

JUSTICE SANDRA DAY O’CONNOR: A SELECTED ANNOTATED BIBLIOGRAPHY

Julie Graves Krishnaswami⁺

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As the first woman appointed to the Supreme Court, Justice Sandra Day O’Connor is a profound and fascinating figure in American jurisprudence. During Ronald Reagan’s presidential campaign, he promised to appoint a woman to the Supreme Court, and he appointed Sandra Day O’Connor.¹ She was confirmed in 1981 and spent the next twenty-four years on the Supreme Court bench, retiring in 2005.² Before her time on the Court, Justice O’Connor

⁺ Reference/Faculty Research Librarian and Associate Law Library Professor, City University of New York (CUNY) School of Law. B.A., 1999 Reed College, J.D., 2004, CUNY School of Law, M.L.I.S., 2008, Pratt Institute. The author wishes to thank Julie Lim, Director, CUNY School of Law Library, and colleagues Raquel Gabriel and Sarah Valentine for encouragement and assistance. The author also acknowledges the support of a research fellowship from Pratt Institute. The author thanks Megan Stuart and Tracy Sabbah for research assistance.

1. Beverly B. Cook, *Justice Sandra Day O’Connor: Transition to a Republican Agenda*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PARTIES* 239 (Charles M. Lamb & Stephen C. Halpern eds., 1991), *infra* annot. 109.

2. Justice O’Connor’s resignation letter was sent to President George W. Bush on July 1, 2005. Letter from Justice Sandra Day O’Connor to President George W. Bush (July 1, 2005), <http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf>. Justice O’Connor stated as follows:

This is to inform you of my decision to retire from my position as an Associate Justice of the Supreme Court of the United States effect upon the nomination and confirmation of my successor. It has been a great privilege, indeed, to have served as a

devoted herself to public service as an assistant attorney general, deputy county attorney, Arizona state senator and senate minority leader, Maricopa County Superior Court judge, and Arizona Court of Appeals judge.³ Justice O'Connor's roots are authentically western, having been raised on a working cattle ranch near the Gila River, bordering Arizona and New Mexico.⁴ She is comfortable outdoors in the harsh desert, riding horses, and assisting with ranch work.⁵ Yet she is similarly comfortable as an intellectual. She graduated from Stanford University and Stanford University School of Law.⁶ Likewise, Justice O'Connor has also been committed to her family as a devoted daughter, wife, and mother of three.

When she was appointed to the Supreme Court to replace retiring Justice Potter Stewart, questions loomed about how she would rule on important constitutional issues, including affirmative action and racial and gender equality.⁷ For instance, during her tenure as a state legislator and state court judge, she did not face any "true affirmative action" case, and produced no writing on the issue.⁸ When responding to questions about affirmative action at her confirmation hearings, Justice O'Connor only observed that it was an issue likely to reach the Court in the future.⁹ She was correct, and it is her affirmative action and discrimination decisions that became some of her most notable opinions.¹⁰ As the annotations below demonstrate, commentators and

member of the Court for 24 Terms. I will leave it with enormous respect for the integrity of the Court and its role under our Constitutional structure.

Id.

3. See DAWN BRADLEY BERRY, *THE 50 MOST INFLUENTIAL WOMEN IN AMERICAN LAW* 34, 56, 64–65, 209 (1996), *infra* annot. 113.

4. See SANDRA DAY O'CONNOR & H. ALLAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* vii–viii, xi (2002), *infra* annot. 50. See also JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* 7–21 (2005), *infra* annot. 111 (focusing on Justice O'Connor's "pioneer roots").

5. ROBERT W. VAN SICKEL, *NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O'CONNOR* 22 (1998), *infra* annot. 106.

6. *Id.* at 23.

7. See JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* 74, 86, 96 (2005), *infra* annot. 111 (focusing on Justice O'Connor's confirmation). See also Beverly B. Cook, *Justice Sandra Day O'Connor: Transition to a Republican Agenda*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PARTIES* 239 (Charles M. Lamb & Stephen C. Halpern eds., 1991), *infra* annot. 109, at 238–40 (discussing Justice O'Connor as Justice Potter Stewart's replacement).

8. Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47, 48 n.4 (1990), *infra* annot. 90.

9. *Id.*

10. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003) (addressing affirmative action in public law school admissions); *Gratz v. Bollinger*, 539 U.S. 244, 249 (2003) (affirmative action in public university undergraduate admissions); *Miller v. Johnson*, 515 U.S. 900, 903 (1995) (affirmative action in congressional redistricting); *Adarand Constructors, Inc. v. Peña*, 515 U.S.

legal scholars have reflected on Justice O'Connor's work as a woman, a conservative, and a former politician.¹¹ Her term ended in 2005, and scholars are beginning the process of reflecting on her years on the Court as well as her influence on constitutional law. In an effort to begin and contribute to this analysis, this selected annotated bibliography focuses on both the substantive and scholarly materials Justice O'Connor wrote, and the legal scholarship written about her and her jurisprudence. It is intended as a tool for researchers, and the categorization is intended to assist them by providing logical access to this material.

Part I focuses on Justice O'Connor's own extra-judicial writing. The subsections reflect the areas on which Justice O'Connor focused frequently. Subsection A compiles her substantive works about the judiciary, judicial philosophy, federalism, and institutional law. Subsection B highlights Justice O'Connor's writing on equality and feminism. In addition, Justice O'Connor spoke and wrote often about the legal profession, specifically addressing lawyers—these remarks are compiled in Subsection C. Subsection D includes Justice O'Connor's reflective tributes to other members of the judiciary. Subsection E includes an examination of Justice O'Connor's substantive autobiographical works.

Part II of this annotated bibliography compiles substantive works written about Justice O'Connor and her jurisprudence. These works are arranged and

200, 204 (1995) (affirmative action in federal government subcontracting); *Missouri v. Jenkins*, 515 U.S. 70, 103 (1995) (O'Connor, J., concurring) (school desegregation remedial measures through salary increases); *United States v. Fordice*, 505 U.S. 717, 743 (1992) (O'Connor, J., concurring) (Mississippi university desegregation); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552, 602 (1990) (FCC minority preference policies); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476–77 (1989) (affirmative action in municipal subcontracting); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring) (private club discrimination); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (Alabama state trooper affirmative action promotions); *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 647 (1987) (O'Connor, J., concurring) (county agency affirmative action promotion plan); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 530 (1986) (O'Connor, J., concurring) (municipal hiring discrimination); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 489 (1986) (O'Connor, J., concurring in part and dissenting in part) (pattern and practice discrimination); *Allen v. Wright*, 468 U.S. 737 (1984) (tax exemption regarding racially segregated private schools); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984) (O'Connor, J., concurring) (pattern and practice discrimination); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender discrimination); *Toll v. Moreno*, 458 U.S. 1, 24 (1982) (O'Connor, J., concurring in part and dissenting in part) (in-state public university tuition status for nonimmigrant aliens).

11. See, e.g., Judith Olans Brown, Wendy E. Parmet, & Mary E. O'Connell, *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219, 1220 (1999), *infra* annot. 66 (arguing that Justice O'Connor's jurisprudence is influenced by her experiences); Stewart Jay, *Ideologue to Pragmatist?: Sandra Day O'Connor's Views on Abortion Rights*, 39 ARIZ. ST. L.J. 777, 827 (2007), *infra* annot. 51 ("Justice O'Connor developed an outlook on abortion rights that can be traced to her early days as a legislator, in an institution that usually worked only through compromise, yet also was one in which the underlying statutes sometimes were hopelessly out of date in ways that harmed women.").

divided by the type of material and how it was published. Subsection A focuses on scholarship published in law reviews and academic journals. Subsection B compiles scholarly monographs and book chapters about Justice O'Connor. Next, Subsection C includes biographies. Finally, Subsection D compiles tributes to Justice O'Connor, by Justices of the Supreme Court and other legal professionals.

This bibliography does not purport to include every document or text written about or by Justice O'Connor. Rather, it is a selection of scholarly works. It does not include newspaper or magazine pieces, or bar journal articles. Likewise, it does not include children's and young-adult works, of which there are several.¹² It should be noted, however, that such works serve as excellent sources for anecdotal insights and biographical information, as well as photographs. The annotations provided are intended to show the myriad ways that Justice O'Connor's opinions, background, and political leanings have been scrutinized and analyzed since her nomination to, and retirement from, the nation's highest Court.

I. WORKS AUTHORED BY JUSTICE O'CONNOR

A. *The Judiciary, Judicial Philosophy, Federalism and International Law*

1. Sandra Day O'Connor, *Fair and Independent Courts: Remarks by Justice O'Connor*, 95 GEO. L.J. 897 (2007). In this short speech given as the introduction to a conference on judicial independence, Justice O'Connor underscores the importance of an independent judiciary as the critical ingredient for the rule of law. *Id.* at 897. Justice O'Connor observes that the rule of law engenders an increasing amount of anger toward judges. *Id.* at 897-98. To remedy this problem, Justice O'Connor directs her audience to "ensure that the public understands that it benefits from judicial independence." *Id.* at 898.

2. Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1 (2005). Justice O'Connor provided these remarks when dedicating the University of Florida's Lawton Chiles Legal Information Center. *Id.* at 1. Justice O'Connor reiterates the role of lawyers in maintaining individual liberty and the rule of law as envisioned under the Constitution, and underscores judicial independence as a key ingredient for these values and

12. See, e.g., SANDRA DAY O'CONNOR, *CHICO* (2005) (Justice O'Connor's first book for children, an autobiographical story about her childhood horse, Chico); see also JUDITH BENTLEY, *JUSTICE SANDRA DAY O'CONNOR* (1983) (biography for young adults); BEVERLY BERWALD, *SANDRA DAY O'CONNOR: A NEW JUSTICE, A NEW VOICE* (1991) (young adult monograph); LISA TUCKER MCELORY, *MEET MY GRANDMOTHER: SHE'S A SUPREME COURT JUSTICE* (1999) (photo essay documenting Courtney O'Connor's trip to Washington to see her grandmother); HAROLD WOODS & GERALDINE WOODS, *EQUAL JUSTICE: A BIOGRAPHY OF SANDRA DAY O'CONNOR* (1985) (for a junior-high audience).

rights. Although she admits that judicial independence is difficult to define,¹³ she notes she is “heartened” by its emergence in young democracies such as the Ukraine, and concerned about the failure of democratic values to develop in nations such as Zimbabwe. *Id.* at 2–3. The next part of her remarks concerns the contemporary disdain for judges and judicial independence expressed by congressional Republicans. Noting the suggestions for restrictions on judges and judicial power, Justice O’Connor states that she is not against limiting judicial terms, but she would not take a formalistic approach to this issue, noting “as I have said before, I am against judicial reform driven by nakedly partisan, result-oriented reasoning.” *Id.* at 5–6.

3. Sandra Day O’Connor, *Dedication of the Eric E. Hotung International Law Center Building: Keynote Address*, 36 GEO. J. INT’L L. 651 (2005). At this dedication for the Georgetown University Law Center’s new building for the study of international law, Justice O’Connor predicts that Georgetown’s international law program is “situated to be the leading global law center in this country and perhaps in the world.” *Id.* at 651. According to Justice O’Connor, globalization has caused international law to emerge and affect courts in the United States and around the world. *Id.* She defines public international law as “law regulating the intercourse of nations.” *Id.* at 652. Similarly, she observes that the study of international law deals with domestic and foreign laws, choice of law rules, regulations that have global application, giving effect to foreign judicial decisions, and the treatment of aliens. *Id.* Justice O’Connor also points to some of the aspects of international law the Supreme Court has been called to address and observes that the Magna Carta is the predecessor to the American concept of the rule of law. *Id.* at 652–53.

4. Sandra Day O’Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT’L L. 1 (2003). This is the text of Justice O’Connor’s remarks given at the National Judges College in Beijing, China. *Id.* at 1 n.*. As she has in other pieces discussing the judiciary, Justice O’Connor argues that an independent judicial system is the underpinning for the rule of law. Justice O’Connor identifies three characteristics of a judiciary committed to the Rule of Law, which she posits transcend national boundaries to apply to all nations. These characteristics are: (1) an independent judiciary made possible through the separation of powers to ensure that judges decide cases on the law and facts before them; (2) judges who act with integrity,

13. In these remarks, Justice O’Connor begins with interesting examples of what judicial independence does not constitute. It is not “the President’s bodyguards kill[ing] the Chief Justice’s pet cat,” or the executive branch threatening “to cut the water supply to the Supreme Court building to prevent the Court from meeting and making anti-Presidential statements,” as was done in the 1990s by then-Russian President Boris Yeltsin. O’Connor, *Remarks on Judicial Independence*, *supra* annot. 2, at 2. And, she says, it is not “the Council of Ministers tr[ying] to evict the Constitutional Court from its offices,” as was attempted in Bulgaria in 1995. *Id.*

courage, and independence in upholding and administering the law; and (3) a competent judiciary that makes reasoned decisions and articulates justification for the same. While admitting the challenges inherent in maintaining the judicial independence, integrity, and competence required to uphold the Rule of Law, she commends China for its recent commitment to the Rule of Law and provides examples of the specific steps the country has taken. *Id.* at 1-7.

5. Sandra Day O'Connor, *William Howard Taft and the Importance of Unanimity*, 28 J. SUP. CT. HIST. 157 (2003). This article publishes Justice O'Connor's remarks delivered at the Supreme Court Historical Society's Annual Lecture. In this speech, she reflects on the term of Chief Justice William Howard Taft. Specifically, she examines his quest for unanimity in Supreme Court decisions and judicial norms of his time, which disfavored dissenting opinions. She further reflects on the similarities between her Court and Chief Justice Taft's Court. But unlike Chief Justice Taft, Justice O'Connor extols the value of dissenting opinions and believes they "can bolster, rather than undermine, the Court's legitimacy." *Id.* at 163.

6. Sandra Day O'Connor, *Keynote Address at the 96th Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348 (2002). This keynote address, given as Justice O'Connor's interest in international law was beginning to flourish, underscores the importance of the establishment and growth of international law in U.S. courts.¹⁴ Justice O'Connor defines globalization and explains the reasons why U.S. courts are reticent to rely on foreign law. She further explores why reliance on international law by U.S. courts will likely change in the near future.

7. Justice Sandra Day O'Connor, *Courthouse Dedication: Justice O'Connor Reflects on Arizona's Judiciary*, 43 ARIZ. L. REV. 1 (2001). At the dedication of two courthouses named in her honor, Justice O'Connor compares the history of the federal district court—1912 through the date of this dedication—in Arizona to her own employment history. She observes that both had "somewhat inauspicious beginnings." *Id.* at 2. In her conclusion, she reflects on the architectural innovations of the building, which symbolize the western sun, sky, and landscape and underscore the importance of these features to Justice O'Connor. *Id.* at 6-7.

8. Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, *Altered States: Federalism and the Devolution at the "Real" Turn of*

14. See JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 331 (2005), *infra* annot. 111 ("Moving through her early seventies, O'Connor stepped up her work on the international legal scene.").

the Millennium, 60 CAMBRIDGE L.J. 493 (2001). At the inaugural Sir David Williams Lecture, Justice O'Connor compares the "diffusion of power" in the United Kingdom with federalism in the United States. *Id.* at 495. In the United Kingdom, "power is being devolved from the sovereign Parliament of a unitary state to national assemblies, and possibly to other regional actors" whereas in the United States, "power originally resided with the people . . . and was ceded upward to a national government of limited authority," which is known as federalism. *Id.* Justice O'Connor concludes by highlighting similarities and common values shared by each system: democracy and accountability, efficiency and experimentation, individual liberty, and sense of community and shared purpose. *Id.* at 508–10.

9. Sandra Day O'Connor, *Juries: They May Be Broke, But We Can Fix Them*, 44 FED. LAW. 20 (1997). Beginning with a brief discussion on the origin of juries, Justice O'Connor expresses support for the jury system while she identifies aspects of the system that could benefit from modification. Justice O'Connor focuses on three aspects of the jury system that need improvement: the treatment of jurors, the jury selection process, and the conduct of the trial. Justice O'Connor provides some specific solutions to these problems: permitting jurors to take notes during trial; providing jury instructions in writing before the trial begins; permitting people who know about a case through the news media to participate as jurors, instead of imposing the current per se ban on them; and improving compensation for jury service. Justice O'Connor also questions the wisdom of peremptory challenges and the requirement for unanimity of jury verdicts, looking to examples in the English legal system.

10. Sandra Day O'Connor, *Religious Freedom: America's Quest for Principles*, 48 N. IR. LEGAL Q. 1 (1997). This speech, given in Belfast, Ireland, was presented at the MacDermott Lecture. Justice O'Connor identifies and describes four core principles underlying the establishment and free exercise clauses:¹⁵ (1) freedom and privacy of religious belief; (2) freedom from religious-based discrimination and oppression; (3) reasonable accommodation of religious practices; and (4) avoidance of government endorsement of religion. She concludes by reflecting on unanswered questions, or "details" such as the degree of accommodation of religious practices required.

11. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, in *NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE* 171 (Marianne O. Nielsen & James W. Zion eds., 2005). In the Introduction, the editors define Navajo peacemaking in the Navajo Nation judicial system as "a

15. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

form of conflict resolution . . . rooted in Navajo culture and practices but . . . modified to take into account present-day issues and resources.” Marianne O. Nielsen & James W. Zion, *Introduction to Peacemaking*, in *NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE* 3 (Marianne O. Nielsen & James W. Zion eds., 2005). The editors further explain that “[t]he ultimate goal of the peacemaker process is to restore the minds, physical being, spirits, and emotional well-being of all people involved.” *Id.* at 4. The essays contained in the text provide legal practitioners with information about peacemaking to assist them in working within Navajo courts and with peacemakers.

Justice O’Connor’s essay is a version of a speech presented at the Indian Sovereignty Symposium on June 4, 1996. O’Connor, *supra*, at 176. In this essay, she recognizes the Indian tribes as one of three types of sovereign governmental entities, along with the federal and state governments. Justice O’Connor then highlights the development of tribal courts and observes that Indian tribes have incorporated particular traditional tribal features into their judicial systems. Noting that tribal courts must work inside and outside of complex tribal communities, Justice O’Connor points out the challenges faced by tribal courts. Yet she reminds the reader that tribal courts deal with some of the most pressing and complicated issues handled by the judicial system—family matters, the control of natural resources, tort, and criminal matters—conceding that the tribal courts often handle these matters more expediently than the Anglo-American system. Likewise, Justice O’Connor observes patterns in the tribal system that strengthen the system and serve as an “alternative[] to [the] conventional adversarial process.” *Id.* at 173. She concludes the essay by providing specific examples of methods that tribal courts have developed for solving problems and meeting the needs of their communities, and she credits the increased number of legally trained individuals, including lawyers and judges, working with the tribal judicial system.¹⁶

12. Sandra Day O’Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT’L L. & POL. 35 (1995–1996). This article was published as part of the symposium issue entitled *The Interaction Between National Courts and International Tribunals* and is a transcription of the remarks Justice O’Connor made at the New York University School of Law Conference on “The Reception by National Courts of Decisions of International Tribunals.” *Id.* at 35 n.*. Justice O’Connor begins by recalling the International Tribunal at Nuremberg; she believes the Tribunal served as “a watershed in promoting the rule of law among nations.” *Id.* at 35. Since Nuremberg, international

16. The examples listed by Justice O’Connor include the Navajo Peacemaker Court, the Northwest Intertribal Court System, the Indian Dispute Resolution Services, the Native Heritage Commission, and the Community Relations Service of the United States Department of Justice. O’Connor, *supra* annot. 11, at 173–74.

tribunals have proliferated, and Justice O'Connor explores the relationship between international tribunals and domestic courts, highlighting the way the Supreme Court handles such matters of international law. *Id.* at 35–36. Justice O'Connor first explores the Supreme Court's limited authority in foreign relations issues, specifically the applicability of the political question and Act of State doctrines. *Id.* at 36–38. Justice O'Connor draws apt parallels in the relationship between the state and federal courts and the relationship between domestic and international tribunals, drawing on her own experience as both a state and federal judge. *Id.* at 40–41. As explained in the remarks, the title recalls Immanuel Kant's words about the relationship between domestic courts and international tribunals. *Id.* at 41.

13. Sandra Day O'Connor, Commentary, 40 ST. LOUIS U. L.J. 1063 (1996). In this short lecture given to judges from the Northern Hemisphere, Justice O'Connor observes that increases in population will cause the courts' dockets to grow, and she provides practical solutions for the management of these ballooning dockets. Her first word of advice is that proper planning for the future requires identification of "core values of the judicial system." *Id.* at 1064. As an example, she provides the "Long Range Plan for the Federal Courts," the first of its kind. *Id.* The core values identified in this plan, according to Justice O'Connor, are the rule of law, the provision of equal justice to all, judicial independence, and maintaining the "federal courts as national courts of limited jurisdiction." *Id.* Next, she explores the strategies employed by U.S. courts for the efficient management of an increased caseload. These strategies include the development of an administrative office for the federal courts to allow the judges to focus on judicial, rather than ministerial, matters, the use of magistrate judges and law clerks, and allowing plea bargains in criminal cases. *Id.* at 1064–65.

14. SANDRA DAY O'CONNOR, THE LIFE OF THE LAW: PRINCIPLES OF LOGIC AND EXPERIENCE FROM THE UNITED STATES (1996). This work is the publication of Justice O'Connor's remarks at the Gauer Distinguished Lecture in Law and Public Policy, and published by the National Legal Center for the Public Interest. *Id.* at iii. The text contains the introduction of Justice O'Connor by then-Judge Kenneth W. Starr, who comments that Justice O'Connor "has brought clearheaded judgment and common sense" to unconscionably high punitive damage awards as well as racial quotas. *Id.* at 4. Judge Starr also identifies Justice O'Connor as "a Justice for all time," embodying the quality of virtue. *Id.* at 6. Justice O'Connor's lecture is substantially the same as the remarks made at the Fairchild Lecture. See Sandra Day O'Connor, *The Life of the Law: Principles of Logic and Experience from the United States, The Fairchild Lecture*, 1996 WIS. L. REV. 1 (1996), *infra* annot. 15. Following her remarks for the Gauer Lecture, there is a short biography on Justice O'Connor and a section entitled, "Pages of

History” which contains the Federalist Papers numbers 78, 79, and 81; *An Apology for Printers*, by Benjamin Franklin; *Property*, by James Madison; and *Democracy in America*, by Alexis de Tocqueville. O’CONNOR, *supra*, at v.

15. Sandra Day O’Connor, *The Life of the Law: Principles of Logic and Experience from the United States, The Fairchild Lecture*, 1996 WIS. L. REV. 1 (1996). In this lecture, Justice O’Connor provides what she refers to as “an interlocking framework of principles [that] must be in place if a nation is to ensure the liberty of its citizens.” *Id.* at 8.¹⁷ She offers these principles to newly democratized nations, particularly Eastern European and former Soviet nations. The three principles articulated are an independent judiciary, free press, and an effective vehicle for the enforcement and maintenance of fundamental rights guaranteed to every citizen.

16. Sandra Day O’Connor, *Foreword* to DAVID C. FREDERICK, *RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1819–1941* (1994). Frederick’s legal history focuses on how the Ninth Circuit contributed to the development and progress of the western states. DAVID C. FREDERICK, *RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1819–1941* xi (1994). While serving as a law clerk for Justice Byron White, Frederick met Justice O’Connor, and she contributed to the work by authoring the Foreword. *Id.* at xii. Justice O’Connor observes that federal case law, as developed in the federal courts of appeals, shaped the development of the West. O’Connor, *Foreword, supra*, at ix. She notes the parts of Frederick’s text she finds most “fascinating,” which serve as illustrations of the court’s profound role in western expansion and development: how federal cases played a role in preserving her alma mater of Stanford University, the exclusion of the Chinese, and the Alaskan gold rush. *Id.* at ix–x. Her words conclude with a passage by Wallace Stegner reflecting on the “big country.” *Id.* at x.¹⁸

17. Commentators have praised Justice O’Connor for her efforts toward fostering democratic values in the international community. See, e.g., Elizabeth F. Defeis, *A Tribute to Justice Sandra Day O’Connor from an International Perspective*, 27 SETON HALL L. REV. 391, 391 (1996), *infra* annot. 69.

18. The passage as quoted by Justice O’Connor:

There is something to the notion of western independence; there 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 seems never 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.

O’Connor, *Foreword, supra* annot. 16, at x (citing WALLACE STEGNER, *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRING* (1992)).

17. Sandra Day O'Connor, *They Often Are Half Obscure: The Rights of the Individual and the Legacy of Oliver W. Holmes*, 29 SAN DIEGO L. REV. 385 (1992). These remarks were delivered as part of the Nathaniel L. Nathanson Memorial Lecture series at the University of San Diego, sixty years after Justice Oliver Wendell Holmes retired from the Supreme Court. *Id.* at 385. Justice O'Connor discusses Holmes's influence as "the chief architect of the application of our Bill of Rights to the states." *Id.* In particular, Justice O'Connor observes that his "strongest influence on current constitutional interpretation is his view that the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment." *Id.* at 391. Justice O'Connor also asserts that Justice Holmes crafted the modern understanding of the writ of habeas corpus and the extent of the power that federal courts have to intervene in state court criminal proceedings. *Id.* at 394.

18. Sandra Day O'Connor, *Keynote Address—Conference on Compelling Government Interests*, 55 ALB. L. REV. 535 (1992). This speech was given shortly after Justice O'Connor completed her first decade on the Supreme Court. After an introduction by James L. Oakes, Chief Judge of the United States Circuit Court of Appeals for the Second Circuit, where he lauded her jurisprudence on constitutional questions, commitment to equality, and the Establishment Clause and intellectual property jurisprudence, Justice O'Connor spoke about constitutional adjudication, federalism, and historical analysis. She further explained why she dissented in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹ and discussed some of the problems when courts use balancing tests in general. *Id.* at 543–44.

19. Sandra Day O'Connor, *Supreme Court Justices from Georgia*, 1 GA. J. S. LEGAL HIST. 395 (1991). In this short piece, and as its title suggests, Justice O'Connor provides an interesting sketch of Supreme Court Justices from the state of Georgia: James M. Wayne, John Archibald Campbell, William B. Woods, Lucius Quintus Cincinnatus Lamar, Joseph Rucker Lamar, and Clarence Thomas. Justice O'Connor offers biographical insight into the lives and Court Terms of each Justice.²⁰

20. Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1 (1990). These remarks, given at the University of Cincinnati College of Law, illuminate the ways that the Judiciary Act established many "fundamental elements of the Nation's judicial system"

19. 469 U.S. 528, 580 (1985) (O'Connor, J., dissenting).

20. Justice O'Connor refrained from discussing her colleague Justice Clarence Thomas except to say, "Justice Thomas's life has been the subject of close public scrutiny this year, so I doubt there is much I can add to the volumes of print that have been generated already." O'Connor, *Supreme Court Justices from Georgia*, *supra* annot. 19, at 404.

and in addition “marked the last great event in our Nation’s founding and formed the genesis of our Nation’s continuing constitutional revolution.” *Id.* at 3. In describing the importance of the Act, Justice O’Connor discusses the history of the federal court system, compares the legal revolution made possible by the Judiciary Act with the French Revolution, and highlights the contributions to the establishment of the rule of law and judicial administration made by Chief Justices John Marshall and William Howard Taft. She also discusses the contributions to an independent judiciary made by Justice Oliver Wendell Holmes, Judge Learned Hand, and Justice Felix Frankfurter. *Id.* at 8–10. Justice O’Connor’s remarks also address recent legal history as she observes that the constitutional legal tradition is the “adherence to the rule of law, even when that adherence draws widespread popular opposition. . . . [A]n equally strong aspect of the judicial tradition is that no person or group, however powerful, is above the law, or can subvert the products of the legal process.” *Id.* at 10–11. Justice O’Connor holds out the federal judges who followed *Brown v. Board of Education*²¹ as exemplars of this aspect of the nation’s judicial tradition. Justice O’Connor lists many of these federal judges who made personal sacrifices, sometimes putting their own lives at risk, to uphold the tradition of the rule of law and the legal process. *Id.* at 11–12.

21. Sandra Day O’Connor, *George Mason—His Lasting Influence*, in *GEORGE MASON AND THE LEGACY OF CONSTITUTIONAL LIBERTY* 117 (Donald J. Senese ed., 1989). This text focuses on various aspects of the life and political thought of Founding Father George Mason. Justice O’Connor’s essay highlights the ways that Mason’s work and political beliefs influenced Supreme Court decisions. Noting some of the cases where the Court has agreed with, or departed from, Mason’s views, Justice O’Connor affirms the Constitution’s applicability to modern life.

22. Sandra Day O’Connor, *Foreword: The Establishment Clause and Endorsement of Religion*, 8 *J.L. & REL.* 1 (1990). In this short piece written during the Bicentennial of the ratification of the Bill of Rights, Justice O’Connor presents “the principle underlying the Establishment Clause [of the First Amendment:] that government may 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.” *Id.* at 2. As Justice O’Connor explains, this is because “we live in a pluralistic society,” where citizens have wide-ranging religious beliefs, or none at all. *Id.* She further observes that the principle underlying the Establishment Clause is consistent with its history. *Id.*

21. 347 U.S. 483 (1954).

23. Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643 (1986). This substantive law review article reflects Justice O'Connor's belief in the importance of understanding the laws of foreign jurisdictions. To Justice O'Connor, such comparisons yield important questions and an opportunity to examine the character of those differences. Here, as the title suggests, Justice O'Connor focuses on judicial review of administrative agencies and actions in the United States and England, examining factors that account for the differences between the two nations' approaches to separation of powers. Justice O'Connor also focuses on the doctrine of standing, observing the connection between standing and statutory preclusion, and contrasts the standing requirements between England and the United States.

24. Sandra Day O'Connor, *Foreword: The Changing Role of the Circuit Justice*, 17 U. TOL. L. REV. 521 (1986). When Justice O'Connor replaced Justice Potter Stewart on the Supreme Court, she became the Circuit Justice for the Sixth Circuit. *Id.* at 521. In this short piece introducing a survey of Sixth Circuit law, Justice O'Connor discusses the challenges of "riding the circuit" and offers anecdotes of the same. Circuit riding persisted until 1869 when Congress established the circuit court system.²² *Id.* at 521-23. Justice O'Connor also explains the contemporary role and responsibility of the Circuit Justice. Providing statistics about cases dealt with and disposed of in the 1983 term, O'Connor observes that the most significant responsibility of the Circuit Justices is granting stays of execution in criminal cases. *Id.* at 525.

25. Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1 (1984). This article was presented as the Sumner Canary Lecture at Case Western Reserve School of Law. Justice O'Connor discusses judicial federalism and explains how the adequate and independent state ground doctrine strengthens both the federal and state courts. Yet she also points out ambiguities in the doctrine that arise in certain instances. Justice O'Connor also examines the then-recent case of *Michigan v. Long*²³ to highlight the new approach for resolving some of these ambiguities, asserting that the case "preserves state court autonomy and ensures Supreme Court oversight in the interests of uniformity." *Id.* at 7-8. Finally, Justice O'Connor explores two additional issues related to Supreme Court review of state decisions, abstention and federal habeas corpus, which are rooted "in respect by the federal courts for state court proceedings." *Id.* at 9.

22. Judiciary Act of 1869, 16 Stat. 44-45 (1869) (establishing the circuit court system and providing for the appointment of circuit court judges).

23. 463 U.S. 1032 (1983).

26. Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981). This is then-Judge O'Connor's first law review article, published shortly before her ascendancy to the Supreme Court. It provides a framework for her understanding of the relationship between the state and federal judiciary. The article reflects her belief that federal courts should show deference to state court rulings, as well as support the finality of state court judgments, even on federal constitutional issues.²⁴

B. Equality and Feminism

27. Sandra Day O'Connor, *The Legal Status of Women: The Journey Toward Equality*, 15 L.J. & RELIGION 29 (2000–2001). In these remarks on the legal and social status of women, Justice O'Connor begins by sketching the development of women's rights in the United States. She remarks that "the path taken by American women can offer useful insight to the international observer," although neither the Constitution nor the Bill of Rights expressly provided women with any rights. *Id.* at 29–30. Juxtaposing the emergence of women's rights in the United States, Justice O'Connor highlights how international agreements and treaties such as the Charter of the United Nations, the Universal Declaration of Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, have served to make women's rights synonymous with human rights. *Id.* at 33–35. She offers three lessons to women throughout the world from the American experience of the development of women's rights: (1) judicial or legislative change is more likely to be successful if preceded by public opinion; (2) in addition to democratic institutions and documents ensuring equality, all women must participate in political life; and (3) substantial change requires that people transcend their differences. *Id.* at 35. Finally, Justice O'Connor recognizes Tunisia as a leader among Arab, North African, and Middle Eastern nations in securing women's rights. *Id.* at 36.

28. Sandra Day O'Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573 (2001). This is a transcript of a short talk given by Justice O'Connor as part of the University of Pennsylvania's Law School sesquicentennial celebration and Family Law Symposium. After observing that the family is "at the heart of . . . American law," Justice O'Connor discusses the challenges posed by the development of family law jurisprudence. *Id.* at 573–74. She observes that the Supreme Court is merely "one voice" in the development of the same. *Id.* at 574. Further, she argues that because family cases involve the "intertwined" rights of individuals, the

24. See also Barbara Olson Bruckmann, Note, *Justice Sandra Day O'Connor: Trends Toward Judicial Restraint*, 42 WASH. & LEE L. REV. 1185 (1985), *infra* annot. 100 (describing Justice O'Connor's judicial restraint and respect for federalism).

application of due process jurisprudence may not be the most appropriate avenue for resolving these disputes. *Id.* at 575–76. Justice O’Connor discusses three Supreme Court cases to illustrate her point: *Troxel v. Granville*,²⁵ *Moore v. City of East Cleveland*,²⁶ and *Santosky v. Kramer*.²⁷

29. Sandra Day O’Connor, *The History of the Women’s Suffrage Movement*, 49 VAND. L. REV. 657 (1996). At the beginning of this article, which was originally delivered as a speech commemorating the 75th anniversary of the Nineteenth Amendment, Justice O’Connor offers “a flavor” of the battle waged by women for the right to vote. *Id.* at 657–68 & n.*. She continues to posit, “what was it all for?” *Id.* at 668. To answer this query, Justice O’Connor discusses the effect of women on elections and politics and observes that women’s votes reflect individualism rather than the vote of their husbands or other women. *Id.* at 669–70. In discussing the advances that American women have made, Justice O’Connor’s tone is positive, even as she observes that this progress has been “fitful.” *Id.* at 670.

30. Sandra Day O’Connor, *Testing Government Action: The Promise of Federalism*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 35 (Stephen E. Gottlieb ed., 1993). This text is a compilation of papers presented at a conference hosted by Albany Law School on September 26–28, 1991, focusing on the concept of compelling government interest. In the work’s introduction, which explores “the logic of overriding public interests,” Gottlieb sets forth the positions of each contemporary Supreme Court Justice. Stephen E. Gottlieb, *Introduction: Overriding Public Values*, in PUBLIC VALUES IN

25. 530 U.S. 57 (2000). This case involved the issue of visitation rights for grandparents. In summarizing the facts of this case, Justice O’Connor eloquently states:

Troxel is a human drama, centered on a particular family and its particular circumstances. The case tells a compelling story of parents who are grieving the loss of their son and trying to carry on his memory by maintaining a close relationship with his daughters. There is a mother who is seeking both to include her daughters’ grandparents in their lives, and also to move on, remarry, and create a new family for her children. And there are two girls who lost their father but who have immediate and extended family members literally battling to spend time with them. As a matter of constitutional law, Tommie Granville may get to make the final decision as to whom her children will visit. But as a matter of parenting and family relationships, the decision is a difficult one and one for which the law has little to offer.

O’Connor, *The Supreme Court and the Family*, *supra* annot. 28, at 577.

26. 431 U.S. 494 (1977). In this case, the Supreme Court invalidated a housing ordinance that restricted occupancy in a home to those members of a single family, recognizing that the family encompasses more than the traditional nuclear family. *Id.* at 504.

27. 455 U.S. 745 (1982). This case held that the “clear and convincing” evidentiary standard must be applied to determine parental unfitness and terminate parental rights. *Id.* at 769. According to Justice O’Connor, this case “reminds us that underneath every legal debate over family law is a family in crisis.” O’Connor, *The Supreme Court and the Family*, *supra* annot. 28, at 579.

CONSTITUTIONAL LAW 1, 2–3, 7 (Stephen E. Gottlieb ed., 1993). For Justice O'Connor, he quotes her words from *City of Richmond v. J.A. Croson Co.*,²⁸ and notes that for her, the concept of strict scrutiny is “central to the protection of liberty secured by the Constitution.” *Id.* at 2. Justice O'Connor's essay is in Part 1, which focuses on the legitimate source of a compelling interest, or as Gottlieb puts it, “the appropriate grounds from which to conclude that something we find desirable should be treated as an overriding public value or ‘interest.’” *Id.* at 31.

Justice O'Connor's essay, Gottlieb writes further, portrays compelling state interests as “inferences from the structural ‘spirit’ of the Constitution and subsequent history.” *Id.* She explores and analyzes the roots, scope, and permissibility of governmental authority, which infringes on personal liberty. In evaluating how courts resolve the conflict between government authority and personal liberty, Justice O'Connor observes that balancing tests, although frequently employed, are inadequate. O'Connor, *Testing Government Action*, *supra*, at 35, 38–39. Rather, she maintains that the Constitution, which blends competing but complimentary concerns, is the starting point in the analysis to resolve the conflict between state interests and individual rights.

31. Sandra Day O'Connor, Foreword, *First Women: The Contribution of American Women to the Law*, 28 VAL. U. L. REV. xiii (1994). This short piece highlights some of the first women to make significant contributions to the legal profession. Justice O'Connor discusses the contributions of Myra Bradwell,²⁹ Antoinette Dakin Leach,³⁰ Clara Shortridge Foltz,³¹ and Crystal Eastman.³²

28. 488 U.S. 469, 493 (1989). This case held that a city's plan to set aside thirty percent of contracts for “Minority Business Enterprises” to remedy past discrimination in the construction industry was unconstitutional because the plan was not narrowly tailored and the city failed to demonstrate a compelling government interest. *Id.* at 477, 505, 508.

29. Bradwell was one of the first women to seek admission to the bar to practice law. O'Connor, *First Women*, *supra* annot. 31, at xiii. Both the Illinois Supreme Court and the United States Supreme Court found that because married women could not enter into binding contracts, Bradwell could not enter into an attorney-client relationship. *Id.* at xiv. Having been denied admission to the bar to practice law, Bradwell instead worked for women's suffrage and for other reforms to improve the legal status of women. *Id.* However, twenty-one years later in 1890, the Illinois Supreme Court reversed itself, and admitted Bradwell. *Id.*

30. Leach was granted admission to the Indiana bar, where she practiced for the remainder of her life despite the negative attitude from her colleagues. *Id.* She was one of the first lawyers to prepare filings using a typewriter, and was noted to be apt at finding applicable case law to support her arguments. *Id.*

31. Justice O'Connor characterizes Foltz as a woman of many “firsts,” including being the first female law student at Hastings College of Law, one of the first women admitted to the California bar, the first woman to practice law in San Diego, and the first woman to serve as a deputy district attorney in California. *Id.* at xiv–xv.

32. As a sociologist and lawyer, Eastman worked to eradicate a range of societal problems including “the effect of industrialization on urban workers.” *Id.* at xv. She published CRYSTAL

32. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546 (1991). Marking the hundred-year anniversary of the admission of women into New York University School of Law, Justice O'Connor begins by highlighting the advances of women in the legal profession, tracking her own experience from being offered a position as a legal secretary after graduating from law school to serving as a U.S. Supreme Court Justice. She provides examples and discusses her present ideas about gender differences, noting that contemporary ideas about gender differences are eerily similar to past gender stereotypes and rationales invoked to keep women out of the public sphere. *Id.* at 1549–53. To be sure, Justice O'Connor admits that women bear the burden of childrearing and housekeeping to a greater extent than men and again cites her own experience of resuming her career in earnest only after raising children. Therein lies the dilemma for Justice O'Connor and the crux of the article: the Court's treatment of pregnancy, which she outlines succinctly. To conclude, Justice O'Connor remarks,

[w]omen do have the gift of bearing children, a gift that needs to be accommodated in the working world. However, in allowing for this difference, we must always remember that we risk a return to the myth of the "True Woman" that blocked the career paths of many generations of women.

Id. at 1557.

C. *The Legal Profession and Professionalism*

33. Sandra Day O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002*, 55 OKLA. L. REV. 197 (2002). In this dedication,³³ Justice O'Connor begins by observing the public dissatisfaction with the bar as well as the dissatisfaction among lawyers themselves, as manifested in the high incidents of depression, substance dependency, divorce, and suicide among the group. *Id.* at 198. Justice O'Connor argues that this disenchantment is rooted in the decline of professionalism. *Id.* She reminds lawyers to be "mindful of the social aspects of the attorney's power and position as an officer of the court." *Id.* To this end, Justice O'Connor urges her audience of law students to embrace public service as the route to return to the standard of professionalism that was once at the heart of the practice and public perception of law. Likewise, she urges future attorneys to spurn intra-attorney conflict and restore civility. *Id.* at 199.

EASTMAN, WORK-ACCIDENTS AND THE LAW (Paul Underwood Kellogg ed., 1910), served as the only female member of the New York State Employer's Liability Commission, and worked to pass early worker's compensation laws. O'Connor, *First Women*, *supra* annot. 31, at xv.

33. In addition to her argument about professionalism, Justice O'Connor remarks that Marion Rice Kirkwood, a professor at the Oklahoma Law Center during the 1930s and 40s, "had a direct effect on my study of law" as her real property and water law professor at Stanford Law School. O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002*, *supra* annot. 33, at 197.

In arguing that lawyers have a need to make a worthwhile contribution to society, Justice O'Connor reminds her audience of the growing number of poor individuals in need of legal assistance and pushes her audience toward working to meet this need. Justice O'Connor summarizes her advice as "the importance of doing good while doing well." *Id.* at 199–201.

34. Sandra Day O'Connor, "Professionalism," 78 OR. L. REV. 385 (1999). In dedicating the William W. Knight Law Center at the University of Oregon, Justice O'Connor speaks about professionalism, beginning with the observation that many lawyers are unhappy with their chosen profession and many members of the public have a dismal view of the same. *Id.* at 385–87. Justice O'Connor believes that greater civility is required of lawyers, and urges lawyers to view litigation and legal argument as discourse—not as war, battle, or siege. *Id.* at 387–88. She concludes that service to the public—especially service to the growing number of underserved poor—is the key ingredient of professionalism. Once lawyers devote themselves to public service, Justice O'Connor believes that they will become less dissatisfied, as such work "is the sustenance that brings meaning and joy to a lawyer's professional life." *Id.* at 391.

35. Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAWYER, Sept. 1998, at 20. Justice O'Connor provides three reasons for domestic lawyers to understand the law of foreign jurisdictions: (1) to be able to proficiently apply foreign law in international disputes; (2) to discover inventive ways to improve our legal system; and (3) to further cooperation among nations to reduce the high costs of transnational litigation. *Id.* at 21. She predicts that the U.S. Supreme Court will increase its use of law from foreign common-law courts, which have struggled with similar constitutional issues as the United States, including equal protection, due process, and the existence of the rule of law in constitutional democracies. *Id.* at 20–21. She cites the South African court as an example of a court that upholds civil rights. *Id.* at 21.

36. Sandra Day O'Connor, *Remarks of Sandra Day O'Connor, Associate Justice, Supreme Court of the United States*, 27 SETON HALL L. REV. 383 (1997). Speaking at a ceremony where the Seton Hall Law Review, Legislative Bureau, and Women's Law Forum awarded her the fifth Sandra Day O'Connor Medal of Honor, Justice O'Connor provides two concrete pieces of guidance based on the lessons she learned in her professional life. First, she advises her audience of future lawyers to "strive for excellence." *Id.* at 384. To illustrate this point, she recalls the early years in her career when she was offered only a job as a legal secretary out of law school, opened her own law practice dealing with commonplace legal issues, and started as a temporary lawyer at the Arizona Attorney General's Office. Yet she reflects

that, despite “starting at the bottom,” she approached every client and every task striving for excellence and working as hard as she could. *Id.* at 385. She advises the future law graduates to do the same, while noting some of the benefits of working at the bottom: “[n]o one learns more about a problem than the person at the bottom.” *Id.* Next, Justice O’Connor reminds her audience to involve themselves in the communities in which they live and work, and specifically suggests that they involve themselves by providing pro bono services to the growing number of people who cannot afford legal assistance. *Id.* at 385–86.

37. Sandra Day O’Connor, Associate Justice, Supreme Court of the United States, *Meeting the Demand for Pro Bono Services*, 2 B.U. PUB. INT. L.J. 1 (1992). Justice O’Connor begins by setting forth statistics about unmet legal needs among poor individuals and notes some specific areas where pro bono service is most necessary. She offers a three-part solution to remedy the problem of unmet legal needs: (1) law students should provide legal services through work in mandatory clinics; (2) educating individual clients needing pro bono assistance about legal solutions; and (3) lawyers practicing in all areas, even the most arcane and specialized, should get involved with providing pro bono services.

38. Sandra Day O’Connor, *Foreword to RUDOLPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM* xi (1989). Judge Rudolph Gerber addresses the public hostility toward, and dissatisfaction with, lawyers and problems with the judicial and legal system reflected by the same. Judge Gerber’s introduction provides a methodology for reflecting upon and critiquing the legal system, defining it as a “salad” of philosophical, anthropological, and linguistic models including those frameworks advanced by thinkers such as Husserl, Heidegger, Levi-Strauss, and Derrida. RUDOLPH J. GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM* 7–8 (1989). Judge Gerber offers some solutions to the problem, observing that “major surgery,” rather than an “occasional Band-Aid,” is required. *Id.* at 6. In Justice O’Connor’s brief foreword, she observes that power coupled with economic self-interest tempts even “public-spirited” attorneys to “manipulate the system of justice for personal gain.” O’Connor, *supra*, at xi. Briefly critiquing lawyers, law students, and law school methodology, she agrees with Judge Gerber that profound challenges face the legal profession and “share[s] his basic concern to rekindle a spirit of professional responsibility.” *Id.* at xi–xii. Justice O’Connor echoes the changes Judge Gerber advocates to the law school curriculum as well as his view that the profession must maintain high ethical standards.³⁴ *Id.* at xii.

34. In this Foreword, Justice O’Connor supports the following changes to law school curriculum: (1) law schools should admit students committed to public service and support them

39. Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5 (1998). Speaking at the dedication of the Washington University School of Law's new Anheuser-Busch Hall, Justice O'Connor posits that the practice of law has become "pointless and no fun" as she observes the dismal public perception and the terrific economic pressures of the legal market. *Id.* at 5. She then shifts to a discussion about a lawyer's obligations to her colleagues, legal institutions, and the public, and observes that many lawyers are dissatisfied with their chosen field. Advocating for greater civility, colloquialism, respect, and understanding, Justice O'Connor asserts that members of the bar must spur the change and set the example for the future of the profession. As Justice O'Connor embraces public service as the vehicle for professionalism, she aptly observes that public service is what distinguishes the practice of law from a business enterprise. *Id.* at 12. She reminds her audience that there is a growing need for engaging in rewarding pro bono service. *Id.* at 12-13.

40. Sandra Day O'Connor, *Legal Education and Social Responsibility*, 53 FORDHAM L. REV. 659 (1985). In a speech dedicating the new wing of Fordham University Law School, Justice O'Connor suggests that lawyers not only have obligations to be proficient in substantive and procedural aspects of the law, but that lawyers also have moral responsibilities. Therefore, law schools must foster civil and moral responsibility among their students so they will have "a habit of pro bono service." *Id.* at 661. Justice O'Connor observes that such programs are already in existence at Fordham.

41. Sandra Day O'Connor, *Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision*, 36 VAND. L. REV. 1 (1983). In this address, given at the dedication to Vanderbilt Law School's Alyne Queener Massey Library, Justice O'Connor observes that the history and mission of the law school is "to prepare the whole lawyer, the complete lawyer, the great lawyer." *Id.* at 2. She reflects that this charge requires professional competence in understanding the legal doctrine, practical skills training, knowledge of and adherence to high ethical standards, and a commitment to pro bono service.

D. Tributes

42. Sandra Day O'Connor, Response, 58 STAN. L. REV. 1673 (2006). Justice O'Connor's brief remarks honor the legacy of Chief Justice William Rehnquist. She recounts their years at Stanford and their shared western

in pursuing a career in public service over a more lucrative career in the private sector; (2) law schools should teach students to be "public trustees," that is, to serve the public as counselors, negotiators, legislators, administrators, civil servants, judges, and conciliators; and (3) law schools should provide students with an appreciation of the ethical conflict between the pursuit of wealth and the duties owed to clients. O'Connor, *Foreword* to GERBER, *supra* annot. 38, at xii.

heritage. Admiring his character and skill she observes that “Bill Rehnquist was a terrific Chief Justice.” *Id.* at 1674.

43. Sandra Day O’Connor, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 3 (2005). Justice O’Connor provides a biographical sketch of Chief Justice Rehnquist as a memorial. She highlights their years at Stanford, his clerkship for Justice Robert Jackson, as well as personal details from his life, such as his sense of humor. Describing his work as the Chief Justice admirably, she observes his skilled handling of President Clinton’s impeachment proceedings. Justice O’Connor goes on to observe that as Chief Justice, Rehnquist served to make the relationships among the Justices “harmonious,” functioning in accordance with the role of the Court as envisioned by the Framers of the Constitution. *Id.* at 5.

44. Sandra Day O’Connor, *Lending Light to Countless Lamps: A Tribute to Judge Norma Levy Shapiro*, 152 U. PA. L. REV. 1 (2003). In this short tribute to Third Circuit Court of Appeals Judge Norma Shapiro, Justice O’Connor comments on Judge Shapiro’s significant “firsts”: (1) she was one of the first women to be a partner at a major Philadelphia law firm; (2) she was the first woman to be appointed to the U.S. District Court for the Eastern District of Pennsylvania; and (3) she was the first woman appointed to the bench for the Third Circuit Court of Appeals. *Id.* at 2. Justice O’Connor also underscores Judge Shapiro’s commitment to women and public service as shown by Judge Shapiro’s founding of the Women’s Law Project. *Id.* at 2. Finally, Justice O’Connor reflects on Judge Shapiro’s willingness to mentor other women, including Justice O’Connor herself. *Id.*

45. Sandra Day O’Connor, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 4 (1999). In this tribute to Justice Powell, originally delivered at his funeral in Richmond, Virginia, Justice O’Connor sketches some of the highlights of his life. Justice O’Connor discusses Justice Powell’s profound impact on her when she joined the Court—according to Justice O’Connor, no other Justice did more to help her adjust to her new position. Because of Justice Powell’s open door policy, he and Justice O’Connor discussed many cases and issues, and she talks about how she misses these conversations. *Id.* at 6. Justice O’Connor also recalls dancing with Justice Powell on several occasions. *Id.* She concludes her remarks by stating, “[f]or those who seek a model of human kindness, decency, exemplary behaviour and integrity, there will never be a better man.” *Id.*

46. Sandra Day O'Connor, *Warren E. Burger: Reflections of a Colleague*, 74 TEX. L. REV. 209 (1995).³⁵ This is a transcript of Justice O'Connor's remarks at the memorial service for Chief Justice Warren E. Burger, on June 29, 1995. Justice O'Connor developed a longstanding friendship with Chief Justice Burger beginning in 1979. This relationship continued during the years Justice O'Connor and Chief Justice Burger served on the Supreme Court, where Chief Justice Burger led the Court "through a time of change." *Id.* at 210. Justice O'Connor highlights three cases during Chief Justice Burger's term that particularly influenced her: *Reed v. Reed*,³⁶ *United States v. Nixon*,³⁷ and *INS v. Chadha*.³⁸

47. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992). Justice O'Connor begins this short tribute by reflecting on the impact of *Brown v. Board of Education*,³⁹ drawing on her Southern roots and the lack of racism she experienced and witnessed growing up in Arizona. She describes the effect Justice Marshall's narrative storytelling and commitment to social justice had on her, especially during her early years on the Court. Justice O'Connor's remark, "[n]o one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul," demonstrates her admiration for Justice Marshall. *Id.* at 1220.

48. Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987). On the occasion of Justice Powell's retirement from the Court, Justice O'Connor contemplates "the role of individual character in the work of the Court," and then shifts her attention to "the man himself and especially on why his leaving is poignant for those of us who remain." *Id.* at 395. To this end, Justice O'Connor discusses the legal issues of particular importance to Justice Powell—public education, military service, and family—and demonstrates how these issues are reflected in his written opinions.

35. This Memorial is also published as Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, *Eulogy for the Honorable Warren E. Burger: Chief Justice, Supreme Court of the United States* (June 29, 1995), in 37 WM. & MARY L. REV. 9 (1995). A similar tribute is published as Sandra Day O'Connor, *A Tribute to Warren E. Burger*, 22 WM. MITCHELL L. REV. 7 (1996).

36. 404 U.S. 71, 76–77 (1971) (declaring unconstitutional a statute that preferred males over equally qualified females on the grounds that the preference was based solely on discrimination prohibited under the Equal Protection Clause of the Fourteenth Amendment).

37. 418 U.S. 683, 702 (1974) (compelling President Nixon to release tapes of conversations).

38. 462 U.S. 919, 957–59 (1983) (finding a congressional one-house veto invalid as violating the requirement of Bicameralism and the Presentment Clauses).

39. 347 U.S. 483 (1954).

E. Autobiographical Works

49. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (Craig Joyce ed., 2003). In the Preface, Justice O'Connor observes that the text reflects her thoughts about "themes in our national history," such as the marble panel depicting the Majesty of the Law at the Supreme Court, an image symbolizing "the liberties and rights of the people[,] the defense of human rights[,] and the protection of innocence." *Id.* at xvi. The image also "embodies the hope that impartial judges will impart wisdom and fairness when they decide the cases." *Id.* In this work, Justice O'Connor examines these themes, as well as "the history of the Constitution, of the Court, and of some former [Justices,] of the expansion of roles for women, and of the Rule of Law worldwide." *Id.* At least one chapter in this book has also been republished as an article.⁴⁰

50. SANDRA DAY O'CONNOR & ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002). This biography, written by Justice O'Connor and her brother Alan Day, is an account of growing up on the Lazy B Ranch on the border of New Mexico and Arizona, along the Gila River. The book reflects the great influence that the ranch, the western heritage, and her parents, affectionately known as "Da" and "Mo," had on Justice O'Connor. *See id.* at 23–49. An underlying theme is survival and hard work—of the Day family, its ranch hands, cattle and other wildlife—in spite of the harsh desert environment of the land of the Lazy B. It includes a reflection on the local history of this area as well as several photographs depicting the ranch, the Day family, and the well-loved ranch hands and cowboys. *See generally id.*

II. WORKS ABOUT JUSTICE O'CONNOR

A. Substantive Law Review Articles Written About Justice O'Connor

51. Stewart Jay, *Ideologue to Pragmatist?: Sandra Day O'Connor's Views on Abortion Rights*, 39 ARIZ. ST. L.J. 777 (2007). In this substantive and critical analysis of Justice O'Connor's views on abortion, Jay argues that Justice O'Connor is neither a pragmatist nor an ideologue. *Id.* at 778. Rather, he maintains that she approaches the issue of abortion from the perspective of both "a legislator and a woman." *Id.* In supporting his argument, Jay begins by describing Justice O'Connor's position on abortion as she explained it at her confirmation hearings. He highlights that, as an Arizona legislator, Justice O'Connor refused to vote in favor of legislation to repeal and criminalize abortion, but nevertheless voted in favor of measures to restrict access to the

40. *See* Sandra Day O'Connor, *Professionalism*, WYO. LAWYER, Apr. 2004, at 12 (reprinting O'CONNOR, *THE MAJESTY OF THE LAW*, *supra* annot. 49, at 225–30).

procedure.⁴¹ Next, Jay analyzes *City of Akron v. Akron Center for Reproductive Health, Inc.*⁴² and opines that this case marks Justice O'Connor's "debut as a defender of abortion regulations" and the introduction of her "undue burden" standard for the examination of abortion restrictions. *Id.* at 784–85. Jay further observes that Justice O'Connor was beginning to develop a view on abortion restrictions that accorded deference to state legislatures, but he notes that she provided no reasons to explain this deference. In *Thornburgh v. American College of Obstetricians and Gynecologists*,⁴³ Justice O'Connor "gave a similar rough treatment" to abortion restrictions and, as a result, she voted to uphold them although the majority of the Court invalidated the restrictions. *Id.* at 792–93. Jay continues to trace Justice O'Connor's abortion jurisprudence by looking closely at her decisions in *Webster v. Reproductive Health Services*,⁴⁴ *Hodgson v. Minnesota*,⁴⁵ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁶ He notes that her views echoed the pronouncements she made in her confirmation hearings and that the "undue burden" standard evolved, although the requirements for an undue burden, or the number of women who "must be deterred before the burden becomes 'undue,'" remained unarticulated. *Id.* at 794–817. In the conclusion, Jay describes Justice O'Connor's "conflicting tendencies": where she believes abortion is repugnant but she is hesitant to step in on behalf of the Supreme Court to tell legislators how to do their job, considering her commitment to states' rights. *Id.* at 825. Jay asserts that "[b]eing to blame for the demise of *Roe* would be a tough legacy [for Justice O'Connor] to accept." *Id.* Moreover, Jay posits that her western heritage, with its strong history of distrust for government involvement in personal affairs, may have contributed to Justice O'Connor's hesitancy to accept government dictates on the forms of medical care people can receive. *Id.*

52. Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 AKRON L. REV. 373 (2006). Written shortly after Justice O'Connor's retirement from the Supreme Court, this article provides a brief overview of Justice O'Connor's constitutional jurisprudence, including decisions addressing the Commerce Clause, the First Amendment, the Due Process Clause, and the Equal Protection Clause. Huhn characterizes Justice O'Connor's early years on the

41. Jay explains that as a state legislator, Justice O'Connor voted for "a conscience clause allowing hospitals, doctors, and other employees to decline to perform abortions," if they had a conscience-based objection. Jay, *supra* annot. 51, at 780. She also voted to "[exclude] state funding for abortions from the state's health plan for low-income women." *Id.*

42. 462 U.S. 416 (1983).

43. 476 U.S. 747 (1986).

44. 492 U.S. 490 (1989).

45. 497 U.S. 417 (1990).

46. 505 U.S. 833 (1992).

Court as revealing her focus on jurisdiction and appellate review, noting that she often dismissed cases on technical and procedural grounds. *Id.* at 375. Next, he observes her attention to the facts and circumstances of a case, which fostered her case-by-case analysis. He also discusses her respect for stare decisis, as evidenced in her refusal to overrule *Roe v. Wade*.⁴⁷ Finally, Huhn explores the evolution of Justice O'Connor's constitutional jurisprudence with respect to fundamental rights.

53. Matthew J. Kita, Comment, *Federalism on the High Seas: The Admiralty Jurisprudence of Sandra Day O'Connor*, 18 U.S.F. MAR. L.J. 131 (2005). According to Kita, Justice O'Connor is "one of the most influential and prolific Justices in the field of admiralty and maritime law," having published seventy opinions in this area. *Id.* at 132. Kita discusses the source of Justice O'Connor's maritime jurisprudence and highlights reactions to her opinions. Particular attention is paid to Justice O'Connor's treatment of the application of federal maritime law by state legislatures and courts. Through the analysis of case law, Kita examines whether Justice O'Connor's jurisprudence serves the historic goals of a uniform maritime law, separation of powers, and local and federal needs. *Id.* at 132, 148–63. Kita reflects that, similar to her jurisprudence in other areas of the law, Justice O'Connor's admiralty decisions reflect

[a] concern for providing a just and equitable result in each case[, which] is evident in her desire to rule narrowly, to eschew bright-line rules, and to seek a pragmatic outcome of the disputes before her. Her recognition that the states play an important role in our national system, and her belief that it is the role of the legislature to make public policy determinations, has been the foundation of her jurisprudence during her tenure on the Court. Her decisions in the maritime law arena have allowed her an opportunity to make manifest her desire to effectuate all of these ideals.

Id. at 168–69.

54. C. Lincoln Combs, Note, *A Curious Choice: Hibbs v. Winn as a Case Study of Justice Sandra Day O'Connor's Balancing Jurisprudence*, 37 ARIZ. ST. L.J. 183 (2005). As Combs explains in his introduction, Justice O'Connor sided with the liberal wing of the Court in *Hibbs v. Winn*,⁴⁸ a case dealing with the Establishment Clause and federalism, issues that have divided the Court along ideological lines. *Id.* at 183–84. Yet Justice O'Connor wrote neither a concurrence nor a dissent, prompting legal scholars to speculate about her reasoning in the case. Combs uses this case to study Justice O'Connor's deliberative process and her approach to balancing tests. He concludes that her

47. 410 U.S. 113 (1973).

48. 542 U.S. 88 (2004).

vote in *Hibbs* demonstrates a balancing of civil rights, stare decisis, and federalism concerns. *Id.* at 196–97.

55. Stephen E. Gottlieb, *Sandra Day O'Connor's Position on Discrimination*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241 (2004). Gottlieb's essay addresses the evolution of Justice O'Connor's treatment of discrimination by analyzing her judicial decisions, their doctrinal underpinnings, and her view of racism. Starting from the premise that the Court holds de jure and explicit forms of discrimination impermissible, Gottlieb provides examples of how the "intent test," most frequently employed by Justice O'Connor in discrimination cases, allows her to ignore the consequences of discrimination against blacks. *Id.* at 242–44. Among other landmark cases, the author discusses *Board of Trustees of the University of Alabama v. Garrett*,⁴⁹ *Tennessee v. Lane*,⁵⁰ *Miller-El v. Cockrell*,⁵¹ *Bowers v. Hardwick*,⁵² *Schlup v. Delo*,⁵³ and *Romer v. Evans*.⁵⁴ There is a particularly insightful discussion of *Herrera v. Collins*,⁵⁵ where Justice O'Connor employed the doctrine of federalism in refusing to consider post-conviction evidence in a capital conviction appeal, resulting in a decision in which "procedure mattered but innocence did not." *Id.* at 249. In situating Justice O'Connor with her conservative colleagues, Gottlieb provides several thoughtful reasons for the failure of Justice O'Connor, and "so much of white society," to understand and remedy more subtle forms of discrimination among black Americans. *Id.* at 252–56.

56. Diane Lowenthal & Barbara Palmer, *Justice Sandra Day O'Connor: The World's Most Powerful Jurist?*, 4 U. MD. L.J. RACE, RELIGION, GENDER &

49. 531 U.S. 356, 367 (2001) (holding that the Fourteenth Amendment does not require states "to make special accommodations for the disabled, so long as their actions toward such individuals are rational").

50. 541 U.S. 509, 531 (2004) (holding that Title II of the Americans with Disabilities Act of 1990 was a constitutional exercise of Congress' enforcement powers under the Fourteenth Amendment to protect the fundamental right to access the courts).

51. 537 U.S. 322, 348 (2003) (finding that a prisoner seeking habeas relief was entitled to a certificate of appealability because it was "debatable" whether prosecutors' use of peremptory strikes against African Americans was the result of purposeful discrimination).

52. 478 U.S. 186 (1986).

53. 513 U.S. 298, 326–27 (1995) (determining that a less stringent standard of review governs the miscarriage of justice inquiry when a petitioner is sentenced to death and raises a claim of actual innocence). Justice O'Connor concurred, writing separately to clarify her view of the Court's holding. *Id.* at 332–34 (1995) (O'Connor, J., concurring).

54. 517 U.S. 620, 635 (1996) (holding that Colorado's constitutional amendment prohibiting all protection of homosexuals from discrimination violated the Fourteenth Amendment).

55. 506 U.S. 390, 426–27 (1993) (O'Connor, J., concurring) (suggesting that a claim of actual innocence based on newly discovered evidence is grounds for federal habeas relief only if the case is "truly extraordinary").

CLASS 211 (2004). This article analyzes statistical patterns in Justice O'Connor's decisions and her influence on the Court's jurisprudence. The authors conclude that although Justice O'Connor writes the same overall number of opinions as her colleagues, in "particular subsets of cases," including civil rights, five-to-four decisions, and landmark cases, she is particularly influential. *Id.* at 212, 226, 238.

57. Masha A. Dabiza, Note, *Roper v. Simmons and the Jurisprudence of Sandra Day O'Connor*, 8 BOALT J. CRIM. L. 1 (2004), <http://www.boalt.org/bjcl/v8/v8dabiza.htm>. This student Note examines Justice O'Connor's personal, historical, and judicial background in order to predict her decision in *Roper v. Simmons*.⁵⁶ Dabiza predicts that Justice O'Connor would join the eventual majority, ruling that the execution of individuals who committed capital crimes as juveniles constituted cruel and unusual punishment. Dabiza also sketches the history of juvenile capital punishment.

58. Kenneth Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357 (2003). Karst examines Justice O'Connor's opinions in areas where the Court addresses whether the right to equal citizenship under the Fourteenth Amendment should be more inclusive. These areas include discrimination on the basis of sex, race, and sexual orientation, abortion rights, and religious freedom. Karst conducts an in-depth examination of decisions dealing with race, religion, and gender roles. In each of the areas that Karst reviews, he finds that Justice O'Connor struggles with reaching the goal of inclusion because of "exclusionary pressures of group status politics." *Id.* at 358. Karst also explores tensions between Justice O'Connor's allegiance to state sovereignty and obtaining equal citizenship.

59. Victoria Ashley, Comment, *Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America*, 54 BAYLOR L. REV. 407 (2002). In this student Comment, the author reflects on Justice O'Connor's remarks made in a speech before the Minnesota Women Lawyers on July 1, 2001, where Justice O'Connor articulated her unease with the administration of the death penalty in the United States and suggested adopting minimum standards for lawyers appointed in capital cases. *Id.* at 408. Ashley compares Justice O'Connor's concerns with Justice Blackmun's views that prompted his change of heart and move to advocate abolition of the death penalty. Ashley further asks whether

56. 543 U.S. 551, 578 (2005) (prohibiting the execution of individuals who were less than eighteen years old at the time they committed a capital crime as a violation of the Eighth and Fourteenth Amendments). Justice O'Connor dissented. *Id.* at 587 (O'Connor, J., dissenting) (arguing that neither societal values nor the doctrine of proportionality prohibit the execution of an individual who committed a capital crime as a juvenile).

the Supreme Court is shifting toward abolition of the death penalty, and finds Justice O'Connor's vote on capital cases to be "dispositive." *Id.* at 425.

60. Jean Hofer Toal, *Reply to Professor Tarpley's Comment Regarding Justice Sandra Day O'Connor*, 54 S.C. L. REV. 267 (2002). Hofer Toal, the Chief Justice of the South Carolina Supreme Court, characterizes Tarpley's essay⁵⁷ as "an overheated, sensational personal attack masquerading under the guise of legal scholarship." *Id.* at 267. Arguing against Tarpley's thesis, Hofer Toal states that Justice O'Connor's affirmative action opinions represent the Supreme Court's struggle "to develop a coherent, effective, and constitutional approach to remedy past and to prevent future discrimination based on race and gender." *Id.* at 271. Hofer Toal also explains how personal attacks on judges, particularly Tarpley's attack on Justice O'Connor, have broader, damaging implications, and threaten judicial independence.

61. Vikram David Amar, *Of Hobgoblins and Justice O'Connor's Jurisprudence of Equality*, 32 MCGEORGE L. REV. 823 (2001). This short essay explores the alleged inconsistencies—a criticism frequently evoked—in Justice O'Connor's decisions addressing race-based government action. After explaining the importance of Justice O'Connor's votes in this area, agreeing that she "holds the fate of constitutional law in her hands," Amar debunks criticisms that she applies standards inconsistently and in an ad hoc fashion. *Id.* at 823–34. He concludes that there is "more consistency and deep constitutional instinct" in her decisions addressing race than her critics admit. *Id.* at 835.

62. Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837 (2001). This essay was written as part of a symposium issue celebrating Justice O'Connor's twentieth year on the Supreme Court. Brownstein provides a cumulative analysis of O'Connor decisions on the Free Exercise Clause and the Establishment Clause, and he concludes that her doctrinal approach, although conclusory and evolving, "sets out the parameters of the appropriate relationship between religion and government in our society." *Id.* at 838. Brownstein's analysis also discusses Justice O'Connor's use of a balancing test, where she weighs the right to religious freedom with the importance of state interests, and explains how her jurisprudence fits into the development of the religious clauses of the First Amendment.

57. See Joan Tarpley, *A Comment on Justice O'Connor's Quest for Power and Its Impact on African American Wealth*, 53 S.C. L. REV. 117 (2001), *infra* annot. 65.

63. Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895 (2001). The authors tell the story of how and why Justice O'Connor's ten-year critique of *Roe v. Wade*⁵⁸ led her to reaffirm the central holding of the case rather than dismantle it. *Id.* at 895–96. They posit that

Justice[O'Connor's] respect for individual choice in matters that define one's personhood is related to an admirable capacity to appreciate equally the role of principles or first premises and the role of context in legal decisionmaking . . . [and] that the capacity to integrate premise-based and contextual analysis is a strength that must be developed against the grain of cultural and psycho-social pressures that are grounded in theories and stereotypes about gender but inhibit intellectual versatility in both men and women.

Id. at 896. Part I of the article explains the relevance of gender to judicial decision-making. Part II explores why sound legal reasoning requires avoiding gender stereotypes that are harmful to women.⁵⁹ The final section demonstrates how Justice O'Connor's understanding of due process has allowed her to avoid gender stereotypes, but the authors stress that “greater vigilance” on Justice O'Connor's part is required. *Id.* at 897.

64. Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915 (2001). Also written as part of the symposium looking at twenty years of Justice O'Connor's constitutional jurisprudence, this article examines the five-to-four decisions that she has written or joined. Justice O'Connor authored five-to-four decisions in cases on federalism, due process, equal protection, affirmative action and reappointment, the Takings Clause, the Eighth Amendment, and the First Amendment. She joined five-to-four decisions in cases involving jurisdiction, justiciability, the Commerce Clause, Section Five of the Fourteenth Amendment implicating the Commerce Clause, the Dormant Commerce Clause, fundamental rights provided under the Due Process Clause, affirmative action, the Takings Clause, and the First Amendment. The authors also examine cases where the Court was less divided, such as six-to-three decisions where Justice O'Connor authored the majority opinion. Last, the article looks at Justice O'Connor's dissenting votes and opinions.

65. Joan Tarpley, *A Comment on Justice O'Connor's Quest for Power and Its Impact on African American Wealth*, 53 S.C. L. REV. 117 (2001). In this essay, Tarpley illustrates the ways that Justice O'Connor's affirmative action opinions, which Tarpley argues are deeply hostile to affirmative action, further

58. 410 U.S. 113 (1973).

59. Justice O'Connor herself has warned against the harm to women from gender stereotypes. See O'Connor, *Portia's Progress*, *supra* annot. 32, at 1547.

poverty among African Americans. Tarpley discusses Justice O'Connor's opinions in *Metro Broadcasting, Inc. v. FCC*,⁶⁰ *City of Richmond v. J.A. Croson Co.*,⁶¹ and *Adarand Constructors, Inc. v. Peña*⁶² to demonstrate the hostile dismantling of affirmative action. The article also explores the disagreements between Justices O'Connor and Scalia.⁶³ Justice Scalia's attacks are important to Tarpley insofar as they reveal Justice O'Connor as a self-interested and result-oriented politician. Tarpley also examines affirmative action in the context of the Court and argues that Justice O'Connor is working to dominate the institution. The final section offers insight into the economic impact that Justice O'Connor's opinions have had on African American wealth and the national economy.

66. Judith Olans Brown, Wendy E. Parmet, & Mary E. O'Connell, *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219 (1999). The authors provide a compelling and well-supported analysis of Justice O'Connor's jurisprudence and reasoning in cases involving issues affecting the lives of women.⁶⁴ After providing a sketch of Justice O'Connor's biography—highlighting her upbringing on the Lazy B ranch, exceptional academic record, strong work ethic, and employment history—the authors argue that in areas of importance to women, Justice O'Connor's use of contextual, fact-based (as opposed to rule-based) analysis, and experiential reasoning, led her to decide cases in ways that resonate with her own “rugged” experiences. The authors compare Justice O'Connor's opinions dealing with various topics such as abortion, children, death and dying, the market, the workplace, and the economy. Concluding that Justice O'Connor's approach is based not only on her femininity but also on “her Protestantism, her wealth, her western heritage, her careerism, and her personal courage,” the authors define her feminism as “rugged and self-reliant.” *Id.* at 1246.

67. Jennifer R. Byrne, Comment, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619 (1998). Examining seventeen years of Justice O'Connor's constitutional affirmative action jurisprudence, Byrne argues that Justice O'Connor's moderate approach as a swing vote has confined her to using affirmative action to remedy past

60. 497 U.S. 547 (1990).

61. 488 U.S. 469 (1989).

62. 515 U.S. 200 (1995).

63. See also JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 277–96 (2005), *infra* annot. 111 (describing the relationship between Justices O'Connor and Scalia).

64. As the authors explain, their analysis is in contrast to examining whether Justice O'Connor is a “true” feminist, as that question “overemphasizes a particular delineation of feminist orthodoxy and neglects the nature of her contributions.” Brown et al., *supra* annot. 66, at 1219 (footnote omitted).

discrimination. *Id.* at 619–20, 623–24. The result, according to Byrne, is that the application of affirmative action will be narrowed as “Justice O’Connor’s moderate approach to affirmative action serves as an equitable and reasonable means of correcting this country’s legacy of discrimination while protecting individual rights.” *Id.* at 620. In discussing Justice O’Connor’s role in the development of affirmative action jurisprudence, Byrne compares Justice O’Connor’s approach with her liberal and conservative colleagues on the Court, and describes the state of affirmative action before Justice O’Connor joined the Court.

68. Suzanna Sherry, *Justice O’Connor’s Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865 (1998). This article explores the relationship between majority and dissenting opinions, and specifically asks, “[s]hould a Justice who disagrees with a majority of the Court nevertheless accept the majority’s holding as defining the law for purposes of establishing a baseline for subsequent questions?” *Id.* at 865. Sherry advances three arguments for answering yes to this question: (1) Justices generally assume that a majority decision defines the law for purposes of deciding subsequent questions, even if they disagreed with the majority holding;⁶⁵ (2) Justices, including O’Connor, employ strong language to show that the Court’s decisions are reflective of the Court acting as a single institution or unit that determines the law; and (3) in many instances, it is appropriate for dissenters to consider the majority as the baseline for future analysis.

69. Elizabeth F. Defeis, *A Tribute to Justice Sandra Day O’Connor from an International Perspective*, 27 SETON HALL L. REV. 391 (1997). This article discusses Justice O’Connor’s support for the spread of democratic values throughout the world. As an executive board member of the Central and East European Law Initiative of the American Bar Association, Justice O’Connor has traveled throughout Eastern Europe and Asia to promote democratic values. *Id.* at 391–92. The author finds parallels in Justice O’Connor’s personal and professional background and the principles that she believes are essential to democracy. Those principles include an independent judiciary,

65. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), Justice O’Connor did not accept the majority decision from an earlier case in which she had dissented, *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990), as defining the laws for purposes of deciding the issue presented in *Flores*. *Flores*, 521 U.S. at 544–46 (O’Connor, J., dissenting); see also Sherry, *supra* annot. 68, at 871 (“Justice O’Connor in *Flores*—without discussing the issue—declined to use *Smith* as a baseline, instead judging Congress’s Section 5 power against her own, dissenting view of the meaning of the Free Exercise Clause.”). However, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Justice O’Connor accepted the Court’s earlier holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), as establishing the law for purposes of deciding *Plaut*, even though she had dissented in *Lampf*. Sherry, *supra* annot. 68, at 876.

free and independent press, fundamental and constant civil rights, and civic participation, engagement, and public responsibility.

70. Sameer M. Ashar & Lisa F. Opoku, *Recent Development, Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence—Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), 31 HARV C.R.-C.L. L. REV. 223 (1996). After providing a brief history of federal affirmative action programs and the evolution of affirmative action jurisprudence, the authors offer an in-depth analysis of *Adarand*. The authors further argue that the decision in this case demonstrates that the Court was incorrect in applying the standard “of strict scrutiny to all programs involving racial and ethnic classification without regard to the relative power of the individuals receiving the benefits or burdens resulting from the classification.” *Id.* at 223. Pointing out that ethnic and racial discrimination persist, the authors demonstrate that providing the statistical proof required to prove discrimination under *Adarand* imposes an expensive administrative burden on the same victims and continues the favored treatment of the white majority. *Id.* at 234–40.

71. Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219 (1996). This article focuses on the conservative majority of the Court to determine the “nonprocess values” that appeal to these Justices and how these values can be understood within the definition of conservatism. *Id.* at 220. Gottlieb argues that historically, conservatives have “a set of views about character.” *Id.* at 221. Further, he asserts that these views have a profound and fundamental impact on how these Justices decide issues. *Id.* at 221–22. Examining the opinions of and differences among Justices O'Connor, Kennedy, and Scalia on race, abortion, religion, free speech, criminal procedure, democracy, and federalism, Gottlieb discusses the nexus between character and conservatism and specifically looks at the ways that each Justice's understanding of character moves his or her vote.

72. Joel S. Jacobs, *Endorsement as “Adoptive Action:” A Suggested Definition of, and Argument for, Justice O'Connor's Establishment Clause Test*, 22 HASTINGS CONST. L.Q. 29 (1994). Jacobs argues that the endorsement test, as formulated by Justice O'Connor's concurrence in *Lynch v. Donnelly*,⁶⁶ should be refined through the crafting of a more refined understanding of “endorsement” based on “adoptive action.”⁶⁷

66. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

67. Jacobs explains the adoptive action standard as follows:

The government unconstitutionally endorses religion when it takes adoptive religious action. An adoptive religious act is an action that expresses approval or disapproval of religion in general, a particular religion, or a “distinctively religious” element of a religion. If approval or disapproval is not explicit, it should nonetheless

73. Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995). The authors evaluate the theory of whether there is a distinction in the way that female judges decide cases from the way that male judges decide cases. By comparing the opinions of Justices O'Connor and Ginsburg in the 1993 Term, the authors conclude that there is no female jurisprudence. Nevertheless, the authors assert that there should be more female judges to remedy past discrimination and invigorate the judiciary.

74. Lisa R. Graves, *Looking Back, Looking Ahead: Justice O'Connor, Ideology, and the Advice and Consent Process*, 3 CORNELL J.L. & PUB. POL'Y 121 (1993). Graves argues that judicial nominees should be required to explain viewpoints on federal law and judicial roles in their Senate confirmation hearings. *Id.* at 125. To this end, the first part of the article looks at Justice O'Connor's refusal to explain her views highlighting specific statements she made at her confirmation hearing, especially her refusal to explain her approach to Title VII of the Civil Rights Act of 1964 and the rights of criminal defendants. The second part examines her jurisprudence on those two issues. The third part connects the first and second parts by showing how Justice O'Connor's jurisprudence supports several theoretical positions for a full Senate investigation of judicial nominees and a discussion of the nominees' ideological views. Moreover, Graves asserts that nominees should be rejected on the basis of ideological views.

75. Jerome McCristal Culp, Jr., Essay, *An Open Letter From One Black Scholar to Justice Ruth Bader Ginsburg: Or, How Not to Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21 (1994). The author addresses Justice Ginsburg in an open letter critical of Justice O'Connor's discourse and jurisprudence on race, noting that she has been "particularly dismissive of the concerns of black people" and supportive of the racial status quo. *Id.* at 23, 32-34.

76. Jennifer E. Spreng, Comment, *Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion*, 38 ST. LOUIS U. L.J. 837 (1994). This Comment asserts that although Justice O'Connor applies the compelling interest standard to issues involving the free exercise of religion, an examination of her free exercise jurisprudence reveals her deference to governmental agencies and state decisions, demonstrating that she instead employs the rational review standard. Rational review, according to Spreng,

be inferred when a special benefit or burden has been assigned to religion in general, a particular religion, or a distinctively religious element of a religion, unless it seems likely that the benefit or burden was assigned pursuant to purely secular criteria that are not a "sham." Courts considering Establishment Clause challenges confront a wide variety of situations, and the test should be consistent when applied to all of them. Jacobs, *supra* annot. 72, at 42.

permits as constitutional under the Free Exercise Clause⁶⁸ onerous and significant burdens on free exercise to those followers of non-traditional or “countercultural religions.” *Id.* at 839.

77. David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 *FORDHAM L. REV.* 895 (1993). In this student Note, the underlying question is whether Justice O'Connor's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶⁹ where she upheld the right to an abortion as a fundamental right, marked a change in her view of unenumerated fundamental rights so as to distinguish her from other conservatives on the Court, particularly Justice Scalia. To explore this issue, Anders examines and compares the theoretical underpinnings of Justices Scalia and O'Connor regarding unenumerated fundamental rights derived from the Due Process Clause.

78. Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 *HARV. C.R.-C.L. L. REV.* 503 (1992). Karst looks at the renewed effort of political groups to obtain government funding for religious purposes in this article. More specifically, he examines the political efforts of such groups to obtain government funding and sponsorship for official exhibitions with religious symbolism. He notes that when state and local governments permit such displays, members of religious minorities suffer a loss of status. In his analysis, he argues that Justice O'Connor's Establishment Clause jurisprudence serves to provide “doctrinal recognition to this harm” by focusing on the issue of whether the governmental action has endorsed or disapproved of religion. *Id.* at 504–05.

79. Alfred W. Blumrosen, *Society in Transition III: Justice O'Connor and the Destabilization of the Griggs Principle of Employment Discrimination*, 13 *WOMEN'S RTS. L. REP.* 53 (1991).⁷⁰ Blumrosen discusses the tension in Justice O'Connor's employment discrimination jurisprudence before the passage of the Civil Rights Act of 1991. He argues that Justice O'Connor was cognizant that the conservatives on the Court employed a narrow view that continued the subordination she herself once faced seeking employment as a woman. Yet, Blumrosen further argues that she is resistant to endorse sex- or race-based affirmative action in the face of employment discrimination as evidenced by

68. U.S. CONST. amend. I.

69. 505 U.S. 833 (1992).

70. This article is a companion to other papers by this author: Alfred W. Blumrosen, *Society in Transition I: A Broader Congressional Agenda for Equal Employment—The Peace Dividend, Leapfrogging, and Other Matters*, 8 *YALE L. & POL'Y REV.* 257 (1990); and Alfred W. Blumrosen, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 *RUTGERS L. REV.* 1023 (1990).

her adherence to the principle established in *Griggs v. Duke Power Co.*,⁷¹ which held that discriminatory employment practices are illegal unless justified by an otherwise nondiscriminatory business necessity.⁷²

80. Marci A. Hamilton, *Justice O'Connor's Intellectual Property Opinions: Currents and Crosscurrents*, 13 WOMEN'S RTS. L. REP. 71 (1991).⁷³ On O'Connor's tenth year as a Supreme Court Justice, Hamilton observes that Justice O'Connor is "a force in the intellectual property area, especially the copyright arena," having authored major copyright decisions. *Id.* at 71. Hamilton compares Justice O'Connor's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*⁷⁴ with her decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁷⁵ and discusses the tension in Justice O'Connor's reasoning in these two copyright cases. Similarly, Hamilton compares *Feist* with Justice O'Connor's decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,⁷⁶ a patent decision. Accordingly, these opinions offer great insight into the functioning of the Court as well as Justice O'Connor's attitudes about intellectual property.

81. Twila L. Perry, *Justice O'Connor and Children and the Law*, 13 WOMEN'S RTS. L. REP. 81 (1991). Perry provides a thoughtful and well-reasoned discussion of Justice O'Connor's view about children through analyzing her votes and written opinions in cases involving the parent-child relationship, students' rights, protections from physical and sexual abuse, and juvenile justice. Finding that Justice O'Connor takes a conservative approach—similar to her male counterparts on the Court—deferring to states and upholding a traditional view of the family while employing a fact-specific analysis, the author also questions the relevance of Justice O'Connor's gender in examining her jurisprudence involving children. *Id.* at 91–92. Perry concludes that the special, unique, and important interests of children are given short shrift by Justice O'Connor's generally conservative approach. *Id.* at 92.

71. 401 U.S. 424 (1971).

72. *Id.* at 436.

73. Also published as Marci A. Hamilton, *Justice O'Connor's Opinion in Feist Publications, Inc. v. Rural Telephone Service Co.: An Uncommon Though Characteristic Approach*, 38 J. COPYRIGHT SOC'Y U.S.A. 83 (1990).

74. 471 U.S. 539, 548–49 (1985) (holding that unauthorized quotations by a magazine from a soon-to-be published memoir did not constitute fair use within the Copyright Revision Act of 1976 because publication by the magazine effectively eliminated the copyright holder's right to first publication).

75. 499 U.S. 340 (1991) (holding that copyright protection does not extend to the logical organization of facts in the white pages of a telephone book).

76. 489 U.S. 141, 167–68 (1989) (holding that a state statute regulating intellectual property is preempted by the Supremacy Clause).

82. Rocco Potenza, Comment, *Affirmative Action: Will Justice O'Connor Author Its End?*, 22 U. TOL. L. REV. 805 (1991). In Potenza's introduction, he outlines the position of the Court on affirmative action during the 1980s, which he characterizes as sharply divided.⁷⁷ Similarly, in cases decided in 1989 and 1990, *City of Richmond v. J.A. Croson Co.* and *Metro Broadcasting, Inc. v. FCC*, he points out that the Court applied different standards.⁷⁸ This background informs Potenza's analysis, which examines Justice O'Connor's views on the constitutionality of race-based affirmative action and the impact of such jurisprudence on the future of affirmative action programs.

83. Annamay T. Sheppard, *The Family Law Jurisprudence of Justice Sandra Day O'Connor*, 13 WOMEN'S RTS. L. REP. 155 (1991). In this speech transcript, Sheppard briefly discusses Justice O'Connor's family law decisions to understand the Justice's views on family rights. Sheppard concludes that Justice O'Connor believes that individuals and not the government are responsible for the survival and stability of the family. Moreover, Sheppard finds, Justice O'Connor's decisions are deferential to state courts' efforts to deal with family matters, but the Justice also seems to believe that any governmental effort to strengthen families is the product of "public largesse" and not constitutionally required. *Id.* at 157.

84. Alfred Slocum, *At the Crossroads of Civil Rights: Tension Between the Wartime Amendments in the Jurisprudence of Justice O'Connor*, 13 WOMEN'S RTS. L. REP. 105 (1991). Slocum's article is premised on the view that Justice O'Connor's vision of equal protection is race neutral and color blind. According to Slocum, this view creates an "uneasy tension" with the Thirteenth Amendment's requirement of "color consciousness to eliminate the badges and indicia of slavery." *Id.* at 105. Slocum's analysis compares the different approaches to resolving race-based issues employed by Justices O'Connor and Marshall.

77. In 1989 in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court reached its first majority decision in an affirmative action case since the 1978 decision of *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). Before *Croson*, the Court was split. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (plurality) (invalidating the school board's layoff provision protecting employees on the basis of race); *Fullilove v. Klutznick*, 448 U.S. 448, 454, 492 (1980) (upholding the "minority business enterprise" provision of the Public Works Employment Act of 1977, which required that at least ten percent of each grant made under the Act be dedicated to obtaining services or supplies from minority business enterprises); *Bakke*, 438 U.S. at 320 (invalidating the special admissions program).

78. Compare *Croson*, 488 U.S. at 508 (applying strict scrutiny review to race-based affirmative action programs and invalidating the programs), with *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-66 (1990) (applying intermediate scrutiny and upholding the affirmative action program).

85. Barbara Palmer, Note, *Feminist Or Foe? Justice Sandra Day O'Connor, Title VII Sex-Discrimination, and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159 (1991). Palmer provides a substantive analysis of eight landmark cases addressing women's rights in the context of sexual discrimination suits to determine whether Justice O'Connor's thinking and voting record on this issue is "sufficiently feminist." *Id.* at 160. Palmer evaluates two categories of cases. First, she evaluates the decisions in sex discrimination cases filed under Title VII of the Civil Rights Act of 1964,⁷⁹ in the employment context: *Arizona Governing Committee v. Norris*,⁸⁰ *Hishon v. King & Spalding*,⁸¹ *Meritor Savings Bank v. Vinson*,⁸² and *Price Waterhouse v. Hopkins*.⁸³ Next, Palmer looks at pregnancy discrimination claims, also raised under Title VII: *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,⁸⁴ *California Federal Savings & Loan v. Guerra*,⁸⁵ and *Automobile Workers v. Johnson Controls, Inc.*⁸⁶ Beginning with the premise articulated in Beverly Cook's 1978 study that women judges are more sympathetic to the civil rights of women, Palmer predicts that Justice O'Connor would be similarly sympathetic—even feminist—regarding women's rights. *Id.* at 160–61. The substantive analysis reveals otherwise and illustrates that although Justice

79. 42 U.S.C. § 2000e–2(a) (2000). Section 2000e–2(a) provides that it shall be unlawful for an employer to refuse to hire, fire, or “otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” *Id.*

80. 463 U.S. 1073, 1074 (1983) (holding that offering retirement benefits from companies that pay a woman less benefits than a man who has made the same contribution constitutes sex discrimination under Title VII). Justice O'Connor concurred, stating that she agreed with Justice Powell's dissent that the decision should be prospective rather than retrospective. *Id.* at 1109 (O'Connor, J., concurring).

81. 467 U.S. 69, 74–76 (1984) (finding that an employment benefit that is not part of an express or implied contract may not be administered in a discriminatory fashion, and any term, condition, or privilege of employment may not be based on factors prohibited by Title VII).

82. 477 U.S. 57, 66 (1986) (holding that a hostile work environment is a form of sex discrimination actionable under Title VII).

83. 490 U.S. 228, 258 (1989) (“[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”). Justice O'Connor wrote separately to explain why the facts of the case warranted departure from the standard established by prior case law, and when the burden of persuasion should be shifted to the employer. *Id.* at 261–62 (O'Connor, J., concurring in the judgment).

84. 462 U.S. 669, 675–76 (1983) (holding that providing female employees with more extensive pregnancy benefits than men discriminates against male employees in violation of Title VII).

85. 479 U.S. 272, 280 (1987) (holding that Title VII did not preempt a state statute favoring pregnant women with respect to pregnancy disability leave because the statute did not require employers to violate Title VII).

86. 499 U.S. 187, 211 (1991) (holding that the exclusion of all female employees, except those with documented infertility, from certain jobs constituted facial discrimination under Title VII).

O'Connor often votes in favor of women or in favor of a broad interpretation of Title VII, her language and votes often support anti-feminist positions, which reinforce stereotypes ultimately harmful to women.

86. Nadine Taub, *Sandra Day O'Connor and Women's Rights*, 13 WOMEN'S RTS. L. REP. 113 (1991). Examining Justice O'Connor's jurisprudence in the area of women's rights, Taub asserts that Justice O'Connor's contribution toward gender equality is "plainly mixed." *Id.* at 113. The author discusses Justice O'Connor's approach as "[a] forward and back 'two-step'" where Justice O'Connor strikes down obvious discrimination based on sex, yet reinforces less obvious sexual stereotypes and archaic notions of the roles of men and women. *Id.* In supporting her thesis, Taub examines *Mississippi University for Women v. Hogan*⁸⁷ and notes that in this case Justice O'Connor moved forward by rejecting a single-sex admission policy, which was founded on gender stereotypes. *Id.* at 113–14. Taub then argues that in several other cases, including *Lehr v. Robertson*,⁸⁸ *Arizona Governing Committee v. Norris*,⁸⁹ *Watson v. Fort Worth Bank & Trust*,⁹⁰ *Michael H. v. Gerald D.*,⁹¹ and *Bowers v. Hardwick*,⁹² that Justice O'Connor's decisions undermine gender equality.⁹³

87. Dorothy E. Roberts, *Sandra Day O'Connor, Conservative Discourse, and Reproductive Freedom*, 13 WOMEN'S RTS. L. REP. 95 (1991). Roberts constructs her analysis and understanding of Justice O'Connor's abortion jurisprudence around four issues: (1) whether the Constitution provides a

87. 458 U.S. 718 (1982).

88. 463 U.S. 248, 264–65 (1983) (concluding that failure to provide notice of adoption to a putative father who had not established a substantial relationship with his child did not violate his due process rights).

89. 463 U.S. 1073 (1983).

90. 487 U.S. 977, 999 (1988) (determining that subjective or discretionary employment actions challenged under Title VII must be evaluated using a disparate impact analysis).

91. 491 U.S. 110, 119, 129–30 (1989) (a California statute that presumed a child born to a cohabiting married couple to be a child of the marriage did not violate the biological father's due process rights). Justice O'Connor concurred in part, disagreeing with a footnote in the majority opinion that "sketch[ed] a mode of historical analysis" she found inconsistent with past decisions. *Id.* at 132 (O'Connor, J., concurring in part). Similarly, Justice O'Connor has discussed some of the pitfalls of historical analysis. See O'Connor, *Keynote Address—Conference on Compelling Government Interests*, *supra* annot. 18, at 541–42.

92. 478 U.S. 186 (1986). Justice O'Connor joined the majority in holding that criminalizing homosexual sodomy was not a violation of substantive due process. See *id.* at 189.

93. In *Bowers*, Justice O'Connor "joined the Court in rejecting the concept of moral autonomy . . . where consenting adults are not affected or harmed by the behavior." Stephen E. Gottlieb, *Sandra Day O'Connor's Position on Discrimination*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 247 (2004). Gottlieb further notes this "rejection of moral autonomy also frees Court conservatives to fill that gap with their own conceptions of proper behavior, including their views on discrimination." *Id.* at 247–48.

fundamental right to abortion; (2) when does the government infringe on that right; (3) what constitutes a compelling government interest justifying infringement of the right to abortion; and (4) what does reproductive freedom mean under the Constitution and how should the federal courts be involved in protective reproductive freedom? *Id.* at 95–96. Contrasting Justice O'Connor's reasoning to that of Justice Scalia's, Roberts argues that Justice O'Connor's jurisprudence constitutes "a veiled articulation of a conservative political perspective that is in fact a bolder judicial defense of the current distribution of wealth and power." *Id.* at 96. In the analysis that follows, Roberts demonstrates how the "neutral and moderate" judicial rationales and standards constructed by Justice O'Connor, such as the undue burden standard, allow her to uphold *Roe v. Wade*⁹⁴ while permitting government intrusion most harmful to poor and oppressed women.⁹⁵ *Id.* at 98. In other words, Roberts shows how, unlike most of her conservative counterparts on the Court, Justice O'Connor examines the real impact of the law on society, albeit with a conservative eye. *Id.* at 103.

88. George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117 (1991). The author premises his argument on the "puzzle" of the Self-Incrimination Clause, which is devoid of meaning because the concept of coercion "has no meaning apart from the consensus that already exists in a particular society at a particular time about what coercion means." *Id.* at 117. Thomas argues that Justice O'Connor's jurisprudence provides "a pragmatic solution to this puzzle." *Id.* After tracing the history of the concept of coerced self-incrimination, Thomas analyzes Justice O'Connor's decisions and votes on *Miranda* issues. Concluding that Justice O'Connor's pragmatism is both "coherent and plausible," as well as "clear and (reasonably) easy to apply," Thomas states that it can result in a "subtle erosion of the Self-incrimination Clause." *Id.* at

94. 410 U.S. 113 (1973).

95. For instance, Roberts discusses the government action/inaction rationale to describe the impact of Justice O'Connor's reasoning in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989):

The government action/inaction rationale is just as manipulable as the judicial deference doctrine. Justice O'Connor's view that the government's funding policy imposes no obstacle to reproductive choice ignores its real life effects on poor women. By funding childbirth and not abortion, the government has in fact determined the choices of women who cannot afford either option. O'Connor's restrictive concept of liberty is ultimately inadequate to protect the dignity and autonomy of poor women and women of color. It stands in opposition to a progressive understanding of reproductive freedom that recognizes the government's affirmative duty to facilitate the processes of choice and self-determination otherwise precluded by the race, gender, and class inequalities that permeate our society.

Roberts, *supra* annot. 87, at 103.

126–27. Nevertheless, Thomas finds that Justice O'Connor's approach supports the basic principle of *Miranda*. *Id.* at 127.

89. Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L. REP. 129 (1991). Written on Justice O'Connor's ten-year anniversary on the Supreme Court Bench, Wermiel posits two factors that distinguish her as a jurist: (1) her role as the first woman on the court and, as such, her views on abortion, and (2) her role as an independent conservative, affecting the Court by being the swing vote. In order to examine and fully appreciate these roles, Wermiel analyzes Justice O'Connor's jurisprudence on sex discrimination, abortion, religious freedom, capital punishment, and federalism.

90. Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47 (1990). During Justice O'Connor's first ten years on the Court, there were ten affirmative action cases generating forty separate opinions. *Id.* at 47. Haggard observes that Justice O'Connor's decisions in these cases were generally criticized for the following: failing to be on either side of the ideological debate (or in Haggard's terms, being an "intellectual 'mugwump'"); taking a moderate view on issues in hopes that the Court would come to agreement; and offering only "lip service" to methods of remedying discrimination. *Id.* at 49. Haggard examines Justice O'Connor's affirmative action decisions and argues that although these criticisms are justified, her opinions reflect "a more favorable image" of affirmative action. *Id.*

91. M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443 (1990). This essay analyzes the different approaches to federalism employed by Justices O'Connor and Scalia. The authors believe that, although these differences are often subtle, they are nevertheless significant. *Id.* at 1443. The article compares the Justices' approaches to separation of powers—Justice Scalia takes a formal, as opposed to functional, approach, whereas Justice O'Connor is more protective of state and local government decisions. These differences are explained by the Justices' backgrounds and general methods of constitutional interpretation, with Justice Scalia employing a strict, rule-bound interpretation, and Justice O'Connor employing a more flexible constitutional interpretation that considers an issue's context.

92. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for An Audience of One*, 138 U. PA. L. REV. 119 (1989). This article was written

shortly after *Webster v. Reproductive Health Services*,⁹⁶ where Justice O'Connor, through her concurring opinion, upheld Missouri's abortion restrictions but declined to review the constitutionality of *Roe v. Wade*.⁹⁷ The authors explain, specifically with Justice O'Connor as their intended audience, why she should "stand up to those who are turning their backs on women," as legislators and the political process are "not to be trusted" to safeguard these rights. *Id.* at 123, 150–55. First, Estrich and Sullivan review the issue of whether there is a fundamental right to abortion. Next, the authors examine government infringement on the right to abortion and the level of constitutional scrutiny required, the questions most relevant following *Webster*.

93. Susan M. Halatyn, Comment, *Sandra Day O'Connor, Abortion, and Compromise for the Court*, 5 TOURO L. REV. 327 (1989). In this student Comment, Halatyn analyzes Justice O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.*,⁹⁸ specifically discussing the standard that Justice O'Connor was proposing. Examining the underpinnings of the decision, Halatyn argues the decision was the product of Justice O'Connor's commitment to judicial restraint, federalism, and bright-line tests, rather than a moral repulsion to abortion.

94. Benjamin D. Feder, *And a Child Shall Lead Them: Justice O'Connor, The Principle of Religious Liberty and Its Practical Application*, 8 PACE L. REV. 249 (1988). The underlying premise of this article is that the legal analysis of issues implicating religion requires a methodology that balances various values. Further, Feder asserts that the Court has failed to articulate such a methodology. Yet Justice O'Connor's approach to Establishment Clause issues, the endorsement or disapproval test, serves as a basis for the development of a framework that the Court should employ in subsequent cases.

95. George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827. Thomas's article sets forth "a single, unifying theory of double jeopardy" so as to identify a "'core' double jeopardy interest." *Id.* at 828. He critiques the Court's derivative double jeopardy protections as presented in decisions by Justice O'Connor and Chief Justice Rehnquist.

96. Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987). Beschle argues that the Establishment Clause and Free Exercise Clause jurisprudence is fundamentally flawed because the principle

96. 492 U.S. 490 (1989).

97. See *id.* at 523, 525 (O'Connor, J., concurring in part and concurring in the judgment).

98. 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

underlying these clauses, the separation of church and state, is both “impossible” to achieve and “an unrealistic goal.” *Id.* at 151. Beschle provides an alternative for First Amendment jurisprudence, liberal neutrality, which is rooted in classic liberalism. He believes that Justice O’Connor’s Establishment Clause and Free Exercise Clause jurisprudence represents “the most direct endorsement . . . of liberal neutrality.” *Id.* at 151–52. Justice O’Connor’s version of liberal neutrality attempts to discern “whether government was, by the practice in question, ‘conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’” *Id.* at 174. Likewise, it does not require separation of church and state, but looks to determine whether benefits or burdens are understood as “messages of favoritism violating the standard of neutrality.” *Id.* Beschle’s analysis describes Justice O’Connor’s approach, traces the development of the religious clause jurisprudence, and applies liberal neutrality to specific First Amendment problems such as prayer in public school, religious symbols, and tax exemptions.

97. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). Sherry argues that Justice O’Connor’s approach to constitutional cases is the result of her “feminine jurisprudence” or application of a “feminine paradigm.” *Id.* at 543–44. Sherry tests and explores this theory by comparing Justice O’Connor’s decisions with Chief Justice Rehnquist’s decisions in Establishment Clause and discrimination cases. The Justices are otherwise similar and any distinctions, Sherry argues, must therefore be meaningful. Sherry finds that gender-based jurisprudence is reflected in Justice O’Connor’s use of individualized decision-making, as opposed to bright-line rules and tests, but Sherry notes that Justice O’Connor’s decisions on criminal procedural matters represent an exception.

98. Edward V. Heck & Paula C. Arledge, *Justice O’Connor and the First Amendment 1981–84*, 13 PEPP. L. REV. 993 (1986). Heck and Arledge, political science professors, analyze Justice O’Connor’s approach to free speech in her first three terms. They argue that Justice O’Connor’s jurisprudence is informed by her experience as a lawyer, state legislator, and state court judge and “reflect[s] a coherent theory of constitutional interpretation broadly consistent with Alexander Meiklejohn’s view that the primary purpose of the First Amendment is the protection of ‘political speech.’” *Id.* at 995. Nevertheless, at her confirmation, there was a dearth of specific indicators to predict how Justice O’Connor would rule on First Amendment issues once on the Supreme Court. *Id.* at 1002. The authors found that Justice O’Connor’s Republican Party affiliation proved to be one of the most reliable indicators in discerning how she would rule, and they provide tables of Supreme Court voting patterns from 1981–1984. *Id.* at 1005–07. Indeed, the authors found that she was more conservative on First Amendment

issues and analyzed her votes and decisions on political speech and freedom of the press and association to provide a theoretical framework for understanding Justice O'Connor's views.

99. Arnold H. Loewy, Essay, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential Of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986). The author's underlying thesis is that the prohibition on any government action that advances or inhibits religion "is thoroughly consistent with our constitutional heritage but that its serious implementation will require rethinking some of our most firmly entrenched practices." *Id.* at 1051. This rethinking is reflected in Justice O'Connor's "endorsement or disapproval" test as articulated in her concurrence in *Lynch v. Donnelly*.⁹⁹ The author then applies the test proposed by Justice O'Connor to historic Supreme Court cases on the Establishment Clause and generally accepted societal practices reflecting the same issues, including prayer in public schools, and the invocation of "God" during the Pledge of Allegiance to the Flag and at the Court's opening ceremonies.

100. Barbara Olson Bruckmann, Note, *Justice Sandra Day O'Connor: Trends Toward Judicial Restraint*, 42 WASH. & LEE L. REV. 1185 (1985). In this student note, Olson Bruckmann explores the extent to which judicial restraint has influenced Justice O'Connor's opinions. Accordingly, Justice O'Connor's judicial restraint is reflected in her view of the federal judiciary as limited by constitutional powers, duties delegated to Congress and the Executive Branch, self-imposed restrictions, and federalism.¹⁰⁰ *Id.* at 1186. Olson Bruckmann argues that the trend in Justice O'Connor's opinions reflect her belief and commitment to the doctrines of separation of powers and federalism. *Id.*

101. Margaret A. Miller, Comment, *Justice Sandra Day O'Connor: Token or Triumph from a Feminist Perspective*, 15 GOLDEN GATE U. L. REV. 493 (1985). This student Comment addresses the question of whether Justice O'Connor's record on issues affecting women served to disappoint or fulfill feminist expectations regarding her appointment. Providing a sketch of feminist concerns at the time of Justice O'Connor's confirmation, Miller argues that Justice O'Connor did not initially disappoint; she even provided feminist observers with some encouragement. *Id.* at 501-02. Miller then examines Justice O'Connor's decisions in the areas of rights for illegitimate children, gender discrimination in education and employment benefits, and

99. 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

100. Bruckmann's article mentions Justice O'Connor's article, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, *supra* annot. 26. Bruckmann, *supra* annot. 100, at 1185 n.2.

abortion. Nevertheless, Miller asserts that Justice O'Connor's jurisprudence in abortion cases, reflected in *City of Akron v. Akron Center for Reproductive Health, Inc.*¹⁰¹ and the companion cases *Planned Parenthood Association v. Ashcroft*¹⁰² and *Simopoulos v. Virginia*,¹⁰³ represented a "severe blow" and disappointment to feminists. *Id.* at 522.

102. Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983). Using Justice O'Connor's Senate confirmation hearings as a platform for his discussion of the judicial selection process, Rees explores four main issues. First, Rees explores whether "judicial selectors" should consider the opinions and views held by potential judges. *Id.* at 928. Next, Rees explores whether senators should employ different standards than presidents in determining whether to confirm a prospective Justice. The final analysis explores whether a statement made by a potential Supreme Court Justice at her confirmation hearings regarding a certain issue would require her to disqualify herself from deciding cases raising that issue.

103. Robert E. Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 BYU L. REV. 1. Marking the first Term of Justice O'Connor's twenty-four years on the Court, Riggs examines whether Justice O'Connor fulfilled expectations regarding "her judicial competence, her concept of the judicial role, and her substantive biases." *Id.* at 2. Riggs provides a statistical synopsis of Justice O'Connor's first Term voting record, and analyzes her decisions on cases involving criminal justice, federal power and jurisdiction, and civil liberties. Accordingly, and based on the foregoing first Term case analysis, Riggs argues that state authority within the federal system is a persistent value in Justice O'Connor's jurisprudence.

104. Charles D. Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases?*, 13 PAC. L.J. 259 (1982). Kelso utilizes two approaches for determining Justice O'Connor's impact on the Court as Justice Stewart's replacement. The first approach involves examining Justice Stewart's last Term on the Court, from 1980–1981, for voting patterns in five-to-four decisions. The second approach involves looking at five-to-four decisions where Justice Stewart provided the fifth and crucial vote for the majority. The article provides helpful charts and tables that break down how the Justices on the Burger Court voted in constitutional cases. Noting that "Justice Stewart was not always found in the conservative or liberal camp," Kelso reasons that, assuming Justice O'Connor will vote with the conservative

101. 462 U.S. 416 (1983).

102. 462 U.S. 476 (1983).

103. 462 U.S. 506 (1983).

bloc, her position on the Court should not change many of its decisions. *Id.* at 266–70. As for the area of affirmative action—a closely decided matter for the Burger Court¹⁰⁴—Kelso correctly predicted that Justice O’Connor’s approach “may make a real difference in whether the Court approves state of federal programs of affirmative action.” *Id.* at 270.

105. Carl R. Schenker, Jr., “Reading” Justice Sandra Day O’Connor, 31 CATH. U. L. REV. 487 (1982). Written shortly after Justice O’Connor joined the Supreme Court bench, and as part of a symposium on state and local government issues before the Supreme Court, this article examines Justice O’Connor’s decisions regarding the same as a state court judge. In addition, the article looks at her early Supreme Court votes and decisions on state and municipal government issues.

B. Scholarly Monographs and Book Chapters About Justice O’Connor

106. ROBERT W. VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O’CONNOR (1998). In the Introduction, the author notes that several commentators describe Justice O’Connor as a “moderate” voice on the Supreme Court. *Id.* at 2. However, he also observes that “[w]hether this moderation might not simply demonstrate a shifting of the Court’s ostensible ideological center, or whether O’Connor’s supposed shift is merely indicative of the substantive types of cases which the Court has chosen to hear in recent terms, are questions which have received much less attention.”¹⁰⁵ *Id.* at 2–3. Van Sichel posits that since Justice O’Connor joined the Supreme Court in 1981, her opinions and votes in cases have been “broadly consistent with the Reagan Administration’s policy agenda.” *Id.* at 3.

The study sets out to answer four related questions about Justice O’Connor: (1) whether there is an “overarching normative legal philosophy which ‘drives’ O’Connor’s behavior and thinking on the bench”; (2) whether any “‘formal’ theories of judicial behavior”¹⁰⁶ contribute to “understanding O’Connor’s approach to adjudication”; (3) whether Justice O’Connor views have evolved; and (4) whether “Justice O’Connor ‘fits’ into the Supreme Court of the last fifteen years.” *Id.* at 4–5. To answer these questions, Van Sichel synthesizes

104. Kelso explains that in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Stewart found that Congress did not intend to permit race to be considered as a factor in employment determinations. Kelso, *supra* annot. 104, at 270. Likewise, Kelso writes that in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Stewart argued “in dissent that affirmative action denies equal protection because the Constitution is color blind.” Kelso, *supra* annot. 104, at 270.

105. Van Sichel opines that although the number of signed opinions has declined in the last fifteen years, “the Court’s overall agenda has changed little in public policy terms.” Van Sichel, *supra* annot. 106, at 3 n.8.

106. Formal theories of judicial behavior include the role of the judge’s background or political ideology in their jurisprudence; for Justice O’Connor, this includes her “‘local’ professional experience” and western ideology. Van Sichel, *supra* annot. 106, at 2, 21–22.

cases (particularly those decided in Justice O'Connor's first decade on the Court), examines other substantive materials written about Justice O'Connor, and examines her legislative voting record and opinions drafted on the Maricopa County Superior Court and Arizona Court of Appeals. *Id.* at 15, 44.

Van Sickel concludes the Introduction by stating that "Justice O'Connor consistently exhibits . . . a 'marginalist' approach to legal and political questions." *Id.* at 5. Her adjudication is within the context of "an essentially conservative political ideology." *Id.* Each chapter begins with an interesting and introspective quotation from Justice O'Connor. *See, e.g., id.* at 1, 13, 43, 73, 111, 161. The work also includes a thorough bibliography. *Id.* at 181-95.

107. ROBERT ZELNICK, *SWING DANCE: JUSTICE O'CONNOR AND THE MICHIGAN MUDDLE* (2004). The author begins by charting Justice O'Connor's abortion decisions, finding that her jurisprudence on abortion developed in a similar fashion to her jurisprudence on race. *Id.* at 5-6. In addition, the author examines the history of affirmative action and the leading Supreme Court cases preceding Justice O'Connor's appointment.¹⁰⁷ Next, the author examines the Justice's employment discrimination cases that show her early approach to dealing with the issue of race discrimination. *Id.* at 30. Zelnick observes that in these early cases, Justice O'Connor distinguished her approach from the "result-oriented activism" of Justices Blackmun, Brennan, and Marshall by consistently applying strict scrutiny: compelling state interest and narrow tailoring. *Id.* at 45. Zelnick describes the three types of affirmative action cases that came before the Court during those years, and discusses Justice O'Connor's approach in these cases.¹⁰⁸ *Id.*

Zelnick thoroughly discusses the history of affirmative action and provides a critical review of percentage plans in a historical context, with an in-depth look at the experiences in Texas, California, and Florida. *Id.* at 67-92. As the title of the book suggests, the text provides a detailed analysis of the University of Michigan affirmative action cases, which includes a discussion of the school's affirmative action programs, the development of the cases, the legal teams for both sides, and the methodology and litigation strategy. *Id.* at 93-118. The author provides excerpts and analysis from oral argument, with particular

107. Those cases include *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *United Steel Workers v. Weber*, 443 U.S. 193 (1979), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *See Zelnick, supra* annot. 107, at 12-25.

108. The first type of affirmative action case identified are those where a private contract or consent decree includes a racial preference, such as *Weber*, 443 U.S. 193. *Zelnick, supra* annot. 107, at 45. The second type involve government programs that provide African Americans special benefits in specified areas in order to integrate the economic sector. *Id. Bakke*, 438 U.S. 265, and *Fullilove*, 448 U.S. 448, are two examples. *Zelnick, supra* annot. 107, at 12-25. The third type of case has to do with judicially imposed remedies for past acts of unlawful discrimination and includes *Local 28 of the Sheet Metal Workers International Association v. EEOC*, 478 U.S. 421 (1986), and *United States v. Paradise*, 480 U.S. 149 (1987). *Zelnick, supra* annot. 107, at 45-46.

attention paid to Justice O'Connor's questions and the legal counsel's responses. *Id.* at 140–41. While discussing all aspects of the case, the author pays particular attention to Justice O'Connor's analysis and opines that by approving the law school's admission policy in *Grutter v. Bollinger*,¹⁰⁹ she “found her way back to the position of society's elites . . . displayed unusual obedience to the whims of big education and its myriad allies.” *Id.* at 167. The author concludes with a broader discussion of race and education.

108. ELIZABETH VRATO, *THE COUNSELORS: CONVERSATIONS WITH 18 COURAGEOUS WOMEN WHO HAVE CHANGED THE WORLD* (2002). Vrato discusses the women's suffrage movement, quoting a statement by Justice O'Connor regarding Abigail Adams: “In 1776, Abigail Adams—the wife of future President John Adams—implored her husband, ‘Remember the Ladies!’ in drafting this nation's new charter.” *Id.* at 59. Vrato continues by discussing the Seneca Falls Conference and the New Women's Movement. She discusses the hurdles that professional women face and recounts Justice O'Connor's inability to find employment with a law firm because of her gender. The book also includes a chapter about Ruth Bader Ginsburg. *Id.* at 173–88. In that chapter, Justice Ginsburg reflects that Justice O'Connor was “like a big sister,” despite their jurisprudential differences. *Id.* at 184.

109. Beverly B. Cook, *Justice Sandra Day O'Connor: Transition to a Republican Court Agenda*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 238 (Charles M. Lamb & Stephen C. Halpern eds., 1991). Focusing on the years that Justice O'Connor sat as a member of the Burger Court from 1981–1986, Cook evaluates Justice O'Connor's jurisprudence using three frameworks: (1) the Justice's judicial agenda; (2) President Ronald Reagan's agenda for the Court; and (3) the Court's own agenda. Cook highlights that both Republican and Democratic values are reflected in Justice O'Connor's decisions. Cook examines the Republican Party values in Justice O'Connor's opinions by looking at her contribution to federalism, substantive law and order—including access to the courts, *Miranda* requirements, right to counsel, double jeopardy, and capital punishment—the separation of church and state, property rights, and judicial restraint. Similarly, she examines the Democratic Party values in Justice O'Connor's jurisprudence on freedom of speech, press and religion, individual autonomy, equality, affirmative action and racial equality. Cook concludes by observing that Justice O'Connor's opinions demonstrate “a willingness to examine case facts carefully and to eschew blind ideological voting.” *Id.* at 271. Cook's essay also includes a short

109. 539 U.S. 306 (2003).

biographical section that provides several astute observations about the influence of Justice O'Connor's background on her jurisprudence.¹¹⁰

110. NANCY MAVEETY, *JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT* (1996). Maveety observes that, at the time this book was written, analysis about Justice O'Connor focused on her "famous firsts." *Id.* at ix. In this work, Maveety aims to provide a more balanced view of Justice O'Connor, revealing the Justice to be "a key strategist shaping the collective outputs of the Burger and Rehnquist Courts." *Id.* Specifically, Maveety discusses Justice O'Connor's contributions to the development of constitutional law, and Maveety observes and explores three aspects of her jurisprudence in this work. They include her "fact-based decision-making accurately described as contextual conservatism[,] . . . her coalitional predilections . . . to join the winning side of a 5-4 majority on the Court," and her use of "concurring opinions to shape the development of legal doctrine." *Id.* at 4. Maveety's chapters focus on Justice O'Connor's personal and professional background, her judicial record, and specific constitutional issues. *Id.* at 5.

C. Biographical Works

111. JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* (2005). Although Justice O'Connor would not meet with Biskupic for this book, Biskupic relied on a wide range of sources for this substantial biography, including Justice O'Connor's Supreme Court colleagues, family members, and former colleagues. *Id.* at 343. The biography weaves the stories of Justice O'Connor's personal and professional experiences and includes extensive discussions about her landmark cases and her jurisprudence as it shaped the areas of race discrimination, religion, and abortion, among others. *See, e.g., id.* at 146-51, 282-86, 319-22. Biskupic also reflects on Justice O'Connor's nomination and confirmation to the Supreme Court as well as relationships with each of her Supreme Court brethren. *Id.* at 73-98, 159. Biskupic's work includes endnotes to numerous sources, including the Day family archival materials and papers of former Supreme Court Justices, upon which she relies for her analysis. *E.g., id.* at 346, 358.

112. ANN CAREY MCFEATTERS, *SANDRA DAY O'CONNOR: JUSTICE IN THE BALANCE* (2005). Written as a work in the Women's Biography Series,

110. Cook opines that Justice O'Connor "never held the kind of prestigious private and public law jobs that have prepared male lawyers for federal appellate judgeships, but she learned to appreciate the law work done at the state and local level." Cook, *supra* annot. 109, at 239. Cook also notes that "[a]s an overqualified woman who found her opportunities only in minor public offices below the national level, she developed a commitment to state and local government, legislative responsibility, and judicial modesty." *Id.*

McFeatters offers a biographical account of Justice O'Connor's life and professional achievements. The work sketches Justice O'Connor's childhood on the Lazy B Ranch, through her appointment to the Supreme Court, and her years serving on the Court. McFeatters also reflects on Justice O'Connor's personal life, balancing marriage, three children, and a demanding career in public service. In the Epilogue, McFeatters provides a thoughtful discussion of Justice O'Connor's resignation from the Court and the potential impact of this void. *Id.* at 211–18. Although this biography includes a useful bibliography and index, the text does not contain footnotes.

113. DAWN BRADLEY BERRY, *THE 50 MOST INFLUENTIAL WOMEN IN AMERICAN LAW* 207 (1996). Situating Justice O'Connor among the “earliest trailblazers” in the legal profession and contemporary, notable female lawyers, Berry provides a short but detailed biography in her section on Justice O'Connor, highlighting the Justice's professional and personal accomplishments. *Id.* at xi, 207–13.

D. Tributes to Justice O'Connor

1. By Supreme Court Justices

114. Anthony M. Kennedy, *William Rehnquist and Sandra Day O'Connor: An Expression of Appreciation*, 58 STAN. L. REV. 1663 (2006). Beginning with a tribute to the late Chief Justice Rehnquist, the author discusses how the West not only shaped the former Chief Justice, but also Justice O'Connor and contributed to her judicial philosophy. Justice Kennedy characterizes Justice O'Connor's approach to decision-making as case-by-case, marked by the notion of utility, which is rooted in her upbringing on a ranch in a young state in the West. *Id.* at 1669–71.

115. Ruth Bader Ginsburg, *Reflections on Arizona's Pace-Setting Justices: William Hubbs Rehnquist and Sandra Day O'Connor*, 49 ARIZ. L. REV. 1 (2007).¹¹¹ In these remarks, Justice Ginsburg “reflect[s] on the contributions . . . to the health and well-being of the Court” by Justices Rehnquist and O'Connor. *Id.* at 1. Justice Ginsburg characterizes Justice O'Connor as the jurist who has made the greatest contribution to collegiality among the Court members and their international counterparts. *Id.* at 6. In addition, the tribute includes charming observations and anecdotes about Justice O'Connor, among others, that Justice O'Connor wore “collars from British gowns, and a ‘frilly’ French foulard.” *Id.* at 4. So as not to be outdone by the women on the Court,

111. This tribute elaborates on another one of Justice Ginsburg's remarks published in an earlier piece. See Ginsburg, *Reflections on Arizona's Pace-Setting Justices*, *supra* annot. 115, at 1 n.* (citing Ruth Bader Ginsburg, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1239 (2006), *infra* annot. 116).

Justice Ginsburg states, Chief Justice Rehnquist wore a robe that he copied from the Lord Chancellor in a local production of Gilbert and Sullivan's *Iolanthe*. *Id.*

116. Ruth Bader Ginsburg, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1239 (2006). In this tribute, which the *Harvard Law Review* dedicated to Justice O'Connor "[o]n the occasion of her retirement from the Supreme Court," Justice Ginsburg characterizes O'Connor as in her other tributes.¹¹² *Id.* at 1239. Justice Ginsburg remarks that in the twelve years that she and Justice O'Connor shared seats on the Supreme Court Bench, Justice O'Connor displayed energy and enthusiasm, even when recovering from breast cancer, and presented her views at Supreme Court conferences in a direct, colloquial manner.¹¹³ *Id.* at 1240–41. Justice Ginsburg also reflects on the Court's decisions striking down gender stereotypes, from Justice O'Connor's decision in *Mississippi University for Women v. Hogan*,¹¹⁴ which was decided by a five-to-four vote, to Justice Ginsburg's decision in *United States v. Virginia*,¹¹⁵ which was decided by a seven-to-one vote. *Id.* at 1241–42.

117. Stephen G. Breyer, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1242 (2006). Justice Breyer reflects on Justice O'Connor's accessibility, which was demonstrated in her commitment to the rule of law, professionalism, and public service for lawyers. *Id.* at 1246. He commented on two cases decided at the end of Justice O'Connor's tenure on the Court that illustrate her "practical understanding of the institutional role that courts must play in America's system of government" where democratic values, protection of basic human freedoms, respect for all citizens, and separation of powers are preserved among different levels of government. *Id.* at 1243. Those cases are *Grutter v. Bollinger*¹¹⁶ and *Hamdi v. Rumsfeld*.¹¹⁷

112. *See id.* at 6–9.

113. Justice Ginsburg notes that Justice O'Connor's civil style is in contrast to fellow Supreme Court Justices. *Id.* at 1241 n.6–8 (citing several opinions to illustrate cases where Justices used uncivil language: *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); *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); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting)).

114. 458 U.S. 718, 733 (1982) (holding that a state-supported university's admission policy that limited nursing school's enrollment to women, thereby denying admission to qualified men, violated the Equal Protection Clause).

115. 518 U.S. 515, 530–31, 534 (1996) (holding that the Equal Protection Clause was violated because the Commonwealth did not show an exceedingly persuasive justification for excluding women from the Virginia Military Institute).

116. 539 U.S. 306 (2003).

117. 542 U.S. 507 (2004).

2. *By Members of the Legal Profession*

118. Scott Bales, *Justice Sandra Day O'Connor: No Insurmountable Hurdles*, 58 STAN. L. REV. 1705 (2006). Bales served as Justice O'Connor's law clerk during the 1984 October Term, and believes "she is regarded as the world's most influential woman lawyer, both for her role on the Court and as a global spokesperson for judicial independence and the rule of law." *Id.* at 1705 & n.*. His tribute provides biographical details from her childhood on the Lazy B Ranch to her work on the Supreme Court.

119. Michelle T. Friedland, *A Wise Justice, and a Great Boss*, 58 STAN. L. REV. 1717 (2006). Friedland served as Justice O'Connor's clerk during the 2001 October Term, and she movingly describes how Justice O'Connor "lived life to the fullest." *Id.* at 1717 n.*, 1719. Examples include Justice O'Connor's morning aerobics class at the Supreme Court's basketball court, "often referred to as 'the highest court in the land,'" impromptu field trips to baseball games and the Smithsonian Institution (among other destinations), a willingness to chat with strangers, and frequent yet inventive cooking that she would share with her clerks. *Id.* at 1717.

120. Kent D. Syverud, *Lessons from Working for Sandra Day O'Connor*, 58 STAN. L. REV. 1731 (2006). Syverud served as Justice O'Connor's law clerk during the 1984 October Term. *Id.* at 1721 n.*. In this tribute, he comments on her reflective method of decision-making, narrow application of theory to the specific set of facts presented, appreciation of all sides and perspective of a well-reasoned argument, and faith manifest in public service. The tribute also includes refreshing anecdotes and observations, such as how Justice O'Connor did not like footnotes in memos or opinions, and that she called her clerks' children "grandclerks" and allowed them to be brought to chambers when work and family demands so required. *Id.* at 1733.

121. Glen D. Nager, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1248 (2006). As an O'Connor law clerk during the 1983 October Term, Nager reflects on Justice O'Connor's "admirable nonjudicial personae." *Id.* at 1248 & n.*. In his tribute, he describes the Justice's admiration of the institution of marriage, having a penchant for matchmaking, commitment to family, affection for her western heritage, her adept (but appropriately private) sense of humor, and enthusiasm for sports and exercise. Nager also characterizes Justice O'Connor as deeply committed to, and loving of, her country and its people.

122. Kathleen M. Sullivan, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1251 (2006). Sullivan identifies three roles in Justice O'Connor's life that "left indelible traces in Justice O'Connor's jurisprudence

while on the Court.” *Id.* at 1252. Justice O’Connor’s roles as a judge, legislator, and westerner marked her development of case law, and Sullivan explains the cases reflecting these three roles.

123. Viet D. Dinh, *First Impressions: A Tribute to Justice Sandra Day O’Connor*, 21 SETON HALL LEGIS. J. 3 (1997). Dinh, a former law clerk for Justice O’Connor, reflects on her commitment to federalism in this tribute. Observing that behind her adherence to state sovereignty, separation of powers, and the democratic process, Justice O’Connor harbors a profound concern and caring for people. In Dinh’s words, Justice O’Connor’s federalism “fosters human capacity for self-governance.” *Id.* at 8.