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Sandra Day O'Connor
The Center Vote That Counted
By Hannah Hayes

When Supreme Court Justice Sandra Day O'Connor was appointed by President Reagan in 1981, she was hailed as "a person for all seasons." While the right-wing Moral Majority feared she would be overly concerned with "issues linked to feminists," Democrats worried she wouldn't go far enough. Sen. Joseph Biden (D-Delaware) went so far as to say, "You have the obligation to the women of this country to speak out [on equal rights issues]."

In the end, no member of Congress had any desire to impede the first female justice to the highest court in the land, and she was approved by a vote of 99–0.

Twenty-four years later, O'Connor has proved to be no less easy to read. A minimalist, she is concerned with judging each case on its own merits, reluctant to overturn precedent yet outspoken in her opinions.

"There is hardly an area of the law that Justice O'Connor did not significantly affect," says Joan Biskupic, who has covered the U.S. Supreme Court for 24 years for The Washington Post, Congressional Quarterly, and now USA Today. "She became the architect of the Supreme Court's rationale on abortion rights, affirmative action, the death penalty, and the line between church and state."

Although O'Connor herself often emphasizes that her vote is only one of nine, her centrist perspective ultimately made her vote the decisive fifth vote in cases directly affecting women's education, employment, and reproductive rights. According to Biskupic, whose book on O'Connor is scheduled for release this year, O'Connor came to the court "knowing how to count votes."

"The divided court—and divided nation—played to her strength as a consensus builder and gave her more power behind the scenes than some of her male colleagues had," Biskupic says. "She always kept her eye on state legislatures and public sentiment."

However, although her vote upheld the right to privacy and reproductive choice, affirmative action, and disability rights, her economic conservatism often placed restrictions and imposed high standards for implementation. She has agreed that women have the right to bring a sexual harassment case to court, but she made the conditions for that happening extremely limited. She voted to uphold provisions of Roe v. Wade as precedent, but her opinion questioned the validity of the 1973 decision as written.

"Her propensity has been to write narrow concurrences that may undercut the broad sweep of the opinion, but the bottom line is she has been relatively favorable to women," says Martha Davis, associate professor of law at Harvard University. Davis has argued several cases before the Supreme Court concerning women's rights.

O'Connor's middle ground in cases like the 1993 Planned Parenthood of Penn. v. Casey, which limited abortion by requiring a 24-hour wait and spousal consent, is an example. Because the law had no provision regarding the state of a woman's health, O'Connor proclaimed espousal consent would be an "undue burden" on the woman. "We would have liked a broader opinion of that, but

[her decision] ultimately meant that the effort to further restrict abortion was held off for the time being."

"O'Connor seemed to capture the center of gravity for women in the culture," says Anne Coughlin, professor of law at University of Virginia and board member of the National Association of Women Lawyers (NAWL). Coughlin also sits on NAWL's Committee to Evaluate Supreme Court nominees. "You could count on her to approach things with an open mind. You may have thought she did not go far enough, but she was able to put her finger on the consensus and bring it to the center."

Roe v. Wade and Reproductive Choice

The first inkling the country had into O'Connor's judgment came in the 1983 decision in City of Akron v. Akron Center for Reproductive Health, Inc. O'Connor criticized Roe, arguing that it "cannot be supported as a legitimate or useful framework." While acknowledging that Roe had now become a part of society, she proposed a new standard that considered whether regulations "throughout the entire pregnancy without reference to the particular 'stage' of pregnancy" are "unduly burdensome."

This approach remained constant. In addition to Casey, O'Connor was in the 5–4 majority in Stenberg v. Carhart (2000) when the Court invalidated a state law that criminalized abortion procedures beyond the first trimester. O'Connor wrote the majority opinion, stating clearly that it was vital to include provisions protecting the pregnant woman's health.

This issue is likely to be revisited during the next few years, says attorney Jamie Sabino, board chair of Planned Parenthood League of Massachusetts. Three district courts already have overturned the so-called "partial-birth abortion ban" passed by Congress in 2003. "This addresses exactly the issues of Carhart, and within a few years it could be overturned with the change of just one vote," Sabino says.

While Roe is not likely to be challenged directly, "reproductive rights and the legality of abortion are clearly at stake," says Jennifer Brown, vice president and legal director of the legal arm of the National Organization for Women (NOW), Legal Momentum. Most of the recent cases that have reached the Supreme Court impose restrictions and limit access.

"These regulations disproportionately impact poor women, young women, women without education, and rural women, and I find that troubling," Sabino says.

Affirmative Action and Discrimination

Affirmative action is another area where O'Connor has made a difference, voicing support for diversity in education and in the workplace. In Mississippi v. Hogan (1982), O'Connor took a strong position supporting a charge of reverse discrimination in a nursing school. In a more recent decision, Grutter v. Bollinger (2003) in which the Court upheld the University of Michigan's affirmative action policy, O'Connor wrote the majority opinion expressing the importance of diversity in education.

Two earlier cases exemplified O'Connor's center-of-the-road stance in which she wrote her own majority opinion following a 6–3 vote. In Johnson v. Transportation (1987), she explained that her vote to uphold the affirmative action policy was based strictly on stare decisis, but she expressed concern that the Court's approach in this area was "expansive and ill-defined." In Price Waterhouse v. Hopkins (1989), she agreed with the Court that the burden of proof in that discrimination case should be shifted to the employer, but she emphasized in her opinion that the issue should be decided on a case-by-case basis.

“I think she had a special sensitivity to sex discrimination issues,” Davis says. “That meant she wasn’t a vote you could absolutely count on, but she was one you could expect to get.”

“Having O’Connor on the Court strengthened and clarified equal protection,” according to Andrea Kramer, attorney with Sullivan Weinstein & McQuay and adjunct legal studies professor at Brandeis University. Kramer recently authored an article on O’Connor for the Women’s Bar Review and moderated a panel discussion on the potential impact of the justice’s upcoming retirement. “She is adamant that, even if the majority of women are one way and the majority of men are another, you must look at individual characteristics,” Kramer says. “She believes that sex-based generalizations just re-enforce gender roles, and she’s really strong on that.”

O’Connor strongly dissented in Nguyen v. INS (2001), which upheld an immigration rule making it harder for fathers to prove paternity to establish their children’s citizenship. “She talked about the roles of mothers and fathers in a way that was quite feminist,” says Davis, who argued the case before the Court.

Kramer agrees. “Her dissent really does take the majority to task for not thinking of what it means to be a parent,” she says. “Essentially they overlooked the parenting aspect and focused on the formalist ways of establishing paternity, rather than accepting the fact that the father actually had parented that child, and O’Connor saw that as a difference.”

Sexual Harassment

O’Connor voted in the majority in a number of 5–4 sexual harassment cases, although the scope of the decisions has been criticized in some circles for imposing strict standards. O’Connor authored the majority opinions in Gebser v. Lago Vista Independent School District (1998) and Davis v. Monroe Board of Education (1999), which held that students can sue their school district for sexual harassment only if “a school had actual knowledge of misconduct and responded with deliberate indifference.”

This, says Andrea Kramer, is where O’Connor’s moderating influence can be felt. “The Court makes the standard very high, but without her vote, other standards might have won. The other four justices in that majority probably wanted to do away with the cause of action altogether,” Kramer opines. “But by agreeing to the cause, albeit with a high standard, they were they able to get their majority. So in that sense, she was a moderating influence.”

O’Connor also wrote the majority opinion for Jackson v. Birmingham Board of Education (2005), another 5–4 decision, which held that Title IX permitted a federal claim alleging retaliation against a whistle-blower who complained about sexual harassment against others.

Family Leave and Health Care Services

In a broader sense, health and family issues that traditionally impact women also have made their way to the Supreme Court in recent years. In another 5-4 decision, the Court ruled that patients have the right to an independent review of decisions in which payment was denied for health care services considered not medically necessary (Rush Prudential HMO Inc. v. Moran (2002)). In the 2003 case of Nevada Dept. of Human Resources v. Hibbs, employees were granted the right to challenge employers who violated the Family and Medical Leave Act by a 6–3 margin.

Despite her position in these decisions, O’Connor’s conservative economic perspective made her less sympathetic, and her voice and vote hit hard on some issues. In United States v. Morrison (2000), O’Connor joined the conservative majority to strike down a part of the Violence Against Women Act that would have allowed women to pursue civil actions for domestic violence.

“Certainly there are cases where Justice O’Connor’s vote has impacted women in a favorable way, and there are also cases in which Justice O’Connor’s vote tipped the balance in a way that, in our assessment, was harmful to women,” Brown says. “She often voted to restrict congressional powers, and that is an area that we think will be very important [in the new Supreme Court].”

In many cases, O’Connor’s perspective and background as a professional, middle-class woman came through, according to Wendy Parmet, a Northeastern University School of Law professor who co-authored The Rugged Feminism of Sandra Day O’Connor. “She seems to understand biological impediments that affect every woman, but I don’t think she understands how economics, class, race, and other issues have a disparate impact.”

The Case for a Woman Nominee

As the first woman justice on the Court prepares to retire, the loss of O’Connor’s consensus abilities, particularly on issues that affect women, has raised concerns.

“What the loss of O’Connor represents is the loss of a steady, thoughtful judge [who employs] a judicious approach to cases and one that is cognizant, really thinking about each case on its own,” Coughlin says. “Also, her ability to strike the appropriate balance when there’s so much hyperbole on both sides will really be missed.”

Kramer agrees. “Even where O’Connor has voted with the conservative majority, it’s the flexibility, and her sensibility to her decision and the moderation that comes through, that I think is a loss,” she says.

Many women especially have asked just how much O’Connor’s opinions were colored by her experience as a woman. “Her approach in both Casey and Stenberg exemplify the perspective of a woman who had born a child,” Parmet says. “In her opinions, you can see a woman’s voice and the concern with the indignity [experienced by an appellant] of having to tell her husband” she wanted an abortion.

O’Connor often has asserted that a wise old woman and a wise old man will reach the same conclusion. However, that view has tempered in recent years, and O’Connor has admitted it is “helpful to the court to have nine members of different backgrounds and experiences and, yes, even gender. We bring different life experiences to the task, and that’s a good thing.”

“Part of it has to do with living as a woman in the real world,” says Renee Landers, who teaches health and administrative law at Suffolk University Law School. She points out that former Chief Justice William Rehnquist shocked conservatives by supporting the Family and Medical Leave Act. “He had ‘an epiphany’ based on his own experience,” Landers explains. “He had been known to leave work early to help his daughter with child care problems.”

The possibility that decisions swung by O’Connor may re-emerge with a new, more conservative Court on the horizon has raised alarms. O’Connor became a symbol for many women during the last two decades. “Her loss is really momentous because of what a symbol she’s been for the women’s movement, but also the symbol for the slow progress, the limitations on what we’ve achieved so far,” Coughlin says. “And when a female face and presence is up there in that male-dominated world, it means something, and she was the first.”

Hannah Hayes is a Chicago area freelance writer.

Issues to Watch as the New Court Convenes:

Although it's difficult to predict exactly what issues will arise in the future, the number of 5–4 decisions during Supreme Court Justice Sandra Day O'Connor's tenure has raised concerns that a more conservative Court could radically change the course of history. Consider the following issues:

Reproductive rights. On November 30, 2005, the Court will hear arguments in the case of Ayotte v. Planned Parenthood (1st Cir. 2004) and will be asked to decide whether to uphold a lower court's decision to strike down a New Hampshire law requiring parental notification 48 hours before an abortion procedure is performed on a minor.

Parental and spousal consent, as well as the ability to offer information about abortion, already have been narrowly decided and could be overturned. Further attempts may restrict access not only to abortion but also to contraceptives for women on Medicaid or Medicare.

Affirmative action. Although nothing specific is on the docket for 2005–06, a question that may rise through the courts is whether the 5–4 decision in Grutter v. Bollinger (2003) upholding affirmative action at the University of Michigan applies to gender, and whether the Court's holding may carry over to employment issues.

Other potential issues revolve around the question of disparate impact and disparate treatment. "Affirmative action has come under tremendous legal stress, and this critical issue will be back before the Court," NOW's Jennifer Brown says. "Disparate impact is an important tool in employment discrimination cases." Brown points to Alexander v. Sandoval (2001), in which the Court maintained there was no private right of action to enforce disparate-impact regulations under Title VI, as reason for concern.

Federalism and state law. Issues that could arise include states' ability to place restrictions on welfare and the right to travel. A more conservative Court could make it much harder for women on welfare who are under physical threat and have no economic security. Similarly, restrictive decisions could impact a teen's ability to travel to have an abortion without parental consent and make it difficult for women to collect child support across state lines.

Privacy. Several cases concerning the government's reach into private life could conceivably come into play. In Lawrence v. Texas (2003), a narrow 5–4 majority ruled that laws against same-sex sodomy violated the constitutional right to privacy. End-of-life issues similar to those presented in the Terri Schiavo case may find their way into what conservatives are likely to perceive as a friendlier Supreme Court.