BYU Law Review

Volume 1983 | Issue 1 Article 3

3-1-1983

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Justice O'Connor: A First Term Appraisal

*Robert E. Riggs**

I. Introduction

The appointment of Judge Sandra Day O'Connor to the United States Supreme Court was one of the most widely-acclaimed acts of the new Reagan administration. Not yet six months into his term of office, the President fulfilled a campaign promise to nominate a woman to fill one of the first Supreme Court vacancies in his administration.[1] The nomination was praised by women's groups because she was a woman,[2] by Republicans because of her sterling political credentials,[3] by lawyers because of her solid legal background,[4] by Senators because of her alert, self-possessed responses at the nomination hearings,[5] and even by Democrats because, "If you have to have a Republican on the court . . . she's about the best we could hope for."[6] The only discordant notes came from the far right, where

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1. N.Y. Times, July 8, 1981, at A1, col. 4; N.Y. Times, Oct. 15, 1980, at A1, col. 1.

2. N.Y. Times, July 8, 1981, at A1, col. 4; *The Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 278-80 (1981) (statement of Kathy Wilson, National Women's Political Caucus); *id.* at 398-401 (testimony of Eleanor Smeal, President, National Organization for Women) [hereinafter cited as *Hearings*].

3. *Hearings, supra* note 2, at 7 (statement of Sen. Paul Laxalt, R-Nev.); *id.* at 32 (statement of Sen. Barry Goldwater, R-Ariz.).

4. *See, e.g., Hearings, supra* note 2, at 405-11 (testimony of Lynn Hecht Schafran, Esq., National Director of the Federation of Women Lawyers' Judicial Screening Panel).

5. Taylor, *Rather an Unknown*, N.Y. Times, July 8, 1981, at A13, col. 1.

6. Ayers, *A Reputation for Excelling*, N.Y. Times, July 8, 1981, at A1, col. 4. The statement was attributed to a "leading Democratic politician in Arizona." The unidentified Democrat may have been Arizona Congressman Morris K. Udall, who said essentially the same thing a few days later in a Washington Post newspaper column. He praised O'Connor as a "practical, conscientious, fair and open-minded judge" with a "reputation for treating the law in a businesslike way," and commented,

> My Democratic friends ought to be grateful for this appointment. It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats. He's going to appoint people to the right of center whenever he can.

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the National Right to Life Committee, Moral Majority, and related groups denounced the nomination because of her past support of the Equal Rights Amendment and some allegedly proabortion votes during her tenure as a member of the Arizona State Senate.[7]

With such broad spectrum support the appointment process proceeded without a hitch. After two days of generally friendly questioning at a hearing before the Senate Judiciary Committee,[8] the appointment was confirmed by a Senate vote of 99-0.[9] On September 25, 1981, she took the oath of office as 102nd Justice and first woman to serve on the Supreme Court of the United States.

This Article will appraise Justice O'Connor's performance during her first term on the Supreme Court in light of expectations raised at the time of her appointment. The nature of the expectations will be established by a brief review of preappointment clues to her judicial competence, her concept of the judicial role, and her substantive biases. Her judicial performance will be examined by means of a statistical summary of her first term voting record, followed by a more detailed analysis of her decisions relating to criminal justice, the exercise of federal court jurisdiction, and civil liberties. A final section will discuss deference to state authority within the federal system as a persistent value running through her judicial decision making.

Udall, *A Master Stroke*, Washington Post, July 13, 1981, at A13, col. 2, *reprinted in Hearings*, *supra* note 2, at 38.

Other liberal Democrats were quick to join the chorus of approval. House Speaker Tip O'Neill called Reagan's choice "the best thing he's done since he was inaugurated." Senator Edward Kennedy was equally positive: "Every American can take pride in the President's commitment to select such a woman for this critical office." Magnusen, *The Brethren's First Sister*, TIME, July 20, 1981, at 8, 9.

7. N.Y. Times, July 8, 1981, at A1, col. 6; *Hearings*, *supra* note 2, at 280-82 (statement of Dr. Carolyn F. Gerster, Vice President in Charge of International Affairs, National Right to Life Committee, Inc.); *id.* at 282-83 (statement of Dr. John C. Willke, President, National Right to Life Committee, Inc.); *id.* at 342-48 (testimony of Dr. Carl McIntire, President, International Council of Christian Churches); *id.* at 385-87 (testimony of Anne Neamon, National Coordinator, Citizens for God and Country, and Trustee, Truth in Press, Inc.).

8. Detailed in *Hearings*, *supra* note 2.

9. 127 CONG. REC. S10188 (daily ed. Sept. 21, 1981) (Democratic Senator Max Baucus of Montana was out of town and did not vote on the nomination).

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II. Preappointment Assessments

A. *Estimates of Judicial Competence*

The public scrutiny preceding Justice O'Connor's accession to office provided a number of clues to her probable performance on the High Court. The evidence suggested that she would be competent, if not brilliant. The unanimous American Bar Association Committee report, based on interviews with numerous lawyers, judges, law professors, and others familiar with her work, concluded that she met "the highest standards of judicial temperament and integrity" and was "qualified from the standpoint of professional competence for appointment to the Supreme Court of the United States."[10] The wording of the endorsement was chosen carefully: she received the "highest" endorsement with respect to "judicial temperament and integrity" but only a satisfactory report on her "professional competence."[11] The Committee's unwillingness to give her the highest rating on competence sprang from its conclusion that her "professional experience [had] not been as extensive or challenging as that of others who might be available."[12] Nevertheless, the Committee was satisfied that she was competent and qualified to fill the office because of "her outstanding academic record,[13] her demonstrated intelligence and her service as a legislator, a lawyer and a trial and appellate judge."[14] No one testified otherwise

10. *Hearings, supra* note 2, at 272.

11. By contrast, Justices Stevens, Powell, and Rehnquist, the most recent appointees preceding O'Connor, received from the ABA Committee the "highest" rating on all three attributes—temperament, integrity, and competence. In the case of Justice Rehnquist, a dissenting minority of the ABA Committee would have withheld the "highest" rating. *See Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 17-18 (1975) (testimony of Warren Christopher, Chairman, ABA Standing Committee on the Federal Judiciary); *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. 1-2, 5 (letters to Hon. James O. Eastland from Lawrence E. Walsh, Chairman, ABA Standing Committee on the Federal Judiciary).

12. *Hearings, supra* note 2, at 277. In addition, the Committee concluded that her opinions in the Arizona appellate court were "competently written" with a "clear and logical" writing style, but were generally not of a subject matter calling for "the elaborate legal analysis of complex social issues often found in Supreme Court decisions." *Id.*

13. Stanford A.B., 1950, magna cum laude; Stanford LL.B., 1952, Law Review, Order of the Coif, third of 102 in the 1952 graduating class (Justice William H. Rehnquist graduated first in the same class). *Id.* at 47, 113, 274.

14. *Id.* at 272. Her experience included service as a deputy in the office of the San Mateo County District Attorney during 1952 and 1953 while her husband John was finishing law school; civilian attorney for the U.S. Army Quartermaster Corps in Frank-

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at the Hearings, and no voice to the contrary was heard in any of the public comment on her nomination and appointment, except for the right-wing ideological objections.

B. Testimonials of Judicial Restraint

Aside from the issue of competence, the evidence suggested that her approach to the new task would emphasize judicial restraint—expressed through deference to legislatures as the policy-making branch of government, respect for precedent, avoidance of constitutional questions when narrower grounds for decision are available, and a determined effort to construe constitutional text in light of the framers' intent, as a basis for constitutional decisions. Her own testimony at the Hearings was unmistakably to that effect. In an opening statement to the Senate Judiciary Committee, the only specific reference to her personal view of the office was a pointed endorsement of judicial deference to legislative determinations. The three branches of government have "separate and distinct roles," she said, and "the proper role of the judiciary is one of interpreting and applying the law, not making it."[15] In subsequent questioning by members of the Committee she reiterated the same philosophy of deference to legislatures as the policy-making branch of government.[16] Her views on stare decisis were somewhat more equivocal since, historically, most courts have occasionally felt the need to overrule prior precedent. Under questioning she distinguished statutory interpretation by the judiciary, which Congress can change by subsequent enactment, from interpretation of the Constitution, which Congress cannot change. With constitutional precedents, the justices should be willing to reconsider prior rulings and might even have an "obligation . . . to overturn [a] previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation."[17] Nevertheless, constitutional precedent is not to be taken lightly.

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furt, West Germany, 1954-57, while her husband served in the Judge Advocate General's Corps; private practice in Maryvale, Arizona, 1958-60; assistant attorney general for the State of Arizona, 1965-69; member of the Arizona Senate, 1969-75, majority leader 1973-74 (appointed by a Republican governor in 1969 to fill a Senate vacancy, subsequently elected in 1970 and 1972); trial court judge, Maricopa County (Phoenix) Superior Court (elected in 1974, served 1975-79); and intermediate appellate court judge, Arizona Court of Appeals, 1979-81 (appointed by a Democratic governor). *Id.* at 47, 113.

15. *Hearings, supra* note 2, at 57.

16. *E.g., id.* at 60.

17. *Id.* at 83.

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Although "not cast in stone, . . . it is still very important."[18]

In discussing the judicial role she specifically endorsed the principle of "judicial restraint,"[19] which she identified, at least by way of illustration, with the practice of deciding cases upon "appropriately narrow grounds"[20] and upon "grounds other than constitutional grounds where that is possible."[21] During the questioning she also espoused the interpretivist concept of judicial review[22] which denies the legitimacy of giving content to constitutional rules by reference to natural law, contemporary social values, or any other source external to the Constitution. This viewpoint was obvious in her response to Senator Biden's suggestion that significant changes in social mores might justify the Court in assuming, from time to time, a posture of judicial activism: "Well, Senator, with all due respect I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed . . . ."[23] This did not rule out changing interpretations of a particular constitutional provision, but any change should be based on the Court's "research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision."[24] Taken in the aggregate, these comments placed the nominee squarely in the mold of the judicial conservative.

Such comments were consistent with the estimate of those familiar with her record as an Arizona judge. Although her daily grist on the Arizona intermediate appellate court consisted of appeals from criminal convictions, workmen's compensation awards, unemployment insurance disputes, divorce settlements, tort actions, and real property questions, rather than matters of broad social or constitutional import, her opinions did pay close attention to statutory text and legislative history. In the words

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18. *Id.*

19. *Id.* at 60, 108.

20. *Id.* at 108.

21. *Id.* at 60.

22. As John Hart Ely defines the term, "interpretivism" means that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," while "noninterpretivism" expresses "the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

23. *Hearings, supra* note 2, at 67.

24. *Id.*

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of one fellow lawyer, she "tends to be a literalist with acute respect for statutes."[25] O'Connor's experience as a former state legislator was also seen as inclining her toward judicial self-restraint, particularly in considering the constitutionality of state legislation.[26]

Perhaps even more to the point, Judge O'Connor was firmly on record in support of restraint by federal judges in matters falling within the jurisdiction of state courts. In an article appearing in the *William and Mary Law Review*[27] just weeks before her nomination, she had lauded recent Supreme Court decisions limiting federal habeas corpus review of state criminal convictions,[28] while decrying the countertendency to enlarge federal jurisdiction at the expense of state courts through vastly expanded litigation under 42 U.S.C. § 1983.[29] To reverse this trend she suggested that Congress eliminate or restrict federal court diversity jurisdiction, require exhaustion of state remedies as a prerequisite to section 1983 actions, and limit or disallow recovery of attorneys' fees under section 1983.[30] Ideally, she indicated, state courts should be allowed "to rule first on the constitutionality of state statutes,"[31] and state judgments on federal constitutional matters should be safe from collateral attack in federal courts "where a *full* and *fair* adjudication has been given in the state court."[32]

Such a view obviously reflects "the perspective of a state court judge,"[33] but that perspective, and the impact of her experience in state government as a legislator and assistant attorney general, would not necessarily be abandoned after elevation to the federal bench.[34] As the first appointee in twenty-four years

25. Magnusen, *supra* note 6, at 10 (quoting Phoenix lawyer John Frank).

26. Footlick & Friendly, *A Woman for the Court*, NEWSWEEK, July 20, 1981, at 18.

27. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

28. *Id.* at 803-04. She cited Sumner v. Mata, 446 U.S. 1302 (1980); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); and Wainwright v. Sykes, 433 U.S. 72 (1977).

29. O'Connor, *supra* note 27, at 808-10. She also expressed misgivings about the enlarged jurisdiction conferred on bankruptcy courts by the Bankruptcy Reform Act of 1978. *Id.* at 810-11.

30. *Id.* at 810, 815.

31. *Id.* at 815.

32. *Id.* (emphasis in original).

33. She identified her bias in the title of her article. *Id.* at 801.

34. But then it might. The only other sitting justice with previous experience as a state court judge is William J. Brennan, Jr., who was a member of the New Jersey Supreme Court prior to his appointment to the United States Supreme Court. Of justices

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with prior state court service, and the first in thirty-two years who had served in a legislative body,[35] she might be expected to have a sympathetic appreciation of the role of state courts and of state governments in the federal system, and nothing in her published comments or her responses at the Hearings dispelled that impression.

When the O'Connor nomination was first announced, Attorney-General William French Smith emphasized to the press that she "shared the President's 'overall judicial philosophy' of 'restraint' and deference to the legislative branch in making law";[36] and the President subsequently praised her judicial philosophy as "one of restraint."[37] As journalist Anthony Lewis pointed out at the time, such expressions may be little more than the "pieties" that any Supreme Court appointment, at least in a conservative administration, is likely to evoke.[38] But when the nominee herself says it, the politicians say it, and those familiar with her record also say it (even though they may not all mean the same thing when they say it), the label of "judicial restraint" begins to acquire some credibility.

C. *Clues to Substantive Bias*

If one could expect the new justice to adopt a posture of judicial restraint, guidelines to her probable response on particular substantive issues were less well marked. On the liberal-conservative spectrum she was generally regarded as conservative but no ideologue—indeed, a moderate rather than an extreme conservative.[39] Vociferous opposition to the appointment by the far right indicated unmistakably that she was not "one of them." Her political opponents on the Democratic side of the aisle recognized her political conservatism but regarded her as a worthy

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presently sitting, he is among those most prone to overturn state court decisions and preempt state judicial processes.

35. Sherman Minton, appointed by President Truman in 1949, had served as U.S. Senator to Indiana from 1935 to 1941. 4 L. Friedman & F. Israel, The Justices of the Supreme Court: Their Lives and Major Opinions 2699-700 (1969). Justice Potter Stewart, whose resignation created the vacancy filled by Justice O'Connor, had served two terms on the Cincinnati City Council. *Id.* at 2923.

36. Taylor, *supra* note 5.

37. Lewis, *Judicial Restraint: No Fixed Principle,* N.Y. Times, Sept. 27, 1981, at E20.

38. *Id.*

39. Footlick & Friendly, *supra* note 26, at 16; Magnusen, *supra* note 6, at 8-9; Taylor, *supra* note 5. N.Y. Times, Sept. 13, at E20, col. 1.

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foe—capable, fair, and openminded.[40] On issues likely to come before the High Court she had few statements on the public record.

During the Hearings on her nomination she prudently refused to be very specific on matters she might later be called upon to adjudicate. Various Senators tried to draw her out on such issues as abortion, the death penalty, the exclusionary rule, school busing, television in courtrooms, women's rights, and racial discrimination.[41] While she sometimes hinted at her personal views—for example, she expressed doubts about the efficacy of court-ordered school busing to achieve integration, and had reservations about the exclusionary rule[42]—she was careful to distinguish her own preferences as an individual from conclusions she might reach as a judge. A careful reading of her responses to questions on criminal justice suggested that she would be inclined to strike the balance in favor of society rather than the criminal defendant.[43] In other matters, however, her responses were appropriately guarded to avoid any improper commitment on matters that might come before the Court. Thus the Hearings provided little specific guidance to her likely judicial posture on particular substantive issues.

Her decisions on the Arizona appellate bench are scarcely more helpful in pointing specific directions because they touch on few constitutional issues and federal law questions.[44] For the most part they suggest an approach oriented toward careful analysis of facts and law rather than a preference for any particular substantive outcomes. A recent study by Schenker has carefully classified by subject matter the eighty-two state court appellate decisions in which she participated and identified only

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40. *See* comments of Democratic Congressman Morris K. Udall, *Hearings, supra* note 2, at 37; Arizona Governor Bruce Babbitt, *id.* at 255-61. Alfredo Gutierrez, Democratic leader in the Arizona State Senate during O'Connor's tenure there, spoke of her "sincerity," "ability," and "great fairness," and called the appointment "an excellent sign for the minority communities of the United States." *Id.* at 230.

41. *See, e.g., Hearings, supra* note 2, at 78-79, 98, 126-27 (abortion); 128-29 (death penalty); 79-81, 93-96, 146-47 (exclusionary rule); 78-79, 119 (school busing); 141-42 (television in courtrooms); 76-78, 127-28 (women's rights); 148-49 (racial discrimination).

42. *See, e.g., id.* at 119 (school busing); 79-81 (exlcusionary rule).

43. *Hearings, supra* note 2, at 73, 80, 166.

44. Magnusen, *supra* note 6, at 10; Taylor, *supra* note 5. Yale law professor Paul Gewirtz, quoted in Footlick & Friendly, *supra* note 26, at 18, probably touched the heart of the matter: "It's not only that *we* don't know what her views are on some issues, *she* probably doesn't know what her views are either . . . . She hasn't been put to the test of figuring them out." (Emphasis in the original).

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three outside the criminal law area that raised federal constitutional questions.[45] The others dealt with criminal appeals (17), workmen's compensation (22), unemployment insurance (10), and a variety of other civil cases.[46]

Besides classifying the O'Connor decisions, Schenker proceeds from the thesis that O'Connor's background as an assistant state attorney general, a state legislator, and a state trial and appellate court judge, taken together with the views expressed in her William and Mary lecture, might presage a sympathetic receptiveness to state and local government interests asserted before the United States Supreme Court.[47] Schenker's examination of the relevant cases does not point unequivocally in that direction, however. Of four cases raising a challenge to the taxing power of state and local governments, Justice O'Connor voted twice to sustain the tax[48] and twice to invalidate it.[49] In two cases arising from disciplinary actions against teachers in state school systems, Justice O'Connor held once for the teacher[50] and once for the school governing board.[51] In two tort actions against local government units she held once for the local government[52] and once for the plaintiff.[53] In three equal protection challenges to state law, Justice O'Connor twice upheld

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45. Schenker, *"Reading" Justice Sandra Day O'Connor*, 31 CATH. U.L. REV. 487, 492 (1982). Schenker does not identify these three cases in his Table at 492, but presumably they are J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. 469, 610 P.2d 471 (Ct. App. 1980); Blair v. Stump, 127 Ariz. 7, 617 P.2d 791 (Ct. App. 1980); and Pastore v. Arizona Dep't of Economic Sec., 126 Ariz. 337, 625 P.2d 926 (Ct. App. 1981). She wrote the opinion in both *J.C. Penney Co.* and *Blair*.

46. Schenker, *supra* note 45, at 492.

47. *Id.* at 487-89.

48. J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. 469, 610 P.2d 471 (Ct. App. 1980); Univar Corp. v. City of Phoenix, 122 Ariz. 220, 594 P.2d 86 (1979). The *Univar* citation is to the Arizona Supreme Court opinion affirming Judge O'Connor's decision as a trial judge. The trial court opinion is not published.

49. State v. Central Mach. Co., 121 Ariz. 183, 589 P.2d 426 (1978), *rev'd sub nom.* Central Mach. Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) (citations are to the Arizona Supreme Court, which reversed her unreported trial decision, and to the United States Supreme Court, which ultimately vindicated her decision); Salt River Project Agricultural Improvement and Power Dist. v. City of Phoenix, 129 Ariz. 398, 631 P.2d 553 (Ct. App. 1981).

50. Orth v. Phoenix Union High School Sys., 126 Ariz. 151, 613 P.2d 311 (Ct. App. 1980).

51. Cooper v. Arizona W. College Dist. Governing Bd., 125 Ariz. 463, 610 P.2d 465 (Ct. App. 1980). O'Connor wrote the opinion for the unanimous court.

52. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (Ct. App. 1979). Citation is to appellate court case affirming decision of Justice O'Connor sitting as trial judge.

53. Lowman v. City of Mesa, 125 Ariz. 590, 611 P.2d 943 (Ct. App. 1980).

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the challenged statute[54] and once held against the state.[55] From a detailed analysis of these cases, Schenker concludes that Justice O'Connor would "fully appreciate the interests of state and local governments advanced before the Supreme Court," but that "her voting record on the state bench suggests that appreciation will not necessarily translate into votes."[56] Certainly her performance on the state bench indicates little of ideological bias for or against local government interests, but rather a discriminating concern with facts and careful attention to relevant statutory and case law.

The same posture seems apparent in the criminal appeals in which she participated. Although nine were decided for the state[57] and five for the defendant,[58] no obvious anti-defendant bias is apparent. As in the civil cases, the outcomes appear to reflect careful factual analysis and conscientious application of relevant statutes and rules of criminal procedure.[59]

Predicting a person's future behavior as a justice of the United States Supreme Court is always risky, as a number of U.S. Presidents could testify. President Dwight D. Eisenhower, for example, allegedly referred to his appointment of Earl Warren as "[t]he worst damn fool mistake I ever made."[60] More recently Justice Harry Blackmun also has proved at least a mild disappointment to the President who appointed him. At first

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54. Pastore v. Arizona Dep't of Economic Sec., 128 Ariz. 337, 625 P.2d 926 (Ct. App. 1981); J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. 469, 610 P.2d 471 (Ct. App. 1980).

55. Blair v. Stump, 127 Ariz. 7, 617 P.2d 791 (Ct. App. 1980).

56. Schenker, *supra* note 45, at 503.

57. State v. Schoonover, 128 Ariz. 411, 626 P.2d 141 (Ct. App. 1981); State v. Morgan, 128 Ariz. 362, 625 P.2d 951 (Ct. App. 1981); State v. Gessner, 128 Ariz. 487, 626 P.2d 1119 (Ct. App. 1981); State v. Wilson, 126 Ariz. 348, 615 P.2d 645 (Ct. App. 1980); State v. Byers, 126 Ariz. 139, 613 P.2d 299 (Ct. App. 1980); Juvenile Action No. J-87631, 125 Ariz. 532, 611 P.2d 119 (Ct. App. 1980); State v. Ramirez, 126 Ariz. 464, 616 P.2d 924 (Ct. App. 1980); State v. Marquez, 127 Ariz. 3, 617 P.2d 787 (Ct. App. 1980).

58. State v. Miguel, 125 Ariz. 538, 611 P.2d 125 (Ct. App. 1980); State v. Blevins, 128 Ariz. 64, 623 P.2d 853 (Ct. App. 1981); State v. Rodriguez, 126 Ariz. 104, 612 P.2d 1067 (Ct. App. 1980); State v. Reuben, 126 Ariz. 108, 612 P.2d 1071 (Ct. App. 1980); State v. Fridley, 126 Ariz. 419, 616 P.2d 94 (Ct. App. 1980). The Schenker article, *supra* note 45, lists 17 criminal cases in which Judge O'Connor participated. A Lexis search produced only 14; I am unable to account for the discrepancy.

59. The same is true of the workmen's compensation and unemployment insurance cases. About 40% of the decisions were in favor of the employee claimant, with 60% against, but the disparity in outcome seemed to hinge on the nature of the law and the facts, not on bias in favor of the state or of employers generally.

60. Magnusen, *supra* note 6, at 18. *See also* J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 200 (1979).

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paired with Chief Justice Burger as one of the "Minnesota Twins" on the right wing of the Court, Justice Blackmun dispelled that image for all time with his opinion in *Roe v. Wade*,[61] the landmark abortion decision. He has since become one of the "swing" votes on the Court with a stronger affinity for the left than for the right.[62] Nevertheless the record necessarily creates expectations, and more often than not it provides some guide to subsequent judicial decision making. If President Nixon miscalculated in his appointment of Justice Blackmun, his other three Supreme Court appointees (Burger, Powell, Rehnquist) have performed much more in line with expectations.[63]

It seems legitimate, therefore, this early in Justice O'Connor's career on the Supreme Court, to identify the expectations raised by her record at the time of her appointment and to use them as a benchmark for comparison with her subsequent performance. As distilled from the foregoing discussion of her background and public statements, those expectations may be briefly summarized:

1. As a judicial craftsman she should be technically competent, with opinions directed more to careful analysis of facts and articulation of relevant rules than to sweeping policy pronouncements.

2. In judicial review and construction of statutes, we would expect a meticulous examination of statutory wording and legislative history in the search for legislative intent, and a reluctance to invalidate legislation without clear constitutional warrant. This expectation is underpinned by her expressed leaning toward judicial restraint and her articulated concern for the preservation of a vigorous federalism.

3. Her strong verbal commitment to judicial restraint should also foreshadow a restrictive approach to the exercise of federal court jurisdiction, particularly where federal courts would encroach upon the jurisdiction of state courts or undermine by collateral attack the finality of state court decisions reached through "full and fair adjudication."

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61. 410 U.S. 113 (1973).

62. During the 1981 term he voted more often with Justice Brennan than with any other member of the Court. He voted least often with Justice Rehnquist. *See infra* Table 2.

63. Without fear of serious contradiction, one might say that the former President has reason to be satisfied, ideologically, with the performance of Justice Powell, highly pleased with Chief Justice Burger, and wildly enthusiastic about Justice Rehnquist.

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4. Substantively, her decisions should have an ideologically conservative cast, as a by-product of her deference to elected policy makers, respect for federalism, and political conservatism. Nevertheless, the conservative tone could be moderated by an approach to substantive questions that is primarily pragmatic rather than ideological.

The discussion that follows will examine the record of Justice O'Connor during her first term on the Supreme Court. At the end of that discussion the first term record will be briefly appraised to determine how closely it conforms to the preceding summary of expectations.

III. The First Term Record

A. *A Statistical Summary*

A statistical analysis may be a useful starting point.[64] Of 166 cases decided by written opinion during the term, Justice O'Connor participated in 162. She wrote thirteen opinions for the Court, twelve concurring opinions, and ten dissenting opinions. As the figures in Table 1 indicate, she wrote fewer dissents and court opinions than any other justice but was more prolific in producing concurring opinions.

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64. Except as indicated in note 65, *infra*, Tables 1 and 2 follow the system for compiling statistics used by the *Harvard Law Review* for its annual review of the Surpeme Court term. See explanation at *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 93, 301-02 (1968). The figure of 166 thus includes both signed and per curiam opinions. In conformity with the Harvard practice, I omitted per curiam decisions which merely state the decision without setting forth reasons. Cases affirmed by an evenly divided court are necessarily excluded because they are not accompanied by a written opinion. One case fell in that category this term: American Medical Ass'n v. FTC, 102 S. Ct. 1744 (1982).

The *Harvard Law Review* report on the 1981 Term presents figures on the number of opinions written by each justice, similar to the information in Table 1 of this study. *See The Supreme Court, 1981 Term*, 96 HARV. L. REV. 4, 304 (1982). Unhappily, there are a number of discrepancies between their figures and ours. For example, I found 13 dissenting opinions written by Justice Marshall while they tabulated only 4. After comparing the two sets of figures, I decided to rely upon my own count which is based on opinions published in Volume 50 of *U.S. Law Week*.

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Table 1
Authorship of Written Opinions
U.S. Supreme Court, 1981 Term

	Opinion of Court	Concurrences	Dissents	Total
Blackmun	15	16	12	43
Brennan	15	11	19	45
Burger	16	6	12	34
Marshall	15	5	13	33
O'Connor	13	12	10	35
Powell	16	13	21	50
Rehnquist	17	6	16	39
Stevens	15	16	25	56
White	19	8	17	44
Per Curiam	25	—	—	25

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*
"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
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

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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.

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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

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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).

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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

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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.

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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.

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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

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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.

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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

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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.

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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 118-19. 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.

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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

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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).

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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

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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).

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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

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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).

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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).

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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).

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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).

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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).

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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

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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).

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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).

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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).

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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

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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.

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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 sterotyping.'" *National Law Journal*, July 19, 1982, at 24, col. 3.

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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.

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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

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).

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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.

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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

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).

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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).

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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-

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.

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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

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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).

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> 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.

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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.

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).

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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.

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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.

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