

## **Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice by Joan Biskupic**

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BY Laura Echevarria

As a yet-to-be-fully retired Justice, Sandra Day O'Connor's legacy is obviously still up for grabs. But as the first woman on the United States Supreme Court, it seems almost guaranteed that historians will mirror the work of most contemporary journalists in portraying O'Connor in the most flattering light possible.

Regardless of what history might eventually say, there is only one conclusion pro-lifers can draw, as we look at O'Connor's votes on abortion. They have seriously hurt the cause of the unborn child.

USA Today reporter Joan Biskupic's take on O'Connor is captured in her title: Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice. O'Connor's enormous influence comes from often being the swing vote on the more divisive issues of our day and her astute behind the scenes politicking, according to Biskupic, herself a lawyer.

O'Connor, Biskupic points out, wrote her decisions narrowly which allowed her room to maneuver in future cases. Biskupic quotes Justice Antonin Scalia, who was often frustrated by O'Connor's decisions and opinions.

In a personal note to [Justice Harry] Blackmun, on July 2, 1996, Scalia said that he was "more discouraged this year than I have been at the end of any of my previous nine terms up here." ... But Scalia stayed and continued to fire his grapes at O'Connor. He criticized her for what he believed was damaging ambiguity and a constant desire to "have it both ways."

Not all journalists, even those who agree with the outcome of *Roe*, like the manner in which O'Connor has upheld the 1973 abortion decision. It brings to mind the original response to *Roe* in which many self-identified "pro-choicers" eviscerated Justice Blackmun's shoddily reasoned opinion. These critics see O'Connor's famous "undue burden" standard as a mishmash that continually left litigators guessing where she would come down next.

For example, in June 2001, Jeffrey Rosen, an associate professor at George Washington University's Law School and a prolific writer, observed in the *New York Times*,

We are all living now in Sandra Day O'Connor's America. Take almost any of the most divisive questions of American life, and Justice O'Connor either has decided it or is about to decide it on our behalf ... . *Roe v. Wade* has been tailored [modified] according to O'Connor's specifications, and judges and legislators have to scrutinize all abortion restrictions in an effort to predict whether O'Connor might consider them an "undue burden" on the right to choose.

Biskupic notes that O'Connor's time in the Arizona state legislature gave her a different view of law than her colleagues. (She was the first female Senate Majority Leader of a state legislature in the nation's history.)

In retrospect, O'Connor's behavior in the state Senate gave a clear view of how she would eventually vote as a justice. In 1970, she voted to repeal Arizona's law outlawing abortion and subsequently

opposed a resolution seeking a constitutional ban on abortion.

As a result then-Arizona Right to Life president Dr. Carolyn Gerster (a former president of National Right to Life who was then and is now on the board of NRLC) testified in opposition to O'Connor's nomination. Dr. Gerster's unsuccessful efforts to lobby O'Connor on the abortion issue clearly showed that a Justice O'Connor would never seriously challenge *Roe v. Wade*.

According to Biskupic, Dr. Gerster and O'Connor moved in many of the same circles. She quotes at length from Dr. Gerster's testimony before the Senate Judiciary Committee:

Gerster spoke of the difficulty of opposing a home-state judge. "I have known Sandra Day O'Connor since 1972," Gerster told senators. "Our children were members of the same Indian Guide group. We attend the same church; we have the same friends. She is very gracious and a very gifted lady. Quite apart from our social contact, however, we were in an absolute adversary position during 1973 and 1974 due to Senator O'Connor's positions on abortion-related legislation when she served as Senate majority leader."

When Sen. Robert Dole (R-Ks.) asked Dr. Gerster if there was anything that O'Connor had said in her testimony before the Judiciary Committee that would lead her to support O'Connor's nomination, Dr. Gerster replied:

Senator, I wanted that with all my heart, I really did. You have no idea of the burden that this has placed on me as an Arizonan and as an acquaintance of Judge O'Connor. I listened to every minute of testimony on public television and took extensive notes, looking for some word. ... I can say that I came here prepared to tear up my testimony and to enthusiastically support Judge O'Connor's nomination.

According to Biskupic, "But, sighed Gerster before a dwindled audience, nothing O'Connor said reassured her."

When O'Connor first joined the Court, her votes on abortion-related cases were a surprise to both sides. Her dissent in *Akron* keenly outlined how *Roe's* analytic framework was "clearly on a collision course with itself."

But with the Court's 1983 *Webster v. Reproductive Health Services* decision, O'Connor began a journey that would culminate in her pivotal vote in 2000 to overturn Nebraska's ban on the grotesque partial-birth abortion technique.

According to Biskupic, Chief Justice William Rehnquist thought he had the five votes (including O'Connor's) to uphold Missouri's abortion regulations intact. Rehnquist was hesitant to push O'Connor on overturning *Roe*, Biskupic writes, but thought he could seriously undermine the 1973 decision by upholding all of the Missouri provisions at issue in *Webster*. Biskupic writes,

... Chief Justice Rehnquist sent around a draft of his opinion upholding the regulations. Rehnquist invoked a new legal standard that would allow abortion restrictions if they "reasonably further the state's interest in protecting potential human life." If adopted, that standard would be a far more lenient test of abortion regulations and a significant departure from *Roe*. On the substance of the law, Rehnquist wrote that the ban on the use of public employees and facilities for abortions only restricted a woman's ability to obtain an abortion to the extent that she chose a physician affiliated with a public hospital.

But to Rehnquist's surprise, O'Connor was not with him. Why did O'Connor abandon moving in the direction seen in the *Akron* decision? Biskupic offers no explanation:

Some researchers reviewing justices' once-private papers believe O'Connor initially agreed with

Rehnquist in seeking to overturn abortion rights. With the benefit of hindsight and private papers of the justices made available over the years, however, it appears that O'Connor never was ready to sign an opinion undermining the core of *Roe*, particularly as the fifth vote against it. It also was clear in retrospect that the Missouri case was a turning point in her acceptance of the right to abortion.

Biskupic writes in journalese (in the best sense). Her biography of O'Connor draws on over 200 interviews that included all of the justice's colleagues except David Souter. Interestingly, O'Connor herself refused to give Biskupic an interview, saying, "What if I want to write a third book?" (O'Connor has already written two well-received books.)

In writing *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice*, Biskupic is "apparently the only reporter to have received access to the papers of Justice Brennan for a published piece," according to Tom Goldstein on SCOTUSblog.com. "She also used the papers of Justices Marshall, Powell and Blackmun."

Biskupic gives a reader not only a look into the first female Supreme Court justice but also an understanding of the inner workings of the Supreme Court and how its decisions are made. Biskupic's understanding of the law and the Court help walk a reader through the legal decisions—this helps to make the book easy to understand and informative.

Readers who are interested especially in O'Connor's abortion decisions will find Ms. Biskupic's work invaluable for the degree of research and unmatched access to the papers, colleagues, and friends of Justice O'Connor. Because O'Connor has sat on the court through the most important abortion decisions since *Roe*, Ms. Biskupic's work on the background and history of these decisions is an important contribution.