

Justice O'Connor Shattered Barriers, Built Bridges

By Erin Coe

Law360 (December 1, 2023, 2:45 PM EST) -- When Sandra Day O'Connor started on the U.S. Supreme Court in 1981, she didn't have much time to dwell on the fact that she was the first female justice ever to sit on the high court bench.

There was so much work to be done. O'Connor, who was coming over from the Arizona Court of Appeals, had just one week to get ready for the summer conference and a couple weeks before oral arguments in October, all while she was moving her household from Arizona to Washington, D.C.

But O'Connor took her appointment to the Supreme Court in stride, recalled Ruth McGregor, retired chief justice of the Arizona Supreme Court who clerked for O'Connor that first year.

"Her chambers wasn't furnished, there was no filing system in place, there was no procedural manual the court gave to her — we had to figure out everything along the way," McGregor said. "She never seemed hurried. She never seemed stressed ... She always was so able to get things done."

O'Connor, who died on Friday at the age of 93, was a justice who inspired those around her with an indomitable work ethic, a deep affection for public service and an innate ability to drive consensus among her colleagues.

Nominated by President Ronald Reagan, O'Connor began her tenure on the Supreme Court in September 1981 and was the first and only female justice for 12 years until Ruth Bader Ginsburg joined in 1993. O'Connor remained on the bench for nearly 25 years, retiring in January 2006 to care for her husband, a prominent lawyer, as his Alzheimer's disease progressed.

"Her appointment ... as the first woman on the U.S. Supreme Court was an extraordinary moment in our nation's history," said Sarah Suggs, president and CEO of the Sandra Day O'Connor Institute in an emailed statement. "For those women who were in law school or practicing law in the summer of 1981, the announcement was akin to the moon landing. Having a woman on the highest court in the land sent a profound message that serving at the highest level of our judicial branch was an attainable goal."

She emerged as a moderate conservative justice with a pragmatic and often narrow approach to cases, but she used her clout as the bench's swing vote to side with more liberal justices in a number of landmark decisions involving abortion rights, affirmative action and separation of church and state. It was a position she didn't fully embrace.

"She was not fond of that characterization [as the swing justice]," said Allyson Ho, a Gibson Dunn & Crutcher LLP partner and former O'Connor clerk. "She saw herself as one member of a collegial and collaborative court."

Yet it can't be denied that O'Connor held the crucial vote in many high-stakes legal battles and wielded that pivotal role with great precision. She was the decisive vote in more than 300 cases, according to Suggs.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for instance, O'Connor co-wrote with Justices David Souter and Anthony Kennedy a plurality opinion in 1992 keeping intact *Roe v. Wade*'s core holding that women's right to have an abortion is protected under the constitution. The ruling also limited *Roe* by allowing states to impose restrictions as long as they did not place an "undue burden" on the right to choose.

Thirty years later, that ruling, which had arguably sealed O'Connor's reputation as a moderate, was overturned by the conservative majority in *Dobbs v. Jackson Women's Health*.

In the affirmative action case, *Grutter v. Bollinger*, O'Connor cast the fifth vote needed to uphold the constitutionality of public universities' narrowly tailored use of race as a factor for decisions on student admissions. However, she also stated in the opinion that programs using racial preferences would no longer be necessary in 25 years.

The court's conservative majority has also overturned *Grutter*, ruling in two *Students for Fair Admissions* cases that use of race as a factor in admissions decisions violated the U.S. Constitution's Equal Protection Clause.

O'Connor was not the kind of justice to pen broad, sweeping opinions, but rather, she dug into the specific record of each case to reach the outcome.

"She wanted to get at the true facts of what was going on, and that will be a big part of her legacy," said Neal Devins, a professor at William & Mary Law School. "Unlike the other famous swing justice — Anthony Kennedy — who made strong platitudes to make his jurisprudence mark, she was very focused on how things worked, and she would make very precise factual distinctions as opposed to grand theory."

O'Connor was a natural consensus builder, a skill she used in the Arizona state Senate, where she rose to become the Republican majority leader, and later on as a barrier-shattering justice of the Supreme Court. She took a keen interest in people, whether it was engaging in small talk with tourists in the U.S. Supreme Court cafeteria, peppering her law clerks with questions about their professional ambitions or forging ties with her colleagues on the bench.

When Justice Clarence Thomas ascended to the court following a highly charged confirmation hearing over sexual harassment allegations, O'Connor kept coming to his chambers and inviting him to the justices' weekly lunch until he finally agreed, according to O'Connor biographer Evan Thomas in a March 2019 interview with National Public Radio.

"She really was the glue that helped to hold that court together," the late Deborah Rhode, a professor at Stanford Law School, once told Law360. "She recognized the importance of collegiality, which was not widespread at the court at that point. There was something about her background and socialization as a woman that helped her recognize what was missing, and she was very effective at implementing it. She

was very good at negotiating compromises for difficult opinions for the same reason."

Her use of unsigned plurality opinions on hot button issues, like the abortion case in Casey, was a signature O'Connor move, according to Eli Savit, a University of Michigan Law School professor who clerked for her after she retired.

"It speaks to her desire to reach a compromise and speak with one voice," Savit said. "Perhaps she felt it enhanced the legitimacy of the opinion if it couldn't be attributed to one author."

Because of her service as a state legislator in Arizona for six years, O'Connor was savvy at running a campaign, appealing to voters of different backgrounds and brokering deals with other lawmakers. She also had a concrete understanding of how the law is made and brought a practical perspective to high court cases. Her tenure marks the last elected official to date to serve on the Supreme Court.

O'Connor also was known for having a dauntless work ethic, and many of her former clerks credited that attribute to her hardscrabble upbringing. Before excelling at Stanford University and then law school there, O'Connor grew up on a sprawling 200,000-acre cattle ranch in Arizona, learning how to ride horses, shoot a rifle and drive a tractor by the age of eight, according to a 2006 tribute written by former Arizona Supreme Court Chief Justice Scott Bales.

"Being raised on the ranch and at a very young age taking on these tasks and responsibilities shaped her ability to be self-confident without being self-important," Ho said. O'Connor had an "unflagging belief that if you are willing to work hard and really commit yourself to excellence, there is no circumstance that can define you or keep you from achieving what life sets in front of you."

By the time O'Connor came to the Supreme Court, she was a master at time management. One of O'Connor's time-saving secrets was she didn't multitask, according to McGregor. Instead, she devoted all of her attention to one task at a time before moving on to the next. Also, she would analyze cases the best she could the first time through and not waste precious minutes second-guessing herself.

"After going through the analysis and applying the law that existed, she would decide ... this is the best resolution taking into consideration the factors in the case, and she would be at ease with it," McGregor said. "She wouldn't fuss about whether she could have done something different."

While she worked hard, she was a people person through and through, and always made time for socializing.

She had a standing tennis match every week, and she always found time to play a round of golf, go to the theater or see family and friends, McGregor said.

Michael Scodro, a Mayer Brown LLP partner who clerked for O'Connor, remembers many long hours and a fair share of all-nighters working in chambers, but also a number of outings with O'Connor and the other clerks, like visiting the Smithsonian, kayaking on the Potomac River and picnicking as the cherry blossoms spread across Capitol Hill. He also thinks fondly of the Saturdays before oral argument when O'Connor and the law clerks would gather in chambers to debate the arguments of each case as a group, and then they'd share a meal together.

"We'd talk, not about the law, but about our family and friends, and it was a terrific way to spend the day after disagreeing over legal issues," Scodro said.

O'Connor was a big believer and demonstrator of civility and felt strongly that the legal system worked better when people treated one another with respect.

"The common objection to civility is that it will somehow disserve the client," O'Connor said in a 1993 speech to the American Bar Association in Washington. "In my view, incivility disserves the client because it wastes time and energy — time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. I suspect that, if opposing lawyers were to calculate for their clients how much they could save by foregoing what has been called 'Rambo-style' litigation (in money and frustration), many clients, although not all, would pass on the pyrotechnics and happily pocket the difference."

Sandra Day, born in El Paso, Texas, in 1930, grew up on the family ranch that spanned the border of Arizona and New Mexico. A precocious girl, she was sent to live with her grandmother in El Paso where she eventually graduated from high school two years early. She went on to Stanford University and Law School, where she met William Rehnquist, apparently a brief beau of hers, who would later serve as chief justice of the U.S. Supreme Court, and John Jay O'Connor III, whom she married and with whom she had three sons.

Although she graduated from law school third in her class of more than 100 students in 1952, she had trouble finding employment with a law firm as a "lady lawyer," receiving one offer from Gibson Dunn as a legal secretary. She turned to public service instead, starting as an unpaid attorney for the San Mateo County District Attorney's Office in California, where she was soon promoted to deputy county attorney. The move was born out of necessity, but it quickly launched O'Connor onto a rewarding and life-altering path.

"The gender walls that blocked me out of the private sector were more easily hurdled in the public sector," O'Connor recalled in a 2004 commencement address at Stanford. "These forays into the exciting area of public service led me to the privilege of serving as an assistant attorney general in my state, a state senator, a state judge and a United States Supreme Court Justice. At every step of the way, I felt the thrill of doing something right for a reason that was good. It was the thrill of building bridges."

After retiring in 2006, she founded two nonprofits to promote civics education and engagement, the Sandra Day O'Connor Institute and the online platform iCivics. O'Connor also worked on advancing the rule of law in the U.S. and internationally and gave speeches urging states to replace partisan elections for judges with merit selection.

There's some question as to whether O'Connor's particular brand of decision-making, as a justice who was consensus-driven and took a minimalist, fact-sensitive approach, still exists on the bench in an era of "alternative facts" and increasing polarization.

"Are there any Justice O'Connors left?" asked William & Mary's Devins. "With someone who's practical and nonideological and not looking for large theories of jurisprudence, but for balancing tests, is that type of person out there? ... It may be that they don't make them like her anymore."

But O'Connor will always be best-known as the first woman to serve on the Supreme Court, and the deep impressions she made on and off the bench are still being celebrated today.

"She was for many years the face of women in the legal profession, and she really rose to the position

[of Supreme Court justice]," Rhode said. "She hadn't had much experience with constitutional law or leadership at that level, and she was an amazingly quick study. ... She was a constant demonstration of civility, grace and sheer intelligence."

O'Connor knew how to be assertive without being abrasive, in a manner she used throughout her life and career that Rhode once described as "relentlessly pleasant."

O'Connor's presence on the Supreme Court and how she conducted herself continue to command respect, according to Benjamin Horwich, a Munger Tolles & Olson LLP attorney who clerked for O'Connor and her successor, Justice Samuel Alito.

"Nobody could say it was tokenism for O'Connor to be appointed to the court, whatever the political calculus of President Reagan might have been," he said. "It was clear to everybody who saw O'Connor on the court that it was very good for all of us that she was there."

--Editing by Pamela Wilkinson and John Campbell. Graphics by Chris Yates.