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## BOOK REVIEW

### A FOUR-DECADE PERSPECTIVE ON LIFE INSIDE THE SUPREME COURT

THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS. By Joan Biskupic. New York, N.Y.: Basic Books. 2019. Pp. 421. \$32.00.

FIRST: SANDRA DAY O'CONNOR. By Evan Thomas. New York, N.Y.: Random House. 2019. Pp. 476. \$32.00.

*Reviewed by Geoffrey R. Stone\**

Judicial biographies can shed important light on the personal lives, professional careers, intellectual evolution, ideological values, political experience, and judicial interactions and motivations of Supreme Court Justices. In that spirit, *First*<sup>1</sup> by Evan Thomas and *The Chief*<sup>2</sup> by Joan Biskupic illuminate in often fascinating ways the lives, experiences, and careers of Justice Sandra Day O'Connor and Chief Justice John Roberts, respectively. Each of these works draws on a wealth of previously undisclosed information to shed light on the twists and turns in their personal and professional lives and on the behind-the-scenes compromises, machinations, and negotiations that produced many of the most important constitutional decisions of the last four decades.

With impressive access to these Justices themselves, as well as to their colleagues on the Court, their law clerks over the years, and their political and personal friends and enemies, Biskupic and Thomas offer often surprising, lively, and engaging insights that should be of interest not only to lawyers, but also to thoughtful citizens more generally.

In these works, Thomas and Biskupic trace the evolution of the Supreme Court's jurisprudence from the Warren Court to the Roberts Court, and in so doing they shed light on how the Court functions and raise interesting and important questions about how we should evaluate its performance. Moreover, these two works are especially engaging together because of the sometimes quite surprising interconnections between these two Justices, even though they never served on the Supreme Court at the same time.

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<sup>1</sup> EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* (2019).

<sup>2</sup> JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* (2019).

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In this Review, I will attempt to lay out, in a highly abbreviated form, some of what I found to be the most enlightening facets of these works. In so doing, I will focus first, in Part I, on Justice O'Connor's and Chief Justice Roberts's lives and careers up to their appointments to the Supreme Court, and then, in Part II, on their respective contributions to our constitutional law and on the often eye-opening revelations Thomas and Biskupic share with their readers about the internal workings of the Court.

## I. THE PATH TO THE COURT

### A. *First*

Sandra Day was born in 1930 in El Paso, Texas. Her family home, known as the Lazy B ranch, occupied roughly 160,000 acres of land along the Arizona-New Mexico border. The ranch had been in the Day family for more than a century. The house had no running water, indoor plumbing, or electricity. An only child until she was nine, Sandra had no neighboring children to play with, but endless numbers of horses, antelopes, coyotes, bobcats, and scorpions with which to amuse herself. Because schools in the area were of poor quality, in 1936 Sandra's parents sent her to live for most of the year with her grandparents in El Paso, where she received a better education. Speaking of this time in her life, Sandra described herself "as shy and unconfident" (p. 18).

In September 1946, Sandra entered Stanford as a sixteen-year-old freshman. The Stanford of 1946 was not the Stanford of today. This was long before it became one of the nation's leading universities. Even so, Sandra was out of place. As one friend later recalled, when Sandra spoke she "sounded like the Dust Bowl" (p. 27). Sandra fell in love with the study of Western Civilization. An "ode to reason and the Enlightenment, to the rule of law, to the separation of powers, to the balance of individual liberty and democratic rule," these values, Evan Thomas observes, "would remain O'Connor's guiding lights[] in later life" (p. 29). Sandra became enamored with college, writing her parents that it "just gets better and better" (p. 31). Eventually, she became interested in the law and, at the age of nineteen, after her junior year, she entered Stanford Law School.

At this time, only one in twenty women graduated from college and the average age of a new bride was twenty (p. 34). The standard joke was that "women went to college for an 'MRS' degree" (p. 34). During her six years at Stanford, between college and law school, Sandra Day was engaged twice, and she received four marriage proposals.

There were only four women in her entering law school class of 150. The faculty routinely referred to the students as "the men" or "the boys" (p. 35). Sandra was one of the top students in her class and one of the

best students on the newly founded *Stanford Law Review*. The top student in the class of 1952 was William Rehnquist, who was smitten with Sandra. They were a steady couple until December 1950, when Sandra told Rehnquist she wanted to break up. Rehnquist was heartbroken. Two years later, still nursing his disappointment, Rehnquist left Stanford a semester early to begin his clerkship with Supreme Court Justice Robert Jackson. Lonely in the nation's capital, Rehnquist wrote Sandra asking her to marry him. Sandra, though, was now in love with another student at Stanford, John O'Connor. Although Rehnquist persisted in his pursuit of Sandra, she informed him that she was seeing O'Connor. Rehnquist was brokenhearted, but he moved past his heartbreak and he and Sandra moved into "a friendship that would last the rest of their lives" (p. 45). Six months later, Sandra and John O'Connor were married at the Lazy B.

Meanwhile, Sandra, who had graduated in the top ten percent of the class, looked for a job. Although many large firms in Los Angeles and San Francisco were actively recruiting graduates with much less impressive records than hers, none of them was interested in Sandra. Those who bothered to explain their position made clear that they were not hiring women lawyers. Finally, she accepted a position with the San Mateo County District Attorney, who offered Sandra a job at no pay, working in the outer office alongside his secretary.

Shortly thereafter, during the Korean War, John obtained a commission in the Judge Advocate General's Corps in Frankfurt, Germany. Sandra got a legal job there with the Quartermaster's Corps. In 1957, they returned to the United States, settling in Phoenix, where Bill Rehnquist was practicing. John took a job in a law firm, but Sandra could not find a position. None of the firms there would employ a woman lawyer. Six months later, after giving birth to a son, Sandra and another young lawyer opened a law office in a shopping center from which she handled whatever matters came her way. Over the next seven years, she had two more children and was active in civic affairs. But as late as 1964, Phoenix law firms remained closed to women lawyers.

Sandra and John were Eisenhower Republicans. They saw themselves "as voices of reason and moderation" (p. 60). They hobnobbed with Barry Goldwater and with other Republican leaders in Arizona, including Bill Rehnquist and his wife. Sandra became president of the Junior League and in 1965 she was appointed State Assistant Attorney General, a title that "was grander than her duties" (p. 68). Then, in 1969, she was appointed by the Republican-controlled Maricopa County Board of Supervisors to fill a vacancy in the Arizona legislature.

As Evan Thomas reports, when O'Connor arrived at the Arizona legislature "she might as well have crashed a fraternity house on Saturday night" (p. 72). Liquor was everywhere, and "[s]exual harassment was the order of the day" (p. 73). "But," Thomas adds, "there are no

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tales of leering lawmakers grabbing for Senator O'Connor," because she was "dignified, correct, and, when it suited her, stone cold" (p. 73). As the former Arizona Governor Bruce Babbitt recalled, you would "have to be a real weirdo to think you could hit on her" (p. 73). Drawing on her experience in the state attorney general's office, O'Connor took a lead role in "boosting efficiency and stamping out cronyism" (p. 74). For all of her "apparent primness," she knew how to get things done (p. 75).

One of the beneficiaries of her effectiveness was her former beau, Bill Rehnquist. In October 1971, President Richard Nixon nominated Rehnquist, who by then had been working for several years in the Department of Justice, to succeed Justice John Marshall Harlan on the Supreme Court. During his confirmation hearings, Rehnquist stayed in almost daily contact with O'Connor, as she worked behind the scenes to help rebut (apparently unfounded) charges that when in Arizona he "had harassed black and Hispanic voters at a polling place" (p. 77). After his nomination was confirmed, Justice Rehnquist wrote O'Connor saying that "[w]ords are inadequate to convey my appreciation for what you have done for me" (p. 77).

As a member of the Arizona Senate, O'Connor grappled with issues involving women. Soon after arriving, she led the successful fight to repeal a 1913 law limiting women to an eight-hour workday. In 1972, the Equal Rights Amendment (ERA) passed the United States Congress and was sent to the states for ratification. The next day, Senator O'Connor rose on the floor of the state legislature to urge her colleagues to vote "yes" on the ERA. But the bill languished in committee and supporters of the ERA began to suspect that O'Connor was "playing games" with them (p. 80). There was some truth to this concern. O'Connor was ambitious, and her powerful friend Senator Barry Goldwater had made clear to her that he did not like "tampering with the Constitution" or attempting to alter "the design of the Lord by making men and women identical" (p. 81). O'Connor therefore hesitated, arguing that there were other ways to achieve equality for women. According to Thomas, O'Connor thought the nation could get to women's equality in a less controversial manner with "a few well-chosen cases brought before the federal courts" (p. 81).

Because O'Connor knew how to "pick[] her fights carefully," she gained support among the state's conservatives, and in November 1972 the Republican caucus elected her the new Senate majority leader, making her the "first female leader of any state legislative upper house" in the nation (p. 72). Her talent, persistence, connections, and strategic politics had paid off. Despite her waffling on the ERA, as majority leader she "never lost sight of trying to reform state laws that discriminated against women" (p. 94). In the end, though, O'Connor decided she wasn't cut out to be a legislator. She soon tired of the arm twisting and the horse trading, and she then announced that she would not run

for reelection to the Senate. According to her legislative aide at the time, O'Connor "wanted to be a judge" (p. 97).

In 1974, O'Connor was elected a Superior Court judge for Maricopa County. Her early ratings as a judge were dismal. Lawyers consistently criticized her for being too tough on them. They were used to getting away with sloppiness. Judge O'Connor had no patience for such behavior. As Thomas observes, "she was not afraid to assert herself to both humanize the law and make it more just" (p. 106). Over time, O'Connor gained respect, and in 1979 she was elevated to become a judge on the Arizona Court of Appeals, the state's second-highest court.

That same year, O'Connor met and charmed Chief Justice Warren Burger, who had come to Arizona for a judicial conference. On the flight back to Washington, Burger's Chief of Staff wondered whether O'Connor, although only a mid-level state court judge, "might make a Supreme Court Justice" (pp. 116–17). Republican women judges were rare in those days, and Chief Justice Burger decided to take steps to make her "better known" nationally by appointing her to the Judicial Fellows Committee (p. 117). The following year, concerned that women favored Jimmy Carter over him in the 1980 campaign, Ronald Reagan surprisingly announced that he would name a woman to "one of the first Supreme Court vacancies of [his] administration" (p. 120).<sup>3</sup>

When it became known in 1982 that Justice Potter Stewart planned to step down, the "Young Turks" in President Reagan's Justice Department wanted Reagan to appoint Solicitor General Robert Bork to the Court. But the President disappointed them. He wanted to appoint the first woman Justice. As Attorney General William French Smith began to put together a list of possibilities, Judge O'Connor, on the Arizona intermediate court, was not a likely prospect. But she had a critical advocate — Justice William Rehnquist "came on strong" for her candidacy (p. 123).

Justice Rehnquist's endorsement carried great weight, but O'Connor still had to pass one critical test. When two members of the search team arrived at her home to interview her, they focused on the issue of abortion. O'Connor told them that she considered abortion "personally abhorrent" (p. 127). She was asked how she felt about overruling precedents "if she felt they were wrong" (p. 127). Responding carefully, O'Connor "finessed the question," stating that "in a limited number of cases, it would be appropriate for the Court to reverse old decisions," but that "this power should be used sparingly" (p. 128).

Apparently, this satisfied her interrogators — one of whom was Kenneth Starr — and soon thereafter she was secretly brought to the

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<sup>3</sup> The author quotes Lou Cannon, *Reagan Pledges He Would Name a Woman to the Supreme Court*, WASH. POST (Oct. 15, 1980), <https://www.washingtonpost.com/archive/politics/1980/10/15/reagan-pledges-he-would-name-a-woman-to-the-supreme-court/844817dc-27aa-4f5d-8e4f-0ab3a5e76865> [<https://perma.cc/AC2B-4RF5>].

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White House to meet the President. A week after their friendly forty-minute conversation in the Oval Office, President Reagan offered her the position. Although O'Connor later said that she wasn't happy to leave Arizona, and "wasn't sure she could do the job," she nonetheless said "yes" (p. 132). According to Evan Thomas, once her nomination was announced, "[a]ll over the country, women and young girls" suddenly began "imagining a future once closed to them" (p. 134).

When O'Connor's nomination was announced, her right-wing opponents in the Arizona legislature came out against her, and the National Right to Life Committee and the Moral Majority falsely claimed that as a state senator she had voted "six times for unlimited abortion" (p. 135). Senator Jesse Helms and Moral Majority leader Jerry Falwell vehemently opposed O'Connor's nomination, and Right to Life protesters chanted "Vote No on O!" (p. 136). In response, O'Connor's friend Barry Goldwater declared that "[e]very good Christian should kick Jerry Falwell in the ass" (p. 136).

O'Connor's confirmation hearings lasted three days. She handled herself gracefully throughout the proceedings. When asked about abortion, she said that she was personally opposed to abortion, but added that "I'm over the hill. I'm not going to be pregnant anymore, so perhaps it's easy for me" (p. 142). In the end, the final vote was 99–0 in favor of confirmation. Sandra Day O'Connor would be the first woman ever to serve as a Justice on the Supreme Court of the United States.

### *B. The Chief*

John Glover Roberts, Jr., was born in 1955, when Sandra Day and John O'Connor were working in Frankfurt, Germany. The son of a steel company executive living in Long Beach, Indiana, an "overwhelmingly Roman Catholic" town in "one of the most segregated areas of the nation," young John was ambitious (p. 24). He was determined not to follow the pattern of his classmates at his Catholic grammar school and attend a pedestrian local high school. Rather, he wanted to enroll in the La Lumiere School, a new private school created by "wealthy businessmen" in the area who sought to establish "an academy in the tradition of the elite boarding schools of the East Coast but with a lay Roman Catholic character" (p. 13). As Biskupic observes, at the age of thirteen Roberts "already had a clear plan for his life" (p. 13). As he wrote in his application for admission to the La Lumiere School, he wanted "to stay ahead of the crowd" (p. 13).<sup>4</sup>

La Lumiere required student attendance at daily chapel services and Sunday Mass. The curriculum was "rigorous," and most of the all-male students came from wealthy families (p. 25). Students were required to wear a jacket and tie. Roberts took the culture of the school seriously.

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<sup>4</sup> Biskupic quotes Letter from John Roberts to James Moore, Headmaster, La Lumiere School (Dec. 22, 1968) (on file with the La Lumiere School).

As a junior, he authored an editorial in the school paper defending the male-only admissions policy, arguing that “the presence of the opposite sex in the classroom will be confining rather than catholicizing,” and objecting to the prospect of class discussions of “Shakespeare’s double entendre” with “a Blonde giggling and blushing behind me” (p. 26).<sup>5</sup>

When John graduated from La Lumiere in 1973, he was first in his class of approximately twenty students (pp. 25, 29). Although he grew up in the era of the Civil Rights Movement and at a time when social injustice was increasingly a part of public consciousness, he led a privileged life and was largely indifferent to, or at least unaware of, that reality.

When he arrived at Harvard College in 1973 he “experienced a kind of culture shock” as he encountered “the liberalism dominant in his new surroundings” (p. 35). Unlike most of his classmates, “Roberts attended Catholic Mass every Sunday” (p. 36) and “dressed the part of the prep school student that he was” (p. 35). One student later recalled that in the era of Watergate most students at Harvard “mocked” their conservative classmates “as jokers or losers” (p. 37).<sup>6</sup> Focusing on his coursework, Roberts graduated summa cum laude in 1976, after only three years of college, having majored in history (p. 44). He then headed to Harvard Law School. Once again, he excelled, serving as managing editor of the *Harvard Law Review* and graduating magna cum laude (p. 45).

In the same year that Sandra Day O’Connor was appointed a judge on the Arizona Court of Appeals, Roberts served as a law clerk to United States Court of Appeals Judge Henry Friendly, one of the most respected jurists of the twentieth century. Early in his time with Judge Friendly, Roberts received word via telegram that Justice William Rehnquist had chosen him for a Supreme Court clerkship for the Court’s 1980–81 Term.

Justice Rehnquist had “turned out to be exactly” what President Nixon wanted when he appointed him to the Court in 1972: “a staunch defender of law enforcement and a consistent opponent” of affirmative action (p. 55). Indeed, just a few months before Roberts began his clerkship with him, Justice Rehnquist authored a blistering dissent in *United Steelworkers of America v. Weber*,<sup>7</sup> in which the Court held that voluntary affirmative action programs by employers did not violate the 1964

<sup>5</sup> Biskupic quotes *Roberts Started on Path to Success at Young Age*, WASH. TIMES (Aug. 16, 2005), <https://www.washingtontimes.com/news/2005/aug/16/20050816-122951-1663r> [https://perma.cc/SS2H-WUEE].

<sup>6</sup> Biskupic quotes Janny Scott, *Roberts’s Harvard Roots: A Movement Was Stirring*, N.Y. TIMES (Aug. 21, 2005), <https://www.nytimes.com/2005/08/21/politics/politicsspecial1/robertss-harvard-roots-a-movement-was-stirring.html> [https://perma.cc/8W53-S4GS].

<sup>7</sup> 443 U.S. 193 (1979).

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Civil Rights Act.<sup>8</sup> As Biskupic notes, Justice Rehnquist's dissent "was the kind of opinion that attracted young conservatives like Roberts for its hard stand against any measures that could be deemed [racial] quotas" (p. 55). During Roberts's clerkship with him, Justice Rehnquist wrote one of the most important opinions of the Term (p. 59). In *Rostker v. Goldberg*,<sup>9</sup> the Court held that Congress could constitutionally exclude women from the draft because they were not "similarly situated" with men when it came to combat.<sup>10</sup> One can only imagine Arizona Court of Appeals Judge Sandra Day O'Connor's disappointment.

When John Roberts heard Ronald Reagan's Inaugural Address during his year as Justice Rehnquist's law clerk, he "knew precisely what his next move would be" (p. 61). Roberts had been "captivated" by President Reagan's commitment to religion and his belief that "to solve the problems of modern life . . . America needed to trust again in the Bible" (p. 63). This resonated with Roberts, as did President Reagan's advocacy of a "color-blind" approach to racial issues (p. 63). Roberts later said, "I felt he was speaking directly to me" (p. 64). Roberts "wanted to be part of what came next" (p. 64).

President Reagan appointed William French Smith as his Attorney General, and Smith selected Ken Starr to be his chief of staff. Not long into the job, Starr received a call from Justice Rehnquist urging him to bring Roberts, then his law clerk, into the Justice Department. Because a recommendation from Justice Rehnquist "carried considerable weight" in the Reagan Administration, Roberts was appointed special assistant to Attorney General Smith (p. 64). This appointment gave the twenty-six-year-old Roberts "a chance to weigh in on the most important social dilemmas of the day," as well as "a key connection to the legal network in Washington" (p. 65).

Roberts arrived at his new position in the Department of Justice in time to help prepare Sandra Day O'Connor for her confirmation hearings. Starr directed Roberts to focus specifically on helping O'Connor "handle questions about abortion" (p. 66). With Roberts's assistance, O'Connor "parried the senators' questions masterfully and drew overwhelming support on Capitol Hill" (p. 67). Roberts then pivoted to other controversies that roiled the Administration, including the enforcement of the Voting Rights Act of 1965,<sup>11</sup> religious issues such as school prayer, and women's equality and abortion rights. As Biskupic describes the moment, in this environment "the seemingly mild-mannered Roberts suddenly turned combative" (p. 67).

For the first time since high school, Roberts found himself surrounded by conservatives who shared his views. It was in this setting

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<sup>8</sup> *Id.* at 208.

<sup>9</sup> 453 U.S. 57 (1981).

<sup>10</sup> *Id.* at 78; *see id.* at 83.

<sup>11</sup> Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.).



that Roberts “solidified his view that remedies tied to an individual’s race were as repellant as racial discrimination” (p. 68). Roberts was convinced that the Voting Rights Act of 1965 “excessively interfered with activities that the states should be able to regulate” (p. 70), and he aggressively urged Attorney General Smith “to be forceful about limits on the act” (p. 72). On these and other issues he established himself within the Reagan Administration as a powerful advocate for strongly conservative positions. As a result, in late 1982, White House Counsel Fred Fielding asked Roberts to join the White House Counsel’s office (p. 81).

In this new position, Roberts revealed his “sarcastic bent” when three women members of Congress proposed “legislation that would have allowed equal pay for comparable work based on factors such as skills and responsibility” (pp. 84–85). In a letter to Fielding, Roberts dismissed the proposal as absurd, declaring that its underlying logic “may as well be, ‘From each according to his ability, to each according to her gender’” (p. 85).<sup>12</sup>

Fielding returned to private practice in 1986 and Roberts, after devoting five years to the Reagan Administration that “clarified his ideological views,” decided to follow suit (p. 87). Joining the D.C. firm of Hogan & Hartson, Roberts began building a lucrative appellate practice (p. 92). Three years later, though, after President George H.W. Bush enticed Ken Starr to become his Solicitor General, Starr hired Roberts as his top deputy (p. 95).

As Deputy Solicitor General, Roberts turned his attention to many of the same issues that had engaged him during the Reagan Administration. In particular, he returned to developing arguments “against government policies that gave a boost to blacks, Hispanics, and other minorities” (p. 97). In *Metro Broadcasting, Inc. v. FCC*,<sup>13</sup> for example, he argued that FCC policies intended “to increase the minority ownership of broadcast licenses” were unconstitutional (p. 97). The Court, in a 5–4 decision, rejected Roberts’s argument, concluding that such policies were permissible because “‘past inequities stemming from racial and ethnic discrimination [had] resulted in a severe underrepresentation of minorities’ in the media” (p. 100).<sup>14</sup>

Roberts also took a leading role in arguing that “*Roe v. Wade*<sup>15</sup> had been wrongly decided and should be overturned” (p. 103). In his brief for the United States in *Rust v. Sullivan*,<sup>16</sup> for example, Roberts wrote that “[t]he Court’s conclusions in *Roe* that there is a fundamental right

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<sup>12</sup> Biskupic quotes Letter from John Roberts to Fred Fielding, White House Counsel (Nov. 18, 1984) (on file with the Ronald Reagan Presidential Library).

<sup>13</sup> 497 U.S. 547 (1990).

<sup>14</sup> Biskupic quotes *id.* at 566.

<sup>15</sup> 410 U.S. 113 (1973).

<sup>16</sup> 500 U.S. 173 (1991).

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to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution” (p. 104).

In no small part because he “had proven himself a committed soldier in some of the toughest, most polarizing litigation battles of the time” (p. 110), on January 27, 1992, the day that Roberts celebrated his thirty-seventh birthday, President George H.W. Bush nominated him to serve on the United States Court of Appeals for the D.C. Circuit to replace Judge Clarence Thomas, who had just been appointed to the Supreme Court. Senate Judiciary Committee Democrats were wary of Roberts, though, and they delayed the confirmation process (p. 111). Roberts’s nomination lapsed after the election of Bill Clinton in November 1992.

Thereafter, Roberts returned to his appellate practice at Hogan & Hartson. Over the next eight years, he appeared frequently before the Supreme Court representing corporate clients. He earned a reputation as a superb appellate advocate. Indeed, Justice Sandra Day O’Connor later observed that “no one presented better arguments on a more consistent basis” than John Roberts (p. 112).

On a more personal level, in 1996, at the age of forty-one, Roberts married Jane Sullivan, a Catholic lawyer in Washington, D.C. Like Roberts, Sullivan “was socially conservative” (p. 115). She was a “strong opponent of abortion rights” and a member of the Board of Feminists for Life (p. 115). Four years later, after they realized they could not conceive a child, they adopted two children (pp. 121–22).

Then came the 2000 presidential election. As the nation awaited the outcome, Roberts flew to Florida to help prepare George W. Bush’s side of the case that eventually became *Bush v. Gore*.<sup>17</sup> In a bitterly contested 5–4 decision, the Supreme Court effectively awarded the presidency to Bush.<sup>18</sup> Justice Sandra Day O’Connor was the deciding vote when she joined the majority opinion.

Like “[o]ther lawyers who had come up through GOP administrations and worked on *Bush v. Gore*,” Roberts was “rewarded” with a plum job — he was renominated for a position on the United States Court of Appeals for the D.C. Circuit (p. 129). In order to avoid a repeat of his first nomination, Roberts distanced himself from the Federalist Society and made clear that he “did not want to be viewed as a member of the hard right” (p. 131). Roberts’s strategy was successful. The Senate Judiciary Committee approved his nomination by a vote of 16–3 and the full Senate confirmed his nomination on May 8, 2003, by a voice vote.

Roberts already had his eye on the Supreme Court, though, and in the approximately fifty opinions he wrote on the Court of Appeals over

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<sup>17</sup> 531 U.S. 98 (2000) (per curiam).

<sup>18</sup> *Id.* at 111.

the next two years he went out of his way to avoid controversy. As Biskupic notes, “[h]aving advised judicial candidates, dating to the 1981 appointment of Sandra Day O’Connor, Roberts knew better than most aspirants for promotion to the high court that his judicial opinions could and would be used against him” (pp. 137–38).

Just weeks before the 2004 presidential election, in which George W. Bush defeated John Kerry, “Chief Justice Rehnquist, who was eighty years old, revealed that he had thyroid cancer” (p. 138). Chief Justice Rehnquist’s “warmest relationship” on the Court “was with his old Stanford classmate O’Connor” (p. 138). In their years together on the Court “[t]hey shared dinners together, played charades, and vacationed together with their families” (p. 139). Chief Justice Rehnquist’s departure from the Court, either by death or retirement, seemed imminent.

As the months went by, Attorney General Alberto Gonzales interviewed a succession of candidates, including Roberts, for the Supreme Court. The administration was looking not only for a possible successor to Chief Justice Rehnquist, but also for other nominees should one or more of the older Justices — like Stevens, O’Connor, and Ginsburg — step down. As Gonzales later observed, among the considerations that were central to the search was whether the nominee “would deliver the consistent conservative votes Bush sought” (p. 142). The “rallying cry” of hard-right Republicans was: “No more Souters” (p. 143). Having impressed Gonzales, Roberts then went through a series of meetings with such figures as Vice President Dick Cheney, White House Counsel Harriet Miers, and Leonard Leo of the Federalist Society (p. 146).

While all this was going on, Justice Sandra Day O’Connor was dealing “with the deteriorating health of her husband, John, who had Alzheimer’s” (p. 147). When the Supreme Court Term ended on June 27, 2005, reporters and government officials waited for news of Chief Justice Rehnquist’s retirement. O’Connor “went to her old friend and asked about his plans” (p. 148). Chief Justice Rehnquist said he thought he could make it through another Term. Justice O’Connor “seized the moment” and, feeling the need to take care of her husband, sent a letter to President Bush informing him of her decision to step down (p. 149). When Harriet Miers called Gonzales to inform him of the situation, she said: “We have a retirement. . . . It’s not who we expected” (p. 149).

After reviewing a list of possible successors to O’Connor, which included Court of Appeals Judges Michael Luttig, J. Harvie Wilkinson, Samuel Alito, Priscilla Owen, Edith Brown Clement, and John Roberts, President Bush, who described Roberts as “a genuine man with a gentle soul,” leaned towards Roberts (p. 155). His senior advisors were divided, though. President Bush then turned to younger lawyers in the White House Counsel’s office for advice. In a critical conversation, Brett Kavanaugh, whom President Bush had nominated to the D.C. Circuit Court of Appeals, suggested to President Bush that the best nominee

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would be the one “most capable of convincing his colleagues through persuasion and strategic thinking” (p. 156). As Biskupic describes the moment, “[t]hat way of looking at it sealed Bush’s choice of Roberts” (p. 156). On July 19, 2005, President George W. Bush announced that his nominee to replace Justice Sandra Day O’Connor was Judge John Roberts.

But it was not so simple. On September 3, before Roberts was confirmed, President Bush received a phone call informing him that Chief Justice William Rehnquist had died. The next morning, President Bush informed his advisers that he had decided to make John Roberts his nominee for Chief Justice. Three days later, Roberts joined seven other pallbearers to carry Chief Justice Rehnquist’s flag-draped casket into the Supreme Court building. Sandra Day O’Connor’s “face was streaked with tears” (p. 160). The next day at the funeral, she “took the lead in the tributes to her former classmate” and lifelong friend (p. 160).

Five days later, “Roberts appeared before the Senate Judiciary Committee for four days of testimony” (p. 161). Roberts “understood the value of a pitch, a slogan” (p. 161). In a memorable moment in his hearings, he analogized judges to umpires. It is their job, he said, not to make the rules, but to call balls and strikes. Roberts described himself as a “modest judge” who was committed to the principle of *stare decisis* (p. 161). He indicated to legislators that “he believed that the right to abortion was a settled precedent” (p. 164). Roberts’s critics in the hearings came mostly from the civil rights community. When then–Senator Barack Obama cast his vote against Roberts, for example, he explained that, “[i]n his work in the White House and the Solicitor General’s Office, [Roberts] seemed to have consistently sided with those who were dismissive of efforts to eradicate the remnants of racial discrimination in our political process” (p. 167). Roberts defended himself by maintaining that he had only been doing the bidding of his superiors. In the end, the Senate voted 78–22 to approve Roberts’s nomination as Chief Justice of the United States (p. 167).<sup>19</sup>

## II. ON THE COURT

### A. *First*

When Sandra Day O’Connor arrived at the Supreme Court to be sworn in as the nation’s first female Justice in 1981, Chief Justice Warren Burger took her by the arm and walked her down the Supreme Court steps. Justice Burger exclaimed to reporters: “You’ve never seen me with a better-looking Justice” (p. 151). As Evan Thomas observes, O’Connor kept smiling because she had “long since learned to ignore minor diminishments” (p. 151). In recognition of her appointment, the

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<sup>19</sup> Misled by Roberts in his confirmation hearings, I endorsed his confirmation. See Geoffrey R. Stone, Opinion, *President Bush’s Blink*, CHI. TRIB., July 27, 2005, at 27.

Court removed the “Mr. Justice” plaques on chamber doorways, but there was no “ladies’ room” near the Justices’ conference room, so O’Connor “had to borrow a bathroom in the chambers of a Justice down the hall” (p. 154). O’Connor “felt isolated” on the Court (p. 158). Even her old beau Bill Rehnquist kept his distance because “he didn’t want his personal relationship to color his professional relationship” (p. 159). Despite her initial challenges, though, O’Connor experienced a sense of “exultation” as she built her relationships with her colleagues on the Court (p. 164).

By the time O’Connor arrived, Republican presidents had made six consecutive appointments to the Court. Presidents Nixon, Ford, and Reagan had transformed the Court as an institution. Unlike the Warren Court, which had been dedicated to protecting the enduring constitutional values of democracy and equality,<sup>20</sup> the Burger Court over the intervening twelve years had shifted to a much more restrained and more conservative stance. Gone were the days when the Warren Court decided such cases as *Brown v. Board of Education*,<sup>21</sup> *Mapp v. Ohio*,<sup>22</sup> *Engel v. Vitale*,<sup>23</sup> *Gideon v. Wainwright*,<sup>24</sup> *Reynolds v. Sims*,<sup>25</sup> *New York Times v. Sullivan*,<sup>26</sup> and *Miranda v. Arizona*.<sup>27</sup> With but a few exceptions, such as *Roe v. Wade*, the Burger Court had significantly shifted the terms of constitutional law. Indeed, by the time Justice O’Connor joined the Court, only Justices William J. Brennan, Jr., Byron White, and Thurgood Marshall remained from the days of the Warren Court.

In March of her first year on the Court, Justice O’Connor heard her first sex discrimination case. In *Mississippi University for Women v. Hogan*,<sup>28</sup> the university refused to admit men to its all-women nursing school, which was the only nursing school in the state. At conference, the eight male Justices divided four to four on whether this policy violated the Equal Protection Clause. As the junior Justice, O’Connor was the last Justice at conference to cast her vote. She joined Justices Brennan, White, Marshall, and Stevens in holding that the policy amounted to unconstitutional discrimination on the basis of sex.

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<sup>20</sup> See GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* (forthcoming 2020) (on file with author).

<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> 367 U.S. 643 (1961).

<sup>23</sup> 370 U.S. 421 (1962).

<sup>24</sup> 372 U.S. 335 (1963).

<sup>25</sup> 377 U.S. 533 (1964).

<sup>26</sup> 376 U.S. 254 (1964).

<sup>27</sup> 384 U.S. 436 (1966).

<sup>28</sup> 458 U.S. 718 (1982).

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Justice Brennan, the senior Justice in the majority, assigned O'Connor to write the opinion. In her opinion for the Court, O'Connor explained that the state of Mississippi lacked the "exceedingly persuasive justification" necessary to uphold discrimination on the basis of sex (p. 180). Excluding men from the nursing profession, she declared, tends to "perpetuate the stereotyped view of nursing as an exclusively woman's job."<sup>29</sup> In this decision, Thomas notes, O'Connor took an important step forward "in the long fight for women's rights" (p. 181).

A year later, O'Connor confronted the issue of abortion. In the decade after the Court's decision in *Roe v. Wade*, many cities and states enacted laws designed to restrict a woman's right to abortion. The city of Akron, Ohio, for example, had enacted rules that required "women to sign 'consent forms' that included a lecture from the doctor that a fetus is 'human life from the moment of conception' and a twenty-four-hour waiting period" (pp. 192–93). The Reagan Administration emphatically supported such restrictions.

In *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>30</sup> six Justices voted to hold the Akron ordinance unconstitutional, but Justice Sandra Day O'Connor — joined by the two Justices who had dissented in *Roe*, Justices Rehnquist and White — dissented.<sup>31</sup> In her dissenting opinion, Justice O'Connor rejected the trimester framework adopted by the Court in *Roe* and, drawing on the Reagan Administration's brief in the case, maintained that states can constitutionally restrict abortion as long as they do not place an "undue burden" on a woman's right to choose.<sup>32</sup> Applying that standard, O'Connor concluded that the restrictions adopted by the city of Akron were constitutional.<sup>33</sup>

At the end of O'Connor's second year on the Court, she revealed to her husband John that she was learning "how to get things done" (p. 195). Although she may have been "humble about her jurisprudence," she was not "averse to exercising power on the Court" (p. 196). Moreover, O'Connor was highly social — and energetic. As Thomas notes, "[s]he did not hold back on the tennis court or golf course or at the bridge table" (p. 199). Indeed, "[h]er nonstop energy could wear out her friends" (p. 199). In her social relations she could be quite bossy, and "[s]ome friends bridled at her bossiness" (p. 200). But they also "saw O'Connor's sweeter side as well" (p. 201). At times she could be quite "goofy" (p. 201). On Halloween in 1984, for example, in an effort "to loosen up the Court's conference," (p. 201) she came wearing "Groucho

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<sup>29</sup> *Id.* at 729.

<sup>30</sup> 462 U.S. 416 (1983).

<sup>31</sup> *Id.* at 418.

<sup>32</sup> *Id.* at 452–75 (O'Connor, J., dissenting).

<sup>33</sup> *Id.* at 452.

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Marx type glasses that [had] a big nose, a moustache and bushy eyebrows" (p. 202). Although a bit stunned, the other Justices "had a big laugh" (p. 202).

In 1985, the Court confronted a difficult issue involving the First Amendment's religion clauses. One of the Warren Court's "most unpopular" decisions was *Engel v. Vitale*, in which the Court held in 1962 that state-sponsored school prayer violates the Establishment Clause (p. 212). Thereafter, many states and cities attempted to circumvent *Engel* by enacting laws permitting "a moment of silence" during which schoolchildren could choose to pray (p. 213). Although Chief Justice Burger and Justices White and Rehnquist voted to uphold such a law in *Wallace v. Jaffree*,<sup>34</sup> Justice O'Connor did not go along with them. Rather, she joined Justices Brennan, Marshall, Blackmun, Powell, and Stevens in striking down the moment of silence law.

In a separate concurring opinion, O'Connor "took apart" the challenged law to show that the legislature's "true purpose" was "to push prayer in schools" (p. 213). To Chief Justice Burger, O'Connor's vote was "further proof" of her "perfidy" (p. 214). She was not "the go-along, get-along Justice (and passive female) he had hoped for" (p. 214). According to Evan Thomas, Chief Justice Burger thereafter "rewarded her independence by assigning her 'second tier' opinions — dealing with economic issues, like taxes and water rights, not the major constitutional disputes" (p. 215).

The following year, O'Connor once again frustrated her more conservative brethren, this time on the issue of affirmative action in *Wygant v. Jackson Board of Education*.<sup>35</sup> In 1978, in *Regents of the University of California v. Bakke*,<sup>36</sup> the Court had divided sharply on the issue of affirmative action in higher education, with four Justices taking the position that any consideration of race in college admissions was effectively unconstitutional, four Justices arguing that the consideration of race to redress past discrimination in society was constitutionally permissible, and Justice Lewis Powell writing the deciding opinion that left the matter more than a little confused.<sup>37</sup>

In *Wygant*, the challenged government policy protected the jobs of black teachers at a time when the number of teachers had to be cut. The vote was 4–4 when it came time for O'Connor to cast the deciding vote. O'Connor wanted to "temporize" on the issue (p. 229). As Thomas describes her position on this and other difficult issues, O'Connor believed in "the importance of doubt" (p. 231). Thus, in O'Connor's view, "[s]ome societal questions do not lend themselves to black-and-white answers, partly because the American people are divided and feeling their

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<sup>34</sup> 472 U.S. 38 (1985).

<sup>35</sup> 476 U.S. 267 (1986).

<sup>36</sup> 438 U.S. 265 (1978).

<sup>37</sup> *Id.*

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way, or because social attitudes are evolving, sometimes slowly” (p. 231). In such circumstances, O’Connor embraced a “humble approach” (p. 231). After months of hesitation and deliberation, she found a way to invalidate the particular affirmative action program at issue in *Wygant*, “while allowing her to signal that affirmative action was still viable” (p. 233).

In the spring of 1986, rumors began to circulate that Chief Justice Burger planned to retire. Justice Powell suggested to O’Connor that he supported her appointment as Chief Justice (p. 216). But she realized that, given the very conservative views of President Reagan’s Attorney General Edwin Meese, her “goose was cooked” (p. 217). After Chief Justice Burger formally announced his intention to retire at the end of the term, President Reagan appointed William Rehnquist the new Chief Justice. O’Connor noted in her private journal that she was “delighted with the selection” and that she had “no doubt” that his jurisprudence was “more to Ed Meese’s liking than mine” (p. 219). She added that “[i]t will be hard to call Bill ‘Chief’” (p. 219).

President Reagan then nominated then-Judge Antonin Scalia to the Court to fill Justice Rehnquist’s seat as an Associate Justice. According to Evan Thomas, it did not take Justice O’Connor long “to realize that a full dose of Scalia could be a little too bracing” (p. 236). Although Justice O’Connor welcomed Justice Scalia’s fresh ideas and intellectual energy, she soon learned that he scoffed behind her back that she “was a politician not a judge,” and that “she was not a rigorous legal thinker but rather felt her way to crowd-pleasing outcomes” (p. 237).

At the end of the following term, Justice Powell announced that he was retiring. Justice Powell had been Justice O’Connor’s “best friend on the Court,” and she observed that, “for her, Lewis’s announcement was like learning her best friend had just died” (p. 233). Four days later, President Reagan nominated Judge Robert Bork to replace Justice Powell. After the defeat of Bork’s nomination because his views were deemed to be out of the mainstream of legal thought, and the withdrawal of President Reagan’s replacement nomination of Judge Douglas Ginsburg because he had smoked marijuana with his students at Harvard, President Reagan successfully nominated then-Judge Anthony Kennedy to replace Justice Powell. Kennedy was generally regarded as much more conservative than Justice Powell, but he was not seen as an extreme conservative like Bork.

Then, in the fall of 1988, at the age of fifty-eight, Justice O’Connor was diagnosed with breast cancer (p. 242). After chemotherapy and surgery, she courageously returned to the Court only ten days later (p. 250). Meanwhile, as the Court’s three remaining “liberals” — Justices Brennan, Marshall, and Blackmun — aged, it became apparent that they would soon have to step down. Justice Brennan “was the first of the old liberals to go” (p. 271). The “great cocreator and preserver of



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the Warren Court resigned a few days” after suffering a stroke in the summer of 1990 (p. 271).

President George H.W. Bush then nominated Court of Appeals Judge David Souter to replace him, and Souter “sailed through his hearing with a modest, wellspoken charm” (p. 271). Justice Souter was unmarried and lived alone in an old New Hampshire farmhouse. Justice O’Connor and Barbara Bush decided that he “should be married” (p. 272). Justice Souter then went on a date or two “arranged by Justice O’Connor,” but they came to naught (p. 272). After one date, for example, “he thanked the woman and said, ‘That was fun. Let’s do it again next year’” (p. 272).

Justice Thurgood Marshall was the next of the “old liberals” to go. He retired from the Court a year later, in October 1991. President George H.W. Bush then nominated Court of Appeals Judge Clarence Thomas, another African American, to replace Justice Marshall. After surviving a brutal confirmation process, Justice Thomas joined the Court as a conservative “to the right of Scalia” (p. 274). Thomas “wanted to restore ‘the Constitution in Exile’ by discerning the intent of the Founders and stripping away the layerings of post-New Deal activist judges” (p. 274). As Evan Thomas describes the situation, “Thomas was the mirror opposite of O’Connor’s balancing act moderation” (p. 274). Over the years, she “rarely joined his opinions, even when she voted on the same side in a case” (p. 274).

With the confirmation of Justice Clarence Thomas, Republican presidents had appointed ten consecutive Justices to the Supreme Court over the preceding twenty-two years. The only Justice remaining from the Warren Court was the relatively conservative Justice Byron White, and the only two Justices still on the Court who had participated in *Roe* in 1973 were Justice Harry Blackmun, the author of the opinion, and Justice White, who along with Chief Justice Rehnquist was one of the two dissenters. At this point, *Roe* seemed doomed.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>38</sup> the newly constituted Court considered the constitutionality of a Pennsylvania law that placed numerous restrictions on a woman’s right to abortion, including a twenty-four hour waiting period, a mandatory lecture on fetal development, and a requirement that, if the woman was married, she had to notify her husband that she planned to have an abortion.

At the conference after the case was argued, Chief Justice Rehnquist, confident that he now had at least five votes to overrule *Roe*, assigned the opinion to himself. When he circulated his draft opinion to the other Justices in May of 1993, Justice Harry Blackmun, the author of *Roe*, was in despair. A few days later, though, “he received a letter from Justice Kennedy. ‘Dear Harry,’ it began, ‘I need to see you as soon as

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<sup>38</sup> 505 U.S. 833 (1992).

you have a few free moments. I want to tell you about some developments in *Planned Parenthood v. Casey*, and at least part of what I say should come as welcome news” (p. 279).

The news was that Justices O’Connor, Kennedy, and Souter “had been meeting secretly to save a woman’s right to abortion” (p. 279). They had drafted an opinion which, when added to the votes of Blackmun and Stevens, “would effectively negate Rehnquist’s effort to gut *Roe v. Wade*” (p. 279). Justice O’Connor wrote most of what came to be the critical plurality opinion in the case. Drawing on her prior opinions on abortion, she insisted that the state could not constitutionally impose an “undue burden” on a woman’s constitutional right to terminate an unwanted pregnancy. As Evan Thomas observes, taken in context, the “opinion is a clear defense of a woman’s liberty,” and given the makeup of the Court at the time, it was truly a stunning victory for women’s rights (p. 281). Chief Justice Rehnquist and Justices White, Scalia, and Thomas were livid (p. 281).

Soon thereafter, President Bill Clinton appointed then-Judge Ruth Bader Ginsburg to replace the retiring Justice Byron White. Justice O’Connor was pleased, not only because there were now two women Justices, but also because “the Court finally installed a woman’s bathroom in the robing room behind the bench” (p. 284). But Justice O’Connor and Justice Ginsburg were “not natural pals,” and “their relationship was not cozy” (p. 284). Among other things, Justice Ginsburg was apparently a lousy driver, and she sometimes scraped Justice O’Connor’s car in the Supreme Court’s parking lot. Justice Ginsburg explained to Evan Thomas that this happened because Justice Scalia parked on the other side of her car and she was “anxious not to scrape” his car (p. 285). “Fender benders aside,” Justices O’Connor and Ginsburg “were bonded by their trials as women pioneers” (p. 285).

In 1994, President Clinton appointed Court of Appeals Judge Stephen Breyer to replace Justice Harry Blackmun, who had retired. Justices Breyer and O’Connor got along well, as they “shared a deep civic-mindedness,” although “Breyer’s center of gravity was more to the left” (p. 299). Throughout this time, Justice Scalia continued to annoy O’Connor. In conference, “Scalia suffered from smartest-kid-in-the-class syndrome, and in private he could be rude” (p. 299). Moreover, they continued to take “fundamentally different approaches to judging” (p. 300). Justice Scalia’s world “was governed by absolute ‘thou shalt nots,’” whereas Justice O’Connor was inclined “more toward three-part tests” (p. 300). Justice O’Connor worked hard, though, “to maintain civility on the Court” (p. 301).

Justice O’Connor and her husband John had hoped that she could retire from the Court in 1996, when she was sixty-six. “Freed from the daily grind, the O’Connors imagined a more relaxed life of travel and sports with family and friends, while they were still young enough to enjoy it” (p. 308). But, after President Bill Clinton was re-elected, there

was “no more talk of retirement,” because she “did not want her successor to be chosen by a Democrat” (p. 308).

Justice O’Connor increasingly became the decisive fifth vote in the Court’s decisions. During the 1999 Term, for example, the Court divided 5–4 in twenty-one of seventy-four cases, but Justice O’Connor “voted in dissent only four times, tying the modern record” (p. 318). As Joan Biskupic observed in an op-ed in 2000, Justice O’Connor had become “The Man.”<sup>39</sup> The most obvious explanation for O’Connor’s shift from being a right-leaning moderate to being the center vote was the sharp ideological shift in the Court over time with the appointments of Justices Scalia, Kennedy, and Thomas.<sup>40</sup>

Justice O’Connor’s centrist role became evident once again on the “ever vexing” issue of abortion (p. 317). In *Stenberg v. Carhart*,<sup>41</sup> the Court considered the constitutionality of a Nebraska law prohibiting the use of so-called “partial-birth abortions” (clinically referred to as “dilation and evacuation”) in late-term pregnancies.<sup>42</sup> With the other Justices sharply divided 4–4, Justice O’Connor joined the more “liberal” Justices (Justices Stevens, Souter, Ginsburg, and Breyer) in holding the law unconstitutional because it did not make an exception for use of the procedure in order to protect the life or health of the woman (p. 317).

And then came *Bush v. Gore*. Justice O’Connor was “a loyal Republican and a friend of the Bush family” (p. 322). During the campaign, she had written “[k]eep your fingers crossed for a Bush victory” to Arizona Governor Jane Dee Hull (p. 322). In part, this was based on politics, and in part it was based on her desire to retire, a desire made even more pressing by her husband John’s health issues relating to possible Alzheimer’s.

With John Roberts now working as a lawyer for the Bush camp, the case made its way to the Supreme Court. The night before the case was argued, Justice John Paul Stevens, who had been appointed to the Court by President Gerald Ford, noted that this should “take us about ten minutes,” because Bush’s position had “obviously no merit” (p. 327).<sup>43</sup> But he was in for “a rude surprise” (p. 327). Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O’Connor voted to stop the recount, thus ensuring Bush’s election. As Evan Thomas notes, Justice O’Connor inserted “the most banal — and telling — phrase” into the majority opinion: that the Court’s holding was “limited to the present circumstances” (p. 332).<sup>44</sup>

<sup>39</sup> Joan Biskupic, *O’Connor the “Go-To” Justice*, USA TODAY, July 12, 2000, at 1A.

<sup>40</sup> See *id.*

<sup>41</sup> 530 U.S. 914 (2000).

<sup>42</sup> *Id.* at 924.

<sup>43</sup> The author quotes JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 198–99 (2011).

<sup>44</sup> The author quotes *Bush v. Gore*, 531 U.S. 98, 109 (2000).

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Of the many consequences of this decision, one was that President George W. Bush, rather than President Al Gore, had the opportunity several years later to replace William Rehnquist as Chief Justice of the United States. It was thus Justice O'Connor's vote in *Bush v. Gore* that brought John Roberts to the Supreme Court.

In later years, Justice O'Connor admitted that she "regretted *Bush v. Gore*," but she added defensively that "second thoughts don't do you a lot of good" (p. 339). Ironically, in light of her vote in *Bush v. Gore*, Justice O'Connor now felt that, in order to protect her reputation, and despite her desire to retire, she couldn't step down from the Court "anytime soon," or it would look as if she had cast the deciding vote in order to ensure that a Republican president would get to replace her (pp. 333–34).<sup>45</sup>

In 2003, the Court had an opportunity to revisit the issue of affirmative action. Two different University of Michigan programs came before the Court (p. 348). The undergraduate admissions program awarded points for each applicant's grades, class rank, SAT scores, extracurricular leadership, and legacy status. Any applicant who earned 100 points was admitted. Minority applicants were automatically given twenty additional points in order to ensure an appropriate representation of minority students. The law school admissions program was more "holistic" (p. 348). Race was a factor, but it was simply taken into account, along with a range of other factors (p. 348).

As the cases came to the Court, Justice O'Connor knew that she was in the middle. The four more conservative Justices — Rehnquist, Scalia, Kennedy, and Thomas — would invalidate *any* form of affirmative action in state universities; the four more liberal Justices — Stevens, Souter, Ginsburg, and Breyer — would uphold any *reasonable* form of affirmative action. As usual, Justice O'Connor "did not welcome her role as the decisive vote" (p. 350).

Justice O'Connor split the difference. She joined Chief Justice Rehnquist's opinion that invalidated the more rigid undergraduate affirmative action program,<sup>46</sup> but she voted with the more liberal Justices in upholding the more flexible law school program. In authoring the opinion in the law school case, *Grutter v. Bollinger*,<sup>47</sup> Justice O'Connor accepted the argument that a "critical mass" of minority students was "necessary to ensure that minorities did not feel isolated or tokenized, and that nonminority students heard their diverse voices" (p. 353). With

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<sup>45</sup> See Andrew Rosenthal, *O'Connor Regrets Bush v. Gore*, N.Y. TIMES (Apr. 29, 2013, 2:36 PM), <https://takingnote.blogs.nytimes.com/2013/04/29/oconnor-regrets-bush-v-gore/> [https://perma.cc/Q5UR-N64F].

<sup>46</sup> See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>47</sup> 539 U.S. 306 (2003).

her vote in *Grutter*, Justice O'Connor saved affirmative action for the nation.

Over the next few years, Justice O'Connor continued to play a pivotal role in the Court's most important decisions. In 2003, for example, in *Lawrence v. Texas*,<sup>48</sup> she voted with the majority to overrule the Court's 1986 5-4 decision in *Bowers v. Hardwick*,<sup>49</sup> in which she had joined the majority in upholding the constitutionality of a state law that criminalized homosexual sodomy. In *Lawrence*, Justice O'Connor boldly took the position that such laws violate the Equal Protection Clause. (A decade later, after she had retired, Justice O'Connor presided over "one of the first marriages of a gay couple at the Supreme Court" — two years before the Supreme Court's decision in *Obergefell v. Hodges*<sup>50</sup> (p. 355).)

In 2003, the Court also considered the constitutionality of the McCain-Feingold Campaign Finance Reform Act of 2002,<sup>51</sup> which regulated "so-called 'soft-money' contributions, money raised by the national political parties . . . to get around earlier campaign finance laws limiting donations to individual candidates" (p. 357). In *McConnell v. FEC*,<sup>52</sup> Justice O'Connor, over the bitter dissents of Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, joined Justices Stevens, Souter, Breyer, and Ginsburg in upholding the legislation against First Amendment challenge. It was, at least for a time, a major victory in the nation's effort to control the distorting impact of money in the political process. Once again, Justice O'Connor was the deciding vote. During this time, Justice O'Connor indicated privately her growing "disappointment with the direction taken by the Republican Party" (p. 363).

Meanwhile, Justice O'Connor's beloved husband John continued to "decline[] day by day" (p. 366). By this point, Justice O'Connor was bringing John with her "to the Court every day and leaving with him at around three o'clock" (p. 366). As time passed, "[t]he physical and emotional toll mounted" (p. 368). As Justice O'Connor increasingly realized she had to step down in order to care for John, Chief Justice Rehnquist was also "fading" (p. 370). In October 2004, Rehnquist entered the hospital for thyroid cancer (p. 371). Justice O'Connor wasn't sure what to do. She wanted to give Rehnquist, her life-long friend and colleague, the right to step down first (p. 371). After he announced that he would stay for another year, Justice O'Connor made her decision (pp. 371-72, 376).

After Justice O'Connor notified her colleagues on the Court, they called to express their sympathy and disappointment (pp. 377-78). After her call with Justice Kennedy, "she said about his conservative clerks

<sup>48</sup> 539 U.S. 558 (2003).

<sup>49</sup> 478 U.S. 186 (1986).

<sup>50</sup> 135 S. Ct. 2584 (2015).

<sup>51</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 36 and 52 U.S.C.).

<sup>52</sup> 540 U.S. 93 (2003).

who saw her as an impediment to Federalist Society purity, ‘You could hear the corks popping in his office’” (p. 378). After all, George W. Bush would now get to replace her. On July 19, 2005, President George W. Bush nominated then-Judge John Roberts to fill her seat. Justice O’Connor was pleased. “He’s good in every way,” she exclaimed, “except he’s not a woman” (p. 379).

Yet, as already noted, before Roberts could be confirmed Chief Justice Rehnquist died. President Bush then nominated Roberts to serve as Chief Justice and, after his nomination of Harriet Miers failed, he nominated Judge Samuel Alito to replace Justice O’Connor. The net effect on the Court going forward was dramatic, and Justice “O’Connor’s friends continued to wonder and worry if she had done the right thing” by stepping down when she did (p. 381).

Two years later, Justice O’Connor complained to former Solicitor General Walter Dellinger that Justice Alito’s nomination was “a betrayal of all her accomplishments” (p. 388). In her view, Justice Alito “was an inflexible believer in conservative jurisprudential doctrine, in the mold of Antonin Scalia” (p. 388). He would, she feared, “undermine her pragmatic compromises on abortion, affirmative action, freedom of religion,” campaign finance restrictions, “and other important issues” (p. 388). Moreover, to Justice O’Connor’s growing “dismay,” Chief Justice Roberts seemed even “more intent on pushing a conservative agenda than his predecessor had been” (p. 389). Indeed, “[i]n a single year,” the Roberts Court upheld a ban on partial-birth abortion, “loosened the rules of campaign spending, [and] chipped away at her balancing act on affirmative action” (p. 389). Justice O’Connor sadly told a friend: “Everything I stood for is being undone” (p. 389).

Meanwhile, Justice O’Connor had to figure out what to do with herself. She was bored. “Stepping down from the Court was ‘the dumbest thing I ever did,’” she confessed to a friend (p. 387). She then came to the view that schools had been teaching outdated civics education and that she should help “educate the next generation” (p. 392). In 2009, she formed a new nonprofit organization to develop free video games to teach civics to middle schoolers. By 2017, “half of all middle schoolers in the United States — about five million students” — were using the games her organization had developed to teach students civics (p. 393). O’Connor “was thrilled” (p. 393).

John, though, continued to deteriorate. In 2009, her beloved husband passed away after a tragic and devastating bout with Alzheimer’s. He had stopped recognizing her many years before. It “was tragic,” she said, that “he had to end his life this way” (p. 395). Justice O’Connor kept busy, though, traveling across the country and around the world, “a salesperson for civic virtue” and “a living memorial to women’s progress” (p. 397). Now, almost ninety years of age, Justice Sandra Day O’Connor, still “undaunted,” remains “aware of her place in history” (pp. 404–05).

### B. *The Chief*

One of the first challenges Chief Justice Roberts faced upon arriving at the Court was managing his relationships with the other Justices (p. 172). Chief Justice Roberts was only fifty years of age and had only two years of experience as a lower court judge. As Joan Biskupic reveals, “personal conflicts” soon arose (p. 172). Within six months, for example, Chief Justice Roberts crossed swords with the generally easy-going Justice Souter in a Fourth Amendment case in which Souter, writing for the majority, accused Chief Justice Roberts of attempting to undermine “centuries of special protection for the privacy of the home” (p. 172).<sup>53</sup>

The addition of Justice Samuel Alito to the Court to replace Justice O’Connor did not help things because, in Biskupic’s words, Justice Alito, unlike Justice O’Connor, was “a rigid conservative” who became ever more so “the longer he served” (p. 175). This left the Court even more rigidly divided than before, with Chief Justice Roberts and Justices Scalia, Thomas, and Alito on the right, Justices Stevens, Souter, Ginsburg, and Breyer on the left, and the generally conservative, although sometimes “unpredictable,” Justice Kennedy in the center (p. 175). Faced with this challenge, Chief Justice Roberts hoped to work towards consensus in order to “foster a more stable impression of the Court and the law” (p. 176). From the very beginning, though, as Biskupic demonstrates, Chief Justice Roberts’s own views often “superseded his desire for consensus” (p. 177).

In 2007, for example, in *Gonzales v. Carhart*,<sup>54</sup> the Court, in a 5–4 decision, effectively overruled the Court’s 2000 decision in *Stenberg v. Carhart*, in which Justice O’Connor had been the decisive vote. In *Stenberg*, the Court had invalidated a law forbidding “partial-birth abortion” because it did not contain an exception that would permit the procedure to be used to protect the health or life of the woman.<sup>55</sup> In *Gonzales*, the Roberts Court, without Justice O’Connor in the middle, upheld a federal law absolutely prohibiting partial-birth abortion, even though the American College of Obstetricians and Gynecologists had made clear that “in some cases it was the best procedure for a pregnant woman in the second trimester” (p. 181). In her dissenting opinion, Justice Ruth Bader Ginsburg, joined by Justices Stevens, Souter, and Breyer, declared the majority’s opinion “alarming” (p. 182).<sup>56</sup>

As divisive as *Gonzales* was among the Justices, even more divisive were the Roberts Court’s 5–4 decisions later that Term dealing with issues of race. As Biskupic describes the situation, these “cases concerned the efforts of school districts in Seattle and Louisville to counteract the

<sup>53</sup> The author quotes *Georgia v. Randolph*, 547 U.S. 103, 115 n.4 (2006).

<sup>54</sup> 550 U.S. 124 (2007).

<sup>55</sup> *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

<sup>56</sup> The author quotes *Gonzales*, 550 U.S. at 170 (Ginsburg, J., dissenting).

return of school segregation, a phenomenon that was the result of national housing trends and diminished judicial and federal involvement in desegregation efforts” (pp. 182–83). Indeed, she notes, “[b]y the early 2000s, a substantial segment of the black student population throughout the country was again attending schools that were nearly 100 percent black” (p. 183). To address this situation, school officials in Seattle and Louisville had begun assigning students to schools in an effort to promote integration (p. 183).

Although the courts of appeals had upheld these programs as consistent with the Equal Protection Clause because they served the government’s compelling interest in achieving racial and ethnic diversity in education (p. 183), the Roberts Court, again divided 5–4, held these programs unconstitutional. Because he clearly believed that Justice O’Connor’s position in *Grutter v. Bollinger* was “misguided,” Chief Justice Roberts “wrote a sweeping opinion” in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>57</sup> asserting that the Court’s landmark 1954 decision in *Brown v. Board of Education* “forbade all practices that took account of race, including those that would increase integration” (p. 184). Chief Justice Roberts concluded his opinion “with a line that reflected his bedrock beliefs: ‘The way to stop discrimination on the basis of race is to stop discriminating on the basis of race’” (p. 187).<sup>58</sup> Voting with him, once again, were Justices Kennedy, Scalia, Thomas, and Alito (p. 186). Justice Kennedy, though, wrote a more moderate concurring opinion that left room for such policies if “racial classifications were the only way to achieve” the compelling interest in diversity (p. 186).

As Biskupic notes, despite Chief Justice Roberts’s professed desire for consensus, this was an issue on “which Roberts would not yield” (p. 187). He was not willing to write a more measured opinion, along the lines suggested by Justice Kennedy, that would have achieved a majority and would have left the other, more divisive questions for the future. The dissenting Justices, and Justice Kennedy, were “startled by Roberts’s rationale” (p. 188). Justice John Paul Stevens called Chief Justice Roberts’s approach “cruel” and, referring to *Brown*, charged that “the Chief Justice rewrites the history of one of this Court’s most important decisions” (p. 188).<sup>59</sup> After the Court handed down its decision in *Parents Involved*, Democratic Senator Patrick Leahy announced that he “regretted voting in favor of Roberts during his 2005 confirmation,” and other critics maintained that Chief Justice Roberts was effectively “asking the country to pretend that the history” of racism and racial discrimination had “never happened” (p. 191).<sup>60</sup> According to Biskupic,

<sup>57</sup> 551 U.S. 701 (2007).

<sup>58</sup> The author quotes *id.* at 748.

<sup>59</sup> The author quotes *id.* at 799 (Stevens, J., dissenting).

<sup>60</sup> The author quotes Linda Greenhouse, *A Tale of Two Justices*, 11 GREEN BAG 2d 37, 39 (2007).



though, Chief Justice Roberts was of the view that “the country had moved past its history of racial strife” (p. 191).

In November 2008, the nation elected its first African American President, Barack Obama. As a United States senator, Obama had voted against Chief Justice Roberts’s confirmation (p. 199). In the spring of 2009, Justice Souter announced that he would soon retire. According to Biskupic, one reason for his decision was “his frustration . . . with the Court’s increasing conservatism” (p. 200). Indeed, although Justice Souter had been appointed by Republican President George H.W. Bush, and considered stepping down earlier, he “decided to wait until a Democratic president . . . could appoint his successor” (p. 200). President Obama appointed Court of Appeals Judge Sonia Sotomayor to replace Souter. The third woman and first Latina to be appointed to the Supreme Court, then-Judge Sotomayor “had grown up in a housing project in the Bronx” (p. 201). The Senate confirmed her nomination by a vote of 68–31 in August of 2009 (p. 203).

The next major issue to confront the Court involved campaign finance regulation. In 1990, in *Austin v. Michigan State Chamber of Commerce*,<sup>61</sup> the Court had held, in a 6–3 decision, that Michigan could constitutionally prohibit corporations from using their general treasury funds for independent expenditures to support or oppose a candidate for public office (p. 205). Then, in 2003, as noted earlier, the Court in *McConnell v. Federal Election Commission*, with Justice O’Connor in the majority, upheld the constitutionality of the McCain-Feingold Campaign Reform Act of 2002 (pp. 206–07). During his confirmation hearings, John Roberts had “assured senators of his commitment” to the doctrine of precedent (p. 207). The campaign finance issue would once again test this commitment.

In 2010, in the case of *Citizens United v. FEC*,<sup>62</sup> the conservative majority overturned both *Austin* and most of *McConnell*. In *Citizens United*, Roberts “helped to lead a revolution that cleared the way for unlimited spending on political campaigns” (p. 211). The five-Justice majority of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito eviscerated any meaningful regulation of campaign spending in the United States. In their view, because spending money to elect the candidate of one’s choice was “speech” within the meaning of the First Amendment, it could not be regulated or restricted unless necessary to serve a compelling government interest.<sup>63</sup> The five conservative Justices held that neither limiting the capacity of corporations or billionaires to dominate our democracy, nor preventing corruption or its appearance,

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<sup>61</sup> 494 U.S. 652 (1990).

<sup>62</sup> 558 U.S. 310 (2010).

<sup>63</sup> *Id.* at 340.

nor protecting shareholders who do not wish to fund corporate political speech, was a sufficient justification for restricting the freedom of speech.<sup>64</sup> As Justice Stevens noted angrily in dissent, “the only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court” (p. 215).<sup>65</sup>

As Biskupic notes, in two subsequent decisions, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,<sup>66</sup> and *McCutcheon v. FEC*,<sup>67</sup> the same five-member majority further restricted government efforts to regulate the impact of money in the political process (pp. 217–18). In his dissenting opinion in *McCutcheon*, Justice Stephen Breyer maintained that the Roberts Court’s jurisprudence in these cases has “eviscerate[d] our Nation’s campaign finance laws,” leaving our nation “incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve. . . . Where enough money calls the tune, the general public will not be heard” (pp. 218–19).<sup>68</sup>

While the Justices were deciding *Citizens United*, Chief Justice Roberts did an extensive C-SPAN interview during which he tried to explain how the Court “differs from the work of politics” (p. 220). “All we’re doing,” he insisted, “is interpreting the law” (p. 220).<sup>69</sup> The Court, he added, is “not a political branch of government” (p. 220). Two months after the decision in *Citizens United*, Chief Justice Roberts repeated his usual refrain that “the Court [is] above politics” (p. 220). But the shift from the decisions in *Austin*, where the majority opinion upholding the constitutionality of campaign restrictions was joined by Chief Justice Rehnquist and Justices Marshall, Brennan, White, Blackmun, and Stevens — four Republican appointees and two Democratic appointees — and *McConnell*, where the majority opinion upholding the constitutionality of campaign restrictions was joined by Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer — three Republican appointees and two Democratic appointees — to *Citizens United*, *Arizona Free Enterprise*, and *McCutcheon*, in which all five Justices in the majority — Roberts, Scalia, Kennedy, Thomas, and Alito — had been appointed by Republican presidents, is striking (pp. 205–06, 214–18). Is the Roberts Court in these cases really “above politics” (p. 220)? Biskupic does a persuasive job of suggesting otherwise.

During this time, Justice John Paul Stevens stepped down from the Court after thirty-five years of service, and President Obama nominated his Solicitor General, Elena Kagan, to fill his seat. Kagan was confirmed

<sup>64</sup> *Id.* at 349–62.

<sup>65</sup> The author quotes *id.* at 414 (Stevens, J., concurring in part and dissenting in part).

<sup>66</sup> 564 U.S. 721 (2011).

<sup>67</sup> 572 U.S. 185 (2014).

<sup>68</sup> The author quotes *id.* at 233–37 (Breyer, J., dissenting).

<sup>69</sup> The author quotes an interview with Chief Justice Roberts at *Supreme Court Chief Justice Roberts*, C-SPAN (June 19, 2009), <https://www.c-span.org/video/?286078-1/supreme-court-chief-justice-roberts> [https://perma.cc/BY5R-T3ER].

by a vote of 63–37. As Biskupic notes: “Every senator who voted against her confirmation was Republican” (p. 226). With Justice Kagan’s appointment, “the Court’s ideological divisions now lined up neatly with the Justices’ political affiliations” (p. 226). That is, the five conservative Justices (Roberts, Scalia, Kennedy, Thomas, and Alito) had all been appointed by Republican presidents, and the four liberal Justices (Ginsburg, Breyer, Sotomayor, and Kagan) had all been appointed by Democratic presidents. This was a virtually unprecedented state of affairs, and “[i]t was becoming more difficult for the public to accept the assertion that the Justices were not voting along political lines,” because “in the most closely watched cases, they divided exactly that way” (p. 226). For the Court as an institution, and for Roberts as Chief Justice, this posed a serious challenge.

It was against this background that the Court, in *National Federation of Independent Business v. Sebelius*,<sup>70</sup> considered the constitutionality of President Obama’s signature legislation, the Affordable Care Act, which had been enacted in 2010 (p. 222). The central question was whether Congress had the authority under the Commerce Clause to enact such legislation. Most lower courts that had addressed the issue had upheld the Act (p. 224). When the Justices first met in conference to vote, they divided 5–4, with all five conservative Justices voting to invalidate the law (p. 222). Over the course of several months, though, Chief Justice Roberts “changed course multiple times” (p. 222), ultimately voting to uphold most of the Act based, not on the Commerce Clause, but on Congress’s taxing power.<sup>71</sup>

The outcome in the case came as a complete surprise, as most commentators predicted, in the words of *Washington Post* columnist E. J. Dionne, that “[a] Supreme Court that is supposed to give us Justice will instead deliver ideology” (p. 237).<sup>72</sup> The legal analyst Jeffrey Rosen cautioned that “[t]his is John Roberts’s moment of truth,” for “if the Roberts Court strikes down health care reform by a 5–4 vote, then the chief Justice’s stated goal of presiding over a less divisive Court will be viewed as an irredeemable failure” (p. 238).<sup>73</sup>

As Biskupic notes, before the publication of *The Chief*, “[a] full account of [Chief Justice Roberts’s] actions during the Justices’ private negotiations [had] not previously been reported,” but in *The Chief* she

<sup>70</sup> 567 U.S. 519 (2012).

<sup>71</sup> See *id.* at 575.

<sup>72</sup> The author quotes E. J. Dionne Jr., *In the Supreme Court, Activist Judges Take on Health Care*, WASH. POST (Mar. 28, 2012), [https://www.washingtonpost.com/opinions/activist-judges-on-trial/2012/03/28/gIQAKdE2gS\\_story.html](https://www.washingtonpost.com/opinions/activist-judges-on-trial/2012/03/28/gIQAKdE2gS_story.html) [<https://perma.cc/YZ6C-BYR0>].

<sup>73</sup> The author quotes Jeffrey Rosen, *Moment of Truth for Justice Roberts*, POLITICO (Mar. 28, 2012, 10:27 PM), <https://www.politico.com/story/2012/03/moment-of-truth-for-justice-roberts-074605> [<https://perma.cc/24XR-DZ22>].

details the complex behind-the-scenes deliberations and negotiations “for the first time” (p. 222). No one knows precisely what led Chief Justice Roberts to take the position he did in *Sebelius*, but it brought him both great praise and severe condemnation (p. 222).

Retired Justice Stevens observed that “the [C]hief had shown integrity, . . . ‘because he certainly made himself very unpopular’ with the conservatives” (p. 243). Indeed, “[c]riticism on the right was swift” (p. 245). The *Wall Street Journal* denounced Roberts’s performance as an unprincipled “one-man show” (p. 245),<sup>74</sup> reality-television personality Donald Trump tweeted “I guess Justice Roberts wanted to be a part of Georgetown society more than anyone knew,”<sup>75</sup> and other conservative critics maintained that his decision in *Sebelius* was “a blemish on his integrity and a breach of the law” (p. 246).

Biskupic reports that, as a result of such criticism, including from his fellow conservatives on the Court, “[f]riends said they had never seen him so dispirited” (p. 245). Biskupic concludes, though, that any sense on the part of liberals that Roberts’s vote in *Sebelius* “appeared to reflect an independent streak” has clearly “evaporated over time as Roberts has remained a reliable conservative in virtually every other area of the law” in the years since (p. 222).

In 2013, for example, the Court, in a 5–4 decision in *Shelby County v. Holder*,<sup>76</sup> held unconstitutional section 5 of the Voting Rights Act of 1965. As Biskupic notes, this case “brought John Roberts’s work full circle” (p. 249). Three decades earlier, when he worked in the Reagan Administration, he had written memos criticizing federal intervention into “the election practices of the states” and insisting that the Voting Rights Act “should be narrowly interpreted” (p. 249). Chief Justice Roberts’s “opinion in *Shelby County* marked the first time since the nineteenth century that the Supreme Court struck down a provision of civil rights law protecting people based on race” (pp. 249–50).

Section 5 of the Voting Rights Act requires “states with a history of race discrimination to submit any changes in their election rules to federal officials for preclearance” (p. 254). When the *Shelby County* case reached the Supreme Court, nine states, including Alabama, were still subject to the preclearance requirement (p. 249). Between 1982 and 2006, when Congress reauthorized section 5 by a vote of 98–0 in the Senate and 390–33 in the House, “the Department of Justice had blocked more than seven hundred new registration and voting-related rules from taking effect based on the determination that they were discriminatory” (p. 254).

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<sup>74</sup> The author quotes *The Roberts Rules*, WALL ST. J. (July 2, 2012, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304058404577494400059173634> [<https://perma.cc/VBY3-VHKU>].

<sup>75</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 28, 2012, 9:23 AM), <https://twitter.com/realdonaldtrump/status/218379090493849601> [<https://perma.cc/LWZ7-KNVP>].

<sup>76</sup> 570 U.S. 529 (2013).

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In 2008, the city of Calera in Shelby County, Alabama, wanted to put in place a new voting-district map that would have “eliminated the only black-majority district in the city” (p. 254). Applying section 5, President George W. Bush’s Justice Department voided the proposed map (p. 254). Shelby County sued, challenging the constitutionality of section 5 on the ground that, without proof that the city’s *specific intent* in adopting the new map was to discriminate on the basis of race, the federal government had no constitutionally legitimate justification for intervening.

Although the Supreme Court had repeatedly upheld the constitutionality of the Voting Rights Act as “a valid exercise of Congress’s authority to enforce the Fifteenth Amendment” (p. 252), in *Shelby County* Chief Justice Roberts “had a ready majority for his views” (p. 264). In an opinion joined by Justices Scalia, Kennedy, Thomas, and Alito, Chief Justice Roberts maintained that the “problems the Voting Rights Act was designed to correct no longer existed” (p. 269). He based his conclusion that section 5 was unconstitutional on the theory of “equal sovereignty” — that is, that under our Constitution the federal government must presumptively treat all states equally (p. 270). “Our country has changed,” Chief Justice Roberts argued, “and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions” (p. 269).<sup>77</sup>

In her dissenting opinion, Justice Ginsburg criticized Chief Justice Roberts for ignoring well-established precedent that “had rejected the argument that a principle of ‘equal sovereignty’ could prevent differential treatment of states when it came to race” (p. 271). She also “ridiculed Roberts for claiming that the evidence of discrimination was stale,” adding that “those who cannot remember the past are condemned to repeat it” (pp. 271–72).<sup>78</sup> Justice Ginsburg insisted that “[t]hrowing out pre-clearance when it has worked and is continuing to work . . . is like throwing away your umbrella in a rainstorm because you are not getting wet” (p. 272).<sup>79</sup>

Although his opinion in *Shelby County* has been widely criticized, Chief Justice Roberts has not backed down. As Biskupic notes, the decision has had significant consequences. In the wake of *Shelby County*, “Texas began enforcing a photo ID requirement for voters,” North Carolina “set to work on similarly restrictive measures” for voting, and other states previously subject to section 5 have moved aggressively to make minority voting more difficult (pp. 273–74). Indeed, the

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<sup>77</sup> The author quotes *id.* at 557.

<sup>78</sup> The author quotes *id.* at 576 (Ginsburg, J., dissenting).

<sup>79</sup> The author quotes *id.* at 590.

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Chief Counsel of the NAACP Legal Defense Fund has charged the decision in *Shelby County* as “an egregious betrayal of minority voters” (p. 273).

Still on the issue of race, the Roberts Court confronted the issue of affirmative action in *Fisher v. University of Texas at Austin*.<sup>80</sup> *Fisher* was the first college affirmative action case to reach the Court since *Grutter v. Bollinger*, in which Justice O’Connor had played a critical role in 2003 in pulling together a five-member majority to uphold the constitutionality of the University of Michigan Law School’s affirmative action program. During oral arguments in *Fisher*, “it appeared the Justices were ready to rule against the University of Texas” and to hold the Texas affirmative action program unconstitutional (p. 265). As Biskupic reports, though, Justice Sotomayor “provoked a different outcome” in the case “based on arguments from her own experience” (p. 265).

Owing in part to affirmative action programs, Justice Sotomayor had been able to attend Princeton University and Yale Law School. She excelled at both institutions and thus described herself as “the perfect affirmative action baby” (p. 265). Justice Sotomayor was thus a fervent proponent of affirmative action. However, Justice Thomas, “the only other person of color on the bench, had had a different experience with affirmative action” (p. 265). He maintained that he could never “escape the stigmatizing effects of racial preference,” and that he regretted going to Yale Law School because everyone there assumed “that he had gotten in because he was black” (pp. 265–66).

After the Justices heard oral argument in *Fisher*, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito were prepared to hold the Texas affirmative action program unconstitutional, undoing the critical compromise that Justice O’Connor had achieved in *Grutter*. Justices Ginsburg, Breyer, and Sotomayor indicated that they would dissent. Justice Kagan could not participate because she had been involved in the case when she was Solicitor General.

Justice Sotomayor then began drafting a dissent “in which she reflected on the disadvantages and slights that people of color continued to face” (p. 266). She “attempted to explain to her brethren in the majority that they did not understand what it was like to be a person of color in America” (p. 266). The personal nature of Justice Sotomayor’s statement “offended Roberts,” but it “moved” Justice Kennedy, who had voted in *Grutter* to strike down the affirmative action program in that case (p. 267). After reading Justice Sotomayor’s statement, Justice Kennedy “began to have second thoughts” (p. 267). In the end, he wrote a majority opinion that sent the case back to the lower courts for further review, leaving the central question of the constitutionality of affirmative action for another day. In the end, all of the conservative Justices

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<sup>80</sup> 570 U.S. 297 (2013).

but Justice Thomas signed on to Justice Kennedy's opinion, as did Justices Breyer and Sotomayor (pp. 267–68).

Three years later, in 2016, the case returned to the Supreme Court in *Fisher II*.<sup>81</sup> In a four-to-three decision (Justice Kagan again recused herself and Justice Scalia had recently died and his seat had not yet been filled), the Court, in an opinion by Justice Kennedy, who had now come around to Justice O'Connor's position in *Grutter*, upheld the constitutionality of the University of Texas's affirmative action program. Justice Kennedy noted that "a university ha[s] 'considerable deference' to ensure student diversity" because "[i]t remains an enduring challenge to our nation's education system . . . to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity" (p. 313).<sup>82</sup> Chief Justice Roberts and Justices Thomas and Alito dissented.

With Justice Kennedy as the Court's swing vote, the Roberts Court in these years also decided *United States v. Windsor*<sup>83</sup> and *Obergefell v. Hodges*, in which the Court, in two 5–4 decisions, recognized a constitutional right to same-sex marriage. In both cases, Chief Justice Roberts and Justices Scalia, Thomas, and Alito furiously dissented. In his dissenting opinion in *Obergefell*, Chief Justice Roberts invoked "the longstanding understanding that a marriage is a union between a man and a woman" (p. 299). "Just who do we think we are?," he roared (p. 299). "This is a court, not a legislature. . . . We have to say what the law is, not what it should be" (p. 299) (omission in original). At the end of his dissent he admonished: "If you are among the many Americans . . . who favor expanding same-sex marriage, by all means celebrate today's decision. . . . But do not celebrate the Constitution. It had nothing to do with it" (p. 299).

Chief Justice Roberts also compared the Court's decision in *Obergefell* to "the Court's infamous *Dred Scott*<sup>84</sup> decision of 1857" (p. 300). "Deriding his colleagues," he quoted from the dissenting opinion in *Dred Scott* to the effect that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical . . . opinions of individuals are allowed to control [the Constitution's] meaning, we have no longer a Constitution; we are under the government of individual men" (p. 300) (alterations in original).

One of the strongest detractors of Chief Justice Roberts's dissenting opinion in *Obergefell*, among many, was Judge Posner, who called Chief Justice Roberts's argument "heartless" and "mocked his view of history" (p. 301). As Biskupic notes, Roberts's position in *Obergefell* "illustrated that over the course of his legal life, at a time when American social

<sup>81</sup> 136 S. Ct. 2198 (2016).

<sup>82</sup> The author quotes *id.* at 2214.

<sup>83</sup> 570 U.S. 744 (2013).

<sup>84</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

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attitudes were changing rapidly, John Roberts was not changing. Central to his personality was a constancy, an immovability. His views were fixed” (p. 301).

On February 13, 2016, Justice Scalia died in his sleep. As Biskupic notes, “[u]nder normal circumstances, the vacancy would have been President Barack Obama’s to fill” (p. 303). But Senate Republicans, led by Senator Mitch McConnell, “blocked action on Obama’s choice for nearly a year” (p. 303). Shortly after Justice Scalia’s death, Leonard Leo, the executive vice-president of the Federalist Society, reached out to Senator McConnell to make sure that he would block any nomination by President Obama (p. 304). Senator McConnell declared that “[t]he American people should have a voice in the selection of their next Supreme Court Justice” and he therefore announced that he would not permit the vacancy to “be filled until we have a new President” (p. 305). Senator McConnell and other conservative advocates had privately maintained that it was consistent with tradition not to confirm a Supreme Court nominee in the last year of a president’s term (p. 303).

This was an outright lie. Almost a quarter of Presidents have found themselves in this position, and the Senate has routinely confirmed their nominees.<sup>85</sup> This list includes Presidents Washington, Jefferson, Jackson, Lincoln, Taft, Wilson, Hoover, Franklin Roosevelt, and Reagan.<sup>86</sup> There was, in short, absolutely no tradition of the Senate refusing to consider a President’s nominee simply because the vacancy arose in the final year of the President’s term. The Senate Republicans’ excuse for their refusal to consider President Obama’s nomination was therefore patently dishonest.

Nonetheless, when President Obama nominated Chief Judge Merrick Garland, “a moderate liberal nominee” who was sixty-three years old and a “veteran appeals court judge,” Senator McConnell outrageously persisted in his refusal to consider Chief Judge Garland’s nomination (p. 310). Then, ten days after Donald Trump was sworn in as President, he nominated Court of Appeals Judge Neil Gorsuch to fill Justice Scalia’s seat. Don McGahn, President Trump’s newly installed White House Counsel, “worked closely with the Federalist Society’s Leonard Leo in the vetting of candidates for the Scalia seat” (p. 316). According to McGahn, President Trump wanted a solid conservative, someone “who, once seated on the bench,” would not turn into a moderate (p. 316). Moreover, during his campaign, President Trump had “vowed to appoint judges who would overturn *Roe v. Wade*” (p. 318).

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<sup>85</sup> Geoffrey R. Stone, Opinion, *Sen. Kirk, Here’s How You Can Persuade the GOP to Consider Merrick Garland*, CHI. TRIB. (Mar. 28, 2016, 11:55 AM), <https://www.chicagotribune.com/opinion/commentary/ct-mark-kirk-merrick-garland-supreme-court-perspec-0329-jm-20160328-story.html> [<https://perma.cc/R82F-C23T>].

<sup>86</sup> *Id.*



During his testimony before the Senate Judiciary Committee, then-Judge Gorsuch, aping Chief Justice Roberts, declared that “[t]here is no such thing as a Republican judge or a Democratic judge” (p. 317). In response to the Republicans’ treatment of Chief Judge Garland, the Democrats filibustered the Gorsuch nomination, but the Republicans, who could not muster the sixty votes necessary to override the filibuster, instead changed the rules of the Senate “so they could approve Gorsuch’s nomination by a simple majority vote” (p. 319). Thereafter, Justice Gorsuch was confirmed “on a nearly complete party-line vote,” with all fifty-one Republicans voting in favor (p. 319).

Not surprisingly, the Supreme Court with Justice Gorsuch on it turned out to be quite different from what it would have been with a Justice Garland on it. That, of course, was the point. According to Biskupic, in President Trump’s first years in office he “disrupted the nation’s constitutional norms” by revealing “disdain for due process of law,” belittling federal judges, and instituting “extreme measures to stop immigrants from crossing the southern border and seeking asylum” (p. 325). In Biskupic’s words, “[a]n overriding question was whether the Court . . . would present a challenge to Trump . . . as the president shattered legal norms” (p. 326).

Inside the Court, “conflicts among the Justices intensified” (p. 327). The 2017 Term was an “unusually difficult” one, “as many cases were decided by a single vote, with conservatives in the majority and liberals protesting vociferously” (p. 329). Privately, the Justices expressed regret that “the collegiality” of the past “was fading” (p. 330). But “rivalries, particularly involving the newest Justice, Gorsuch,” became more intense as the Court moved further to the right (p. 330).

Biskupic points to several decisions during the 2017 Term that proved bitterly divisive among the Justices. In *Husted v. A. Philip Randolph Institute*,<sup>87</sup> for example, Ohio enacted a law purging citizens from the voting rolls in a process triggered by the fact that they had not voted for two years.<sup>88</sup> A federal law specifically barred removing voters because of a failure to vote.<sup>89</sup> Nonetheless, in a 5–4 decision, with Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Gorsuch in the majority, the Court held that the Ohio law was permissible.<sup>90</sup> The four dissenters, Justices Ginsburg, Breyer, Sotomayor, and Kagan, invoked “the nation’s history of racial discrimination, poll taxes, literacy tests, and other electoral practices that kept blacks and the members of other racial minority groups from voting” (p. 333).

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<sup>87</sup> 138 S. Ct. 1833 (2018).

<sup>88</sup> See *id.* at 1838.

<sup>89</sup> See *id.*; see also National Voter Registration Act, 52 U.S.C. §§ 20501–11 (2012).

<sup>90</sup> See *Husted*, 138 S. Ct. at 1848.

In another case, *Abbott v. Perez*,<sup>91</sup> the five conservative Justices overturned a lower court finding that in drawing new legislative maps after the 2010 census, Texas had “denied Latinos an equal opportunity to elect candidates of their choice” (p. 334). Writing for the majority, Justice Alito maintained that “the record failed to prove that the state legislature . . . had acted in bad faith” (p. 334). Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, accused the majority of “ignoring the factual record” and of dismissing the lower court’s finding that “political processes were ‘not equally open to Hispanics’ in Texas because of its ‘history of official discrimination’” (p. 334).<sup>92</sup> As Biskupic notes, “[t]he two sides plainly differed in their perceptions of discrimination in America and the Court’s role when state governments perpetuated that discrimination” (p. 335).

In *Janus v. AFSCME, Council 31*,<sup>93</sup> the Court again divided 5–4 in overturning a four-decade-old precedent in *Abood v. Detroit Board of Education*,<sup>94</sup> in which the Burger Court had held in 1977 that states could constitutionally permit public-sector unions to collect union dues from nonunion members to support collective bargaining efforts benefiting all employees.<sup>95</sup> Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch, overruled *Abood* and held that such a practice violates the First Amendment rights of nonunion employees.<sup>96</sup> Justice Kagan, writing for the dissenters, accused the majority of overruling *Abood* for no reason other than that they “never liked the decision” (p. 336).<sup>97</sup> She wrote that the conservatives were “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy” (p. 336).<sup>98</sup>

As a final example from the 2017 Term, Biskupic cites *Trump v. Hawaii*,<sup>99</sup> in which the Court once again divided 5–4 in rejecting the claim that President Trump’s effort to restrict immigration from certain Muslim-majority countries violated federal immigration law and the First Amendment’s protection of religious freedom.<sup>100</sup> Chief Justice Roberts’ majority opinion, joined by Justices Kennedy, Thomas, Alito, and Gorsuch, “look[ed] past what Trump had said and consider[ed] the executive’s power over immigration” (p. 338). In dissent, Justice Sotomayor, joined by Justice Ginsburg, pointed to President Trump’s

<sup>91</sup> 138 S. Ct. 2305 (2018).

<sup>92</sup> The author quotes *id.* at 2354 (Sotomayor, J., dissenting).

<sup>93</sup> 138 S. Ct. 2448 (2018).

<sup>94</sup> 431 U.S. 209 (1977).

<sup>95</sup> See *id.* at 222.

<sup>96</sup> See *Janus*, 138 S. Ct. at 2486.

<sup>97</sup> The author quotes *id.* at 2501 (Kagan, J., dissenting).

<sup>98</sup> The author quotes *id.*

<sup>99</sup> 138 S. Ct. 2392 (2018).

<sup>100</sup> *Id.* at 2423.

insults to Muslims, including such statements as “Islam hates us” and “[w]e’re having trouble with Muslims coming into the country,”<sup>101</sup> and argued that “[o]ur Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.”<sup>102</sup> In a separate dissenting opinion, Justice Breyer, joined by Justice Kagan, also rejected the majority’s analysis (p. 338).

At the end of the 2017 Term, Justice Kennedy announced that he was retiring. Despite Justice Kennedy’s consistent embrace of the Roberts-Thomas-Alito-Gorsuch positions in his last year on the Court, throughout his career, like Justice O’Connor, he had often rejected the views of his more conservative colleagues on such critical issues as affirmative action, abortion, and gay rights, and found common ground with the more liberal Justices.

With the nomination and confirmation of Brett Kavanaugh to replace Justice Kennedy — the same Brett Kavanaugh, by the way, who successfully encouraged President George W. Bush to appoint John Roberts as Chief Justice — the Court shifted even further to the right. It is stunning that over the past half-century Republican presidents have made fourteen of the last eighteen appointments to the Supreme Court — even though Republican presidential candidates won the popular vote in only six of the last thirteen elections. Moreover, the conservative ideology of the more recent Republican nominees, including all five on the Court today, is far more extreme than the conservative ideology of the Justices who were considered “conservative,” for example, in the Nixon era.

Biskupic notes that, as things now stand, Chief Justice Roberts is “the member of the conservative bloc closest to the center” (p. 344). But he will “be no ‘swing vote’ like Kennedy, whose flexible approach meant the four liberals had [at least] a chance to attract his vote” (p. 344). In practical effect, Biskupic asks, in light of the current state of the Court, how can “the Chief Justice still insist that judging [has] nothing to do with politics?” (p. 344). The plain and simple fact is that, despite Chief Justice Roberts’s continuing assertions to the contrary, the best way to predict the votes of the conservative Justices on the Court today in important cases involving such issues as guns, campaign finance, gerrymandering, abortion, religion, affirmative action, gay rights, immigration, public sector unions, voting rights, and the like has nothing to do with judicial restraint, originalism, textualism, footnote four,<sup>103</sup> or any other “principled” approach to constitutional interpretation. It is, rather, simply to ask what outcome the Republican Party would favor. Sadly,

<sup>101</sup> *Id.* at 2436 (Sotomayor, J., dissenting).

<sup>102</sup> The author quotes *id.* at 2448.

<sup>103</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); STONE & STRAUSS, *supra* note 20.

we have come a long way from the era when Justice O'Connor was on the Court.

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Taken together, *First* and *The Chief* describe Justices with starkly different paths to the Court. Sandra Day O'Connor was raised on a ranch in the Southwest with no running water, electricity, or indoor plumbing. John Roberts, the son of a steel executive, was born into relative comfort in suburban Indiana. Although both attended — and excelled at — elite schools, only Roberts could find a paying job after graduation. O'Connor, excluded from all-male law firms in Phoenix, Arizona, worked for a district attorney for free; Roberts clerked for Judge Friendly and then-Justice Rehnquist before becoming Special Assistant to the Attorney General. O'Connor entered private practice by opening her own firm in a strip mall and handling whatever cases she got; Roberts did so by joining a large firm and specializing in appellate litigation. O'Connor became a state legislator; Roberts became Deputy Solicitor General. O'Connor ran for and won a seat as a trial judge in state court, where she was so assertive that lawyers complained she was too tough on them; President Bush rewarded Roberts for his work on *Bush v. Gore* with a seat on the D.C. Circuit, where — his eyes on the Supreme Court — he went out of his way to avoid controversy. President Reagan nominated O'Connor to the Court in part because he had promised to nominate the first woman Justice; President Bush nominated Roberts to the Court in part because he wanted a consistent conservative vote.

Although Justice O'Connor occupied the ideological center of the Court during most of her tenure — just as Chief Justice Roberts does now — these two Justices' contrasting personal histories contributed to wildly different judicial philosophies. Justice O'Connor — shaped by her time at the Lazy B, in the Arizona legislature, and as a trial judge — was a pragmatist. Though she experienced rampant sex discrimination as a lawyer, as a legislator, and even as a Justice, she acquiesced to the practical realities of her time; she did not fight for radical change. Instead, she worked within the system: she opened her own firm instead of practicing at an existing one, waffled over the ERA while fighting to overturn laws discriminating against women in Arizona, and simply ignored the “minor diminishments” of her colleagues on the Court (p. 151). As a Justice, she was “moved less by constitutional theory than by . . . purely practical problems” (p. 194) and was far from an ideological purist. She had “an intuitive feel for the public mood” that guided her decisions and helped her create a “fragile national consensus” on

controversial issues like abortion.<sup>104</sup> Though she was conservative, her jurisprudence, according to Thomas, was “to say as little as possible and to let the argument evolve through the delicate balance between legislatures elected by the people and judges sworn to protect the Constitution” (p. 264). And she prided herself on her ability to find common ground. After retiring, she lamented that all the compromises she had reached — on, among other things, campaign finance, abortion, and affirmative action — were being undone.

In contrast, *The Chief* paints Chief Justice Roberts as an ideologue. Unlike Justice O’Connor, he experienced almost no setbacks in life;<sup>105</sup> born into a world where his identities were structurally advantaged, he never had to compromise to achieve his goals. Although he was conservative from an early age, his views became increasingly unyielding after working in the Reagan Administration. They eventually earned him a seat on the Court. And though as a Justice he is “more judicially temperate than the other Republican appointees” — in part because he is the Chief Justice<sup>106</sup> — Biskupic is not optimistic that he will become a pragmatic moderate like Justice O’Connor. Though “[t]he Court’s reputation” going forward will “depend” heavily on Chief Justice Roberts — on how he casts his votes and how he steers the other Justices (p. 344) — Biskupic notes that some of Chief Justice Roberts’s colleagues do not trust him and think “that he is not always acting in good faith, that he is not an honest broker” (p. 347).

Moreover, although Chief Justice Roberts has consistently maintained that “he has no political agenda on the bench,” Biskupic concludes that “his opinions show that, despite the ‘umpire’ assertion,” he did not in fact “shed his partisan thinking once he donned the black robe” (p. 347–48). With the retirement of Justice Kennedy and the appointment of Justice Kavanaugh in his place, she concludes that the Chief Justice is now “leading a Court increasingly in his own image. He is positioned at the center in every way, and the law will likely be what he says it is” (p. 349).

Let us hope that Chief Justice Roberts understands the stakes and does not undermine both the integrity of Supreme Court and his own place in history. In short, let us hope that Chief Justice Roberts will find a bit of Justice Sandra Day O’Connor in his soul.

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<sup>104</sup> Evan Thomas, *How the Supreme Court Justice Sandra Day O’Connor Helped Preserve Abortion Rights*, NEW YORKER (Mar. 27, 2019), <https://www.newyorker.com/news/news-desk/how-the-supreme-court-justice-sandra-day-oconnor-helped-preserve-abortion-rights> [https://perma.cc/GG7Z-ESVC].

<sup>105</sup> Ronald Collins, *Ask the Author: “Mr. Everything” – Joan Biskupic on Chief Justice John Roberts*, SCOTUSBLOG (Apr. 11, 2019 10:05 AM), <https://www.scotusblog.com/2019/04/ask-the-author-mr-everything-joan-biskupic-on-chief-justice-john-roberts/> [https://perma.cc/HNL9-DWW9] (“I often asked people who knew Roberts in his younger years about setbacks he might have experienced. That question stumped people. He seemed to have so few things go wrong, and he appeared good at just about everything.”).

<sup>106</sup> *Id.*