

TRIBUTES

WILLIAM REHNQUIST AND SANDRA DAY O'CONNOR: AN EXPRESSION OF APPRECIATION

Anthony M. Kennedy*

Thank you for the invitation to be here to honor Sandra O'Connor and the memory of the late William Rehnquist. We meet at Stanford, the place that did so much to shape their lives and careers. The years at Stanford gave them their skills as scholars and professionals. Those years, too, helped them find their self-definition, their sense of identity. At Stanford, they continued to shape their ethical frameworks and their beliefs that the individual can, and must, contribute to the progress of a free society. It is a privilege to discuss not just one but two great Justices, here at the University that means so much to Justice O'Connor and that Chief Justice Rehnquist ever admired.

The legal academy, the Bar, historians, and the American people will study their decisions and, in good time, assess their place in the history of the Court and the history of the law. It will be for later generations to find insights more penetrating, judgments more balanced than are possible for us; but it is appropriate for you to begin the dialogue.

My remarks are a brief introduction to your discussions and an expression of appreciation for your undertaking to study the work of my late former colleague and true friend, Chief Justice Rehnquist, and my dear friend, and still esteemed senior colleague, Justice O'Connor.

To begin, let me ask you to match this description to a famous Justice: On a personal level he was casual, almost to the point of being indifferent about his dress. He was devoted to his wife, and it was touching to see the tender affection and care he gave her when she was ill. Then, too, he enjoyed the company of his friends and a night out with the boys. His mind was brilliant in

* Associate Justice, United States Supreme Court. These remarks were delivered on March 17, 2006, at the *Stanford Law Review* Symposium, "Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor."

scope and remarkable for being so well ordered. His open, friendly demeanor helped put visitors and friends at ease when they were in the company of his powerful intellect. His tenure was one of the longest in the history of the Court. This is the standard description of John Marshall, the one we read in his biographies. Yet it is also accurate in all respects as to William Rehnquist.

In the conferences of the Court, Chief Justice Rehnquist maintained his positions with great force, but he was respectful of the deliberative process, and our discussions were dynamic yet precise. Outside of formal deliberations, he enjoyed initiating casual conversations, but the element of precision was always a requirement. If the topic was history, the date had to be right to the year, not just the era. If the conversation turned to travel or places, the geography had to be exact.

This applied, alas, even to the weather. When I came to the Court, the Justices on argument days had lunch in the smaller of our two dining rooms. That is because Justices Brennan, Blackmun, Marshall, and White were infrequent attendees. On the first or second day I had lunch with my new colleagues, though, Bill Brennan and Byron White were there to join in the welcome. Seeking to put me at ease, the Chief Justice asked me, "What is the average annual rainfall in Sacramento?" Undaunted, I replied, "Just over twenty inches." The Chief Justice said, "Oh, that is too high."

I let the matter rest. The Chief did not. Within the hour, he sent a memo saying the answer was 18.9 inches. I congratulated myself on a good guess, an answer close enough for government work. The Chief, on the other hand, thought my answer was a wild inaccuracy.

The Chief was not just one for details; he had a fine grasp of complex ideas in the academic sense. During his undergraduate years at Stanford, and through presentation of his thesis for a master's degree, one of his favorite professors was Dr. Arnaud B. Leavelle of the Political Science Department. In that era it was common for political science faculties at major universities to have a scholar whose erudition and learning were drawn upon for a course in the history of political thought. The typical course would begin with Plato, Aristotle, and Cicero; then proceed to Aquinas; then to Montesquieu, Hobbes, Hutchinson, Locke, and Rousseau; then to Adam Smith, Marx, and Bentham; then to Acton, Laski, and Popper. This was the course Leavelle taught. He became Rehnquist's advisor and mentor.

Some eight years after Rehnquist submitted his master's thesis, I, too, began taking the course from Professor Leavelle. He was an inspiring classroom teacher. When he died suddenly, my sense of loss was real because he had taken a personal interest in me and had agreed to be my advisor. It was only a few years ago that the Chief and I learned, through a chance conversation, that we both knew and admired Leavelle. The Chief was delighted and said how grateful he was to Leavelle for introducing him to the world of great ideas.

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Another of the Chief's influential teachers was Professor Charles Fairman at Stanford. My surmise is that Professor Fairman taught the future Chief Justice how to be so confident in using original sources when writing history. In 1949, the *Stanford Law Review* published Fairman's article entitled *Does the Fourteenth Amendment Incorporate the Bill of Rights?*¹ As the title indicates, the article addressed Justice Black's theory of incorporation. Black explained his theory in 1947 in *Adamson v. California*,² though he had joined the majority in *Palko v. Connecticut*.³ It took some ten years for Black to articulate his position, and he expressed it with remarkable clarity and consistency. Black and Rehnquist reached quite different conclusions, but they were alike in that each had a confidence in formulating a consistent theory for resolving a broad range of constitutional issues. Many of us who were teaching constitutional law when Rehnquist first came to the Court remarked upon the fact that he expressed a comprehensive, confident, and lucid position on the subject of federalism very early in his tenure.

Fairman recounted that the phrase "privileges or immunities" was suggested by Representative Bingham of Ohio because, in the words of one of Bingham's colleagues on the Joint Committee on Reconstruction, "Its euphony and indefiniteness of meaning were a charm to him."⁴ To my regret I did not think to ask the Chief to comment on Fairman's historical account, if only to provoke a predictable reaction. It seems safe to conclude that, given his respect for care in stating the purpose and meaning of any text, particularly a constitutional text, he would have been horrified by the disclosure that the phrase "privileges or immunities" found its way into the Constitution simply to preserve a half-finished thought. This slipshod approach would have fortified his view that considerable caution should be used when deciding the extent to which the Fourteenth Amendment alters the federal balance.

Rehnquist chose a limited interpretation of the Civil War Amendments in part because of his concern about committing the Judicial Branch beyond its authority. This was his abiding concern on the Court, and he relied on federalism as a first line of defense against overreaching. As part of his insistence on using federalism as a limiting rule, Rehnquist was troubled that at least one version of the phrase "living Constitution" meant the Court should fill a void when no other branch of the government offers necessary protection for some modern conception of dignity. This he called the "living Constitution with a vengeance."⁵ In his view, the general language of the Bill of Rights was

1. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? An Original Understanding*, 2 STAN. L. REV. 5 (1949).

2. 332 U.S. 46 (1947).

3. 302 U.S. 319 (1937).

4. See Fairman, *supra* note 1, at 19 & n.37.

5. William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (revised text of the ninth annual Will E. Orgain Lecture, University of Texas School of Law).

not designed to solve problems society might confront a century later.

Rehnquist found no occasion to express a theory so far reaching as Black's, but right from the start, he was willing to discuss doctrinal issues in basic terms. One of his early writings on the subject of federalism was in *Furman v. Georgia*.⁶ In dissenting from the Court's decision to strike down the death penalty laws of Congress and some forty states, Rehnquist said this:

The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.⁷

He urged that the Court, by invalidating the statutes, had transgressed the doctrines of separation of powers and federalism.

In *Cox Broadcasting*,⁸ Rehnquist issued a sole dissent—"lone dissent" may be the better phrase, for it is lonely to write just for yourself. He gave voice, for neither the first nor last time, to the concern that "uncontrolled federal judicial interference with state administrative and judicial functions would have untoward consequences for our federal system."⁹

When addressing the subject we now call criminal procedure, Rehnquist often voted against expanding the rights of defendants. For him the concern was to preserve the federal balance by confining the power of the Court. Present-day law students and professors may not understand his insistence on seeing these cases as presenting, first and foremost, problems of federalism. This is the result, in part, of the way the law school curriculum was designed before it had to change to accommodate the decisions of the Warren Court. Before the late 1960s or early 1970s, criminal procedure was not generally taught as a separate course, nor was it generally thought of as a discrete subject. Instead, it was just another chapter in the constitutional law course; the key question we asked was the extent to which adoption of a particular rule would require federal judicial intrusion into state affairs.

Then things changed. Criminal procedure became a separate, freestanding subject. The emphasis became not whether a particular rule was a justified extension of federal power, but whether it was necessary for a fair trial. The difference is subtle, yet important. It might be compared to the mindset of a judge from my generation when he or she confronts a certain class of cases in present times. Were the judge to adhere to the framework learned in the law school curriculum of an earlier day, a case is a statute of limitations case or a torts case, but in the present generation it is an environmental case. Law school categories affect the way we think. It seems fair to say that for the Chief Justice, in a criminal procedure case federalism remained the overriding

6. 408 U.S. 238 (1972).

7. *Id.* at 467 (Rehnquist, J., dissenting).

8. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

9. *Id.* at 503 (Rehnquist, J., dissenting).

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consideration.

In defending federalism, Rehnquist found assurance in knowing he was from the West. For him, the West was a visible, tangible manifestation of the idea that federal power must be held in check. He enjoyed poetry, and one of his favorite stanzas was from a poem by Arthur Clough:

And not by eastern windows only,
When daylight comes, comes in the light;
In front the sun climbs slow, how slowly!
But westward, look, the land is bright!¹⁰

At the request of the Chief Justice the poem was read at his funeral service. For Justice O'Connor, who had lost a close friend she had known from their time here at Stanford, those words about the West were comforting. They also comforted me. For me it was a friendship of fewer years, but still a wonderful one.

In his master's thesis, Rehnquist noted that it was submitted to Professor Leavelle, "whose supervision of this work at every stage passed beyond the realm of academic duty into that of personal friendship."¹¹ That phrase caught my attention because it described the role he assumed when he became Chief Justice. His supervision of the Court at every stage passed beyond the realm of duty into that of personal interest and friendship. The Chief was a decent, warm, compassionate, and caring human being. He was a brilliant, effective, and dedicated Chief Justice.

The Court is more stable, more constant, more resilient than some may realize. It has a force and permanence of its own. Yet the persisting duality is that, like all institutions, it remains susceptible to human frailty and to the errors of those who misunderstand their duties. William Rehnquist and Sandra O'Connor honored their offices and strengthened the Court.

This brings me to Justice O'Connor. For her, too, the experience of the West was a formative and dominant influence in shaping her vision and hopes for the country. Today, when transportation and communication unite us in effortless ways, the idea that being from the West can be part of one's self-image might seem an outmoded concept. Some might even consider it a condemned stereotype, disclosing bias, narrow vision, and provincial prejudice.

Pride in one's past, though, is not necessarily mischievous. Rehnquist chose Arizona because it was growing, and it offered a young lawyer the opportunity to prove his talent and integrity as a member of the Bar. And for O'Connor, the sense of place and pride in her origins are splendid aspects of her persona and part of the reason America came to admire her for who she is and what she has become.

10. Arthur Hugh Clough, *Say Not the Struggle Naught Availeth*, reprinted in *THE OXFORD BOOK OF ENGLISH VERSE: 1250-1900*, at 741 (Arthur Quiller-Couch ed., 1919).

11. William Hubbs Rehnquist, *Contemporary Theories of Rights*, 58 STAN. L. REV. 1997, 2000 (2006) (1948). The *Stanford Law Review*, as part of this Symposium, has published Rehnquist's previously unpublished master's thesis in this Issue.

The sense of adventure and purpose Sandra shared with her family must have come, in part, from the fact that Arizona was still a young state. She was riding horses before the state was even twenty-five years old. Surely, her hope that success on the ranch would bring honor to her family and to her state can instruct us now just as it inspired her then.

Her book, *Lazy B*,¹² is a story of place and a way of life, a place that shaped her character and resolve, a way of life then heroic, now overtaken by time and change. The West she knew in Arizona, and the West we think of as being so much a part of her existence, had all the more meaning because the image of life on a great cattle ranch in Arizona is so powerful and so straightforward, compared, for instance, with the more complex image of a modern-day California.

The western experience on the Day ranch in the 1930s and 1940s had a direct and powerful link to the American frontier experience. With no cities or towns, no preexisting social structures or governments, those who came to the frontier confronted the meaning of freedom in a new and direct way. Acquaintances, co-venturers, neighbors, and adversaries all had to take the measure of one another and establish their respective rights and privileges. The common premise was simple: equality. The western and frontier experience taught that each person was entitled to be treated as equal and given the opportunity to prove his merit, her character, his resourcefulness, her strength.

Neither the place nor the concept, of course, was anything close to idyllic. In the West there were, in both the literal and figurative senses, scorpions and snakes aplenty. On the frontier, just as in other places, race and gender prejudice were all too active and injurious. Still, there was an attempt to show that equality was a common thread.

The frontier and the West wanted to prove a commitment to individualism, but that idea must be contained. Individualism is justified only when it proceeds from equality. As the frontier began, in an imperfect way, to endorse the idea, equality became part of the American ethic, the American faith. The frontier brought equality, the promise of the Declaration of Independence, to the American sense of self. In this way the West sought to repay the Nation by making its own contribution to the idea of freedom. The frontier experience embraced the time when Lincoln taught the idea of equality and when the Civil War Amendments made that word—in its moral and conceptual sense—a critical part of the Constitution.

Equality was an operating principle on the Lazy B. Richard Chambers, a Stanford graduate who served as a judge on the United States Court of Appeals for the Ninth Circuit for thirty-seven years, took pride in his knowledge of Arizona and its history. He used to tell us that he had not been given the privilege, in his early days as an Arizona attorney, of knowing the Day family.

12. SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002).

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He knew their reputation, though, and it was clear: the Days were the best neighbors in Arizona.

Sandra O'Connor's belief in equality, grounded in real experience, still sustains her, and it is a strong theme in her jurisprudence. We see this in *Mississippi University for Women v. Hogan*¹³ and in *Grutter v. Bollinger*.¹⁴ Her elaboration of our law is at once extensive and subtle, and scholars will find she has written much to teach us. She wrote careful, thoughtful, and often creative opinions. Cases like *Lynch v. Donnelly*,¹⁵ in which she concurred, spring to mind. Another evident theme she has in common with the thought and writings of William Rehnquist is her respect for the federal balance and the dignity of the states. This commitment, of course, had some roots in her valuable and formative experience as a state legislator and state judge.

Justice O'Connor felt a real stake in opinions written by other Justices in which she joined. This sense of shared participation in the work of the Court is a dynamic not often commented upon. Justice O'Connor exhibited a strong sense of collective authorship over the Court's work product, whether or not she was the designated author. It was essential to listen to her views at conference and to try to incorporate them in drafting an opinion.

Perhaps as important as her decisions was her approach to deciding. Although it is a considerable oversimplification, one might suggest that while the Chief Justice shaped the Court with his clear and consistent voice, Justice O'Connor shaped the Court with her meticulous, case-by-case approach. To compress even more, one might suggest that the Chief's defining characteristic was what he decided, whereas Justice O'Connor's defining characteristic was how she decided.

As for the related issue of Justice O'Connor's overarching jurisprudential theory, please permit a brief observation. It would be too bold to ask Justice O'Connor, "Are you a pragmatist?" Since the term is sometimes used to describe her approach, though, we can speculate on what her answer might be. She would say, it seems to me, that if the question asks whether she subscribes to the formal system described by James, Pierce, and Dewey, she would decline to embrace the entirety of their philosophy. For the formal pragmatist school, "No abstract concept can be a valid substitute for a concrete reality."¹⁶ I should think she could not accept this principle, because to do so would cast doubt upon belief in the innate spirituality of humankind. On the other hand, she would be pleased, I should think, to acknowledge that if by "pragmatic" we mean paying serious attention to real-world consequences, this is a good attribute for a judge. Even in this limited sense, pragmatism does not suggest result-driven thinking. Awareness of real-world consequences is a far cry from

13. 458 U.S. 718 (1982).

14. 539 U.S. 306 (2003).

15. 465 U.S. 668 (1984).

16. EDWARD C. MOORE, AMERICAN PRAGMATISM: PIERCE, JAMES, AND DEWEY 136 (1961) (quoting William James).

having a preexisting purpose to achieve a particular outcome.

Perhaps at this point in the hypothetical dialogue, Justice O'Connor would interject an additional observation: "And just what do you think the case system is all about? One of its objects is to make judges aware of the consequences of their decisions. If pragmatism is used in this sense, without linking it to the formal philosophic school of that name, then the label is fine with me." Her book about the Lazy B, it is worth noting, describes a way of life in which utility, while not the sole value, cannot be shrugged off as irrelevant.

This brings us back to her sense of place, her sense of coming from an America that could teach her something, can teach all of us something. There is a certain humility that the western space brings. In *O Pioneers!* by Willa Cather, which Justice O'Connor read as a child, the protagonist is a young girl, Alexandra. She and her family go to the frontier to shape the land, and then find that it shapes them. Alexandra says this: "The land belongs to the future . . . that's the way it seems to me. We come and go, but the land is always here. And the people who love it and understand it are the people who own it—for a little while."¹⁷

Perhaps this describes Sandra's way of thinking about the ranch, about Arizona, about America. We cannot own America. At best we can hold it in trust for those who are to come after us. She kept that trust in a grand and historic way.

Sandra became the best of colleagues and reached out to each one of us who served with her. She was marvelous at representing the Court in a gracious and charming manner in the rich cultural life in Washington. In doing so, she added to the luster and dignity of the Court itself.

All this Justice O'Connor could make seem effortless. It was not. Though we heard no complaint, it could not have been easy to be the first woman Justice. Coupled with the difficult work of the Court, her role must have been stressful, and surely lonely. It should be left to those who themselves have been on the outside to describe the pain and indignities visited upon one who breaks through a barrier. Some of the slights, of course, can stem from well-intended yet still bumbling reactions or insensitive remarks. In any event, the Nation could not have chosen a stronger or better person than Sandra O'Connor to carry out that assignment.

I wish it were possible for me to put into better words the debt my wife Mary and I owe to Sandra and John O'Connor not only for those deeds all America thanks them for but also for their friendship to us. We shall be grateful always that they did what some people might not think to do: they shared with us their best friends. Their welcome helped us find our own sense of place in Washington.

Today it is our good fortune to be in the West, and indeed at Stanford. In this place we should not neglect to mention Wallace Stegner, an author Sandra

17. WILLA CATHER, *O PIONEERS!* 179 (Houghton Mifflin Co. 1995) (1913).

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likes to quote. Stegner was an imposing man, a distinguished author, and, as you may know, a member of the faculty in the Stanford English Department. Meeting him as a student, and knowing he would read something you had written, was a daunting experience. For me it was an experience filled with the same sense of wonder I would feel years later when greeted as a colleague by William Rehnquist and Sandra O'Connor.

At the outset of *Lazy B*, Sandra quotes Stegner. He wrote:

There is something about living in a big empty space, where people are few and distant, under a great sky that is alternately serene and furious, exposed to sun from four in the morning till nine at night and to a wind that never seems to rest—there is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him who he is.¹⁸

It is our Nation's good fortune that William Rehnquist and Sandra O'Connor knew who they were, and that the Nation came to know them. It knew them as shaped by the West, as noble individuals, as inspiring Justices, and as defenders of the Constitution, America's own great charter of Freedom.

18. WALLACE STEGNER, *Finding the Place: A Migrant Childhood*, in *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST* 9-10 (2002) (quoted in O'CONNOR & DAY, *supra* note 12, at vii).

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