Mike --

These are clips referring to the Court in general (or specific decisions) -- with references to O'Connor

Significant

Supreme Court Limits Application of Double Jeopardy Clause

6-8-82

Special to The New York Times

WASHINGTON, June 7 — The Supreme Court ruled today that the Constitution permits the Government to retry a defendant after an appellate court has overturned a guilty verdict as "against the weight of the evidence."

By a vote of 5 to 4, the Court rejected a Floridian's argument that the Constitution's prohibition against double jeopardy barred a second prosecution after the state supreme court set aside his conviction for rape and murder.

The decision, by Associate Justice Sandra Day O'Connor, turned on a distinction between two grounds that appellate courts cite for overturning convictions.

One ground is that the evidence is "legally insufficient" to support a conviction. In a case four years ago, the Supreme Court ruled that a defendant whose conviction is overturned on that basis may not be tried again because such a case is so lacking in merit that it never should have been sent to a jury.

A Different Ground

The second ground, at issue today, is that the jury reached its verdict of guilty "against the weight of the evidence." Justice O'Connor said that an appellate court's use of that ground for overturning a conviction does not trigger a defendant's protection against double jeopardy.

"A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict," Justice O'Connor said. "Instead, the appellate court sits as a '13th juror' and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves."

There is no constitutional ban on a second trial after a jury has become deadlocked, Justice O'Connor continued, and a new trial should be permitted when the appellate court has simply disagreed with the jury's conclusions.

Double jeopardy is one of the most complex and confusing areas of criminal law. As a general rule, a second trial is permitted when a convicted defendant is successful on appeal. The "legal insufficiency" of the evidence has been the one clear exception to that general rule. The question in the case dealt with today was whether that exception should be expanded to cover the "weight of the evidence" situation as well, and the Court's answer was no.

The decision, Tibbs v. Florida, No. 81-5114, affirmed a decision by the Florida Supreme Court.

Associate Justice Byron R. White filed a dissenting opinion. There should be no new trial, he said, because "the fact remains that the state failed to prove the defendant guilty in accordance with the evidentiary requirements of state law."

Justice O'Connor's opinion was joined by Chief Justice Warren E. Burger and Justices William H. Rehnquist, Lewis F. Powell and John Paul Stevens. Associate Justices Harry A. Blackmun, William J. Brennan Jr. and Thurgood Marshall joined the dissent.

The ruling was one of several actions the Court took on criminal law issues. The others included these:

Abscam Appeal

Without comment, the Court refused to hear an appeal by two Philadelphia men convicted on charges growing out of the Federal Abscam investigation. Harry P. Jannotti, a member of the City Council, and George X. Schwartz, the former council president, raised constitutional issues of entrapment and governmental "overreaching."

The Court's refusal to hear the case implies no judgment on the merits. Rather, the Justices almost certainly viewed the case as inappropriate for review at this time because it is "interlocutory," meaning that the two men have not yet appealed to the United States Court of Appeals.

Judge John P. Fullam, who presided over the Federal District Court trial, initially threw out the convictions, principally on grounds of entrapment. The Government appealed; the United States Court of Appeals for the Third Circuit ruled that Judge Fullam's entrapment analysis was in error because the jury had been explicitly instructed on an entrapment defense but had been unpersuaded.

After the two are sentenced, they have the right to return to the Third Circuit to challenge their convictions on a variety of grounds. They may then bring the issues back to the Supreme Court. (Jannotti v. U.S., No. 81-1899).

Sniffing Dog

The Court agreed to decide whether police need a warrant before they can detain luggage at an airport for the purpose of exposing it to a dog trained to detect narcotics.

The case, U.S. v. Place, No. 81-1617, is an appeal by the Federal Government from a ruling by the United States Court of Appeals for the Second Circuit, in New York.

That court ruled that an hourlong detention of two suitcases violated the Fourth Amendment's prohibition against unreasonable search and seizure. A trained dog at Kennedy International Airport signaled that one of the suitcases contained narcotics. At that point, Federal agents obtained a warrant, opened the bag and found cocaine, marijuana and LSD.

Legal Strategy

The Court accepted an appeal by District Attorney Elizabeth Holtzman of Brooklyn from a ruling that a man convicted of robbery and assault was entitled to a new trial because the lawyer who was assigned by the court to represent him in his appeal had ignored the man's request to brief and argue particular issues. The United States Court of Appeals for the Second Circuit ruled that the lawyer's behavior deprived the man of his Sixth Amendment right to effective assistance of counsel. (Jones v. Barnes, No. 81-1794).

Court's Ruling Clears Way for Curbs on Assumable Mortgages

6-29-82

By Fred Barbash
Washington Post Staff Writer

In a victory for struggling savings and loans and a defeat for the hard-pressed real estate industry, the Supreme Court yesterday upheld a federal regulation allowing restrictions on assumable mortgages.

The 6-to-2 decision allows federal savings and loans to ban assumption of mortgages despite state laws permitting them.

Real estate interests had vigorously opposed yesterday's action by the justices on the grounds that assumable mortgages have enabled millions of home buyers to purchase at lower interest rates.

Lending institutions said the practice was draining them of millions of dollars in new and more lucrative loans at a time when they need money most.

In two other important rulings yesterday, the justices limited the obligations of local school districts to provide extra help to handicapped students [Details on Page A7] and held unconstitutional the new bankruptcy court system created by Congress in 1978. [Details on Page D6]

At issue in the mortgage ruling was a Federal Home Loan Bank Board regulation giving federal savings and loans a choice of allowing assumption of low-interest, long-term loans or of demanding payment in full when a home with a "due on sale" provision was sold.

The regulation had been challenged by laws and court rulings in 18 states, including Virginia, as part of an effort to protect consumers and the real estate industry from the paralyzing impact of high mortgage interest rates.

Those states, the justices said, are powerless to override a federal regulation. Justice Harry A. Blackmun wrote the opinion for the court. Justice Lewis F. Powell Jr., without explanation, did not participate. Justices William H. Rehnquist and John Paul Stevens dissented.

The case was one of the most important confronting the court this term and was a direct result of the hard times facing two of America's most crucial businesses: mortgage lending and real estate. Mortgage assumption allows the seller of a home to pass along to the buyer an existing home loan, sometimes negotiated years earlier at low interest rates. For example, an 8.5 percent loan obtained in 1975 might be assumed in 1982 when prevailing interest rates are 14 or 15 percent. Assumption is often the only way some purchasers can buy.

But assumptions, a boon to buyers and sellers, deprive the savings and loans of acquiring new customers at prevailing, or higher, interest rates. The practice, according to industry spokesmen, is costing them $800 million a year when they can least afford it. In addition, the lending industry said the practice forced rates up for millions of home buyers without access to assumable loans.

As a result of the practice, the Federal Home Loan Bank Board, which regulates all federally chartered savings and loans, promulgated a regulation in 1976 allowing the lending institutions to require payment in full of the old loan at the time of a home sale. The new buyer must then renegotiate at higher interest rates.

Yesterday's case, *Fidelity Federal Savings and Loan Association vs. De La Cuesta*, stemmed from a California appellate court decision rendering the "due on sale" clause unenforceable.

Blackmun said the conflict was a conventional one between federal and state authority and, as is conventionally the case, federal power prevails.

The fact that the controversy involves real estate, sometimes thought to be a matter of local or state control, does not change the requirement of federal preemption, Blackmun said.

"Congress delegated power to the [Federal Home Loan Bank] Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound insitutions able to supply financing for home construction and purchase."

Blackmun also rejected the argument that the federal regulatory board had exceeded its authority in promulgating the regulation. In setting up the regulatory framework during the Great Depression, Blackmun said, "Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular state—deemed to be the 'best practices.' "

Justice Sandra Day O'Connor agreed with Blackmun's opinion, but wrote separately as well to say that the Federal Home Loan Bank Board's authority to preempt state law is "not limitless."

Rehnquist, joined by Stevens, said the board had overreached its authority. "Discharge of its mission to ensure the soundness of federal savings and loans does not authorize the Federal Home Loan Bank Board to intrude into the domain of state property and contract law that Congress has left to the states," he said.

Justices Give Employers New Tool For Minimizing Job Bias Liability

6-29-82

Special to The New York Times

WASHINGTON, June 28 — The Supreme Court today gave employers who are sued for job discrimination a potentially important new tool for minimizing their eventual financial liability if they lose the suit.

The Court ruled that an employer who offers a job to the person bringing the suit will incur no additional liability for back pay from the date of the job offer, even if the offer was made on unfavorable terms and the plaintiff rejects it.

The 6-to-3 opinion by Associate Justice Sandra Day O'Connor overturned a ruling by the United States Court of Appeals for the Fourth Circuit. That court, ruling in a sex discrimination suit against a Ford Motor Company plant in North Carolina, said that a job offer to two women was "incomplete and unacceptable," and therefore did not cut off the company's back pay liability because the offer did not include retroactive seniority.

Two years had passed since the women initially applied for jobs at the plant and were turned down. At the time Ford offered them jobs, they had accumulated two year's seniority in similar jobs at a General Motors plant and did not want to give up the seniority. The appellate court said that the women should not be presented with the "intolerable choice" of giving up their accrued seniority or allowing Ford to escape any additional back pay liability if they eventually won their discrimination suit against Ford.

Justice O'Connor for the Majority

Writing for the majority today, Justice O'Connor disagreed. "It is a fact of life that litigation is risky," she said, but "it is hard to see" how the two women were "deprived of adequate compensation because they chose to venture upon a path that seemed to them more attractive than the Ford job, plus the right to seek full compensation in court."

A rule that allowed a plaintiff both to turn down a job offer and to keep accumulating the right to back pay "would have the perverse result of requiring the employer in effect to insure the claimant against the risk that the employer might win at trial," Justice O'Connor said.

The case, Ford v. Equal Employment Opportunity Commission, No. 81-300, involved Title VII of the Civil Rights Act of 1964, the principle Federal law prohibiting discrimination in employment, whether on the basis of sex or of race.

The Equal Employment Opportunity Commission sued Ford in 1975 on behalf of the women. In the Supreme Court, the Justice Department represented the commission and argued that the appellate court was correct.

The department's brief argued that if Ford had not discriminated against the women two years before it finally offered them a job, they would have had two years of seniority at Ford and thus the job offer "was not an offer of full reinstatement" sufficient to terminate Ford's future back pay liability.

Cites Incentive to Hire

Justice O'Connor said that a rule permitting an employer to limit its future liability by offering a plaintiff a job "serves the objective of ending discrimination through voluntary compliance" because it gives the employer an incentive to hire the person.

However, she continued, if the employer also has to offer the plaintiff retroactive seniority, there will be no such incentive and job offers will be less frequent. In addition, she said, offers of retroactive seniority to persons who had simply sued the employer but had not yet prevailed in court would harm "innocent third parties" who would have to "yield seniority to a person who has not proven, and may never prove, unlawful discrimination."

A trial court may order retroactive seniority as part of a remedy once it has found that discrimination existed.

In a dissenting opinion, Associate Justice Harry A. Blackmun said that, as a result of today's ruling, "discrimination victims will be forced to accept otherwise unacceptable offers because they will know that rejection of those offers truncates their back pay recovery." The decision, he added, "is fundamentally incompatible with the purposes of Title VII."

Chief Justice Warren E. Burger and Associate Justices Byron R. White, Lewis F. Powell, William H. Rehnquist and John Paul Stevens joined Justice O'Connor's opinion. Associate Justices William J. Brennan Jr. and Thurgood Marshall joined Justice Blackmun's dissent.

Nursing School Told Not to Exclude Men

7-2-82

By Fred Barbash
Washington Post Staff Writer

The Supreme Court, reaffirming that it would carefully scrutinize any form of sex discrimination, ruled 5 to 4 yesterday that the nursing school at the nation's oldest publicly supported all-female college may no longer exclude men.

Justice Sandra Day O'Connor wrote the opinion in a notable departure from her state's rights campaign and from some of her usual allies, who mourned the death of a tradition in their dissent.

O'Connor said the exclusion of men from the Mississippi University for Women nursing school served only to "perpetuate" stereotypes that some jobs are for women and some are for men.

And in language called crucial by women's rights lawyers, O'Connor underscored what she called the "firmly established" principles that "do not vary," and which the court should bring to any cases involving legal distinctions between men and women.

Those principles, requiring "exceedingly persuasive" justification for any gender distinction in the law, appeared to be softening considerably at the court last year.

Though the actual judgment yesterday apparently applies only to one school and directly benefited a man, women's rights advocates were anxiously watching it as the Equal Rights Amendment deadline passed for clues as to how the court will treat future sex discrimination cases.

"This is a key decision," said Phyllis Segal, a prominent women's rights attorney. "They were pointed in a very different direction last year. We were very concerned."

Eleanor Smeal, president of the National Organization for Women, said the ruling was particularly welcome "on the day after the ERA deadline," but expressed concern about the closeness of the decision.

Chief Justice Warren E. Burger, and Justices Harry A. Blackmun, Lewis F. Powell Jr., and William H. Rehnquist dissented. Blackmun and Burger wrote separate dissents.

"I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination," said Blackmun.

"The court's opinion bows deeply to conformity," wrote Powell, joined by Rehnquist. "Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life."

The ruling, based on the 14th Amendment's requirement that governments dispense equal treatment under the laws, does not apply to private colleges, although it will likely be used to file suits against private schools.

The Mississippi University for Women, in Columbus, is one of the country's only sex segregated public institution of higher learning. Established in 1884, it is also one of the oldest.

Joe Hogan, who brought the suit, is a licensed practical nurse and resident of Columbus. He attempted to enroll in the school's nursing program in August, 1976, to obtain a college degree in nursing. He was denied admission because he is male. Hogan reapplied unsuccessfully in 1979 before filing suit in U.S. District Court.

Hogan lost at the district court level. But the 5th U.S. Circuit Court of Appeals held that the all-female college violated the Constitution's equal protection provision and amounted to an unjustified act of sex discrimination.

Numerous forms of sex discrimination, including differences in liquor laws, Social Security benefits and terms of employment have been struck down in the last decade under the court's test, which allows gender distinctions only when they are "substantially related to an important governmental objective."

Last year, in rulings upholding statutory rape laws punishing only men and the exclusion of women from the military draft, the court seemed to be abandoning these requirements or changing them from case to case.

O'Connor wrote yesterday that those requirements "do not vary simply because the objective appears acceptable to individual members of the court."

She rejected Mississippi's explanation for excluding men, that an all-female nursing school was a form of affirmative action for women, by noting that women dominate the nursing field and hardly need any help getting in.

In fact, "rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the school of nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."

In another ruling yesterday, the court unanimously upheld a California law allowing liquor distillers to choose a single distributor in the state. The court said the law, similar to those in a number of other states, does not automatically violate federal antitrust laws. Rehnquist wrote the opinion in *Rice vs. Norman Williams Co., et al.*

In a third case, the court said Puerto Rico may sue Virginia apple growers on behalf of Puerto Rican workers who were allegedly unfairly treated in the allocation of seasonal apple orchard jobs. Justice Byron R. White, in a unanimous ruling in *Alfred L. Snapp & Son, Inc., et al. vs. Puerto Rico*, said the state's interest in the well-being of its residents entitled it to "parens patriae" status, meaning literally "parent of the country."

COURT SAYS SCHOOL CANNOT BAR MEN

Policy of a State-Run Nursing Program Unconstitutional

7-2-82

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, July 1 — The Supreme Court, in a ruling of limited practical impact but considerable constitutional importance, held today that a state-operated nursing school cannot constitutionally exclude men.

In a 5-to-4 decision written by Associate Justice Sandra Day O'Connor, the Court agreed with a Federal appeals court that the Mississippi University for Women had violated a male student's constitutional right to equal protection of the law by refusing to admit him to the university's nursing school.

The appeals court had ruled that the women-only admissions policy of the entire university, founded in 1884 as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, was unconstitutional. But the majority today ruled less broadly, addressing only the status of the nursing school to which the man, Joe Hogan, sought admission.

The decision therefore left unclear the status of the university as a whole, as well as that of the nation's only other all-female state university, Texas Woman's University, which has a coeducational nursing school. Because the Constitution regulates only governmental and not private behavior, the ruling does not apply in any event to private single-sex colleges.

The broader significance of the decision lay in the Court's approach toward analyzing the sex discrimination issue.

Justice O'Connor said that a statute or policy that classifies individuals on the basis of sex can be justified only if the classification "serves important governmental objectives" and is "substantially related to the achievement of those objectives."

The Government bears the burden of meeting both those tests, Justice O'Connor said, and the Mississippi nursing school failed to satisfy either one.

The university justified the nursing school's admissions policy on the ground that the school provided much needed "affirmative action" in women's education.

Justice O'Connor rejected that argument. Noting that women earn 98.9 percent of all nursing degrees in the country, she said, "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field."

'Perpetuates' Stereotyped View

"Rather than compensate for discriminatory barriers faced by women," Justice O'Connor continued, "excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively women's job." She said the policy "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."

She said the university failed the second part of the test by failing to prove that excluding men "is substantially and directly related" to the asserted objective of helping women. She noted that men were permitted to attend class as auditors. The fact that men do attend classes, she said, "fatally undermines" the university's assertion that women nursing students "are adversely affected by the presence of men."

Justice O'Connor concluded, "The state has fallen far short of establishing the exceedingly persuasive justification needed to sustain the gender-based classification."

The test the majority applied to the Mississippi policy was the so-called "heightened scrutiny" to which the Court has subjected claims of sex discrimination since the mid-1970's. The approach differs from the "minimal scrutiny" that the Court applies to most legislation. Under "minimal scrutiny," a statute will be upheld as long as it bears a "rational relationship" to a "legitimate state objective." It is rare that a statute fails to survive "minimal scrutiny."

In several decisions last year, especially those upholding male-only draft registration and a California statutory rape law, the Court gave signs of abandoning the "heightened scrutiny" approach to sex discrimination cases. The Court also indicated doubts about continuing to require the Government to bear the burden of justifying a sex-based distinction, suggesting that perhaps the plaintiff should have the burden of showing why the distinction was impermissible.

When the Court agreed to hear Mississippi's appeal from the ruling of the United States Court of Appeals for the Fifth Circuit, feminist lawyers were worried that a majority might use the case as a vehicle to put an end to the heightened scrutiny approach.

At best, they saw the case as a double-edged sword, in which the Court was being asked to uphold a policy that ostensibly favored women but might well do so in terms that could be used in the future to justify policies favoring men.

Against that background, Justice O'Connor's opinion was a strong reaffirmation of both the heightened scrutiny approach and the Government's burden of justifying discrimination.

In dissenting opinions, Associate Justices Harry A. Blackmun, Lewis F. Powell and William H. Rehnquist objected that the majority's approach was unnecessarily rigid, subjecting educational choices to "conformity" in the name of equality. Associate Justices William J. Brennan, Byron R. White, Thurgood Marshall and John Paul Stevens joined the majority opinion. Chief Justice Warren E. Burger provided the fourth dissenting vote.

The case, Mississippi v. Hogan, No. 81-406, was the only case of the term, which ends Friday, dealing with the constitutional, rather than statutory, basis for sexual equality.

State nursing schools ordered to admit men

By Lyle Denniston
Washington Bureau of The Sun

Washington—The Supreme Court, in a major victory for sex equality, ruled yesterday that it is unconstitutional for a state to let only women attend a nursing school.

The 5-4 ruling raised significant new doubts about the constitutionality of any state-run school or college that offers unique education to students of only one sex.

That, however, may not be the most important result of yesterday's decision.

Justice Sandra Day O'Connor, the first woman in history to sit on the court, wrote the opinion and made it a strong new statement on the right of the sexes to be treated alike by official policy.

The ruling appeared likely to become the most important the court has issued on sex equality since it began focusing more intently on that question 11 years ago.

In Justice O'Connor's 15-page opinion, the court made it clearer than it had ever before that laws designed to favor women will be struck down if they reinforce the image of women as the weaker sex, capable of doing only things that women have done traditionally.

"If the objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate," the opinion declared.

While the majority insisted that its ruling actually was narrowly focused, three of the dissenting justices argued that the reasoning behind it was so broad that it would mean the end of all one-sex public schools or colleges.

"There is inevitable spillover from the court's ruling," Justice Harry A. Blackmun, one of the dissenters, said.

The Supreme Court had split 4-4 five years ago in upholding a lower court ruling that public high schools could be segregated by sex. In 1971, it had upheld a lower court ruling allowing single-sex colleges. Those earlier rulings were not discussed by the majority yesterday.

There are now about 180 single-sex colleges in the country that are either run by state or local government or are heavily supported by government funds. The state of Mississippi argued that all of them could be affected by this case.

The decision may not apply to one-sex private colleges or universities, since the Constitution does not apply to their admissions policies. Even though such schools often get public money, the Supreme Court said just last week that that fact alone does not bring a private school within the Constitution's reach in this matter.

In addition, Congress has said that the 1972 law providing for a cutoff of federal funds to schools and colleges that discriminate on the basis of sex does not apply to institutions that have traditionally admitted only one sex.

The move by Congress, the court noted yesterday, does not dictate the meaning of the Constitution's clause requiring that official policy treat people the same unless there is an "exceedingly persuasive justification" for not doing so.

Aside from the fact that the ruling was authored by the first woman justice, it had a number of other symbolic aspects to it.

The court issued it just hours after the proposed equal rights amendment to the Constitution died, having failed to gain ratification from enough states.

There was speculation among women's rights lawyers here that the ruling had been held up by the court deliberately until after that deadline had passed, so as not to have it become an issue in the ERA debate.

In addition, the decision came on a legal dispute surrounding the nursing profession—one that women have always dominated and one that now is used by feminists to suggest the limits that society puts on females' job opportunities. Nurses usually are paid less than other members of the health professions.

The O'Connor opinion took note of a claim—brought to the court's attention by feminist lawyers—that keeping men out of the nursing field "has depressed nurses' wages."

There is no way to know exactly why Justice O'Connor was chosen to write the opinion. Usually, opinions are assigned by the senior justice on the majority's side of the issue—in this instance, Justice William J. Brennan, Jr. His reasons for choosing her were not disclosed publicly.

The decision ended a women-only policy enforced by the 11-year-old school of nursing at Mississippi University for Women in Columbus, Miss. The university has admitted only women since it was founded in 1884. It is the nation's oldest state college exclusively for women.

The university had taken the case to the Supreme Court after it was required by a lower court to admit its first male student, Joe Hogan, 26, of Columbus.

He wanted to study nursing at MUW because the institution was in his hometown and he did not want to move. He could have attended nursing school at other state universities, in Hattiesburg or Jackson.

In ruling that he could not be excluded, the Supreme Court said that the nursing school offered "a unique educational opportunity," and that that could not be reserved solely for females unless there was a strong reason for doing so.

The court found that there was no such reason. The majority rejected the state's argument that the university's policy was designed to compensate women for past discrimination against them.

There was no proof that women lacked opportunities to enter the field of nursing, Justice O'Connor wrote. In fact, she said, they hold more than 98 percent of the nursing jobs nationwide, and the MUW policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."

The policy "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."

The opinion did not even mention one explanation that some of the university's students and alumnae offered for the women-only policy: that in matters of courtship, females remain "the pursued sex," so keeping males out of the school would free the female students from "the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis."

That argument, however, was cited by two of the dissenters, Justices Lewis F. Powell, Jr., and William H. Rehnquist.

Justice O'Connor, in saying that the ruling was limited, said the court was taking no position on the women-only policy in parts of the university other than the School of Nursing or on a one-sex policy at any college or university at the undergraduate level.

Her opinion was supported by Justices Brennan, Thurgood Marshall, John Paul Stevens and Byron R. White.

Dissenting, in addition to Justices Blackmun, Powell and Rehnquist, was Chief Justice Warren E. Burger.

All-Female School Told It Can't Bar Men

High Court Decision Doesn't Affect Private Women's College

By JIM MANN, *Times Staff Writer*

WASHINGTON—In a decision reaffirming and broadening rules against sex discrimination, the Supreme Court Thursday decided, 5 to 4, that the century-old, all-female Mississippi University for Women violated the Constitution by refusing to admit a male student to its nursing school.

Despite protests by dissenting justices that single-sex schools have deep historical roots and provide "unique benefits" to women, the high court decided that the Mississippi school's nursing program "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."

The court's opinion was written by Justice Sandra Day O'Connor. The first woman justice pointedly recalled how members of her sex were once barred from practicing law and warned government officials against "the mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women."

The unusual sex discrimination case was brought by a man named Joe Hogan of Columbus, Miss. Three years ago, Hogan was refused admission to the nursing program of the nearby university—a school that, O'Connor noted, was founded in 1884 as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi.

Hogan's challenge to the all-female program was supported by several leading feminist groups. Lawyers for the university, on the other hand, argued that the no-men-allowed program was designed to provide "affirmative action," opening up opportunities for women.

School Is Last of Its Kind

The immediate impact of the ruling may be limited. The Mississippi school is believed to be the last remaining state-financed all-women's college or university in the nation.

The ruling does not affect private single-sex institutions such as the numerous private women's college. O'Connor pointed out also that the court was not passing judgment on whether states may set up "separate but equal" schools for women and men.

The decision covers only the Mississippi school's nursing program, but dissenters warned that the logic of the court's ruling might eventually be applied to other schools at Mississippi University for Women or even to single-sex programs or classes operated within a state-supported institution.

The ruling has symbolic importance because, on the day after the formal interment of the proposed equal rights amendment, the Supreme Court revived and broadly applied the legal standard it has developed to decide when government programs may treat men differently from women.

In a 1976 case, the high court ruled that laws that discriminate between the sexes violate the 14th Amendment unless it can be shown that they serve important governmental objectives and that the methods used are substantially related to the achievement of those objectives. That principle has been applied in a number of sex-discrimination cases since then.

A year ago, however, in rulings upholding statutory rape laws and the all-male draft registration program, the court seemed to be backing away from this rule. In the draft case, Justice William H. Rehnquist, writing for the court, at one point called the legal standard "a facile abstraction."

In Thursday's case (MUW vs. Hogan, 81-406), O'Connor used the standard developed in 1976, carefully examining both the objectives and the methods used by Mississippi University for Women in setting up an all-female nursing school.

90% of Nurses Are Women

O'Connor said the university had failed to come up with any evidence showing that women needed "affirmative action" in the field of nursing. She cited census figures showing that more than 90% of all nursing degrees, both in Mississippi and in the nation, go to women. In fact, she said, officers of the American Nurses Ass. "have suggested that excluding men from the field has depressed nurses' wages."

Furthermore, she said, the university's admissions policy lends credibility to the view that women, not men, should become nurses and makes the assumption that nursing is a field for women a self-fulfilling prophecy.

O'Connor's decision was signed by Justices William J. Brennan Jr., Thurgood Marshall, Byron R. White and John Paul Stevens. The dissenters were Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist.

O'Connor's opinion was by far the strongest stand she has taken on issues of sex discrimination since joining the court. She voted with the majority, but did not write the opinion, when the justices ruled in May that Title 9, the law barring sex discrimination by schools receiving federal aid, protects employees as well as students.

The new justice has not supported women's groups in every case, however. Last Monday, for example, she wrote an opinion for the court narrowing the extent to which women may seek back pay from employers in job discrimination lawsuits.

"Although she has a conservative bent, she brings to the court a unique perspective that shows an awareness of the reality of sex discrimination," said Marcia Greenberger of the National Women's Law Center after reading Thursday's decision. "Her opinion was right on target in recognizing sex-stereotyping in education."

Also Thursday, the Supreme Court upheld the contentions of civil rights lawyers that the election system of Burke County, Ga., unconstitutionally discriminates against black voters.

The justices ruled 6 to 3 that the county's at-large system was being maintained "for the invidious purpose of diluting the voting strength of the black population" in violation of the 14th and 15th amendments. White wrote the opinion for the court, and Powell, Rehnquist and Stevens dissented.

The case (Rogers vs. Lodge, 80-2100) had originally been viewed as a test of the legal standards that will be applied in voting rights cases. But its importance was reduced by recent passage of new voting rights legislation.

Ld. Times
7/2/82

Off Until Next Term:

Supreme Court Ends Term; Ducks Legislative Veto Case

The Supreme Court July 2 wound up its 1981-82 term after deciding 150 cases. But the justices left until another day a decision on the constitutionality of the legislative veto.

The court said it would hear a second round of arguments next fall in the case of *Immigration and Naturalization Service v. Chadha*, the first full-scale challenge to the legislative veto that the justices have agreed to review.

The court gave no explanation for the postponement. But a second, more sweeping challenge to the veto is now before the justices, awaiting a decision on whether they will review it. On Jan. 29, a three-judge appellate panel in the District of Columbia declared the veto unconstitutional. The affected parties have appealed to the high court, and the justices may decide to weigh all of the cases together. *(Weekly Report p. 200)*

In the final days of its term the court issued more than two dozen decisions, ruling on issues ranging from school busing for racial balance to the rights of handicapped students.

The justices also struck down key portions of the 1978 bankruptcy reform law. *(Story, p. 1572)*

And they denied states the power to block enforcement of clauses in many mortgage loan contracts that prevent the assumption of existing low-interest mortgages by home buyers. *(Story, p. 1569)*

The court's failure to address the issue of the legislative veto leaves Congress without guidance on the subject at a time when members are seeking to expand its use.

The Senate in March passed a regulatory reform bill (S 1080) that provides for a two-house legislative veto, without presidential review, of most federal regulations. Although Congress has attached some form of legislative veto to other laws, the veto was never before used so broadly.

The House has yet to consider its regulatory reform measure (HR 746), which allows both chambers to overturn proposed rules in a joint resolution but also requires the president's signature. When HR 746 reaches the floor, Rep. Elliott H. Levitas, D-Ga., plans to introduce an amendment allowing one house to overturn a rule but giving the other chamber the opportunity to override the first veto. His amendment would not require a presidential sign-off. *(Weekly Report pp. 740, 701)*

NAACP Boycott

On July 2, as the court wound up its work for this term, the justices ruled that the NAACP is not liable for damages suffered by the merchants of Port Gibson, Miss., as a result of a 1966 civil rights boycott of their stores led by Charles Evers, then NAACP field secretary for that state.

In 1976 the merchants won a state court judgment of $1.25 million against the national civil rights organization. The state supreme court held that judgment was excessive, but it upheld the lower court's ruling that the boycotters were liable for the merchants' losses. *(Weekly Report p. 282)*

The Supreme Court voted 8-0 in favor of the NAACP. Justice John Paul Stevens wrote the court's opinion. Justice Thurgood Marshall, former director of the NAACP Legal Defense and Education Fund, did not take part in the decision.

The ruling came two days after the NAACP announced that it was launching a boycott of U.S. films and movies that do not provide sufficient exposure or employment for blacks.

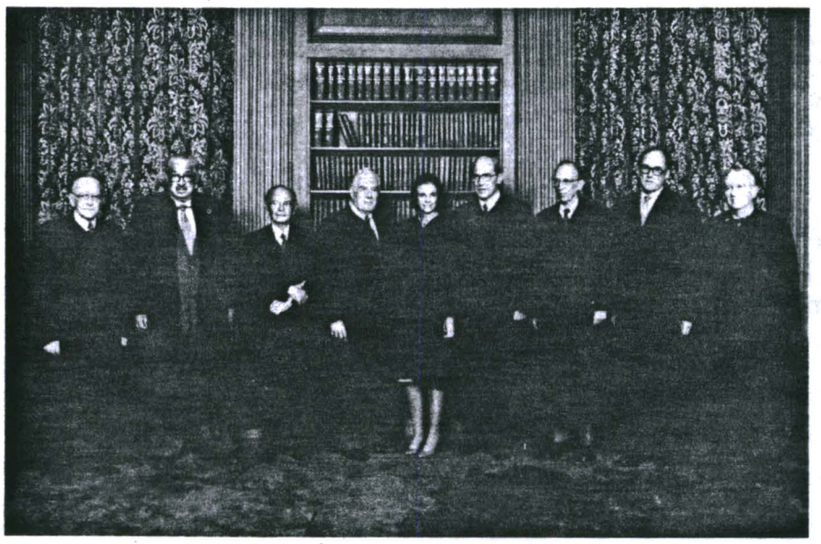
The First Amendment protects nonviolent boycotts as a collective form of speech, wrote Stevens. Participants in such activity may not be held liable for any damages that result. But, he continued, "the First Amendment does not protect violence."

A state may assess damages to compensate for the result of violent action, but it may not hold liable those not responsible for the violence.

Busing

The court June 30 ruled that voters may limit the use of busing for school desegregation by changing a state's laws or amending its constitu-

—*By Elder Witt*



The Supreme Court, 1981-1982 Term

tion, but only if the action does not narrow rights guaranteed by the U.S. Constitution or place special burdens on blacks.

By an 8-1 vote, the justices upheld Proposition 1, a 1979 voter-initiated amendment to California's constitution that bars state courts from going further than federal courts in ordering busing. The amendment put a halt to a mandatory busing program in Los Angeles that had been ordered by state courts.

By a 5-4 vote, however, the court struck down a 1978 Washington state law, adopted as a voter initiative, that prohibited local school boards from requiring busing to correct racial imbalances. The initiative grew out of opposition to busing voluntarily adopted by the Seattle school board.

Justice Marshall was the lone dissenter in the California case, *Crawford v. Los Angeles Board of Education.* Justice Lewis F. Powell Jr. wrote the opinion for the majority.

In the case of *Washington v. Seattle School District No. 1*, Justice Harry A. Blackmun wrote the majority opinion, while Powell — joined by Chief Justice Warren E. Burger and Justices William H. Rehnquist and Sandra Day O'Connor — dissented.

Critical to the distinction that the court made between the two measures were the motives behind their adoption and the procedures used.

The court found the California measure racially neutral, and noted that while it curbed the power of state courts to order busing, it left school boards free to adopt such plans.

The Washington initiative, on the other hand, was found discriminatory in intent since it restricted busing for racial desegregation but expressly permitted it for selected other purposes. In addition, the high court said, busing was the lone area in which a local school board decision was overruled.

The rulings came at a time when Congress is considering legislation that would strip the federal courts of power to order busing for desegregation. Such language was included in a bill (S 951) that was passed by the Senate March 2 and is now pending in the House Judiciary Committee. *(Weekly Report p. 522)*

Rep. James M. Collins, R-Texas, filed a discharge petition May 25 in an effort to dislodge the measure from the committee, which shows little inclination to act on it. But he has not yet gathered the 218 signatures needed to succeed.

Background

The Supreme Court has held since 1954 that school segregation is unconstitutional if it results from state law or official policy. This is called *de jure* segregation, and the court has held that a variety of remedies may be required to eliminate it, including the busing of pupils away from their neighborhoods.

The court has not imposed any obligation on states and local school boards to eliminate a second kind of racial imbalance — *de facto* segregation that results primarily from housing patterns and is particularly evident in urban areas.

Both of the cases decided June 30 involved *de facto* school segregation, which the state courts in California and local school boards in Washington sought to correct through busing.

The California Case

The California Supreme Court in 1976 declared that the state's constitution required school boards to end *de facto* as well as *de jure* segregation. Thereafter, a busing plan was put into effect in Los Angeles, where there were significant racial imbalances in the schools.

In upholding Proposition 1, adopted three years later, the Supreme Court said it would be "destructive of a state's democratic processes" to hold that "once a state chooses to do 'more' than the 14th Amendment requires, it may never recede."

Justice Powell, writing for the court, said that "Proposition 1 does not inhibit enforcement of any federal law or constitutional requirement." Indeed, he noted, it tied state law specifically to federal requirements.

Further, he said, the amendment "neither says nor implies that persons are to be treated differently on account of their race.... The benefit it seeks to confer — neighborhood schooling — is made available regardless of race in the discretion of school boards." In a footnote, Powell added that "a neighborhood school policy does not offend the 14th Amendment in itself."

The Washington Case

Early in 1978, the Seattle school board voluntarily adopted an extensive busing and pupil reassignment plan to correct *de facto* racial imbalances in its schools. That November, state voters overwhelmingly approved Initiative 350, which barred assignment of pupils outside of neighborhood schools. However, the initiative permitted exceptions for a variety of reasons, including overcrowding at the neighborhood school and special education needs.

The Seattle school board went to court, claiming the initiative was unconstitutional under the equal protection guarantee of the 14th Amendment. The Carter administration supported the school board's challenge, but the Reagan administration took the opposite position and urged the Supreme Court to uphold the state law. *(1981 Weekly Report p. 1853)*

Justice Blackmun, writing for the majority, said that although the state law appeared racially neutral on its face, "there is little doubt that the initiative was effectively drawn for racial purposes ... [and] carefully tailored to interfere only with desegregative busing."

Furthermore, Blackmun said, the initiative "burdens all future attempts to integrate Washington schools ... by lodging decision-making authority over the question at a new and remote level of government.... This imposes direct and undeniable burdens on minority interests."

When a state restructures its political processes to make it more difficult for racial minorities to win favorable legislation, it violates the equal protection clause, the court held.

Justices Powell, Burger, Rehnquist and O'Connor criticized this "unprecedented intrusion into the structure of a state government."

In a footnote, Powell said that as a former school board member, he "would not favor reversal of the Seattle board's decision to experiment with a reasonable mandatory busing program.... But this case presents a question not of educational policy or even the merits of busing for racial integration. The question is one of a state's sovereign authority to structure and regulate its own subordinate bodies."

Other School Cases

Handicapped Students

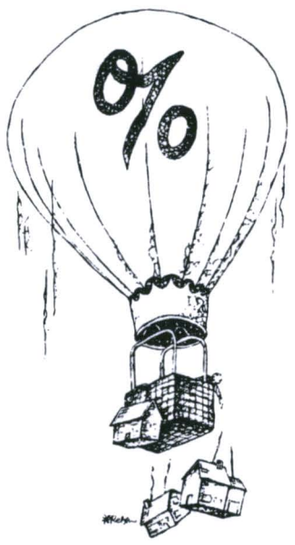
School districts must provide enough specialized services to allow handicapped students to benefit educationally from their instruction, but they need not assure such children an opportunity to maximize their potential, the Supreme Court ruled June 28.

By a 6-3 vote in the case of *Hendrick Hudson District Board of*

Efforts to Aid Buyers, Lenders Continue

A U.S. Supreme Court decision that could prevent some home buyers from assuming low-interest mortgages will not sidetrack congressional efforts to forge a compromise protecting both buyers and lenders.

The court June 28 overturned state laws barring the enforcement of due-on-sale clauses by federally chartered savings and loan associations. The clauses permit mortgage lenders to block loan assumptions by demanding that homeowners pay off a mortgage when they sell a home, and requiring a new interest rate to be negotiated with the buyers. *(Weekly Report p. 1339)*



Jake Garn, R-Utah, chairman of the Senate Banking Committee, is continuing to consider a bill that would allow enforcement of the due-on-sale requirement by both federal- and state-chartered lending institutions.

But he also is considering modifying the measure to include buyer safeguards, according to M. Danny Wall, committee staff director.

One proposal would require lenders to meet borrowers halfway by providing loans at a "blended" rate between the original low interest rate and the current higher market rate, he said.

The compromise could be written into a bill (S 1720) introduced by Garn last fall and tentatively scheduled for markup in July, Wall said. S 1720 is a broad banking reform bill. *(1981 Almanac p. 123)*

Although no legislation is under active consideration by the House, Banking Committee aides said they expect pro-consumer lawmakers to introduce bills to overturn the court decision.

The opinion was a victory for the lending industry because it allows S&Ls to unload unprofitable, low-yielding mortgages. But the National Association of Realtors denounced the decision, warning that it could push up housing costs and make it difficult for many prospective buyers to qualify for loans.

Court Decision

The Supreme Court ruling came in *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*. The court held, 6-2, that a California law prohibiting enforcement of due-on-sale clauses was pre-empted by federal rules allowing federal S&Ls to include the clauses in contracts. The regulations were issued in 1976 by the Federal Home Loan Bank Board, which oversees federal S&Ls.

The Supreme Court case arose after Fidelity Federal, a federally chartered S&L in Glendale, Calif., tried to invoke due-on-sale clauses by foreclosing on three homes, each of which had been sold by transferring an old mortgage held by Fidelity to new buyers. The new owners sued to block foreclosure, citing California law banning enforcement of due-on-sale clauses.

A state court decided in favor of Fidelity, but an appellate court reversed it, holding that state law ruled the situation. Fidelity appealed to the Supreme Court.

"Federal regulations have no less pre-emptive effect than federal statutes," Justice Harry A. Blackmun wrote for the Supreme Court majority. "A savings and loan's mortgage lending practices are a critical aspect of its 'operations,' over which the [Federal Home Loan Bank] Board unquestionably has jurisdiction," he wrote.

"Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase."

Justices William H. Rehnquist and John Paul Stevens dissented, protesting that the majority view authorizes an undesirable federal intrusion into state affairs. Justice Lewis F. Powell Jr. did not take part in the case.

Reaction

Richard T. Pratt, chairman of the Bank Board, hailed the decision and predicted it will lower mortgage rates over time and provide first-time buyers and purchasers of newly built homes fairer access to credit.

"Without enforceable due-on-sale clauses, the troubled thrift industry would have experienced an additional loss of some $1.3 billion within the next two years alone, and the effect on home buyers would have been a decreased supply of housing finance," Pratt said.

The ruling will have the greatest impact in about 18 states where due-on-sale enforcement was challenged, and in three states where the Bank Board's pre-emption of state law was attacked, Pratt said.

The U.S. League of Savings Associations also praised the ruling, saying it "testifies to the sanctity of contracts between lending institutions and borrowers."

But the National Association of Realtors predicted an adverse effect on sales. In 1981, nearly half of all sales of older homes involved mortgage assumptions, Gil Thurm, legislative counsel for the Realtors, said. By blocking assumptions, the ruling could increase housing costs at a time when many Americans do not qualify for mortgages because of high interest rates, he said.

Thurm urged that due-on-sale be used "in a way that will minimize foreclosures. . . . We urge accommodation and the blending of mortgage and market rates."

Thurm said the Realtors also would like to see "legal or legislative alternatives" that would minimize the ruling's impact on home buyers and sellers.

Lobbyists for the savings league said the group would back a compromise like Garn's so the power to block loan assumptions could be extended to state-chartered, as well as federal S&Ls.

—By Diane Granat and Elder Witt

Education v. Rowley, the court said the 1975 Education for All Handicapped Children Act (PL 94-142) did not go so far as to require the provision of a sign language interpreter for a deaf child who was already doing well in school.

It was the first high court decision interpreting the landmark 1975 act, which required all states to provide a "free appropriate public education" to all handicapped children. *(Act background, Congress and the Nation Vol. IV, p. 389)*

Hundreds of lawsuits have been filed against school districts across the country by parents of handicapped students seeking to use the law to expand the services available to their children. While the June 28 ruling may help resolve some of these, many are likely to be unaffected because each case is so different.

Writing for the majority, Justice Rehnquist said the intent of Congress was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."

A state satisfies its obligation under the law "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction," Rehnquist said. Schools need not provide services "sufficient to maximize each child's potential commensurate with the opportunities provided other children."

The dissenters — Justices Byron R. White, William J. Brennan Jr. and Marshall — argued the 1975 law was intended to provide handicapped students "an equal opportunity to learn."

All states except New Mexico accept funds under the law and are therefore required to comply with its provisions. More than 4 million handicapped children now receive special education in the public schools.

The case before the court involved fourth-grader Amy Rowley, who has severely impaired hearing. She reads lips well, although she misses a substantial portion of what is said in her classroom. With the aid of an individualized instruction program, a state-supplied hearing aid and special free tutoring, she has progressed well through the public schools, remaining in a regular classroom.

Amy's parents, however, felt she would do even better academically with the aid of an interpreter. Lower courts held she was entitled to such help under the law. The school board provided her an interpreter in compliance with these orders but appealed the ruling to the Supreme Court. As a result of its decision, the child will now lose her interpreter, because her parents cannot afford the cost.

Book Banning

Holding that the First Amendment limits a school board's authority to remove books from the shelves of high school libraries, the Supreme Court June 25 sent to trial the case of the *Board of Education, Island Trees Union Free School District v. Pico.*

In that case, high school students challenged their school board's power to remove eight books from the library shelves, arguing that this action violated their First Amendment rights. Among the books were Bernard Malamud's "The Fixer," Eldridge Cleaver's "Soul on Ice," Kurt Vonnegut's "Slaughterhouse Five," and Desmond Morris' "The Naked Ape."

The federal district court in which the case was brought ruled summarily in favor of the board, holding that it acted within its authority to remove "educationally unsuitable" material from the school libraries. But the 2nd U.S. Circuit Court of Appeals reversed and ordered a trial.

The Supreme Court, 5-4, agreed that there should be a trial. Justice Brennan announced this decision in an opinion joined by Marshall, Stevens, and — except for one portion — Blackmun. Brennan explained that a trial was necessary to develop the record and determine the motivation for the board's action. If it acted to remove vulgar or otherwise unsuitable material, the action was permissible. If it acted to remove unpopular ideas from the library, it violated the First Amendment. "Our Constitution does not permit the official suppression of *ideas,*" he wrote.

Justice White provided the crucial fifth vote to order a trial, but he felt that it was too early for the court to address the constitutional issues presented.

Chief Justice Burger and Justices Powell, Rehnquist and O'Connor dissented, each writing a separate opinion. Burger warned that if the views set out in Brennan's plurality opinion prevailed, the court "would come perilously close to becoming a 'super censor' of school board library decisions." In their separate dissenting views, Justices Powell and O'Connor emphasized the responsibility of the school board to oversee the education of a district's children and to remain responsive to the community. Powell decried the ruling as "a debilitating encroachment upon the institutions of a free people."

Alien Students

Further enlarging the rights of alien students to a public education, the court June 28 held that the University of Maryland may not deny in-state status — and lower tuition — to the children of employees of the World Bank and other international organizations who are legally domiciled in the state.

Justice Brennan noted that the federal government admitted these aliens, permitted them to establish domicile, and exempted them from income taxes. The court, he said, "cannot conclude that Congress ever contemplated that a state, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification."

The vote in the case of *Toll v. Moreno* was 7-2. Justices Rehnquist and Burger dissented in a long and strongly worded opinion, arguing that there was no good reason to deny the state the power to charge these students the higher tuition. *(Earlier ruling, Weekly Report p. 1479)*

Single-Sex State Colleges

By a 5-4 vote, the court July 1 struck down as unconstitutional the single-sex admissions policy of the School of Nursing at the Mississippi University for Women (MUW), saying the state had failed to show that discrimination against men was "substantially related to an important government objective."

The university, founded by the state Legislature in 1884, is the oldest state-supported all-female college in the nation.

"That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review," the court said in an opinion delivered by O'Connor, the court's first woman justice.

The case of *Mississippi University for Women v. Hogan* arose when a male student in 1979 was denied admission to MUW's nursing education program, located in his hometown. *(Weekly Report p. 587)*

The state claimed its single-sex policy was designed to compensate for

discrimination suffered by women. But the court said that rather than compensating for such bias, "MUW's policy . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."

The four dissenters — Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun — objected to such reasoning. They noted the male student denied admission at the MUW School of Nursing could have attended public nursing education programs at other locations in the state.

"A constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the state of Mississippi. In essence, he insists that he has a right to attend a college in his home community. This simply is not a sex discrimination case," declared Powell.

Powell defended the value of "voluntarily chosen single-sex education," calling it "an honored tradition in our country, even if it now rarely exists in state colleges and universities."

Civil Rights

Voting Rights

The court July 1 upheld a finding by two lower federal courts that the at-large system used by Burke County, Ga., to elect its Board of Commissioners is unconstitutional because it has been maintained for the purpose of discriminating against blacks.

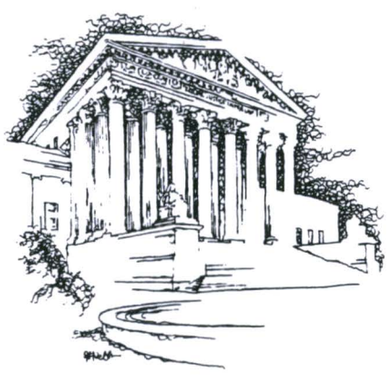
By a 6-3 vote, the justices said the lower courts had correctly looked for — and found — evidence of discriminatory intent in the county's maintenance of at-large elections, rather than relying solely upon the fact that no blacks have ever been elected to the county governing board.

The high court, in deciding the case of *Rogers v. Lodge*, upheld a lower court requirement that the county switch to an election system using single-member districts.

The court reaffirmed a 1980 ruling in a Mobile, Ala., case that an at-large election system cannot be found unconstitutional merely because no blacks have been elected under it. But the justices held circumstantial evidence is adequate to prove a "racially discriminatory purpose or intent." *(Mobile case, 1980 Almanac p. 9-A)*

In *Rogers v. Lodge*, the court noted, both the federal district court and the appellate court "thought the supporting proof in this case was sufficient to support an inference of intentional discrimination," and the Supreme Court has traditionally been reluctant to disturb findings of fact in which two lower courts concur.

Dissenting Justices Powell and Rehnquist objected that the lower courts "relied on factors insufficient



as a matter of law to establish discriminatory intent." There was little to distinguish the kind of evidence in this Burke County case from that offered in the Mobile one, they contended.

In a separate dissent, Stevens said the majority erred "by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially-manageable standard for adjudicating cases of this kind."

The intent-vs.-effects distinction drawn by the court in *Rogers v. Lodge* and the earlier Mobile case may soon become moot in practice. President Reagan June 29 signed into law an extension of the 1965 Voting Rights Act that includes new language aimed at largely negating the effect of the *Mobile* decision. *(Story, p. 1586)*

The language makes it possible to prove voting rights violations by showing that an election law or practice "results" in discrimination, regardless of the intent behind it.

In effect, this means that it will now be easier to prove voting rights discrimination under the law — the Voting Rights Act — than it is under the 14th and 15th amendments to the Constitution.

In another voting rights decision, the court June 15 held that the Mississippi Supreme Court acted improperly when it directed a county to proceed with a school board election under new procedures without obtaining approval for those changes from the Justice Department as required under the Voting Rights Act.

But the court softened this blow to state pride by declaring for the first time that state courts have the power to decide whether such electoral changes in fact require clearance under the law.

In the case of *Hathorn v. Lovorn*, Justice O'Connor wrote that state courts have the duty as well as the power to make such decisions, and that they must refrain from issuing any orders that would violate the Voting Rights Act.

Justice Rehnquist dissented alone.

Job Bias

Employers won two job bias rulings from the court during the week of June 28.

On June 28, the court held that an employer charged with discriminatory refusal to hire a job applicant could terminate all liability for back pay to that applicant — should the charge be proved — by making an unconditional offer of a job to the applicant, even if that offer did not include seniority retroactive to the date of the alleged discrimination.

The court divided 6-3 in the case of *Ford Motor Company v. Equal Employment Opportunity Commission (EEOC)*. Justice O'Connor wrote the decision, reasoning that if offering the job to the complaining applicant limited an employer's liability, he would probably offer a job to that applicant rather than another. But if he was required also to give that new employee retroactive seniority, he would be less likely to hire that individual than someone to whom such an award was not necessary. "The victims of job discrimination want jobs, not lawsuits," wrote O'Connor, and this rule — rather than that advocated by the EEOC — would result in more jobs for such individuals.

On June 29, the court held that unless there is evidence of intentional discrimination, a contractors' association may not be held liable for racial discrimination practiced by a union hiring hall the contractors use as part of a collective bargaining agreement.

By a 7-2 vote, the court narrowed the liability of employer associations to such suits. Justice Rehnquist wrote the majority opinion in the case of *General Building Contractors Association v. Pennsylvania*. Justices Marshall and Brennan dissented.

Congress Must Rewrite Bankruptcy Law

The House and Senate may find themselves at odds again over how much authority to give bankruptcy judges and how to appoint them to office.

Members will have to address the issue because the Supreme Court June 28 held unconstitutional a key portion of a major federal bankruptcy-law reform (PL 95-598) enacted in 1978. *(1978 Almanac p. 179)*

The justices ruled 6-3 that Congress, in creating a new set of courts to handle bankruptcy cases and ancillary matters, gave those courts more power than the Constitution allows for judges with less than complete independence from the other branches of government.

The decision will not invalidate any actions taken by these bankruptcy courts before the court acted. And the justices gave Congress until Oct. 4 "to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."

Background

Article III of the Constitution provides that the judicial power of the United States shall be exercised by courts whose independence from the other two branches is protected by life tenure and a salary that cannot be reduced during a judge's term.

It was clear when Congress passed the 1978 law that judges of these new bankruptcy courts, which are adjuncts of federal district courts, lacked such guarantees. They are appointed by the president for 14-year terms and have salaries that are fixed by law and can be adjusted.

Yet Congress also granted these new courts and the judges who staff them broad jurisdiction that encompassed virtually all the powers of federal district courts that could be used to resolve any sort of civil case — contract, antitrust, job bias, labor relations — related to a bankrupt individual or organization.

It was this combination of too much power and too little independence that the court found a fatal constitutional flaw. *(Background, Weekly Report p. 806)*

Until the 1978 law was enacted, bankruptcy "referees" were appointed by federal district courts. They had no power to hear cases involving matters ancillary to a bankruptcy case; these were generally handled by the district courts.

A major reason for the new judicial scheme was to provide a more efficient bankruptcy procedure and to end litigation over which matters relating to bankruptcy would fall into what federal courts.

The House-Senate Dispute

Many House members were not happy with the legislation when it was enacted because they had favored making bankruptcy judges the equivalent of federal district court judges, appointed for life under Article III of the Constitution.

On the other hand, Chief Justice Warren E. Burger — who dissented in the June 28 decision — had opposed presidential appointment of the judges and had lobbied against such a move. *(1978 Almanac p. 180)*

Anticipating an adverse ruling from the court, Rep. Peter W. Rodino Jr., D-N.J., chairman of the House Judiciary Committee, introduced a bill (HR 6109) April 20 to make bankruptcy judges Article III judges.

Rodino said June 28 that after Congress returns from its Independence Day recess, he will begin hearings on how "to provide for the appointment of U.S. bankruptcy judges under Article III of the Constitution."

Rodino said he believed it was clear from 1978 debate that a specialized bankruptcy court with broad authority was necessary for efficient resolution of cases.

In the Senate, there was much less enthusiasm for solving the dilemma by creating Article III bankruptcy judges. Sen. Robert Dole, R-Kan., chairman of the Judiciary Subcommittee on Courts, said he too would hold hearings after the recess, but he declined to say what alternatives he favored. Some of Dole's aides said, however, that making bankruptcy judges Article III judges would not be "the preferred option."

They suggested exploring other alternatives, such as cutting back the authority of bankruptcy judges.

Dole made clear that he would like to use the bankruptcy-judge issue as a vehicle for making even more changes in bankruptcy laws. The senator already has two bills pending on the Senate calendar.

One (S 2000) would revise existing law to make it more difficult for consumers to declare bankruptcy. *(Weekly Report p. 805)*

The other bill (S 1365) would expedite procedures for handling bankruptcies involving grain elevators.

The Opinion

To approve the sort of court called for in the 1978 law would be to endorse "a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent judicial branch of the federal government," wrote Justice William J. Brennan Jr. in the case of *Northern Pipeline Co. v. Marathon Pipe Line.*

He was joined in this opinion by Justices Thurgood Marshall, Harry A. Blackmun and John Paul Stevens. Justices William H. Rehnquist and Sandra Day O'Connor also voted to hold the law unconstitutional, but they explained in a separate opinion that they based their determination on more narrow grounds.

The dissenting votes were cast by Chief Justice Burger and Justices Byron R. White and Lewis F. Powell.

Burger suggested that Congress might cure the constitutional flaw in PL 95-598 by simply routing such "ancillary common-law actions . . . as the one involved in this case" to the federal district court of which the bankruptcy court was an adjunct.

Justices White and Powell found the new bankruptcy courts well within constitutional limits and would have deferred to congressional judgment in creating them.

—By Nadine Cohodas and Elder Witt

Other Cases

Cable Television

In a decision that could slow the march of cable television into urban areas, the court June 30 declared unconstitutional a New York law requiring landlords to permit installation of cable TV equipment on their apartment buildings for a nominal fee.

By a 6-3 vote, the court struck down the 1972 state law challenged in the case of *Loretto v. Teleprompter Manhattan CATV Corp.*

Writing for the majority, Justice Marshall declared that the equipment installation amounted to a "permanent physical occupation of another's property," which historically has been viewed as a "taking" forbidden under the Fifth Amendment unless just compensation is provided to the property owner.

The state law did require compensation, but left it up to a special panel to set the amount. That cable television commission required only $1 in compensation to the owners of rental property.

While the high court by implication found a $1 fee to be inadequate compensation, the justices did not specify what an appropriate payment might be. Marshall said that was an issue for the state courts to decide.

New York officials had defended the law, arguing that before it was passed, landlords were demanding huge fees and imposing other burdensome conditions on cable companies.

The state Court of Appeals upheld the law on grounds that it placed only a minor burden on property owners while serving a legitimate governmental purpose in encouraging the expansion of cable TV.

The Supreme Court disagreed. Marshall said neither the public interest involved nor the small amount of space required for installation of the cable equipment excused the "taking" of property without adequate compensation. "Whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox," he wrote.

Excluding Evidence

The continuing controversy over the "exclusionary rule" in criminal cases surfaced again in a pair of late June opinions from the court. The rule, adopted in 1914 for federal courts, requires judges to throw out of court evidence obtained in violation of

a defendant's constitutional rights. The Supreme Court has held that this rule also applies to state trials.

On June 23, the court held, 5-4, that Omar Taylor's confession that he had robbed a grocery store in Montgomery, Ala., could not be used as evidence against him because it followed his illegal arrest by police who lacked either probable cause to arrest him or an arrest warrant.

Justice Marshall wrote the opinion in *Taylor v. Alabama.* He explained that although Taylor's confession came after he was warned three times of his constitutional rights, after he met with his girlfriend, and in the absence of any physical mistreatment by police, it was still the product of his illegal arrest and could not be used in court.

In a vigorous dissent, Justice O'Connor — joined by Burger, Powell and Rehnquist — argued that Taylor's confession was not the result of his illegal arrest but was the product of a decision made with full knowledge of his rights and after discussing his situation with friends.

In the case of *United States v. Johnson,* decided June 21, the court held that one of its 1980 decisions requiring the exclusion of evidence obtained after an illegal arrest applied retroactively to any case not finally adjudicated.

In 1980 the court held that police may not enter someone's home without an arrest warrant in order to arrest the occupant. In the *Johnson* case, which involved a 1977 arrest, the court held, 5-4, that the 1980 ruling applied because the Johnson case was still on appeal when it was announced. Justice Blackmun wrote the opinion; White, Burger, Rehnquist and O'Connor dissented. *(1980 Almanac p. 5-A)*

Antitrust and Insurance

Continuing to apply the antitrust laws broadly, the court June 28 sent to trial an antitrust case in which an individual chiropractor charged that an insurance company and the state chiropractic association violated federal laws against price-fixing when they cooperated in setting the "reasonable" chiropractic fees for which the insurance company would reimburse its policyholders.

Dividing 6-3 in the case of *Union Labor Life Insurance Co. v. Pireno,* the court held that this activity was not part of the "business of insurance," which Congress has exempted from antitrust laws. Justice Brennan wrote the court's opinion, clearing the way for a trial on the antitrust charges. Justices Rehnquist, Burger and O'Connor would apply the exemption to foreclose a trial. *(Earlier antitrust rulings, Weekly Report p. 1552)*

States and Taxes

The Supreme Court June 29 limited the state tax liability of multistate and multinational corporations, reiterating that a state may base the tax it assesses such a corporation on total income — including income from foreign subsidiaries — only if the corporation and its subsidiaries are sufficiently integrated to be considered a unitary business.

Ruling in favor of ASARCO Inc. and F. W. Woolworth Co. and against Idaho and New Mexico, the court explained that these two companies — and the subsidiaries whose dividends or other payments to the parent company the state sought to tax — were not such unitary businesses. Justice Powell wrote the court's opinions in the cases of *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico and ASARCO v. Idaho State Tax Commission.* The vote was 6-3 in each case.

The majority added a footnote leaving open the possibility that Congress could act to set rules for state taxation of such corporations that presumably might allow the inclusion of this type of subsidiary income in the tax base. But the dissenting justices, O'Connor, Blackmun and Rehnquist, warned that by basing its ruling on the due process clause, the majority may have deprived Congress of the authority to take such action. ■

Wash. Post 7/4/82

Court's Rulings Hinged On the Middle Faction

By Fred Barbash
Washington Post Staff Writer

The occasion was oral argument before the Supreme Court on a major death penalty case. Justice William H. Rehnquist, the arch-conservative, asked a lawyer for the state of Oklahoma whether it wouldn't be cheaper "from the taxpayers' point of view" to execute the defendant than to confine him for years of psychiatric treatment.

From the other side of the bench came the familiar growl of Justice Thurgood Marshall, the arch-liberal: "Well," Marshall said sarcastically, "it would be cheaper just to shoot him when you arrested him, wouldn't it?"

News Analysis

Marshall and Rehnquist are in hostile camps at the court, and, during the term that ended Friday, the camps were perhaps as hostile as they've ever been: Marshall and Justices William J. Brennan Jr. and Harry A. Blackmun on one side and on the other, Chief Justice Warren E. Burger and Justices Rehnquist and Sandra D. O'Connor. The three others, Byron R. White, John Paul Stevens and Lewis F. Powell Jr., shifted between the poles, deciding which would prevail.

What the court did this term depended on which coalition seized control. Sometimes, two courts seemed to be at work.

One court broke new ground in federal-state relations by imposing important restrictions on federal court intervention in state criminal proceedings and property tax controversies.

Another court seemed to revive the federal interventionism of the '60s by telling legislatures that they cannot deny a free public education to illegal aliens, and by telling school boards that they risk being hauled into federal court for censoring books in their school libraries.

One side won major victories by ruling that the states must have stronger evidence of abuse or neglect before removing children from parents and that minorities do not need "smoking gun" evidence of voting abuses to prove discrimination.

SANDRA D. O'CONNOR
... ruled for states' rights in first term

The other succeeded in giving police nearly blanket authority to search private belongings in automobiles; in awarding absolute immunity from civil damages suits to the president and in telling school systems they do not have to go overboard in providing special schooling for handicapped children.

See COURT, A8, Col. 1

The votes on many of the major cases were close. That means the decisions are unstable. They may survive a year or a decade, depending on who becomes president and who he appoints to the court.

The court now includes the appointees of six presidents, starting with Dwight D. Eisenhower and excepting Jimmy Carter.

The court comprises a former majority leader of the Arizona Senate (O'Connor); a former president of the Richmond school board (Powell); a one-time leader of the NAACP (Marshall); a former Nixon Justice Department official (Rehnquist); a former political adviser to Harold Stassen (Burger); a former Harvard mathematics major (Blackmun); an antitrust lawyer (Stevens); a Rhodes scholar who played professional football (White); and a former New Jersey superior court judge (Brennan).

The court's record is clear on individual cases, but collectively its record in the difficult cases this term was a smorgasbord guaranteed to give lawyers whatever quote they need for whatever point they're arguing.

Aliens "by definition, are those outside the community," the court said in a case upholding California's exclusion of legal aliens from jobs as probation officers. But when issuing the ruling on illegal aliens and education, the court said, "We cannot ignore the social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests."

In a ruling which upheld federal intervention in cases involving termination of parental rights, the justices said, "When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." But when it resolved a second case by ruling against a federal role, the court said the use of federal *habeas corpus* intervention "should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns."

Extraordinary facts—the heartbreaking plight of the mentally retarded, the sickening crime of exploiting young children in sex films, a blatant abuse of power by the courts of Mississippi—occasionally permitted solid majorities or unanimity on controversial social issues.

In unanimous votes, the court extended constitutional rights to the institutionalized mentally retarded, threw out a damages award against the NAACP for its political boycott in Port Gibson, Miss., and relaxed the First Amendment to allow a broad attack on child pornography.

The split at the court is not new, but O'Connor's arrival seemed to polarize the court further.

She came with her own conservative agenda of judicial restraint, most pronounced in cases involving confrontations between federal and state power. Thus, when the court split on such social issues as defendants' rights, she sided with Burger and Rehnquist most of the time.

Much of her writing struck one note: states' rights.

Federal *habeas corpus*, which allows judges to review state criminal incarceration at any time, is "federal intrusion," she wrote in one of her opinions restricting it.

Federal court rulings on whether state unemployment taxes may be imposed on religious schools constitutes "federal court interference," she wrote in another case.

A decision striking down Idaho's method of taxing corporations, she said in dissent, "has straitjacketed the states' ability" to develop fair systems of corporate taxation.

The crusade clearly got to the liberal wing of the court. Brennan reached his conclusion early in the term. "The bloom is off the rose," he said as he dissented from one of her rulings, accusing her of straying from an earlier opinion she wrote in *Rose vs. Lundy*.

By the end of the term, Blackmun, Marshall and Brennan openly accused her of purposely "mischaracterizing" a lower court ruling to reach a desired pro-business result in a sex discrimination case pitting the Ford Motor Co. against the Equal Employment Opportunity Commission.

She, in turn, took them to task, in the genteel fashion of the court, for attacking her character. ". . . . We decline the opportunity to address further this *ad hominem* [personal] argument," she responded in a footnote in the same case.

There was one major exception to her efforts on behalf of judicial restraint. She wrote the decision declaring unconstitutional the exclusion of men from the Mississippi University for Women nursing school. Womens' rights activists considered the language of the decision an important reinforcement of the law against sex discrimination.

In other highlights of the court's term, the justices:

• Made it clear in several cases that it disapproves of making one person responsible for the

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misconduct of others. In two cases involving this concept of "vicarious liability," the court said that contractors in Pennsylvania cannot be punished for job discrimination committed by a union hiring hall and that NAACP protesters in Mississippi cannot be punished for violence not directly tied to them. It also said a criminal cannot be put to death unless he is directly involved in a murder.

- Further carved out a special place in the law for children. In the "kiddie porn case," the illegal aliens case and the federal intervention in child custody case, the court justified its decisions on the grounds that special protections are due the young. Similarly, it permitted prayers on public college campuses but refused to retreat from its ban on prayer in public grade schools, in part because the students there are children.
- Said that fee-splitting arrangements among doctors could be automatic violations of antitrust law and that bar associations could not impose excessive restrictions on the content of lawyer advertising.
- Reaffirmed what had been an uncertain "right of access" to criminal trials, which some observers hope can be expanded into a general right of access to all kinds of governmental activities and proceedings.
- Continued to forge novel concepts of how to interpret the Congress. In a case granting a private right to sue under commodities futures laws, the court said Congress indicated that it approved of such a right by remaining silent in the face of lower court rulings establishing it. Congress would have done something about those rulings if it had disapproved, the court ruled.

Justice Says Rights Rulings Won't Alter Administration's Anti-Busing Stance

United Press International

The Justice Department's top civil rights lawyer said yesterday that the Supreme Court's mixed pair of desegregation rulings will not alter the Reagan administration's opposition to court-ordered busing.

Assistant Attorney General William Bradford Reynolds said nothing in Wednesday's rulings on desegregation in Los Angeles and Seattle "casts the slightest constitutional doubt upon a neutrally drawn plan of neighborhood schools."

The justices upheld, 8 to 1, a California ballot initiative that limits state court power over desegregation, but struck down, 5 to 4, a measure approved by Washington state voters attempting to ban busing.

The administration persuaded the court to reject the American Civil Liberties Union's challenge to the California measure, contending that the state still has racial balancing requirements "above and beyond the federal Constitution."

But the administration was unsuccessful in urging the court to uphold the Washington ballot initiative. The Justice Department had argued that the measure merely attempted to establish a "race-neutral" neighborhood school policy in Seattle.

In a written statement, Reynolds said, "In the Seattle case, the court emphasized the power of local school boards to choose among alternative means of achieving desegregation and affirmed the state's power of decision in public education so long as it does not subject desegregative student assignments to unique legal treatment .... The Department of Justice continues to believe that a desgregated school system can be achieved through means that do not involve compulsory transportation."

Staff researcher Carin Pratt contributed to this report

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Chicago Tribune 7/6/82

Top court leaves legal landmarks

by Glen Elsasser
Chicago Tribune Press Service

News analysis

WASHINGTON—For the last nine months, the Supreme Court has zigged and zagged across the nation's consciousness.

With Chief Justice Warren Burger at the helm, as he has been since 1969, the court has charted an uncertain and unpredictable course. It's a court that the ACLU and NAACP love to berate, even though they lose some and win some.

The term that ended Friday was no exception. Despite its deep divisions, the near epidemic of 5-to-4 decisions and its apparent inability to settle some of the nation's nagging legal issues, the high court made some landmark law:

- For the first time, illegal aliens won equal protection of the law in a ruling that assured their children the right to a free public education.
- U.S. presidents have absolute immunity from damages for their official acts, a major victory for former President Richard Nixon, who has been plagued with lawsuits. But other high-level officials enjoy only qualified or "good faith" immunity.
- Busing remains a major tool for school desegregation. But the court warned that voter initiatives cannot be used for racial motives to block voluntary busing. In another ruling, the court held that states are not required to go beyond the law and resort to excessive busing.
- Peaceful boycotts of white businesses by civil-rights groups are protected from damage suits.

THERE WERE this term the perennial problems of pornography and capital punishment, two areas where the court's previous guidelines have led to more questions than answers.

The court this term allowed states to relax the definition of obscenity to deal with child pornography because of the "compelling interest" in preventing sexual exploitation of children.

Before imposing the death penalty on a minor, the court said on another occasion, state courts must take cognizance of an individual's "turbulent family history" and "severe emotional disturbance." And in a Florida case it ruled unconstitutional laws that allow the death penalty for those who act only as accomplices to murder and are not present when it is committed.

TYPICALLY, THE court's record in job-discrimination cases was mixed. It held last month, for instance, that employers cannot use favorable statistics in hiring women and members of minority groups as a defense against job-test challenges.

But in another interpretation of the 1964 Civil Rights Act, the court rejected arguments that seniority systems adopted in the last 17 years discriminte illegally because more blacks and women are in lower-paying jobs. Intentional discrimination must be proven to prevail in such cases.

The Burger court has increasingly demanded evidence of intent before a discrimination suit can be won, whether its focus is housing, jobs or voting rights.

DEALING WITH other areas of discrimination this term, the court significantly expanded and restricted federal laws. For example:

- Individuals posing as buyers or renters are entitled to sue under the fair housing law when subjected to "racial steering."
- Federal law bars educational institutions receiving government funds from discriminating in employment as well as in policies toward students.
- Schools are not required to provide handicapped children with an education that would enable them to achieve their maximum capabilities. The court said that the law simply assures such children only of access to special instruction so that they can achieve passing grades.

There were also few surprises in the area of ciminal law from a court often accused of being proprosecution. For instance, the court said police can accompany an arrested suspect to his home and seize without a warrant contraband there in plain view.

THE BURGER court also attracted unfavorable notice for its uneven record on free-speech issues. This year was no exception. It gave communities broad power to regulate "head shops," which sell drug paraphernalia. It upheld a union rule barring nonmembers from contributing to union election campaigns.

At the same time the court struck down a state law that automatically excluded the press and public from trials involving minor victims of sex offenses.

For the first time in six years the Supreme Court had a new member, Sandra Day O'Connor. A former state judge and politician, she regularly sided with justices sympathetic to states' rights.

But the new justice also displayed an independent streak and didn't hesitate to take her more liberal colleagues to task for their views in her court opinions. During the final week she issued an unusually strong statement condemning sexual stereotypes in a decision striking down a women-only admissions policy at a nursing school.

O'Connor's appointment raised speculation about retirements, because the majority of the justices are in their 60s and 70s. But as six justices left the courtroom for the last day of the term Friday—three were absent—there were no clues as to their future plans.

High Court Term Focuses Attention On Big Workload, Antitrust Rulings

By Stephen Wermiel
Staff Reporter of The Wall Street Journal

WASHINGTON — The Supreme Court term that has just ended made at least two points clear: Changes in antitrust law will come more slowly than critics would like, and the high court's workload looms as an increasingly serious problem.

The justices set modern records, issuing more opinions (141) and hearing arguments in more cases (184) than at any time in the last several decades. They granted review to so many cases that they have filled two-thirds of their schedule for arguments next term. Conceivably, a petition filed this summer and voted on by the court in late fall might not be argued until October 1983, and might not be decided until spring 1984.

Just 3½ years ago, three justices complained about the court's workload and called for creation of a national court of appeals to ease the burden. Justice Byron White said at the time, "We are performing at our full capacity." His December 1978 comments were joined by Justice Harry Blackmun and Chief Justice Warren Burger. They were based on a term in which the court handled 475 fewer total cases, including the thousands denied review, than this term and issued a dozen fewer opinions.

Explanations of the problem vary. Some experts say the increase in the number of federal judges in 1979 and 1980 has increased the flow of cases to the high court. But Gerald Gunther, a professor at Stanford University's law school, says: "The major source of help has to come from within the court. The size of their docket is within their control."

Justice John Stevens, dissenting in a case on Friday, complained that the court is spending time on cases that aren't worthy of its consideration. Saying the high court is encouraging the "rising administrative tide," Justice Stevens said, "We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review."

Mr. Gunther says another problem is "the lack of collegiality" among the justices. "There appears to be a real deterioration in the amount of time they spend talking to each other about common issues and problems in cases," he says. This leads to more justices writing separate opinions, and increasingly volatile, often bitter, wording in dissenting opinions. "The rhetoric is getting stronger," Mr. Gunther says. "It is needlessly hysterical."

Reagan administration officials say they don't expect any retirements among the nine justices this summer. Four are 74 or older, and one is 73. One of the youngest, 57-year-old Justice William Rehnquist, has been in the hospital twice this year.

Vacancies are more likely a year from now. Some think Justice Lewis Powell or even Chief Justice Burger, both 74, might retire. Others point to Justice Byron White, who recently turned 63 and completed 20 years on the court, important for pension purposes.

In the most recent court term, some of the notable developments included the arrival of Justice Sandra Day O'Connor as a member of the court's conservative wing, an unusually high number of both unanimous and 5-4 decisions, and a general absence of major victories for business.

The major decisions of interest to business fall into several categories:

Antitrust

Traditional antitrust concepts have been criticized recently by some lawyers, economists and government officials as outdated and simplistic, but the high court continues to come down on the side of strong antitrust enforcement.

Recent antitrust opinions haven't engaged in elaborate economic analysis, a lawyer says. "We've taken a step back into the days when everything was black and white."

In six decisions this term, the court refused to broaden exemptions from antitrust law, expanded the ability of private citizens to sue for antitrust violations and applied the strictest price-fixing standard it could to the setting of maximum insurance fees by doctors in Arizona.

Immunity from the law was denied to professional engineering societies for industry performance codes, home-rule cities for regulation of cable television franchises, doctors for insurance fees and chiropractors and other health professionals for use of peer review panels to evaluate insurance claims.

In recent years, says Joe Sims, an antitrust lawyer and former Justice Department official, "the guy who is trying to broaden the exemption or immunity has almost always lost."

Mr. Sims says some of the opinions have another common theme. They don't engage in elaborate economic analysis and balancing of competing policies. "We've taken a step back into the days when everything was black and white," he says.

Banking and Securities

The justices ruled that states can't prevent federal savings and loan associations from enforcing due-on-sale mortgages that require payment of the balance of the loan if the property is sold. The ruling was a blow to the real estate industry and will sharply reduce the availability of assumable mortgages.

The high court struck down the Illinois law governing corporate takeovers, casting doubt on laws of 36 other states. It also ruled that certificates of deposit issued by federally insured banks aren't covered by federal securities law. The court said commodity futures merchants and the exchanges on which they trade can be sued by customers for fraud.

Discrimination

The justices ruled in a large number of job-discrimination cases. Two decisions make it harder to challenge seniority systems as biased, and another requires that allegations of bias under an 1866 civil rights law must be shown to have been intentional. The 1866 law is often used to sue employers and other private citizens. The justices said federal courts in job-bias cases must give deference to earlier state court rulings. The court also said that if the charge is discrimination in hiring, class action lawsuits can't include some people who weren't hired and others who weren't promoted.

However, the court gave school-system employees an important weapon, ruling that 1972 education-law amendments banning sex discrimination in school programs can be used to challenge employment practices as well. The justices also ruled that employers can't defend a promotion policy that hurts some minorities by showing the "bottom line" is a racially balanced work force.

In housing discrimination, the justices upheld the right of fair-housing groups to sue for violations of federal law by using "testers"—people who pose as home buyers to test a real estate agent's policies.

Labor

The justices said employers can't pull out of multiemployer bargaining units when contract talks are at an impasse. They declined to expand the definition of "confidential" employees who are entitled to less labor-law protection than others. And they said that unions can compel construction contractors to use only subcontractors that recognize the union.

They also ruled a longshoremen's boycott of Soviet cargo was an illegal secondary boycott and upheld a union ban on outside donations to union election campaigns, a loss for dissident candidates.

Other

The justices said it is up to the Interior Department to decide if it wants to experiment with offshore leasing bidding systems that would give greater access to smaller oil and natural gas companies. They upheld a severance tax on oil and natural gas imposed by the Jicarilla Apache tribe in New Mexico on its federal reservation land. They

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struck down, effective Oct. 4, 1982, an important part of the federal bankruptcy law expanding the jurisdiction of bankruptcy judges, leaving it up to Congress to decide how to change it.

The court said cable television companies have to compensate landlords if they want to run cable lines on the landlords' property, although the amount may be minimal. It also refused to hold several makers of non-brand-name generic drugs liable for infringing on the trademark of brand-name manufacturers.

The justices avoided deciding two important nationwide disputes: whether Vietnam veterans can recover damages from chemical companies for the use of "Agent Orange" during the war, and how the insurance industry should determine which companies are liable for damages for thousands of victims of asbestos exposure.

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Los Angeles Times

Busing in Los Angeles: What the courts give, the voters can take back

The Court's Hectic Finale

The Burger Court clings to two traditions that each year mark its final days. The Justices always unload dozens of decisions in a rush to adjournment, and the rulings always defy simple characterization. Last week the finale of the 1981-82 term was no different. In a series of civil-rights rulings, the Court rescued the NAACP from a crippling lawsuit and split on when voters may overrule mandatory busing plans. In education, the Justices opened the doors of public women's colleges to men but closed the doors a bit to handicapped students. And in criminal law, they made it easier to go after child pornographers, but harder to execute convicted murderers.

The week's most important decision came in an area in which the Justices have long had difficulty: obscenity. The Court held unanimously that states may prosecute publishers and sellers of child pornography even when they can't prove that the dirty books and films are legally obscene. Now, law enforcement agents will have to show only that the questionable material featured children engaging in sexual acts—and not that the pictures also appealed to the average person's "prurient interest." The decision adds another narrow exception to the First Amendment's guarantee of free expression; normally a person may not be punished for selling non-obscene books. But Justice Byron R. White concluded that the Constitution could be bent to allow for "the state's particular and . . . compelling interest in prosecuting those who promote the sexual exploitation of children."

The Court upheld a New York law that bars the promotion of sexual performances by children. Nineteen other states have similar statutes; more state legislatures will likely follow. While all nine Justices agreed to the result, two, William J. Brennan Jr. and Thurgood Marshall, cautioned that these laws should not be used against legitimate books and films. (In "The Exorcist," for instance, the teen-age heroine simulates masturbation on screen.) In his main opinion, White pledged that the Court would step in to save material of serious artistic, scientific or educational value.

In another First Amendment case, the Justices ruled that the NAACP cannot be held liable for damages resulting from a boycott that the civil-rights group organized against white merchants in Claiborne County, Miss., in 1966. The Court declared that the Constitution's guarantee of freedom of association extends to peaceful concerted actions. "One of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means," Justice John Paul Stevens concluded for the unanimous Court. The case had once threatened the NAACP with financial ruin; a state judge had awarded the boycotted merchants $1.25 million in damages.

Other highlights of the final week:

■ The Court reviewed two state referendums that overturned local busing plans; it approved one and struck down the other. California's state courts had ordered busing in Los Angeles to relieve school segregation. They held that the state constitution required busing even if segregation was not intentional (Federal courts require proof of intent to discriminate). In 1979 California voters approved an amendment which, in effect, directed state judges to apply the narrower Federal rule. By an 8-to-1 vote, the Justices upheld the amendment, declaring that what the state's courts give, the state's voters may take back. "Having gone beyond the requirements of the Federal Constitution," Justice Lewis F. Powell Jr. wrote, "[California] was free to return to the standard prevailing generally throughout the United States."

The other case involved a 1978 Washington state referendum that stripped local school boards of the power to use mandatory busing for integration. Under the referendum, school districts could authorize busing beyond neighborhood schools to relieve overcrowding or promote special programs, but if the object was integration busing could be ordered only by the state legislature or the courts. By a 5-to-4 vote, the Justices found this arrangement to be an unfair burden on minority groups. For the majority, Justice Harry A. Blackmun distinguished this case from California's because it interfered with local control over the single issue of racial balance in the schools—and thus "worked a major reordering of the state's educational decision-making process."

■ Seven years ago Congress guaranteed "free appropriate education" for handicapped children, requiring public schools to treat them, as much as possible, like other children. The Peekskill, N.Y., school system provided tutoring and a hearing aid for 11-year-old Amy Rowley, who is deaf, but her parents demanded the assignment of a sign-language interpreter to Amy's class. In its first interpretation of the statute, the Court held, 6 to 3, that Peekskill had treated Amy well enough, especially since she does above-average work. The intent of Congress, said Justice William H. Rehnquist, "was more to open the door of public education . . . than to guarantee any particular level of education once inside." In dissent, Justice White sneered that the majority would have been satisfied if Amy had been "given a teacher with a loud voice."

■ In the same week that the Equal Rights Amendment died, the Justices decided a sex-discrimination case with a novel twist; men, they said, may not be barred from a state nursing college established exclusively for women. Ruling in a case brought against the Mississippi University for Women, Justice Sandra Day O'Connor held that Mississippi could not justify its gender-based classification.

■ Earl Enmund drove the getaway car for a man and a woman who robbed and killed an elderly Florida couple. Enmund wasn't in their house when the shots were fired, but police charged him with felony murder—participating in a crime that ended in a homicide. Enmund was sentenced to die. By a 5-to-4 vote, the Justices reversed, saying that capital punishment should be reserved for actual killers. Wrote Justice White, "Putting Enmund to death to avenge two killings that he did not commit . . . does not measurably contribute to . . . ensuring that the criminal gets his just deserts."

ARIC PRESS with DIANE CAMPER in Washington

The Supreme Court: A House Divided

The dominant direction in the 1981-82 term was to the right. But shifting alliances at times sent the Justices careening off that path.

The Supreme Court—with its first change in membership since 1975—is holding to the markedly less activist course it has pursued in recent years.

In the term that ended on July 2, the Justices deferred more often than not to Congress, state legislatures and the executive branch when deciding important public issues.

At the same time, the Court remained badly splintered on key legal questions—divisions mostly unaffected by the replacement of Potter Stewart, who retired last July, by Sandra Day O'Connor.

Justices cast 255 dissenting votes during the term, 10 more than last year's total. "The Court still is unbelievably divided on many issues," remarks Norman Chachkin of the Washington-based Lawyers Committee for Civil Rights Under Law.

The issue of judicial power was raised in one of the first rulings of the term, an opinion barring citizens from suing local officials under U.S. civil-rights laws to protest property-tax-assessment systems.

Writing the opinion for the Court, Justice William Rehnquist declared that allowing such suits would be "contrary to the scrupulous regard for the rightful independence of state governments."

Other rulings during the term gave federal, state and local lawmakers and bureaucrats wider latitude in many ways. The Justices—

- Allowed cities to regulate sales of drug paraphernalia.
- Ruled a judge had erred by deciding that a U.S. law required public schools to supply sign-language interpreters for deaf students.
- Freed the Navy from filing an "environmental-impact statement" for a nuclear-weapons-storage site.
- Declared that a citizens group had no right to challenge in court the federal government's sale of surplus property to a religious organization.
- Said U.S. courts were powerless to decide whether states can collect unemployment taxes from church workers.
- Blocked parents from asking federal judges to second-guess state officials' placement of children in foster homes.

While many rulings relieved other branches of government from court scrutiny, the Justices sometimes strayed from that path and imposed their judgments on states and cities.

Among other things, the Court required states to provide free education to illegal aliens and training for hospitalized retarded persons, subjected cities to antitrust suits and made it harder for states to win child-neglect cases against parents.

Observes A. E. Dick Howard, University of Virginia law professor: "The Court's attitude on federal-state relations was curiously ambivalent."

The zigzags stemmed largely from the tendency of four of the nine Justices to shift alliances unpredictably.

During the 1981-82 term, Justices William Brennan and Thurgood Marshall remained staunch activists, while Rehnquist and Chief Justice Warren Burger—often joined by O'Connor—consistently preached restraint.

The Court's other members continued their past practice of lining up part of the time with one camp and part of the time with the other, depending on the issue. Observers say this sometimes caused the Justices to reach inconsistent results in cases involving similar questions.

One example: Texas was required to admit illegal aliens to public schools, but California was allowed to deny legal aliens jobs as probation officers.

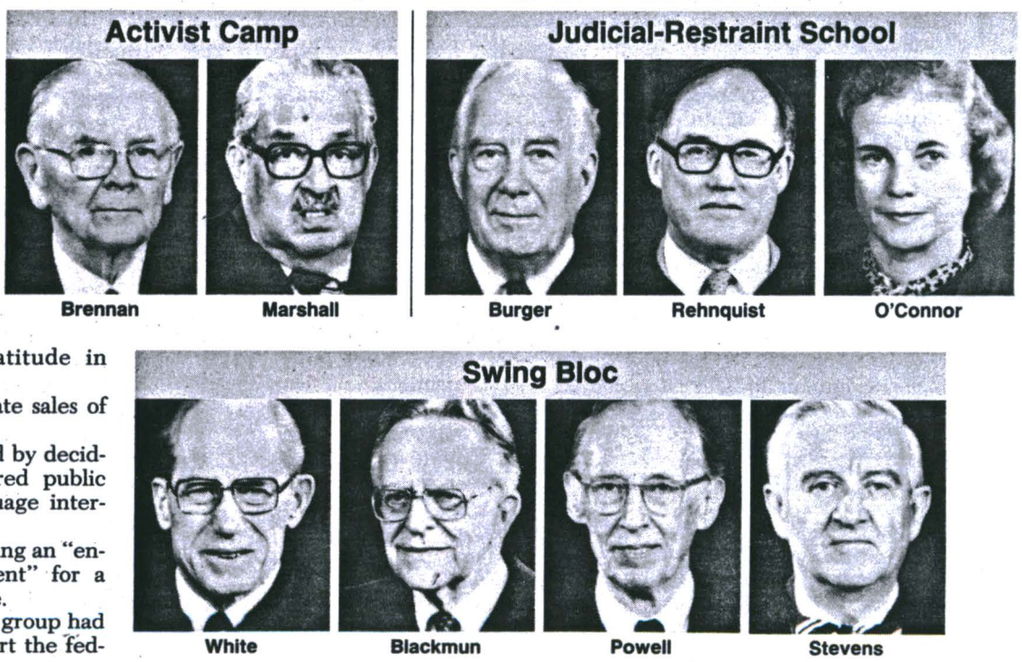
The Court also took seemingly contradictory actions in two cases involving the refusal by the International Longshoremen's Association to unload Soviet cargo after Russia's invasion of Afghanistan.

First, the Justices termed the union's action an illegal secondary boycott. Then in a later opinion, the Court said judges were not empowered to block the longshoremen's work stoppage—a conclusion termed by dissenter Burger a "strange result."

Concludes Philip Kurland, law professor at the University of Chicago: "The lack of consistent doctrine means that the decision in each case depends on the facts, and the Justices' reaction to those facts. One can't predict the results."

Close votes have made it impossible for the Court to come to grips with some crucial legal questions. Two important issues went unresolved after Justices disqualified themselves because of conflicts of interest, and the

The Split Among the Justices



TIMOTHY A. MURPHY—USN&WR

O'Connor and Chief Justice are often allies.

Justice O'Connor Carves Own Niche

Sandra Day O'Connor, a little-known Arizona judge when President Reagan appointed her to the Supreme Court a year ago, has wasted no time making her mark in Washington.

Ignoring the tradition that new Justices don't create waves, O'Connor during her first term wrote some strongly worded decisions—several of them aimed pointedly at senior Justices.

"She's not lying in wait; she got her feet on the ground very early," says Charles Ares, a law professor at the University of Arizona.

Some experts are surprised that O'Connor has so often parted company with the majority. Of the 34 opinions she has written, nine were dissents and 13 agreed with the majority but stated different reasons.

O'Connor sided most of the time with the prime advocates of judicial restraint—Chief Justice Warren Burger and Justice William Rehnquist.

But because O'Connor's predecessor, Potter Stewart, also was conservative, she "hasn't made any significant difference in the Court's results," says Jesse Choper of the University of California Law School.

As a former state legislator and an ex-state judge, O'Connor's most significant long-term role may turn out to be as a defender of state powers. When the Court approved federal restraints on state utility regulators, she dissented, declaring: "State legislative and administrative bodies are not field offices of the national bureaucracy."

O'Connor joined Burger and Rehnquist in usually deferring to lawmakers. In her first opinion, she wrote that regulation of bidding on offshore oil and gas development is a "question . . . for Congress alone to answer."

One of the cases in which the first woman Justice did break ranks with Burger and Rehnquist was a July 1 ruling that Mississippi violated the law when it set up an all-female nursing school. In the majority opinion, O'Connor warned other Justices about making "traditional, often inaccurate assumptions about the proper roles of men and women."

Court divided, 4 to 4. One appeal was a test of presidential-campaign spending limits for political committees; the other challenged federal regulation of doctors' ethics rules.

The Justices sidestepped a ruling on controversial "legislative vetoes" of executive-branch actions and decided to hear new arguments next term.

Other cases that had been expected to decide major constitutional questions became muddled when five Justices were unable to agree on a single majority opinion. In one, a decision on whether the Constitution permits executions of juvenile criminals was sidetracked. Instead, the Justices demanded more information from a trial judge.

In another, the Court failed to establish guidelines for school boards to follow when banning controversial books; the case was sent back to a lower court for more evidence. In the book case, the Justices issued seven separate opinions in various combinations to explain their result. "I'm beginning to think I need an adding machine and a computer to analyze the decisions," says Jesse Choper, a law professor at the University of California at Berkeley.

In some appeals, the divisions on the Court boiled over into sharp language.

When the Justices ruled 5 to 4 that Presidents are immune from civil suits, dissenter White said it was "ironic as well as tragic that the Court would so casually discard its own role of assuring the right of every individual to claim the protection of the laws."

In a 6-to-3 ruling restricting the right of state convicts to file federal civil suits challenging their convictions, O'Connor termed one of dissenter Brennan's arguments "incomprehensible."

Among other major decisions—

Business and labor. The Justices showed no clear pattern, coming out on the side of business about as often as they did on the side of labor or consumer interests.

Industry won rulings striking down state regulation of business takeovers and voiding a law that prevented energy firms from selling their products across state lines.

But business lost when the Court allowed investors for the first time to sue commodity traders in fraud cases and permitted Indians to tax firms that extract oil and gas from their land.

A decision preventing many home buyers from assuming low-interest mortgages helped savings and loan institutions but hurt the real-estate industry.

Labor won an expansion of U.S. labor law to include employes who handle confidential business data, but lost an effort to obtain federal-court review of collective-bargaining pacts for transit workers. Quentin Riegel of the National Association of Manufacturers, who studies the Court's handling of business and labor issues, says: "I've been looking for a trend, but I can't find one."

Criminal law. In trying to untangle a raft of complex procedures, the Justices usually came out on the side of law enforcement.

In two rulings on search issues, the Court extended police powers to inspect containers in automobiles for contraband and upheld an officer's seizure of marijuana from a student's room, which the officer had entered while the student looked for his identification papers.

In curbing criminals' lawsuits, the Justices said convicts could challenge only trial errors that affected the verdict—not minor technicalities. Such prisoner cases have clogged U.S. courts in recent years.

In a case testing the federal speedy-trial law, the Court ruled that defendants' right to a swift trial goes into effect only after an arrest and does not limit the length of an investigation.

The Court ruled 5 to 4 that states could not execute a convict who aided a robbery but didn't participate in murdering the victim.

Civil rights. In perhaps the most controversial civil-rights issue of the session, the Justices split in two busing cases. They upheld a California law limiting state judges' power to order busing, but voided a Washington State law aimed at stopping busing for desegregation in Seattle.

The Court ruled in favor of civil-rights groups in several other cases. Justices allowed "testers" to sue landlords who refuse to rent to minorities, made it easier for blacks to prove that at-large voting systems violate their right to vote and upheld boycotts of discriminatory merchants. □

By TED GEST

THE WHITE HOUSE
AND
EXECUTIVE OFFICE OF THE PRESIDENT
INFORMATION CENTER

TO: Barbara Gleason

ROOM: 158 DATE: 7/29/81

☑ TO KEEP

☐ TO BORROW

☑ PER YOUR REQUEST

MESSAGE:

OA FORM 20
NOV 1979

Wash. Post
July 8, 1981
P. A1

Associated Press

Sandra O'Connor: "A person for all seasons," the president said.

Nominee Has Avoided Ideological Extremes

By Fred Barbash
Washington Post Staff Writer

Her benchside manner is so stern, her stare so penetrating, that some young lawyers call her "laser eyes."

Her written opinions tick off the law, tick off the precedents and fit in the facts, all without rhetoric or asides. They are the work of a technician, not an ideologue.

In a state where ideological extremes flourish, Sandra D. O'Connor has shown a knack for avoiding them throughout her career as a lawyer, state senator and judge. As a politician, she has been on either side of the Equal Rights Amendment and the abortion issue. As a judge, she is described as a tough sentencer, capable of imposing the death penalty.

But as she demonstrated in a 1978 murder case, she is just as capable of wiping out her own sentence and ordering a new trial when she thinks something has gone wrong in the process of criminal justice.

For these reasons, her nomination was endorsed by virtually all those who know her in Arizona, from conservative Sen. Barry Goldwater to the head of the Arizona American Civil Liberties Union. At the same time, the state's lawyers

See O'CONNOR, A6, Col. 1

WASH POST July 8, 1981 P. 1

New Nominee Has Shunned Extremes

Arizonans Praise Record, Say Stands Hard to Predict

O'CONNOR, From A1

have given her consistently high marks in the bar association's ratings of judges in the state.

And for the same reasons, most lawyers said it would be risky to predict how she might vote on many of the controversial issues that will confront the Supreme Court.

At 51 she is young for a Supreme Court justice, and her term of service could carry her far beyond any of the current skirmishes and into territory as yet untouched by the high court or any other.

A recent law journal article she wrote suggests, however, that in her overall view of the role of the federal judiciary she is well in tune with the Burger Court's efforts to shift much judicial power back to the states.

"It is," she wrote, "a step in the right direction."

O'Connor for 18 months has been one of nine judges on the Arizona Court of Appeals, one step below the state's highest court, the state Supreme Court. She served as a Superior Court judge in Phoenix for five years before that, hearing ordinary criminal and civil cases.

She is one of the few court appointees in recent years to mix substantial political experience with the law. She was a Republican state senator representing a wealthy suburb of Phoenix, majority leader of the senate and was mentioned as a candidate for Arizona governor. In 1972, O'Connor was co-chairman of the Nixon campaign in her state.

O'Connor returned to Arizona, where her parents lived, after graduating third in a Stanford law class that included current Supreme Court Justice William H. Rehnquist. At Stanford, she was good enough to make the law review.

In Phoenix, she joined a general law practice with one other lawyer, Thomas H. Tobin, and left after about a year, Tobin recalls, to have her three children. She returned to law as an assistant attorney general for the state of Arizona in 1965.

As a state senator, she sponsored and supported a wide variety of bills on social issues but followed no consistent ideological line.

She co-sponsored a bill opposed by anti-abortionists to establish a state family planning service. But she voted for a bill giving hospitals and doctors the "right to refuse" to perform abortions.

She voted for a resolution urging Congress to stop school busing to achieve racial balance, and for a resolution opposing federal gun controls.

But she favored legislation to provide workers' compensation for migrant farm workers, to encourage bilingual education in the state and to improve conditions for mental patients.

At first, she supported the Equal Rights Amendment. "I remember the day it passed out of Congress," said current Arizona Senate President Leo Corbert. "There were some of us that didn't know what it meant. All of the women, including Sen. O'Connor, said we should pass it before the state of Hawaii did. They wanted to be first.

"But then their ardor sort of cooled."

Corbert says that O'Connor turned her attention to more limited bills designed to equalize conditions for women. She helped push through, for example, a measure allowing women to buy and sell property.

N.Y. Times July 8, 1981 P. 1.

'A Reputation for Excelling'

Sandra Day O'Connor

By B. DRUMMOND AYRES Jr.
Special to The New York Times

WASHINGTON, July 7 — Judge Sandra Day O'Connor's place in history is already secure, based on today's announcement that she will be President Reagan's nominee as the first woman on the United States Supreme Court.

Woman in the News

But if her past is prologue, after her Senate confirmation Judge O'Connor might well go on to leave even larger "footprints on the sands of time," as Mr. Reagan, quoting Longfellow, described the mark of United States Justices. Thus far in her 51 years, Judge O'Connor has compiled an impressive list of academic, civic, political and legal achievements.

"She's finished at the top in a lot of things," said Mary Ellen Simonson of Phoenix, who was a legislative aide when Mrs. O'Connor was majority leader of the Arizona State Senate, the first woman in the nation to hold such a leadership position.

"She has a reputation for excelling," Mrs. Simonson continued. "As a result she's been one of the state's leading role models for women. Now she's a national role model."

Judge O'Connor, who currently sits on the Arizona Court of Appeals, the state's second highest court, refused this afternoon to discuss "substantative issues" when she met with reporters in Phoenix. And, because of her short, 18-month tenure on the appeals court and its somewhat limited docket, she has faced few of the nettlesome issues routinely taken up by the United States Supreme Court. Nevertheless, her past and her acquaintances provide some insights into her mind and personality.

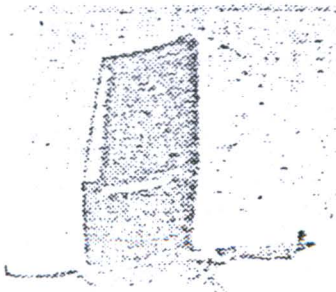
She is said, by friend and foe alike, to be notably bright, extremely hard-working, meticulous, deliberate, cautious and, above all, a Republican conservative.

"But she has an open mind when it comes to her conservatism," said a longtime friend, Sharon Rockefeller, wife of Gov. John D. Rockefeller IV of West Virginia. "I can't conceive of her closing off her mind to anything."

A leading Democratic politician in

Continued on Page A13, Column 5

sses Channel



By Margaret Thomas—The Washington Post

President Reagan enters White House press room to announce his choice for nomination to the Supreme Court.

Many Supreme Court critics say the current justices badly need a negotiator in their ranks. As majority leader, Arizona politicians say, O'Connor was good at that. "She was good at identifying what the issue was and articulating it to everyone," Corbert recalled. "She managed bills very sensitively and kept some things from becoming too controversial," said Alice Bendheim, state ACLU chairman.

"She was a very political animal," Bendheim said. "She started out as a moderate Republican and then, after about 1974, moved toward the right."

Women, although still vastly outnumbered by men judges, were represented relatively early at high levels in the Arizona judiciary. The country's first woman state chief justice served in that state in the early 1960s. So O'Connor's election in 1975 to the Superior Court of Maricopa County shocked no one.

Neither did her performance on the bench. Lawyers who practiced before her recalled no decisions departing from precedent. She excluded evidence when necessary, they say, yet dealt sternly with those convicted, particularly those convicted of second offenses.

"She would not bend over backwards to give any breaks to anyone who had previously been given a break," said David Derickson, a Superior Court judge who practiced before O'Connor as a lawyer.

"But she kept a tight rein on everybody. I remember a couple of incidents when I was a defense attorney where I suggested that the prosecutor ought not to be arguing such a baldly wrong position. I said I knew the judge could see through the smoke."

O'Connor cut him off, Derickson recalls. " 'I appreciate the compliment,' she said. 'But I'll decide what's smoke or what's not.' "

"She was very strict early in her career," said John Foreman, a former public defender and now a private criminal defense lawyer. "There were quite a few young attorneys who got their backsides roasted by her. She does not tolerate nonsense or people who don't know what they're doing."

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Lawyers remembered only one occasion when she imposed the death penalty. The defendant had been convicted of a contract murder, said the defense lawyer, Tom Henze. Following the trial, O'Connor was informed that statements by a key witness that contradicted his trial testimony had been concealed from the defense. She then canceled the verdict and the death sentence and ordered a new trial.

O'Connor initially was appointed to the Court of Appeals to fill an unexpired term. Most of that court's cases involve dry matters like contracts. But she also occasionally dealt with more controversial issues.

In September, 1980, she ruled that making an indigent tenant put up large sums of money in order to sue a landlord unconstitutionally discriminated against poor people. In March, 1980, she ruled that a public college's trustees had violated the law by holding meetings in private.

Also in March, 1980, she ruled that workmen's compensation benefits received by a husband as a result of an on-the-job injury did not have to be shared with his divorced wife.

"She has done a good and competent job," said John P. Frank, a noted constitutional scholar who practices in Arizona and describes himself as a "yellow dog Democrat."

"But you can't draw much social significance from the kind of work that court does. In terms of general social outlook, I'd say she's conservative but not reactionary. I would say she would tend to have views more or less similar to Chief Justice Burger. But she won't be a right-wing ideologue like Rehnquist."

"Some of my more radical friends picture her as very very conservative," said ACLU Chairman Bendheim. "But if you put her on the spectrum of conservatives, especially in Arizona, I don't think she's that far over to the right. I don't think she would be an activist judge in any direction, for any cause."

The only recent statement of O'Connor's philosophy toward the federal courts came in the William and Mary Law Review this summer. In an article about the relationship between state and federal courts, O'Connor expressed the view that federal judges were exercising more authority than they should in constitutional matters, particularly in civil rights suits.

When a state judge becomes a federal judge, she said, "he or she does not become immediately better equipped intellectually to do the job . . . . If we are serious about strengthening our state courts and improving their capacity to deal with federal constitutional issues . . . it is a step in the right direction to defer to the state courts and give finality to their judgments on federal questions where a full and fair adjudication has been given in the state court."

Contributing to this story was special correspondent Al Senia.

Reputation for Excelling

Continued From Page 1

Arizona agreed that Judge O'Connor was "not your far-out Republican."

"If you have to have a Republican on the court," he said privately, "well, she's about the best we could hope for, to be perfectly honest."

"She just might fool some people," he continued. "She's comfortable — establishment Republican, Junior League, blood bank, all the right things and respectable groups. She just might surprise some people because I don't think she's out of the knee-jerk mold."

Justice Jack D. H. Hays of the Arizona Supreme Court offered a somewhat similar observation about Judge O'Connor. "She's an excellent legal scholar," he said. "She tends to the conservative area. But she is sound legally and could surprise a lot of people."

Astonishment as a Senator

As a state Senator, Judge O'Connor caused some astonishment when she came out in support of the proposed Federal equal rights amendment and then cast several votes that were taken as "pro-abortion" by organizations that oppose abortion. Several of the groups have vowed to fight her nomination.

Her legislative successes included work on efforts to provide regular reviews for people committed to mental institutions, probate code reform, the establishment of no-fault divorce in Arizona and merit selection for Superior Court judges.

In addition, she was a prime mover for legislation requiring public bodies to conduct their affairs in open meetings, and she helped promote the idea of limiting state spending increases to corresponding increases in personal income.

Judge O'Connor also attempted, unsuccessfully, to push through a Medicaid program for Arizona while serving as a legislator.

Her efforts for passage of the rights amendment also failed, but Judge O'Connor established herself as one of Arizona's outspoken advocates for women and did succeed in repealing an old Arizona law that limited women to working eight hours a day.

An Appeal for Involvement

"Women have lacked a certain amount of job opportunity and have failed to receive equal pay for equal work," Judge O'Connor asserted at one point in a debate on the rights amendment. "I feel strongly that qualified women should involve themselves more than they do now. They should be particularly anxious to seek appointments in government or seek out qualified women for political offices."

Certainly Judge O'Connor has attempted to live by those words.

She was born March 26, 1930, the daughter of Mr. and Mrs. Harry Day of Duncan, Ariz., where she grew up on a ranch. She graduated from Stanford University with a bachelor of arts degree in 1950 and with a law degree two years later, in both cases with high honors.

While in law school, she also served as an editor on the Stanford Law Review and was made a member of the Order of the Coif, an honorary legal organization.

One of Judge O'Connor's classmates at Stanford was John Jay O'Connor 3d, whom she married. He now practices law in one of Phoenix's largest firms. They have three sons.

Another classmate was William H. Rehnquist. He is now a Supreme Court Justice and, like Judge O'Connor, a Republican conservative. Justice Rehnquist graduated first in his law class. Judge O'Connor was third.

Judge O'Connor spent six years in private practice in Arizona, then served as Assistant Attorney General for the state from 1965 through 1968. When an opening occurred in the Arizona Senate in 1969, she was temporarily appointed to fill the slot. Subsequently, she won election to two full terms and, in 1973, was elected majority leader.

'A Super Floor Leader'

"She was a super floor leader," said William Jacquin, a former state Senator who now heads the Arizona Chamber of Commerce. "She was devoted to the law by the nature of her own professionalism," he added, "and was extraordinarily thorough in drafting legislation."

In 1972 she served as a state co-chairman of the committee to re-elect Richard M. Nixon as President.

Judge O'Connor left the Legislature in 1974 to run for Superior Court judge in Phoenix. She served on that court until she was appointed to the Arizona Court of Appeals in 1979 by Gov. Bruce Babbitt, a Democrat. At the time, Judge O'Connor was being mentioned as a possible political challenger to Mr. Babbitt.

Rating Judge O'Connor's performance on the appellate bench, 90 percent of the Arizona bar recommended last year that she be retained. Similarly, 85 percent of the bar had recommended that she be retained on the Superior Court bench.

While Judge O'Connor is most often described as a diligent, no-nonsense woman, always ready to move up the next notch of success, close friends say that in private she talks frankly of working hard to be both a successful public figure and a successful wife and mother. She relaxes over a game of tennis now and then and every so often lets slip some wry wit.

But, even while relaxing, it seems she cannot avoid the limelight. Over the weekend, while vacationing in the Arizona mountains, she was approached by fellow vacationers from nearby cabins on the morning of July 4 and asked to read them the Declaration of Independence. She readily agreed.

N.Y. Times July 8, 1981 p. 1

Baker Vows Support for Nominee

By FRANCIS X. CLINES
Special to The New York Times

WASHINGTON, July 7 — Anti-abortion groups today denounced President Reagan's decision to nominate Judge Sandra Day O'Connor to the Supreme Court, but initial reaction in the Senate, which will vote on confirmation, was favorable.

"I commend the President for the courage of his decision," said Howard H. Baker Jr., the Senate Republican majority leader. "I am delighted with his choice, and I pledge my full support for her confirmation by the full Senate."

The National Right to Life Committee, an amalgam of anti-abortion lobbying groups in the 50 states, said that it would mobilize its members to "prevail upon senators to oppose this nomination." The committee said that Judge O'Connor was "pro-abortion" as a member of the Arizona State Legislature.

Dr. Carolyn Gerster, a vice president of the National Right to Life Committee, said that the nominee, as a legislator, voted in 1974 not to allow an anti-abortion resolution out of caucus, thus killing it. The resolution asked Congress to pass a Constitutional amendment protecting the fetus except when the mother's life was in danger, and allowed abortions in the case of rape.

Dr. Gerster based her statement of Judge O'Connor's record on that and other votes, which were characterized as "pro-abortion," on newspaper accounts and the recollections of other legislators, she said. Before 1975, the State Legislature kept no records of

Continued on Page A12, Column 1

INSIDE

9 More Executed in Iran

Iran executed nine opponents in its drive against "counterrevolutionary" elements. It also ordered Reuters to close its Teheran bureau. Page A3.

Upset in Mississippi Vote

Wayne Dowdy, a Democrat, apparently won a Congressional election in Mississippi, beating a strong supporter of President Reagan. Page A18.

N.Y. Times Wed. July 8, 1981 p. 1

REAGAN NOMINATING WOMAN, AN ARIZONA APPEALS JUDGE, TO SERVE ON SUPREME COURT

Associated Press

Judge Sandra Day O'Connor at news conference yesterday in Phoenix

REACTION IS MIXED

Senate Seems Favorable but Opposition Arises on Abortion Stands

By STEVEN R. WEISMAN
Special to The New York Times

WASHINGTON, July 7 — President Reagan announced today that he would nominate Sandra Day O'Connor, a 51-year-old judge on the Arizona Court of Appeals, to the United States Supreme Court. If confirmed, she would become the first woman to serve on the Court.

"She is truly a 'person for all seasons,'" Mr. Reagan said this morning, "possessing those unique qualities of temperament, fairness, intellectual

Remarks on Court post, page A12.

capacity and devotion to the public good which have characterized the 101 'brethren' who have preceded her."

White House and Justice Department officials expressed confidence that Judge O'Connor's views were compatible with those espoused over the years by Mr. Reagan, who has been highly critical of some past Supreme Court decisions on the rights of defendants, busing, abortion and other matters.

Some Quick Opposition

From the initial reaction in the Senate, it appeared her nomination would be approved. However, her record of favoring the proposed Federal equal rights amendment and having sided once against anti-abortion interests while she was a legislator provoked immediate opposition to her confirmation by the National Right to Life Committee, Moral Majority and other groups opposed to abortion.

At a brief news conference in Phoenix, Judge O'Connor declined to explain her views, saying that she intended to leave such matters to her confirmation hearings before the Senate Judiciary Committee. [Page A12.]

Mr. Reagan, himself an opponent of abortions, said in response to a question that he was "completely satisfied" with her position on that issue.

White House officials were hopeful that Judge O'Connor's appointment could be historic not only because she is a woman but also because her presence on the Court, as a replacement for Associate Justice Potter Stewart, who was often a swing vote between ideological camps on the Court, could shift the Court's balance to the right.

However, An examination of the Court's voting patterns suggests no radical shift is likely even if she does vote with the more conservative Justices. [News analysis, page A13.]

It is the additional hope of Mr. Reagan's aides to make the Court even more conservative in the years ahead, when more vacancies are possible.

Judge O'Connor was appointed to Arizona's second-highest court in 1979

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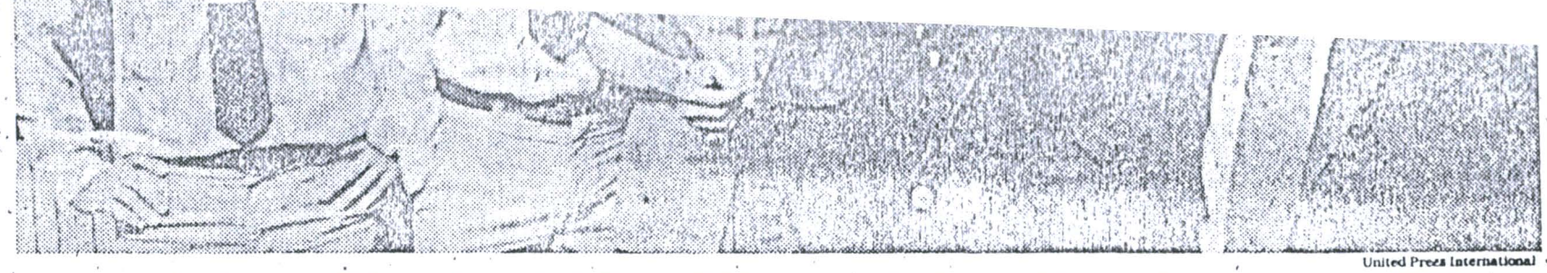
CBS News News Poll. The poll, conducted last month, showed that 72 percent of the public believed that it made no difference whether a man or a woman was appointed. Fifteen percent preferred a woman, 12 percent wanted a man named and 1 percent had no opinion. Women were no more eager than men to see a woman on the Court.

The National Women's Political Caucus celebrated the nomination as proof that "women are breaking the barriers of nearly 200 years of exclusion from decision making in our nation."



United Press International

Sandra Day O'Connor with her family yesterday in Phoenix. With her was her husband, John, and their sons, from left, Jay, Brian and Scott.

Reagan Selects Woman, an Arizona Judge, for Supreme Court

Continued From Page A1

by Gov. Bruce Babbitt, a Democrat, after five years as an elected Superior Court judge in Maricopa County, Ariz. Before becoming a judge, she served in the Arizona State Senate for six years.

With the selection, Mr. Reagan fulfilled a campaign promise last year to pick a woman for the Court at one of his earliest opportunities. Associate Justice Stewart announced his retirement last month after 23 years on the Court.

In a brief statement before television cameras at the White House, Mr. Reagan urged the Senate's "swift bipartisan confirmation so that, as soon as possible, she may take her seat on the Court and her place in history."

Reagan Administration officials had said earlier that Mr. Reagan placed a high priority on finding a woman with conservative views for the Court. It seemed likely, however, that Judge O'Connor's past positions on issues linked to feminists would serve as a focus for any confirmation battle.

While a member of the Arizona Senate, Judge O'Connor at first advocated passage of the equal rights proposal, and then, for reasons that are unclear, supported a different version that was regarded by some as less sweeping. She is also on record as opposing a measure that would have outlawed abortions in some state facilities.

White House officials asserted that Judge O'Connor had assured President Reagan personally in an Oval Office interview last Wednesday that she was personally opposed to abortions. They quoted her as saying that she opposed the anti-abortion measure only because it was not germane to the legislation to which it was attached and the Arizona Constitution forbids nongermane amendments. But those officials also said that she felt the legality of abortions was a legitimate matter for the legislative branch to decide.

Position on Rights Proposal

As for the proposed equal rights amendment, a senior White House official maintained that Judge O'Connor's onetime support had lessened and that she now had "more problems" with the proposal, He pointed out that Mr. Reagan himself had once supported the proposal before changing his position. Feminist groups characterized Judge O'Connor as a supporter of the amendment, however.

Tonight an enthusiastic Mr. Reagan said in a speech in Chicago that his appointment made it "a happy day for me and I hope for my country."

Speaking before a Republican fund-raising dinner, he praised Judge O'Connor's "long and brilliant record as a legislator and jurist" and said she had impressed him "as a thoughtful and capable woman whose judicial temperament is highly appropriate for the Court." He added that her principles adhered to those in the Republican Party platform.

Impression on Reagan

Michael K. Deaver, the deputy White House chief of staff, told reporters in Chicago that Mr. Reagan was impressed with "her kind of moderate approach" in the sense that "she had not been an activist" on the rights amendment or abortion issue and had taken "a moderate position" on both.

The decision on Judge O'Connor came quickly because Mr. Reagan was impressed with her immediately, Mr. Deaver said, adding: "I guess that was the first one, and it's like buying a car."

The selection of Judge O'Connor brought to a conclusion a search that, according to Mr. Reagan's aides, was one of the most exhaustive conducted by the Administration, An initial list of about 25 candidates was winnowed last week to a "short list" of only a few potential nominees.

Among the names on the shorter list, a Reagan aide said, were Dallin H. Oaks, a Utah Supreme Court judge; J. Clifford Wallace, a California judge on the United States Court of Appeals for the Ninth Circuit; Robert Bork, a former Solicitor General and law professor at Yale, and Cornelia Kennedy, a Michigan judge on the United States Court of Appeals for the Sixth Circuit.

Interviews by Key Aides

Several potential choices were interviewed by Attorney General William French Smith and his aides. Judge O'Connor was interviewed June 30 by Mr. Smith and four White House officials — Fred F. Fielding, the counsel, and Mr. Reagan's three top advisers, Mr. Deaver, Edwin Meese 3d and James A. Baker 3d.

Mr. Reagan himself spoke to Judge O'Connor the next day and made the decision to choose her yesterday, according to the White House. An Administration official said she was the only person who was interviewed by Mr. Reagan or White House officials.

Fears Seen Misplaced

White House officials said a lengthy survey had been made of Judge O'Connor's views and that fears among conservatives about her record would be seen as being misplaced.

Judge O'Connor's confirmation prospects in the Senate were seen as significantly enhanced by the backing of the two conservative Senators from Arizona — Barry Goldwater, a Republican, and Dennis DeConcini, a Democrat.

Not until today did the White House ask the Federal Bureau of Investigation and the American Bar Association to conduct their examinations of Judge O'Connor. Mr. Smith said her name would be forwarded to the Senate formally, pending completion of the F.B.I. check.

"Mrs. O'Connor has been considered with respect to her overall qualifications and background, and there has not been any effort to focus in on any one issue and judge her on that basis," Mr. Smith said.

He said her record on the bench was "quite satisfactory," even though it contained opinions on few, if any, major constitutional issues. He said he was confident that her philosophy was, like President Reagan's, "that it is the responsibility of elected representatives of the people to enact laws and not that of the judiciary."

One insight into the selection process was provided by an Administration official who said that Judge O'Connor had been asked several questions in her interviews with top White House aides.

Among the questions were whom she felt she was closest to on the Court philosophically; what were her opinions on the exclusionary rule, under which evidence that is obtained unconstitutionally is deemed inadmissible in court; and whether she felt that the Court should take into consideration the practical implications of its decisions.

WASH. POST
July 8, 1981
P. A7

Reagan Choice for Court Decried by Conservatives But Acclaimed by Liberals

By Bill Peterson
Washington Post Staff Writer

The reaction yesterday to President Reagan's first nomination to the Supreme Court was an ironic one: he was condemned by conservatives who supported him all the way to the Oval Office, but praised by liberals and feminists who have found so little to like about him there.

The Rev. Jerry Falwell, head of Moral Majority, declared that the nomination of Sandra D. O'Connor to the high court was a "disaster." The National Right to Life Committee, a major anti-abortion group, pledged an all-out fight against her confirmation because of "her consistent support for legal abortion."

But Eleanor Smeal, president of the National Organization for Women, called the nomination "a major victory for women's rights." And prospects for a quick and relatively painless confirmation appeared good.

Among the first to jump aboard O'Connor's bandwagon were Sen. Edward M. Kennedy (D-Mass.) and Rep. Morris K. Udall (D-Ariz.), two of the most outspoken liberals in Congress.

"I'm really quite pleased," said Udall, who has known O'Connor as a lawyer, state senator and judge. "She's about as moderate a Republican you'll ever find being appointed by Reagan. If we're going to have to have Reagan appointees to the court, you couldn't do much better."

"President Reagan should be commended for naming a woman to the Supreme Court — the first such nominee in our nation's history and one that is very long overdue," said Kennedy.

His words were echoed by feminist leaders. "Justice O'Connor's nomination will be a major step in moving toward equal justice in every court in our land," said Iris Mitgang, chairman of the bipartisan National Women's Political Caucus.

Senate GOP leaders pledged to work for a swift confirmation. Majority Leader Howard H. Baker Jr. (Tenn.) said he was "delighted." Judiciary Committee Chairman Strom Thurmond (S.C.) said, "I will do everything I can to help the president."

The reaction from the New Right could hardly have been more different. Richard Viguerie, the conservative direct-mail expert, accused Reagan of rushing O'Connor's nomination because of growing opposition on the right to reports of her selection.

Others accused Reagan of betraying the Republican platform. In one of its most controversial planks, the GOP platform pledged: "We support the appointment of judges to all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."

"O'Connor's appointment represents a repudiation of the Republican platform pledge . . . . This appointment is a grave disappointment to the pro-life public nationwide," said Dr. J.C. Willke, president of the National Right to Life Committee, which supported Reagan in the 1980 campaign.

The words from Falwell's Moral Majority were even harsher. "Either the president did not have sufficient information about Judge O'Connor's background in social issues or he chose to ignore that information . . . . Judge O'Connor also has been active in feminist causes and is a supporter of the Equal Rights Amendment, which Moral Majority believes would be a disaster for men and women and would further undermine the traditional family."

Anti-abortion groups focused their opposition to O'Connor on votes she cast while a state senator and on the fact that she once spoke, as a judge, before an International Women's Year meeting.

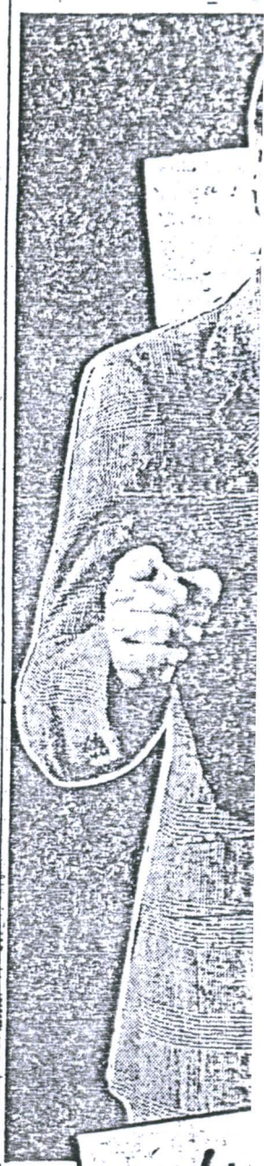
In 1974, she voted against a rider to a football stadium bond issue that would have barred abortions at the University of Arizona hospital, according to NRLC. That same year she reportedly voted against a resolution calling on Congress to pass a Human Life Amendment in the state Senate Judiciary Committee and in the Senate Republican caucus.

In a 1970 party caucus, she also voted in favor of a bill to legalize abortion, and in 1973 was a prime sponsor of a family planning bill that would have made birth control information available to minors without the knowledge of their parents. That same year she voted for a bill giving doctors and nurses the right to refuse to participate in abortion operations.

Dr. Carolyn Gerster, former president of the NRLC, said she notified the White House Monday about the alleged pro-abortion votes, and mailed a package documenting her charges. Gerster, a Scottsdale, Ariz., physician, said, "It was common knowledge she was philosophically against us in the legislature. It is unforgiveable that the White House could ignore this."

But O'Connor also has powerful Republican friends in her home state. The most important among them is Sen. Barry Goldwater, who called her nomination "a great step." After being notified of the nomination by Reagan, Goldwater said he doubted if the president "could ever find anyone more qualified to occupy a Supreme Court seat than Sandra O'Connor, whom I have known for years and greatly respect and admire."

Such words will weigh heavily even among hard-core Senate conservatives. "I assume that if she meets the satisfaction of the president of the United States and Barry Goldwater, she must have some basic philosophy I agree with," said Sen. Charles E. Grassley (R-Iowa).



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TIME/JULY 20, 1981

COVER STORY

The Brethren's First Sister

A Supreme Court nominee—and a triumph for common sense

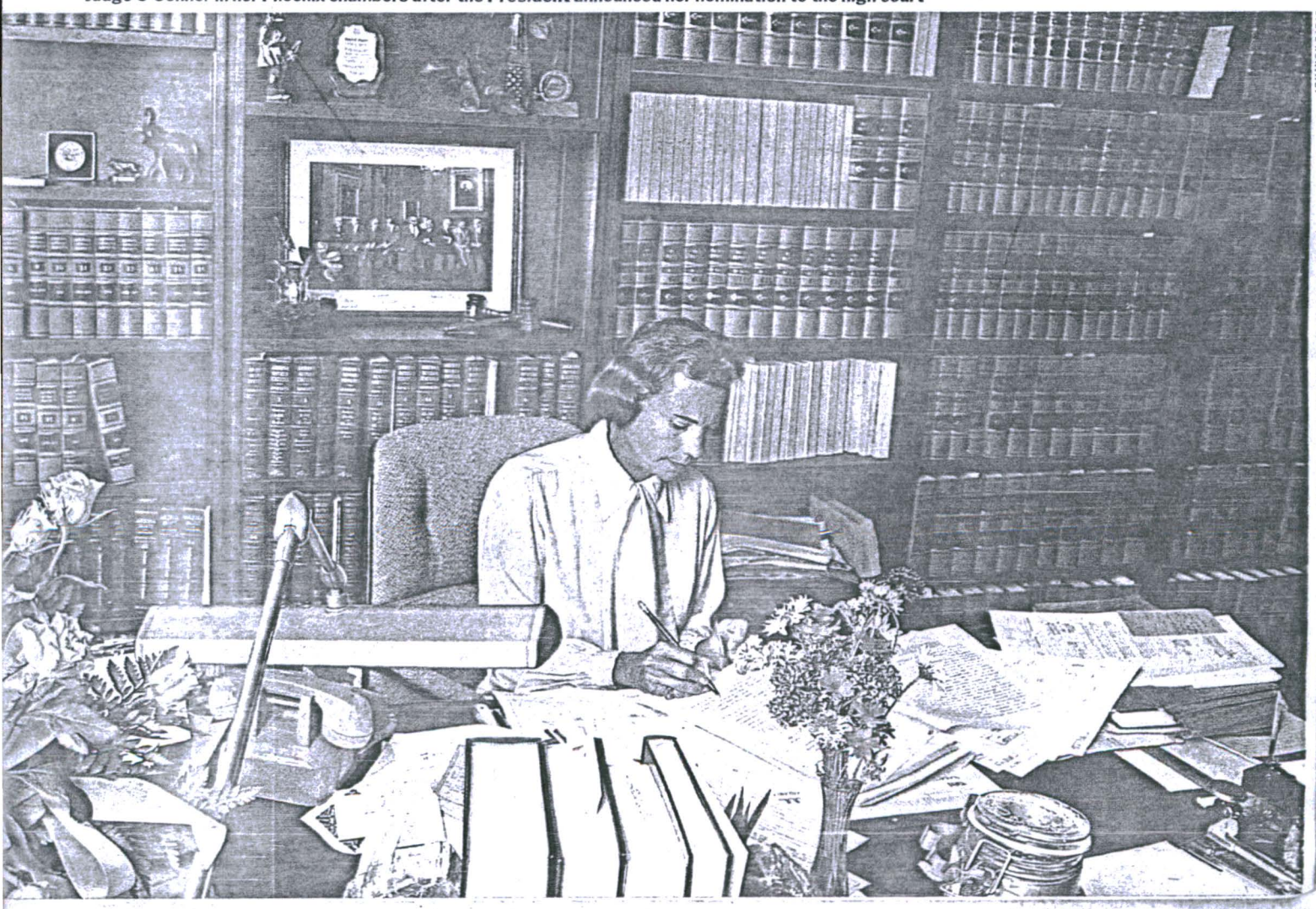
Ronald Reagan lived up to a campaign pledge last week, and the nation cheered. At a hastily arranged television appearance in the White House press room, the President referred to his promise as a candidate that he would name a woman to the Supreme Court, explaining: "That is not to say I would appoint a woman merely to do so. That would not be fair to women, nor to future generations of all Americans whose lives are so deeply affected by decisions of the court. Rather, I pledged to appoint a woman who meets the very high standards I demand of all court appointees." So saying, he introduced his nominee to succeed retiring Associate Justice Potter Stewart as "a person for all seasons," with "unique qualities of temperament, fairness, intellectual capacity." She was Sandra Day O'Connor, 51, the first woman to serve as majority leader of a U.S. state legislature and, since 1979, a judge in the Arizona State Court of Appeals.

O'Connor's name had been floated about in rumors ever since Stewart, 66, announced his intention to retire last month, but her nomination, which must be approved by the Senate in September, was a stunning break with tradition. In its 191-year history, 101 judges have served on the nation's highest court, and all have been men. By giving the brethren their first sister, Reagan provided not only a breakthrough on the bench but a powerful push forward in the shamefully long and needlessly tortuous march of women toward full equality in American society.

To be sure, Reagan's announcement that he intended to elevate O'Connor to the highest U.S. Government post ever held by a woman had its roots in partisan politics. Mainly because he had been portrayed by Jimmy Carter as a man who might blunder the nation into war, Reagan had lacked strong support among women in last year's campaign. Moreover, his Administration's record of appointing women to office is very poor: only one highly visible Cabinet-level post (Ambassador to the United Nations Jeane Kirkpatrick); only 45 women among the 450 highest positions.

There were also ironies aplenty in Reagan's choice of O'Connor. As a true-blue conservative, he had been widely expected to select a rigidly doctrinaire jurist in order to stamp his own political ideology on the court. Instead, he picked a meticulous legal thinker whose devotion to precedent and legal process holds clear priority over her personal politics,

Judge O'Connor in her Phoenix chambers after the President announced her nomination to the high court



STEVE ROOT UPI

DAVID HUME KENNERLY

which are Republican conservative.

Whether Reagan was playing shrewd politics, or merely following his own best instincts, almost did not matter. After naming O'Connor, the President suddenly found himself awash in praise from a wide range of political liberals, moderates and old-guard conservatives. At the same time, he was under harsh assault from the moral-issue zealots in the New Right who helped him reach the Oval Office. Although they had little chance of blocking the nomination, they charged that O'Connor was a closet supporter of the ERA and favored abortion.

Other than on the far right, reaction to the nomination ranged from warm to ecstatic. Feminists generally were pleased. Eleanor Smeal, president of the National Organization for Women, termed the choice "a major victory for women's rights." Patricia Ireland, a Miami attorney and a regional director of NOW, said she was "thrilled and excited" by the selection, adding: "Nine older men do not have the same perspective on issues like sex discrimination, reproductive rights or the issues that affect women's rights directly." Declared former Texas Congresswoman Barbara Jordan, a black lawyer: "I congratulate the President. The Supreme Court was the last bastion of the male: a stale dark room that needed to be cracked open. I don't know the lady, but if she's a good lawyer and believes in the Constitution, she'll be all right."

RODDEY E. MIMS

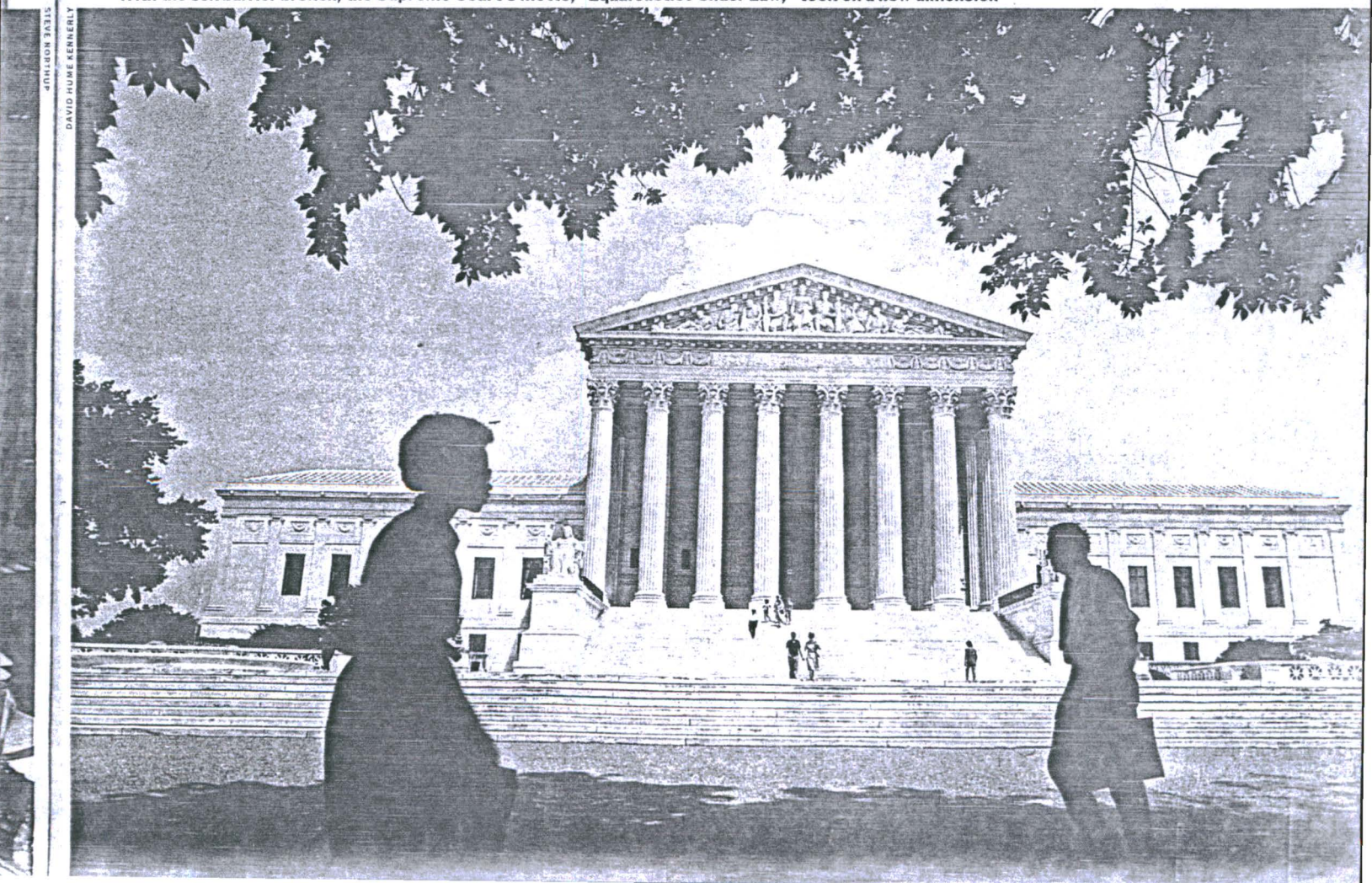
"Unique qualities of temperament, fairness, intellectual capacity."

Liberal politicians joined the praise. House Speaker Tip O'Neill, who has been feuding with Reagan over his budget cuts and tax policies, termed the choice "the best thing he's done since he was inaugurated." Said Democratic Senator Edward Kennedy, who sits on the Judiciary Committee that will hold hearings on O'Connor's nomination: "Every American can take pride in the President's commitment to select such a woman for this critical office."

Many conservative Republican Senators added their endorsement. Utah's Orrin Hatch called it "a fine choice." Reagan's close friend, Nevada Senator Paul Laxalt, was enthusiastic, and Senate Majority Leader Howard Baker said he was "delighted by the nomination." But South Carolina's Strom Thurmond, chairman of the Judiciary Committee, was a bit more restrained. "I intend to support her," he said, "unless something comes up."

No one championed O'Connor more forcefully than her longtime Arizona friend, Senator Barry Goldwater, whose early urging had helped her gain White House support. Noting the opposition to O'Connor from the far-right groups, Goldwater declared: "I don't like getting kicked around by people who call themselves conservatives on a nonconservative matter. It is a question of who is best for the court. If there is going to be a fight in

With the sex barrier broken, the Supreme Court's motto, "Equal Justice Under Law," took on a new dimension



DAVID HUME KENNERLY

STEVE RUDY/HUP

the Senate, you are going to find 'Old Goldy' fighting like hell." Goldwater attacked directly a claim by the Rev. Jerry Falwell, head of the fundamentalist Moral Majority, that all "good Christians" should be concerned about the appointment. Scoffed Old Goldy: "Every good Christian ought to kick Falwell right in the ass."

But the protests from the New Right were blistering. "We feel we've been betrayed," charged Paul Brown, head of the antiabortion Life Amendment Political Action Committee. Brown claimed that Reagan had violated a Republican Party platform plank, which declared that only people who believe in "traditional family values and the sanctity of the innocent human life" should be made judges. "We took the G.O.P. platform to be the Bible," he said. Carolyn Gerster, former president of the National Right to Life Committee and a physician from Scottsdale, Ariz., who knows O'Connor well, argued that the judge "is unqualified because she's proabortion. We're going to fight this one on the beaches." Also leading the charge from the right were Howard Phillips, head of the Conservative Caucus, and Richard Viguerie, publisher of *Conservative Digest*. Declared Viguerie: "We've been challenged. The White House has said we're a paper tiger. They've left us no choice but to fight."

Despite the outcry, the rightists had no effective leader in the Senate who could influence the outcome of O'Connor's confirmation hearings and floor vote. North Carolina Republican Jesse Helms was urged to take up the cause, but remained aloof last week. Trying to stamp out the brushfire, Reagan met with Helms to assure him that O'Connor's legislative record was not clearly pro-ERA and prochoice on abortion, as her opponents had charged. Reagan declared that "I am completely satisfied" with O'Connor's attitude. In a 45-minute meeting with the President at the White House on July 1, O'Connor had told Reagan that she found abortion "personally repugnant," and that she considered abortion "an appropriate subject for state regulation."

Much of the furor was based on O'Connor's votes in the Arizona senate. Far more important than her stand on abortion—an issue on which virtually no current woman jurist could fully satisfy the New Right—was whether she was qualified to serve on the Supreme Court. On that point, legal scholars acquainted with her past and lawyers who had worked with her in Arizona were in wide agreement: while she had much to learn about federal judicial issues, she was a brilliant lawyer with a capacity to learn quickly. Indeed, her legislative background gives her a working knowledge of the lawmaking process that none of the current Justices can match.

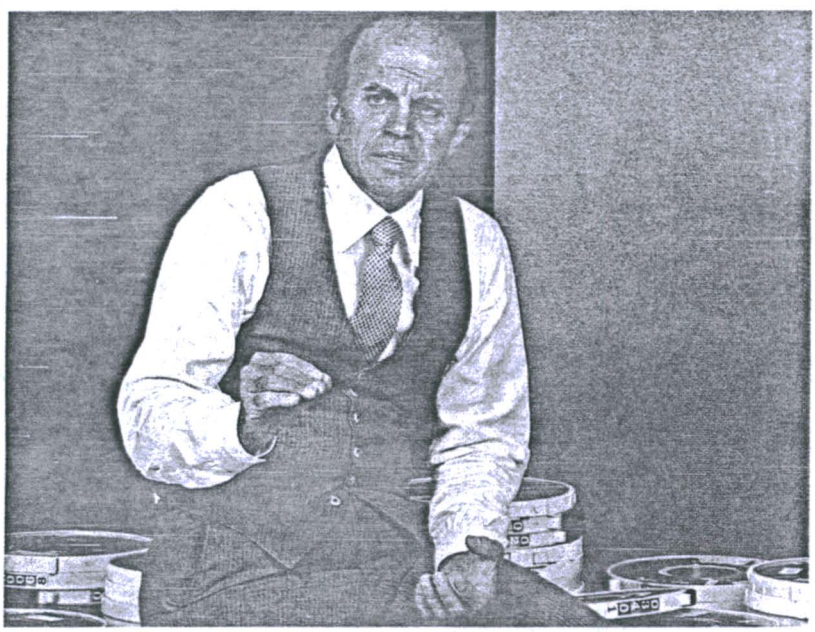
"She's entirely competent, a nominee of potentially great distinction," said Harvard Law Professor Laurence Tribe. Yale Law Professor Paul Gewirtz termed O'Connor "smart, fair, self-confident and altogether at home with technical legal issues." Michigan Law's Yale Kamisar, a judicial liberal, said of Reagan: "Give the devil his due; it was a pretty good appointment."

In Arizona, lawyers described her as a painstakingly careful attorney and a judge who ran her courtroom with taut discipline and a clear disdain for lawyers who had not done their homework. "She handled her work with a certain meticulousness, an eye for legal detail," recalled Phoenix Lawyer John Frank. Added John McGowan, another Phoenix attorney: "She's a very conscientious, very careful lawyer." Some defense lawyers, however, found O'Connor's strict demeanor on the bench so intimidating that they dubbed her "the bitch queen."

Those who have read her 125 decisions on the Arizona appeals court, which deal with such routine legal issues as workmen's compensation, divorce settlements and tort actions, see her in the mold of judges who exercise "judicial restraint." "She tends to be a literalist with acute respect for statutes," said Frank. O'Connor's colleagues consider her decisions crisp and well written. "Mercifully brief and cogent," said McGowan. "Clear, lucid and orderly," said Frank. But one Supreme Court clerk finds her writing "perfectly ordinary—no different from any other 2,000 judges around the country."

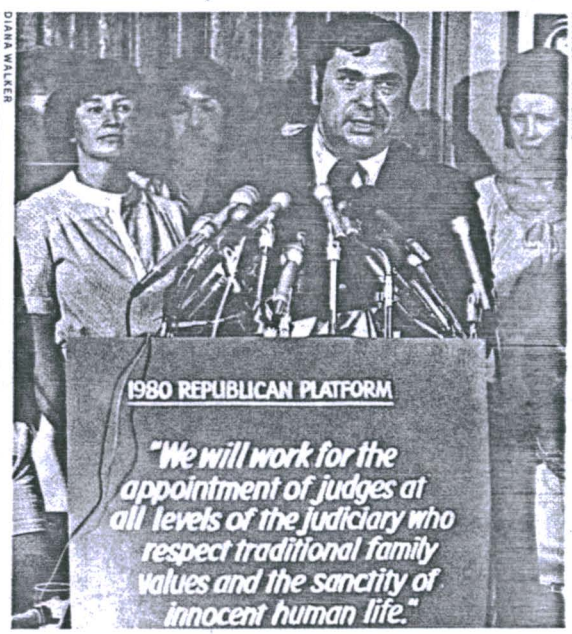
How did Reagan happen to pluck O'Connor out of the relative obscurity of a state court? For one thing, he had plenty of time to order a thorough search for prospects. Reagan learned of Stewart's intention to resign on April 21, as he recuperated from the assassination attempt. When Attorney General William French Smith and Presidential Counsellor Edwin Meese gave Reagan the news, he promptly reminded them of his promise to appoint a woman.

O'Connor's name had initially surfaced early at Justice as a possible choice to head the department's civil division. The old-boy network of Stanford had brought her to Smith's attention. Among those who recommended O'Connor, as the search for a new Justice intensified: Stanford Law Dean Charles Myers, former Stanford Professor William Baxter, who now heads the Justice Department's antitrust division, and one of Stanford Law's most eminent alumni, Justice Wil-



DIANA WALKER

Viguerie, an opponent of O'Connor's nomination, at his *Conservative Digest* office



ARTHUR—CAMERA 5

Phillips of the Conservative Caucus at press conference

The outrage on the far right was over abortion; her qualifications to sit on the high court did not really matter.

liam Rehnquist. He is clearly the court's most consistent and activist conservative, so his advice that O'Connor was the best woman for the court carried clout. When Goldwater weighed in, too, O'Connor's cause flourished.

At a White House meeting on June 23, Smith handed the President a list of roughly 25 candidates; about half of them were women. Some White House aides, in the words of a female Reagan admirer, "have a big problem in coping with professional women," and were neither enthusiastic nor optimistic about finding a qualified woman judge. The President, however, again conveyed his "clear preference" for a woman. By then, speculation about his possible choice of a woman was spreading. The nomination of a doctrinaire male conservative, which might have been his inclination, would have brought sharp criticism. Beyond that, passing over a qualified female candidate now would put even more pressure on Reagan to find one for the next vacancy —and he would get much less credit by doing it later rather than earlier.

Another factor seemed significant: one member of the Supreme Court quietly passed word to the Justice Department that some of his aging colleagues were watching the selection carefully. If it was a reasonable choice, someone they could respect, they might decide there was little to fear from Reagan's attitude toward the court and follow Stewart into retirement. Otherwise they might hang on as long as they were physically able. Two of the Justices, William Brennan, 75, and Thurgood Marshall, 73, are liberals Reagan might like to replace.

Regardless of the motives, Reagan's men moved expeditiously to seek out a woman who met the President's main criteria. She had to be both a political conservative, meaning that she had a record of support for the kinds of issues Reagan favors, and a judicial conservative, meaning that she had a strong sense of the court's institutional limitations and would not read her own views into the law. The President even cautioned his search team that he did not want any single-issue litmus test, such as a prospect's views on abortion or ERA, to exclude her automatically from further consideration. That, of course, is precisely what critics of the O'Connor nomination wished the President had done.

By late June the list of women candidates had dwindled to four: O'Connor; Michigan's Cornelia Kennedy, 57, a Carter-appointed judge on the Sixth U.S. Circuit Court of Appeals; Mary Coleman, 66, chief justice of the Michigan Supreme Court; and Amalya L. Kearse, 44, a black who sits on New York's Second Circuit Court of Appeals. At this point none of the men was still in serious contention.

Smith sent his chief counselor, Kenneth Starr, and Jonathan Rose, an Assistant Attorney General, to Phoenix on June 27 to interview O'Connor and Ar-

Answers to Some Accusations

"With this nomination, the Administration has effectively said, 'Goodbye, we don't need you.' " That was the angry complaint of Mrs. Connaught Marshner, head of the National Pro-Family Coalition, at a Washington press conference, where luminaries of the New Right launched an all-out attack on Ronald Reagan's first nominee to the Supreme Court. Armed with accusations against Sandra O'Connor's record in the Arizona state senate—some of them gleaned from records, others based on insinuation and surmise—the critics charged that she is soft on touchstone social problems like abortion.

None of the charges have anything to do with O'Connor's suitability for a seat on the Supreme Court; by the standards of the New Right the seven Justices who recognized the constitutional right to an abortion in the 1973 *Roe* vs. *Wade* case would be disqualified for their decision. Moreover, it is unlikely that the New Right accusations will influence many Senators.

The New Right's complaints against O'Connor center on four issues:

Abortion. Right-to-lifers have attacked O'Connor for votes she cast as a state legislator on several separate bills. In 1973 she co-sponsored a measure that would make "all medically acceptable family-planning methods and information" available to anyone who wanted it. These "methods," her critics contend, might be interpreted to include abortion. In a vote of the Arizona senate's judiciary committee the following year, O'Connor reportedly opposed a "right-to-life memorial" that called upon Congress to extend constitutional protection to unborn babies, except where the pregnant mother's life was at stake. Also in 1974, she opposed a University of Arizona stadium bond issue after a rider had been attached banning state abortion funding to the university hospital.

O'Connor as Arizona senator

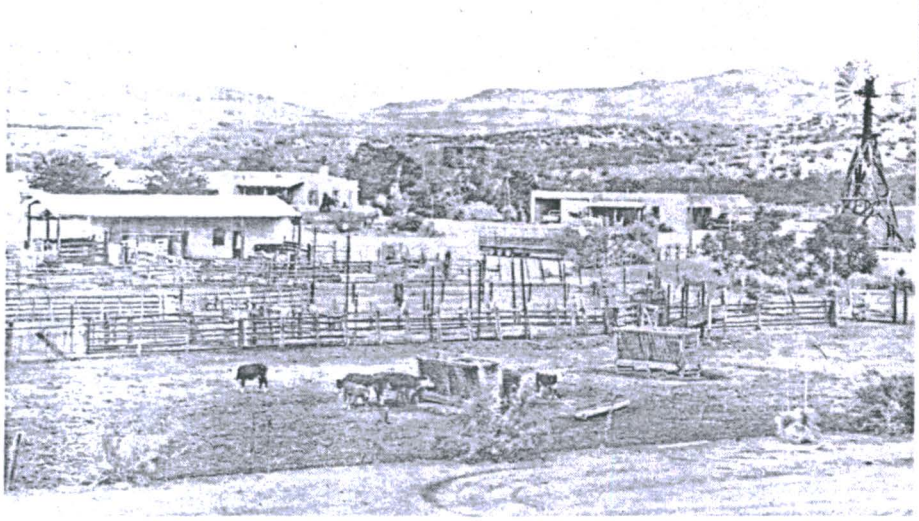
O'Connor does not recall her vote on the pro-life memorial (it was not officially recorded). She has solid, if legalistic, explanations for her other two votes. A strict constructionist, she does not believe that her family-planning measure could be interpreted to include abortion. The bond-issue rider, she believed, was not germane to the bill and therefore violated the state constitution.

Equal Rights Amendment. O'Connor, as her critics accurately charge, favored passage of the amendment by the state legislature in 1972, and two years later attempted to put ERA before the voters in a referendum. But she did not subsequently press for its passage. Her critics fail to note that other conservatives favored ERA at first and later changed their minds. In any case, Arizona is one of the states least likely to ratify ERA.

Pornography. Charges that O'Connor is soft on pornography are soft indeed. Principally, they stem from what New Rightists call her "drastic amending" of a bill that would have banned adult bookstores within a one-mile radius of schools and parks. O'Connor altered the restriction to 4,000 feet, but she clearly had no desire to corrupt youth. One possible motive: getting state law to conform with federal statutes, thus reducing the possibility of court challenges.

Drinking. In 1972, according to O'Connor's critics, she challenged a Democratic Senator who sought to remove the right to drink alcoholic beverages from a bill that would grant 18-year-olds all the rights of adulthood. The implication of the criticism is that O'Connor was soft on booze. The implication is wrong. O'Connor's point was that the proposed amendment was far too vague and a bill that included it might not withstand a challenge from the courts.

Apart from the disclosure by the White House that she described abortion as "personally repugnant," O'Connor remained silent last week about all of the New Right charges. Her suitable explanation: she would reserve her statements for the Senate confirmation hearings.



HOPPER—EL PASO HERALD-POST

The Lazy B Ranch on New Mexico–Arizona border, where O'Connor grew up

"We played with dolls, but we knew what to do with screwdrivers and nails."

izonans who knew her well. Reporting back, Starr and Rose cited her experience as a legislator, a state government lawyer, and a trial and appellate judge, which made her aware of the practicalities of each branch of government. Smith liked her judicial inclination to defer to the legislative and executive branches. She was also seen as tough on law-and-order and reluctant to rule against police on technicalities. "She really made it easy," recalled one participant in the search. "She was the right age, had the right philosophy, the right combination of experience, the right political affiliation, the right backing. She just stood out among the women."

O'Connor flew to Washington on June 29 for a breakfast the next morning with Smith in a secret hotel hideaway. That same day she met with Reagan's senior staff, including the troika of Meese, James Baker and Michael Deaver. On July 1 she was invited to the Oval Office by Reagan. The 10 a.m. meeting was unannounced and, like countless other private presidential meetings, went unnoticed by reporters. She moved quickly to break any tension in the talks by reminding the President that they had met a decade ago, when he was Governor of California and she was in the Arizona senate. They had talked about the kinds of limitations on spending being considered in both states, she recalled. Quipped Reagan with a smile: "Yours passed, but mine didn't." Then Reagan and O'Connor settled into two wing-back armchairs and chatted for 45 minutes. "She puts you at ease," observed one admiring participant in the meeting. "She's a real charmer."

Like Reagan, Sandra O'Connor has spent many of her happiest days on a Western ranch, riding horses and even roping steers. Her parents, Harry and Ada Mae Day, operated a 260-sq.-mi. cattle spread straddling the New Mexico–Arizona border. Called the Lazy B, it had been in the Day family since 1881 —three decades before Arizona became a state. Her grandfather had traveled from Vermont to found it. Sandra, first of the Days' three children, was born in an El Paso hospital because the remote area in which they lived had no medical facilities; their ranch house had neither electricity nor running water. Greenlee County also had no schools that met her parents' standards, so Sandra spent much of her youth with a grandmother in El Paso, attending the private Radford School and later a public high school there.

"I was always homesick," O'Connor told TIME last week. But she loved her summers on the ranch, where she had plenty of time to read. A dog-eared *Book of Knowledge* encyclopedia, copies of the *National Geographic Magazine* and her father's assorted volumes from the Book-of-the-Month Club fed her curiosity. By the age of ten, she could drive both a truck and a tractor. "I didn't do all the things boys did, but I fixed windmills and repaired fences." Recalls her girlhood friend and cousin, Flournoy Manzo: "We played with dolls, but we knew what to do with screwdrivers and nails too. Living on a ranch made us very self-sufficient."

Sandra (right) with mother, brother and sister in 1940

Sandra finished high school at the age of 16 and did something her father had always longed to do: attend Stanford. He had been forced to give up his college plans and take over the family ranch when Sandra's grandfather died. "I only applied to Stanford and no place else," said Sandra. She rushed through her undergraduate work and law studies in just five years, graduating *magna cum laude* and joining the honorary Society of the Coif, which accepts only the best law students. She won a post on the *Stanford Law Review*, where she met her future husband John, who was one class behind her. She ranked in the top ten in her class scholastically. So too did Rehnquist, who had graduated six months earlier.

Degree in hand, O'Connor collided head-on with the legal profession's prejudice against women: "I interviewed with law firms in Los Angeles and San Francisco, but none had ever hired a woman before as a lawyer, and they were not prepared to do so." Among the firms to which she applied was Los Angeles' Gibson, Dunn & Crutcher. One of its partners was William French Smith. The firm offered to hire her—as a legal secretary.

O'Connor took a job as a deputy county attorney in San Mateo, Calif., while John, whom she had married in 1952, finished law school. When he joined the Army's Judge Advocate General's Corps, the two lived in Frankfurt, West Germany, for three years, where she worked as a civilian lawyer for the Quartermaster Corps. They returned to the U.S., moving to Phoenix in 1957, when the first of their three sons was born. All the children attended a Jesuit-run high school in Phoenix (Sandra O'Connor is an Episcopalian, her husband a former Roman Catholic). Scott, 23, graduated from Stanford last year; Brian, 21, attends Colorado College; and Jay, 19, is a sophomore at Stanford. After a brief fling at running her own law firm in a Phoenix suburb, where she handled everything from leases to drunken driving cases, she spent five years as a full-time housewife. She was a typical joiner: president of the Junior League, adviser to the Salvation Army, auxiliary volunteer at a school for blacks and Hispanics, member of both town and country private clubs. "Finally," she recalled, "I decided I needed a paid job so that my life would be more orderly."

HOPPER—EL PASO HERALD-POST

O'Connor's parents: Harry and Ada Mae Day

That was in 1965. She spent four years as an assistant attorney general in Arizona. Appointed by the Maricopa County Board of Supervisors to fill a vacancy as a state senator in 1969, she ran successfully for the senate in 1970 and 1972. Her 17 admiring Republican colleagues (all but two were men) elected her majority leader in 1972.

O'Connor's devotion to detail soon became legendary. She once offered an amendment to a bill merely to insert a missing, but important, comma. As majority leader, she learned to use both tact and toughness to cajole colleagues into achieving consensus on divisive issues. When the usual flurry of eleventh-hour legislation delayed adjournment of the Arizona legislature in 1974, one committee chairman was furious at what he considered O'Connor's failure to finish up the senate's business. Said he to O'Connor: "If you were a man, I'd punch you in the mouth." Snapped the lady right back: "If you were a man, you could."

While critics focus on her ERA and abortion votes, O'Connor notes that her legislative achievements ranged from tax relief to flood-control funding to restoring the death penalty. "She worked interminable hours and read everything there was," says Democratic State Senator Alfredo Gutierrez. "It was impossible to win a debate with her. We'd go on the floor with a few facts and let rhetoric do the rest. Not Sandy. She would overwhelm you with her knowledge."

Although highly successful in the senate, O'Connor grew restless and decided to return to law. She ran and won a spot on the Maricopa County Superior Court bench in 1974. Explained her senate colleague Anne Lindeman: "At the end of her term she was at a crossroads. She had to choose between politics and the law. She was more comfortable with the law." Said O'Connor about the law: "It is marvelous because it is always changing."

As a trial judge, O'Connor was stern but fair. At least twice, colleagues recall, she advised defendants to get new attorneys because their lawyers had been unprepared. After a Scottsdale mother of two infants pleaded guilty to passing four bad checks totaling $3,500, she begged for mercy from O'Connor, claiming the children would become wards of the state. The father had abandoned the family. O'Connor calmly sentenced the middle-class woman to five to ten years in prison, saying, "You should have known better."

Foot Soldiers of the Law

The paramount mission and destiny of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

It was also the doctrine of the Supreme Court in 1873, when Justice Joseph Bradley wrote those words in a decision upholding the right of Illinois to deny a license to practice law to the first woman applicant, Myra Bradwell. Women, the court in effect ruled, could be barred from becoming lawyers.

Nothing dramatizes the changes that have taken place in the past 108 years more than the nomination of Sandra O'Connor to the bench where Bradley once sat. Today some 50,000 women are going beyond their "paramount mission and destiny" by pursuing careers as lawyers. They represent about 10% of the profession, and the proportion is growing: one out of three students now graduating from law school is a woman. Female attorneys are no longer considered "a bizarre thing," as Shirley Hufstedler, Secretary of Education under Jimmy Carter, recalls they were when she was one of two women graduating from Stanford University's law school in 1949 ("It was a bumper crop that year"). Nor do law firms now tell female applicants that "we just don't hire women; the secretaries might resent it," as one informed Orinda Evans, 38, now a federal district judge in Georgia, as recently as 1968. In addition, women no longer restrict themselves to the genteel specializations of real estate and probate law, as they did when former Watergate Prosecutor Jill Wine Banks finished Columbia Law School in 1968.

Eleanor Holmes Norton

Yet women are still "the foot soldiers of the profession," says Eleanor Holmes Norton, former chairman of the Equal Employment Opportunity Commission. "You don't find many in the upper reaches of bench or bar." Recent studies have shown that women account for only 2% of the partners in the 50 largest U.S. law firms, 5% of the nation's full professors of law, and about 5% of all judges. Nor has a woman ever served as president of a state bar association or on the powerful 23-member board of governors of the American Bar Association, though one is expected to be elected next month.

Carla Hills

The main difficulty, most female attorneys agree, is that the boom in women law graduates has essentially come about since 1970, when women accounted for only 2.8% of the profession. Thus there has not been enough time to yield a sufficient pool of experienced practitioners. "You can't appoint women judges if you don't have a large number of women lawyers who are trained," says Carla Hills, Secretary of Housing and Urban Development under President Ford. Until 1977, only ten women had been named to the federal bench. During the Carter Administration, partly because of the establishment of 152 new judgeships, 41 women were named. "That," says Brooksley Landau, chairman of the A.B.A. federal judiciary committee, "was a real revolution."

A key step in women's progress toward top legal posts is attaining partnership in the large, traditional law firms that dominate lucrative corporate practice and carry considerable prestige within the profession. Susan Getzendanner, 42, a former partner in the Chicago firm of Mayer, Brown & Platt, who last December became the first woman U.S. district court judge in Illinois, notes that some major law firms are currently hiring 40% to 50% women. But, she cautions, "their clients haven't changed. The business world is still male-dominated. It will be very interesting to see when women in law firms become the client controllers."

Women lawyers and judges greeted the O'Connor nomination last week with a mixture of enthusiasm and skepticism. "If she is superior, she will help the next generation of women," says Banks, "but she will be judged more harshly than men." As Hufstedler sees it, having a woman on the highest court has "significant symbolic importance." But she too is wary: "There can be such a thing as a token woman on the Supreme Court to avoid addressing women's issues." For most observers, the real test is whether Ronald Reagan is about to depart from his early appointments pattern by naming women to a number of other important posts. On that point, the jury is awaiting the evidence.

Shirley Hufstedler

But when she got back to her chambers she broke into tears.

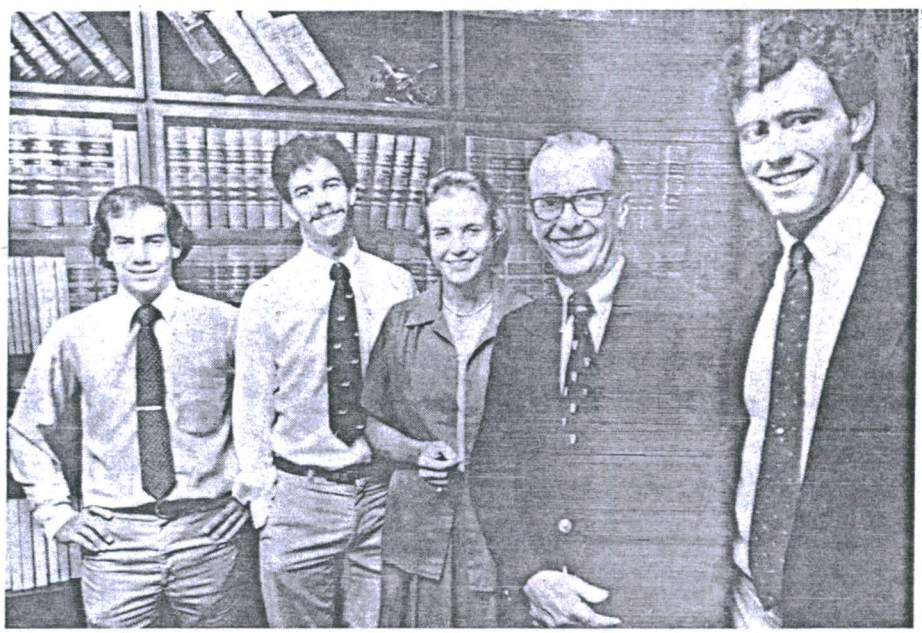
Judge O'Connor did not hesitate to order the death penalty for Mark Koch, then 23, who had been found guilty of murder for agreeing to knife another man in return for a $3,300 fee. The contract killing stemmed from a dispute over drugs. (Koch has since appealed the verdict and been granted a new trial.)

When state Republican leaders urged her to run against Democratic Governor Bruce Babbitt in 1978, she declined. Instead, she was retained as a judge in Maricopa County and, after only eleven months, was nominated to the Arizona Court of Appeals by Babbitt, who denies trying to sidetrack a potentially dangerous opponent. Says Babbitt: "I had to find the finest talent available to create confidence in our new merit system. Her intellectual ability and her judgment are astonishing."

On the appeals court, O'Connor faced no landmark cases. But she did manage to cut the court's case load by persuading her former colleagues in the senate to modify laws involving workmen's compensation and unemployment insurance. Generally, she upheld trial judges, dismissing appeals from defendants who claimed they had been denied a speedy trial, refused transcripts, and other technicalities. In an article for the current issue of the *William and Mary Law Review*, she urged federal judges to give greater weight to the factual findings of state courts, contending that when a state judge moves up to the federal bench, "he or she does not become immediately better equipped intellectually to do the job."

But if O'Connor's own intellectual gifts are widely praised, the self-assured woman, who is of medium height and wears such sensible clothes as suits with silk blouses and matching ascots, is neither dull company nor dour. "She never forgets she's a lady—and she'll never let you forget," says Attorney McGowan. Yet Stanford Vice President Joel P. Smith recalls her as "the best dancer I've ever danced with" when he knew her as a member of the Stanford Board of Trustees. She does a nifty two-step and enjoys country music. A superb cook specializing in Mexican dishes, she, along with her husband, is a popular partygiver and -goer. While the prosperous Phoenix lawyer regales guests with Irish jokes told in a brogue, she jumps in to lift stories along, without ever stepping on the punch lines. She golfs weekly (her handicap is 18), plays an average game of tennis and, typically, works intensely at both.

It is that striving for perfection that most impresses acquaintances. When she and John helped complete their lavish home in suburban Paradise Valley, where houses cost $500,000 or more, one friend was amazed to find them both soaking adobe bricks in coat after coat of milk. "It's an old technique," O'Connor explained. "But I don't know why you use skim and not homogenized milk." Her father, who is 83, jokes about her diligence. "She's so damned conscientious," he says, "she wouldn't even give me a legal opinion. As a judge she can't, so she refers me to her husband." Still, her mother sees a humility in Sandra, despite her accomplishments, explaining, "She isn't the type who would try to high-hat anyone." A friend recalls an example. When O'Connor was president of Heard Indian Museum, which holds an annual and overcrowded handcraft sale, her son Scott wanted one item badly but had broken his leg in a skiing accident. Instead of using her clout to bypass a long line of buyers, his mother spent several hours sitting on a camp stool to await her turn.



UPI

Sandra and John O'Connor (center) with sons Jay, Brian and Scott

Could she possibly be a foe of "traditional family values?"

How will O'Connor's appointment, assuming she is confirmed, affect the decisions of the high court? The security of lifetime tenure can liberate Justices to see themselves in a new perspective, unencumbered by the pressures of climbing toward the top. They are there. Justices have often confounded the Presidents who appointed them with unpredictable decisions. After Oliver Wendell Holmes ruled against Teddy Roosevelt in a key antitrust case, the President, who had appointed Holmes, fumed: "I could carve out of a banana a judge with more backbone than that." Said Dwight Eisenhower about his selection of Earl Warren: "The worst damn fool mistake I ever made." Harry Blackmun stunned Richard Nixon by writing the court's majority opinion in *Roe* vs. *Wade* (1973), the decision that legalized abortion.

Based on what little they know about O'Connor, legal scholars expect her to fit in neatly with a court that is sharply split in philosophy, tends to analyze each case on strictly legal merits, and has pioneered only in selected areas of the law. A Justice Department official says approvingly of O'Connor: "She is not leaping out to overrule trial court judges or state lawyers or to craft novel theories. Her opinions are sensible and scholarly."

O'Connor shares with Rehnquist more than a Stanford background; both are Republicans from Arizona who have Barry Goldwater's favor. Nonetheless, legal scholars doubt that O'Connor will become a clone of the court's leading conservative. They do not expect a pair of "Arizona twins" to develop and to hang together any more consistently than have the now-splintered "Minnesota twins," Burger and Blackmun. Broadly speaking, the court now has two liberals, Brennan and Marshall, in a standoff facing two conservatives, Rehnquist and Burger. The decisions thus often depend on how the other so-called fluid five divide on a given case. And that rarely can be foreseen.

Blackmun, who has moved increasingly to the left, probably works harder than the other judges on his decisions, which often reflect his *ad hoc*, personal sense of right and wrong. The courtly Virginian, Lewis Powell, is regarded as the great balancer, in the middle on almost every case. John Paul Stevens, the most original thinker on the court, is an iconoclastic loner who likes to file separate opinions that challenge old assumptions even when his conclusions coincide with those of his brothers. Byron White, the best pure lawyer on the court, is unpredictably liberal and unpredictably conservative, but meticulously careful about facts and precedent. O'Connor is generally expected to fit into that shifting middle, as her predecessor Stewart did; thus her appointment, at least initially, is likely to be less decisive a factor than if she had replaced one of the men on either the left or the right.

At the very least, some court observers hope that her consensus-building experience as a legislator, with its premium on dealing with personalities, as well as the fact that she is a woman, will dissolve some of the aloofness among the brethren. There is little personal rapport and togetherness on the current court —and the Justices tend to communicate with one another only in writing. The result is often a series of individual opinions based on conflicting rationales that confuse the impact of a majority decision. Powell has called the court "nine one-man law firms." A touch of warmth and sociability could improve the court's effectiveness, no matter what direction it takes.

Some experts see the current court as a transitional tribunal poised between the social activism of the distinctly liberal Warren court and whatever might lie ahead. Despite four appointments made by Richard Nixon and one by Gerald Ford, the Burger bench has retreated surprisingly little from the pioneering decisions on school integration, procedural rights for criminal defendants, and the "one man, one vote" principle of legislative apportionment. Moreover, the Burger court has broken some new ground. It was unanimous in restricting Nixon's Watergate-era claims of Executive privilege. It has upheld affirmative action to correct past racial inequities in a moderate way. It has advanced women's rights against discrimination in employment to a notable degree.

Former Deputy Solicitor General Frank Easterbrook, professor of law at the University of Chicago, cites some less familiar areas where the Justices put their stamp. "They have completely overhauled antitrust law, by unanimous votes in many cases," he says. "They have turned securities law upside down. They have greatly clarified the law of private rights of action—who can sue whom. They have done wonders at rationalizing the law on double jeopardy." Easterbrook, however, is less happy with court rulings on Fourth Amendment questions dealing with search and seizure: "They're all over the lot. They haven't the foggiest notion of what they're doing."

In presenting Sandra O'Connor to the press, Reagan described his right to nominate Supreme Court Justices as the presidency's "most awesome appointment" power. True enough, and chances are that he will have the opportunity to exercise that power again. Whether or not Reagan is able to shape "his" court is as problematical as it was for most of his predecessors. What is important is that he had the imagination and good sense to break down a useless discriminatory barrier by naming a woman to the nation's Supreme Court—at last. America waits to see what place in legal history will be carved out by this daunting daughter of Arizona pioneers. *—By Ed Magnuson. Reported by Joseph J. Kane/Phoenix and Evan Thomas/Washington*

The Presidency/Hugh Sidey

Citadel on a Hill

When the antiabortion shouting is finally muffled, as it will be, the nomination of Sandra O'Connor to the Supreme Court will emerge as the balanced and responsible presidential action it was intended to be. Dozens of Ronald Reagan's aides, acting more like clinical psychologists than bureaucrats, probed her shadings of emotion, her intellect, her theology. O'Connor's background and that of her family were searched by computer. She was, to a remarkable degree, judged by a man who sees more and more each day that he must be President to a nation and not to a single-interest group.

One might expect that Reagan's first nominee to the Supreme Court would have had a certain intimacy with the White House or some special link to the Oval Office. But that is not the case. O'Connor is as independent and self-contained as any court nominee of the past two decades. She may reflect the White House philosophy, but she is not beholden to it, not bound to any mission or personal power adventure. Her nomination may be certification of a fact that has been dawning: the court is truly a citadel on the Hill—a part of Government but removed from it, as powerful as ever but beyond the reach of partisanship.

It was not so long ago that the man in the Oval Office considered the court either an adversary to be intimidated or a part of his private preserve, peopled with enough Justices from the political system to allow room for discreet wheeling and dealing behind the scenes.


MILLER—LIFE

L.B.J. gets Warren Report from its author

Lyndon Johnson leaps to mind. He was a product of the tumultuous Roosevelt years, when the court was more enemy than friend. The goal was to get enough of the old gang aboard to have the court with you instead of against you. A molder of men, Johnson knew how to get along with his court. Tom Clark and William Douglas were longtime New Deal buddies, and he kept the friendships going over lunch and on the phone. Hugo Black was out of the Senate tradition, and Earl Warren was a former Governor, the ultimate breed of political survivor. When L.B.J. wanted to clear the air about the Kennedy assassination, he never worried more than a second or two about the sanctity of the court. He went after Warren with his full guile and authority, rejecting Warren's first shocked refusals to head a special commission and simply wearing the man down with the old Johnson "treatment." Deciding that he wanted Justice Arthur J. Goldberg to be his U.N. Ambassador, Johnson reckoned that since he had pushed Goldberg's appointment (by Kennedy) to the court, he had a right to take him off. Using his powerful personality, L.B.J. persuaded Goldberg to take the lesser job. Johnson was still working the old game when he named his longtime crony and lawyer, Abe Fortas, to succeed Warren as Chief Justice. That one fell through because of Fortas' conflict-of-interest problems and Johnson's unhappy departure from the White House.

Richard Nixon harbored some of Johnson's political sentiments about the purposes and authority of the court. The Senate rejection of his nominees, Clement Haynsworth and G. Harrold Carswell, is now history. Nixon was in utter despair when he learned that his own appointee, Chief Justice Warren Burger, had ruled that Nixon had to surrender the White House tapes. That was a pivotal drama in the Watergate scandal. Things were changing.

Modern media had discovered the power of the court, the entertainment value of the obscure doings in the shadowy marble chambers at the far end of Pennsylvania Avenue. The Justices became good television; the collection of gossip in the book *The Brethren* was worth big money on the publishing market. In singular fashion, the court was raised still higher on its public pedestal.

In an extraordinary way, this deeper awareness and understanding of the court have been focused in Reagan's time to produce the nomination of O'Connor. She seems to be a person in harmony with the White House. But she also gains credence as a potential Justice by her distance from the White House that proposed her.

A Woman for the Court

Working in her Phoenix chambers one day last week Sandra Day O'Connor was interrupted by a telephone call from a friend. Warren Burger, Chief Justice of the United States, was on the phone—and the news he had for her was historic. But only moments after the conversation began, O'Connor was forced to put the Chief Justice on hold. Ronald Reagan was on the other line to add Presidential majesty to Burger's chatty message—that she had been selected to fill the vacancy on the Supreme Court created by Justice Potter Stewart's retirement. Would she accept? Twice blessed and slightly dazed, O'Connor said yes.

With those phone calls, the last major barrier to America's most exclusive men's club finally toppled. After 191 years and 101 male Justices, Reagan had elevated to the Supreme Court a strong-willed, traditionally conservative judge of the Arizona court of appeals whose overriding qualification was her gender. "She is truly a person for all seasons," the President said last week as he announced the nomination, "a woman who meets the very high standards that I demand of all Court appointees." But whatever her other abilities—and they seemed to be considerable—O'Connor, 51, was named to the Court because Reagan was determined to find a judge who wasn't a man.

Dividends: Reagan's choice paid immediate dividends. It extended his Washington revolution to the third branch of government and fulfilled a well-timed campaign pledge to appoint the first female Justice—in the process, somewhat easing the resentment of women unhappy over the famine of high-level female appointees in the executive branch. "This is worth 25 assistant secretaries, maybe more," said one senior Administration aide. As strategy, it seemed to work: feminist groups praised the move, if not the man who made it. "This nomination will be a major step toward equal justice in our land," said Iris Mitgang, head of the National Women's Political Caucus. In fact, O'Connor's confirmation seemed all but certain. Senate Majority Leader Howard Baker promised his support—others ranging from Judiciary Committee chairman Strom Thurmond to Edward Kennedy of Massachusetts and Alan Cranston of California backed the President's choice.

But Reagan's choice angered many of his New Right supporters. "I see this as a slap in the face," said Richard Viguerie, the direct-mail expert whose computer records provide a statistical base of power for the fundamentalist movement. And Jerry Falwell, the television preacher who leads the Moral Majority, immediately called for a Christians-against-Reagan crusade. The dispute stemmed from reports by right-to-lifers and fundamentalist Christians that O'Connor had supported pro-abortion measures and the Equal Rights Amendment when she served in the Arizona State Senate. The reports were misleading—and the complaints of the New Right were quickly challenged by the barons of the Old Right. "I think that every good Christian ought to kick Falwell right in the ass," said Sen. Barry Goldwater after the attacks on his home-state judge.

Lester Sloan—Newsweek

O'Connor: After 191 years, a Justice named Sandra

Reagan's appointment of Sandra O'Connor enrages the New Right, but her confirmation seems assured.

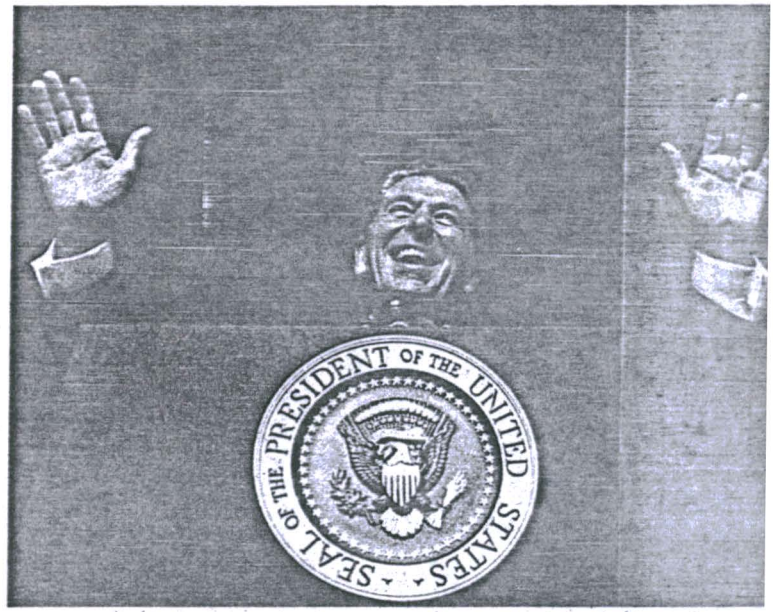
Kicking Up Dust: Privately, the leaders of the New Right conceded that their stop-O'Connor drive would fall well short of success; at best, they might count on a dozen votes in the Senate. Their real motive, they stressed, was to "Hickelize" the process*—to kick up enough dust so that Reagan would not stray next time. And there almost certainly will be a next time. With five of the Justices over 70, Reagan might get to appoint a full majority of the Court. The Court's remaining liberals, William Brennan Jr., 75, and Thurgood Marshall, 73, have been in poor health in the past, but neither will voluntarily hand over their seats to Reagan.

O'Connor's presence probably will not alter the ideological balance of the Court. She replaces a Justice who has tended to side with conservatives on important questions before the bench, and judging by her record of careful attention to precedent and the prerogatives of the legislative branch in Arizona (page 18), she seems almost perfectly suited to the High Court's direction. In recent years the Supreme Court has repeatedly deferred to the two other branches of government; in its last session, for example, the Court deferred to Congress in its decisions on health regulations for industry and the drafting of women, and it supported the President on the Iranian assets case. Such judicial restraint is precisely what Richard Nixon and Gerald Ford intended with their Supreme Court appointments during the early part of the 1970s—and it fits Ronald Reagan's design as well.

In a sense, the search that led to the O'Connor nomination actually began last

*After he was named Interior Secretary by Richard Nixon, Alaskan Walter Hickel was so traumatized by being called pro-business that he took special pains to act in behalf of environmental interests.

October when Reagan's Presidential campaign seemed to be faltering. The problem, in the candidate's quaint term, was "the ladies." GOP polls showed that women resented his stand against abortion and the ERA. When his senior staff cast about for a reassuring gesture, top campaign strategist Stuart Spencer passed along a suggestion that Reagan vow to name a woman to the High Court. The candidate was enthusiastic, and he used a Los Angeles press conference to pledge that a woman would fill one of "the first vacancies in my Administration." Barely four months into his term, Reagan was presented with his first opportunity to deliver when Stewart told Attorney General William French Smith that he would resign this summer.



Photos by John Ficara—Newsweek

Phillips and Reagan: A slap in the face on the President's 'happy day'

Smith began collecting names immediately. By May his aides had filled an eyes-only loose-leaf binder with facts on two dozen candidates. White House counsel Fred Fielding drew up a similar list. He had not been told of Stewart's decision, but since there had been no change on the Court in six years he figured that the odds favored a vacancy. Both lists gave the President three categories of people: prominent conservative lawyers like former Solicitor General Robert Bork, old friends like top aide Edwin Meese III and Deputy Secretary of State William Clark, and women.

O'Connor's name turned up on both lists. Exactly how she got there is not clear, but given her remarkable connections it was hardly surprising. She had known Chief Justice Burger for some time, cementing their friendship last summer during two weeks at an Anglo-American judicial exchange. And she was a classmate at Stanford and longtime personal friend of another Justice, William H. Rehnquist.

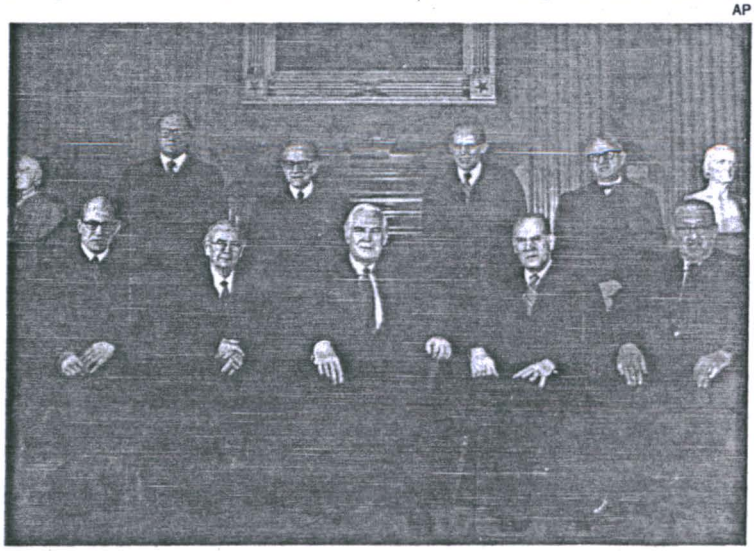
Iced Tea: The Attorney General brought his loose-leaf to the White House a few days after Stewart announced his resignation on June 18. After briefing Reagan, he returned to Justice and reported that "the direction seemed to be toward one of the qualified women on the list," one aide recalled last week. On June 23 Smith sent a Justice Department lawyer to Phoenix to gather additional background information on O'Connor and he held several conversations with her by phone. Four days later two other Justice lawyers flew to Arizona and spent the day at O'Connor's home in Paradise Valley, just outside Phoenix. While they sipped iced tea, the lawyers tried to get a complete brief on her personal life and philosophy. "We were impressed by her intelligence and lawyerlike abilities," said one participant. They were also charmed by her personal manner. Their heady discussions of Federal-state comity were interrupted by a lunch of salmon salad, prepared by the judge herself.

While the interviews continued, support for O'Connor was building in other quarters. Rehnquist called the White House with a glowing endorsement. Smith asked Burger for his opinion; he concurred with Rehnquist. Barry Goldwater added his praise. Still, Smith continued his search. He spoke by phone with U.S. circuit court of appeals Judge Cornelia Kennedy and dispatched a team of lawyers to interview her in Detroit. A Justice official saw Federal

Ira Wyman

An aging Court: Left to right, Byron White, 64, William Rehnquist, 56, William Brennan Jr., 75, Harry Blackmun, 72, Warren Burger, 73, Lewis Powell, 73, retiree Potter Stewart, 66 (at right, fishing in New Hampshire last week), John Paul Stevens, 61, Thurgood Marshall, 73.

AP



appeals Judge J. Clifford Wallace of California at a judicial conference in Wyoming. By that point, however, any man was considered a long shot.

In the end, O'Connor was the only candidate to meet with the White House hierarchy in Washington. She flew to the Capital on June 29 and met with Smith, his top aide, Ed Schmults, and William Clark. They all relayed to the White House what one man called "an affirmative readout." On the afternoon of June 30 top members of the White House staff took over. Two White House sedans carried Meese, James Baker, Michael Deaver and Fielding to the L'Enfant Plaza Hotel where O'Connor was waiting. For 90 minutes, and with varying degrees of intensity, they grilled her. As one participant put it, "We were testing her psychological and intellectual stamina, the lack of which has caused some Justices to desert their conservative base."

That left only Reagan. The next morning O'Connor met with the President for 48 minutes and talked mainly about social and "family" issues. Officials say she told him that abortion was personally abhorrent to her and generally impressed him with her conservative credentials. Reagan expressed no interest in interviewing anyone else; all that was left was to float her name in public. The next day The Washington Post reported that O'Connor was at the top of a "short list" and seemed likely to be Reagan's choice. Within hours, the furor broke. Anti-abortion groups said that O'Connor had a pro-abortion voting record in the Arizona Senate. The alarm set off New Right activists—and telegrams to the White House ran nearly 10 to 1 against her nomination. The reaction was so overwhelming that one Reagan political aide told Howard Phillips, the national director of the Conservative Caucus, that the Arizonan's chances were dashed. The aide was wrong.

Stanford, Class of '52

Law Prof. George Osborne pronounced the Stanford University Law School class of 1952 the "dumbest" he had ever taught—but were he alive today, Osborne probably would have to recant. Sandra Day O'Connor finished among the top ten in a 102-student class that produced Supreme Court Justice William H. Rehnquist (he was No. 1); Scott M. Matheson, Democratic governor of Utah; five current members of the California superior court; 1960s activist and "hippie lawyer" Jerry Rosen, and Forrest Shumway, chairman of the Signal Companies, a $4.3 billion conglomerate. When asked to name its *most* successful member, Shumway replied, "I probably make the most money."

Based on her legislative record, the case against O'Connor is weak. She introduced a bill permitting doctors to refuse to participate in abortion procedures. It passed. Either she voted against or did not vote at all—the records are unclear—on an innocuous appropriation bill that included a rider banning all abortions in state educational facilities. Although she once favored ERA—as did Reagan—she never sponsored the amendment's adoption as the conservatives charged. And she co-sponsored a bill permitting the state to disseminate family-planning information. It died in committee.

Even though the rap on O'Connor had little punch, the White House moved quickly to defuse the attack. Speaking at a Chicago fund-raiser the evening after he had selected O'Connor, Reagan reaffirmed his support to the partisan crowd. The appointment, he said, was "a very happy day for me and I hope for our country." Back in the Capital he called in Sen. Jesse Helms of North Carolina for some friendly persuasion.

Self-restraint: The O'Connor appointment is consistent with Reagan's record as governor of California, where he tended to fill the bench with able lawyers who usually sided with him on sensitive issues. But in tapping someone without a long judicial record, the White House is guessing about her future. "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," says Yale Prof. Paul Gewirtz. "She hasn't been put to the test of figuring them out."

As a former legislator, O'Connor seems likely to join in the Court's current move toward judicial self-restraint. In addition to its decisions upholding a male-only draft, the Iranian hostage deal and strict health laws in the workplace, the Court supported the executive over the State Department's decision to lift the passport of former CIA agent Philip Agee for reasons of national security. In each case, the Justices decided that Congress had more or less settled the issue involved. What is really new about this judicial reticence, says Brooklyn Law School Prof. Joel Gora, is "the zeal" with which the Court backed away from an opportunity to overrule one of the other branches.

Judicial restraint itself is an old principle. In 191 years the Justices have voided only 106 acts of Congress, fifteen in the last ten years. But it can have the effect of leaving the law in a bit of a muddle. According to University of Virginia law professor A. E. Dick Howard, the Burger Court would rather not "answer hot questions. The Court passes the ball on these issues regardless of whether Congress reaches a liberal or a conservative result." In 1980 the Court upheld Congressional restrictions of Medicaid-funded abortions. The majority concluded that while the

A Keen Mind,

Until last week Sandra O'Connor was an obscure judge who has served a mere eighteen months on an intermediate appeals court. She has never decided weighty constitutional issues and her *curriculum vitae* does not include a bibliography of scholarly law-review articles. What then are her qualifications for a seat on the U.S. Supreme Court? One of her mentors in Phoenix offers an answer. O'Connor brings two key qualities to the job, says Arizona Gov. Bruce Babbitt: "raw intellectual ability and a great sense of judgment."

The nation's legal community seems to concur. Stanford constitutionalist Gerald Gunther, praising President Reagan for taking "the high road" with his selection, says that O'Connor "seems by all reports to be a perfectly qualified, conservative-philosophy judge." She is hardly a towering figure in the law—few legal authorities outside Arizona know much about her work—but that has never counted for much in Supreme Court nominations. The main factor in her favor was plainly her sex. "There are women around with better credentials," says Brooklyn Law School Prof. Joel Gora, "but hers are awfully good."

Modern Woman: O'Connor's credentials as the quintessential modern woman—capable of melding family, career and civic responsibilities—are almost flawless. She and her lawyer husband, John Jay O'Connor III, have been married for 29 years and have raised three sons along the way.* Friends call her a gourmet cook. She was once president of the Junior League of Phoenix and now serves on the boards of the Arizona chapters of the Salvation Army, the YMCA and the National

*John O'Connor has not said whether he plans to remain in Arizona or move to Washington.

Riding high at 10: A very bright child

Fine Judgment

Conference of Christians and Jews.

Sandy Day was born on March 26, 1930, and grew up on her family's Lazy B ranch in southeastern Arizona. She was such a bright child that her parents, finding no rural school nearby worthy of her, sent her to live with her grandmother in El Paso, Texas, where she attended a private school. She entered Stanford at 17, graduated with great distinction, then attended Stanford Law School, where she was an editor of the Law Review (box).

In law school she met John, one class behind her; they had dinner the first night they met, while working on the Law Review; it was the first of 46 straight dates. They married shortly after she graduated; when John finished school, the O'Connors worked in Germany for three years, she as a civilian lawyer for the Army, he in the Judge Advocate General's Corps. After they moved to Phoenix, O'Connor went into practice for two years before she had the first of three sons, Scott, now 23. (The others are Brian, 21, and Jay, 19.)

Politician: About the time her youngest son entered school, O'Connor returned to law, became an assistant attorney general of Arizona and entered Republican Party politics. Appointed to the state Senate in 1969, she was later elected twice, becoming Majority Leader in 1973. The U.S. Supreme Court has known many former politicians, but O'Connor would be the only current Justice ever elected to legislative office. (Potter Stewart, just retired, was once a Cincinnati city councilman.)

Arizona politicians describe O'Connor as conservative, a view supported by her record on the abortion issue. But on some women's issues she often took the liberal position. She led fights to remove sex-based references from state laws and to eliminate job restrictions in order to open more positions to women. "Sandra succeeded as a political leader because she not only has intelligence and integrity, but is a warm person and very fair," says Mary Dent Crisp, a longtime Arizona friend who broke with the GOP last summer over its opposition to the Equal Rights Amendment.

O'Connor left the Senate and won election as a Phoenix trial judge in 1975. Although she was mentioned regularly as a potential Republican candidate for governor, she committed herself to the judicial branch in 1979 when she accepted an appointment from Babbitt, a Democrat, to the Arizona court of appeals. The docket of a state intermediate court consists largely of appeals from criminal convictions, workmen's and unemployment compensation cases, divorces and bankruptcies. It is a long way from *Marbury v. Madison,* and in O'Connor's 29 written opinions there are no examples of soaring constitutional rhetoric. What the opinions do show is a careful study of precedent, ample citation and a clear, no-nonsense writing style that some Justices of the Supreme Court might do well to emulate.

O'Connor probably will be comfortable with a Burger Court that pays growing obeisance to legislative decisions and the prerogatives of state courts. In an essay published in the William and Mary Law Review last January she predicted that President Reagan's election would encourage the Supreme Court's trend toward "shifting to the state courts some additional responsibility" and argued that state judges rivaled Federal judges in competence. Noting that many state-court judges become Federal judges, O'Connor said: "When the state-court judge puts on his or her Federal-court robe, he or she does *not* become immediately better equipped intellectually to do the job."

'Role Model': The nation should soon find out if she is right. Some Justices grow on the job; some don't. It is one of the historic truths about the Supreme Court that no one can safely predict how a Justice will turn out—in either legal competence or judicial philosophy. The first judgments on O'Connor are that she will not be a great intellectual force on the Court, but rather a skilled craftsman. "She is a technician in the best sense of the word," says Ernst John Watts, dean of the National Judicial College. It is easier, perhaps, to predict the impact of her presence on the Supreme Court in nonjudicial matters. "Sandra is very clearly a role model for somewhat younger women," says her close friend Sharon Rockefeller, wife of a governor (Democrat John D. Rockefeller IV, of West Virginia) and daughter of a U.S. senator (Republican Charles H. Percy of Illinois). "She understands very well the conflict between a woman's desires to be part of the professional world and yet to be a perfect mother and wife as well." O'Connor is "serenity itself," says Rockefeller. "If anyone was born to be a judge, Sandra was."

JERROLD K. FOOTLICK with
DAVID T. FRIENDLY in Phoenix and bureau reports

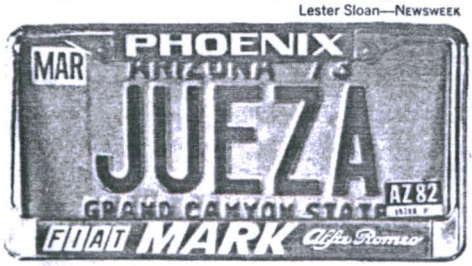
UPI

Family woman: The judge with (from left) sons Jay, Brian, husband John and son Scott

State senator in the '70s: High marks

Her judicial license: It's judge in Spanish

Lester Sloan—Newsweek



First Woman Justice—Impact on Supreme Court

Sandra O'Connor is not easy to label, her fellow Justices will discover. Her effect on them is likely to be subtle rather than revolutionary.

The nation's first female Supreme Court nominee is a meticulous, scholarly jurist who will bring a new perspective to the 190-year-old institution.

But the arrival of Sandra Day O'Connor, a 51-year-old Arizona appeals judge, may do little to alter the splintered course the High Court has followed in recent years. O'Connor, whose selection was announced by President Reagan on July 7, has qualities and experience that should serve her well as she tackles complex issues facing the Court. At the same time, she fits no neat ideological category.

"Judge O'Connor is a middle-roader—not an extreme rightist or an extreme leftist," says David C. Tierney, a Phoenix lawyer who has observed her career. "She will make her own way and be her own person."

In many ways, O'Connor resembles the moderate Justice she would replace, Potter Stewart, who was one of five "swing votes" often crucial in deciding key issues.

If O'Connor herself becomes a swing Justice, she would perpetuate the split that has existed on the Court in recent years—two conservatives, two liberals and five whose alignments vary.

Some feel "betrayed." In selecting O'Connor, Reagan kept a campaign pledge to give an early Supreme Court vacancy to a woman and to choose a Justice who is not prone to expansive interpretations of the law.

Those who had hoped that the President would pick a doctrinaire conservative were disappointed. What's more, anti-abortionists and several strongly conservative groups voiced outrage over O'Connor's record of support for the proposed equal-rights amendment to the Constitution and her past opposition to measures restricting abortion.

"We feel betrayed by the President," declared Paul Brown, chairman of the Life Amendment Political Action Committee. "We've been sold out."

Still the nomination won praise from most political quarters, Republican and Democratic. Federal-court critics were heartened by O'Connor's belief that legislative bodies and state courts should be relied on for most legal judgments—a stance that the High Court has been taking more frequently. "She will not try to remake the universe casually," predicts John P. Frank, a Phoenix lawyer and longtime friend. "She is exactly what this administration wants."

Though anti-abortion forces will oppose O'Connor, the Senate is expected to confirm her appointment well before the new Supreme Court term starts in October—unless a surprise problem turns up in her record.

The nomination of O'Connor ended a search that began when Justice Stewart told administration officials last spring of his plans to retire at 66. The drive to fill the first open Court seat since 1975 intensified after Stewart announced his resignation in mid-June.

Women pressured the President to make good on his vow last October to appoint a woman to "one of the first" vacancies on the Court. Abortion opponents reminded Reagan of the Republican Party platform approved last summer, which called for judges who respect "the sanctity of innocent human life."

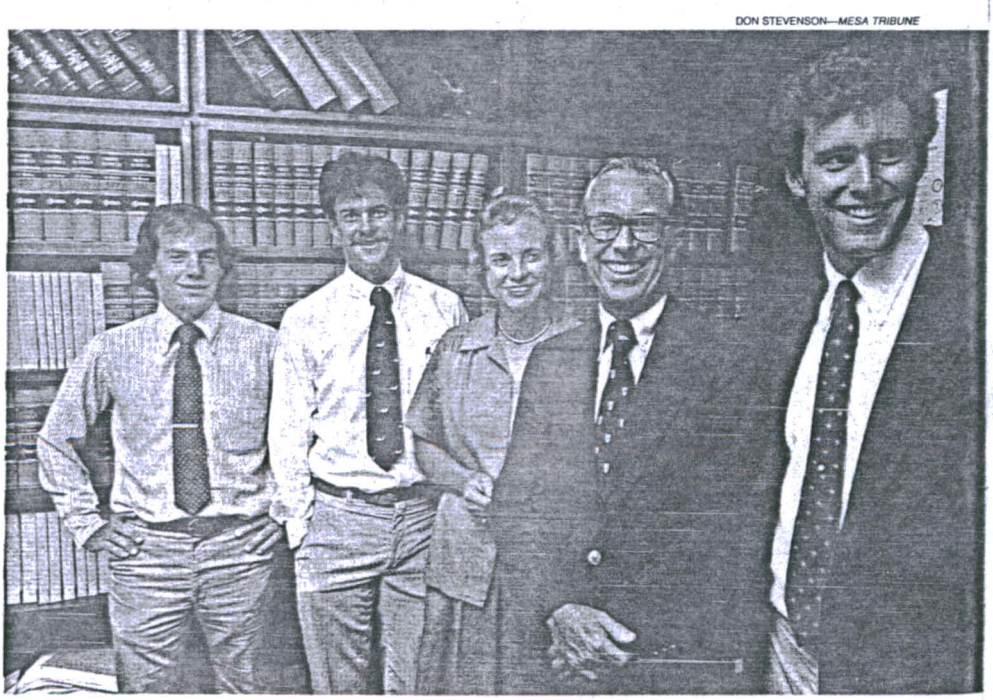
In the end, Reagan followed the path he often took in his eight years as governor of California: Picking a lower-court judge whose views seemed most compatible with his.

DON STEVENSON—*MESA TRIBUNE*

A Stanford University law-school classmate of Supreme Court Justice William Rehnquist, formerly of Arizona, O'Connor has experience in private law practice as well as in all three branches of government.

She was an assistant Arizona attorney general and later a Republican member of the State Senate, where she

DON STEVENSON—*MESA TRIBUNE*



Supreme Court nominee Sandra O'Connor with husband John and three sons after President's announcement. Her views on issues range from moderate to conservative.

Clues to O'Connor's Judicial Philosophy

Sandra O'Connor has spoken out on few issues likely to come before her on the Supreme Court, but what she has said indicates an independent turn of mind.

In 1972, as majority leader of the Arizona Senate, she was a sponsor of the proposed equal-rights amendment to the Constitution, which is opposed by Reagan and many of his conservative backers.

Two years later, O'Connor opposed a measure that would have barred most abortions at a state hospital—a vote that has provoked criticism of her nomination from abortion foes.

O'Connor has been a state appeals judge for less than two years and has written about 30 opinions, many of them in areas that give little clue to her philosophy.

Yet several of her rulings suggest a trait that Reagan wants in a Supreme Court Justice—deference to lower-court judges and legislators.

In a recent criminal case, she said that "the trial court's determination of admissibility of a confession will not be upset in the absence of clear and manifest error."

Rejecting a challenge to a state tax in another case, O'Connor said that "the tax is presumed to be constitutional, and the court must be satisfied beyond a reasonable doubt that it is unconstitutional in order to so hold."

In general, O'Connor favors more reliance on state courts to decide important issues. The President and his advisers have called for less intervention by federal judges into state and local matters, and O'Connor agrees.

As she said in a recent law-review article: "It is a step in the right direction to defer to the state courts . . . on federal constitutional questions, where a full and fair adjudication has been given in the state court."

quickly became majority leader. She was elected a trial judge in 1974, and five years later she was named by Democratic Governor Bruce Babbitt to the appeals court.

Married to a Phoenix lawyer, Judge O'Connor is the mother of three sons. When not in court, she enjoys cooking gourmet dinners, golfing, swimming and tennis and is active in civic affairs.

Her biggest liability in Washington may be her lack of federal experience. All but two of the other current Justices—William J. Brennan and Lewis F. Powell—served either as a federal judge or Justice Department official before joining the Supreme Court.

"Her first few years on the Court may be very rocky," says a Phoenix lawyer. "But in five years or so, she should have it mastered."

The Supreme Court has split in recent years on such issues as affirmative action and school desegregation. The nominee's views on these subjects are not on the public record, but some of her interests are evident. Prosecutors and police are likely to get a sympathetic ear from O'Connor, who helped draft Arizona's death-penalty law. Says Burton Barr, Arizona House majority leader: "She's not going to coddle the criminal. Her decisions as a Superior Court judge were tough. If you have done wrong, you are going to pay."

At the same time, associates report that O'Connor has a strong interest in prison conditions. "She was known as a stiff sentencer, but she is also concerned about what happens to the guy once he is in the can," says one lawyer.

Although not an ardent feminist, O'Connor took a strong interest in women's issues as a legislator and could tip the balance in close Supreme Court cases involving women's rights.

Some also believe she could have a significant impact as a negotiator. The High Court has split so badly in the last few years that in many cases no more than three or four Justices could agree on any single opinion. Result: Legislators and lawyers are left confused about the meaning of rulings. Associates think O'Connor might be able to help matters. "In the Senate, she was known as a wizard at consensus making," recalls Phoenix lawyer Tierney.

No "shrinking violet." Those who know O'Connor say that she would not be intimidated as the first woman on the Court. "She is far from a shrinking violet," says Donald F. Froeb, a colleague on the Arizona appeals court. "She always assumes the intellectual leadership role in a group discussion."

Analysts emphasized that all is conjecture at this stage. Presidents often have been surprised by judicial appointees who turned out to be more conservative or more liberal than they had expected. Also, O'Connor's track record as a jurist is so limited that no one can predict with much confidence how she would vote on the wide range of legal issues before the Court.

With the Justices so closely divided on many questions, it may take several more appointments for Ronald Reagan to reshape the tribunal into the sort of Supreme Court he favors. □

By TED GEST

Barriers Fall Slowly at the Supreme Court

Taney, 1835

Brandeis, 1916

Marshall, 1967

When the U.S. Supreme Court set up shop in 1790, George Washington appointed six Justices. Each was white, male and Protestant.

Almost two centuries passed before a President got around to naming the first woman. Other milestones were reached sooner.

The first Roman Catholic member of the high bench was Roger Taney, a prominent Marylander appointed Chief Justice by Andrew Jackson in 1836.

The barrier against Jews was breached in 1916, when Woodrow Wilson filled a vacancy with Louis Brandeis. The Boston lawyer, a crusading liberal, was so controversial among conservatives that one of his new colleagues on the Court refused to speak to him for three years.

The so-called Jewish seat was held successively by Benjamin Cardozo, Felix Frankfurter, Arthur Goldberg and Abe Fortas. Fortas resigned in 1969, and Richard Nixon filled the vacancy with Harry Blackmun, a Protestant.

The barrier against blacks fell in 1967. Lyndon Johnson appointed Thurgood Marshall, former head of the NAACP Legal Defense and Education Fund, to a seat that Marshall continues to hold today.

Despite the cracks in their monopoly, white male Protestants remain the dominant element on the nation's highest tribunal. With Sandra O'Connor, the Court would consist of one woman, one black, one Catholic—William J. Brennan—and, as in 1790, six white male Protestants.

But Senate Seems Receptive

Continued From Page A1

committee, subcommittee or caucus votes.

"We feel betrayed by the President," said Paul Brown, chairman of the Life Amendment Political Action Committee, who contended that Mr. Reagan had violated a campaign pledge to support anti-abortion positions and appointees. "We've been sold out."

In contrast, the National Organization for Women called the nomination a "victory for women's rights." Eleanor C. Smeal, president of the organization, contended that increasing political pressure from women's groups and a drop in ratings among women in public opinion polls had forced Mr. Reagan to the choice of Judge O'Connor. She rated the judge "sensitive to women's rights, a moderate on women's rights."

Any Senate opposition was thought likely to be led by Jesse Helms, Republican of North Carolina, a leader of conservative causes. The Senator was reported to have spent much of the day today at the White House, "seeking reassurances," as one anti-abortion lobbyist put it, but he offered no immediate comment.

The anti-abortion groups insisted that they would marshal Republicans and Democrats to fight the nomination in the Senate. But in some of their statements were acknowledgments that the nomination might be approved.

"I'm not sure we'll defeat her," said Peter Gemma, executive director of the National Pro-Life Political Action Committee. "But we want to send the President a clear signal at how much of an insult this is, and how his next court appointment had better be pro-life."

Senator Paul Laxalt of Nevada, a key Republican on the Judiciary Committee who is a confidant of the President, discussed the appointment with him this morning at the White House and later endorsed Judge O'Connor as "an excellent addition" to the court, emphasizing Mr. Reagan's assurances that he is "fully satisfied with Mrs. O'Connor philosophically."

This same emphasis on assurances from Mr. Reagan that Mrs. O'Connor finds abortion "personally abhorrent" was cited by Senator Orrin G. Hatch, Republican of Utah, in his endorsement of "an excellent choice."

"I'm relying on the President of the United States," Senator Hatch said in describing the opposition of anti-abortion groups as premature and perhaps misinformed. "If it turns out serious opposition develops, that's another matter."

Democrats on the Judiciary Committee offered lengthier and warmer endorsements of Judge O'Connor. Senator Edward M. Kennedy of Massachusetts said: "Every American can take pride in the President's commitment to select such a woman for this critical office." The ranking Democrat on the committee, Joseph R. Biden of Delaware, said: "From all outward appearances Sandra D. O'Connor seems to eminently well qualified for this position, and I'm personally very glad that the President has named a woman to fill the vacancy."

As anti-abortion groups cited her legislative record to prove their contention that Judge O'Connor was "pro-abortion," Alfredo Gutierrez, a rival Democrat who succeeded her as majority leader of the State Senate in Arizona, denied this. "That's absolutely not in the record," he said. "It just isn't there. I'm surprised at the choice: she's conservative in a conventional way, but no ideologue. She's a terrific lady and they ought to put her on the court quick."

The issue of naming the first woman to the Supreme Court, while a major feminist goal in recent years, has stirred little general public interest, according to the latest New York Times/CBS News News Poll. The poll, conducted last month, showed that 72 percent of the public believed that it made no difference whether a man or a woman was appointed. Fifteen percent preferred a woman, 12 percent wanted a man named and 1 percent had no opinion. Women were no more eager than men to see a woman on the Court.

The National Women's Political Caucus celebrated the nomination as proof that "women are breaking the barriers of nearly 200 years of exclusion from decision making in our nation."

MEMBERS OF THE SUPREME COURT

Name	Served[1]	Appointed By	From
CHIEF JUSTICES			
John Jay	1790–1795	Washington	N. Y.
John Rutledge	1795[2]	Washington	S. C.
Oliver Ellsworth	1796–1800	Washington	Conn.
John Marshall	1801–1835	J. Adams	Va.
Roger B. Taney	1836–1864	Jackson	Md.
Salmon P. Chase	1864–1873	Lincoln	Ohio
Morrison R. Waite	1874–1888	Grant	Ohio
Melville W. Fuller	1888–1910	Cleveland	Ill.
Edward D. White	1910–1921	Taft	La.
William H. Taft	1921–1930	Harding	Conn.
Charles E. Hughes	1930–1941	Hoover	N. Y.
Harlan F. Stone	1941–1946	F. Roosevelt	N. Y.
Fred M. Vinson	1946–1953	Truman	Ky.
Earl Warren	1953–1969	Eisenhower	Calif.
Warren E. Burger	1969–	Nixon	Minn.
ASSOCIATE JUSTICES			
James Wilson	1789–1798	Washington	Pa.
John Rutledge	1790–1791	Washington	S. C.
William Cushing	1790–1810	Washington	Mass.
John Blair	1790–1796	Washington	Va.
James Iredell	1790–1799	Washington	N.C.
Thomas Johnson	1792–1793	Washington	Md.
William Paterson	1793–1806	Washington	N. J.
Samuel Chase	1796–1811	Washington	Md.
Bushrod Washington	1799–1829	J. Adams	Va.
Alfred Moore	1800–1804	J. Adams	N. C.
William Johnson	1804–1834	Jefferson	S. C.
Henry B. Livingston	1807–1823	Jefferson	N. Y.
Thomas Todd	1807–1826	Jefferson	Ky.
Gabriel Duval	1811–1836	Madison	Md.
Joseph Story	1812–1845	Madison	Mass.
Smith Thompson	1823–1843	Monroe	N. Y.
Robert Trimble	1826–1828	J. Q. Adams	Ky.
John McLean	1830–1861	Jackson	Ohio
Henry Baldwin	1830–1844	Jackson	Pa.
James M. Wayne	1835–1867	Jackson	Ga.
Philip P. Barbour	1836–1841	Jackson	Va.
John Catron	1837–1865	Jackson	Tenn.
John McKinley	1838–1852	Van Buren	Ala.
Peter V. Daniel	1842–1860	Van Buren	Va.
Samuel Nelson	1845–1872	Tyler	N. Y.
Levi Woodbury	1845–1851	Polk	N. H.
Robert C. Grier	1846–1870	Polk	Pa.
Benjamin R. Curtis	1851–1857	Fillmore	Mass.
John A. Campbell	1853–1861	Pierce	Ala.
Nathan Clifford	1858–1881	Buchanan	Me.
Noah H. Swayne	1862–1881	Lincoln	Ohio
Samuel F. Miller	1862–1890	Lincoln	Iowa
David Davis	1862–1877	Lincoln	Ill.
Stephen J. Field	1863–1897	Lincoln	Calif.
William Strong	1870–1880	Grant	Pa.
Joseph P. Bradley	1870–1892	Grant	N. J.
Ward Hunt	1873–1882	Grant	N. Y.
John M. Harlan	1877–1911	Hayes	Ky.
William B. Woods	1881–1887	Hayes	Ga.
Stanley Matthews	1881–1889	Garfield	Ohio
Horace Gray	1882–1902	Arthur	Mass.
Samuel Blatchford	1882–1893	Arthur	N. Y.
Lucius Q. C. Lamar	1888–1893	Cleveland	Miss.
David J. Brewer	1890–1910	B. Harrison	Kans.
Henry B. Brown	1891–1906	B. Harrison	Mich.
George Shiras	1892–1903	B. Harrison	Pa.
Howell E. Jackson	1893–1895	B. Harrison	Tenn.
Edward D. White	1894–1910	Cleveland	La.
Rufus W. Peckham	1896–1909	Cleveland	N. Y.
Joseph McKenna	1898–1925	McKinley	Calif.
Oliver W. Holmes	1902–1932	T. Roosevelt	Mass.
William R. Day	1903–1922	T. Roosevelt	Ohio
William H. Moody	1906–1910	T. Roosevelt	Mass.
Horace H. Lurton	1910–1914	Taft	Tenn.
Charles E. Hughes	1910–1916	Taft	N. Y.
Willis Van Devanter	1911–1937	Taft	Wyo.
Joseph R. Lamar	1911–1916	Taft	Ga.
Mahlon Pitney	1912–1922	Taft	N. J.
James C. McReynolds	1914–1941	Wilson	Tenn.
Louis D. Brandeis	1916–1939	Wilson	Mass.
John H. Clarke	1916–1922	Wilson	Ohio
George Sutherland	1922–1938	Harding	Utah
Pierce Butler	1923–1939	Harding	Minn.
Edward T. Sanford	1923–1930	Harding	Tenn.
Harlan F. Stone	1925–1941	Coolidge	N. Y.
Owen J. Roberts	1930–1945	Hoover	Pa.
Benjamin N. Cardozo	1932–1938	Hoover	N. Y.
Hugo L. Black	1937–1971	F. Roosevelt	Ala.
Stanley Reed	1938–1957	F. Roosevelt	Ky
Felix Frankfurter	1939–1962	F. Roosevelt	Mass.
William O. Douglas	1939–1975	F. Roosevelt	Conn.
Frank Murphy	1940–1949	F. Roosevelt	Mich.
James F. Byrnes	1941–1942	F. Roosevelt	S. C.
Robert H. Jackson	1941–1954	F. Roosevelt	N. Y.
Wiley Rutledge	1943–1949	F. Roosevelt	Iowa
Harold H. Burton	1945–1958	Truman	Ohio
Tom C. Clark	1949–1967	Truman	Texas
Sherman Minton	1949–1956	Truman	Ind.
John M. Harlan	1955–1971	Eisenhower	N. Y.
William J. Brennan, Jr.	1956–	Eisenhower	N. J.
Charles E. Whittaker	1957–1962	Eisenhower	Mo.
Potter Stewart	1958–	Eisenhower	Ohio
Byron R. White	1962–	Kennedy	Colo.
Arthur J. Goldberg	1962–1965	Kennedy	Ill.
Abe Fortas	1965–1969	Johnson	D. C.
Thurgood Marshall	1967–	Johnson	Md.
Harry A. Blackmun	1970–	Nixon	Minn.
Lewis F. Powell, Jr.	1972–	Nixon	Va.
William H. Rehnquist	1972–	Nixon	Ariz.
John P. Stevens	1975–	Ford	Ill.

[1] Terms begin with date of actual service, not date of appointment. [2] Appointed by Washington but not confirmed by the Senate.

the Supreme Court for a writ of mandamus to compel Madison to deliver the commission. If Marshall granted the writ, Jefferson would order Madison not to obey it. If Marshall refused to issue the writ, he would admit the impotence of his court.

Marshall avoided both horns of this dilemma and found another issue on which to decide the case. He held that the statute purporting to grant the Supreme Court authority to issue writs of mandamus in its original jurisdiction, under which Marbury had brought the suit, had extended the court's original jurisdiction beyond that provided for in the Constitution. The heart of his opinion, and its enduring contribution, was a logical demonstration that the court was obliged to refuse enforcement of any statute that it found to be contrary to the Constitution.

Having placed the court in a strong position, Marshall's next purpose was to guarantee broad authority for Congress. Here his greatest opinion was *McCulloch* v. *Maryland* (1819), in which he ruled that Congress enjoyed not only the powers specifically granted by the Constitution, but also those implied powers necessary or helpful in carrying out its constitutional purposes. One of the most important of the specifically granted powers—to regulate commerce—was given a broad interpretation in *Gibbons* v. *Ogden* (1824).

Part of Marshall's strategy to promote a strong national government was to win the support of the propertied interests by giving them federal protection. For example, in a series of decisions, such as the Dartmouth College case (*Dartmouth College* v. *Woodward;* 1819), he extended the protection of the contract clause—Article I, Section 10, whereby states were forbidden to pass any "Law impairing the Obligation of Contracts"—to a corporate franchise, which was clearly beyond the intentions of the framers.

Chris
fyi

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED JUL 28 1981
GLEN D. CLARK, CLERK
By _____

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

UNITED RIGGERS ERECTORS, Petitioner-Employer, HARTFORD ACCIDENT AND INDEMNITY COMPANY, Petitioner-Carrier, vs. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CHARLES BATTAGLIA, Respondent-Employee.	1 CA-IC 2408 DEPARTMENT C O P I N I O N

Special Action - Industrial Commission

ICA Claim No. 122-10-2804

Carrier No. 957 C 66414

Administrative Law Judge Jerry C. Schmidt

AWARD AFFIRMED

O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS
By Donald L. Cross
Larry L. Smith
Attorneys for Petitioner-Employer and Petitioner-Carrier — Phoenix

CALVIN HARRIS, Chief Counsel
THE INDUSTRIAL COMMISSION OF ARIZONA
Attorneys for Respondent — Phoenix

FRANK W. FREY
Attorney for Respondent-Employee — Tucson

O'C O N N O R, Judge

The employer, United Riggers Erectors, and the insurance carrier have brought this Industrial Commission special action to challenge a loss of earning capacity award to a claimant who has been incarcerated in a prison. The respondent employee, Charles Battaglia, suffered an industrial injury while working for the petitioner in 1977. His workmen's compensation claim was accepted for benefits by the carrier, and benefits were paid until July 28, 1978, when the carrier issued a notice of claim status terminating benefits with a permanent partial disability of 15%. Thereafter, Mr. Battaglia pled guilty to mail fraud and was sentenced to three years in a federal penitentiary. After Mr. Battaglia was sentenced, the Industrial Commission issued its findings determining that he had a 56.67% reduction in his monthly earning capacity as a result of the industrial injury. The carrier requested a hearing after which the administrative law judge found that the employee had sustained a 54.93% reduction in his earning capacity. The administrative law judge also determined that Mr. Battaglia's incarceration did not prevent him from receiving permanent partial disability benefits, and he allowed proof of loss of earning capacity by the use of expert testimony and hypothetical questions. The award was affirmed on administrative review, and this special action was filed.

Petitioners raise three issues: (1) whether the employee's incarceration constitutes a voluntary removal from the job market, thereby precluding him from receiving permanent partial disability benefits; (2) whether the employee's status as a prisoner creates an economic condition precluding him from proving a loss of earning capacity; and (3) whether loss of earning capacity may be proven by hypothetical questions of an expert witness.

With respect to the first issue raised by petitioners, they contend that the employee's inability to work and to seek suitable

employment is the result of his own criminal conduct and his subsequent incarceration, and that the employee was required to prove that he had made a good faith and reasonable effort to find other employment. The administrative law judge rejected petitioner's contentions and concluded that the case was governed by Bearden v. Industrial Commission, 14 Ariz. App. 336, 483 P.2d 568 (1971). The Bearden case held that a claimant was not disqualified from receiving total temporary disability benefits during his confinement in prison for a criminal offense. The court found that:

> . . . [T]he Arizona Legislature has not provided for the forfeiture or suspension of compensation and accident benefits during the period of the prison confinement of a claimant serving a sentence less than life. We find no extensions of time within which to process and protect his workmen's compensation rights during a period of confinement. We expressly refrain from expressing an opinion as to the effect of a life sentence whereby one is declared to be civilly dead.

14 Ariz. App. at 343, 483 P.2d at 575.

Mr. Battaglia was seeking permanent, rather than temporary, disability benefits. A.R.S. § 23-1041 provides in part that:

> Every employee. . . who is injured by accident arising out of and in the course of employment . . . shall receive the compensation fixed in this chapter on the basis of such employee's average monthly wage at the time of injury.

A.R.S. § 23-1044(C) provides in part that:

> [W]here the injury causes permanent partial disability for work, the employee shall receive during such disability compensation equal to fifty-five percent of the difference between his average monthly wages before the accident and the amount which represents his reduced monthly earning capacity resulting from the disability, but the payment shall not continue after the disability ends, or the death of the injured person. . . .

No provision in the workmen's compensation statutes expressly prohibits payment of disability benefits during periods when the claimant is confined in a penal or other institution.[1] Many Arizona

[1] Footnote on next page.

decisions involving the burden of proof in loss of earning capacity hearings enunciate the concept of requiring a claimant to prove he has made a good faith and reasonable effort to find other employment after his industrial injury has become stationary. The injured claimant has the burden of proof in establishing that he is entitled to compensation. Wiedmaier v. Industrial Commission, 121 Ariz. 127, 589 P.2d 1 (1979); Standard Accident Ins. Co. v. Industrial Commission, 66 Ariz. 247, 186 P.2d 951 (1947). However, once the injured worker has shown that his industrial injury prevents him from returning to his former job, that he has a permanent partial disability resulting from the injury, and that he has made a good faith and reasonable effort to find other work, then the burden of going forward with the evidence shifts to the employer. See, e.g., Wiedmaier v. Industrial Commission, supra, and cases cited therein. As explained in Wiedmaier:

> After a workman has received an unscheduled injury and the percentage of permanent disability has been determined, if suitable work that he can do in his disabled condition is not available in the area where the workman resides the measure of workman's loss of earnings is the salary he received before the injury. The workman has an obligation, however, to take such work as he is able to perform and is available in order to mitigate the amount of compensation that may be due him. Timmons v. Industrial Commission, 20 Ariz. App. 57, 510 P.2d 56 (1973). Not only does this reduce the amount of benefits that must be paid, but usually has a beneficial rehabilitative result as far as the injured workman is concerned. If suitable work is available and the workman refuses to take the job, the carrier must pay only an amount based upon what he would have received had he accepted the work available.

121 Ariz. at 128-29, 589 P.2d at 2-3 (emphasis added).

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[1] [from previous page] The workmen's compensation statutes provide for suspension or reduction of benefits under certain circumstances which do not include periods of confinement in penal institutions. See, e.g., A.R.S. §§ 23-1071 (absence from the state without Commission approval), 23-908 (failure to report accident and refusal of employer's medical examination), 23-1026 (refusal of medical examination), 23-1027 (unreasonable refusal of medical treatment).

The respondent employee has not claimed disability benefits over and above the amount that he says is based on the proof of what he could have earned had he been out of prison and able to accept the work available, considering his industrially caused physical impairment. We believe the administrative law judge correctly determined that under present Arizona law and on the facts of this case, the employee was not precluded from receiving permanent partial disability benefits by virtue of his incarceration. It is not our function to question the wisdom of the legislative scheme, but to interpret and apply the statutes as they have been enacted.

In further support of their first argument, petitioners cite Bryant v. Industrial Commission, 21 Ariz. App. 356, 357-58, 519 P.2d 209, 210-11 (1974), for the proposition that "where the predominant cause of an injured workman's changed economic status is of his own making ... the Industrial Commission will not subsidize [him] for his miscalculations." The Bryant case arose out of a petition by an injured worker to readjust or rearrange his disability benefits pursuant to A.R.S. § 23-1044(F) after he voluntarily left his post-injury job to take a better job, but the new position was terminated after a short time, leaving him without a job and unable to find any employment. Bryant's reduced earnings were caused by his voluntary action, not by his industrial injury.[2]

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[2]In this regard, we also note such cases as Todd v. Hudson Motor Car Co., 328 Mich. 283, 43 N.W.2d 854 (1950), in which the partially disabled injured employee had been reemployed at the same salary at lighter work. He was fired for the illegal act of gambling at work and applied for and received compensation for partial disability during the resulting six month period of unemployment. The Michigan Supreme Court set aside the award of benefits, holding:

> It is the duty of a disabled employee to cooperate not only by accepting tendered favored employment which he is physically able to perform [citation omitted], but also by refraining from criminal conduct. . . . Where he engages in criminal gambling activities (continued next page)

We find the facts of the present case distinguishable from those of Bryant. Mr. Battaglia did not lose his job due to his voluntary criminal conduct, but rather because of his industrial injury. After the injury, he attempted to return to his job with the petitioner employer, but was unable to continue because of back pain and quit work some ten days after the injury. The record does not show that he has ever returned to work.

The question in the present case is whether the evidence was sufficient to support an initial determination that the employee had a loss of earning capacity caused by the existence of the permanent partial disability for work. A.R.S. § 23-1044(D) sets forth some of the factors to be considered in making this determination. The voluntary conduct of the claimant resulting in his incarceration and inability to work in order to mitigate his loss of earnings does not preclude him from proving the amount of his reduced monthly earning capacity caused by his job related physical impairment, based on an assumption that he could accept suitable employment. The employee's status as a prisoner does not excuse him from complying with the various requirements of the workmen's compensation statutes. Continental Casualty Co. v. Industrial Commission, 113 Ariz. 116, 547 P.2d 470 (1976). On the other hand, it does not preclude him from receiving benefits if he meets his burden of proof. Bearden v. Industrial Commission, supra. Moreover, A.R.S. § 13-904(D) provides in part that "[t]he conviction of a person for any offense shall not work forfeiture of any property, except if a forfeiture

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[2] (continued)

> while at work and is discharged for that cause, he will not be entitled to compensation for the resultant loss of earnings. His favored employment has ceased through his own volition and turpitude and not by reason of his accidental injury.

Id. at 289, 43 N.W.2d at 856.

is expressly imposed by law." The right to receive workmen's compensation benefits is a property right. Bugh v. Bugh, 125 Ariz. 190, 608 P.2d 329 (App. 1980). In the absence of legislation providing for a suspension of workmen's compensation benefits during periods while the claimant is incarcerated, A.R.S. § 13-904(D) indicates that the imprisonment does not preclude the award of benefits if the employee is otherwise entitled to receive them.

Petitioners' second contention is that the employee's incarceration is an economic circumstance which caused his loss of earning capacity, and he is thereby precluded from receiving benefits, citing Wiedmaier v. Industrial Commission, supra, and Fletcher v. Industrial Commission, 120 Ariz. 571, 587 P.2d 757 (App. 1978). Wiedmaier and Fletcher establish that where there are no jobs available solely because of general economic circumstances or other reasons unrelated to the industrial injury, the employee is not entitled to receive workmen's compensation benefits.[3] As stated in Wiedmaier:

> Where the workman shows he has made a good faith effort to obtain employment and that none is available, the carrier may show that the inability of the workman to obtain employment is not due to the workman's physical condition, but due to the fact that economic conditions are such that no jobs are available. [citation omitted] This follows the intent of the Workman's Compensation Act that the workman should be compensated for loss of earning capacity only. [citation omitted] Where there are no jobs available because of economic conditions, the workman is not prevented from obtaining work because of his physical impairment. He would not be hired regardless of his physical condition. Therefore, he has suffered no loss of earning capacity because of his industrial injury.

121 Ariz. at 129, 589 P.2d at 3 (emphasis added).

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[3] Wiedmaier involved a widespread scarcity of construction jobs due to economic conditions in the construction industry and Fletcher, the closure of a copper mine which was "economically catastrophic to the area", 120 Ariz. at 572, 587 P.2d at 758.

However, the Industrial Commission

> ...should consider not only the actual impairment of the physical and mental capacity of the injured person to do work, but whether and to what extent his injury is likely to deprive him of the ability to secure the work which he might do if he were permitted to attempt it.

Ossic v. Verde Central Mines, 46 Ariz. 176, 191, 49 P.2d 396, 402 (1935).

As stated in Fletcher:

> The standard applied in virtually all of the cases which have come to our attention is that when a claimant loses employment as a direct result of economic or other reasons unrelated to his injury, he may nevertheless be entitled to compensation if he is able to show that the difficulties in finding other employment are due to his injuries.

120 Ariz. at 573, 587 P.2d at 759.

In this case, two labor market experts testified at the hearing. Both evaluated the employee's employment potential with regard to his age, education, training, work experience and his industrially caused physical limitations. Both conducted labor market surveys of the metropolitan Tucson area. Both experts agreed that, because of the respondent employee's industrial injury, his employment opportunities are limited to relatively sedentary unskilled jobs which pay low wages. Their testimony supported the findings of the hearing judge that the employee had the capacity to be employed in one of several positions available at a shooting equipment factory in Tucson at a rolled back monthly wage of $450.63. The findings and award were not based on any incapacity to work resulting from the employee's incarceration. The award has compensated the employee for his losses attributable to his industrial injury rather than for any loss attributable to his incarceration.

Finally, petitioners contend that the award may not be based solely on the hypothetical testimony consisting of questions

and answers by the expert witnesses where the employee made no attempt to seek employment. The hearing judge determined otherwise, finding that under cases such as Wiedmaier v. Industrial Commission, supra:

> [T]here is no logical or legal reason to assume that the only way a claimant can meet his burden of establishing the amount of his reduced earning capacity is through the showing of an unsuccessful good faith effort to secure suitable employment. One of the specific evidentiary guidelines that a hearing officer is required to consider in establishing the amount representing the applicant's reduced earning capacity under § 23-1044 D is " ... [T]he type of work the injured employee is able to perform subsequent to the injury... ." The undersigned can perceive of no legal reason why the applicant could not elect to meet his burden by relying upon his expert employment witness to show the type of available post injury work that the applicant was able to perform with his residual injuries and the amount that might be earned in such employment. The principle underlying the applicant's duty to mitigate his damages, see, Hoffman v. Brophy, 61 Ariz. 307, 149 P.2d 160 (1944) could be satisfied in such event by basing the loss of earning capacity award upon what the applicant would have merited had he accepted the available work within his capacities, Wiedmaier v. Industrial Com'n, supra; Bierman v. Magma Copper Company, 88 Ariz. 21, 352 P.2d 356 (1950).

We agree. As this court stated in Bearden, supra:

> We recognize that it may be difficult to determine loss of earning capacity while a person is confined with a disability which is less than a total disability, whether that total disability be permanent or temporary. The fact that a particular case presents a difficult problem does not resolve the case into one of no compensation.

Id. at 342-43, 483 P.2d at 574-75.

We believe the hearing judge correctly determined that the award could be based on the hypothetical testimony of the expert witnesses. Franco v. Industrial Commission, 1 CA-CIV 2372 (filed June 25, 1981).

The award is affirmed.

SANDRA D. O'CONNOR, Judge

CONCURRING:

LAURANCE T. WREN, Judge

DONALD F. FROEB, Judge