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A Supreme Court Justice's Uneven Volume of Views

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The Majesty of the Law: Reflections of a Supreme Court Justice

By Sandra Day O'Connor Random House, 330 pages, \$25.95

Sandra Day O'Connor is the most closely watched justice on the U.S. Supreme Court, since her often unpredictable vote usually proves decisive when the court splits 5-4 in deciding an important case. Many court watchers will reach quickly for her new book, hoping to find a hint or insight into how O'Connor will resolve some crucial issue, but "The Majesty of the Law" almost certainly will prove disappointing.

Take affirmative action, for example. Two potentially landmark challenges to race-based admissions programs at the University of Michigan are presently pending before the justices and ought to be decided sometime this June. O'Connor has been the court's decisive swing vote on race cases for more than a decade, and her opinion in an important 1995 case, *Adarand Constructors vs. Peña*, could govern how she votes on Michigan's policies.

In prepublication copies of "The Majesty of the Law," O'Connor made one intriguing reference to how the *Adarand* decision vindicated the intensely skeptical view of such programs she had voiced in a 1990 case: "My own views of the level of scrutiny to be given to affirmative action programs expressed in my dissent in *Metro Broadcasting* were, in due course, adopted by this Court's opinion in *Adarand*. I must confess to having hopes that some of my other dissents will one day be similarly vindicated."

But O'Connor seems to have drawn a lesson from how New York Yankees pitcher David "Boomer" Wells several months ago tried to tamp down the controversy that erupted over his baseball memoir, "Perfect I'm Not," by amending several of the most colorful claims that appeared in advance copies of the book before it reached store shelves. O'Connor's two sentences about affirmative action have vanished from her final book, and now court watchers will wonder what led O'Connor to make this last-minute deletion about such a hot-button topic.

Only readers with a strong appetite for similar guessing games will find "The Majesty of the Law" interesting or rewarding. One year ago O'Connor and her brother, H. Alan Day, published "Lazy B: Growing Up on a Cattle Ranch in the American Southwest," a rich and sometimes beautifully expressive childhood memoir. "Lazy B" contained some notable statements, such as when O'Connor and Day called one special ranch hand "as rare as an honest politician," but in "The Majesty of the Law" similar passages are very few and far between.

Many chapters have been published previously in law reviews, and several more seem to have originated as speeches to a society or group. O'Connor makes a number of statements about

the court that are utterly fallacious, such as one claim that the justices "are perennially overworked, understaffed, and (some of us occasionally are tempted to think) underappreciated." Not only are O'Connor and her colleagues feted at any law school or bar association gathering they choose to visit, each justice has a personal staff of four law clerks and two secretaries above and beyond numerous other court employees.

O'Connor's contention that "each and every petition for review . . . is reviewed with care by each Justice" is simply false; the vast majority of petitions are read only by a few law clerks and are dismissed without ever being discussed by the justices themselves. And O'Connor's claim that the court's workload "has increased dramatically" is true only in the misleading sense that the overall number of petitions sent to the court has risen. This year the justices actually will hear and decide only 75 cases during the nine months the court is in session. Twenty years ago, the court routinely heard twice that number each year, and earlier this month Justice Anthony M. Kennedy told a congressional subcommittee that the court's present workload is too light.

Most puzzling of all is how "The Majesty of the Law" twice misstates the full import of the court's 1973 decision in *Roe vs. Wade*. In identical language in two separate chapters, the book states that *Roe* "struck down as unconstitutional limitations by states on abortions in the first three months of pregnancy." Actually, *Roe* not only legalized women's access to safe abortions right up to the time of fetal viability, approximately six months into pregnancy, but also precluded the states from prohibiting post-viability abortions if a pregnancy in any way threatens a woman's health.

On some subjects O'Connor speaks clearly and strongly. One is federalism, where she is the most fervent voice leading the court's narrow, 5-4 conservative majority further rightward "in articulating affirmative restrictions on the extent to which Congress may directly regulate the states or their officers." O'Connor's championing of local autonomy--"the states are powerful sovereigns, nearly equal to the national government" --has a powerful impact when four or more other justices join with her in voiding numerous federal statutes, such as the Gun Free School Zone Act and the Violence Against Women Act, that they see as excessive assertions by Congress.

O'Connor's criticisms of feminist analyses of women judges may surprise many readers, coming as they do from the first-ever female justice (Ruth Bader Ginsburg became the second in 1993). "There is simply no empirical evidence that gender differences lead to discernible differences in rendering judgments," O'Connor says, and claims that women have "uniquely female perspectives" are "unsettling." She singles out one law professor, Suzanna Sherry, who "to my surprise" has "surmised that my opinions differ in a peculiarly feminine way from those of my colleagues." O'Connor finds such a contention "troubling" and pointedly asks, "Do we want to return to the days when women judges were routinely placed on family or juvenile courts because they were more caring?"

The tough-minded individualism that's visible when O'Connor discusses gender appears elsewhere too. In one discussion of race that remains in the book, a reference to "the color-blind aspirations for our society that first found expression" in *Brown vs. Board of Education* is quickly followed by the potentially suggestive statement that the Supreme Court "will continue to ensure that individuals participate as equals in this country." And when O'Connor addresses how the Constitution requires Senate confirmation of Supreme Court justices, her forceful assertion that "merit was the sole criterion on the mind of the delegates to the Constitutional

Convention" appears to signal her own view of how present-day senators should react to nominees.

But outspoken comments are rare. In what may be a criticism of O.J. Simpson's acquittal, O'Connor says that "as we have seen only recently, permitting television in the courtroom can result in sensationalistic reporting of crimes and trials that may hamper the administration of a fair trial." And when O'Connor volunteers, ostensibly in a 19th Century context, that it is "so important for politicians" to see "beyond their desire to cast out a partisan and disliked opponent," it's easy to imagine that she implicitly is commending the Senate's impeachment trial acquittal of former President Bill Clinton.

Yet "The Majesty of the Law" is often a dull and tedious volume. Sandra Day O'Connor is a justice who merits our closest attention, but this book is likely to disappoint readers who admire O'Connor and seek a fuller understanding of her fascinating life.

PHOTO (color): Justice Sandra Day O'Connor. AP photo.

PHOTO: Chief Justice Warren Burger swears in Sandra Day O'Connor as an associate justice of the U.S. Supreme Court on Sept. 25, 1981. O'Connor's husband, John, holds two family Bibles. AP photo.

PHOTO (color): (Book cover.)