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Justice O'Connor Replaces Justice Stewart: What Effect On Constitutional Cases?

CHARLES D. KELSO*

Potter Stewart, a Republican from Ohio, was appointed to the Supreme Court of the United States in 1958 by President Eisenhower. By the time of his retirement in 1981, Justice Stewart had served through the Warren years and the first decade of the Burger era.¹ President Reagan appointed Sandra Day O'Connor to fill the vacancy. A Republican from Arizona, she served in its legislature and on its Court of Appeals. Lawyers who follow decisions of the Court are asking what difference her appointment will make in constitutional cases.

The question can be approached by studying the most recent term of the Court. From the pattern of votes, particularly how Justice Stewart stood in the 5-4 decisions, some inferences can be drawn. Another approach is to look back at 5-4 decisions in previous years where Justice Stewart's vote with the majority was crucial to the outcome. Both approaches will be explored in this article.

During its 1980-81 term, the Supreme Court decided and wrote opinions in 70 cases where constitutional issues were presented. The pattern of votes was as follows:

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1. On the occasion of Justice Stewart's retirement July 2, 1981, the Chief Justice said of him that "[J]ustice Stewart has sought constantly to maintain a balanced view of the judiciary as one limited by precedent and tradition as well as by the Constitution itself. He has sought to preserve appropriate boundaries consistent with the constitutional duties placed on the judiciary by article III. His opinions particularly reflect his strong views on guarantees of individual liberty and freedom of expression and those views make up a substantial body of our jurisprudence of the past two decades. — U.S. —, 101 S. Ct. cccxcii (1981).

<u>Votes</u>	<u>Number of Cases</u>
9-0	16
8-1	9
7-2	12
6-3	21
5-4	<u>12</u>
Total:	70 ²

With respect to the issues involved in 9-0 and 8-1 decisions, one new Justice will not alter either case results or the general direction of the Court's thinking. Such decisions represent a consensus on fundamental principles and their application. Before exploring the divided areas where the vote or views of a single new Justice could make a difference, here is a brief look at constitutional areas where the Court is in unanimous or near-unanimous agreement.

The Burger Court usually does not exercise its jurisdiction to decide a constitutional question unless the record clearly presents the issue, and the Court does not exercise federal jurisdiction when an adequate state remedy is available.³ In matters of federalism, the Court has been according great deference to Congressional legislation. Social and economic enactments that do not employ a suspect classification or impinge on fundamental rights will be upheld when the legislative means are rationally related to a legitimate governmental purpose.⁴ The limits on federal power noted in *National League of Cities*⁵ are relevant

2. In a few of the cases, not all of the Justices participated. In this tabulation, a Justice who did not participate has been counted with the majority. For example, in *Minnesota v. Clover Leaf Creamery Company*, — U.S. —, 101 S. Ct. 715 (1981), counted as 7-2, the vote was actually 6-1-2 because Justice Rehnquist did not participate.

3. For example, in *Minnick v. California Dept. of Corrections*, — U.S. —, 101 S. Ct. 2211 (1981), the Court first granted and then dismissed a writ of certiorari in a case challenging the constitutionality of an affirmative action program in California prisons. The Court said there were significant ambiguities in the record concerning the extent to which race or sex had been used for promotions and the justifications for such use. *Id.* at —, 101 S. Ct. at 1223. Justice Stewart, dissenting, said he would reverse the California Court because it had wrongly held that the state may consider a person's race in making promotion decisions. *Id.* at —, 101 S. Ct. 2223. See also *Webb v. Webb*, — U.S. —, —, 101 S. Ct. 1889, 1892 (1981) where despite references to "full faith and credit" in the record below, the Supreme Court was unable to conclude that petitioner had raised a federal claim. *Parratt v. Taylor*, — U.S. —, 101 S. Ct. 1908 (1981) dealt with the adequacy of state remedies. There a prisoner had been deprived of his property, a hobby kit, by negligence of prison officials. The Court held that this deprivation fell within the fourteenth amendment. *Id.* at —, 101 S. Ct. at 1913. State tort claims procedures, however, satisfied the requirements of procedural due process. *Id.* at —, 101 S. Ct. at 1917. Justice Stewart, concurring, said that this kind of loss was not a deprivation within the meaning of the fourteenth amendment. *Id.* He agreed, however, that Nebraska had done all that the fourteenth amendment requires. *Id.* Justice Marshall, dissenting, said there was not an adequate state remedy because prison officials did not say they had informed the prisoner about his rights under state law. *Id.* at —, 101 S. Ct. at 1923.

4. *Hodel v. Indiana*, — U.S. —, —, 101 S. Ct. 2376, 2386 (1981) (upholding the Surface Mining and Reclamation Control Act of 1977).

5. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (tenth amendment bars application of federal wage and hour laws to state and local employees).

only for regulations that apply to the states *as states*.⁶ Further, the Court rather readily finds that state law conflicts with federal law or policy and, thus, that the state law must give away.⁷

Again, deference describes the posture of the Court in its 1980-81 separation of powers decision concerning Presidential action with respect to the claims of American citizens against Iran.⁸ Those claims could be suspended and the claimants required to pursue them only through binding arbitration in an Iran-United States Claims Tribunal. Over Justice Powell's dissent,⁹ the Court said, 8 to 1, that this was not a taking which required just compensation. The Court was less deferential to Congress, however, with respect to the time at which salary increases for federal judges became vested.¹⁰

Most of the constitutional decisions in 1980-81, as usual, were in the realm of individual rights. The Court protected individual rights 9-0 or 8-1 against claimed governmental interests by extending the *Miranda* doctrine to sentencing¹¹ and by predictably applying the fifth amendment's guarantee against self-incrimination,¹² due process protections for indigent defendants,¹³ the equal protection clause,¹⁴ and the free exercise of religion clause.¹⁵ On the other hand, the Court found gov-

6. In *Hodel v. Virginia Surface Mining and Reclamation Association*, — U.S. —, 101 S. Ct. 2352 (1981), the Court held that the United States could regulate surface mining of coal because that activity so affects interstate commerce as to make its regulation an appropriate means to the attainment of a legislative end. *Id.* at —, 101 S. Ct. at 2363. Distinguishing *National League*, and thereby emphasizing its limits, Justice Marshall said that the federal act did not apply to the states *as states*, *id.* at —, 101 S. Ct. at 2366; did not address matters that were indisputably attributes of state sovereignty, *id.*; and did not directly require a state to restructure its operations in areas of traditional functions, *id.*

7. See *Maryland v. Louisiana*, — U.S. —, 101 S. Ct. 2114, 2128-130 (1981) (Louisiana's "first use" tax held to interfere with Federal Energy Regulatory Commission's authority to determine pipeline and production costs).

8. *Dames & Moore v. Regan*, — U.S. —, 101 S. Ct. 2972 (1981).

9. *Id.* at —, 101 S. Ct. at 2992.

10. *United States v. Will*, — U.S. —, —, 101 S. Ct. 471, 487 (1981) (Congress can repeal an announced intention to increase the salary of federal judges but cannot lower judicial salaries once an increase becomes due and payable).

11. See *Estelle v. Smith*, — U.S. —, 101 S. Ct. 1866 (1981) (defendant must be advised that anything he says to a psychiatrist can be used against him in a sentence proceeding, *id.* at —, 101 S. Ct. at 1875, and sixth amendment right to counsel is violated if defense counsel is not advised in advance that a psychiatric examination would encompass the issue of future dangerousness), *id.* at —, 101 S. Ct. at 1876; *Edwards v. Arizona*, — U.S. —, —, 101 S. Ct. 1880, 1884 (1981) (after counsel is requested, the police may not re-interrogate unless the accused has initiated further communications and has made a valid waiver of counsel).

12. See *Carter v. Kentucky*, — U.S. —, —, 101 S. Ct. 1112, 1121 (1981) (a defendant who does not testify is entitled to an instruction that no inference of guilt should be drawn from that fact).

13. See *Little v. Streater*, — U.S. —, —, 101 S. Ct. 2202, 2211 (1981) (on request of an indigent defendant in a paternity proceeding the state must pay for blood tests of the mother).

14. See *Kirchberg v. Feenstra*, — U.S. —, —, 101 S. Ct. 1195, 1199 (1981) (a statute granting a husband power to dispose of property owned jointly with his wife denies equal protection).

15. See *Thomas v. Review Board of Indiana Employment Security*, — U.S. —, —, 101 S. Ct. 1425, 1432 (1981) (a state may not refuse to pay unemployment benefits to a worker who quit because for religious reasons he could not work on tanks).

ernmental interests sufficient to overcome claimed individual rights when it extended the scope of warrantless searches in several circumstances,¹⁶ permitted TV experimentation at trials over defendant's objections,¹⁷ allowed double-celling of prisoners,¹⁸ consecutive sentences for marijuana importing and distributing,¹⁹ and retroactive application of changes in the income tax.²⁰ Similarly, it unanimously held that the right to travel is not violated by a statute which penalizes a parent who abandons a child and leaves the state.²¹ It also held 9-0 that dismissing an indictment is not the proper remedy for breach of fourth or fifth amendment rights nor of the sixth amendment right to counsel.²²

An examination of majority opinions and dissents in the Court's 7-2 and 6-3 cases decided in 1980-81 will reveal, as in previous years, that there are consistently divergent patterns of voting behavior. On the basis of these patterns, liberal and conservative positions can be sketched out on various constitutional issues.

At one extreme of constitutional doctrine are Justices Brennan and Marshall. In the 54 constitutional cases where the Court was not unanimous, Justice Marshall dissented 29 times. Justice Brennan was the second most frequent dissenter, casting 26 votes against the majority. Table I provides additional details on the frequency of dissents by various Justices.

16. See *United States v. Cortez*, — U.S. —, —, 101 S. Ct. 690, 697 (1981) (border patrol officers could stop a car where they had an objective basis for suspecting that the driver was transporting illegal aliens) *id.*; *Donovan v. Dewey*, — U.S. —, —, 101 S. Ct. 2534, 2541 (1981) (mine inspectors can conduct warrantless searches of commercial property for safety violations).

17. See *Chandler v. Florida*, — U.S. —, —, 101 S. Ct. 802, 814 (1981) (states may experiment with TV in the courtroom if there are guidelines with respect to unobtrusiveness of equipment and defendant has pretrial opportunities to make objections).

18. See *Rhodes v. Chapman*, — U.S. —, —, 101 S. Ct. 2392, 2399 (1981) (double-celling of prisoners is not *per se* cruel and unusual punishment).

19. See *Albernaz v. United States*, — U.S. —, —, 101 S. Ct. 1137, 1145 (1981) (the double jeopardy clause is not violated by consecutive sentences for importing and for distributing marijuana because each crime requires proof of a fact that the other does not).

20. See *United States v. Darusmont*, — U.S. —, —, 101 S. Ct. 549, 553 (1981) (a change in the income tax can be applied to the entire calendar year because taxpayers have reason to know that such a change might occur).

21. See *Jones v. Helms*, — U.S. —, —, 101 S. Ct. 2434, 2439-42 (1981).

22. *United States v. Morrison*, — U.S. —, —, 101 S. Ct. 665, 669 (1981) (dismissal of an indictment is not the proper remedy for breach of fourth or fifth amendment rights nor of the sixth amendment right to counsel).

TABLE I. DISSENTS IN 70 CONSTITUTIONAL LAW CASES IN 1980-81 TERM

Justice	Vote Pattern				Total Dissents
	8/1	7/2	6/3	5/4	
Rehnquist	3	2	9	3	17
Burger	0	1	4	3	8
Powell	1	0	3	3	7
Stewart	2	0	6	4	12
Blackmun	0	1	6	5	12
White	0	2	5	5	12
Stevens	0	6	7	7	20
Brennan	0	5	12	9	26
Marshall	3	6	11	9	29

The groupings of Justices in dissent are even more revealing than are the total number of dissents. Table II presents the data.

TABLE II. PAIRINGS IN DISSENT DURING 1980-81 TERM

	Rehnquist	Burger	Powell	Stewart	Blackmun	White	Stevens	Brennan
Burger	8							
Powell	4	3						
Stewart	6	4	1					
Blackmun	3	1	2	1				
White	4	1	1	2	1			
Stevens	3	1	2	1	5	4		
Brennan	1	0	1	5	5	5	11	
Marshall	0	0	1	4	6	7	12	24

Table II shows that Justices Brennan and Marshall joined in dissent a total of 24 times. In half of those cases they were joined or supported by Justice Stevens. The judicial positions taken in dissenting opinions joined by both Brennan and Marshall will be identified herein as "liberal".

The liberal agenda for the Court, as indicated in dissents written or joined in by Brennan and Marshall, is that the Court should not be reluctant to exercise its jurisdiction in cases where individual rights are at stake and that it should give individual interests great weight when they are balanced against claims of governmental interest. For example, Brennan and Marshall dissented from the denial of certiorari in each death penalty case considered by the Court. Each time they reaffirmed their view that the death penalty is unconstitutional as cruel and

unusual punishment under all circumstances.²³ In another 7-2 decision, they said that a pretrial suppression hearing on identification evidence should be provided when requested by the defendant whenever the identification procedures were unduly suggestive.²⁴

At the other constitutional extreme are Justice Rehnquist and Chief Justice Burger. As Table II shows, Justice Rehnquist did not join Justice Marshall in a single dissent. He joined Justice Brennan only once. The Chief Justice did not join either Brennan or Marshall in any dissenting opinion or vote. In contrast, he voted with Justice Rehnquist, dissenting, in eight cases. Again, Justice Powell was in dissent only once with Brennan, once with Marshall, and only twice with Stevens. Yet Powell joined Rehnquist four of the seven times that Powell dissented. Positions supported by Justice Rehnquist will be identified herein as "conservative" when he is joined by Justice Powell or by Chief Justice Burger.

When Rehnquist or Marshall dissented by themselves, as each did in three of the 8-1 cases, their views may be regarded as extreme variations of conservative or liberal themes, respectively.²⁵ Combinations of Justices who dissented together in more than one case, analyzed in Tables III, IV, and V, were likely to include both Brennan and Marshall.²⁶

23. *See Quinones v. Texas*, 592 S.W. 2d 933 (Tex. 1980), *cert. denied*, — U.S. —, 101 S. Ct. 256 (1980).

24. *Watkins v. Sowders*, — U.S. —, —, 101 S. Ct. 664, 659-65 (1981).

25. Dissenting alone, Justice Marshall said that double-celling was unconstitutional punishment where it did not result from a policy judgment but, rather, from the fact that more people were sent to a prison than it was designed to hold, *Rhodes v. Chapman*, — U.S. —, —, 101 S. Ct. 2392, 2410 (1981); that plaintiff's use of the phrase "full faith and credit" was enough to raise a federal constitutional claim that full faith and credit had been denied, *Webb v. Webb*, — U.S. —, —, 101 S. Ct. 1889, 1894 (1981); and that a prisoner should be able to sue in federal courts for an unconstitutional deprivation of property where state prison officials did not inform plaintiff that a state procedure was available, *Parratt v. Taylor*, — U.S. —, —, 101 S. Ct. 1908, 1923 (1981). Justice Rehnquist, in his three solo dissents, maintained that the Supreme Court should not exercise its original jurisdiction to hear a case brought by Maryland against Louisiana because the plaintiff's claim was like that of any other consumer and could adequately be handled, initially, by lower courts, *Maryland v. Louisiana*, — U.S. —, —, 101 S. Ct. 2114, 2136 (1981); that it was a violation of the establishment clause to order a state to pay unemployment compensation solely because of the claimant's religious beliefs, *Thomas v. Review Bd. of Indiana Employment Sec.*, — U.S. —, —, 101 S. Ct. 1425, 1433 (1981); and that the constitutional privilege of self-incrimination is not denied if the trial court refuses to give an instruction, on defendant's request, that no implication of guilt should be drawn from defendant's refusal to testify, *Carter v. Kentucky*, — U.S. —, —, 101 S. Ct. 1112, 1123 (1981).

26. TABLE III. THREE JUSTICE COMBINATIONS WHO DISSENTED MORE THAN ONCE TOGETHER

Brennan/Marshall/Stevens	3
Brennan/Marshall/White	3
Brennan/Marshall/Blackmun	2
Brennan/Marshall/Stewart	2
Rehnquist/Burger/Stewart	2

TABLE IV. FOUR JUSTICE COMBINATIONS WHO DISSENTED MORE THAN ONCE TOGETHER

Brennan/Marshall/Stevens/Blackmun	3
Brennan/Marshall/Stevens/White	2

This and other evidence indicates a strong tendency for the Burger Court to decide cases in accord with conservative positions. The conservative approach to constitutional law is to use federal jurisdiction sparingly. There is a tendency to let Congress rather than the Court decide when the states should be prohibited from affecting interstate commerce. In individual rights cases there is a tendency to work for practical accommodations of the competing interests.

The contrast between conservative and liberal positions can be explicated by noting the answers given in conservative or liberal opinions to questions presented in 14 of the constitutional cases that were decided by a 6-3 vote during the 1980-81 term. Liberal dissents appeared in 9 of the 14 cases. In these cases the majority extended search and seizure power of the police,²⁷ did not compel *voir dire* on racial prejudice when requested by a defendant accused of a violent crime against a person of a different race,²⁸ approved parental notice requirements in abortion cases,²⁹ allowed a street to be closed for the convenience of white residents where that would inconvenience black residents,³⁰ and found a rational connection between male-only draft registration and the goal of drafting persons for combat only.³¹ Conservative dissents appeared in five cases. In those cases a majority of the Court (1) was quite deferential to Congressional delegation of broad legislative power in the economic realm;³² (2) found that Iowa had not introduced enough evidence on safety factors to show that its ban on 65 foot double trucks

TABLE V. COMBINATIONS WITH BRENNAN AND MARSHALL DISSENTING IN FIVE-FOUR CASES

In 9 of the 12 cases decided by a 5-4 vote, Brennan and Marshall were in dissent. They were joined in dissent as follows:

- 7 times by Stevens
- 3 times by Blackmun
- 3 times by White
- 2 times by Stewart
- 1 time by Powell

27. *See Michigan v. Summers*, — U.S. —, —, 101 S. Ct. 2587, 2589-595 (1981) (a warrant to search carries with it the implied authority to detain occupants while the premises are searched); *New York v. Belton*, — U.S. —, —, 101 S. Ct. 2860, 2864 (1981) (a warrantless search of a car, incidental to a valid custodial arrest of the driver, can extend to the entire passenger compartment, including areas that the driver could not reach at the time of the arrest).

28. *Rosales-Lopez v. United States*, — U.S. —, —, 101 S. Ct. 1629, 1634-37 (1981).

29. *H. L. v. Matheson*, — U.S. —, —, 101 S. Ct. 1164, 1170-72 (1981).

30. *City of Memphis v. Greene*, — U.S. —, —, 101 S. Ct. 1584, 1596-98 (1981).

31. *Rostker v. Goldberg*, — U.S. —, —, 101 S. Ct. 2646, 2651-55 (1981). Liberal dissents were also handed down in 6-3 holdings that Congress intended to abolish the federal interstate common law of nuisance when it passed an act to control river pollution. *See e.g.*, *City of Milwaukee v. Illinois and Michigan*, — U.S. —, —, 101 S. Ct. 1784, 1800-11 (1981); *California v. Prysock*, — U.S. —, —, 101 S. Ct. 2806, 2811-12 (1981); *Miranda* warnings need not literally indicate that the accused may have a court appointed attorney before being interrogated by the police; *Pennhurst State School & Hosp. v. Halderman*, — U.S. —, —, 101 S. Ct. 1531, 1548-59 (1981) (Congress did not intend to give disabled persons an enforceable bill of rights in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 but, rather, merely encouraged states to do so).

32. *See American Textile Mfrs. Inst. Inc. v. Donovan*, — U.S. —, —, 101 S. Ct. 2478, 2492-97

was other than mere economic protectionism;³³ and (3) used the first amendment to strike down a state ban on outdoor advertising³⁴ and a statute directing that delegates elected at a primary election be seated at the party's national convention.³⁵

Justice Stewart was not always found in the conservative or liberal camp. Table II shows that he dissented six times where Rehnquist was also in dissent. Four times he dissented with Chief Justice Burger. On the other hand, he was in dissent five times with Justice Brennan and four times with Justice Marshall. For example, Justice Stewart joined in liberal positions, dissenting, to reaffirm his views that states cannot bar the distribution of obscenity between consenting adults,³⁶ and a homeowner may not be detained by the police during a search conducted pursuant to a warrant.³⁷

Justice Stewart joined with conservative dissents to say that Congress did not intend to preempt California's community property laws with respect to military pensions³⁸ and that Iowa can bar 65 foot double trucks from its highways in light of the safety evidence adduced by the state.³⁹ In most of the cases, however, Stewart was in the majority. Thus, he was opposing the relatively few conservative dissents or was disagreeing with one of the much more frequent liberal dissents.

Five-to-four cases are, of course, the most critical for assessing the possible difference in having Justice O'Connor on the Court in place of Justice Stewart. There were twelve such cases in 1980-81. In nine of the twelve cases a conservative position prevailed and a liberal position was asserted in dissent. Stewart voted with the prevailing conservative majority in holding that:

- 1) A plaintiff who sues the United States has no right to a jury.⁴⁰
- 2) A presumption favoring the right to a court-appointed counsel exists only when personal freedom is at stake.⁴¹
- 3) An increase in sentence after an appeal by the United States is

(1981) (Congress did not unconstitutionally delegate legislative power when it authorized cotton dust standards that would protect health "to the extent feasible").

33. *Kassel v. Consolidated Freightways Corp.*, — U.S. —, —, 101 S. Ct. 1309, 1318 (1981).

34. *Metromedia, Inc. v. City of San Diego*, — U.S. —, —, 101 S. Ct. 2882, 2895-97 (1981) (city ban on all outdoor advertising, except outside commercial ads, with some 12 exceptions, such as temporary political advertising).

35. *Democratic Party v. LaFollette*, — U.S. —, —, 101 S. Ct. 1010, 1018-019 (1981).

36. *See Wood v. Georgia*, — U.S. —, —, 101 S. Ct. 1097, 1105 (1981); *Flynt v. Ohio*, — U.S. —, —, 101 S. Ct. 1958, 1960 (1981). Stewart previously had taken this position with Brennan and Marshall, dissenting, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 112-13 (1973).

37. *Michigan v. Summers*, — U.S. —, —, 101 S. Ct. 2587, 2595 (1981).

38. *McCarty v. McCarty*, — U.S. —, —, 101 S. Ct. 2728, 2743 (1981).

39. *Kassel v. Consolidated Freightways Corp.*, — U.S. —, —, 101 S. Ct. 1309, 1324-34 (1981).

40. *Lehman v. Nakshian*, — U.S. —, —, 101 S. Ct. 2698, 2701-02 (1981).

41. *Lassiter v. Department of Social Services*, — U.S. —, —, 101 S. Ct. 2153, 2158-59 (1981).

- not a violation of the double jeopardy clause.⁴²
- 4) California's statutory rape law does not violate equal protection, even though it applies only to men.⁴³
 - 5) Equal protection is not denied by a federal statute which did not extend monthly comfort allowances to mentally ill persons in state facilities.⁴⁴
 - 6) Voting in a water district can be restricted to landowners and need not follow the one-person one-vote principle.⁴⁵
 - 7) A state can require a religious organization to limit its sales and solicitations at a state fair to an assigned location.⁴⁶

It does not seem likely that Justice O'Connor would have departed from the conservative position in these cases. Thus, they probably would have been decided the same way had she been on the Court.

Justice Stewart joined with liberal dissenters in two of the nine cases decided five-to-four where a conservative view prevailed.⁴⁷ In both of these cases the ground for Stewart's dissent was the view he had expressed, dissenting, in *Paris Adult Theatre I*,⁴⁸ that the first amendment is violated by a ban on the distribution of obscenity among consenting adults. Even if Justice O'Connor agreed with this liberal view, which seems unlikely, it does not have the support of enough Justices to prevail.

Justice Stewart joined the conservative position, dissenting, in two of the three cases decided five-to-four where the conservative view did not prevail. Thus, in *California Medical Ass'n v. Federal Election Comm'n*,⁴⁹ where the majority held that federal election law may place an annual \$5,000 limit on contributions to a multi-candidate political action committee, Justice Stewart agreed with Justices Rehnquist, Burger and Powell that the case should have been dismissed for want of jurisdiction.⁵⁰ The dissent pointed out that an alternative proceeding, which did not include a direct appeal from the District Court, was already underway. In a similar vote, Justice Stewart (with Burger and Blackmun) would have given plenary consideration in *Stone v. Graham*⁵¹ to the Kentucky statute which called for posting the Ten Commandments in public schools.⁵² The majority decided, per curiam, that the statute had no secular purpose and was unconstitutional. That re-

42. *United States v. DiFrancesco*, — U.S. —, —, 101 S. Ct. 426, 434-38 (1980).

43. *Michael M. v. Superior Court*, — U.S. —, —, 101 S. Ct. 1200, 1204-08 (1981).

44. *Schweiker v. Wilson*, — U.S. —, —, 101 S. Ct. 1074, 1081-82 (1981).

45. *Ball v. James*, — U.S. —, —, 101 S. Ct. 1811, 1816-21 (1981).

46. *Heffron v. International Society for Krishna Consciousness Inc.*, — U.S. —, —, 101 S. Ct. 2559, 2563-68 (1981).

47. See note 36 *supra*.

48. 413 U.S. 49, 73, 112-13 (1973).

49. — U.S. —, —, 101 S. Ct. 2712, 2725 (1981).

50. *Id.* at —, 101 S. Ct. at 2725.

51. — U.S. —, 101 S. Ct. 192 (1980).

52. *Id.* at —, 101 S. Ct. at 195.

sult, said Rehnquist, dissenting, was "cavalier." Whichever way Justice O'Connor might have voted in these two cases, she could not have changed the result.

*Bullington v. Missouri*⁵³ was the only case during the 1980-81 term in which Justice Stewart, taking a liberal position, formed part of a five Justice majority against a conservative dissent by four Justices (Rehnquist, Burger, Powell and White). In *Bullington* the court decided that the double jeopardy clause of the fifth amendment, read into the fourteenth, prohibited the imposition of a harsher sentence after reversal of a bifurcated sentence proceeding in which the state had the burden of proving certain factual issues beyond a reasonable doubt. If Justice O'Connor had been on the bench and had adhered to conservative views, this case would have been decided the other way and the Court would have adopted the dissenters' position that the double jeopardy clause does not apply to sentencing.

It appears, therefore, that Justice O'Connor's vote on cases decided during the 1980-81 term would have made almost no difference in the pattern of results.⁵⁴ Several areas where her vote in the future might well produce a significant difference may be perceived by looking back a few years to several 5-4 cases where Justice Stewart was in the majority.

In *National League of Cities v. Usery*,⁵⁵ Justice Rehnquist (writing for himself and Justices Burger, Powell and Stewart) said that Congress, exercising its commerce clause power, may not apply federal wage and hour laws to state or local employees. The tenth amendment embodies a policy, Rehnquist said, that prohibits Congress from forcing directly on the states its choices as to how essential decisions are to be made regarding the conduct of integral government functions.⁵⁶ Blackmun, concurring, said that the Court's opinion used a balancing approach. It did not outlaw federal power in areas such as environmental protection, where the federal interest was greater and state facility compliance with imposed federal standards would be essential.⁵⁷ Brennan, Marshall and White, dissenting, complained that the Court was inventing a tenth amendment policy to cut back on the scope of the commerce power in ways that the Court had repudiated in the 1930's.⁵⁸ Stevens,

53. — U.S. —, 101 S. Ct. 1852 (1981).

54. It is possible, of course, that she would have voted in a different manner than did Justice Stewart on petitions for writs of certiorari. Because of the "rule of four," her votes might have resulted in additional cases being decided or some that were decided not being taken. That line of inquiry, however, cannot be explored from data available in the reports.

55. 426 U.S. 833 (1976).

56. *Id.* at 852-55.

57. *Id.* at 856.

58. *Id.* at 860-63.

also dissenting, said that he could find no limit on federal power that would not also restrict clearly permissible areas for federal regulation of state action.⁵⁹ If Justice O'Connor is as perplexed by the case as was Justice Stevens, or believes that it injects the Court into the political process, as Brennan charged, there would be a future majority on the Court to hold the case rather closely to its precise facts. It should be noted, however, that the *National League* dissents, not its majority opinion, set forth the liberal position. It seems likely, therefore, that Justice O'Connor will not be pressing to limit the case.

A related case was *Reeves v. Stake*,⁶⁰ also decided 5-4 with Stewart in the majority. There the Court held that South Dakota, in a time of emergency, could confine the sale of cement it produced solely to residents. When acting as a proprietor, said the majority, a state should be free from the "implied negative" of the commerce clause in its dormant state. This would leave regulatory policy up to Congress rather than to the Court.⁶¹ Justices Powell, Brennan, White and Stevens, dissenting, said that a state should be free from the commerce clause only when it provides goods or services for the operations of government. If a state is in the marketplace for other purposes, the Constitution prevents it from impeding the flow of interstate commerce.⁶² The division on the Court, it will be noted, is not completely along conservative or liberal lines since although Justices Rehnquist and Burger were in the majority, Powell dissented. Thus, it is more likely here than in some other areas that Justice O'Connor might side with the dissenters and that future cases may confine *Reeves* rather narrowly to its facts.

A good deal of attention has been given in the press and on TV to how Justice O'Connor might vote in abortion cases. It is not likely that her presence on the Court could change the basic holding of *Roe v. Wade*⁶³ that a woman has a constitutional privacy right to seek an abortion during the first trimester.⁶⁴ That result was reached by a seven-to-two vote. Only Rehnquist and White complained that the Court erred in protecting the convenience of the prospective mother more than the continued expectancy of the life or potential life she carries.⁶⁵ As to whether it is constitutional to deny public funding for certain medically necessary abortions, however, Stewart was the fifth vote as well as the author of the Court's opinion in *Harris v. McRae*⁶⁶ which

59. *Id.* at 880-81.

60. 447 U.S. 429 (1980).

61. *Id.* at 440-46.

62. *Id.* at 449-51.

63. 410 U.S. 113 (1973).

64. *Id.* at 164.

65. *Id.* at 222.

66. 448 U.S. 297 (1980).

held that such funding can constitutionally be denied.⁶⁷ Brennan, Marshall, Blackmun, and Stevens dissented vigorously.⁶⁸ If Justice O'Connor wanted to reconsider the *Harris* result, it seems likely that she could get the necessary votes. It is not probable, however, that she will frequently reach out to overturn precedent. During her confirmation hearing she said that the judge's role is "one of interpreting and applying law" and it is not "the function of the judiciary to step in and change the law because times have changed or because cultural mores have changed."⁶⁹

Another area where the Court has been riding close to a 5-4 edge is affirmative action. Stewart interpreted federal legislation in the *Bakke* case⁷⁰ as not intended to allow consideration of race as a factor in employment. In *Fullilove v. Klutznick*,⁷¹ he said in dissent that affirmative action denies equal protection because the Constitution is color blind. Under our Constitution, he asserted, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid.⁷² How Justice O'Connor approaches that question may make a real difference in whether the Court approves state or federal programs of affirmative action.

Also in the equal protection area is *Ambach v. Norwich*.⁷³ There a 5-4 Court recently held, over a liberal dissent (with Stewart in the majority), that a state may refuse to employ aliens as school teachers when they are eligible for U.S. citizenship but refuse to seek naturalization.⁷⁴ A similar judicial lineup held in *Lalli v. Lalli*⁷⁵ that a state could refuse inheritance rights to an illegitimate child whose father had not been subjected to a judicial order of filiation during his lifetime.⁷⁶ Justice O'Connor could help hold these cases to their precise facts if she felt somewhat more strongly about the rights of aliens and illegitimate children than did Justice Stewart. Again, however, the conservative view was expressed by the majority of these 5-4 cases, as it usually has been in recent years.

In sum, then, if the assumption is made that Justice O'Connor will more often than not align herself with conservative rather than liberal positions, her presence on the Court will not change many of its deci-

67. *Id.* at 312-18.

68. *Id.* at 329.

69. Wall St. J., Sept. 10, 1981, at 12, col. 2.

70. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

71. 448 U.S. 448 (1980).

72. *Id.* at 523.

73. 441 U.S. 68 (1979).

74. *Id.* at 80-81.

75. 439 U.S. 259 (1978).

76. *Id.* at 271-74.

sions. Of course, if Justice Brennan or Justice Marshall were to retire during President Reagan's term and were succeeded by conservative Justices, then a number of old doctrines might well be re-examined. This re-examination might well be in accord with views of Justice Rehnquist which now appear only in dissents that today may be considered extreme statements of conservatism, e.g., that *Mapp v. Ohio*⁷⁷ should be overruled.⁷⁸

77. 367 U.S. 643 (1961). *Mapp* held that evidence illegally obtained is not admissible in state criminal proceedings. In *Robbins v. California*, — U.S. —, 101 S. Ct. 2841 (1981), Justice Rehnquist, dissenting, repeated his call for overruling *Mapp*, saying that “[t]he harm caused by the exclusionary rule is compounded by the judicially-created preference for a warrant as indicating satisfaction of the reasonableness requirement of the fourth amendment.” — U.S. at —, 101 S. Ct. at 2852.

78. In her confirmation hearing, Justice O'Connor said that she has doubts about the exclusionary rule. “There are times when perfectly relevant evidence, and indeed sometimes the only evidence in the case,’ is excluded when it might be usable, ‘if different standards were applied.’” Wall St. J., Sept. 10, 1981, at 12, col. 1. She continued, however, to say that, “‘I don’t want to be interpreted as suggesting that I think it (the rule) is inappropriate when force or trickery or some other reprehensible conduct has been used.’” *Id.*

Justice O'Connor's opinions, when on the bench of the Court of Appeals of Arizona, were concise, clear, and well grounded in precedent. They do not, however, provide much insight into how she would address specific constitutional issues. She most frequently faced problems of interpreting words or phrases in state statutes and determining whether or not the evidence sustained a judgment below. Her opinions, spanning a period of about a year and a half, are as follows:

Fernandez v. United Acceptance Corp., 125 Ariz. App. 459, 610 P.2d 461 (1980) (when action by a creditor is an invasion of privacy).

Cooper v. Arizona Western College, 125 Ariz. App. 463, 610 P.2d 465 (1980) (interpretation of open meeting statute).

J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. App. 469, 610 P.2d 471 (1980) (constitutionality of Rental Occupancy Tax; entire excise tax structure examined to determine whether classification was reasonable).

State v. Miguel, 125 Ariz. App. 538, 611 P.2d 125 (1980) (failure to empanel jury of proper size, and the definition of robbery).

Andrews v. Andrews, 126 Ariz. App. 55, 612 P.2d 511 (1980) (jurisdiction of a trial court in postdissolution child support hearing).

O'Malley Lumber Co. v. Riley, 126 Ariz. App. 167, 613 P.2d 629 (1980) (interpretation of a loan commitment).

Helena Chem. Co. v. Coury Bros. Ranches, 126 Ariz. App. 448, 616 P.2d 908 (1980) (error in granting new trial when no error was fundamental).

Terry v. Lincscott Hotel Corp., 126 Ariz. App. 548, 617 P.2d 56 (1980) (interpretation of statute requiring posting of notice by innkeeper to overcome common law liability; statute narrowly construed so as not to change the common law beyond what was clearly intended).

Lewis v. Swenson, 126 Ariz. App. 561, 617 P.2d 69 (1980) (liability of attorney who asks questions of a witness at trial).

Sende Vista Water Co., Inc. v. City of Phoenix, — Ariz. App. —, 617 P.2d 1158 (1980) (eminent domain and declaratory relief).

Thompson v. Arizona Dep't of Economic Security, — Ariz. App. —, 619 P.2d 1070 (1980) (remand to determine whether wages were paid in an untimely manner).

Ott v. Samaritan Health Serv. — Ariz. App. —, 622 P.2d 44 (1980) (instructions in medical malpractice action).

Nolden v. Industrial Comm'n, — Ariz. App. —, 622 P.2d 60 (1980) (worker's compensation).

Town of El Mirage v. Industrial Comm'n, — Ariz. App. —, 621 P.2d 286 (1980) (sufficiency of evidence in workers' compensation case; was a lifeguard a seasonal employee).

Gardiner v. Arizona Dep't of Economic Security, — Ariz. App. —, 623 P.2d 33 (1980) (did worker misconduct disqualify him for unemployment compensation).

Ryan v. Industrial Comm'n, — Ariz. App. —, 623 P.2d 37 (1981) (jurisdiction of Industrial Commission over employment contracts formed in another state).

State v. Blevins, — Ariz. App. —, 623 P.2d 853 (1981) (vehicle manslaughter; sufficiency of evidence).

Magma Copper Co. v. Arizona Dep't of Economic Security, — Ariz. App. —, 625 P.2d 935 (1981) (did employer meet burden of proving that employee was discharged for misconduct).

State v. Morgan, — Ariz. App. —, 625 P.2d 951 (1981) (evidence and instruction questions regarding conviction for assault with a deadly weapon).

Cote v. A.J. Bayless Markets, Inc., — Ariz. App. —, 626 P.2d 602 (1981) (breach of tenant's covenant to repair and maintain premises).

Parkway Mfg. v. Industrial Comm'n, — Ariz. App. —, 626 P.2d 612 (1981) (review of evidence in worker's disability case).

State v. Gessner, — Ariz. App. —, 626 P.2d 1119 (1981) (probation revocation; waiver of right to appeal).

Owens v. Industrial Comm'n, — Ariz. App. —, 628 P.2d 962 (1981) (burden of proof that fear of work was disabling).

Food Products Corp. v. Industrial Comm'n, — Ariz. App. —, 630 P.2d 31 (1981) (did an injury arise in the course of employment).

Hughes Aircraft Co. v. Industrial Comm'n, — Ariz. App. —, 630 P.2d 56 (1981) (was contact dermatitis a permanent impairment).

D.E.S. Youth Conservation Corps v. Industrial Comm'n, — Ariz. App. —, 630 P.2d 58 (1981) (did a pocket knife injury relate to employment).

Pinnacle Park Developers v. TRW Inv. Corp., — Ariz. App. —, 631 P.2d 540 (1980) (promissory fraud and the parol evidence rule in formal contracts between parties with some expertise and sophistication; a scholarly review of conflicting opinions and a reasoned attempt to resolve the problems).