Golden Gate University Law Review

Volume 15
Issue 3 *Women's Law Forum*

Article 2

January 1985

Justice Sandra Day O'Connor: Token or Triumph from a Feminist Perspective

Margaret A. Miller

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

Part of the Judges Commons

Recommended Citation

Margaret A. Miller, *Justice Sandra Day O'Connor: Token or Triumph from a Feminist Perspective*, 15 Golden Gate U. L. Rev. (1985).
http://digitalcommons.law.ggu.edu/ggulrev/vol15/iss3/2

This Comment is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

JUSTICE SANDRA DAY O'CONNOR: TOKEN OR TRIUMPH FROM A FEMINIST PERSPECTIVE

I. INTRODUCTION

When Justice Sandra Day O'Connor was sworn in as the 102nd Justice of the United States Supreme Court,[1] she made history. O'Connor was the first woman to attain a seat on the Court in its 199 years of existence.[2] She represented a symbolic reward for nearly 200 years of struggle by women for political and social recognition in America. Feminists[3] applauded not only her symbolic achievement[4] but also the potential substantive effect she could have on women's ongoing legal battles. O'Connor gained entry into the most powerful and prominent judicial entity in the nation and would have a tremendous op-

1. N.Y. Times, Sept. 26, 1981, at 8, col. 1. Shortly after Justice Potter Stewart offered his resignation from the Supreme Court in May, 1981, President Ronald Reagan announced his selection of Judge Sandra O'Connor of Arizona as Stewart's replacement in July. She was approved 99-0 in the Senate and took her seat on the Supreme Court in October, 1981. For reaction to her nomination, see *A Woman for the Court*, NEWSWEEK, July 20, 1981, at 16; *The Brethren's First Sister*, TIME, July 20, 1981, at 8.

2. The only other time a woman was considered for a position on the Supreme Court was during the New Deal-World War II era of Presidents Roosevelt and Truman. *See* Cook, *Women as Supreme Court Candidates*, 65 JUDICATURE 314 (1981-82) for a comparison of Judge O'Connor to Judge Florence Allen, the sole female candidate during that time.

3. "Feminists," for the purposes of this paper, refers to those who support, or appear to support, the doctrine or theory of "feminism." The definition of "feminism" will be understood as "the theory of the political, economic, and social equality of the sexes." WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 837 (4th ed. 1976).

4. *See, e.g., The nomination of Judge Sandra Day O'Connor of Arizona to serve as an Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary, United States Senate*, 97th Cong., 1st Sess. 278, 395 (Sept. 9-11, 1981) (statements of Kathy Wilson, National Women's Political Caucus, and Eleanor Smeal, President, NOW) [hereinafter cited as *Senate Hearings*]. *See also* Schafran, *Sandra O'Connor and the Supremes*, MS, Oct., 1981, at 71. "[W]e may . . . take great pleasure in this historic and long overdue appointment." *Id.* at 71-72 (Lynn Hecht Schafran was a New York City attorney and national director of the Federation of Women Lawyers' judicial screening panel at the time MS printed her article).

Published by GGU Law Digital Commons, 1985

Golden Gate University Law Review, Vol. 15, Iss. 3 [1985], Art. 2

portunity for a positive, far-reaching impact on women's legal rights. Effective use of that opportunity could outweigh her importance as a symbol of the rightful role of women as equal participants in society.[5] Feminists anticipated that O'Connor's experiences as a woman would serve as an assurance of sympathy in her legal decision-making on issues that affect women.[6]

This Comment will examine the feminist perception of Sandra Day O'Connor's record on the Supreme Court on issues affecting women.[7] It will analyze how her decisions have fulfilled and how they have disappointed feminist expectations. In view of her performance on the Court, can Justice Sandra Day O'Connor be considered a "token" or a "triumph" for feminists?

II. ANALYSIS

A. *A Conservative Judge*

Between the time Ronald Reagan announced Judge O'Connor of Arizona as his appointee, and the time Justice O'Connor took her seat on the Court,[8] there was a great deal of speculation about her past record, her politics, her judicial philosophy and how these would influence her decisions on the Court.[9]

5. *See, e.g.*, Schafran, *supra* note 4, at 82. "I do suggest that she will bring to the Court's deliberations on [women's] issues the touchstone of reality that has been so glaringly absent." *Id. See also* Kerr, *The Woman Whose Word is Law*, MS, Dec. 1982, at 52. Kerr discusses O'Connor's philosophy and the extent to which it may be reconciled with feminist theories to achieve a substantive gain for women. *Id.* (Virginia Kerr is a former Supreme Court clerk and was an assistant professor at the University of Pennsylvania Law School at the time MS printed her article).

6. *See* Kerr, *supra* note 5, at 84. "One hopes . . . that she does not demonstrate that class and race, more so than gender, determine perspective." *Id.*

7. This Comment will consider only briefly matters which may be of significance to a broader constituency. *See infra* notes 50, 71-73 and accompanying text.

8. *See supra* note 1.

9. *See, e.g.*, NEWSWEEK, *supra* note 1, at 16; TIME, *supra* note 1, at 8. These articles discuss O'Connor's background and philosophy, including somewhat simplistic predictions about her future performance. For more in-depth analyses, see Schenker, *"Reading" Justice Sandra Day O'Connor*, 31 CATH. U.L. REV. 487 (1982). This article profiles Judge O'Connor's decisions on the Arizona State Court of Appeals and discusses how they may be read as predictions of her Supreme Court performance. *See also* Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 B.Y.U. L. REV. 1. Riggs analyzes O'Connor's background, political and judicial philosophies, and follows with a careful examination of how these were revealed in her first term decisions.

O'Connor had been a state assistant attorney general,[10] a state senator,[11] a trial judge,[12] and an intermediate appellate court judge.[13] She was generally conservative on most issues.[14] She was "tough" on crime, and was oriented toward favoring society's needs over the rights of the criminal.[15] In her six years on the state bench,[16] she acquired a reputation as a fine legal technician and an excellent jurist.[17] She did not get a chance to hear many federal issues or to decide matters of constitutional significance.[18] It was difficult to predict what her attitude would be on the Supreme Court.

Since she had had extensive experience in the state system, in the executive, legislative and judicial branches,[19] Justice O'Connor was expected to approach issues before the Court from the "state" point of view.[20] She had advocated deference to state court decisions under federal court review.[21] This illus-

10. O'Connor served as assistant attorney general for Arizona from 1965 to 1969.

11. In 1969, O'Connor was appointed to the state senate by the Maricopa County Board of Supervisors. She ran successfully for the seat in 1970 and 1972. In 1972 she was elected senate majority leader.

12. In 1974 she was elected to the Maricopa County Superior Court.

13. O'Connor accepted appointment by Arizona Governor Babbit to the Arizona Court of Appeals in 1979. She served on that bench for just over a year and a half before she was appointed to the United States Supreme Court.

14. *See, e.g.*, Riggs, *supra* note 9, at 3-12; Schenker, *supra* note 9, at 492-503. These articles review O'Connor's state court record to reveal a conservative pattern in her reasoning on most issues, composed of meticulous fact analyses and strict statutory interpretation. O'Connor's conservative political and judicial background was a pivotal consideration for her appointment. *See* NEWSWEEK, *supra* note 1, at 16-17; TIME, *supra* note 1, at 11, briefly touching on President Reagan's selection requirements and how close O'Connor came to fulfilling them.

15. *See* Riggs, *supra* note 9, at 19-26, reviewing O'Connor's decisions generally favoring society's needs in the criminal context, and Kelso, *infra* note 40, at 270-71, arguing O'Connor's potential threat to the exclusionary rule.

16. *See supra* notes 12 & 13.

17. Wren, *Justice Sandra Day O'Connor: Reflections of a Fellow Jurist*, 1981 ARIZ. ST. L.J. 647; Matheson, *Justice Sandra D. O'Connor*, 1981 ARIZ. ST. L.J. 649. Both of these articles are fairly sentimental profiles of O'Connor's tenure on the state court of appeals. They describe her as an exceptional judge and a fine legal technician who displayed ability, clarity, and excellence on the bench.

18. *See, e.g.*, Schenker, *supra* note 9, at 492-503. See chart illustrating O'Connor's docket on the state bench. *Id.* at 492. *See also* Riggs, *supra* note 9, at 5-10. These two articles describe the cases O'Connor dealt with on the state court, most of which did not touch on federal questions.

19. *See supra* notes 10-13.

20. *See* Schenker, *supra* note 9, at 487-89; Riggs, *supra* note 9, at 11-12.

21. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981). In this

trated her belief in federalism as a doctrine of independent state sovereignty and limited federal interference.[22] This concept of the friction between state autonomy and federal intervention is what shaped O'Connor's "state" orientation[23] in her approach to issues before the Court. In addition, her judicial philosophy reflected deference to the legislature.[24] She had strongly argued that the role of the Court is to interpret and apply the law without looking beyond the statutory language and history.[25] She believed that courts should not engage in the creative decision-making characteristic of judge-made law which considers social and cultural influences.[26] A judge, according to O'Connor, should decide issues narrowly, through a carefully constructed rationale, structured to avoid broad alterations in the law or sharp departures from precedent.[27] In short, O'Connor preferred to temper her decisions through the conservative doctrine of judicial restraint.[28]

Despite her reputation as a judicial conservative, the con-

---

article, published shortly before her appointment to the Supreme Court, Judge O'Connor discussed the need for federal courts to defer more to state court findings in order to preserve "strong, independent and viable" judicial systems. *Id.* at 814.

22. Today's notion of "dual federalism" views federal and state governments as having their own separate spheres into which the other cannot intrude except in a cooperative effort for the common good. *See* Comment, *Recent Tenth Amendment Decisions—Judicial Retreat From a Metaphysical Universe and a Return of Federalism Analysis to the Congressional Forum,* 1983 UTAH L. REV. 359, 360 n.10. *See also infra* note 50, for an opinion in which O'Connor most clearly stated her federalism views.

23. *See supra* notes 20-22.

24. Schenker, *supra* note 9, at 489. *See* text and accompanying statistics demonstrating O'Connor's deferential attitude. *Id.*

25. *See Senate Hearings, supra* note 4, at 57, 67 & 83. O'Connor discussed several conservative judicial themes. In particular, she stated that judges should not reflect social changes in their decisions, rather the role of the judiciary is to interpret and apply, not "create," the law. *Id. See also* Riggs, *supra* note 9, at 4-7. O'Connor believes the judiciary should not be a law making body. Its decisions should be drawn as narrowly as possible, and the rationale should stem directly from legislative history, intent and language. The role of judge does not include interpretations or reflections of changing social or political values. *Id. See also infra* note 119 for definition of "interpretivism."

26. This judicial "activism" or "creativity" can be defined as "court-generated change in public policy" that goes beyond interpretation and articulation of statutory law. *See* Canon, *Defining the Dimensions of Judicial Activism,* 66 JUDICATURE 237, 239 (1982-83) (emphasis omitted).

27. *See infra* note 118 for definition of "judicial restraint." *See also supra* notes 25 & 26, discussing O'Connor's judicial philosophy.

28. *See supra* notes 26 & 27. O'Connor's limit on judicial creativity is restraint; she keeps her decisions narrow and based on the "letter of the law." *See Senate Hearings, supra* note 4, at 108.

sensus was that O'Connor was neither doctrinaire nor particularly likely to "follow the leader."[29] She approached problems on a case by case basis and characterized each according to its own facts. She was capable of manipulating her analysis of the facts in order to make decisions unrestrained by ideology. Hence, although her philosophy appeared to coincide with that of the Court's conservative bloc,[30] Chief Justice Burger and Justice Rehnquist,[31] she had demonstrated sufficient independence and originality in the past[32] to lead Court observers to predict she would join the group of justices generally described as the "swing votes."[33] There were other chinks in O'Connor's conservative armor. For example, on the abortion issue,[34] although she expressed her personal beliefs,[35] she refused to discuss what her legal conclusion might be.[36] Members of the far right and "pro-life" groups hotly contested her appointment because they

---

29. *See generally* Riggs, *supra* note 9. O'Connor's habit was to approach case analysis by careful examination and characterization of the facts and the law, and not to decide solely along ideological lines. *Id.* at 43-46. *See also* Schenker, *supra* note 9, at 503. Although O'Connor may have certain idealogical biases, she has the capacity to vote unexpectedly. *Id.* at 490.

30. Schenker, *supra* note 9, at 489. "If the attitude reflected in Justice O'Connor . . . carries over into her votes, the Burger-Rehnquist orientation may command the allegiance of a fourth Justice." *Id. See generally* Riggs, *supra* note 9, at 10-46.

31. Chief Justice Burger and Justice Rehnquist were both appointed by President Nixon, in 1969 and 1974, respectively. They are generally accepted as the benchmark conservatives on the Court. *See* Riggs, *supra* note 9, at 11 n.63, for President Nixon's probable opinion of the present Supreme Court conservatives.

32. *See supra* note 29.

33. A "swing vote" is defined as either a moderate justice or one that "votes more often with the majority result than with any other justice." Riggs, *supra* note 9, at 15 n.66. "Swing voter" may also be one who consistently votes unpredictably. Justices Blackmun, Stevens, White and often Powell are regarded as "swing voters." *Id.* Because O'Connor relied so heavily on fact nuances, it was reasonable to assume she was capable of joining this "swing" bloc. However, once on the Court, she joined the conservative faction. *See infra* note 40.

34. The abortion issue, encompassing the validity of the *Roe* decision (discussed *infra* note 192 and accompanying text), the extent of the right to choose an abortion, and the various moral, social and political implications involved, was a point of extensive discussion following O'Connor's nomination, both in the press and in the Senate Hearings. *See Senate Hearings*, *supra* note 4, at 60-63, 78-79, 98 & 125-27. *See also* TIME, *supra* note 1, at 10-11 (see box); NEWSWEEK, *supra* note 1, at 16.

35. *See Senate Hearings*, *supra* note 4, at 60-61. O'Connor admitted her personal opposition to abortion. *Id.* at 61.

36. *Id.* at 60-61. Throughout the questioning before the Senate Committee, O'Connor refused to discuss what her decision on any particular issue might be. She did point out that personal views should not influence a decision, rather it should be determined by the facts and relevant law. *Id.* at 60.

asserted that she was pro-abortion.[37] They argued that she supported abortion when she served in the Arizona State Senate although she explained her actions as turning on other matters.[38] This kind of conjecture suggested a potential sympathy on a critical issue.[39] Overall, however, Justice O'Connor did not appear to differ much from Justice Stewart, whom she replaced, and her impact as far as the direction of the Court was not likely to be significant.[40]

B. *Feminist Theory Reconciled*

Feminists, however, wanted Sandra Day O'Connor to effect a change in the present direction of the Court.[41] They were concerned with what they saw as the erosion of women's rights through some of the Court's recent decisions.[42] With a newly

37. *See, e.g.*, TIME, *supra* note 1, at 10; NEWSWEEK, *supra* note 1, at 16.

38. The allegations were based on O'Connor's voting record during her state senate career on legislation dealing with abortion and birth control. *See* TIME, *supra* note 1, at 11 (box). *See also* Newsweek, *supra* note 1, at 16.

39. *See, e.g.*, Kerr, *supra* note 5, at 84. "[T]here is some reason to be optimistic about the stand O'Connor will take [on the abortion issue]." Though she sees abortion as "'morally repugnant,' [so] do many who defend *Roe* . . . ." *Id.*

40. Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases?*, 13 PAC. L.J. 259, 270-71 (1982). Kelso compared the moderate Stewart to the incoming O'Connor in an effort to predict what change, if any, she might have on the direction of the Court. Due to the present composition of the Court and the fact that Kelso thought Stewart and O'Connor had fairly comparable philosophies, he predicted her vote would not be outcome determinative. *Id.* at 266-67, 270-71. It is apparent after three years, however, that O'Connor is considerably more conservative than her predecessor Justice Stewart.

41. *See, e.g.*, Schafran, *supra* note 4, at 82. *See infra* notes 46, 48 and accompanying text.

42. *See generally* Denniston, *What the All-Boys Bench Did Last Year*, MS, Oct. 1981, at 74. This summary of decisions from the 1980-81 Supreme Court term illustrates the Court's inability to assess women's rights without the limitations of cultural and biological stereotypes. (*See infra* notes 51, 165, 185, 189 and accompanying text for discussion of such restrictions on women's equal participation in society). These cases included, for example, Rostker v. Goldberg, 453 U.S. 57 (1981) (women may be excluded from draft registration without unconstitutionally discriminating on the basis of sex); McCarty v. McCarty, 453 U.S. 210 (1980) (a spouse of a military serviceman could not share in his pension upon divorce); Michael M. v. Superior Court, 450 U.S. 464 (1981) (males, but not females, may be held criminally liable for statutory rape without unconstitutionally discriminating on the basis of sex). These decisions, among others, were strongly criticized by feminist authors as dangerously perpetuating restrictive sexual stereotypes. *See generally* Freedman, *infra* note 165, at 913; Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) (comprehensive discussion on the status of women's rights as evaluated by the American legal system, including the influences of biological and cultural expectations as they affect the sexes and legal rights).

elected conservative president,[43] an aging Court,[44] and the probable impending loss of two strong liberal Justices,[45] feminists needed a sympathetic voice on the Court. They hoped that O'Connor would alter the outcome of future decisions involving the rights of women by arguing from the perspective of a woman and by bringing some fresh perception of "real life" into a Court that many felt had lost touch with the world outside.[46]

Although O'Connor espoused a conservative philosophy on the bench,[47] feminists gleaned from that certain encouraging signs. They argued that O'Connor's gender could be a source of insight into women's issues.[48] Feminists analogized O'Connor's philosophy on federalism and the conflicts between state and federal power to a corresponding recognition of the tension between individual rights and government intervention.[49] O'Connor criticized overbearing federal interference with state sovereignty.[50] Similarly, women struggle against institutionalized

---

43. Ronald W. Reagan, a conservative Republican, was elected President of the United States in November, 1980 and re-elected in November 1984. He will serve his second four-year term through January, 1989.

44. Over half of the Justices on the present Supreme Court are over 75 years old: Brennan, 79; Powell, 77; Burger, 77; Marshall, 77; Blackmun, 76. Justices Brennan and Marshall, generally accepted as the Court liberals, and Justice Blackmun, who often votes with them, reportedly are not in the best health. With President Reagan in office through 1988, and the probability of vacancies on the Court, there is a distinct possibility that the Court could take on an even more conservative attitude. (The remaining Justices: White, Stevens, Rehnquist and O'Connor, are 68, 65, 60, and 55, respectively.)

45. *See supra* note 44.

46. *See, e.g.*, Schafran, *supra* note 4, at 84. Schafran discusses an ossified Court's inability to understand reality: "Whatever her judicial philosophy, Sandra Day O'Connor will bring to the Supreme Court a solidly grounded understanding of the real lives of women in contemporary society." *Id.*

47. *See generally supra* notes 14, 15, 25, 40 and accompanying text. *See also infra* notes 50, 118, 119, and accompanying text, explaining O'Connor's adherence to judicial restraint and interpretivism.

48. *See* Kerr, *supra* note 5, at 84; Schafran, *supra* note 4, at 82. Generally these two writers recognize the potential difference the gender of the new Justice may make both in her decision-making and in her overall influence on the Court. *Cf.* Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 388 n.68 (1980-81). "[T]here is no guarantee that female judges will have any particular sympathies by virtue of their gender." *Id.*

49. *See, e.g.*, Kerr, *supra* note 5, at 84. Kerr speculates that O'Connor's pro-state position might be translated to a feminist theory of "exclusion from power," with the related consideration of unwarranted intervention into the sphere of the less powerful by the hand of the more powerful. This is analogous to government regulation of women's reproductive decisions. *Id.*

50. *See infra* note 72. O'Connor disapproved the suppression of state autonomy through the application of federal environmental regulations in Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 775 (1981) (O'Connor, J., concurring and

interference with their individual autonomy, a symptom of their political powerlessness and limited access to equal participation. Biological and cultural stereotypes have been employed to justify the manipulation and regulation of women's reproductivity.[51] This interference with individual autonomy, codified by legislation[52] and judicial interpretation,[53] entrenches archaic role expectations which impair female equality. Men do not suffer from this lack of control over their own reproductivity.[54] This denial of control to women forms a facet of gender discrimination which has been legitimated by stereotypic role expectations and perpetuated by institutionalized blinders.[55]

Feminists emphasized the parallels between women's struggle for access to participation in society and a state's struggle to be free from federal interference.[56] The essence of both is autonomy; the key to both is recognizing the oppression.

O'Connor recognized the conflict in the relationship between the federal and state systems.[57] She should be able to correlate that struggle with the struggle for equality by women.[58] Feminists argued that O'Connor, as a woman[59] and as a person with fresh contact with the "real" world, entering a Court isolated by age and experience,[60] potentially had the insight and even the compatible philosophy[61] to convey to the Justices that

dissenting).

51. *See* Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 266 (1984). The goal of the battle against sex discrimination has been equal access to participation in society. Women have been barred from equal opportunities by regulation and restriction justified by cultural stereotypes regarding a woman's "proper" role and by biological stereotypes regarding her relative abilities and limitations. *Id.* at 266-69.

52. *Id.* at 301.

53. *Id. See infra* notes 141 & 142 for discussion of the Court's role in these matters.

54. Wildman, *supra* note 51, at 275.

55. *Id.* at 301.

56. *See, e.g.*, Kerr, *supra* note 5, at 82-84. Kerr, and feminists generally, tried to reconcile O'Connor's conservatism with feminist goals in a way that wasn't "laughable." *Id.* at 82.

57. *See supra* note 50 and *infra* note 72 and accompanying text.

58. *See supra* note 56. The key to reconciling the theories of state sovereignty and women's reproductive autonomy is the goal of freedom from outside interference.

59. *See supra* notes 48-49 and accompanying text indicating some feminists' hopes that O'Connor's perceptions of women's issues would be affected at least as much by her gender as by her conservative ideology. Kerr, *supra* note 5, at 84.

60. *See supra* note 46.

61. *See supra* note 49 and accompanying text.

the essence of gender discrimination is exclusion from power. The key to that exclusion is the denial of reproductive autonomy to women because the ultimate effect of that denial is to limit women's access to equal participation; they are disadvantaged due to their gender, and men are not.[62]

However, feminists had to be realistic. O'Connor had a conservative record[63] and a conservative outlook. She was not a proponent of examining social influences while constructing her decisions.[64] As an "interpretivist,"[65] she focused on the law itself and not on the society which produced it. The impact of her philosophy could as easily prove detrimental to women's rights. Cultural and social changes affect the meaning of such concepts as "sex discrimination."[66] To give flesh to the meaning of sex discrimination it is vital to examine the society that practices it.[67] It is to this that O'Connor objects.[68] Feminists hoped, at the least, that O'Connor's experiences as a woman would help shape her perception of issues and solutions affecting women's rights and outweigh her tendency to decide cases narrowly without considering the broader needs of women[69] as a group. Armed with the knowledge that Sandra Day O'Connor had a conservative yet pragmatic reputation and a somewhat favorable, though sparse, record on women's issues,[70] feminists awaited the results of her performance on the Supreme Court.

C. *Some Positive Signals*

Initially, Justice O'Connor did not disappoint general expectations. As virtually all commentators anticipated, she voted

---

62. Wildman, *supra* note 51, at 266.

63. *See supra* note 14 and accompanying text for discussion of O'Connor's judicial record.

64. *See infra* notes 118 & 119, defining relevant conservative judicial doctrines.

65. *Id.*

66. *See infra* notes 140-41 and accompanying text for expansion of the notion that the cultural and biological stereotypes which ostensibly justify government restrictions also seriously influence the Court's concept of what constitutes sex discrimination.

67. Wildman, *supra* note 51, at 305.

68. *See supra* note 25 and accompanying text for discussion of O'Connor's dislike of "creative" decision-making.

69. *See supra* notes 48-49, 59 and accompanying text.

70. *See Senate Hearings*, *supra* note 4, at 278, 395 (statements of Kathy Wilson, National Women's Political Caucus, and Eleanor Smeal, President, NOW, discussing O'Connor's achievements as a woman lawyer and as a supporter of women's groups).

conservatively on criminal matters,[71] federalism,[72] and standing and jurisdiction issues.[73] She was even more strongly conservative than was originally expected[74] and consistently yielded to the decisions of state legislatures and courts.[75] She agreed with her conservative colleagues Burger and Rehnquist on many issues[76] but demonstrated enough independence so as not to be considered a shadow or a puppet to those two.[77] Feminists had stoically expected O'Connor's conservatism.[78] However, some early positive signals in her decisions on women's issues that came before the Court[79] offered encouragement to feminists.

1. Rights of Illegitimate Children

In *Mills v. Hableutzel*,[80] O'Connor voted with a unanimous Court to strike down a one year statute of limitations on the filing of paternity suits by illegitimate children in anticipation of a suit seeking child support.[81] The Court held, in an opinion written by Justice Rehnquist, that the Texas statute violated the equal protection clause of the fourteenth amendment by imposing such a restriction on illegitimate children. Though both

---

71. Riggs, *supra* note 9, at 19-26. O'Connor's record on criminal justice reveals a strong commitment to "law and order." *Id. See, e.g.*, Nix v. Williams, 104 S. Ct. 2501 (1984) (adopting the "inevitable discovery doctrine" as an exception to the exclusionary rule).

72. Riggs, *supra* note 9, at 40-43. As expected, O'Connor showed deference to state authority. *Id.* Her views on federalism were most clearly stated in her dissent from the majority opinion in FERC v. Mississippi, 456 U.S. 742, 755 (1981) (O'Connor, J. concurring and dissenting). "State legislative and administrative bodies are not field offices of the national bureaucracy . . . . Instead, each state is sovereign within its own domain . . . . The constitution contemplates . . . a system in which both the state and national governments retain a 'separate and independent existence.'" *Id.* at 777 (citations omitted).

73. Riggs, *supra* note 9, at 26-32. O'Connor preferred judicial restraint; she found copious reasons for not reaching the merits, particularly by insisting that standing had to be eminently clear. She argued for exhaustion of all state remedies prior to a Supreme Court hearing. *Id. See, e.g.*, Boag v. MacDougall, 454 U.S. 364 (1982).

74. *See* Riggs, *supra* note 9, at 19.

75. *See supra* note 72.

76. Riggs, *supra* note 9, at 12-19.

77. O'Connor did part company with her conservative colleagues on some issues. *See infra* notes 163-78 and accompanying text for a discussion of her most dramatic departure from the conservative position.

78. *See supra* text and accompanying notes 63-65.

79. *See, e.g.*, Kerr, *supra* note 5, at 52, 80 (discussing cases analyzed *infra* notes 80, 100, 163 and accompanying text).

80. 456 U.S. 91 (1982).

81. *Id.* at 101.

legitimate and illegitimate children had the right to seek child support from their estranged fathers under Texas law,[82] only illegitimate children had to first establish the threshold fact of paternity. Hence, while Texas provided the opportunity to establish paternity through a court action, the one year statute of limitations made that opportunity "so truncated that few could utilize it effectively."[83] The Court decided that the opportunity must be long enough so that such children, or those suing in their behalf, could bring the action despite the difficult personal, financial and social constraints associated with bearing children out of wedlock.[84] The state's argument that it was attempting to prevent fraudulent or stale claims[85] was insufficient to sustain the legislation because Texas failed to prove that these problems were particularly affected by the twelve month cut-off.[86] Therefore, the requisite substantial relation between the legitimate state interest of preventing fraudulent or stale litigation and the one year statute of limitations was lacking.[87]

Justice O'Connor concurred in a separate opinion,[88] adding that the holding of the Court did not prejudge the constitutionality of a longer statute of limitations.[89] She maintained that while the state had a legitimate interest in preventing stale or fraudulent claims, its competing interest of protecting genuine claims undercut that justification.[90] This latter interest included not only a legitimate desire to see that " 'justice is done,' "[91] but also a desire to prevent swelling of the welfare rolls.[92] O'Connor also pointed out that only paternity suits, actions "unique to il-

82. *Id.* at 92. The Court was referring to a prior case, Gomez v. Perez, 409 U.S. 535 (1973), in which it held that once a state affords legitimate children the right to receive support from their fathers, it must afford the same right to illegitimate children.

83. *Mills*, 456 U.S. at 97.

84. *Id.*

85. *Id.* at 101. The state, in arguing that its interest lay in preventing stale or fraudulent claims, asserted that the proof problems involved in establishing paternity lent themselves to fraud or staleness. Blood tests, for example, do not prove paternity but merely set up a probability which places the alleged father in the "pool" of prospective fathers. *Id.* at 98 n.4 (explanation of relevance of blood test results).

86. *Id.* at 101.

87. *Id.*

88. *Mills*, 456 U.S. at 102 (O'Connor, J., concurring).

89. *Id.* at 106.

90. *Id.* at 103.

91. *Id.*

92. *Id.*

legitimate children,"[93] were singled out for special treatment even though there are countless proof problems in other kinds of civil actions.[94] This coupled with the state's attempt to severely limit any efforts to prove paternity cast doubt on the permissibility of the motivation behind the statute.[95] O'Connor reiterated, in closing, the kinds of social and financial obstacles that prevent the filing of paternity suits during a child's early years which include jeopardizing the relationship with the child's father.[96] These problems, she argued, exist beyond the first twelve months of a child's life and therefore could bar an even longer statute of limitations on paternity suits.[97]

O'Connor's analysis of the kinds of problems illegitimate children and their mothers must face, and her articulation of these concerns in a separate opinion, indicated to feminists that she was particularly sensitive to those difficulties.[98] It was, they hoped, a precursor to a deeper identification with the legal struggles of women.

In a pair of decisions concerning the scope of Title IX of the Civil Rights Act of 1964,[99] O'Connor continued to show limited signs of sympathy with feminist concerns about equity in education and employment.

2. Gender Based Discrimination in Education

O'Connor conspicuously joined the liberal bloc in *North Haven Board of Education v. Bell*[100] to apply Title IX prohibitions

---

93. *Id.* at 104. *See also id.* at 104 n.3 explaining the general rule of tolling the statute of limitations when a minor has a cause of action.

94. *Mills*, 459 U.S. at 104.

95. *Id.* at 104-05.

96. *Id.* at 105-06. O'Connor reiterated the social and financial obstacles to such suits, including jeopardizing the relationship with the father and other emotional strains. *Id.* at 105 n.4.

97. *Id.* at 102, 106.

98. *See, e.g.*, Kerr, *supra* note 5, at 52. Because the *entire* Court voted to strike down the one year statute of limitations, O'Connor's vote should be little indication of any particular concern on her part toward the claims of illegitimate children. But that she went to the trouble to concur separately and to uncharacteristically broaden the holding indicates strong feeling on the matter. Riggs, *supra* note 9, at 36.

99. 20 U.S.C. § 1681 (1978): "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.*

100. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (two boards of education challenged regulation promulgated under Title IX, arguing that they were not applicable

against discrimination on the basis of sex to employees of educational institutions[101] as well as to students. The Court said that the scope of the statute included employment practices[102] and the words "no persons"[103] in the statute included employees of education institutions.[104] Conservatives Burger and Rehnquist joined Powell in dissent,[105] insisting that it "tortures the language"[106] of Title IX to extend it to employment.[107] O'Connor's departure from this narrow interpretation represented not only a sign of her independence,[108] but an indication of her receptiveness to expansion of statutory meaning in a gender discrimination context.

Unfortunately, O'Connor did not so broadly interpret Title IX in a later case, *Grove City College v. Bell.*[109] The Court held that Title IX is program-specific when applied; its prohibitions only apply to those programs which receive federal funding[110] directly or indirectly.[111] Grove City College accepted no direct funds[112] from the federal government, but some of its students received federal grants without school participation.[113] The Court decided that this indirect aid to the college triggered Title IX protection but that it was program-specific and therefore only affected the financial aid program which disbursed the funds.[114] Justice Brennan, joined by Justice Marshall, dissented in part,[115] maintaining that Title IX should be applied institu-

---

to employment practices at educational institutions).

101. *Id.* at 530.
102. *Id.* at 520.
103. *Id.* at 521-22.
104. *Id.* at 530.
105. *North Haven*, 456 U.S. at 540 (Powell, J., dissenting).
106. *Id.* at 541.
107. *Id.* at 554-55.
108. *See* Kerr, *supra* note 5, at 52, 53.
109. 104 S. Ct. 1211 (1984) (a private college challenged the application of Title IX sanctions where the only federal funding it received was indirect).
110. *Id.* at 1222.
111. *Id.* at 1220. Title IX application is triggered where federal financial assistance is granted directly to the school or granted to students for the purpose of attending school, an indirect form of funding to the school. *Id.* at 1216.
112. *Grove City College*, 104 S. Ct. at 1214. The school accepted no funding from the federal government directly, nor did it participate in assessing student need for the purpose of direct federal grants. *Id.*
113. *Id.* at 1214-15. Basic Education Opportunity Grants (BEOG) are federal grants awarded to students without assessment of need by the schools. *See supra* note 112.
114. *Id.* at 1222.
115. *Id.* at 1226 (Brennan, J., dissenting in part).

tion-wide. Both the history of the statute and the purpose of the funding pointed to this result.[116] O'Connor, however, was not willing to expand on the scope of Title IX.[117] She was willing only to recognize its application in a situation of indirect federal funding. Her policies of judicial restraint[118] and interpretivism[119] operated more strongly to define her decisions than any possible sympathies for feminist goals.

3. Disparity in Employment Benefits

In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*,[120] O'Connor joined the portion of Marshall's majority opinion which held[121] that retirement plans which paid lower benefits to female employees violated Title VII of the 1964 Civil Rights Act.[122] The lower payments to women were based on an impermissible sex classification since sex was the sole component differentiating longevity risk levels in particular age brackets.[123] The Court interpreted Title VII as requiring that other pertinent variables be taken into account so that risk allocation is based essentially on the individual rather than the gender class of which the employee is a member.[124]

---

116. *Id.* at 1237.

117. *Grove City College*, 104 S. Ct. at 1223 (Powell, J., concurring) (Justice O'Connor joined in Justice Powell's opinion).

118. Riggs, *supra* note 9, at 5. Riggs paraphrases Justice O'Connor's definition of judicial restraint as deciding cases on "appropriately narrow grounds," on other than constitutional grounds where possible. *Id.* (quoting Judge O'Connor from her confirmation hearings before the Senate).

119. Riggs, *supra* note 9, at 1. "Interpretivism" is a "concept of judicial review which denies the legitimacy of giving content to constitutional rules by reference to natural law, contemporary social values, or any other source external to the Constitution." *Id.* at 5 (footnote omitted).

120. 103 S. Ct. 3492 (1983) (a state employee challenged the validity of state deferred retirement compensation plans under Title VII which used sex-based mortality tables for calculating payments, resulting in lower monthly payments for female retirees).

121. *Id.* at 3499.

122. 42 U.S.C. §§ 2000e-2(a) (1981): "It shall be an unlawful employment practice for an employer to discriminate against any individual with respect to . . . terms, conditions or privileges of employment, because of . . . sex . . . ." *Id.*

123. *Norris*, 103 S. Ct. at 3498. The plan required all employees to pay in the same amount but women received lower payments. *Id.* at 3497.

124. *Id.* at 3498-99. The Court relied on its rationale in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1979), in which the Court held it impermissible under Title VII to require female employees to make higher contributions into retirement plans in order to receive the same monthly payments as male employees. *Id.* at

O'Connor emphasized in her concurrence[125] that the issue the Court decided was whether solely sex-based actuary tables used for calculating retirement payments fall within the scope of the sex discrimination which Congress contemplated under Title VII.[126] The Court did not decide the broader issue of whether sex is an appropriate consideration in insurance schemes available either to private individuals or to employees.[127] In addition, O'Connor reiterated the importance of "language, structure, and legislative history."[128] Characteristically, she sought to limit the decision to the facts presented in this case. She emphasized that the discrimination occurred between employer and employee when the former presented a choice of retirement payment schemes which were all computed on sex-based tables.[129] That was not to say that the use of such tables themselves was a violation of Title VII if a female employee purchased whatever plan she preferred on the open market where both sex-based and non-sex-based plans were available.[130] Strict adherence to statutory construction and restraint from any expansion controlled O'Connor's decision.

Although feminists agreed with O'Connor's vote in *Norris*,[131] they found her concurrence troubling. It was not clear what she thought about sex-based tables as a whole. The feminist position would decisively label *any* payment plan based solely on gender as discriminatory, regardless of the availability of other non-sex-based plans. Sex alone is an unreasonable and unfair basis for assessing longevity given all the other relevant variables.[132] O'Connor's hedging on the issue was unfortunate and discouraging to feminists.

711.

125. *Norris*, 103 S. Ct. at 3510 (O'Connor, J., concurring).

126. *Id.* at 3510-11.

127. *Id.* at 3511.

128. *Id.*

129. *Id.*

130. *Norris*, 103 S. Ct. at 3511 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1979)).

131. *See, e.g.*, Note, *A Step Towards Insurance Equity: Arizona Governing Committee v. Norris*, 7 HARV. WOMEN'S L.J. 251-64 (1984). Generally *Norris* is a step in the right direction toward treating employees equally on an individual basis. *See also* Comment, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris: Mandate of Manhart*, 86 W. VA. L. REV. 437 (Winter 1983-84).

132. Variables other than sex include "smoking habits, alcohol consumption, weight, medical history, or family history." *Norris*, 103 S. Ct. at 3495.

The Court decided several other cases that dealt with equality of benefits flowing from employment. In *Newport News Shipbuilding & Drydock Co. v. EEOC*,[133] O'Connor voted with the majority,[134] which held that an employer violated the Pregnancy Discrimination Act (PDA)[135] of Title VII when it provided certain pregnancy-related medical benefits to female employees but not to their male counterparts.[136] The thrust of the PDA, the Court found, was to overturn the Court's 1978 decision in *General Electric v. Gilbert*,[137] which had held that the denial of pregnancy-related medical benefits to female employees did *not* constitute sex discrimination.[138] Now the Court recognized pregnancy-related classifications in employment situations as impermissible sex discrimination.[139] This finding in *Newport News*, which O'Connor supported, was particularly significant for feminists who had been extremely frustrated with the *Gilbert* case.

Feminists had argued, in the wake of the *Gilbert* decision, that the Court had failed to recognize that special or different treatment of pregnancy or pregnancy benefits merely perpetuated gender discrimination; it represented government control of a woman's reproductive choices which a man does not have to endure.[140] When the Court legitimated this special treatment by

133. 103 S. Ct. 2624 (1983) (the EEOC challenged the validity of a medical benefit plan which provided benefits for pregnancy-related expenses for female employees but provided less extensive pregnancy benefits for female spouses of male employees).

134. O'Connor parted with fellow conservative Justice Rehnquist who wrote a vehement dissent. *Id.* at 2632.

135. 42 U.S.C. § 2000e(k) (1981): "The term[] 'because of sex' include[s] . . . on the basis of pregnancy . . . and women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits . . . as persons not so affected but similar in their ability or inability to work." *Id.*

136. 103 S. Ct. at 2627.

137. 429 U.S. 125 (1976).

138. *Id.* at 145-46. *See also* Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (pregnancy discrimination was not a sex classification within the meaning of the fourteenth amendment).

139. *See supra* note 135.

140. Wildman, *supra* note 51, at 301. The Court seems to be confused about how to deal with the biological differences between the sexes in the context of gender equality. It seems unable to reconcile equal participation notions with the fact that the sexes are fundamentally and unchangeably *different*. It has allowed the state to restrict women's reproductive choices because women are different from men (and the male is generally used as the standard from which "*female*" necessarily deviates). The Court has continued to uphold legislation based on biological stereotypes; it has been "side-tracked" by the physical differences between the sexes. *Id.* 301-04.

interpreting it as *not* discrimination on the basis of gender, it participated in limiting women's access to equal participation. The value of women in the economic sphere is affected by these limitations, as is their status in the society generally.[141] The Court has unfortunately recognized and accepted a woman's biological reproductive abilities as a justification for special or different treatment, therefore it has allowed interference with a woman's individual autonomy. A man suffers no such interference. This prerogative which the state claims over a woman's reproductivity but not a man's is a key component in the gender discrimination scheme. As long as women are precluded from reproductive autonomy, they are effectively barred access to participation on an equal basis with their male counterparts. That Sandra O'Connor seemed to agree with the Court's recognition that disparate pregnancy benefits equal sex discrimination was a very encouraging sign to feminists. It would, of course, be unwise to make too much of O'Connor's vote in this matter; the decision was statutorily mandated and did not expand on the equal protection meaning of sex discrimination.[142] Further, O'Connor was not so moved as to write separately as she did in *Mills*.[143]

In a later case, *Hishon v. King & Spalding*,[144] also involving the privileges and benefits of employment, but not related to pregnancy, a unanimous Court held that Title VII prohibitions against sex discrimination applied to the process of considering

---

141. *See* Scales, *supra* note 48, at 375-76. This article focuses on the issue of pregnancy because it illustrates the final battleground in the war for equal treatment of the sexes; the condition of pregnancy, unique to women, has served, historically, as an excuse to limit women's access to the public sphere and to equal participation in society. *Id. See also infra* note 189.

142. This distinction is important because Geduldig v. Aiello, 412 U.S. 484 (1974), is still good law, therefore the present equal protection meaning of sex discrimination does not include in its classification on the basis of pregnancy. Sex discrimination under the Pregnancy Discrimination Act does include pregnancy within its scope. What feminists want the Court to understand is that sex discrimination within the meaning of the Constitution means limitation on access to equal participation. Restricting reproductive control, in the context of pregnancy, abortion, birth control, etc., eliminates equal access and results, therefore, in discrimination on the basis of sex. Wildman, *supra* note 54, at 301-02.

143. *See supra* note 88. Writing a separate opinion is evidence of strong feeling on the issue, and is a good indication of the actual attitude of a Justice. Riggs, *supra* note 9, at 36.

144. 104 S. Ct. 2229 (1984) (a female lawyer alleged that the law firm for which she worked as an associate for six years discriminated on the basis of sex when it did not ask her to become a partner).

associates for partnership in a law firm. The firm had argued that Title VII requirements did not apply to it, rather Title VII was intended to apply only to larger business organizations.[145] In addition, application of the statute would infringe on the first amendment rights of the partnership.[146] The Court disagreed. It found that Title VII attaches once an employment contract relationship commences and it applies to the "terms, conditions or privileges" of that employment.[147] The promise to consider associate lawyers for partnership is a privilege of employment in this context and is therefore subject to Title VII requirements.[148]

The holding in *Hishon* extended the protections of Title VII to the "boys club" realm of the law firm. This was a major step forward for women in a profession which has been and virtually remains predominantly male.[149]

In another case involving women gaining access to a "boys club," the Court in *Roberts v. U.S. Jaycees*,[150] upheld the application of the Minnesota Human Rights Act[151] to compel the Jaycees to accept women as regular members.[152] The Court found that the Jaycees' attempt to shield itself from sex discrimination prohibitions by claiming first amendment rights was inapposite.[153] Although the first amendment protects intimate and

---

145. *Id.* at 2235 n.10 and accompanying text.

146. *Id.* at 2235.

147. *Id.* at 2233-34.

148. *Id.*

149. *See generally* Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, but They're Happy*, 69 A.B.A. J. 1384 (Oct. 1983). Due to male domination in the legal profession, female lawyers are implicitly forced to work harder and juggle more responsibilities. The article also discusses perceptions of female lawyers, how they deal with parenting in conjunction with work, etc. *See also* Fossum, *A Reflection of Portia*, 69 A.B.A. J. 1389 (Oct 1983). Thirty-seven percent of all law students are women. Of 606,000 lawyers in the U.S., 94,000, or 14%, are women, according to the U.S. Bureau of Labor Statistics. *Id.*

150. 104 S. Ct. 3244 (1984) (the Jaycees sought to enjoin enforcement of the Human Rights Act of Minnesota, passed pursuant to the Civil Rights Act of 1964, which prohibited sex discrimination in public accommodations. The Act, if applicable, would strike down the Jaycees' restrictive policy of admitting women only as "associate" members and would compel the organization to admit women as "regular" members).

151. MINN. STAT. § 363.03(3) (1982) defines it as an "unfair discriminatory practice [t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex." *Id.*

152. *Jaycees*, 104 S. Ct. at 3255.

153. *Id.* at 3250-55.

expressive associations,[154] the Court decided that neither characterization shielded the Jaycees in this context.[155] The Jaycees organization was too large and unrestrictive in its membership to constitute a personal or intimate association. It could not be described in terms of smallness, selectivity or seclusion to fall with the former category of association under the first amendment.[156] Although the Jaycees did have the "collective effort" selectivity necessary to fall with the category of expressive advocacy, the state's interest in eradicating gender discrimination outweighed any concerns about infringing on first amendment rights.[157]

Justice O'Connor, although concurring in the result,[158] differed on the proper first amendment analysis. She offered an alternate approach which distinguished between expressive and commercial associations.[159] The Jaycees, she asserted, were primarily involved in the latter and should receive lessened first amendment protections.[160] O'Connor indicated that her analysis would be a more effective protection of women's rights because it would disallow the first amendment shield where the majority's rationale might sustain it.[161]

4. Affirmative Action in Nursing Education

Although her argument in *Jaycees* has been criticized,[162] O'Connor manifested an awareness of the dangers of invidious sex discrimination and the need for the proper judicial mecha-

---

154. *Id.* at 3250.

155. *Id.* at 3251.

156. *Id.* at 3250-51. Characteristics of "intimate associations" involve "personal affiliations" that are small and selective, such as marriage, childbirth, and cohabitation relationships. *Id.*

157. *Jaycees*, 103 S. Ct. at 3252-53. The collective efforts for the shared goal of promoting assimilation of young people into the business community would be unaffected by allowing women as regular members in the organization, hence its expressive nature was not sufficient to warrant first amendment protection. *Id.*

158. *Id.* at 3257. (O'Connor, J., concurring and dissenting).

159. *Id.* at 3258. O'Connor argued that the Jaycees involvement in providing goods and services rendered it commercial speech which should receive less first amendment protection. *Id.* at 3261.

160. *Id.* at 3261.

161. *Id.* at 3257. O'Connor's analysis would protect women who sought access to organizations involved solely in commercial speech, whereas the majority might sustain the first amendment protection in another context due to the expressive aspect of the association. *Id.*

162. *See* Note, *Leading Cases of the 1983 Term: Freedom of Association*, 98 HARV. L. REV. 87, 195 (1984).

nism for eradicating it. This apparent understanding of women's struggles was never more clear than in her analysis of *Mississippi University for Women v. Hogan*.[163] She concluded in her majority opinion that Mississippi University for Women School of Nursing (MUW) could not lawfully deny a male admission to the nursing program solely on the basis of his sex.[164] O'Connor utilized a value- or sex-neutral analysis on the sex discrimination claim.[165] This analysis involved a double hurdle test which first seeks to determine the *actual* purpose of the state restriction or classification, and whether it is an important purpose. Second, it asks whether the gender classification (the "means") is substantially related to the state's important purpose or interest (the asserted "end").[166]

MUW asserted that its purpose was to compensate women for the effects of past discrimination through a form of educational affirmative action.[167] Justice O'Connor, however, found first that MUW had not provided any evidence to support the assertion that women had suffered from discrimination in the nursing profession in the past.[168] She argued that even if such evidence were provided, MUW was causing harm under the guise of affirmative action. She pointed out that the school's sex-based admission policy tended to "perpetuate the stereotyped view of nursing as an exclusively woman's job."[169] By reserving the program for women alone, MUW had created the "self-fulfil-

163. 458 U.S. 718 (1982) (a male nurse alleged that a state supported college of nursing discriminated on the basis of sex within the meaning of the equal protection clause of the fourteenth amendment when it denied him admission to the program because he was male).

164. *Id.* at 733.

165. *See* Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983). The value-neutral analysis asserts that *any* sex-based classification must be carefully tailored to serve recognized and important state interests. The underlying biological differentiation between the sexes is inherently suspect as a justification because of the dangers of creating or reinforcing gender stereotypes. Therefore, a test which is virtually blind to gender and which examines strictly the means-ends relationship to the asserted state purpose is preferred. *Id.* at 949-60. *See* Craig v. Boren, 429 U.S. 190 (1976). This case illustrates the middle tier of scrutiny now associated with sex discrimination cases. It is more rigorous than differential minimal scrutiny, but not as rigorous as the strict scrutiny utilized in race cases. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (Brennan, J., plurality opinion) (application of strict scrutiny in an equal protection sex discrimination case failed to get majority support).

166. Freedman, *supra* note 165, at 949-51.

167. *Hogan*, 458 U.S. at 727.

168. *Id.* at 728-29.

169. *Id.* at 729.

ling prophecy"[170] that nursing is, and will continue to be, women's work. O'Connor warned that "[c]are must be taken in ascertaining whether the statutory objective *itself* reflects archaic and stereotypic notions."[171] She found that the purpose of compensating women for past harms done was impermissible here. The admission policy in itself was a reflection of the kind of harm it purported to correct. It mirrored traditional, paternalistic notions about women, rather than rectifying any alleged wrong.[172]

O'Connor went on to say that even if the purpose were valid, the admissions restriction did little to effect that purpose since men were allowed to audit courses in the nursing program.[173] Since neither the actual purpose nor the tailoring of the means to achieve certain goals could satisfy the test, O'Connor found the sex-based classification unconstitutional under the equal protection clause of the fourteenth amendment.[174]

In separate dissenting opinions, Chief Justice Burger[175] and Justice Blackmun[176] each focused on their concern that the majority opinion threatened to render all single sex education institutions unconstitutional, even though O'Connor stressed that the decision was limited to the facts of the case.[177] Although her language was eloquent on the dangers and subtle effects of stereotype-based legislation, much of her decision was limited by the unique nature of the nursing profession, which has long been recognized as a sex-segregated profession.[178]

---

170. *Id.* at 730.

171. *Id.* at 725 (emphasis added).

172. *Hogan*, 458 U.S. at 729-30.

173. *Id.* at 730-31. O'Connor was referring to the second part of the equal protection-sex discrimination analysis which requires the state's classification to be substantially related to its objective. *Id.*

174. *Id.* at 733.

175. *Id.* (Burger, C.J., dissenting).

176. *Id.* (Blackmun, J., dissenting).

177. *Hogan*, 458 U.S. at 723 n.7, limiting the scope of the decision to Mississippi University for Women School of Nursing.

178. *Id.* at 729-30. The existing stereotype which labels nursing as women's work made this intermediate level of analysis easy to apply. The conflict between the state purpose and the means used to achieve it is fairly clear. Such clarity is unique to this case. There is no indication, however, that O'Connor will abandon this analysis when the facts are not so suitable.

Powell's dissent[179] discussed at length the need to preserve choices for women, while O'Connor stressed the dangers of limiting choices for women through institutionalized sex-stereotyping. Feminists applauded this latter emphasis.[180] Classifications which are ostensibly aimed at protecting or assisting women can, in effect, create or perpetuate stereotypes that are harmful to both sexes. The danger lies in codifying role expectations that limit the opportunity for equal participation by both sexes in society. Feminists support a level of scrutiny which delves into the subtle effect of such legislation.[181] Such an analysis exposes the stereotyped basis of the reasoning behind the legislation and therefore reveals the harm of the classification.[182]

O'Connor's adoption of this kind of value-neutral, heightened analysis was a welcome surprise to feminists. It ran counter to the conservative reputation she had built for herself on other issues.[183] She won extensive feminist praise in the wake of *Hogan*[184] because she so willingly attacked the legislative justification for the sex classification and so strongly supported the feminist position which rejects the biological and cultural strictures limiting women's access to political and social participation.[185] It was encouraging for feminists to observe O'Connor's departure from her previously-held interpretivist[186] stance to include in her opinion a broader recognition of the subtle barriers to

---

179. *Id.* at 735, 737-38 (Powell, J., dissenting).

180. *See, e.g.*, Note, *Reinforcement of Middle Level Review Regarding Gender Classifications: Mississippi University for Women v. Hogan*, 11 PEPPERDINE L. REV. 421 (1984) (generally supporting the *Hogan* analysis). *See also* Note, *Sex Discrimination in Higher Education—The U.S. Supreme Court and a Bastion of Tradition: Mississippi University for Women v. Hogan*, 1983 S. ILL. U.L.J. 71 (1983) (suggesting the potential for expansion of the holding to all single-sex education institutions). *But see* Miller, *The Future of Private Women's Colleges*, 7 HARV. WOMEN'S L.J. 153 (1984) (arguing that the ramifications of expanding *Hogan* would be *injurious* to sex equality). "As an alternative institution designed to give power to a powerless class of people, the woman-centered university should be allowed to experiment with new ideas and educational forms. [T]hey must . . . argue . . . that voluntary separatism does not violate the fourteenth amendment . . . ." *Id.* at 187.

181. *See* Freedman, *supra* note 165, at 968.

182. *Id.* at 952.

183. *See supra* notes 71-73 and accompanying text.

184. *See, e.g.*, Freedman, *supra* note 165, at 958-65.

185. *Id.* at 965-68. *See* Williams, *supra* note 42, at 175. These articles discuss the difficulties of escaping the biological and cultural role expectations surrounding gender when defining and redefining sex equality. *See also* Wildman, *supra* note 54, at 265-69.

186. *See supra* note 119 for definition of "interpretivism."

women's progress in society.[187]

D. *The Abortion Issue*

O'Connor's sensitivity to the disadvantages women suffer from the oppression of stereotypic role expectations suggested that she might be sensitive to the oppression of women in the context of abortion restrictions.[188] O'Connor could correlate her analysis regarding limitations on women's rights at MUW to the realm of reproductive autonomy.[189]

As noted above, Justice O'Connor had expressed her personal opposition to abortion but had never had the opportunity to rule on an abortion case. She had presented herself as an interpretivist and did not favor expanding broadly on the words of the Constitution. Because the right to choose an abortion was first recognized in *Roe v. Wade*[190] under the "concept of personal liberty"[191] and the right to privacy within the due process clause of the fourteenth amendment, and not in the express language of the Constitution itself,[192] there was a good possibility

187. *See supra* notes 42, 169-72 and accompanying text for discussion on the difficulties of overcoming cultural barriers to sex equality.

188. Wildman, *supra* note 51, at 301. O'Connor's understanding of the state's mishandling and misunderstanding of women's rights at Mississippi University for Women might translate to recognition of a woman's right to be free from legislative meddling in her individual sovereignty. Kerr, *supra* note 5, at 84.

189. *See* Wildman, *supra* note 51, at 301-04. Abortion, pregnancy, birth control and other matters related to a woman's reproductivity all touch on the main issue of sex discrimination since legislative efforts to control these matters result in limiting women's access to full participation in society. All, then, are sex discrimination issues and all raise similar equal protection questions. *Id.*

190. 410 U.S. 113 (1973).

191. *Id.* at 153.

192. *See id.* at 152-53, for discussion of the origins of the right to privacy and the kinds of rights it encompasses. Only those personal rights that can be called "fundamental" may be included in the right of personal privacy. *Id.* at 152. The *Roe* case established within the right to privacy a limited right for a woman to choose to terminate her pregnancy. *Id.* at 153. This qualified right to choose an abortion cannot be infringed upon by the state without a compelling interest. Although the Court recognized the state had an interest both in the health of the mother and in the potentiality of human life, the Court said these only reach a compelling level at certain stages during the pregnancy. *Id.* at 155. This has been called the trimester framework which roughly describes the time and extent to which a state may regulate a woman's right to choose an abortion. The state's interest in the woman's health becomes compelling at approximately the beginning of the second trimester. At that time the state may regulate abortions, if the regulations are necessarily related to the asserted interest. *Id.* at 164-65. The state may proscribe abortions altogether when its interest in the potentiality of human life attaches at approximately the beginning of the third trimester. *Id.* at 163-64. *See also* Griswold v.

that O'Connor might not support either the right or the *Roe* decision. As a conservative and an advocate of judicial restraint, she could be expected to be critical of this technique of "finding" rights without express Constitutional wording.[193] Previously, Justice O'Connor had not looked favorably upon this kind of "judge-made" law.[194] Feminists were unable to predict to their satisfaction O'Connor's reaction to the series of abortion cases that came before the Court.

1. Disappointment on a Critical Issue

In the lead case, *City of Akron v. Akron Center for Reproductive Health*,[195] the Court held, per Justice Powell, that a series of restrictions on abortions in an Akron ordinance[196] violated a woman's right to choose to have an abortion.[197] These restrictions included the following requirements: a) that all second trimester abortions be performed in a hospital; b) that notice to and consent from the parents of an unmarried minor under fifteen be obtained; c) that the attending physician make certain specified statements to insure consent is "informed consent;" d) that the physician observe a twenty-four hour waiting period after the patient signs the consent form; e) that the fetal remains be disposed of in a "humane and sanitary" fashion.[198]

The Court found that these requirements, without sufficient justification, too heavily burdened the exercise of the right to choose to have an abortion.[199] While the Court expressly reaffirmed *Roe*,[200] it refined the trimester framework analysis enunciated in that case by incorporating into it recognition of the medical advances made since the time of *Roe*.[201] These advances make abortions performed during the early portion of the second trimester much safer than before. Therefore, although the

Connecticut, 381 U.S. 479 (1965), for the origins of the right to privacy.

193. *See supra* notes 25-28 and accompanying text for a discussion on O'Connor's attitude toward "creative" or judge-made law.

194. *Id.*

195. 103 S. Ct. 2481 (1983).

196. Akron, Oh., Codified Ordinances ch. 1870 (1978).

197. *See supra* note 192 and accompanying text.

198. Akron, Oh., Codified Ordinances §§ 1870.03, .05-.07, .16 (1978).

199. 103 S. Ct. at 2504.

200. *Id.* at 2487.

201. *Id.* at 2495-97.

state's interest in maternal health still becomes compelling at approximately the beginning of the second trimester, that interest must be protected by regulations that contemplate both relevant medical advances and the preservation of the discretion of the attending physician in the relationship with his or her patient.[202] With this in mind, the requirement that all second trimester abortions be performed in a full service hospital infringes on a woman's right to choose an abortion because it does not take into account the safety with which early second trimester abortions may be done in less expensive, out-patient facilities.[203] It is not reasonable to require hospitalization in those cases where maternal health can be adequately protected at a clinic.[204]

The Court next held that the parental consent requirement did not provide alternate means for the minor to establish that she is emotionally mature enough to make the abortion decision herself.[205] Without that alternate procedure, the parental consent restriction was essentially a veto power by a third party and therefore unconstitutional.[206]

The Court decided that the requirement that a physician recite a prescribed litany in order to establish that the woman seeking an abortion had given true "informed consent" usurped the physician's professional judgment.[207] Not only was the prescribed litany an "undesired and uncomfortable strait jacket"[208] to the physician, but it also "is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[209] Among other things, the ordinance required that the doctor tell the patient that the fetus is a human life from the moment of conception,[210] and that the doctor continue with a detailed

202. *Id.*

203. *Id.*

204. *Akron*, 103 S. Ct. at 2497.

205. *Id.* at 2498. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (parental consent requirements were unconstitutional if they represent a "blanket" veto provision. But if a satisfactory procedure were set up through which a minor may establish her maturity for the purposes of the abortion decision, such a requirement might stand).

206. *Akron*, 103 S. Ct. at 2498-99.

207. *Id.* at 2500.

208. *Id.* at 2499 (quoting *Danforth*, 428 U.S. at 67 n.8).

209. *Id.* at 2500.

210. *Id.* The Court pointed out that such a requirement is inconsistent with *Roe*

description of the development of the fetus—its ability to feel pain, the psychological ramifications of the abortion[211]—all constituting a virtual " 'parade of horribles.' "[212] Although the state's legitimate interest in the woman's health was furthered through a general "informed consent" requirement,[213] it did not follow that the state may prescribe the contents of the informed consent or purport to establish what constitutes informed consent. To the extent a state requires a doctor to recite a particular "list" of information, it has unreasonably prevented the physician from following his or her own judgment, upon which the patient is relying.[214] A consent requirement which leaves room for the physician's discretion and actually goes to informing the patient of pertinent facts regarding her particular condition and her choice of abortion is constitutionally permitted.[215] However, it was unreasonable to require the doctor personally to inform the patient when that duty could easily be delegated to other qualified personnel.[216]

The Court disposed of the twenty-four hour waiting period as impermissibly arbitrary; the state had failed to present sufficient evidence to establish that the requirement furthered the alleged purpose of insuring full and informed consent.[217] The waiting period merely served to financially and emotionally burden women by forcing them to make at least two trips to obtain an abortion.[218] It also limited the doctor's discretion regarding the timing of the procedure, and increased the health risks through unnecessary delay.[219] Finally the Court held that the requirements with respect to the disposal of the remains of the

---

which held a state may not adopt a theory of when "life" begins to justify its regulation of abortion. *Id.* (citing *Roe*, 410 U.S. at 159-62).

211. *Akron*, 103 S. Ct. at 2500.

212. *Id.*

213. *Id.* at 2501. "[A] state may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion . . . [through] general subject matter relevant to informed consent." *Id.*

214. *Id.*

215. *Id.* at 2501.

216. *Akron*, 103 S. Ct. at 2501-02. "[T]he critical factor is whether [the woman] obtains the necessary information . . . from a qualified person, not the identity of the person from whom she obtains it." *Id.*

217. *Id.* at 2503.

218. *Id.*

219. *Id.*

fetus were unconstitutionally vague.[220]

In two companion cases, the Court dealt with similar restrictions with varying outcomes. In *Planned Parenthood v. Ashcroft*,[221] the Court held a series of abortion requirements constitutional.[222] These included a requirement that a pathology report follow every abortion, a parental consent requirement for unmarried, minor women, and a requirement that a second physician be present during an abortion performed after "viability" of the fetus.[223] Five members of the Court, however, could not agree on the rationale.[224] A majority of the justices merely agreed, for different reasons, that the state's reasons for establishing the requirements were sufficiently justified and that the burdens on a woman's right to choose an abortion were not prohibitive.[225] Justice Powell, writing for himself and Chief Justice Burger,[226] argued that the pathology report on the fetus furthered the state's compelling interest in discovering any abnormalities which could affect the woman's health.[227] The burden on the exercise of the right to choose abortion was not significant, nor was the cost sufficiently affected to be prohibitive.[228] Similarly, the requirement that a second physician attend an abortion performed after viability[229] for the purpose of protecting the unborn child was a permissible exercise of the state's power to protect the potentiality of human life.[230] Finally, the parental consent requirement contained the requisite alternate

220. *Id.* at 2504.

221. 103 S. Ct. 2517 (1983).

222. A hospital requirement, MO. ANN. STAT. § 188.025 (Vernon 1983), similar to that in *Akron* was held unconstitutional for the same reasons. *Id.* at 2520.

223. MO. ANN. STAT. §§ 188.028, 188.030, 188.047 (Vernon 1983).

224. Justice Powell announced the judgment of the Court and an opinion, joined by Chief Justice Burger. *Ashcroft*, 103 S. Ct. at 2518. Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, dissented from all but the hospital finding. *Id.* at 2526. Justice O'Connor, joined by Justices White and Rehnquist, dissented from the hospital finding and from Powell's reasoning, though she concurred in the balance of the findings. *Id.* at 2532. *See infra* notes 239-64 and accompanying text where O'Connor's dissent is discussed.

225. *Ashcroft*, 103 S. Ct. at 2526 (judgment of the Court).

226. *Id.* at 2518.

227. *Id.* at 2524-25.

228. *Id.* The Court viewed the pathology report as "a relatively insignificant" record keeping burden. *Id.* at 2524-25.

229. " 'Viability' is defined as 'that point at which the fetus . . . [is] potentially able to live outside the mother's womb, albeit with artificial aid.' " City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. at 2505 n.1 (quoting *Roe*, 410 U.S. at 160).

230. *Id.* at 2522.

means through which the minor could establish her maturity to make the abortion decision.[231]

The liberal bloc joined Justice Blackmun in dissenting[232] from these findings. He argued that the requirements were improperly tailored to meet the asserted state interests and unconstitutionally infringed upon a woman's right to choose to have an abortion.[233]

In the final case, *Simopoulos v. Virginia*,[234] the Court upheld a statute requiring that second trimester abortions be performed in a licensed hospital.[235] The Court carefully pointed out that "hospital" in the statute did not mean solely full-service hospitals but also included properly equipped outpatient clinics. This broader definition distinguishes the Virginia statute from those in *Akron* and *Ashcroft*.[236] The state legitimately furthered its interest in protecting maternal health by insuring that the facilities which provide abortions are safe and operating within accepted medical standards.[237] In addition, the requirement that second trimester abortions take place in a licensed clinic left the method and timing of the abortion precisely where they belong—with the physician and the patient.[238]

Justice O'Connor dissented strenuously in the *Akron* case.[239] In her separate opinions in both *Ashcroft*[240] and *Simo-*

231. *Ashcroft*, 103 S. Ct. at 2526. *See supra* note 205 discussing parental consent requirements generally.

232. *Id.* (Blackmun, J., dissenting). Blackmun argued it was an extraordinary burden to require a pathology report for all abortions when, for other medical procedures, they were only called for if the physician observed something abnormal in the tissue. *Id.* at 2517. The requirement of a second physician at post-viability abortions was not tailored properly to state interests because more often than not there was no chance for the fetus to be born alive. *Id.* at 2529-30. Blackmun also argued that the parental consent requirement represented a blanket veto power and that the alternate judicial procedure described was also contrary to a minor's privacy rights. *Id.* at 2531-32.

233. *Id.* at 2526-27.

234. 103 S. Ct. 2532 (1983).

235. *Id.* at 2540. VA. CODE §§ 18.2-73 (1950).

236. *Id.* at 2536-38 nn.5-6 and accompanying text. The Court explains the statutory meaning of "hospital" as including outpatient surgical clinics.

237. *Id.* at 2539-40.

238. *Id.* at 2540.

239. *Akron*, 103 S. Ct. at 2504 (O'Connor, J., dissenting).

240. *Ashcroft*, 103 S. Ct. at 2532 (O'Connor, J., concurring and dissenting).

poulos,[241] she agreed with the result but dissented from the rationale. She based her decisions on an analysis entirely different from the majority.

In all three opinions, O'Connor argued that the trimester framework was unworkable. She suggested that the majority in *Akron* demonstrated the trimester weaknesses by admitting that the state has a compelling interest which attaches at approximately the commencement of the second trimester, while at the same time the Court tinkered with the state's ability to protect that interest where medicine had made certain advances.[242] The result, O'Connor said, was to burden the state legislature with a duty to conduct extensive research into the medical field to determine the latest advances whenever the state wanted to protect, through regulation, its legitimate interest in maternal health or in the potentiality of human life.[243] What the Court ought to have done, she asserted, was adopt an analysis which utilized the "undue burden" test.[244] That test disregards the trimester framework altogether and defines the state's interest as compelling throughout the entire pregnancy.[245] To suggest that at the later stages of a woman's pregnancy, the state's interest is compelling, while earlier it is not, was arbitrary. O'Connor insisted that the only consistent approach is to recognize that the state's interest is compelling at conception.[246] The state should be able to protect its interests, in both maternal health and the potentiality of human life, without close scrutiny unless the regulation places an undue burden on the right to choose to have an abortion.[247] In other words, unless the state substantially prevents a woman from exercising her right,[248] the state regulation need only be rationally related to the interest it seeks to protect.[249] According to O'Connor, none of the challenged regula-

241. *Simopoulos*, 103 S. Ct. at 2540 (O'Connor, J., concurring in part and concurring in the judgment).

242. *Akron*, 103 S. Ct. at 2504-06.

243. *Id.* at 2506-07.

244. *Id.* at 2505.

245. *Id.*

246. *Id.* at 2509.

247. *Id.* at 2509-11. O'Connor argued that state restrictions which impose *severe* criminal sanctions or an *absolute* spousal consent requirement would create an "undue burden." *Id.* at n.8 (emphasis added; citations omitted) and 2509-11.

248. *Id.* at 2510-11.

249. *Id.*

tions exerted an undue burden on a woman's access to an abortion. In all three cases, a woman was not substantially prevented from obtaining an abortion and the regulations were reasonably related to protecting the state's compelling interests.[250] Therefore, all the regulations should have been found constitutional.

The *Akron* majority pointed out that though O'Connor would stop short of overruling *Roe*, her analysis "is wholly incompatible with the existence of the fundamental right recognized [therein]."[251] Indeed, O'Connor completely ignored *Roe* as precedent by dismissing it as a decision unable to weather the passage of time and, therefore, not capable of being binding.[252] Her unfortunate response to the problems with the Court's analysis and its reliance on *Roe* in *Akron* and the other cases, was to barely recognize the fundamental right to choose to have an abortion.[253] Further, by constructing a test which extends the compelling interests of the state and lowers the threshold of relation which its regulations must reach, she would severely limit whatever right she thinks *may* exist. By neither affording the right much credence nor requiring much justification for the state's regulations, O'Connor would effectively destroy the right altogether.[254]

Justice O'Connor's failure to support this fundamental right was a severe blow to feminists who had cautiously suggested that, based on her strong adherence to a state's autonomy versus federal intervention, and in view of her sensitivity to sexual ste-

---

250. In both *Ashcroft* and *Simopoulos*, O'Connor concurred in the judgments upholding the restrictions at issue but she dissented from any reliance on the trimester framework. By her "undue burden" analysis, she found none of the regulations place significant burdens on a woman's right to choose an abortion. *Ashcroft*, 103 S. Ct. at 2532; *Simopoulos*, 103 S. Ct. at 2540.

251. *Akron*, 103 S. Ct. at 2487-88 n.1.

252. *Id.* at 2508.

253. *E.g.*, O'Connor said, "*Even assuming that there is a fundamental right* to terminate pregnancy . . . ." *Id.* (emphasis added). Such careful wording suggests she has no confidence in the "right" or in the *Roe* decision which established it. In fact, she escaped *Roe* as precedent by arguing that the trimester framework is constructed in such a way as to create its own obsolescence. Medical advances over time are constantly changing the meaning of the *Roe* framework; it cannot survive the passage of time as good decisions ought. It should not, therefore, serve as a constraint on the Court through stare decisis. Thus, O'Connor ignored *Roe* and proceeded to question the right it articulated. *Id.*

254. *See supra* notes 248, 252, and accompanying text. *See also infra* notes 258-63 and accompanying text.

reotyping and discrimination, her philosophy could be reconciled with the right of a woman to choose to have an abortion.[255] Had O'Connor been willing to recognize a woman's reproductive autonomy as an "inner realm" or a personal sovereignty that ought to be free from outside interference, her decision might have been different.[256] Obviously, O'Connor chose to defer to the legislature, especially since the right in question had been judicially created without any express mandate from the Constitution.[257]

Where O'Connor failed to meet feminist expectations, the *Akron* majority did little better. Although the Court did reaffirm *Roe* and the existence of the fundamental right to choose to have an abortion, it expanded the importance of the physician's role. The unfortunate result of *Akron* is that it focused more on a doctor's right to exercise his or her professional judgment than on a woman's right to exercise a constitutionally protected interest.[258]

In addition, the Court based a significant portion of its rationale on advances in medicine. O'Connor pointed out a rather intriguing problem which the majority has created for itself. By emphasizing the key importance of medical advances in determining the nature and extent of permissible state regulations, the majority analysis has put itself on a collision course with its own reasoning.[259] While medical technology pushes forward the time at which a safe abortion may be performed, it is at the same time pushing back the point of viability of the fetus. With the Court relying so heavily on the status of medical technology in its rationale rather than on a woman's fundamental right, the snake-eating-its-tail potential could become a reality. When the collision occurs, and certainly it will some day, the Court will face a tremendous dilemma: how to reconcile the conflicting and

255. Kerr, *supra* note 4, at 71, 84.

256. *Id. See also supra* note 48 and accompanying test.

257. *Supra* note 193 and accompanying text.

258. Note, *The Supreme Court, 1982 Term—Due Process*, 97 HARV. L. REV. 70, 78 (1983). The rationale of the Court in *Akron* depends more on preserving the discretion of doctors than on the rights of women. This insulates the Court from some of the controversy surrounding the moral issues but it leaves the right to choose an abortion vulnerable to attacks on funding, or minors, etc. In addition, it virtually replaces the state's restrictions with the doctor's control, leaving women still at the hands of another's discretion. *Id.* at 84-85. *See* Wildman, *supra* note 51, at 302-03 and accompanying text.

259. 103 S. Ct. at 2506. *See* Note, *supra* note 258; *see also infra* note 262.

concurrent interests of a woman's right to choose an abortion and the state's interest in the potentiality of human life.[260]

Feminists reaped a hollow victory in the majority opinion in *Akron*,[261] and no victory whatsoever in Justice O'Connor's analysis.[262] Without any strong endorsement of this essential but vulnerable right, the survival of a woman's choice to have an abortion seems precarious.

III. CONCLUSION

Sandra Day O'Connor has excelled as a symbol of achievement and recognition for women. She has demonstrated skill, professionalism, and dignity in a position which had been exclusively male for nearly 200 years. Presumably, she has opened the door to this male sanctum so that women will be considered on an equal basis with men for future appointments.[263] She symbolizes a milestone in women's history. However, for feminist expectations of a positive effect on women's rights, she has been less than a success.

Her record on gender discrimination in employment and education is comparatively strong. However, her treatment of the abortion cases was abysmal. She failed to recognize that comprehensive reproductive autonomy is basic to women's struggle for access to full and equal participation in all aspects of society. Without that fundamental understanding, Justice O'Connor has fallen short of feminist expectations. Where feminists hoped O'Connor's experiences as a woman in a modern society would lead to some insight into the need for legal recognition of reproductive autonomy, she retreated to the familiar conservative

260. Note, *supra* note 258, at 86. The precarious victory in the majority opinion in itself "erodes women's abortion rights even as it purports to affirm them." *Id.*

261. *Id. See also* Note, *supra* note 258, at 86.

262. Note, *Constitutional Law—Right to Privacy—Municipal Roadblock to Abortion Denounced—City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983)*, 14 SETON HALL L. REV. 658 (1984). Even recognizing the problems with the *Roe* framework, O'Connor's solution is "unsatisfactory" in its treatment of the right to terminate pregnancy. *Id.* at 681.

263. Some feminists and Court observers suspect that O'Connor has merely established a woman's seat and the remainder of the Court will continue as male. *See* Slotnik, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE U.L. REV. 519, 519 (1984). "O'Connor's appointment . . . perhaps sets a precedent for a "women's seat" on the Court analogous to the "seats" sometimes attributed to regional, ethnic, religious and, more recently, racial interests." *Id.*

doctrines of restraint and deference. Feminists had expected her decision-making process to be affected not only by her conservative background and philosophy, but by her gender as well. They wanted O'Connor to reconcile the tension between these two themes and emerge with a feminist perspective broad enough to encompass reproductive rights. Clearly this did not come to pass.

Feminists are left with a symbolic achievement for women but no positive, concrete gains in women's rights. Justice Sandra Day O'Connor is then a token for feminists, "having semblance of the real thing, but having no substance,"[264] effecting no significant change in the Court's perception of gender discrimination. Justice O'Connor is only a symbolic triumph; as a substantive achievement for women, she has failed.

*Margaret A. Miller**

264. WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2404 (4th Ed. 1976).

* Golden Gate University School of Law, Class of 1986.