

That Time I Met Justice O'Connor

By: Catherine W. Smith

“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Sandra Day O'Connor's death in early December got me thinking about the two times we “met”—once, in court, and later, at a conference. This column is about those encounters.

On January 5, 2000, I had the good fortune to argue in the U.S. Supreme Court. I was defending the Washington State Supreme Court's 5-4 decision in *Custody of Smith*,¹ which struck down as unconstitutional a statute that purported to give the courts authority to award visitation with a child to “any person” “at any time.”² I had represented two of three parents resisting court-ordered third-party visitation in the state Supreme Court, and when a petition for certiorari was filed by the paternal grandparents in one of the three cases, I told my clients it would be “like lightning had struck” if the U. S. Supreme Court took review. After all, at that point it had been decades since the Court had deigned to review a “family law” case.

Lightning struck. My partner Howard Goodfriend and I spent the last three months of 1999 briefing and preparing for our no-expenses-paid trip to the “other Washington” in the first week of this century. That is probably worth another column—the oral argument was one of the most exhilarating experiences of my life.³ But for the purposes of this column, the relevant fact is that in June 2000, Justice O'Connor wrote the lead opinion in *Troxel v. Granville*,⁴ the U.S. Supreme Court's 6-3 decision affirming

the state court's decision striking down Washington's "breathtakingly broad" third-party visitation statute.⁵

The Green Bag "is a quarterly legal journal dedicated to publishing 'good writing' about the law."⁶ In 2003, the Green Bag began issuing "bobbleheads" of U.S. Supreme Court Justices. *Troxel* was—and still is—usually characterized as a case involving "grandparents' rights." But it is grounded in the protection of liberty and associational interests that extend far beyond that.⁷ I was gratified to see that at least the editors of the Green Bag seemed to recognize that when it issued its bobblehead Justice O'Connor⁸. Standing alongside a bobblehead cow (representing her "cowgirl" past), the bobblehead Justice is holding Volume 530 of the U.S. Reports, because (as the editors explained) that is the volume containing the *Troxel* decision.



I was, however, a little bummed that I could not obtain an O’Connor bobblehead for myself. At the time these “limited edition” bobbleheads were a hot commodity, and available only to subscribers to *The Green Bag*. Alas, neither I nor any of my partners subscribed to the journal—it was expensive, and not in our library budget.

I expressed my disappointment over drinks with fellow appellate nerds at a meeting of the American Academy of Appellate Lawyers in early 2005. A few weeks later, I was thrilled when the mailman delivered a Priority Mail box from my friend Jim Martin, a bicoastal appellate specialist who had heard my tale of woe. The box contained my very

own Justice O'Connor bobblehead—Jim's firm had a library budget that included The Green Bag, and he graciously shared his BigLaw largesse with me.

Fast forward to 2008, when I attended another meeting of judges and lawyers sponsored in part by the Academy in Portland, Oregon. Justice O'Connor was a speaker at the conference; she had by then retired and was promoting civics education in the schools.⁹ I brought along my bobblehead, thinking perhaps she might sign it for me. But when the opportunity arose to approach her during a break, I lost my nerve.

I confessed my shyness to another Academy friend attending the conference, Wendy Lascher.¹⁰ Wendy immediately pulled the bobblehead out of my briefcase, procured a Sharpie, and marched up to Justice O'Connor. After a few words from Wendy, Justice O'Connor beckoned to me.

With the alacrity she had shown during oral argument, Justice O'Connor peppered me with questions about the state of the law on third-party visitation in Washington, eight years after the *Troxel* decision. I briefly described the difficulties that had accompanied attempts to craft a substitute statute but assured her that horses were not running backwards in the streets as a result of the legislature's failure to action, in part because of the development of the *de facto* parent doctrine.¹¹

It was a wonderful conversation—and at its end, Justice O'Connor signed my bobblehead. It now has pride of place on top of my office bookshelf:



Regardless of the disappointments I have felt over the past quarter century on the path the Court has taken, as a “secret” (social) libertarian, I will always appreciate my encounters with Justice O’Connor, who recognized that there are some places where the courts just don’t belong.

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¹ 137 Wn.2d 1, 969 P.2d 21 (1998).

² “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” RCW 26.10.160(3).

³ It helped that *Troxel* was briefed and decided before *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

⁴ 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

⁵ 530 U.S. at 67.

⁶ [https://en.wikipedia.org/wiki/The_Green_Bag_\(1997\)](https://en.wikipedia.org/wiki/The_Green_Bag_(1997))

⁷ I was terrified that we might be responsible for the demise of substantive due process when the Supreme Court granted review in October 1999. But it took another 20 years.

⁸ <http://www.greenbag.org/bobbleheads/annotO'Connor.pdf>

⁹ After retiring, Justice O'Connor on occasion expressed regret for her participation in *Bush v. Gore*. She believed civics education was critical to maintaining an informed electorate and a working democracy and republic.

¹⁰ Wendy is my California doppelganger. We both work in small firms doing exclusively appeals and have been fast friends for almost 30 years, having met when we were two of three women attending the meeting when I was inducted into the Academy.

¹¹ *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). It would take eighteen years after *Troxel* was decided for the Washington legislature to enact a new nonparental child visitation statute under RCW ch. 26.11, which took effect on June 7, 2018. The Washington legislature then enacted RCW ch. 11.130, the minor guardianship statute, which took effect on January 1, 2021, replacing the nonparental custody statute.