

The Pragmatist on the Bench:
The Western and Political Roots of Justice Sandra Day O'Connor

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In her dedication of the courthouse named in her honor in downtown Phoenix, Justice Sandra Day O'Connor closed her remarks by quoting Winston Churchill's famous adage that, "We shape our buildings and afterwards our buildings shape us."² As she stood at the Courthouse that would bear her name in the center of Phoenix, she couldn't help reflecting on how she had been shaped by her own history in the state. She had not aspired to be a lawyer, let alone a Justice on the Supreme Court, and had wanted to be a "cattle rancher" like her father when she grew up.³ Her legal career began in 1957 in Phoenix when she went into practice on her own after finding that none of the established firms in town would hire a woman.⁴

Perhaps more so than any recent Supreme Court Justice, Justice O'Connor's rise to the Court was intimately bound up with the state from which she came. She lacked any experience in Washington D.C.; her entire professional career came from her public and private work in Arizona.

This Essay seeks to strengthen our understanding of Justice O'Connor's relationship to Arizona as well as her legal and political career in Arizona. We write this in anticipation that, with the opening of the O'Connor Institute's oral history project, there will be a greater ability to analyze Justice O'Connor's career in Arizona before her ascent to the Court, her continued attention to the state, and her return to it after her service on the Court.⁵ We argue that Justice O'Connor's jurisprudence reflects a unique pragmatism that is born from her political career in Arizona. We argue that her service as

² Sandra Day O'Connor, *Courthouse Dedication: Justice O'Connor Reflects on Arizona's Judiciary*, 43 ARIZ. L. REV. 1, 8 (2001).

³ *Id.* at 1.

⁴ *Id.*

⁵ "Sandra Day O'Connor Oral History Project," O'CONNOR HOUSE, (2014), <http://www.oconnorhouse.org/history/oral-history.php>.

a Justice emphasized collegiality, compromise and pragmatism that were an extension of her distinguished career in private practice and in Arizona in all three branches of government.

In writing this Essay, we pay tribute to Justice O'Connor's remarkable and unique journey to serving on the Supreme Court. We hope that others will build on this work with the access to new resources at the O'Connor Institute and further our understanding of this remarkable jurist who considered herself, first and foremost, an Arizonan with the sensibility that came from growing up on a cattle ranch in Eastern Arizona.

I. Humble Origins and A Rising Influence in Law and Politics

Though Justice O'Connor often portrays herself disarmingly as a "cowgirl from Eastern Arizona," this belies a remarkable career that involved service in the top legal posts in Arizona.⁶ During her career in Arizona, Justice O'Connor served in top posts in all three branches of the state's government. She had the opportunity to interact with the legal system through posts in all three branches of government. As an Assistant Attorney General, an elected Judge in Maricopa County, and finally as a State Senator, O'Connor accumulated an array of experience that led to her ascension to the highest levels of Phoenix's legal community.⁷ The achievement was remarkable considering that when she first graduated law school she was unable to find a paid job as an attorney (she was

⁶ See, e.g., Sandra Day O'Connor, Commencement Address at Stanford University (June 13, 2004), <http://news-service.stanford.edu/news/2004/june16/oconnor-text-616.html>.

⁷ Scott Bales, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist in Honor of Sandra Day O'Connor*, 58 STAN. L. REV. 1705, 1709 (2006) (discussing Justice O'Connor's role as serving in all three branches of government).

famously offered employment as a legal secretary) and had to hang out her own shingle in Phoenix when the larger law firms refused to hire a woman.⁸

While some scholars have viewed her work in Arizona as a series of “minor political offices below the national level,” this is a mistaken characterization of her career.⁹ O’Connor built her career in Arizona while remaining closely connected to some of the rising stars of the Republican legal community in Washington D.C. through her connections from Stanford Law School.¹⁰ Of course, the limitations on her ability to achieve some of the professional accomplishments that her male colleagues had at the court was the direct product of “the gender factor” which made those positions unavailable.¹¹

While she was unable to easily move to Washington D.C. for positions that could have offered her legal advancement, O’Connor made herself into a powerhouse at the intersection of the political and legal communities in Phoenix. “I have always wanted to be part of the process of the dynamics of my community, to help it develop and achieve its goals, to try to make it a good place to live,” she observed of her work in Arizona.¹² She served as the President of the Phoenix Junior League and actively campaigned for Barry Goldwater’s Presidential campaign in 1964.¹³ For what she lacked in service in some of the nation’s high-echelon legal circles, O’Connor was able to attain professional success through her ability to gain support from the state’s Republican leadership and her

⁸ *Id.*

⁹ Beverly Cook, *Justice Sandra Day O’Connor: Transition to Republican Court Agenda*, in *THE BURGER COURT: JUDICIAL POLITICAL PROFILES* 238, 239 (Charles Lamb & Stephen Halpern, eds. 1991).

¹⁰ Ed Magnuson, *The Brethren’s First Sister*, *TIME*, July 20, 1981, at 10.

¹¹ Nancy Maveety, *JUSTICE SANDRA DAY O’CONNOR: STRATEGIST ON THE SUPREME COURT* 16 (1996).

¹² *Id.* at 14 (quoting Justice O’Connor).

¹³ *Id.*

ties to the national Republican legal elite. This ability to build a strong local network while remaining connected to the legal community in Washington D.C. led President Reagan to select her for the Supreme Court., in keeping with his pledge to select a woman.

While her nomination raised considerable ire amongst conservative activists, who wanted a solidly anti-abortion nominee, her support in Arizona was helpful in her nomination. Congressman Morris Udall of Arizona noted that she had “good judicial temperament” and said that his “Democratic friends ought to be grateful for this appointment. It’s almost inconceivable they could do any better.”¹⁴ While she brought a complex record on abortion from her work in the State Legislature, her support for the Equal Rights Amendment and removing limits on women’s ability to work in the State Legislature were helpful in establishing her credibility with Democrats.¹⁵

II. A Majority of One: From Politics to the Bench

Justice O’Connor may become the last Justice to have held political office before an appointment to the Supreme Court. Since Justice O’Connor was appointed to the court in 1981, no President has selected an elected official for the Supreme Court. While President Clinton carefully reviewed a number of elected officials, including Governor Bruce Babbitt and Senator George Mitchell, he ultimately chose individuals who had experience as appellate Judges.¹⁶ Her experiences in the political branches of Arizona’s government produced a famously collegial Supreme Court Justice, both gifted at

¹⁴ James Johnson, ARIZONA POLITICIANS: THE NOTABLE AND THE NOTORIOUS 53 (2002)

¹⁵ *Id.*

¹⁶ Douglas Jehl, *The Supreme Court: The Overview; Mitchell Viewed As Top Candidate For High Court*, N.Y.TIMES, April 7, 1994, at A1.

compromise and constantly concerned with the Court's institutional role in the American system of government.

A. Collegiality

As many, including her fellow Justices, have noted, O'Connor "has a special talent, perhaps a gene, for lighting up the room . . . she enters; for [restoring] good humor in the presence of strong disagreement; for [producing constructive] results; and for [reminding] those at odds today . . . that 'tomorrow is a new day.'"¹⁷ Her amiability, energy, and genuine interest in her colleagues and clerks made her in many ways the social core of the Court. The 8 AM exercise class that O'Connor founded in the 1980s has endured – and, even 7 years after her retirement, she still attended.¹⁸ It was O'Connor, Justice Ginsburg wrote, "who told me what I needed to know when I came on board for the Court's 1993 term – not an intimidating dose, just enough to enable me to navigate."¹⁹

But that "special talent" referred to by Justices Breyer and Ginsburg was not merely a social skill; it was political and managerial as well. O'Connor honed and wielded her gifts deftly as she navigated Arizona's (stubbornly male) political and legal institutions. And her collegiality was a way of signaling to the other Justices that the Court's fundamental mission was collaborative – to fulfill its constitutional mandate and allow the other branches and the states to fulfill their own responsibilities.

¹⁷ Justice Ruth Bader Ginsburg, *Reflections on Arizona's Pace-Setting Justices: William Hubbs Rehnquist and Sandra Day O'Connor*, 49 ARIZ. L. REV. 1 (2007) (quoting Justice Stephen G. Breyer, A Tribute to Sandra Day O'Connor, 119 HARV. L.REV. 1243 (2006)).

¹⁸ Adam Liptak, *Honoring O'Connor's Legacy at the Supreme Court*, N.Y. TIMES (April 12, 2012, 8:51 AM), <http://thecaucus.blogs.nytimes.com/2012/04/12/honoring-oconnors-legacy-at-the-supreme-court/>.

¹⁹ Ginsburg, *surpa* note 16.

In the State Senate, O'Connor was famous for the collegiality she fostered through large dinners that she hosted for colleagues from both parties. "The years I was in the Senate we would host gatherings at the house for the senators," she recalled.²⁰ In her large Southwestern-style home, "I would fix chalupas and Mexican food and all the trimmings. I remember sessions in the living room area with various leaders in the community talking about provisions for Arizona that would keep it out of debt but allow progress to be made."²¹ The meetings were not simply social affairs; they were designed to help keep a level of camaraderie, or at least civility, in the State Senate. "We would have senators from both sides of the aisle," because she believed that the evenings meant they were "less apt to be terribly partisan and difficult and when you're back at work - it makes a huge difference."²² O'Connor's dinners represented her commitment to collegiality, even in a high-powered and often acrimonious work environment. The dinners certainly had some effect. Leo Corbert, who served as President of the State Senate, recalled "Through the years that I served with Sandra, I used to marvel at her ability to go from Senate Majority Leader to gracious hostess with such ease. She would have the full Senate over for dinner within hours of debating legislation and never miss a beat. We wrote the Grand Jury bill on her kitchen table while she was baking cookies for one of her son's school events."²³ The affairs embodied O'Connor's low-key leadership

²⁰ *Sandra Day O'Connor House*, TEMPE.GOV, <http://www.tempe.gov/index.aspx?page=1704> (last visited Feb. 17, 2014).

²¹ *Id.*

²² Kathy Shayna Shocket, *Justice's Adobe Home Slated For Preservation*, THE ARIZONA REPUBLIC, May 5, 2008,

<http://www.azcentral.com/news/articles/2008/05/05/20080505oconnor0505.html>.

²³ Andrea Norman, *From The Mud of the Salt: Legal History Reborn in The O'Connor House*, ARIZONA ATTORNEY (September 2011),

http://www.myazbar.org/AZAttorney/PDF_Articles/0908Oconnor.pdf.

style; through an act as simple as hosting a dinner, she was able to exercise leadership over the legislative process and build a collaborative state Senate.

Her role as an institutional consensus-builder and a thoughtful colleague continued through her transition from Arizona political life to the Court. She was famously warm mentor to her clerks and took an active interest in their lives: she required that her female clerks participate in her morning exercise class three times a week, and male clerks getting married were “ordered to get in shape.”²⁴ One clerk wrote that O’Connor would usually eat lunch with her clerks and made an effort to steer the conversation away from work; she wanted to talk about family and friends and current events.²⁵ Whenever a former clerk had a baby, O’Connor would send a tiny t-shirt with the words: “O’Connor Grandclerk.”

B. Compromise

While O’Connor’s tenure on the Court has been labeled by Court observer Jeffrey Rosen as a “majority of one,” that phrase originally referred to her service in the Arizona State Senate.²⁶ She served as the first female majority leader in any legislative body in the United States when her Republican colleagues elected her the majority leader in 1972. Arizona was politically divided at the time and she had a slim majority, with Republicans holding 16 seats and Democrats holding 14 seats.²⁷ Her tenure in the early 1970s marked a time when Arizona was more politically moderate. She was “known as a broker of

²⁴Jeffrey Toobin, *Excerpt O’Connor Led Court on Abortion*, CNN.com (Oct. 3 2007, 8:48 AM), <http://www.cnn.com/2007/US/law/10/02/toobin.excerpt2/index.html?iref=mpstoryview>.

²⁵Michelle Friedland, *A Wise Justice and a Great Boss*, STANFORD ALUMNI MAGAZINE, January/February 2006, http://alumni.stanford.edu/get/page/magazine/article/?article_id=33334.

²⁶Jeffrey Rosen, *A Majority of One*, NEW YORK TIMES, June 3, 2001.

²⁷*Id.*

compromises during her long-ago tenure as Arizona's Senate majority leader” and was able to bring opposing political forces together.²⁸

That reputation as broker of compromises carried over, of course, to her time in Washington. Her instinct for forging a middle path in difficult cases reflected the attitude of a jurist with experience in non-judicial branches of government; difficult cases, like the problems faced by legislatures and executives, could be resolved by avoiding extreme outcomes. O’Connor tended to support “only incremental changes in the law – which helped her control the ideologically divided court.”²⁹ The incremental approach built compromise by acting as a kind of safeguard: her narrow, fact-specific opinions allow lower court judges greater discretion than the more muscular opinions written by many of her colleagues.

Many Court observers have noted the cases that might have gone differently were it not for O’Connor’s moderating influence. Her 2003 majority opinion in *Grutter v. Bollinger* is a prime example. Jeffrey Toobin called the decision “a classic O’Connor compromise: she supported diversity but not quotas; she embraced racial preferences but put a time limit on their use – twenty-five years.”³⁰

Similarly, in her concurrence in *McCreary County v. ACLU of Kentucky* – one of her last opinions – O’Connor found the middle ground in an important Establishment

²⁸ Charles Lane, *In The Center, Hers Was The Vote That Counted*, WASH. POST, July 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070101087.html>

²⁹ Joan Biskupic, *O’Connor’s Legacy Fading On Reshaped Court*, USA TODAY, June 10, 2008, http://usatoday30.usatoday.com/news/washington/2008-06-09-oconnor_N.htm.

³⁰ Jeffrey Toobin, *Justice O’Connor Regrets*, THE NEW YORKER (May 7, 2013), <http://www.newyorker.com/online/blogs/comment/2013/05/sandra-day-oconnor-shift-on-bush-v-gore.html>.

Clause case regarding state displays of religious expression.³¹ She wrote eloquently of the nation's history of religious liberty and upheld a longstanding process in which courts have discretion to examine the purposes behind disputed state displays and assess whether the message conveyed is an unconstitutional endorsement of religion. This view stood between the position of that case's dissent – that public acknowledgment of the Judeo-Christian God is entirely permissible – and the view that any religious display, regardless of historical context, is unconstitutional.

Those compromises took measure of not just the ideological divisions on the Court itself, but of the divisions of opinion in society generally. Conflicting constitutional values often echo public debates, and O'Connor's path in many cases accounted for those debates and balanced even the non-constitutional interests involved. Her political sense allowed her to craft a body of jurisprudence that repeatedly helped the Court avoid both political backlash and radical legal consequences.

C. Pragmatism

O'Connor's moderate approach was grounded in more than just a personal disposition toward compromise. It reflected what Justice Breyer identified as “a particularly strong practical understanding of the institutional role that courts must play in America's system of government.”³² Her experiences in three branches of Arizona's *state* government gave her a clear sense of the federal judiciary's relation to other institutional structures. She had an “often unerring sense of how our nation's democracy works.”³³

³¹ Marty Lederman, *Justice O'Connor's Fragile Legacies*, BALKINIZATION (June 10, 2008, 12:09 AM), <http://balkin.blogspot.com/2008/06/justice-oconnors-fragile-legacies.html>.

³² Justice Stephen G. Breyer, A Tribute to Sandra Day O'Connor, 119 HARV. L.REV. 1243 (2006)

³³ *Id.* at 1244.

Unlike her colleagues on the court, whose involvement with state governance and legislatures was more distanced and abstract, she was a successful elected state official. She brought to the court a practical grasp of how legislatures and state governments approach problems, and in this capacity she wrote opinions that reflected common sense, balanced interests, and a feel for the broader governmental and societal context in which judicial rulings have effect.

That feel manifested in an antifformulaic approach to balancing conflicting constitutional principles.³⁴ The middle path of *Grutter* was one embodiment of her practicality and institutional awareness – one which admitted of the complexity of an evolving American society without establishing dangerous judicial principles regarding racial quotas. *McCreary*, too, maintained a reasonable, fact-specific method of judicial assessment. Another instance was her opinion in *Hamdi v. Rumsfeld*, which established that the president’s war powers, even in a new and complex fight against Al Qaeda, did not allow for the denial of due process from Americans detained in pursuit of that war.³⁵

The above are recent cases, but her antifformulaic approach to striking constitutional balances can be seen from the start of her tenure on the Court. In response to a question at a conference shortly after she announced her retirement, she admitted that it was hard to know which of her opinions would have lasting effect, but she still mentioned being partial to two: one was *Hamdi*.³⁶ The other was *Strickland v. Washington*, a landmark 1984 case that established the “reasonably effective assistance” standard for evaluating the quality of legal representation guaranteed to defendants under

³⁴ Maveety, *supra* note 9.

³⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁶ Biskupic, *supra* note 28.

the Sixth Amendment.³⁷ Her opinion emphasized that case-by-case analysis was required, and that mechanistic principles should not obscure the “ultimate focus of the inquiry, [which] must be on the fundamental fairness of the proceeding.”³⁸ Her pride in those two opinions demonstrates her thoughtfulness about Court’s proper role within a vast judicial and governmental system.

As an actor within the Court, O’Connor held a remarkable strain of confidence in her work that stemmed from her political background and her “upbringing on the Lazy B Ranch.”³⁹ In reaching a decision, O’Connor would analyze the issue and “once she made up her mind, she refused to be budged.”⁴⁰ The pillow that sat in her chambers, with the hand-stitched label, “maybe in error but never in doubt,” captured some of the confidence that she brought to the job.⁴¹ Justice Kennedy went back and forth in his decision in *Casey* but O’Connor made her choice to uphold *Roe* and “never looked back.”⁴²

III. The Activist Off the Bench

During her time on the Court, Justice O’Connor was stunningly active in her ‘off the bench’ work. She traveled constantly: “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; [and] speaking to high school, college, and law school students

³⁷ Maavety, *supra* note 10, at 39.

³⁸ *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

³⁹ Jeff Rosen, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 17 (2007).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 18.

about the Court's work."⁴³ She was so energetic that Justice Ginsburg's secretaries joked that O'Connor placed some of the burden on a secret twin sister.⁴⁴ Ginsburg herself recalled the impossible stream of invitations from universities, countries, and civic associations, all indicating that O'Connor had visited in previous years and insinuating that – as the other female Justice – “now it's your turn.”⁴⁵

O'Connor retired earlier than she might have if it weren't for her husband's illness. John Jay O'Connor had been battling Alzheimer's for over fifteen years, and she left the Court in order to spend more time with him as his condition worsened.⁴⁶ He died, in Phoenix, just a few years after his wife's departure from the Court.⁴⁷ But even before his death Justice O'Connor sustained her commitment to public service. She continued to sit by designation as a judge in federal appellate and district courts. In 2006, she was appointed by Congress and served on the Iraq Study Group, a commission charged with examining the intelligence failure that led up to 2003's invasion.⁴⁸ She is Chancellor of the College of William and Mary, teaches an annual two-week course on the Supreme Court at University of Arizona Law School, and once co-taught a course at the Sandra Day O'Connor College of Law at Arizona State University. Just as during her time as an active Justice, O'Connor continues fighting for better civics education and engagement, rule of law, and argues powerfully against continued state judicial elections.

⁴³ Breyer, *supra* note 31, at 1244.

⁴⁴ Ginsburg, *supra* note 16, at 7.

⁴⁵ *Id.*

⁴⁶ William Branigin, Fred Barbash, and Danliela Deane, *Supreme Court Justice O'Connor Resigns*, WASH. POST, July 1, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>

⁴⁷ Dennis Hevesi, *John J. O'Connor III, Husband of Former Justice, Is Dead at 79*, N.Y. TIMES, Nov. 11, 2009, http://www.nytimes.com/2009/11/12/us/12oconnor.html?_r=0

⁴⁸ *Iraq Study Group*, U.S. INST. OF PEACE, <http://www.usip.org/iraq-study-group/members> (last visited Feb. 20, 2014).

Though her first judgeship – on the Maricopa County Superior Court – was an elected post, one of her most consistent causes has been the defense of the independent judiciary. She consistently decries political attacks on judges and maintains that judges must not be subject to retaliation from the other branches of state and federal government.⁴⁹ The need to raise money and build political support for elections “presents one of the greatest threats to fair courts,” she says, and points out that jurists from other countries are astonished when they find out that we still have judicial elections.⁵⁰ She also emphasizes that the Framers insisted on judicial independence: they believed – as she does – that judging must be insulated from politics to be exercise its proper constitutional role.⁵¹ As an advocate on this issue, she inhabits a unique perspective: the only Justice with firsthand experience of the corrosive potential of politics. She has also expressed reservations about 2010’s controversial decision in *Citizens United v. FEC* – another case in which her experience as an elected official might have had an influence on the outcome, had she still been on the Court.⁵²

A prominent public role is by no means a given for retired Justices. Justice David Souter actively avoided the public eye throughout his tenure on the Court and returned, upon retirement, to a largely private life in Hopkinton, New Hampshire. He sometimes sits by designation on the U.S. Court of Appeals for the First Circuit, in addition to

⁴⁹ Nina Tottenberg, *O’Connor Decries Republican Attacks on Courts*, NPR ONLINE, (Mar. 10, 2006, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=5255712>.

⁵⁰ Bill Rankin, *Ex-Justice Says Contested Elections Threaten Fair Judiciary*, ATLANTA J. CONST. (Aug. 12, 2013, 4:12 PM), <http://www.ajc.com/news/news/local/ex-justice-says-contested-elections-threaten-fair-/nZMSC/>.

⁵¹ Tottenberg, *surpa* note 44.

⁵² David Weigel, *Justice O’Connor Worries About SCOTUS’s New Tack on Campaign Finance*, SLATE (June 27, 2011, 5:48 PM), http://www.slate.com/blogs/weigel/2011/06/27/sandra_day_o_connor_worries_about_scotus_s_new_tack_on_campaign_finance.html.

serving on New Hampshire’s curriculum committee on civics education.⁵³ He shares O’Connor’s concern for the state of political and civic awareness, but his modest activities highlight O’Connor’s extraordinary energy and commitment to using her position to shape the public sphere.

IV. An Arizonan at Heart

One of Justice O’Connor’s former clerks, Michelle Friedland, recalled how the Justice took her clerks to an Orioles-Padres game in Baltimore and the group stopped at a crab house for lunch.⁵⁴ The Justice struck up a conversation with a “man at the next table, who was wearing a Padres hat and shirt.”⁵⁵ The man had no idea that O’Connor was a Supreme Court Justice, and when he asked her where she was from she simply replied, “Arizona originally, but I now live in Maryland, near D.C.”⁵⁶ The anecdote reveals how unassuming O’Connor has always been about her incredible accomplishments and how important her Arizona roots have remained for her. In this Essay, we have sought to offer new insights into the importance of O’Connor’s roots in Arizona in shaping her career. With the forthcoming oral history project at the O’Connor Institute, we hope that those who follow the work of the Court will be able to have a greater understanding of the centrality of Arizona in O’Connor’s life and career.

⁵³ Ashby Jones, *What’s in Souter’s Future?*, WALL STREET JOURNAL (May 20, 2009, 6:01 PM) <http://blogs.wsj.com/law/2009/05/20/whats-in-souters-future-civics-for-starters/>.

⁵⁴ Friedland, *supra* note 24.

⁵⁵ *Id.*

⁵⁶ *Id.*