



RACING RIGHT: REFLECTIONS ON THE O'CONNOR RESIGNATION BY JULIANNE Malveaux

When Supreme Court Justice Sandra Day O'Connor was nominated to the court by former President Ronald Reagan, she showed up on the ideological scan as a conservative. In one of her early opinions, *Croson v. Richmond*, she rather derisively wrote about the legitimacy of minority business set-asides in an opinion I satirized as "show me your chains." Writing about a modest set-aside plan that was developed in the cradle of the confederacy, O'Connor said that people had to "prove" specific past discrimination, and proposed a cumbersome arithmetic formula to measure the extent of discrimination in particular industries. Essentially, she suggested that if the number of businesses in a certain industry doing business with a city were proportional, there might not be discrimination, ignoring the fact that historical discrimination may have impeded the process of business formation in the past, thus affecting the denominator, understating the numerator, and also the amount of past discrimination. Yes, I know this is a cumbersome sentence, but work with me here. What I'm saying is that O'Connor's inclination was to understand the extent of discrimination by looking at the universe of businesses that existed, instead of the universe of businesses that might have existed but for discrimination. In English? Ignoring the effect of the past in measuring business formation in the past undermined the ability to prove a need for minority business set-asides in the present.

In any case, cities rushed to change their rules because of *Croson*, and those who justifiably supported affirmative action and set-asides counted O'Connor out in the fight for justice. That was a mistake. The quality that she is being touted for, on the heels of her resignation, is her "moderate conservatism," or her ability to see both sides of an argument and to try to find some common ground, or at least a place of compromise. It is amazing to consider that the same woman whose decision seriously challenged minority business set-aside programs was a woman touted as the savior of college affirmative action programs. The middle ground she took in the Michigan cases offered "something for everyone," both a ban on quotas and the use of hard numbers to account for race in the undergraduate case, and an affirmative that race still matters and should be remediated in the graduate case. O'Connor offered something else – a timeline. She said that perhaps affirmative action programs would not be necessary in 25 years or thereabouts. Count on her to be quoted in 2028 when another affirmative action case is winding its way through the courts.

O'Connor is not the only conservative that ended up sounding like she had good sense, when you looked at her views in context. Two other Republican choices for the Supreme Court, Anthony Kennedy and David Souter, have offered a "moderate" balance that might not have been expected from their pre-Supreme Court records. What can we say? That there is rarified air at the Supreme Court that encourages people to leave ideology and embrace good sense? Probably not. Otherwise, we may have seen sensible demonstrations of sense (other than his recent appropriately racially sensitive comments in the eminent domain case) from Associate Justice Clarence Thomas. Actually, I think conservative moderates like Kennedy, Souter and O'Connor seem so reasonable these days because our country is racing to the right.

Bush partisans spit out social programs like babies do spoiled food, preferring "privatization" options for education, Social Security, and everything else. They attack a series of pivotal rights, including the right to free speech in their opposition to flag-burning, the right to choice, in their attacks on *Roe v. Wade*, their attacks on compulsory education with the imposition of "zero tolerance", and their attacks on simple human decency with their support of torture in

Guantanamo Bay. Am I overreaching? Ask the folks who live with the changes that have been made by this administration. Bottom line – a decade ago we might not have imagined an unjustified attack on Iraq, a ballooning budget deficit initiated by tax-cutting Republicans, or the current attack on the United Nations. And we might not have anticipated a day when conservative looks liberal and when even Richard Nixon emerges, for liberals, as a president who had considerable redeeming social value.

Nixon would engineer the break-in of an office in a heartbeat. He was also the father of affirmative action. He signed Executive Order 116255 in 1971, authorizing the development and coordination of a program for minority business enterprise. The executive order begins by saying, "The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and to improve the functioning of our national economy." When have you last heard the words "social and economic justice" used by a Republican, or even a Democrat for that matter? When is the last time our nation contemplated the meaning of social and economic justice. If Richard Nixon is using executive order language that, arguably, Bill Clinton would not, is it no wonder that Sandra Day O'Connor, often described as "the most powerful woman" in our nation, was perceived as more moderate than conservative.

I don't write this to excoriate O'Connor. Like most progressives in higher education, I am grateful that Justice Sandra Day O'Connor put her finger in the dam to stave off, at least temporarily, attacks on affirmative action in higher education. Instead, I write to raise a series of questions about our nation's ideological continuum and the many ways that it has shifted right. "Fair and balanced" debate now seems to mean a conversation between moderates and conservatives, forget about liberals or progressives. The possibility of social and economic justice seems distant in an economy that this president has structured as "an ownership economy" in which millions at the periphery are systematically disowned.

Scholars can't do much about the political reality – Republicans own the House of Representatives, the Senate, the White House, and possibly the Supreme Court. But those who teach and write can be clear about the ideological continuum and the parts of it that are missing in public discourse. Liberal should be neither a bad word nor an endangered species, but a dynamic concept that is studied and discussed, even when liberals are in the minority.

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