



Priscilla Owen: The Judicial Philosophy of a Radical
Why She is Wrong for the U.S. Supreme Court

prepared by Court Watch

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Introduction

After she was nominated to the U.S. Court of Appeals for the Fifth Circuit, Priscilla Owen was roundly criticized for her opinion in *In re Doe*, 19 S.W.3d 346 (Tex. 2000). In that case, she charged the majority with ignoring rules of appellate review and not respecting Texas precedent. The public debate on *In re Doe* has largely focused on Owen's politically conservative position on reproductive rights and her judicial activism; it was then-Justice Alberto Gonzales, after all, who said that Owen's method of statutory interpretation would be an "unconscionable act of judicial activism." But *In re Doe* is also significant for the light it sheds on her unprincipled judicial philosophy.

In the opening of her opinion, Owen wrote: "Rather than conduct an appellate review to determine if there was evidence to support the lower courts' determination, this Court has usurped the role of the trial court, reweighed evidence, and drawn its own conclusions. The Court has forsaken any semblance of abiding by principles of appellate review." She continued with a broad indictment against the majority: "Now that the Court has, after the fact, issued an opinion, it has obliterated, with the stroke of a pen, more than fifty years of precedent regarding appellate review of a trial court's findings."

Owen's lofty pronouncements on appellate review and precedent were hardly principled, however. In cases where plaintiffs had been injured by hospitals, manufacturers, and state government, she frequently ignored the very rules she charged the majority with violating in *In re Doe*. In fact, as a whole, her opinions on the Texas Supreme Court were characterized by a glaring disrespect for the rule of law. Her opinion in *In re Doe* highlights her unprincipled judicial philosophy.

Before she was confirmed to the U.S. Court of Appeals for the Fifth Circuit, Priscilla Owen was criticized by a broad range of organizations for her pro-defendant ideology, judicial activism, and palpable hostility to injured plaintiffs. Until now, however, her judicial philosophy has not been scrutinized in any detail. The American public understood the results of Owen's decisions without always understanding how she reached those results.

As we explain, Owen's judicial philosophy has been characterized by a deliberate disregard for the rule of law. In her ten years as a judge on the Texas Supreme Court, she frequently misinterpreted statutory law, reversed longstanding precedents, and ignored reasonable jury verdicts. No judge with Owen's radical judicial philosophy is qualified to serve on the U.S. Supreme Court.

The rule of law is a tradition with a proud history in the United States. If confirmed, Owen would jeopardize that tradition.

In this report, we describe the major features of Owen’s judicial philosophy, particularly as they relate to consumer rights. We discuss her unprincipled method of statutory interpretation, her lack of respect for legislative authority, her radical approach to the doctrine of stare decisis (which from Latin translates as “to stand by things decided”), and her unwillingness to defer to jury verdicts. In describing Owen’s judicial philosophy, we have avoided using the label “judicial activist”; we recognize that the label is often pejorative and unhelpful as a description. We believe Owen’s judicial philosophy speaks for itself. We have also avoided criticizing Owen’s judicial philosophy based solely on the results of her decisions.

Statutory Interpretation

By any measure, Priscilla Owen’s method of statutory interpretation is arbitrary and unprincipled. As a judge on the Texas Supreme Court, she often distorted statutory language and ignored the intent of the Texas legislature. Her respect for the legislature as a co-equal branch of government generally depended on the substance of a law. When the law in question protected injured individuals, for example, she interpreted the law narrowly. When the law protected manufacturers, she interpreted the law broadly. Owen’s approach to statutory interpretation is at odds with what the American people expect from judges.

***F.F.P. Operating Partners v. Dueñez*, ___ S.W.3d ___, 2004 WL 1966008 (Tex. 2004)**

Significance: In her dissent, Owen ignored the plain meaning and intent of a statute holding alcohol providers responsible for the liability of their inebriated customers.

In *F.F.P. Operating Partners*, the Texas Supreme Court considered the proper interpretation of Texas’s Dram Shop Act. According to the Act, the “liability of [alcohol] providers” is “for the actions of their employees, customers, members, or guests who are or become intoxicated.” In light of that language, a majority on the Court held that F.F.P. Operating Partners was responsible for the liability of its inebriated customer Robert Ruiz, who, after purchasing a twelve-pack of beer from a store owned by F.F.P., had collided head-on with a car, causing life-threatening injuries.

In a remarkable example of judicial hubris, Owen strongly objected to the majority’s reading of the Act. “I do not believe,” she wrote in dissent, “the Legislature intended the single phrase parsed by the Court to mean that a provider of alcohol is liable for 100 percent of the damages caused by an intoxicated person” But that is precisely what the language of the Act mandated. In arguing otherwise, Owen ignored traditional rules of statutory construction and attempted to expand the Court’s constitutional mandate.

As we demonstrate below, Owen’s judicial slight of hand in *F.F.P. Operating Partners* was nothing new. It is also significant that her interpretation of Texas’s Dram Shop Act would have protected businesses from liability.

***Montgomery Independent School Dist. v. Davis*, 34 S.W.3d 559 (Tex. 2000)**

Significance: In her dissent, Owen distorted the legislative intent of a statute because she disagreed with the result of the majority’s decision.

In this case, Joanne Davis, a science teacher at Montgomery Junior High School, sued the school district after her contract was not renewed. Despite a recommendation by an independent hearing examiner that her contract be renewed, the District’s Board of Trustees voted to not renew her contract. After considering the relevant statutory language in Chapter 21 of the Texas Education Code, a majority on the Texas Supreme Court held that the Board had exceeded its authority under the Code. The Court refused to “read into subchapter F’s detailed administrative scheme permission for a board to find additional facts when the Legislature did not include that authority.”

Owen filed a dissent, arguing that the majority opinion left school policy in the hands of hearing examiners. Whether or not that was the result of the decision was of no consequence, however, to the Court’s judicial responsibility to interpret the Education Code according to its plain language; courts are not in the business of making public policy. Owen’s interpretation of the Code was motivated by a result she disagreed with, despite the Code’s mandate. But, as the majority explained, the Education Code delegated fact-finding authority to a hearing examiner, not a school board. Owen ignored these procedural elements set down by the Texas Legislature and attempted to rewrite key provisions in the Code.

***Fitzgerald v. Advanced Spine Fixation Systems*, 996 S.W.2d 864 (Tex. 1999)**

Significance: In a dissenting opinion, Owen narrowed the meaning of a statute that was intended to be broadly interpreted.

Advanced Spine Fixation Systems involved the proper interpretation of Section 82.002(a) of the Texas Civil Practice & Remedies Code, an indemnification statute. After Ken Fitzgerald sold a device manufactured by Advanced Spine Fixation Systems, he was sued in a products liability action. Fitzgerald later sued Advanced Spine to indemnify him for his litigation costs, despite the fact that he had not sold the particular product responsible for the injury in the underlying litigation. According to Section 82.002(a), “a manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action” Interpreting that language, a majority on the Texas Supreme Court ruled that Advance Spine was required to indemnify Fitzgerald.

In her dissent, Owen argued for a judicially created exception to Section 82.002(a). She interpreted “seller” to include only a seller who had sold the particular product that caused the injury in the underlying litigation. Nothing in Section 82.002(a) or the Texas Products Liability Act, however, mandated that “seller” be interpreted so narrowly. To the contrary, the language in Section 82.002(a) was intentionally broad. In effect, Owen’s interpretation would have protected manufacturers from indemnifying faultless sellers in products liability actions.

While not exhaustive, the above cases are broadly representative of Priscilla Owen’s approach to statutory interpretation. Standing alone, they raise troubling questions about her commitment to the rule of law.

Precedent

A healthy respect for precedent is an admirable virtue in the law. In a literal sense, precedent serves as an anchor by providing predictability and stability in the law. Without precedent, the law would be in a perpetual state of chaos. When she served on the Texas Supreme Court, Priscilla Owen had a penchant for reversing decisions she disagreed with on ideological grounds. Her judicial philosophy often rejected the doctrine of stare decisis.

***Excess Underwriters v. Frank's Casing*, ___ S.W.3d ___, 2005 WL 1252321 (Tex. 2005)**

Significance: Writing for the majority, Owen ignored settled precedent and upset longstanding principles in Texas insurance law.

In *Frank's Casing*, the Texas Supreme Court considered whether an insurance carrier had a right to be reimbursed by its policyholder in a coverage dispute. In an earlier case, *Texas Association of Counties v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), a majority on the Court had ruled that in only very limited circumstances was an insurance carrier entitled to reimbursement from its policyholder. (“[W]e hold that, when coverage is disputed and the insurer is presented with a reasonable settlement demand within policy limits, the insurer may fund the settlement and seek reimbursement only if it obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement.”) Owen dissented in *Matagorda County*, arguing for an implied right to reimbursement.

When *Frank's Casing* was decided, six justices who had joined the majority in *Matagorda County* were no longer on the Texas Supreme Court. Writing for the majority in *Frank's Casing*, Owen adopted the argument from her *Matagorda County* dissent, effectively reversing that decision by recognizing an implied right to reimbursement.

Judges have an obligation to respect the precedential value of earlier decisions, despite the fact that they might disagree with the decisions. Evidently, Owen disagreed with the holding in *Matagorda County*, but her disagreement by itself was not a legally legitimate reason for reversing the decision.

***Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995)**

Significance: In a dissenting opinion, Owen attempted to reverse established precedent widely recognized by Texas courts.

In *Wasson*, a majority on the Texas Supreme Court held that Section 10.01 of Texas's Medical Liability and Insurance Improvement Act violated the open courts provision of the Texas Constitution. Section 10.01 allowed a minor under twelve years of age to file a medical malpractice claim until her fourteenth birthday. In an earlier case, *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), the Court had concluded that a provision resembling Section 10.01 was unconstitutional under Texas's open courts provision. In so holding, the Court had ruled that a suit by a parent on behalf of a minor was not a reasonable alternative to the statute of limitations provision. The majority in *Wasson* respectfully acknowledged *Sax* as binding precedent and refused to reverse the decision.

Owen dissented in *Wasson*, questioning the precedential value of *Sax*. She wrote: “I recognize that in *Sax*, [sic] the Court declined to accept suit by a parent or guardian as a reasonable substituted remedy. On this point, I fundamentally disagree with the assumption in *Sax* that competent parents cannot be trusted to act in the best interest of their child.” *Sax*, however, had been decided twelve years earlier by the Texas Supreme Court and served as a sound precedent for subsequent decisions. Besides disregarding precedent, Owen’s dissent is significant for its hostility to the open courts provision of the Texas Constitution. If adopted, her dissent would have closed courthouse doors to a large class of injured plaintiffs.

***Humble Sand & Gravel v. Gomez*, 146 S.W.3d 170 (Tex. 2004)**

Significance: Owen joined a majority opinion that radically altered precedent in products liability actions.

In this case, the Texas Supreme Court considered whether Humble Sand & Gravel, a manufacturer of flint, had a duty to warn its customers and the employees of its customers that silica (a primary ingredient of flint) was dangerous, if not fatal. Before the case reached the Court, Texas precedent held that manufacturers of dangerous products, as a rule, had a duty to provide adequate warnings. The sophisticated-user doctrine, however, was an exception to that duty, protecting manufacturers from liability when users had adequate knowledge of a product’s dangers.

Owen joined a majority opinion written by Justice Nathan Hecht. Disregarding longstanding precedent, the majority held that Humble Sand & Gravel had no duty to warn employees of its customers if those warnings would not have been effective. In an earlier decision, *Alm v. Aluminum Co. of America*, 717 S.W.2d 588 (Tex. 1986), the Court had recognized a fundamental principle that guided courts in Texas: a manufacturer had a duty to warn its customers that its products were potentially dangerous. The holding in *Humble Sand & Gravel* subverted that principle. As Justice Harriet O’Neill wrote, “Breathtaking in scope, the Court’s decision today ventures where no court has gone before, adopting a confusing and legally immaterial evidentiary proof requirements to re-examine whether a duty that we have long recognized exists in the first instance.”

Judges should not be allowed to ignore precedent just because they disagree with it. On the contrary, the rule of law stands for respecting precedent. Owen’s disrespect for precedent is a betrayal of the rule of law.

Jury Verdicts

In a typical case, the trial court, not the appellate court, is responsible for findings of fact. Appellate judges are supposed to defer to the fact-finding authority of trial courts. In her years on the Texas Supreme Court, Priscilla Owen managed to stand that rule on its head. Ignoring her judicial mandate to interpret the law, she voted to reverse reasonable jury verdicts by weighing evidence, despite having no authority from the Texas Constitution to do so.

***Volkswagen of America v. Ramirez*, 159 S.W.3d 897 (Tex. 2004)**

Significance: Owen joined a majority opinion that unconstitutionally weighed disputed evidence and reversed a jury verdict against Volkswagen of America.

In *Volkswagen of America*, the Texas Supreme Court reversed a jury verdict against Volkswagen of America, the defendant, holding that evidence of causation was not legally sufficient. In the original trial, the jury heard from two expert witnesses for the plaintiffs who testified that a defect in a Volkswagen Passat had caused the fatal accident in the underlying litigation.

Owen joined Justice Dale Wainwright's majority opinion reversing the jury verdict and holding that the testimony of the plaintiffs' expert witnesses was unreliable and conclusory. The majority, however, refused to indulge in reasonable inferences favorable to the jury verdict, a standard procedure of review for appellate courts. Nothing in the majority opinion indicated that jury verdicts are entitled to deference. In fact, as Chief Justice Wallace Jefferson wrote in his dissent, the majority "tipp[ed] the scale in the opposite direction to dismiss as 'conclusory' expert testimony that support[ed] the verdict. This Court is constitutionally bound to conduct only a legal—not factual—sufficiency review."

Volkswagen of America is not an isolated example of Owen's hostility to jury verdicts. She has a documented history of weighing conflicting evidence and reversing jury verdicts against corporate defendants.

***State Farm Fire & Casualty Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1998)**

Significance: Owen joined a dissent that would have dismissed altogether a jury's findings of fact.

In *Simmons*, the legal sufficiency of a jury verdict against State Farm Fire & Casualty for bad faith was before the Texas Supreme Court. After the home of James and Cynthia Simmons was destroyed in a fire and their claim denied by State Farm, they filed suit against the company. Acknowledging its duty to "draw all inferences in favor of the jury's findings," a majority on the Court upheld a jury verdict against State Farm, concluding that the company had breached its duty of good faith and fair dealing with the Simmonses.

Justice Nathan Hecht filed a dissent joined by Owen. But rather than indulging in inferences favorable to the jury verdict, which involved disputed evidence, Hecht squarely rejected the jury's conclusions and refused to concede the possibility of bad faith. What Hecht was reluctant to admit is that juries, not judges, are responsible for weighing conflicting evidence; a judge's finding of no evidence of bad faith is not enough to reverse a jury's finding. That Owen joined Hecht's dissent demonstrates her hostility to jury verdicts against corporate defendants.

If there's a place for modesty and humility in the judiciary, it's in a judge's deference to findings of fact and jury verdicts. It's not a stretch of the imagination to say that Owen's propensity for reversing jury verdicts represents the height of judicial hubris.

Conclusion

Whether a judge is qualified to serve on the bench often depends on his or her judicial philosophy. In general, judges are expected to respect the rule of law, which, in practice, requires that they faithfully interpret the law, abide by the doctrine of stare decisis, and recognize that we have a government of separate powers. Judges are also expected to hold themselves to a level of modesty and humility appropriate to the judicial branch.

When a judge is nominated to the U.S. Supreme Court, the American people have a duty, if not a right, to scrutinize that judge's judicial philosophy. It's a widely recognized fact that the Supreme Court has the final word on the U.S. Constitution. Justices also serve for life. In a country with as robust a democracy as the United States, the American people have an obligation to probe the judicial philosophies of judges who have the power to affect the everyday lives of Americans.

In every respect, the judicial philosophy of Priscilla Owen is troubling. As a judge on the Texas Supreme Court, she consistently misinterpreted or distorted the statutory directives of the Texas legislature; separation of powers was an idea largely foreign to her judicial philosophy. She frequently ignored longstanding precedent and was not particularly concerned with stability and predictability in the law; her judicial philosophy was characterized by a glaring disrespect for the doctrine of stare decisis. Lastly, Owen often refused to recognize the legitimacy of jury verdicts she disagreed with; her conservative ideology and politics prevented her from deferring in principle to a jury's findings of fact.

Despite her experience on the Texas Supreme Court, Priscilla Owen is not qualified to serve on the U.S. Supreme Court. Her judicial philosophy is a radical departure from what the American people expect from justices on the U.S. Supreme Court. If confirmed, Owen would upset the delicate balance on the Court and likely work to reverse decisions from the Court protecting fundamental rights and liberties that belong to the American people.

About Court Watch

Court Watch is a project of the Texas Watch Foundation, a nonpartisan research organization located in Austin, Texas, dedicated to protecting the consumer rights of Texans. Since 1997, Court Watch has published an annual report on the Texas Supreme Court, describing the Court's major decisions and its jurisprudence. We have also published a prior report on Priscilla Owen's hostility to consumer rights.

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