

**TEXAS SUPREME COURT JUSTICE
PRISCILLA OWEN**

**AN EXTREMIST JURIST -
EVEN BY TEXAS STANDARDS**

A REPORT BY
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Texans for Public Justice is a non-profit, non-partisan research and advocacy organization that monitors money in Texas politics and promotes campaign finance and judicial-selection reforms.

I. Owen's Judicial Career

Immediately before she was elected to the Texas Supreme Court, Priscilla Owen represented oil and gas clients for the Houston-based corporate defense firm of Andrews & Kurth. Since joining the court in January 1995, Owen has authored and joined a body of activist, right-wing opinions that are out of the mainstream--even by Texas standards. Her result-oriented opinions overwhelmingly favor defendants over plaintiffs, businesses over consumers and judges over juries.

Public confidence in these opinions has been further undermined by the fact that Owen and her colleagues were elected to office in expensive political campaigns that were heavily funded by the same business interests and defense attorneys who have benefited from the bulk of their opinions. The Texas Supreme Court's own 1999 poll found that 83 percent of Texans, 79 percent of Texas lawyers, and even 48 percent of Texas judges say that campaign contributions significantly influence judicial decisions.¹ Justice Owen rarely has recused herself from cases involving large campaign contributors.

Examining opinions that Owen wrote or joined from 1995 through 2001, this report documents the extent to which Owen has written and joined opinions that are:

- Activist and Extremist;
- Anti-Consumer;
- Anti-Jury; and
- Tainted By Contributor Conflicts.

¹ "The Courts and the Legal Profession in Texas," State Justice Institute, Austin, 1999.

A. Activist and Extremist Jurist

The Texas business lobby launched a major campaign in the late 1980s to push the state Supreme Court to the far right, an effort that bore its first fruit in 1988, when Chief Justice Tom Phillips and Justice Nathan Hecht both were elected to the court.² "By 1991, conservative, activist judges had a majority on the court," notes a 1998 law journal article.³ After Owen joined the court in 1995, she and Justice Hecht formed an extreme, right-wing voting bloc. "Since 1995, [Justice Nathan Hecht] and Justice Priscilla Owen have provided a solid block that is activist in its use of power and wholly conservative on substance," noted Austin-based Court Watch's analysis of the court's 1998-1999 term.⁴ This Owen-Hecht bloc often spoke for the majority of that ultra-conservative court during Owen's first several years on the court. After the rest of the court moderated its ultra-conservative positions in the late 1990s (following a *60 Minutes* expose and the influence of then-Gov. George W. Bush's more moderate appointees),⁵ however, Owen and Hecht became isolated and increasingly filed extremist dissents.⁶ Justice Hecht and Owen lead the court by far in the number of dissents that they have written or joined since Owen joined the court in 1995. Hecht lent his name to 110 of these dissents and Owen signed 87. Since the court's more moderate turn in 1998, Owen has dissented 66 times, second only to Justice Hecht's 86 dissents.

In its analysis of the 1999-2000 term, the court-watching publication *Juris Publici* noted that the court's new majority

² Earlier that year, Phillips was appointed to complete the term of a resigning chief justice.

³ "Juries Under Siege," Chief Justice Phil Hardberger, *St. Mary's Law Journal*, V. 30, No. 1, 1998.

⁴ "The Texas Supreme Court in 1998-1999: Moderating the Counter-Revolution," Texas Watch's Court Watch, Austin, August 1999.

⁵ Bush appointed Justices James A. Baker, Greg Abbott, Deborah Hankinson and Alberto Gonzales.

consisted of five "moderate conservatives and judicial traditionalists (those who believe the court should limit its use of judicial power)."⁷ In contrast, "The conservative judicial activists whose views seemed to lead the court in previous years-- notably justices Hecht and Owen--are now isolated dissenters on most votes." The report found that Owen agreed with Hecht in 76 percent of the cases in which the court issued split opinions. In a law journal article, Justice Phil Hardberger, the chief justice of Texas' 4th District Court of Appeals, noted four watershed 1998 cases in which the Texas Supreme Court surprisingly ruled on behalf of plaintiffs. Significantly, Owen dissented from all of these majority opinions, voting against the plaintiffs on every occasion.⁸

Examples of Owen's activism abound. A recent Texas law requires minor women seeking an abortion to get parental consent unless a court finds that notification would not be in the applicant's "best interest." The majority opinion in *In re Jane Doe 2* instructed trial courts on how to judge if notification would be in a minor's best interest. Although the statute mentioned no such criteria, Owen's concurring opinion criticized the majority for not requiring judges to find that the abortion *itself* would be in the applicant's best interest. Owen's activist plurality opinion in *Ford Motor Co. v. Miles* overturned a \$40 million jury verdict, a court of appeals affirmance and years of well-established venue precedents. Although the court did not grant review on the venue issue (which had not been argued or briefed), Owen's opinion nevertheless reversed and remanded on this issue.

⁶ "Visit by Texas Supreme Court Designed to Shed Light on Work," *Houston Chronicle*, October 1, 2000.

⁷ "Legal Wranglers: The Texas Supreme Court in 1999-2000, *Juris Publici*, Austin, 2000.

⁸ The four 1998 cases are: *Hyundai Motor Co. v. Alvarado*; *Balandran v. Safeco Ins. Co.*; *Uniroyal Goodrich Tire Co. v. Martinez*; and *H.E. Butt Grocery Co. v. Bilotto*.

B. Anti-Consumer Opinions

The business interests that financed the conservative takeover of the court got a splendid return on their investment--at the expense of consumers. Studying 625 opinions issued between 1995 and April 1999, Court Watch found that "physicians, hospitals and other medical entities won 86 percent of their cases against other types of appellate parties."⁹ The report added that, "Insurance companies and manufacturers each won more than 70 percent of their appeals, and businesses triumphed in two-thirds of their appeals. Individuals, on the other hand, won only 36 percent of the time in cases against other types of litigants." Owen helped lead the court in its anti-consumer decisions. Even as a majority of the court moderated its opinions, however, Owen has been on the far right of a conservative court on these issues.

In *Provident American Ins. v. Castaneda*, Denise Castaneda sued her insurer for not covering her medical costs after she had her spleen and gallbladder removed due to a hereditary blood disease. A jury awarded her \$50,000 in damages, which the trial court trebled under the Deceptive Trade Practices Act. But Owen's majority opinion overturned two lower courts, finding insufficient evidence of liability and creating a new defense for insurers to deny claims on pre-existing conditions. Owen is especially proud of the activist, anti-consumer majority opinion she wrote in *In re City of Georgetown*, listing it as one of "ten significant opinions that I have written." In this opinion, Owen rewrote the Texas Public Information Act to block the media from seeing an engineering report that a city commissioned in response to a lawsuit over sewage discharges. To reach this result, Owen had to overrule the

⁹ "Food Chain: Winners and Losers in the Texas Supreme Court 1995-1999," Texas Watch's Court Watch, May 1999.

trial court and the state Attorney General and plowed under statutory language that said that the courts could not bar from disclosure any information that is not expressly made confidential by the statute.

Owen's unyielding support for business interests has often isolated her from the less extreme, yet generally pro-business majority. In a test of the constitutionality of a state law tailored to exempt a specific land developer from the City of Austin's water quality rules, Owen wrote a forceful dissent that decried the majority for finding this special-interest statute unconstitutional (*FM Properties Operating Co. v. City of Austin*). The dissenting Owen, who received \$2,500 in campaign contributions from the same developer and \$45,000 from the developer's attorneys, criticized the majority for curtailing the developer's private property rights. The majority opinion retorted that, "most of Justice Owen's dissent is nothing more than inflammatory rhetoric and thus merits no response."

C. Anti-Jury Opinions

Juries have lost considerable authority under the Texas Supreme Court in general and Justice Owen in particular.¹⁰ Since the conservative takeover of the court a decade ago, "Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons," wrote 4th District Court of Appeals Justice Phil Hardberger in his law journal article.¹¹ "Legal tools of 'no duty,' 'no proximate cause,' 'no evidence,' 'insufficient evidence,' 'unreliable experts,' 'unqualified experts,' and 'junk science,' wiped out many jury verdicts. Damages, too, did not go unnoticed. Juries' assessments were wiped out by increasingly harsher standards for mental anguish and punitive damages. Summary judgments took on a new life. Statutes of limitations, particularly in medical cases, were interpreted much more narrowly, adding to the number of summary judgments." Owen has consistently been one of the court's most anti-jury members and has often dissented from the majority to put forth extreme anti-jury opinions.

An anti-jury opinion that Owen counts among one of "ten significant opinions that I have written" is her majority opinion in *Merrell Dow Pharm. v. Havner*. The Havner family alleged that the morning sickness drug Bendectin caused severe birth defects in their daughter, Kelly. Owen's opinion used extremely strict limits on the admissibility of expert testimony to overturn a jury award (after trial court modification) of \$3.75 million in actual damages and \$15 million in punitive damages.

¹⁰ "Power Shift: Laws Are Snatching Authority From Jurors and Transferring It To the Hands of Judges," *Dallas Morning News*, May 7, 2000.

¹¹ "Juries Under Siege," Chief Justice Phil Hardberger, *St. Mary's Law Journal*, V. 30, No. 1, 1998.

Owen also hammered juries in her majority opinion in *State Farm Life Ins. Co. v. Beaston*. Terri Beaston sued an insurer that denied a life insurance claim after her husband died in a car crash. The trial court judgment granted Beaston the \$250,000 value of her husband's policy but overruled a jury award of \$200,000 in mental anguish damages on the grounds that there was no finding that the defendants acted knowingly. A court of appeals reinstated the mental anguish award and trebled it under a state Insurance Code provision. Owen's majority opinion overturned the jury and two lower courts to rule that Beaston take nothing. This opinion created new obstacles for consumers who are deceived by insurers.

In her dissent in *Universe Life Insurance Co. v. Giles*, Owen shows herself to be more extreme than the majority in undermining the authority of Texas juries. In this bad-faith insurance case, the majority overturned the jury's punitive damages award citing a lack of evidence. Owen joined a more extreme dissent that would have directed judges to replace juries in making bad-faith determinations. The majority criticized this dissent, saying it "would take the resolution of bad-faith disputes away from the juries that have been deciding bad faith cases for more than a decade."

D. Contributor Conflicts

Texas is the largest of nine states in which voters still select Supreme Court justices through expensive, partisan elections. This controversial practice has undermined public confidence in the court's rulings. More than half of the money that Texas justices raise comes from lawyers or litigants who have brought legal matters before the court.¹² All of the Texas Supreme Court Justices are mired in these donor conflicts.

Justice Owen raised a total of \$1,376,000 for her 1994 and 2000 Supreme Court campaigns. With the help of consultant Karl Rove, Owen raised more than \$1 million of this money for a competitive 1994 race against a Democratic opponent.¹³ There is a disturbing correlation between Owen's donors and the lawyers and litigants who have had legal matters in her court. The 2001 Texans for Public Justice report *Pay to Play* identified the employer and occupation of donors who gave a total of \$926,516 to Owen's 1994 campaign. Lawyers and litigants who were parties to *petitions* in Owen's court between 1994 and 1998 provided 43 percent of this money that she raised.¹⁴ Lawyers and litigants who were parties to 60 percent of the 758 *opinions* that the court issued between January 1995 and October 2000 gave Owen \$510,503 (37 percent of all her Texas Supreme Court money).

The table below shows the top Owen donors who appeared before her court as litigants. These donor parties fared extremely well before the court's majority, winning 77 percent of the 26 cases that they had there. They did even better, however, before Justice

¹² "Pay to Play: How Big Money Buys Access to the Texas Supreme Court," Texans for Public Justice, April 2001.

¹³ During her 2000 race, in which she faced no major-party opposition, Owen returned a third of the \$295,000 she raised.

¹⁴ This includes donations made by PACs and employees of law firms and litigants that had cases before the court.

Owen, who occasionally broke from the majority to support a party that has supported her campaigns. As a result, these same big donors prevailed with Owen in 85 percent of these cases.¹⁵

Owen's Top Litigant Donors (1995-2001)

Owen's Top Litigant Donors	Donations	Sup. Ct. Cases Involving Owen	Win/Loss Ratio With Majority	Win/Loss Ratio With Owen
*Haynes & Boone	\$16,510	1	1:0	1:0
*Hughes & Luce	\$14,236	1	1:0	1:0
Reliant Energy	\$9,500	4	3:1	3:1
Enron Corp.	\$8,600	1	1:0	1:0
H.E. Butt Grocery	\$7,500	3	2:1	3:0
Valero Energy	\$6,000	2	1:1	1:1
Texas Utilities	\$5,950	3	3:0	3:0
Farmers Insurance	\$5,722	2	2:0	2:0
Union Pacific	\$5,278	4	4:0	4:0
Coastal Corp.	\$5,000	3	2:1	2:1
Dow Chemical	\$5,000	2	0:2	1:1
TOTAL:	\$89,296	26	20:6	22:4

*Besides appearing before the court as counsel, these firms were defendants in legal malpractice suits.

Justice Owen cast a deciding 1995 vote that prevented one of her top donors from being sued for legal malpractice (*Peeler v. Hughes & Luce*). After pleading guilty to federal tax fraud, a securities worker tried to sue Hughes & Luce (which this plaintiff had retained for \$250,000) for failing to tell her that a prosecutor had offered her immunity in exchange for her testimony in a wider probe. After taking \$14,236 from Hughes & Luce in her 1994 race, Owen joined the court's plurality opinion that ruled that convicted criminals cannot bring malpractice lawsuits. Three dissenting justices pointed out that the plaintiff arguably never would have been indicted or convicted if her attorney had told her about the immunity offer.¹⁶

¹⁵ Owen broke from the majority to join separate opinions in four of these cases. She departed from the majority to rule for a donor in: *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22; *Dow Chemical Co. v. Garcia*, 909 S.W.2d 503; and *Coastal Corp. v. Garza*, 979 S.W.2d 318. In the fourth case, *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, she broke from the majority to partially rule against donor Coastal Corp.

In another contributor-conflict case, Owen wrote a scathing dissent to a 2000 majority opinion that found a state law unconstitutional because it was written to let a single developer dodge Austin's water-quality rules (*FM Properties Operating Co. v. City of Austin*). Owen decried the majority for curtailing the property rights of Freeport McMoRan's development arm after taking \$2,500 from Freeport board members and \$45,458 from its lawyers.

With its PAC and executives giving court members \$134,558 since 1993, Enron Corp. was the justices' biggest source of corporate donations. During this same period the justices received six Enron-related petitions for review. In three of them, Enron's adversaries sought Supreme Court review and the justices denied review every time.¹⁷ In contrast, the court granted review in two of the three cases in which Enron sought review (66 percent). This is an extraordinary record in a court that accepts just 11 percent of all petitions received. The court then issued opinions favoring Enron in both cases that it heard. Both opinions overturned lower appeals court rulings against Enron and both occurred in 1996, two years after Owen and consultant Karl Rove raised \$8,600 from Enron's PAC and executives. In the court's first Enron ruling, Owen wrote a unanimous opinion that prevented Enron from having to pay \$224,989 in school taxes (*Enron v. Spring Independent School District*). Owen did not participate in the second decision, presumably because it involved her old law firm.¹⁸

Enron's success in getting its cases accepted by the court was replicated by numerous big-donor lawyers, law firms, and parties. Owen took \$361,602 from these docket sources between 1995-1998. Court records show that law firms that donate heavily to Owen and

¹⁶ Because one of the nine justices did not sit for this case, Owen's vote was a deciding one in this case.

¹⁷ The court does not disclose if individual justices voted to accept or deny a petition.

¹⁸ *Tenneco v. Enterprise Products*, 925 S.W.2d 640.

the other justices are much more likely to have the Supreme Court agree to hear their cases on appeal. The 11 percent overall acceptance rate for petitions to the court jumped to 37 percent for the 149 cases filed by law firms that contributed more than \$100,000 to the justices' campaigns. The justices accepted an astonishing 58 percent of the 43 cases filed by the two law firms that gave them more than \$250,000. Yet they agreed to hear just six percent of the appeals by lawyers who made no contributions.¹⁹

On the same day as *Enron v. Spring Independent School District*, the court issued a *per curiam* tax decision in favor of another big donor to Owen and the other justices.²⁰ *HEB Grocery Co. v. Jefferson County* allowed a grocery store chain to pay taxes on just one of six stores that it operated in Jefferson County. This decision benefited HEB Chair Charles Butt, who has hosted fundraisers for justices in his home and who was the justices' second-largest individual donor at the time. The Butts family had given the justices \$53,098, including \$2,000 to Owen.

Owen dissented from a pro-consumer HEB decision delivered in 1998, when the court's majority was moderating its opinions following national media coverage of its money scandals as well as the influence of then-Governor Bush's relatively moderate Supreme Court appointments. In *HEB Grocery Co. v. Vinnie Bilotto*, an appeals court and a Supreme Court majority both affirmed a trial court judgment that granted \$91,000 in actual damages to a customer who was injured in a grocery store fall. Owen joined two dissents in the case that argued that damages questions to the jury should not have been predicated on the degree of negligence

¹⁹ "Pay to Play: How Big Money Buys Access to the Texas Supreme Court," Texans for Public Justice, April 2001.

²⁰ In a *per curiam*, an anonymous majority backs an opinion, disagreeing justices fail to write dissents and the voting records of individual justices are kept secret.

attributed to the defendant. In his concurring opinion in the case, Justice Raul Gonzalez said that the dissenters must have a low opinion of jurors if they think that juries do not know that negligence findings affect damage awards in personal injury cases. HEB Chairman Charles Butt contributed \$5,000 more to Owen shortly after she launched her re-election campaign in 1999.

Many of these conflict concerns also apply to other Texas Supreme Court members. Yet Owen's record on money-related ethical issues is sometimes even more troubling than that of her colleagues. She is one of two justices with the worst records of taking campaign money from business interests. She also turned a blind eye to the serious ethical lapses of private law firms that paid improper "bonuses" to her court's law clerks (see page 7).

Public records reveal that, among Texas' Justices, Owen took the second-highest amount and share of campaign money from non-law firm businesses. During her 1994 campaign Owen took \$231,379 from non-law firm businesses and trade

associations, accounting for 21 percent of her total campaign funds. Only one other justice--current White House Counsel Alberto Gonzales--took a greater share of his campaign money from business interests.²¹ As discussed on page 2, Owen ruled in favor of her top business donors in 22 of the 26 cases they argued before her.

Owen's Top Business Group Donors

Organization	Contributions
TX Society of Certified Public Accountants	\$20,000
TX Medical Association	\$13,261
TX Assn of Business & Chambers of Commerce	\$9,500
TX Apartment Association	\$7,500
TX Civil Justice League	\$6,900
TX Association of Insurance Agents	\$6,572
TX Association of Defense Counsel	\$5,500
TX Bankers Association	\$5,362
Texans for Lawsuit Reform PAC	\$5,000
TX Association of Realtors	\$5,000
TX Dental Association	\$5,000

²¹ "Checks and Imbalances," Texans for Public Justice, April 2000.

Owen's Top Law Firm Donors

Law Firm	Donations	Supreme Court Cases (1995-2001)
Vinson & Elkins	\$31,550	22
*Andrews & Kurth	\$29,374	6
Fulbright & Jaworski	\$21,108	33
Baker & Botts	\$20,450	35
Haynes & Boone	\$16,510	23
Hughes & Luce	\$14,236	10
Strasburger & Price	\$11,100	21
McDade Fogler Maines	\$11,000	3
McGinnis Lochridge & Kilgore	\$10,000	6
Susman Godfrey	\$10,000	6
TOTAL:	\$175,328	165

*Owen did not sit for these cases involving her ex-firm.

During another recent Texas Supreme Court money scandal, moreover, Justice Owen appeared utterly blind to serious concerns about impropriety and unethical behavior at the court. *Texas Lawyer* reported in 2000 that some of the state's top law firms were paying pre-employment subsidies of up to \$45,000 to Texas Supreme Court law clerks who had been hired to work at the firms after their clerkships ended. These bonuses--paid before or during the clerkships--violated the plain language of the "Bribery and Corrupt Influence" section of the state penal code, which bars judicial employees from accepting "any benefit" from interests with matters before the court. Justice Owen publicly dismissed the scandal as "a political issue that is being dressed up as a good-government issue."²² Yet the Texas Legislature, the Texas Ethics Commission and the Office of the Travis County Attorney all indicated that the subsidies violate Texas ethics laws, and the Supreme Court recently was forced to eliminate these private subsidies.

²² "Bribery or Perks for Clerks?" *Houston Chronicle*, February 11, 2001.

E. Conclusion

The practice of Texas Supreme Court justices ruling on behalf of the interests who fund their campaigns is a source of national embarrassment for Texas. This scandal was investigated by CBS' *60 Minutes* in 1987 and again in 1998. The Texas Supreme Court's own 1999 poll found that 83 percent of Texans, 79 percent of Texas lawyers and even 48 percent of Texas judges say that campaign contributions significantly influence judicial decisions.²³ Commenting on this poll on PBS' *Frontline* in 2000, U.S. Supreme Court Justice Anthony Kennedy said, "The law commands allegiance only if it commands respect. It commands respect only if the public thinks judges are neutral."

Although campaign-contribution conflicts would raise ethical questions about the nomination of any Texas Supreme Court justice for the federal bench, President George W. Bush exercised particularly bad judgment in nominating Owen. Not only is her record particularly troubling on campaign contribution and related issues, but Owen is also on the far right wing of this conservative court. When the rest of the court moved toward the center in 1998 (ironically due partly to the influence of then-Governor Bush's appointees), Justices Owen and Hecht became isolated extremists who often were reduced to writing far-right dissents that promote the interests of their campaign donors at the expense of consumers and juries. Legal scholars can and should debate which of these opinions Owen decided rightly or wrongly. Taken together, however, they reflect the work of a jurist who is far outside the mainstream--even by Texas standards.

²³ "The Courts and the Legal Profession in Texas," State Justice Institute, Austin, 1999.

II. Owen's Judicial Philosophy

Justice Owen's judicial philosophy can be discerned only through her written opinions. She has no known published articles, speeches or other writings. In more than seven years on the Texas Supreme Court, Owen has authored or joined dissents 87 times, while authoring just 48 majority opinions (ultra-conservative Justice Hecht authored many of the dissents that Owen joined). This section lists and then summarizes key cases that reflect Owen's judicial philosophy.

A. Listing of Selected Cases

1. Contributor-Conflict Opinions

Opinions Owen Wrote

Concord Oil Co. v. Pennzoil, 966 S.W.2d 451 (Tex. 1998)
Enron v. Spring Independent School District, 922 S.W.2d 931 (Tex. 1996)
FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000)
GTE v. Bruce, 998 S.W.2d 605 (Tex. 1999)
Gunn Infiniti, Inc. v. O'Byrne, 996 S.W.2d 854 (Tex. 1999)
Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998)
Provident American Insurance Co. v. Castaneda, 988 S.W.2d 189 (Tex. 1998)
State Farm Life Ins. Co. v. Beason, 907 S.W.2d 430 (Tex. 1995)

Opinions Owen Joined

Clayton W. Williams, Jr., Inc v. Olivo, 952 S.W.2d 523 (Tex. 1997)
Dickinson Arms-Reo, L.P. v. Campbell, 35 S.W.2d 633 (Tex. 2000)
Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455 (Tex. 1997)
Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1995)
H.E. Butt Grocery Co. v. Vinnie Bilotto, 985 S.W.2d 22 (Tex. 1998)
Peeler v. Hughes & Luce and Darrell C. Jordan, 909 S.W.2d 494 (Tex. 1995)
Saenz v. Fidelity Ins. Underwriters, 925 S.W.2d 607 (Tex. 1996)
State Farm Fire & Casualty Co. v. Simmons, 963 S.W.2d 42 (Tex. 1998)
State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997)
Stringer v. Cendant Mortgage Corp, 23 S.W.3d 353 (Tex. 2000)
Texas Utilities Electric Co. v. Timmons, 947 S.W.2d 191 (Tex. 1997)
Timberwalk Apartments v. Cain, 972 S.W.2d 749 (Tex. 1998)
Universe Life Insurance Co. v. Giles, 950 S.W.2d 48 (Tex. 1997)

2. Activist/Extremist Opinions

Opinions Owen Wrote

Concord Oil Co. v. Pennzoil, 966 S.W.2d 451 (Tex. 1998)
Ford Motor Co. v. Miles, 967 S.W.2d 377 (Tex. 1998)
FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000)
GTE v. Bruce, 998 S.W.2d 605 (Tex. 1999)
Gunn Infiniti, Inc. v. O'Byrne, 996 S.W.2d 854 (Tex. 1999)
In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001)
In re Jane Doe, (five opinions in 2000) 19 S.W. 3d 249; (2) 19 S.W. 3d 278; (3) 19 S.W. 3d 300; (4) 19 S.W. 3d 337; (5) 19 S.W. 3d 346.
Johnson & Johnson Medical v. Sanchez, 924 S.W.2d 925 (Tex. 1996)
Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997)
Mid-American Indemnity Insurance Co. v. King, 22 S.W.3d 321 (Tex. 1995)
Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998)
Provident American Insurance Co. v. Castaneda, 988 S.W.2d 189 (Tex. 1998)
Sonnier v. Chisholm-Ryder Co., Inc., 909 S.W.2d 475 (Tex. 1995)
State Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430 (Tex. 1995)
Stier v. Reading & Bates Corp., 922 S.W.2d 423 (Tex. 1999)

Opinions Owen Joined

Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444 (Tex. 1996)
Dallas County Mental Health v. Bossley, 968 S.W.2d 339 (Tex. 1998)
Dickinson Arms-Reo, L.P. v. Campbell, 35 S.W.2d 633 (Tex. 2000)
Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455 (Tex. 1997)
Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1995)
Lozano v. Lozano, 52 S.W.3d 141 (Tex. 2001)
Operation Rescue v. Planned Parenthood, 975 S.W. 2d 546 (Tex. 1998)
Read v. The Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998)
Saenz v. Fidelity Ins. Underwriters, 925 S.W.2d 607 (Tex. 1996)
St. Luke's Episcopal Hosp. v. Agbor, 952 S.W. 2d 503 (Tex. 1997)
State Farm Fire & Casualty Co. v. Simmons, 963 S.W.2d 42 (Tex. 1998)
State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997)
Stringer v. Cendant Mortgage Corp, 23 S.W.3d 353 (Tex. 2000)
Texas Utilities Electric Co. v. Timmons, 947 S.W.2d 191 (Tex. 1997)
Universe Life Insurance Co. v. Giles, 950 S.W.2d 48 (Tex. 1997)

3. Anti-Consumer Opinions

Opinions Owen Wrote

City of McAllen v. De La Garza, 898 S.W. 2d 809 (Tex. 1995)
Enron v. Spring Independent School District, 922 S.W.2d 931 (Tex. 1996)
Ford Motor Co. v. Miles, 967 S.W.2d 377 (Tex. 1998)
FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000)
GTE v. Bruce, 998 S.W.2d 605 (Tex. 1999)
Gunn Infiniti, Inc. v. O'Byrne, 996 S.W.2d 854 (Tex. 1999)
In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001)
In re Jane Doe, (five opinions in 2000) 19 S.W. 3d 249; (2) 19 S.W. 3d 278; (3) 19 S.W. 3d 300; (4) 19 S.W. 3d 337; (5) 19 S.W. 3d 346.
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Mid-American Indemnity Insurance Co. v. King, 22 S.W.3d 321 (Tex. 1995)
Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998)
Provident American Insurance Co. v. Castaneda, 988 S.W.2d 189 (Tex. 1998)
Sonnier v. Chisholm-Ryder Co., Inc., 909 S.W.2d 475 (Tex. 1995)
State Farm Life Ins. Co. v. Beason, 907 S.W.2d 430 (Tex. 1995)

Opinions Owen Joined

Dickinson Arms-Reo, L.P. v. Campbell, 35 S.W.2d 633 (Tex. 2000)
Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455 (Tex. 1997)
Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1995)
H.E. Butt Grocery Co. v. Vinnie Bilotto, 985 S.W.2d 22 (Tex. 1998)
Hernandez v. Tokai Corporation, 2 S.W.3d 251 (Tex. 1999)
Kerville State Hosp. v. Clark, 923 S.W.2d 582 (Tex. 1996)
Operation Rescue v. Planned Parenthood, 975 S.W. 2d 546 (Tex. 1998)
Peeler v. Hughes & Luce and Darrell C. Jordan, 909 S.W.2d 494 (Tex. 1995)
Read v. The Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998)
Saenz v. Fidelity Ins. Underwriters, 925 S.W.2d 607 (Tex. 1996)
St. Luke's Episcopal Hosp. v. Agbor, 952 S.W. 2d 503 (Tex. 1997)
State Farm Fire & Casualty Co. v. Simmons, 963 S.W.2d 42 (Tex. 1998)
State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997)
Stringer v. Cendant Mortgage Corp, 23 S.W.3d 353 (Tex. 2000)
Texas Utilities Electric Co. v. Timmons, 947 S.W.2d 191 (Tex. 1997)
Timberwalk Apartments v. Cain, 972 S.W.2d 749 (Tex. 1998)
Universe Life Insurance Co. v. Giles, 950 S.W.2d 48 (Tex. 1997)

4. Anti-Jury Opinions**Opinions Owen Wrote**

City of McAllen v. De La Garza, 898 S.W. 2d 809 (Tex. 1995)
Concord Oil Co. v. Pennzoil, 966 S.W.2d 451 (Tex. 1998)
Ford Motor Co. v. Miles, 967 S.W.2d 377 (Tex. 1998)
Gunn Infiniti, Inc. v. O'Byrne, 996 S.W.2d 854 (Tex. 1999)
Johnson & Johnson Medical v. Sanchez, 924 S.W.2d 925 (Tex. 1996)
Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997)
Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998)
Provident American Insurance Co. v. Castaneda, 988 S.W.2d 189 (Tex. 1998)
State Farm Life Ins. Co. v. Beaton, 907 S.W.2d 430 (Tex. 1995)

Opinions Owen Joined

Clayton W. Williams, Jr., Inc v. Olivo, 952 S.W.2d 523 (Tex. 1997)
Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444 (Tex. 1996)
Dallas County Mental Health v. Bossley, 968 S.W.2d 339 (Tex. 1998)
Dickinson Arms-Reo, L.P. v. Campbell, 35 S.W.2d 633 (Tex. 2000)
Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455 (Tex. 1997)
Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1995)
H.E. Butt Grocery Co. v. Vinnie Bilotto, 985 S.W.2d 22 (Tex. 1998)
Hernandez v. Tokai Corporation, 2 S.W.3d 251 (Tex. 1999)
Kerville State Hosp. v. Clark, 923 S.W.2d 582 (Tex. 1999)
Lozano v. Lozano, 52 S.W.3d 141 (Tex. 2001)
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Universe Life Insurance Co. v. Giles, 950 S.W.2d 48 (Tex. 1997)

B. Case Summaries

Key:

\$ = Contributor-Conflict Case

A = Activist/Extremist Case

C = Anti-Consumer Case

J = Anti-Jury Case

***** = Precedes the court's 1998 swing toward the center (which left Owen and Hecht isolated).

***City of McAllen v. De La Garza**, 898 S.W.2d 809 (Tex. 1995) **C/J**
Owen wrote majority opinion re landowner duty to warn of roadside dangers.

Robert Garza was drinking while under the influence when he veered off the road, plowed through a wire fence and flipped upside down into a 29-foot-deep limestone pit that a city had purchased for a landfill. His 16-year-old passenger, Aaron De La Garza, was killed. The victim's parents alleged that the city was negligent for failing to maintain dirt embankments in front of the pit and for failing to warn motorists of the resulting danger. While the trial court granted summary judgment for the city, the court of appeals reversed and remanded, concluding that the city failed to establish that it owed no duty to De La Garza as a matter of law. Without holding oral arguments in the case, Owen wrote a majority opinion that reversed the court of appeals, holding that no duty was owed because the driver was intoxicated. Justice Cornyn's dissent argued that the court should not decide this novel duty question "without the benefit of oral argument." Cornyn's dissent also argued that the city failed to prove as a matter of law that it owed no duty to travelers on the adjoining highway. He concluded that whether or not the driver was traveling with reasonable care was a comparative-negligence question for the jury.

***Clayton W. Williams, Jr., Inc v. Olivo**, 952 S.W.2d 523 (Tex. 1997) **\$/J**
Owen joined majority opinion re premises defects and worker injuries.

After David Olivo was paralyzed in an oil-rig fall, Owen joined Justice Baker's majority opinion that reversed a jury verdict of \$2 million in actual damages against a contractor. The court held that Olivo's attorney failed to prove the existence of a premises defect. By ruling on this point as a matter of law, the court trumped a jury's factual findings and deprived Olivo of compensation for his paralysis. The beneficiary of this decision, Mr. Clayton Williams, Jr., contributed \$1,250 to Owen's 1994 campaign.

Concord Oil Co. v. Pennzoil Exploration & Production Co., 966 S.W.2d 451 (Tex. 1998) **\$/A/J**

Owen wrote a plurality opinion on the construction of an oil and gas contract.

The parties to this case disputed the meaning of a deed that granted Concord Oil a tiny (1/96th) interest in the oil and gas produced on a piece of land, as well as a larger share (1/12th) of all rentals and royalties produced on that land. Despite this language, Concord claimed that the deed unambiguously granted it a 1/12th interest in oil and gas produced on this land. Pennzoil countered that all that the deed conveyed to Concord was a 1/96th interest in the oil and gas. A jury verdict and trial court judgment that was affirmed by a court of appeals found for Pennzoil. Owen's activist plurality opinion overturned these lower courts to rule for Concord. Dissenting and concurring opinions filed in the case objected that her opinion violated rules of construction by: finding ambiguity in an unambiguous contract; presupposing what the grantor meant rather than relying on what the deed said; and by setting new precedent by reading a future-lease clause into a deed in which the parties expressed no intent about future events. A year after the decision, Concord Oil President Tom Pawel pumped \$1,000 into Owen's campaign fund.

***Continental Coffee Prods. Co. v. Cazarez**, 937 S.W.2d 444 (Tex. 1996)A/J
Owen joined a unanimous opinion re the retaliatory firing of injured worker.

Juanita Cazarez alleged that a Quaker Oats subsidiary fired her in retaliation for filing a worker's compensation claim for a job-related injury. A jury awarded Cazarez \$500,000 in punitive damages. Owen joined Chief Justice Phillips' unanimous decision that reversed a trial court and court of appeals by overruling their finding that the employer acted with malice in firing Cazarez.

Dallas County Mental Health v. Bossley, 968 S.W.2d 339 (Tex. 1998)A/C/J
Owen joined a majority opinion re sovereign immunity and causation in a wrongful death case.

Owen joined Hecht's majority opinion that reversed a court of appeals and affirmed a trial court summary judgment that found no causal link between a mental hospital leaving its doors open and suicidal patient Roger Bossley escaping and killing himself by leaping in front of a truck. Justice Abbott's dissent argued that if the hospital had not left the doors open, "Bossley would still be in the hospital—he would have never escaped and would not have had the opportunity to jump in front of a truck." By narrowly interpreting sovereign immunity claim limits, the court blocked future juries from deciding similar questions of fact.

Dickinson Arms-Reo, L.P. v. Campbell, 35 S.W.3d 633 (Tex. 2000)\$/A/C/J
Owen joined a dissenting opinion assessing landlord liability for crimes committed on the premises.

Leaving a teenage gang "get-together" at a friend's apartment in the Dickinson Arms apartment, a recidivist juvenile delinquent murdered Joe Darwin Campbell and stole his pick-up truck. Campbell's family alleged that the apartment owners negligently failed to provide adequate security. The trial court rendered judgment on a jury verdict for Campbell's family and the court of appeals affirmed this decision. When the Texas Supreme

Court denied the apartment owners' petition for review, Justice Hecht wrote a dissent, which Owen joined. The dissent questioned the foreseeability of the crime given that, "Never before had there been a murder or a car-jacking at the Dickinson Arms." As the dissent conceded, however, police had reported 184 crimes at this apartment building in the previous two and a half years, including one instance in which shots were fired. The dissent also acknowledged that the court of appeals had concluded that the surrounding area was a hot bed of drug activity, prostitution "assaults, child abuse, you name it." Owen took \$7,500 from the Texas Apartment Association.

***Enron v. Spring Independent School District**, 922 S.W.2d 931 (Tex. 1996)

\$/C

Owen wrote majority opinion on the constitutionality of a tax statute.

Owen wrote a unanimous opinion that prevented one of the justices' biggest donors, Enron Corp. from paying \$224,989 in school taxes. This opinion reversed a court of appeals ruling that a state law violated the Texas Constitution's guarantee of tax equality and uniformity. The disputed law granted corporations flexibility to pick the date used for property tax inventories (Enron's gas inventories are subject to dramatic seasonal fluctuations). Owen's opinion said "we need not decide the consequences of transfers [i.e. shuffling inventory among subsidiaries] that occur for tax evasion purposes." Enron's PAC and executives have given \$8,600 to Owen's campaigns.

Ford Motor Co. v. Miles, 967 S.W.2d 377 (Tex. 1998)

A/C/J

Owen wrote a plurality opinion re product liability and venue.

Owen authored this divisive, plurality opinion that overturned a jury verdict, a court of appeals affirmation and years of well-established venue precedents. The underlying case involved allegations that a faulty seatbelt used in a pickup truck accident paralyzed teenager Willie Searcy, severing his brain from his spinal cord. A jury awarded the plaintiffs \$30 million in actual and \$10 million in punitive damages. The court of appeals affirmed the actual damages but reversed the punitive damages, finding insufficient evidence of gross negligence and malice. Despite the fact that the Supreme Court did not grant writ in this case on the venue issue (and had not been argued or briefed on venue), Owen's plurality opinion notably reversed and remanded on the venue issue. "A reviewing court must defer to the trial court's venue determination if any probative evidence supports the trial court's venue ruling," noted the dissent of four justices. "Resolution of venue issues perforce requires detailed factual analysis; the court's failure to give due weight to the facts in this case is thus all the more troubling." The dissent also noted that Owen improperly discussed jury charge and evidentiary issues in this remanded case. Her opinion also disparaged plaintiff evidence, arguing that it should not have been admitted at all.

FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000) **\$/A/C**

Owen wrote and joined dissents on the constitutionality of an anti-environmental statute.

A Texas Supreme Court majority issued a summary judgment that held that a state law tailored to let specific developers dodge City of Austin water-quality rules unconstitutionally delegated legislative powers to private landowners. Owen's forceful dissent decried the majority for curtailing the private property rights of the developers. The majority opinion retorted that, "most of Justice Owen's dissent is nothing more than inflammatory rhetoric and thus merits no response." The development company seeking the special favor was owned by mining giant Freeport McMoRan. Owen received a total of \$2,500 from a Freeport director and its chairman, Jim Bob Moffett. She also received \$45,458 from the developer's legal counsel.

****Grain Dealers Mut. Ins. v. McKee***, 943 S.W.2d 455 (Tex. 1997) **\$/A/C/J**

Owen joined a majority opinion assessing an insurer's contractual right to deny a claim.

Gerald McKee's insurer refused to pay claims relating to injuries that his 11-year-old daughter, Kelly, sustained in a car crash. The trial court and the court of appeals granted summary judgment for McKee. Owen joined a majority opinion by Justice Abbott that ruled that how the language of the insurance policy was construed was a matter of law to be determined by the court rather than a question of fact for the jury. The high court reaffirmed the trial court's summary judgment that narrowly interpreted this contract in favor of the insurer. Justice Spector's dissent said, "The majority's conclusion that the policy language at issue here is not ambiguous defies commonsense: the two lower courts in this case and the courts of several other states have discerned a lack of clarity that escapes the majority." Owen received \$6,572 from the Texas Association of Insurance Agents.

GTE v. Bruce, 998 S.W.2d 605 (Tex. 1999) **\$/A/C**

Owen wrote a concurring opinion re sex-related inflictions of emotional distress in the workplace.

A high court majority upheld trial court and court of appeals decisions that awarded \$275,000 in jury damages to three female GTE employees. The women all worked under an alpha-male supervisor who bullied them by charging them like a bull, screaming profanities, forcing them to do menial cleaning chores and making them stand in his office while he leered at them. Owen wrote a concurring opinion to clarify that such behavior should not be considered "extreme and outrageous" nor "utterly intolerable in a civilized community." Owen received \$1,000 from GTE's "Good Government Club."

Gunn Infiniti, Inc. v. O'Byrne, 996 S.W.2d 854 (Tex. 1999) **\$/A/C/J**

Owen wrote a majority opinion re mental anguish and Texas' Deceptive Trade Practices Act.

Donald O'Byrne bought a car from a dealer who repeatedly lied to him, falsely claiming that that the car was new and had never been damaged. A jury granted him \$71,500 in actual and punitive damages under the Deceptive Trade Practices Act. The dealer unsuccessfully appealed to the court of appeals, arguing in part that there was insufficient evidence to support the jury's \$11,000 mental anguish award. Owen's majority opinion reversed the \$11,000 that the jury awarded to the plaintiff for mental anguish, as well as \$50,000 in punitive damages, arguing that the evidence presented did not meet the "high degree of mental pain and distress" required by Texas law. While the jury was swayed by O'Byrne's testimony that he had been aggrieved each time he discovered a new flaw in the damaged car, Owen's opinion substituted her own finding that this testimony was unconvincing and "conclusory." This activist opinion goes beyond the "sufficiency of evidence" standard for reviewing mental anguish damages, infringing upon the Texas Constitution, which grants juries rather than judges the role of weighing evidence. Dealership owner Curtis Gunn, Jr., contributed \$500 to Owen's 1994 campaign.

***Haynes & Boone v. Bowser Bouldin, Ltd.**, 896 S.W.2d 179 (Tex. 1995) \$/A/C/J
Owen joined a majority opinion assessing damages for legal malpractice.

Shortly after a mall opened with a Blockbuster video store as its anchor tenant, Blockbuster backed out of its lease. In the ensuing litigation, the mall hired a Haynes & Boone attorney, whom the firm later admitted had bungled the case by missing two court deadlines. The resulting summary judgment allowed Blockbuster to lift anchor and the mall was foreclosed upon. A trial court and court of appeals upheld a \$4.4 million malpractice award against Haynes & Boone. A unanimous Supreme Court decision did not dispute the malpractice finding, but found "no evidence" supporting the damages against the law firm. Owen received \$16,510 from Haynes & Boone and its attorneys.

H.E. Butt Grocery Co. v. Vinnie Bilotto, 985 S.W.2d 22 (Tex. 1998) \$/C/J
Owen joined dissenting opinions re jury charges in personal injury lawsuits.

A court of appeals and Supreme Court majority affirmed a trial court judgment that granted \$91,000 in actual damages to Vinnie Bilotto, who injured his back in a fall at an HEB grocery store. Owen joined two dissents that argued that juries should not be informed of the effects of their answers and that this impermissibly was done when damages questions to the jury were predicated on negligence findings of 50 percent or less negligence. Justice Gonzalez's concurrence said that the dissenters must have a low opinion of jurors if they believe that a jury does not know that its findings in a personal injury case affect damage awards. HEB owner Charles Butt, who has hosted fundraisers for justices in his home, personally has given \$7,500 to Owen. In a 1996 case similar to *Enron v. Spring Independent School District*, the high court issued an unsigned *per curiam* opinion that reversed a court of appeals decision in order to let HEB pay taxes on just one of the six stores that it operated in Jefferson

County [*H.E. Butt Grocery Co. v. Jefferson County Appraisal District*, 922 S.W.2d 941 (Tex. 1996)].

Hernandez v. Tokai Corporation, 2 S.W.3d 251 (Tex. 1999) C/J
Owen joined a majority opinion re child safety and product liability.

Two-year-old Ruben Hernandez was severely burned by a fire that his sister started with a butane lighter from her mother's purse. The Hernandezes filed a product liability suit against the manufacturer for marketing lighters without readily available child-safety features. Owen joined Hecht's unanimous opinion that severely curtails the responsibility of manufacturers to incorporate child safety into the design of products intended for adult use. The court's ruling came on a certified question from the U.S. 5th Court of Appeals after a trial court had issued summary judgment for the defendants, thereby preventing the case from going to a jury.

In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001) A/C
Owen wrote a majority opinion re disclosure of government records.

Owen's controversial majority opinion rewrote the Texas Public Information Act to block the media from seeing an engineering report that a city commissioned in response to a lawsuit over sewage plant discharges. Owen's opinion overruled the Texas Attorney General and the trial court, which both ruled in favor of disclosing this taxpayer-financed report. To reach this result, Owen plowed under statutory language that said that the courts could not shield from disclosure any information that is not expressly made confidential by the statute. The legislature expressly wrote into the statute that the Public Information Act "shall be liberally construed in favor of granting a request for information." Owen's decision departs from court precedent on statutory interpretation. The court previously held that "a court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute." [See *Lee v. City of Houston*, 807 S.W.2d 290 (Tex. 1991)]. Justice Abbott's dissent concluded, "Today, the Court abandons strict construction and rewrites the statute." Owen lists this as one of, "Ten significant opinions that I have written."

In re Jane Doe, (five opinions delivered in 2000) A/C
(1) 19 S.W. 3d 249; (2) 19 S.W. 3d 278; (3) 19 S.W. 3d 300; (4) 19 S.W. 3d 337; (5) 19 S.W. 3d 346.
Owen wrote dissenting and concurring opinions re a statute governing teenage abortions.

A recent Texas law requires minor women who seek an abortion to obtain parental consent unless a court grants a "judicial bypass" based on its finding that: the applicant is "mature and sufficiently well informed" to make the decision herself; notification would not be in the applicant's "best interest;" or "notification may lead to physical, sexual, or emotional abuse" of the applicant. Owen wrote or joined separate concurring or dissenting opinions from the majority in all five cases, often questioning the maturity of the anonymous "Jane Doe" applicants and

belittling their fears of notifying their parents. Owen was most disturbing in the concurring opinion she wrote in *In re Jane Doe 2*, a case in which the majority identified four factors that trial courts should use to determine if parental notification would serve the applicant's best interests. Owen's concurring opinion criticized the majority for not requiring trial courts to find that the abortion *itself* would be in the applicant's best interest. Given that the underlying statute never mentions such a criteria, Owen sought to make rather than interpret abortion law. Owen received \$12,350 from the family of anti-abortion activist James Leininger.

***Johnson & Johnson Medical v. Sanchez**, 924 S.W.2d 925 (Tex. 1996) **A/C/J**
Owen wrote a dissenting/concurring opinion re wrongful termination of an injured worker.

Martha Sanchez suffered an on-the-job injury that kept her out of work for a long time. After several months, Johnson & Johnson put her on "indefinite medical layoff," meaning that she would be rehired for the first available job after her doctor cleared her to return to work. Sanchez filed suit against the company for never rehiring her. A trial court issued summary judgment for the employer on the grounds that the statute of limitations had expired. The court of appeals and the Supreme Court reversed and remanded the case for further trial proceedings on a question of fact. Owen's dissent argued that the suit was unequivocally barred by the statute of limitations, an issue that the majority deemed ambiguous.

***Kerville State Hosp. v. Clark**, 923 S.W.2d 582 (Tex. 1996) **C/J**
Owen joined a majority opinion re sovereign immunity in a wrongful death case.

The week after a mental hospital released patient Gary Ligon, he dismembered his estranged wife, Rebecca. Her parents alleged that the hospital was liable because it administered short-term rather than long-term drugs to a dangerous patient who had a history of not taking medications. Owen joined Justice Gonzalez's 5-4 majority decision that ruled that this hospital was immune from a Texas Tort Claims Act lawsuit, thereby overturning a jury award of \$2 million (which the trial court reduced to \$250,000). Justice Abbott's dissent said that "the Court incorrectly interprets the facts and abandons precedent."

Lozano v. Lozano, 52 S.W.3d 141 (Tex. 2001) **A/J**
Owen joined a concurring/dissenting opinion re liability for interfering with child custody rights.

Deana Lozano won custody of her daughter, Bianca, after separating from her husband, who later kidnapped the child. Deana Lozano then sued her husband's family under Texas family law provisions that impose liability on those who interfere with a parent's possessory interest in a child. The trial court rendered judgment on a jury verdict that included \$1.2 million in punitive damages. The Texas Supreme Court reviewed the case to determine if there was legally sufficient evidence to uphold this verdict

in a case where the evidence of the family's complicity was sketchy. The court's *per curiam* decision reaffirmed the equal inference rule, which emphasizes the role of the jury over the judiciary in determining what evidence to privilege in the jury's fact-finding search. Owen joined a separate dissenting and concurring opinion by Hecht that would severely curtail the fact-finding function of juries.

***Merrell Dow Pharm. v. Havner**, 953 S.W.2d 706 (Tex. 1997) **A/C/J**
Owen wrote a majority opinion re admissibility of expert testimony in a defective product case.

The Havner family's lawsuit alleged that the morning sickness drug Bendectin caused their daughter, Kelly, to be born with severe birth defects. Owen's majority opinion used extremely strict limits on the admissibility of expert testimony to overturn a jury award of \$3.75 million in actual damages and \$30 million in punitive damages (the trial court reduced the punitives to \$15 million). Owen lists this as one of, "Ten significant opinions that I have written."

***Mid-American Indemnity Insurance Co. v. King**, 22 S.W.3d 321 (Tex. 1995) **A/C**
Owen wrote a dissenting opinion interpreting a statute that set capital requirements for insurers.

After the Lopez-Gloria construction firm bought insurance from Mid-American Indemnity, Texas passed a 1993 law that required certain insurers that fail to maintain \$15 million in capital reserves to post bonds prior to filing court pleadings, thereby ensuring that they pay any judgments. Lopez-Gloria then sued Mid-American for refusing to defend it in a suit covered by its policy. When Mid-American failed to obey a trial court order to post bond, the court issued a default judgment against it. Justice Spector's majority opinion denied mandamus relief to the insurer, citing the Texas Insurance Code as evidence of the "Legislature's efforts to protect Texas consumers from unauthorized insurers that lack adequate capital." Owen's dissent argued that the legislature intended to grandfather then-existing insurance policies from the new requirements that it passed in 1993. The majority warned that a reading of the statute would pose "a real danger that an unlicensed carrier would not have sufficient capital at the time the policy was issued [and that] it would neither have to post any bond in court nor maintain adequate reserves." The majority could not square this outcome with the legislature's intent.

Operation Rescue v. Planned Parenthood, 975 S.W.2d 546 (Tex. 1998) **A/C**
Owen joined a majority opinion re the First Amendment and abortion clinic access.

Owen joined Hecht's majority opinion that severely restricted the "buffer zones" that a trial court established to protect the entrances of Houston abortion clinics from aggressive protesters. Justice Spector's dissent criticizes the majority for, "Ignoring the district court's unchallenged finding that 'Defendants' aggressive and harassing manner of protesting and sidewalk counseling of clinic patients increases the medical risks

attendant to the abortion procedure.' " Owen received \$12,350 from the family of anti-abortion activist James Leininger.

***Peeler v. Hughes & Luce and Darrell C. Jordan**, 909 S.W.2d 494 (Tex. 1995)
\$ / C

Owen joined a plurality opinion assessing damages for legal malpractice.

Securities worker Carol Peeler plead guilty to federal tax fraud in a plea bargain that involved a fine and probation but no jail time. Three days later, she learned from a reporter that the prosecutor had contacted her lawyer to offer her immunity in exchange for her cooperation with a wider IRS probe. Peeler filed a legal malpractice suit over the fact that she was never informed of this offer. Owen joined Justice Enoch's plurality opinion that upheld a trial court and court of appeals judgment. These rulings held that Peeler could not collect even for egregious malpractice because she was a convicted criminal. Chief Justice Phillips' dissent argued that the issue of guilt is "irrelevant" when considered against Peeler's lost opportunity to receive immunity for her crime. Hughes & Luce and its attorneys contributed \$14,236 to Owen's 1994 campaign.

Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998) \$ / A / C / J

Owen wrote a majority opinion re a doctor's duty to warn of dangers posed by an epileptic motorist.

Terri Lynn Praesel was killed in an accident caused by Ronald Peterson, a motorist having an epileptic seizure. Praesel's family alleged that a physician who was aware of a recent Peterson seizure should have notified the authorities that Peterson should not drive. A trial court ruled in a summary judgment that the doctor owed no such duty to third parties, but the court of appeals reversed and remanded the case for trial. In reversing the court of appeals and again issuing summary judgment for the defendant, Owen's majority opinion kept the issue from a jury. Justice Enoch's concurrence criticized Owen's opinion for misreading the record and ignoring contrary case law. Owen took \$13,261 from the Texas Medical Association.

Provident American Ins. v. Castaneda, 988 S.W.2d 189 (Tex. 1998) \$ / A / C / J

Owen wrote a majority opinion re insurance claim liability under the Deceptive Trade Practices Act.

Denise Castaneda sued her insurer for not covering her medical costs after she had to have her spleen and gallbladder removed due to a hereditary blood disease. A jury awarded her \$50,000 in damages, which the trial court trebled under the Deceptive Trades Practices Act. Owen's majority opinion overturned two lower courts, finding insufficient evidence of liability. In so doing, the opinion created a new defense for insurance companies that deny claims due to pre-existing conditions. Criticizing the majority for second guessing the jury, Justice Gonzalez's dissent said, "The Court's opinion may very well eviscerate the bad-faith tort as a viable claim of action in Texas. If the evidence in this case is not good enough to affirm judgment, I do not know what character or quality of

evidence would ever satisfy the Court." Owen received \$6,572 from the Texas Association of Insurance Agents.

Read v. The Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998)

A/C/J

Owen joined dissenting opinions re business liability for a door-to-door salesman who raped a customer. Mickey Carter raped Kristi Read in her home after an independent contractor hired him to make door-to-door sales of Kirby vacuum cleaners. Had the distributor checked Carter's references, it would have learned that his former female coworkers had complained of his sexually inappropriate behavior and that one employer fired Carter because he was arrested for indecency with a child. A jury awarded Read \$160,000 in actual and \$800,000 in punitive damages. The court of appeals affirmed the actual damages but ruled that there was insufficient evidence for the punitives. A Supreme Court majority affirmed the court of appeals judgment. Owen joined Hecht's more extreme dissent, which argued that the distributor had no legal duty to perform background checks on door-to-door salesmen and that failure to perform these checks could not result in foreseeable sexual assaults.

***Saenz v. Fidelity Ins. Underwriters**, 925 S.W.2d 607 (Tex. 1996)

\$/A/C/J

Owen joined a concurring/dissenting opinion re worker compensation for mental anguish.

A jury awarded secretary Corina Saenz \$5 million in actual and punitive damages after finding that her employer's workers' compensation insurer wrongfully induced her to settle job-related concussion claims. A majority opinion by Hecht reversed the entire jury award and ruled that jury awards for mental anguish can be reversed for insufficient evidence. This reversed Texas case law, which previously relied on juries to assess mental anguish awards. Owen, who joined Chief Justice Phillips' opinion that concurred with the majority on these issues, received \$6,572 from the Texas Association of Insurance Agents.

***Sonnier v. Chisholm-Ryder Co., Inc.**, 909 S.W.2d 475 (Tex. 1995)

A/C

Owen wrote a dissenting opinion re the statute of limitations in a product liability case.

After part of supervisor John Sonnier's arm was chopped off as he inspected a cannery tomato chopper, he filed a product-liability suit against machine manufacturer Chisholm-Ryder Co. A federal court entered judgment for the manufacturer based on a jury finding that the defendant was covered by a Texas law that provides a 10-year statute of limitations for those who construct or repair improvements to real property (Chisholm-Ryder made the machine 20 years before the accident). Responding to a certified question from the U.S. 5th Court of Appeals, Justice Enoch's majority opinion held that "the statute of repose was not intended to grant repose to manufacturers in product liability suits but only to preclude suits against those in the construction industry that annex personalty to realty." Owen's activist dissent argued that the intention of manufacturers should determine what is protected by this statute. Owen's subjective test would appear to grant manufacturers immunity on any product that has been installed for more than a decade. The majority said,

"the dissent's test is significantly more broad than any holding in this area so far. Despite its protests to the contrary, the dissent's test encompasses all materialmen—all suppliers of any kind."

***St. Luke's Episcopal Hosp. v. Agbor**, 952 S.W. 2d 503 (Tex. 1997) **A/C/J**

Owen joined a majority opinion re hospital liability for medical malpractice.

After the Agbor family's baby was born with a permanently disabled arm, they sued the hospital that had granted staff privileges to a doctor who—despite a history of malpractice claims—lacked proper malpractice insurance. Owen joined Justice Gonzalez's majority opinion, which used an activist interpretation of a patient-protection law to harm malpractice victims. The Texas Medical Practice Act shields hospitals and their medical review committees from lawsuits filed by doctors who are denied hospital privileges after a review committee deems them to be unsafe. "It is as clear as such things get that by enacting the Texas Medical Practice Act (TMPA) the Legislature did not intend to lower then prevailing standards of patient care by insulating hospitals from their own negligence in credentialing physicians," Justice Cornyn's dissent said. "But the Court's irregular construction of TMPA does just that." The majority's twisted summary judgment reversed an appeals court and kept the case from a jury.

State Farm Fire & Casualty v. Simmons, 963 S.W.2d 42 (Tex. 1998) **\$/A/C/J**

Owen joined a majority opinion re insurance claim liability under the Deceptive Trade Practices Act.

An insurer refused to pay claims after the Simmons family's home burned to the ground. A jury, which found that the insurer acted deceptively and in bad faith, awarded \$275,000 in actual and \$2 million in punitive damages. The court of appeals affirmed this judgment. A majority opinion by Justice Spector ruled that the evidence of bad faith was insufficient to warrant the jury's award of punitive damages. Despite the presumption that, when all things are equal, courts should rule in favor of the insured, Owen joined a more extreme Hecht dissent that questioned even the actual damages award by finding "no evidence of bad faith in this case." Owen received \$6,572 from the Texas Association of Insurance Agents.

***State Farm Life Ins. Co. v. Beaston**, 907 S.W.2d 430 (Tex. 1995) **\$/A/C/J**

Owen wrote a majority opinion re insurance claim liability under the Deceptive Trade Practices Act.

Terri Beaston sued an insurer that denied a life insurance claim on her husband, David, who died in a car crash. The trial court judgment granted Beaston the \$250,000 value of her husband's policy but overruled a jury award of \$200,000 in mental anguish damages on the grounds that there was no finding that the defendants acted knowingly. A court of appeals reinstated the mental anguish award and trebled it under a Texas Insurance Code provision. Owen's majority opinion overturned the jury verdict and two lower courts to rule that Beaston take nothing, thereby creating new obstacles for consumers who are deceived by insurers. Justice Gammage's

dissent said, "The majority overlooks procedural waiver by defendants in order to reach statutory construction issues, rewrites the [Deceptive Trade Practices Act] and Insurance Code ... in ways never conceived before, then misapplies its own new rule." Owen received \$6,572 from the Texas Association of Insurance Agents.

***State Farm Lloyds v. Nicolau**, 951 S.W.2d 444 (Tex. 1997) **\$/A/C/J**
Owen joined dissenting opinions re insurance claim liability under the Deceptive Trade Practices Act.

A jury awarded the Nicolau family more than \$450,000 in actual and punitive damages under the Deceptive Trade Practices Act after finding that their insurer breached its contract and acted in bad faith in denying most of their claims for foundation damage to their home. A majority opinion by Justice Spector affirmed the bad-faith damages but ruled that there was insufficient evidence to warrant the jury's award of punitive damages. Owen joined a more extreme Hecht dissent that reweighed the trial court evidence and found that no tort was committed at all. Noting that the dissent improperly second-guessed a jury finding, the majority wrote that the state "Constitution allocates that [evidence-weighting] task to the jury and prohibits us from reweighing the evidence, as the dissent does." The dissent, which was striking in its disdain for plaintiffs in general, said, "For plaintiffs, bad faith is more like Hollywood television's Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you can play whenever you want, and if you win you hit the jackpot-tens, maybe hundreds, of thousands of dollars for the awful mental anguish that invariably seems to accompany denial of even the smallest insurance claim and millions in punitive damages." This vitriol aside, nothing in the record suggested that the Nicolauses were out to fraudulently bankrupt an insurer. Owen received \$6,572 from the Texas Association of Insurance Agents.

Stier v. Reading & Bates Corp., 922 S.W.2d 423 (Tex. 1999) **A**
Owen wrote a majority opinion re federal preemption and workplace injury liability.

Owen authored this majority opinion holding that the federal Jones Act (which provides broad remedies to injured seamen) preempted the state claims of German worker Hans-Henning Stier. Stier was injured near Trinidad on an off-shore drilling rig owned by a Texas company. "The Court reaches the result it wants by avoiding a plain reading of the statute," Justice Baker wrote in dissent. Baker said the applicable section of the Jones Act "does not say anything about state tort laws, state procedural laws, or the availability of state courts as a forum." Owen lists this as one of "Ten significant opinions that I have written."

Stringer v. Cendant Mortgage Corp, 23 S.W.3d 353 (Tex. 2000) **\$/A/C**
Owen joined a unanimous opinion interpreting state constitutional protections for homeowners.

A 1997 constitutional amendment that Texas voters approved to permit home equity lending contained consumer protections that prohibit lenders from

forcing borrowers to apply these funds to other debts. A mortgage company then tried to force the Stringer family to do just that. Owen joined a unanimous Baker ruling that held that, although lenders must *notify* borrowers of this protection, lenders can then utterly ignore it because this consumer protection is trumped by pre-existing constitutional language. The author of the home-equity legislation, ex-state Senator Jerry Patterson, told *Texas Lawyer* that the justices gutted the legislature's intent.²⁴ Owen received \$5,362 from the Texas Bankers Association, which filed a brief urging the court to rule as it did.

***Texas Utilities Electric Co. v. Timmons**, 947 S.W.2d 191 (Tex. 1997)

\$/A/C/J

Owen joined a majority opinion re the "attractive nuisance" doctrine in a wrongful death lawsuit.

After drinking with his friends, 14-year old Billy Timmons climbed the 90-foot electric tower in his neighborhood. He was fatally electrocuted when high-voltage current leapt between the power lines, "arcing" through his body. Owen joined Hecht's majority opinion, which reversed the court of appeals to reinstate a trial court's summary judgment for the power company on the grounds that the tower did not pose an "attractive nuisance" to children. To reach this decision, which kept the case from a jury, the court was legally required to review the evidence in the most favorable light for the Timmons family. Justice Gonzalez's dissent argued that the majority "refused to follow precedent." The dissent noted evidence that the tower did pose an "attractive nuisance." This included the fact that it was located in a residential neighborhood, the fence around it offered token deterrence and kids had climbed it in the past. Texas Utilities PACs and executives gave \$5,850 to Owen's campaigns.

Timberwalk Apartments v. Cain, 972 S.W.2d 749 (Tex. 1998)

\$/C/J

Owen joined a majority opinion assessing landlord liability for a rape committed on the premises.

After Tammy Rene Cain was raped in her apartment, she filed suit, alleging that the apartment company failed to invest in adequate security. The trial court ruled for the defendants after a jury failed to find the landlord negligent. The court of appeals remanded the case for a new trial, holding that the negligence definition given to the jury was too strict. Owen joined Hecht's majority opinion that ruled that, as a matter of law, the apartment company "owed Cain no duty to provide additional security." Specifically, the court ruled that the risk of assault was not foreseeable because there had been no reports of criminal activity at the apartment complex. The court of appeals, however, concluded that "evidence of eleven sexual assaults within a one mile radius of the Timberwalk apartment complex" could trigger foreseeability. Justice Spector's concurring opinion criticized the majority for ignoring case law that recognizes other foreseeability evidence, including the "nature, condition and location of the defendant's premises." The Texas Apartment Association gave Owen \$7,500.

²⁴ "Lenders Can Require Borrowers to Use Loan Proceeds to Pay Debts," *Texas Lawyer*, June 19, 2000.

***Universe Life Insurance Co. v. Giles**, 950 S.W.2d 48 (Tex. 1997) **\$/A/C/J**
Owen joined a dissenting opinion re bad faith and insurer liability for denied claims.

Ruling that an insurer acted in bad faith in refusing to cover Ida Mae Giles' heart surgery bills until it was contacted by her attorney, a jury awarded Giles \$75,000 in actual damages and \$500,000 in punitive damages. A majority opinion by Justice Spector ruled that there was no evidence to support the jury's punitive damage award. Owen joined a much more extreme Hecht dissent that would have had judges permanently replace juries in making bad-faith determinations. The majority criticized this dissent, saying it "would take the resolution of bad-faith disputes away from the juries that have been deciding bad faith cases for more than a decade." Owen received \$6,572 from the Texas Association of Insurance Agents.

MEMORANDUM

To: Members of the Senate Judiciary Committee
From: Texans for Public Justice
Re: Judicial Criticism of Priscilla Owen's "Most Significant Opinions"
Date: June 30, 2002

Question No. 15 on the Senate Judiciary Committee questionnaire for federal judicial nominees asks nominees to identify their "10 most significant opinions." It then asked nominees to summarize "all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings." Justice Owen responded, "None of my decisions have been reversed or criticized by the United States Supreme Court." While Owen's response is correct, it is telling that eight of her top-10 opinions have sparked criticism from her fellow Texas Supreme Court justices or by other judicial bodies.

Judicial Critiques of Owen's "Most Significant Opinions"

1. *Merrell Dow Pharm. v. Havner*, 953 S.W.2d 706 (Tex. 1997)

The Havner family's lawsuit alleged that the morning sickness drug Bendectin caused their daughter, Kelly, to be born with severe birth defects. Owen's majority opinion used extremely strict limits on the admissibility of expert testimony to overturn a jury award of \$3.75 million in actual and \$30 million in punitive damages (the trial court reduced the punitive damages to \$15 million).

Critique:

Justice Spector said in her concurring opinion that she was "uncomfortable with the majority's ambitious scientific analysis and unnecessarily expansive application of the *Daubert* standard," which governs the admissibility of expert evidence. Subsequently, the Texas Supreme Court has limited Owen's *Merrell Dow* decision twice. In *Maritime Overseas Corp. v. Ellis* the court affirmed a less-stringent standard to admit expert evidence in a Jones Act case involving an injury at sea. In *General Motors Corp. v. Sanchez*, the court again adopted a more inclusive standard for expert testimony. In this case—involving a man who was killed when his truck spontaneously slipped out of gear—the court admitted unpublished, non-peer-reviewed expert testimony on whether or not GM negligently failed to use a safer transmission.

2. *In re City of Georgetown*, 2001 TX. LEXIS 10, 44 Tex. Sup. J. 434

Owen's controversial majority opinion interpreting the Texas Public Information Act blocked the media from seeing an engineering report that a city commissioned in response to a lawsuit that it faced over sewage plant discharges. Owen's opinion overruled the Texas Attorney General and the trial court, which both ruled in favor of disclosing this taxpayer-financed report.

Critique:

Noting that the legislature expressly indicated that the Public Information Act "shall be liberally construed in favor of granting a request for information," Justice Abbott's dissent concluded, "[t]oday, the Court abandons strict construction and rewrites the statute." Abbott complained that Owen's opinion usurped the legislature's law-making authority.

3. *Stier v. Reading & Bates Corp.*, 922 S.W.2d 423 (Tex. 1999)

Owen wrote this majority opinion that held that the federal Jones Act (which provides broad remedies to injured seamen) preempted the state claims of German worker Hans-Henning Stier. Stier was injured near Trinidad on an off-shore drilling rig owned by a Texas company.

Critique:

“The Court reaches the result it wants by avoiding a plain reading of the statute,” Justice Baker wrote in dissent. Baker said the applicable section of the Jones Act “does not say anything about state tort laws, state procedural laws, or the availability of state courts as a forum.” Nonetheless, Federalist Society member Owen used this Federal act to preempt state law.

4. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1999)

After HECI Oil sued a neighboring oil operator for overproducing from a common reservoir, it failed to inform the Neel family, which had royalty claims on this oil. The Neels won a trial court judgment that forced HECI to pay them proceeds from its earlier judgment. Owen’s majority opinion reversed the trial court on the grounds that the Neels had exceeded the statute of limitations when they filed suit four years after HECI won its judgment. The trial court had ruled differently on the statute of limitations because it held that HECI broke an implied covenant to inform the Neels about the earlier lawsuit. Owen’s opinion ruled that HECI owed no such duty. Instead, her opinion held that the Neels should have monitored records at the Texas Railroad Commission (the oil regulatory agency) to learn about royalty infringements. “The information that the Railroad Commission maintains regarding fields in which there is competing production indicates that injury to a common reservoir by an adjoining operator is not inherently undiscoverable,” she wrote.

Critique:

In a subsequent case, a state court of appeals admitted to “being somewhat bewildered” by Owen’s *HECI* ruling that royalty owners should monitor these complicated records. “Rather than bringing predictability and consistency to this area of the law,” wrote the San Antonio-based 4th Court of Appeals, “we fear that placing the onus on royalty owners to hire the experts necessary to investigate whether the Railroad Commissions records reveal that they are being cheated is inherently unfair and unworkable.” (See *Advent Trust Co. v. Hyder*, 12 S.W.3d 534).

5. *In Re Ethyl Corp.*, 975 S.W.2d (Tex. 1998)

This Owen decision denied a writ of mandamus that sought to block a trial court’s consolidation of disparate asbestos claims into a single class-action lawsuit against five defendants. The 22 asbestos workers whose cases were consolidated had been exposed to differing levels of asbestos for different amounts of time. These plaintiffs also suffered from several illnesses that were at varying stages of development. Owen’s majority decision denied the petition, allowing the consolidation to proceed.

Critique:

Justice Hecht dissented to Owen’s court-sanctioned consolidation of vastly differing claims. “As important as efficiency has become to the justice system, it is not as important as justice itself,” Hecht wrote in dissent.

6. *In Re Bristol-Myers Squibb Co.*, 975 S.W.2d 601 (Tex. 1998)

Owen’s majority opinion in this breast-implant case came down the same day as her similar decision in *In Re Ethyl Corp* (above). In this case the majority also denied a writ of mandamus seeking to block consolidation of nine breast-implant lawsuits. Owen’s decision upheld this consolidation despite the fact that the trial court admitted that it arbitrarily combined the cases of plaintiffs who had different symptoms, doctors and implant manufacturers. Owen’s decision, which held that consolidation would not prejudice these claims, said, “we cannot plumb the subjective reasoning of the trial court.”

Critique:

Justice Nathan Hecht's dissent quoted a unanimous Owen opinion (*Goode v. Shoukfeh*, 943 S.W.2d 441) that said "a trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to guiding principles." "When judged by this standard," Hecht wrote, "the record before us shows a clear abuse of discretion."

7. *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400 (Tex. 1998)

Owen wrote this majority decision that declined to recognize a common-law cause of action for a nurse who got fired after she blew the whistle on a co-worker who illegally abused and distributed prescription drugs. Owen argued that the court did not have the discretion to modify existing employment-at-will doctrine.

Critique:

Justice Gonzalez's concurring opinion (joined by Justice Spector) reminded the majority that, since the employment-at-will doctrine was judicially created, the court had authority to amend it. Justice Gonzalez was concerned that this majority opinion might dissuade the court in the future from modifying this doctrine when such adjustments were needed to protect public safety.

8. *Board of Trustees of Bastrop ISD v. Toungate*, 958 S.W.2d 365 (Tex. 1997)

Owen's majority opinion upheld school rules that prohibited boys from growing their hair below their shirt collars. The opinion relied heavily on workplace-rule cases without probing the differences between workplaces and schools. Owen also quoted cases from other jurisdictions to support her finding that such rules are constitutional.

Critique:

Arguing that the courts owed long-haired Zach Toungate protection, Justice Spector's dissent concluded that, "This Court has failed to give that protection." The dissent noted that the cases that Owen quoted to support the constitutionality of her ruling involved *workplace* grooming rules but ignored contrary case law that had found similar *school* rules unconstitutional.