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## II. THE O'CONNOR COURT?

### *In This Section*

- “Consistently, A Pivotal Role”  
*Linda Greenhouse* p. 35
- “O’Connor Not Confined by Conservatism”  
*Joan Biskupic* p. 39
- “Which Important Precedents are Likely to Be in Jeopardy?”  
*Marty Lederman* p. 43
- “The Power of Unpredictability: Justice Sandra Day O’Connor’s  
Numerous Swing-Vote Decisions Have Kept U.S. Supreme Court  
Watchers Guessing”  
*Dahlia Lithwick* p. 45
- “O’Connor Leap Moved Women Up the Bench”  
*Adam Liptak* p. 47
- “How O’Connor and the Court Have Drifted Leftward”  
*Stuart Taylor, Jr.* p. 50
- “A Majority of One”  
*Jeffrey Rosen* p. 53
- “Fall Cases on Hot-Button Issues May Hinge on the New Justice”  
*Charles Lane* p. 62
- “An Advocate for the Right”  
*David E. Rosenbaum* p. 65
- “Reading Robert’s Mind”  
*Terry Eastland* p. 68
- “In Search of John Roberts”  
*Jeffrey Rosen* p. 74

## “Consistently, A Pivotal Role”

*New York Times*  
July 2, 2005  
Linda Greenhouse

### **The O'Connor Court.**

The phrase has been used so many times over so many years to describe the Supreme Court that it is nearly a cliché. Yet the simple words capture an equally simple truth: to find out where the court is on almost any given issue, look for Justice Sandra Day O'Connor.

If you are a lawyer with a case at the court, pitch your arguments to her. If your issue is affirmative action, or religion, or federalism, or redistricting, or abortion, or constitutional due process in any of its many manifestations, you can assume that the fate of that issue is in her hands. Don't bother with doctrinaire assertions and bright-line rules. Be meticulously prepared on the facts, and be ready to show how the law relates to those facts and how, together, they make sense.

And it is because Justice O'Connor has played such a pivotal role on the court for much of her 24-year tenure that her unexpected retirement is such a galvanizing event. Much more than the widely anticipated retirement of the predictably conservative Chief Justice William H. Rehnquist, her departure creates an opportunity for President Bush to shape the court.

The last such defining moment occurred with the retirement in 1987 of Justice Lewis F. Powell Jr., whose position on the court then resembled Justice O'Connor's today. President Ronald Reagan nominated a polarizing conservative, Robert H. Bork,

whose defeat by a Democratic-controlled Senate after a protracted battle still resonates today.

A list of the issues on which Justice O'Connor has held the balance of power goes far to explain why holiday weekend preparations screeched to a halt in Washington on Friday morning as word spread of her decision to retire.

Just two years ago, she wrote the opinion for the 5-to-4 majority that upheld affirmative action in university admissions. Earlier, in a series of decisions interpreting the Constitution's guarantee of equal protection, she led or joined 5-to-4 majorities that viewed with great suspicion government policies that took account of race in federal contracting, employment and electoral redistricting. Her view was that the government should not be in the business of counting by race.

But in *Grutter v. Bollinger*, the University of Michigan case decided in 2003, she became persuaded that affirmative action in university admissions was still justified. “Effective participation by members of all racial and ethnic groups in the civic life of our nation is essential if the dream of one nation, indivisible, is to be realized,” she wrote.

Until the pair of Ten Commandments decisions this week, which found her in dissent from the ruling that upheld a Ten Commandments monument on the grounds of the Texas Capitol, she had occupied a central position on the role of religion in

public life.

Beginning with her earliest years on the court, Justice O'Connor adopted her own test for evaluating whether government policy amounted to an unconstitutional establishment of religion. Instead of a three-part test that the court used, she asked whether the government policy under review conveyed to nonadherents the message that they were "outsiders, not full members of the political community."

This led her to vote to prohibit public prayer at high school graduations and football games, but to insist on equal access for student religious publications and clubs. In 2002, she voted with the 5-to-4 majority that upheld the use of publicly financed tuition vouchers at religious schools. In her opinion this week concurring with the 5-to-4 majority that declared framed copies of the Ten Commandments hanging in Kentucky courthouses to be unconstitutional, she said the Constitution's religion clauses "protect adherents of all religions, as well as those who believe in no religion at all."

On the other most intensely fought social issue of the day, abortion, Justice O'Connor's successor will not be in a position to move the court away from its support of the core right to abortion, now at 6 to 3. But in the court's last major abortion ruling, five years ago, Justice O'Connor provided the crucial fifth vote to strike down Nebraska's ban on what were called "partial birth" abortions.

She has been a loyal ally of her Stanford Law School classmate Chief Justice William H. Rehnquist in the court's continuing reappraisal of the relationship between the states and the federal government, joining the five-member majority in a series of cases that have insisted on greater respect for the

sovereignty of the individual states while limiting the role of Congress.

One of the few federalism cases in which she and Justice Rehnquist parted company came last year in *Tennessee v. Lane*, on whether states were immune from being sued for failing to make their courthouses accessible to people with disabilities. Justice O'Connor provided a fifth vote against immunity, while Chief Justice Rehnquist dissented. The plaintiff was a man who used a wheelchair and who had been forced to crawl up the stairs to reach the courtroom in a Tennessee county courthouse.

To the extent that Justice O'Connor had an overall judicial philosophy, she might have expressed it most directly in an opinion dissenting from a 1995 decision that authorized public school districts to subject student athletes to drug testing without any suspicion of individual wrongdoing. The policy was justified to deal with rampant student drug use, the district had argued in *Vernonia School District v. Acton*.

In her dissenting opinion, Justice O'Connor warned that judges should be wary of overreacting to such arguments.

"Some crises are quite real" but some are not, she said. "The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone."

Sandra O'Connor's pragmatic approach to life and the law was probably born in the stark and isolated desert of the Southwest that she described in vivid detail in *Lazy B*, a childhood memoir she published three years ago. The Day family ranch, 250 arid square

miles straddling the Arizona-New Mexico border, “was no country for sissies,” she wrote.

The house, 35 miles from the nearest town, had neither electricity nor running water. Her companions were horses and ranch hands, and her goal as the first-born child was to be useful around the place and to please her hard-driving, perfectionist father. When things broke, they needed to be fixed. There was little room for discussion and none for theorizing.

Fulfilling her father's own ambition that had been thwarted by the lack of money, she attended Stanford University and Stanford Law School, where she graduated third in the class of 1952 at the age of 22. The top honors in the class went to a World War II veteran more than five years her senior, William H. Rehnquist. He went on to a Supreme Court clerkship. As a woman, she could not get a job with the law firms to which she applied, receiving offers of secretarial jobs instead.

She turned to the public sector as a lawyer for state and local governments, while raising three sons with her husband, John, who had been a fellow law-review editor at Stanford. The couple settled in Phoenix, where civic activities led her to a career in Republican politics. The Arizona governor appointed her to a vacant seat in the State Senate in 1969, and she later twice won election. She became majority leader, the first woman in the country to hold such a high leadership position in a state legislature.

In 1974, she was elected to a seat on the state trial court. Five years later, Gov. Bruce Babbitt, a Democrat, appointed her to the state appeals court, where she was serving when President Reagan, who had

promised to appoint a woman to the Supreme Court, chose her in July 1981 for the first vacancy to occur during his term. She was confirmed unanimously, forever to be known as the first woman on the Supreme Court, or F.W.O.T.S.C., as she has put it dryly.

Although hardly a feminist in terms of political activism, Justice O'Connor demonstrated from her earliest years on the court a sensitivity to issues of sex discrimination that she maintained throughout her tenure.

One of her first majority opinions, in 1982, came in *Mississippi University for Women v. Hogan*. The 5-to-4 decision declared unconstitutional the exclusion of a male applicant from a state-supported, women-only nursing school. Her opinion warned against using “archaic and stereotypic notions” about proper roles for men and women.

On several occasions, including this year, she joined the four more liberal justices to uphold a broad interpretation of a federal statute addressing sex discrimination. In 1999, for example, she wrote the opinion for a 5-to-4 majority in *Davis v. Monroe County Board of Education*, holding public school districts accountable for one student's sexual harassment of another student.

And during the term that just ended, she wrote the majority opinion in another 5-to-4 decision, *Jackson v. Birmingham Board of Education*, that expanded the scope of the sex discrimination law known as Title IX to provide protection against retaliation for whistle-blowers who complain about discriminatory practices in schools and colleges.

One exception came in 2000, when she

joined Chief Justice Rehnquist's 5-to-4 majority opinion in *United States v. Morrison*, invalidating a provision of the Violence Against Women Act on the ground that Congress had lacked the constitutional authority to enact the law.

The most famous, or notorious, 5-to-4 opinion in 2000 was, of course, *Bush v. Gore*, which ended the Florida recount and effectively called the presidential election for George W. Bush. Justice O'Connor joined the unsigned opinion that declared the conditions of the recount to violate the constitutional guarantee of equal protection.

While Mr. Bush was undoubtedly pleased by that decision, he was just as undoubtedly displeased last year when the court refused to accept his administration's position that the federal courts lacked jurisdiction to hear challenges to the open-ended detention of those being held both at the United States naval base at Guantanamo Bay, Cuba, and in military custody in the United States.

"A state of war is not a blank check for the president," Justice O'Connor wrote for the court in *Hamdi v. Rumsfeld*. She said "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others." In a second case decided at the same day last June, *Rasul v. Bush*, she joined the majority opinion

extending federal jurisdiction to the Guantanamo detainees.

During the term that ended on Monday, Justice O'Connor was on the losing side in two major cases: *Kelo v. City of New London*, which upheld governmental power to use eminent domain for economic development, and *Gonzales v. Raich*, upholding the federal government's power to enforce federal drug laws in states that permit marijuana to be used for medical purposes.

Justice O'Connor learned she had breast cancer early in the court's 1988 term and underwent a mastectomy and follow-up treatment. She never missed a day that the court was on the bench, and only years later did she reveal publicly, in a talk to other cancer survivors, how stressful the period had been. She also bounced back quickly from an emergency appendectomy.

In recent years, she has maintained an active schedule of public speaking and foreign travel, in addition to writing two books. It was her husband's deteriorating health, not her own brushes with illness, that finally wore down a woman who still proudly refers to herself as a cowgirl.

"She has taught us all," her friend and colleague Stephen G. Breyer said Friday in a statement released by the court.

## “O'Connor Not Confined by Conservatism”

*USA Today*  
June 24, 2004  
Joan Biskupic

She is an enduring part of Ronald Reagan's legacy, the first woman justice on the U.S. Supreme Court. But for years, Sandra Day O'Connor has confounded many of the conservatives for whom the late president is an icon.

On a divided, nine-member court, O'Connor is a conservative with an asterisk: a pragmatic jurist who, when she sees fit, will vote with the four liberal justices. Particularly galling to some conservative Republicans has been O'Connor's retreat from initial stands against abortion rights and some affirmative action policies.

Lately, the 23-year veteran of the high court has been giving such critics more reasons to gripe. Although O'Connor usually votes with the court's conservative wing, she increasingly has sided with the liberals in significant cases that have been decided by 5-4 votes. It's led some conservative observers of the court to wonder whether O'Connor, at 74, is turning more to the left.

In May, she broke with her conservative brethren to cast a decisive vote to let disabled people sue states for access to courthouses. Earlier this term, she joined the court's liberals—John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer—to preserve key parts of the McCain-Feingold campaign-finance limits, which ban unlimited donations from corporations and unions to national political parties.

She also joined the liberals in 5-4 rulings that enhanced the U.S. government's power

to enforce the Clean Air Act on states, and that allowed taxpayers to sue states to challenge tax credits that benefit religious schools.

That all followed a landmark ruling last summer, when O'Connor's opinion upheld the use of affirmative action in college admissions.

Many legal analysts see such votes by O'Connor as signs of her tendency to view each case along narrow legal lines. But some conservatives say she seems to be enticed more by the left, and that unlike Souter—an appointee of the first President Bush who has become a consistent vote for the liberal wing—they never know when O'Connor will be with them or against them.

### **Reagan would be disappointed**

With several major rulings due in the next week as the high court wraps up this term—including key tests of the Bush administration's legal strategies in dealing with suspected terrorists—O'Connor is being viewed warily by some supporters of the administration.

"Reagan would be disappointed in her recent rulings," says Charles Cooper, a Washington lawyer who was an assistant U.S. attorney general under Reagan. "It is difficult to reconcile some of her recent cases and things she said in the past."

So is O'Connor really showing signs of latent liberalism after nearly a quarter-century on the nation's highest court?

A closer look at O'Connor's recent decisions—and at others throughout her tenure—suggests that she often is driven not by ideology, but by general pragmatism and life experiences that are atypical among the current justices.

She was a rancher's daughter who was taught the virtues of rugged individualism; a woman lawyer who had trouble finding work in a profession dominated by men; an elected Arizona legislator familiar with the relationship between money and politics, and a state trial judge who sees access to courts as fundamental.

Several of O'Connor's recent votes seemed to reflect those experiences, particularly as the only current justice who has raised campaign money and run for public office.

During the past six months, O'Connor was the only justice who was in the majority to uphold the new campaign-finance law (a move that infuriated conservatives) and in the majority to prevent voting rights lawsuits against partisan gerrymanders (a move that irritated liberals).

"Perhaps I am swayed by my own experience as a legislator," she said in a note to a fellow justice when the court first reviewed partisan gerrymanders in 1986, and she urged her colleagues to leave them alone. Such oddly shaped congressional districts, drawn by the party controlling a statehouse to favor its candidates, have become more common in recent years as parties have used computer programs to reshape districts.

"There is no question that she has a distinctive world orientation from the other justices," says Cardozo Law School professor Marci Hamilton, a former law clerk to O'Connor. "But it's more than that.

She is the anti-ideologue. She will never let theory trump reality."

Other legal analysts say O'Connor has resisted taking positions that she believes most Americans would not accept—most notably on abortion.

"This is a justice who is tempted by analytical consistency," says David Garrow, a law professor at Emory University in Atlanta. "But when analytical consistency seems to be carrying her to an outcome that would draw widespread denunciation, she draws back."

Overall, O'Connor votes most often with Chief Justice William Rehnquist (80% of the time during the past four years), and least often with senior liberal Justice John Paul Stevens (58% of the time during the same period).

In most 5-4 rulings, O'Connor votes with the court's conservatives—Rehnquist, Antonin Scalia, Anthony Kennedy and Clarence Thomas. But the percentage of 5-4 rulings in which O'Connor has joined the liberals has risen in recent years, from 5.6% in the 1999-2000 term to 28.6% in 2002-2003.

To many Americans, O'Connor is a symbol of women's rights because of her historic ascension to the court. Among Republicans she forever will be linked to Reagan, who in 1981 fulfilled a campaign promise when he tapped her as the first woman justice. Today, her stature is such that few in the GOP dare to openly criticize her.

At the former president's funeral June 11, O'Connor, as Reagan requested, read part of the 1630 sermon by Massachusetts Puritan John Winthrop expressing the ideals of a "city on a hill."

Immediately afterward she flew to Phoenix,



where she received a "distinguished career" award that night from the State Bar of Arizona. Looking out at the crowd of 350 who had paid \$ 150 a plate to attend a dinner saluting her, O'Connor praised Reagan for "opening countless doors to women."

### **Early lessons in Arizona**

O'Connor grew up on a ranch on the Arizona-New Mexico border, the daughter of a man who preached individual initiative and resented the New Deal welfare of Democrat Franklin D. Roosevelt. When she became a judge, she would show a similar distaste for the U.S. government's intervention in local affairs and would emphasize states' rights, a frequent theme on today's Supreme Court.

At age 16 in 1946, she entered Stanford University, where, she has said, she thrived and became interested in notions of community and the power of the law.

But O'Connor has said that when she graduated from law school in 1952 she was rejected by every law firm to which she applied. One firm offered her a job as a legal secretary—"depending on my typing," O'Connor recalled at the Phoenix dinner. She declined it.

O'Connor wound up working in a county attorney's office. She eventually returned to Arizona and quickly rose through the ranks of state politics.

A Republican loyalist, O'Connor worked on Barry Goldwater's Senate re-election bid in 1958, passing out bumper stickers and stuffing envelopes. In 1972, she was an Arizona co-chairman of Richard Nixon's presidential re-election campaign.

From 1969-1975, she was a state senator. For two of those years, she was Senate

majority leader, the first woman to hold such a post in the nation. Under the copper dome of Arizona's capitol, O'Connor learned to maneuver for her legislative priorities and to build consensus—experience that now seems to help her negotiate with justices who are more conservative or more liberal than she is.

During her first several years on the Supreme Court, O'Connor regularly lined up with fellow conservatives Warren Burger (who was then the chief justice) and Rehnquist, a classmate of O'Connor's from Stanford who became the chief after Burger retired in 1986.

But even in her first term, she broke from the right in a major case involving a Mississippi man who had been rejected by a state-run nursing school.

O'Connor cast the fifth vote in favor of Joe Hogan, who claimed that the state-run school violated the Constitution's guarantee of equal protection under the law by excluding men. In the opinion she wrote for the court, she said excluding men from nurse training "tends to perpetuate the stereotyped view of nursing as an exclusively women's job."

Her move away from conservatives on abortion was gradual.

In opinions in 1983 and 1986, she said the legal rationale of *Roe vs. Wade*, the 1973 ruling that made abortion legal nationwide, was "unworkable." In dissenting opinions with other conservatives, she backed state abortion limits.

But in 1989, O'Connor appeared to have misgivings about where the court—with the addition of more conservative jurists—was headed on abortion, and she softened her

criticism of *Roe*. In 1992, she voted to uphold a woman's right to end a pregnancy and emphasized, in an opinion with Kennedy and Souter, how long women had relied on the *Roe* ruling.

### **Embracing affirmative action**

A case last June that challenged racial preferences in college admissions played to O'Connor's experience as a young lawyer and her willingness to back away from a legal principle for pragmatic reasons.

Before the University of Michigan case, O'Connor generally had opposed government policies that favored minorities because of their race.

But arguments about the value of diversity in education won O'Connor's vote in the Michigan dispute, and she joined the majority in a 5-4 ruling in favor of affirmative action. The justice who has said she felt poorly prepared for college but then blossomed at Stanford wrote that the "path to leadership" offered by education must be open to all qualified students.

Last December, O'Connor again was the fifth vote, joining the liberals to uphold the campaign-finance overhaul named for Sens. John McCain, R-Ariz., and Russ Feingold, D-Wis. The law banned unregulated contributions from corporations and labor groups to political parties, and restricted political ads on TV.

The opinion she wrote with Stevens acknowledged that "money, like water, will always find an outlet" to influence politics. It also emphasized deference to elected lawmakers.

Last month, O'Connor was back with the

court's liberal wing as she broke with her usual pattern of protecting states from lawsuits based on federal civil rights laws. In a case brought by a man in a wheelchair who had to crawl up courthouse steps to get to a hearing, the court voted 5-4 to allow people to sue states under the Americans with Disabilities Act for access to courthouses.

O'Connor is familiar with the gritty side of local courts. She first donned a black robe for trials in a dingy Phoenix courtroom where she kept a can of bug spray to fight off cockroaches. In the ADA case, she joined an opinion by Stevens that stressed the importance of allowing people to participate in the judicial process.

Todd Gaziano, legal director of the conservative Heritage Foundation and a former Reagan administration lawyer, says O'Connor's vote in the disability case undermined earlier decisions in which she joined the court's conservatives. He says she deviated from rulings that set a high standard for when federal civil rights laws should be imposed on the states.

"She's certainly a disappointment" to conservatives, he says.

Gaziano says his group is eager to see how O'Connor votes in the upcoming cases that test parts of Bush's terrorism strategy.

The cases will determine whether suspected foreign terrorists held in Cuba should have access to U.S. courts, and whether the administration can lock up U.S. citizens indefinitely, without charges or a hearing.

O'Connor's decisions in those cases, Gaziano says, "will probably be more telling."

## “Which Important Precedents Are Likely to Be in Jeopardy?”

*SCOTUSblog*

July 1, 2005

Marty Lederman

These are among the cases in which Justice O'Connor's has been the decisive vote or opinion, and in which a more conservative Justice might well vote to overrule the governing precedent. (The most significant constitutional or quasi-constitutional rulings are in **boldface**.) From among these, I believe that the President's nomination has the potential to have the most significant impact on issues relating to the Establishment Clause and campaign financing. Obviously, some of the precedents in the abortion, affirmative action and takings areas might also be implicated in a dramatic way; but on these issues, it might take a longer while for the Court to have before it the proper vehicles for serious reconsideration. . . .

Caveat: The Court does not blithely overrule numerous precedents every time there is a change in membership (even when the change is the replacement of a "pivotal" Justice such as Justice O'Connor)—such changes are usually accomplished gradually, by accretion. Moreover, it is possible that the new Justice will be more "liberal" than Justice O'Connor in certain contexts, which could also lead to the overruling of some of the many 5-4 precedents in which Justice O'Connor has voted with the more conservative wing of the Court.

Note also: Because most Justices consider *stare decisis* a more serious obstacle in cases of statutory construction, those cases (e.g., the *Davis* and *Jackson* Title IX decisions) might be more secure, even if Justice O'Connor's replacement would not have agreed with her as a matter of first

impression.

***McCreary County v. ACLU*** (2005)—Ten Commandments displays

*Jackson v. Birmingham Board of Educ.* (2005)—Title IX Liability for Retaliation

*Rompilla v. Beard* (2005)—standard of reasonable competence that Sixth Amendment requires on the part of defense counsel

*Johanns v. Livestock Marketing* (2005)—assessments for government speech

*Smith v. Massachusetts* (2005)—double jeopardy

*Small v. United States* (2005)—felon firearm possession ban doesn't cover foreign convictions

***Tennessee v. Lane*** (2004)—Congress's Section 5 power

*Hibbs v. Winn* (2004)—Tax Injunction Act

*Alaska Department of Environmental Conservation v. EPA* (2004)—EPA authority under Clean Air Act to issue orders when a state conservation agency fails to act

***McConnell v. FEC*** (2004)—campaign finance

*Groh v. Ramirez* (2004)—sufficiency of non-particularized search warrant

*Grutter v. Bollinger* (2003)—affirmative action

*Brown v. Legal Foundation of Washington* (2003)—no takings violation in IOLTA funding scheme

*American Insurance Ass'n v. Garamendi* (2003)—presidential foreign-affairs "pre-emption" of state law

*Stogner v. California* (2003)—ex post facto clause as applied to changes in statutes of limitations

*Alabama v. Shelton* (2002)—right to counsel  
*Rush Prudential HMO v. Moran* (2002)—upholding state laws giving patients the right to second doctor's opinion over HMOs' objections

*Kelly v. South Carolina* (2002)—capital defendant's due process right to inform jury of his parole ineligibility

*FEC v. Colorado Republican Federal Campaign Committee* (2001)—upholding limits on "coordinated" political party expenditures

*Zadvydas v. Davis* (2001)—prohibiting indefinite detention of immigrants under final orders of removal where no other country will accept them

*Easley v. Cromartie* (2001)—race-based redistricting

*Rogers v. Tennessee* (2001)—"judicial" ex post facto

*Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001)—state action

*Stenberg v. Carhart* (2000)—"partial-birth abortion" ban

*Mitchell v. Helms* (1999)—direct aid to religious schools

*Davis v. Monroe County Board of Educ.* (1999)—recognizing school district liability under Title IX for student-on-student sexual harassment

*Schenck v. Pro-Choice Network* (1997)—injunctions against abortion-clinic protestors

*Richardson v. McKnight* (1997)—private prison guards not entitled to qualified immunity in section 1983 suits

*Camps Newfound/Owatonna v. Town of Harrison* (1997)—"dormant" Commerce Clause as applied to nonprofit camps

*Morse v. Republican Party of Virginia* (1996)—provisions of the Voting Rights Act are constitutional as applied to choice of candidates at party political conventions

*Schlup v. Delo* (1995)—habeas, actual innocence

UPDATE:

As Professor Doug Berman notes, Justice O'Connor also provided the crucial fifth vote in two cases creating exceptions to the *Apprendi/Blakely* doctrine: *Almedarez-Torres* (prior convictions) and *Harris* (mandatory minimum). She's also the fifth vote for Justice Breyer's governing remedial opinion in *Booker/Fanfan*—a vote that might have enormous practical consequences as future questions of application arise.

**“The Power of Unpredictability: Justice Sandra Day O'Connor's  
Numerous 'Swing-Vote' Decisions Have Kept  
U.S. Supreme Court Watchers Guessing”**

*Los Angeles Times*  
December 1, 2003  
Dahlia Lithwick

Saying that Sandra Day O'Connor represents the perennial "swing vote" on the United States Supreme Court is a legal truism. The term is invoked constantly—watch for it later this month as the court hands down its decision testing aspects of the McCain-Feingold campaign finance rules.

Is the presence of a "swing voter" a good thing for the court or the law? Or is it dangerous, as some critics suggest? O'Connor is often described as the most powerful woman in the country. Is it true?

Political theorists have long struggled to craft an empirical description of the "swing justice," but ultimately they can only agree that—to paraphrase Justice Potter Stewart, another notorious swing voter—we simply know one when we see one. And what we see in O'Connor is a justice who moves back and forth between two more or less established liberal and conservative blocs. When the court is fairly evenly divided, a justice such as O'Connor can easily be seen as controlling its direction.

In the 2002-2003 term, the high court decided nearly 20% of its cases by a 5-4 margin. In 12 of those 14 cases, O'Connor was in the majority. A good illustration of the way she "swings": her vote upholding the affirmative action program at the University of Michigan law school while she simultaneously invalidated as unconstitutional the school's undergraduate

program. She aligned herself with the court's liberal bloc to decide the former case and with the conservatives to decide the latter.

O'Connor comes by her lightning-rod status fairly, given that her unpredictability often surfaces in the court's highest profile cases—the ones that cut to core American tensions: race, religion, sexuality and crime. Over the years, her lone vote has meant the survival of affirmative action and abortion despite her conservative leanings. But it has also led to the erosion of the wall between church and state and the resurgence of state's rights, whittling away at the Warren court's liberal revolution.

Following her votes enshrining the constitutionality of affirmative action and striking down Texas' anti-homosexual sodomy law last term, and despite her tough-as-nails upholding of California's "three strikes" law, conservative critics spent the summer denouncing her as a monarch while liberals rejoiced in the thought that beneath her starchy exterior beats the heart of a hippie.

But it's not just her high-profile role in high-profile cases that creates controversy around O'Connor's votes. She (and to a lesser degree, her colleague Justice Anthony Kennedy—the court's less swifty "swing justice") often comes under attack because unpredictability seems like a bad quality in

interpreting the law.

If O'Connor and Kennedy aren't anchored in any ideological or jurisprudential doctrine, aren't they simply careening from belief to belief, like weathervanes in black robes? The real fear about O'Connor and Kennedy, then, is that they are either deciding cases based on what they ate for breakfast or, even worse in critics' eyes, based on law review articles, the theories of elite Ivy League professors or public opinion polls.

It is, of course, impossible to cite any evidence that O'Connor is actually swayed by such externalities. No one has caught her flipping coins in chambers, and it's unlikely anyone ever will. On the other hand, there is evidence—in some of her more controversial opinions and in her latest book, *The Majesty of the Law*—to suggest that O'Connor worries, perhaps more so than some of her colleagues, about the role of the court in history and about its continued legitimacy in the public mind. She has stubbornly refused to overturn some precedents with which she personally disagrees, showing a higher regard for stare decisis (the notion that from court to court there needs to be consistency in judgments) than ideology.

Overall, unpredictability does confer power on O'Connor. But if she is indeed the most powerful woman in the country, it's because of another characteristic that is alarming to her critics: the narrowness of her opinions. As a result of her crabbed, case-by-case

approach, whatever new law comes from an O'Connor decision may not apply in future cases unless—improbably—the future facts are identical.

She has thus become the lone architect of entire new legal structures—of O'Connor "sniff tests" for when abortion regulations are permissible (no "undue burden" on the pregnant woman); when gerrymanders of voting districts are constitutional (if they are not "bizarre") or when affirmative action programs in college are legal (if they foster "diversity"). O'Connor is willing to sacrifice future clarity in legal doctrine for future flexibility. And when she's the all-important "fifth" vote, the rest of the court has no choice but to go along for that ride.

Of course, O'Connor isn't the only important swing voter in history. Before her, Justice Lewis Powell was viewed as the perennial moderate, even when O'Connor sat on the court with him. And after his retirement, Powell wasn't derided as a capricious monarch. He was widely feted as a free thinker and balancer on an otherwise polarized court. Court watchers celebrated his ability to get beyond liberal and conservative dogma to arrive at equitable if unpredictable results.

Whether O'Connor will similarly be viewed someday as having brought a kind of equilibrium to the court or simply as having wrenched it into her own image is for history to decide. O'Connor doubtless likes it that way.

## **“O'Connor Leap Moved Women Up the Bench”**

*New York Times*

July 5, 2005

Adam Liptak

When President Ronald Reagan decided to nominate Sandra Day O'Connor as the first woman ever to the Supreme Court in 1981, he did not have a lot of other women to choose from. The bench, one might say, was not deep.

“The pool of well-credentialed women lawyers was minuscule at the time,” said Patrick J. Schiltz, a law professor at the University of St. Thomas in Minneapolis who served as a law clerk for Justice Antonin Scalia. “They had to reach for O'Connor. She wasn't even on the high court in Arizona. She was on a middle-level appellate court. Has there been another nominee to the Supreme Court from a midlevel state appeals court?”

The answer, it seems, is no. “You would be very hard pressed to find anyone in the history of the court who was elevated from that role,” said Kermit L. Hall, the president of the State University of New York at Albany and the editor of *The Oxford Companion to the Supreme Court of the United States*. “It speaks volumes to the presence of women on the bench at that time. O'Connor really opened up a set of opportunities that really would not have existed without her.”

A look at the courts shows the breadth of change across the quarter of a century bookmarked by Justice O'Connor's nomination and her retirement. In 1981, Mr. Reagan's first year in office, there were almost 700 active federal judges, and 48 were women, some of them semiretired.

Today, according to the Federal Judicial Center, there are 201 women and 622 men among active federal judges. As late as the beginning of the administration of Jimmy Carter in 1977, there were fewer than 10 women on the federal bench, according to the administrative office of the federal courts.

Roberta C. Ramo, who became the first woman to be president of the American Bar Association in 1995, recalls what a breakthrough the O'Connor nomination was in 1981.

“It makes me tear up right now just to think about it,” Ms. Ramo said. “She was a woman who had led a life that included having children, stopped practicing for a while, suffered discrimination, was a legislator, was a judge. That was terribly meaningful.”

Justice O'Connor, who had served as a trial judge for five years in Phoenix and then for less than two years on the state court of appeals, one step down from the Arizona Supreme Court, made her way at a time when women who were lawyers were often lucky to get job offers, much less judicial appointments.

Eleanor Smeal, who was the president of the National Organization for Women in 1981, said the O'Connor nomination was a turning point.

“At that time women were a very teeny percentage of judges,” Ms. Smeal said. “We

were begging male judges to give us our rights, and we wanted someone on the inside.”

The first woman to serve on the federal bench was Florence Ellinwood Allen, appointed to the federal appeals court in Cincinnati by Franklin D. Roosevelt in 1934. Harry S. Truman appointed the first woman to be a federal trial judge, Burnita Shelton Matthews, in 1949.

Because of Justice O'Connor's conservative reputation on certain issues, some women's groups were wary of her at the outset, fearful that she would oppose legal protections for abortion and interpret federal laws addressing sex discrimination narrowly. But her rulings in those areas have generally found approval with women's groups.

That is not to say women who are judges are more likely to side with women who appear before them than men are, said Cass R. Sunstein, a law professor at the University of Chicago who has studied judges' voting patterns.

“In sex discrimination and sexual harassment cases,” Mr. Sunstein said, “women judges are no more sympathetic to female plaintiffs than men judges. But Democratic appointees are more sympathetic to female plaintiffs than Republican appointees.”

Justice O'Connor was one of 5 women in a class of 102 students who graduated from Stanford Law School in 1952, at a time when tuition was \$220, said Catherine Nardone, an associate dean there. The class of 2007 has 71 women and 95 men, and they pay more than \$35,000 a year.

In 1981, according to the American Bar Association, 36 percent of law school

students were women. Last year, it was 48 percent.

But the change in law schools is not reflected in the upper ranks of the big law firms, said Larry Kramer, the dean of Stanford Law School. “In the profession,” Mr. Kramer said, “this is definitely still an issue. Partnerships in law firms haven't kept pace.”

About 16 percent of law firm partners are women, according to a 2003 bar association report.

That represents substantial progress. Justice O'Connor was refused a job at every law firm to which she applied and was offered secretarial jobs instead, even though she had graduated near the top of her class.

There is much room for improvement on law school faculties, too, Mr. Kramer said. Of 43 law professors at Stanford, 13 are women.

In all, said Deborah Rhode, a law professor at Stanford, “Women's representation in status, income and security have increased, but they're still overrepresented at the bottom and underrepresented at the top.”

Justice O'Connor's successor will face legal issues of grave concern to women, but most of the ones likely to reach the court soon will be incremental. The core right to abortion, supported by six of the current justices, appears secure in the short term, although the constitutionality of various restrictions is likely to arise. The court will also continue to shape the contours of laws prohibiting sex discrimination, including one concerning discriminatory practices in school athletic programs.

Justice O'Connor's unexpected resignation has upended the conventional wisdom about



the relevant criteria for the next nominee. There had been much talk of racial and ethnic diversity and almost none concerning the implications of candidates' gender. That has changed.

“Until the middle of last week, when the White House started hearing rumors that Justice O'Connor would resign,” said Thomas C. Goldstein, who argues frequently before the court and is an authority on it, “every name on the short list was a boy. Every name on the long list was a boy.”

Ms. Smeal, now the president of the Feminist Majority Foundation, a women's rights group, said the question should not be whether Justice O'Connor's seat ought to be filled by a woman but why half of the nine justices are not women. The other woman on the court is Ruth Bader Ginsburg, who was appointed by Bill Clinton. “We're asking for another woman,” Ms. Smeal said. “We should have at least four. We should not be allowed to go back to one. The era of

tokenism is over.”

Although the pool of female judges is much larger today than it was in 1981, the relevant group remains small.

“The number of prominent conservative Republican female federal appellate judges,” Professor Schiltz said, “gets to be a very, very small pool.”

The women most frequently mentioned as being considered for Justice O'Connor's seat all sit on federal appeals courts. They include Judges Edith Brown Clement, Edith H. Jones and Priscilla R. Owen, all of the United States Court of Appeals for the Fifth Circuit, in New Orleans, and Judge Janice Rogers Brown of the United States Court of Appeals for the District of Columbia Circuit.

There has been no serious talk, this time, of the need to scour the state lower courts to find a woman suitable for the nation's highest court.

## **“How O’Connor and the Court Have Drifted Leftward”**

*National Journal*

July 1, 2005

Stuart Taylor, Jr.

On June 27, as the Supreme Court ended its term amid rampant speculation about 80-year-old Chief Justice William Rehnquist's future, his 75-year-old colleague Sandra Day O'Connor was continuing to inch away from her "conservative" past.

In one of the two Janus-faced decisions on the Ten Commandments, the Reagan-appointed O'Connor positioned herself to the left of Clinton-appointed Justice Stephen Breyer. She voted (in dissent) to order removal of a Ten Commandments monument in Texas that he voted to save. Breyer wrote that court-ordered removal "would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions."

It was unusual to see Breyer associating O'Connor (among others) with hostility toward religion. But it has become increasingly common over the past two decades to see the woman who was once routinely (if misleadingly) labeled a member of the Court's conservative bloc siding with its four most liberal members. She has tipped many a 5-4 decision in their direction, including three big ones this year: the other Ten Commandments case; a decision expanding educational institutions' liability for sex discrimination; and one overturning a death sentence because of blunders by the defense lawyer.

O'Connor's leftward drift helps account for the supposedly conservative Rehnquist Court's surprisingly liberal trend in recent years. So do the similar evolutions of

Anthony Kennedy, another Reagan appointee, and John Paul Stevens, a once-moderate Ford appointee who is now the leader of the Court's liberal bloc. Not to mention the emergence of David Souter as a liberal soon after his appointment by the first President Bush. Kennedy or O'Connor (or both) often leave conservatives gnashing their teeth, by allying with Stevens, Souter, Breyer, and Ruth Bader Ginsburg, the only other Democratic (Clinton) appointee, against Rehnquist, Antonin Scalia, and Clarence Thomas.

This pattern explains the near-desperation with which conservative groups are urging the current President Bush to fill any vacancies with proven, principled, passionate conservatives. For better or worse (or some of each, as I see it), for complex reasons (explored in my July 7, 2003, column), Republican-appointed justices without ideological anchors tend to become more liberal over time.

Justice O'Connor is still conservative on some issues, as recently demonstrated by her passionate dissents in two cases: the 5-4 decision allowing use of eminent domain to take a person's property and give it to a private company, and the 6-3 decision narrowing states' rights. (Kennedy joined the liberals in both cases.) O'Connor also takes pains to avoid flat contradiction of her prior opinions. But her current views do contrast with positions that she once took on all four of the biggest culture-war issues: religion, abortion, racial preferences, and gay rights.

**Religion.** O'Connor joined conservatives early on in some church-state decisions that seem hard to reconcile with her more recent opinions and votes. In 1983, she joined a 6-3 ruling that the Constitution permits a state legislature to pay a chaplain to open each day's session with a prayer; in 1984, she joined a 5-4 ruling that a city may include a Nativity scene as part of an official Christmas display. And she has consistently supported some government aid programs that benefit religious schools.

By 1985, however, O'Connor had begun to side with liberals in attacking governmental actions that appear to endorse religion. She joined in a 6-3 decision that year striking down an Alabama law that allowed a daily minute of silent meditation or prayer in the public schools. Her concurrence condemned any governmental "message that religion or a particular religious belief is favored or preferred." Since then, that view has led her to join decisions banning state-sponsored nondenominational prayers at public school graduation ceremonies (in 1992) and football games (in 2000).

So it was no great surprise on June 27 to see O'Connor joining liberals (including Breyer) in a 5-4 decision ordering removal of framed copies of the Ten Commandments that officials had recently, with a clear religious purpose, put on the walls of two Kentucky courthouses. It was a bit more surprising to see her part with Breyer by voting to order removal of a six-foot-high monument containing the Decalogue from the grounds of the Texas Capitol. That would have doomed dozens of similar monuments around the country. But in the Texas case she was in dissent, with Breyer (and Kennedy) joining the three conservatives. Breyer's concurrence said the Texas case was different because the monument had stood for 40 years with few objections and

conveyed a mainly "moral and historical" message.

**Abortion.** In her first two abortion cases, in 1983 and 1986, O'Connor voted (in dissent) to uphold some relatively mild restrictions. More important, she also asserted in her 1983 dissent that states have "compelling interests in the protection of potential human life . . . throughout pregnancy," and that *Roe v. Wade's* three-trimester framework for regulating abortion was "on a collision course with itself." Such statements fostered speculation that she would eventually vote to overrule *Roe*.

But later in the 1980s, O'Connor began siding with the liberals on some issues. And in 1992, she joined a 5-4 decision reaffirming what the pivotal opinion—co-authored by O'Connor, Kennedy, and Souter—called "the essential holding of *Roe v. Wade*." While they upheld a 24-hour waiting period and some other previously forbidden restrictions, this was a seismic defeat for the right-to-life movement.

Then, in 2000, O'Connor tipped the balance in a 5-4 decision striking down state laws against the grisly procedure that opponents call "partial-birth abortion." This prompted a cry of betrayal (in dissent) from Kennedy, who had no thought of blessing such an "abhorrent" procedure when he reaffirmed *Roe*. (The pro-*Roe* count had become 6-3 when Ginsburg replaced Justice Byron White in 1993.)

**Racial preferences.** Never a colorblind-Constitution absolutist, O'Connor hinted as early as 1986 that "promoting racial diversity" on a school's faculty might justify racial preferences. She also voted in 1987 to uphold some job preferences for women.

But O'Connor joined conservatives in

finding serious fault with all seven of the specific racial-preference programs to come before her before 2003. In 1989, in striking down a city's program setting aside a percentage of its contract dollars for minority contractors, she wrote that such preferences "promote notions of racial inferiority and lead to a politics of racial hostility." She also seemed to suggest that governmental racial-preference programs were unconstitutional except when necessary to remedy proven racial discrimination.

In 2003, however, O'Connor gave racial-preference proponents their greatest victory, by writing a 5-4 decision approving extremely large racial preferences in admissions at the University of Michigan Law School and around the country, in the name of seeking a more diverse student body.

To be sure, O'Connor joined conservatives the same day in striking down (also by 5-4) the all-too-transparent, overtly numerical preferences used by Michigan's undergraduate school. But the law school decision was far more important. Taken together, while requiring admissions officers to make a pretense of giving each applicant individualized consideration, the decisions upheld what Rehnquist's dissent demonstrated to be a de facto racial quota.

**Gay rights.** In 1986, O'Connor joined an

opinion for a 5-4 conservative majority upholding use of a Georgia sodomy law to prosecute two men for having sex in their bedroom and rejecting as "facetious" a claim that due process protected such acts.

But in 1996, O'Connor seemed to reverse course, by joining a 6-3 decision invoking the equal protection clause to strike down a Colorado ballot referendum. It had barred localities (and the state) from including protections for gays in their antidiscrimination laws. And in 2003, she joined a 6-3 decision striking down a Texas law against homosexual sodomy.

The other five justices also reinterpreted the due process clause and overruled the 1986 sodomy decision. O'Connor parted company with them there. She argued for a narrow ruling that Texas (unlike Georgia) had violated equal protection (not due process) by barring only homosexual (not heterosexual) sodomy. But few scholars (if any) take these hairsplitting distinctions seriously.

The bottom line is that Justice O'Connor leans to the liberal side on the most divisive issues that come before the Court. Of course, no matter what she does, many liberals will never forgive her for joining the 5-4 decision that handed the 2000 election to George W. Bush. And they will be more than a little upset if she retires before Bush is gone.

## “A Majority of One”

*New York Times*

June 3, 2001

Jeffrey Rosen

We are all living now in Sandra Day O'Connor's America. Take almost any of the most divisive questions of American life, and Justice O'Connor either has decided it or is about to decide it on our behalf. The Supreme Court may tell us soon whether affirmative action in public universities is permissible, and if it does, O'Connor is likely to cast the deciding vote. The court is divided about school vouchers too; O'Connor's views will probably tip the scales.

Voting districts drawn for the benefit of minorities have to be submitted for O'Connor's approval and stand or fall on whether she finds their shapes bizarre. *Roe v. Wade* has been tailored according to O'Connor's specifications, and judges and legislators have to scrutinize all abortion restrictions in an effort to predict whether O'Connor might consider them an "undue burden" on the right to choose. And in December O'Connor helped to decide the presidential election, joining the 5-4 vote to stop the Florida recount and delivering the White House to George W. Bush.

Now, 20 years after she took her seat as the first woman on the court, O'Connor may see her power grow greater still. After one television network prematurely called Florida for Al Gore on election night, John O'Connor, the justice's husband, was reported to have expressed distress, lamenting that O'Connor wanted to retire and that Gore's victory would make this impossible. The Bush victory, presumably, cleared the way for a smooth exit: O'Connor, who is 71, could step down

knowing her replacement would be a Republican nominee. Last month, however, O'Connor announced that she had "no present plans to retire." Speculation has since focused on whether Chief Justice William Rehnquist might resign. And if he does, there are already Republicans and even a few Democrats who have in mind a natural successor: Rehnquist's Stanford Law School classmate and fellow Arizonan, Sandra Day O'Connor.

Whether she becomes the first woman to serve as chief justice, O'Connor is already the most powerful woman in America. How did she achieve this formidable distinction? Part of the explanation is the coincidence of her position at the center of a divided court. The Rehnquist court frequently decides its most important cases by a single vote, with the three conservatives (Rehnquist, Antonin Scalia and Clarence Thomas), joined by the two moderate conservatives (Anthony Kennedy and O'Connor), in the majority and the four liberals (John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer) in dissent. Kennedy and O'Connor have long been competing for the role of decisive swing vote: from 1994 to 2000, each was on the winning side of the same number of 5-4 cases. Last term, O'Connor wrote only one dissenting opinion, approaching Justice William Brennan's record of zero dissents in 1967 at the height of the Warren era.

But there have been many swing votes in the history of the court. O'Connor is arguably the most powerful of all of them because of the distinctive way she approaches her job.

In case after case, she will join the majority and then write a concurring opinion that seems designed to drain her colleagues' reasoning of its more general implications. She has a habit of confining her vote to the case at hand. Her views are so exquisitely calibrated that once in a voting rights case she wrote a separate concurrence to her own opinion, prompting Pam Karlan, a voting rights scholar at Stanford Law School, to say, "At last, O'Connor has found someone she can agree with: herself."

O'Connor's narrow opinions have the effect of preserving her ability to change her mind in future cases. It is not that O'Connor is easily swayed by the lobbying of her fellow justices: there is little lobbying or horse-trading on the Rehnquist court. (Indeed, the justices rarely have substantive discussions.) It is that she approaches her job less like a typical justice than like the state legislator she once was. O'Connor, who prefers vague standards to clear rules, does not derive her opinions from consistent principles that guide her from case to case. Her pragmatic approach allows her to remain not only at the center of the court but also at the center of American politics.

Antonin Scalia, O'Connor's frequent sparring partner, has noted that deciding cases according to principle is the way that judges restrain themselves. "When, in writing for the majority of the court, I adopt a general rule and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well," Scalia declared in his Holmes Lecture at Harvard in 1989. "If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle." Scalia sometimes betrays his own principles—

ignoring the original understanding of the Constitution in voting rights cases, for example—but he reminds us how important it is for judges to have principles to betray.

By her refusal to commit herself to consistent principles, O'Connor forces the court and those who follow it to engage in a guessing game about her wishes in case after case. Each of her decisions is a ticket for one train only. This is not to say, however, that there are no consistencies that mark her tenure. Over the years she has emerged as the leader of the federalism revolution that may be the Rehnquist court's most distinctive legacy, returning power from Washington to the states. And although she is not a committed social conservative, she is a committed anti-government conservative—a justice eager to second-guess the judgments of state and federal lawmakers and executives. By refusing to defer to Congress and the president, she has enhanced not only her own power but also the power of the court itself. If she is, in fact, nominated as the next chief justice, her generally moderate votes should give less pause than her view that no branch of government is entitled to respect except the one to which she belongs.

O'Connor was the first woman to be elected majority leader of any state senate in the nation, and her experience as an Arizona legislator continues to influence the way she approaches her job. Most Saturdays when the court is in session, she and her clerks meet in chambers to discuss the cases that she will consider during oral arguments in the week to follow. "She makes lunch for everybody—Tex-Mex, Southwestern fare," says Marci Hamilton, a former clerk who is now a professor at Cardozo Law School in New York. "She cooks it up and brings it from home. Then we would sit down and talk about the cases and eat."

There are justices—Scalia and Thomas, for example—who conduct their discussions with clerks as freewheeling debates about the law. O'Connor's discussions are more formal, like a senator's receiving briefings from her staff. She is unusual among justices in requiring her clerks to write extensive memorandums about a case before any discussion. During the Saturday meetings, a clerk who has prepared a memorandum will give a brief presentation; then O'Connor will ask the other clerks to make short presentations of their own.

After hearing her clerks' views and reviewing the briefs, O'Connor sometimes announces her vote or suggests that she has not yet made up her mind. At oral arguments, she is an active questioner and often makes little effort to conceal her views, confessing her ambivalence or revealing her skepticism about one side or the other. She is genuinely open-minded in many cases, especially those involving race and religion, and—like a legislator—is especially moved by arguments about the practical effects of a decision.

Once she makes up her mind, however, O'Connor continues to try to keep her options open. Like a politician, she is careful not to tie herself down in the future, instructing her clerks to write majority opinions as narrowly as possible. "She tries very hard to avoid broad rules, for fear that if you speak too broadly, you might bind yourself down the road," says one former clerk, who, like most of O'Connor's former clerks I spoke with, asked not to be identified. (The justice was said to be infuriated a few years ago by Edward Lazarus's *Closed Chambers*, a tell-all book about the court.) Another former clerk says: "She's very careful to write minimalist opinions, taking each case one at a time and trying not to decide too much that's not

before the court. She really has no grand constitutional theory. But that's a different sense of calculatedness than the idea that she holds out in order to dictate what the court says, which I didn't see at all."

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

More than some of her colleagues, O'Connor enjoys the ceremonial aspects of her job and has handled the public scrutiny that accompanies being the first female justice with poise and confidence. According to Ruth McGregor, who clerked for O'Connor in 1981 and now sits on the Arizona Supreme Court, O'Connor received more than 500 letters a week during her first term, and she tried to answer all of them. "The thing I noticed was how personal the communications were, partly because her hearings had been televised and perhaps people related more easily to a woman," McGregor says. "People sent hand-knit socks and homemade fudge and pictures of their grandchildren."

The mail has tapered off a little over the years, but O'Connor continues to travel the world like a head of state, giving worthy

speeches at law-school dedications and international events about the importance of federalism and hard work. She is a fixture on the Georgetown party circuit, where her husband, John, a Washington lawyer, is popular for telling humorous stories in Scottish and Irish dialect. She is also attentive to her press clippings. "Charles Barkley came to the court one day with Justice Thomas, and Thomas, being the way he is, he doesn't tell anybody about it," recalls a former clerk for another of the justices. When O'Connor learned that Barkley was in the building, she had him photographed for the *Washington Post* Style section putting an ornament on the Christmas tree in her chambers.

In addition to cultivating her public persona, O'Connor takes a warm interest in her clerks' welfare and goes out of her way to organize events and outings for their amusement and instruction. Clerks recall excursions to see the cherry blossoms, a tour of Washington by a Civil War historian and outings with the justice for white-water rafting, fly fishing and hiking in the Blue Ridge Mountains. "She loves to hike, she loves skiing, she loves tennis, she loves golf," says her brother, H. Alan Day. A few days after deciding *Bush v. Gore*, she scored her first hole in one.

Early in her tenure, several commentators suggested that O'Connor's opinions were written in a distinctively feminine voice. In 1986, Suzanna Sherry, then a law professor at the University of Minnesota, cited the works of Carol Gilligan on behalf of the proposition that "while women emphasize connection, subjectivity and responsibility, men emphasize autonomy, objectivity and rights." Painting O'Connor as the apotheosis of "difference" feminism, Sherry ventured that the justice's preference for moderation over confrontation—and community over

individualism—was attributable to her sex. O'Connor herself has little patience for these stereotypes, and in a speech at N.Y.U. in 1991, she strenuously rejected Sherry's thesis. "This 'New Feminism' is interesting but troubling, precisely because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long," O'Connor declared. "Asking whether women attorneys speak with a 'different voice' than men do is a question that is both dangerous and unanswerable."

According to Marci Hamilton, the former O'Connor clerk: "When you grow up riding wild horses—Western women tend not to buy that different voices stuff. They tend to be pretty much in the camp of 'Annie Get Your Gun': Anything he can do, I can do better."

Being a woman has shaped O'Connor's work far less, it would seem, than being a legislator. O'Connor's service as majority leader of the Arizona State Senate was one of the formative experiences of her life, and it is remarkable how much her approach as majority leader anticipates the role that she would come to play on the Supreme Court. In the 1970's, the Arizona Senate was almost evenly divided: 16 Republicans and 14 Democrats. Most of the issues that O'Connor faced were practical challenges—like the effort to divert water from the Colorado River to Arizona as part of the Central Arizona Project—and her tendency was to confront them in a bipartisan spirit. "I can't remember a damn thing we ever came to blows over really," recalls Bob Stump, who was the Democratic minority leader during O'Connor's years as majority leader and is now a Republican congressman from Arizona, having switched parties in 1982. At the end of each session, Stump says, O'Connor would invite Democrats and Republicans over to her house for a



bipartisan party, where she would cook burritos and tortillas.

According to Stump, O'Connor's chief opposition came not primarily from Democrats but from the John Birch wing of her own party, which was clamoring to abolish the income tax and investigate the United Nations. "It was more moderating them than it was bringing our side around," he says. As majority leader, O'Connor viewed it as her mandate to rein in the conservative extremists. And she was independent-minded enough to break ranks with her party on issues she cared deeply about. Stump says that the Senate, with overwhelming Democratic and Republican support, passed a law giving direct financial aid to parochial schools. Insisting that the bill was unconstitutional, O'Connor was the only Republican to join three Democrats in opposing it. "In those days, that was a very unpopular thing to do," Stump says. Later the Arizona Supreme Court agreed with O'Connor's position and struck down the law.

O'Connor has shown similar independence on the Supreme Court, suggesting that the Constitution permits some aid to religious schools and some race consciousness, but not too much—which is more or less the view of the majority of American voters. A few weeks ago, for example, after voting repeatedly to strike down voting districts drawn for the benefit of minorities, O'Connor broke rank with her conservative colleagues and decided that she could live with a redrawn North Carolina voting district that she had first expressed concern about in 1993.

I called David Garrow, the Pulitzer Prize-winning author and a Supreme Court historian at Emory Law School, to ask what he made of her apparent change of heart. "Is

there an extensive, deep-seated indecisiveness to her?" Garrow asked. "And is there something wrong about using 'indecisive' to characterize a female justice?" Garrow posed some more blunt questions. "Does she at some deep level doubt her own ability? Is that the way to understand this two-steps-forward, two-steps-back quality to her decision making, that she's not at all certain about her own judgment? If she doesn't lack the courage of her convictions, she lacks the clarity of her convictions."

These are strong sentiments—and I have expressed similar sentiments in the past. But those who have worked with O'Connor insist that she is anything but indecisive, as does O'Connor herself. "When I'm at the court faced with a case, I try to find out everything about that case I can," O'Connor told the National Coalition of Cancer Survivorship in 1996. "Then I make my decision, and I don't look back. I do not look back and say, 'Oh, what if I had done the other thing,' or 'Oh, I should have done something else.'"

Deborah Jones Merritt, another of O'Connor's former clerks—she is now the director of the John Glenn Institute at Ohio State—says: "Indecisive is probably the last word I would ever choose to describe Justice O'Connor. She would listen to all the arguments, get the answers and then be very decisive about her view in the case."

In her decisiveness about the bottom line, O'Connor operates in marked contrast to her fellow swing justice, Anthony Kennedy. "I'm more of an agonizer than many of our colleagues," Kennedy told me five years ago. In his meetings with clerks, Kennedy experiments with different opinions. He sketches out various arguments on a white board in his chambers, often announcing that he is persuaded by one position only to

return the next morning to declare that he has been thinking about the case overnight and now is inclined to take the opposite view. Once Kennedy makes up his mind, however, he is far more willing than O'Connor to embrace broad principles that constrain his discretion in future cases.

During a recent visit to O'Connor's office, I found a bit more evidence of her decisiveness. She declined to grant an interview for this article but kindly agreed to show me around her chambers. At the front of the Supreme Court Building, her airy inner office, painted in Southwestern earth tones, has a spectacular view of the Capitol and the court steps, where there were protesters demonstrating against *Roe v. Wade* and *Bush v. Gore*. Her inner office is decorated with Zuni drums, a Carl Oscar Borg landscape of the Grand Canyon and George Catlin paintings of a buffalo hunt in the Rocky Mountains. With her steady gaze and beige suit, O'Connor seemed like a formidable C.E.O. of the most powerful corporation in America, but she was also gracious and candid, although understandably wary. (I've written critically about several of her decisions.) She came to life when I produced a copy of *Where the Bluebird Sings to the Lemonade Springs*, a collection of essays by her favorite author, Wallace Stegner. And she talked with warmth and enthusiasm about Stegner, the great chronicler of the West who was also her creative-writing teacher at Stanford.

Soon, it was time for our tour. By her large desk, there was a cartoon of O'Connor on a swing being pushed by Jerry Falwell. Above it was a framed front page from *Newsday* celebrating her confirmation in 1981 with the headline "Her Honor." There were photographs of O'Connor's three sons and her grandchildren. As I tried to take it all in, she bustled me along to the outer

office, past a signed basketball from the U.S. Women's Olympic team. Suddenly, the tour was over. Realizing that I had left the Stegner book on the couch in her inner chambers, I went back to retrieve it. On the chair where the justice had been sitting, I noticed a hand-stitched pillow, embroidered with the motto: "Maybe in error but never in doubt."

By her own account, the roots of O'Connor's self-confidence came from her upbringing riding horses and roping steers on the Lazy B cattle ranch, a 250-square-mile tract on the Arizona-New Mexico border that is 35 miles from the nearest town and 12 miles from the nearest neighbor. During the C-Span biography, O'Connor quoted Wallace Stegner's description of growing up in the West: "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 4 in the morning until 9 at night, and to a wind that never seems to rest—there is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him who he is." O'Connor continued with a vivid recollection of driving around the ranch in a pickup truck with her father, waiting for the rain that the grass and the cattle needed to survive. "Rain was our life's blood . . . the essential element, the most treasured event, prayed for, hoped for, anticipated, savored when it came . . . celebrated and enjoyed—every drop," she recalled. "Joy, wonder, incredible gift from above."

O'Connor and her 61-year-old brother, Alan Day, have been writing a memoir about growing up on the ranch, which is scheduled for publication early next year. "A lot of people have asked Sandra through the years how someone from a rural, humble, agricultural background could have achieved

what she's achieved, and maybe this book is a long answer to that question," Day says. Day, who ran the family ranch for many years, says that his sister's upbringing as a rancher made her independent and self-reliant. "You would be out on the ranch in a pickup or on horseback, or whatever," he relates, "when you would come upon a situation that needed a response: a broken fence or a windmill or a sick cow or a flat tire or a broken fan belt. There wasn't anybody to call and there wasn't anybody to take care of you. You very quickly learned that you're responsible for yourself." In deliberate Western cadences very similar to his sister's, Day expresses moving, brotherly admiration for her impressive example: "The essence of Sandra is that if you're around her very much, the bar is raised in your life. You just feel like doing better things and being a better person."

After attending school in El Paso, where she lived during the school year with her grandmother, O'Connor enrolled at Stanford at 16 and then after graduating attended Stanford Law School. At law school, she dated her classmate William Rehnquist and met her future husband and fellow law-review editor, John O'Connor.

The story of her progress after law school has been told often. Because of her sex, she was unable to get a job in a law firm; instead, she became a deputy county attorney in San Mateo, Calif., in 1952. After spending several years in Germany, where John served in the Army, the couple moved to Arizona, where O'Connor set up a private practice in a shopping mall. After taking some time off to have three sons, she returned to full-time work when her youngest boy began school. She spent four years as an assistant attorney general in Arizona, where she developed a reputation for attention to detail. In 1964, she served

as a precinct captain for Barry Goldwater, who remained a close friend until his death. (A picture of both of them hangs in her chambers, inscribed, "Hi Sandy—Love, Barry.") Appointed in 1969 to fill a vacancy as an Arizona state senator, she was elected on her own the following year, and in 1973 she became majority leader.

In the Arizona Senate, O'Connor was less socially conservative than some of her Republican colleagues, not only opposing aid to religious schools but also staking out a moderate position on abortion. In 1970, three years before *Roe* was decided, O'Connor voted to repeal Arizona's draconian anti-abortion law, and the year after *Roe* came down, she voted against a petition asking Congress to pass a human life amendment to the Constitution. In her interview with President Reagan before he nominated her to the court—she was by then a judge on the Arizona Court of Appeals—O'Connor emphasized her personal opposition to abortion but did not commit herself one way or the other on the subject of *Roe*. During her confirmation hearings, her fiercest opposition came from anti-abortion conservatives who felt that her moderate record on abortion in the Arizona Legislature meant that she could not be counted on to overturn *Roe*. As it turned out, O'Connor's conservative critics were right to worry. O'Connor staked out her ambivalent position in the very first abortion case she heard, in 1983, in which she denounced *Roe* without explicitly calling for it to be overturned. Instead, she proposed her own test for evaluating restrictions on a woman seeking an abortion—whether the restriction "unduly burdened" the right to choose. By adopting the vague "undue burden" language, O'Connor gave herself lots of discretion to decide, from case to case, whether or not she considered a particular abortion restriction permissible.

Between 1983 and 1992, O'Connor upheld every abortion restriction she confronted. According to Lazarus's *Closed Chambers*, liberal clerks were so concerned that O'Connor would overturn *Roe* that a few female clerks toyed with the idea of having one of them fake an unwanted pregnancy and break down while discussing it in the locker room after O'Connor's morning aerobics class, so that the justice was certain to overhear. But these theatrics were unnecessary: in 1989, despite strong pressure from conservatives, O'Connor refused to provide the fifth vote to overturn *Roe* itself. And three years later in *Planned Parenthood v. Casey*, a case involving a Pennsylvania anti-abortion law, she joined Souter and Kennedy in upholding what they called the core holding of *Roe*: namely, that states may not place serious restrictions on abortion before fetal viability.

O'Connor's performance in *Casey* was characteristically self-assured and judicially aggressive. According to a former clerk involved with the decision, she was most offended by the provisions of the Pennsylvania law requiring wives to notify their husbands before having an abortion. Having decided to strike that down, she was amenable to Souter's suggestion that they write an opinion that would preserve the core of *Roe*. She and Souter then approached Kennedy, who agreed to adopt O'Connor's "undue burden" standard as the new test for evaluating all abortion restrictions. While Kennedy agonized endlessly about the decision—wavering until the final days before the opinion circulated and musing openly about writing a brief opinion that would sidestep the question of whether abortion is a fundamental right—O'Connor made her decision and never looked back. Using the same reasoning that she would turn to in *Bush v. Gore*, the majority opinion justified

the decision to short-circuit the political debate about abortion on the grounds that the court had to save the country from legislative battles that could only polarize and divide Americans.

Last summer, when it came time to evaluate the constitutionality of so-called partial-birth abortion laws, O'Connor provided a fifth vote for Stephen Breyer's expansive 5-4 decision striking down 31 state laws that restrict late-term abortions. Kennedy, by contrast, wrote an angry dissent, suggesting that he had been duped in 1992 into supporting a malleable legal standard that O'Connor and the liberal justices were invoking to strike down abortion restrictions far later in pregnancy than he had anticipated—restrictions supported by George W. Bush, Al Gore and two-thirds of the American people.

O'Connor's conservatism is found less in her views about social issues than in her views about where political power rests. She is adamantly anti-Washington. She is not alone, of course. In its view toward federal power, the Rehnquist court is the least deferential court in American history. Seth Waxman, who served as solicitor general in the Clinton administration, notes that in the first 200 years after the Constitution was ratified, the Supreme Court struck down only 127 federal laws. In the past six years alone, the Rehnquist court has struck down 28 federal laws. O'Connor joined all but six of these decisions. (The most restrained justices are Breyer and Ginsburg, who dissented in half the cases.)

Her attachment to states' rights seems to have stemmed from her upbringing on the Lazy B ranch, where her father was an opponent of Franklin D. Roosevelt and the New Deal. Today, less than 15 percent of the land is privately owned in Arizona, and

federal land and water regulations are a constant source of frustration to ranchers like her brother. "I got really discouraged with the way the federal government leases their land for grazing," Alan Day says. "Sandra is very much a federalist, which is saying the states should be able to solve more of their problems and the federal government should stick their nose in as little as possible. I think that certainly comes from her heritage in the West."

But during the past few years, it has become increasingly clear that the federalism revolution that O'Connor has led is not only about states' rights. It is also about the growing determination of O'Connor and her conservative colleagues to reserve for themselves the exclusive authority to decide what counts as illegal and impermissible in America. Last year, for example, O'Connor and the four conservative justices held that private individuals could not sue the states for violating the federal age discrimination

act. O'Connor did not think that age discrimination was a national problem, even though Congress thought otherwise when it passed the Age Discrimination in Employment Act.

Later that same year, O'Connor joined the four conservatives in striking down part of the Violence Against Women Act. They dismissed the voluminous evidence that had led Congress to conclude that the states were failing to respond adequately to gender-motivated violence. In this and other cases, O'Connor's experience as a state legislator seems to have given her a robust skepticism about the state and federal legislative process. "Somebody was making the case about a state legislature, and the gist of her comment was, 'I was in a state legislature—I know how foolishly they can act,'" a former clerk remembers. "Having been there, she understood that these were not such wise deliberative bodies."

## **“Fall Cases on Hot-Button Issues May Hinge on the New Justice”**

*Washington Post*

July 5, 2005

Charles Lane

Abortion. Physician-assisted suicide. Gay rights. How will the Supreme Court handle those issues without Justice Sandra Day O'Connor, the centrist swing voter who announced her retirement from the court last week after a 24-year tenure?

Actually, it probably won't take long to find out. The abortion rights of teenagers, administration efforts to override a state right-to-die law, and the military's "don't ask, don't tell" policy are all on the docket for the court term that begins Oct. 3.

O'Connor's past opinions show that she would have played a pivotal role in these cases. Now, their outcome may hinge on the views of her successor. Learning those views may prove challenging to senators, if a nominee adheres to the practice of not answering questions about matters that are, or soon will be, before the court.

"One of the fascinating dances in the confirmation process is going to be how much you can get a nominee to answer, even about relatively recent precedents, when the issues are presented in cases that are pending on the docket," said Douglas W. Kmiec, a professor of constitutional law at Pepperdine University.

The retirement of O'Connor, who often cast the deciding vote in the court's cases, could portend great change at the court, especially if President Bush replaces her with a steadfastly conservative nominee, as many expect.

If O'Connor's career teaches anything, it is that a justice's initial votes on the court are not necessarily a reliable guide to what that justice will do in the course of a long, life-tenured career. In her first years, she leaned heavily against abortion and affirmative action, only to tack in the other direction later.

Even if O'Connor were replaced by a conservative opponent of *Roe v. Wade*, the 1973 ruling recognizing a right to abortion, *Roe* would still have the support of a five-justice majority. Any challenge to its core holding would take years to bubble up from lower courts.

Still, next term will present O'Connor's successor with a chance to answer important questions about the scope of *Roe* as well as other precedents.

For example, a 1992 Supreme Court decision, co-written by O'Connor, set forth a test for the constitutionality of state abortion regulations, saying they must not impose an "undue burden" on exercising the right to abortion.

The court defined an undue burden as a law that "in a large fraction of cases" puts a "substantial obstacle" in the way of someone seeking an abortion.

At the same time, the court has said that states may pass laws requiring minors to notify their parents of plans to terminate a pregnancy, as long as they permit minors to

seek a court's permission when informing their parents is impossible or dangerous.

The court has never clarified whether O'Connor's "undue burden" test means that parental-notification laws, which are on the books in 33 states, must include an explicit exception for cases in which the pregnant girl's health is at risk.

But in *Ayotte v. Planned Parenthood*, No. 04-1144, which is to be argued in December and decided by mid-2006, the court will rule on a New Hampshire law that has no health exception. The U.S. Court of Appeals for the 1st Circuit, based in Boston, ruled last year that the New Hampshire law is unconstitutional and cannot go into effect.

In its appeal, however, New Hampshire said the 1st Circuit applied the wrong legal standard. It cited a 1987 Supreme Court ruling that suggests opponents of the law must show that the law would limit abortion rights not just in some or most cases but in all cases.

If the justices affirm the ruling of the 1st Circuit, striking down the law, the effect will be to fortify and entrench Supreme Court precedents on abortion rights. If the court rules in favor of New Hampshire law, it will open the door to other states to adopt similar legislation.

Any elucidation of the court's view of its doctrine of a health exception could also affect the federal ban on the procedure critics call "partial birth" abortion. Enacted by Congress with Bush's support in 2003, it included no exception to protect the woman's health. But three district courts have found it unconstitutional under a 5 to 4 Supreme Court ruling in 2000, joined by O'Connor, that said such bans must include a health exception.

The government's appeals are pending, and conflicting decisions by appeals courts could lead to a Supreme Court case in the early years of O'Connor's successor.

In October, physician-assisted suicide will be before the court in *Gonzales v. Oregon*, No. 04-623. The administration has appealed a lower court's order barring the Justice Department from taking away the prescribing rights of Oregon doctors who prescribe lethal doses of drugs to terminally ill patients who have chosen to die under that state's 11-year-old Death With Dignity Act.

Assisted suicide is an intensely emotional issue, both for advocates of a "right to die," who see it as many people's only means of a dignified death, and for conservative Christians, who see it as a form of murder.

Opposition to laws such as Oregon's was a favorite cause of former attorney general John D. Ashcroft, who issued a November 2001 directive determining that assisting suicide is not a "legitimate medical purpose" under federal drug-control law—and that the Drug Enforcement Administration could act against any physician who authorized drugs to help someone die.

The directive overturned a 1998 decision by President Bill Clinton's attorney general, Janet Reno, that permitted Oregon doctors to assist in suicides.

Strictly speaking, the case does not involve any assertion of a constitutionally protected right to die. The court unanimously refused to recognize such a right in 1997, ruling that it should be left to the states to determine whether legalized assisted suicide is wise policy.

Rather, the case is framed by the parties as a

clash between federal power to regulate drugs and states' power to regulate the practice of medicine.

But the practical effect of the Ashcroft directive is to make Oregon's law a dead letter—and O'Connor might have been sympathetic to Oregon. She vigorously dissented from the court's 6 to 3 ruling last month in which it upheld a federal override of California's medical marijuana law. In the 1997 case, *Washington v. Glucksberg*, the court was ruling on state bans on assisted suicide. O'Connor was one of five justices who wrote or signed concurring opinions implying that they might not strike down a state law such as the Oregon one that permits assisted suicide.

"Death will be different for each of us," she wrote. "For many the last days will be spent in physical pain . . . some will seek medication to alleviate that pain and other

symptoms."

In *Rumsfeld v. FAIR*, No. 04-1152, to be argued in November, the question is whether some law schools may curb military recruiters' access to their students in protest of the U.S. armed forces' ban on openly gay members.

The court is being asked to rule on the constitutionality of the Solomon Amendment, a federal law that requires universities to give military recruiters equal access or risk millions of dollars in federal funding.

Legal analysts generally expect a win for the government, but the case will create a high-profile forum in which both opponents and supporters of the "don't ask, don't tell" policy can fight out this particular battle of the culture wars.



## **“An Advocate for the Right”**

*New York Times*  
July 28, 2005  
David E. Rosenbaum

The early 1980's were a heady time for conservatives in Washington.

Ronald Reagan was president, and after years on the outside, some of the strongest voices in the conservative movement—men like Edwin Meese III, James G. Watt, William Bradford Reynolds and Theodore B. Olson—were in high positions in the government and were determined to reverse what they believed to be years of liberal policies in areas like civil rights, environmental protection, criminal law and immigration.

John G. Roberts, a young lawyer in the Justice Department in 1981 and 1982 and on the White House counsel's staff from 1982 to 1986, held positions too junior for him to set policy in those days.

But his internal memorandums, some of which have become public in recent days, reveal a philosophy every bit as conservative as that of the policy makers on the front lines of the Reagan revolution and give more definition to his image than was apparent in the first days after President Bush picked him to be an associate justice of the Supreme Court.

On almost every issue he dealt with where there were basically two sides, one more conservative than the other, the documents from the National Archives and the Ronald Reagan Presidential Library show that Judge Roberts, now of the United States Court of Appeals for the District of Columbia Circuit, advocated the more conservative course.

Sometimes, he took positions even more conservative than those of his prominent superiors.

He favored less government enforcement of civil rights laws rather than more. He criticized court decisions that required a thick wall between church and state. He took the side of prosecutors over criminal defendants. He maintained that the role of the courts should be limited and the president's powers enhanced.

Mr. Roberts was only 26 when he joined the Reagan administration and 31 when he left. But the ideology he expressed as a young man helps explain why conservative activists seem pleased with him, even though others Mr. Bush might have picked have a more detailed public record of conservative advocacy.

Consider Mr. Roberts's stands on some of the hottest political issues of the 1980's as revealed in the newly public documents:

**BUSING**—In 1985, when he was an assistant White House counsel, Mr. Roberts took issue with Mr. Olson, an assistant attorney general at the time, on whether Congress could enact a law that outlawed busing to achieve school desegregation.

Mr. Olson, who was one of the nation's most widely known conservative lawyers on constitutional matters, was arguing that Congress's hands were tied because the Supreme Court had ruled that busing was constitutionally required in some

circumstances.

Mr. Roberts wrote in a memorandum to the White House counsel, Fred F. Fielding, that Mr. Olson had misinterpreted the law. He said evidence showed that by producing white flight, busing promoted segregation. "It strikes me as more than passing strange for us to tell Congress it cannot pass a law preventing courts from ordering busing when our own Justice Department invariably urges this policy on the courts," he wrote.

**SEX DISCRIMINATION**—Mr. Roberts also challenged Mr. Reynolds, who was assistant attorney general for civil rights and another prominent conservative who outranked him.

In 1981, he urged Attorney General William French Smith to reject Mr. Reynolds's position that the department should intervene on behalf of female prisoners who were discriminated against in a job-training program. If male and female prisoners had to be treated equally, Mr. Roberts argued, "the end result in this time of state prison budgets may be no programs for anyone."

**JUDICIAL RESTRAINT**—Mr. Roberts consistently argued that courts should be stripped of authority over busing, school prayer and other matters. In a letter in November 1981 to Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, in New York, for whom he had clerked and whom he considered a mentor, Mr. Roberts wrote that he and his colleagues in the administration were determined to "halt unwarranted interference" by the courts in the activities of Congress and the executive branch.

A month later, he wrote to Rex Lee, who was the solicitor general, that courts were "ill-suited to policy making because they are

limited to the facts presented to them."

Court-stripping is still an issue in American politics. Last year, the House approved legislation that would prevent federal courts from ordering states to recognize same-sex marriages in other states. The measure never became law.

**PRESIDENTIAL WAR POWERS**—In 1983, Arthur J. Goldberg, the former Supreme Court justice, wrote a letter to the White House questioning President Reagan's constitutional authority to send troops to Grenada without a declaration of war.

Mr. Roberts replied with a ringing endorsement of the president's power. "This has been recognized at least since the time President Jefferson sent the Marines to the shores of Tripoli," he wrote. "While there is no clear line separating what the president may do on his own and what requires a formal declaration of war, the Grenada mission seems to be clearly acceptable as an exercise of executive authority, particularly when it is recalled that neither the Korean nor Vietnamese conflicts were declared wars."

**AFFIRMATIVE ACTION**—Mr. Roberts held that affirmative action programs were bound to fail because they required "the recruiting of inadequately prepared candidates."

"Under our view of the law," he wrote in 1981, "it is not enough to say that blacks and women have been historically discriminated against as groups and are therefore entitled to special preferences."

**IMMIGRATION**—Mr. Roberts took strong issue with a Supreme Court decision striking down a Texas law that had allowed school districts to deny enrollment to children who

were in the country illegally. The court had overreached its authority, he wrote, and the Justice Department had made a mistake by not entering the case on the state's side.

CHURCH-STATE—Mr. Roberts was

sharply critical of the Supreme Court decision outlawing prayer in public schools, and he said the court had exceeded its authority when it allowed any citizens to challenge the transfer of public property to a parochial school.

## “Reading Robert’s Mind”

August 1, 2005  
*The Weekly Standard*  
Terry Eastland

So, just who is John G. Roberts? His brainpower, legal experience, and character duly recognized, what is his judicial philosophy? What is his approach to judging—to interpreting and applying the Constitution and other federal law? What kind of jurist will he turn out to be—20, 30 years hence?

One place to look for the answer is in Roberts's record as a federal circuit judge. Appointed two years ago to the U.S. Court of Appeals for the D.C. Circuit, Roberts has participated in some 200 decisions and 100 orders. Of the 200 decisions, almost all were unanimous, according to a review by Anisha Dasgupta and Brian Fletcher (posted at [www.sctnomination.com/blog](http://www.sctnomination.com/blog)). Roberts wrote the majority opinion in about 40 cases, drawing very few dissents. He also wrote three concurrences and two dissents.

Most of his cases involved technical questions of administrative law and proved relatively noncontroversial. He has yet to sit on a big social-issue case—one involving, say, abortion, same-sex marriage, or establishment of religion. Perhaps his case of most national significance is *Hamdan v. Rumsfeld*, in which he and two other judges voted to affirm the validity of military commissions under the 2001 congressional resolution authorizing the president to "use all necessary and appropriate force" against al Qaeda, and to uphold the president's judgment that the Geneva Convention does not apply to members of al Qaeda. Some of Roberts's writing is notable.

In a case holding that the Drug Enforcement

Administration had wrongly blocked the importation of ephedrine, which is used to treat asthma, Roberts, in a concurrence, took issue with the majority's reasoning. Arguing for a narrower and "effectively conceded basis" for disposing of the case, he invoked "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." Regarding the majority's rationale, he said, "I cannot go along for that gratuitous ride."

Roberts dissented from a decision holding that the secretary of labor went beyond her statutory authority by issuing certain reporting obligations for labor organizations. Contending that the congressional delegation of authority was broad enough to encompass the secretary's action, Roberts chided the majority for applying "the very antithesis of deferential review."

Roberts wrote for a unanimous panel upholding a lower court judgment that the arrest, search, handcuffing, and detention of a 12-year-old girl for eating a single French fry in a Washington Metrorail station did not transgress the Fourth and Fifth Amendments. Roberts began his opinion, "No one is very happy about the events that led to this litigation," noting that the district court described the policies leading to her arrest as "foolish" and that indeed the policies were changed after "those responsible endured the sort of publicity reserved for adults who make young girls cry." But foolish policies were not necessarily unconstitutional. "The question before us," he wrote, "is not whether these policies were a bad idea but whether they

violated" the Constitution, and "we conclude they did not."

Roberts dissented from his court's refusal to rehear a panel decision on the scope of the commerce clause. At issue was a judgment upholding an order of the Fish and Wildlife Service as a constitutional regulation of interstate commerce. The agency told a developer that it must remove a fence from its own property in order to accommodate the movement of arroyo toads. Roberts faulted the panel's decision for failing to ask—as he said it should have under recent Supreme Court precedents—whether the movement of a toad, a seemingly noncommercial activity that occurs entirely within the state of California—can be said to be interstate commerce. "The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" Roberts also noted that the panel's decision was in conflict with another ruling in the circuit, making it doubly necessary for the full court to take up the case.

The sample size from the D.C. Circuit is small, yet it points in certain directions. Roberts seems to have a proper understanding of the executive power that Article II vests in the president. Whether he agrees or not with the Supreme Court's federalism precedents—and his opinion in the arroyo toad case does seem sympathetic to them—he is certainly willing to apply them, as a lower-court judge must. At the same time, Roberts defers to agency judgments so long as there is sufficient congressional authorization. His respect for the separation of powers is such that he is unwilling as a judge to condemn as unconstitutional merely bad ideas embraced by one of the other branches. Roberts's

conception of judicial restraint also encompasses a preference for a narrower ground of decision unless a broader one is truly necessary. Roberts's own writing is restrained, for it is marked by its lawyerly precision and its avoidance of grandiose or strident pronouncements. It is sometimes dashed with humor, as witness the judge's reflection on that hapless toad.

Another place to look for clues about Roberts's judicial philosophy is in the work he's done as an appellate lawyer. After Harvard (he graduated in three years), Harvard Law (he was editor of the *Law Review*), clerkships first with federal circuit judge Henry Friendly and then with Associate Justice William Rehnquist, and jobs advising Reagan's first attorney general and then Reagan and his White House aides, Roberts took a job at a prestigious Washington law firm. There he began to establish a reputation as one of the nation's finest appellate lawyers. In 1989, Roberts returned to the Justice Department, where he worked as principal deputy solicitor general under Kenneth Starr. In that capacity, of course, he remained an appellate lawyer, his client now the government, as he briefed and argued cases in the Supreme Court. In 1993 he returned to private practice, leaving two years ago when the Senate finally, and by unanimous consent, approved his nomination to the D.C. Circuit. (Roberts, it bears noting, was in the first batch of judges Bush nominated in 2001, his nomination not moved until after the Republicans captured the Senate in 2002. Earlier, in 1992, the first President Bush had tapped Roberts for the D.C. Circuit, but the Democratic Senate had not been inclined to act on the nomination as Election Day approached.)

Roberts has participated in cases involving a wide range of subjects: administrative law, admiralty, antitrust, arbitration, banking,

bankruptcy, civil rights, constitutional law, the environment, federal jurisdiction and procedure, the First Amendment, health care, Indians, interstate commerce, labor, and patent and trade law. He has definitely had his share of big, controversial cases, especially when he worked in the first Bush administration. As deputy solicitor general, he helped prepare the government's briefs in *Rust v. Sullivan*, *Lee v. Weisman*, and *United States v. Eichman*, among other high-profile cases. In *Rust*, the Court agreed with the government's position that regulations prohibiting family-planning services in receipt of federal funds from advising on abortion were not a violation of the free speech clause. The brief also reminded the Court that the government remained of the view that the abortion right announced in *Roe v. Wade* had no basis in the text, structure, or history of the Constitution. In *Lee*, the government argued, unsuccessfully, that prayers at a public school graduation ceremony were not an unconstitutional establishment of religion. And in *Eichman*, the government argued, also unsuccessfully, that a federal law against burning the American flag did not violate the free speech clause.

During his confirmation hearing two years ago, Roberts said that no one should infer from the views of his clients what his own views might be. That is a fair point, and extends even to his time in the solicitor general's office. For while it is surely true that Roberts, a political appointee, was at least in broad sympathy with the legal and policy goals of the Bush administration, it would be wrong to infer—to take the most notable case—that the statement about *Roe* in the *Rust* brief reflected his own view of *Roe*. It might, or it might not. Roberts is nowhere on the record on *Roe*, so far as anyone can determine. His appellate practice is not a very good place to look for

clues about his judicial philosophy.

Roberts told the committee that his practice "has not been ideological in any sense. My clients and their positions are liberal and conservative across the board. I have argued in favor of environmental restrictions and against takings claims. I've argued in favor of affirmative action. I've argued in favor of prisoners' rights under the Eighth Amendment. I've argued in favor of antitrust enforcement. At the same time, I've represented defendants charged with antitrust cases. I've argued cases against affirmative action." Roberts implored the committee to look "at cases on both sides" of an issue and "see if the professional skills applied, the zealous advocacy is any different." Roberts conceded that "that's not judging . . . but it is the same skill, setting aside personal views, taking the precedents and applying them either as an advocate or as a judge."

While the skill of setting aside personal views and enforcing the law lies at the heart of sound judging, there is much more to it than that, especially for a Supreme Court justice. Lower court judges work with the precedents of their own circuits, and of course they are bound by the decisions of the Supreme Court. Justices, by contrast, make the precedents governing the courts below by interpreting statutes and the Constitution. Moreover, they can overrule their own decisions. Roberts's years as an appellate lawyer seem useful mainly for understanding his considerable professionalism—and not for discerning how he might interpret and apply the Constitution.

Which brings us to another way to discover Roberts's views on such matters: by asking him directly about cases already decided. Two years ago Judiciary Committee

Democrats, with Charles Schumer taking the lead, tried to get Roberts to discuss Supreme Court cases. The effort failed. "I have opinions about particular decisions," Roberts told Schumer in one exchange. "Probably every decision I read, I have an opinion whether I think it is good, bad, or—." At which point the eager and voluble Schumer interrupted, apparently unaware that Roberts had effectively stated that his mind is locked in, rendering judgment, whenever he reads a judicial decision. Now that Roberts has been tapped for the High Court, Schumer remains insistent that he declare his "opinions about particular decisions." That's not going to happen.

During the hearing, Roberts laid out his reasons for what might be called nominee restraint. A nominee who offered personal views of the Court's precedents in the confirmation process would undermine the independence and integrity of the judiciary, he said. Those important qualities are ensured by the assumption that "judges come to the cases before them unencumbered by prior commitments beyond the commitment to apply the rule of law and the oath that they take."

When Schumer asked how it was any different—was there not also harm done to the judiciary?—when litigants go before the Supreme Court knowing that some justices have opined in previous cases in such a way as to indicate opposition to their arguments, Roberts said that it was different, precisely because the confirmation process is not the judicial process. "The concern is that you are giving commitments, forecasts, hints, even at the extreme, bargains, for confirmation," whereas, in the judicial process, "you are deciding a particular case and stating your reasons for it." If a nominee gave in effect "a prior commitment" as to how a case should be

decided, that would be wrong, Roberts said, and it would "have a distorted effect on how that judge will appear to parties appearing before him." Roberts was firm in drawing this line, and Schumer concluded by conceding how good a lawyer he is—"far better than I would ever be."

It is hard to imagine what might compel Roberts to change course and discuss a decision—unless, as was the case with Ruth Bader Ginsburg in 1993, in a speech or article he has said something about a ruling. Ginsburg had criticized *Roe's* rationale in a law review article, and thus felt compelled to reiterate, when asked about the article during her hearing, what she had said. But she declined to offer an opinion about *Planned Parenthood v. Casey*, which sustained "the essential holding" of *Roe*. As I write, three days after the announcement of the nomination, the media having pursued every detail about Roberts, it appears that he has nowhere—either in print or a speech, on the air, or in cyberspace, for that matter—offered any "opinions about particular decisions."

In his confirmation hearing, Roberts did offer some views, not about decided cases, but about judicial philosophy. Because he was nominated to a lower court, he emphasized his obligation to follow Supreme Court precedents. But he also seemed to endorse a way of approaching the task of interpreting the Constitution. "I do not think beginning with an all-encompassing approach to constitutional interpretation is the best way to faithfully construe the document," he said. He said that the Court itself didn't have such a philosophy, but he also seemed to think that the Court was right not to have one. He said he didn't feel comfortable with labels like originalist, textualist, or literalist, and he said different constitutional provisions call

for different interpretative approaches. "You have a very different approach in saying how you are going to give content to the Fourth Amendment prohibition on unreasonable searches and seizures. That's one thing. It doesn't mean that you apply the same approach to a far more specific provision like the Seventh Amendment," which preserves the right of trial by jury in suits at common law.

Doubtless, as the confirmation process unfolds, Roberts will be asked to expand upon his varied approaches to constitutional interpretation. And about statutory interpretation, specifically whether he would consult legislative history in determining the meaning of a statute. And about how he would read the Court's precedents—narrowly or broadly. And the circumstances under which he might be willing to overrule a case he thought wrongly decided. Nor would such questions threaten judicial independence and integrity. The answers might tell us more about the man likely to be our newest justice.

In choosing this nominee, Bush necessarily chose to pass over the others on his short list. There was more risk in choosing Roberts than in picking some others on that list, notably J. Michael Luttig, a federal appellate judge of roughly the same age but with many more years of service than Roberts. One reason presidents look to the federal appeals courts for justices is that the judges on those courts are not representing others but indeed making their own decisions, which constitute the best evidence of how the individuals might think about the law and might perform on the Supreme Court. Luttig would have come with less risk simply because, tested for so much longer, his record is more emphatically that of someone who practices the approach to

judging Bush says he wants in his Supreme Court nominees. The extra risk associated with the Roberts choice might not matter much if another vacancy occurs in the next year or two and the president chooses Luttig or someone like him. But if it turns out that Bush has only this one opportunity, then the question of the choice not made could come back to haunt him—just as the choice of David Souter, in 1990, has his father.

That helps explain conservative misgivings about Roberts. These are seldom expressed publicly—with Ann Coulter the loud exception. In Roberts's defense, it might be said that he is surely not oblivious to the pitched ideological battles of the past two decades, having lived in Washington all of that time—he knows what is at stake in the courts. And, being a lawyer's lawyer, he could help the Court become more rigorous in its reasoning. That would be a positive development.

It's hard to see Roberts writing a weak-as-water opinion of the sort O'Connor penned for the Court two years ago in sustaining admissions preferences at the Michigan Law School. Likewise it is hard to imagine Roberts abiding the religion-clause chaos to which O'Connor made major contributions; likely he would, like his former boss Rehnquist, strive for doctrinal clarity. And it is hard to envision Roberts buying into such pretensions to supremacy as came from O'Connor, Souter, and Anthony Kennedy in their dismaying joint opinion in *Planned Parenthood v. Casey*. At the same time, it is easy to imagine Roberts—who has advised an attorney general and a president, and argued the executive's position in the Supreme Court—being especially aware of the importance of the executive power, at a time when terrorists still threaten America and the world.



In short, John G. Roberts may prove an excellent choice. To say that time will tell

is, of course, a cliché. But with a nominee for the Supreme Court, it always does.

## “In Search of John Roberts”

*New York Times*

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Jeffrey Rosen

Here is what liberals and conservatives can agree on about John Roberts, President Bush's first Supreme Court nominee: He is perhaps the most impressive Supreme Court advocate of his generation, extremely intelligent, thoughtful and able—a lawyer's lawyer. In a reasonable world, that should be enough to assure his confirmation with bipartisan enthusiasm. Unfortunately, Washington politics is anything but reasonable.

Judge Roberts takes pride in representing both sides of the political spectrum. He delighted environmental groups by convincing the Supreme Court that a freeze on development in an unspoiled part of Lake Tahoe didn't violate the private property rights of the affected landowners. He has argued for and against the constitutionality of affirmative action. For Mr. Roberts, the ability to "argue a case round or argue it flat," as the lawyers say, is a point of pride.

As both an appellate lawyer and an appellate judge, he earned the reputation of a legal craftsman who didn't come to cases with preconceived grand theories, but took positions based on the arguments and legal materials in each case.

Judge Roberts is, by all accounts, a very nice man: funny, humble and decent. He treats judges and litigants with a Jimmy Stewart-like courtesy. He sends notes to associates whose children are sick. His winning personality has raised the hopes of conservatives who understand that the most influential justices are those who work well with their colleagues.

But here is where conservatives and liberals may part company about John Roberts: Conservatives hope he will be a William Brennan of the right, using his intelligence and charm on behalf of his deeply conservative views to move the court far to the right of where it was under the moderate influence of Justice Sandra Day O'Connor; liberals fear that conservatives are correct.

Liberals worry that a Justice Roberts might take a narrow view of Congress's power to regulate the economy that would impose severe limitations on the regulatory state. And they fear that he would vote to overturn *Roe v. Wade*, because in 1990, when he was a deputy solicitor general, he signed a brief in an abortion-financing case that included a footnote calling for *Roe* to be overturned.

How can the Senate cast light on the question of whether Judge Roberts is a conservative ideologue with an agenda to transform the law or a conservative incrementalist who may surprise liberals and conservatives alike with his independence?

To begin with, senators should forget about the government briefs Mr. Roberts signed about *Roe v. Wade*, school prayer and other hot button issues. It's clearly not fair to hold him accountable for defending the George H.W. Bush administration's official positions. After all, that was, at the time, his job.

Instead, the Senate should explore Judge Roberts's judicial philosophy and temperament. He has been on the appellate court for only two years, however, so clues

in his judicial record are necessarily sparse.

But based on his record throughout his career, he does not appear to be a rigid Constitutional "originalist" in the tradition of Justices Antonin Scalia and Clarence Thomas. These men believe that the Constitution should be strictly interpreted in light of its original understanding; they are willing (to different degrees) to overturn years of Supreme Court precedents in the name of constitutional fidelity.

Having spent decades arguing before courts rather than sitting on them, John Roberts has never embraced one grand legal theory to the exclusion of all others. On the contrary, he has been trained to cast a wide net in order to reach a convincing result. Inflexible originalism is a theory embraced by academics and crusaders, not practicing lawyers who must persuade judges of different stripes.

At the same time, Judge Roberts is not a former legislator—as was Justice O'Connor—and therefore he is not likely to be as willing to split every difference between liberals and conservatives. As an appellate lawyer forced to apply legal precedents, he was trained to believe that judges should provide clear answers to legal questions rather than keeping the country guessing.

So, are conservatives right to hope, and liberals right to fear, that as a justice, he would vote to overturn many of the 5-4 cases where Justice O'Connor sided with her more liberal colleagues? The best way for the senators to find an answer to this question is to explore Judge Roberts's view of precedents, which the lawyers call *stare decisis*, or "let the decision stand."

In the confirmation hearings for his appellate judgeship, Mr. Roberts said he was

bound to apply the Supreme Court's precedents. That was a good answer at the time, but it is no longer terribly relevant: as a Supreme Court justice, he would be free to overturn the court's earlier rulings. Would he read precedents broadly or narrowly? And under what circumstances might he vote to uphold precedents with which he disagrees?

The truth is that Judge Roberts probably doesn't have a well-thought-out theory of *stare decisis*. As an appellate lawyer and judge, he had no need or occasion to develop one.

In fact, very few Supreme Court justices have developed a theory of *stare decisis* that is entirely satisfying. At one extreme there is Justice Thomas, who, according to his colleague Justice Scalia, is willing to overturn any precedent he thinks is inconsistent with the original understanding of the Constitution. At another extreme have been justices like John Marshall Harlan, who, in the name of judicial continuity, are very reluctant to overturn precedents, even those with which they disagree.

Perhaps one clue to Judge Roberts's leanings on the force of precedents can be found in the outlook of one of his judicial heroes, Henry Friendly, an appellate judge for whom he became a clerk in 1979. Friendly was famously cautious, a man devoted to incremental rather than radical legal change.

It might be illuminating for the senators to ask Judge Roberts what he admired about Friendly, and why.

Another potentially fruitful line of questioning might center on Judge Roberts's views about the scope of Congress's power to regulate the environment and the economy.

As an appellate judge, his record on this crucial issue has been indistinct. In one case, he took an expansive view of Congress's power to condition the receipt of public funds on an agency's promise not to discriminate. In another, he took a much more restrictive view of Congress's power to regulate the environment. Some of his comments suggest that he thinks the court is correct to strike down federal laws on rare occasions, but that he may be unlikely to try to resurrect what some conservatives call "the Constitution in exile," overturning decades of precedents and dismantling the regulatory state root and branch.

While it is appropriate for senators to ask Judge Roberts about specific cases, they

might get him to reveal more of himself if they asked him about his vision of the role of the courts in democracy. When I interviewed him three years ago, I was impressed with his reverence for the law as something distinct from politics, his belief that courts should operate according to independent ideals of professionalism and neutrality, and, most of all, his apparent lack of anger, which sometimes mars the opinions of Justices Scalia and Thomas.

If his confirmation hearings confirm this impression, Judge Roberts may prove to be not only a great justice, but one whom principled liberals can embrace with gratitude and relief.