

# BOOK REVIEW

## SANDRA DAY O’CONNOR’S “FIRST” PRINCIPLES: A CONSTRUCTIVE VISION FOR AN ANGRY NATION

First: Sandra Day O’Connor.

By Evan Thomas. New York: Random House, 2019. Pp. 476. \$32.00.

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*During her twenty-five-year tenure on the Supreme Court, Justice Sandra Day O’Connor became one of the most admired figures in American public life. A recent biography by historian and journalist Evan Thomas chronicles her extraordinary personal qualities, remarkable professional journey, and constructive brand of patriotism. In this Book Review, a former O’Connor clerk describes a legacy in three parts: a lived example of how to thrive in the face of challenges, a jurisprudence driven by the courage to make compromises, and a theory about the long game of American democracy. First reintroduces O’Connor’s voice at a critical moment in our national conversation. Although First sounds wistful notes about what seems a bygone era, it also contains hopeful lessons about repairing American civic life.*

INTRODUCTION .....	2018
I. O’CONNOR THE PERSON: BIOGRAPHY AS A LIVED SELF-HELP BOOK.....	2021
A. No Regrets or Grievances .....	2022
B. Superpowered Focus.....	2023
C. Resilience and Self-Possession .....	2024
D. “Do the Work” .....	2025
E. “Other People Matter” .....	2026
II. O’CONNOR THE PROFESSIONAL: JUDGING AND THE COURAGE IN COMPROMISE .....	2027
A. Flexibility, Fairness, and Context .....	2027
B. Incremental Steps .....	2028
C. A Legacy of Pragmatism.....	2030
III. O’CONNOR THE PATRIOT: DEMOCRATIC DISCUSSION IN AN ANGRY NATION .....	2031
CONCLUSION .....	2035

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## INTRODUCTION

Once upon a time in American public life, there were figures who achieved universal admiration. It was even possible to earn the trust of those with whom one disagreed. Justice Sandra Day O'Connor, who joined the Supreme Court as the first woman Justice in 1981 and retired in 2006,<sup>1</sup> may be the last such public person—an icon able to transcend partisan polarization. Look around and try to spot another one. This problem extends beyond the familiar, rancorous spaces occupied by the branches of government. Journalists and nightly news anchors no longer serve as shared sources of information.<sup>2</sup> Entertainers and professional athletes often feel compelled to “choose sides.”<sup>3</sup> Even the U.S. women’s national soccer team angered some vocal groups in the United States last year while they triumphed in the World Cup competition.<sup>4</sup> Everyone always seems mad at someone.

In her day, however, O'Connor touched a chord that resonated with a wide and varied audience. When she appeared before the Senate Judiciary Committee in 1981, 100 million Americans watched on television,<sup>5</sup> about the same number of people that tuned in for Super Bowl LIV on February 2, 2020.<sup>6</sup> She was confirmed by the full Senate 99-0 and emerged from the proceedings as the first celebrity Supreme Court

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1. Justices 1789 to Present, Sup. Ct. of the U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/U9UY-SFHC>] (last visited Aug. 25, 2020).

2. See, e.g., Knight Found. & Gallup, Inc., *American Views 2020: Trust, Media and Democracy—A Deepening Divide* 5, 9, 30–31 (2020), <https://knightfoundation.org/wp-content/uploads/2020/08/American-Views-2020-Trust-Media-and-Democracy.pdf> [<https://perma.cc/CEQ8-VWB2>]; Matthew Ingram, *Most Americans Say They Have Lost Trust in the Media*, *Colum. Journalism Rev.: The Media Today* (Sept. 12, 2018), [https://www.cjr.org/the\\_media\\_today/trust-in-media-down.php](https://www.cjr.org/the_media_today/trust-in-media-down.php) [<https://perma.cc/5GQE-QZC9>].

3. See, e.g., Christopher Clarey, *In 2017, Many Athletes Found Their Voices*, *N.Y. Times* (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/sports/year-sports-protests.html> (on file with the *Columbia Law Review*); Karen Given, *Athletes Take a Leading Role in Black Lives Matter Protests*, *WBUR: Only a Game* (June 5, 2020), <https://www.wbur.org/onlyagame/2020/06/05/black-lives-matter-protests-ken-shropshire> [<https://perma.cc/B2PL-FBBU>]; Deena Zaru, *Why Athletes Are Getting More Political in the Age of Trump*, *CNN* (Aug. 14, 2017), <https://www.cnn.com/2017/02/10/politics/donald-trump-colin-kaepernick-athletes-activism-sports/index.html> [<https://perma.cc/BEF2-FD5U>].

4. Will Leitch, *A National Team for the Trump Era*, *N.Y. Mag.: Intelligencer* (July 8, 2019), <https://nymag.com/intelligencer/2019/07/u-s-womens-soccer-a-national-team-for-the-trump-era.html> [<https://perma.cc/K2BN-78DH>] (“[C]elebration of their victory felt like . . . a rebuke to Trumpism and the America we currently inhabit . . .”).

5. Evan Thomas, *First: Sandra Day O'Connor 141* (2019) [hereinafter *Thomas, First*].

6. Helen Coster, *Super Bowl TV Audience Rises Slightly to 99.9 Million Viewers*, *Reuters* (Feb. 3, 2020), <https://www.reuters.com/article/us-football-nfl-superbowl-ratings/super-bowl-tv-audience-rises-slightly-to-99-9-million-viewers-idUSKBN1ZX2LI> (on file with the *Columbia Law Review*).

Justice.<sup>7</sup> Flashbulbs fired when she entered any event in Washington, and she received 60,000 letters in the first year after her confirmation.<sup>8</sup> Over the next twenty-five years, she cast the decisive votes to resolve the most emotional debates that came before the Court, including a series of abortion and affirmative action cases.<sup>9</sup> And across more than 300 majority opinions,<sup>10</sup> O'Connor both achieved consensus among her colleagues and retained the public's high regard.<sup>11</sup>

Fast forward to the present Court. In the October 2019 Term, the Justices faced contentious questions about reproductive rights, discrimination, immigration, and executive power.<sup>12</sup> The realignment since O'Connor's departure has left a void in the pragmatic middle spaces on many issues,<sup>13</sup> yet the Court still maintains civil exchanges relative to the

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7. See Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* 82–83, 98 (2005) (noting O'Connor's description of the intense environment around her after her nomination and her observation that she “couldn't move without a battery of television cameras following [her] every step” (internal quotation marks omitted) (quoting Interview by KAET Horizon with Sandra Day O'Connor, Assoc. J., Sup. Ct., U.S. (Nov. 27, 2002))). Twelve years later, Justice Ruth Bader Ginsburg joined the Court and later became the “Notorious RBG”—a tiny figure in gloves and lace who was an intergenerational popular culture icon of intellect and strength. See Irin Carmon & Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* 7 (2015); Justices 1789 to Present, *supra* note 1.

8. Thomas, *First*, *supra* note 5, at 159.

9. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding a law school's race-conscious admissions plan); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (establishing the undue burden standard for evaluating abortion regulation).

10. See Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth & Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* 633 (6th ed. 2015).

11. See, e.g., Adam Cohen, *Opinion, Sandra Day O'Connor's Careful Steps Through the Judicial Landscape*, N.Y. Times (Oct. 30, 2005), <https://www.nytimes.com/2005/10/30/opinion/sandra-day-oconnors-careful-steps-through-the-judicial-landscape.html> (on file with the *Columbia Law Review*) (noting O'Connor's ability to “pull[] the court's two blocs inward toward consensus” and her “interest in what unites the country rather than in what can divide it”).

12. See, e.g., Robert Barnes, *One of the Most Politically Volatile Terms in Years Tests John Roberts and the Supreme Court*, Wash. Post (Oct. 6, 2019), [https://www.washingtonpost.com/politics/courts\\_law/one-of-the-most-politically-volatile-terms-in-years-tests-john-roberts-and-the-supreme-court/2019/10/06/ffe72528-e608-11e9-a6e8-8759c5c7f608\\_story.html](https://www.washingtonpost.com/politics/courts_law/one-of-the-most-politically-volatile-terms-in-years-tests-john-roberts-and-the-supreme-court/2019/10/06/ffe72528-e608-11e9-a6e8-8759c5c7f608_story.html) (on file with the *Columbia Law Review*).

13. See Jeffrey Rosen, *Why I Miss Sandra Day O'Connor*, New Republic (July 1, 2011), <https://newrepublic.com/article/91146/sandra-day-o-connor-supreme-court-alito> [<https://perma.cc/2LPG-RMMC>] [hereinafter Rosen, *Why I Miss O'Connor*] (“[T]he Court would be a far more centrist institution today if O'Connor were still on it.”); Evan Thomas, *Trump Should Have Picked a True Conservative for the Supreme Court*, Yahoo News (July 10, 2018), <https://www.yahoo.com/news/trump-picked-true-conservative-supreme-court-015014785.html> [<https://perma.cc/6463-LZNF>] (explaining that O'Connor “had an uncanny sense of finding the middle ground that not only produced court majorities but more or less helped keep the [C]ourt from getting too far ahead—or too far behind—the American body politic”). A particularly consequential case in which O'Connor's presence on the Court would have produced a different outcome is the 5-4

woeful state of the discourse in the political branches of the government and throughout our public life.<sup>14</sup> Even in a time of bitter political division, Chief Justice Roberts has crafted compromises and defied expectations in what seems to be an effort to demonstrate that the Court itself will not fracture hopelessly along partisan lines.<sup>15</sup> Among themselves, the Justices also tend to avoid personal vitriol, and they owe that norm in part to O'Connor's collegial influence on the institution during her years on the Court.<sup>16</sup>

Although she has fallen largely out of sight, O'Connor provides a reassuring reference point during a time of dispiriting public affairs. She recently circulated an open letter sharing news of her failing health and complete withdrawal from public life.<sup>17</sup> Shortly after this announcement, historian and journalist Evan Thomas published an intimate new biography of O'Connor. A bestselling author of ten nonfiction works—including biographies of Robert Kennedy, Dwight Eisenhower, and Richard Nixon—Thomas has a particular interest in American political culture, the legacies of noted and notorious figures, and the essence of leadership.<sup>18</sup> With this project, Thomas portrays a woman leader for the first time and writes his first judicial biography. In collaboration with his spouse Oscie Thomas, he conducted more than 300 interviews of O'Connor's family, friends, colleagues, and clerks; drew upon unprecedented access to O'Connor's private papers (including twenty years of her husband John O'Connor's journals); reviewed internal

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decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), which permits corporations to make unrestricted independent expenditures to advance political campaigns. See Rosen, *Why I Miss O'Connor*, *supra* (“[O'Connor] was also highly critical of the *Citizens United* campaign finance case and said she would have voted the other way.”).

14. See, e.g., Charles DuHigg, *The Real Roots of American Rage*, *Atlantic* (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/charles-duhigg-american-anger/576424> (on file with the *Columbia Law Review*) (“[V]isceral disdain for one’s political opponents has become common . . .”); Robin Wright, *Is America a Myth?*, *New Yorker* (Sept. 8, 2020), <https://www.newyorker.com/news/our-columnists/is-america-a-myth> (on file with the *Columbia Law Review*) (reporting commentary about the United States having “tribes with at least two or more sources of information, facts, narratives, and stories we live in” and becoming “a house divided about what holds the house up”).

15. See, e.g., Harry Litman, *Opinion, Chief Justice Roberts Delivers a Deft and Nearly Unanimous Rebuke to Trump’s Bid to Be Above the Law*, *L.A. Times* (July 9, 2020), <https://www.latimes.com/opinion/story/2020-07-09/supreme-court-john-roberts-donald-trump-vance-mazars> [<https://perma.cc/659G-PW6F>].

16. See Thomas, *First*, *supra* note 5, at 300–02 (quoting Justice Thomas’s statement that “[t]he reason this place was civil was Sandra Day O’Connor”).

17. Letter from Sandra Day O’Connor, *Former Assoc. J., Sup. Ct., U.S.* (Oct. 23, 2018), [www.supremecourt.gov/publicinfo/press/Public\\_Letter\\_from\\_Sandra\\_Day\\_OConnor\\_10\\_2318.pdf](http://www.supremecourt.gov/publicinfo/press/Public_Letter_from_Sandra_Day_OConnor_10_2318.pdf) [<https://perma.cc/7M3P-HQED>].

18. See Evan Thomas: *About the Author*, Penguin Random House, <https://www.penguinrandomhouse.com/authors/30902/evan-thomas> [<https://perma.cc/8YCA-KX75>] (last visited Aug. 25, 2020).

Supreme Court documents; and met with O'Connor and seven other Supreme Court Justices.<sup>19</sup>

While O'Connor no longer participates directly in the national conversation, *First* speaks for her and reintroduces her voice at a critical moment. It reveals both why O'Connor has been so admired and what she can still teach the country she loves. As this Book Review explains, *First* does so by chronicling a legacy in three parts: a lived example of how to thrive in the face of challenges, a lesson about the courage that lies beneath compromises, and a theory about the long game of American democracy. Part I of the Review describes O'Connor's exceptional personal strengths and suggests that Thomas's account of her trajectory could double as a guide to individual and professional development. Part II explores the connection between O'Connor's character and her moderate—but also brave and consequential—jurisprudence. Part III discusses O'Connor's dedication to civility and continuing democratic discourse. The Review concludes that *First* sounds wistful notes about what seems a bygone era yet contains hopeful lessons about repairing American civic life.

#### I. O'CONNOR THE PERSON: BIOGRAPHY AS A LIVED SELF-HELP BOOK

Throughout *First*, Thomas considers whether O'Connor changed the world or just caught the moment when the world was changing around her. The answer becomes clear as Thomas paints his layered portrait. She served not only as the first woman on the Supreme Court but, in Arizona, as the first woman leader of any state legislature's upper house.<sup>20</sup> And O'Connor advanced not because she appeared at the right place and right time but because her personal qualities made her precisely the right person for an extraordinary assignment. As Judge J. Harvie Wilkinson observed, "Someone to her right or her left, or without her flinty pragmatism and indefatigable public energy, could not have carried off the transition nearly so well."<sup>21</sup>

One could even read *First* as a sort of manual for leading a fulfilling and productive life: Seize opportunity, let go of regret, focus on the moment, try not to take things personally, do the work and do your best, and never be above caring for others. *First* enables understanding of O'Connor's example, which is subtle enough to require close study or long-form description. Unlike the fierce and fashionable Justice Ginsburg, O'Connor has never spawned lace-collared memes or inspired any tattoos, and she was not known for keeping pace with contemporary culture.<sup>22</sup>

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19. Thomas, *First*, supra note 5, at 407–09.

20. *Id.* at 72.

21. *Id.* at 404.

22. See, e.g., Ariane de Vogue & Jeff Simon, Down with 'Notorious R.B.G.', CNN (Feb. 12, 2015), <https://www.cnn.com/2015/02/12/politics/ruth-bader-ginsburg-supreme->

Indeed, O'Connor's occasionally prim demeanor and strict code of personal conduct can at times seem anachronistic.<sup>23</sup> But in her approach to life and work, O'Connor modeled the tenets of self-improvement before bestsellers and podcasts even introduced buzzwords like "mindfulness" and "grit."<sup>24</sup>

A. *No Regrets or Grievances*

Though it is hard to picture O'Connor adopting an actual mantra, were she to have one, it would be: "Look only forward." Always without grievance, she has consistently expended energy in just one direction. Upon her graduation from Stanford Law School in 1952, many employers rejected her because of her gender.<sup>25</sup> But she never once looked back and expressed bitterness.<sup>26</sup> Instead, she credited the need to pivot to different opportunities as the fortuity that landed her in the public sector and eventually launched her judicial career.<sup>27</sup> She rigorously avoided regret, and she would often say that "[t]he time to worry about a decision . . . is before it is made."<sup>28</sup>

Even with regard to the *Bush v. Gore* decision that stopped the Florida recount in the contested 2000 presidential election,<sup>29</sup> a moment in the Supreme Court's history that O'Connor rued, if not regretted, she told Thomas in a 2017 interview that "second thoughts don't do you a lot of good."<sup>30</sup> O'Connor's dedication to her "ever onward" philosophy and insistence on letting go of past grievances was tested by the *Bush v. Gore* decision. She acknowledged that the case tarnished the Court's

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court-justice-notorious-rbg/index.html [https://perma.cc/J7SQ-BFKM] (last updated Aug. 10, 2018).

23. See Biskupic, *supra* note 7, at 96 (describing how O'Connor "appeared to represent a tidy world of working mothers who could have it all" and explaining that she "favored more opportunities for women without being on the cutting edge of the feminist movement").

24. See, e.g., Carol S. Dweck, *Mindset: The New Psychology of Success* 41 (2006); Ten Percent Happier with Dan Harris, *Three Mindfulness Strategies from Joseph Goldstein* (Oct. 14, 2020) (downloaded using Apple Podcasts); Ten Percent Happier with Dan Harris, *The Secrets of Gritty People with Angela Duckworth* (Aug. 10, 2020) (downloaded using Apple Podcasts); see also *infra* sections I.B–C.

25. See Thomas, First, *supra* note 5, at 39–44.

26. See Kathleen Sullivan, *A Tribute to Justice Sandra Day O'Connor*, 119 *Harv. L. Rev.* 1239, 1251 (2006) (commenting that O'Connor responded to "the overt professional sex discrimination she encountered with remarkable resilience and resourcefulness" and "wasted no energy on self-pity"); see also Biskupic, *supra* note 7, at 28; Thomas, First, *supra* note 5, at 269.

27. See Thomas, First, *supra* note 5, at 362 ("In recounting how she had been rejected by seemingly every major law firm in California, she emphasized how 'lucky' she was to have been forced into the public sector.").

28. *Id.* at 206 (citation omitted).

29. 531 U.S. 98, 110–11 (2000).

30. Thomas, First, *supra* note 5, at 339.

reputation,<sup>31</sup> but she otherwise avoided discussing it in public whenever possible.<sup>32</sup> Publicly, she curtly defended the Court's intervention, and privately she would pointedly change the subject when the case arose.<sup>33</sup> Her holiday card that season—sent far and wide—wished everyone a new year “Free of Hanging Chads,” a reference to the disputed punch-card ballots in the Florida recount.<sup>34</sup>

With both humor and force of will, O'Connor imposed forward momentum on her chambers. She pressed past contentious decisions at the Court and urged clerks to “move on” from their own disagreements and disappointments as well.<sup>35</sup> Nor was O'Connor inclined to apologize for things she could not attend or accomplish given her taxing schedule; she simply said “no.”<sup>36</sup> As Justice Breyer (her closest friend on the Court) relates, she was fond of pointing out that “tomorrow is a new day.”<sup>37</sup>

#### B. *Superpowered Focus*

*First* also captures O'Connor's capacity for mindfulness, an indispensable skill in the face of today's cacophony of noise and information and a talent she mastered long before the term itself was ubiquitous.<sup>38</sup> Almost never relaxed, but always calm, O'Connor focused intently on every conversation.<sup>39</sup> She would hold completely still and make an unnerving amount of eye contact. Throughout *First*, Thomas describes O'Connor's “extraordinary ability to focus on work and tune out distractions.”<sup>40</sup> Former clerks warned as I began my term working for O'Connor that she would digest documents at a blistering pace. When we left drafts with her to read, we raced back to our desks because she would appear in our office moments later with penetrating comments and instructions on next steps.

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31. See, e.g., Jeffrey Toobin, Justice O'Connor Regrets, *New Yorker* (May 6, 2013), <https://www.newyorker.com/news/daily-comment/justice-oconnor-regrets> (on file with the *Columbia Law Review*) [hereinafter Toobin, O'Connor Regrets].

32. Thomas, *First*, supra note 5, at 337–38 (noting that O'Connor often began Q&A sessions “by announcing ‘Don't ask me about *Bush v. Gore*’”).

33. *Id.*

34. *Id.* at 388.

35. *Id.* at 206.

36. *Id.*

37. See Stephen G. Breyer, A Tribute to Justice Sandra Day O'Connor, 119 *Harv. L. Rev.* 1239, 1244 (2006); see also Jeffrey Toobin, *The Nine* 207 (2007) [hereinafter Toobin, *The Nine*] (noting the close relationship between O'Connor and Breyer and observing that they had “the two least neurotic personalities on the Court”).

38. For a popular book about focus, quieting the mind, and the benefits of meditation, see generally Dan Harris, *10% Happier* (2014).

39. See Thomas, *First*, supra note 5, at 16, 164, 357.

40. *Id.* at 16, 357.

When O'Connor decided it was time to go, people left; when she pointed in some direction, others followed.<sup>41</sup> Indeed, she seemed a magnet able to bend events to her will. I recall a particular Arizona gathering to honor her, when the desert weather took an unexpected turn, and it began to rain. "Can you believe it?" she intoned in her characteristic clipped speech. "What we can't believe," one of her clerks responded, "is that you did not make the rain stop." The Justice's eyes sparkled, as everyone within earshot nodded vigorously. To us, the power of her mind made it seem entirely possible that such a thing could happen.

C. *Resilience and Self-Possession*

O'Connor exhibits what contemporary commentators have labeled "grit" as well.<sup>42</sup> The canonical origin stories about her tenacity emphasize a childhood spent branding calves, firing rifles, changing truck tires, and encountering life and death on the range.<sup>43</sup> Her particular strength was not just to be unyielding but also to identify the fights worth having. From a loving but severe father, with a mercurial temper, she learned to determine "which fires would flame out on their own."<sup>44</sup> Later, when she confronted the intransigence of the male legislators she led in Arizona or irascible colleagues on the Court like Justice Blackmun, O'Connor knew both how to stand up for herself and when not to take things personally.<sup>45</sup>

Though I never once heard O'Connor complain about slights or dwell on obstacles, that is not to say that she showed no emotion. Vulnerability and fragility are not, of course, the same thing. And perhaps the most poignant section of *First* describes O'Connor's despairing reaction to her initial breast cancer diagnosis.<sup>46</sup> She indulged in fear and grief only briefly, however, and then turned her attention to getting well.<sup>47</sup> As a survivor, she has continued to hearten others who confront the disease, just because of how she was in the face of it: "[H]onest, practical, and ultimately optimistic."<sup>48</sup> O'Connor never denied that she faced challenges, but she never let adversity define her either.

This combination of self-awareness and self-assurance characterized O'Connor's approach to every task. When she first joined the Court, she had no experience as a federal judge and little knowledge of constitutional

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41. See *id.* at 289.

42. See, e.g., Angela Duckworth, *Grit: The Power and Passion of Perseverance* 7–8 (2016).

43. See Sandra Day O'Connor & H. Alan Day, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest* 99, 111, 165–69, 239–44 (2002).

44. Thomas, *First*, *supra* note 5, at 42–43.

45. See *id.* at 172 ("[O'Connor] had long ago learned—from the provocations of her father and less benign males in the Arizona courts and legislature—not to take the bait.").

46. See *id.* at 244–48.

47. See *id.* at 250.

48. *Id.* at 251.

law.<sup>49</sup> Nor was she informed about the Court's rules and traditions or even advised on how to organize her chambers.<sup>50</sup> At the first conference she attended—the Justices' regular meeting about which cases to hear—she arrived with the petitions for certiorari under consideration filed in the wrong order.<sup>51</sup> In John O'Connor's diaries, however, he reported that, despite setbacks at the outset, she “never once suggested or implied that the job was, even for a moment, beyond her.”<sup>52</sup> Though she questioned whether she was “on a par with some of the great intellectual [J]ustices of [the] history of the Court,” she also found that she understood the issues and could persuade her colleagues.<sup>53</sup> From the beginning, O'Connor held her own.

D. “*Do the Work*”

When law students ask for advice on daunting projects or demanding new positions, O'Connor's not-so-secret formula has become a refrain when I respond. As a student, a practicing lawyer, a public official, a judge, and then a Justice, O'Connor followed a simple rule, which was to “do the work.” She neither sought nor used shortcuts for anything, and she counseled both preparation and determination.<sup>54</sup>

As O'Connor would point out, her earliest jobs were not glamorous posts. While John O'Connor was stationed in Germany in the Army JAG Corps, she worked as a government procurement lawyer.<sup>55</sup> She then opened a storefront law firm in a shopping center.<sup>56</sup> When she served as State Assistant Attorney General in Arizona, she was first detailed to a windowless office in a hospital, where she “worked on legal problems arising in the state mental health system.”<sup>57</sup> Yet she treated each case with meticulous professionalism. Thirty years later, she advised her new colleague, Justice Ginsburg, who was disappointed that one of her first assignments on the Supreme Court was a technical ERISA opinion: “Ruth, now you just do it! Just do it!”<sup>58</sup> Whether processing minor cases in early-career obscurity or drafting a tedious labor law decision when one would

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49. *Id.* at 164.

50. *Id.* at 158.

51. *Id.* at 155.

52. *Id.* at 189.

53. *Id.*

54. See, e.g., Biskupic, *supra* note 7, at 112; B. Drummond Ayres Jr., ‘A Reputation for Excelling’—Sandra Day O’Connor, *N.Y. Times* (July 8, 1981), <https://www.nytimes.com/1981/07/08/us/a-reputation-for-excelling-sandra-day-oconnor.html> (on file with the *Columbia Law Review*) (“[O’Connor] is said, by friend and foe alike, to be notably bright, extremely hard-working, meticulous, deliberate, [and] cautious . . .”).

55. Sullivan, *supra* note 26, at 1251.

56. *Id.*

57. Thomas, *First*, *supra* note 5, at 68.

58. *Id.* at 285–86.

rather craft constitutional theory, O'Connor insisted that everyone just get to it and do the best work they could on the task at hand.<sup>59</sup>

E. “*Other People Matter*”

Some of these examples might portray O'Connor as a stern striver, but *First* also depicts the sincere affection and deep connection between O'Connor and the people around her. Another useful mantra that she brings to life involves service to others. As positive psychology teaches, remembering that “other people matter” can be the key to both equilibrium and joy.<sup>60</sup> One of O'Connor's defining traits has been her empathy and her desire to care for people, listen to them, and take an interest in their lives. In the years after her law clerks left the Court, she has never failed to celebrate personal and professional milestones with them. She welcomed my three children with a treasured “O'Connor Grandclerk” t-shirt when they were born, and she offered me advice on new positions in the government and later academia. She acknowledged what was important to each of us, and she could recall the details of an issue we had last discussed months or years before whenever we met again. Powerful people can make others feel less important. But not O'Connor. She elevated everyone around her. At any event, however grueling, she would work her way through the room and give each person the gift of a memorable moment with her.

She admired selflessness in others as well. As Thomas reports in *First*, she held Chief Justice Marshall in particular esteem, in part because Marshall found the time each day to care for his spouse over the course of a long illness.<sup>61</sup> And she often expressed gratitude for Justice Powell's welcoming advice during her early days on the Court.<sup>62</sup> Although they did not always agree, her disagreements with Powell were amicable, and she regarded that collegiality as the essential ingredient in any professional relationship.<sup>63</sup>

Of course, few people could match O'Connor's particular blend of focus, drive, equanimity, humility, and generosity. But Thomas's account

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59. See *id.* at 290 (noting that O'Connor urged her clerks to use their careers to “Do something!” and “Help someone!”).

60. See Christopher Peterson, *Pursuing the Good Life: 100 Reflections on Positive Psychology* 5 (2013) (“Other people matter mightily if we want to understand what makes li[f]e most worth living.”). Many also associate the phrase “other people matter” with positive psychologist Martin E.P. Seligman. See, e.g., Peter Gibbon, Martin Seligman and the Rise of Positive Psychology, Nat'l Endowment for the Humans., <https://www.neh.gov/article/martin-seligman-and-rise-positive-psychology> [<https://perma.cc/HTX3-7URU>] (last visited Oct. 3, 2020).

61. Thomas, *First*, *supra* note 5, at 356.

62. *Id.* at 159.

63. *Id.* at 160 (discussing the warm relationship O'Connor and Powell shared, and Powell's own “hardline moderat[ion]”); see also *id.* at 302 (“The human relations on the Court—warm bonds formed over time—were essential.”).

of her astonishing achievements and her rich relationships contains some invaluable lessons for navigating any tough assignment or challenging time.

## II. O'CONNOR THE PROFESSIONAL: JUDGING AND THE COURAGE IN COMPROMISE

Perhaps the least understood aspect of O'Connor's legacy is that, although she was indeed the perfect "first," it was not as easy as it looked. Most commentators, Evan Thomas included, highlight the flexibility of her jurisprudence. Few have noted the fortitude that it took to craft it and the connection between her personal qualities and the position she occupied on the Court.

### A. *Flexibility, Fairness, and Context*

Moderation can require heroics because identifying and taking a centrist position does not occur by default. Some Justices vote according to alliances or adhere to a method of interpretation like originalism.<sup>64</sup> O'Connor proceeded without those signposts and was "not constrained either by rigid doctrine or by another justice."<sup>65</sup> She rejected templates and formulas, and in her view, many "Grand Unified Theor[ies] . . . turn out to be neither grand nor unified."<sup>66</sup> But she did not lack conviction, feel uncertain, or fall short of clarity. Rather, she sought just outcomes and desirable compromises. From her first days as a judge in Arizona, the question she most often asked herself and her law clerks was "is it fair?"<sup>67</sup> As a result, she had to weather crosscurrents and criticism from all sides.<sup>68</sup> For example, both Justice Scalia (a forceful critic of *Roe v. Wade*<sup>69</sup>) and Justice Blackmun (its author) attacked the accommodations she made to protect its core holding on reproductive rights.<sup>70</sup> O'Connor demonstrated that bravery does not require coming out swinging and that knowing when to fight does not signal indecision.

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64. See, e.g., *id.* at 300–01; see also *supra* notes 11, 13; *infra* note 66.

65. Thomas, *First*, *supra* note 5, at 313.

66. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring); see also Sullivan, *supra* note 26, at 1252 (noting O'Connor's "common law approach to constitutional controversies" that "led her to reject reliance upon any single grand theory or categorical interpretation").

67. Thomas, *First*, *supra* note 5, at 106–07 (describing O'Connor's efforts as an Arizona trial judge to impose just sentences and encourage parties to reach fair compromises); see also *id.* at 346 (noting that "is it fair?" had been Chief Justice Warren's famous question, and that O'Connor sounded the same note "when the facts compelled her").

68. See Biskupic, *supra* note 7, at 273 (explaining that the opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), "was attacked by commentators on the right and [the] left—although it appeared the majority of Americans approved").

69. 410 U.S. 113 (1973).

70. See, e.g., Thomas, *First*, *supra* note 5, at 262–64.

Nor did O'Connor, once she achieved a desired outcome, feel the need to claim victory. To her, what mattered was how an opinion worked in the world, not how it sounded when announced from the bench. She was comfortable focusing on the facts and rarely appealed to lofty principles, or even tried to turn a phrase.<sup>71</sup> In both rhetoric and ideology, she avoided extremes. While at times her pragmatism left her open to charges of indecision, she was plenty resolved but not doctrinaire. And if she could reconcile competing demands, and "patch together five votes on an issue she cared about," then she embraced a hybrid or compromise decision that left room for later modifications.<sup>72</sup> Like Judge Learned Hand, she understood that "the spirit of liberty is the spirit which is not too sure that it is right,"<sup>73</sup> and she was alert to competing points of view. Where Scalia would rely on "bright-line rules and fixed principles," O'Connor preferred to "set more flexible standards to accommodate the facts and changed circumstances."<sup>74</sup> She recognized that tests "sensitive to context" might yield some inconsistent results, but she regarded them as necessary to express underlying constitutional principles.<sup>75</sup> As Thomas writes, her methodology referenced real-world consequences, and for pragmatists, "the truth of a belief rests in the success of its practical application."<sup>76</sup>

#### B. *Incremental Steps*

O'Connor's personal humility surfaced not only in the limited scope and practical methodology of her decisions but also in the measured pace of her jurisprudence. She avoided sweeping rulings and did not overstate the Court's role. She was willing to proceed incrementally and "preferred to live in the world of the possible, to go for better if best was not immediately obtainable."<sup>77</sup> Among her predecessors, O'Connor had particular admiration for Justice Holmes, and like him, she saw the law not just as "logic" but as "experience."<sup>78</sup>

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71. See Toobin, *The Nine*, supra note 37, at 223 (describing the distinctive "antistyle" of an O'Connor opinion); see also Thomas, *First*, supra note 5, at 280 (characterizing O'Connor's legal writing style as "almost willfully dull").

72. Thomas, *First*, supra note 5, at 296–97 ("Like Brennan—and unlike a loner like Stevens or an absolutist like Scalia—O'Connor wanted to cobble together majorities however she could.").

73. Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 190 (Irving Dillard ed., 1952).

74. Thomas, *First*, supra note 5, at 300.

75. See *County of Allegheny v. ACLU*, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

76. Thomas, *First*, supra note 5, at 222.

77. *Id.* at 82.

78. *Id.* at 222; see also Oliver Wendell Holmes, *The Common Law* 5 (M. Howe ed., 1963).

When it came to affirmative action, for example, O'Connor felt her way case-by-case, "instinctively in sync with public attitudes, looking for ways to balance competing interests."<sup>79</sup> "Context matters," she wrote in *Grutter v. Bollinger*, which addressed whether the Equal Protection Clause prohibited a state law school from using race as a factor in admissions.<sup>80</sup> O'Connor weighed how diversity in each context could contribute to "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation."<sup>81</sup> She favored a "flexible, nonmechanical" consideration of race, and she embraced the goal of diversity but not the structure of a quota system.<sup>82</sup> She considered how different approaches would affect the military, universities, workplaces, and other institutions on the ground, and then she affirmed racial preferences, while also suggesting that the practice might not be necessary in future generations.<sup>83</sup>

Flexible and incremental decisionmaking does not mean minimal impact. Justice Ginsburg was also characterized as a moderate and centrist, but her calculated strategy on gender equality produced monumental shifts in the law over time.<sup>84</sup> Although best known today for powerful dissents, delivered while wearing her symbolic dissenting collar, Ginsburg moved at a deliberate pace and constructed precedents with exquisite care. She often cited Justice Cardozo's observation that justice is not "taken by storm" but rather "wooed by slow advances."<sup>85</sup> For her part, O'Connor shaped the law through her narrow majority opinions, careful concurrences, and deft navigation through heated debates.

O'Connor's restrained jurisprudence perhaps applied most consequentially to reproductive rights. Her "just-the-facts concurrence" in *Webster v. Reproductive Health Services*<sup>86</sup> prevented the Court from overturning *Roe v. Wade*<sup>87</sup> at a critical juncture.<sup>88</sup> And the "undue burden" test she first advanced in her separate opinions became established law in the *Planned Parenthood v. Casey* plurality, rendering abortion restrictions unconstitutional when their "purpose or effect" was to "place a substantial obstacle in the path of a woman seeking an abortion before the fetus

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79. Thomas, First, *supra* note 5, at 226.

80. 539 U.S. 306, 327 (2003).

81. *Id.* at 332.

82. *Id.* at 334.

83. *Id.* at 331–32, 343.

84. See Neil S. Siegel, "Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision, 43 *New Eng. L. Rev.* 799, 801 (2009) (noting "progressive criticism of Justice Ginsburg as an excessively cautious jurist").

85. Dahlia Lithwick, The Irony of Modern Feminism's Obsession with Ruth Bader Ginsburg, *Atlantic* (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/ruth-bader-ginsburg-feminist-hero/576403> (on file with the *Columbia Law Review*).

86. 492 U.S. 490, 522–31 (1989) (O'Connor, J., concurring).

87. 410 U.S. 113 (1973).

88. Thomas, First, *supra* note 5, at 264.

attains viability.”<sup>89</sup> For almost thirty years, the accommodations of the “undue burden” test have preserved the central right to an abortion while still allowing the issue to “evolve through the delicate balance between legislatures elected by the people and judges sworn to protect the Constitution.”<sup>90</sup> In light of *Grutter* and *Casey*, legal scholars like Cass Sunstein described O’Connor as the Court’s “leading minimalist” during her tenure.<sup>91</sup>

C. *A Legacy of Pragmatism*

Observing O’Connor’s focus on the facts, some commentators concluded that she lacked vision or had no theory of the Constitution.<sup>92</sup> One such detractor, Jeffrey Rosen, disparaged her “split-the-difference jurisprudence”<sup>93</sup> during her tenure—even calling each of her opinions “a ticket for one train only.”<sup>94</sup> But he later published an essay, entitled *Why I Miss Sandra Day O’Connor*, lamenting the loss of her sensible presence after she retired.<sup>95</sup> O’Connor had a “knack,” Rosen wrote, “for expressing the views of the moderate majority of Americans more precisely than either Congress or the [P]resident.”<sup>96</sup> Justice Kagan likewise called her “unerring instinct for what the citizenry could accept” her unique brilliance.<sup>97</sup>

O’Connor did trim her opinions strategically, and she would write separately, as she did in *Webster*, to blunt the impact of a majority decision

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89. 505 U.S. 833, 878 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.); see also *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 325 (2006) (O’Connor’s last opinion for the Court).

90. See Thomas, First, *supra* note 5, at 264. Indeed, *Casey* was reaffirmed in the Court’s recent decision in *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020).

91. Cass R. Sunstein, *Problems with Minimalism*, 58 *Stan. L. Rev.* 1899, 1907 (2006).

92. See Linda Greenhouse, *The First and Last of Her Kind*, *N.Y. Rev. Books* (Nov. 7, 2019), <https://www.nybooks.com/articles/2019/11/07/sandra-day-oconnor-first-last-her-kind> [<https://perma.cc/AEN6-DDN8>] (“The legal academy has tended to be dismissive of O’Connor, arguing that she had no overarching theory of constitutional interpretation, and that her instinct for compromise led her to write opinions that were too closely tied to the facts of the specific case under review.”).

93. Rosen, *Why I Miss O’Connor*, *supra* note 13.

94. Jeffrey Rosen, *A Majority of One*, *N.Y. Times Mag.* (June 3, 2001), <https://www.nytimes.com/2001/06/03/magazine/a-majority-of-one.html> (on file with the *Columbia Law Review*).

95. Rosen, *Why I Miss O’Connor*, *supra* note 13; see also Noah Feldman, *Opinion, Thank You, Justice O’Connor, for the Art of Compromise*, *Bloomberg* (Oct. 24, 2018), <https://www.bloomberg.com/opinion/articles/2018-10-24/sandra-day-oconnor-s-influence-is-missed-at-supreme-court> [<https://perma.cc/2NDH-SQHG>] (reflecting on the importance of Justice O’Connor’s impact on the Court and predicting that individuals will increasingly “learn to appreciate O’Connor’s contributions through the lens of our current [political] polarization”).

96. Rosen, *Why I Miss O’Connor*, *supra* note 13.

97. Thomas, First, *supra* note 5, at 402–03 (internal quotation marks omitted) (quoting Justice Kagan).

she regarded as either too conservative or too liberal.<sup>98</sup> Those moves, however, did not arise from timidity. They reflect both a unifying vision and a pragmatic methodology. The affirmative action and abortion cases, for example, express a theory of the Constitution: O'Connor saw the Court as a participant in an ongoing conversation that sustains democracy.

At first glance, shifts in the Court's personnel in recent years seem to have "dismantled" O'Connor's legacy of pragmatic decisions.<sup>99</sup> Yet Chief Justice Roberts—who is significantly more conservative than O'Connor but appears to share her concern with institutional roles—acquired the same "minimalist" label after the October 2019 Term of the Court.<sup>100</sup> Roberts authored decisions deferring the abortion debate in *June Medical Services L.L.C. v. Russo*,<sup>101</sup> declaring that Presidents are not "categorically above the common duty to produce evidence when called upon in a criminal proceeding" in *Trump v. Vance*,<sup>102</sup> and concluding that courts enforcing congressional subpoenas must balance "the significant legislative interests of Congress and the 'unique position' of the President" in *Trump v. Mazars*.<sup>103</sup> Whatever else these decisions portend, they account for some practical and political realities and keep the conversation going. Perhaps like O'Connor, Roberts is demonstrating baseline commitments to dialogue, accommodation, and consensus.

### III. O'CONNOR THE PATRIOT: DEMOCRATIC DISCUSSION IN AN ANGRY NATION

The central insight of *First* stems from this understanding of O'Connor's theory of the Constitution. She envisioned democracy as an enduring civic discussion that maintains the balance of power and ensures the government's accountability to the citizenry. The Supreme Court, in her conception, is engaged in a "centuries-long conversation with the other branches of government" about "the great and hard questions of fairness."<sup>104</sup> Some see the American government as a Darwinian struggle for power—" [M]odified by its environment, necessitated by its tasks,

98. See Linda Hirshman, *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* 183 (2015) (stating that O'Connor often wrote a concurring opinion when she "agree[d] with the outcome of her chosen majority but differ[ed] with the opinion of whoever was writing").

99. See Linda Greenhouse, *Opinion, Justice Scalia's Fading Legacy*, N.Y. Times (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/justice-antonin-scalia-legacy.html> (on file with the *Columbia Law Review*); see also Rosen, *Why I Miss O'Connor*, *supra* note 13 (describing O'Connor's "impressive but now embattled legacy").

100. See, e.g., Jonathan H. Adler, *Opinion, This Is the Real John Roberts*, N.Y. Times (July 7, 2020), <https://www.nytimes.com/2020/07/07/opinion/john-roberts-supreme-court.html> (on file with the *Columbia Law Review*).

101. 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring).

102. 140 S. Ct. 2412, 2431 (2020).

103. 140 S. Ct. 2019, 2035 (2020) (quoting *Clinton v. Jones*, 520 U.S. 681, 698 (1997)).

104. Thomas, *First*, *supra* note 5, at xv, 181.

shaped to its functions by the sheer pressure of life.”<sup>105</sup> Reviewing O’Connor’s constitutional jurisprudence, however, one pictures a solar system in which the branches of government orbit each other, both pushed and held in place by the forces between them. Accordingly, she resisted categorical judicial decisions that cut off discussion and also rejected heavy-handed moves by the other branches that she regarded as disturbing “the proper constitutional balance.”<sup>106</sup>

In the *Hamdi v. Rumsfeld* case on the detention of “enemy combatants,” for example, O’Connor felt moved to pen the most famous “line” to be found in all 643 of her published opinions for the Court,<sup>107</sup> that “a state of war is not a blank check for the President when it comes to the rights of the nation’s citizens.”<sup>108</sup> Moreover, she often sent cases back to the lower courts or deferred to legislatures, as in *Casey*,<sup>109</sup> so that a debate could continue. And by far the most painful episode on the Court during her tenure was *Bush v. Gore*,<sup>110</sup> in part because it cut off conversation about state control over election proceedings in the middle of Florida’s recount of the 2000 ballots.<sup>111</sup>

O’Connor’s intuitions about democratic discourse developed during her time in the Arizona legislature and the state court system. The current Supreme Court, for the first time in its history, has not one member who was elected to any legislative or executive position or served as a cabinet official.<sup>112</sup> When the Court issued its 1954 *Brown v. Board of Education* decision declaring segregated schools unconstitutional,<sup>113</sup> only one of the nine Justices had previous experience as a federal judge.<sup>114</sup> On the day that Samuel Alito replaced O’Connor in 2006, he became the ninth Justice then serving who was a sitting federal appeals court judge at the time of

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105. Jon Meacham, *The Soul of America: The Battle for Our Better Angels* 36 (2018) (internal quotation marks omitted) (quoting Woodrow Wilson).

106. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004).

107. See Epstein et al., *supra* note 10, at 633.

108. *Hamdi*, 542 U.S. at 535–36 (concluding that the Due Process Clause prohibits the military from detaining an American citizen without providing an opportunity to challenge “enemy combatant” status before a neutral decisionmaker).

109. See *supra* notes 88–90 and accompanying text.

110. 531 U.S. 98 (2000).

111. See Thomas, First, *supra* note 5, at 330; *supra* note 31 and accompanying text.

112. See Epstein et al., *supra* note 10, at 374–81 tbl. 4-12 (listing the position at time of nomination for all Supreme Court Justices from 1789 to 2010). Indeed, Justices Gorsuch and Kavanaugh (whose nominations were not captured in the table above) had also never been elected or appointed to any legislative or executive branch position prior to their elevation to the Court. See Current Members, Sup. Ct. of the U.S., <https://www.supremecourt.gov/about/biographies.aspx> [https://perma.cc/7RS5-HC6J] (last visited Sept. 23, 2020).

113. 347 U.S. 483, 495 (1954).

114. Akhil Reed Amar, Clones on the Court, *Atlantic* (Apr. 2015), <https://www.theatlantic.com/magazine/archive/2015/04/clones-on-the-court/386252> (on file with the *Columbia Law Review*).

his elevation.<sup>115</sup> With a narrower aperture to view the actions of the executive and legislature,<sup>116</sup> the Justices may also have a shallower understanding of the incentives to “satisfy short-term political appetites at the expense of long-term constitutional structure”<sup>117</sup> and of the necessary give-and-take between the branches.

Balancing forces and engaging on issues served not only as guiding jurisprudential principles for O'Connor but also as her touchstones in professional exchanges.<sup>118</sup> She exhibited relentless civility and unfailing decency, even when other Justices denigrated some of her draft opinions.<sup>119</sup> Collegiality was a daily, concrete expression of her dedication to civil discourse. When she received the initial assignment to draft a decision requiring the admission of women to the Virginia Military Institute, O'Connor suggested that Justice Ginsburg write the landmark discrimination opinion instead, saying simply and clearly: “This should be Ruth’s.”<sup>120</sup> O'Connor’s characteristic sense of community and moment of generosity proved very significant. In the tributes to Justice Ginsburg following her recent death, the decision in *United States v. Virginia*<sup>121</sup> topped the list of her noteworthy opinions.<sup>122</sup>

Both honoring her colleagues’ contributions and enduring critiques with composure paid dividends for O'Connor. In part because she withstood Scalia’s acerbic edits without ever responding in kind, she would often achieve what she wanted in a given case, while Scalia “lost cases that were deeply important to him.”<sup>123</sup> “She built coalitions. She tried for consensus. She never took a cheap shot at a colleague.”<sup>124</sup>

Indeed, Justice Thomas credits her with bringing him into conversation with his colleagues after his bruising confirmation battle because she insisted that the Justices eat lunch together.<sup>125</sup> Every Saturday

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115. *Id.*

116. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (“[C]onventional materials of judicial decision . . . seem unduly to accentuate doctrine and legal fiction.”).

117. Sullivan, *supra* note 26, at 1253.

118. See *supra* notes 60–63 and accompanying text.

119. Thomas, First, *supra* note 5, at 299–301.

120. *Id.* at 286–87.

121. 518 U.S. 515 (1996).

122. See, e.g., Marcia Coyle, 5 of Ruth Bader Ginsburg’s Most Powerful Supreme Court Opinions, PBS News Hour: Nation (Sept. 23, 2020), <https://www.pbs.org/newshour/nation/5-of-ruth-bader-ginsburgs-most-powerful-supreme-court-opinions> [<https://perma.cc/8K4M-RB7R>]; Jacob Gershman, Justice Ruth Bader Ginsburg’s Most Notable Decisions and Dissents, Wall St. J. (Sept. 19, 2020), <https://www.wsj.com/articles/justice-ruth-bader-ginsburgs-most-notable-opinions-and-dissents-11600549902> (on file with the *Columbia Law Review*).

123. See Biskupic, *supra* note 7, at 279, 290 (concluding that “Scalia’s disparagement did not stop her” because she “won the votes” and was the “majority-maker”).

124. *Id.* at 288.

125. Thomas, First, *supra* note 5, at 301.

during the Supreme Court's Term, she would gather her clerks in chambers for her crockpot chili and assign them different sides of the week's cases to debate.<sup>126</sup> She even famously (and fruitlessly) lectured senators on the need for more civil discourse in politics.<sup>127</sup>

Mutual respect between decisionmakers and reverence for democratic institutions may seem quaint to an observer of the current political scene, but it endures between the Justices at One First Street. And if the relative stability and civility there play a pivotal role in sustaining the balance of power, that will be due in large part to the traditions that O'Connor established. As Justice Thomas observes, she was the "glue" that bound the Justices together as people.<sup>128</sup> Justice Breyer has similarly described the "special talent" she had for "helping to restore good humor in the presence of strong disagreement" and to "produce results that are constructive."<sup>129</sup>

O'Connor's constitutional vision depends on channels of communication—not just within the Court, or between the branches of government, but throughout the country. In her October 2018 farewell to the public, she emphasized this commitment to democratic engagement. She called upon citizens to "participate actively in their communities," "solve problems," "put[] country and the common good above party and self-interest," and "hold[] our key governmental institutions accountable."<sup>130</sup> Democracy, O'Connor would say, "is not passed down in our gene pool" but must be taught to each generation, and she worried about public confidence in institutions.<sup>131</sup> Like most of the Justices, O'Connor hardly used a computer and did not even write her own emails, but she established a nationwide civics education initiative based on online games in 2009.<sup>132</sup> iCivics has the goal that, by 2021, every middle and high school student in the country—almost ten million annually, in all fifty states—will learn about the structure of their government using its resources.<sup>133</sup> And O'Connor intends to pass on to those students what she called the "guiding lights" of her own education: an understanding of "the rule of law, the separation of powers, the balance of individual liberty and democratic rule."<sup>134</sup>

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126. See Biskupic, *supra* note 7, at 111.

127. Thomas, *First*, *supra* note 5, at 325.

128. *Id.* at 301.

129. Breyer, *supra* note 37, at 1244.

130. Letter from Sandra Day O'Connor, *supra* note 17.

131. See Sonia Sotomayor, Sandra Day O'Connor, *Time*, <https://time.com/collection/2017-time-100/4736341/sandra-day-oconnor> [<https://perma.cc/9NKC-TZBN>] (last visited Sept. 16, 2020).

132. *Id.*

133. Our Story, iCivics, <https://www.icivics.org/our-story> [<https://perma.cc/LY7A-BTTT>] (last visited Aug. 25, 2020).

134. See Thomas, *First*, *supra* note 5, at 29.

Perhaps “America has always been an angry nation,” born of revolution and steeped in combat “on battlefields, in newspapers, at the ballot box.”<sup>135</sup> But O’Connor reminds us that dialogue and discourse are quintessentially American too. Among the words I heard most often from O’Connor was “constructive.” She endeavored to bring ideas together and build from the exchange—to make things a little better than before by combining them. At a time of intense political tribalism, when one media environment seems hermetically sealed off from the facts reported in another, it may read as wildly aspirational to suggest that encouraging discussion can somehow leaven negative partisanship. But as public life seems to contract and becomes increasingly divisive, O’Connor’s unwavering belief in looking beyond oneself, doing something to help others, and finding shared baselines provides some guidance. She was onto something about inspiring an engaged citizenry too. A recent experiment actually demonstrates that deliberations will moderate participants’ political opinions.<sup>136</sup> Anger has long ebbed and flowed beneath the surface of civic discourse.<sup>137</sup> O’Connor recognized that. But she also understood the way in which the democratic ideal of engagement could hold the nation together.<sup>138</sup>

#### CONCLUSION

Evan Thomas says that he finds his way into writing biographies by identifying the flaw in his subject. After reviewing thousands of documents and speaking to hundreds of people, he reported that he failed to locate a fundamental flaw in O’Connor.<sup>139</sup> She inspired those around her and held the public’s regard by being exceedingly rare and wholly ordinary at

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135. See Duhigg, *supra* note 14.

136. See Peter Hamby, “Intense Democracy”: How Two Academics Are Trying to Break the Outrage Cycle, *Vanity Fair* (Sept. 19, 2019), <https://www.vanityfair.com/news/2019/09/america-in-one-room-academics-is-trying-to-break-the-outrage-cycle> [<https://perma.cc/DNF2-6HQX>] (documenting how 500 registered voters with opposing positions about politics and culture moderated their views after debating face-to-face); see also Jon Meacham, *The Impeachment Inquiry Is About More than Donald Trump—It’s About Who We Are as Americans*, *Time* (Nov. 7, 2019), <https://time.com/5720747/jon-meacham-trump-impeachment-inquiry> [<https://perma.cc/DF4A-VB2A>] (quoting Eleanor Roosevelt’s observation that “[i]t is not only important but mentally invigorating to discuss political matters with people whose opinions differ radically from one’s own”).

137. See, e.g., Richard Hofstadter, *The Paranoid Style in American Politics*, *Harper’s* (Nov. 1964), <https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics> (on file with the *Columbia Law Review*) (theorizing that the longstanding history of “heated exaggeration, suspiciousness, and conspiratorial fantasy” created an “arena of angry minds” in American politics).

138. See Jill Lepore, *Opinion, The Impeachment Hearings and the Coming Storm*, *New Yorker* (Dec. 6, 2019), <https://www.newyorker.com/news/daily-comment/the-impeachment-hearings-and-the-coming-storm> (on file with the *Columbia Law Review*) (lamenting “how many people had to give up on the idea of democracy for things to come to this”).

139. Interview with Evan Thomas, author of *First: Sandra Day O’Connor*, in Phx., Ariz. (Apr. 8, 2017).

the same time. Confident but humble, possessed of both piercing intellect and generous heart, prone to blunt rhetoric but guided by diplomatic instincts, a clear-eyed pragmatist but also an idealistic patriot, traditional to the core but the boldest of trailblazers.

O'Connor has preferred setting an example to making a point. She felt she could help just by being "visible" to those who would follow,<sup>140</sup> and she believed in showing up and being accessible. *First* brings her example to the forefront of the national conversation once again. As this Review explains, O'Connor offers the simplest of lessons in the most complicated times—look only forward, have the courage to compromise, keep the conversation going. Although it strikes wistful notes, *First* also tells a profoundly hopeful story about the difference that one individual can make.

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140. See Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 201 (2004).