of strict race neutrality on the law, Justice O’Connor was blocking the “Second Reconstruction,” just as an earlier brand of reactionary judicial views had blocked the first: “Not only is Justice O’Connor deaf and blind to the concerns of Black Americans—she has, in significant ways, added her

2. Ramesh Ponnuru, *Sandra’s Day: Why the Rehnquist Court Has Been the O’Connor Court, and How to Replace Her (Should It Come to That)*, NATIONAL REVIEW, June 30, 2003.

3. Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAGAZINE, June 2, 2001, §6, at 32.

4. Joan Tarpley, *A Comment on Justice O’Connor’s Quest for Power and Its Impact on African American Wealth*, 53 S.C. L. REV. 117, 119 (2001).

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voice to form a working majority on the Court in favor of a return to a form of nineteenth-century white supremacy in our judicial discourse on race.”⁵

A less angry scholar, Vikram David Amar, of the Hastings College of Law, writing with the benefit of a few years’ additional Court pronouncements, saw in O’Connor’s work only the command that although, in certain circumstances the government may take race into account, it cannot take *only* race into account. Instead, “Justice O’Connor’s basic constitutional admonition is that race ought not to crowd out other aspects of a person’s humanity.”⁶

Justice Sandra Day O’Connor came to Washington in 1981 as the first Supreme Court justice appointed by Ronald Reagan, who had pledged during his presidential campaign to nominate a woman among his first three Court appointments, and the first woman justice in the history of the Court. She had grown up on her family’s Lazy B cattle ranch, a 250-square-mile property on the Arizona–New Mexico border. She graduated from Stanford Law School, where she served as editor of the *Law Review*, dated William Rehnquist, and met her future husband, John O’Connor. Unable because of her sex to land a job with a prestigious law firm, she instead signed on as a county attorney in San Mateo, California, specializing in civil litigation. There followed a period in Germany, where her husband was an Army lawyer, and then private practice in Arizona as well as four years as an assistant attorney general in the state. In 1969, at the age of 39, she was appointed to fill a vacancy in the Arizona senate. She was

5. Jerome McCristal Culp, Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or, How Not to Become Justice Sandra Day O’Connor*, 1 DUKE J. GENDER L. & POL’Y 21, 22 (1994).

6. Vikram David Amar, *Of Hobgoblins and Justice O’Connor’s Jurisprudence of Equality*, 32 McGEORGE L. REV. 823, 826 (2001).

elected on her own in 1970 and was selected Republican majority leader in 1973. Later she served as both a trial and appellate state judge.

At about the time Governor Ronald Reagan was signing a pre-*Roe v. Wade* bill making abortions legal in California, State Senator Sandra Day O'Connor was voting to decriminalize abortions in Arizona. By 1981, both had changed positions, but whereas the right-to-life forces forgave Reagan as the sinner who had seen the light, they didn't trust O'Connor's conversion as real, and many opposed her nomination. Pressed for her views at her confirmation hearings, O'Connor testified, "For myself, abortion is offensive to me, it is repugnant to me, it is something in which I would not engage."⁷ In her prepared statement, O'Connor offered only a single matter of substance, telling the committee that her experience as a state legislator "has given me a greater appreciation of the important role the states play in our Federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the state and Federal levels." She also said her experiences "have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it."⁸

Over her years on the bench, Justice O'Connor would remain far more faithful to the federalism attitude she volunteered than the anti-abortion position articulated in response to committee questions. At the same time, while showing considerable respect for the principle of stare decisis as it pertained to previous Supreme Court decisions, she

7. Eileen McNamara, *Both Sides on Abortion Target O'Connor*, BOSTON GLOBE, June 26, 1989, A1.

8. *Text of Judge O'Connor's Statement to Panel*, N.Y. TIMES, Sept. 10, 1981, at B14.

would become the very antithesis of the judicial self-restraint model her testimony described, tossing out on constitutional grounds acts of Congress, the federal agencies, state and federal courts, and the state legislatures with little apparent hesitation. Legal commentators were slow to discern this propensity in Justice O'Connor's jurisprudence because another of her judicial tendencies was to decide cases on the narrowest of grounds, thereby masking the precedent she was establishing or, more precisely, establishing less precedent than a casual first reading of her opinion might imply. Once the O'Connor pattern became clear, however, critics zeroed in on her "judicial imperiousness." As Jeffrey Rosen complained, "[O'Connor] views the court in general, and herself in particular, as the proper forum to decide every political and constitutional question in the land. And she refuses to defer to competing interpretations by Congress or the state legislatures when they clash with her own."⁹

O'Connor's treatment of the abortion issue would bitterly disappoint those who took seriously her hearing room conversation on the subject. For eight years, she teased them by critiquing both the judicial and medical logic of *Roe* and voting to uphold every state restriction on abortion to come before the bench while postponing an up or down vote on *Roe* and its underlying recognition of unenumerated fundamental rights—in this case, privacy—which the majority had found controlling. She claimed there would be time enough to reconsider *Roe* when the court confronted state laws that were "unduly burdensome" to the exercise of the rights granted in the 1973 decision. When four of her fellow justices thought Missouri had provided the Court with a golden opportunity to reverse *Roe* in the 1989 case of *Webster v.*

9. Rosen, *A Majority of One*, at 32.

Reproductive Health Services,¹⁰ Justice O'Connor, while supporting the Missouri procedures, declined the invitation to take the bigger constitutional step, drawing from Justice Antonin Scalia one of the most wrathful and biting critiques in the recent history of the High Court.¹¹ Three years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹² Justice O'Connor left no doubt that she had crossed the Rubicon on the abortion question, specifically embracing the central holding of *Roe v. Wade*.¹³

It is worth devoting a bit more attention to Justice O'Connor's judicial journey on abortion, because it followed a road very similar to the one she would travel on race preferences. In the 1983 case, *City of Akron v. Akron Center for Reproductive Health*,¹⁴ one of three companion cases dealing with state or local restrictions on abortion, the Court specifically reaffirmed both *Roe* and its trimester approach to abortion regulation. Justice O'Connor dissented in an opinion that urged at least the partial reversal of *Roe*. She termed the trimester system "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context."¹⁵ Limiting a state's interest to the period when the fetus becomes viable shortchanged the state's interest throughout the pregnancy, because in any stage "there is the potential for human life."¹⁶ Moreover, in terms of science and technol-

10. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

11. *Id.* at 532.

12. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

13. *Id.* at 846.

14. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

15. *Id.* at 454.

16. *Id.* at 461.

ogy, *Roe* was on a collision course with itself: “Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.”¹⁷

Clearly O’Connor seemed to be positioning herself for the functional, if not total, reversal of *Roe*. State regulations that did not unduly burden a woman’s decision to have an abortion would easily pass judicial muster. More severe impediments could be justified by a compelling state need. Because O’Connor seemed to recognize such a need at all stages of the pregnancy, and because the privacy right involved was not absolute, what would be left of *Roe* had her view prevailed on the Court? The moment of truth came in the 1989 *Webster* case, in which a Missouri anti-abortion law came under challenge. The law’s preamble stated, “[T]he life of each human being begins at conception,” and much of the text of the law was devoted to restrictions against participation in non-therapeutic abortions by public employees and the performance of abortions at public medical facilities or abortions supported by public financing. More important, the legislation also contained a section requiring physicians to test for the viability of a fetus in any pregnancy of twenty weeks or longer and to refrain from performing abortions involving viable fetuses.

A majority of the Supreme Court discarded the preamble challenge as nonsubstantive and the restrictions on public support for abortions as well within the rights of states. How-

17. *Id.* at 456.

ever, a plurality found the viability sections at variance with *Roe*'s trimester approach. Three justices, led by Chief Justice Rehnquist, concluded that the *Roe* trimester framework should be abandoned, a position urged years earlier by Justice O'Connor. Justice Scalia declared that the time had come to reverse *Roe*, ending the Court's "self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juritical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive."¹⁸

A number of commentators have suggested that the three members of the Rehnquist plurality, including Justices White and Kennedy, were prepared to join Justice Scalia in reversing *Roe*, but they needed a fifth vote, one that Justice O'Connor refused to provide.¹⁹ Instead, she argued that the requirement for twenty-week viability determination was not inconsistent with the trimester approach when the former was judged a subsidiary matter to be administered only where not imprudent or careless. "Where there is no need to decide a constitutional question," she wrote, "it is a venerable principle of this Court's adjudicatory processes not to do so. . . . Neither will it generally 'formulate a rule of constitutional law that is broader than is required by the precise facts to which it is to be applied.'"²⁰

This sent the former University of Virginia law professor into judicial orbit. "Justice O'Connor's assertion [citation

18. *Webster*, 492 U.S. at 532.

19. See Al Kamen & Ruth Marcus, *Two Cases May Clarify O'Connor's Murky Views on Abortion*, WASHINGTON POST, Nov. 27, 1989, at A1.

20. *Webster*, 492 U.S. at 490, 525.

omitted] that a ‘fundamental rule of judicial restraint’ requires us to avoid reconsidering *Roe*, cannot be taken seriously,” Scalia huffed.²¹ The Missouri case was already being decided on constitutional grounds; the only question was whether, having embarked on the journey, the Court should use *Roe*, its leading case, as a benchmark. According to Scalia, the important principle, then, was not to avoid deciding cases on constitutional grounds; rather, it was to “formulate a rule of constitutional law no broader than is required by the precise facts to which it is applied.” And even this “sound general principle” is “often departed from when good reason exists.” Indeed, in a recent leading affirmative action opinion written by Justice O’Connor,²² the Court did not content itself in holding simply that a racially based set-aside was unconstitutional if “unsupported by evidence of identified discrimination”—all that was necessary to decide the case. Instead, “we went on to outline the criteria for properly tailoring race-based remedies in cases where such evidence is present.”²³ Justice Scalia then proceeded to cite other examples in which O’Connor opinions reached for constitutional grounds, and having found them, defined them broadly. His tone was one of a superior legal scholar addressing a careless former student whose considerable success cannot be traced to profundity. It caught the attention of a number of commentators and, presumably, did little to endear the Court’s first Italian American to its first female. Three years later, in *Planned Parenthood*, Justice O’Connor would join Justices Souter and Kennedy to declare that the principle of stare decisis demanded adherence to the Court’s holding in *Roe v. Wade*.

21. *Id.* at 532.

22. *City of Richmond v. J. A. Croson Company*, 488 U.S. 469 (1989).

23. *Webster*, 492 U.S. at 532.

Past reversals by the Court had occurred because of changed facts or appreciation of those facts, they maintained. In *Casey*, however, where the factual underpinnings of the issue were the same, the Court could not pretend to be reexamining *Roe* with any justification beyond a doctrinal disposition to come out differently from the *Roe* court because that would be an inadequate basis for overruling a prior case.²⁴

Justice O'Connor had thus traveled a very long road from the fervent opponent of abortion poised to hold it unconstitutional in the proper case to one who found the right to abortion firmly enough embedded in the law so as not to be overturned without undermining respect for judicial precedent. A scholar examining her opinions would be hard-pressed to see any reversal in terms of specific holding, just a change in tone or emphasis. As would be the case with affirmative action, Justice O'Connor always kept a candle burning in the dark in preparation for the day when she would see the light.

24. *Planned Parenthood*, 505 U.S. at 833, 861.