



## TRIBUTE

**The Bridge Builder**

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It is quite fitting for the *Stanford Law Review* to publish a collection of essays celebrating the life of Justice Sandra Day O'Connor. While she often referred to herself as "a cowgirl from Eastern Arizona,"<sup>1</sup> she was just as much a woman of Stanford as of the Arizona high desert. Her experiences at Stanford profoundly shaped her personal and professional identity, not to mention her life's trajectory. In her words, "it was there that I commenced my long, totally unexpected walk into history."<sup>2</sup>

In attending Stanford, Justice O'Connor fulfilled the dreams of her father, Harry Day. A generation earlier, Day had been forced to scuttle his plans to attend Stanford due to an obligation to manage the Lazy B, the family's 160,000-acre ranch straddling the Arizona-New Mexico border.<sup>3</sup> Her immersion in a community brimming with ambitious and intellectually curious people like herself—whether in her freshman *Western Civilization* course or in her creative writing class with Wallace Stegner—stretched and shaped her understandings of philosophy, religion, politics, and the human condition. Perhaps most important, it was at Stanford that she decided to devote her many gifts to a career in law, enrolling in the law school at the precocious age of nineteen.

Indeed, Sandra Day was an editor for Volume 4 of this law review.<sup>4</sup> It was through a cite-checking and proofreading assignment that she connected with

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1. Scott Bales, Tribute, *Justice Sandra Day O'Connor: No Insurmountable Hurdles*, 58 STAN. L. REV. 1705, 1705 (2006).
2. Paul Brest, *In Praise of Sandra Day O'Connor '52*, STAN. LAWYER, Fall 1991, at 20, 20.
3. EVAN W. THOMAS, FIRST: SANDRA DAY O'CONNOR 12 (2019).
4. *Volume 4 Editorial Board*, STAN. L. REV., <https://perma.cc/JH3A-7GZ2> (archived Aug. 16, 2024).

a fellow editor, John O'Connor, sparking an extraordinary life partnership.<sup>5</sup> Moreover, as has been well documented, it was at Stanford Law School that she befriended William Rehnquist. Though the romantic aspect of their relationship fizzled (much to Rehnquist's chagrin, at least at the time), their friendship paid lasting dividends, as they each played an important behind-the-scenes role in the other's selection to serve on the Court.<sup>6</sup>

My own lasting memories of the Justice are likewise bound up with Stanford. In September 1991, four weeks into my 1L year, Justice O'Connor spoke to our student body at a Women of Stanford Law event,<sup>7</sup> the first time I had encountered a Supreme Court justice in person. A year later, now as a *Stanford Law Review* editor myself, I assisted with a final read-through of O'Connor's tribute to Justice Thurgood Marshall<sup>8</sup>—an essay I found eloquent and deeply moving. It spoke of Marshall as “a man who immerses himself in human suffering and then translates that suffering in a way that others can bear and understand,” someone “who sees the world exactly as it is and pushes on to make it what it can become.”<sup>9</sup> And it was at Stanford—through eighteen holes of golf together, and in accompanying her in 2006 for Justice Kennedy's address paying tribute to her and Chief Justice Rehnquist<sup>10</sup>—that I had my last two chances to spend extended, quality time with her.

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Personal time with the Justice was a gift, a blessing I savor with ever more gratitude as the years pass. But it was not always easy. Rarely was it easy. One does not become the nation's first female Supreme Court justice by sitting back and relaxing. Justice O'Connor often had fun, to be sure, but I cannot recall a moment of genuine *relaxation*. That just was not a trick in her bag.

So if you had the privilege of clerking for her, you never really relaxed either, at least in her presence. Her instructions were rarely explicit. As

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5. Sandra Day O'Connor, *Response*, 58 STAN. L. REV. 1673, 1673-74 (2006).

6. JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 2 (2005) (explaining that Justice O'Connor “created a vast network to advance the Supreme Court nomination of William Rehnquist”); THOMAS, *supra* note 3, at 75-77 (detailing Justice O'Connor's efforts to organize political support for Rehnquist's confirmation); THOMAS, *supra* note 3, at 123-24 (noting how then-Justice Rehnquist “privately, behind the scenes,” lobbied Justice Department officials for President Reagan to nominate Justice O'Connor (quoting Hank Habicht, a member of President Reagan's nominee search committee)).

7. *Friends, Football, and a Famous First*, STAN. LAWYER, Fall 1991, at 16, 16.

8. Sandra Day O'Connor, *Tribute, Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

9. *Id.* at 1220.

10. Anthony M. Kennedy, *Tribute, William Rehnquist and Sandra Day O'Connor: An Expression of Appreciation*, 58 STAN. L. REV. 1663 (2006).

another of her clerks commented, the Justice “would have done well in Asia,” where social norms often dictate that one should already know what to do—and when and how—without subjecting your boss to the indignity of spelling it out. If you need to ask for direction, you have already failed.

But her exacting standards were clear. It was incumbent on us to manage our collective responsibilities: the cert pool memos, the emergency stay applications, the speeches, the bench memos, the draft opinions, and so forth. We were free to shift assignments around and cover for one other; the Justice did not need (or even want) to know those details. But the quality and timeliness of our work was nonnegotiable.

For the slower among us (like me), that meant long hours. I was married, but my spouse did not bother to move to Washington, as we barely would have seen each other. (I typically left my home for the Court at 7:00, and usually returned between 11:00 and midnight.) Often the Justice would host official dinner parties in one of the Court’s conference rooms, typically to entertain some important entourage (like the justices of another country’s high court), and she would come back to her chambers around 9:30 to pick up her keys and purse. The look on her face when she found one of us still at our desk was classic: part exasperation, part pity. She abhorred being the boss who kept her charges at their desks late into the night. But she also was not handing out any extensions. “This wouldn’t be so hard—for either of us—if you were just a little *better* at this,” her eyes implied.

Alas, she was right. We were quite limited compared to her. She never fully appreciated that most human beings (including some reasonably capable ones) found it nearly impossible to keep up with her. Or that her energy and focus and productivity were completely off the charts. Or that her implicit expectation that everyone shared her “almost sacramental devotion” to hard work<sup>11</sup> was, to put it politely, a little unrealistic.

Nor was the Justice especially patient. She possessed an insatiable desire to keep going and learning and doing. One autumn afternoon, she invited me to join her for a round of golf at the Chevy Chase Club, the course where she and John were longtime members. (My ability to play golf—or more accurately, her perception of it—was the principal reason she hired me.) The tenth hole at Chevy Chase is a reasonably short par five. I had hit a decent drive, and my ball sat about 180 yards from the green. The threesome in front of us was still on the green, so I pulled out my 6-iron and took some practice swings, waiting for the group ahead to finish putting out.

“*Well*,” the Justice intoned, “go *ahead*.” It seemed she had never waited over someone’s second shot on a par five.

“I think I might hit into them,” I responded.

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11. THOMAS, *supra* note 3, at 23.

“Then you are just going to have to lay up,” she announced. Never mind your fancy notions of how the game is played, young man; just bunt the ball down the fairway so we can keep *moving*. And that was that. Even at age 70, on the golf course, on a Sunday afternoon, purely for recreation, there was no room for standing still. Zero.

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That is not to say the Justice lacked a playful side. The stories are legion of her dancing with John, or playing charades at dinner parties, or hosting pool parties with chalupas and beer for state legislators in Arizona. We clerks were not privy to those antics, but what we did see could be pretty funny, too.

One of the cases our Term, *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*,<sup>12</sup> concerned whether a knockoff line of children’s dresses sold by Wal-Mart—“one-piece seersucker outfits decorated with appliques of hearts, flowers, fruits, and the like”—infringed a manufacturer’s trademark.<sup>13</sup> A crucial step in the Court’s analysis was the conclusion that a product’s design is not inherently distinctive. As Justice Scalia explained the matter for the Court, consumers are aware that “even the most unusual of product designs—such as a cocktail shaker shaped like a penguin—is intended not to identify the source, but to render the product itself more useful or more appealing.”<sup>14</sup> The morning the Court handed down *Samara Brothers*, Justice Scalia brought a penguin-shaped cocktail shaker into the justices’ robing room. Justice O’Connor was tickled: “Isn’t that so *funny*,” she exclaimed when she returned to chambers.

And she was not to be outdone. As it turned out, the next O’Connor opinion scheduled for hand down was *City of Erie v. Pap’s A.M.*,<sup>15</sup> which concerned a city ordinance banning public nudity, including erotic dancing.<sup>16</sup> The proprietors of an establishment known as “Kandyland” contended that being forced to adorn their performers with “pasties” and “G-strings” violated the Free Speech Clause of the First Amendment.<sup>17</sup> One afternoon, I quietly (and sheepishly) slipped away from the Court to visit an adult superstore near Tyson’s Corner, so the Justice could bring her own props to the robing room. On the day the Court handed down *Erie*, she was positively giddy.

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What I will remember most about the Justice, though, is her kindness and concern for others. Whether it was detouring to a former clerk’s parents’

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12. 529 U.S. 205 (2000).

13. *Id.* at 207.

14. *Id.* at 213.

15. 529 U.S. 277 (2000).

16. *Id.* at 282-83.

17. *Id.* at 284.

home, or contacting a former clerk's parent after a cancer diagnosis, or just taking the time to entertain the thousands of guests who cycled through her chambers—she always took an interest in *you*, always made sure you knew you were important to *her*. Her exacting standards were not so much about her and more about the Justice's deep sense of obligation to serve the public.

In one of my first significant assignments, I helped draft an opinion that—shortly after the Justice's review and revision—was circulated to the full Court. Unfortunately, the draft overlooked an ambiguity in the opinion below, exactly the sort of hidden complication that clerks were supposed to identify. The problem was fixable, but the draft was already in circulation, and Justice O'Connor was out of town. Before I could explain my mistake to her, another Justice authored a memorandum to the full conference—sarcastic and unsparring—that exposed the flaw. I was responsible, and I wanted to disappear.

The Justice returned to work the next morning. Following a night without sleep, I walked into her office first thing and explained my oversight. She sensed my shame, and her steely exterior dissolved. Though I knew she must have been disappointed, and more than a bit frustrated, what I *felt* was her sympathy and acceptance. We talked through next steps, and how the opinion could be resuscitated with a few tweaks. And as I got up, she gently shared three words that lifted the world off my shoulders: "It'll be fine."

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Wallace Stegner—after instructing the teenage Sandra Day in creative writing at Stanford—became one the Justice's favorite authors; she often quoted him in her writings and speeches.<sup>18</sup> One of Stegner's more memorable scenes occurs near the end of *Angle of Repose*, when Oliver Ward—besought with grief and a sense of betrayal—methodically pulls up his prized rose bushes by the roots, plants he had spent years cultivating and carefully nurturing:

One by one he tears the bushes from the ground and leaves them lying—Jacqueminot, American Beauty, Paul Fontaine—rose-pink, black-crimson, rich red. One by one, not yanking in a fury but tugging thoughtfully, almost absent-mindedly, he destroys one row and comes back along for the other, down the long narrow bed. At the end, when it is all done, he stands inspecting his bloody hand, and then steps across the lawn and picks up the reins of the standing horse.<sup>19</sup>

As someone professionally and personally invested in Justice O'Connor's legacy (and thus hardly unbiased), it is hard not to see a parallel with recent events at the Court. One by one, the justices have uprooted several of O'Connor's distinctive contributions to constitutional law. The principle that the Constitution forbids the government from acting in ways that signal to the

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18. See, e.g., SANDRA DAY O'CONNOR & ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST*, at vii, 51, 61, 121 (2002).

19. WALLACE STEGNER, *ANGLE OF REPOSE* 539 (1971).

reasonable observer that it is endorsing religion.<sup>20</sup> The principle that the Constitution permits public colleges and universities to consider an applicant's race so as to promote diversity on their campuses.<sup>21</sup> The principle that the Constitution guarantees a woman's right to terminate her pregnancy—or at least protects her from the government's imposition of an undue burden on that right before her fetus is viable.<sup>22</sup>

For better or worse, these propositions stood as landmarks for more than a generation. So did several other propositions for which Justice O'Connor's view was pivotal, such as that most restrictions on campaign financing are consistent with the First Amendment.<sup>23</sup> But since the Justice's retirement, the Court has torn much of this legacy from the ground, down one row and then back along another. Text, history, and tradition have supplanted her decidedly non-originalist, case-by-case, common-law approach.

One might criticize Justice O'Connor's jurisprudence as *ad hoc*, lacking in theoretical coherence. According to some, she decided constitutional questions as if she were still a legislator, finger to the political winds. But in assessing her body of work, it is critical to hold in mind how much she prioritized a pragmatic understanding of the Court's institutional role. To her, the Court's highest purpose was to craft workable solutions to the legal problems brought before it.<sup>24</sup> So a decision's real-world consequences meant more than its adherence to any overarching theory of constitutional interpretation. And it was occasionally more important for the Court to produce a majority opinion—one that set down clear precedent for litigants and lower courts to follow—than for each detail of her preferred analysis to carry the day.

Mind you, the Justice cared deeply about the content of the law, and her facility with constitutional theory was far more sophisticated than she let on. But she also placed a real premium on civility and humility. She was willing to set aside her ego—to sacrifice her “jurisprudential reputation,” at least in the eyes of some—to reach practical resolutions. Her conception of the Court's

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20. Compare *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring in part and concurring in the judgment), with *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).

21. Compare *Grutter v. Bollinger*, 539 U.S. 306, 326-29 (2003), with *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 212, 228-29 (2023).

22. Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), with *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

23. Compare *McConnell v. FEC*, 540 U.S. 93, 94-96 (2003), with *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010).

24. Perhaps the quintessential example was her vote in *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*), and particularly her insistence that any continuation of the recount in Florida would be impermissible. See *id.* at 110-11. As a purely practical matter, Justice O'Connor believed that the nation needed the Court to end the election dispute. See THOMAS, *supra* note 3, at 330-34.

basic purpose sometimes meant foregoing a measure of theoretical or doctrinal tidiness. And her understanding of the role of a single judge on a multimember court (as well as her genuine respect for others' views) sometimes meant accommodating colleagues whose judicial methodologies were quite different than her own—even colleagues who occasionally thought her opinions “cannot be taken seriously.”<sup>25</sup>

Moreover, inherent in any narrow, case-sensitive decision is an abiding judicial modesty, a judge's confession of her uncertainty about the answers to the broader, deeper questions. Justice O'Connor's cautious, incremental approach to constitutional decision-making persistently invited others into the conversation—future courts, future legislators, future citizens.<sup>26</sup> It recognized that hers was merely one voice—and often an uncertain one—in the unfolding story of our democracy.

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Not long ago, a close friend's daughter dressed up as Justice O'Connor for Halloween, and it prompted me to reflect on the Justice's impact on our country. As one small measure, more than 56 percent of U.S. law students today are women.<sup>27</sup> And of course, four female justices sit on the Supreme Court. No doubt, gender inequality remains deeply entrenched in American society, but it is hard to overstate just how much the Justice moved the needle, especially within the legal profession.

The Justice often recited her favorite stanzas from a poem written by Will Allen Dromgoole, *The Bridge Builder*.<sup>28</sup> An older man has journeyed through a canyon and crossed a river, at which point he decides to stay and build a bridge back across:

“Old man,” said a fellow pilgrim near, “You are wasting strength with building here. Your journey will end with the ending day; You never again must pass this way; You have crossed the chasm, deep and wide—Why build you the bridge at the eventide?”

The builder lifted his old gray head. “Good friend, in the path I have come,” he said, “There followeth after me today. A youth whose feet must pass this way. This chasm that has been naught to me. To that fair-haired youth may a pitfall

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25. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

26. See Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1915-17 (2006).

27. Ian Pisarcik, Opinion, *Women Outnumber Men in US Law School Classrooms, but Statistics Don't Tell the Full Story*, JURIST (Jan. 17, 2024 2:28 PM), <https://perma.cc/38LB-S8CK>.

28. See, e.g., *Full Text of Justice Sandra Day O'Connor's Commencement Address*, STAN. REP. (June 13, 2004), <https://perma.cc/2769-WMSA>. President Obama referenced the Justice's quoting of the poem in his remarks at the ceremony awarding her the Presidential Medal of Freedom. *Remarks by the President at the Medal of Freedom Ceremony*, WHITE HOUSE (Aug. 12, 2009), <https://perma.cc/KJ4Q-ZYSE>.

*The Bridge Builder*  
76 STAN. L. REV. 1893 (2024)

be. He, too, must cross in the twilight dim; Good friend, I am building the bridge for him.”<sup>29</sup>

Justice O’Connor’s was a life of building bridges. As she wrote in the instructions she left for her own memorial service, “I hope I have helped pave the pathway for other women who have chosen to follow a career. Our purpose in life is to help others along the way.”<sup>30</sup> So many times, the Justice was the first to cross the deep and wide chasm. She endured the mud and the rocks, the cold water and the rapids, and she reached the other side. Through the pitfalls of sex discrimination and old boys’ networks, her battle with cancer and John’s tragic decline from Alzheimer’s, she persevered. Her courage in doing so, in such a remarkable way, laid the path for the many who have followed after.

May we be forever grateful.

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29. Will Allen Dromgoole, *The Bridge Builder*, in *THE BEST LOVED POEMS OF THE AMERICAN PEOPLE* 137, 137 (Hazel Felleman ed., 1936).

30. THOMAS, *supra* note 3, at 405.