Some Superheroes Wear Robes: Justice Sandra Day O'Connor

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BY definition, superheroes possess superhuman abilities – Wonder Woman has extraordinary physical strength, Storm of the X-Men franchise can control the weather, and Catwoman has nine lives. But sometimes reality produces a character more impressive than anything fiction writers could create. As the first female justice to sit on the highest court in the United States, Justice Sandra Day O'Connor's strength of character and pursuit of justice during her twenty-four years on the Supreme Court were nothing short of heroic. Her voting record and opinions reflect her unwavering commitment to a core principle: deciding a case on its facts. Justice O'Connor's First Amendment jurisprudence – involving issues from nudity and drugs to religion – exemplifies her exceptional commitment to ensuring justice. We highlight several of those decisions here, many of which we expect will have a lasting impact on American jurisprudence. This article follows an article highlighting the arbitration legacy of Justice O'Connor published in the January 2022 *Defense Counsel Journal* in continuing recognition of the special relationship between The IADC Foundation and the iCivics initiative, which was spearheaded by Justice O'Connor.

I. Balancing Government and Religious Speech

In *Lynch v. Donnelly*, Justice O'Connor voted with the majority in holding that including a nativity scene or crèche set up by the City of Pawtucket, Rhode Island was constitutional.[1] The display at issue included myriad of traditional Christmas decorations, such as reindeer, Santa's sleigh, a Christmas tree, and a banner reading "Seasons Greetings."[2] All components of the display were owned by the City.[3] Residents of Pawtucket, individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself filed suit, arguing that the City's inclusion of the crèche in the annual display violated the Establishment Clause.[4] The district court granted plaintiffs a preliminary injunction, and the First Circuit affirmed.[5]

The Supreme Court reversed the First Circuit, holding that "notwithstanding the religious significance" of the nativity scene, the city did not impermissibly advance religion or "create excessive entanglement" between

[1] 465 U.S. 668, 687 (1984).
[2] *Id*. at 671.
[3] *Id.*
[4] *Id.*
[5] *Id*. at 671-672.

the government and religion in violation of the Establishment Cause.[6] The Supreme Court noted that the government has recognized holidays with religious significance and references to America's religious heritage are found in places like our national motto, "In God We Trust," and in the Pledge of Allegiance.[7] The Court does not take a "rigid, absolutist view of the Establishment Clause" and will not "mechanically invalidat[e] all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith[.]"[8] Against that backdrop, the Supreme Court determined that the city's purpose for the display was legitimate and further held that: "*When viewed in the proper context* of the Christmas Holiday season, it is apparent that, *on this record*, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."[9] In this case, the crèche "depict[ed] the historical origins of a traditional event long recognized as a National Holiday," and the secular purpose for the display – to celebrate and depict the origins of the Christmas holiday – was legitimate.[10] In other words, under certain circumstances, a city's government can recognize, and even join in the celebration of, a religious holiday without offending the Constitution.

Justice O'Connor issued a meaningful concurrence. For one, she stated that the proper focus of the analysis should be "on the character of the government activity [at issue]."[11] Consistent with her commitment to conducting case-by-case analyses, she declared that "[e]very government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion."[12] Justice O'Connor highlighted that "[i]t is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years."[13] After subjecting the display to "the careful scrutiny it deserves," Justice O'Connor concluded that the "particular" display of the crèche was not "intended to endorse or had the effect of endorsing Christianity."[14] This offers an example of the careful assessment and balancing of

[6] *Id*. at 685, 687.
[7] *Id.* at 676.
[8] *Id*. at 678.
[9] *Id*. at 680 (emphasis added).
[10] *Id*. at 681-682 (citation omitted).
[11] *Id*. at 689.
[12] *Id*. at 694.
[13] *Id*. at 693.
[14] *Id*. at 694.

governmental and public interests seen throughout the Justice's tenure.

II. Balancing Religious Freedom in Schools

In *Board of Education of the Westside Community Schools v. Mergens*,[15] Justice O'Connor delivered the majority opinion, holding that the Equal Access Act required a high school in Nebraska to give a Christian club access to the school premises during non-instructional time. The district court had found that the Equal Access Act did not apply to the particular facts of the case, because the Christian club was not curriculum-related, unlike all other clubs that were allowed access to the school premises, such as the scuba diving club, the chess club, and the service club.[16] In other words, the district court determined that the school had not provided a "limited open forum" triggering an obligation of equal access under the Equal Access Act. According to the Act, a "limited open forum" exists when a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[17]

The Eighth Circuit reversed the district court based on its finding that many of the other clubs that allowed access were not, in fact, curriculum related, and the school district had provided a limited public forum.[18] For example, the club for students interested in scuba diving did not involve a subject matter taught in any regularly-offered course; it did not relate to the general curriculum in the same way that a student government might; and participation in the club was not required nor did it result in extra academic credit. Because the scuba club – and others according to the Supreme Court – "fit within [the] description of a 'noncurriculum related student group[,]'" the Supreme Court found the facts supported a finding that Westside High School had maintained a limited open forum under the Act and affirmed the Eight Circuit's decision.[19]

The Court explained that the Equal Access Act sets a low threshold for triggering the Act's protections.[20] Because several student groups that were unrelated to any regularly-offered courses were offered access to the school premises, the Equal Access Act's

[15] 496 U.S. 226 (1990).
[16] *Id.* at 233.
[17] *Id.* at 235.
[18] *Id.* at 234.
[19] *Id.*
[20] *Id.* at 240.

requirements prohibited the school from discriminating against clubs based on their objective.[21] Ultimately, the Court determined that the school's denial of access to the Christian club was based on its religious content, in violation of the Equal Access Act.[22] Justice O'Connor's opinion again gave careful consideration to the unique facts of the case and the surrounding circumstances.

III. The Balancing Act Continues

Fifteen years later, Justice O'Connor voted with the majority in holding unconstitutional certain Kentucky counties' displays of the Ten Commandments in their courthouses.[23] The ACLU brought suit, seeking a preliminary injunction to block maintenance of the displays as violations of the Establishment Clause of the First Amendment.[24] The counties' revised their displays twice, with the final version titled, "The Foundations of American Law and Government Display" and consisting of nine documents along with statements about their historical significance: the Ten Commandments, which were more extensively quoted than in prior iterations of the displays, Magna Carta, Declaration of Independence, Bill of Rights, lyrics to the Star-Spangled Banner, Mayflower Compact, National Motto, preamble to the state constitution, and a picture of Lady Justice.[25] The counties attempted to justify this third display as educational and a demonstration that the Ten Commandments were a part of the foundation of law and government.[26] The district court enjoined the counties from showcasing any version of the display, and the Sixth Circuit affirmed.[27]

In a 5-4 decision, the Supreme Court's Opinion, supported by Justice O'Connor's First Amendment jurisprudence, held that the counties' displays were unconstitutional and affirmed the judgment of the Sixth Circuit.[28] The Court cited Justice O'Connor's concurring opinion in *Wallace v. Jaffree*[29] and noted that discerning the government's purpose from the lens of an objective observer makes sense in an Establishment Clause analysis, "where an understanding of official objective emerges from readily discoverable fact."[30] Such evidence includes "'text, legislative history, and implementation of the

[21] *Id.* at 245-246.
[22] *Id.* at 246-247.
[23] McCreary Cty. Ky. v. A.C.L.U., 545 U.S. 844, 850 (2005).
[24] *Id*. at 853.
[25] *Id*. at 853-856.
[26] *Id*. at 857.
[27] *Id*. at 854, 857.
[28] *Id*. at 858.
[29] 472 U.S. 38 (1985).
[30] *McCreary Cty*. at 862 (citing *Wallace*, 472 U.S. at 74).

statute,'" or comparable official act."[31] The Court noted that in the cases where government action had been held unconstitutional, it was "only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action."[32] Justice O'Connor's reasoning, relied upon by the Court, illustrated an appreciation for the fact-sensitive nature of each case.

Justice O'Connor concurred with the majority's opinion. In her concurrence, Justice O'Connor's careful balancing of competing interests was apparent. She took a strong stance with respect to the First Amendment's protection of religious liberty and emphasized its historical roots in the founding of the United States.[33] Despite that viewpoint, she acknowledged that the constitutional analysis is less than straightforward, stating that "*[r]easonable minds can disagree about how to apply the Religion Clauses in a given case*. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society."[34] "*Given the history of this particular display* of the Ten Commandments," Justice O'Connor agreed with the Court's determination that such display constituted a violation of the Establishment Clause.[35] Here again, the Justice demonstrated her heroic ability to balance critically-important competing interests.

IV. Striking Government-Related Laws

Justice O'Connor delivered the majority opinion in *Boos v. Barry*,[36] addressing the issue of whether District of Columbia Code § 22-1115 violated the First Amendment by restricting any sign within 500 feet of a foreign embassy that displayed negative language and prohibiting the congregation of three or more people within 500 feet a foreign embassy. This section of the Statute was intended to prohibit the use of certain signs outside of foreign embassies that "tends to bring that foreign government into 'public odium' or 'public disrepute.'"[37] The United States District Court for the District of Columbia granted summary judgment in favor of the defendants – the Mayor and certain other law enforcement officials of the District of Columbia.[38] The Court of Appeals considered the "display" clause and "congregation" clause of the Statute separately.[39] The Court of Appeals found that the display clause was a

[31] *Id*. (quoting *Wallace*, 472 U.S. at 76).
[32] *Id*.
[33] *See id*. at 881-885.
[34] *Id*. at 882 (emphasis added).
[35] *Id*. at 883 (emphasis added).
[36] 485 U.S. 312 (1988).
[37] *Id.* at 315.
[38] *Id.* at 316-317.
[39] *Id.*

content-based restriction, but that it was constitutional because it was narrowly construed to serve a governmental interest.[40] The Court of Appeals found that the statute's prohibition of congregation survived First Amendment scrutiny because it was applied "only when the police reasonably believe that a threat to the security or peace of the embassy is present[.]"[41]

The Court affirmed the Court of Appeals in part and reversed in part.[42] Justice O'Connor authored the majority opinion, which held that the display clause of the D.C. statute constituted a content-based restriction but that it was not narrowly tailored to serve a compelling government interest, in violation of the First Amendment.[43] Justice O'Connor's opinion identified a less restrictive alternative statute to protect diplomats from criticism.[44] Conversely, the Court determined that the congregation clause was not facially invalid, because the language of that section was not overbroad and did not reach substantial constitutionally protected conduct.[45]

V. Upholding Laws to Protect the Most Vulnerable

Justice O'Connor's resolve was likewise reflected in *Florida Bar v. Went for It.*[46] Undeterred by the prospect of ruling against the interests of members of her own profession, she authored an opinion upholding restrictions on the commercial speech of attorneys.[47] At the time, the rules of the Florida Bar forbade lawyers from sending targeted direct mailing to victims and their relatives in the thirty days after an accident.[48] "Went for It", a lawyer referral service, and its owner challenged the prohibitions, arguing that the rule violated the First and Fourteenth Amendments.[49]

The Supreme Court upheld the Florida Bar's restrictions on attorney advertising, and applied intermediate scrutiny to this commercial speech and the three-part test articulated in the *Central Hudson* case.[50] *Central Hudson* states that commercial special that is not misleading or does not involve unlawful activity may be regulated, provided that "government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the

[40] *Id.* at 317-318.
[41] *Id*. at 317.
[42] *Id*. at 334.
[43] *Id*. at 321.
[44] *Id*. at 326-327.
[45] *Id*. at 331-332.
[46] 515 U.S. 618 (1995).
[47] *Id*. at 635.
[48] *Id*. at 628.
[49] *Id*. at 621.
[50] *Id*. at 623-624.

restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'"[51] The Court accepted that the State had a substantial interest in "protecting the privacy and tranquility" of accident victims and their loved ones and preventing the decline of the Florida legal profession's reputation amongst the public.[52] Justice O'Connor found the Bar's two-year study on the effects of lawyer advertising on accident victims established that the rule materially advanced that interest.[53] She also concluded that the provision was reasonably well-tailored, and there were no obvious, less-burdensome alternatives to the rule.[54] "The Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession."[55] Justice O'Connor's opinion demonstrated her heroic ability to use the law to protect the public during very vulnerable times – a superpower that most heroes possess.

VI. Seeing Clearly Through the Smoke

In another application of the *Central Hudson* test, Justice O'Connor authored the Court's opinion in *Lorillard Tobacco Co. v. Reilly*.[56] Here, a group of manufacturers and retailers of cigarettes, smokeless tobacco, and cigars launched a constitutional challenge to the Massachusetts Attorney General's regulations governing the advertising and sale of these items.[57] The regulations consisted of three types of prohibitions: restrictions on "outdoor advertising within 1,000 feet of a school or playground," "sales practices regulations, which restrict the location and distribution of tobacco products," and "point-of-sale advertising regulations, which require that indoor advertising be placed no lower than five feet from the floor."[58] The district court held that all such regulations were constitutional except those involving point of sale.[59] The First Circuit reversed the district court in part, finding that the point-of-sale regulations passed constitutional muster as well, because the Attorney General was best

[51] *Id*. at 624 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 564-565 (1980)).
[52] *Id*. at 624-625.
[53] *Id*. at 626.
[54] *Id*. at 633.
[55] *Id*.
[56] 533 U.S. 525 (2001).
[57] *Id*. at 532.
[58] *Id*. at 538.
[59] *Id*.

positioned to determine whether these restrictions were necessary.[60]

The Supreme Court largely disagreed. Writing for the majority, Justice O'Connor applied the *Central Hudson* test for commercial speech.[61] Only the last two parts of the test were disputed in *Lorillard*.[62]

First, the Court held that the outdoor advertising regulations failed to pass the last step of the *Central Hudson* analysis, which requires "a reasonable fit between the means and ends of the regulatory scheme."[63] Justice O'Connor noted, "[t]he degree to which speech is suppressed—or alternative avenues for speech remain available—under a particular regulatory scheme *tends to be case specific*. *And a case specific analysis makes sense*, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly *vary from place to place*."[64] Specifically, "[t]he FDA's regulations would have had widely disparate effects nationwide. Even in Massachusetts, the effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring."[65] Justice O'Connor again exhibited her appreciation for the nuances of each scenario in which the law might be applied.

Second, the Court held that regulations prohibiting indoor point of sale advertising within five feet of the floor of any retailer within one thousand feet of a school or playground failed the third and fourth parts of *Central Hudson*.[66] The government's goal was to prevent youth use of tobacco products and reduce demand by restricting minors' exposure to advertising; however, this regulation does not advance this goal – not all children are under five feet tall, and advertising complying with this height restriction can still be in view when children look upward.[67]

Third, the Court held that regulations banning self-service

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[60] *Id*. at 539.
[61] *Id*. at 554-555 (citing *Central Hudson*, 447 U.S. at 566).
[62] *Id*. at 555.
[63] *Id*. at 561 (citing *Central Hudson*, 447 U.S. at 569).
[64] *Id*. at 563 (internal citations omitted) (emphasis added).
[65] *Id*.
[66] *Id*. at 566.
[67] *Id*.

displays and mandating placement of tobacco products outside the reach of customers were constitutional.[68] The Court concluded "that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest."[69] The sales practices provisions "regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas."[70]

VII. When "Expressive" Conduct Expresses Too Much

Justice O'Connor took the opposite view of a different form of expressive conduct. *City of Erie v. Pap's A.M* involved an Erie, Pennsylvania ordinance banning public nudity.[71] The operator of a nude dancing establishment brought action challenging constitutionality of city's ordinance and sought to enjoin its enforcement.[72] Ultimately, Pennsylvania's Supreme Court held that the public nudity sections of the ordinance violated respondent's right to freedom of expression.[73] The Court reversed and upheld the constitutionality of the ordinance.[74]

As a preliminary matter, the Court noted that while nude dancing is considered expressive conduct, it falls within the outer limits of First Amendment protection.[75] The Court then determined what level of scrutiny should be applied by considering "whether the State's regulation is related to the suppression of expression."[76] Here, the governmental purpose of the content-neutral regulation "is unrelated to the suppression of expression," so the ordinance "need only satisfy the 'less stringent' standard" set forth in the *O'Brien* case.[77] According to the Court, the ordinance was a "general prohibition on public nudity" regulating conduct, regardless of whether the nudity is accompanied by expressive activity.[78] It aimed to regulate "secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' establishment."[79]

The Supreme Court declared that the ordinance passed the

[68] *Id*. at 569.
[69] *Id.* (citing United States v. O'Brien, 391 U.S. 367, 382 (1968)).
[70] *Id*. (citations omitted).
[71] 529 U.S. 277, 282-283 (2000).
[72] *Id*. at 283.
[73] *Id*. at 284-285.
[74] *Id*. at 296.
[75] *Id*. at 289.
[76] *Id.* at 289 (citations omitted).
[77] *Id*. (quoting *O'Brien*, 391 U.S. at 377, Texas v. Johnson, 491 U.S. 397, 403 (1989)).
[78] *Id*. at 290 (citation omitted).
[79] *Id*. at 291 (citations omitted).

O'Brien test.[80] The first factor asks "whether the government regulation is within the constitutional power of the government to enact" and here, the city's "efforts to protect public health and safety" were deemed are squarely within its police powers.[81] Second, the Court considered "whether the regulation furthers an important or substantial government interest."[82] The Court stated that the interests in "regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important."[83] The third and fourth factors, "that the government interest is unrelated to the suppression of free expression" and "that the restriction is no greater than is essential to the furtherance of the government interest," were also deemed satisfied.[84] "The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*."[85]

VIII. Conclusion

As the classic Spiderman adage goes, "with great power comes great responsibility." As the decisions above demonstrate, Justice O'Connor provides a real-life example of that principle. She used her "powers" for good. She remained focused on the specific circumstances of each case, never failing to appreciate the need for careful application of the law to the controversy at hand. Her trailblazing tenure on the Supreme Court and unwavering commitment to justice make her as admirable and interesting as any comic book superhero.

[80] *Id*. at 296.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*. at 301.
[85] *Id*.