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JUSTIN DRIVER

The Education Justice

In June 2007 – as my year with Justice O’Connor began drawing to a close – she stopped by my office for a friendly chat late one afternoon. Rather than physically knocking, she playfully intoned the words “knock, knock,” and then sat down to inquire whether my time clerking at the Supreme Court had met my expectations. I expressed deep gratitude for her willingness to take a chance on me, as it provided not only the greatest honor that a young lawyer can receive, but also an invaluable, intimate vantagepoint for glimpsing the Supreme Court’s actual workings. Succumbing to the unmistakable tug of pre-nostalgia, I told her that the opportunity to serve as a law clerk in this building means all the more to me because I grew up in Washington, D.C. – east of the Anacostia River, far removed from even the faintest whiff of governmental glamour. Starting in the fifth grade, my parents secured special permission for me to attend schools in upper Northwest, D.C., a trip that required lengthy rides on various modes of public transit. On some occasions, my journey involved a bus ride that drove down First Street, right past this very building. If you had told ten-year old me that I would one day become a lawyer of any kind – let alone one who worked within the Supreme Court, and for an American hero – I would have told you to refrain from ingesting hallucinogens.

As I made my way through this (let’s face it) well-rehearsed origin story, a wry smile crept across Justice O’Connor’s face. She retorted that southeast D.C. may have been tough, but assured me that southern Arizona was no picnic either – particularly as far as education was concerned, noting that at least a city slicker like myself had some attractive schooling options that were relatively close

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by. Her tone made clear that she was at once ribbing me and bonding with me, but in no sense altogether joking. Justice O'Connor recalled that, in order to obtain a solid education, she moved away from the Lazy B Ranch and her beloved parents to live with her grandmother in El Paso, Texas – some four hours away – beginning at the ripe old age of six.¹ The sprawling Lazy B cattle ranch straddled the Arizona-New Mexico border in an area so remote that even other Arizonans deemed it *out there*,² as the nearest (meager) town stood thirty-five long miles away on primitive roads.³ “The real trauma of living in a remote ranch area is the educational problem of children,” Justice O'Connor once stated publicly. “You really have limited choices. It's kind of a poor choice whichever way you go.”⁴ Justice O'Connor was decidedly not one for casually tossing around words like “trauma,” so there can be no doubt that her home region's educational privations were severe and – for many inhabitants – severely limiting.

When I served as Justice O'Connor's law clerk, she was well underway with preparations for what would become the most significant post-bench endeavor that a Supreme Court Justice has ever ventured in the modern era – the iCivics program that she founded and launched in 2008. I often heard Justice O'Connor explain that civic education could not simply be taken for granted, as too many people seemed to believe that young Americans somehow absorbed lessons about our governing structures through osmosis. Sensing a profound need, Justice O'Connor took it upon herself to help devise and promote civic education video games that would engage young people – making the subject feel active and alive rather than dry and desiccated.⁵

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1. See EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* 15 (2019); JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* 16 (2005).
 2. I borrow this formulation from the indelible first sentence of Truman Capote's *In Cold Blood*. See TRUMAN CAPOTE, *IN COLD BLOOD* 3 (1966) (“The village of Holcomb stands on the high wheat plains of western Kansas, a lonesome area that other Kansans call ‘out there.’”).
 3. See Linda Greenhouse, *Sandra Day O'Connor, First Woman on the Supreme Court, Is Dead at 93*, N.Y. TIMES (Dec. 1, 2023), <https://www.nytimes.com/2023/12/01/us/sandra-day-oconnor-dead.html> [<https://perma.cc/CS5B-QQVC>].
 4. BISKUPIC, *supra* note 1, at 16.
 5. I have it on good authority from my eighth-grade daughter, Claire Ellison Driver, that Justice O'Connor and iCivics have accomplished their core mission – making civic education enjoyable for youngsters. Claire particularly commends one of the iCivics video games called “Winning the White House.”

One of iCivics's many virtues is that its online-based approach serves to democratize civic education, as its nonpartisan content is freely available to anyone with a working internet connection. Millions of students from around the Nation and from quite disparate walks of life—ranging from inner-cities like Southeast, D.C. to rural areas like the Lazy B—have accessed the iCivics material. The iCivics program has thereby played a meaningful role in addressing what has been evocatively called the “civic empowerment gap,”⁶ and strengthened our American experiment in democracy. When Justice O'Connor announced that she was stepping back from public life in 2018, she dedicated her valedictory address to underscoring the vital link between civic education and democracy. “If we want our democracy to thrive, we must commit to educating our youth about civics, and to helping young people understand their crucial role as informed, active citizens in their communities and in our nation,” Justice O'Connor stated. “We must arm today's young people with innovative civic education that is relevant to them. Bringing high-quality civics to every school in every state of our union is the only way that the next generations will become effective citizens and leaders.”⁷

It is tempting to construe Justice O'Connor's emphasis on the centrality of citizenship and democracy—through her work with iCivics—as representing a sharp departure from her time on the bench. Upon close inspection, though, her foregrounding of those concepts simply continued and elaborated upon animating themes of Justice O'Connor's jurisprudence. Indeed, from my perspective as a constitutional scholar with a particular focus on education law, it is impossible to understand Justice O'Connor's admirable judicial opinions involving the educational sphere without foregrounding her concerns for democratic citizenship. Justice O'Connor taught the nation many valuable lessons over the years, and no realm better illuminates her thoughtful contributions to our constitutional order than those that she dispensed regarding schools and universities. If one truly seeks to understand her judicial work, then, we would do well to recall the education of Justice O'Connor.⁸

6. See MEIRA LEVINSON, *NO CITIZEN LEFT BEHIND* 56 (2012) (analyzing the civic empowerment gap).

7. *First Woman on Supreme Court Sandra Day O'Connor Will Be Remembered as Country's Foremost Advocate for Civic Education*, PR NEWSWIRE (Dec. 1, 2023), <https://www.prnewswire.com/news-releases/first-woman-on-supreme-court-sandra-day-oconnor-will-be-remembered-as-countrys-foremost-advocate-for-civic-education-302003465.html> [https://perma.cc/6P]L-3BD2].

8. For insightful journalistic efforts to highlight Justice O'Connor's education law jurisprudence that aided my own thinking, see Mark Walsh, *What Sandra Day O'Connor Did to Shape School Law and Civics Education*, EDUC. WEEK (Dec. 1, 2023), <https://www.edweek.org/policy-politics/what-sandra-day-oconnor-did-to-shape-school-law-and-civics-education/2023/12>

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Justice O'Connor's first major opinion for the Court, which she produced at the end of her first Term in 1982, established early on that she understood the deep connection between education and democratic citizenship. In *Mississippi University for Women v. Hogan*,⁹ the Court weighed whether states could limit enrollment in nursing programs to female students without violating the Fourteenth Amendment's Equal Protection Clause. Although that question may seem to present a painfully obvious constitutional violation today, the Justices found it an agonizingly close call in the early 1980s. Not only was *Hogan* decided by a narrow 5-4 margin, Justice Blackmun—who had authored *Roe v. Wade*¹⁰ nine years earlier—was one of the dissenters who failed to understand how the university's exclusionary nursing admissions policy undermined the cause of sex equality.¹¹ Justice Blackmun, along with his fellow dissenters, conceived of the dispute primarily as involving one pushy man attempting to force his way into a realm that was quite understandably reserved as an all-women domain.¹²

Justice O'Connor's opinion for the Court, however, understood that the exclusionary policy at issue in *Hogan* communicated the sexist message that women belonged in only certain, limited realm and were therefore unworthy of the full rank of citizen.¹³ In striking down Mississippi's admissions approach, Justice O'Connor established for the first time that educational institutions must provide an "exceedingly persuasive justification" for limiting enrollment to one sex.¹⁴ More importantly, though, Justice O'Connor eviscerated Mississippi's

[<https://perma.cc/NP6A-EAFF>]; Andrew Trotter, *Justice O'Connor Played Pivotal Role in Education Cases*, EDUC. WEEK (July 1, 2005), <https://www.edweek.org/policy-politics/justice-oconnor-played-pivotal-role-in-education-cases/2005/07> [<https://perma.cc/88CB-V2D8>].

9. 458 U.S. 718 (1982).
10. 410 U.S. 113 (1973).
11. *Hogan*, 458 U.S. 733 (Blackmun, J., dissenting).
12. See *id.* at 734 ("[R]espondent Hogan 'wants in' at this particular location in his home city of Columbus. It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to males at Jackson and at Hattiesburg."); see also *id.* at 735 (Powell, J., dissenting) (contending that *Hogan* involved "one man, who represents no class, and whose primary concern is personal convenience").
13. See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (analyzing the notion of citizenship in the context of sex discrimination).
14. 458 U.S. 718, 724 (1982). *Hogan* was decided fourteen years before *United States v. Virginia* endorsed the "exceedingly persuasive justification" standard in the decision prohibiting the Virginia Military Institute (VMI) from remaining an exclusively male university. 518 U.S. 515,

contention that maintaining an all-women nursing institution served as a form of compensation for gender discrimination. “Rather than compensate for discriminatory barriers faced by women,” O’Connor explained, “[Mississippi’s] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”¹⁵ Furthermore, O’Connor contended that the “admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.”¹⁶ States are prohibited from sex classifications, O’Connor noted, when they are driven by “fixed notions concerning the roles and abilities of males and females,” “reflect[ing] archaic and stereotypic notions.”¹⁷ In articulating an early version of what has come to be called “the anti-stereotype principle,”¹⁸ Justice O’Connor made it unmistakably clear that—in a truly democratic society—women belonged in any professional role they desire, not just in the role of a caregiver. So conceived, Justice O’Connor in *Hogan* powerfully articulated as the law of the land the very idea that her historic elevation to the Supreme Court represented for the nation one year earlier.

Students of education law might be forgiven for believing that the Constitution contains a Drug Exceptions Clause, where the Court interprets, and distorts, our governing document to uphold almost any action that educators take if it is justified as aiming to curtail drug usage in schools.¹⁹ The potency of the Drug Exceptions Clause doctrine was on full display in 1995, when the Court issued *Vernonia School District 47J v. Acton*.²⁰ In that case, the Supreme Court upheld the authority of public school to require athletes to submit to suspicionless drug searches—even though traditional Fourth Amendment principles frown upon

531 (1996). Notably, Justice O’Connor initially had the opportunity to write the *VMI* decision, but demurred and insisted that the opportunity to author the historic opinion should go to Justice Ginsburg. See THOMAS, *supra* note 1, at 286-87.

15. 458 U.S. 718, 729 (1982)

16. *Id.* at 730.

17. *Id.* at 725.

18. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, (2010). I greatly admire Professor Franklin’s insightful excavation and analysis. Curiously, though, this Article treats *Hogan* only in passing, *see id.* at 137, and declines even to mention that Justice O’Connor authored the opinion.

19. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1984); *Morse v. Frederick*, 551 U.S. 393 (2007); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2000). For a thoughtful, recent argument that one can understand as contending that the Constitution, writ large, effectively contains a Drug Exceptions Clause, see DAVID E. POZEN, *THE CONSTITUTION OF THE WAR ON DRUGS* (2024).

20. 515 U.S. 646 (1995).

such dragnet searches. The schools in *Acton* required students to provide urine samples under the supervision of school authorities. Nevertheless, the majority opinion – written by Justice Scalia – portrayed the invasion of privacy as “negligible” and “[in]significant,” not least because of the paramount importance of “[d]eterring drug use by our Nation’s schoolchildren,” lest the nation suffer “the effects of . . . drug-infested school[s].”²¹

To her great credit, Justice O’Connor’s dissenting opinion in *Acton* eschewed the Drug Exceptions Clause, contending: “It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis.”²² Empowering school officials to conduct these invasive searches in a wholesale fashion, O’Connor maintained, would teach students ugly lessons about their place in our constitutional democracy: “[I]ntrusive, blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware.”²³ Justice O’Connor made clear that the school district’s dragnet approach harmed our constitutional democracy by treating citizens as mere subjects. “[M]any schools, like many parents, prefer to trust their children unless given reason to do otherwise,” she stated. “As James Acton’s father said on the witness stand, ‘[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they’re innocent . . . , and I think that kind of sets a bad tone for citizenship.”²⁴

Driving home this point further still, Justice O’Connor viewed this constitutional dispute through the eyes of a vulnerable student-citizen, rather than only through the eyes of searching school administrator. “[F]rom the student’s perspective,” she noted, “any testing program that searches for . . . serious wrongdoing can never be made wholly nonaccusatory,” and “the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably – and quite reasonably – understood as punishment.”²⁵ Going directly to the source, Justice O’Connor observed that “[t]he best proof” that the suspicionless drug tests are “to *some* extent accusatory can be found in James Acton’s own explanation on the witness stand as to why he did not want to submit to

21. *Id.* at 658, 660, 661, and 662.

22. *Id.* at 686 (O’Connor, J., dissenting).

23. *Id.* at 682.

24. *Id.*

25. *Id.* at 683.

drug testing: ‘Because I feel that they have no reason to think I was taking drugs.’”²⁶ Justice O’Connor concluded: “It is hard to think of a manner of explanation that resonates more intensely in our Fourth Amendment tradition than this.”²⁷ This student-centered approach to the Fourth Amendment law did not alas carry the day in *Acton* or even a closely-related follow-on case that Justice O’Connor correctly anticipated would flow from *Acton*.²⁸ But, happily, Justice O’Connor’s student-centered approach can be understood as driving the Court’s most recent school-based interpretation of the Fourth Amendment.²⁹

At first blush, Justice O’Connor’s decisive vote upholding the constitutionality of vouchers for use at private schools—including religious schools—in *Zelman v. Simmons-Harris*³⁰ might seem at odds with her broad emphasis on democratic citizenship in education law cases. Indeed, the four dissenting Justices—who would have found that using public funds for tuition at religious schools in Cleveland, Ohio, violated the Establishment Clause—all contended that such programs undermined democracy because they sowed the seeds of religious resentment on American soil. Justice Stevens’s dissent, for example, linked vouchers to “religious strife,” and even invoked the specter of religious discord found in “the Balkans, Northern Ireland, and the Middle East.”³¹ But Justice O’Connor’s concurring opinion in *Simmons-Harris* construed those assertions as nothing less than “alarmist.”³² It is important to appreciate that Justice O’Connor was far from insensitive to Establishment Clause objections in the educational sphere. To the contrary, she voted with the majority in finding that educators acted impermissibly when they incorporated state-backed prayers at public school graduation ceremonies and football games.³³ It is not hard to see how

26. *Id.* at 683-84.

27. *Id.* at 684.

28. *Id.* at 685 (noting that the school district’s policy focus upon athletes was “driven . . . by a belief in what would pass constitutional muster,” and that the school’s “original program was targeted at students involved in any extracurricular activity”). Five years after *Acton*, and over Justice O’Connor’s objection, the Supreme Court upheld suspicionless drug testing of students who participate in nonathletic extracurricular activities. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2000).

29. See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 375 (2009) (finding a school violated the Fourth Amendment when it strip-searched a student because due to the search’s “embarrassing, frightening, and humiliating” character, and noting that students’ “adolescent vulnerability intensifies the patent intrusiveness of the exposure”).

30. 536 U.S. 639 (2002).

31. *Id.* at 686 (Stevens, J., dissenting).

32. *Id.* at 668 (O’Connor, J., concurring).

33. See *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

Justice O'Connor's votes in those landmark decisions were driven by her longstanding concern that the Establishment Clause prohibits the state from "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."³⁴

But Justice O'Connor did not believe that the voucher program at issue in *Simmons-Harris* raised a significant risk of fracturing American society, sorting the nation into groups of insiders and outsiders. Demonstrating her context-sensitive constitutional approach, Justice O'Connor viewed the Establishment Clause concerns as reduced given that the Cleveland program did nothing to inject religion into its public-school environments. Justice O'Connor also emphasized that the Court's decision upholding Cleveland's voucher program hardly "mark[ed] a dramatic break from the past," as college students already used public money in the form of Pell Grants and the GI Bill to attend religious institutions.³⁵ If Pell Grants being used to attend the University of Notre Dame had not brought the United States to its knees, she suggested, there was little reason to fear that a high school voucher program would somehow present a breaking point. In addition, Justice O'Connor emphasized that Cleveland parents had a wide range of educational options (including both public and private nonreligious schools) where they could opt to enroll their children.

Most importantly, Justice O'Connor—perhaps drawing upon her own youth, and reflecting upon the difficult educational choices made on her behalf³⁶—understood very well that parents are often selecting not *the* optimal schooling option for their children, but instead are selecting among various suboptimal options. "I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program," she wrote. "For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents."³⁷ She, in effect, queried: Why should indigent Cleveland parents who were not Catholic, say, be prevented from selecting a Catholic school if they believed that it would furnish their children with the best available education?

34. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

35. *Simmons-Harris*, 536 U.S. at 663, 666 (O'Connor, J., concurring).

36. See BISKUPIC, *supra* note 1, at 16 (noting that, in her own part of the Southwest, educational options were "kind of a poor choice whichever way you go").

37. 536 U.S. at 670 (O'Connor, J., concurring).

Justice O'Connor noted that in Cleveland some "parents enrolled their children in religious schools associated with a different faith than their own."³⁸ But rather than construe that fact as constitutionally fatal for Establishment Clause purposes, it might instead be understood to advance the democratic project of religious pluralism, as students from different faith traditions could rub shoulders within Catholic schools. Committed pragmatist that she was, moreover, Justice O'Connor would have had little time for entertaining the idea that preventing Cleveland from offering an escape hatch for some of its indigent students somehow set back the cause of American citizenship. Instead, she firmly believed that enabling everyone from all of sectors of society to realize whatever potential they possess was an essential element for ensuring that the American democratic order continues to flourish.

This democratic commitment featured prominently in a renowned majority opinion that she wrote on behalf of the Court, upholding affirmative action's constitutionality in *Grutter v. Bollinger*.³⁹ In perhaps the most arresting passage of *Grutter*, Justice O'Connor explicitly connected affirmative action programs to citizenship, contending that they were essential to maintaining our multiracial democracy. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," Justice O'Connor wrote. "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."⁴⁰ She amplified this connection elsewhere in *Grutter*: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."⁴¹ Our body of educational law decisions would be much stronger if more Supreme Court jurists borrowed a page from Justice O'Connor's book, and foregrounded considerations of how constitutional decisions help or hinder the nation's civic life.

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In closing, I feel compelled to observe that the four education law decisions that I have analyzed here are difficult to categorize as all falling neatly into either a conservative camp or a liberal camp. Although I believe that Justice O'Connor both applied the correct framework and reached the correct outcome in all four of these cases, very few of my fellow constitutional law scholars would agree

38. *Id.* at 672.

39. 539 U.S. 306 (2003).

40. *Id.* at 332.

41. *Id.*

with that assessment.⁴² Justice O'Connor's refusal to march in lockstep with any recognizable political program forms an unmistakable, important part of her legacy. Such marked intellectual independence is seldom seen on the current Supreme Court, as—in high-profile cases—the Democratic-appointed Justices overwhelmingly hew to the liberal line and the Republican-appointed Justices overwhelmingly hew to the conservative line.

Reexamining her jurisprudence today thus succeeds in inverting the public's predominant conception of Justice O'Connor. Due to her breaking the gender barrier at the Supreme Court, Justice O'Connor has long been conceived of as a historic first. *The Washington Post's* obituary for Justice O'Connor is only one of many remembrances that struck this theme with considerable force: “[H]er *first* reference in the history books will always be as the *first* woman on the court, and the *first* mother.”⁴³ In this same vein, Evan Thomas's recent biography of Justice O'Connor was titled simply: *First*.⁴⁴ This focus on Justice O'Connor's primacy is, of course, entirely understandable, as the spotlight that accompanied her pioneering role was fierce and unforgiving. Justice O'Connor herself repeatedly told her law clerks, including me: “It's good to be first. But you don't want to be the last.”⁴⁵

Yet, in an important sense, Justice O'Connor's notable judicial independence does today seem to have marked her as the last Justice of a certain kind. Four women now sit on the Supreme Court, alongside five men. But Justice O'Connor has no discernible jurisprudential heirs—at least in the sense of her refusal to conform to a rigid ideology. In our current era of orthodoxy, Justice O'Connor's unabashed heterodoxy bespeaks a bygone age. All of this is an elaborate way of saying, then, that we shall not soon see her like again. And our Nation is poorer for her absence.

42. For my own analysis of these education law disputes, see generally Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* (2018); Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208 (2022); Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651 (2024); Justin Driver, *The Cure as Disease: The Conservative Case against SFFA v. Harvard*, 2023 SUP. CT. REV. 1 (2024).

43. Fred Barbash, *Sandra Day O'Connor, Pathbreaking Woman on Supreme Court, Dies at 93*, WASH. POST (Dec. 1, 2023), <https://www.washingtonpost.com/obituaries/2023/12/01/sandra-day-oconnor-supreme-court-justice-dead> [<https://perma.cc/8WV2-FC4U>] (emphasis added).

44. THOMAS, *supra* note 1.

45. *Id.* at xii.