

HARVARD LAW REVIEW

© 2006 by The Harvard Law Review Association

A TRIBUTE TO JUSTICE SANDRA DAY O'CONNOR

On the occasion of her retirement from the Supreme Court of the United States, the editors of the *Harvard Law Review* respectfully dedicate this issue to Justice Sandra Day O'Connor.

*Justice Ruth Bader Ginsburg**

Justice Sandra Day O'Connor's twenty-four years on the Supreme Court's bench are cause for celebration. She has been rightly praised for her independence, self-reliance, practicality, and self-possession. Of all the accolades, one strikes me as describing my dear colleague best. Growing up on the Lazy B Ranch in Arizona, Justice O'Connor could brand cattle, drive a tractor, and fire a rifle with accuracy well before she reached her teens. One of the hands on the Ranch recalled his clear memory of Sandra Day: "She wasn't the rough and rugged type, but she worked well with us in the canyons — she held her own."¹

Justice O'Connor did just that at every stage of her professional and family life. The first woman to serve on the Supreme Court brought to the Conference table experience others did not possess: the experience of growing up female in the 1930s, 40s, and 50s, of raising a family, of doing all manner of legal work — government service, private practice, successive successful candidacies for legislative and judicial office, leadership of her state's Senate, state court judicial service, first on a trial court, then on an appellate bench. Hard worker and quick learner that she is, she mastered mysteries of federal law and practice and held her own from the very start.

Justice O'Connor's welcome when I became the junior Justice is characteristic. The Court has customs and habits one cannot find in

* Associate Justice, Supreme Court of the United States.

¹ PETER HUBER, AMERICAN WOMEN OF ACHIEVEMENT: SANDRA DAY O'CONNOR 25 (1990).

the official Rules or in *Stern & Gressman*.² Justice O'Connor knew what it was like to learn the ropes on one's own. She told me what I needed to know when I came on board for the Court's 1993 Term — not in an intimidating dose, just enough to enable me to navigate safely my first days and weeks.

At the end of the October 1993 sitting, I eagerly awaited my first opinion assignment, expecting — as the legend goes — that the brand-new Justice would be slated for an uncontroversial, unanimous opinion. When the list came round, I was dismayed. The Chief had given me an intricate, not at all easy, ERISA case, on which the Court had divided six to three.³ I sought Justice O'Connor's advice. It was simple. "Just do it," she said, "and, if you can, circulate your draft before he makes the next set of assignments. Otherwise, you will risk receiving another tedious case." That advice typifies Justice O'Connor's approach to all things. Waste no time on regret or resentment, just get the job done. Justice O'Connor was a dissenter in the case that was my first. As I read the bench announcement summarizing the Court's decision, she gave a Marshal's Office attendant a note for me. It read: "This is your first opinion for the Court, it is a fine one, I look forward to many more."

As the first woman on the Supreme Court, Justice O'Connor set a pace I could scarcely follow. To this day, my mail is filled with requests that run this way: last year (or some years before) Justice O'Connor visited our campus or country, spoke at our bar or civic association, did this or that; next, words politely phrased, but to this effect — now it's your turn. My secretaries once imagined that Justice O'Connor had a secret twin sister to share all her appearances. The reality is, she has an extraordinary ability to manage her time. Why does she go to Des Moines, Lithuania, or Rwanda, when she might rather fly fish, ski, or play tennis or golf? In her own words:

For both men and women the first step in getting power is to become visible to others, and then to put on an impressive show. . . .

. . . As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we'll all be better off for it.⁴

There was a time in 1988 when Justice O'Connor's energy flagged, long months in which she endured rigorous treatment for breast cancer. Though tired and in physical discomfort, she did not miss a sitting day on the Court that busy Term. Once fully recovered, she spoke

² ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* (8th ed. 2002).

³ *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993).

⁴ Sandra Day O'Connor, Address to the 1990 Sixteenth Annual Olin Conference: Women in Power (Nov. 14, 1990).

of that hard time; her account, carried on public television, gave legions of women hope, the courage to continue, to do as she did. She went back to the 8:00 a.m. exercise class she inaugurated at the Court long before it was predicted she could. “[T]here was a lot I couldn’t do,” she said, “[b]ut I did a little, I did what I could.”⁵

What she could became evident years later, the day the Olympic women’s basketball team visited the Court. Justice O’Connor led the team on a tour ending at “the Highest Court in the Land,” the full basketball court on the building’s top floor. The team practiced some minutes, then passed the ball to Justice O’Connor. She missed the first shot, but the second went straight through the hoop.

Each case on the Court’s docket attracted Justice O’Connor’s best effort and she was never shy about stating her views at Conference or in follow-on discussions. When she wrote separately, concurring or in dissent, almost invariably, she presented her disagreement plainly and professionally. She wasted no words castigating colleagues’ opinions as “Orwellian,”⁶ “profoundly misguided,”⁷ or “a jurisprudential disaster.”⁸

In the twelve years we served together, Court watchers have seen that women speak in different voices, just as men do. Even so, some advocates, each Term, revealed that they had not fully adjusted to the presence of two women on the High Court bench. During oral argument, distinguished counsel — including a Harvard Law School professor and more than one Solicitor General — began their responses to my questions: “Well, Justice O’Connor . . .” Sometimes when that happened, Justice O’Connor would smile and crisply remind counsel: “She’s Justice Ginsburg. I’m Justice O’Connor.” Now, sadly, there will be no need for the T-shirts presented to us in 1993 by the National Association of Women Judges. Hers read, “I’m Sandra, not Ruth,” mine, “I’m Ruth, not Sandra.”

In June 1996, when I read the summary of the Court’s opinion in *United States v. Virginia*,⁹ the VMI case, I looked across the bench to Justice O’Connor, as I referred to her pathmarking opinion in *Mississippi University for Women v. Hogan*,¹⁰ which held that qualified men

⁵ *Surviving Cancer: A Private Person’s Public Tale*, WASH. POST, Nov. 8, 1994, Health, at 7 (reprinting selections from Sandra Day O’Connor, Address to the Nat’l Coalition for Cancer Survivorship (Nov. 3, 1994)).

⁶ *E.g.*, *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁷ *E.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 685 (2002) (Stevens, J., dissenting).

⁸ *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

⁹ 518 U.S. 515 (1996).

¹⁰ 458 U.S. 718 (1982).

could not be refused admission to a state-operated school for nurses.¹¹ That decision issued in 1982, at the end of her first Term on the Court; the judgment, striking down a classically stereotypical gender line, was a close five to four. The judgment fourteen years later in the VMI case was seven to one. What occurred in the intervening years at the Court as elsewhere in society? Justice O'Connor said it best when she appeared one night as Isabel, Queen of France, in the Shakespeare Theatre's production of *Henry V*: "Haply a woman's voice may do some good"¹²

Justice O'Connor's voice has done enormous good in our nation and world. She has endeavored, tirelessly, to improve the administration of justice, promote the professionalism of the bar, and encourage the integrity and independence of the judiciary. She has earned the respect of jurists everywhere for her influential legal reasoning, her meticulous preparation for Court sessions, and her open-mindedness, which defies any ideological label. In her work and days at the Court, she strived to make what was momentous for women in 1981 no longer extraordinary, but entirely expectable.¹³ In that effort, I will strive to follow her lead.

*Justice Stephen G. Breyer**

Sandra Day O'Connor was born in El Paso, Texas and raised in rural Arizona on a cattle ranch that her grandfather founded. She loved life on the "Lazy B," where she learned to mend fences, ride horses, fire a rifle, and drive a truck — all by the age of eight. Her favorite pets included a bobcat named Bob, a horse named Chico, and a sparrow hawk named Sylvester. She left the ranch to enter Stanford University, where she attended both college and law school. Despite graduating third in her law school class, she had to deal with considerable gender-based discrimination on her way to becoming a lawyer, a legislator, and a judge. Given Sandra's love of riding, fishing, and the outdoors, I have no doubt she would have made a great rancher. But luckily for all of us, she chose law and became a great Supreme Court Justice instead.

¹¹ *Id.* at 718.

¹² WILLIAM SHAKESPEARE, *HENRY V* act 5, sc. 2.

¹³ See Kimba M. Wood, *A Tribute to Justice Sandra Day O'Connor*, 1996 N.Y.U. ANN. SURV. AM. L. XLVIII, li.

* Associate Justice, Supreme Court of the United States.

Justice Byron White used to say that with each new appointment the Supreme Court is a different Court. I know only the most recent Court, the Court of the past eleven years. But that is time enough for me to understand the enormous benefit — for the Court, for its members, and for the law itself — of having Sandra Day O'Connor as a judicial colleague.

Justice O'Connor has brought to the Court's work, among other skills, a particularly strong practical understanding of the institutional role that courts must play in America's system of government. She has been able to translate that understanding into decisions that help to maintain the kind of nation that the Constitution foresees: a democracy, protective of basic human liberty, equally respectful of each citizen, with power dispersed among different levels and among different branches.

Two recent cases illustrate the kind of practical understanding that I have in mind. In *Grutter v. Bollinger*,¹ the Court considered whether the Constitution's Equal Protection Clause prohibits a state law school from using minority race as a special favorable factor in admissions. The Court concluded that the clause permits this kind of affirmative action — to a limited degree. Justice O'Connor's opinion for the Court places important weight on the practical consideration that student body diversity is necessary to maintain the kind of society the Constitution envisions, namely an inclusive democracy in which the nation's civic, military, business, and professional institutions are racially diverse. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation," Justice O'Connor wrote for the Court, "is essential if the dream of one Nation, indivisible, is to be realized."²

In *Hamdi v. Rumsfeld*,³ the Court considered the military's constitutional authority to detain an American citizen who the military claimed (but the citizen denied) had fought against American forces in Afghanistan. The Court concluded that the Due Process Clause requires that the detained citizen be given an opportunity to present evidence and argument to contest his detention before a neutral decisionmaker. As in *Grutter*, Justice O'Connor's opinion explores the practical and institutional considerations that help the Court "strick[e] the proper constitutional balance" — here, between individual freedom and national security during wartime.⁴

¹ 539 U.S. 306 (2003).

² *Id.* at 332.

³ 124 S. Ct. 2633 (2004).

⁴ *Id.* at 2648.

As these and many other O'Connor opinions make clear, the institutional considerations she has in mind are constitutional in nature. They arise out of the Framers' efforts to create a Constitution that will *in practice* secure its permanent values for generations to come. In my view, Sandra O'Connor has an often unerring sense of how our nation's democracy works. And that means that, whatever the debates that arise out of our Court's decisions in any particular case, her opinions, taken as a whole, are properly seen to embody a balance, common sense and sound judgment necessary for our Court — and for the Constitution — to function well.

Justice O'Connor once said that a constitutional judge's initial decisions leave "footprints" that later decisions almost inevitably will follow. Her legal writing has left footprints that courts will follow for many years to come.

Justice O'Connor's contribution to the law is not limited, however, to her opinions. Due to the prominence of the Supreme Court at home and the reputation of the American judicial system abroad, a Justice of our Court can often work with nonprofit organizations or use public appearances to help bring about a better-functioning judicial system. No one knows how to use the "Supreme Court" label in the public interest better than does Sandra. She works tirelessly, traveling during Court vacations to American Indian reservations; meeting with Asian, African, and European judges; planning with bar association representatives about how to advance the rule of law, democracy, and independent judicial systems in the nations of the former Soviet bloc; encouraging women lawyers and judges by sharing her own life experiences; speaking to high school, college, and law school students about the Court's work. Throughout, she speaks, she listens, she teaches, and she learns. And she has urged others — both bench and bar — to do the same.⁵

Justice O'Connor's professional achievements explain why the *Law Review* is dedicating this issue to her. The other tributes elaborate upon those achievements. As her colleague, I want to add that we members of the Court treasure her presence for personal reasons as well. Sandra has a special talent, perhaps a gene, for lighting up the room that she enters; for helping to restore good humor in the presence of strong disagreement; for helping to produce results that are constructive; for helping those at odds today to remember that "tomorrow is a new day." These personal qualities improve the quality of the personal as well as the professional lives of the most recent Court's mem-

⁵ See, e.g., Justice Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 15, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20, 20.

bers. Luckily for all of us, Justice O'Connor will maintain an office at the Court. She will continue her "off the bench" activities. And we shall have the benefit of her company and friendship for many years to come.

*Ruth V. McGregor**

When Justice Sandra Day O'Connor joined the Supreme Court of the United States in 1981, the Court gained much more than a Justice who, during the next quarter century, would play a major role in determining the direction of the Court's jurisprudence. It gained the services of a woman who would use her influence, coupled with her considerable intellect and energy, to improve justice systems here and internationally. She became personally and deeply involved in efforts to improve the status of women in the legal profession, to spread the rule of law, and to increase professionalism among lawyers. Much of her success in each area depended upon her willingness to sacrifice anonymity and to become more accessible and visible than most past Justices had been. Any analysis of the impact of Justice O'Connor's tenure on the Court is incomplete if it does not consider her impact outside the courtroom.

The effect of Justice O'Connor's appointment upon the status of women in the legal profession cannot be overstated. With Justice O'Connor's confirmation, the axis of the legal world for women shifted, never to return to its old position. By 1981, women were making their presence felt as law students, but had only the most precarious toehold on positions of influence within our profession. Many areas of practice were, for all practical purposes, closed to women. Few major law firms included women on their roster of partners. Women in the judiciary, both state and federal, were noted primarily for their rarity. The persuasiveness of the rationalizations used by those in control of the legal profession to justify the absence of women faded after Justice O'Connor took her place on the Court. If a woman could serve, with distinction, on the nation's most important judicial body, how could women as a class be regarded as incapable of filling any challenging role in the legal profession? If Justice O'Connor could resolve this country's most difficult legal issues while also fulfilling her roles as a wife, mother, daughter, and friend, how could other women be barred because family commitments allegedly would prevent them

* Chief Justice, Arizona Supreme Court; law clerk to Justice Sandra Day O'Connor, October Term 1981.

from devoting sufficient time and energy to their professional obligations? If a woman could serve as a Supreme Court Justice, how could anyone argue that women should not be considered to fill judicial positions on other courts? And what little girl should ever be told that becoming a Supreme Court Justice was beyond her grasp?

Justice O'Connor's very presence on the Court did much to enable women, but, typically for her, she worked actively to make certain that other women could advance. Since joining the Court, Justice O'Connor has been an active supporter of women's organizations, including the National Association of Women Judges. She has chided — sometimes gently, sometimes less so — those in our profession who would limit opportunities for women. She has served as a role model, motivator, and mentor for countless women. As young girls listen to Justice O'Connor tell the story of a girl from a dusty Arizona ranch who overcame every obstacle placed in her path, their rapt expressions and starry eyes tell her that they understand their unlimited options. Every woman who is a part of or who aspires to join the legal profession owes a debt of gratitude to Justice O'Connor.

Justice O'Connor also took advantage of every opportunity to serve as an ambassador for the rule of law. She did more than simply voice her belief that all nations should live under the rule of law, which requires that democratically elected legislatures enact laws that independent judiciaries enforce. She worked tirelessly to encourage emerging nations to adopt this basic principle and to remind us that this country could lose the rule of law if we do not act to protect our precious heritage. No Justice has been more open to meeting with judicial leaders from other countries to exchange ideas about the need for and place of the rule of law. When the American Bar Association responded in 1990 to the needs of emerging independent nations by forming the Central and Eastern European Law Initiative (now the Central European and Eurasian Law Initiative) to help establish independent judicial systems, Justice O'Connor immediately joined its Executive Board, a position she continues to fill, and pledged her support for the CEELI goals. Her commitment has been real and personal. She has attended numerous international CEELI meetings to encourage and motivate those working to establish a functioning system of law for countries in which such a principle was previously unknown. She has literally crisscrossed the globe through her activities to expand the rule of law, traveling to Brazil, China, Bahrain, Mongolia, the Baltic states, Eastern Europe, and seemingly every point between. To each country, she brings the message of the United States's history in establishing the rule of law and the knowledge gained from those sometimes-painful experiences. From each country, she takes new ideas and lessons learned from seeing the excitement in countries making a greater commitment to the rule of law. Her presence at confer-

ences to address the rule of law brings increased energy to discussions and calls attention to the critical need for continuing work in this area.

Justice O'Connor also has devoted her time and expertise to focus attention on the need for greater professionalism and commitment to public service among lawyers. The legal profession spent years talking about the need for greater civility and professionalism; Justice O'Connor took action to see that something was done. Following her usual practice, she both supported organizations that foster professionalism and acted individually to further this goal. She became an ardent supporter of the American Inns of Court Foundation, which advances the cause of professionalism through a system based on the English Inns of Court model. Countless students and lawyers at universities, law schools, and legal organizations have heard Justice O'Connor speak about the importance of acting professionally and in a manner that is mindful of a lawyer's role as an officer of the court. No law student or young lawyer could fail to appreciate the urgency of Justice O'Connor's admonition that entry to the legal profession requires that lawyers use their special privileges and advantages by giving back through some form of public service. By insisting that lawyers look beyond the accumulation of wealth and use their skills for the greater public good, Justice O'Connor has herself performed yet another great public service.

Justice O'Connor could not have accomplished so much in these areas had it not been for her accessibility, which enabled her to bring a new dimension to the role of Supreme Court Justice. Whereas members of the Court previously were regarded as distant and aloof, thousands of students and citizens will remember Justice O'Connor for being willing to talk with them. I can only guess how many young children proudly display pictures taken when their classes met with Justice O'Connor. I wonder how often those encounters led to a decision by a student that she or he would study the law and try to be "just like Justice O'Connor." Those adults and law students who met with the Justice or heard her speak left knowing that her words would affect their lives, and many responded to her calls for action. She convinced judges, lawyers, and government leaders across the globe of the strength of her commitment to a system of laws by appearing personally and speaking directly with them. She could have remained in her Court chambers and made some difference. Instead, she left her chambers and made a substantial difference.

As the legal academy examines Justice O'Connor's influence upon the Court's decisions, we should not lose sight of the important and lasting contributions she made in these other areas. She brought to the Court a unique combination of intellect, commitment, caring, and personal strength and used these qualities to change the face of the Court, the legal profession, and the justice system. We may never see another Justice like her.

*Glen D. Nager**

I had the honor of serving as a judicial law clerk to Sandra Day O'Connor during the October 1983 Term. She was then and is now a Justice who revered the Supreme Court and who took her responsibility to interpret the law impartially with the utmost seriousness. Given that I am a former law clerk owing the Justice and the Court the continuing obligations of confidentiality and discretion, I feel obliged to eschew further comment on her jurisprudence, judicial craftsmanship, and impact on the law and the Court. However, no tribute to Sandra Day O'Connor, or "SOC" as her law clerks affectionately call her, would be complete without a recognition of her admirable nonjudicial personae. So I am pleased to accept the *Review's* invitation to provide firsthand reflections about a Justice who remains a personal and treasured friend to so many.

One of SOC's nonjudicial personae is revealed in her love of marriage and devotion to it. Her half-century romance with John J. O'Connor, or "JOC" as we call him, is enhanced by a mutual love affirmed daily, and by a lifelong commitment that clearly influences all of SOC's priority decisions. But also prominent on SOC's romantic record are her tireless efforts to play matchmaker for others — and particularly for her own law clerks. For some, she actively seeks ideal partners. For others, she just tries to seal the deal. In my case, I had already found the "perfect woman"; but, to SOC's dismay, I was for the time content with continuing my bachelor status. That so frustrated SOC that, during a party in chambers, she turned to me and my co-clerks and declared: "You know, we don't have anything on the calendar to celebrate next month; Glen, an engagement party would be quite nice." Her expression was mild and her mien innocent, but the tone was strikingly injunctive. Now who needs a mother-in-law when they have such a Justice-in-law?

Paralleling her commitment to spouse and matchmaking, SOC's nonjudicial personae are also reflected in her devotion to family. Her annual Christmas cards, which appealingly display her children and grandchildren, track the immense pride that SOC has in her ever-growing family tree. And what a tree! For SOC, its branches extend "to my law clerks — past, present, and future," as she makes clear in

* Partner, Jones Day, Washington, D.C.; law clerk to Justice Sandra Day O'Connor, October Term 1983.

the warm dedication of her book, *The Majesty of the Law*.¹ SOC's dedication and loyalty to her law clerks and their children — termed her “precious grandclerks” — is even more vividly revealed in her continued active involvement in our lives. She has been our cheerleader; our mentor; and, though strictly adhering to the code of judicial ethics, our loyal supporter. So, in my first oral argument before the Court, SOC subjected me to intensely hostile questioning and then joined the dissent from my client's victory in the case. But, after the decision was handed down, SOC encouraged me to keep up the “good work.” Former clerks of SOC have countless such tales, wherein she prods us upward and inspires us by her guidance and example.

Those of us who are fortunate to be under her wing also know of her unyielding attachment to her Western roots. SOC spoke eloquently of those roots in the moving eulogy that she handwrote, with tears streaming from her eyes, after her beloved rancher father passed away during the Term of my clerkship. Those Western roots also repeatedly manifested themselves when, during Court Terms filled with blockbuster criminal procedure, First Amendment, and civil rights cases, she always spoke with fiery passion from the bench about cases involving such subjects as water rights, immigration, and family farms and ranches. Anyone entering her chambers had only to look at the art and artifacts displayed to see her continuing love of the West. And we law clerks also experienced the Mexican-American food that SOC regularly cooked and brought to chambers for us to eat — delighting those of us with our own Western roots, and frightening those poor souls who (to SOC's devilish amusement) had apparently never before tasted a tamale or jalapeño.

We law clerks also know and cherish SOC's quiet but rich sense of humor. Because she has been so much in the public eye, she has always had to take great care with what she says in public. But SOC loves a good laugh and indulges her wit in private. Her beloved JOC belonged to a national joke network and always had the latest laughs available to share. SOC regularly added some great original lines of her own, puncturing pomposity with a wilting phrase and still leaving the victim smiling. For example, right after she arrived at the Court, SOC commented that she was “surprised to find that there were more lawyers in Washington, D.C. than people.” And, during a game of Jeopardy at a clerks' reunion, she laughed loudly that, with regard to the Answer “SOC's Handicap,” the Question must be “What part of her golf game does SOC talk about the least?”

¹ SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* vii (Craig Joyce ed., 2003).

SOC's passion for golf and seemingly every other sport known to mankind also stands out — perhaps again reflecting her “rancher” origins. Not surprisingly, when President Bush announced his initial selection of a nominee to succeed her, our nation found Sandra Day O'Connor, at age seventy-five, standing in the middle of a mountain stream trying to catch fish. SOC's calendar still shows regularly scheduled tennis outings; there are many impromptu golf outings; and she even has a putting course set up in chambers so that she can entertain “precious grandclerks” when they visit. Though SOC is not one to brag about her own accomplishments, she does manage to ask in most conversations about golf whether she has “mentioned that I have a hole-in-one?” And she has even sponsored an exercise class at the Supreme Court. Indeed, though it is not well known, it was SOC who persuaded then-Chief Justice Warren Burger to renovate the basketball court and shower facilities on the top floor of the building — what SOC and other Justices call “the Highest Court in the Land.”

SOC's passion for sports and exercise is exceeded, however, by her unquenchable thirst for exploring new places. All of her clerks bear tales of being told to drop whatever they were doing and to accompany SOC on the latest field trip that she had arranged: perhaps a tour of the FBI building by the Director of the FBI; perhaps a visit to the Smithsonian to see the latest exhibition; or perhaps a private tour of the Shakespeare Theatre. Enriching and broadening experiences always. And we all anticipate each year the postcards that we receive as SOC and JOC visit exotic parts of the world that they have not yet seen. My personal favorite is a striking picture of the two of them at the Great Wall in China.

Truly, though, SOC's love of adventure is far surpassed by her love of people and country. Her deep concern for people and our country is famously illustrated in the moving eulogies that she delivered at the memorial services held for Chief Justice Rehnquist, Justice Powell, and President Reagan. And, as those eulogies reveal, when SOC speaks, she does not just say what people want to hear. She speaks from the heart and the mind.

So here is a peek, at least, at some of the nonjudicial personae of Sandra Day O'Connor: devotee of marriage; energetic matriarch of a quite extended family; lover of the West and the values for which it stands; good-natured and warm-hearted; sports diehard; enthusiastic explorer; and lover of people and country. SOC has certainly been no navel-gazing ponderer; hers has been a life of active, focused, practical engagement. One has to marvel at how she found the time and energy also to be such a hard-working judge; and others will no doubt explore how her nonjudicial personae may have influenced her judicial work. But all should be inspired — as I have been — by the good, gracious, and value-filled life that she has led and continues to lead. She is a

role model and loyal mentor for so many of us, and we live our lives as part of her lasting legacy.

*Kathleen M. Sullivan**

For those of us who graduated from law school in 1981, the year that Sandra Day O'Connor became the first woman Justice appointed to the Supreme Court, it was difficult to imagine the legal world she had faced upon her own graduation from Stanford Law School in 1952. While her classmate William H. Rehnquist headed off to a clerkship with Justice Robert Jackson, his future colleague on the Court scrambled for legal work despite her top grades and law review membership. Law firms would consider her for positions as a secretary but not as a lawyer; she later recalled them asking, "Ms. Day, do you type?" Nothing in her experience then could have foretold that she would ascend to the high Court at all, much less become one of the most influential Justices in its history.

In the intervening three decades, Justice O'Connor exercised exceptional strength of character, responding to the overt professional sex discrimination she encountered with remarkable resilience and resourcefulness. She talked her way into a job in a local prosecutor's office. She served as a government procurement lawyer while her husband John O'Connor was stationed in Germany in the JAG Corps. She opened a storefront law office in a shopping center when she and her husband settled back in Phoenix. While raising three sons, she mastered the art of political networking. She wasted no energy on self-pity. As one recent biographer noted, Justice O'Connor has followed a lifelong mantra that reflects her upbringing in Arizona on her family's Lazy B Ranch, where women had a presumptive rough equality because there was so much work to do: "That's the way it is. . . . Deal with it."¹

Eventually Justice O'Connor entered public life, at first appointed and then reelected to a position as an Arizona state senator. Effective and astute, she rose to the position of Arizona senate majority leader. Sidestepping efforts to press her into further political candidacies, she chose to serve as a judge on an Arizona trial court and intermediate appeals court. When President Ronald Reagan sought to fulfill his

* Stanley Morrison Professor of Law and former Dean, Stanford Law School.

¹ JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 209, 247 (2005).

campaign promise to nominate the first woman to the Supreme Court, she rose quickly to the top of his list: as one of his advisers recounted, “She had been a judge. She had been a legislator. She was from the West.”²

All three roles later left indelible traces in Justice O’Connor’s jurisprudence while on the Court. She was a judge’s Justice, whose common law approach to constitutional controversies led her to reject reliance upon any single grand theory or categorical interpretation. As the only member of her Supreme Court cohort to have held elected office, she had seen the proverbial sausage being made, and thus had special insight into the incentives and behaviors of legislators. And from her roots in the vast spaces of the West grew her articulation of a frontier federalism that aimed to limit the encroachment of the federal government upon the states, reasserting the value of local self-help over reliance on distant bureaucrats in the nation’s capital.

To begin with the first of these three frames of reference, Justice O’Connor’s common law constitutionalism became nothing less than the dominant mode of jurisprudence in the key constitutional decisions of the Rehnquist Court. She rejected originalism, literalism, and bright-line per se rules: “When bedrock principles collide,” she cautioned in one case pitting free speech against establishment claims, “they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.”³ She embraced instead a different conservative tradition — one closer to Holmes and Brandeis, Harlan and Hand — by which broad principles are translated into practical standards designed to enable judges to take into account variations in context and differences of degree. And she repeatedly garnered majorities for these standards, proving adept at the Supreme Court art form that her predecessor William J. Brennan, Jr. had called “counting to five.”

Thus, she famously authored what became the Court’s governing standard of review for abortion regulations: namely, that the right of privacy precludes “undue burden[s]” on a woman’s right to choose whether to continue a pregnancy, so that criminal prohibitions and spousal notice requirements are unconstitutional but informed consent and cooling-off provisions are not.⁴ She likewise authored the Court’s still-governing “endorsement” test for the permissibility under the Es-

² *Id.* at 76.

³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852 (1995) (O’Connor, J., concurring).

⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.); *see id.* at 877 (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

establishment Clause of public religious displays: namely, that “government must not make a person’s religious beliefs relevant to his or her standing in the political community by conveying a message ‘that religion or a particular religious belief is favored or preferred.’”⁵ And she reiterated for another generation that race-based preferences in university admissions may be upheld against equal protection challenge, so long as they reflect “truly individualized consideration” that employs race “in a flexible, nonmechanical way” rather than a quota system.⁶

Justice O’Connor unabashedly defended such tests against criticism that they were too flexible. For example, in stating the advantages of her endorsement test for establishment over the coercion test proposed by other Justices, she wrote:

To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins. But that is true of many standards in constitutional law⁷

And contrary to critics who suggested that such tests were undertheorized or unmoored from constitutional text, structure, and history, she took pains to ground them in underlying principles. For example, she explained, the endorsement test is necessary to render the Establishment Clause distinct from and not redundant of free exercise:

The Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.⁸

A former state senator as well as former state judge, Justice O’Connor exhibited a second orientation toward constitutional decisionmaking that reflected her insight into the hydraulics of legislative behavior. She well understood power seeking among the branches and levels of government, and the strong incentives legislatures have to satisfy short-term political appetites at the expense of long-term constitutional structure. She accordingly favored judicial intervention to keep legislatures from exceeding their constitutionally allocated powers, insisting, for example, that the vertical separation of powers between the federal government and the states should be policed by courts rather

⁵ *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring in the judgment)).

⁶ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

⁷ *County of Allegheny*, 492 U.S. at 629 (O’Connor, J., concurring in part and concurring in the judgment).

⁸ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring in part and concurring in the judgment).

than left to the untrustworthy political safeguards of federalism. Lamenting the overrule of *National League of Cities v. Usery*,⁹ she noted:

The political process has not protected against . . . encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of [judicial intervention,] all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.¹⁰

On the other hand, Justice O'Connor, having witnessed firsthand various legislative machinations in smoke-filled backrooms, consistently believed there were some political matters too partisan and unmanageable for judges to referee. For example, she would have held equal protection claims against partisan gerrymandering nonjusticiable:

[T]he legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out — by the very parties that are responsible for this process — present a political question in the truest sense of the term.

To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues.¹¹

To be sure, she saw race-based redistricting differently, authoring a line of decisions for the Court that invalidated the overly visible creation of majority-minority electoral districts as violating equal protection.¹² But even in these cases, her knowledge of the legislative process drove her reasoning: she identified race-based districting as undermining republican government through factionalism, whereby “elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”¹³

And Justice O'Connor, the only member of the recent Court who had actually taken to the hustings and spellbound a political crowd, was acutely aware of how elected officials are made accountable to voters. In a decision resurrecting federalism-based limits on acts of Congress when they “commandeer” state legislative decisionmaking,

⁹ 426 U.S. 833 (1976) (holding traditional state sovereign functions immune from federal labor legislation).

¹⁰ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 587–88 (1985) (O'Connor, J., dissenting).

¹¹ *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment); *see also Vieth v. Jubelirer*, 124 S. Ct. 1769, 1792 (2004) (plurality opinion).

¹² *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.”).

¹³ *Id.* at 648.

she wrote for the Court that the constitutional flaw in such laws is that they blur the lines of electoral accountability, confusing voters as to which set of bums to throw out at election time if they don't like a burdensome government policy.¹⁴

Justice O'Connor's third constitutional orientation on the Court was to favor a robust form of federalism that surely must owe something to the fact that she is the only Supreme Court Justice ever inducted into the Cowgirl Hall of Fame. Her upbringing in the forbidding open spaces of the West, on a ranch where her father, Harry Day, was taciturn and exacting, her mother, Ada Mae Day, self-sacrificing, and the ranch hands a microcosm of racial diversity and cooperative self-reliance, seem to have contributed to her deep commitment to "protect historic spheres of state sovereignty from excessive federal encroachment."¹⁵

Justice O'Connor strikingly maintained a consistent commitment to equal-opportunity federalism for red states and blue states alike. For example, she not only voted to invalidate federal overreaching into state authority over gun possession¹⁶ and domestic violence,¹⁷ but also dissented from a decision of the Court allowing Congress to bar a state from permitting the medicinal use of marijuana to palliate the effects of chronic or terminal illness.¹⁸ While she cautioned that she would not have voted for the latter law as a legislator or a voter,¹⁹ she reaffirmed the notion that "[o]ne of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"²⁰

While Justice O'Connor's rich and repeatedly decisive contributions to the Court's jurisprudence thus reflected these three frames of reference from her earlier life — judge, legislator, Westerner — she was strikingly reticent in her opinions about any frame of reference to be derived from being what she sometimes jokingly called the FWOTSC — the first woman on the Supreme Court. Only very occa-

¹⁴ *New York v. United States*, 505 U.S. 144, 168–69 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

¹⁵ *Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting).

¹⁶ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁷ *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁸ *Raich*, 125 S. Ct. at 2220 (O'Connor, J., dissenting).

¹⁹ *Id.* at 2229.

²⁰ *Id.* at 2220 (quoting *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

sionally did faint glimmers appear of any possible scars from the experience she had had early in her career of flat exclusion from professional opportunity, despite her academic brilliance, because she was a woman.

In a sex discrimination decision she wrote for the Court in her first Term, for example, she noted that the archaic and overbroad sex-role stereotypes that had led a state university to exclude a male student from its nursing school had likewise damaged women's opportunities to enter traditionally male professions.²¹ And in voting to uphold against Title VII challenge a county's decision to prefer a female to a male applicant for a construction supervisor's position, she considered determinative the complete absence of women from such positions with the county prior to this promotion.²² Observers could read between the lines of such passages that it had been no mean feat to break the gender barrier at the Court itself, and to carry all the burdens of high expectation that went with it.

But if Sandra Day O'Connor had not been the FWOTSC, the nation could hardly have done better in inventing one. Justice O'Connor has risen to the role with extraordinary strength, grace, dignity, intellect, and elegance. She has changed the legal profession for all the women who came after her, proving that a woman could do anything and everything in the law. She has authored a distinctive and powerful body of jurisprudence that will epitomize the era of the Rehnquist Court in any future historical perspective. She has devoted herself to legitimizing the Court in the eyes of the public, and to preserving the independence of the Court from the other branches and the independence of its Justices from the partisan expectations of those who appoint them. She has modeled both a rigorous work ethic and an unstintingly generous devotion to her family and community that shows that a balanced life is truly possible. For all of us fortunate enough to have known and worked with her, and for all those who have benefited from her life of public service, we owe her the profoundest admiration and thanks.

²¹ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function.")

²² *Johnson v. Transp. Agency*, 480 U.S. 616, 653, 656 (O'Connor, J., concurring in the judgment) (noting that, "[a]t the time the affirmative action plan was adopted, not one woman was employed in [the agency's] 238 skilled craft positions," and that the permissibility of affirmative action to remedy past discrimination was confirmed by this "inexorable zero" (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)) (internal quotation mark omitted)).

*Afterword: Lazy B and the Nation's Court:
Pragmatism in Service of Principle*

Craig Joyce*

[T]here is something about living in big empty space, where people are few and distant, under a great sky that is alternately serene and furious, exposed to sun from four in the morning till nine at night, and to a wind that never seems to rest — there is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him who he is.

— Wallace Stegner¹

On the morning of July 16, 1945, Sandra Day and her father, Harry (“DA”),² stood in the kitchen of Lazy B, the Day family ranch on the Arizona–New Mexico border, rinsing off the breakfast dishes. The sink sat below a window with a view to the northeast. The morning sun had not yet risen. Suddenly, they saw what the daughter would one day recall, in *Lazy B: Growing Up on a Cattle Ranch in the American Southwest*, as “an enormous flash of intense light . . . in the distance. There was no sound. A dark cloud formed where the light had been, and then the cloud rose in the sky.”³

Weeks would pass before Sandra and her father learned that they had seen, 180 miles away, the first test of the atomic bomb.⁴ In many ways, that ranch window would prove to be a window to the future —

* Andrews Kurth Professor of Law, and Co-Director, Institute for Intellectual Property & Information Law, University of Houston Law Center; Editor, SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (2003). With abundant thanks to the following friends and colleagues for their thoughtful observations and kind reviews: RonNell Andersen Jones, Ruth V. McGregor, Eugene Volokh, Leslie Griffin, and Peter Egler. All errors in fact or judgment are, of course, the author's alone.

¹ WALLACE STEGNER, *Finding the Place: A Migrant Childhood*, in *WHERE THE BLUE-BIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST* 3, 9–10 (2002). Justice O'Connor quoted this passage by Stegner, her favorite author, as the opening words of the loving memoir she wrote with her brother. SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST*, at vii (2002). All references hereafter to *Lazy B* should be read as acknowledging the tremendous contributions of the Justice's brother to their book.

² Pronounced “Dee-ay.” The future Justice's mother, Ada Mae, was “MO” (pronounced “Em-oh”). They married in 1927 and made the rest of their lives together at the ranch. In time, they would have three children: Sandra, the first born; Ann, who gave the parents their nicknames when she was young and learning to spell; and Alan, with whom Sandra would write the book that bears the ranch's name. O'CONNOR & DAY, *supra* note 1, at xi.

³ *Id.* at 244.

⁴ *Id.*

the nation's, the world's, and the life that lay ahead for one young cowgirl.

It is a long way from the Lazy B to the Marble Palace on Capitol Hill — and further still to the many world capitals that Sandra Day O'Connor has visited in her quest to advance around the globe the rule of law, so threatened on that long-ago morning at the Lazy B. DA and MO (the future Justice's mother, Ada Mae), who enjoyed going off to see the wide world from time to time themselves, would be proud of how far she has traveled from that dusty ranch house — and proud also of how rooted in that place, and its values, she has remained.

America, too, is grateful, as the nation's first woman Justice, and its only Justice ever elected to the Cowgirl Hall of Fame, ends her remarkable tenure on the Supreme Court of the United States and embarks on the remainder of her singular journey.⁵

* * * *

The Days came to the Arizona–New Mexico border in 1880.⁶ The place they settled, ultimately a combination of private land where the ranch house sat and federal and state lands available for grazing cattle, is sparse, open high desert, with rainfall of ten inches a year, or less. Ranching there was not for the timid. Nothing could be wasted. No task was too small to be done as well as possible, or too large to be undertaken. In surviving at the Lazy B, the family found ways to make things work. They had to.

The cattle brought to the ranch by the Justice's grandfather, H.C. Day, were branded on the left hip with a “lazy” B — that is, a B lying down flat. Hence, the ranch's name.

H.C. and his wife had five children, the last of whom was the Justice's father, Harry. In due course, they found a manager for the ranch and moved the family to Pasadena, California. Each summer, H.C. and Harry returned to Arizona to supervise the herd and oversee needed improvements. The plan was for Harry, on graduation from high school, to attend Stanford University. But difficulties in making the ranch pay under other than family management, and then the death of H.C. in 1921, intervened. Harry returned to the ranch. He never left.

⁵ Justice O'Connor's life has been, and will be, the subject of much biography and scholarship. *See, e.g.*, JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE (2005) (the first full-length biography); PETER HUBER, AMERICAN WOMEN OF ACHIEVEMENT: SANDRA DAY O'CONNOR (1990) (a children's book written early in the Justice's tenure by a former clerk).

⁶ The section that follows is based largely on *Lazy B*, and on other publicly available sources and the author's personal knowledge. Citations to specific authorities are provided as appropriate.

In 1927, Harry journeyed to El Paso to buy bulls from W.W. Wilkey, a fellow rancher. He ended up, four months later, eloping with Ada Mae, W.W. and Mamie Scott Wilkey's daughter. The two began life together in Harry's ranch house, a four-room structure near Lazy B's most prominent feature, a 600-foot tall, perfectly rounded volcanic cone called Round Mountain — a home with no running water, no indoor plumbing, and no electricity (none of which would arrive for a decade). This is the life into which their eldest child, Sandra, would be born on March 26, 1930.⁷

Harry and Ada Mae (hereafter, DA and MO)⁸ divided their responsibilities at the Lazy B in traditional fashion. Outside the ranch house, DA ran the operation, which through careful management and hard work, and despite the Great Depression and World War II, he turned into the largest and most successful ranch in the region. MO ran the household with equal thriftiness and dedication. They liked to travel, and did more so as the stability of ranch finances progressed. In their later years, when they traveled, MO carried the bags, because DA no longer could. He was the brains; she was the brawn. Such was the toll exacted by decades spent eking out a living in a dry, harsh — but, for the Day family, rewarding — land.

To keep the ranch humming all those years, there was emphasis always on honesty, individual responsibility, and doing the job right. Who a person was — man, woman, or child — mattered not at all. Anyone who could get a job done was needed and welcomed. MO mostly busied herself at ranch headquarters. Sandra, however, began riding with the cowhands and driving the ranch truck as soon as she was old enough to see over the dashboard.⁹

Ranch life was close (particularly in light of the isolation), loving, and full. Ledgers had to be balanced, but then DA and the children would go out behind the house to shoot bottles. There would be hours of conversation at the dinner table, with the whole family discussing ranching, politics, or economics.

Ranch work, however, still needed to be done in a competent and professional manner. Communications of approval, like the surround-

⁷ The Days' younger two children, Ann and Alan, were born, they might wish to have pointed out, considerably later. The future Justice's family consisted, for many years, of DA, MO, and the ranch hands.

⁸ For the origin of their nicknames, see *supra* note 2.

⁹ As she would later summarize:

Before I rode occasionally on the roundup, it had been an all-male domain. Changing it to accommodate a female was probably my first initiation into joining an all-men's club, something I did more than once in my life. After the cowboys understood that a girl could hold up her end, it was much easier for my sister, my niece, and the other girls and young women who followed to be accepted in that rough-and-tumble world.

O'CONNOR & DAY, *supra* note 1, at 96.

ing desert, were plain and spare. An afternoon spent fixing up a badly weathered screen door — sanding, masking, repainting — could fetch from DA an inspection, an inquiry whether the paint can and brush had been put away properly, and a simple nod: “That’s all right then.”¹⁰

Another time, the Days’ eldest daughter volunteered to take lunches to the roundup crew at a well two and a half hours distant from the ranch compound over a rough dirt road. A rear tire went flat. Propping up the front wheels with large rocks, young Sandra managed to change the tire alone. She arrived with lunch an hour late. DA was not happy. She had anticipated a word of praise for her resourcefulness in changing the tire. It was not forthcoming. The daughter realized she should have started earlier. “[O]nly one thing was expected: an on-time lunch. No excuses accepted.”¹¹

Practicality — making do with available means — was a recurring theme. One day, DA took Sandra out to a spot on the range where vultures were circling. A coyote had savaged the rear end and haunch of a young calf, which had to be put out of its misery. That left the bereft mother cow to be found and brought back to the ranch — and, back at the corral, several orphan (or dogie) calves who themselves had lost mothers. Normally, a mother will not adopt a calf other than her own, which she knows mostly by smell. One of the hands brought in the dead calf’s carcass, removed most of its hide with a pocketknife, and tied the hide over the back of a dogie calf. The dead calf’s mother, its udder starting to swell with unused milk, approached and eventually, reassured by the smell of her own calf, allowed the orphaned calf to suckle. Two problems solved.¹²

While economical in other matters, the Days never skimmed on time or money where their children’s educations were concerned. MO loved reading and spent endless hours on that activity with all three children. She taught their eldest to read at age four. Ever after, the daughter would say without prompting, “Books are my friends.” DA, too, greatly valued reading. And college. He had never been able to fulfill his dream of attending Stanford. Sandra got to go.

In between, there was El Paso. The schooling was better there than near the Lazy B, so MO and DA sent Sandra back to MO’s old hometown to live with Grandmother Wilkey. She would return to the ranch on every occasion possible, and always for summers. But otherwise, the Days’ eldest child spent almost all her school years, before departing for college, in the “big city” on the Texas-Mexico border.

¹⁰ *Id.* at 33–34.

¹¹ *Id.* at 239–43.

¹² *Id.* at 229–31.

The ranch, too, provided education, and not just about cattle and trucks. The hands themselves were a diverse crew — men with names like Rastus¹³ and Bug — who slept on the porch of DA and MO's house. And there were neighbors, some of whom lived hard lives.¹⁴ There was much to learn about people, and the differences in their circumstances.

There was no church near the Lazy B, nor brooding omnipresence of any other description. Once, the daughter asked the father whether he believed in God. It turned out he did, albeit not necessarily in bad preachers and stories of which he lacked firsthand knowledge. The “something” that had created the orderly universe that sustains nature and man — “a God if you will” — surely existed. Mankind might be “only specks” in that universe, but “we don't need to go to church to appreciate” its creator. “It is all around us. This is our church.”¹⁵

In time, her education at the ranch was done, and Sandra Day went away to college at Stanford. She earned honors and fell in love with John O'Connor there, married him at the Lazy B, and left to start her own family and career.

The life that Sandra Day O'Connor led between her wedding in 1952 and her appointment to the Supreme Court in 1981 is recounted elsewhere and is largely beyond the scope of this tribute.¹⁶ Her first position after law school, as a young woman in yet another man's

¹³ Rastus, whose real name was Rafael Estrada, had been born in New Mexico to Mexican American parents:

Life for Rastus was a little like playing poker. He was dealt what many would say was a poor hand in life — he was small, crippled, fatherless, a minority race in his birth land. He couldn't read, write, or drive a car. He had no wife. But he was skilled in the work he did. . . . He played the hand he was dealt like a master — he succeeded in a way that made him happy. From him we learned the contentment of doing the best you can with what you have.

Id. at 58–59.

¹⁴ *Lazy B* recounts the story of one family who lived on a homestead nearby. “Jim Black,” perhaps not his real name, was usually unshaven and smelled strongly of alcohol. The woman with him sometimes was black and blue. Their frightened daughter would not answer when Sandra said hello. Eventually, they moved. “We never knew where that pitiful family went, but the sight of them stayed with me always . . .” *Id.* at 118–19.

¹⁵ In the fuller detail it deserves, the exchange reads:

“DA, why don't we go to church on Sunday? . . . Do you believe in God?” “Yes, I do. I know some people question whether God exists and whether all those Bible stories are true. I don't know about the stories, but when you watch the world around us, . . . you have to believe that some power beyond us has created the universe and established the way nature works. It is remarkable to see how the clouds form and produce rain, which produces the grass and plants, which sustains animal, bird, and insect life, and which in turn sustains human life from generation to generation. It is an amazing, complex, but orderly universe. And we are only specks in it. There is surely something — a God if you will — who created all of this. And we don't have to go to church to appreciate it. It is all around us. This is our church.”

Id. at 142.

¹⁶ See, e.g., BISKUPIC, *supra* note 5; HUBER, *supra* note 5.

world, proved hard to come by.¹⁷ She took a job in a California county attorney's office, at no pay, to get started, moving on to employment as a civilian lawyer for the U.S. government in post-World War II Germany, a storefront law practice when she and her husband returned to settle in Phoenix, volunteer civic duties, and various positions in local and state government (including the Arizona Attorney General's office), all the while raising three sons. By then, her ability, including her capacity to solve complex problems by getting different people to work with one another and with her, had attracted wide notice. Appointed to an opening in the State Senate in 1969 and then chosen by the people at the ballot box to continue there, at the beginning of only her second full two-year term in the legislature in 1972, she was selected by her colleagues to become majority leader — the first woman so to serve in United States history. In 1974, she was elected a state court trial judge. In 1978, having served in all three branches of state government and stood repeatedly for election,¹⁸ then-

¹⁷ The story has been told often, but rarely in her own words, as in these remarks to students at the University of Houston Law Center:

[W]hen I entered law school, I didn't even think about the future, whether I would want to practice law, and if I did, what the job opportunities would be. I just assumed I would be able to get a job, and that was a very naive position, looking back.

I finally called an undergraduate woman friend of mine at Stanford, whose father was a partner in a well-known, very large California law firm, headquartered in Los Angeles. I said, "Ask your father, if you would, if he could get me a job interview in the law firm."

She did. And he did.

I made the trip to Los Angeles. I sat down with the law firm partner doing job interviews, and we chatted for a little while, and then he said, "Ms. Day, how do you type?"

I said, "Well, medium. I can get by but it's not great."

He said, "If you can demonstrate that you can type well enough, I might be able to get you a job in this firm as a legal secretary. But Ms. Day, we have never hired a woman as a lawyer here, and I don't see the time when we will."

So that was pretty much the situation.

Justice Sandra Day O'Connor, Remarks at the University of Houston Law Center 2 (Mar. 10, 2005) (transcript on file with the Harvard Law School Library).

¹⁸ During her tenure, Justice O'Connor would be the only member of the Court who had served in elected office. The time spent there was, she later said, "interesting, demanding, and challenging":

I learned how to develop legislation that I thought was needed. I learned how to organize support to get that legislation passed. I learned what it takes to develop and enact public policy in a state legislature

. . . .
 What I learned was to try to get bipartisan support for the things I cared about. How do you do that? I think you do that by making friends on both sides of the aisle. And how do you do that? Well, you can ask all of them over to your house and fix a barbeque for them. I did that on a regular basis. And I did everything else I could think of to make relationships across party lines that would enable me to get that legislation passed.

Id. at 6. There would be echoes of those days as Senator O'Connor in later life. Justice O'Connor's experience as a legislator-turned-jurist enabled her to meld her rich understanding of

Judge O'Connor moved up to the state court of appeals, a position that would prove to be her last job, save one.

Back at the ranch, there were changes. Alan Day had succeeded his father, now older and ailing, in running ranch affairs. New initiatives in the management of federal lands had begun driving ranchers off the range.¹⁹ DA died in 1984 and MO in 1989, both at the ranch. They were buried on Round Mountain.²⁰ By 1993, recognizing that nothing is forever, the Lazy B had been parceled off and sold to others, and the last of the Days, after 113 years on the border, left the ranch. But the ranch never left them. As the Justice herself later wrote of those years in the high desert, the family had “felt lucky to have such a place in our lives — a never-changing anchor in a world of uncertainties.”²¹ By then, however, she herself had long since moved into the wider world beyond.

* * * *

On July 7, 1981, fulfilling a campaign pledge that would shatter a two-centuries-old tradition, President Ronald W. Reagan nominated to the Supreme Court of the United States the nation's first woman Justice. Confirmed by the Senate 99–0 on September 21, Sandra Day O'Connor took her oath of office on September 25 in the presence of DA, MO, John, and a host of family and friends. She said later, in a metaphor that came entirely naturally to a Southwestern native, that the appointment had hit her like a bolt of lightning.²²

the first job into a richer understanding of the confines of the second. She was so good as majority leader in Arizona in part for the same reason she was so good as “the Justice who got things done”: she understood people, understood their government, and understood that each branch and each level of government had its own sphere of expertise and proper influence.

¹⁹ There were good things and bad things in government (particularly federal government) management of the public lands. DA had agreed, for example, with the Bureau of Land Management's multiple use policy, believing that “ranchers were simply long-term stewards of the lands” and that others should be free to camp, hike, and picnic there. O'CONNOR & DAY, *supra* note 1, at 32. But over time, the Bureau's staff increased dramatically, and problems that could have been resolved in the field would be referred instead to Washington, D.C., for decisions that sometimes lacked common sense. *See generally id.* at 259–65, 307–11.

²⁰ Of her father's burial place, the Justice wrote:

There, around us, lay the site of DA's life for most of his eighty-six years. We put his ashes in a rock cairn that we piled up to hold them. We joined hands and recited the Lord's Prayer, and shed some tears for the great loss each of us felt. But we also knew that DA was where he wanted to be — a place where all the ranch could be seen, a place where the wind always blows, the sky forms a dome overhead, and the clouds make changing patterns against the blue, and where the stars at night are brilliant and constant, a place to see the sunrise and the sunset, and always to be reminded how small we are in the universe but, even so, how one small voice can make a difference.

Id. at 302. The same rock cairn holds MO's ashes as well. *Id.* at 310.

²¹ *Id.* at 298.

²² Lightning or no, Sandra Day O'Connor was not changed fundamentally by getting a better job in Washington, nor has she changed fundamentally, in her approach to the law or her own

In the wake of Justice O'Connor's retirement from the bench, forests of bits and bytes will be felled by journalists and historians attempting to assess the influence of the ranch, and of every other aspect of her life, on her judging and, specifically, her opinions. Only she, of course, could say with any degree of certainty, what really mattered or why. The rest is conjecture — which will deter no one.

All such speculation must recognize, of course, that Supreme Court Justices do not decide entirely according to their individual preferences which cases the Court will hear, which opinions (other than concurrences and dissents) they will write, or even precisely what words may be necessary to muster and maintain four other votes for the majority opinions they are assigned. No opinion, other than perhaps a lone dissent, should be read as representing necessarily, in perfect distillation, the views of its author alone. That said, all Justices speak to us and to posterity through their words in the *United States Reports*, to which Sandra Day O'Connor made ample contributions in the twenty-five Terms of her service.

A snapshot or two from the Justice's first Term, spanning calendar years 1981 and 1982, follow.

Apart from other opportunities, the Term brought a first occasion to write as a Justice (albeit on behalf of a minority) on a matter fundamental both to the structure of American government and to her life and professional experiences: federalism. The case, *FERC v. Mississippi*,²³ was a Tenth Amendment challenge to certain regulatory policies enacted by Congress. More generally, it seems fair to say that *FERC* and similar cases concern the proper role of different levels of government vis-à-vis one another and the nation's citizens. In *FERC*, the federal statute in question was upheld by a majority of the Court.

In partial dissent, Justice O'Connor observed:

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare.²⁴

deprecating self-estimation, in the two and a half decades since. Perhaps she will escape the typical, unflattering assessment of retiring Justices that (and this is rarely said aloud), however poorly they may have started off, (at least) they have "grown" in office. There will be no books about "becoming" Justice O'Connor. She is who she was, although her principles, already well-tempered by prior experience, always have had "reasonableness" at their core — and thus the ability to accept and reflect the reality of a changing America.

²³ 456 U.S. 742 (1982).

²⁴ *Id.* at 777 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor's partial dissent was characterized to the author shortly thereafter by preeminent constitutional lawyer and legal historian Gerald Gunther as the "best opinion ever written" on federalism.

The opinion is deeply informed by a knowledge of the Founders' times, views, and writings, but perhaps also, to a degree, by the Justice's pre-Court experiences in Arizona as a witness to the good that the states (and ordinary people) can do, in appropriate spheres, when left largely to their own devices. In any event, in time the confidence embodied in her *FERC* opinion that many matters are better handled by — and are constitutionally reserved to — the states would achieve greater support on the Court and become the majority view in numerous decisions.²⁵

The 1981 Term also produced an important decision, this time by Justice O'Connor for herself and the Court, on gender equality and opportunity: *Mississippi University for Women v. Hogan*.²⁶ The precise question at issue was whether the denial of an otherwise qualified male applicant for admission to nursing school at a state-supported university historically exclusive to women violated the Equal Protection Clause. Speaking for a 5–4 majority and applying evenhandedly precedent overturning gender-based discrimination against women, Justice O'Connor wrote:

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females.²⁷

Her opinion continued:

[The university's] 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.

. . . [T]he record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any [prof-fered "legitimate and important"] educational goals.²⁸

How appropriate for a woman who had grown up in a man's world — actually, many such worlds — and succeeded in all of them. Over the years, other important opinions seeking to assure equality of opportunity for the sexes would follow.²⁹

Indeed, many more opinions of all descriptions — for unanimous Courts, as the “swing” vote of popular remembrance, for herself alone, or with others — would follow. There were 680 in all.³⁰ Along the

²⁵ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

²⁶ 458 U.S. 718 (1982).

²⁷ *Id.* at 724–25.

²⁸ *Id.* at 730–31.

²⁹ See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261 (1989) (O'Connor, J., concurring in the judgment).

³⁰ A February 11, 2006 search in LexisNexis's U.S. Supreme Court Cases, Lawyers' Edition database yields 680 cases with majority, plurality, concurring, or dissenting opinions by Justice O'Connor.

way, there would be no abstract doctrinalism, no rigid interpretive methodologies, no one-size-fits-all rules or slogans. Instead, Justice O'Connor's jurisprudence would be grounded by her special concern for practical problem solving deeply rooted in faithful adherence to the Constitution and the laws as she read them.

Instances abound, of course, and in numbers far beyond the scope of the present tribute. On race-based affirmative action, for example, Justice O'Connor insisted early on that the Fourteenth Amendment places "clear limits on the States' use of race as a criterion for legislative action,"³¹ that legislative bodies may not enact into law policies "embody[ing] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the Government by history and the Constitution,"³² and that "racial classifications, imposed by whatever federal, state, or local governmental actor, . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests"³³ — a standard she has insisted is *not* "strict in theory, but fatal in fact" in disallowing all affirmative action.³⁴

In the area of reproductive freedom, the Court's first woman Justice pointed out early on the practical consequences of relying too simplistically on logically appealing, readily administrable intellectual constructs. In 1983, she wrote in dissent that the trimester framework in the Court's landmark *Roe v. Wade*³⁵ decision was "on a collision course with itself,"³⁶ and that the critical threshold issue must be whether a state's legislative action to limit the right recognized in *Roe* placed upon the expectant mother an "undue burden."³⁷ Justice O'Connor believed, on the other hand, in the importance of precedent rather than in revolutions in law or in life. Thus, in time, having counseled patience until the question of upholding or overturning *Roe* was properly before the Court,³⁸ she joined with like-minded Justices in an attempt to assure continuity and predictability, within broad parameters, for judicial oversight of women's settled expectations regarding the reasonable balance between responsible individual decision-

³¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989) (plurality opinion) (building on her own concurrence in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986) (O'Connor, J., concurring)).

³² *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting).

³³ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

³⁴ *Id.* at 237.

³⁵ 410 U.S. 113 (1973).

³⁶ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

³⁷ *Id.* at 463.

³⁸ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 525–26 (1989) (O'Connor, J., concurring).

making and limited opportunity for governmental intrusion into “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”³⁹

On church and state matters, again Justice O'Connor consistently sought a middle way both faithful to the Constitution and capable of application without unswerving deference to simplistic bright lines. In cases involving the Establishment Clause, she sought to determine whether a challenged governmental endorsement or disapproval of religion, as viewed by the “reasonable observer,” served to “send[] a message” to nonadherents and adherents alike regarding the fullness of their inclusion in the political community.⁴⁰ In her Free Exercise Clause jurisprudence as well, the theme was consistent: reasonable minds may disagree concerning the application of their prohibitions in particular cases,⁴¹ but the objective of both the Religion Clauses is the preservation of religious liberty to the fullest extent possible in a pluralistic society.⁴²

Her common sense approach to issues, while perhaps first formed in ranch days, had been honed, not surprisingly, by her experiences as a legislator and state court judge. She led the way in redirecting the Court's approach to congressional redistricting.⁴³ On the issues of lawyer advertising, solicitation, and professionalism, first confronted by the Court in a case from her home state prior to her arrival on the bench,⁴⁴ she helped to effect a substantial shift back toward more

³⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

⁴⁰ *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). While that test “depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, . . . may not always yield results with unanimous agreement at the margins,” *id.* at 629, no alternative test “captures the essential mandate of the Establishment Clause as well,” *id.* at 631, making its inherent flexibility “a virtue and not a vice,” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

⁴¹ *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in the judgment) (arguing that courts have amply demonstrated capability, in applying free exercise jurisprudence, to strike “sensible balances between religious liberty and competing state interests”).

⁴² *See McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring) (summing up the guiding principle of this body of law with James Madison's admonition that “[t]he Religion . . . of every man must be left to the conviction and conscience of every man” (quoting JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)) (internal quotation marks omitted)).

⁴³ *Compare, e.g., Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (O'Connor, J., concurring in the judgment), *with Shaw v. Reno*, 509 U.S. 630 (1993).

⁴⁴ *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

muscular state regulation of the practice of law.⁴⁵ On controls by the courts of awards of punitive damages, she led quietly in moving the Court from a single vote (hers) to majority support for such oversight in little over a decade.⁴⁶

Justice O'Connor's influence could turn up also, however, in the most unexpected of places: for example, in intellectual property law, where her opinion for a unanimous Court in defining facts, history, and other such non-authored matter as beyond Congress's power to impart ownership to anyone under the Copyright and Patent Clause,⁴⁷ became the most significant copyright decision of the twentieth century; and maritime law, where in a series of opinions applying both vertical and horizontal federalism,⁴⁸ she led the Court in recasting yet another body of arcane law. Few intellectual property disputes, in all likelihood, were debated around the Day family dinner table; and, as Chief Justice William H. Rehnquist (a fellow Stanford Law graduate who, like Justice O'Connor, had settled in Phoenix and been transported to the Supreme Court) sometimes reminded counsel in maritime cases, Arizona was a long way from any coast. Yet even in such instances, Justice O'Connor's style of practical judging allowed her to learn up the law that had preceded her, listen attentively to the facts of the case at bar, rationalize competing concerns, and somehow forge tools for middle-way decisionmaking that both satisfied her colleagues on the Supreme Bench and proved flexible enough for lower court judges to resolve, in a common sense manner, the great majority of similar cases that would follow.

The last years of Justice O'Connor's tenure brought no fewer challenges. Although by that time, to her great dismay, many in the press and academia were calling the body on which she served as only one of nine members the "O'Connor Court," she won some and lost some — but continued, above all, to advance her own special brand of down-to-earth realism in judicial decisionmaking. Among the most notable opinions of the period: her dissents from the Court's rulings

⁴⁵ Compare, e.g., *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), with *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

⁴⁶ Compare *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (O'Connor, J., dissenting) (1991), with *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

⁴⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (denying protectibility, on a sweat-of-the-brow basis, for such matter, and thereby securing broad access via the public domain). For the Justice's influence in patent law, see *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), which reconciled the Court's prior jurisprudence concerning federal intellectual property law preemption of competing state law causes of action.

⁴⁸ See, e.g., *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

overturning state and federal sentencing guidelines;⁴⁹ recognition of racial diversity as a legitimate consideration, when properly administered, in admissions to public institutions of higher education;⁵⁰ proper application of redistricting principles under the nation's voting rights laws;⁵¹ clarification of executive branch powers regarding enemy combatants in a post-September 11 world;⁵² the impermissibility of job retaliation against advocates of equal funding and equal access for female and male public school athletes alike;⁵³ the intersection of personal choice, state government statutory authority, and federal Commerce Clause power in matters of medical treatment;⁵⁴ and the capacity, under the Constitution, of governments to take private property for public purposes.⁵⁵

⁴⁹ See, e.g., *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004) (O'Connor, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 525, 552 (2000) (O'Connor, J., dissenting) (lamenting that the majority "cast[] aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule" that will likely usher in "lengthy period of considerable confusion").

⁵⁰ *Grutter v. Bollinger*, 539 U.S. 306, 334, 343 (2003) (vindicating such diversity as a "plus" factor but expressing the "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

⁵¹ *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003) (explaining that the purpose of the Voting Rights Act of 1965 is to "encourage the transition to a society where race no longer matters").

⁵² *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (plurality opinion) (noting that even "in times of conflict," the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake").

⁵³ *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1510 (2005). Justice O'Connor also managed with aplomb challenges that her Title IX jurisprudence and her federalism jurisprudence were somehow in conflict, as indicated amusingly in a comment on the bench. Carrying a 5-4 majority in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), Justice O'Connor observed in announcing the Court's opinion that, contrary to the dissent's assertion that the ruling would invite federal interference in local school matters, the point was not that "little Johnny [will learn] a perverse lesson in federalism," but rather that, where severe, pervasive, and objectively offensive sexual harassment would otherwise effectively bar a victim's access to educational opportunity, "little Mary may attend class." BISKUPIC, *supra* note 5, at 329.

⁵⁴ *Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting). Passionately summarizing much of her federalism jurisprudence, Justice O'Connor wrote:

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment

Id. at 2221 (citations omitted); see also *id.* at 2229 (remarking, in a rare personal note, that had she been a California citizen, she would not have voted for the medical marijuana ballot initiative, and had she been a California legislator, she would not have voted for its codification, but that the wisdom of a state's experiment in such matters was not a proper subject for consideration under the Court's Commerce Clause precedents).

⁵⁵ *Kelo v. City of New London*, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting). Justice O'Connor's dissent distinguished *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), an opinion she had written for the Court:

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to

Justice O'Connor's final opinion came in *Ayotte v. Planned Parenthood of Northern New England*,⁵⁶ a case in which, owing to her letter of resignation on July 1, 2005 (effective, however, only upon qualification of a successor), no one had expected her to participate. The case involved, as had so many of the most controversial cases of her tenure, a woman's reproductive freedom. Would the result, many wondered, again be bitterly fought and determined ultimately by her vote? If so, would the result have been the same had a new Justice already ascended the bench — or be good law any longer after she or he did? For a unanimous Court, Justice O'Connor began, "We do not revisit our abortion precedents today."⁵⁷ The opinion proceeded to remand the case for a determination, which the lower court decisions had failed to render, as to whether the relief appropriate in the circumstances could be more finely drawn than entire abrogation of the challenged statute if only some, but not all, of its provisions might be unconstitutional as applied.⁵⁸ The preferred remedy in such instances, the opinion noted, was "to limit the solution to the problem."⁵⁹ Practically speaking, then, the decision in *Ayotte* deferred further consideration of *Roe* and *Casey* to another day, when that question could receive full and unhurried attention not subject to immediate reconsideration owing to a change in the membership of the Court itself. The outcome was a remarkably sensitive, and practical, recognition, by the Justice and the Court as a whole, of the legal and institutional parameters operative in the last days of her tenure.

being taken and transferred to another private owner, so long as it might be upgraded — *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process. To reason . . . that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property . . .

Kelo, 125 S. Ct. at 2671 (O'Connor, J., dissenting). The dissent continued:

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Id. at 2673. Her opinion concluded:

States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

Id. at 2677.

⁵⁶ 126 S. Ct. 961 (2006).

⁵⁷ *Id.* at 964.

⁵⁸ *Id.* at 969.

⁵⁹ *Id.* at 967.

On January 31, 2006, Sandra Day O'Connor retired as an active Justice of the Supreme Court of the United States and became, instead, simply one of the greatest judges in the history of American law.

* * * *

Distilling, and then properly describing, Justice O'Connor's judicial philosophy and style will be the work of several generations of scholars. A few preliminary observations, however, may be permissible here.

Her overall approach to judging might be characterized as real-world practicality. The Justice is, above all, a real person who understands real people and has made a life — and, indeed, a jurisprudence — of serving them. This approach seems, in significant part, a product of her very practical, get-it-done upbringing on the Lazy B. Any judge who learns, of necessity, to drive a ranch vehicle at a tender age, and who sees her father and the hands dig in and get through even the grisliest tasks in short order, surely brings a unique experience of problem solving to the bench. On an attentive reading, many of the Justice's opinions were infused with a keen sense of what it felt like to live inside the shoes of affected litigants and ordinary citizens, and with an almost urgent need to make certain that the outcome of the case, while doctrinally sound, also was workable. Justice O'Connor's style of problem solving, both in Arizona government before 1981 and on the federal bench thereafter, mirrored the style that real people adopt intuitively in solving problems in their everyday lives: they recognize that different problems often require different approaches.

One strand of criticism of her jurisprudence was, and likely always will be, to the effect that such problem solving was a fatal flaw rather than a redeeming virtue. The critique is that Justice O'Connor was wrong to focus on the case, its facts, and the people affected by it, rather than on an overarching legal methodology — and that this refusal to remove herself from the mix of real life and promulgate more sweeping theoretical tests proved harmfully inconsistent over subject matter areas and over time. But hers was not a jurisprudence devoid of principle. On the contrary, it was jurisprudence rooted in a principle that derives from a proud American intellectual history, starting in the late nineteenth century and continuing into the early twentieth: namely, pragmatism.

Justice O'Connor's consistent approach was pragmatism in service of principle. Whatever critiques anyone may suggest of that approach, it is, by no means, the absence of an approach. Indeed, her case-by-case decisionmaking required deliberation by incrementalism and, as such, was both more realistic and more cautious — both more moderate and more conservative — than the approaches she sometimes was criticized for eschewing. Unpretentious enough to recognize that the

most significant of the social and legal problems debated by the polity and presented to the Court are not capable of ready, complete, and eternal resolution, she understood that there often is room at the margins for balancing the affected interests.

Some problems are not easy. Justice O'Connor was the master of the "reality check," guided by an intensely modest view that, in tough cases, the best that she and her colleagues could accomplish sometimes would be, as it had been on the ranch, to get the job at hand done — that is, to answer the question presented in the case that presented it — and to believe that the people would take it from there.

More than anything, those who saw her frequently on the bench may miss her questioning style at oral argument — a style deployed entirely in service of her philosophy as a Justice but also clearly derived from her rural Arizona upbringing. It was striking how, from up there on the Supreme Bench, she employed that same curt, down-to-earth, get-to-the-bottom-of-things style that defines her father, DA's, appearances throughout *Lazy B*. One critical lesson young Sandra Day had learned at the ranch was that when you don't cut it, you don't cut it — and that excuses will not do when what is needed is a real solution now. In questioning counsel at the Supreme Court bar, Justice O'Connor, with no lack of respect but instead a demanding professionalism, treated them the exact same way.

The loss of that give-it-to-me-straight, cowgirl mentality may cause spillover effects at the Court beyond merely the subtraction of her single, pragmatic vote. Particularly in instances in which Justice O'Connor was perceived to be the fifth vote, her questions from the bench about "where the rubber hit the road" added a dynamic perhaps rarely, if ever, seen at the Court. Over time, she sometimes did not even need to ask her seemingly patented brand of questions — questions about how real legislatures, or real police officers, or real people filing for bankruptcy protection, would be impacted by this outcome or that — because litigants routinely anticipated the concerns and addressed them without prompting.

It may be that, with Justice O'Connor's departure, the bench will ask fewer of those sorts of questions, counsel will answer fewer of them *sua sponte*, and the Court's focus will shift perceptibly more toward doctrine and less toward practical matters. That would be a shame. Arguments during Justice O'Connor's tenure, while sometimes tailored to her specifically, were heard, of course, by all members of the Court — and perhaps affected others besides the Justice herself in ways both relevant and healthy.

This was a Justice who never left her roots. Perhaps some of those roots will remain firmly planted in the soil of Washington, D.C., even as she herself goes home.

* * * *

“Context matters.”⁶⁰ That surely can be said of all Justices, the worst and the best. Individuals matter, as Justice O’Connor has proven throughout her life, both personally and professionally. In the quarter century just passed — and along with the facts of each case, the arguments of counsel, the analyses of colleagues and clerks, the Constitution and the laws enacted pursuant thereto, precedent, and common sense — the Lazy B has mattered much to the nation’s first woman Justice, and thus, to the nation’s Court. As to how it all happened and what it all meant, history now will have its say.

Someday, Round Mountain will call. Or Arlington. Not soon.⁶¹ Sandra Day O’Connor has much left to contribute, particularly in exemplifying and promoting the crucial importance of an independent judiciary, both in the United States and around a changing world. The legacy of the most influential woman in American history will be immense — not bad for a modest daughter who started out life, and whose first lessons were learned, “growing up on a cattle ranch in the American Southwest.”

⁶⁰ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

⁶¹ Indeed, given Justice O’Connor’s current robust health, the State of Arizona should have decades to bone up on the “rules and regs” associated with celebrating her life one day in Washington’s Capitol Statuary Hall. John Campbell Greenway, whose statue has resided there since 1930 (along with Father Eusebio Kino in the Hall of Columns since 1965), has had a good run on the Hill, and for far longer than he resided in Arizona. The state’s favorite daughter always will be revered in her former workplace across the street. But her representation in the Nation’s Capitol, as well, surely will be well merited.