Table 2
Voting Agreement on the U.S. Supreme Court
1981 Term

	*	White	Stevens	Rehnquist	Powell	O'Connor	Marshall	Burger	Brennan	Blackmun
Blackmun	A	122	116	106	112	115	119	107	125	
	N	163	163	165	162	162	163	164	164	
	P	74.85	71.17	64.24	69.14	70.99	73.01	65.24	76.22	
Brennan	A	116	117	82	97	97	149	88		
	N	163	163	165	162	161	163	184		
	P	71.17	71.78	49.70	59.88	60.25	91.41	53.66		
Burger	A	119	106	141	135	139	82			
	N	163	163	165	162	161	164			
	P	73.01	65.03	85.45	83.33	86.33	50.00			
Marshall	A	106	113	78	92	88				
	N	162	162	164	161	160				
	P	65.43	69.75	47.57	57.14	55.00				
O'Connor	A	118	108	145	132					
	N	160	160	162	160					
	P	73.75	67.50	89.51	82.50					
Powell	A	118	115	131						
	N	161	161	163						
	P	73.29	71.43	80.37						
Rehnquist	A	115	105							
	N	164	164							
	P	70.12	64.02							
Stevens	A	108								
	N	162								
	P	66.66								
Court Majority	A	137	133	124	136	135	116	129	120	137
	N	164	164	166	163	162	164	165	165	165
	P	83.53	81.10	74.70	83.44	83.33	70.73	78.18	72.73	83.03

* "A" represents the number of times each Justice agreed with another Justice (or with the majority) in voting for or against the judgment of the Court. *See* note 65, *supra*.
"N" represents the number of decisions in which each justice participated with the other (or with the majority) and thus the number of opportunities for agreement.
"P" represents the percentage of times that one Justice agreed with another (or with the majority), calculated by dividing "A" by "N".

Table 2 shows the voting agreement of each member of the Court with every other member and with the Court majority.[65] The raw figures place her ideologically on the conservative wing of the Court. She voted most frequently with the Court's generally recognized "conservatives," Justice Rehnquist (89.5% of all decisions in which both participated) and Chief Justice Burger (86.3%); and least often with the Court's most consistent "liberals," Justice Brennan (60.3%) and Marshall (55.0%). She also voted with the Court's two acknowledged conservatives more frequently than she voted with the Court majority.[66] She falls on the center side of the conservative wing, however, since she voted with Brennan and Marshall more often than did either Rehnquist or Burger. Another indication of a centrist tendency is her frequent agreement with the result of the Court's decision. The four justices on either extreme of the ideological spectrum agreed with the majority result in less than 80% of the cases; Justice O'Connor, along with the four justices usually regarded as moderate or swing votes, approved the result more than 80% of the time.

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65. This table differs slightly from the *Harvard Law Review* voting alignment tables. They record a voting agreement whenever two justices join in the same *opinion*. Table 2 records agreement whenever two justices vote for the same *result*, even though the two may have concurred separately or dissented for different reasons. Agreement with the majority is calculated the same way. The agreement figures thus are slightly higher than those which appear in the Harvard voting alignment table for the 1981 term. *See The Supreme Court, 1981 Term, supra* note 64, at 305.

66. Comparison of paired agreement scores and majority agreement scores provides an interesting test for differentiating moderate or "swing" voters from justices clustered closer to the ideological extremes. If we define a swing voter as one who votes more often for the majority result than with any other justice, we have three swing voters for the 1981 term: Justices Blackmun, Stevens, and White. At the left extreme Justices Brennan and Marshall vote more often with each other than with the majority; on the right wing Justices O'Connor and Rehnquist and Chief Justice Burger each vote more frequently with each other than with the majority. Justice Powell is a borderline case. Usually regarded as a swing voter, during the 1981 term he voted for the majority result in 83.4% of the cases in which he participated, and he voted for the same result as the Chief Justice in 83.3% of the cases in which they participated. His next highest voting agreement scores were with Justice O'Connor (82.5%) and Justice Rehnquist (80.4%). By the test suggested here he should be classified as a swing voter for the term, but only by the narrowest of margins—one-tenth of one percentage point.

TABLE 3
STATE CRIMINAL CASES

Justice	Votes Favoring Government	Votes Favoring Defendant
Marshall	3 (13.6%)	19
Brennan	7 (31.8%)	15
Stevens	14 (63.6%)	8
White	16 (72.7%)	6
Blackmun	18 (81.8%)	4
Powell	20 (90.9%)	2
O'Connor	21 (95.5%)	1
Burger	22 (100.0%)	0
Rehnquist	22 (100.0%)	0
Court Majority	19 (86.4%)	3

TABLE 4
FEDERAL CRIMINAL CASES

Justice	Votes Favoring Government	Votes Favoring Defendant
Brennan	2 (20%)	8
Marshall	3 (33%)	6
Stevens	6 (60%)	4
Blackmun	6 (60%)	4
Powell	8 (80%)	2
O'Connor	8 (80%)	2
White	9 (90%)	1
Rehnquist	9 (90%)	1
Burger	9 (100%)	0
Court Majority	8 (80%)	2

When O'Connor votes are classified by the nature of the issues rather than by affinity with other members of the Court, certain other patterns emerge. She favored the state over the defendant in twenty-one of twenty-two criminal cases originating in state courts (Table 3), and voted for the government in eight of ten federal criminal cases (Table 4). Of fifty-seven cases pitting a state or local government party on one side against one or more private parties on the other, she voted for the government party nearly two-thirds of the time (thirty-six of fifty-seven cases) (Table 5). The federal government fared only slightly less

well, winning her support in seventeen of twenty-seven cases (Table 6). In forty-eight cases raising a challenge to the exercise of federal court jurisdiction,[67] she voted against the exercise of jurisdiction thirty times (Table 7). In thirteen freedom of expression cases (Table 8), Justice O'Connor supported the individual's first amendment claim against the government less than half the time. All these positions are consistent with her expressed attitudes of deference to elected policy makers, state or federal, her restrictive view of federal court jurisdiction—especially as it impinges on the functioning of state courts—and her concern with achieving finality in criminal justice procedures.

TABLE 5
CIVIL CASES: STATE/LOCAL GOVERNMENT VERSUS A PRIVATE PARTY

Justice	Votes Favoring Government	Votes Favoring Private Party
Marshall	15 (25.9%)	43
Brennan	17 (29.3%)	41
Stevens	22 (37.9%)	36
Blackmun	22 (37.9%)	35
Powell	28 (48.3%)	30
White	30 (52.6%)	27
O'Connor	36 (63.2%)	21
Burger	37 (63.8%)	21
Rehnquist	41 (70.7%)	17
Court Majority	25 (43.1%)	33

67. One scholar defines "'exercise of federal jurisdiction' broadly, to include such matters as justiciability, standing, mootness, ripeness and equitable discretion." Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 n.4 (1976).

TABLE 6
CIVIL CASES: FEDERAL GOVERNMENT
VERSUS A PRIVATE PARTY

Justice	Votes Favoring Government	Votes Favoring Private Party
Rehnquist	16 (59.3%)	11
O'Connor	17 (63.0%)	10
Burger	19 (70.4%)	8
Stevens	19 (70.4%)	8
Powell	21 (77.8%)	6
Blackmun	21 (77.8%)	6
Marshall	21 (77.8%)	6
Brennan	21 (77.8%)	6
White	23 (85.2%)	4
Court Majority	21 (77.8%)	6

TABLE 7
CASES RAISING A CHALLENGE TO THE
EXERCISE OF JURISDICTION

Justice	Votes Favoring Exercise	Votes Opposing Exercise
Blackmun	30 (61.2%)	19
Brennan	28 (57.1%)	21
White	26 (53.1%)	23
Stevens	26 (53.1%)	23
Marshall	26 (54.2%)	22
Powell	23 (46.9%)	26
O'Connor	19 (39.6%)	29
Burger	19 (39.6%)	29
Rehnquist	18 (36.7%)	31
Court Majority	23 (46.9%)	26

TABLE 8
CASES INVOKING FIRST AMENDMENT RIGHTS
OF EXPRESSION AND ASSOCIATION

Justice	Votes Favoring First Amendment Claims	Votes Opposing First Amendment Claims
Marshall	9 (69.2%)	4
Brennan	9 (69.2%)	4
Blackmun	8 (61.5%)	5
Stevens	7 (53.8%)	6
White	6 (46.2%)	7
Powell	6 (46.2%)	7
O'Connor	6 (46.2%)	7
Burger	5 (38.5%)	8
Rehnquist	5 (38.5%)	8
Court Majority	7 (53.8%)	6

Tables 3 through 8 help put her voting record in perspective by comparison with other members of the Court individually and with the Court as a whole. In each table the justices are arranged in descending order of support for the individual or private party claimant, or, in the case of Table 7, support for the exercise of federal jurisdiction. As a generalization, Justice O'Connor's position was usually somewhere between that of Justice Rehnquist and the Court majority, with a much greater distance separating her position from that of Justices Marshall and Brennan at the other extreme.

B. Criminal Justice

While the information in the tables gives a general perspective of Justice O'Connor's first term performance, a closer examination of her opinions and her votes on particular issues provides more shading, depth, and detail. Her voting on the criminal cases suggests a much stronger commitment to law and order than one might have predicted from her decisions on the state court bench, or from her guarded comments during the nomination hearings.[68] She had, of course, given strong expressions of support for finality in the criminal process and greater

68. *See supra* text accompanying notes 57-59.

respect for the determinations of state court judges.[69] In particular, she had urged limiting habeas corpus as an avenue of collateral attack upon state court criminal convictions,[70] and a number of her first term decisions on criminal cases originating in the state courts undoubtedly reflect these views. Twelve of the twenty-two state criminal cases involved habeas attacks upon state criminal convictions,[71] and one other raised a collateral attack upon a state criminal proceeding in the form of an action under 42 U.S.C. § 1983.[72] In each case Justice O'Connor and the Court rejected the collateral attack. Factually, one of the more notable decisions was *Hutto v. Davis*[73] in which the Court sustained a Virginia court's imposition of a forty-year sentence for the possession of less than nine ounces of marijuana. Lower federal courts had granted the writ of habeas corpus on the ground that so disproportionate a sentence violated the eighth amendment injunction against cruel and unusual punishment,[74] but the Supreme Court found that granting the writ was "an intrusion into the basic line-drawing process" reserved for legislatures, and reversed.[75]

Opinions by Justice O'Connor in some of the cases shed light on her view of habeas corpus as a means of collateral attack upon state criminal convictions. In *Rose v. Lundy*[76] she interpreted a provision in 28 U.S.C. § 2254 calling for exhaustion of state remedies to require dismissal of habeas petitions containing both exhausted and unexhausted claims.[77] In reaching this conclusion she relied mainly on the policy argument that the "exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent dis-

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69. O'Connor, *supra* note 27, at 802-06, 814-15; *Hearings*, *supra* note 2, at 72-75.

70. O'Connor, *supra* note 27, at 802-06, 814-15; *Hearings*, *supra* note 2, at 72-75.

71. Hopper v. Evans, 102 S. Ct. 2049 (1982); Zant v. Stephens, 102 S. Ct. 1856 (1982); Engle v. Isaac, 102 S. Ct. 1558 (1982); Fletcher v. Weir, 102 S. Ct. 1309 (1982); Sumner v. Mata, 102 S. Ct. 1303 (1982); Wainwright v. Torna, 102 S. Ct. 1300 (1982); Rose v. Lundy, 102 S. Ct. 1198 (1982); Smith v. Phillips, 455 U.S. 209 (1982); Hutto v. Davis, 454 U.S. 370 (1982); Harris v. Rivera, 454 U.S. 339 (1981); Jago v. Van Curen, 454 U.S. 14 (1981); Duckworth v. Serrano, 454 U.S. 1 (1981).

72. Murphy v. Hunt, 102 S. Ct. 1181 (1982). In jail awaiting trial on several counts of sexual assault, Hunt brought a § 1983 action to challenge the denial of bail as a violation of various constitutional rights.

73. 454 U.S. 370 (1982).

74. Davis v. Davis, 601 F.2d 153 (1979).

75. 454 U.S. at 374.

76. 102 S. Ct. 1198 (1982).

77. This "total exhaustion" rule had been adopted by the Fifth and Ninth Circuits, but rejected by most of the others. *Id.* at 1201 n.5.

ruption of state judicial proceedings."[78] She noted that the petitioner could still obtain speedy relief by amending his petition to include only the exhausted claims. But in dictum she indicated that deliberate withholding of the unexhausted claims might risk subsequent dismissal of those claims in a later petition if the federal court were to find an abuse of process in the petitioner's decision to proceed piecemeal.[79] If that dictum were the law, it would provide strong incentive for the prisoner to proceed first in state court with the unexhausted claims before seeking federal habeas corpus.

The same solicitude for the role of state courts was evident in *Engle v. Isaac*,[80] where she denied habeas corpus with the observation that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights."[81] The *Engle* decision denied habeas corpus review of a petitioner's homicide conviction because he failed to raise a contemporaneous objection at the trial to the jury instruction complained of. Petitioner had not objected to a trial instruction on the burden of proof for self-defense because the instruction was in accordance with then settled Ohio law. The law was subsequently changed by decision of the Ohio Supreme Court.[82] The principal issue before the United States Supreme Court was whether the presumed futility of presenting an objection at the time of the trial was sufficient "cause" for the procedural default under the rule of *Wainwright v. Sykes*.[83] The Court decided that it was not.

A perfect score of twelve denials of twelve habeas corpus petitions might suggest a fixed bias against use of the habeas corpus petition to circumvent the decisions of state courts. But her opinions, at least, suggest that this is no unthinking, ideological reaction.[84] Her opinion for the Court in *Engle v. Isaac* emphasizes the social costs of habeas corpus review, but it also recognizes the important role of the Great Writ in Anglo-American

78. *Id.* at 1203.
79. *Id.* at 1204-05.
80. 102 S. Ct. 1558 (1982).
81. *Id.* at 1571.
82. State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).
83. 433 U.S. 72 (1977).
84. If it were such an automatic reaction, it would be one shared with the majority of the Court. In each case Justice O'Connor voted with the majority, and in no case did fewer than six justices concur in the judgment.

law:

> The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Article I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate "fundamental fairness."[85]

In *Rose v. Lundy*[86] the holding against "mixed petitions" of exhausted and unexhausted claims was buttressed by a careful examination of the applicable statute and the policy reasons underlying the exhaustion doctrine.[87]

The praise of habeas corpus in *Engle* could of course be viewed as mere window-dressing and the careful statutory analysis in *Rose v. Lundy* as a rationalization for the underlying bias against federal intervention in state court criminal proceedings. In my opinion they are not this easily dismissed. In any event her concurring opinion in *Smith v. Phillips*[88] cannot be explained on any similar basis. When writing for the Court a justice must make the argument sound as persuasive as possible, certainly persuasive enough to win four votes, and window-dressing and plausible rationalizations may help. But a concurring opinion need not be written at all and probably would not be written except for the doctrinal conviction which the opinion embodies, since the result of the case remains the same with or without the concurring opinion.

In *Phillips* the respondent had alleged a due process violation as the basis for habeas corpus relief because one of his jurors had applied for a job as investigator in the prosecuting attorney's office and the prosecutors, upon learning of this fact, failed to inform the court.[89] The Supreme Court, speaking through Justice Rehnquist, held that due process does not require a new trial "every time a juror has been placed in a potentially compromising situation"[90] and that Phillips, in this case, had not been deprived of a fair trial. Phillips had contended that the law must impute bias to jurors in such a situation, whereas the Court insisted that the defendant was entitled only

85. 102 S. Ct. at 1570.
86. 102 S. Ct. 1198 (1982).
87. *Id* at 1201-05.
88. 455 U.S. 209, 221 (1982) (O'Connor, J., concurring).
89. 455 U.S. at 212-14.
90. *Id.* at 217.

to the opportunity to prove "actual bias."[91] This opportunity had been afforded the defendant in a post-trial hearing.[92]

Justice O'Connor wrote to express her view that "the opinion does not foreclose the use of 'implied bias' in appropriate circumstances."[93] Although a post-conviction hearing might be an adequate safeguard in most cases, bias ought to be implied at least in such extreme cases as where a juror is actually employed by the prosecuting agency, is a close relative of one of the participants in the trial, or is himself involved in the criminal transaction.[94] Such an opinion belies any suggestion of a rigid, doctrinaire insistence on letting state court criminal convictions stand in the face of any habeas corpus challenge. Instead, it reveals a recognition of differences in fact situations to which the underlying preference for finality may yield.

The same openness is apparent in other state criminal cases. Although she voted only once to reverse a conviction (in *Eddings v. Oklahoma*),[95] her opinions often evinced a willingness to be persuaded otherwise by facts indicating some fundamental unfairness in sustaining the conviction. In that one case, a homicide, her vote was crucial in obtaining a remand for individualized consideration of possible mitigating factors prior to imposition of the death penalty.[96] The age of the defendant (sixteen at the time of the murder) was undoubtedly signficant in her assessment of the facts,[97] but so was that portion of the record which hinted that the trial judge may have felt precluded by applicable law from considering potential mitigating circumstances.[98]

Her dissent in *Enmund v. Florida*[99] was similarly discriminating and undoctrinaire. Although she objected strenuously to the Court's ruling that the death penalty, as applied to a felony murder conviction, was a violation of the eighth amendment

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91. *Id.* at 215.

92. *Id.* at 213-14.

93. *Id.* at 221 (O'Connor, J., concurring).

94. *Id.* at 222.

95. 455 U.S. 104 (1982).

96. *Id.* The Court was divided 5-4.

97. *Id.* at 118 (O'Connor, J., concurring).

98. *Id.* at 116-17. Significantly, her opinion indicated agreement with Lockett v. Ohio, 438 U.S. 586 (1978), which required that a trial judge be permitted to consider any aspect of a defendant's character or record proffered in mitigation.

99. 102 S. Ct. 3368, 3379 (1982) (O'Connor, J., dissenting). The opinion was joined by the Chief Justice and Justices Powell and Rehnquist.

prohibition on cruel and unusual punishment, she nevertheless would have remanded for resentencing because the record, as in *Eddings*, suggested that the trial court had not fully considered all mitigating factors.[100] Likewise, in *Taylor v. Alabama*[101] she dissented from a holding that petitioner's confession should not have been admitted, but her disagreement was based upon a differing assessment of the facts and not on the controlling substantive law.[102]

Evidence of judicial flexibility in these opinions must of course be considered in the light of the outcomes for which she actually voted. Although her vote controlled the outcome in only one case (none of the cases in which she favored the prosecution was decided by a five to four vote), she was part of a majority that tended to give greater weight to finality of judgment and social order than to safeguards for the criminal defendant. As a result of decisions during the 1981 term, habeas corpus petitions were uniformly rejected,[103] the scope of permissible fourth amendment search was widened,[104] the scope of double jeopardy protection was limited,[105] and states were given greater leeway in regulating pornographic depictions of children.[106] Only in the two death penalty cases[107] and a third case involving an improperly admitted confession[108] did the Court rule in favor of the defendant. This represents a rather strong law and order stance by

100. *Id.* at 3392-94.

101. 102 S. Ct. 2664, 2669 (1982) (O'Connor, J., dissenting).

102. *Id* at 2671. *See also* United States v. Valenzuela-Bernal, 102 S. Ct. 3440, 3450 (1982) (O'Connor, J., concurring). In *Valenzuela-Bernal*, she agreed that the deportation of potential witnesses did not violate either fifth amendment due process or the sixth amendment right to compulsory process because their testimony would have been merely cumulative in this instance; but she argued that the Court should, in the future. require brief detention of potential alien witnesses for interview by defense and government counsel to determine if the witnesses could provide material, noncumulative evidence.

103. *See* cases cited *supra* note 71.

104. Michigan v. Thomas, 102 S. Ct. 3079 (1982); Washington v. Chrisman, 455 U.S. 1 (1982). *See also* United States v. Ross, 102 S. Ct. 2157 (1982) (expanding the limits of permissible search in a federal criminal context). In United States v. Johnson, 102 S. Ct. 2579 (1982), the Court upheld a fourth amendment claim by making one of its prior decisions, Payton v. New York, 455 U.S. 573 (1980), retroactive. Justice O'Connor joined Justice White's dissent from the *Johnson* decision. 102 S. Ct. at 2595 (White, J., dissenting).

105. Tibbs v. Florida, 102 S. Ct. 2211 (1982); Oregon v. Kennedy, 102 S. Ct. 2083 (1982).

106. New York v. Ferber, 102 S. Ct. 3348 (1982).

107. Enmund v. Florida, 102 S Ct. 3368 (1982); Eddings v. Oklahoma, 455 U.S. 104 (1982).

108. Taylor v. Alabama, 102 S. Ct. 2664 (1982).

Justice O'Connor and by the Court as a whole.

Her record in federal criminal cases is similar. In eight of ten cases she voted for a result which favored the prosecution. The eight raised claims, respectively, of denial of the right to a speedy trial,[109] unlawful search,[110] prosecutorial vindictiveness,[111] compulsory process,[112] appealability,[113] applicability of the "plain error" rule to a collateral challenge under 28 U.S.C. § 2255,[114] and construction of a federal statute prohibiting interstate transportation of forged securities.[115] However, in *Williams v. United States*,[116] she joined an opinion which construed 18 U.S.C. § 1014 as not proscribing the deposit of "bad checks" in a federally insured bank, thereby providing the fifth vote necessary to reverse the conviction. And in *Ralston v. Robinson*,[117] she joined a dissent which would have sustained a young prisoner's habeas corpus petition seeking to prevent conversion of his unexpired sentence under the Youth Correction Act (YCA)[118] into an adult sentence.[119] The majority concluded that the conversion was permissible because subsequent crimes of assault committed while incarcerated, for which he had received adult prison sentences, justified the sentencing judge in concluding that the prisoner would not benefit from YCA treatment during the remainder of his youth term.[120]

The federal criminal cases thus reinforce the impressions of Justice O'Connor gleaned from the state cases. Her basic commitment is to social order, but that concern is tempered by a thoughtful, flexible recognition of factual differences and a professional, nonideological approach to statutory construction. The commitment to law and order, and especially to the finality of judgments, is evinced by the whole record and is perhaps epitomized by a comment from her opinion for the Court in *United States v. Frady*.[121] Responding to Frady's ninth collateral attack

109. United States v. MacDonald, 102 S. Ct. 1497 (1982).
110. United States v. Ross, 102 S. Ct. 2157 (1982).
111. United States v. Goodwin, 102 S. Ct. 2485 (1982).
112. United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982).
113. United States v. Hollywood Motor Car Co., 102 S. Ct. 3081 (1982).
114. United States v. Frady, 102 S. Ct. 1584 (1982).
115. McElroy v. United States, 102 S. Ct. 1332 (1982).
116. 102 S. Ct. 3088 (1982).
117. 454 U.S. 201 (1981).
118. 18 U.S.C. § 5005-26 (Supp. XI 1982).
119. 454 U.S. at 223.
120. *Id.* at 216-19.
121. 102 S. Ct. 1584 (1982).

on his 1963 first-degree murder conviction, she rejected his petition as falling "far short" of showing "the degree of actual prejudice necessary to overcome society's justified interests in the finality of criminal judgments."[122] But the flexibility is also there. *Ralston* and *Williams* surely testify that her approach to statutory construction is not conviction oriented, but characterized by a genuine search for legislative intent.[123] Her concurring opinion in *United States v. Valenzuela-Bernal*[124] further illustrates the concern for fairness. Although she agreed with the Court that due process and the right to compulsory process had not been violated by the deportation of witnesses to the alleged crime of illegally transporting aliens, since their testimony would have been merely cumulative, she urged the Court to require a change in deportation procedures for the future. By requiring brief detention of potential alien witnesses for interview by defense counsel and the government, both sides might ascertain whether the witness could provide material, noncumulative evidence.[125] Her performance in criminal cases thus suggests a commitment not only to order in society but also to the time-honored judicial values of fairness, dispassionate statutory analysis, and sensitivity to factual differences.

C. *Exercise of Federal Jurisdiction*

Justice O'Connor's first term performance on questions relating to the exercise of federal court jurisdiction was generally consistent with her previously expressed preference for more judicial restraint in this area.[126] The figures in Table 7 place her very close to the extreme conservative position of Justice Rehnquist on such issues, although a close reading of the opinions suggests at least modest differences in two instances. Both justices found reasons not to reach the merits in *Fair Assessment in Real Estate Association v. McNary*,[127] but the grounds espoused by O'Connor had less drastic implications for the limitation of federal jurisdiction. Justice Rehnquist wrote the opinion

122. *Id.* at 1598.

123. In Ralston v. Robinson, she joined a dissenting opinion by Justice Stevens. 454 U.S. at 223. In Williams v. United States, she agreed with the majority in reversing a lower federal court criminal conviction. 102 S. Ct. 3088 (1982).

124. 102 S. Ct. 3440, 3450 (1982) (O'Connor, J., concurring).

125. *Id.* at 3451-53.

126. *See* O'Connor, *supra* note 27.

127. 454 U.S. 100 (1981).

of the Court for a majority of five, holding that the principle of comity barred a federal court challenge to the constitutionality of a state tax system by means of a 42 U.S.C. § 1983 damages action.[128] Justice O'Connor, on the other hand, joined an opinion by Justice Brennan which concurred in the judgment because of the plaintiff's failure to exhaust state administrative remedies but forcefully rejected the "comity" theory as an unwarranted renunciation of "jurisdiction over an entire class of damages actions brought pursuant to 42 U.S.C. § 1983."[129] "Where Congress has granted federal courts jurisdiction," the opinion insisted, "we are not free to repudiate that authority."[130] Justice O'Connor's agreement with this opinion suggests a reluctance to endorse sweeping limitations on the exercise of jurisdiction in the face of specific congressional authorization, even though exhaustion was sufficient ground for dismissal in this case.

The other case in which she expressed a viewpoint different from that of Justice Rehnquist was *Edgar v. Mite Corp.*[131] There she concurred in a majority finding that Mite Corporation's action to enjoin enforcement of the Illinois Business Takeover Act was not moot, even though Mite had withdrawn the tender offer which had evoked threatened enforcement of the Act. The case was not moot, the Court reasoned, because Mite Corporation might still be exposed to criminal and civil liability for making the offer in the first place.[132] Justice Rehnquist argued that the possibility of a future enforcement action against Mite was not sufficient to clothe the present case with the habiliments of a live controversy.[133]

Aside from these two cases, however, Justice O'Connor appeared to share Justice Rehnquist's restrictive view of the Court's proper scope of action. Indeed, in company with the Chief Justice, they formed a voting coalition generally receptive to any substantial challenge to exercise of federal court jurisdiction. In nineteen of forty-eight cases raising jurisdictional ques-

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128. *Id.* at 116.

129. *Id.* at 117 (Brennan, J., concurring).

130. *Id.* at 124.

131. 102 S. Ct. 2629 (1982).

132. *Id.* at 2635. For Justice O'Connor's comments see *id.* at 2643 (O'Connor, J., concurring in part).

133. *Id.* at 2653 (Rehnquist, J., dissenting). Justices Marshall and Brennan also believed that the case was moot because a preliminary injunction in effect at the time of the alleged violations of the Act would preclude any effective prosecution by the Secretary of State. *Id.* at 2648-49 (Marshall, J., dissenting).

tions, Justice O'Connor voted for the exercise of federal court jurisdiction (Table 7). But in fourteen of the nineteen instances there was no dissenting vote, indicating that the jurisdictional challenge was not very substantial. In only five cases did she take a position more favorable to the exercise of jurisdiction than one or more of her colleagues. Her position in the five cases undoubtedly indicates a degree of flexibility on the subject, but in some of them the nature of the substantive issues may have influenced her vote.

The five exceptional cases were *Edgar v. Mite Corp.* (discussed above), *Patsy v. Board of Regents,*[134] *Nixon v. Fitzgerald,*[135] *Globe Newspaper Co. v. Superior Court,*[136] and *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater.*[137] In *Patsy* Justice O'Connor concurred with the Court, as a matter of statutory interpretation, that exhaustion of state administrative remedies was not required of a plaintiff under 42 U.S.C. § 1983, but she wrote a separate opinion urging Congress to amend the law so as to require exhaustion.[138]

Nixon v. Fitzgerald presented a most unusual alignment since the challenge to the Court's exercise of jurisdiction came from the left rather than the right. By a five to four majority the Court decided the substantive issue in favor of absolute Presidential immunity for acts performed in his official capacity. Justice White, joined by Justices Brennan, Marshall, and Blackmun, dissented from this holding,[139] and the latter three justices also contended that the petition should have been dismissed because the parties had reached a settlement agreement after certiorari had been granted.[140] The agreement provided for payment of $142,000 to Fitzgerald, but technically the case was not moot because the settlement provided for an additional payment of $28,000 by the former President if the Supreme Court's decision was favorable to Fitzgerald. The dissenters regarded this as something approaching "a wager on the outcome of the case" and hence not "the *kind* of case or controversy over which we should exercise our power of discretionary review."[141] This align-

134. 102 S. Ct. 2557 (1982).
135. 102 S. Ct. 2690 (1982).
136. 102 S. Ct. 2613 (1982).
137. 454 U.S. 90 (1981).
138. 102 S. Ct. at 2568 (O'Connor, J., concurring).
139. 102 S. Ct. at 2709 (White, J., dissenting).
140. *Id.* at 2726 (Blackmun, J., dissenting).
141. *Id.* at 2727 (emphasis in original).

ment on the jurisdictional question is highly unusual, since the three dissenters are the members of the Court most prone to favor exercise of the Court's jurisdiction (Table 7). On the facts, the jurisdictional question was arguable either way. The settlement agreement undoubtedly undercut the assumption that a genuine case or controversy still existed, but the immunity question was of great importance and the sum of $28,000 was still riding on the outcome. One is tempted under the circumstances to speculate whether the three would have voted to dismiss the petition if a fifth vote had been available to defeat the former President's claim to absolute immunity (or whether some members of the majority might have been more sympathetic to dismissal if the immunity issue had been decided the other way).

Mootness once again was the jurisdictional issue in *Globe Newspaper Co. v. Superior Court.*[142] Globe Newspaper had raised a first amendment challenge to a Massachusetts statute which, as construed by the state court, mandated exclusion of press and public from a sex-offense trial during the testimony of any minor victim. Although the exclusion order had long since expired with the termination of the trial, the Court held the case was not moot because the underlying dispute was one "capable of repetition, yet evading review."[143] Justice O'Connor concurred in the judgment;[144] only Justice Stevens would have found the case moot.[145]

The fifth case, *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater,*[146] was a per curiam opinion holding that a city, "in a public nuisance abatement action brought against a motion picture theater," need not "prove beyond a reasonable doubt that the motion pictures at issue are obscene."[147] Three justices—Brennan, Marshall, and Stevens—urged remand to determine whether the California court decision rested on a federal or a state ground.[148] The majority opinion addressed the jurisdictional issue only through an assertion in a footnote that the lower court decision "rested solely on federal grounds; no state authority was cited for the proposition that obscenity must

142. 102 S. Ct. 2613 (1982).

143. *Id.* at 2618 (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

144. *Id.* at 2623 (O'Connor, J., concurring).

145. *Id.* at 2627 (Stevens, J., dissenting).

146. 454 U.S. 90 (1981).

147. *Id.*

148. *Id.* at 94 (Brennan, J., dissenting); *id.* (Stevens, J., dissenting).

be proven beyond a reasonable doubt."[149] The nature of the substantive issue in this case may also have influenced attitudes toward the jurisdictional question. The three dissenters have historically been more aggressive than other members of the Court in extending first amendment protection to obscene expression.[150] And the majority, in its eagerness to strike down the reasonable doubt standard of proof in a civil obscenity trial, may have been less disposed to give weight to the argument that the lower court decision rested on an adequate and independent state ground.

Apart from these five cases, some of which may be explained by their own special facts, Justice O'Connor consistently leaned toward restraint in the exercise of federal court jurisdiction. This posture was evident in her invocation of the whole range of possible barriers to adjudication—constitutional, statutory, and discretionary. In a concurring opinion in *Boag v. MacDougall*[151] she expressed concern about the grant of certiorari to review a lower court dismissal of a pro se complaint filed by an inmate of an Arizona state prison. Although concurring in the per curiam decision of reversal, she wrote separately to express reservations about the propriety of granting certiorari in such a case:

> I find merit in Justice Rehnquist's comments that this Court is not equipped to correct every perceived error coming from the lower federal courts. The effectiveness of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases, such as the present one, whose significance is limited to the parties. In exercising our discretionary certiorari jurisdiction, we should not be influenced solely by the merits of the

149. 454 U.S. at 92 n.5.

150. *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 777 (1977) (Stevens, J., dissenting); Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting); Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting); Stanley v. Georgia, 394 U.S. 557 (1969). And, in an opinion precisely on point with the issue in *Cooper*, Justice Brennan had previously argued that "the hazards to First Amendment freedoms inhering in the regulation of obscenity require that even in . . . a civil trial proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt." McKinney v. Alabama, 424 U.S. 669, 683-84 (1976) (Brennan, J., concurring). This statement had been quoted by the California Court of Appeal in its opinion affirming the "reasonable doubt" standard. People *ex rel.* Gow v. Mitchell Bros. Santa Ana Theater, 114 Cal. App. 3d 923, 936, 171 Cal. Rptr. 85, 93 (1981).

151. 454 U.S. 364, 366 (1982).

petitioner's case.[152]

In *Boag* Justice O'Connor's appeal for restraint was prompted by concern for the "limited judicial resources" of the Supreme Court. In *Middlesex County Ethics Committee v. Garden State Bar Association*,[153] she joined an opinion by the Chief Justice in which the rationale for restraint was rooted instead in respect for the role of states within the federal system. *Middlesex*, applying the abstention principle of *Younger v. Harris*,[154] held that a federal district court should not interfere with an ongoing disciplinary proceeding of the New Jersey state bar. No member of the Court disagreed with this holding, but four justices objected to the Court's broad dictum that the policies underlying *Younger* were "fully applicable to noncriminal judicial proceedings when important state interests are involved."[155] By joining the Burger opinion Justice O'Connor firmly allied herself with the Court's recent tendency to extend the *Younger* principle of noninterference beyond its original *criminal* context and apply it to a wide range of state *civil* proceedings.[156]

Her preference for restraint in the exercise of jurisdiction was equally apparent in decisions on plaintiff standing.[157] Undoubtedly the key decision in this area was *Valley Forge Christian College v. Americans United for Separation of Church and State*,[158] where she provided a crucial fifth vote for denying

152. *Id.* Justice Rehnquist, joined by the Chief Justice, wrote an opinion dissenting from the reversal on the merits but also voicing strong reservations about the propriety of granting certiorari in this case. *Id.*

153. 102 S. Ct. 2515 (1982).

154. 401 U.S. 37 (1971).

155. 102 S. Ct. at 2521. The four who objected were Justices Brennan, Marshall, Blackmun, and Stevens. *See id.* at 2524 (Brennan, J., concurring); *id.* at 2525 (Marshall, J., concurring).

156. *See* Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

157. Her two Court opinions shed little light on her views because in each case the appropriate outcome was obvious enough to command unanimity. In Watt v. Energy Action Educ. Found., 454 U.S. 151 (1981), she found standing for California to challenge Interior Secretary Watt's choice of bidding systems for offshore mineral leases; and in Bread Political Action Comm. v. Federal Election Comm., 102 S. Ct. 1235 (1982), she invoked a straightforward statutory analysis to deny the Bread PAC standing to utilize expedited procedures for challenging provisions of the Federal Election Campaign Act of 1971. Section 437h lists three categories of plaintiffs entitled to use the expedited procedures. 2 U.S.C. § 437h (Supp. V 1981). The Court unanimously found that the Bread PAC did not fall within any of the categories.

158. 454 U.S. 464 (1982).

plaintiff standing to raise an establishment clause challenge to HEW's gift of a surplus army hospital to a church-related college. *Valley Forge* severely limited the *Flast* test[159] as a basis for taxpayer challenge to federal expenditures alleged to violate the religion clauses, with the apparent effect of leaving many such issues nonjusticiable in federal courts.[160] In *Larson v. Valente*[161] and *Blue Shield v. McCready*[162] her votes against plaintiff standing were not as crucial, since she was part of a minority of four in each case, but her support for a restrictive view of standing was evident.[163]

On the whole record there is little doubt that Justice O'Connor's performance during her first term follows a path of restraint in the exercise of federal court jurisdiction. This is evident in voting statistics; it is evident in her opinions. Her approach, certainly, is not rigid or doctrinaire, but her commitment to the values of federalism and deep concern for conserving the Court's "limited judicial resources" suggest that such restraint may be a hallmark of her jurisprudence for some time to come.

D. Civil Liberties

Attitudes toward individual rights distinguish, as much as any other single criterion, the conservative from the liberal judge. Because the threat to individual rights generally comes in the form of a state or, less often, federal law that impinges on someone's freedom of action, values of political conservatism and judicial conservatism tend to reinforce each other in this substantive area of the law. That is, the judicial conservative's inclination to defer to decisions of popularly chosen officials, and the political conservative's tendency to value the interests of society above the interests of the individual when the two come into conflict, both encourage a narrow view of individual rights. A similar affinity of political liberalism and judicial activism may be perceived at the opposite end of the spectrum. The political liberal values individual rights and liberties above almost all else, and the judicial activist is quick to read preferred social

159. Flast v. Cohen, 392 U.S. 83 (1968).

160. Justices Brennan, Marshall, Blackmun, and Stevens strongly dissented. *See id.* at 490 (Brennan, J., dissenting); *id.* at 513 (Stevens, J., dissenting).

161. 102 S. Ct. 1673 (1982).

162. 102 S. Ct. 2540 (1982).

163. *See also* Leeke v. Timmerman, 454 U.S. 83 (1981).

policies into the Constitution even if legislative enactments must be struck down in the process.[164]

At the time of her appointment Justice O'Connor had a reputation for both political and judicial conservatism. This conservatism would not augur a strong posture in support of individual rights; rather, one would expect that societal interests would overshadow individual rights in her judicial decisions. Both of these tendencies appear to have been borne out during the 1981 term. As previously noted, she voted for the defendant in just three of thirty-two criminal cases and, perhaps significantly, two of the three exceptions involved youth offenders.[165] As compared with Justice Rehnquist, by universal consensus the arch-conservative member of the Court, her opinions appeared more fact-oriented, more geared to careful statutory analysis where indicated, and less ideological in tone. But in the end, the two voted for the same result in all but two of the thirty-two criminal cases.[166] The same is true of the cases dealing with individual rights in a noncriminal context. She displayed more sensitivity to the plight of the individual generally; and in one area—gender-based discrimination—she placed very high priority upon equal protection. Considered overall, however, her decisions gave the expected weight to the claims of society against the individual.

The exceptional cases will be considered first. Her opinion in *Mississippi University for Women v. Hogan*[167] revealed deep convictions about discrimination on the basis of sex. Her espousal of a strong (might one say doctrinaire?) equal rights position was all the more remarkable because the disparate treatment of the sexes could readily be justified on noninvidious grounds, and the disadvantaged sex was male rather than fe-

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164. Although the affinity seems clear with respect to the protection of individual rights, political liberalism has no across-the-board claim on judicial activism. The committed ideological conservative, just as the political liberal, might attempt to vindicate his preference by voiding statutes, overturning precedent, reaching out to make broad pronouncements on cases that could be decided on narrower grounds, and reading his personal views into the Constitution regardless of text (or absence of appropriate text) and founders' intent. These elements of judicial activism are not the monopoly of any ideology.

165. Eddings v. Oklahoma, 455 U.S. 104 (1982); Ralston v. Robinson, 454 U.S. 201 (1981).

166. *See* Tables 3 and 4. The two cases in which Justices Rehnquist and O'Connor disagreed were Eddings v. Oklahoma, 455 U.S. 104 (1982) and Ralston v. Robinson, 454 U.S. 201 (1981).

167. 102 S. Ct. 3331 (1982).

male. Indeed, the effect of the decision was to deny women the option of an all-female environment for a nursing education. Mississippi University for Women (MUW) was from its inception in 1884 a state-supported institution limiting its enrollment to women. In 1970 MUW established a School of Nursing, also limited to women students, although two other state nursing schools admitted applicants of either sex. In 1979 Joe Hogan was denied admission to the MUW nursing school because of his sex and promptly challenged the restriction in court.[168] On the facts it was obvious that the State of Mississippi had no general policy of excluding males from a nursing education and, indeed, provided opportunity for it. The exclusion of male students from MUW's nursing school, equally obviously, had nothing to do with nursing as such but rather was dictated by the non-coeducational character of the school.[169]

Nevertheless, the Court of Appeals found Hogan's rejection to be a violation of the equal protection clause,[170] and the Supreme Court by a five to four decision affirmed. Justice O'Connor provided an indispensable fifth vote for this outcome, and she wrote the opinion of the Court. Given the express discrimination in the challenged policy, the analysis called simply for stating the applicable standard of review and applying it to the facts.[171] She applied the accepted standard of intermediate scrutiny enunciated in *Craig v. Boren*[172] that the classification must serve "important governmental objectives" by means "substantially related to the achievement of those objectives."[173] She gave the test additional bite, however, by tacking on the reinforcing requirement that the state must show "an 'exceedingly

168. *Id.* at 3334.

169. I find the dissenting opinions of Justice Powell, *id.* at 3342 (Powell, J., dissenting), and Justice Blackmun, *id.* at 3341 (Blackmun, J., dissenting), more persuasive, but the O'Connor opinion is a good statement of her views on sex discrimination. The Chief Justice also dissented. *Id.* at 3341. Justice Rehnquist joined in the Powell dissent. *Id.* at 3342.

170. Hogan v. Mississippi Univ. for Women, 646 F.2d 1116 (5th Cir. 1981).

171. In addition the Court briefly discussed and rejected the State's contention that the University was shielded from the equal protection clause by the Title IX exemption of single sex undergraduate institutions from the general prohibition on sex discrimination in federally aided educational programs. 102 S. Ct. at 3340. *See* 20 U.S.C. § 1681(a)(5) (1976).

172. Craig v. Boren, 429 U.S. 190 (1976).

173. She quoted Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980), however, rather than *Craig v. Boren*. 102 S. Ct. at 3336.

persuasive justification' for the classification."[174] She also pointedly emphasized that discrimination "against males rather than against females does not exempt [the statute] from scrutiny or reduce the standard of review."[175]

Although the State had alleged that the University's single-sex admissions policy was intended to compensate for past discrimination against women, the Court concluded that the State had failed to establish this as the actual purpose because it could not show that women lacked opportunities either for training or for subsequent leadership in the nursing field.[176] Instead, the policy served only to "perpetuate the stereotyped view of nursing as an exclusively woman's job."[177] Furthermore, there was no showing of any adverse effect upon women's nursing education stemming from the presence of men in the classroom.[178] Thus Mississippi fell "far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification."[179] The pointed, deprecatory references to sex stereotypes and "traditional, often inaccurate, assumptions about the proper roles of men and women"[180] reveal a depth of conviction that may place her often on the side of the challenger in sex discrimination cases.[181]

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174. 102 S. Ct. at 3336 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)). In a footnote she went further, writing that on appropriate facts the Court might wish to apply an even stricter standard: "Because we concluded that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect." 102 S. Ct. at 3336 n.9.

175. *Id.* at 3336.

176. The Court cited Petitioner's Brief as authority for the alleged compensatory purpose, *id.* at 3337-38, but, unfortunately, engaged in a slight misrepresentation of what the Brief actually said. The Brief did not argue that the *School of Nursing* had been established in 1970 to compensate for limited nursing education opportunities for women (an obviously simple-minded argument which the Court erroneously imputed to the state), but rather that the *University* had been established in 1884 to serve a compensatory purpose and was presently maintained as a non-coeducational institution to provide additional educational options for women. Brief for Petitioner at 7-8, Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982).

177. 102 S. Ct. at 3339.

178. Indeed, "MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men." *Id.*

179. *Id.* at 3340.

180. *Id.* at 3337.

181. Others deeply involved with feminist issues apparently saw it the same way. As reported by the *National Law Journal*, Phyllis Segal of the National Organization of Women's Legal Defense Fund called the opinion "consistent with what we hoped for" and "evidence of Justice O'Connor's perception of the 'deleterious nature of sex stereotyping.'" *National Law Journal*, July 19, 1982, at 24, col. 3.

In *North Haven Board of Education v. Bell*[182] she also forsook the more conservative viewpoint and joined the majority in interpreting section 901(a) of Title IX of the Education Amendments of 1972[183] to ban sex-based employment discrimination in federally aided education programs. The statute was not explicit on the employment question, and the North Haven Board had brought suit to enjoin enforcement of HEW regulations proscribing sex discrimination in employment within the school district. The Court held that the statute did apply to employment practices and remanded for the district court to determine whether a fund cutoff was warranted.[184] Justice Powell, joined by the Chief Justice and Justice Rehnquist, dissented.[185] Although Justice O'Connor wrote no separate opinion, her agreement with the majority once more found her at odds with the three colleagues with whom her votes on other issues most frequently coincided.

Only one case during the term, *Mills v. Habluetzel*,[186] focused squarely on the rights of illegitimate children, another area where an intermediate level of equal protection scrutiny has often been used.[187] The Texas law at issue—providing a one-year statute of limitation for paternity suits—so obviously prejudiced the illegitimate child's claim for parental support that no member of the Court could be persuaded to sustain it.[188] Thus, the case may provide little guidance to Justice O'Connor's views when the issue is closer. Nevertheless, her concurring opinion gives some indication that she may prove very sympathetic to the claims of illegitimates. Prior to the Supreme Court's final disposition of the case, the Texas legislature had repealed the one-year limitation and replaced it with a four-year statute. Justice O'Connor wrote separately to express her view that the Court's opinion should not be "misinterpreted as approving the four-year statute" currently in force[189] and that "longer periods of limitation for paternity suits also may be unconstitutional."[190]

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182. 102 S. Ct. 1912 (1982).

183. 20 U.S.C. §§ 1681-86 (1976).

184. 102 S. Ct. at 1927-28.

185. *Id.* at 1928 (Powell, J., dissenting).

186. 102 S. Ct. 1549 (1982).

187. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

188. *Mills*, 102 S. Ct. 1549 (1982).

189. *Id.* at 1556 (O'Connor, J., concurring).

190. *Id.* at 1558.

Justice O'Connor also displayed some receptiveness to first amendment claims of association and expression. Still, when the Court was strongly divided, she was generally lined up on the side of the state rather than the individual. She provided an essential vote to sustain a Texas law requiring various public officeholders to resign their positions as a prerequisite for candidacy to designated elective office.[191] She joined a per curiam decision holding that the standard of proof "beyond a reasonable doubt" is not required in *civil* obscenity cases.[192] In *Board of Education v. Pico*[193] she dissented from the Court's conclusion that the first amendment imposed limitatons upon the discretion of a local school to remove books from high school and junior high libraries. Although she did not "personally agree with the board's action with respect to some of the books in question," she insisted that the school board—not the courts—had the responsibility to make decisions about the suitability of educational materials.[194] Along with a unanimous Court, she also rejected first amendment attacks upon a local ordinance regulating head shops,[195] a Puerto Rican statute permitting political parties to fill vacancies in the Commonwealth legislature by interim appointment,[196] and a New York child pornography law.[197] Similarly, the Court was unanimous in rejecting a claim by International Longshoremen that an otherwise unlawful refusal to unload cargoes from the Soviet Union was protected by the first amendment because the object of the boycott was to protest the Soviet invasion of Afghanistan.[198]

As indicated, Justice O'Connor's first amendment record was by no means totally negative. She voted to sustain the first

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191. Clements v. Fashing, 102 S. Ct. 2836 (1982). Justices Brennan, Marshall, Blackmun, and White dissented. *Id.* at 2850 (Brennan, J., dissenting).

192. California *ex rel.* Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 (1981). Justices Brennan, Marshall, and Stevens dissented. *Id.* at 94 (Brennan, J., dissenting); *Id.* (Stevens, J., dissenting). This case is discussed in text accompanying notes 146-50, *supra*.

193. 102 S. Ct. 2799 (1982).

194. *Id.* at 2835 (O'Connor, J., dissenting).

195. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 102 S. Ct. 1189 (1982).

196. Rodriguez v. Popular Democratic Party, 102 S. Ct. 2194 (1982).

197. New York v. Ferber, 102 S. Ct. 3348 (1982). In *Ferber*, the Court concluded that the materials in question had no serious literary, scientific, or educational value, *id.* at 3357, but Justice O'Connor wrote separately to stress that the first amendment would not shelter child pornography from state regulation even if the work were found to have some such value. *Id.* at 3364 (O'Connor, J., concurring).

198. International Longshoremen's Ass'n v. Allied Int'l, Inc., 102 S. Ct. 1656 (1982).

amendment claim in six of thirteen cases involving rights of expression and association (Table 8). Three of the six were decided without dissent,[199] and two others with but a single dissenting vote.[200] In *Globe Newspaper Co. v. Superior Court*,[201] however, she voted with the majority in a sharply divided Court[202] to strike down a Massachusetts law interpreted by the lower court as requiring mandatory exclusion of press and public from a sex-offense trial during the testimony of a minor victim. Justice O'Connor concurred separately to express her view that the holding of the case carried no implications "outside the context of *criminal* trials."[203] These decisions undoubtedly reveal a genuine concern for first amendment values on the part of Justice O'Connor and an earnest attempt to weigh the competing concerns of society and the individual. The outcomes suggest, however, that societal values tend to weigh a little heavier in Justice O'Connor's scale than in the balances used by the Court as a whole.[204]

In most other areas of individual rights, Justice O'Connor has exhibited the same tendency to support the position of the government. This was especially evident in two cases dealing with the rights of aliens. She provided a deciding vote in support of California's requirement of United States citizenship for dep-

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199. *In re* R.M.J., 455 U.S. 191 (1982) (invalidating Missouri restrictions on lawyer advertising); Brown v. Hartlage, 102 S. Ct. 1523 (1982) (holding that a Kentucky Corrupt Practices Act could not, consistent with the first amendment, be construed to bar a campaign promise to reduce office-holders' salaries); NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982) (holding a nonviolent political boycott of white merchants to be protected by the first amendment).

200. Widmar v. Vincent, 454 U.S. 263 (1981) (finding discriminatory exclusion of student religious groups from use of state university facilities to be a content-based regulation of speech, in violation of first amendment speech guarantees; Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (voiding a Berkeley ban on campaign contributions). Justice White was the sole dissenter in each case. 454 U.S. at 282 (White, J., dissenting). 454 U.S. at 303 (White, J., dissenting).

201. 102 S. Ct. 2613 (1982).

202. The Chief Justice and Justices Rehnquist and Stevens dissented. *Id.* at 2623 (Burger, C.J., dissenting); *Id.* at 2627 (Stevens, J., dissenting).

203. *Id.* at 2623 (O'Connor, J., concurring) (emphasis added).

204. Reference should be made once more to Table 8, which shows Justice O'Connor only slightly more protective of first amendment interests than Justice Rehnquist, by consensus the anchor man on the far right of the Court. However, in some respects his voting record on freedom of expression issues during the 1981 term is misleading. During the preceding five terms he voted to sustain the first amendment claim in only five of 50 free speech cases. Justice O'Connor might also be found further to the right on a different set of first amendment issues, but at the present time her overall voting record in support of first amendment claims yields a much higher percentage than his.

uty probation officers,[205] thus further extending the "political function" exception to strict scrutiny of alienage classifications under the equal protection clause.[206] In *Plyler v. Doe*[207] she joined the Chief Justice and Justices Rehnquist and White in a vigorous dissent from a holding that the Constitution required Texas school districts to grant alien children, illegally resident in the country, tuition-free elementary and secondary education on an equal basis with citizens and lawfully admitted aliens.[208] The Court had propounded a special intermediate equal protection standard of scrutiny, tailored apparently to the special facts of this case.[209] The dissent, however, insisted that in the absence of a suspect class or a fundamental right, the "inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose."[210] Utilizing this test, the dissent readily concluded it was "not 'irrational' " for a state to prefer persons lawfully present in the state to those not lawfully admitted.[211] While deploring the Texas school policy as wrong and unwise, the dissent called for a solution through the political processes rather than through "unwarranted judicial action."[212]

Justice O'Connor also voted to sustain anti-school-busing measures adopted by the voters of California and the State of Washington. Only Justice Marshall dissented from the Court's decision rejecting a challenge to a California constitutional

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205. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

206. The right of the state to exclude aliens from governmental positions involving discretionary decision making or execution of policy was first enunciated in Sugarman v. Dougall, 413 U.S. 634 (1973), and subsequently applied to the position of state trooper in Foley v. Connelie, 435 U.S. 291 (1978), and to public school teaching in Ambach v. Norwick, 441 U.S. 68 (1979).

207. 102 S. Ct. 2382 (1982).

208. *Id.* at 2408 (Burger, C.J., dissenting).

209. The Court concluded that the school district policy of charging tuition to illegal aliens would effectively exclude them from an education, thus marking them with a lifetime "stigma of illiteracy" and foreclosing "any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." 102 S. Ct. at 2398. In view of these costs, the discriminatory policy could "hardly be considered rational unless it furthers some substantial goal of the State." *Id.*

210. *Id.* at 2411 (Burger, C.J., dissenting).

211. *Id.* at 2412.

212. *Id.* at 2414. In Toll v. Moreno, 102 S. Ct. 2977 (1982), another case involving alien rights, the Court required the State of Maryland to grant certain classes of aliens resident status for purposes of university tuition and fees. The right was derived from federal statute, however, rather than the equal protection clause. Justice O'Connor, also relying upon statutory interpretation, agreed with the Court as to some classes of aliens but not others. *Id.* at 2989 (O'Connor, J., concurring and dissenting).

amendment prohibiting state courts from going further than the fourteenth amendment would require in ordering programs of mandatory pupil assignment and transportation in public school systems.[213] The Court was more deeply divided, however, in striking down Washington's state-wide initiative measure mandating a neighborhood school policy, with exceptions permitted only for reasons of health, safety, voluntary student choice, or court order arising from the adjudication of constitutional issues.[214] Justice O'Connor, along with the Chief Justice and Justice Rehnquist, joined Justice Powell's dissent which found the initiative measure to embody a "policy of racial neutrality in student assignments"[215] and characterized the majority decision as an "unprecedented intrusion into the structure of a state government."[216]

E. Federalism

Justice O'Connor supported civil liberty claims often enough to refute any suggestion that her decisions respond to a knee-jerk brand of conservatism, political or judicial. Her opinions reflect a high regard for factual nuances and a sensitivity to merits of conflicting claims that negates any suggestion of a ju-

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213. Crawford v. Board of Educ., 102 S. Ct. 3223 (1982) (Marshall, J., dissenting). *See also* CAL. CONST. art. I, § 7(a).

214. Washington v. Seattle School Dist. No. 1, 102 S. Ct. 3187 (1982). Text of the initiative may be found in WASH. REV. CODE §§ 28A.26.010 to 28A.26.900 (1981). The measure was challenged by the Seattle School District, which had adopted a plan for pupil assignment and transportation to achieve racial balance. The initiative originated with opponents of the Seattle busing desegregation plan.

215. 102 S. Ct. at 3207 (Powell, J., dissenting).

216. *Id.* at 3205. The dissent interpreted the decision to mean that the local school district could abandon its desegregation policy if it chose, since the policy was not required by the fourteenth amendment, but that the State, which created the school district, could not require the district to alter its policy.

In cases involving voting rights, however, Justice O'Connor supported the position of the minority group challengers. Blanding v. DuBose, 454 U.S. 393 (1982) held without dissent that Sumter County, South Carolina, had not satisfied the preclearance requirements of the Voting Rights Act of 1965 prior to instituting at-large county council elections. In Hathorn v. Lovorn, 102 S. Ct. 2421 (1982), Justice O'Connor wrote for the Court in requiring preclearance before a school districting system could be implemented. Only Justice Rehnquist dissented. *Id.* at 2431 (Rehnquist, J., dissenting). Justice O'Connor joined a 6-3 majority in Rogers v. Lodge, 102 S. Ct. 3272 (1982), upholding a district court finding of discriminatory intent in the maintenance of an at-large system for electing members of the Burke County, Georgia, Board of Commissioners. All members of the Court agreed that the fourteenth and fifteenth amendments required discriminatory intent to invalidate the system, but the dissenters argued that the facts did not justify the district court's finding of such intent. *Id.* at 3281 (Powell, J., dissenting).

risprudence dominated by policy preferences[217] or by a single overriding rule of constitutional adjudication. Nevertheless, the pattern of her judicial decision making is laced with threads of deference to state authority within the federal system. The underlying deference can be and is submerged in particular cases by a persuasive combination of facts and law, but the proclivity is unmistakable. I have discussed the impact of this federalist value preference in the criminal cases and in cases raising challenges to the exercise of federal court jurisdiction. Undoubtedly, it also underpins many of her decisions favoring governmental prerogatives over individual civil rights. Nowhere, however, is the preference spelled out more explicitly or in greater detail than in her dissent from the Court's tenth amendment analysis in *Federal Energy Regulatory Commission v. Mississippi*.[218]

In *Federal Energy Regulatory Commission v. Mississippi* the Court upheld the Public Utility Regulatory Policies Act of 1978 against a facial challenge by Mississippi. The Act exempted small power plants and cogeneration facilities from state regulation, a provision admittedly within the broad commerce powers of Congress. However, the Act also required state regulatory commissions to implement certain FERC regulations and to "consider" the adoption and implementation of specific rate design and regulatory standards, including prescribed procedures by which the standards must be "considered."[219] Since the Con-

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217. However, at least one highly consistent result-oriented pattern appeared in her judicial decison making. In conflicts between labor and management she almost always favored the employer. *See* Summit Valley Indus. v. Local 112, United Bhd. of Carpenters, 102 S. Ct. 2112 (1982); Woelke & Romero Framing, Inc. v. NLRB, 102 S. Ct. 2071 (1982); Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982); Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404 (1982); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981). *See also* United States v. Clark, 454 U.S. 555 (1982) (decision for the United States as employer in a civil service pay dispute); United Mine Workers v. Robinson, 102 S. Ct. 1226 (1982) (a unanimous court favored the Union in a dispute with one of its pensionees). In Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 102 S. Ct. 2673 (1982), Justice O'Connor took the Union position, but in a separate concurrence she hinted at a willingness to overrule Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), the controlling precedent. 102 S. Ct. at 2687 (O'Connor, J., concurring).

In Title VII employment discrimination cases she also characteristically took the side of the employer. *See* American Tobacco Co. v. Patterson, 102 S. Ct. 1534 (1982); Pullman-Standard v. Swint, 102 S. Ct. 1781 (1982); Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982); Connecticut v. Teal, 102 S. Ct. 2525 (1982); Ford Motor Co. v. EEOC, 102 S. Ct. 3057 (1982). The only exception I found was Zipes v. TWA, Inc., 102 S. Ct. 1127 (1982), a sex discrimination case decided by a unanimous court.

218. 102 S. Ct. 2126, 2145 (O'Connor, J., concurring and dissenting).

219. 102 S. Ct. at 2143.

gress had power under the commerce clause to preempt the whole field of utility regulation, the Court argued, the Constitution was not violated by requiring a state agency to comply with federal rules "as a condition to its continued involvement in a preemptible field."[220]

To this analysis Justice O'Connor responded with feeling:

> The Court's conclusion . . . rests upon a fundamental misunderstanding of the role that state governments play in our federalist system.
>
> State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes. The Constitution contemplates "an indestructible Union, composed of indestructible States," a system in which both the state and national governments retain a "separate and independent existence."[221]

Consistent with these principles, Justice O'Connor found the Act to be a violation of tenth amendment restraints on congressional action, as set forth in *National League of Cities v. Usery*[222] and further elaborated in *Hodel v. Virginia Surface Mining & Reclamation Association*.[223] Applying the three-part *Hodel* test she found that the challenged statute regulated " 'States as States,' addresse[d] matters that are indisputably 'attribute[s] of state sovereignty,' and 'directly impair[ed the State's] ability' to 'structure integral operations in areas of traditional governmental functions.' "[224] After a detailed analysis of limits on congressional powers springing from the nature of the federal system, she could not resist one final paean to state autonomy:

> Finally, our federal system provides a salutary check on governmental power. As Justice Harlan once explained, our ancestors "were suspicious of every form of all-powerful central

220. *Id.* at 4575 (O'Connor, J., concurring and dissenting) (quoting Texas v. White, 7 Wall. 700, 725 (1869) and Lane County v. Oregon, 7 Wall. 71, 76 (1869)).

221. 426 U.S. 833 (1976).

222. 452 U.S. 264 (1981).

223. 102 S. Ct. at 2147 (O'Connor, J., concurring and dissenting).

224. *Id.* at 2153-54 (citations omitted).

authority."

To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government. Unless we zealously protect these distinctions, we risk upsetting the balance of power that buttresses our basic liberties. In analyzing this brake on governmental power, Justice Harlan noted that "[t]he diffusion of power between federal and state authority . . . takes on added significance as the size of the federal bureaucracy continues to grow." Today, the Court disregards this warning and permits Congress to kidnap state utility commissions into the national regulatory family. Whatever the merits of our national energy legislation, I am not ready to surrender this state legislative power to the Federal Energy Regulatory Commission.[225]

The dissent also found the majority decision to be "at odds with our constitutional history, which demonstrates that the Framers consciously rejected a system in which the national legislature would employ state legislative power to achieve national ends."[226]

IV. Conclusion

Justice O'Connor's first term on the United States Supreme Court brought few genuine surprises. Her opinions revealed technical competence and good judicial craftsmanship, as earlier critiques of her state court opinions had presaged. By and large her opinion writing was characterized by a lucid statement of relevant facts, reasoned elaboration of the argument, and defensible use of precedent. She usually avoided reaching out beyond the facts and issues, as presented by the record, to make pronouncements on questions not necessary to the disposition of the case. The meticulous search for legislative intent in statutory

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225. *Id.* at 2154. Additional evidence of deference to state legislatures may be found in her dissent in Greene v. Lindsey, 102 S. Ct. 1874, 1881 (1982) (O'Connor, J., dissenting), and in her concurring opinion in Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3031 (1982) (O'Connor, J., concurring), where she argued that Federal Home Loan Bank Board regulations preempted California limitations on the enforceability of "due on sale" clauses in real estate mortgages held by savings and loan institutions, but wrote separately "to emphasize that the authority of the Federal Home Loan Bank Board to preempt state laws is not limitless." *Id.* at 3031-32.

226. The type of opinion may also be relevant. Justice O'Connor's more flamboyant pronouncements were reserved for concurring and, particularly, dissenting opinions. I was unable to find any published concurring or dissenting opinions authored by Justice O'Connor while on the Arizona court.

wording and legislative history, a hallmark of many of her state court decisions, was also evident in her first term performance.

The new judicial setting did, however, bring out a forcefulness of expression and occasional resort to broad policy pronouncements that had not been so evident in her opinions for the Arizona court. Perhaps this is inherent in the nature of the issues and the office, since in this respect her behavior differed much more from her state court performance than from that of her colleagues on the United States Supreme Court.[227] Perhaps the most striking example of judicial assertiveness is found in her dissent from the decision of the Court in *Federal Energy Regulatory Commission v. Mississippi*.[228] Departing from the measured language of the judicial technician, she slipped with remarkable ease into the role of sharp-tongued critic and impassioned advocate. Justice Blackmun, who wrote the opinion of the Court, captured some of the more imaginative figures of speech in a somewhat wry and defensive footnote:

> Justice O'Connor's partial dissent suggests that our analysis is an "absurdity" and variously accuses us of "conscript[ing] state utility commissions into the national bureaucratic army," of transforming state legislative bodies into "field offices of the national bureaucracy," of approving the "dismemberment of state government," of making state agencies "bureaucratic puppets of the Federal Government," and—most colorfully—of permitting "Congress to kidnap state utility commissons." While these rhetorical devices make for absorbing reading, they unfortunately are substituted for useful constitutional analysis.[229]

Such occasional resort to metaphor and simile for the expression of strong feeling should not be permitted to obscure, however, the basically workmanlike character of her judicial opinions.

The preference for judicial restraint, so strongly emphasized in public statements prior to her appointment, also accurately foreshadowed her first term performance. Restraint was evident in a generally consistent deference to state and federal legislative enactments, a restrictive approach to the exercise of federal court jurisdiction, and a concept of federalism dictating a high degree of respect for state sovereignty within the federal system.

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227. 102 S. Ct. 2126, 2145 (1982) (O'Connor, J., concurring and dissenting).
228. *Id.* at 2141 n.30.
229. 102 S. Ct. 3331 (1982).

It surfaced also in frequent allusions to the framers' intent and the historical background of constitutional provisions.

Statistically, her voting record ensconces her firmly on the Court's conservative wing, although closer to the center than the Chief Justice and Justice Rehnquist. This positioning undoubtedly reflects her commitment to judicial restraint and to federalism as well as her substantive ideological leanings, tempered by the qualities of pragmatism and fairness that had marked her prior public behavior. In dispensing criminal justice her first term reveals a stronger commitment to law and order than her state court record might have suggested, but even here the bias in favor of social order and the finality of state court judgments was moderated by a sensitivity to fact differences and a concern for constitutional guarantees of fairness. In dealing with civil liberties she also tended to give greater weight to societal interests as embodied in legislative enactments than to individual claims against the state. Illustrative is her support for the California and Washington state voter initiatives directed against school busing for racial purposes and for the constitutionality of the Texas attempts to relieve school enrollment pressure by raising a tuition barrier to children illegally resident in the country. Her approach was not inflexible, however. Her opinion in *Mississippi University for Women v. Hogan*,[230] holding a state nursing school to be constitutionally barred from limiting enrollment to women, ran strongly counter to precepts of judicial restraint (not to mention political conservatism).[231] Her defense of the rights of illegitimates in *Mills v. Habluetzel*[232] also indicated a concern for fairness in dealing with disadvantaged groups.

One term doth not a judicial career make, and long-range projections based upon data for a single year would be risky indeed. This Article makes no such pretensions. Looking at the single year, however, one can say that the performance conforms remarkably well to expectations created at the time of the nomination. President Reagan's praise of the candidate as a judicial conservative has thus far been vindicated. Republicans, except those of the extreme right, have good reason to be satisfied with most of the substantive positions she has taken. The lawyers

230. In my opinion it also departed from her usual standards of judicial craftsmanship, ignoring relevant facts and seriously misinterpreting the relevant interests of the state.

231. 102 S. Ct. 1549 (1982).

232. N.Y. Times, July 8, 1981, at A1, col. 4.

who thought she would be competent have not been wrong; indeed, the ABA Committee might now be willing to give her the "highest" recommendation for competence as well as for temperament and integrity. Women's groups have been reassured that she is sensitive to the evils of gender discrimination and invidious sex stereotyping. And, given her flexible, nonideological approach to judicial decision making, even committed Democrats might still be prepared to admit, "If you have to have a Republican on the court . . . she's about the best we could hope for."[233]

233. Ayers, *A Reputation for Excelling*, N.Y. Times, July 8, 1981, at A1, col. 4. *See supra* note 6.

What Difference Can a Justice or Two Make?

The following is a condensed excerpt from Chapter Two of the forthcoming book, God Save This Honorable Court, *by Laurence H. Tribe, to be published by Random House in September 1985.*

By Laurence H. Tribe

In a speech delivered on the eve of the 1984 election, Justice Rehnquist observed that presidents have little success in "packing" the Supreme Court with like-minded men and women, in large part because new justices "invariably come 'one at a time' and each new appointee goes alone to take his place . . . no cohorts with him." Once there, the appointee is supposedly absorbed by the institution, with the result that the new justice is more likely to be changed by the Court than to effect any significant changes himself. In fact, almost two-thirds of all the Court's members have taken their seats within one year of another new justice, creating an entering class of sorts. Justice Rehnquist himself was nominated on the same day as Justice Lewis Powell, and the two were confirmed by the Senate only four days apart.

But there remains the fundamental assertion behind the "one at a time" idea: each individual justice, or even a pair of new members, is said to be swallowed up by the institution of the Court, and is therefore not in a position to reshape its course. Alternatively, as Justice Rehnquist also suggested in the same speech, the Court's "centrifugal forces" can be perceived as so powerful that the justices may be expected to grow completely independent of one another, each becoming an island unreachable by any "hierarchical order" or "institutional unity." The argument is that, because the justices are appointed for life and answer only to their own consciences, they are less concerned with being "team players" and more concerned with securing their individual places in history.

In different ways, these seemingly contradictory images serve to make the same point by denying the idea that one or two justices can make a major difference at the Court. But, to the extent they share a grain of truth, both observations leave the door open to many ways in which just one or two justices *can* make a difference, and a crucial one.

The 5-4 Court

Even those who accept the idea of "centrifugal forces" on the Court would have to acknowledge the difference that one justice can make when the Court is closely divided and renders a 5-4 decision, and about one-fifth of the Court's cases in the decade from 1974 to 1984 were decided on a 5-4 basis. Yet this is a Court not known for ideological divisions or intramural rivalries as sharp and deep as some previous Courts have experienced. If it seems surprising or unsettling that so large a fraction of the constitutional choices being made in the 1970s and 1980s turn on the narrowest of margins, there is some comfort in learning that the phenomenon is hardly a new one.

Some of the Court's early decisions to grant states broad power to modify their own contracts (the 1837 *Charles River Bridge* case) or to impose restraints on state ability to issue bills of credit (*Craig v. Missouri*, decided in 1830) were resolved by margins of one justice. The great Civil War cases testing the boundaries of presidential and national power (*The Prize Cases* and the *Test Oath Cases*) were all decided by Courts split 5-4. The famous *Slaughterhouse Cases* of 1873, which were the first major attempts to interpret the 14th Amendment, turned on the vote of a single justice.

Nearer to the turn of the century and in the early 1900s, the Court's string of conservative economic rulings were often handed down in 5-4 decisions. For example, the 1895 decision to hold the income tax unconstitutional in *Pollock v. Farmers Loan and Trust Co.* and the 1905 decision to strike down a New York maximum hours law for laborers in *Lochner v. New York* were decided by the narrowest of margins. When the Court then struck out at the New Deal in 1935 and 1936, it invalidated the Railroad Retirement Act and a New York minimum wage law by a single vote margin. When the famous 1937 "switch in time that saved the nine" occurred, the Court, by 5-4 votes, sustained a Washington minimum wage law in *West Coast Hotel v. Parrish* and the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*

The landmark criminal defense rulings of the early 1960s—requiring the exclusion by state courts of illegally obtained evidence in *Mapp v. Ohio*, extending the Fifth Amendment privilege against compelled self-incrimination to state proceedings in *Malloy v. Hogan*, and guaranteeing that suspects are to be informed of their rights when subjected to "custodial interrogation" and to be assisted by counsel during such questioning in *Miranda v. Arizona* and *Escobedo v. Illinois*—all depended on the vote of one justice. And, by 5-4 votes, the Court has more recently cut back on many of these very protections.

The 5-4 decisions run the gamut of issues and show no sign of disappearing. In 1978 the Court addressed the subject of affirmative action in its 5-4 decision upholding some programs but barring the use of numerical "quotas" to aid minority students in *University of California v. Bakke*. In 1984 alone, the Court ruled by the narrowest of margins in favor of the constitutionality of city-sponsored nativity scenes in *Lynch v. Donnelly*, the legality of home videotape recording in *Sony Corp. of America v. Universal City Studios*, and the president's power to ban travel to Cuba in *Regan v. Wald*.

Key 5-4 decisions are thus more than a century old, and will be with us as long as the Court is. They serve as reminders that one justice can, and does, make a difference in the choice among possible constitutional futures. The Court often

rests on a delicate balance between two blocks of justices split on some issue, with one or more others positioned between the rival camps. In such a case, the addition of one justice to the Court can serve to create a "critical mass" of justices that tips the Court firmly to one side, eventually bringing others along as well. Any Court as delicately balanced as that of the 1980s is capable of being thrown squarely to one side of the ideological divide by an appointment that upsets still narrow margins on key questions.

Forecasting the past

Over the course of a long judicial career, one justice's voting pattern might differ strikingly from that of another. Only if we know who might have been appointed in a justice's place can we say with confidence how decisively a given appointment affected ultimate results. But how do we forecast the past? After all, there is usually no way to know which person would have been nominated for a seat on the Court if the person ultimately selected had been passed over. Yet in cases where the Senate has rejected one nominee and confirmed instead a subsequent choice, we do have tangible evidence of just how great a difference one justice can make.

No case demonstrates that difference more dramatically than the substitution of Owen Roberts for nominee John Parker. Parker, a 45-year-old federal judge from North Carolina with a reputation for antilabor, conservative decisions, was rejected by a narrow 41-39 Senate confirmation vote in 1930. In his place, President Hoover nominated the more moderate 55-year-old Pennsylvanian, Owen Roberts. Roberts became the justice who switched his vote on minimum wage laws in 1937, abandoning the Court's conservative "Four Horsemen" on the validity of state economic regulation and joining four other justices to begin upholding key elements of the New Deal.

Roberts's switch was critical in sidetracking President Franklin Roosevelt's controversial "Court-packing" bill, an attempt to add six new justices to the Court and ensure its support of the Roosevelt program. Had Parker been on the Court, would he have switched as Roberts did? If not, would the Court-packing bill have passed? If it had, what then?

To take another, more recent case, there is the Senate's 1970 rejection of former segregationist G. Harrold Carswell, and the subsequent approval of Nixon nominee Harry Blackmun to the Court. Justice Blackmun has been quite liberal on racial issues coming before the

Rehnquist: "Staked out the right."

Court and has been a key figure in the Court's development of pro-choice principles in the abortion area. Would Carswell have played a parallel role? We are entitled to doubt it.

Catalysts on the Court

Beyond the potentially pivotal role of the justice's own vote, a justice's persuasive powers may often make a difference by rallying colleagues. The difference in these cases may go well beyond simply changing a result or a margin of victory; a "catalytic" justice may even be able to change the Court's very chemistry, altering its understanding of the basis of its decisions, and therefore changing the development of the constitutional law the Court announces. Such a justice can also play a key role in the separation of the hundred-odd cases the Court chooses to hear annually from the many thousands it turns away.

For example, in the Court's internal discussion of *Grosjean v. American Press Co. Inc.*—a 1936 case involving a Louisiana law that selectively taxed newspapers which opposed Governor Huey Long—it was unanimously agreed that the law would be struck down, but there was dispute over what the basis of the decision would be. Justice Sutherland carried the day for the more conservative justices on the Court, and won an agreement that the decision would rest on the state's discrimination against certain commercial enterprises under the 14th Amendment's equal protection clause. But Justice Cardozo drafted an alternate opinion resting the decision on a far more novel ground: application of the First Amendment to prohibit state—instead of simply federal—laws hindering freedom of the press. Cardozo's opinion proved so powerful that Justice Sutherland adopted it in place of his original draft of the Court's official ruling. The landmark holding in that case, especially coming from the pen of a justice—George Sutherland—known for his conservative opinions, was a major advance in the law of the First Amendment. In 1931 only five justices had been willing to apply the First Amendment to state laws; a unanimous Court did so in 1936 as a result of Cardozo's intervention.

Justice Brennan played a similar catalytic role in many of the difficult and often path-breaking cases decided by the Warren Court. He organized his brethren and articulated the Court's broader vision of the Constitution in *Baker v. Carr*, when the Court held that it could rule on the validity of a state legislature's apportionment, and in the 1964 case of *New York Times v. Sullivan*, which limited the ability of public officials to bring libel actions against the press. Catalytic justices, another established tradition on the Court, prove that one justice can often make much more than one vote's difference. One person's persuasive judicial skills are often the key to taking the Court to new frontiers of constitutional law.

Staking out the ground

One justice can also make the difference in the important, if difficult to document, role of broadening the range of acceptable views on the Court—or redefining the "center" by staking out the ground at one end of the ideological spectrum. Justice William O. Douglas's persistent liberal rulings in many criminal defense and civil liberties cases widened the scope of options seriously considered by the Court, and may have allowed more liberal views to seem distinctly "moderate." In the other direction, the addition of Justice Rehnquist's conservative ideology to the Court has "staked out the right" for a more moderate majority, and allowed Chief Justice Warren Burger to lead the Court toward—if not to—the Rehnquist perspective.

Like the "rabbit" technique often used by track teams—the tactic in which one competitor keeps up the pace by running far in front of the field, knowing that he cannot win but simply hoping to aid a comrade in gaining victory—a justice who trailblazes an ideological outlook on the Court normally will not carry the day. But his legacy can influence an entire era.

The chief justices—only 15 have served in our entire history—present the most obvious examples of the "one justice who can make a difference." Although often in dissent, and sometimes

lagging behind instead of leading the Court, one chief may make all the difference in the constitutional world. No example better proves this point than Chief Justice John Marshall. The legendary chief justice personally wrote the opinion of the Court in 519 of the 1,215 cases decided during his tenure on the Court. Of the decisions that involved interpretation of the Constitution, Marshall penned the Court's judgment in more than half. Marshall was able to keep his Federalist majority together for dozens of key decisions, absorbing appointments by Democratic-Republican Presidents Jefferson, Madison and Monroe. His intellectual grip on his fellow justices was so firm that Marshall dissented from a constitutional ruling only once: in every other major case decided in his 34 years at the helm of the Supreme Court, Marshall got his way.

The 20th century

In the 20th century the changing of the chiefs has translated into an important difference in the Court's direction. For example, most observers believed that Chief Justice Fred Vinson was ambivalent about the constitutionality of school segregation, and uncertain about what position he would take after hearing arguments in a series of cases in 1953. Instead of deciding the cases, the Court ordered their reargument the following year. In the interim Vinson died and new Chief Justice Earl Warren took his place. The new chief not only wrote the Court's precedent-shattering decision in *Brown v. Board of Education*, signaling the end of segregated public schools in this country, but also worked with his associate justices to develop an opinion which could be announced unanimously, That the Court spoke with a single, authoritative voice in *Brown* added immeasurably to the ruling's credibility in the face of widespread and bitter resistance.

The Court's first female justice

Justice Potter Stewart can neither be credited nor blamed for the quite different votes cast by his successor, Justice Sandra Day O'Connor, in the wake of his 1981 resignation from the Court at the judicially youthful age of 66. But the consequences of this single change on the Court demonstrate anew how a one-justice switch can shift the direction of the entire Court.

On some issues, of course, there is no reason to believe that Justice O'Connor's votes differ from those that Justice Stewart would have cast. Taken as a whole, however, there are sharp differences between what she has done—and what he was likely to do. In her first three years as a justice, Sandra Day O'Connor voted with the Court's most conservative member—Justice William Rehnquist—almost nine times out of 10, or 87 percent of the time. During the decade Justice Stewart shared on the Court with Justice Rehnquist, the two voted together in only two-thirds of the cases, or 66 percent of the time. Given how often the Court's divisions are close ones, the potentially different vote in one-fifth of its decisions would have produced a number of important changes.

O'Connor: 87 percent conservative.

Although Justice Stewart voted with the 7-2 majority that struck down most abortion restrictions in 1973, Justice O' Connor voted with the two 1973 dissenters in one key abortion ruling a decade later, and joined three justices in dissenting from an even closer abortion vote in another 1983 case. Her votes on abortion issues contributed to no new anti-choice majority on the Court as of 1985, but the same cannot be said of another aspect of the right to privacy: security from "unreasonable searches and seizures."

In 1984, for example, in *Segura v. United States*, Justice O'Connor supported a 5-4 majority opinion that Justice Stewart almost certainly would have opposed. The case involved a warrantless 19-hour police seizure of Andres Segura's apartment. Acting on a tip, federal agents concluded early one evening that they had probable cause to search Segura's apartment. But the agents were told by the U.S. Attorney's office to "secure the premises" while awaiting the issuance of a warrant the next morning, because it was too late to find a magistrate who might issue a warrant that day. At midnight, the agents hauled away Segura and four friends and began a lengthy vigil in the apartment. Morning had broken—but the agents, warrantless as ever, were still rummaging through Segura's belongings. It was not until that evening, fully 18 hours into their occupation of the residence, that the agents even went before a magistrate. When asked *why* they had waited so long, their only excuse was that they preferred to file a *typed* warrant application, and a good secretary was hard to find.

The Supreme Court's opinion acknowledged the illegality of the agents' entry but nonetheless allowed the use of the evidence. Labeled "astonishing" by the four dissenting justices, the result would undoubtedly have been different if Potter Stewart, rather than Sandra Day O'Connor, had cast the deciding vote. For it was Justice Stewart who, during the 1960s, had written the Court's most far-reaching opinions extending constitutional protection against just such warrantless searches. Nor is *Segura* an exceptional case: several times in 1983 and 1984, a 5-4 Court found in the Constitution's ban on unreasonable searches and seizures no obstacle to invasions that the Court, when Justice Stewart was a member, would predictably have invalidated in the name of privacy.

At the same time, Justice Stewart's more ambivalent record on questions of sex discrimination indicates that Justice O'Connor's presence might have been indispensable to the "liberal" outcome of the Court's 1981 decision in *Mississippi University for Women v. Hogan*. There, Justice O'Connor's vote was needed to create the 5-4 majority which rejected as unfairly discriminatory the exclusion of males from a Mississippi nursing school. Defying the desire of Court-watchers to stuff justices once and for all into pigeonholes of "right" or "left," this story too is fairly typical: when one justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others.

That complexity makes all the more crucial a sensitive inquiry into the full range of views each justice will bring to the Court—unless, of course, one still believes that substantive views can somehow be excluded from a justice's role. That, as we shall see in the next chapter, is a dangerous fantasy.

—Journal

Laurence H. Tribe is the Tyler Professor of Constitutional Law at Harvard Law School. A review of his book, God Save this Honorable Court, *appears at page 82 of this issue.*

A Change In Judicial Philosophy?

By Norman Dorsen
Special to The National Law Journal

JUSTICE HARRY A. Blackmun has served on the U.S. Supreme Court for almost 15 years and, yet to many, he remains an enigmatic figure.

The conventional wisdom is that Justice Blackmun has changed over the years and become more "liberal" or less "conservative" or something — though it is is not quite clear what that is. The word is that we have here a justice whose constitutional philosophy has fundamentally changed, to the disappointment of his sponsors, from a cautious judicial defender of established institutions to an activist critic of those institutions — in the name of protecting individuals victimized by archaic and unjust procedures and rules.

I suggest that Justice Blackmun's change is more apparent than real, that the major themes of his recent rulings were evident many years ago and that they are a product of his essential character.

If, in fact, Justice Blackmun did undergo a change, he would be in distinguished company. In recent decades, Felix Frankfurter disappointed many liberal supporters by his judicial restraint; conversely, Earl Warren was widely thought to have reversed this ideological path. Earlier, Justice Oliver Wendell Holmes was reputed to have so irritated the president who appointed him, Theodore Roosevelt, that he was thereafter banished from the White House dinner table. There is no record that Justice Holmes found this an intolerable burden, either socially or gastronomically.

If we confine ourselves to a tabulation of some of Harry Blackmun's rulings, it is indeed possible to claim that he is a new man.

THUS, THE "OLD" Harry Blackmun protested the creation of a federal tort to remedy fourth amendment violations.[1] The "new" Harry Blackmun advocated civil remedies against abusive police conduct.[2]

The "old" Harry Blackmun would have permitted bar-association character committees to probe individual beliefs in search of potentially dangerous lawyers.[3] The "new" Harry Blackmun barred state pharmacy boards from outlawing advertising of the price of drugs needed by the poor and sick.[4]

The "old" Harry Blackmun rejected a welfare client's Fourth Amendment claim against a welfare monitoring program.[5] The "new" Harry Blackmun protested the termination of parental custody rights at the hands of an insensitive bureaucracy.[6]

The "old" Harry Blackmun would have denied a jury trial in state juvenile proceedings.[7] The "new" Harry Blackmun voted to prevent states from denying an elementary school education to alien children.[8]

Does this prove that there is an "old" and a "new" Harry Blackmun that bear little resemblance to one another? I do not think so.

In the first place, the "new" Harry Blackmun was apparent long ago. While sitting on the 8th U.S. Circuit Court of Appeals, he wrote many opinions supporting the constitutional rights of aggrieved individuals. These included a case abolishing corporal punishment in prisons[9] and a series of cases finding civil rights violations.[10] At his confirmation hearings before the Senate Judiciary Committee, he underscored these decisions by expressing the hope that his appellate court opinions "show . . . in the treatment of little people . . . a sensitivity to their problems."

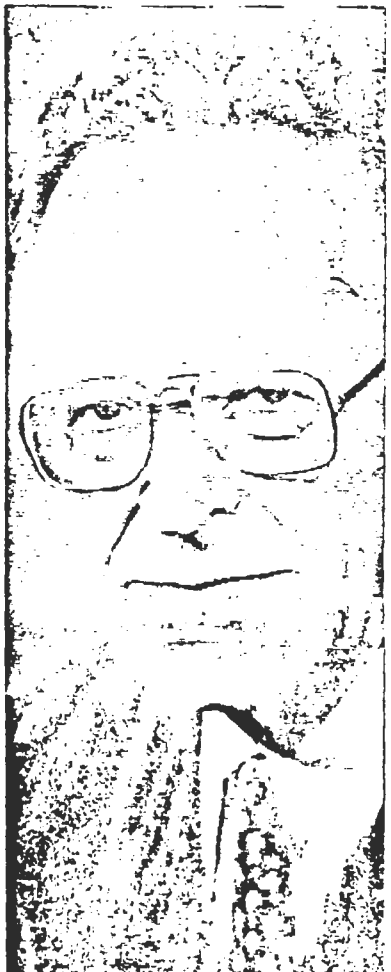
And in his early years on the Supreme Court — what should have been the era of the "old" Harry Blackmun — he wrote two libertarian opinions that transformed the law. *Graham v. Richardson*[11] was the first case to uphold the constitutional rights of aliens, expressing what a former law clerk has called "equality with a human face." And *Roe v. Wade*[12] is famous as a humane charter of liberty for women who wish to control their lives and reproductive destinies.

BY THE SAME TOKEN, the supposedly "new" Harry Blackmun has adhered in many cases to a stern view of criminal due process that no doubt has disappointed many defense lawyers," and, among other "conservative" rulings, he recently dissented from a finding of sex discrimination in the establishment of an all-female school of nursing."

The statistics suggest similar conclusions. In the 1983 term, Justice Blackmun voted with Chief Justice Warren E. Burger and Justice Sandra Day O'Connor more often than with either Justices William J. Brennan Jr. or Thurgood Marshall." And while Justice Blackmun aligned with Justice Brennan far more than with Justice William H. Rehnquist in the preceding five terms, he voted with Chief Justice Burger as often as with Justice Marshall."

There is thus much evidence that the "new" Harry Blackmun is not so new after all. But there is a second, and deeper, reason for distrusting the facile conclusion that the justice has undergone a transformation over the years.

We must never forget that the boy is father to the man, that the seeds of the fully mature person are long embedded in his character. One need not embrace Freudian psychology to conclude that early experience and training will be reflected in later actions and decisions, and that flexibility and open-mindedness are themselves the product of what has gone before. As William James once wrote, "In its widest possible sense . . . a man's Self is the sum total of all that he can call his." So too with judges. When a president appoints someone to the bench he does not select a programmed robot, he nominates the whole person, and the whole person includes that individual's capacity for growth.



JUSTICE HARRY A. BLACKMUN

I suggest Justice Blackmun's change is more apparent than real, that his rulings are a product of his basic character.

JUSTICE BLACKMUN from the start embodied an evolutionary potential. His summa cum laude degree at Harvard College suggests a creative man. His decision to leave a flourishing legal practice to become resident counsel to the Mayo Clinic suggests an unconventional one. Justice Blackmun's extrajudicial writings are consistent with a dynamic philosophy. Years ago he observed: "As in medicine, so in law, although more slowly, there is constant movement. We should be aware of this, anticipate it, not resent it."

The Felix Frankfurter known as a conservative and the Earl Warren known as a liberal were already in existence — even if latent — when Presidents Roosevelt and Eisenhower sent their names to the Senate. Similarly, on his first day in his new chambers, Harry Blackmun possessed all the qualities of mind and heart of the Justice Blackmun we now know. As in the physical universe, the movement we observe today reflects the energy previously stored and awaiting the day of release.

The new Harry Blackmun remains the essence of the old Harry Blackmun, the same man with the same values who took his seat in 1970. He is a man strong and kind, concerned with concrete problems and real, suffering people. Justice Blackmun has been a "generator of institutional respect . . . grounded . . . in intuitive fairness and human warmth."[13] He has learned, as Albert Camus once wrote, that justice is often the fugitive from the winning camp. Justice Blackmun has learned, as he has said, that judgment "grows by experience and it grows by learning."[14]

Whether these qualities are "new," as some believe, or grounded deeply in Justice Blackmun's very nature, as I believe, is not resolved. As usual, history will have the last word.

Mr. Dorsen is Stokes Professor of Law at the New York University School of Law and president of the American Civil Liberties Union. These remarks are based on Professor Dorsen's introduction of Justice Blackmun when he delivered the 1984 James Madison Lecture at NYU law school.

(1) Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting).
(2) Rizzo v. Goode, 423 U.S. 362, 381 (1976) (Blackmun, J., dissenting); U.S. v. Bailey, 444 U.S. 394, 419 (1980) (Blackmun, J., dissenting).
(3) In re Stolar, 401 U.S. 23, 34 (1971) (Blackmun, J., dissenting).
(4) Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
(5) Wyman v. James, 400 U.S. 309 (1971).
(6) Lassiter v. Department of Social Services, 452 U.S. 18, 35 (1981) (Blackmun, J. dissenting).
(7) McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (Blackmun, J., dissenting).
(8) Plyler v. Doe, 457 U.S. 202 (1982).
(9) Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).
(10) Knecht v. Beasley, 433 F.2d 651 (8th Cir. 1970) (black faculty members ordered rehired after all black school closed); Bailey v. Henslee, 287 F.2d 836 (8th Cir. 1961) (jury discrimination).
(11) 403 U.S. 365 (1971).
(12) 410 U.S. 113 (1973).
(13) E.g., U.S. v. Leon, 104 S.Ct. 3405 (1984) (exclusionary rule narrowly construed); New York v. Quarles, 104 S.Ct. 2626 (1984) (public safety exception created to the Miranda rule).
(14) Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).
(15) Supreme Court, 1982 Term, 96 Harv. L. Rev. 1, 368 (1982).
(16) Supreme Court, 1982 Term, 97 Harv. L. Rev. 1, 304 (1983).
(17) Blackmun, Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases, 43 F.R.D. 343, 359 (1967).
(18) Neuborne, Blackmun's Intellectual Openness Elicits Needed Respect for the Judicial Process, Nat'l L.J., Feb. 18, 1980, at 22.

O'Connor on Own Path

Justice Adopts a Pragmatic Conservatism

By Al Kamen
Washington Post Staff Writer

"We'd written her off," said a pleasantly surprised news media lawyer, Bruce W. Sanford, upon hearing last week that Justice Sandra Day O'Connor had cast the deciding vote in favor of the press in a libel ruling.

O'Connor's vote with the liberal wing also stunned conservatives, such as American Legal Foundation lawyer Michael McDonald. "I am surprised and disappointed," he said.

Last week's ruling, requiring plantiffs in libel suits to assume the difficult burden of proving that a published story was false, was one of several this term in which O'Connor abandoned her usual allies on the court's conservative wing and cast the pivotal vote to create a liberal majority on a major issue.

In O'Connor's view, the press deserved substantial protection from libel suits because "the First Amendment requires that we protect some falsehood in order to protect speech that matters."

The dissenters, this time led by centrist Justice John Paul Stevens, called her opinion "pernicious" and said it would give "the character assassin a license to defame."

O'Connor's voting record this term, as the court approaches the halfway mark, hardly makes her a new member of the court's centrist bloc, much less its liberal wing.

But President Reagan's only appointee to the high court, who in her first years sided consistently with the most conservative of her colleagues, has become considerably less predictable, a change that is attracting notice.

The court is generally seen as split into three groups on controversial social issues, with Chief Justice Warren E. Burger, William H. Rehnquist and O'Connor on the right and Justices William J. Brennan and Thurgood Marshall on the left. Justice Byron R. White, although lately increasingly conservative, along with Justices Lewis F. Powell, Stevens and Harry A. Blackmun have formed "a floating center."

During her first term on the court in 1981-82, O'Connor voted with Rehnquist, a fellow Arizonan and longtime friend, 81.7 percent of the time, according to statistics compiled by the Harvard Law Review. Two years later, she voted with Rehnquist 91.9 percent of the time and joined him 90.5 percent of the time last year.

So far this term, with nearly 60

When she arrived at the court, O'Connor agreed with Brennan in less than half the court's rulings. This term she and the liberal justice find themselves in agreement about 60 percent of the time.

Statistics, especially this early in the term, can be misleading. The difficult cases for the most part have yet to be decided, while the less divisive ones, which are unanimous or nearly so, often come down early.

Still, the preliminary pattern is supported by several votes where O'Connor abandoned conservatives when it mattered most—when the court was closely divided on highly symbolic issues such as school prayer, federalism or libel.

Those votes indicate that O'Connor, 56, is adopting a more independent, pragmatic, case-by-case conservatism. She appears as much or more concerned with the process used to reach a result than the particular result reached.

That concern for process was illustrated last month when she denied conservatives a major victory in a case involving the constitutionality of voluntary prayer groups in public schools. O'Connor joined the court's liberals in a 5-to-4 ruling that said the person challenging the prayer group in Williamsport, Pa., a former school board member, had no legal basis to do so.

The ruling let the prayer group in Williamsport's high school continue, but, at least temporarily, deprived conservatives of a ruling they wanted saying such religious groups were constitutionally permissible.

O'Connor also backed the liberals on the losing side of a case involving the power of the military to enforce strict dress codes—in this instance whether the Air Force could deny an Orthodox Jewish captain's request to wear a yarmulke while in uniform.

The 5-to-4 majority, in an opinion by Rehnquist, said the judiciary should as a general rule defer to the military's "professional judgment" and the Air Force decision not to permit the yarmulke overrode the captain's claims to a First Amendment right to freedom of religion.

O'Connor, in a dissent, said the "need for military discipline . . . is unquestionably . . . important," but the military is still subject to constitutional constraints.

In this case, she concluded, "I would hold that the government's policy of uniformity must yield to the individual's assertion of the right of free exercise of religion."

On other occasions, O'Connor, while agreeing with the result reached by one side or the other,

For example, in a criminal case involving government violations of grand jury rules, O'Connor agreed with the conservatives that later convictions in this case should not be overturned, but said: "I write separately because I believe the analysis adopted by the majority"—an analysis written by Rehnquist—"seriously undermin[es] the grand jury's traditional functions of protecting the innocent from unwarranted public accusation."

O'Connor's shift—if it is one—is not unusual for justices. Blackmun, a member of the court's center who often sides with the liberals, began his tenure in the early 1970s as a consistent ally of Burger, his fellow Minnesotan. They voted so often together that they came to be known as the "Minnesota Twins," a sobriquet that infuriated Blackmun.

O'Connor's mini-odyssey is much less dramatic, but it is quite evident to some observers, such as John P. Frank, a law professor and court expert from O'Connor's home town of Phoenix who has followed her career closely.

"The tradition is that it takes five years for a new justice not previously part of the federal system to stand on one's own," Frank said, noting that O'Connor's previous judicial experience had been on a state court.

"I have been predicting that at about the end of five years that, as a superbly capable lawyer, she would be flying off on her own," Frank said.

O'Connor's independent views were evident early in her tenure, but they most often led her to agree in general with her fellow conservatives. More recently they seem to be leading her to disagree.

O'Connor is the court's junior justice in terms of tenure. That often translates to limited influence in shaping opinions. But fellow justices across the ideological spectrum say privately, and sometimes publicly, that they find her hardworking and perceptive and that they consider her views carefully.

Despite her junior status, O'Connor has been known to write opinions that occasionally lead more senior justices to shift their votes, and the eventual outcome of a case, her way.

"Justice O'Connor," Frank said, "has now been there long enough to be an independent force. But she will remain a staunch conservative, make no mistake about that."

Frank, who has known O'Connor for years, said, "We can anticipate less echoing of Justice Rehnquist and much more standing on her [illegible] from here on out. But

[illegible] Washington.

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Wide World

Justice Sandra Day O'Connor and the "Freshman Effect"

Contrary to expectations, the newest justice quickly adapted to her environment and almost immediately began participating fully in the work of the Court.

by John M. Scheb, II and Lee W. Ailshie

Students of the judiciary have long been interested in the process by which new appointees are assimilated into the United States Supreme Court.[1] Some of the behavioral and biographical literature suggests the existence of a "freshman effect," that is, a distinct pattern of behavior manifested by neophyte justices. The so-called freshman effect entails behaviors one might expect from a newcomer to any group where the norms of the group are peculiar to it and, at least initially, unknown to the newcomer. Such behaviors would be characterized by uncertainty, disorientation and vacillation. J. Woodford Howard has suggested that it took Justice Frank Murphy three terms to overcome just this kind of problem in adapting to the norms and business of the Supreme Court.[2] On the other hand, Heck argues that Justice Brennan quickly overcame the freshman syndrome.[3]

The literature focuses on three aspects of the freshman effect: a subjective aspect manifested in the "feelings of the new justice himself about his new role,"[4] an

"effect manifested in the behavior of the chief justice and other senior justice with opinion assignment responsibilities;"[5] and, finally, an effect "manifested in the voting behavior of the new justice."[6] This article examines the behavior of Justice Sandra Day O'Connor as displayed during her first three terms on the Court in terms of each of these aspects of the freshman effect.

The first aspect of the freshman effect is a purported sense of bewilderment experienced by the neophyte justice upon joining the highest court in the land.[7] Justice Brennan once noted that "such factors as workload, unfamiliarity with...procedures and the unique nature of constitutional decision-making tend to create difficulties for any neophyte justice."[8] One might think that prior judicial experience would to some degree mitigate this sense of bewilderment. However, Justice Brennan has also stated "categorically that no prior experience, including judicial experience, prepares one for the work of the Supreme Court."[9] Heck, after studying Justice Brennan's early years on the Court found, to the contrary, that Brennan's "experience on the New Jersey Supreme Court provided a useful 'anticipatory socialization' experience, which prepared him for what lay ahead."[10] Perhaps Justice O'Connor's experience as a state judge provided her some degree of "anticipatory socialization."

As yet there have been no signals that Justice O'Connor has experienced an observable sense of disorientation or bewilderment. To the contrary, there are signs that Justice O'Connor was very quick to adapt to her new environment. Admittedly, this subjective aspect of the freshman effect, i.e., "feelings of the new justice," is extremely difficult to observe. Therefore, any conclusion regarding this aspect of the freshman effect must be viewed as speculative and tentative. Fortunately, however, the other aspects of the freshman effect take the form of overt behavior which appears in the public record.

The second aspect of the freshman effect is a supposed tendency for the chief justice and other senior justices to ease the newcomer's transition by assigning "a less-than-equal share of opinion writing responsibilities."[11] Table 1 provides data on the number of opinions written by each justice during the 1981 and 1982 terms. The data for 1981 show that Justice O'Connor ranks last among the justices in terms of "opinions of the Court." This would coincide with the traditional expectations expressed in the literature. However, it is noteworthy that, in terms of separate concurring opinions, O'Connor ranks fourth for 1981. This would suggest that, while the Chief Justice and other senior justices were following the norm governing opinion assignment to freshmen, Justice O'Connor was making an effort to assert herself through separate opinions. This is hardly the kind of behavior one would expect from a bewildered, insecure or disoriented neophyte. Perhaps this assertive opinion-writing behavior in 1981 helps to explain the fact that for 1982, Justice O'Connor ranks fifth among the justices in writing

Table 1 Opinions of justices, 1981, 1982 and 1983 terms

1981 Term

Justice	Opinions of Court	Concurrences	Dissents	Total
Stevens	15	15	26	56
Powell	16	13	22	51
Blackmun	14	18	12	44
Brennan	16	11	17	44
White	19	8	17	44
Rehnquist	17	7	15	39
O'Connor	13 (9th)	12 (4th)	10 (8th	35 (7th)
Burger	16	6	12	34
Marshall	15	5	4	24
Total	141	95	135	371

1982 Term

Justice	Opinions of Court	Concurrences	Dissents	Total
Stevens	15	12	27	54
Marshall	17	3	27	47
Brennan	15	13	18	46
Blackmun	15	12	17	44
Rehnquist	20	5	16	41
White	19	6	11	36
Powell	18	9	8	35
O'Connor	16 (5th)	7 (5th)	11 (5th	34 (8th)
Burger	16	3	5	24
Total	151	70	140	361

1983 Term

Justice	Opinions of Court	Concurrences	Dissents	Total
Stevens	16	18	34	68
Brennan	16	10	29	55
Rehnquist	19	3	14	36
Powell	16	11	9	36
O'Connor	17 (4th)	10 (tied for 3rd)	9 (tied for 5th)	36 (tied for 3rd)
White	18	6	9	33
Marshall	15	2	16	33
Blackmun	16	6	9	31
Burger	16	2	0	18
Total	151	68	127	346

Sources: Harv. L. Rev. Vol. 96, No. 1, at 304 (1982); Vol. 97, No. 1, at 295 (1983); Vol. 98, No. 1, at 357 (1984).

1. Snyder, *The Supreme Court as a Small Group*, 36 SOCIAL FORCES 232 (1958); Howard, *Mr. Justice Murphy: The Pre-Court Years*, 18 VANDERBILT L. REV. 473 (1965); Slotnick, *Judicial Career Patterns and Majority Opinion Assignment on the Supreme Court*, 41 J. OF POLITICS 640 (1979); Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan*, 10 PACIFIC L. J. 767 (1979); Heck and Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. OF POLITICS 852 (1981); Brenner, *Another Look at Freshman Independence on the United States Supreme Court*, 16 POLITY 320 (1983).
2. Howard, *supra* n. 1.
3. Heck, *supra* n. 1.
4. Heck and Hall, *supra* n. 1, at 853.
5. *Id.*
6. *Id.* at 854.
7. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).
8. Heck, *supra* n. 1, at 770.
9. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 484 (1973).
10. Heck, *supra* n. 1, at 774.
11. Heck and Hall, *supra* n. 1, at 853.

the "opinions of the Court." In 1983, Justice O'Connor's rank climbs to fourth among her colleagues in terms of majority opinions rendered. Thus whatever freshman effect may have been present in 1981 appears to have disappeared in the 1982 and 1983 terms.

Voting behavior

The third, and probably most significant, aspect of the freshman effect is manifested in the voting behavior of the new justice. The seminal study in this regard is Snyder's "small group" analysis of the Court from 1921 to 1953.[12] Snyder observed that incoming justices were "absorbed" by first joining a "pivotal clique" and later moving into a more distinctively ideological bloc. Snyder speculated that this phenomenon might be due to lack of prior ideological commitment, but was more likely the result of sociopsychological factors. "In this respect it is not altogether inconceivable that the new justice might have experienced a lack of assurance and thus responded in a neutral manner."[13]

More recently, Heck and Hall examined the voting behavior of "freshmen" on the Warren and Burger Courts.[14] In contrast to Snyder, they observed that the new justices (with the notable exception of Justice Stevens) tended to vote with established ideological blocs. Heck and Hall concluded that "freshmen justices come to the Court with about the same degree of ideological and policy commitment as those justices already on the Court."[15]

How can the findings of Heck and Hall be reconciled with those of Snyder? Or can they? Unfortunately, Snyder is not explicit about the criteria she used to determine voting blocs. It may well be that the way she constructed her "cliques" biased her findings. On the other hand, since Snyder examined a time-frame spanning three decades and five appointing presidents, perhaps her conclusions are less time-bound than Heck and Hall's. Whatever the cause of the discrepancy, it is imperative that researchers continue to examine the behavior of newly appointed justices in order to determine whether *any* generalizations can be made.

In this research we focus on the voting behavior of Justice O'Connor as manifested in her first three terms on the Court. It is submitted that this time period is short enough to make the label "freshman" plausible and long enough to get a "feel" for her behavior, i.e., to minimize the impact of potentially misleading anomalies in her voting patterns. The data for this research consist of the nine current justices' votes in all plenary decisions during the 1981, 1982 and 1983 terms. The criterion we have adopted for determining the existence of voting blocs is a 70 per cent average rate of inter-justice agreement. The reader should note that this criterion for bloc identification is not particularly stringent, especially given the inclusion of all (i.e. unanimous and non-unanimous) plenary decisions in the analysis. However, since a more demanding criterion would result in multiple alignments, we chose to utilize the less stringent approach which allows the Court to be divided into two intuitively valid ideological groups.

Table 2 Voting alignments on Supreme Court, 1981 Term

%	O	R	Bu	P	W	S	Bl	Br	M
O'Connor	—	81.6	77.2	72.0	64.0	53.4	60.7	48.8	46.6
Rehnquist	81.6	—	80.1	75.6	64.2	52.1	51.2	37.3	40.0
Burger	77.2	80.1	—	74.8	65.9	49.4	55.8	44.2	44.8
Powell	72.0	75.6	74.8	—	63.0	56.8	56.4	50.3	50.6
White	64.0	64.2	65.9	63.0	—	55.8	64.6	61.0	58.9
Stevens	53.4	52.1	49.4	56.8	55.8	—	61.0	59.8	61.3
Blackmun	60.7	51.2	55.8	56.4	64.6	61.0	—	75.2	72.0
Brennan	48.8	37.3	44.2	50.3	61.0	59.8	75.2	—	90.2
Marshall	46.6	40.0	44.8	50.6	58.9	61.3	72.0	90.2	—

Note: "alignments" represent the percentage of times that one Justice agreed with another Justice on the judgment of the Court in those plenary decisions where both Justices participated.
Conservative bloc: O'Connor, Rehnquist, Burger, Powell.
Average rate of agreement—76.9%
Liberal bloc: Blackmun, Brennan, Marshall.
Average rate of agreement—79.1%
Swing vote: White.
Average rate of agreement with conservatives—64.3%
Average rate of agreement with liberals—61.5%
Swing vote: Stevens.
Average rate of agreement with conservatives—52.9%
Average rate of agreement with liberals—60.7%
Source: 96 Harv. L. Rev. 306 (1982).

In 1981, Justice O'Connor voted with the conservative bloc at an average rate of nearly 77 per cent.

In the 1981 term (see Table 2), the liberal bloc is comprised of Justices Marshall, Brennan, and Blackmun, manifesting an average rate of inter-agreement of 79.1 per cent. The conservative bloc, comprised of Justices Powell, Burger, Rehnquist and O'Connor, manifests an average rate of 76.9 per cent. Justice White, who can be viewed as a "swing voter," displays an average rate of agreement with the conservative bloc of 64.3 per cent and an average agreement with the liberals of roughly 62 per cent. Justice Stevens, another swing voter, agrees with the conservatives at an average rate of 52.9 per cent and with the liberals at an average rate of 60.7 per cent. In 1981, Justice O'Connor votes with her colleagues in the conservative bloc at an average rate of nearly 77 per cent. Thus, as far as the 1981 term is concerned, Justice O'Connor can hardly be viewed as a "pivotal" or "swing" voter.

12. Snyder, *supra* n. 1.
13. *Id.* at 237.
14. Heck and Hall, *supra* n. 1.
15. *Id.* at 860.

Justice O'Connor appears to be an exception to the "freshman effect."

Table 3 Voting alignments on Supreme Court, 1982 Term

%	O	R	Bu	P	W	Bl	S	Br	M
O'Connor	—	85.7	80 7	79.7	70.8	57.8	58.4	54.7	40.8
Rehnquist	85.7	—	82.1	81.1	77.8	54.3	51.9	46.9	37.3
Burger	80.7	82.1	—	84.3	79.6	64.8	57.4	57.4	48.3
Powell	79.7	81.1	84.3	—	73.6	59.7	54.1	53.5	45.6
White	70.8	77.8	76.9	73.6	—	67.3	55.8	57.4	56.5
Blackmun	57.8	54.3	64 8	59.7	87.3	—	66.7	74.7	70.2
Stevens	58 4	51.9	57.4	54.1	55.6	66.7	—	70.4	81.5
Brennan	54.7	46.9	57.4	53.5	57.4	74.7	70.4	—	83.2
Marshall	40.8	37.3	48.4	45.6	56.5	70.2	61.5	83.2	—

Conservative bloc: O'Connor, Rehnquist, Burger, Powell, White
Average rate of agreement—79.5%

Liberal bloc Blackmun, Stevens, Brennan, Marshall.
Average rate of agreement—71.1%
Source: 97 Harv. L. Rev. 296 (1983).

Table 4 Voting alignments on Supreme Court, 1983 Term

%	O	R	Bu	P	W	Bl	S	Br	M
O'Connor	—	91.9	91.9	84 9	84.5	75.2	58.5	56 6	51.3
Rehnquist	91.9	—	87.5	82.4	81.1	88 9	51.6	49.7	45.5
Burger	91.9	87.5	—	89.4	87.5	77 8	55.9	60.0	55 8
Powell	84.9	82.4	89 4	—	81.0	78.3	55.6	58.5	58.8
White	84.5	81.1	87.5	81.0	—	77.8	61.0	62.3	61.2
Blackmun	75.2	68.9	77 8	78.3	77.8	—	66.3	70.9	71.7
Stevens	58.5	51.8	55 9	55.6	61.0	66.3	—	75.0	67.5
Brennan	56.6	49.7	60 0	58.5	62.3	70.9	75.0	—	94.2
Marshall	51.3	45.5	55.8	58.8	61.2	71.7	67.5	94.2	—

Conservative bloc: O'Connor, Rehnquist, Burger, Powell, White, Blackmun.
Average rate of agreement—82.6%

Liberal bloc: Stevens, Brennan, Marshall.
Average rate of agreement—71.7%
Source: 98 Harv. L. Rev. 308 (1984).

As Table 3 shows, in the 1982 term the Court becomes more polarized. Justice White no longer appears to be a swing voter; rather he joins the conservative bloc which manifests an average rate of agreement of nearly 80 per cent. Justice Stevens joins the liberal bloc, which manifests a 71 per cent rate of agreement. Again, Justice O'Connor is firmly entrenched within the conservative camp, voting at an average rate of 79 per cent with her conservative brethren. The data for the 1983 term (see Table 4) again show Justice O'Connor decidedly within the ranks of the conservatives as she manifests an average agreement rate of 85 per cent with her conservative brethren. Interestingly, the conservative bloc grows more cohesive even with the addition of Justice Blackmun.

Conclusion

Given the voting data we have examined, it seems perfectly reasonable to conclude that Justice O'Connor is behaving more in line with the tendency observed by Heck and Hall[16] than with that reported by Snyder.[17] It appears that she comes to the Supreme Court with a well-defined ideological orientation. Indeed, it is safe to observe that she is one of the most conservative members of the current court, voting with Justice Rehnquist well above 80 per cent of the time. Because some Supreme Court Justices have "surprised" the Presidents who appointed them,[18] we surmise that President Reagan must be very pleased with his choice of Sandra Day O'Connor.

Although it is dangerous to generalize from one case, our research would lead us to question, along with Heck and Hall, whether the "small group theory" of judicial decisionmaking is applicable to the Supreme Court. Justice O'Connor's behavior suggests that sociopsychological forces within the Court may be much less important than previously held political attitudes as determinants of decisionmaking.

In conclusion, there is substantial evidence that Justice O'Connor does not fit the traditional model of a freshman Supreme Court justice. Apparently, she comes to the Court with a clear orientation in terms of ideology and policy. She appears to have had no appreciable difficulty in adapting to the new position and began to assert herself almost immediately. If indeed there is any generalizable "freshman effect," Justice O'Connor appears to be an exception.

It is widely assumed that, given the fact that five of the current nine justices are beyond the age of 75, President Reagan will have more opportunities to influence the direction of the Supreme Court through his power of appointment. The addition of even one more Reagan appointee of a conservative persuasion could have dramatic consequences for public policy. Undoubtedly, President Reagan would be delighted to appoint one or more justices with ideological orientations similar to those of Justice O'Connor, and who, like Justice O'Connor, would assert themselves almost immediately. □

16. Heck and Hall, *supra* n. 1.
17. Snyder, *supra* n. 1.
18. For example, Earl Warren, appointed by Eisenhower, James McReynolds, appointed by Wilson, and Oliver Wendell Holmes, appointed by Theodore Roosevelt. These justices, and perhaps others, were known to manifest decisionmaking behaviors both unexpected and undesired by their appointing President. This information is derived from a personal interview with Otis H. Stephens, Professor of Political Science, University of Tennessee, March 1st, 1985.

JOHN M. SCHEB, II is an assistant professor of political science at the University of Tennessee. LEE W. AILSHIE is a law student at the University of South Carolina.

Supreme Court

The Day They Discarded All the Labels

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, May 1 — At least on the surface, the Supreme Court seemed to have things backward Wednesday when it overruled a 1965 precedent and handed a major victory to black criminal defendants at the expense of prosecutors and the Reagan Justice Department.

This is supposed to be the era of the conservative majority under Chief Justice Warren E. Burger, a group whose approach is often contrasted, almost reflexively, with the Court's pioneering liberal activism and expansive view of criminal defendants' rights two decades ago, when Earl Warren was Chief Justice.

President Nixon wanted his four appointees to be tough on crime, and generally they have been. Yet two of them, Justices Lewis F. Powell Jr. and Harry A. Blackmun, were in the 7-to-2 "liberal" majority that on Wednesday curbed the powers of prosecutors to exclude prospective black jurors from the trials of black defendants. In fact, Justice Powell wrote the opinion.

Also in the majority was Justice Sandra Day O'Connor, President Reagan's lone appointee to the Court.

The decision was one of those that confound the labels — liberal and conservative, judicial activism and judicial restraint — for which journalists, lawyers, politicians and judges often grasp when seeking to fit the Court's shifting coalitions into a logical framework.

'Tides of Public Opinion'

The Court's sharp reversal on exclusion of black jurors may also have something to do with the subtle effect on the Court's thinking that Justice William H. Rehnquist, the Court's most consistent conservative, ascribed last month to the "currents and tides of public opinion which lap at the courthouse door."

The national consensus that racial discrimination is unacceptable may be one current lapping at the door even more powerfully now than in the heyday of the Warren Court.

The Warren Court did much to create that consensus. But it was that Court, in the 1965 case of Swain v. Alabama, that allowed prosecutors to exclude all black prospective jurors from a black defendant's jury. Condemning racial discrimination in theory, the Court refused to find proof of it in practice even in a county where no black had ever been seated on a jury. It did not want to fetter the ancient rights of prosecutors and defense lawyers alike to use their allotted "peremptory challenges" to exclude some jurors without giving a reason.

The 'conservative' Burger Court was expected to reject 'liberal' decisions...

And it was the Burger Court (with the Chief Justice and Justice Rehnquist dissenting) that overruled the major holding of Swain in Wednesday's decision in Batson v. Kentucky, barring prosecutors from excluding a black from a black defendant's jury on account of race.

Justice Byron R. White, who wrote the Swain decision, voted Wednesday to overrule it. "The time has come," he wrote in a concurring opinion in the Batson decision, to move against racial discrimination in jury selections, even at the cost of spawning "much litigation" over peremptory challenges.

The Batson decision surprised and delighted many liberals, some of whom had viewed Swain as one of the Warren Court's darkest hours.

Terry Eastland, chief spokesman for Attorney General Edwin Meese 3d, was not a bit delighted, if not altogether surprised, by the Justices' willingness to depart from centuries of tradition in pursuit of their vision of racial fairness.

"Many conservatives expected the Burger Court to overturn Warren Court decisions," he said with the wry laugh of a man whose team just lost a big one, "but certainly Swain was not one of them." The Administraion had urged the Court to reaffirm Swain.

In fact, as Mr. Eastland and other students of the Court have written for some time, far from overturning many liberal Warren Court decisions, the Burger Court has in some ways been both more "liberal" and more "activist," sometimes in opinions written by Chief Justice Burger himself, sometimes over his objection.

It was the Burger Court, not the Warren Court, that first ordered busing of students when necessary to desegregate public schools in 1971, legalized abortion in 1973, upheld use of affirmative action preferences for blacks by private employers in 1979 and struck down in 1980 a state law that required posting of the Ten Commandments in public schools. The Burger Court has also gone well beyond the Warren Court in holding unconstitutional certain forms of discrimination against women.

Does this mean that it is the labels that are backward, that the Burger Court is really more liberal than the Warren Court? Certainly not, say Professors Vincent Blasi of Columbia Law School and Laurence Tribe of Harvdard Law School; the labels are a very rough, sometimes misleading approximation of a far more complicated reality.

Mr. Blasi, editor of a 1983 book, "The Burger Court: The Counter-Revolution That Wasn't," says the "pragmatists" who occupy the shifting center of the Burger Court are "activist" in using their power of judicial review to serve justice as they see it but are not driven by the "larger principles" that moved liberals like Chief Justice Warren, Justice Hugo Black and others.

They are, he said, "hardworking and above all open-minded," and they take "an issue-by-issue, fact-specific view of the world."

He contrasted the Batson decision, which he said might be explained in part by the Court's concern that innocent black defendants might sometimes be convicted by unsympathetic all-white juries, with the Court's decisions cutting back defendants' Fourth Amendment rights not to be subjected to unreasonable searches and seizures.

In the Fourth Amendment context, Mr. Blasi said, the Court is often asked to reverse the conviction of a clearly guilty criminal because of errors or abuses by the police. He contrasted the Burger Court's careful analysis of costs vs. benefits in such cases, driven by reluctance to let the guilty defendants escape punishment, with the Warren Court's determination to vindicate an idealistic vision of Fourth Amendment freedom, cost what it may.

'Wonderful and Long Overdue'

Mr. Tribe, who is generally considered a liberal but who disdains such labels, said "it would be a mistake to paint too rosy a picture" of the Burger Court's record on civil rights and civil liberties. But he said the Batson decision was a "wonderful and long overdue" example of the Burger Court's willingness to "push forward the frontiers" of the law to combat racial and gender discrimination.

He said the decision was more easily understood "as not so much a case about criminal pocedure as about race relations."

Although the Burger Court "has been far slower to vindicate and expand" civil liberties under the Fourth and Fifth Amendments than the Warren Court was, Mr. Tribe explained, "it has been willing to recognize the relevance of both sexual and racial discrimination in contexts that the Warren Court had left largely untouched, such as family law and the peremptory challenges involved in this very case."

USA TODAY: 10-4-85

SUPREME COURT RETURNS

Court straddles ideological fence

Issues ahead will test its balance

By Bob Minzesheimer
and Tony Mauro
USA TODAY

1298

Will the real U.S. Supreme Court please stand up?

Starting Monday, the nine justices face a new term and a docket full of controversies that could force them to show their true colors: Are they turning to the right or maintaining a more moderate, cautious approach?

The court this fall will reconsider some of its most emotional issues: abortion, religion in the schools and whether affirmative action plans — aimed at helping minorities and women — create what the Reagan administration calls "reverse discrimination."

The court calendar includes two new issues: political gerrymandering — designing congressional districts to favor one political party — and the modern dilemma presented by the Reagan administration's "Baby Doe" regulations, which force hospitals to keep alive severely handicapped infants.

Since President Nixon appointed Chief Justice Warren Burger in 1969, the court has taken unpredictable swings, alternately delighting conservative admirers, as in the 1983-84 term, then reassuring liberal critics, asin the last term.

A.E. Dick Howard, University of Virginia law professor, expects last term's return to the "mainstream" to continue. That middle path reflects the court's sharp divisions, he said.

Paul Kamenar of the conservative Washington Legal Foundation, isn't expecting major changes either — at least from the current court. The Reagan administration, which is urging the court in a pending case to overturn its landmark 1973 ruling legalizing abortion, is "laying the groundwork for the future," he said.

"The court is likely to maintain the status quo," said Burt Neuborne of the American Civil Liberties Union. "It's nibbling at the margins, rather than making any doctrinal breakthroughs."

Attention will be on the health of the aging justices, especially Lewis Powell, 78, who has undergone prostate cancer surgery and a hernia operation, but shows no signs of retiring.

Powell's pivotal vote "tends to keep the conservative wing in more moderate bounds," Howard said. "Should President Reagan have a chance to replace him, it would be a much different court."

The median age of the justices — 76 — is the oldest in the court's history.

The youngest justices, Sandra Day O'Connor, 55, and William Rehnquist, 61, are among the most conservative.

The Burger Court

Justices who delighted conservatives with their decisions two years ago returned to the moderate center during the term that ended in July.

LIBERALS

William Brennan, 79
Oldest and most liberal

Thurgood Marshall, 77
Court's only black member

Harry Blackmun, 76
Wrote decision legalizing abortion

MODERATES

John Paul Stevens, 65
Unpredictable

Lewis Powell, 78
Focus on health after two surgeries

Byron White, 68
Unpredictable, leans conservative

CONSERVATIVES

Sandra Day O'Connor, 55. Earned respect as justice

Warren Burger, 78
Could shift to antiabortion side

William Rehnquist, 61
Court's conservative leader

O'Connor's key vote

Record on issue 'mixed'

By Tony Mauro
USA TODAY 12B/10P

Justice Sandra Day O'Connor — the Supreme Court's only woman — is the one to watch Tuesday as the justices take up the issue of sexual harassment of women.

O'Connor's record on women's issues is a "mixed bag," says the American Civil Liberties Union's Isabelle Pinzler, making her a key swing vote on a conservative, aging court.

Example: In 1983, O'Connor topped a 5-4 majority in ruling that retirement plans could not discriminate against women; but she switched sides and formed a majority to say the ruling should not be retroactive, neutralizing its impact.

O'Connor, who turns 56 Wednesday, is "clearly the only member of the court who has suffered sex discrimination," says Elder Witt, author of *A Different Justice*, a book about the Reagan-era Supreme Court. "She is the most concerned of any justice that people should not be mistreated either way, men or women."

O'Connor's brush with sexism came after graduating third in her class at Stanford Law School — she was offered a legal secretary's job.

But Witt says, O'Connor can be unpredictable. "She's a very practical woman ... she might say that if you're a victim of sexual harassment, you should pick yourself up and do something about it."

Feminists are upset with O'Connor's abortion views. In a 1983 decision, she authored what is viewed as one of the best arguments against *Roe v. Wade*, the 1973 decision legalizing abortion. She wrote that scientific advances, making it possible for a fetus to survive earlier outside the womb, were setting the *Roe* ruling "on a collision course with itself."

Douglas Johnson of the National Right to Life Committee notes that O'Connor voted for abortion as an Arizona legislator: "Unlike some justices, she doesn't feel she has license to impose her philosophy on the court."

Since joining the court in 1981, O'Connor has:

- Rejected the right of the Jaycees to exclude women.
- Spurned the Mississippi University for Women's barring men from its nursing program.
- Proclaimed that "the victims of job discrimination want jobs, not lawsuits" in a Ford Motor Co. sex case.
- Agreed that law firm partnership decisions are covered by sex discrimination laws.
- Said court should have reviewed case of demoted anchorwoman Christine Craft, whose sex discrimination claims were struck down by two federal courts.

AP

O'CONNOR: Was offered a legal secretary's job after graduating third in her Stanford Law School class in 1952.

High court closer to middle than right or left would like

By Curtis J. Sitomer 1287
Staff writer of The Christian Science Monitor

Boston

FORMER Supreme Court Associate Justice Arthur J. Goldberg says that "the Burger court is not as conservative as some liberals feared and not as conservative as some conservatives hoped"

Justice Goldberg, an appointee of President John F. Kennedy in 1962, served three years on the high tribunal and was considered part of a liberal coalition on the Warren court.

The other living retired associate justice, Potter Stewart, an Eisenhower appointee, served from 1959 to 1981. When Justice Stewart retired, Ronald Reagan replaced him with Sandra Day O'Connor.

Some legal observers felt this last change would mark the end of a liberal-moderate era for the court and the start of a conservative trend that would grip the high tribunal for decades to come. But that has not occurred, as former Justice Goldberg indicates.

Most legal scholars agree that the court under Chief Justice Warren E. Burger has broken less ground in the area of civil liberties and minority rights than it did under the 15-year tutelege of Chief Justice Earl Warren.

But even strong civil liberties advocates, such as American Civil Liberties Union lawyer Bert Neubourne, concede the Burger court has made significant gains, of late, in protecting individual rights — particularly bolstering the role of women in the workplace.

What most troubles Mr. Neubourne and other liberals is that the Burger court has, at the same time, restricted some Warren court decisions that afforded broad protections to the accused in criminal proceedings. So-called Miranda rulings and Exclusionary Rule decisions (dealing with reading of rights to suspects and invalidating court evidence that is tainted by improper police procedures) have been significantly modified.

Also the votes of the court's avowed conservatives, Associate Justices William W. Rehnquist and O'Connor, have not always been predictable. Justice Rehnquist, whose decisions generally please conservatives, has occasionally come down hard in favor of civil liberties claims. And Justice O'Connor, the court's least-tenured member, surprised and chagrined some of her conservative allies by voting against Alabama's moment-of-silence statute, which provided meditation periods in the schools for the purposes of prayer.

Chief Justice Burger likes to point out that his decisions are not marked by political and ideological considerations — but by constitutional dictum. But he tends to vote against strong federal controls and regulation of big business and also bucks extended interpretations of the Constitution to protect the rights of felons and others accused of crime. He believes that criminals have no special civil rights that transcend the privileges of all citizens.

In comparing the Warren and Burger courts, Harvard Prof. Laurence H. Tribe, a leading Supreme Court scholar, warns against "labels," which he says are misleading. He also suggests that it is particularly difficult to characterize the present tribunal because of "strong individuals [associate justices] who don't always take the lead of the chief."

Professor Tribe further points out that the Warren and Burger styles are vastly different — with the former more clearly shaping internal court policy and the latter focusing on broader problems of court structure, reform within the legal system with less emphasis on litigation, and prison reform.

Court watchers also stress that another difficulty of pinpointing a specific direction for the Burger court is that certain longtime members of the panel have drifted from earlier philosophies.

For example, Associate Justice William F. Powell Jr., a Nixon appointee, has, in many cases, moved from his conservative position and voted more with court moderates, Harry A. Blackmun and John Paul Stevens. On the other hand, Kennedy designate Byron R. White has of late entrenched himself in the conservative camp of Justices Burger, Rehnquist, and sometimes O'Connor.

What of the future? Some legal analysts predict that circumstances will soon dictate a clear swing to the right. Conservatives court-watchers — including American Enterprise Institute scholar Bruce Fein and former Solicitor General Rex Lee — predict that a single Reagan appointment could result in decisions which would: totally eliminate Exclusionary Rule and Miranda protections, sharply limit affirmative-action plans that now provide job preferences for racial minorities, and establish a stronger pro-big-business trend.

Despite some predictions that President Reagan will get the opportunity to appoint up to five new justices by the end of 1988, when his second term ends, none of the members of the current court have indicated an intent to retire or resign.

Five of the current nine are well past normal retirement age. Liberal members William Brennan and Thurgood Marshall, among the most senior in age, hint they may leave the court only if and when a Democratic president is elected. Justice Powell, who last term missed hearing one-third of the court's cases and considered retirement due to ill health, now says he is fully capable of fulfilling his duties.

Mentioned as possible replacements, in the event of a Supreme Court opening, are Robert H. Bork and Antonin Scalia, judges on the US Court of Appeals in Washington, D.C., and Richard A. Posner, who serves on the US Court of Appeals in Chicago.

All are Reagan appointees, ideological conservatives, and philosophically attuned to the administration's stances on judicial retraint and laissez-faire government, explains Yale Kamisar, criminal law expert and University of Michigan law school professor.

Harvard's Professor Tribe holds that Supreme Court appointees tend to "not disappoint the president who nominated them." But he adds, as do other scholars of the court's history, that there have been notable exceptions to this rule.

Analysis | Linda Greenhouse

Justice O'Connor Finds a Theme in States' Rights

6-4-82

Special to The New York Times

WASHINGTON, June 3 — As she nears the end of her first Supreme Court term, Associate Justice Sandra Day O'Connor has emerged as one of the Court's most ardent champions of states' rights, a development with important implications for a Court in the midst of re-examining the balance of power between the states and the Federal Government.

The first state court judge named to the Supreme Court in 25 years, Justice O'Connor is using her vote and, increasingly, her pen to criticize Federal invasions of state "sovereignty" and to advocate greater deference by Congress and the Federal judiciary to state courts and state legislatures.

In both majority opinions and dissents, she has expounded a vision of "our federalism" that entails a diminished Federal presence, whether as overseer of the fairness of state criminal procedures or as arbiter of whether a state is giving its citizens "due process" in the noncriminal context.

That her vision does not prevail in every case is not particularly important at this point in her tenure. What matters is the single-minded fervor she brings to a subject, federalism, that is at the core of the Supreme Court's current agenda, and at the heart of the Reagan Administration's domestic program.

Shares View of Rehnquist

After decades of encouraging an expansive role for the Federal Government, particularly as the front-line defender of individual rights, the Court is now redefining the balance and presiding over a shift of power to the states. The process has proceeded fitfully for the last 10 years, with Associate Justice William H. Rehnquist providing the ideological underpinnings and a shifting majority coalescing around the issue on a case-by-case basis.

For the first time, Justice Rehnquist has a colleague who seems to share fully not only his interest in the subject, but his sense of mission. As the two youngest members of the Court — he is 57, she is 52 — Justices Rehnquist and O'Connor are likely to have a long time to press their campaign to restore the states to a place of honor in the Federal system.

This week, in dissenting from a decision that upheld a Federal energy law, Justice O'Connor filed a 23-page opinion that was really a roadmap to the Federal-state relationship as she sees it. The energy statute, challenged in Federal court by the state of Mississippi, requires state utility regulators to consider adopting various pricing policies to spur conservation. Justice O'Connor said that in finding the law constitutional, the Court's majority "permits Congress to kidnap state utility commissions into the national regulatory family" and "undermines the most valuable aspects of our federalism."

"I am not ready to surrender this state legislative power to the Federal Energy Regulatory Commission," she said.

Rebuttal From Blackmun

Justice O'Connor's dissent, which Justice Rehnquist and Chief Justice Warren E. Burger joined, prompted a scathing rebuttal from the author of the majority opinion, Associate Justice Harry A. Blackmun.

Her "apocalyptic observations, while striking, are overstated and patently inaccurate," Justice Blackmun wrote. "While Justice O'Connor articulates a view of state sovereignty that is almost mystical," he said, "she entirely fails to address our central point," which was that since the Federal Government could constitutionally take over the entire field of utility regulation, it can certainly take the less drastic step of leaving the field to the states but requiring them to follow certain procedures.

Justice O'Connor has used her majority opinions as well as her dissents to lecture her colleagues about the role of the states and the need to treat state officials, including judges, with more respect.

For example, she wrote an opinion for the Court holding that a Federal court had erroneously granted a new trial to a state prisoner in Ohio. The Federal court had found constitutional defects in the jury instructions at the prisoner's trial in state court.

"State courts are understandably frustrated," she wrote, "when they faithfully apply existing constitutional law only to have a Federal court discover new constitutional commands."

She continued: "In an individual case, the significance of this frustration may pale beside the need to remedy a constitutional violation. Over the long term, however, Federal intrusions may seriously undermine the morale of our state judges. Indiscriminate Federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own."

'They Simply Abdicate'

Those sentiments were foreshadowed in an article that Justice O'Connor, then a judge on the Arizona Court of Appeals, wrote for the William and Mary Law Review, which was published shortly before President Reagan named her to the Supreme Court last summer.

State appellate judges, she wrote then, "occasionally become so frustrated with the extent of Federal court intervention that they simply abdicate in favor of the Federal jurisdiction." Noting that "we appear to be the only major country with two parallel court systems," she said that "the labyrinth of judicial reviews of the various stages of a state criminal felony case would appear strange, indeed, to a rational person charged with devising an ideal criminal justice system."

Clearly, Justice O'Connor believes that her background in state politics and the state judiciary gives her particular expertise. She was majority leader of the Arizona state senate when she became a judge, spending four years on the state trial court and two on the middle-level appellate court.

It is a background unmatched on the current Court. None of the other Justices has ever held elective office, and only one, William J. Brennan Jr., has ever been a state court judge. He was on the New Jersey Supreme Court when President Eisenhower named him to the High Court in 1956.

Ironically, Justice Brennan seems to have drawn the opposite lesson from his exposure to state jurisprudence. "One of the strengths of our Federal system," he said in a recent speech at the New York University School of Law, "is that it provides a double source of protection for the rights of our citizens."

"Federalism," Justice Brennan said, "is not served when the Federal half of that protection is crippled."

L.A. TIMES: 7-5-85

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Oldest Justice Still Staunchly Liberal

Brennan Now a Dissenter as High Court Edges Right

By PHILIP HAGER, *Times Staff Writer*

WASHINGTON—When Justice William J. Brennan Jr. was named to the Supreme Court in 1956, Dwight D. Eisenhower was President, "Peyton Place" was a best seller and the Dodgers were winning the National League pennant—in Brooklyn.

America has changed a lot since then, and so has the Supreme Court—but Brennan is still going strong, remaining true to his liberal beliefs. Although the court's rightward shift has left him in a distinct minority, the oldest justice shows no intention of leaving the bench and allowing President Reagan to name his replacement.

"I can't know, of course, what the Good Lord may have in mind for me," he tells audiences these days. "But I can say that, insofar as the suggestions contemplate my voluntary departure, like Mark Twain's reported death, the rumor is grossly exaggerated."

Had he wished, the 79-year-old Brennan could have retired years ago in a blaze of judicial glory, the author of a long list of landmark decisions by the liberal Warren Court of the 1950s and 1960s. Even more than Chief Justice Earl Warren himself, Brennan has come to be regarded as the linchpin of that court's liberal majority, and the milestone 1962 ruling that paved the way for the "one-man, one-vote" doctrine of legislative apportionment was just one product of his prolific pen.

But Brennan stayed on and now finds himself on the lonely liberal wing of a more conservative court under Chief Justice Warren E. Burger. Brennan still writes some major decisions—for example, last year's ruling upholding Minnesota's authority to require the Jaycees to open membership to women. Much more often, however, he is in the minority, writing bristling dissents against court decisions allowing capital punishment or easing the restrictions on police interrogations and searches.

Joined by Justice Thurgood Marshall, he still votes against the death penalty in every capital case that comes before the court, stating his view that capital punishment in all circumstances constitutes "cruel and unusual punishment" prohibited under the Eighth Amendment.

In April, Brennan urged the court to consider whether electrocution was an impermissible method of capital punishment because of the "unnecessary pain and suffering" it imposed. In a lengthy dissent, he cited vivid accounts of electrocutions—"the prisoner's eyeballs sometimes pop out and rest on his cheeks"—and pointed out that jolts of electricity must often be repeated over a period of minutes before the condemned prisoner dies.

Dissent in Mitchell Case

Recently, he issued a sharp dissent to the court's decision granting former Atty. Gen. John N. Mitchell protection against a civil damage suit that arose from his having authorized in 1970 a warrantless "domestic security" wiretap that later was ruled illegal. Brennan remarked tartly that he was "at a loss" to understand the court's action, "aside from sympathy for the defendant or hostility to the plaintiff."

The justice has taken his criticism of the court majority to public forums around the country. He recently told a legal audience in Macon, Ga., that court rulings favoring government authority over individual rights "condoned both isolated and systematic violations of civil liberties."

And he voiced concern before an audience in New York about the court's "disturbing" trend toward ruling against constitutional claims brought by individuals. The court, he noted, upheld constitutional claims in 86% of the cases presented to it in 1963 but in only 19% of such cases in 1983.

Brennan, one of only two Supreme Court justices with state court experience, has been encouraging lawyers to bring constitutional rights cases in state courts, which, more frequently, are extending broader individual rights under their own constitutions than are required by the Supreme Court. His views are regarded as widely influential on the more liberal and innovative of these state courts.

"Justice Brennan keeps the vision alive," University of Chicago law professor Dennis J. Hutchinson said. "His views provide the moral support, encouragement and doctrinal respectability for the liberal vision of the law that he has."

'One of Great Justices'

In his 29 years, Brennan has won wide admiration from civil liberties groups. At a recent dinner of the Constitutional Rights Foundation in Los Angeles, he was introduced by the group's president, Raymond C. Fisher, as "one of the great justices." Fisher noted a study by former Harvard Law School dean and Solicitor General Erwin N. Griswold showing that Brennan had written 29 of the court's major opinions from 1956 to 1978—compared to 14 by Burger and 13 by Warren.

But Brennan has critics also, persons who see him as a judicial activist trying to change society by manipulating the law to suit his liberal views.

The conservative National Review concluded in a lengthy article last year that Brennan, perhaps more than anyone else, was responsible for turning the federal judiciary into a "super-legislature" in which judges' policy views prevail over those of the legislative and executive branches.

And James McClellan, executive director of the Center for Judicial Studies in Washington, said of Brennan: "He simply decides what policy he wants to implement and then finds the legal precedents to support it. He's not regarded as a constitutional scholar of the first order but rather has been influential mainly because he's been in power at a time when he could write opinions for the majority.

"He may be a mild-mannered man," McClellan said, "but he is a very strong-willed political activist."

Brennan's record on the Warren Court alone will ensure his place in history. He was a close colleague of the late chief justice, a hard-working innovator who could bring together diverse views among the justices to produce important decisions.

"One might say that Justice Brennan's opinions most embody what the Warren Court stood for and most clearly and fully represent the liberal tradition of that court," University of California law professor Stephen R. Barnett said. "He clearly has been the leading spokesman for a point of view that was created with the Warren Court and that remains vital even up until today."

During the Warren Court's glory days, Brennan wrote milestone decisions that:

—Gave federal courts unprecedented power to review legislative

apportionment plans, leading to the "one-man, one-vote" rule for representation within voting districts. Before that case, called Baker vs. Carr, the court had studiously avoided the issue as part of its desire to avoid the "political thicket."

—Granted the press broad new constitutional protection against libel suits by requiring that public officials carry the heavy burden of proving "actual malice"—that the article was published with knowledge that it was false or with reckless disregard for the truth.

School Bias Ruling

—Mandated that school districts that had been guilty of racial discrimination may not get by with racially neutral "freedom of choice" desegregation plans but must take affirmative steps to attain racial balance.

—Barred states from forcing welfare applicants to establish a one-year residency before receiving aid and said welfare recipients are entitled to a hearing before their aid may be cut off.

—Gave criminal suspects the right to have a lawyer present at police identification lineups.

Even as the court grew more conservative as the Warren era ended in 1969, Brennan held his own. For example, he wrote opinions that struck down the denial of free public education to illegal alien children in Texas, upheld a voluntary affirmative action plan by a private employer that gave minority-member workers preference over whites in an apprenticeship program and opened the way for civil rights damage suits against cities when their official policies were found to violate an individual's constitutional rights.

Now, however, Brennan is clearly out of the court's mainstream. But, although he voted in the minority in 63 cases last term, more than any other justice, knowledgeable observers say that he still skillfully asserts his views to help narrow the scope of a majority opinion.

"He is still a force to be reckoned with," Chicago's Hutchinson said. "He knows cases so well, jurisprudence so well, that he is able to put together precedent and doctrine in such an innovative way that it forces others to stop and think."

Brennan influences his colleagues not only with his legal ability but also with his powers of persuasion. He is a warm and friendly man in private and has long impressed court observers as having almost the manner of an "old pol." Court aides say he frequently walks down court hallways with his arm tightly on the shoulder of a fellow justice with whom he is deeply engrossed in conversation.

Brennan was born in Newark, N.J., to an Irish immigrant who worked as a coal heaver in a brewery. He earned money as a boy by delivering milk and working in a gasoline station. Eventually, he received degrees from the Wharton School of Finance at the University of Pennsylvania and then Harvard Law School before joining a law firm in Newark, where he specialized in labor law. Later, he was a trial judge, appeals court judge and member of the New Jersey Supreme Court.

Appointed in 1956

Eisenhower named Brennan, a politically inactive Democrat, to the high court in 1956 and was considerably surprised to realize later that he had appointed a liberal. When asked if he had ever made a mistake as President, Eisenhower responded, "Yes, two; and they are both sitting on the Supreme Court"—a sardonic reference to Brennan and Warren, whom Eisenhower appointed in 1953.

Brennan was treated seven years ago for a cancerous tumor in his throat and, after a brief absence from the bench, seemed troubled by hoarseness. Later, as his wife, Marjorie, became increasingly ill from cancer before her death in 1982, Brennan publicly acknowledged that he was considering retirement.

But now, apparently fully recovered and remarried since 1983 to his former secretary, Brennan perseveres as the oldest member of a court that includes five justices 76 and older and only one (Sandra Day O'Connor) under 60. In the nation's 196-year history, only 10 justices have served longer than Brennan.

BALT.SUN:7-8-84

1 of 2

Court's shift to right gives Reagan a boost

ANALYSIS S865
By Lyle Denniston
Washington Bureau of The Sun

WASHINGTON — On the final day of the Supreme Court's term, a brief, symbolic scene unfolded in the front of the ornate chamber.

The Reagan administration's top lawyer in the court, Solicitor General Rex E. Lee, sat quietly in his accustomed place at the attorneys' table.

He listened as Justice Byron R. White, on the bench directly in front of him, began talking about the court's ruling in the case of U.S. vs. Leon — a sweeping addition to the power of police to search for evidence of crime. The justice said in a matter-of-fact way that the court had decided to accept the government's position.

It was clear to everyone what that meant: The administration had won the most important criminal case since a new era in the court opened 15 years ago, when Warren E. Burger succeeded Earl Warren as chief justice.

It also meant that President Reagan's lawyers — and especially Mr. Lee — had completed the court term with a remarkable number of major victories. And they had done it with a great deal of help from Byron White, a 67-year-old justice named to the court 22 years ago by President John F. Kennedy.

The solid bloc of conservatives on the court was able to attract Justice White to join it with more regularity.

The government's successes came in a surprising turnabout from just one year before, when the administration lost all but one of the most important initiatives it had taken in the court.

Time after time in the most recent nine-month term — in fact, in two dozen of the most significant rulings — the Reagan administration got its way. Its most significant gains came on issues involving race and sex bias and the powers of police and FBI agents, but its views also prevailed on issues as wide-ranging as Christmas Nativity scenes on city government property and telecasting of college football games.

When asked in an interview to explain the difference, Mr. Lee said: "I honestly don't know. There has not been any change in the way we do our business. I take each case one at a time and try to win it; we have simply won more. I do not know to what to attribute it."

He added: "Like every lawyer, I, of course, enjoy winning my cases. Of course, I'm gratified with the results of this term."

Because Mr. Lee must appear before the court as an advocate, he would not be inclined to speculate on ideological shifts on the bench.

The rate of success that the solicitor general's office is now having under the 49-year-old Mr. Lee is sure to make him a leading candidate for a seat on the court, if President Reagan is reelected in November.

It is commonly assumed, at least at the courthouse, that one or more justices will be retiring after one more term of the court, and that as many as five seats may open in the four-year term of the president elected this fall.

Mr. Lee fits the most important requirements that the president's aides have set for a Supreme Court nominee: He is young enough to serve for a long time, and he is a dedicated conservative in his views. Although he has no experience as a judge, that would not necessarily disqualify him.

Even a single additional appointment by Mr. Reagan of someone with Mr. Lee's philosophy almost surely would mean that the court would move even more in a conservative direction. When the administration has won or lost on key cases, the margin often is not wide: 5-4 or 6-3. One new justice thus could make a notable difference, and two could make continued Reagan victories a near certainty.

Because of that prospect, Democratic presidential candidates, including Walter F. Mondale, have been trying to make the court's future an issue in this year's campaign. They have suggested that

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REX E. LEE

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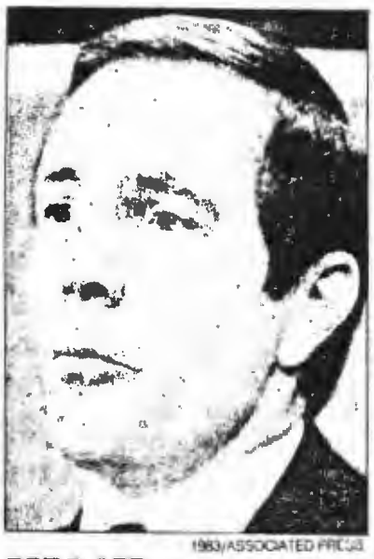
JUSTICE BYRON R. WHITE



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REX E. LEE

the nation's legal history for years to come could depend on the outcome of the voting on November 6.

The court's just-ended term has given a strong glimpse of what that future could be. Even though the court in recent years had been moving steadily toward a conservative stance, the trend never was as strong as it has been in the last few months.

One measure of the results was the protest issued at term's end by the American Civil Liberties Union, calling the term "genuinely appalling." The ACLU said that "individual rights now mean whatever the government wants them to mean," and it argued that "Americans are far less free today than they were a year ago."

The shift that so troubled the ACLU appeared to have come about much of the time because of the new allegiance by Justice White to the conservative bloc that includes Chief Justice Burger and Justices Sandra Day O'Connor (Mr. Reagan's only appointee), Lewis F. Powell, Jr., and William H. Rehnquist.

An indication of Mr. White's shift is that, in 18 decisions on which the court split 5-4 — many with conservative results — he was in the majority 15 times.

A more precise indication is that on the 10 most important victories for the Reagan administration, Justice White was on its side all but once, and he personally wrote the main opinion in three of the most important rulings of the term.

Those were the one in the Leon case, allowing the use in criminal trials of evidence that police have obtained illegally by using an invalid warrant; a decision that came close to ruling out the use of quotas as a remedy for race or sex bias in employment, and a ruling that sharply reduced the government's power to attack sex bias in colleges and schools receiving federal aid.

Justice White's only notable dissent to a big victory for the government came when the court struck down, as an antitrust violation, the National Collegiate Athletic Association's controls on television broadcasts of college football games.

Of the other, less sweeping administration victories, Justice White objected to only one: a refusal to bar illegally obtained evidence from deportation cases.

During the term, the administration suffered losses on only three cases, none considered in the top echelon of its cases during the term: allowing juries to award heavy damages to persons injured because nuclear power plants are not safe enough, allowing businesses to file for bankruptcy to get out of labor contracts and permitting public television stations to broadcast their own editorial comments. Justice White wrote the nuclear decision, but voted with the administration on the other two.

The string of administration victories during the term included decisions to uphold the nearly total ban on travel to Cuba, create a new exception to the rule that police must give suspects "Miranda warnings" about their rights before questioning them, bar challenges to the Internal Revenue Service to force it to help close down white-only private schools in order to help public school desegregation, uphold the ban on federal college aid for male students who do not register for the military draft and ease federal restrictions on air pollution.

The administration even won on a couple of occasions when it took liberal positions. The court accepted its arguments that law firms could not discriminate against women and minorities in choosing partners, and state courts could not discriminate on the basis of race in deciding child custody cases.

Although the court's strongly conservative actions during the term did not produce as many angry public complaints from the liberal dissenters, one of those, Justice John Paul Stevens, kept up a personal crusade against what he called "judicial activism."

He also accused the majority, several times, of a strong bias toward the claims of prosecutors, and against the claims of criminal suspects. Several times he added up the string of summary rulings the court issued in criminal cases, and suggested that that swift method of disposing of cases was being used almost exclusively to favor prosecutors.

Court sources suggested that Justice Stevens had become even testier in private dealings with other justices, especially Chief Justice Burger. One staff aide, noting that Justice Stevens had demanded that unflattering sketches of him be taken down from an exhibit of court artists' work, commented: "The reality about this place is that what people complain about is not what they are really having trouble with. But it's the only thing they can do something about."

Judicial independence and power

What the courts can — and cannot — do

By Arthur J. Goldberg 128

PRESIDENTS have often been surprised by the votes cast by the very judges they appointed to the United States Supreme Court. President Theodore Roosevelt appointed Justice Oliver Wendell Holmes to our highest court, believing that he would be an antitrust jurist, only to learn very early that the Great Yankee from Olympus did not share the President's views about antitrust matters.

President Eisenhower appointed Chief Justice Earl Warren and Justice William Brennan. The President discovered, to his great chagrin, that these outstanding jurists departed very widely from his concepts about our constitutional safeguards. President Truman appointed Justice Tom Clark, a trusted adviser and his attorney general. All accounts indicate that this feisty President was outraged when Justice Clark voted against Truman's seizure of the nation's steel mills. The decisions of the Burger court, by and large, are further proof of the unpredictability of presidential judicial appointees.

True, the Burger court is nibbling away at Miranda restrictions on interrogation; narrowing the exclusionary rule; limiting the safeguards of the Fourth Amendment; tolerating some breaches in the wall of separation between church and state; restricting resort to the great writ of *habeas corpus;* proving somewhat tolerant about coerced confessions; and cutting back on others of the Warren court's decisions, particularly in the area of the rights of the accused in criminal cases.

But! The Burger court, with the votes of some and in certain cases all of the recent "conservative" appointees, has never totally overruled Miranda. It has reaffirmed Reynolds v. Sims — one person, one vote; ordered President Nixon to turn over the Watergate tapes; outlawed silent prayer and the instruction of public school children in parochial schools; legalized abortions; sanctioned busing as a permissible tool to eliminate segregation in public schools; and declared publication of the Pentagon Papers to be protected by the First Amendment.

The Burger court has not been as "conservative" as "liberals" feared or rightists hoped. And, I predict, the same will be true of virtually all the federal judges who have been or may yet be appointed by President Reagan.

This leads to a discussion of repeated attempts to categorize justices as "liberal," "activist," or practitioners of "judicial restraint." The President and Attorney General Edwin Meese criticize judges labeled "liberal" or "activist" on grounds they overstep proper bounds, but the terms are not illuminating.

The most "activist" Supreme Court in our history was the "nine old men of the '30s." They usurped the power to invalidate virtually all of President Roosevelt's and Congress's New Deal legislation. And this court was perhaps the most conservative of all times.

By way of contrast, the so-called "liberal" and "activist" Warren court, in Ferguson v. Skrupa (1963), declared: "We refuse to sit as a superlegislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when courts [struck down laws] regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Surely, this opinion is a very model of judicial restraint. And the writer of it was none other than that outstanding "liberal" jurist, Hugo L. Black.

It is true that all courts, present and past, are activists in enforcing the liberties enshrined in the Bill of Rights, as distinguished from social and economic privileges.

But in light of the language of the Constitution, they cannot, in fidelity to our fundamental law, do otherwise.

The Bill of Rights is explicit in its terms. "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech, or of the press. . . . The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; . . . the accused shall enjoy the right . . . to have the assistance of counsel for his defense . . . [and] cruel and unusual punishments [shall not be] inflicted."

Surely, it would appear that judicial activism in these areas is mandated.

Paradoxically, Attorney General Meese appears to be a closet believer in the Cult of the Robe. While denigrating decisions of the court, he exaggerates the role of the judiciary in our constitutional scheme. The late legal scholar Alexander M. Bickel termed the judiciary "the least dangerous branch of our government."

The mistaken belief that judicial law can fundamentally change our social and economic institutions is evidenced by the flood of young men and women to our law schools. This reflects commendable idealism and does give the bar new voices that should be heard. It is necessary, however, to bear the limitations of the judicial process in mind. Although judicial law can do many things, judges cannot establish social and economic justice by judicial fiat.

The courts can do nothing about the deficit, inflation, high interest rates, and unemployment; it is up to the President and Congress to provide the remedy. Yet, the consequences of the failure to reduce the deficit, curb inflation and high interest rates, and check unemployment may be even more menacing to our democratic institutions than the clear danger to them of Watergate. The fate of the Weimar Republic is a stark example.

The courts cannot balance the budget. Only the executive branch and Congress can.

The judiciary cannot seek to persuade the Soviet Union to negotiate an acceptable SALT II treaty, as envisioned by President Reagan. But our very survival depends upon staying the hand of the nuclear clock.

Judges cannot bring peace to the Middle East — a problem of the utmost significance, which thus far has defied the best efforts of the executive branch.

The judiciary lacks the power of the purse and the sword.

Even in the area of judicial competence, like enforcing the Bill of Rights, we must never overlook the profound teaching of Judge Learned Hand: ". . . a society so riven that the spirit of moderation [liberty] is gone, no Court can save; a society where the spirit flourishes no Court need save."

The attorney general ignores what may be at the very heart of the issues he has raised.

Our Constitution is an instrument of practical government. It is also, and more important, a declaration of faith in the spirit of liberty, freedom, and equality.

The ultimate safeguard of our liberty is the people. They are the source of our Constitution. Its first words are: "We, the people of the United States, in order to . . . secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America." The people are the ultimate guardians and protectors of our liberty, not the president, not Congress, and not the judiciary.

And we the people, if we are to keep our constitutional faith, must always recall the admonition of Thomas Paine: "Those who expect to reap the blessings of freedom must . . . undergo the fatigue of supporting it."

Arthur J. Goldberg is a former justice of the United States Supreme Court.

Second of two articles. The first appeared yesterday.

JOSEPH SOBRAN

When 2 93/123 the Court changes

Four current Supreme Court justices — Harry Blackmun, Thurgood Marshall, Lewis Powell, and Chief Justice Warren Burger — were born in 1907 or 1908. William Brennan was born in 1906.

If they all can hang in there for two more years, we will have five octogenarians on the Supreme Court at once. But the odds are against it. There are rumors that Chief Justice Burger will retire soon. Justice Powell has been battling cancer. Justice Marshall has been ailing for some time.

So Ronald Reagan will very likely be naming some new members to the court before very long, and the name most frequently mentioned is that of Robert Bork, currently of the U.S. Court of Appeals for the District of Columbia. Mr. Bork, who might be described as a reasonably strict constructionist, would not only replace a liberal; he has a legal mind powerful enough to reshape the high court's debates, raising their quality.

How? For a sample of Mr. Bork's thought, recall the speech Justice Brennan gave last October at Georgetown University — a manifesto of liberal judicial activism.

Justice Brennan all but dismissed the idea that we can know the "original intent" of the Constitution's authors. He even said that the Constitution is in some ways "anachronistic." Nevertheless, he professed to find in it certain "overarching principles" and "a vision of human dignity" clear enough to render capital punishment, in his judgment, unconstitutional, even though the Constitution expressly allows for it. (The less certain the liberals are about what the framers intended, the more certain they seem to be about what the Constitution mandates today.)

Forgetting his premise, Justice Brennan even came up with his own version of original intent. "Our Constitution was not intended to preserve a pre-existing society but to make a new one." If he found the letter of the Constitution blurry, Justice Brennan seemed to enjoy a pipeline to its spirit — its "vision."

Mr. Bork indirectly replied to this in a speech of his own a few weeks later. He said flatly that "original intent is the only legitimate basis for constitutional decision."

The words of any given law or of the Constitution, Mr. Bork went on, "constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens."

Alluding to Justice Brennan's formless "overarching principles," Mr. Bork commented: "Obviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be protected, the judge must not state it with so much generality that he transforms it."

A case in point is the alleged constitutional "right of privacy." William O. Douglas, speaking for the court in 1965, discovered this principle not in the text of the Constitution, but in a "penumbra" of the Bill of Rights. The court then invoked this dubious principle in 1973 to strike down all the nation's abortion laws, no matter how restrictive or permissive. The five oldsters mentioned at the beginning of this column all concurred in that ruling.

Mr. Bork observes that "since there is no constitutional text or history to define the right, privacy becomes an unstructured source of judicial power." Furthermore, "the level of abstraction chosen makes a generalized right of privacy unpredictable in its application."

This is a beautifully succinct summary of how judicial activism led to the abortion decisions. And it hints at the real issue: what Justice Byron White, dissenting in the first abortion case, called "raw judicial power." "Not surprisingly," says Terry Eastland, an aide to Attorney General Edwin Meese, "those who reject a jurisprudence of original intention still admire judicial power."

Liberals have never had to face the problem of unchecked judicial power, for the simple reason that they have never considered it a problem. For them it has been a great convenience, enacting their social agenda without the bother of legislative process or political accountability. While they regarded the court as virtually infallible, they were glad that its rulings were nearly irreversible.

A Reagan court may give them a change of heart.

WASH. POST: 7-7-85

Supreme Court Rulings Swing Back to Center

Conservative Trend Eased in Last Term

1287 By Al Kamen
Washington Post Staff Writer

The Supreme Court, which last year seemed to take a sharp turn to the right, this year returned to a more centrist position, deciding almost half of its civil liberties cases in favor of individual rights and pointedly reaffirming the separation of church and state.

And, although the court generally upheld the police powers of the states and the federal government, the justices did expand a handful of the landmark Warren court cases granting rights to criminal suspects.

During the 1984-85 term that ended last week, the moderate center that has dominated the court for most of the last 16 years eased the court back to its traditional moderate position.

Civil libertarians expressed elation, while the Reagan Justice Department puzzled over what went wrong in its effort to push a conservative agenda. U.S. Solicitor General Rex E. Lee said the administration had some "major disappointments this term," especially in its effort to lower constitutional barriers between church and state.

In four major cases, a narrow majority voted to draw a solid line between the government and church schools. A 5-to-4 majority ruled not only that a Michigan program of open-ended aid to parochial schools was unconstitutional, but also, in the term's biggest surprise, that New York City could not use federal funds to send public school teachers into religious schools under a program to help disadvantaged students.

American Civil Liberties Union legal director Burt Neuborne, who called last year's court record "truly appalling," said that the court has "returned to the role it has played historically as a defender of the individual."

What "the trend people thought they saw last term," when the court came down with a host of conservative decisions, "did not materialize," he said.

The difference between the two terms was the court's key swing vote, Justice Lewis F. Powell Jr. Powell sided with conservatives consistently during last year's term, but this year pulled in the opposite direction.

Powell tipped the scale in virtually every close vote. He was on the losing side only six times in 89 decisions in which he participated this term. In 18 cases where the court split 5 to 4, Powell was in the majority 14 times.

Neuborne said Powell's position leaves the 78-year-old Virginian "the most powerful individual in America." Powell, a moderate appointed by President Richard M. Nixon, sided with the liberals this year more than he has in any of his 14 years on the court.

Conservatives such as Bruce E. Fein, who analyzes the court for the American Enterprise Institute, said last week that he was surprised when the administration "suffered severe defeats" in several areas in what he called a term of "pause and irresolution."

Fein said conservatives had every reason to be optimistic last fall that the court would lower the barriers to church-state separation. The Supreme Court in recent terms had approved a city government-sponsored Christmas nativity scene, state tuition tax deductions for religious schools and a state-paid chaplain for the Nebraska legislature.

"Everything that seemed to have been won," Fein said last week, "went out very quickly," as the court, in addition to the parochial school cases, reaffirmed its disapproval of teacher-led prayer in public schools and struck down a law that gave employes who are religious greater rights than nonreligious workers.

"State officials misread the court as having moved all the way toward the authoritarian end of the spectrum," said Harvard Law School Professor Laurence H. Tribe, a prominent constitutional scholar.

"It was teetering" last year, Tribe said, "but it had not gone all the way." Conservatives were pushing the justices "so far so fast that they may have recoiled from an invitation to join the new right. It was an offer the court could readily refuse. Having smelled victory, the right pushed the court over the brink."

The Reagan administration nevertheless won a substantial number of cases in which the justices backed executive branch prerogatives, and the administration generally had its way in criminal cases, although there were notable exceptions.

Justice Department figures show the government won 80 percent of its cases overall, down from an extraordinary 87 percent a year ago. But the cases it lost this year often were the most important cases, a reversal of last year's record.

Overall, the justices this term gave much greater weight to individual rights as opposed to government power.

Last year the court handed down signed opinions in 69 civil liberties cases. It decided 13 in favor of the individual and 56 in favor of the federal or state government. The government's 81 percent rate was the highest in nearly five decades.

This term, the court, in 51 decisions involving similar constitutional claims, ruled 29 times—or 57 percent—for the government and 22 times for the individual. That government success rate is actually lower than its average for the five years preceding last term.

In four other cases, with Powell absent due to illness, the court split 4 to 4, upholding an appeals court ruling that sided with the individual's constitutional claims against the government. A tie vote does not set a constitutional precedent.

In two other cases, the court upheld individual free speech claims, but not on constitutional grounds.

If these two cases and the tie cases are counted, individuals with civil liberties claims won nearly half the time before the Supreme Court, a record not seen since the days of Chief Justice Earl Warren.

The court continued to favor law-and-order views, but individuals won a number of significant cases as the states, although not the Justice Department, seemed to misread how far the justices were prepared to go.

In several cases, the court extended Warren court precedents and expanded suspects' rights. It ruled that indigents pleading insanity had the right to a court-appointed psychiatrist, that indigents appealing convictions had the right to a court-appointed lawyer, that police could not use deadly force to stop a fleeing felon except where there was a danger to the public, and that prosecutors could not force a suspect to undergo surgery to remove a bullet sought as evidence.

On the other hand, the justices continued to uphold prison officials' prerogatives, to give police greater freedom to act without warrants and to chip away at the 20-year-old Miranda rule requiring police to read suspects their rights.

Last year the court created a "public safety" exception to Miranda. This year, it said a confession induced before Miranda warnings are given is not usable in court, but a second one obtained after the warnings are issued could be used against a suspect.

The court was sympathetic to individual claims of discrimination by state governments. In the most significant of them, the court struck down zoning laws that barred a group home for the mentally retarded, but not for anyone else.

While the court insisted it was doing nothing new, Tribe, Fein and Neuborne were adamant that the case, in Tribe's words, "reinvigorated equal protection." The case, they said, likely will make it tougher for government to justify laws that treat some groups, such as the retarded, differently than others.

In a major case involving the balance of power between the states and the federal government, Justice Harry A. Blackmun, a centrist, changed his mind this year and the court decided that the 10th Amendment did not protect states from federal laws regulating the wages and hours of state or local employes. The case overturned a ruling nine years ago, in which Blackmun voted the other way.

Although that was seen by some observers as a major blow to states' rights, others, such as former deputy solicitor general Philip A. Lacovara, see the court last year as generally sympathetic to state prerogatives, especially in economic regulation, so long as the states play fair.

The court, Lacovara said, generally struck down state laws that discriminated among their own residents or set up distinctions between state and out-of-state residents. It overturned residency requirements for a tax break for veterans, residency requirements for lawyers and breaks for local, as opposed to out-of-state, insurance companies.

But while the justices several years ago exposed local and state governments to a barrage of antitrust suits, this term the justices heightened protections against such suits in two cases that "much more directly affected pocketbooks," Lacovara said. "Where there is elbow room to interpret federal statutes in favor of state autonomy, the Supreme Court gives states the benefit of the doubt."

The last term seemed quieter than recent terms. There were fewer signed opinions—140 as opposed to 151 in each of the preceding two terms—and a number of important cases were decided by tie votes because of Powell's absence. He missed 56 cases because of surgery for a cancerous prostate.

The justices also ducked constitutional questions whenever possible, deciding several major cases on narrow grounds that resolved the individual case but did not touch on broader questions.

The term has already sparked debate among law professors over whether last year was an aberration or this year was the calm before a conservative storm.

A year ago, Tribe said, the court was "on the precipice and no one could say whether it was going to leap or step back." This term was a source of relief to civil libertarians because the court stepped back.

But the most recent term "should not lead [them] to breathe easily," Tribe warned. It is a "dicey situation" with a court that is deciding things on a case-by-case basis and in close votes.

Conservatives said they hope that one or two key Reagan appointments will make the difference. Although the justices appear to be in good health and seem bent on staying on the court as long as they can, five of them are over 76.

At 80, Brennan has no plans to retire

By Lyle Denniston 128
Washington Bureau of The Sun

WASHINGTON — Supreme Court Justice William J. Brennan Jr. said yesterday that he sees "no indication" that any of the nine members of the court plans to retire, and noted that he personally is "going to stay right here until the good Lord says I have to leave."

In a 45-minute interview a week after his 80th birthday, the court's oldest and most senior justice said he feels "no differently than I did 30 years ago" when he joined the court.

He suggested that anyone troubled about the health or age of any justice should sit in on the court's public sessions, "just to look us over; I think you can tell."

Justice Brennan, who has relaxed his long time rule against interviews because of his birthday, was animated and at times jocular as he talked easily about his colleagues, gave characteristically blunt answers, and displayed a detailed memory about specific cases and bits of court history.

BY KEN HEINEN

WILLIAM J. BRENNAN
Court's most predictable liberal

Asked if his job was too tough for a man of 80, he answered quickly: "Definitely not!" He said he follows a six-day-a-week routine of rising at 5 or 5:30 a.m., doing a half-hour on an exercise bike, which "leaves me breathing a little harder at the end," and starts work about 7:30 a.m. At night, he usually takes work home, he added.

He said the only way he would consider retiring was if either he alone decided he was "not up to carrying on," or his family or colleagues were to suggest the idea. "Neither is a prospect at the moment," he added.

Discussing his eight colleagues, Justice Brennan said he knew of no one who was weighing the possibility of retiring in order to create a vacancy for President Reagan to fill before his term ends in 1989. While he said some justices in the past have timed their retirement for reasons like that, "I have seen no sign of anything like that" among his current colleagues.

He praised the "cordial and friendly" relations among the justices despite deep differences in their views and opinions, and singled out Sandra Day O'Connor — President Reagan's only appointee to the court and Justice Brennan's philosophical opposite — for special praise.

She is "a most accomplished member of the court," and is "beautifully prepared for every case" and for the justices' private discussions — "on top of all of which, she's an absolutely delightful lady and she's a wonderful colleague."

Justice O'Connor votes most often with the court's more conservative justices, and Justice Brennan is the court's most predictable liberal — a stance to which he has held unchangeably since President Dwight D. Eisenhower placed him on the court in 1956.

Justice Brennan, who has long had a reputation of being one of the court's best behind-the-scenes maneuverers, said: "I haven't stopped trying to put together a court in every case." But he noted that he does fail at that sometimes and then turns to the role of dissenting justice — something more frequent for him in recent years.

In answering questions about major constitutional issues of the day, Justice Brennan sought to counter some popular impressions about current trends at the court. He said he saw "nothing to indicate" that the court's controversial 1966 decision in the case of Miranda vs. Arizona, requiring police to warn suspects in custody about their rights, was "in any difficulty" — even though several recent rulings have cut back somewhat on that decision.

When it was suggested to him that a court made up of justices more in tune with the Reagan administration's conservatism probably would not reach a decision like the 1973 ruling in favor of abortion rights, Justice Brennan said he was not sure of that.

He said the "right of privacy," upon which abortion rights are based, "goes back an awfully long ways" and thus might well have the respect of judges who favor interpreting the Constitution as it was understood when written.

He said he had no intention of starting a constitutional debate with Attorney General Edwin W. Meese III last summer. Mr. Meese made a speech arguing that [illegible] constitution should be interpreted only as the Founding Fathers stood it, and Justice Brennan [illegible] a later speech saying the [illegible] stitution had to be interpreted [illegible] to keep it up to date.

His own speech, he said, had been written long [illegible] and, besides, he said, he had his views "long before I came [illegible] the court." He and Mr. Meese, he [illegible] ded, did not originate the contro[illegible]sy over the right way to read the [illegible] onstitution; "that has been with [illegible]s since the days the Constitution [illegible] s written."

Asked about the [illegible] court's recent 6-3 vote against allo[illegible]ng live broadcasts of Supreme [illegible] ort hearings, Justice Brennan [illegible] e of the three in dissent — said he could not "understand why we could limit our exposure, as long as radio and television have the tech[illegible]logy to do it without disrupting [illegible] proceedings."

To a question about whether any of the justices would "play to the cameras" if there were television in the courtroom, he replied: "No; we're not handsome enough — at least I'm not!"

WALL ST.J.:10-23-85

The Words According to Brennan

By Walter Berns 1289

Supreme Court Justice William J. Brennan Jr. is an angry man who has begun to give vent to his anger off the bench and in public. Although his recent Georgetown University address appears to have been well received by those whom it was calculated and designed to please—the address is filled to the brim with righteous liberal indignation—this sort of public posturing is almost unseemly and is certainly injudicious.

Federal judges are supposed to be nonpartisan, and they are not supposed to accuse officials in the other branches of government of arrogance, facile historicism (whatever that means), or plotting wicked schemes to deprive minorities of their rights. Justice Brennan's law clerks should have reminded him of the sage observation—uttered almost 400 years ago by Francis Bacon—that a much-talking judge is like an ill-tuned cymbal.

While not mentioned by name, the immediate object of Justice Brennan's anger is, quite obviously, Attorney General Edwin Meese III; in one way or another, Justice Brennan manages to make that clear enough. Still, no one who knows Mr. Meese would recognize him in the epithets Justice Brennan employs: "arrogance cloaked as humility," feigning "self-effacing deference," leading a "chorus of lamentations," or, for one more, having "no familiarity with the historical record."

Almost Amusing

This last charge is almost amusing coming from a man who subscribes to the view that nothing in the historical record lends support to a state's policy of apportioning seats in at least one house of its legislature on a basis other than one person, one vote. And it ill-befits a judge to accuse anyone of arrogance when he himself is on record as conceding that the lower-court decision in the case before him follows the letter of the law but then proceeds to overrule it anyway because he finds it to be contrary to the law's "spirit," which he, of course, was able to divine. (This was in 1979, by which time Justice Brennan had become quite skilled in divination; he was part of that 1965 majority that found a constitutional right to sexual privacy in "penumbras, formed by emanations" from the First, Third, Fourth, Fifth, Ninth and 14th Amendments.)

Mr. Meese had suggested that the judges ought to be guided by the intention of its framers when called upon to expound the Constitution's meaning. Justice Brennan has nothing but disdain for this idea. What framers, he asks, and what intention? Anyone familiar with the historical record knows that the so-called framers "hid their differences in cloaks of generality" precisely because they could not agree on the meaning of particular constitutional provisions. Besides, he goes on, even if they had intended anything specific, after 200 years we could not possibly know what it was. In this situation, all the judges can do—and the candid judge will admit it—is read the constitutional text "as 20th-century Americans," asking what its words mean "in our time."

But Justice Brennan is not being as candid as he would have us believe. The last seven or eight pages of his address are given over to talk about human dignity—he's for it—and, in his only reference to a specific constitutional issue, he illustrates the meaning of human dignity by discussing capital punishment. He is against it; not only that, he insists it is unconstitutional. But the Constitution itself lends no support whatever to this judgment.

In no uncertain terms it permits capital trials when preceded by a "presentment or indictment of a Grand Jury"; permits a person to be "put in jeopardy of life," provided it not be done twice "for the same offense"; and permits both nation and states to deprive persons of their lives with but not "without due process of law." In addition to these various Fifth (and 14th) Amendment provisions, Article II, Section 2(1) empowers the president "to grant reprieves." There are no "textual ambiguities" to resolve here; the Constitution permits capital punishment. But here and elsewhere, according to Justice Brennan, the Constitution embodies "the values of 1789," and he prefers to follow his up-to-date conscience.

A women's rights case of a dozen years ago (*Frontiero vs. Richardson*) provides a good example of Justice Brennan's conscience at work. The issue was whether sex, like race, should be treated as a suspect classification, and Justice Brennan circulated a draft opinion in which classification by sex was held to be impermissible under almost any circumstance. This was, of course, the intent of the Equal Rights Amendment, which at the time had passed Congress but had not yet been ratified—and, in the event, would not be ratified—by the constitutionally required three-fourths of the states.

When "time" and not the constitutional text is the standard by which judicial decisions are to be measured, why bother with a Constitution?

Justice Brennan was aware of this, of course, but as Bob Woodward and Scott Armstrong report in their book, "The Brethren," he was accustomed to having the court "out in front, leading any civil rights movement." As he saw it, "there was no reason to wait several years for the states to ratify the amendment"—no reason other than the fact, which he knew to be a fact, that the Constitution as then written would not support the decision he wanted the court to make. Unable to persuade Justice Potter Stewart to join the coalition he had put together, Justice Brennan lamented to his law clerks that he had come "within an inch of authoring a landmark ruling that would have made the Equal Rights Amendment unnecessary."

Only a public grown accustomed to government by the judiciary could fail to note the radical implications of this statement. It suggests that the Constitution can be amended in two ways, one difficult and the other easy; one by following the procedures delineated in Article V that, in the typical case, require a two-thirds vote in both houses of Congress and ratification by three-fourths of the states, the other by vote of William J. Brennan joined by four other Supreme Court justices.

In his view, the trouble with the Constitution is not really that its provisions are "obscure," but that its principles are old, "anachronistic," as he said at Georgetown, written for "a world that is dead and gone"; it is the job of the "20th-century Americans" on the Supreme Court to adapt them "to cope with current problems and current needs." The Constitution must be kept in tune with the times.

This is easily said—which is why it is so frequently said—but not so easily done, and not so easily done because there is typically no agreement on what is required to deal with the problems or meet the needs. In fact, the 20th century is filled with Americans—in the electorate, Congress, state legislatures, White House, statehouses, and lower courts of all descriptions—who have ideas on what is required by the times but are not in agreement. Even a glance at the Reports will show the Supreme Court to be sharply divided.

Better Grasp

In principle, of course, the justices' notions of what is required must be given equal weight and only time will tell who on the court is right, Justice Brennan or, for example, Chief Justice Warren E. Burger. But when "time" and not the constitutional text provides the standard by which judicial decisions are to be measured, the inevitable consequence is a Constitution that can be interpreted but not misinterpreted, construed but not misconstrued. Why, then, bother with a Constitution? Of what use is it?

The framers had a better grasp of these matters. They wrote and solemnly adopted a Constitution in order to keep the times—to the extent possible—in tune with the Constitution. In the words of the great chief justice, John Marshall, the principles of the Constitution "are deemed fundamental [and] permanent," and, except by means of formal amendment, "unchangeable."

Five years ago—that is to say, on the eve of the 1980 presidential election—Justice Brennan was said to be not an angry man but a tired man soon to announce his retirement from the bench. The election of Ronald Reagan changed all that. The truth is, the chief object of his current anger is not Edwin Meese but Ronald Reagan—the man who appointed Mr. Meese and, what is more, stands ready to appoint Justice Brennan's successor. Justice Brennan would like nothing more than to deprive him of that opportunity.

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Time Running Out for Reagan to Reshape Court

High-Bench Nominee Would Face Difficulty in 1988, Even if Republicans Hold Senate

By Al Kamen
Washington Post Staff Writer 128

Jimmy Carter talked about it in 1980. Walter F. Mondale talked about it in 1984. Interest groups across the political spectrum—from Planned Parenthood to the Moral Majority—variously dreaded or heralded a revolutionary transformation of the Supreme Court under Ronald Reagan. As a simple matter of actuarial fact, President Reagan was believed likely to have the opportunity to make five appointments to the aging court.

But now, entering the sixth year of the Reagan era, time is beginning to run out. Reagan, who has nominated only one justice, Sandra Day O'Connor, needs at least one more conservative to replace a moderate or liberal vote in order to effect a substantial shift on the court. The wholesale judicial revolution he seeks would require two such changes.

Reagan has, at most, two more years to put his mark on the high court. And with control of the Senate at stake in this year's elections, he may have considerably less time than that.

Some observers, citing Lyndon B. Johnson's inability to elevate Abe Fortas to chief justice in the last year of his presidency, say it will be difficult for Reagan to put anyone on the bench in 1988 even if the Republicans retain control of the Senate. If the Democrats prevail in November, it will be virtually impossible to fill a high court vacancy in 1988, and difficult even in late 1987.

A senator tapped for the court might squeeze through in early 1988, some observers say, given the traditional Senate support for its own, but no other nominee would stand much of a chance with the Democrats in control.

There is even talk that Senate Democrats would stall a nomination as early as this spring, hoping to regain power in the fall. In that event, Reagan's shrinking "window of opportunity" for a judicial revolution could be reduced to the first six months of 1987.

All this assumes that Reagan will have more vacancies to fill—a major assumption given the remarkable staying power of the current justices.

The average age of the justices—70.9 years this month—is slightly below the average age of the "Nine Old Men" who blocked Franklin D. Roosevelt's New Deal in the mid-1930s. But in terms of median age, the Burger court is the oldest in history, with five of its nine members over 77 years old.

The court, according to a recent study in Judicature, a legal magazine, is the most stable since 1823, with only one change of membership in the last 10 years. No sitting justices appear to be talking about leaving voluntarily.

The court's liberal wing, anchored by Justices William J. Brennan Jr., 79, and Thurgood Marshall, 77, is apparently not even thinking of resigning.

Centrist Justice Lewis F. Powell Jr., 78, who was hospitalized last year for removal of a cancerous prostate, plans to stay as long as his doctors say he can; Harry A. Blackmun, 77, another member of the center group, has not indicated any intention of stepping down.

Chief Justice Warren E. Burger, 78, a member of the conservative wing, is likely to stay on for at least this court term and another.

If there is a vacancy this year or next, the key variables would be whose seat is vacant, who is nominated and when the vacancy occurs.

For example, if centrist-conservative Justice Byron R. White, a relatively youthful 68-year-old, decides to retire, and Reagan were to nominate one of two highly regarded conservative appeals court judges, Robert H. Bork or Antonin Scalia, to replace him, even a Democratic Senate would probably confirm either of them, even in late 1987.

On the other hand, should Marshall leave and either Bork or Scalia be chosen to replace him, a Democratic Senate could block the move, certainly in 1988 and possibly in 1987.

A Republican-controlled Senate would probably prevail in such a scenario in 1987, but not without considerable turmoil.

The Judicature study noted that the Senate has approved high court nominees about 80 percent of the time. Twenty-five have been rejected or postponed while 113 have been approved.

But the approval rate falls to 25 percent, according to the study, in the last year of a presidency when the Senate is controlled by the opposition.

Given the highly ideological approach the Reagan administration has taken to judicial appointments, Senate Democrats are likely to be especially reluctant to defer to Reagan's wishes, especially if the vacancy seems likely to tip the ideological balance on the court.

If the Senate goes to the Democrats, one key Democratic staffer said, the Reagan revolution may never happen. The administration would be able to fill any vacancies that might occur in early 1987, he said, but the Senate would not be likely to approve nominees who would reshape the high court.

Supreme Court

Recalling Favorite Decisions

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By STUART TAYLOR Jr.

Special to The New York Times

WASHINGTON, Dec. 2 — The cases some Supreme Court Justices recall most fondly are not those that made the biggest headlines when the decisions came down.

Or so it seems from the responses received by an enterprising librarian who asked the Court's nine members and retired Justice Potter Stewart to pick their favorite cases.

The cases cited in the brief letters the librarian received from Justices William H. Rehnquist, Sandra Day O'Connor and John Paul Stevens evoked the history of the American West, sunken Spanish treasure and the strange saga of a three-inch minnow. Justice Byron R. White and Justice Stewart stuck to more serious themes. All the letters are on display in Hofstra Law School's library in Hempstead, N.Y.

Its assistant director, Gerard E. Giannattasio, inquired in letters to the Justices, "Is there a case of which you are particularly fond, for whatever reason — the interesting procedural aspects, a cogent dissent, the importance of the social issues raised or the point of law involved?"

Justice Rehnquist said "a case I enjoyed writing as much as any" was Leo Sheep Company v. United States, "just because it enabled me to get away from strictly case law and into a little bit of history."

The legal issue in the obscure 1979 decision was "mundane," as Justice Rehnquist put it in ruling that the Government did not have an "implied easement" to build a road across some land Congress granted the Union Pacific Railroad in the 1860's.

But in searching out the intent of Congress in using land grants to finance the race to span America with rails, the Court's most dedicated history buff plunged with relish into the epic of the American West: the California Gold Rush, Civil War battles, range wars, payoff scandals, the driving of the gold spike in Utah in 1869.

Justice O'Connor's favorite was a wrangle among salvage divers, Florida and the United States over ownership of a treasure-laden Spanish galleon found off Florida's coast. While she did not write an opinion, her letter said the "facts and drama" made it "one of the most unusual and interesting cases the Court has heard since I have been sitting."

The most cryptic response came from Justice Stevens, who scribbled on the bottom of Mr. Giannattasio's letter, "T.V.A. v. Hill, et al., 437 U.S. 153." Better known as the snail darter case, it was a great legal victory for environmentalists, who persuaded the Court in 1978 to order construction stopped on the Tellico Dam across the Little Tennessee River to save an obscure minnow. But it turned out to be a Pyrrhic victory from a public relations standpoint.

Opponents of the dam had been outgunned by the politically potent supporters until an ichthyologist found the world's only known population of snail darters near the dam in 1973. Few cared a hoot about the lowly fish, which seemingly was of no practical use to mankind. Well, one practical use: The opponents saw the darter as a wedge with which to crack the dam.

The Court ruled that the dam would violate the Endangered Species Act by wiping out all known snail darters. Chief Justice Warren E. Burger's opinion seemed to anticipate snickers as well as applause. "It may seem curious to some," he wrote, "that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million." But he found this was "the plain intent of Congress."

History has not been kind to this ruling. For starters, Congress soon revived the Tellico Dam, flooding thousands of acres. The snail darter seemed doomed. Then darters started popping up all over the place, with five colonies in Tennessee, Georgia and Alabama.

Justice Stevens did not say why he picked this case, and the meaning of such delphic judicial pronouncements is difficult to divine. Justice Harry A. Blackmun observed in a speech last summer that Justice Stevens was "still a bit of a maverick and likes to keep the rest of us wondering how he's going to vote — he's picking on the Chief a little bit and doesn't hesitate to criticize, and it's rather fun."

Was Justice Stevens's snail darter

citation a tribute to Chief Justice Burger's dogged enforcement of the letter of the law? Or was he poking fun at a ruling that has become something of a national joke? If so, he was also poking himself, for he joined in the Chief Justice's opinion.

Justice White's response was almost as brief but less puzzling: "One of my favorite cases is Gaffney v. Cummings." The 1973 decision upheld a Connecticut reapportionment plan despite minor inequalities in populations of state legislative districts and allegations of gerrymandering. Justice White's majority opinion stressed that the Court should hesitate to plunge deep into "the political thicket," a view he may press in a pending appeal of a ruling that gerrymandering is unconstitutional.

"My favorite case is Rideau v. Louisiana," wrote Justice Stewart, without elaboration. His 1963 opinion reversed a murder conviction because television broadcasts of the defendant confessing to the sheriff had biased jurors at the subsequent trial.

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Brennan: Tipping the Scales of Justice at 80

upreme Court's Most Enduring Figure Celebrates His Longevity in Liberal Fashion

By Al Kamen
Washington Post Staff Writer

A unanimous Supreme Court ng "Happy Birthday" yesterday at surprise party for Justice William Brennan Jr., the court's oldest, gest-sitting justice and leading eral.

The justices and some 200 court ployes followed with a rendition "For He's a Jolly Good Fellow" d lengthy applause before cutting giant cake in the court's ornate st Conference Room.

Brennan, who turns 80 today, s at a momentary loss for words. "I guess I'm supposed to say nething," he said. "And I thought ning 80 wouldn't be any fun." e affable Brennan worked the om for nearly an hour, shaking nds with his male colleagues and kissing the court's only female justice, Sandra Day O'Connor.

President Dwight D. Eisenhower once said that appointing Brennan to the court was the second biggest mistake he ever made. (The late Chief Justice Earl Warren was the first on that list.) Thirty years later, Brennan, the son of Irish immigrants, becomes only the seventh sitting octogenarian in the court's history, according to the court's news officer.

Brennan, who rides an exercise bicycle for 30 minutes every morning and has the handshake of a dockworker, says he has no intention of quitting as long as his health holds out. He had a medical checkup last week and says his health is "first-rate."

For six years observers have predicted that President Reagan would be able to fill several vacancies on the aging court. Five of the justices are over 76: Chief Justice Warren E. Burger and Justice Lewis F. Powell are 78; Justices Thurgood Marshall and Harry A. Blackmun are 77.

Conservatives, who often single out Brennan as the archetypal liberal "activist," were hopeful that either he or fellow liberal Marshall would be among those to retire.

So far, however, there has been only one vacancy—O'Connor in 1981 replaced Justice Potter Stewart—and none of the older justices is giving any indication of a voluntary retirement in the near future.

In the late 70s Brennan spoke of retiring. Friends said he seemed tired. He was treated in 1978 for a cancerous tumor in his throat and suffered a mild stroke in 1979.

But he has been healthy since then, and he says he hasn't slowed. Alone among his colleagues, he still personally reviews all of the thousands of petitions that come to the court. Other justices have their clerks screen the petitions.

"I always give at least half a day on Saturday" to reviewing petitions, Brennan said in a recent interview, and "sometimes a good deal more than that. But it's never been any different for me. When you have been here as long as I have and you've had so many of these damn things to look at, it's not too hard a job."

And Brennan's memory remains formidable. He illustrated by rattling off a string of cases from the 1950s to demonstrate a point.

Brennan's views have been consistently liberal throughout his three decades on the court, but his role has changed dramatically.

Brennan's task for 13 years under Chief Justice Earl Warren was to create a consensus on the court to extend the basic protections of the Bill of Rights to the states. He built an impressive record, authoring some of the most important decisions of the Warren court and rarely finding a need to dissent.

During the last 17 years under Burger, however, his role has been to preserve the legacy of the Warren court. There, too, he feels that effort has been largely successful, though he now dissents from a third of the court's approximately 150 opinions each year.

"The only one [amendment] that [the Burger court] has gone drastically far" in limiting is the Fourth Amendment, Brennan said. The high court has consistently cut back in recent years on the "exclusionary rule" which prohibits the use of illegally obtained evidence in court. Brennan feels that rule is the "warp and woof of the Fourth Amendment," which protects individuals from unreasonable searches.

Those protections have begun to "unravel" Brennan said. "When I got here it was unraveled and then with [several key rulings] we put it back on its feet and now its being unraveled again, I'm afraid."

One area in which Brennan's efforts have been to no avail has been the death penalty. Brennan and Marshall stand a lonely vigil on the court against capital punishment.

Brennan, always the optimist, says "someday that may fall. After all, 'separate but equal' went down the drain with *Brown v. Board of Education*. I can give you any number of instances," he said, "when better knowledge and wisdom" dictate overturning prior rulings.

Winning or losing, Brennan seems able to maintain cordial relations with all the justices. "In 30 years I've sat with 20 justices," Brennan recalled, "the original eight, all of whom are dead," four others who have come and gone, and the current court. "I have never had a cross word with any of the 20, not one. My personal relations with everyone have been most cordial and amiable, however different our views."

WASH. TIMES: 7-24-84

Reagan administration is big winner in decisions

1 of 3

By Elder Witt
CONGRESSIONAL QUARTERLY

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No matter what happens in November, Ronald Reagan has already won big this year.

In a series of major decisions, the Supreme Court has put its stamp of approval on the administration's proposals for significant changes in national policy on questions of civil and individual rights, business, environmental and criminal law.

The string of victories marks a dramatic comeback for the White House. During Reagan's first three years in office, the high court repeatedly rebuffed administration arguments that it was time to rethink the court's position on matters ranging from abortion and busing to tax policy and affirmative action.

This year, the court found the administration's arguments — presented by Solicitor General Rex E. Lee and his office — considerably more persuasive.

Reagan's victories were only the most visible aspect of the most conservative court term in decades.

The 1983-84 term — the 15th since Warren E. Burger took over the chief justice's post from Earl Warren — looked like a watershed term, one in which the Supreme Court turned firmly away from judicial activism aimed at enlarging individual rights to a new posture of committed, conservative restraint.

In virtually every area of the law, the court swung its weight to the side of the government, deferring to the authority of Congress, the executive branch, states and cities. Of all the groups whose rights were argued before the court this term, only women came away with notable victories. And even they could not claim a clean sweep.

The court this term declared laws or government practices in violation of the Constitution in only 17 of the more than 150 cases it decided. Fifteen of those involved state laws or practices; only two concerned federal laws. Those two were the law barring editorializing by public broadcast stations and part of a law limiting photographic depictions of U.S. currency.

Time and again, the court reversed rulings by the 12 U.S. circuit courts of appeals, which are dominated by relatively liberal judges named by Democratic presidents, particularly President Jimmy Carter. The court reversed lower courts in 93 cases, affirming them in only 38 — a clear contrast with last term, when it reversed 80, but affirmed 55.

The nation's most powerful judges curtailed the authority of other federal judges to enforce federal and state laws, insisting that the judiciary should generally defer to the "political" branches of government.

Election-year concern about the effect of a second term for Reagan, in which he might appoint additional conservative justices, seemed almost irrelevant for the short term.

By replacing the moderate Potter Stewart with the conservative Sandra Day O'Connor in 1981, Mr. Reagan has already tipped the balance of the court to the right. Additional Reagan justices would merely reinforce that trend — and ensure that it would continue into the future.

In criminal law, the court's record over the last several terms has been decidedly conservative, favoring the arguments of prosecutors and police three or four times as often as those of defendants. That trend continued and intensified this year, as the justices carved out major new exceptions to key evidentiary rules aimed at protecting the rights of suspects.

Despite its conservative views on criminal law, until this term the court had continued the Warren court's tradition of enlarging the constitution's protection for individual rights and civil rights, and expanding the scope of First Amendment guarantees.

This year, however, the court breached that tradition as often as it honored it. The justices voted to limit the reach of affirmative action, to narrow the scope of the ban on sex discrimination by federally aided colleges, and to make clear that the constitution provides little protection for the privacy or property of prison inmates. The court also found no constitutional problems in congress' decision to deny federal education aid to young men who failed to register for the draft, or in a city's move to ban political signs on public property.

The court was unanimous or nearly so in an unusually high percentage of its cases. Almost 70 percent of its decisions came without dissent or by votes of 8-1 or 7-2, up from 60 percent in the last term.

When only one member of the court dissented, it was usually Justice John Paul Stevens, maintaining his maverick reputation. When two justices dissented, they were Thurgood Marshall and William J. Brennan Jr. And in well over half of the cases decided by 6-3 votes, the three were Stevens, Brennan and Marshall.

Justices Byron R. White and Harry A. Blackmun cast the key votes defining the term's conservative character.

As in the 1982-83 term, White was the swing vote in a number of cases, and this term, he swung more often to the conservative than to the liberal side. When the court divided 6-3 or 5-4, White voted with the liberals in only one of every four cases, a definite change from the previous term, when he had joined the liberals — Brennan, Marshall, Stevens and Blackmun — on one of every three close cases.

Justice Blackmun, a reliable new ally of the court's liberals during the 1982-83 term, pulled away from them this time around. He voted with the conservative majority on most of the major issues of the term — particularly in the field of criminal law, but also to narrow the reach of affirmative action and of the law banning sex discrimination. Altogether, Mr. Blackmun sided with the liberals only half as often on close cases this term as last.

Although the administration fared far better than last term, when it sometimes commanded the vote of no more than one justice, President Reagan won many of his legal victories by narrow 5-4 and 6-3 margins.

Mr. Reagan's success was due in part to the choice of issues upon which the administration took a position. Last term's major setbacks came on abortion, tax exemptions for discriminatory private schools, and rescission of auto seat-belt and air-bag regulations.

In all three, the solicitor general was asking the court to approve major changes in settled areas of law and public policy, changes sought primarily by conservative activists or by big business.

This year, the administration took its stand on less explosive issues, endorsing positions supported by a broader constituency in the nation at large.

Arguing that the primary goal of Warren court rulings separating church and state or guaranteeing fair treatment for criminal suspects had been attained, the solicitor general told the justices that lower courts were taking the precedents one step too far — a trend the court should halt.

Voluntarily joining pending cases as a "friend of the court," Solicitor General Lee successfully urged the justices to permit more public use of religious symbols, to curtail the reach of affirmative action, and to approve new exceptions to the controversial exclusionary rule, which bars use in criminal trials of illegally obtained evidence.

In the major policy-change cases in which the government was itself a party, administration attorneys skillfully tailored their arguments to the justices' inclination to take a literal, restrictive view on questions of statutory law.

The justices approved a narrow view of key sections of the Clean Air Act and of Title IX of the 1972 Education Amendments, the ban on sex discrimination by federally funded education programs.

In so doing, the court contributed to a major goal of the Reagan administration: easing the burden of federal regulation of American life.

Mr. Reagan's representatives capitalized on the fact that he and a majority of the justices share the belief that the role of the federal judiciary is a limited one — that judges have no business making policy, but should defer to the judgment of Congress and the executive unless a constitutional breach or clear abuse of administrative discretion is involved.

The administration sounded this theme again and again in its arguments this year, and the justices responded in the same key.

"Federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do," declared the court June 25 in a case involving interpretation of the Clean Air Act.

Upholding the administration's power to restrict travel to Cuba, the court June 28 reiterated an earlier dictate that matters relating to the conduct of foreign relations "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

And a day later, as it upheld the administration's rule banning overnight sleeping by demonstrators in Lafayette Park, Mr. White declared that nothing in the court's precedents "assign to the judiciary the authority to replace the Park Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise . . ."

Key Supreme Court rulings handed down in '84

THE ENVIRONMENT

• Clean Air Act – The administration scored another victory when the court reinstated clean air regulations that environmentalists had challenged as too permissive. The justices said the Environmental Protection Agency was acting within its power when it adopted the so-called "bubble concept" for enforcing key provisions of the law in areas that had not yet met national clean-air standards.

• Offshore Oil Leasing – The justices ruled that states may not block federal offshore oil lease sales by arguing that the sales are inconsistent with state plans for protecting their coastal areas. Such objections may be raised only at later stages of the development process, when exploration drilling and production begin, the court said. The justices said lease sales are not actions "directly affecting" a state's coastal zone, and thus did not have to be consistent with state protective plans.

• Pesticide Registration – The court found "no constitutional infirmity" in key data disclosure provisions of the federal law that requires pesticide manufacturers to register their products with the EPA prior to marketing. The justices said lease sales are not actions "directly affecting" a state's coastal zone, and thus did not have to be consistent with state protective plans.

• Nuclear Safety – In a case involving the late Karen Silkwood, the court ruled that juries may assess punitive damages against employers whose workers are injured by exposure to radioactive materials. In deciding Silkwood v. Kerr-McGee, the justices held that states could permit such damage awards even in cases where federal regulators had found no serious violation of federal nuclear safety rules.

PERSONAL RIGHTS

• Sex Bias – The administration's first major victory this term came Feb. 28, when the court in Grove City College v. Bell adopted a narrow view of Title IX. Discarding a decade of administrative interpretation, the court ruled that only the particular program receiving federal aid at a school is affected by the ban. No longer could the government insist that because a school's students received federal aid, its athletic program could not discriminate against women students. Congress moved quickly, however, to amend Title IX and similarly worded laws to overturn the court's decision.

The court's record in this area was not unremittingly conservative. Except for the Title IX ruling, women did well again this term, winning decisions applying the job bias ban of the 1964 Civil Rights Act to partnership decisions by law firms, and clearing the way for states to compel the Jaycees and organizations like it to admit women as full members.

• Affirmative Action – On June 12, the court held that Congress had denied federal judges the power to modify the operation of a valid seniority system in order to preserve hiring gains under an affirmative action program. In layoff situations, the traditional "last hired, first fired" seniority rule prevails, the justices said.

Although the sweep of the court's ruling was not clear, Attorney General William French Smith claimed the decision meant that "federal courts cannot impose quotas based upon racial considerations in employment relationships."

• Tax Exemptions and Private Schools – On July 3, the court — which a year earlier had upheld the power of the Internal Revenue Service to deny discriminatory private schools tax-exempt status — blocked a suit by black parents seeking to force the IRS to toughen its policy.

• Prisoners' Rights – The same day, the court held that the Constitution does not protect the privacy of prison inmates. The sweep of Chief Justice Burger's language in this decision caused Justice Stevens to protest that the court was taking a "hands-off" attitude, leaving prison officials complete discretion to deprive prison inmates of basic human rights.

• Student Aid/Draft Registration – The court found nothing unconstitutional about Congress' denial of federal education aid to young men who failed to register for the draft. A lower court had declared the measure an impermissible bill of attainder, imposing punishment through legislation and without trial, but the court reversed that holding and reinstated the law.

• Travel Restrictions – Travelers lost their challenge to the administration's power to limit travel to Cuba. Restrictions imposed in 1982 were justified by "weighty concerns of foreign policy," the 5-4 majority said.

• Illegal Aliens – Aliens working illegally in the United States won a ruling granting them the protection of federal labor law, but in another case, the court upheld the power of immigration agents to conduct "sweeps" of factories as they look for illegal aliens. Aliens fighting deportation with the argument that they will be persecuted in their home country lost their effort to have those arguments judged by a less strict standard than in the past.

• Race and Custody – The court ruled that states may not take the race of a parent's new spouse into consideration when making decisions about the custody of a child from a former marriage. The administration had urged the court to issue such a decision.

BUSINESS

• Antitrust – The administration this term mounted a major assault on several aspects of antitrust policy. It joined cases challenging the ban on resale price maintenance, the view that "tying" arrangements — in which a supplier of one product compels customers to buy a second product as well — are almost always illegal, and the concept that a company and its wholly owned subsidiary can conspire together to reduce competition.

The administration won two out of three of these cases. Congress moved to block the administration's attorney from arguing the resale price maintenance issue, and the court decided that particular case without reaching that issue.

But in March the court held that "tying" arrangements are not invariably forbidden by the antitrust laws. And in June, the justices ruled that a parent company and its wholly owned subsidiary cannot conspire together to restrain trade.

The court followed the administration's lead in the other direction on an antitrust case involving NCAA's control of televised college football. The court ruled that a clear violation of antitrust law, as both a lower court and the administration had already decided.

• Home Video/Copyright Law – The court finally clarified the copyright situation concerning the home use of videotape recorders to record copyrighted television shows, ruling that such a practice was not copyright infringement.

• Bankruptcy and Labor Contracts – Business won a short-lived victory Feb. 22 when the court held that companies filing for bankruptcy could unilaterally abrogate their labor contracts; Congress quickly reversed that decision.

• Cable TV Content – A more lasting success came when the court denied states the power to regulate the content of cable television broadcasts, saying the Federal Communications Commission had pre-empted this area.

• Job Safety, Subpoenas, Job Bias – Business was far more successful when allied with the administration than when it challenged the position of a federal agency.

The court rejected the businessman's position in cases involving the right of workers to refuse to work in unsafe conditions, the government's power to use administrative subpoenas to obtain business records, and the government's power to bring broad job bias charges against a company.

CONSTITUTIONAL ISSUES

● **Church-State** – In March, the court lowered the wall of separation between church and state, permitting the city of Pawtucket, R.I., to include a Nativity scene in its Christmas holiday display. The administration had urged the justices to overrule a lower court's ban on such a display, arguing that the First Amendment did not "require government wholly and rigidly to exclude religion from our public occasions."

● **Sign Ban, Sleep-ins, Currency Photos** – In later rulings, the court upheld Los Angeles' ban on political signs on public property, the administration's prohibition on overnight sleeping in Lafayette Park across from the White House, and the century-old law limiting the photographic or pictorial reproduction of American money.

● **Libel** – The press lost in its effort to limit the jurisdictions in which it could be sued for libel, but won vigorous affirmation from the court of the vitality of the landmark 1964 New York Times v. Sullivan ruling requiring proof of "actual malice" by public figures suing the media for libel damages.

● **Open Courtrooms** – The press also won decisions that jury selection proceedings and most pretrial hearings on contested evidence should be open to newsmen and the public.

● **Public Broadcasting Editorials** – In two of the handful of cases in which the court found a law unconstitutional, it struck down the 1967 law banning editorials on public broadcast stations that accept federal funds and invalidated Maryland's law restricting the amount of money that charities could spend to raise funds.

● **Exclusionary Rule** – The court approved two major exceptions to the controversial exclusionary rule barring use of illegally obtained evidence. The first provided that such evidence may be used if it is clear that it would have inevitably been discovered for reasons independent of the improper police conduct.

And as the term ended, the court gave prosecutors what they had been seeking for almost two decades — a "good faith" exception to the rule. The court held that when police conduct a search based on a warrant, only to find out later that the warrant was defective, the evidence obtained in the search may still be used in court.

● **Miranda Warnings** – In June, the court approved the first exception since 1966 to the rule set out in Miranda v. Arizona that suspects must be advised of their rights before they may be questioned. In some situations, the court held, considerations of public safety demand that an officer question a suspect first — about, for example, the where abouts of his weapon — and only then inform him of his constitutional rights.

But later in the term, the court reaffirmed that Miranda applies to questioning of all persons in custody, regardless of the seriousness of their alleged offense. Persons stopped on the road and questioned briefly in regard to possible traffic offenses need not be informed of their rights immediately, the court held, but once they are arrested, they must be advised of their right to silence and to the aid of a lawyer.

● **Capital Punishment** – In two important rulings on capital punishment, the court found no constitutional basis for requiring review by courts of death sentences to ensure they are proportional to the punishment imposed on others convicted of similar crimes. Later in the term, the court upheld the power of trial judges to overrule jury recommendations of leniency in capital cases and to impose a death sentence instead.

● **Preventive Detention** – The court also upheld New York's preventive detention law for juveniles, the first time it had given full consideration to any preventive detention law.