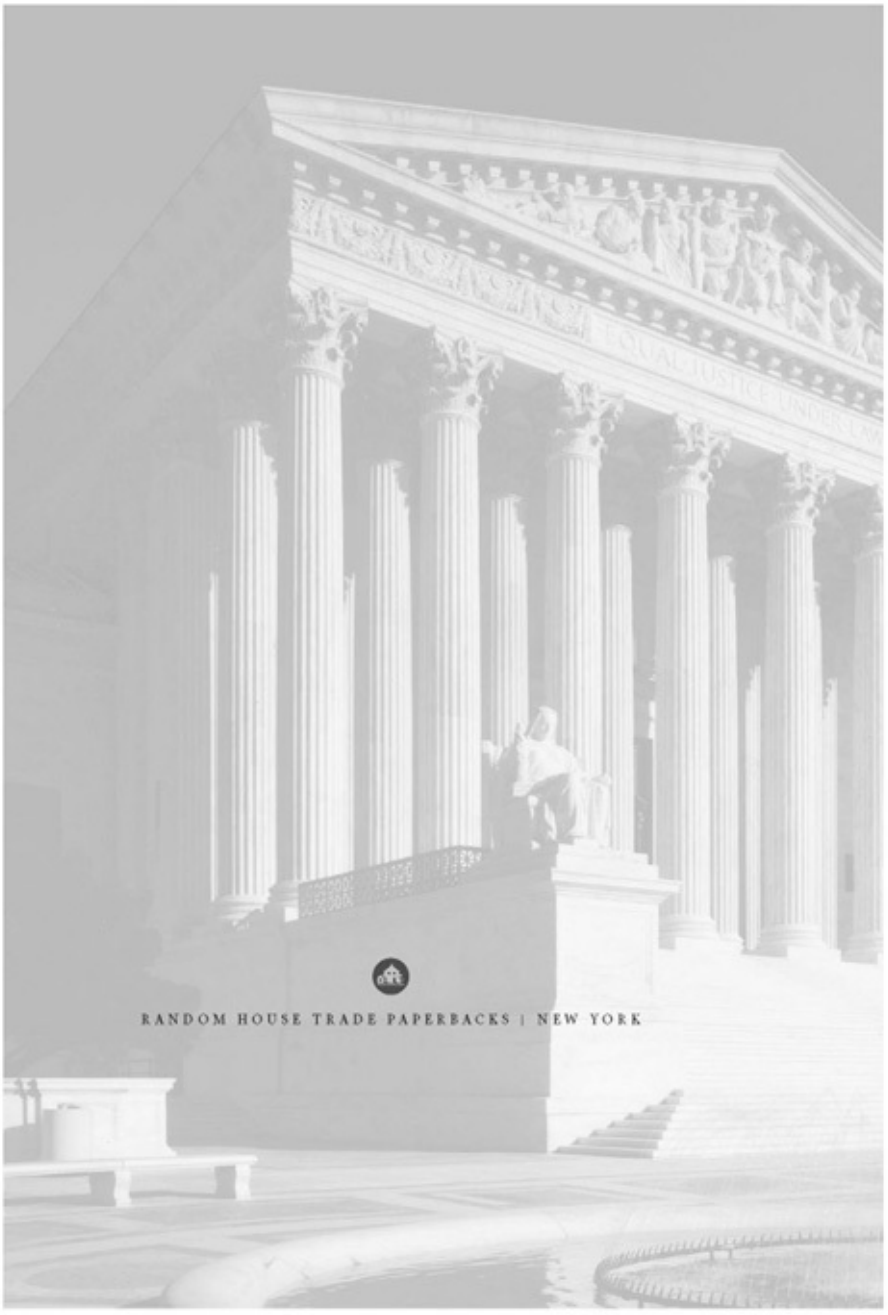
THE MAJESTY OF THE LAW

Reflections of a Supreme Court Justice

Sandra Day O'Connor

RANDOM HOUSE



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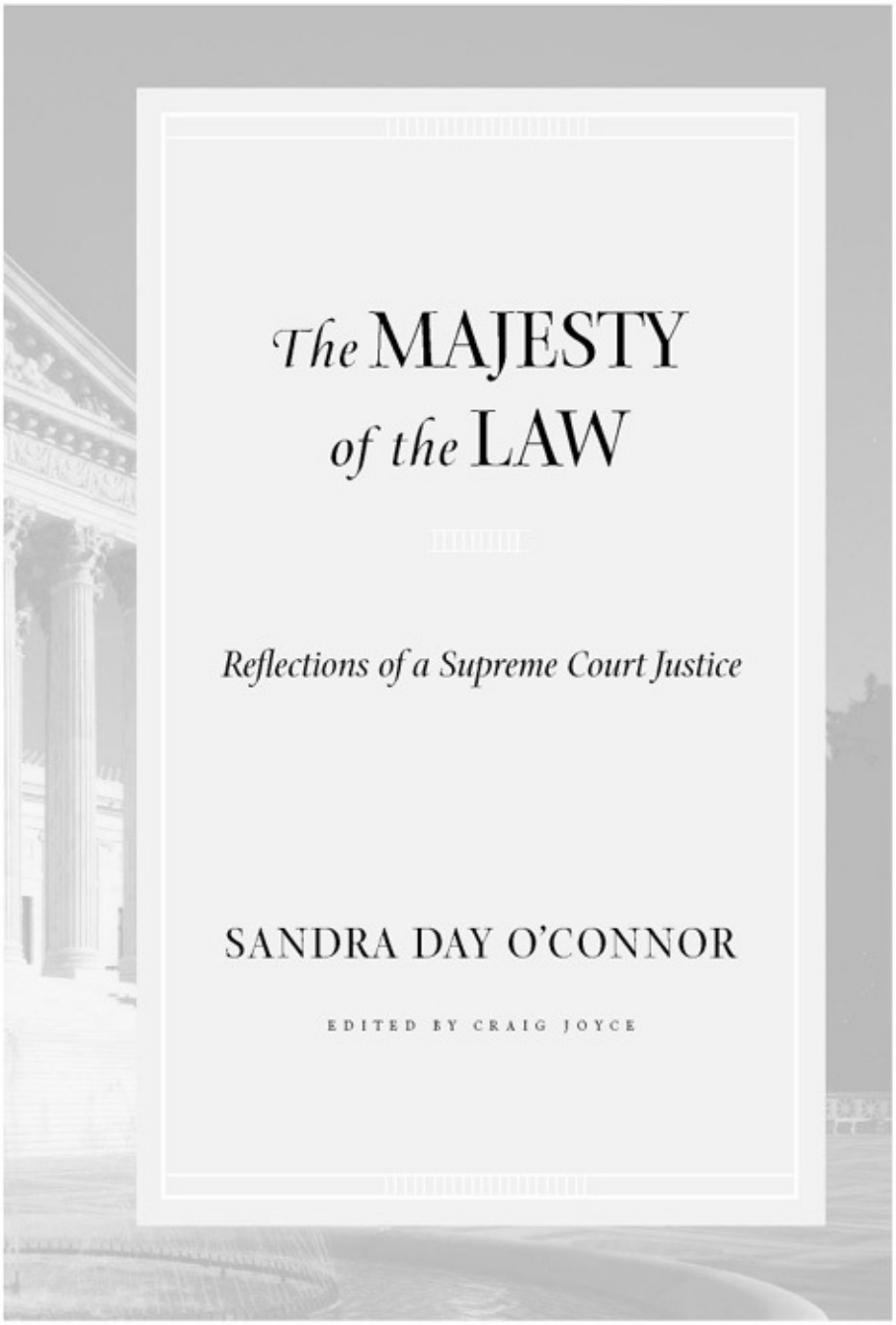
The MAJESTY
of the LAW
Reflections of a Supreme Court Justice
SANDRA DAY O'CONNOR
EDITED BY CRAIG JOYCE

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This book is dedicated
to my law clerks—past, present, and future

PRAISE FOR The MAJESTY of the LAW

"With this important book, one of the most intriguing figures in American history reveals her priva musings about history, the law, and her own life—both public and personal. *The Majesty of the La* shows us why Sandra Day O'Connor is so compelling as a human being and so vital as a publ thinker."

—MICHAEL BESCHLOSS, author of *The Conquerors: Roosevelt, Truman, and the Destruction of Hitler's Germany, 1941–1945*

"Justice O'Connor's newest book will intrigue and enlighten many different readers. She discuss multiple issues, including what it's like to be on the Supreme Court, how and by whom the Court ha been shaped, and the meaning of the rule of law. Her reflections on women in the law, and women i power, are especially thought-provoking. No one is better qualified than she to write about thes issues, and she does so with her customary wit and clarity."

—NAN KEOHANE, president, Duke University

"A marvelous collection of wide-ranging and plainspoken ruminations on the Constitutio consitutionalism, and the Supreme Court by the Court's first female Justice. Justice O'Connor's keen wittedness, honesty, and common sense are revealed throughout. Although she eloquently reveals th majesty of the law, she also brings that majesty down to earth and makes it intelligible to all of us. is her special genius."

—GORDON S. WOOD, Alva O. Way University Professor and professor of history at Brown University, author of *The American Revolution: A History*

"In The Majesty of the Law, Justice Sandra Day O'Connor has blended personal reflections with ke professional insights to give us a richly textured account of the fascinating history, current status, an hopeful future of the rule of law. The fact that the author is destined to take her place among the mo influential Justices to serve on the modern U.S. Supreme Court makes this important book all th more significant."

—JAMES F. SIMON, Martin Professor of Law at New York School and author of *What Kind of Nation: Thomas Je ferson, John Marshall, and the Epic Struggle to Create a United States*

Preface

When my husband John and I packed up and moved from Arizona to Washington, D.C., in 1981 t
begin my service on the nation's Court, we looked forward to the many new experiences—bo
professional and personal—we were sure to have: enjoying new and wonderful friends; meeting wi
Presidents, Vice Presidents, cabinet members, ambassadors, and other Justices and judges fro
around the world; travel to each of the fifty states and sometimes other countries for speeches
meetings; and, most important, I looked forward to the privilege of applying myself to work wor
doing, addressing the toughest legal issues in our nation, helping shape the development a
explanation of the principles of federal law required to resolve these issues.

I felt molded in large part by my life in the Southwest, where I had spent my earliest days on
cattle ranch in a dry and isolated part of the Arizona desert. My favorite author, Wallace Stegner, pu
it best when he said, "There is something about living in big empty space, where people are few a
distant, under a great sky that is alternately serene and furious, exposed to sun from four in t
morning till nine at night, and to a wind that never seems to rest—there is something about exposu
to that big country that not only tells an individual how small he is, but steadily tells him who he is."

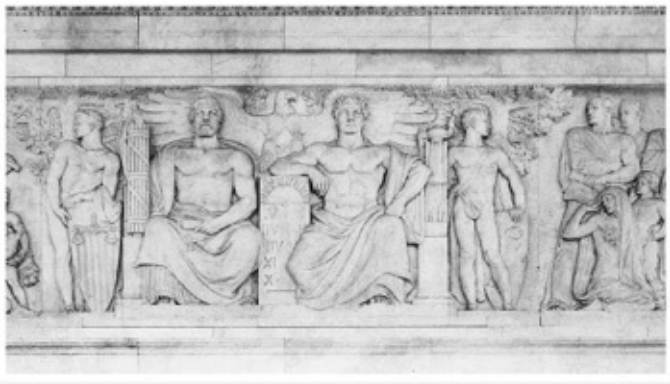
This book is an attempt to speak about my exposure not only to the Arizona desert and sun but
the rest of our country as well—exposure to the richness of its history, to the Supreme Court and
some of its members, and to some of the legal issues I have confronted along the way.

When the Supreme Court sat on the bench again the first Monday of October 2001, it had its fu
complement of nine members—one appointed by President Ford (Justice John Paul Stevens), four b
President Reagan (Chief Justice Rehnquist, myself, Justices Antonin Scalia and Anthony Kennedy
two by President Bush (Justices David Souter and Clarence Thomas), and two by President Clinto
(Justices Ruth Bader Ginsburg and Stephen Breyer). The process of nominating a new Justice tends
receive a good deal of attention. In more than two hundred years, the Court has had only 108 Justice
which comes to about one appointment every two years. An appointment to the Court is, therefore,
terms of frequency, about half as special as a nomination to the presidency—and involves infinitel
less public participation and releasing of balloons. Nonetheless, a Court appointment (which requir
both nomination by the President and confirmation by the Senate) is an occasion for public interest,
we have been reminded graphically in the past twenty years.

The person making the nomination—the President—doubtless pays special attention to the
appointments. From the President's point of view, I suppose it's a little like trying to rear childre
The President only gets to control the process for a brief period—in choosing a particular nominee-
and then the Justice, like an eighteen-year-old, is free to ignore the President's views. And Justices a
usually walking around in their judicial chambers long after the President who appointed them h
departed the Oval Office. Parenting and nominating Justices have both been common activities amo
Presidents: all of our Presidents except seven had children, and all except three—Harrison, Taylo
and Carter—nominated at least one Supreme Court Justice.[2] Like fathers in an earlier day, th

President makes the proposal and escorts the new Justice down the aisle in the marriage between th Justice and the Court, which, barring impeachment, lasts until death does them part.

As I suspect has been the case with most Justices, my nomination to the Court was a great surpri to the nation but an even greater surprise to me. My former colleague Justice Lewis Powell once sa that being appointed to the Court was a little like being struck by lightning in both the suddenness ar the improbability of the event.[3] I certainly never expected to be on the Court. Rather, I looked forwa to continuing my career as a state court judge, having served happily as a trial judge and then, wi equal contentment, on the Arizona Court of Appeals, for whose members I had deep affection ar great professional respect. I had anticipated that I would live the balance of my life in our adobe hou in the desert, where John and I had many friends and a pleasant way of life, and where we expecte our sons to settle.



East courtroom frieze (Adolph Weinman, 1932–1934) in the Supreme Court building, titled *The Majesty of the Law and the Power of the Government*.

King John of England (1166–1216), holding the Magna Carta, in the north frieze of the Supreme Cou courtroom (Adolph Weinman, 1932–1934).

My situation changed dramatically on June 25, 1981, when then– Attorney General William Frenc Smith called my home and said he wanted to talk to me about the Potter Stewart vacancy on th Supreme Court. The metaphorical lightning bolt suddenly seemed as if it might head in my directio and I was about as astonished, though slightly less frightened, as if I had seen a real bolt of lightni making its way straight for me.

The attorney general asked me to come to Washington to visit with him, with some of Preside Reagan's staff and close advisors, and with the President himself. I did so, and on July 6, twelve da after Attorney General Smith first phoned me, the President called to ask if he could announce h intention to nominate me to the Court. I said I would be honored if he did.

From my point of view, the nomination was traditional in at least some ways. Like many nominee I went to Capitol Hill to pay my respects to the appropriate legislators. And as I imagine is the ca for all nominees, I lay in bed the night before the confirmation hearings worrying about how I wou be treated and how well I would be able to respond to the questions.

After sitting in the witness chair on national television answering endless questions about th Constitution, various cases, and my personal feelings on some of life's great issues, I began to thi that the hearings would never end. Fortunately, however, Nancy Thurmond was giving a tea for me four o'clock on the third day of the hearings. Mr. Thurmond, otherwise known as Senator Stro Thurmond, was the chairman of the Judiciary Committee, and so, fortunately, he made sure that I g to his wife's tea on time.

I was sworn in on Friday, September 25, 1981. At the President's request, John and I rode with hi and Mrs. Reagan from the White House to the Supreme Court. While I waited to take the oath of m new office, I was seated in the chair that John Marshall had once used. After my voice echoed th Chief Justice's administration of the oath, I was seated at the end of the bench in our beautif courtroom, and I looked down at my parents, my husband, and our three children. I will never forg that moment.

Oscar Wilde said that the only thing worse than being talked about was not being talked about.[4] will readily confess, however, that my first years on the Supreme Court sometimes made me yearn f obscurity. The press constantly accompanied me in huge flocks; everywhere that Sandra went, th press was sure to go.

With some exceptions, things have quieted down since. But amusing stories do still result from m former media exposure. John witnesses some of the incidents that I don't see and laughingly relat them to me. After being in Washington a few years, we went to a restaurant for dinner with one of m law clerks. On our way out, John heard someone say about me, "It doesn't look like her, but it's her Others have asked me if I knew how much I looked like Sandra O'Connor. Some say, "Don't I kno you?" And a few people, when they hear that Justice O'Connor is present, walk over to shake John hand and tell him how proud they are to meet a Justice.

The appointment of a woman to the Supreme Court of the United States opened many doors young women all across the country. The following letter that I received shortly after I was nominate sums up how a great many women in this country reacted to President Reagan's decision:

I cannot begin to describe with what delight I viewed the surprising headlines in Chicago's newspapers the day of your nomination actually stood there with my mouth hanging open and an idiotic grin on my face, feeling overwhelmingly euphoric and proud.

What [it] affirm[s] to this 27-year-old female [is] that determination, judiciousness, skill and professionalism are valued a rewarded in our society, that females certainly do possess these qualities, that people will find it increasingly difficult to deny a discourage these in females, and that there is absolutely no excuse not to get everything I want in life.

Some women even gave me advice about how to deal with my brethren. One wrote: "I am so prou of you as a woman. The old 'Supreme Court' will never be the same with a lady among those me That should wake them up a little. Don't let them push you around."

While almost all of the mail was extremely upbeat, there were a few exceptions.

MRS. JOHN O'CONNOR
C/O THE WHITE HOUSE
WASHINGTON, D.C. 20500

Dear Mrs. O'Connor:

I am disgusted and disappointed that President Reagan has nominated a woman to the Supreme Court. A female justice, engagi in routine matters, would find herself asserting issues and arguing contentions, activities which more accurately become the Marxi related feminists rather than a wife and a mother who respects the psychological components of a family. . . .

In view of these matters, I hope that you turn down President Reagan's nomination.

cc: President Ronald Reagan

I received a postcard addressed as follows:

WOMAN
JUDGE ELECT O'CONNOR
C/O WHITE HOUSE
WASHINGTON, D.C.

Back to your kitchen and home female! This is a job for a man and only he can make the rough decisions. Take care of yo grandchildren and husband.

Senior Citizen

Hundreds of men have spoken to me throughout every part of this country, in airports and all sor of public places, saying things like "I think it is absolutely wonderful that there's a woman on th Court. It's about time. I'm happy for you, I'm happy for women, but most of all I'm happy for th country."

Thank goodness for men. I am indebted to two of them for my appointment: the President an Potter Stewart, about whom the following little poem was written:

A toast to Potter Stewart,
His chivalry can't be beat;
The first Supreme Court Justice
To give a lady his seat.

I am still amazed that I am that lady.

One result of becoming a Supreme Court Justice is the steady and frequent arrival in the mail invitations to attend and speak at special events across the country. They come from universitie colleges, and high schools, from state and local bar associations, from women's groups, religiou organizations, and civic organizations, and from fund-raisers of every kind and description. The la are easily declined because federal law prohibits federal judges from speaking at fund-raising even even for worthy causes. Some invitations are hard to refuse because they come from my alma mate or from organizations that have been a part of my life or the lives of one of my children grandchildren, or from a close friend.

I decided that one way I could select which invitations to accept was to speak at least once in eac of our fifty states. By my nineteenth year on the Court, I had, indeed, spoken in each state at lea once.

But that method of choosing still left open the question of what topic to address. Most audienc would be delighted to hear details of how the Court reached a consensus on some hot-button issue, gossip about the Court or its members. But those topics are, of course, off limits.

Above the bench in the courtroom of the Supreme Court is a sculpted marble panel. In the center this work is an allegorical figure depicting the Majesty of the Law. My seat in the courtroom is almo directly below this image. The panel itself suggests why we revere the Majesty of the Law. It is a essential safeguard of the liberties and rights of the people. It allows for the defense of human righ and the protection of innocence. It embodies the hope that impartial judges will impart wisdom an fairness when they decide the cases that come before them. In thinking about this book, I found myse drawn to the ideas represented by the panel above me. In the pages that follow, I explore themes suc as the history of the Constitution, of the Court, and of some former members of the Court, of th expansion of roles for women, and of the Rule of Law worldwide. My own education was n specialized in constitutional or legal history, and the opportunity to learn more in these areas wa welcome. In this effort, I was joined and assisted greatly by my law clerks, to whom this book dedicated.

This book, then, is the result of more than twenty years of thinking about and speaking about som of the major themes in our national history and the principal challenges facing our world today. Wit the breakup of the Soviet Union and the development of many new nation-states around the world, an with the concerns we all have following the destruction at the World Trade Center on September 11 2001, the articulation and consideration of our own history and our basic constitutional structu appear more important than ever before. My hope is that the historical themes explored in this boo and the reflections expressed here, will help the reader better understand our own system, and als why and how the Rule of Law offers the world its best hope for the future.

—Sandra Day O'Connor
June 2002

PART ONE

Life on the Court

Despite all that is written about the nation's Court and all the television coverage of the Justices' speeches and public appearances, day-to-day life at the Court is something of a curiosity to the public. Each Justice is asked frequently what she or he does each day, how we work together with other members of the Court, and what it was like to be nominated and confirmed. In Part One I try to answer these questions.

The daily activities of the Court are not as well known as those of the President or of Congress. Some say that the Court operates behind closed doors, and thus out of public view. Most of our daily work does, in fact, occur in our chambers. But the fruits of that work—our decisions—are in writing and fully available to the public and the media to read, discuss, and critique.

Indeed, in that sense the Court is perhaps the most open of the three branches of government. We explain the reasons for our decisions in detail. If our opinion is not unanimous, the dissenting and concurring Justices likewise explain their views. All these explanations are distributed in print and on the Internet for the world to see. No such justification is routinely given for decisions of the executive branch or the legislative branch. The fact that the Court enforces on itself an obligation to explain what we do is one reason to have some confidence in our labors.

Still, the public interest in *how* we do our work remains. Here is one insider's look at "life on the Court."

CHAPTER ONE

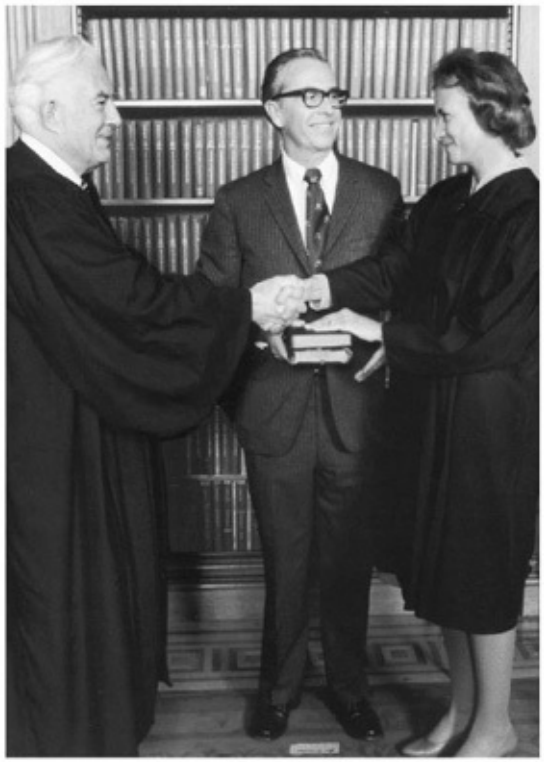
What's It Like?

WHAT IS IT LIKE WORKING AT THE SUPREME COURT? Because I never dreamed that I woul end up where I am, I had no preconceived ideas about the job upon arriving for work the first day. had not been admitted to practice before the Court. The first argument I ever witnessed in the Supren Court was one that I considered as a member of the Court. My guess is that such experiences were n uncommon for new Justices, at least until more recent years.

All I knew was that the job would be a tremendous undertaking. I had no specific ideas about th mechanics of being a Justice, however, or what the decision-making process on the Court was reall like. I hoped that I had the basic ability and could develop the skills not only to do the job but to do well in order that not only women but most citizens would think that the President had made a goo choice.

There is one custom we have on the Court that was a pleasant surprise to me and that I treasur Each day when there is oral argument, just before we go out on the bench, and each day before w confer, every Justice shakes the hand of every other Justice. To an outsider, this may seem baroqu and unnecessary, but you must realize we are a very small group. We see and interact with one anothe often, and we all know we will continue to do so for the rest of our professional lives. It is importa that we *get* along together so we can *go* along together.

The one-page memo and the color-coded distribution sheet have yet to reach the Supreme Cour Indeed, the Court is a more reliable backstop for the health of the paper industry than any protectioni legislation



Chief Justice Warren Burger administers the Constitutional Oath of Office to Justice Sandra Day O'Connor as her husband, John, holds the Bibles, at the Supreme Court building, September 25, 198

President Ronald Reagan, Chief Justice Warren Burger, and Justice designate Sandra Day O'Connor the White House, September 22, 1981.

Congress might pass. A Justice is by protocol allowed to make a grocery list without making eig copies to distribute around the Court, but pretty much everything else is done not only on paper b with copies for every other Justice to read as well.

Petitions asking the Court to grant review of a case come to us throughout the year from both t federal and the state court systems. And they come in significant numbers. We now receive more tha seven thousand applications a year. Many call but few are chosen; the Court accepts for full revie with briefing and oral argument no more than one hundred or so cases for each year's term. addition, the Court summarily decides up to another hundred or so cases without oral argument a

full briefing. In making this drastic culling, the Court has relatively few hard-and-fast rules to gui
or restrict its decisions.

We follow an unwritten policy that it takes the agreement of at least four Justices to accept a cas
With each petition we consider the importance of the issue, how likely it is to recur in various cour
around the country, and the extent to which other courts considering the issue have reached conflictin
holdings on it.

My own evaluation of the applications is based on what I believe to be the primary role of th
Court: with fifty separate state-court systems and thirteen federal circuits, our task is to try to develo
a reasonably uniform and consistent body of federal law. Petitions seeking full-scale review in case
posing a genuine conflict among the lower courts on an important issue of federal law obviously a
much more likely to garner the required number of votes to grant the petition than are petitions
cases where the lower courts are generally in agreement on the legal issue in the case.

Each year the members of the Court must read the briefs in the one hundred or so cases on whic
the Court hears oral arguments. After argument, each case has to be decided and explained in
published opinion.

During the weeks of oral arguments the Justices confer after the arguments are heard. This is whe
we learn how each Justice thinks the case should be resolved and why. Based on this discussio
writing assignments are made for the case. If the Chief Justice is in the majority on a case, he assig
the writing of the Court's opinion to one of the Justices in the majority or to himself. If not, the mo
senior Justice in the majority makes the assignment. Likewise, if a dissent is to be written and joine
by more than one Justice, the most senior Justice planning to join that dissent assigns the writing.

The writer of the majority opinion must try to reconcile the views of those in the majority. Whe
the opinion draft is circulated, each Justice reads it and decides whether to join it or to ask f
revisions as a condition of joining. Sometimes a Justice will write a concurring opinion subscribing
the result in the majority opinion but based on different reasons, which it provides. If there is
dissenting view, that too is written up and circulated to all the Justices. In the end the opinion for th
Court may be the result of many drafts and changes. Eventually, each participating Justice will hav
agreed to one or more of the opinions in the case. Each term produces something like twenty-fiv
hundred pages' worth of opinions in the *United States Reports*. It all adds up to a lot of paper.

Serving on the Court has provided me with a number of pleasant surprises. Some people think th
the Court is full of bitter battles, and it *is* true that the Court's opinions sometimes include stron
language. But in fact one of my earliest and most rewarding experiences on the Court, and one that
did not fully anticipate, was of the warmth, kindness, and civility of my fellow Justices. Every one
my colleagues has been very thoughtful and considerate. There have been times with some previou
Courts when some members did not get along and when some animosity persisted among certa
Justices. Happily, that has not been the situation during my time here. It is a particular pleasure to b
able to serve in an atmosphere of respect and affection for one's colleagues.

What is quite remarkable in my view is that each and every petition for review, whether produce
by a sophisticated lawyer in a high-rise or handwritten by a prison inmate or a private citizen in h

home, is reviewed with care by each Justice. And every written opinion of the Court is read wi utmost care and attention by every other Justice, with an eye toward refinement or improvement. Th process we follow, I think, provides some reason to have faith in the nation's judicial system.

Of course, not everyone is happy with the Court's decision in any given case. After all, you hav two sides and only one can win. And often that unhappy party is the court below, because the Suprem Court reverses about two thirds of the lower-court decisions in those cases it reviews.

When I am not hearing oral arguments, researching and considering the law, or discussing the cas with my colleagues or my clerks, part of my time is spent dealing with a mass of correspondenc Some relates to pending cases. I ignore all such letters. Many letters are from schoolchildren wh want information from me or about me. I do the best I can to process and answer these.

People often think of the Supreme Court as a remote Washington institution. State and local judge are forced by proximity to stay in touch with the concerns of those they serve. The Supreme Court, contrast, serves a national purpose for a vast country. One might wonder, therefore, if the Court simply a large, federal institution, distant and out of touch with the people. But in fact the Court is n a bad place from which to get some sense of the nation's concerns, or at least its national leg concerns. The more than seven thousand petitions for review each year come from all across th country and involve a very wide range of legal issues. The Court hears oral argument in cases th have their genesis in front-page actions by Congress as well as in the actions of police officers in tin towns. The attorneys who appear before the Court, and the clients whose problems have brought the there, present a similarly broad geographical cross section.

Justices are drawn from all over the country and are a diverse group. This, in my view, is anoth reason to be optimistic about the Court. Diversity is its strength, just as it is the strength of Americ itself. In my twenty-plus years on the Court, I have learned at least one lesson very vividly. A Justic is constantly called upon to try to draw some harmony from that diversity—and even to reconcile th irreconcilable.

E. B. White said, "Democracy is based on the recurrent suspicion that more than half of the peop are right more than half of the time." [1] In the narrow view, the Supreme Court is based on th suspicion that five Justices are similarly correct. In the broader view, I think that the Justice contribute to the wider democracy. We struggle with national issues and attempt to define from national perspective what it is that the federal laws and the Constitution say. If you don't agree wi all of the Court's holdings, you are certainly not alone. But you may be confident that we never sto trying in our writings on every case on our agenda to contribute appropriately to the fragile balanc of our national democracy.

CHAPTER TWO

The Court's Agenda

IT IS SAID THAT DAVY CROCKETT ONCE HEARD DANIEL WEBster speak, and that afterwar he said to Webster: "I had heard that you were a very great man, but I don't think so. I heard you speech and understood every word you said."

Crockett probably would have thought the Supreme Court to be a great court. Notwithstanding th public's interest in the Court, and despite the Court's voluminous output, opinion polls reveal that th public knows profoundly little about our legal system generally and even less about what the Supren Court does, where it is going, or what it has held. For example, a recent poll told us that 37 percent our citizens believe it is up to the criminal defendant to prove his innocence.[1] One would suppose th viewers of *Perry Mason* or *Law & Order* would have learned long ago that a criminal defendant presumed innocent until proven guilty beyond a reasonable doubt. Of those polled, 78 percent believ the Supreme Court can review and reverse *every* decision made by a state court. [2] Yet certainly even high school government class learns that federal courts, including the Supreme Court, have the pow to decide only issues of *federal*, not state, law.

One may gain considerable insight into where the Court has been and where it is likely to go from study of the Court's plenary docket— the cases decided by the Court after full briefing and or argument. To put the numbers in context, the Court agrees to review only a small percentage of th cases brought to its attention. When I arrived at the Court in 1981 we received around 4,00 applications a year to review particular lower-court decisions, but we accepted and decided with fu opinion only about 150 a year. Recently, the Court has been receiving over 7,000 petitions a year an has been accepting fewer than 100. The number of petitions granted declined after Congress in 198 made the Court's appellate jurisdiction discretionary.

The west façade of the Supreme Court building, c. 1992.

Sandra Day O’Connor, Associate Justice, Supreme Court of the United States.

Although the spotlight of publicity on the Court has varied in intensity over the years, most of th subject areas of the Court’s plenary docket throw off a steady glow from year to year. One especiall noteworthy example is the Court’s criminal-procedure docket. Criminal-procedure cases come fro both the state and the federal court systems, although by far the greater number of crimin prosecutions are handled in the state courts. The number of criminal-procedure cases decided by th Court rose gradually from about twelve per term in the 1950s to around twenty-five per term in th mid-sixties, and has remained essentially constant since then.[3] Comprising about one sixth of o cases, the criminal-procedure docket is an important and constant presence.

What accounts for this striking stability in the number of criminal cases on our docket? My guess that criminal procedure is simply not perfectible. The Court must constantly reexamine the way which law enforcement agencies, legislatures, and the Court itself strike the balance between th rights of defendants and the interests of society at large. And I think this continuing process reexamination is healthy. First, it helps to remind us all that important issues are at stake when th machinery of the state proceeds against the least favored members of our society. Second, it allow the law to be developed gradually and in small steps. Third, it enables the Court to correct or refi rules that prove ineffective or counterproductive. Correction of this nature is not only inevitable, it an essential part of our legal system. It is, indeed, the possibility of later correction that allows mar advances to be explored in the first place.

Like the Court’s criminal-procedure docket, much of its civil docket also reflects a rather steac routine. About one third of our docket is in the area of general federal law–business regulation.[4] Th rate at which we decide these cases has been quite steady over the last thirty years. This is n

surprising, because most of the cases that we accept for review arise from conflicting interpretatio of federal law reached in the different federal circuit courts of appeal. If there is one fixed a invariant rule of law, it is that so long as there is more than one circuit, there will be more than o view of what the law is. As the saying goes: two lawyers, three opinions.

Yet within the broad area of general federal law, we find some mature, aging subject areas a some new, more fertile ones. We have, for example, seen a persistent drop in federal tax cases, fro an average of more than eight a term from 1953 to 1965 to about four a term since then.[5] Whether th reflects the Court's complete satisfaction with the current state of tax law or its utter despair, I cann say. There has been a similar drop in the number of decisions reviewing action by the National Lab Relations Board.[6] In these areas the governing federal statutes are older, and their various provisio have been dissected and analyzed to the point where little further enlightenment seems possibl Unsurprisingly, the Court begins to see less of them.

Quite the opposite occurs when new legislation comes on the scene. Recent employment-relat federal legislation—the Americans with Disabilities Act, the Employee Retirement Income Securi Act, the Age Discrimination in Employment Act, and the Occupational Safety and Health Act—ha spawned a significant amount of new litigation. All of the statutory environmental-law cases on t Court's books—more than sixty in all—were decided in the last thirty terms.[7]

In other areas, of course, a sudden burst of activity by the Court is triggered not by new legislati but by a decision of the Court itself. Our construction of the Eighth Amendment's prohibition of cru and unusual punishment supplies one example. The Court decided no such cases between 1953 a 1970. Since the 1970 term and the death penalty decision in Furman v. Georgia,[8] however, the Cou has decided eighty-three cases on capital punishment.

A broader area of even more striking growth is the Court's civil rights docket: cases touching d due process, freedom of expression, equal protection, and the like. These are the cases based on t Bill of Rights and the ones most often covered by the media. You will not be surprised to learn th the number of civil rights cases decided by the Court underwent a quantum jump in the mid-195 following the decision in Brown v. Board of Education.[9] That landmark ruling was one of fi separate school-desegregation cases that were consolidated for decision in *Brown* for a single opini of the Court: *Brown* itself was from Kansas; the other four were from Delaware, Virginia, Sou Carolina, and the District of Columbia. The decision that resulted was certainly one of the mo important in the Supreme Court's history, requiring as it did an end to racial segregation of students the public schools of this nation.

The Court's civil rights docket, broadly defined to include judicial procedure, equal protectio voting rights, and other "freedoms," grew steadily longer through the 1960s, reaching a high of clo to sixty cases per term at the beginning of the 1970s, probably as a result of the *Brown* case and i progeny. Since then there has been a steady decline. [10]

One final portion of the docket worth mentioning, in part because it has received much comment, the Court's recent jurisprudence concerning issues of federalism and separation of powers. The issues concern the balance of power between the states and the federal government—a balance stru

by the constitutional limits on state and federal power, the rules concerning preemption of state law b federal law, the doctrine of separation of powers, and the Eleventh Amendment, which addresses th states' immunity from lawsuits brought in federal court. The Court in recent terms has given a mo expansive interpretation of the Eleventh Amendment, and that in turn has produced more cases in th area.

One generally doesn't have much appreciation for the delicate balance between the states and th federal government until adulthood, or at least until a high school civics class, but one federalism ca from Florida involved something that every small child could tell a story about: sunken treasur Some treasure seekers succeeded in finding many valuable items from a sunken seventeenth-centu Spanish galleon—the *Atocha*—west of the Marquesas Islands. They claimed title to the artifacts, b the state of Florida, not content with golden sunshine, wanted the golden coins as well. Despite th fascinating facts, the outcome of the case hinged on a rather arcane question: how to apply th Eleventh Amendment to a case concerning admiralty jurisdiction filed against state officials in feder court for the recovery of property. As things turned out, the little guys beat the government—at lea until they had to fill out their income tax reports.[11]

The trend in "federalism" cases is rather interesting. The number of such cases accepted by th Court averaged around fifteen per term through the 1950s and early 1960s, dropped substantially the latter half of the 1960s (the same period in which the civil rights docket was expanding), and the rose steadily to an average of about twenty to twenty-five per term—a level that has been maintaine up to now.[12] It has been suggested that "the continuing expansion of this segment of the docket leav no doubt that the Justices of today have a strong interest in fine-tuning the federal system."[13] But appears that, under the banner of "states' rights," issues affecting the federal/state balance have bee shared by much of the nation since President Nixon's election in 1968. In that light, the Court federalism "agenda," like the rest of its agenda, is largely a reflection of concerns that origina outside the Court.

This brief overview of argued cases indicates that the Court's business is of three types. First, the is the steady routine of resolving intercircuit federal-court conflicts and thereby overseeing th enforcement of complex federal statutes like antitrust law, labor law, and the internal revenue cod Similar, at least in its effect on our docket, is our responsibility to supervise the administration criminal procedure. These two areas account for by far the largest part of our activity: about two thir of our workload. And they probably receive the least publicity. I have noticed without surprise th there are few headline stories on our decisions concerning the power of the U.S. marshals to remov prisoners from state jails[14] or the rules on how to decide if a federal magistrate's report may b challenged in federal appeals court even if the losing party fails to object.[15]

Second, when our agenda does change, the change most frequently is a delayed response to chang in the nation's agenda. When Congress, the executive branch, or a state lights a new fire by passin significant new legislation or taking bold new action, we are inevitably summoned to attend to th blaze. Some litigants will ask us to fan the flames, others will demand their extinguishment, and sti others will request only that the fire not be allowed to spread. Justice moves slowly (especially in federal system where multiple courts may be entitled to review the issue before we do), so the Cou usually arrives on the scene some years late. But once there, we must usually linger for a while.

often takes a series of decisions to flesh out a new statute or to draw new boundaries between state an federal authority, or to reconsider the limits on government intrusions on individual right Eventually, of course, most of what can be done in an appellate court is written and published, an thereafter we see little more of that particular conflagration.

Finally, I must concede, the Court occasionally starts a fire of its own. Or perhaps it would be mo accurate to say that the Court occasionally supplies the crucial first spark. Perhaps *Brown v. Board o Education* was one such case. But cases of this type, despite the considerable publicity they receiv are rare. Generally, they represent an extremely minor, though disproportionately controversial, pa of our docket.

Most of the Court's agenda is dictated by external forces: the actions of the other branches of th government, the decisions of the lower courts, and ultimately the concerns of the public. It is the forces, not secret ones within the Court, that frame the bulk of the issues we decide. The Court's ro is uniquely reactive. It is the Constitution, after all, that limits our business to "Cases Controversies."[16] The business of the Court is to resolve controversies, not to create them. That is ho it should be. And, our docket reveals, that in fact is how it is.

I am sure we do not always succeed in striking precisely the right balance among the competin ideals of law, freedom, and justice. But we never stop trying. It is safe to say that at least one lawy disagrees with almost every opinion we hand down; we don't take a case without two sides to it, an one side always must lose. Indeed, I have known judges whose natural temperament led them endeavor to decide a case against the lawyers on *both* sides, but generally speaking, such efforts hav not been crowned with success.

Despite the occasional obfuscation in its communications, the Court does its best to struggle wi the difficulties it faces term after term. I think that Justice Rutledge spoke for every Justice when h said, "I believe in law. At the same time I believe in freedom. And I know that each of these thing may destroy the other. But I know too that, without both, neither can long endure. . . . Law, freedom and justice—this trinity is the object of my faith."[17]

CHAPTER THREE

Judicial Appointment and Tenure: A History

PRESIDENT JOHN ADAMS ONCE SAID: "MY GIFT OF CHIEF Justice John Marshall to the peop of the United States was the proudest act of my life." [1] Many students of American history have note that, although Presidents change, the Supreme Court endures. A number of Justices have served on th Court for decades after the Presidents who appointed them have left office.

From 1790 until 2002, only 108 people have served as Justices of the Supreme Court of the Unite States. On the average, a new Justice is appointed every twenty-two months. Because of th significance of the Supreme Court in our government, the selection of its Justices garners inten interest.

The provisions of our Constitution relating to the Court are characteristically succinct. Article II Sec. 1, provides that "the judicial Power of the United States shall be vested in one supreme Cour and in such inferior Courts as the Congress may from time to time ordain and establish. The Judge both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." Article I Sec. 2, provides that "The President . . . shall nominate, and by and with the Advice and Consent of th Senate, shall appoint . . . Judges of the supreme Court."

The Constitution does not provide for the number of Supreme Court Justices. Congress original fixed the number at six by the Judiciary Act of 1789. A month before President John Adams left offic in 1801, Congress reduced the number to five in order to prevent the next President, Thom Jefferson, from filling a vacancy. That plan failed, however, because Congress changed the law agai in 1802 and restored the number to six. Jefferson made three appointments to the Court during h years as President. In 1807 Congress increased the number of Justices to seven. In 1827 it increase the Court's size again, to nine. The Judiciary Act of 1863 added a tenth Justice, but Congress reduce the Court back to seven in 1866 in an attempt to prevent President Andrew Johnson from fillin vacancies with appointees who shared his views about the unconstitutionality of Reconstructio legislation. President Johnson did nominate one Justice, but the Senate took no action on th appointment. The last change in the Court's size occurred in 1869, when Congress increased it agai to nine, where it has remained ever since.

Most of the increases in Court size were made to accommodate the duties of the Justices in "ridin circuit" to hold court with district judges around the country and thus extend the law of the ne federal government to the farthest reaches of the young nation. Although the Justices complaine about their circuit-riding duties almost from the Court's inception, those duties were not ended b Congress until 1891. Because of circuit riding, it was common in the past to appoint to the Court person from the circuit in which the vacancy occurred. This is no longer a consideration in th selection of Justices, as is apparent from the makeup of the present Court, with two Justices fro Arizona: Chief Justice Rehnquist and myself.