

South Dakota Law Review

Volume 67 | Issue 1

2022

Dedication to Professor Emeritus David S. Day

Doug Hoffman

Derek J. Hoffman

William Husted

David L. Nadolski

Erin Scott

See next page for additional authors

Follow this and additional works at: <https://red.library.usd.edu/sdlrev>

Recommended Citation

Doug Hoffman, Derek J. Hoffman, William Husted, David L. Nadolski, Erin Scott, Nancy L. Oviatt, Thad A. Titze, Ronald A. Parsons Jr., Lisa Prostrullo, David M. Reizes & Lyndze Thompson, *Dedication to Professor Emeritus David S. Day*, 67 S.D. L. REV. i (2022).

Available at: <https://red.library.usd.edu/sdlrev/vol67/iss1/6>

This Dedication is brought to you for free and open access by USD RED. It has been accepted for inclusion in South Dakota Law Review by an authorized editor of USD RED. For more information, please contact dloftus@usd.edu.

Dedication to Professor Emeritus David S. Day

Authors

Doug Hoffman, Derek J. Hoffman, William Husted, David L. Nadolski, Erin Scott, Nancy L. Oviatt, Thad A. Titze, Ronald A. Parsons Jr., Lisa Prostrullo, David M. Reizes, and Lyndze Thompson



PROFESSOR EMERITUS DAVID S. DAY

The Board of Editors of the *South Dakota Law Review* is pleased to dedicate Volume 67 to Professor Emeritus David S. Day.

David S. Day was born in Iowa in April 1948. He graduated with his Bachelor's Degree in History from the University of Iowa in 1970. A few years later, he returned to his alma mater for law school and graduated with his Juris Doctor in 1977. Upon graduation, he entered the field of litigation as an associate at the founding Los Angeles branch of the prestigious firm Latham & Watkins. Finding that something was missing, he left Latham & Watkins to join the faculty at the University of South Dakota School of Law.¹ A short six years later, Professor Day became a tenured faculty member. He served the University of South Dakota for thirty-seven years. During that time, Professor Day made a significant impact on South Dakota through his role as an educator, his numerous scholarly publications, and his contributions to critical South Dakota cases.

As an educator, Professor Day taught Constitutional Law, First Amendment Rights, Advanced Civil Procedure, and Employment Discrimination courses, as well as specialized Constitutional Law seminars. He also became involved in extracurricular activities as a faculty advisor. For his dedication to the school and to his students, he received the Jackson Teaching Award three times. The Jackson Award is particularly meaningful as both students and faculty members nominate

1. Now the University of South Dakota Knudson School of Law.

candidates for this honor. After students and colleagues submit nominations, the committee considers several criteria that demonstrate excellence in teaching law. One criterion is the nominees' legal writing and research, yet another area where Professor Day has excelled.

Professor Day has published over thirty scholarly articles. The topics range from effective teaching methods to Constitutional Law, First Amendment rights, and discovery practices. These works have been cited many times, perhaps most notably in Wright and Miller's famed *Federal Practice and Procedure*. Alongside his publications in distinguished journals, Professor Day has also published several editions of his Constitutional Law casebook, *Cases and Materials on Constitutional Law*. Ever dedicated to his students, Professor Day and his family have used the casebook's royalties to fund a scholarship they established to benefit second- and third-year law students at the University of South Dakota.

Due to his numerous publications and reputation as a scholar and litigator, Professor Day served as a member of the Federal Advisory Committee for the Eighth Circuit Judicial Conference and as a reporter for the South Dakota Federal Practice Committee. As a member of the California, Eighth Circuit, and United States Supreme Court bars, he has had a pivotal role in shaping the common law of South Dakota. In this role, Professor Day has shown his expertise in civil rights, dormant commerce clause, and privacy actions. Even as a litigator, Professor Day made time to teach, often lending a helping hand to former students in their litigation practice.

Even as he has retired from the University of South Dakota, Professor Day remains a force. Currently, he is writing another book and multiple articles on subtopics within Constitutional Law and discovery. In addition to his forthcoming scholarly works, Professor Day remains busy as a visiting professor at several law schools. Finally—and arguably Professor Day's favorite post-retirement activity—he now enjoys more free time with his wife, Lynne, and their children, Daniel, Elizabeth, Sara, and David Jr.

HONORABLE DOUG HOFFMAN[†]

Professor for the Generations

David S. Day has been a *tour de force* in the South Dakota legal world for thirty-eight years. With this dedication, the *South Dakota Law Review* commemorates Professor David S. Day's impactful career spanning a generation at the University of South Dakota School of Law.

Professor Day arrived in Vermillion to teach at the University of South Dakota School of Law in the fall of 1983, with a bachelor's degree in history and

[†] J.D., 1985, University of South Dakota School of Law. South Dakota Second Judicial Circuit Judge.

a J.D. from the University of Iowa and experience as a litigation associate at the prestigious Latham & Watkins firm in Los Angeles. That year I was a 2L at the University of South Dakota and a student in Professor Day's First Amendment Rights class. Literally, a generation later, my son sat in the same building with Professor Day at the lectern, learning First Amendment Rights, as well as Constitutional Law and Civil Procedure. Many hundreds of other students filled those seats in Professor Day's classes during his career at the University South Dakota School of Law from Fall 1983 to Spring 2020, including the majority of the current South Dakota State Bar membership.

Professor Day is a true scholar. His textbook, *Cases and Materials on Constitutional Law*,² co-authored by Professors David Crump and Eugene Gressman, is published by LexisNexis and has been a staple in Constitutional Law didacticism since 1993. In addition, he has over thirty published law review articles, ranging on topics from religious freedom and freedom of speech to Commerce Clause jurisprudence and civil discovery practice, in many respected journals, including *Arizona State*, *Michigan State*, *Creighton*, *Iowa*, *Toledo*, *Miami*, and, of course, the *South Dakota Law Review*.

Although his true passion is Constitutional Law, Professor Day has also earned a reputation as a national scholar in civil discovery. His 1985 article, *Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study of the South Dakota Judiciary*, originally published in the *South Dakota Law Review*,³ was later revamped and republished in the *John Marshall Law Review*.⁴ A few years later, his article *Expert Discovery in the Eighth Circuit: An Empirical Study* (1989)⁵ was cited by Wright and Miller's *Federal Practice and Procedure*, the preeminent research source on federal civil procedure.⁶ Moreover, his works *Civil Justice Reform Act Advisory Group Report for the District of South Dakota* (1992)⁷ and *Discovery Standards for the Testimonial Expert Under Federal Rule of Civil Procedure 26(b)(4)(A): A Twentieth Anniversary Assessment* (1990),⁸ were published in West Publishing's *Federal Rules Decisions Reporter*. A quick search of his name on Westlaw reveals many court decisions citing these various works.

2. DAVID S. DAY, DAVID CRUMP & EUGENE GRESSMAN, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (2d ed. 1993 – 6th ed. 2014).

3. David S. Day, *Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota*, 31 S.D. L. REV. 40 (1985).

4. David S. Day & Charvin Dixon, *A Judicial Perspective on Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study of Trial Court Judges and a Proposed Amendment*, 20 J. MARSHALL L. REV. 377 (1987).

5. David S. Day, *Expert Discovery in the Eighth Circuit: An Empirical Study*, 122 F.R.D. 35 (1988).

6. 8A CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 2032 nn.22, 27 (3d ed. 1998) (citing Day, *Expert Discovery in the Eighth Circuit*, 122 F.R.D. 35).

7. William F. Day, Jr., Advisory Grp. for the Dist. of S.D., *Civil Justice Reform Act Advisory Group Report for the District of South Dakota*, 148 F.R.D. 393 (1992) (listing Professor David S. Day as the reporter of this group).

8. David S. Day, *Discovery Standards for the Testimonial Expert under Federal Rule of Civil Procedure 16(b)(4)(A): A Twentieth Anniversary Assessment*, 133 F.R.D. 209 (1990).

Some professors are known for their great scholarship, others for their didactic skills teaching in the classroom. A select few truly excel in both categories. Professor Day is one of those rare law professors truly gifted in both facets of legal education. His scholarship is erudite, penetrating, and eminently readable. His classroom manner is welcoming, inquisitive, clever, and insightful, but never intimidating. His sharp intellect has always been balanced by his sincere interest in students, his benign wit, and his mentoring spirit. South Dakota law students have been the primary beneficiaries of his gift, and they have thanked him by awarding him the University of South Dakota School of Law's Jackson Teaching Award three times. But he has also shared those talents as a visiting professor at McGeorge Law School, and of course, his beloved alma mater, the University of Iowa.

I had the opportunity to sit in on one of Professor Day's classes with my son during an Accepted Student event at the Law School in 2017. Thirty-four years after my first class with Professor Day, nothing had changed, other than a few subtle lines in his learned visage. A smile on his lips, discerning questions to the class, encouraging demeanor, budding new lawyers expounding their minds in the lyceum, the Socratic method at its finest.

In retirement, Professor Day intends to contribute further to legal scholarship. Among other projects, he is writing a book about expert witness discovery, an article on spending powers jurisprudence after *South Dakota v. Dole*,⁹ and a piece exploring the tension between "hate speech" legislation and free speech. We will anxiously await these portentous works. And, on behalf of the hundreds of University of South Dakota Law graduates who have benefitted in so many ways from his teaching and mentorship, we thank, congratulate, and wish Professor Day Godspeed in all his future endeavors.

DEREK J. HOFFMAN[†]

A Scholarly Practitioner

In early August of 2017, I found myself immersed in both angst and excitement in the hallowed hallways of the University of South Dakota School of Law. Thirty-five years prior, my father and mentor, the Honorable Douglas E. Hoffman, shared the same feelings of unease as a new law student. My father and I were greeted by many of the same faces in both eras of attendance at the University. One of those faces was Professor David S. Day. For nearly four decades, Professor Day has been a cornerstone in the South Dakota legal education system. His specialties include, but are not limited to, areas of U.S. Constitutional law, First Amendment law, U.S. Federal Civil Procedure, and employment

9. 483 U.S. 203 (1987).

[†] J.D., 2020, University of South Dakota School of Law.

discrimination. Throughout his tenure as a professor, he has helped mold and influence literally hundreds of legal minds. His impact on the South Dakota legal system is immense.

Professor Day holds the unique quality of being both a highly decorated practitioner and a published legal scholar. This combination of attributes is rarely seen in attorneys. His legal career began at the University of Iowa School of Law in Iowa City, IA. There he soared amongst his peers and graduated in 1977 with his Juris Doctorate. Upon graduating, and after a multi-interview process, he took a position with Latham & Watkins, LLP, in Los Angeles, CA.¹⁰ Professor Day worked at Latham & Watkins until 1983, where he specialized in, *inter alia*, complex commercial litigation and employment discrimination.

In 1983 Professor Day transitioned his professional and personal life to Vermillion, SD, where he began teaching at the University of South Dakota School of Law. In addition to the stressors and workload of teaching, he has published over thirty law review and legal journal pieces, in addition to publishing his own casebook.

During my tenure at the University of South Dakota School of Law, I was able to enjoy several classes with Professor Day, in addition to the occasional cup of coffee in the commons. His teaching abilities and style are renowned. His ability to give credence to student responses yet encourage deeper thinking is uncanny. Speaking with my father, we have agreed that Professor Day's style and teaching gifts have remained unwavering through time. I am honored to have spent three years at the University of South Dakota School of Law under the guidance of Professor Day. He has been a bedrock in my legal career.

WILLIAM HUSTEAD[†]

I met Professor David S. Day in Civil Procedure during my first semester at the University of South Dakota School of Law. He is a very tall man, reflective of his father's athletic career at the University of Iowa. His voice, however, is surprisingly soft-spoken with a comforting Midwestern patois. My class was unsure how to approach the much-lauded professor of Constitutional Law as we took our baby steps into the legal world. My first memorable interaction with Professor Day occurred during the initial month of classes for the fall semester. I was called on to recite and decided that this was the perfect moment to attempt a comedic first impression. I indicated that I was prepared to add to the class's discussion, albeit on a "Pro Bono" basis. While the joke was lost on the majority of my classmates, Professor Day immediately doubled over in silent laughter and then lumbered over to the blackboard where he wrote out "Pro Bono" in large

10. An international firm currently employing over 3,000 attorneys in fourteen countries, see LATHAM & WATKINS, LLP, *About Us*, <https://www.lw.com/AboutUs> (last visited Jan. 24, 2022).

[†] J.D., 2018, University of South Dakota School of Law.

letters. He gleefully never lost a chance to ridicule me as Pro Bono during class for the next year and a half. Thus were the seeds of my devotion sown.

During my third year, I reached my professional peak when I was selected to be Professor Day's Teaching Assistant. Among my various administrative duties was the expectation that I sit in on his classes and take roll. During those classes, I was able to witness anew the subtle genius of his humor that is woven into his lecturing style. Professor Day's passion for teaching is evident in every lecture. He has complete command of the room (even with his restrained Iowa farm boy affect). He presents to his students a comprehensive history of the U.S. Constitution and a photographic recollection of every Supreme Court Justice, complete with all their foibles.

One other beloved facet about Professor Day is his style of communicating with students. He punctually makes himself available in the hallway or commons area after a lecture. One can easily spend a brief forty-five minutes in these post-lecture discussions. He is also renowned for personally calling a student to compliment them on their response in class. It soon becomes a contest among the students about who receives the phone call at the latest time of the night.

Professor Day's extensive grasp of so many areas of the law must be both a blessing and a curse. Many of his former students continue to seek his counsel on a variety of unique cases. I happily number myself among those who have benefitted from his collaboration on a case. Be it a 42 U.S.C. § 1983 action or a First Amendment defense in a criminal proceeding, Professor Day tirelessly avails himself to provide a levelheaded approach to the issue. Each individual analysis is naturally punctuated with a meditation upon his time in private practice at the Los Angeles office of the prestigious international law firm of Latham & Watkins. Aside from the law, our conversations over the years have touched upon literature, politics, men's fashion, and the next feature showing on Turner Classic Movies. We trade war stories about my summers working at Wall Drug and his summers spent at his grandparents' farm in Iowa. I look forward with great anticipation to his late-night phone calls and updates about the goings-on in Vermillion.

Professor Day, I fear the brevity of this dedication mimics one of your chats in the hallway after class. If nothing else, it demonstrates the impact you have made on a kid from Wall and on countless lawyers and judges who populate the legal constellation of South Dakota and far beyond. Thank you for being my teacher. Thank you for being my friend. May you live forever!

DAVID L. NADOLSKI[†]

Fun

Congratulations to the *South Dakota Law Review* for dedicating Volume 67 to Professor David S. Day. Thank you for the honor of allowing me to provide these comments as one of the people who were lucky in their lives to cross paths with this teacher lawyer. Professor Day (may I call him David) is a good teacher, lawyer, husband, father, patriot, and friend.

Before going to law school, I had been in business, divorced, remarried, and had two teenage children, the oldest headed to the University of Iowa. I had a successful real estate business ninety miles away from the University of South Dakota. My new bride, Pat, was a bank VP, very smart, and encouraged me to go to law school. I followed Pat's advice and became a forty-year-old "summer bummer"¹¹ survivor when I started law school in 1984. Over the next three years, I would go home every weekend and share law school stories with Pat, many of which would feature David or the goings-on of his classroom.

I had done my research on my professors, who were, almost all, younger than me. I learned David had practiced law at Latham & Watkins, an established Los Angeles law firm still in business today. I learned David was a University of Iowa graduate (both undergraduate and law) and was new to teaching at the University of South Dakota, a good but small state law school. Despite this impressive resume, I wasn't intimidated because I graduated from Notre Dame and we ate Big Ten schools for lunch. Also, I intended to be a business lawyer, so what did the Constitution have to do with real estate, contracts, or insurance. Boy, was I wrong!

I learned over time of David's commitment to teaching. On a number of occasions, I questioned why he left "all the money" he would have made if he had stayed with Latham & Watkins. They have become one of the largest firms in California, with multiple state and international offices. He reminded me that I had left the real estate profession to be a lawyer and pointed out that he valued teaching people like me more than making a lot of money. I think, when I was a student, David was the only faculty member with real-life practice experience. David clearly showed he was a teacher who had a law degree.

David made every class meaningful, especially for someone like me, older and with more life experience than ninety percent of the other students. I was lucky to have taken three classes from David. In each class, David challenged each student to think about the facts, the law, and the reasoning behind the decisions. David made each of us feel like we were a part of each case. He covered topics meaningful to me. He taught about impeachment, Nixon,

[†] J.D., 1987, University of South Dakota School of Law; B.B.A., 1966, University of Notre Dame. Thanks to my wife Pat for helping me with these comments.

11. "Summer Bummer" was a program for students that didn't get direct admission. We took two classes and the top ten of thirty students were admitted.

Watergate, Vietnam, Westmoreland, all important in the cases we studied and, as it turns out, in this history we just lived. I loved talking to the other nontraditional law students who, like me, lived through the actual events, and to the traditional students to help them grasp what living through history entailed. Not everyone agreed with me, but that was a learning experience. I learned to look at the other side of an argument. I loved going home and talking to my wife about our discussions. Pat didn't always agree with me either. David made the learning experience continue after his classes ended. He could make each student participate without embarrassing anyone. I still admire his ability to draw out everyone. I found students who didn't participate in other classes did in his class. He was a teacher. It was fun.

Little did I know that his teaching of the Dormant Commerce Clause would impact, in a big way, my practice and allow me the opportunity to work with David on future cases. With David leading the way, the classes had meaningful discussions about equal protection, employment, privacy, freedom of information, First Amendment rights, discrimination, and our political systems (both State and Federal). He could make each student explain their reasoning and authority for the position they took. It was great training for the practice of law. It was fun.

After graduation, I quickly learned that other lawyers could call David anytime and "bounce" ideas off him. So, I started doing the same thing. He was always there for me. Then I was blessed with the help of my good friend, Alan Peterson, to get a job with Lynn, Jackson, Shultz, and Lebrun. On one of my first cases, Don Shultz, the senior partner, suggested I call David and ask him to work with me. David agreed, and we worked on cases until I retired. David was instrumental in one of my most important cases involving landowner liability for a visitor's known conduct. We got the largest jury verdict in the county at that time. We worked on agriculture cases involving out-of-state investors (the Commerce Clause), product liability, Amendment E (privacy and commerce), Zoning (standards for state and federal referendums), and a civil rights case representing Muslims right after 9-11. The Constitution, in one way or another, impacted almost every case. It was fun.

While preparing my comments for this publication, I checked sources to see what else David has been doing. It was no surprise to find he was a visiting professor at the University of Iowa and the University of the Pacific. I already knew he co-authored a Constitutional Law book and its updates. I found, not surprisingly, over two dozen articles and presentations. David has always been involved in law school and bar activities, sharing his knowledge and expertise. The University of South Dakota School of Law has recognized him with three Jackson Teaching Awards, and he served on committees for the Federal System. He has received Law Foundation grants and has consulted with several other law firms and government departments. Best of all, he has taught several hundred practicing lawyers, many of them remaining in South Dakota. Think about how he has influenced the bar here. It's amazing, and it's fun.

I am retired now, living on the Gulf in southern Alabama. I still call David (or he calls me) to talk about the law, politics (there and here), new SCOTUS

appointments, and life. Professor David Day exemplifies what a law professor should be. Congratulations, David. I can say without a doubt, knowing you as a teacher, lawyer, and friend . . . it's still fun.

ERIN SCOTT[†]

Champion

I was proud to be asked to contribute my remarks about Professor David S. Day for this well-deserved honor from the *South Dakota Law Review*. However, capturing and conveying the impact and influence of Professor Day proved to be far more difficult than I imagined. To someone who helped me reach my ultimate destination—my home—how do I express my deep gratitude? Here, the focus will be on the support and contributions made by Professor Day during my law school and early professional career.

Throughout law school, I had the pleasure of taking several classes taught by Professor Day. As a first-year student, the thought of attending any of my classes immediately flooded my entire body with a range of emotions: I was excited and eager to learn, and yet anxious and terrified to recite the facts of a case, to answer a question, or to speak in general. Professor Day, however, reduced the anxiety and terror I had in attending his class by giving me a space to make mistakes without feeling the shame that usually accompanies it. For instance, one day, Professor Day asked me a question, and I answered incorrectly. Instead of bluntly telling me I was wrong, he said, “that’s the right answer to a different question.” At that moment, I grinned and began to chuckle. As Professor Day continued to teach for the remainder of the hour, I sat and mused over how he so graciously rejected my answer without making me feel the need to bury my head in the ground. From that day on, I was no longer terrified to speak or engage in discussions while in Professor Day’s class. I also saw Professor Day in a new light: a champion for his students’ success.

As a third-year student, I began to understand the genius of Professor Day’s decision to teach the context, relevant circumstances, and events impacting a particular decision. By offering such context, Professor Day gave me perspective as to the fullness of a decision beyond the pages of the decision. By separating the rows of his students to represent the various Supreme Court Justices, Professor Day encouraged his students to recognize the influence humanity had on the decisions that became the law of the land. The perspective I gained from Professor Day pushes me to see judicial officers beyond their role and as people—people who are complex, multifaceted, and subject to growth. Thus, this perception has allowed me to question my assumptions in situations where a judge rules one way

[†] J.D., 2018, University of South Dakota School of Law

in a case and then takes an opposing stance in a later case. And this is a perspective I carry with me and apply in both my personal and professional lives.

After graduating from law school, Professor Day continued to be a presence in my life as a mentor. While studying for the bar exam, he would periodically call and check in to see how I was doing. He had impeccable timing with the advice that he gave, which always uplifted my spirit and gave me confidence in my ability to pass the bar. As I transitioned into the next phase of life, Professor Day remained a supportive force. Most significantly, Professor Day helped me become the first University of South Dakota School of Law alumna to obtain a judicial clerkship at a Colorado state appellate court, which has profoundly impacted the trajectory of my legal career. There are no words to express my gratitude or feeling of appreciation for all of Professor Day's help and support, as he has undoubtedly contributed to my academic, professional, and personal development.

NANCY L. OVIATT[†] & THAD A. TITZE^{††}

Then and Now: Reflections on our Shared Professor and Mentor

Our family's love for the law and the legal profession began when Nancy's father, Ross, entered the University of South Dakota School of Law in 1938. Nancy graduated from the University of South Dakota School of Law in 1986 and Thad in 2020. The two of us became bookends to the teaching career of Professor David S. Day. For over 30 years, the Iowa farm boy who landed in Vermillion by way of California has shown an enduring interest in the methods of classroom teaching, good lawyering, and the individual students who filled the seats. We are grateful to be two of many benefactors of Professor Day's commitment to the University of South Dakota.

Nancy: At the start of law school in the fall of 1983, nothing seemed familiar and everything was challenging. Memories of that time focus on those professors who mentored my classmates and me from the beginning and throughout our law school years. Some of those memories faded as the years passed after law school . . . until my son, Thad, started his first year at the University of South Dakota School of Law in the fall of 2017. My experiences thirty-four years earlier came into sharper focus again, as I considered the profound influence law school mentors have on a student's adjustment and development. The fact that several of

[†] J.D., 1986, University of South Dakota School of Law; Partner at Green Roby Oviatt LLP in Watertown, South Dakota.

^{††} J.D., 2020, University of South Dakota School of Law; Law Clerk at United States District Court for the District of South Dakota.

those same professors were still at the University of South Dakota and were clearly still mentoring first-year students assured me that Thad's class was in excellent hands. And indeed, the next three years showed how true that was.

Law students need professors who will not only teach but also guide, mentor, and inspire.

A unique quality of Professor Day was how approachable he was. That attribute made all the difference to me; it also set him apart from most other professors. We often hear that how a person makes you feel will remain with you even if you no longer remember the words spoken. His welcoming and encouraging manner established the foundation for him to guide, mentor, and inspire us. He seemed to genuinely welcome our questions and the lively discussions that often followed. Not only did we learn, but those exchanges also helped us gain much-needed confidence. His intrigue with the law and enthusiasm for sharing with students was evident in every class. With his wry smile and often a laugh, he thrived on finding humor and irony in cases. While entertaining, it continually provided new perspectives as we learned how to study the law.

When my class started law school, Professor Day and his wife, Lynne, had just moved from Los Angeles to South Dakota. We knew Vermillion was an especially major change for Lynne and were impressed that he left the practice of law to teach. They were adjusting to their new surroundings, and so were we. Those common bonds led to some good times with Lynne in downtown Vermillion. Of course, stories from downtown Vermillion are better left to memory than the written word.

Professor Day remains connected to students after graduation. Throughout my years of practice, a periodic call to my office from Professor Day is always welcome. He starts with a check on my family and law practice. Once we catch up, he typically has a law-related topic to discuss and easily references a law review article or topic of mutual interest from many years before. Ever the scholar, he reflects on recent developments in the law and often encourages the writing of an article that would benefit South Dakota lawyers. When asking other classmates to reflect on his contributions to the law and his students, the Honorable Bridget Mayer summarized with: "When I think of Constitutional Law, I think of David Day!"

In February 2020, I had the good fortune to sit in on a timely seminar he taught on impeachment. His command of the topic was obvious, but the best part was the animated exchange of contrasting viewpoints among the students and Professor Day. He continued to guide, mentor, and inspire his students, both present and past. For that, I am grateful.

Thad: When I think of Professor Day, it is hard to distinguish between the person and the teacher. After all, it is clear that his calling in life is teaching and that he simply loves it. But to begin with some reflections on Professor Day the person, there are just so many classic Day-isms: a club sandwich, side salad, and coffee at the Main Street Pub; war stories of the illustrious history of University of South Dakota School of Law; great tales about prominent alumni; travel, book,

and film recommendations; the great white binder overflowing with lecture notes and class handouts; adjusting his tie mid-lecture; scribbling an obscure acronym or chart on the chalkboard (that only makes sense if you did the reading); a phone call to check-in; needling the bar examiners; sharing an encouraging word in the law school breezeway, library, or student commons. I could go on.

A defining aspect of Professor Day's teaching style is his version of a "mock Supreme Court" where each row or group of students represents the viewpoint of a Supreme Court Justice and his or her progeny, *e.g.*, White, Ginsburg, Barrett. As a pedagogical tool, "Role-playing the Supreme Court" challenges students' personal viewpoints, spurs discussion, and puts a given case or issue in a historical and jurisprudential context.¹² I had the good fortune to sit next to Drew Hurd and Aidan Goetzing in the "Breyer Row" during Civil Procedure (2017-2018), Constitutional Law (2018), and First Amendment (2019). Our quips from the back row in Civil Procedure somehow landed us in the front row the next year in Constitutional Law. Role-playing the Court inspired wonderful class debates that did more to help us develop our own viewpoints, learn the material, and prepare for the profession than we realized at the time. Professor Day, who had surely taught the day's class material dozens of times before, would look on with a delight-filled smirk, completely fascinated and entertained to see yet another class of students become lawyers before his very eyes.

While thousands of students have taken Civil Procedure, Constitutional Law, and First Amendment with Professor Day, only about ten of us took his spring 2020 constitutional law seminar: Impeachment. The unfortunately timely topic provided us with a forum to analyze and discuss a bitter, partisan, and sensationalized legal term. What is impeachment? Where does it come from? What does the Constitution say about it? What about the Founders and the Supreme Court? What do non-lawyers misunderstand about it? How could the impeachment process be improved? And so we read; we discussed; we watched hours and hours of House and Senate proceedings. Discussions continued at the Main Street Pub. Before COVID-19 upended the semester, one of our last class meetings was held at Red Steakhouse with former Congressman Max Sandlin, a key player in President Clinton's impeachment. The seminar was exactly the type of challenging and thoughtful capstone course filled with free-ranging discussion that I hope every law student takes. I think it turned out to be exactly the type of "laboratory" class Professor Day hoped it would be—and more.

In closing, a few more fond memories come to mind: the Saint Patrick's Day dinner at Willie Hustead's house; the surprise seventieth birthday party that our class hosted for Professor Day; hilarious one-liners and expressions that we would scribble in our notebooks. It has been a privilege to benefit from Professor Day's wisdom, both in the law and in life. His legacy as a practitioner, scholar, teacher,

12. David S. Day, *Teaching Constitutional Law: Role-Playing the Supreme Court*, 36 J. LEGAL EDUC. 268, 268-69 (1986).

and friend has shaped our profession for the better. Well done, and thank you, Professor Day.

RONALD A. PARSONS, JR.[†]

There is a scene in Michael Mann's existential heist drama, *Heat*, starring Robert DeNiro and Al Pacino, in which the criminal crew, with police detectives closing in on their operation, is discussing whether the monetary payoff from one last big score would be worth the attendant risks. For Tom Sizemore's character, that was the wrong question.

"For me, the action *is* the juice," he tells DeNiro.¹³

That line always resonated with me, and it perfectly embodies the professional life and career of Professor David S. Day. Acclaimed Constitutional Scholar. Respected and Beloved University Law School Professor. Teacher and Mentor, helping to guide the educations and philosophies of multiple generations of South Dakota lawyers. Skilled Attorney and Advocate, working at the highest levels of the legal profession. Reaching any one of those pinnacles would merit the accolades he is now receiving.

But for Professor Day, one can see that it has been the engagement of the intellectual arena itself, not tributes or laurels, that always was the true reward. That arena is where he has lived.

Looking in from the outside, it has always seemed that one of the many blessings of having tenure at a wonderful law school like ours must be the freedom to continue intellectual pursuits outside the friendly confines of the academy. Professor Day made the most of that opportunity.

He was the co-author of a highly praised constitutional textbook, *Cases and Materials on Constitutional Law*,¹⁴ used in schools across the country. His pathfinding legal scholarship, focusing especially on the First Amendment and Commerce Clause, has been cited widely and relied upon by courts and fellow scholars for decades.

No less impressive, though perhaps less known, is Professor Day's wide-ranging career as a first-class litigator, including several of the more significant constitutional cases to have arisen in South Dakota. After a successful career in civil litigation at a major law firm in California, his jurisprudential triumphs blossomed further as a law school professor. He was co-lead counsel and primary architect for the plaintiffs in *South Dakota Farm Bureau, Inc. v. Hazeltine*,¹⁵ prevailing in the United States District Court and presenting the successful

[†] Partner, Johnson Janklow Abdallah & Reiter LLP; U.S. Attorney for the District of South Dakota (2018-2021).

13. *HEAT* (Warner Brothers 1995).

14. DAVID S. DAY, DAVID CRUMP & EUGENE GRESSMAN, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (2d ed. 1993 – 6th ed. 2014).

15. 340 F.3d 583 (8th Cir. 2003).

argument on appeal to the Eighth Circuit that Amendment E, enacted by the South Dakota Legislature to restrict corporate ownership of agricultural land, was motivated by a discriminatory purpose and, therefore, unconstitutional under the Dormant Commerce Clause.

Interestingly, one of Professor Day's fellow University of South Dakota School of Law professors very capably represented one of the opposing parties in that case, revealing another side benefit of tenure: the rules for conflicts of interest governing law firms apparently do not apply to law school faculties. One imagines it made for some captivating, or at least delightfully awkward, moments in the faculty lounge.

But it was a First Amendment case that had its genesis in federal court in South Dakota and ascended to the United States Supreme Court in which I was able to observe and experience Professor Day's mastery of the litigation process firsthand. I imagine very few law students have had the opportunity to litigate a constitutional case against their former constitutional law professor. For me, that was the backdrop of *Johanns v. Livestock Marketing Association*.¹⁶

After a federal trial in Aberdeen, my clients prevailed in seeking to have a federal statute requiring beef producers to fund generic advertising, with which they philosophically disagreed, struck down as compelled speech in violation of the First Amendment. Professor Day laid the fundamental groundwork for the defense of the statute in his briefing and presented the closing argument for Nebraska Cattlemen, Inc., which intervened in the case in opposition to our complaint.

On appeal, Professor Day graciously handed off what eventually proved to be the winning argument to another pretty good lawyer who took over his role in the case: John G. Roberts, Jr., then widely considered the top appellate lawyer in the country, and now Chief Justice of the United States Supreme Court. Although my clients also prevailed at the Eighth Circuit, the arguments advanced by Professor Day at trial ultimately held sway and became a substantial basis for the Supreme Court's 6-3 decision reversing the Eighth Circuit and upholding the statute. There is a truism (or at least a meme) along the lines of "and now the student has become the master." In the case of Professor Day and me, decidedly, the student remained the student.

And throughout the years, being a student in Professor Day's classes has been a wonderful place to be. There is a distressing, and hopefully passing, trend afflicting parts of academia and other institutions these days—one that thankfully has not taken root here—in which speakers, opinions, and information are suppressed in order to "protect" those who might be unsettled by exposure to differing perspectives. Although our political and legal viewpoints certainly did not always align, Professor Day's commitment to free expression, respectful debate, and the open exchange of ideas—not just as an ideal but as a true Northwest Passage to real education and learning—was evident immediately to all of his students and never wavered.

16. 544 U.S. 550 (2005).

In his larger classes, he was that rare professor who could awaken and stir even the sleepest audience and, by eliciting opposing positions on an issue through skillful examination, inspire and moderate a discussion that explored each of its substantive angles, often without revealing where his own views stood. But some of my favorite law school experiences were his smaller, more specialized constitutional law classes (many of which I took alongside my friend and moot court partner Dave Lust, who served as Professor Day's Research Assistant), where the conversations were deeper, more enlightening, and always on pleasant terms.

Most great professors never stop being students. They also understand that in terms of growth and transcendence, asking the right question often is more essential than the answer itself. That is Professor Day. Learning is both his polestar and his gift to those around him. Despite his well-earned official retirement, I am confident he will remain happily engaged with us in the jurisprudential arena for quite some time. After all, the heat is just around the corner, the action is the juice, and many fascinating chapters of his intellectual life-well-lived are yet to be compiled.

LISA PROSTROLLO[†]

Teacher, Mentor, and Scholar

It is my pleasure and great honor to write a dedication for this volume of the *South Dakota Law Review* to Professor David S. Day. His outstanding career as a teacher and mentor has positively impacted hundreds of students. Professor Day's contributions to the University of South Dakota School of Law, legal scholarship, and steadfast commitment to students will leave a lasting mark on our community and profession.

In each of the classes I attended with Professor Day, he encouraged the class to analyze the constitutional principles underlying the cases we studied. Using insightful questions and in-class debate, students learned to apply the constitutional principles they were learning. Rather than merely memorizing facts and holdings, students were encouraged to think critically about the cases and consider them in their historical and political context. He gave students a firsthand opportunity to debate constitutional law and sharpen their skills as legal advocates. By employing this teaching methodology, Professor Day instilled in his students a deeper and more meaningful understanding of the subject matter.

Professor Day's teaching efforts extended beyond the classroom. He gave unselfishly of his time. It was not uncommon to find him engaging with groups of students in the hallway, challenging them to answer questions about

[†] J.D., 2010, University of South Dakota School of Law.

constitutional arguments they were making. He would provoke laughter and debate to connect with his students and inspire curiosity. Professor Day has a unique ability to keep students engaged and excited about the subject matter he is teaching. His passion for constitutional law is contagious.

Professor Day also served as an exceptional mentor to me over the years. He was always willing to read and comment on law review articles I had written, discuss career prospects, or write letters of recommendation on my behalf. It has been over ten years since I graduated from law school, but Professor Day still calls periodically to check on the progress of my career. My experience with Professor Day is not unique; he is a mentor to me as he is to countless other students. He truly cares about the students he teaches. The law school has been blessed by the decades of service Professor Day has provided as a teacher, mentor, and scholar. I wish him all the best in his retirement.

DAVID M. REIZES[†]

The Greek philosopher and educator Socrates is reported to have described educating as “the kindling of a flame, not the filling of a vessel.” Professor David S. Day kindled the flame of intellectual rigor, the integrity of scholarship, and joy in the pursuit of the law within me and so many of his students. I continue to reap the benefits of his influence twenty-four years after I first walked into his constitutional law lecture.

Notwithstanding the *joie de vivre* the professor imparted to his students with respect to the study and practice of the law, I cannot fail to mention that my earliest exposure to him was less a soaring inspiration and more a check of my then-Freudian id. Early in my second year of law school, I had spent an hour listening to Professor Day’s lecture on the Dormant Commerce Clause Doctrine. As many know, this subject has been an area of the professor’s focused study. My second-year law student mind was having trouble grasping the concept that any constitutional doctrine could be “dormant,” much less understanding how the Supreme Court validated South Dakota owning the means of production in the form of a cement plant that discriminated against out-of-state purchasers.¹⁷

After class, I decided to visit with him for the first time to relieve my confusion. I waited outside the lecture room and approached the professor when he appeared. I confidently initiated the conversation by stating: “Excuse me, Professor Day, but I did not follow where you were going in your lecture today. I failed to understand your explanation of the doctrine.” A very slight smile appeared on his face, and in his slow, punctuated, Iowa accent, he replied: “I’m sorry, Mr. Reizes, that is really very unfortunate.” He then turned and walked

[†] J.D., 1998, University of South Dakota School of Law.

17. See generally *Reeves v. Stake*, 447 U.S. 429 (1980) (discussing the Dormant Commerce Clause and described by Professor Day as “South Dakota’s greatest victory [at the Supreme Court]”).

away. I was left standing alone in the hall with only the sound of air escaping from my justifiably punctured over-inflated ego. The professor's point was made and understood regarding the intellectually lazy nature of my question.

Thankfully, as the year progressed, my study and grasp of the law began to mature. The skills acquired from the professor that contributed to this maturity were not spoon-fed to me or any of his students. Instead, they were found in his vigorous Socratic engagement and debate; academic writing; frank constructive criticism; and, mentoring for those students with a seriousness of purpose. The bright flame of Professor Day's practice of legal education continues to burn in his former students and those young lawyers that his former students now mentor. This inheritance will be the professor's enduring legacy for generations of lawyers to come.

LYNDZE THOMPSON[†]

Passing the Well-Carried Torch

I first met Professor David S. Day in the fall of 2014 as he strolled into Constitutional Law with his calm demeanor, a stack of books under his arm, and his signature side part. At that time, I had no inkling he would become an instrumental mentor, providing me with invaluable guidance and countless words of encouragement in my academic, professional, and personal endeavors.

During my time at the University of South Dakota School of Law, I worked as Professor Day's teaching assistant, and it was then I came to know the full range of his scholarship. Over more than four decades of publication, Professor Day has accumulated some of the highest accolades in legal academia. He has published his work in numerous highly-rated journals and peer review outlets such as the *Miami Law Review*,¹⁸ the *Arizona State Law Journal*,¹⁹ and the *Association of American Law Schools*,²⁰ to name a few. Furthermore, he has published one of the leading Constitutional Law textbooks²¹ from which many law students around the country have learned foundational legal concepts.

The South Dakota School of Law has had many distinguished professors pass through its classrooms. However, only a handful of professors, including Professor Day, have a true love of the law. His love was displayed through his well-organized, history-fed courses and countless publications. It is evident that

[†] J.D., 2016, University of South Dakota School of Law; M.P.A., 2016, University of South Dakota.

18. David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIA. L. REV. 491 (1988).

19. David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195 (1987).

20. David S. Day, Anthony R. Baldwin & Judith A. McMorrow, *Will There Be Life After Law School? The Impact of Uncapping the Mandatory Retirement Age*, 41 J. LEGAL EDUC. 395 (1991).

21. DAVID S. DAY, DAVID CRUMP & EUGENE GRESSMAN, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (2d ed. 1993 – 6th ed. 2014).

he believes each student should be judged on their own merits, not by age, sex, creed, or social class. While treating all students with reverence, Professor Day, nevertheless, was demanding of his students, especially through his examinations. He was notorious amongst students for writing difficult exam questions with buried legal issues. He always reminded us that he felt it was the best basis for testing our analytical potential. Since my graduation, I have reminded him countless times that I have never come across a legal issue as dense as what he presented on exams. My remarks are always met with his dry sense of humor and laughter.

Not only have students benefited from Professor Day's expertise over the years, but so has the entire legal community. Practitioners contact him with questions about legal issues, and he provides sound ideas and strategies. Though it may not be known by many, he has helped shape numerous pivotal South Dakota cases, and I know he will continue to do so into retirement.

Professor Day's love for his wife, Lynne, and their four children, Daniel, Elizabeth, Sarah, and David Jr., is the only thing that can surpass his love for the law. He is so proud of each and every one of them. For example, Professor Day always appraises me with what new and exciting venture Lynne is undertaking, as well as the ever-evolving trajectory of his children. The elation reflected in his voice when talking about his family further illustrates his adoration for them.

Teaching is a noble profession, and someone who can pervade the mind with education can change the world. Professor Day has changed thousands of students' worlds. It is difficult to imagine the University of South Dakota without one of its quintessential educators, but just as one great professor passed the torch to Professor Day, it is time for him to pass it on to a new generation of professors. Let us hope that the torch continues to burn as bright as it did when Professor Day carried it.