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4 Decisions For Which Justice O'Connor Will Be Remembered

By **Erin Coe**

Law360 (December 1, 2023, 4:13 PM EST) -- Many of the hotly divided cases at the U.S. Supreme Court came down to Justice Sandra Day O'Connor, a central force on the bench whose savviness at striking compromises and taking a pragmatic approach to resolve disputes is on full display in several opinions.

During her tenure on the high court from 1981 to 2006, Justice O'Connor was the justice many petitioners and amici curiae would write to, and some didn't bother hiding whom they were trying to convince.

"At times it would get amusing when I'd be reading through briefs, particularly amicus briefs, that were rather transparently targeted at the justice," recalled Allyson Ho, a Gibson Dunn & Crutcher LLP partner who clerked for Justice O'Connor. A couple of times, Ho even saw citations to "Lazy B," Justice O'Connor's 2002 memoir of her childhood on her family's cattle ranch in the Southwest.

Justice O'Connor came to the bench as a moderate conservative and left with that reputation intact.

"She was remarkably consistent," said Erwin Chemerinsky, dean of the University of California, Berkeley School of Law. "She was a justice who didn't change much ideologically while on the court."

But as a swing justice, Justice O'Connor held a powerful position at the court's center. While she generally voted with conservative justices on criminal justice issues, she was pivotal in siding with liberal justices in key areas, such as upholding abortion rights and allowing affirmative action programs at public universities.

"As an incredible people person, she always kept human beings at the center of what she did," said Eli Savit, a University of Michigan Law School professor who clerked for Justice O'Connor after she retired. "Nobody doubted that she was trying to do what was best for the country and the human beings that populated it."

Lisa K. Griffin, a Duke University School of Law professor who clerked for Justice O'Connor, said commentators have mistaken the justice's moderation for a lack of sophistication.

"It is a common observation about Justice O'Connor that I think is incorrect that she didn't state a strong enough vision of constitutional rights, or that she didn't have a theory of constitutional rights," Griffin said. "I think most commentators revisiting her legacy … have realized that that is wrong, and that even

though a lot of her opinions were grounded in context, in fact and in particular conditions on the ground, that turned out to be a very sensible way of preserving rights."

Here are four opinions that Justice O'Connor, the first woman on the Supreme Court, will be remembered for.

Grutter v. Bollinger

Affirmative action programs drew skepticism from Justice O'Connor, but in a 5-4 opinion in Grutter v. Bollinger in 2003, she was the deciding vote and wrote for the majority that the equal protection clause of the U.S. Constitution didn't bar public universities' use of race as a factor in admissions decisions to promote a diverse student community.

Grutter v. Bollinger "was an impactful decision and it's another good example of what I would characterize as humble jurisprudence," Griffin said. "In Grutter, she very carefully assessed how to balance the competing interests there, where public attitudes were, and also what affirmative action could accomplish."

The Supreme Court has since reversed its holding in Grutter, ruling in a pair of June decisions in Students for Fair Admissions Inc. v. President & Fellows of Harvard College and Students for Fair Admissions Inc. v. University of North Carolina that public universities' use of race as a factor in admissions did in fact violate the equal protection clause.

Justice O'Connor ruled against affirmative action in other contexts, including City of Richmond v. J.A. Croson Co., where she wrote that an "amorphous claim" of past discrimination isn't enough to justify an "unyielding" racial quota in awarding public contracts, and Adarand Constructors Inc. v. Pena, where she wrote that federal racial classifications "must serve a compelling governmental interest, and must be narrowly tailored."

"These decisions show her strong influence and role as a compromiser," said Adam Winkler, a professor at the UCLA School of Law. "She helped erect barriers for affirmative action in public contracting, for example, but she did uphold it in higher education, which is a very important realm for diversity."

One of Justice O'Connor's most memorable lines from the Grutter opinion is: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Griffin noted that she was "optimistic about the pace of change and how long affirmative action would be relevant and necessary. But the decision, notably, and in keeping with the rest of her jurisprudence, didn't foreclose the continuation of affirmative action practices beyond the timeframe that she imagined in passing."

While it may be odd to put what some might view as an expiration date on an opinion, the statement reflects how Justice O'Connor thought about affirmative action at the time and how her view of the Constitution strayed from conservatives like Justice Antonin Scalia, according to Savit.

"Her hope was that circumstances will change and our constitutional analysis will change," Savit said. "That was a very different approach from say, Scalia, who believed rules are the rules, and as he said in his famous line: The Constitution is 'dead, dead, dead.'"

Planned Parenthood of Southeastern Pennsylvania v. Casey

In another 5-4 case, Justice O'Connor, along with Justices Anthony Kennedy and David Souter, co-wrote a ruling in Planned Parenthood of Southeastern Pennsylvania v. Casey in 1992 that backed Roe v. Wade's central holding that women's right to have an abortion was protected by the Constitution. It also found that states could enact measures limiting access to abortions as long as they didn't place an "undue burden" on women's reproductive rights — a new standard that replaced the stricter trimester framework. Under the old standard of review, it was difficult for states to pass any laws governing abortion in the first trimester of pregnancy.

Under the new test, the court upheld most of the Pennsylvania law requiring a woman seeking an abortion to give her informed consent and wait a full day before the procedure, but invalidated a spousal notification requirement.

This is a classic compromise case and shows how Justice O'Connor generally looked to define and explain the law, rather than expand it in some way.

"She made clear that the 14th Amendment did apply and protects a woman's fundamental right to control her body," said Myles Lynk, a professor at Sandra Day O'Connor College of Law at Arizona State University who also serves on the board of directors at the Sandra Day O'Connor Institute. "She was willing to limit the scope of Roe v. Wade, but not overturn it. It reflected her respect [for] the law."

The Supreme Court in June 2022 reversed both Roe and Casey in its ruling in Dobbs v. Jackson Women's Health, which ended women's constitutional right to have an abortion.

Bush v. Gore

An unforgettable part of her record is the key vote Justice O'Connor cast with the majority in Bush v. Gore, the controversial Supreme Court decision that stopped the manual recount in Florida and effectively handed the U.S. presidential election in 2000 to Republican George W. Bush.

The fact that Republican-appointed justices issued a majority decision that ended up favoring the Republican candidate, and in particular the candidate who had lost the national popular vote, drew a public outcry, and the Supreme Court's reputation as a neutral arbiter took a hit, according to sources.

"In a lot of people's minds, Bush v. Gore tarnished the institution of the Supreme Court, and it probably tarnished the faith in all of the members of the Supreme Court," Savit said.

Justice O'Connor didn't escape the criticism. Soon after the decision, she came under scrutiny for remarks she reportedly made on election night that raised questions about a potential bias against Democrat Al Gore. According to a Newsweek report, Justice O'Connor was at a private party on election night in November 2000, and when news outlets began calling the close presidential race for Gore, Justice O'Connor reportedly said, "This is terrible."

In 2013, many years after she had retired from the bench, Justice O'Connor expressed regret that the court had accepted the case.

"Maybe the court should have said, 'We're not going to take it, goodbye,'" she told the Chicago

Tribune's editorial board. "Obviously the court did reach a decision and thought it had to reach a decision. It turned out the election authorities in Florida hadn't done a real good job there and kind of messed it up. And probably the Supreme Court added to the problem at the end of the day."

Strickland v. Washington

While this 8-1 holding in a criminal case wasn't a close decision in 1984, Strickland v. Washington set out the standard for courts to find ineffective assistance of counsel, and it is far and away the one cited most often out of all of Justice O'Connor's opinions.

Writing for the majority, Justice O'Connor held that convicted defendants asserting ineffective assistance of counsel have to show that counsel's performance failed to meet an "objective standard of reasonableness" and that there was a "reasonable probability" that if it weren't for the deficiencies, the outcome would have been different. Using this two-step test, the court upheld the death sentence of David Washington, who had pled guilty to an indictment that included murder charges.

"This decision is so foundational to many habeas corpus challenges where [arguments of deficient counsel] are so frequently litigated," said Michael Scodro, a Mayer Brown LLP partner who clerked for Justice O'Connor. "Strickland's two-step analysis has become second nature to attorneys in this area."

--Additional reporting by Jimmy Hoover. Editing by Pamela Wilkinson.
