Former U.S. Supreme Court Justice Sandra Day O'Connor Passes Away

On Dec. 1, 2023, former U.S. Supreme Court Associate Justice Sandra Day O'Connor died of complications related to advanced dementia. Justice O'Connor, who was 93 years old, was known for her pragmatic and moderate approach to constitutional issues. In her time on the court, Justice O'Connor played a crucial role in shaping the Court's First Amendment jurisprudence and wrote landmark opinions on Copyright and Fourth Amendment protections.

On Sept. 21, 1981, O'Connor became the first female Supreme Court Justice. Appointed by President Ronald Reagan, Justice O'Connor served on the Court for 24 years, retiring on Jan. 21, 2006. During her retirement, Justice O'Connor continued to advocate for judicial independence and the Rule of Law. In 2009, she was awarded the Presidential Medal of Freedom by President Barack Obama in recognition of her accomplishments.

In her time on the Court, Justice O'Connor wrote over fifty opinions involving First Amendment freedom of speech issues. Many of her influential opinions involve content-based speech restrictions. Justice O'Connor wrote the unanimous decision in *Simon & Schuster Inc. v. Members of New York State Crime Victims Board*. The case dealt with New York's 1977 "Son of Sam" law, which aimed to prevent criminals from profiting off crime by selling their stories. The law required proceeds from book deals go to an escrow account for victims. Justice O'Connor wrote that in passing the law, "New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income." Justice O'Connor concluded that the law amounted to a content-based restriction on speech. Although acknowledging the State's interest in compensating crime victims, the Court found that the law was overly broad and encompassed a wide range of expression beyond the criminal's direct story. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/502/105/. *Simon & Schuster Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991)

In *Virginia v. Black*, the Court evaluated the constitutionality of a Virginia statute that prohibited the burning of a cross with the intent to intimidate individuals or groups. Justice O'Connor wrote the plurality opinion, upholding the statute based on the government's interest in preventing true threats.

However, O'Connor emphasized the importance of considering the intent of the expression and invalidated a provision that treated any cross burning as evidence of intent to intimidate. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/538/343/. Kent Willis, the Executive Director of the American Civil Liberties Union (ACLU) of Virginia at the time, commented: "We are pleased that the court reaffirmed free speech by making it clear that cross-burning, when it is not used as a direct threat, is protected by the Constitution." The statement is available online at: https://www.aclu.org/press-releases/us-supreme-court-upholds-va-cross-burning-ban-sends-law-back-state-court-refinement. *Virginia v. Black*, 538 U.S. 343 (2003)

Justice O'Connor's jurisprudence reflects the viewpoint that the primary aim of the First Amendment is to protect political speech. In an analysis of her 12 years on the bench, Robyn Goodman, Professor of Communication Studies at Alfred University, noted that Justice O'Connor protected political speech more than nonpolitical speech: "While in the majority of nonpolitical cases she rules against individual rights to free speech, in the majority of political expression cases she ruled in favor of individual rights to free speech." Goodman's article, "Supreme Court Justice Sandra Day O'Connor's First Amendment Approach to Free Expression: A Decade of Review," was published in *Communications and the Law* Volume 15, Issue 4, in December 1993. It is available online at: https://perma.cc/U4B6-PDVE.

Justice O'Connor's support for political expression was strongest in cases involving the press. In *Philadelphia Newspapers Inc. v. Hepps*, the Court addressed the burden of proof in defamation cases involving public figures. In the case, Maurice Hepps, the principal stockholder of a large corporation, sued after a Philadelphia newspaper published a series of articles accusing him of having connections to organized crime. In a 5 to 4 decision by Justice O'Connor, the Court held that the burden rested on Hepps to prove the falsity of the statements, reasoning that requiring the press to prove the truth of each statement would impose a significant burden and chill speech. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/475/767/. *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986)

In an article for the *Texas Wesleyan Law Review* published on March 1, 2010, Emily Buchanan Buckles argued that Justice O'Connor was most influential in shaping the Court's public forum doctrine. Shortly after joining the bench, Justice O'Connor supplied the fifth vote in *Perry Education Association v. Perry Local*

Educators' Association. The majority opinion in *Perry*, written by Justice Byron White, defined three categories of government property for purposes of expression: 1) traditional public forums, where restrictions on speech are highly suspect; 2) limited public forums, where reasonable restrictions on speech may be allowed with a compelling state interest; and 3) nonpublic forums, which the government may reserve for certain purposes. Justice White's full opinion is available online at: https://supreme.justia.com/cases/federal/us/460/37/. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)

Justice O'Connor went on to write the majority opinion in *Cornelius v. NAACP Legal Defense Fund*, which, as Buckles notes, "introduced the concept that the forum need not be a physical place." Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/473/788/. Emily Buchanan Buckles' article is available online at: https://scholarship.law.tamu.edu/txwes-lr/vol16/iss3/2/. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788 (1985)

In addition to her impact on free speech issues, Justice O'Connor's jurisprudence was influential in cases involving the Establishment Clause of the First Amendment. Justice O'Connor introduced the "Endorsement Test" to determine whether government actions run afoul of the Establishment Clause by endorsing a religion. In *Lynch v. Donnelly*, the Court was asked to determine whether a city Christmas display in a shopping district violated the Establishment Clause. In a 5 to 4 decision authored by then-Chief Justice Warren Burger, the Court found that the display was not unconstitutional because it was not a purposeful effort to advocate for a particular religion. Justice O'Connor wrote a concurring opinion to suggest a clarification to the Establishment Clause doctrine. Under Justice O'Connor's proposed "Endorsement Test," courts must examine 1) what the government *intends* to communicate and 2) what message is *actually* conveyed. If a government either intends to endorse or disapprove of a religion, or in fact conveys a message of endorsement or disapproval, the Establishment Clause is violated. This test is frequently used in lower courts. Chief Justice Burger's opinion and Justice O'Connor's concurring opinion are available online at: https://supreme.justia.com/cases/federal/us/465/668/. *Lynch v. Donnelly*, 465 U.S. 668 (1984)

Justice O'Connor also provided the swing vote in *McCreary County v. American Civil Liberties Union of Kentucky*, which held that the display of the Ten Commandments at Kentucky courthouses violated the Establishment Clause. In her concurring opinion, Justice O'Connor defended the separation of church and

state. "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish," Justice O'Connor wrote. "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" Justice O'Connor's full concurring opinion is available online at: https://supreme.justia.com/cases/federal/us/545/844/. *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844 (2005)

Regarding copyright, Justice O'Connor authored the majority opinion in the landmark case *Feist Publications, Inc. v. Rural Telephone Service Co.* In this case, Rural Telephone Service Co., a local telephone company, sued Feist Publications for publishing an area-wide telephone directory using listings from Rural's local directory. The question before the Court was whether a compilation of facts (such as a telephone directory) is eligible for copyright protection when there is no originality in the selection or arrangement of those facts. In a unanimous opinion, Justice O'Connor emphasized that originality is a constitutional requirement for copyrightable works and that Rural's directory did not meet the requisite originality. She reasoned that Rural had not "selected, coordinated, or arranged" the facts held in its directory in any original way. In doing so, the Court rejected the "sweat of the brow" doctrine, which provided copyright protection on the basis of the effort and labor expended by authors. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/499/340/#tab-opinion-1958569. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)

In an article written for the *Houston Law Review*, Craig Joyce and Tyler Trent Ochoa praised *Feist* as "among the greatest opinions in all of U.S. copyright history." They note that Justice O'Connor grounded the opinion in the constitutional text of the Copyright Clause and "firmly reinvigorated a standard for originality that has proven durable [and] flexible[.]" The article is available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607953.

Justice O'Connor also authored an important Fourth Amendment case, *Florida v. Bostick*. While riding on a Miami-to-Atlanta bus, Terrance Bostick was questioned by two Broward County (Fla.) Sheriff's Department officers who asked to search his belongings. With Bostick's permission, the officers conducted the search, found cocaine, and arrested Bostick. The Florida Supreme Court found

that the search was *per se* unconstitutional because the officers did not allow passengers to leave the bus to avoid questioning. On appeal, the question before the Supreme Court was whether random bus searches with passengers' consent were *per se* violations of the Fourth Amendment's protection against unreasonable searches and seizures. In a 6 to 3 decision, the Court found no Fourth Amendment violations in Bostick's encounter with law enforcement. Justice O'Connor reasoned that the critical factor was the voluntariness of the encounter. Instead of looking at whether an individual feels "free to leave," Justice O'Connor wrote that the "more appropriate inquiry is whether a reasonable passenger would feel free to decline the officers' request or otherwise terminate the encounter." Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/501/429/. *Florida v. Bostick*, 501 U.S. 429 (1991)

The *Bostick* decision faced harsh criticism from racial justice advocates and opponents of the War on Drugs. David Cole, National Legal Director of the ACLU, critiques the case in his book *No Equal Justice*. Cole states that the reasonable person described in the *Bostick* opinion is "patently fictional" and mischaracterizes how most individuals would act in Bostick's position, with officers "standing over him, blocking his exit, displaying badges and a gun, and directing questions at him[.]" Cole argues that the Court's standard "allows the police to engage in substantial coercion under the rubric of 'consent[.]'" Cole also highlights how the standard can further exacerbate racial disparities in searches and seizures: "[A]lthough the doctrine leaves the police free to target whomever they please, the targets will not be random; by and large they will be young black men." An excerpt from *No Equal Justice* is available online at: https://z.umn.edu/NoEqualJusticeBostickquote.

Throughout her time on the court, Justice O'Connor was the deciding vote in many important decisions involving affirmative action (*Grutter v. Bollinger*, 539 U.S. 306 (2003)), environmental protections (*Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004)), abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)), voting rights and campaign finance (*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996)), disability rights (*Tennessee v. Lane*, 541 U.S. 509 (2004)), and more. (For more information regarding *McConnell v. Federal Election Commission*, see "In *FEC v. Wisconsin Right to Life*, Court Upholds As-Applied Challenge to McCain-Feingold Act in the

Summer 2007 issue of the Silha *Bulletin*, and "U.S. Supreme Court Rules on Constitutionality of Bipartisan Campaign Reform Act" in the Fall 2003 issue.)

Justice O'Connor also provided the deciding vote in *Bush v. Gore*, the controversial case that settled a vote recount dispute between former President George W. Bush and former Vice President Al Gore in the 2000 presidential election. As votes were tallied on Nov. 8, 2000, it became clear that the election result would hinge on who won Florida's 25 electoral votes. The initial vote tally in Florida was close enough to trigger a recount and spark debates surrounding the process and deadlines for vote recounts. On Dec. 8, 2000, the Florida Supreme Court ordered a recount of the contested ballots. Four days later, on Dec. 12, 2000, the U.S. Supreme Court released a two-part *per curiam* opinion. First, in a 7 to 2 decision, the Court held that Florida's method for recounting ballots was unconstitutional under the Fourteenth Amendment. The Court reasoned that the Equal Protection Clause protected individuals from having their ballots devalued by "arbitrary and disparate treatment" and noted that the recount plan had no uniform standard. Next, in a 5 to 4 decision, the Court held that no other recount method could be decided and executed within the time limits imposed by U.S. election law. The decision stopped the Florida recounts and provided President Bush with the critical electoral votes to secure his presidency. *Bush v. Gore*, 531 U.S. 98 (2000)

Reflecting on the case in 2013, O'Connor expressed uncertainty that the Court made the right decision in taking the highly political case. "It took the case and decided it at a time when it was still a big election issue," O'Connor told the *Chicago Tribune*. "Maybe the court should have said, 'We're not going to take it, goodbye.'" The *Chicago Tribune* article is available online at: https://www.chicagotribune.com/news/ct-xpm-2013-04-27-ct-met-sandra-day-oconnor-edit-board-20130427-story.html.

In May 1998, Justice O'Connor chaired the Ditchley Foundation's "The Media and the Law" conference in Oxfordshire, England. Silha Center Director and Professor of Media Ethics and Law Jane Kirtley, who was the Executive Director of the Reporters Committee at the time, worked with Justice O'Connor as one of the Group Rapporteurs. "She was incredibly gracious to me," Kirtley recalled. "She chaired the conference with her characteristic qualities of pragmatism and good humor, showing great insight about genuine issues regarding press freedom and competing interests." More information on the conference is available online at:

https://www.ditchley.com/programme/past-events/1990-1999/1998/media-and-law.

Justice O'Connor modeled how to break glass ceilings with "courage, competence, and self-confidence," according to RonNell Anderson Jones, who served as one of Justice O'Connor's clerks and is currently the Lee E. Teitelbaum Chair in Law at the University of Utah. "Her truest gift to us wasn't that she broke every barrier. It was that she taught us how to keep breaking them," Anderson Jones stated. Her statement is available online at: https://www.americanbar.org/groups/litigation/resources/litigation-journal/2017-2022/impact-justice-sandra-day-o-connor/.

"A daughter of the American Southwest, Sandra Day O'Connor blazed a historic trail as our Nation's first female Justice," Chief Justice John G. Roberts, Jr. said in a statement on Dec. 1, 2023. "She met that challenge with undaunted determination, indisputable ability, and engaging candor." Chief Justice Roberts' statement is available online in a press release found at: https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-01-23.

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