

Judicial Profile

Hon. Sandra Day O'Connor Associate Justice, U.S. Supreme Court

IN JULY 2001, as literati across the country mourned her death, the late Katharine Graham — publisher of *The Washington Post* — was eulogized as “the most powerful woman in America.” Graham’s influence is beyond dispute.

But there is also no doubt that the most powerful woman in America is actually Justice Sandra Day O'Connor — someone who has never published the news, but who makes it every day. Indeed, Justice O'Connor is not only the most powerful woman in America; she is also the most powerful judge — male or female. As a June 2001 *New York Times* profile observed, “Talk is that Sandra Day O'Connor may be

next to lead the Supreme Court. In many ways, she already does.”

On the deeply divided Rehnquist Court, 5–4 opinions have become a way of life, with Justice O'Connor at the epicenter. Many of the Court’s most important cases — including 26 of the 85 cases handed down in its most recent term (the famous *Bush v. Gore* among them) — have been decided by a single vote. Moderate Justices Anthony Kennedy and Sandra Day O'Connor are the perennial “swing” votes in cases pitting the Court’s three conservatives (Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas) against the four liberals (Justices Stevens, Souter, Ginsburg, and Breyer). From 1994 to 2000, Justices Kennedy and O'Connor each were in the majority on the same number of 5–4 opinions.

There have been many swing votes in the history of the U.S. Supreme Court. What sets Justice O'Connor apart is the unique way in which she approaches her job. In case after case, she joins the majority and then writes a concurring opinion that effectively saps the majority’s rationale of general application. Her style is to carve out legal rules incrementally, building a body of law one case at a time and reaching for a pragmatic resolution that is driven by the facts of the specific dispute before her. That approach confounds legal scholars, who find it difficult to characterize her jurisprudence. But her narrow rulings leave her free to reach a different result in similar cases in the future, and thus make her the single most important vote on the Court. In the words of the *New York Times*, “We are all living now in Sandra Day O'Connor’s America. Take almost any of the most divisive questions of American life” — for example, affirmative action in public universities, school vouchers, abortion, voting rights, sexual harassment, the list goes on and on — “and Justice O'Connor either has decided it or is about to decide it on our behalf.”

Many analysts attribute Justice O'Connor’s pragmatism and independence to her Arizona roots. She is fond of quoting the words of author Wallace Stegner, the great chronicler of the West, who was also her creative writing instructor at Stanford: “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.” The eldest of three chil-



dren of Harry and Ada Mae Day, Justice O'Connor was raised in the frontier spirit of the American West. Her grandfather, Henry Clay Day, moved from Vermont in the late 1800s, and began ranching on the harsh terrain of what is now southeastern Arizona. By 1930, the Lazy B Ranch was still far from any town or hospital, so Ada Mae Day went to her mother's home in El Paso, Texas, to give birth to the future justice.

Life on the remote, sprawling, 198,000-acre ranch was difficult for a child. The family's home — a four-room adobe building — had no electricity or running water until Sandra Day O'Connor was 7 years old. With the closest neighbors 25 miles away, the family spent most of its days in isolation. And Justice O'Connor was an only child until the age of eight, when the first of her two siblings was born. Her mother spent many hours reading to her from the *Wall Street Journal*, *Los Angeles Times*, *New Yorker*, and *Saturday Evening Post*; and the young girl became a voracious reader herself. To fend off loneliness, the future justice also befriended the ranch hands and kept many pets, including a bobcat and a few javelina hogs. By the age of eight, she was mending fences, riding with the cowboys, firing her own .22 rifle, and driving a pickup truck. Together with her brother Alan, 10 years her junior, Justice O'Connor has written a memoir about growing up on the ranch; the book is scheduled for release in 2002.

Because the isolation of the ranch made education difficult, when Justice O'Connor was five years old, her parents began sending her to her maternal grandmother in El Paso, Texas, for the school months. There she attended the Radford School, a private academy for girls, from kindergarten on, summering in Arizona at the ranch. Suffering from extreme homesickness, she withdrew from Radford at the age of 13 and returned home for a year. But commuting to the nearest school meant leaving before dawn and returning after dark; therefore, after a year, she returned to Radford. One year later, she transferred to Austin High School. All in all, she skipped two grades and graduated from high school with top marks at the tender age of 16.

Justice O'Connor studied economics at Stanford University, planning to apply what she learned in the operation of the family's ranch to her own — maybe even the Lazy B. But a legal dispute involving the family's ranch turned her interest to law, and she decided to enroll in Stanford Law School after receiving her B.A., magna cum laude, in 1950. It took her only two years to complete law school and, along the way, she served as an editor of the *Stanford Law Review*, joined the Order of the Coif, dated her law school classmate William Rehnquist, and met her future husband and *Law Review* colleague John J. O'Connor III. She graduated from law school in 1952,

third in a class of 102; William Rehnquist was first in the class. That same year, she married O'Connor.

In 1952, it was hard for a woman to find work as a lawyer even if she had graduated at the top of her Stanford class. No law firm in California wanted to hire the newly minted lawyer, and only one offered her a position — as a legal secretary. (A senior partner of that firm, former Attorney General William French Smith, would be instrumental in her appointment to the Supreme Court 30 years later.) Unable to find work in the private sector, Justice O'Connor eventually accepted a position as deputy county attorney for San Mateo, Calif. When her husband graduated from law school in 1953, he was immediately drafted into the Army's Judge Advocate General Corps. He served in Frankfurt, West Germany, for three years, with his wife by his side. During that time, she worked as a civilian lawyer in the Quartermaster's Corps, specializing in contracts.

When the O'Connors returned to the United States in 1957, they settled in Phoenix and had their first son. Again unable to land a position in private practice, Justice O'Connor started her own firm in 1958, with a single partner and an office in a shopping mall. After the birth of her second son, Brian, in 1960, she temporarily withdrew from the practice of law to care for her growing family and gave birth to her third son, Jay, in 1962. She remained active outside the home, however, getting involved in a wide range of volunteer activities and in the Arizona Republican Party.

After five years as a full-time mother, Justice O'Connor returned to work (initially part time) as an assistant attorney general. Four years later, when a state senator resigned to accept an appointment in Washington, D.C., Arizona Gov. Jack Williams appointed her to fill the vacant seat. She successfully defended her state Senate seat for two more terms, serving from 1960 to 1975 and compiling a record that was less conservative than those of many of her Republican colleagues — supporting limits on government spending and restoration of the death penalty but opposing aid to parochial schools, staking out a moderate position on abortion, and supporting the Equal Rights Amendment. Eventually, she was elected majority leader of the Arizona state Senate — a first for a woman anywhere in the United States. Her terms in the state Senate provided some of the most formative experiences of Justice O'Connor's life.

In 1974, she ran for and won a post as a judge on the Maricopa County Superior Court. State Republican leaders pressed her to consider a campaign for the governorship in 1978, but she declined. A year later, the newly elected Democratic governor, Bruce Babbitt, nominated her for the Arizona Court of Appeals. When she took office in 1979, she was already

well-respected, and Chief Justice Warren Burger took note of her when they both attended a judicial conference in England the following year. Her national profile was further enhanced by her participation in a January 1981 program on federalism and the state courts. She adapted her remarks there for publication in the Summer 1981 issue of *William and Mary Law Review*, in which she urged greater federal deference to state courts.

On June 17, 1981, an unsuspecting Justice O'Connor was reading the front page of the local newspaper when something caught her eye. Justice Potter Stewart had just announced his retirement, the paper announced, and Arizona Sen. Dennis DeConcini was urging President Reagan to replace Justice Stewart with a 51-year-old judge on the Arizona Court of Appeals named Sandra Day O'Connor. Justice O'Connor dismissed it as a friendly gesture by one of her colleagues in the state, but she soon learned that she was mistaken.

In April 1981, when President Reagan was advised of Stewart's plans to retire, the President had asked aides to compile a list of the nation's most prominent female lawyers and judges — the first step in delivering on his campaign pledge to appoint the first woman to the Supreme Court, an attempt to offset criticism of his opposition to the Equal Rights Amendment in 1980. Topping the list that the President received was the name of Sandra Day O'Connor. He then asked the Justice Department to begin a secret investigation of the Arizona judge. When a positive report came back, the President told Attorney General William French Smith to call Judge O'Connor, and she received the call on June 25, 1981. After several lengthy meetings with her in Arizona, the attorney general's top aides returned to Washington, D.C., with glowing reviews. On July 1, the Arizona judge met with the President in the Oval Office. He was immediately charmed by her, as they talked about their mutual love of horseback riding before turning to matters of law and judicial philosophy. Forty-five minutes later, the President told his aides that the search was over; O'Connor was the right woman for the job. At a televised news conference less than a week later, the President announced his historic decision, describing the justice-to-be as "truly 'a person for all seasons,' possessing those unique qualities of temperament, fairness, intellectual capacity, and devotion to the public good that have characterized the 101 'brethren' who have preceded her."

At her Senate confirmation hearings, Justice O'Connor expressed cautiously conservative views on capital punishment, the exclusionary rule, and busing, and she refused to be pinned down on her position with respect to abortion. Asked how she wanted to be remembered, she replied: "Ah, the tombstone question. I hope it says 'Here lies a good judge.'" Of the 18-member Judiciary Committee, 17

members recommended approving her nomination; one voted "present" because the nominee had declined to condemn *Roe v. Wade*. The Senate unanimously confirmed her appointment, and she took office on Sept. 25, 1981.

On that historic afternoon, the Supreme Court was filled to capacity. At 2:04 p.m., the doors at either side of the courtroom swung open. The President of the United States emerged from one door, and Justice O'Connor strode in from the other, ready to take her oath as the 102nd member of the Supreme Court and the first woman in its 191-year history.

When she began her first term in October 1981, the justice brought to the nation's highest court experience from all three branches of government and the unique perspective of a state government official. She was also the only sitting justice who had ever been elected to public office. In her confirmation hearings, she had opined that "judges should avoid substituting their own views ... for [those] of the legislature." Elected lawmakers, she explained, are more "attuned to the public will" and more "politically accountable" than appointed judges are. It is difficult to square those views with many of the opinions handed down by the Rehnquist Court today.

To be sure, over the years Justice O'Connor has emerged as the leader of the federalism movement that is likely to be the hallmark of the Rehnquist Court — devolving power from Washington to the 50 states. Her commitment to states' rights is largely a product of growing up in the West, where federal regulation of land and water is a constant source of irritation to ranchers like her father and brother. The numbers bear out the current Court's anti-Washington bias: according to Seth Waxman, who served as solicitor general in the Clinton administration, the Supreme Court struck down only 127 federal laws in the first 200 years after the Constitution was ratified. In the past six years alone, the Rehnquist Court has struck down 28 federal laws (with Justice O'Connor joining in all but six of those opinions).

Nevertheless, particularly in recent years, it has become increasingly clear that the federalism revolution that Justice O'Connor is leading goes well beyond states' rights. Some commentators have labeled the movement "judicial supremacy" — the reflection of a Court that is confident in both its capacity and its authority to settle issues it might once have left to other branches of the federal government, or even to the states. Former Acting Solicitor General Walter Dellinger has pronounced this "the least deferential Supreme Court in American history." Summing up the Court's most recent term, including the controversial opinion in *PGA Tour v. Martin*, he has quipped that "the Court assumes that it is more qualified than Congress to resolve electoral votes, more entitled than the President's agencies to fill gaps in federal law, and better equipped than the Professional Golf Association to determine the rules of golf."

Indeed, many commentators note that *Bush v. Gore* is just the most high profile opinion of a long line of recent opinions evidencing the Court's growing propensity to substitute its judgment for that of Congress, the lower courts, federal agencies, and state governments. In essence, they say, that case was the Court's declaration that it was better positioned than a lower state court or Congress to decide how — or if — ballots in Florida should be counted. At least in that case, it is clear that Justice O'Connor's experiences in state government did not translate into states' rights. Indeed, some have suggested that her experiences in Arizona have rendered her a skeptic. According to one former clerk, someone once "was making the case about a state legislature, and the gist of her comment was, 'I was in a state legislature — I know how foolishly they can act.'"

In any event, *Bush v. Gore* — no doubt one of the most important cases any Supreme Court will ever hear — bears Justice O'Connor's trademark stamp. Reportedly at least partly at her insistence, the landmark opinion includes a disclaimer emphasizing that its rationale applies only to the precise facts then before the Court and should not bind the Court in future cases. "Our consideration is limited to the present circumstances," the opinion notes, "for the problem of equal protection in election processes generally presents many complexities." This statement is classic O'Connor.

While many scholars debate precisely how Justice O'Connor's experiences as a state legislator affect her rulings on the Court, others debate whether her gender makes a difference — an issue of great interest, particularly at the time of her arrival in 1981 as the "FWOTSC" (first woman on the Supreme Court, as she has often referred to herself). Early in her tenure, several commentators suggested that her opinions were written in a distinctively feminine voice — evincing a preference for moderation over confrontation and community over individualism. But the justice has generally rejected such judgments. In a 1991 speech at New York University, she cautioned, "This 'new feminism' is interesting but troubling, precisely because it so nearly echoes the Victorian myth of the 'true woman' that kept women out of the law for so long. Asking whether women attorneys speak with a 'different voice' than men do is a question that is both dangerous and unanswerable." Earlier, Justice O'Connor had rejected the notion of a "woman's approach" to judging: "I think the important fact about my appointment is not that I will decide cases as a woman," she said just after joining the Court, "but that I am a woman who will get to decide cases." One former clerk, quoted in a profile published in the *New York Times*, put it even more bluntly: "When you grow up riding wild horses — Western women tend not to buy that different voices stuff. They tend to be pretty much in the camp of 'Annie Get Your Gun': Anything he can do, I can do better."

Supreme Court, 2000 Term Majority Opinions by Justice Sandra Day O'Connor

Date	Docket #	Case
6/28/01	00-596	Lorillard Tobacco Co. v. Reilly
6/18/01	00-121	Duncan v. Walker
6/4/01	00-6677	Perry v. Johnson
5/14/01	99-6218	Rogers v. Tennessee
4/25/01	99-1884	Lackawanna County D.A. v. Coss
4/25/01	99-9136	Daniels v. United States
2/21/01	99-1331	Lewis v. Lewis & Clark Marine Inc.
1/17/01	99-1185	Seling v. Young
11/28/00	99-1030	City of Indianapolis v. Edmond

Still, scholars note that Justice O'Connor has demonstrated special sensitivity to the prejudices that women face. The first major case came in 1982, when she wrote an opinion invalidating a women-only enrollment policy at a state-run nursing school in Mississippi, saying that it "tends to perpetuate the stereotyped view of nursing as exclusively a woman's job." A 1994 concurrence that she penned was to similar effect. In a case challenging the constitutionality of striking prospective jurors on the basis of sex, she wrote that, although there were no "definitive studies" on how jurors behaved in cases of sexual harassment, child custody, or domestic abuse, "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case." And, in 1999, she played a key role in *Davis v. Monroe County Board of Education*, a 5–4 ruling that public schools could be held liable for failing to stop students from sexually harassing other students. In a stinging dissent, Justice Kennedy charged that Justice O'Connor was ignoring the facts of school life and inviting federal interference in local matters. He wrote that the majority opinion offered "little Johnny a perverse lesson in federalism." Justice O'Connor countered firmly from the bench that her view would ensure "that little Mary may attend class."

Linda Greenhouse, Supreme Court correspondent for the *New York Times*, was captivated by the exchange:

There was a memorable scene, lasting no more than 10 minutes, as [Justices O'Connor and Kennedy] each summarized their respective majority and dissenting opinions. ... The two

justices, both Westerners in their 60s, both Stanford University graduates, both the appointees of Republican presidents, each the parent of three grown children, might have been speaking from different planets. For O'Connor, ... the case was about sex discrimination so severe as to destroy the learning environment in the classroom. For Kennedy, ... the case was about federal intrusion into a place where the federal government has no business. That O'Connor and Kennedy are longtime allies in the cause of states' rights made this nonmeeting of the minds all the more striking. Ever since O'Connor arrived on the court as the FWOTSC, ... the obvious question has been: Does it make a difference? [This] decision — indeed, O'Connor's entire Supreme Court career when viewed through the lens of gender — suggests that it does."

Justice O'Connor's junior colleague, Justice Ruth Bader Ginsburg (a noted women's rights advocate in the 1970s), joined the majority opinion in *Davis*. The two women have forged a bond — on the bench and off — since Justice Ginsburg's arrival at the Court in 1993. For example, in autumn 1988, Justice O'Connor was diagnosed with breast cancer. The day

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before her surgery, she honored a speaking commitment at Washington and Lee University in Virginia; and she was back on the bench 10 days later, without missing a single oral argument. When Justice Ginsburg was diagnosed with colon cancer, the senior justice was the first person to call the junior justice in the hospital. Sharing her own experiences as a breast cancer survivor, Justice

O'Connor advised the ailing justice to schedule chemotherapy for Fridays, so that she would be strong enough to come to work on Mondays. While Justice Ginsburg appreciated Justice O'Connor's support since joining the Court, their common experiences with cancer brought the two women even closer together.

Indeed, some advocates before the Court appear to believe that the two are one and the same, addressing Justice O'Connor as Justice Ginsburg, and vice versa. Statistically, this mistake happens much more frequently than it does with the male justices, even though, with only two women on the Court, it would seem that the odds would favor confusing the seven male justices and keeping the two women straight. The Court's most recent term is reportedly

the first in which the two women have not been mistaken for each other on the bench. Still, they like to laugh about it. In fact, soon after Justice Ginsburg's appointment, anticipating the likelihood of such confusion, the National Association of Women Judges presented the two women with T-shirts: Justice O'Connor's reads: "I'm Sandra, not Ruth"; Justice Ginsburg's reads: "I'm Ruth, not Sandra."

It is hard to imagine how the two women could be mistaken for each other. Justice Ginsburg is petite, dark, and wears glasses, while Justice O'Connor is much taller, more fair, has a direct gaze, and speaks in Western cadences, exuding a quiet, confident authority. Her former law clerks have described Justice O'Connor as a person who is in control, committed, intense, and a perfectionist. But she is also described as warm, down-to-earth, and upbeat.

In a C-SPAN profile broadcast in December 2000, Justice O'Connor described her typical day: "I'm a fan of reading a newspaper in the morning," she said. "By 5:30 or so I'm awake and ready to get up and get going, and I'm usually outside ... looking for the newspaper before it has even arrived. And once it has, we have a little breakfast and read the paper, and I go down to the Court. ... I try to leave the house around 7:15 to go downtown and beat some of the traffic." When she arrives at the Court, the first order of the day is an hour of exercise. Shortly after joining the Court, Justice O'Connor organized a morning aerobics and yoga class for female clerks and employees in the Court's basketball court, which is known as "the highest court in the land."

Justice O'Connor's chambers are at the front of the Supreme Court building. Her inner office, decorated in the tones of the desert Southwest, boasts a breathtaking view of the Capitol and is accented with American Indian drums and landscapes of the West painted by well-known artists. Near her desk hangs a framed front page from *Newsday* celebrating her confirmation, sporting the headline "Her Honor." Scattered about are photos of her children and grandchildren, as well as a needlepoint pillow on one chair that says it all: "Maybe in error but never in doubt." One prize among her many mementos is an autographed basketball from the women's Olympic team.

The justice's chambers are known as the scene of long hours and occasional seven-day workweeks. When the Supreme Court is in session, she meets with her clerks in her chambers on most Saturdays to discuss the cases to be argued in the week ahead. She makes lunch for everyone — usually Tex-Mex or Southwestern fare — and brings it from home. Then they all sit and eat and talk about the cases. Justice O'Connor's discussions with her clerks are more like formal briefings, in contrast to the freewheeling debates favored by some of her colleagues. And she requires her clerks to write extensive memorandums about cases before any discussion takes place. After hearing the clerks' views and reviewing the briefs,

the justice sometimes announces her vote, or she indicates that she has not yet made up her mind. At oral argument, she is an active questioner and generally wears her heart on her sleeve, making little effort to conceal her views. Like the legislator she once was, she finds arguments about the practical effects of a decision to be particularly persuasive.

Although the midnight oil is often burned in her chambers, it's a "work hard, play hard" ethic. Justice O'Connor is renowned for the field trips and other events that she organizes for her clerks — including excursions to see the cherry blossoms; a tour of Washington, D.C., led by a Civil War historian; and outings with the justice for whitewater rafting, fly-fishing, and hiking in the Blue Ridge Mountains. Indeed, she has assumed the mantle of unofficial "cruise director" for the Court as a whole. She accompanied Justice Harry Blackmun when he obtained a grand piano and began the Court's now traditional spring musical more than a dozen years ago; when he retired in 1994, she took over the event. She is at the center of other social activities designed to foster collegiality as well, organizing everything from bridge games to official trips. She herself is passionate about hiking, skiing, and playing tennis and golf. Only days after handing down the decision on *Bush v. Gore* in December 2000, she scored her first hole in one on the golf course.

Even more than the many other 5–4 opinions, the Court's decision in *Bush v. Gore* stands as a reminder of how much the next appointment to the Supreme Court will matter. With the law of the land in the balance, that appointment — when it comes — could change the Court's (and thus the nation's) course on nearly every important constitutional question in modern life. With three justices on the Court now over the age of 70, including Justice O'Connor, the likelihood that President Bush will have a vacancy to fill is high.

Recently there has been talk that Justice O'Connor is looking to retire — a rumor fueled by reports that, after one television network prematurely called Florida for Al Gore on election night, John O'Connor ex-

pressed distress, lamenting that his wife wanted to retire and that Gore's victory would make that impossible. Other observers counter that she has already hired law clerks for the next several terms. But it is possible that she is nevertheless planning to depart and simply doesn't want to tip her hand. Her husband has had health problems, and both are said to miss their friends and family back home in Arizona.

The speculation became so feverish that, in May of this year, Justice O'Connor took the unusual step of issuing a public statement announcing that she had "no present plans to retire." Some commentators have suggested that she may be deferring retirement precisely to avoid any appearance of partisanship in the wake of *Bush v. Gore*. But others anticipate that Chief Justice Rehnquist may retire soon, and that Justice O'Connor has decided not to resign because promotion is in the air. If the President were to promote Justice O'Connor to chief justice of the Supreme Court, and if he were to nominate a moderate conservative Hispanic — such as White House Counsel Alberto Gonzales — as associate justice, he might ensure two relatively civil confirmation proceedings and earn a place in history as the President who appointed the first Latino to the Supreme Court and named the first woman chief justice.

There would be a certain pleasing symmetry to this possibility. A little more than 20 years ago, shortly before Justice O'Connor's appointment and, as if in anticipation of her arrival, the Supreme Court decided to abandon its formal use of "Mr. Justice" as the form of address, opting for the simpler, gender-neutral "Justice." Now, two decades later, "*Madame Chief Justice*" has a nice ring to it. TFL

This article is a special submission for the September issue of The Federal Lawyer, published in conjunction with this year's annual FBA convention in Tucson, located in Justice O'Connor's home state of Arizona.