

**SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2002
LIFE AND THE LAW – A PERSONAL JOURNEY**

1 My husband and I have felt very privileged indeed to have the opportunity to visit Singapore. We have looked forward with much anticipation to visiting here and we are not disappointed. You make strangers and visitors feel very welcome indeed.

2 As the Chief Justice told you, I am the first cowgirl to serve on the United States Supreme Court. It is a long way from the Lazy B Ranch to Singapore. I grew up on a cattle ranch in the American Southwest, a ranch that was started by my grandfather Day in 1880 on land in both Arizona and New Mexico. It was still part of the territory of Arizona in 1880 and anyone who wished to use the land could do so. Much of it was federally owned. My grandfather went to Mexico and bought cattle, which were branded with a Lazy B – a B lying down on its side. We called the ranch the “Lazy B.” Singapore, as I understand it, consists of roughly 240 square miles. The Lazy B Ranch was a bit larger than that. Singapore has 4 million people, and we had 10 people, more or less, who lived and worked on the ranch.

3 It was a rather spartan life there. The ranch was on high desert, about 5000 feet in elevation, but had no more than about ten inches of rainfall a year.

4 My favorite American author was Wallace Stegner. He said:

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

5 Most ranch land provides better grazing than where the Lazy B Ranch was located. It was along the Gila River in both Arizona and New Mexico and it was populated by such things as deer, antelope, javelina, raccoons, badgers, coyotes, rabbits, bob-cats, rattle snakes, desert tortoises and all kinds of insects and birds.

6 My father was born on the Lazy B Ranch, and ended up living there until his death in the 1980s. When my father took over the management of the ranch, he made a trip to Texas to buy a load of bulls, and he says he got my mother as “part of the deal.” Her father sold my father the bulls, and he invited my father to come have dinner at their house. If there is such a thing as love at first sight, it occurred that night. When my father went

back to the Lazy B Ranch, he and my mother wrote to each other all through the summer. Finally, my father wrote to my mother that he did not have much of a future, stuck on the ranch, that surely my mother could find somebody better to take care of her, and that they should just end the relationship. There the correspondence ended; two weeks later, they eloped. My mother joined him at the Lazy B Ranch. Her mother was not pleased about this. At the time, there was only a four-room house, no indoor plumbing and no running water. My mother thought it was going to be all right. But her mother's advice to her was, "Ada Mae, don't ever learn to milk the cow." My mother didn't. She managed all through the years to be very nicely dressed, and whenever she went outside she had the good sense to wear a hat, gloves, and long sleeves. She and my father led a very happy life on the Lazy B Ranch.

7 My earliest memory of the ranch was of sounds. Most of the time, it was a place of all-encompassing silence. Probably living here in Singapore, with people constantly around, you never experience silence like that. But it was complete silence, unless the wind blew. If the wind blew, then the big windmills would start to turn and the suckerods would make noise as they moved up and down in the well casing. At night, I would lie in bed and hear the coyotes howling in the distance. It was a very lonesome sound, I have to say.

8 Our obsession was water. Water is one of the most precious things we have in the world. I predict that in the 21st century we will have to deal with water shortages all around the globe. Even Singapore has to buy some of its water offshore. All our waking hours were spent worrying that we would not get enough rainfall to grow enough grass to feed the cattle.

9 The people on the ranch tended to be the old style cowboys. They were usually unmarried men who lived all their lives on the ranch. They were special people, and I learned a lot from them. They were not well educated; some were illiterate. They could not read the written word, but they could read signs. They could tell you whether a horse had gone past the area, whether the horse had a rider or not, and how many days ago it occurred. Everything on that desert seemed to have the capacity to hurt you. You could be punctured by a thorn, hit by a bush as you rode along, bitten by an insect, or kicked by a horse. Whatever it might be, there was a protective mechanism on almost everything on the ranch.

10 What is it that I learned from that kind of life? Certainly all of us are shaped by our experiences as children. The value system that we learned on the ranch was simple and unsophisticated. What counted there was competence to do whatever was required to keep the ranch in good working order. Verbal skills were less important than the ability to know and understand how things worked in the physical world. Qualities like honesty, discipline and good humor were valued most.

11 The Lazy B Ranch was eventually sold in the early 1990s, and is no longer in our family. But it will always certainly be in my own heart and memory.

12 There was no school nearby so beginning with kindergarten I was sent to live with my maternal grandmother in El Paso, Texas. I attended school there through high school. I then went to Stanford and majored in economics. While an undergraduate, I took a class in law and the professor was highly intelligent and inspiring. He was the first person, in my experience, to urge the notion that an individual can really make a difference in this big world of ours. This *is* a very big world – billions of people worldwide. Nevertheless, individual qualities of leadership and concern can enable each of us to make a difference. I decided that I would apply to law school at Stanford to see if I could learn to make a difference.

13 I was accepted, much to my surprise. There were not many women in law school in those days. I learned from Mrs Lee Kuan Yew that she attended law school about the same time I did and there were few women in her class also. I assumed that it would be easy to get a job after I graduated. I applied to various law firms in California and I could not get a job. I finally asked an undergraduate friend of mine whose father worked in a big law firm to see if he could get me a job interview. I went to Los Angeles for the interview and we had a pleasant conversation, and finally the partner said, “Miss Day, how do you type?” I said, “fair ... not excellent.” He said, “Well, if you type well enough, I can give you a job as a legal secretary.”

14 But this was not what I wanted. I went to see the District Attorney of San Mateo County, California. I heard that he had once had a female lawyer on his staff. We worked out an arrangement and I went to work for him. In those days when opportunities for women lawyers emerged, the work was more often in the public sector. I found the work to be exciting. It was not long before John was drafted during the Korean War. He was sent not to Korea, but to Germany. This meant I had to give up my hard-won job and follow him to Germany. I succeeded in getting a job there for the government quartermaster as a contract lawyer. I enjoyed that for the three years he was in Germany. When he was discharged, we went to Phoenix, Arizona, but the law firms there still did not hire women as lawyers. So I opened a law firm in the suburbs in Phoenix with a young man I met when we were studying for the Bar exam in Arizona. We just did any legal work that came through the door; it might be writing a will, or doing some form of collection work for the local merchants. It was not the type of work one usually sees in the United States Supreme Court. I took a number of criminal cases. The judge would appoint a lawyer to represent the defendant and I took some of the appointments and learned about criminal practice the hard way.

15 Anyway, I enjoyed my work in Phoenix and I had three children over the course of the next few years. Then my babysitter moved to California. I had to stay at home the next few years. I was afraid that I would never get back into the mainstream of legal practice. I started a lawyer referral plan, I served as a juvenile court referee and heard juvenile cases. I served as a member of the planning and zoning commission and other voluntary activities. I do not know about your situation here in Singapore, but in the United States, volunteer service is quite a common activity for people. Finally, I decided I had better get a job because I was too busy as a volunteer.

16 When there was a vacancy in the Arizona state senate, I was appointed and then ran for election a couple of times. Later I became the majority leader. As senate majority leader, nothing important happened in Arizona without my consent. Many people would come to me who wanted something and they would tell me lots of flattering things. I decided that this was not healthy in the long run. I thought I would be better off as a judge where at least one person in every case would be criticizing me. I became a trial judge. Now when they say "sit on the bench" they really mean it. I literally "sat on that bench" for hour after hour. It was like sitting in front of a soap opera because I would hear the most remarkable stories. Sometimes the stories would be very sad and I would find myself on the verge of tears. I pretended to write something and get over my concerns. Sometimes what I heard would make me laugh. Sometimes it would just be out and out boring, but I did not want to fall asleep. On the trial bench I saw the full spectrum of life. Then, I was appointed to the Court of Appeals, where I served until 1981.

17 Then, I received a call from the Attorney General under President Ronald Reagan, a man named William French Smith. He had been a partner in the Los Angeles firm that had offered me the legal secretary job early in my career. So when he asked me whether I could come back to Washington to talk about a vacancy, I assumed it was to talk about a "secretarial job." President Reagan called me a week later to ask if he could announce my appointment to the Supreme Court. I had some qualms about the position because I felt he could find someone more qualified than I. The person who felt most strongly that I should take the job was my husband, despite the fact that it meant that he had to give up his position in Arizona which he really liked.

18 I have been at the Court over 21 years, and it has been a remarkable experience. Sitting on the nation's highest court, one can get a sense of the nation's legal concerns because we have had a great many legal petitions. In 1981 there were 4000 petitions; last year, there were 7500. Fortunately, Congress has given us discretion over which cases to take. I am glad that we have that discretion. All of us – all nine justices – have to read those thousands of petitions for *certiorari* and decide which ones to accept for

review. We only take about 100 or so each year. They tend to be cases where the lower courts have reached conflicting results. We see the role of the Supreme Court as one of developing a reasonably consistent body of federal law. We do not see ourselves as adding another layer of appellate review. We are concerned about making clear what the correct federal rule is when the lower courts are in disagreement.

19 In the United States, as in Singapore, our constitution defines certain individual rights, and an independent judiciary is entrusted to safeguard these guarantees against encroachment by the other branches of government. Gatherings such as this provide welcome opportunities to compare our respective national experiences, and I would like to take this opportunity to discuss the judicial role in the protection of individual rights as that role has taken shape in the United States.

20 After 21 years on the United States Supreme Court, that role emerges as perhaps the most important to our citizens although the proper role of the judiciary in enforcing civil and human rights has always been a contentious one. Though the American judiciary has at times played a leading role in this process, it has also come under much criticism for so doing. Whether one looks to such classical theorists as Aristotle or Locke, or to American political thinkers like Madison or Lincoln, majority rule has always been considered the foundation of a democratic political system. The American Constitution was written in terms of what the three branches of the national government can do, and contained few explicit limitations on the power of government.

21 But the United States Constitution does not end there. Like much of politics, the United States Constitution was the result of compromise. Though the main advocates of the Constitution – the Federalists – were content with a document that simply gave certain enumerated powers to the government, their opponents – the Anti-Federalists – wanted a specific list of rights retained by the people. To overcome the objections of the Anti-Federalists, and to ensure ratification of the Constitution, the Federalists promised that, soon after the Constitution became effective, amendments would be added to expressly limit certain actions by the federal government and to protect the autonomy of the States.

22 This is the great irony of the Bill of Rights. Most Americans think of the Constitution and the Bill of Rights as going hand-in-hand, but the more appropriate analogy is ball-and-chain. The Bill of Rights was a restraint imposed on the new federal government to keep it from running out of control. While the Constitution is the cornerstone of our commitment to principles of representative government and majority rule, the Bill of Rights is a decidedly anti-majoritarian document. In the Bill of Rights, the framers of our Constitution built a wall around certain fundamental individual freedoms, forever limiting the majority's ability to intrude on them. The Bill

of Rights assures freedom of religion, of the press, of speech and assembly. It protects citizens from unreasonable searches and seizures. It prohibits the deprivation of life, liberty, or property without due process of law. It assures that private property will not be taken for public use without just compensation. And it confers a panoply of rights on the accused, including the assistance of counsel for the accused's defense. All these guarantees are written in language that any literate American can understand, and many can recite from memory.

23 Merely writing them down, however, does nothing to ensure that these rights will be respected. Two additional developments in American constitutional history were necessary for the Constitution to become the true guarantor of civil and human rights. The first was the establishment of judicial review, a power that is the "cornerstone" of our constitutional law. In 1803, in the famous case of *Marbury v Madison*, the Supreme Court declared that it had the authority to declare an Act of Congress void if, in the opinion of the Justices, the Act violated the Constitution. That principle has survived to this day in the United States. The power of the independent courts to declare unconstitutional the acts of another branch of government – the power of judicial review – is the foundation of the courts' role in protecting individual rights. Without such power, the rulings of our Supreme Court would be less important and less enduring. Without such power, Congress, when distressed by a ruling interpreting individual rights, could pass statutes rejecting the decision, and the courts would be powerless to react. But because the courts, and especially the Supreme Court, are the final arbiters of the constitutionality of all acts of government, it is possible for a citizen to win a victory in the Supreme Court that neither Congress nor the President can take away. As Chief Justice Marshall sweepingly asserted in *Marbury*, "it is, emphatically, the province of the judicial department, to say what the law is."

24 The second important development in United States constitutional history came over 80 years later, with the passage of the Reconstruction Amendments, particularly the 14th Amendment. As originally adopted, the Bill of Rights was directed only at abuses of power by the *federal* government. The First Amendment, for example, says "*Congress* shall make no law ... abridging the freedom of speech ..." But what about the States? In the wake of the Civil War, the 14th Amendment was proposed and ratified. It requires *States* to accord all citizens due process and equal protection of the laws. And in a series of landmark decisions, the Supreme Court has interpreted the 14th Amendment to incorporate most of the provisions of the Bill of Rights. This means that the fundamental liberties guaranteed in the Bill of Rights now apply not just against the federal government, but against the 50 state governments as well.

25 But the 14th Amendment did more than ensure that the Bill of Rights was applied to the States. Although the drafters of the Bill of Rights were

particularly concerned with protecting the rights of *all* the people – including the majority – against an unrepresentative and undemocratic monarchy, the Civil War and the Reconstruction era taught us that even *democratic* majorities can sometimes oppress. Reconstruction forced us to focus on instances in which democratic process protects the majority, but does not protect the minority.¹ Majority rule, though the heart of our democracy, is not without its imperfections. And when the majority tyrannizes or disadvantages a minority, the courts have a particular obligation to ensure that the majority has not violated the constitutional rights of the minority.

26 Of course, by saying that courts should have such a role, I do not mean to suggest that judges are perfect, or that the Court on which I sit has always lived up to its obligations. We have not. But our errors themselves support my point, for it is no coincidence that many of the Supreme Court's most discredited decisions are ones in which the Court has been unsympathetic to the civil and human rights of the minority. Because we have an obligation to enforce the anti-majoritarian provisions of the Constitution, history has not looked fondly on our failure to do so.

27 Many would say that the Supreme Court's 1857 decision in *Dred Scott* was the worst decision in the Court's history. In that case the Court upheld the right of some people to hold others in slavery or bondage, a practice still in effect in much of the United States at that time. The Court held that blacks were not citizens of the United States and could not sue in federal court. It also held that Congress did not have the power to abolish slavery in the territories west of the eastern states. In the process the Court noted that blacks had long "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."² That unfortunate decision was one of the factors leading to my country's most tragic war – the Civil War in the mid-1800s.

28 Of course, blacks were not the only group to suffer discrimination at the hands of the majority. Women – though not technically a minority – were long locked out of the political process because they were denied the right to vote. Women also faced debilitating stereotypes that kept them from advancing outside the home. Take the legal profession, for example. Women were thought to be ill-qualified for adversarial litigation because it required sharp logic and shrewd negotiation, as well as exposure to the unjust and the immoral.

1 Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment", 101 Yale LJ 1193, 1272–1284 (1992).

2 60 US 393, 407 (1957).

29 Perhaps the most famous case of discrimination in the field of law involves Myra Bradwell of Chicago, Illinois. In 1869, Bradwell, who had studied law under her husband, applied to the Illinois bar and was refused admission. The Illinois Supreme Court reasoned that, as a married woman, her contracts were not binding, and contracts were the essence of an attorney-client relationship. The Court also proclaimed that “God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws.”³ The Supreme Court of the United States, I blush to admit, agreed.

30 Today we do not follow these decisions; we instead look to them as examples of where the Court has gone wrong. The Supreme Court today understands that one of its most important functions is to protect minority groups from discrimination and oppression by the majority. Indeed, for much of this century, the Court has played just such a role. The Court’s 1954 decision in *Brown v Board of Education* held that a State’s maintenance of separate public schools for black and white elementary and secondary students denied the black students the equal protection of state law assured by the 14th Amendment. *Brown* called for an end to a system of segregation that had become a way of life in a large part of the United States. That decision, and those that followed from it, caused the Court, under the banner of equal protection and due process, to take a leading role in the issue of race relations in the United States.

31 But the Court’s role in protecting civil and human rights has by no means been limited to the racial context. Some of the Supreme Court’s most important cases after *Brown* involved sex (or gender) classifications. Beginning in the early 1970s, the Court made clear that it would no longer swallow unquestioningly the story that women are different from men. In 1973, striking down a federal statute which made it easier for men to claim their wives as dependents than it was for women to claim their husbands as dependents, Justice Brennan wrote: “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”⁴

32 Through the next decade, the Court invalidated, on Equal Protection grounds, a broad range of statutes that discriminated on the basis of gender. In all of these cases, the Court has looked with a somewhat jaundiced eye

3 *Bradwell’s Case*, 55 Ill 535 (1869).

4 *Frontiero v Richardson*, 411 US 677, 684 (1973)(plurality opinion).

at the loose-fitting generalizations, myths, and archaic stereotypes that previously kept women at home. Instead, the Court has often asked employers to look to whether the particular person involved, male or female, is capable of doing the job.

33 Of course, many of our recent decisions – including those striking down legislation disadvantaging blacks and women – have led to great criticism of the Court. When the Court gets out in front of the people – when it takes the lead in forcing social change – some say the Court is being too activist and that it should instead defer to the will of the majority. For example, when the Court in the 1950s struck down as unconstitutional the racially segregated school system in many of the states, it was necessary to call out the soldiers of the National Guard to enforce some of the Court's edicts. And when in the 1970s the Court struck down as unconstitutional limitations by States on abortions in the first three months of pregnancy, many protesters took to the streets in opposition. Given the unrepresentativeness and the lack of political accountability of the Supreme Court of the United States, and given the power granted the Court by the doctrine of judicial review, it is probably unsurprising that the Court sometimes finds itself at the center of public controversy.

34 I have some sympathy for this criticism. The legislative bodies are more representative of the people and are more directly controlled by the people. It makes sense that these bodies should have principal responsibility for determining the fate of the people. The Court, by contrast, is decidedly unrepresentative and undemocratic. The Justices of the Supreme Court, like the members of Singapore's Supreme Court, are not elected; we are appointed by the President. US Justices serve not just for two years, as do the members of the lower house of America's Congress; or for four years, as does the President; or for six years, as do the members of the upper House of Congress. We serve for life. And the Supreme Court does not reflect the American population. All of the current Justices are older than 50 years of age, yet only 30% of Americans of voting age have lived five decades.⁵ All of the current Justices – indeed, all of the 108 Justices who have ever sat on the Court – are lawyers. Despite the impression that you may have of the United States, not *all* Americans are lawyers – indeed, only one in 418 was a lawyer as of 1980.⁶ And women in America constitute over half of the general population and approximately a third of the new lawyers. Women on the Supreme Court, in contrast, are – well, half of us are right here in front of you today.

5 Information provided by the United States Bureau of the Census, Projection Branch.

6 *Statistical Abstract of the United States*, p 177 (1985).

35 For these reasons among others the Court should not, in general, be a leader. Instead, I view the Court like a firefighter. It is a reactive institution, putting out blazes here and there, and making sure that we don't burn our house down. Of course, as I have indicated, there are times where the Court takes a leadership role, and is correct in doing so. The hard question then is distinguishing between when, in the area of civil and human rights, the Court should take a leadership role and when the Court should defer to the will of the legislature. While I do not purport to have the answer to this question that has so long bedeviled us, I can offer some guiding principles.

36 First, as I discussed above, the Court is on its firmest footing when it invokes the anti-majoritarian doctrine of judicial review on behalf of the most anti-majoritarian provisions of the Constitution – the Bill of Rights. The members of the First Congress drafted the broad principles of our Bill of Rights to ensure that the State could not take away certain fundamental freedoms. These individual liberties sometimes trump the power of the State. And the Civil War Amendments require us to be especially concerned that the majority might trample the rights of minorities. Because the Court is insulated from political pressures, it is the institution best situated to say no to the will of the majority in those cases where the majority's will violates the right of minorities. Indeed, the doctrine of judicial review has placed much of the interpretation and enforcement of individual liberties in the hands of the courts in general and the Supreme Court in particular, in part precisely because the courts are not part of the executive or legislative branch.

37 Second, the Court is again on firm footing when it acts to ensure that outsider groups – including women and minorities – have access to the political process. And by access I mean more than that these groups have the right to vote and the right to be adequately represented by a fairly apportioned legislature. Access to the political process also includes the right to political protest, and the right to speak out in making their claims. Indeed, while many have focused on this Court's decision in *Brown v Board of Education* as fostering the rights revolution of the 1960s and 1970s in America, there is another series of lesser known but equally important decisions that deserves to be remembered when we consider the Supreme Court's role in protecting civil and human rights.

38 These cases, which I will call protest cases, are all examples where the Court acted *against* the will of the democratic majority, but in doing so *furthered* democracy by ensuring that all groups – including outsiders and minorities – had the right to speak and be heard. In *NAACP v Alabama*,⁷

7 357 US 449 (1958).

decided in 1958, the Supreme Court held that the State of Alabama could not force the National Association for the Advancement of Colored People – a leading civil rights organisation for blacks – to disclose its membership lists. The Court feared that forced disclosure of membership records threatened the free association rights of southern blacks, for if their membership in this controversial organisation became public, they might suffer retaliation at the hands of hostile white southerners. Similarly, there were the sit-in cases. By the early 1960s the sit-in movement was spreading rapidly throughout the Southern United States, as African Americans would simply visit and remain in segregated restaurants, swimming pools, libraries, movie theaters and everywhere that blacks were relegated to separate and unequal status. Protestors also took their cause to the capitols of state government and other institutions of state authority, demanding that the southern States provide them equality under law. These protestors were generally carted off to jail as soon as possible by local officials. In a series of cases, the Supreme Court overturned the convictions of these protestors.⁸ In so doing, the Court made clear that this political protest by an unpopular minority was at the very heart of our constitutional democracy. Describing one of the protests, the Court concluded that it reflected an exercise of “basic constitutional rights in their most pristine and classic form.”⁹ That political protest speech is “provocative and challenging” and may “strike at prejudices and preconceptions” is reason to protect, not prohibit it.¹⁰ Singapore courts might take a different view of some of these cases. There is no doubt that our highest court has robustly enforced the First Amendment to our Constitution – the right of free speech.

39 The unfortunate fact is that, like the rest of the world, America continues to be plagued by poverty, inequality, and discrimination against minority groups. The ultimate responsibility for resolving these and other problems lies with the people, and with their democratically elected legislative and executive leaders. But in the United States, as in Singapore, courts also have a role to play. Indeed, while the protest cases I have just discussed are typically classified as “free speech” or “First Amendment” cases in American law schools, I think they are classic examples of how courts can act to preserve the civil and human rights of all citizens. In protecting speech rights of the minority citizens in these cases, the United States Supreme Court protected their access to the democratic process, and protected their right to persuade one another and the majority of the correctness of their position. In taking steps such as these, I believe our

8 See *Garner v Louisiana*, 368 US 157 (1961); *Edwards v South Carolina* 372 US 229 (1963); *Hamm v Rock Hill* 379 US 306 (1965); *Cox v Louisiana* 379 US 536 (1965).

9 372 US at 235.

10 *Ibid* at 238.

judiciary has acted to ensure equal rights for all citizens, and to foster a vibrant, healthy, democracy.

40 It has been a great privilege for me to visit Singapore and for you to listen to my description of life on the “Lazy B.” I congratulate you here in Singapore for having established principles that stand out in this region of the world, principles of good governance and freedom from corruption. These are examples that are very important to the world today. I would like to thank the Chief Justice for his wonderful hospitality. It has been such a pleasure for me to get acquainted with some of you in high office here. I sincerely hope John and I can come back to Singapore again sometime soon. Thank you.

JUSTICE SANDRA DAY O’CONNOR*

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