



Justice O'Connor with Justices

Anthony Kennedy (at left)

and Stephen Breyer

An Interview with  
Associate Justice  
**Sandra Day O'Connor**

When three US Supreme Court Justices met at Cardozo with eight of their counterparts from the Court of Justice of the European Union, they discussed ways that their courts and procedures were similar as well as different in an effort to discover how they can learn from each other. Prior to the meeting, David Rudenstine, Dr. Herman George & Kate Kaiser Professor of Constitutional Law, sat down with Associate Justice Sandra Day O'Connor, the most senior member of the US delegation, to discuss her thoughts about the day's conference and to gain insight on the first woman appointed to the highest court in the land.



Justice O'Connor with  
Judge Leif Sevón of the Court of Justice  
of the European Communities

Canada. Canada has a Charter of Rights and Freedoms that is parallel to our Bill of Rights—it is not identical but similar. They have faced many of the same issues we have and at roughly the same time. It is my sense that we have not paid close attention institutionally to the jurisprudence of Canada or other nations. I think that's changing.

RUDENSTINE: As Justices consider a particular case that has been briefed and argued and read, would you then also consider reading opinions of a supreme court or a constitutional court in some other land as a way of gaining additional insight on our own traditions or interpretations?

O'CONNOR: I would, if it were an issue that had a close parallel in decisions of that other country. I would be interested to know how they handled it, yes.

RUDENSTINE: In any opinion that you have offered, do you recall citing an opinion of a foreign court?

O'CONNOR: Yes, but I don't have specifics to give you this morning.

It is a good thing to do occasionally. Let me give you some examples. We had a case not long ago involving state laws governing physician-assisted suicide. We have virtually no experience of that in this country—none. And that was a case where we had some very useful amicus briefs and materials that brought before us the experience of other countries, such as the Netherlands. I found that this was very useful, and I suspect that if we looked we would see some of these materials cited. I also recall that in some of the cases in which our court was looking at state laws governing abortion, it was very interesting to look at comparative experiences in other western nations. I suspect that we would find cited some of those materials as well.

RUDENSTINE: When looking at the history of the Supreme Court and the dialogue that goes on among justices and scholars over how to interpret and apply the United States Constitution, there is no evidence that we have looked to Italy and France and Germany or any other country for ways to interpret or rule on cases and legislation.

O'CONNOR: Historically courts in this country have been insulated. We do not look beyond our borders for precedents. When I went to law school, which after all was back in the dark ages, we never looked beyond our borders for precedents. As a state court judge, it never would have occurred to me to do so, and when I got to the Supreme Court, it was very much the same. We just didn't do it. Occasionally we have to interpret an international treaty—one, perhaps, affecting airlines and liability for injury to passengers or damage to goods. Then, of course, we have to look to the precedents of other member nations in resolving issues. But short of that, we have tended not to pay any attention to what other countries were doing. Yet most countries, at least in the western world, face similar issues from time to time. Look at

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RUDENSTINE: During the course of the year, as you meet with circuit court judges and district court judges at conferences, meetings, and lectures, is it your sense that this international flavor is having a trickle-down effect as well?

O'CONNOR: All over the country federal courts are facing certain international law issues as a result of treaties like NAFTA. If you go to the Ninth Circuit and other areas closely affected by NAFTA, you will begin to see some cases raising issues with international import: enforceability of judgments, taking depositions. What about the enforcement of orders from some decision-making body established by NAFTA itself as opposed to a judicial judgment?

Certainly we have had to face extradition of people to and from this country that invoke international issues. Our court has had a couple of cases involving the alleged failure of state prosecutors to advise criminal defendants who are nationals of another country that there is a consul from their country with a certain address, with whom they may wish to consult, as is required by the Vienna Convention. When that obligation is not observed, an important issue of international law is presented.

I have had some contact with various circuit court judges to explore the possibility of having circuit conference programs address issues in international law. There is a great deal of interest in this kind of program. I will participate on a panel this summer at the Ninth Circuit conference focusing on international law issues.

RUDENSTINE: Let me shift ground if I might. When you have a difficult case, besides perhaps consulting other precedents and decisions of other countries, are there any figures in American jurisprudence—and let's just talk for the moment about figures who are no longer on the court—to whom you turn with any regularity for insight, perspective, and wisdom?

O'CONNOR: I have found it most helpful, when I have a particularly tough legal issue at the court, to find some opinion by Justice Harlan [John Marshall Harlan (1955–1971)] to see how he would deal with that issue. He was a very thoughtful justice. And he dealt with issues so fairly and so well. It's a joy to find them! Inter-

estingly enough, on the issues of federalism I think Justice Frankfurter [Felix Frankfurter (1939–1962)] offers a lot of insights. You wouldn't expect that, would you, but he did. You can find the writings of many past justices helpful, depending on the issue and the circumstance.

RUDENSTINE: It's interesting to hear the two that you do cite, because in my own experience in the classroom, I would flag both of them, especially Justice Harlan, for letting you know exactly what's on their minds. You might not agree with him, you might come at it a different way, but there's no way to walk away from a Harlan opinion without thinking he's...

O'CONNOR: He's thought it through.

RUDENSTINE: And he's told you what he thinks. Is that partially the quality that you find?

O'CONNOR: Well, yes, and it seems to me that he evaluated issues in a very fair, equitable manner. He had a balanced and objective approach, I think, to everything that I've seen of his opinions.

RUDENSTINE: In thinking about what to ask you this morning, I asked my daughter, who is a high school senior, "As you know, Justice O'Connor is the first woman to be appointed to the US Supreme Court. If you had a chance, what kind of questions would you ask her?" And then I got about 12! So let me run down the list very quickly. I think they are all part of the same piece of cloth. What was it like when you were first appointed and became a member of the court? Was there awkwardness or hostility of any kind that you experienced? Did that change over the years? Did it particularly change when Justice Ginsburg arrived?

O'CONNOR: There was no hostility at the court when I arrived. The fact is, we are a nine-member court that sits on cases. When there are only eight members, it does not function right, particularly in those days when it often divided four to four. The members of the court were just delighted to have a ninth member—male or female. They were all kind and welcoming. What was a problem was the excessive amount of media attention to the appointment of the first woman and everything she did. Everywhere that Sandra went, the press was sure to

go. And that got tiresome; it was stressful. I didn't like it. I don't think my husband liked it. It was a constant presence. And over the years, just because I was somehow symbolic of something different on the court, when the court would hand down a decision, there would be a little add-on: What did Justice O'Connor do in the case? This changed dramatically with the arrival of Justice Ginsburg. All of a sudden there were two women and we all became "fungible" justices, and that was an enormous help. Justice Ginsburg is a very competent justice, and it is a joy to have her on the court, but particularly for me it is a pleasure to have a second woman on the court.

RUDENSTINE: Over the period of the past fifteen or so years, do you have a sense that the standing and position of women in the profession as a whole has changed as a result of your appointment to the high court?

O'CONNOR: Clearly it has. When I was nominated in 1981, and took the position, it was incredible to see doors opening for women around the world on courts and for other positions, too. And law schools became more open. More young women started attending law school. It's now half and half, at least, if not more.

My concern was whether I could do the job of a justice well enough to convince the nation that my appointment was the right move. If I stumbled badly in doing the job, I think it would have made life more difficult for women, and that was a great concern of mine and still is.

RUDENSTINE: As you experienced that responsibility, especially during your early months or years on the court, were there opinions that you had the responsibility to author where you really felt this more acutely?

O'CONNOR: Any time there was an issue involving any kind of gender discrimination, there would be a particular focus on "what is the woman justice going to do?" *Mississippi University for Women v. Hogan* [1982], for ex-



David Rudenstine with Justice O'Connor

ample, was a case in which there was a great deal of press attention, and I ended up writing the majority opinion. So that was a focal point. The abortion cases produced an enormous amount of mail to my chambers, vastly more than to the other chambers, I am sure. I sometimes thought there wasn't a woman in the United States who didn't write me a letter on one side or the other of that issue. I have two secretaries, and we were incapable of opening all the mail. We physically could not do it in a normal working day.

RUDENSTINE: As you move around from forum to forum, especially when you meet with international jurists and lawyers, there must be times when there are conversations about the role of the Supreme Court in American life. In my experience, this international group has a hard time really appreciating what that role is, what it may have been in the past, and what it might be in the future. How do you reflect on that role, and how do you describe it in your conversations?

O'CONNOR: My sense is that jurists from other nations around the world understand that our court occupies a very special place in the American system, and that the court is rather well regarded in comparison, perhaps, to their own. It is also my sense that jurists from other nations believe our court has broader powers than most of theirs have in terms of, for example, declaring a legislative enactment unconstitutional.

Many courts don't have the power of judicial review of acts of legislation. Most high courts in other nations do not have discretion, such as we enjoy, in selecting the cases that the high court reviews. Our court is virtually alone in the amount of discretion it has. We are constantly grateful that Congress has seen fit to give the court that amount of discretion. We would drown in cases otherwise—cases that neither warrant nor merit the attention of the nine-member court. ■

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