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Sandra Day O'Connor: Moderate or Something More?

A Thesis

Submitted to the Graduate Faculty of the
University of New Orleans
in partial fulfillment of the
requirements for the degree of

Master of Arts
in
Political Science

by

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B.A. University of Southwestern Louisiana, 1972

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Abstract

In 2006 an historic era of the Supreme Court came to a close with the retirement of its first female justice, Sandra Day O'Connor. This paper attempts to expand judicial behavior scholarship by examining O'Connor's policy preferences for possible ideological change during her twenty-five year tenure on the Court. Average liberalism scores for her overall and civil rights/civil liberties issue area votes show an increase in liberalism over time. The researcher employs time series cross section analysis with panel corrected standard errors to determine factors responsible for this increase. Issue change, interagreement with the other justices, changes in Court membership, ideological mood of the country, and political polarization account for the lion's share of the increase. Contrary to the prevailing attitudinal model, change of preference does occur; however, the issue of separating true preference change from other salient influences in a statistical model remains unresolved.

Keywords: Sandra Day O'Connor, judicial behavior, policy preference, ideological change, attitudinal model

Sandra Day O'Connor: Moderate, or Something More?

When Sandra Day O'Connor retired in early 2006, a milestone chapter in the history of the Supreme Court came to a close. Appointed in 1981 by President Reagan as the first woman to sit on the Supreme Court, Justice O'Connor became the object of speculation and scholarly research as to her impact on the Court itself and on the issues that came before it. Would she be a standard bearer for women's rights and the feminist movement? Would she support the conservative Republican agenda promulgated by Reagan and help swing the Court to the right, away from the liberalism of the Warren years? Or, would her presence on the Supreme Court make any appreciable difference at all? Students of the Court have tried to provide answers to these questions, but many have only considered as evidence the early years of her tenure. Now that she is retired, researchers have the benefit of data from the entire length of her tenure to use in search of the answers to these important questions about her role, contributions, and importance to the Court.

The question this study will attempt to answer has to do with Justice O'Connor's political preferences. President Reagan appointed her for two reasons. The first was to fulfill a campaign promise to appoint the first woman to the Supreme Court. However, his motivation had more to do with gender than gender equality (Cook, 1991). O'Connor was not the standard bearer feminists would have picked for this milestone appointment, and their hopes that she would become an ally of their agenda did not materialize (Behuniak-Long, 1992). The second reason for her appointment was to bolster Reagan's conservative agenda and move the Court further to the right, especially in the areas of deregulation, family values, and criminal procedure (Cook, 1991). Early studies of O'Connor's voting record, discussed in more detail below, suggest that Reagan's wishes

in that regard were fulfilled. In light of the completion of Justice O'Connor's tenure on the Court, this study will try to determine whether she remained the solid conservative Reagan had hoped for, or moved, as some authors have suggested, toward a more moderate position in the later years of her tenure.

Literature Review

In their study of Supreme Court decision-making, Jeffrey Segal and Harold Spaeth put forward the attitudinal model. This model explains decision-making on the Court as the result of the justices' consideration of the facts of a case filtered through their ideological attitudes and values. In other words, justices vote the way they do, not because of the meaning of the Constitution or statutes, or intent of the Framers, or in light of the facts vis-à-vis precedent as the legal model contends, but because they are motivated by their own conservative or liberal preferences (Segal and Spaeth, 2002).

The findings of Mark Hurwitz and Joseph Stefko lend support to Segal and Spaeth's attitudinal model. They studied acclimation and precedent conformance on the Court. Their primary contention is that justices experience an acclimation effect upon their ascent to the Court marked by the tendency of newcomers to follow legal precedent at significantly greater rates than their more tenured colleagues. In fact their data showed that justices serving from one to five years' tenure cast preference votes 77.5 percent of the time. That percentage rose for those serving from six to fifteen years to 90.1 percent and continued to rise past 96 percent for those serving longer than twenty-five years (Hurwitz and Stefko, 2004). On the basis of these findings then, a justice's vote is always heavily influenced by attitudinal preference but later votes are more indicative of a justice's true feelings.

Since ideology or political preference is generally considered a stable attitude, much scholarly work is based on the assumption that the political preferences of Supreme Court Justices tend to remain consistent over time. In fact, Epstein, Hoekstra, Segal and Spaeth state that the “stability assumption” is so widely held that nearly all tests of preference-based theories of judicial decision-making treat it as a given (Epstein, et al, 1998). One study that contradicts the assumption of stability was conducted by Burton M. Atkins and Terry Sloop. Their research focused on Justice Hugo Black who was thought to be liberal but in the later years of his tenure appeared to have a falling out with the liberal bloc, becoming one of the Court’s most conservative justices. Atkins and Sloop examine several theories that have been suggested to explain this apparent change. One holds that Justice Black’s apparent retreat from liberalism was the product of his advancing age. Another suggests that since his decline in support for civil rights and civil liberties issues coincided with the formation of a liberal majority on the Court, it was the overall leftward movement of the Court that precipitated the change. A third argument focuses on the changing nature of case stimuli over time. For example, a civil liberties issue concerning race may differ considerably in content and intensity from 1954 to 1965 to 1980. Atkins and Sloop devised measures to control for Court change and issue saliency and found that Black’s voting behavior did change over time in what appeared to be part of an ideological transformation (Atkins and Sloop, 1986).

Epstein, Hoekstra, Segal and Spaeth also challenged the assumption of stability, noting that very little research has focused on actually testing it. Attitudinalists as well as rational choice theorists, who believe that justices are goal-directed actors operating strategically or interdependently in the decision-making context, have incorporated the assumption of stability into their investigations and have still achieved a high degree of

explanatory power. Nonetheless, anomalies do occur and under these models they are usually attributed to issue or membership change rather than a change in voting preference among the justices. In order to see if individual justices did indeed change preferences over time, Epstein, et al examined the voting records on civil liberties cases of the 16 justices who served 10 or more terms on the Court and completed their service between the 1937 and 1993 terms. They controlled for changes in the case mix and for the possibility that civil liberties issues may become harder or easier over time. Of the 16 justices they tested, seven remained stable over time, three were minimally significant, but six exhibited change in significant linear or nonlinear ways. Their results offer convincing evidence that research based on the assumption of stability may produce flawed or misleading findings (Epstein, et al, 1998).

Stimson, Mackuen, and Erikson find policy preference to be dynamic rather than stable. In their study of the effects of public opinion on public policy, they used domestic policy mood as a measure of global preference for a larger, more active federal government rather than a smaller more passive one. They examined the four major institutions of government – Presidency, House of Representatives, Senate and Supreme Court – for these effects, and, as one might expect, found that the three elective institutions are highly influenced by the left/right swings in the ideological mood of the country. Elections produce policy change first by changing the lineup of the creators of public policy. Moreover, they find that elected politicians sense the nation’s ideological mood and rationally anticipate the consequences of its trend for future elections. The Supreme Court, however, is not an elective body. Nonetheless, they found the Court to be sensitive to public opinion as well, albeit in a less direct and much less intense fashion (Stimson, et al, 1995).

In another study of public opinion, Durr, et al, considered whether public support for the Supreme Court was affected by the Court's ideological position. They found that public opinion responded not to the Court's ideological position per se, but to the extent to which the Court's position diverged from the ideological preferences of the citizenry. The part of this study pertinent to the current work has to do with their findings regarding the relationship between the public's perception of Congress and their view of the Court. They find that support for the Court increases as congressional approval rises (Durr, Martin and Wolbrecht, 2000). If the Court is sensitive to public opinion, and approval of the Court is tied to approval of Congress, then the Court or its members may respond to negative perceptions caused by polarization in Congress with rational anticipation of their own. This could cause voting change by some members, if not true preference change.

Mishler and Sheehan examine the influence of public opinion on individual justices rather than on the aggregate decisions of the Court. Like Stimson, et al, they believe that attitudinal preferences are dynamic rather than fundamental and unchanging. They point to social psychological attitudinal theories which suggest that behavior is a joint function of individual attitudes and subjective norms that reflect influences of the social environment. As applied to a Supreme Court justice, these influences include but are not limited to the President, Congress, other members of the Court, interest groups and the public. As a result, they suggest three ways in which public opinion impacts Supreme Court decisions: indirectly through presidential elections and subsequent presidential appointments to the Court, called the replacement hypothesis; the political adjustment hypothesis, which suggests that justices pay heed to strongly held public views on fundamental issues and vote against personal preference so as to avoid jeopardizing the legitimacy or collective authority of the Court; and the conversion, or

attitude change, hypothesis which holds that individual justices usually do vote their personal preferences, but that these can change in response to changes in the public mood or the underlying social forces which set these changes in motion. Also in keeping with social psychology theories, they posit that moderate justices are more likely to change their opinions in response to public opinion, with potentially significant effect on the outcome of Court decisions. Their findings suggest that replacement is the most influential factor underlying changes in Supreme Court decisions, but that individual attitudes and behaviors do change, often in substantial and rapid fashion. They found significant responsiveness to public opinion over time in just less than half of the justices studied, and substantial responsiveness for one third. As expected, moderates were most profoundly affected by public opinion. Since they find that attitudes are a primary determinant of judicial behavior, they maintain that their findings call for a more nuanced and sophisticated attitudinal model that incorporates fluidity in favor of stability (Mishler and Sheehan, 1996).

In order to see if Justice O'Connor experienced change in her own political preferences, it is necessary to determine what her early positions were in order to compare these to her later stands on the issues. Scholarship from the early years of her career and tenure testifies to Justice O'Connor's strong conservatism. John M. Scheb and Lee W. Ailshie examined O'Connor's voting record during her first three terms on the Court by calculating her percentage of agreement with the other justices. They found her in agreement with the conservative bloc an average of 80 percent of the time. They found that she came to the court with a well-defined ideological orientation, and that her voting record established her as one of the Court's most conservative members (Scheb and Ailshie, 1985).

Terry Bowen and John M. Scheb conducted another study which examined voting bloc alignment on the Court from 1921-1990 looking for evidence of a “freshman effect”. Four terms from their study have implications for this work. O’Connor was a freshman in the 1981 term, Scalia in 1986, Kennedy in 1987-88, and Souter in 1990. Again, in all four of these terms, O’Connor was aligned with the conservative voting bloc, and most highly so in 1990 (Bowen and Scheb, 1993).

Other authors place O’Connor at more of a center-right position. Robert Van Sichel’s mostly anecdotal work credits her upbringing on a ranch in Arizona with instilling in her an ideology of individualism, independence, and minimal government intervention in the lives of the citizenry. He discusses her heavy involvement in Republican politics in Arizona as the majority leader of the state senate, as an assistant state attorney general, and as a protégé of Barry Goldwater. While strong affiliation with Barry Goldwater would not ordinarily suggest centrism, Van Sichel maintains that Justice O’Connor exhibited a center/right Republican ideology during her state service and that her hallmark on the Supreme Court has been center/right pragmatism. He contends that many of her decisions contain a mix of positions, that she sometimes functions as an occasional voice of moderation on a conservative court, and that she tried to walk a middle ground between Brennan’s near absolute acceptance of affirmative action and the near absolute rejection by Scalia and Rehnquist. He also claims that she has provided a fifth vote to the majority in 5-4 decisions in the first fifteen years of her tenure more than any other single member of the Court. However, he also insists that Justice O’Connor is not a true moderate in the traditional sense and that her record on the Court has been remarkably consistent (Van Sichel, 1998). The fact that Van Sichel had an apparently

hard time reconciling aspects of O'Connor's record suggests that her ideology may not be as easy to pin down as some assert.

Arledge and Heck studied First Amendment decisions from O'Connor's first five years on the Court. In her first term they found that she demonstrated the conservative tendencies that President Reagan had expected. However, as early as her second term she was engaged in a doctrinal debate with her classmate and usual ally, Justice Rehnquist, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue (1983)*, over the level of scrutiny called for in a case deciding the constitutionality of a tax on ink and paper used by the press. O'Connor held that since the central meaning of the First Amendment was protection of political speech, and since newspapers were a prime forum for such speech, the rational basis test favored in this case by Rehnquist was unsatisfactory. By her third term she was offering an alternative to the Lemon test in Establishment Clause cases that staked out a middle ground on church and state issues called the Endorsement Test. In *Lynch v. Donnelly (1984)* she held that inclusion of a nativity scene in a public park was permissible since it communicated neither a message of government endorsement or disapproval of religion. Although Arledge and Heck found that she generally aligned with fellow conservatives, she recognized a need to balance competing constitutional values, and when striking such a balance, sometimes found herself in Brennan's camp rather than Rehnquist's. At least as far as First Amendment issues were concerned, O'Connor exhibited some genuine disagreement with Rehnquist and other conservatives on the Court (Arledge and Heck, 1992).

Patrick Schmidt and David Yalof, in trying to enlarge upon "swing voter" scholarship, focused on the possibility of casting Anthony Kennedy in that role. They fault previous scholarship in this area for missing essential aspects of certain justices'

decision-making philosophies by examining voting behavior at too high a level of generality. They posit that some justices veer off from their normal blocs on certain narrowly defined issues, creating a decisive majority against that justice's normal bloc, referring to this type of justice as a marginal, rather than swing, voter. While their study focused on Kennedy, it provided some enlightening data on O'Connor as well. They examined liberal voting in non-unanimous free speech and civil liberties decisions in the 1987-2001 terms. Overall, O'Connor's support for the liberal position in civil liberties was only 29.5 percent and slightly higher at 34.3 percent in free speech cases, definitely a conservative record. However, for the 1987, 1988 and 1989 terms her support for the liberal position in civil liberties cases was 17.5 percent and only 13.6 in free speech cases. Interestingly, for the terms from 1994-2001 her support nearly doubled for civil liberties cases to 32.3 percent, and nearly tripled in free speech cases to 39.3 percent. Again, this is still a conservative record, but indicates some movement away from the right and toward the center. They suggest that according to their definition of a marginal voter, O'Connor might occupy that role in specific policy areas, citing her moderating influence in later terms (Schmidt and Yalof, 2004).

Thomas Hensley and Christopher Smith analyzed the civil rights and liberties decisions in the four natural court periods of the Rehnquist Court from 1986-1991 to determine if the Court was becoming significantly more conservative. Their findings show that in the last two natural court periods under study, O'Connor increased her support for civil rights and liberties by 13.6 percentage points and 9.2 percentage points respectively. They attribute this change, however, to an overall shift in the Court rather than change of preference. Since Kennedy and Souter also showed increases in support for civil rights and liberties, Hensley and Smith suggest that they and O'Connor may

have feared an aggressive move by the conservative majority to reverse established precedents. They cite as proof the joint opinion of the three justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) upholding the basic core of *Roe v. Wade* (1973) against pressure to overturn from the Bush administration. They admit, however, that their explanation is speculative. They found that the Rehnquist Court from 1986 to 1992 was more liberal in its voting behavior than the Burger Court in its last decade. They point to membership change, changes in the voting patterns of continuous members of the Court, and issue change as the main influences on the Court's collective voting behavior (Hensley and Smith, 1995).

Beverly Cook writes that Justice O'Connor's votes did contribute to the movement of the Court in a new conservative direction from 1981-1986. However, she also discusses O'Connor's penchant for seeking some middle ground. For example, Cook points out that in O'Connor's confirmation hearings she left both liberals and conservatives unsatisfied with her responses to questions on women's rights issues. O'Connor disappointed liberals by holding that the Equal Protection Clause precluded the need for the Equal Rights Amendment. On the issue of sex-segregated organizations neither group was satisfied when she favored desegregating professional associations, but not service clubs. She supported changing the definition of combat to provide more opportunities for women in the military, but did not approve of women participating in battlefield combat. As a justice, her votes on religious accommodation and free speech were more moderate than the Reagan administration would have hoped. On gender issues she made rigorous use of intermediate scrutiny rather than the strict scrutiny favored by liberals or the rational basis test preferred by conservatives. She sometimes concurred in part and dissented in part. In *Arizona Governing Committee v. Norris*

(1993) she upheld the liberal position that paying lower benefits to women upon retirement was unconstitutional, but also pleased conservatives by refusing to make that holding retroactive. Cook contends that O'Connor's careful consideration of the facts on a case by case basis is evidence of her willingness to eschew blind ideological voting (Cook, 1991).

Nancy Maveety, writing in *Justice Sandra Day O'Connor, Strategist on the Supreme Court*, would seem to agree with Cook. Maveety asserts that Justice O'Connor is a far more complex juridical actor than previous studies have given her credit for. Most studies view O'Connor's decision-making through the narrow lenses of gender, as the first woman on the Court, or of ideology, a prevailing model of Supreme Court scholarship. Maveety suggests these studies fall short because O'Connor can only be understood clearly through a wide-angle lens, and points to some other factors as more salient to her style and impact on the Court.

She contends that O'Connor brings a unique legislative mindset to the Court due to her service in the Arizona state legislature, where accomplishment occurs through compromise. Maveety sees O'Connor as a strategic player who has used this legislative mindset to maximize her influence on the Court, and cites her penchant for joining the winning side in 5-4 majorities as evidence of her understanding of the value of compromise and willingness to bargain. O'Connor has generally rejected bright-line rules that call for dichotomous ideological decisions in favor of a case-by-case, fact-based approach that seeks to balance the interests of the parties involved, leading to the development of the endorsement test in the area of church-state relations and the "unduly burdens" test in the area of reproductive rights, which was used by the Court in its most recent decision upholding a ban on partial-birth abortions. O'Connor has also used the

tactic of writing separate opinions to indicate weakly defined areas of the law open to future review and more nuanced development. While she frequently aligns herself in voting with the majority conservative bloc, issuing a concurring opinion effectively signals that she agrees while disagreeing and offers additional options to her more ideological cohorts.

Maveety sees O'Connor as a "justice of standards", adjudicating by balancing conflicting values rather than by categorization, as a "justice of rules" like Scalia would do. Her balancing-of-interests approach to shaping constitutional policies in certain issue areas, in fact, has prevented the dominance of ideologues like Scalia and Thomas. Maveety points to the significant difference in O'Connor's percentage of agreement with the majority compared to her agreement with the conservative majority as evidence of her strategic and non-ideological jurisprudence. She sees O'Connor as the "Great Compromiser" of the Rehnquist Court, and as a justice whose coalitional behavior does not exactly coincide with the attitudinal model (Maveety, 1996).

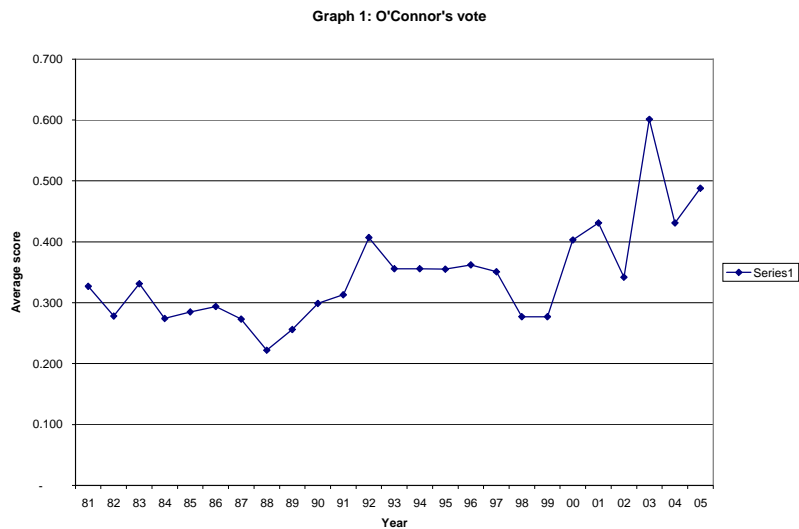
Research Question and Hypotheses

Some examples of the literature surveyed above suggest that Justice O'Connor is, or at least began as, one of the most conservative justices on the Court. There is much discussion from several authors, however, about her frequent search for a middle ground. Some of the collective studies of the Court previously discussed show that she became more moderate in relation to the other justices. This study, then, asks if Justice O'Connor did actually move from a strongly conservative to a more moderate ideology, and if so, is change of preference or some other factor(s) responsible for the move. Two hypotheses spring from this question. Hypothesis 1 says that O'Connor's votes will become more

moderate over time. Hypothesis 2, based on the stability assumption, holds that O'Connor's position will remain relatively consistent over time.

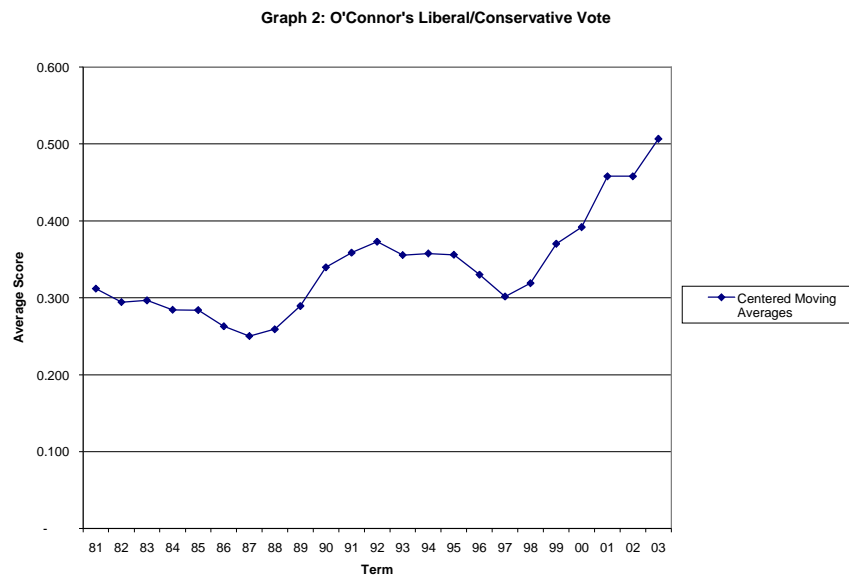
Bivariate Methodology

Since the research question asks if O'Connor's position changed over the length of her tenure, time is the independent variable and sincere preference, as measured by the vote, is the dependent variable. Data for this study was drawn from Spaeth's Original U.S. Supreme Court Judicial Data Base. In the data base, a liberal vote is coded as 1 and a conservative vote is coded as 0. Justice O'Connor's votes were averaged together by term. These scores were then plotted on a graph to indicate the direction of O'Connor's votes over time. This information is presented in Graph 1 below.



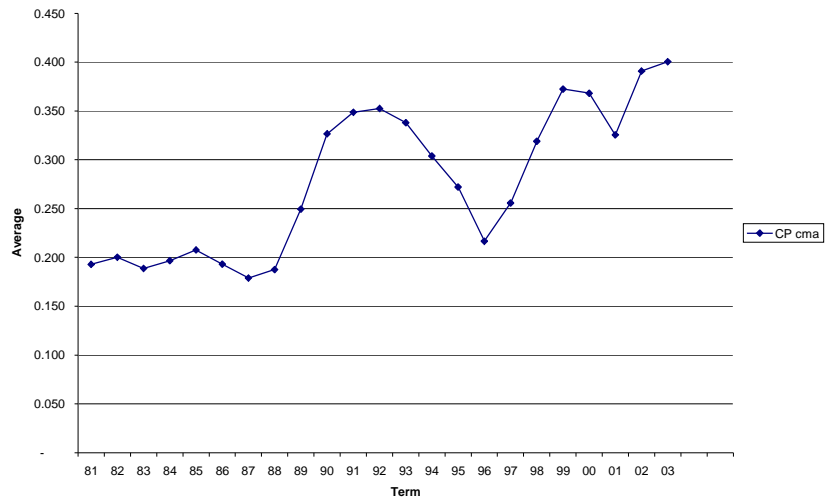
Random movement from term to term sometimes consists of large swings that are distracting and make interpretation difficult. Epstein, et al (1998), suggest taking a centered moving average to smooth the data and give a better picture of the overall shape of a justice's preferences. Therefore a new score was calculated by averaging three year intervals – an average for term 81-83, 82-84, 83-85 and so on, to indicate a clearer shape

for preferences indicated by Justice O'Connor's votes. These results are reported below in Graph 2 and indicate a .195 or 62% increase from her first year to her last.

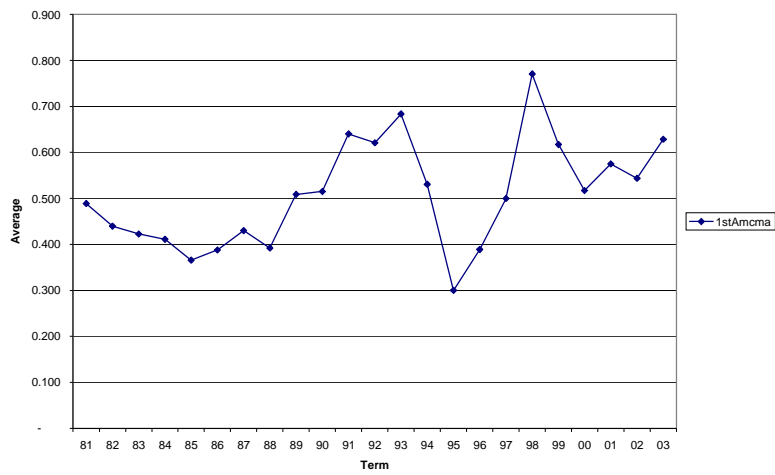


Several authors suggest that the direction of a justice's vote in civil liberties and civil rights cases may be a more conclusive measure of ideology than the overall vote, and Schmidt and Yalof (2004) suggest that since the category of civil liberties generally encompasses several issue areas, examining each issue area separately might be more instructive. Consequently the same procedure described above was followed in the issue areas of criminal procedure, First Amendment, due process, and privacy, along with civil rights. The three-year adjusted averages of each issue area are reported below in Graphs 3-7.

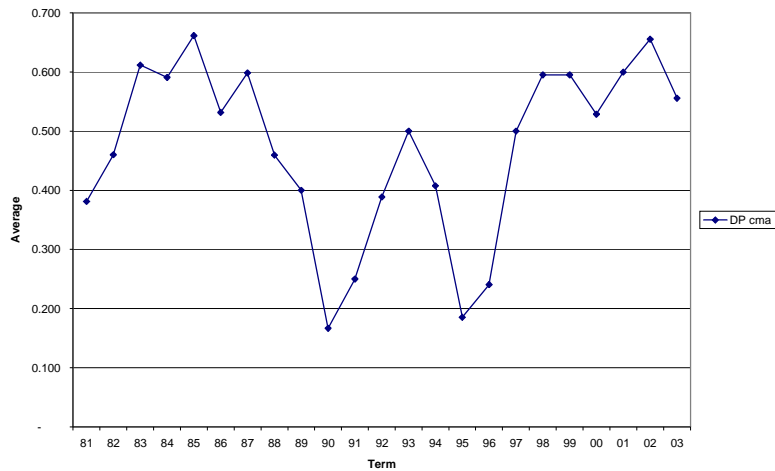
Graph 3: Criminal Procedure



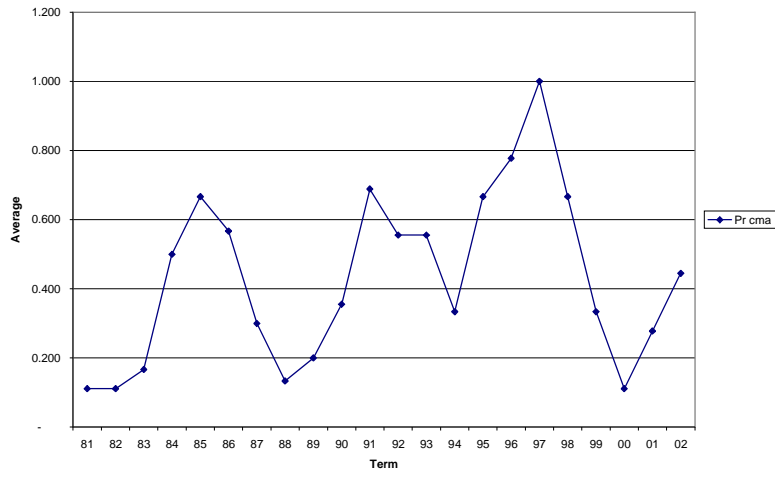
Graph 4: 1st Amendment



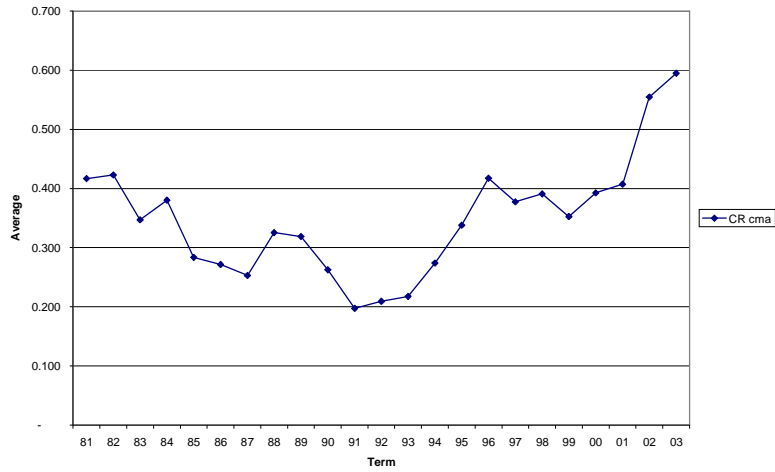
Graph 5: Due Process



Graph 6: Privacy



Graph 7: Civil Rights



Graph 8 was created to help compare the voting record in each issue area under investigation.

Graph 8: Civil Rights/Civil Liberties

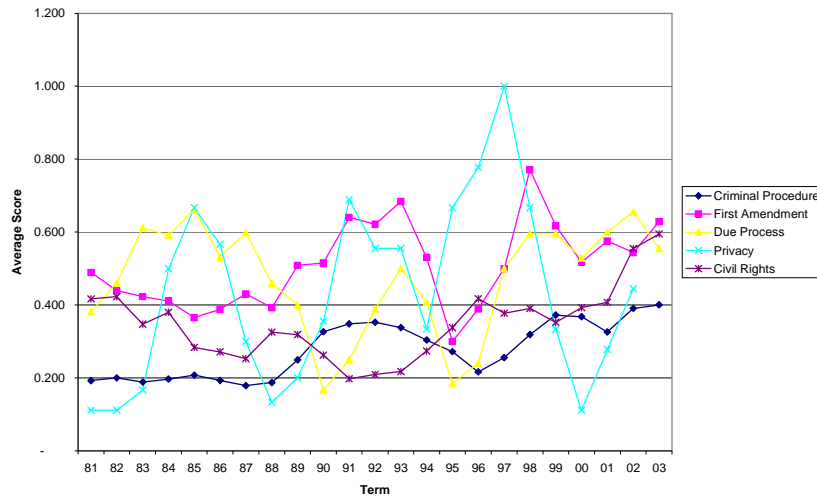
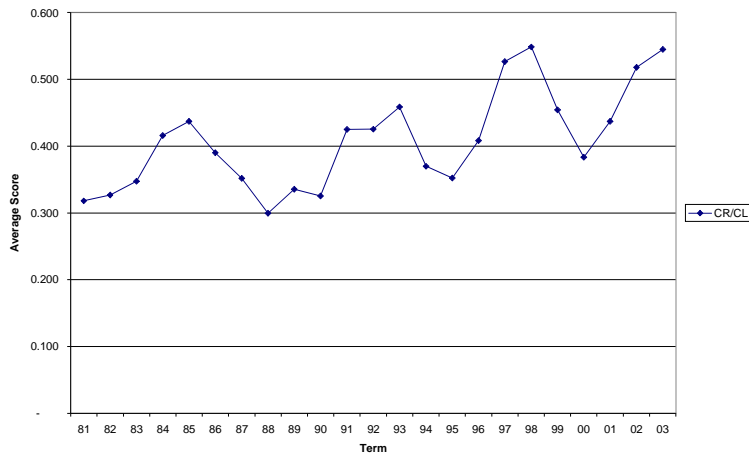
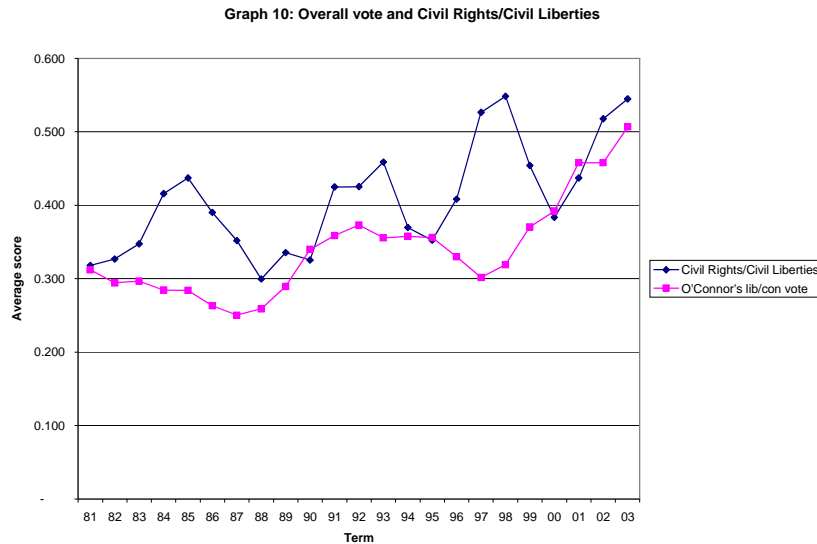


Chart 9 shows the trend over Justice O'Connor's tenure for Civil Rights and Civil Liberties combined.

Graph 9: Civil Rights/Civil Liberties



Finally, Chart 10 shows a comparison between O'Connor's overall vote as shown in Chart 1, and the Civil Rights/Civil Liberties vote shown in Chart 9.



Analysis of Bivariate Results

Graph 2 on page 14, or for ease of reference Graph 10 above, indicates that Justice O'Connor exhibited a fairly strong conservative voting record throughout the 1980's. In the early 90's there was a slight move toward a more moderate position, followed by a conservative dip later in the decade. From then on, however, her voting record shows a steady climb in a moderate direction, eventually casting slightly more liberal than conservative votes. Scores from her final terms represent a 62% increase in liberal voting from those scores at the beginning of her tenure.

The issue areas, too, suggest a move toward more moderate voting, in spite of extreme fluctuations from term to term, probably caused by the small number of cases in some terms. Graph 3 on page 15 shows that O'Connor's criminal procedure votes started out at a very conservative .19 and remained steady for most of the 80's, experienced a big rise and fall in the 90's and again climbed to finish at .4 – an increase of 108%. Graph 4 indicates that O'Connor's 1st Amendment scores started off at a moderate .49, declined slightly throughout the 80's then climbed to .68. This was followed by a precipitous dip and a steep climb to .77 in the liberal range followed by

another dip and small rise ending at .63 for a 29% increase. Although O'Connor began at a more moderate position for this issue area, she still exhibited a respectable increase. Due process and privacy, as shown in Graphs 5 and 6, were the issue areas that had the fewest number of cases per term, as well as the biggest ups and downs. O'Connor's scores increased by 46% and 300% respectively from beginning to end, but the wild swings in the middle cast some doubt on the reliability of those figures, particularly in the case of privacy. The record for civil rights issues shown in Graph 7 is a bit steadier than due process or privacy, staying between a right center .2 and .4 until the mid-nineties. For the later terms, however the record climbed to just under .6, representing a 43% increase from the beginning of O'Connor's tenure.

Graph 8 lends support to Schmidt and Yalof's (2004) assertion that issues do matter. The line for criminal procedure does show an increase from beginning to end but never climbs above center right territory. Except for a final surge into the moderate zone, civil rights also seems to be a center right issue for Justice O'Connor. On the other hand, except for one or two dips, O'Connor's rulings on First Amendment issues are rather moderate with some terms approaching liberal. Due process shows some steep conservative dips, but most of the averages are found between .4 and .6 with the median at .5 – moderate. Ironically, O'Connor's most conservative and most liberal averages are found in the issue area of privacy. Again, these figures are greatly affected by small N, but even here the median is a centrist .4.

Graph 9, showing the civil rights/civil liberties scores combined, is characterized by rises and falls, although except for the first dip, none of the falls goes lower than the starting point. The final score represents a 71% increase over the beginning score.

Graph 10 compares O'Connor's overall voting record with her civil rights/civil liberties

scores. This graph shows O'Connor to be more moderate for civil rights/civil liberties than for all cases combined, but both do show a trend toward moderation in the later years of her tenure.

Rationale for Multivariate Research

The results outlined above support the hypothesis that Justice O'Connor's votes did become more moderate over time. Her overall voting record, as well as the record for each issue area, shows a substantial increase in the percentage of liberal compared to conservative votes. Other researchers (Hurwitz and Stefko, 2004) have maintained that the later years of a justice's tenure are most indicative of true preference. If so, the findings in this work would suggest that Justice O'Connor was strongly conservative in the area of criminal procedure, as President Reagan had hoped, but less so in other issue areas. The methodology used above, however, does not explain whether her votes represent a true change of preference on her part or are the result of other salient factors at work. What might those factors be?

Case mix is one. It has already been noted that the number of cases per issue varies from term to term, and that small N seems to have impacted the data for due process and privacy issues. Issue complexity is another factor that impacts judicial behavior. Each time an issue comes before the Court, the decision refines the issue in ways that make it harder or easier over time to cast an ideological vote. Abortion cases, for example, have become increasingly complex as medical knowledge grows and as the issue narrows from whether a woman can choose one, to under what circumstances that choice is possible. It has been asserted by several authors (Cook, 1991), (Behuniak-Long, 1992), (Maveety, 1996) that O'Connor prefers not to be bound by ideology, but to make decisions on the basis of the facts case by case. This could easily be part of the

reason for the up and down voting pattern for privacy and other issue areas as well.

Graph 10 indicates a spike in liberal support for civil rights/civil liberties issues at the same time there was a conservative dip in her overall record.

Change in court membership has also been cited as a factor that could influence a justice's vote. Did the addition of Scalia and Thomas, considered by some to be conservative ideologues, push O'Connor toward the center? Her record shows spikes in the areas of 1st Amendment and due process after they joined the Court. Or was it the increasingly polarized political climate of the country as a whole or of Congress that was responsible for the change, since her final start toward the center coincides with President Clinton's impeachment woes. Finally, was there an appreciably feminine jurisprudence behind O'Connor's decisions that pulled her to the center?

Multivariate Methodology

In order to control for issue complexity, an "issue change" variable of Baum-adjusted figures was constructed for O'Connor civil rights/civil liberties votes, calculating the median amount of change among all the serving justices from term to term and subtracting it from the Court's raw scores (Epstein, et al, 1998). As Baum himself admits, the procedure is not perfect and does not completely address the problem but it does minimize it (Baum, 1988). To address membership change, dummy variables were created representing the natural court terms with some courts combined to account for the small number of cases for that court. Additionally, dummies were constructed for Justice Thomas, a strong conservative, and Justice Ginsburg, and a strong liberal and another woman. An "interagreement" variable measuring the average percentage of agreement by the other justices with O'Connor's conservative and liberal votes was developed as a gauge of preference similar to that suggested by Scheb and Ailshie (1985). The raw data

for this variable suggest that she voted with the conservative majority over 90% of the time, so this would seem to be a strong indicator of preference. To see if the ideological mood of the country had influence on her vote, a “libcon” variable is included with data drawn from Ellis and Stimson’s Liberal and Conservative Self Identification scores (Ellis and Stimson, 2007). Stimson, et al (1995) and Mishler and Sheehan (1996) indicate that Supreme Court justices anticipate actions of the other branches of government, particularly Congress, so a polarization variable constructed from Lewis and Poole’s DW-NOMINATE data is also included (Lewis and Poole, 2006).

O’Connor’s voting record indicates that she is generally conservative with her percentage of liberal votes increasing over the course of her tenure. One could suppose then that:

- She would most often be in agreement with the conservative justices, and if so, this would have a negative effect on her liberalism score.
- Positive scores for libcon (ideological mood) and polarization would suggest moderate tendencies, since moderates are most susceptible to the influence of outside actors or reference groups (Mishler and Sheehan, 1996).
- Significant coefficients for the natural courts or specific justices would indicate a reaction to changes in the Court as a whole or to the presence of specific members on the Court. This would be another sign of moderation since justices closer to either ideological extreme are least likely to exhibit change (Mishler and Sheehan, 1996).
- A positive sign for the year coefficient after other factors have been controlled for would indicate the level of pure preference change.

Standard OLS regression, which assumes the independence of observations and error terms, is unsuitable for this work because time series data, and presumably the issue area data in this case, are serially correlated in the error terms. In order to obtain accurate standard errors suitable for hypothesis testing, this serial correlation must be corrected for

or else confidence in test results will be over inflated. So a time series analysis that produces panel corrected standard errors and corrects for serial correlation is what is needed. The results are shown in Table 1 below.

Table 1

Variable	Coefficient	z	b*
Constant	51.44	1.64	.
Issue Change	.10	1.95 †	.15
Interagreement	-.77	-9.42†††	-.75
Year	-.02	-1.64	-.75
Libcon	.04	3.57†††	.32
Rehnquist 1/2	-.10	-1.70 †	-.12
Rehnquist 3	-.04	-.059	-.05
Rehnquist 4	-.12	-1.39	-.14
Rehnquist 5/6	-.07	-.097	-.06
Rehn 7/Robt 1	.15	2.93††	.30
Thomas	.09	0.79	.21
Ginsburg	.04	0.52	-.01
Polarization	1.01	1.07	.45

Number of Observations = 113
 $R^2 = .73$
 $\text{Prob} > \chi^2 = .000$

Note: † significant < .10; †† significant < .01; ††† significant < .001

Aggregate Analysis

The model itself seems robust, with a highly significant .000 probability > chi2 and a healthy .73 R-squared. There are also several significant P values. Some interesting relationships are evident in the model. The positive figure for issue change indicates that for every one percentage point increase in the Court's civil rights/civil liberties' support from year to year O'Connor's average liberalism goes up 10 points.

This figure is statistically significant at $<.10$, but the beta weight indicates that this variable is substantively rather weak.

The strong negative coefficient for interagreement shows that O'Connor was, as expected, most often in agreement with the conservative element on the Court. This could be due to the overall conservative nature of the Court and its membership, so that when she agrees with them it is more likely to be a conservative vote. It could also have something to do with the preponderance of criminal procedure cases where she tends to be more conservative, and the small N in some of the other issue areas where she tends to be more liberal. It could also have more to do with her style of jurisprudence. Others have pointed to her tendency to align with the conservative bloc but to issue a concurrence to signal a desire for a slightly different interpretation of the law. Whatever the cause, this is a highly substantive variable because its coefficient of $-.77$ is greater than the range of the liberalism variable itself. Its substance is borne out by the beta coefficient of $-.75$. It is also highly statistically significant at $<.001$.

Most of the Court variables are showing a negative relationship to O'Connor's liberalism scores. This is not surprising considering her early conservative tendencies, her high level of interagreement with conservative justices, and the overall conservatism of the Court. Rehnquist 1/2 is significant at $<.10$, but is substantively weak. Rehnquist 7/Roberts 1, however, is showing a positive correlation with her liberalism scores. The strength and significance of this coefficient, as well as its moderately substantive beta weight, suggest a reaction to the change in the makeup of the Court. However, it is difficult to believe that this reaction is due simply to Justice Breyer's ascension to the Court. Taken in tandem with the results for the Thomas and Ginsburg variables and the general acceptance of the assumption that these changes occur at a lag (Mishler and

Sheehan, 1996), it would seem that Justice O'Connor did perhaps seek to moderate the rightward shift that the addition of the highly conservative Thomas caused in the Court. The .21 beta weight is in the moderately substantive range. The Ginsburg variable also indicates an increase in liberalism although to a much smaller and less substantive degree.

The libcon measure of ideological mood shows a 4 percentage point increase in O'Connor's liberalism for every 1 point increase in liberal identification by the public. It is both highly significant at $<.001$ and also highly substantive at .32 beta. The strength of the polarization variable is also surprising. Controlling for other factors, this model shows that the full range of variation in partisan polarization in Congress is associated with a change of .31 in O'Connor's liberalism score. This is almost twice the amount of change in her overall vote over her 25 year tenure. Although not statistically significant, its beta of .44 is indicating a highly moderate effect. Together these two variables indicate that O'Connor exhibits noteworthy susceptibility to the influence of subjective norms in the social environment.

The time variable, contrary to expectations, produced a negative .02 coefficient. Since the graphs of her votes clearly indicate a rise in liberal voting over time, the explanation for this negative coefficient must mean that the other competing variables have "eaten up" all the variation in liberalism. As a result this model is inconclusive in its attempt to isolate true preference change from other factors influencing O'Connor's vote. However, these findings do suggest that Justice O'Connor was sensitive to changes in the overall membership and tenor of the Court, Congress and the nation. When the Court moved to a more liberal position on an issue, so did she to an even greater degree. Her less liberal votes come when she is in highest agreement with the conservative Court.

She becomes more liberal as ideological mood and polarization increase. Taken together, these findings lend support to those who see O'Connor as a situational rather than a doctrinal voter, and according to Mishler and Sheehan's research (1996), do suggest a moderate philosophy.

Suggestions for Further Research

From the outset, the challenge for this paper has been to develop a model that takes into consideration the many factors that comprise the decision making calculus of a Supreme Court Justice and measures them in a way that produces robust and reliable results. The model presented here relies on Baum-adjusted figures to measure issue change. As this study was nearing completion, research from earlier this year came to light that calls into question the efficacy of the Baum adjustment. According to Martin and Quinn (2007) the correction Baum designed is only appropriate if preference is assumed to be temporally constant. Their belief is that preference is dynamic rather than constant, and that the Baum adjustment, which does reflect when change occurs, is faulty because it cannot separate change in the case parameters from change in the justices' preferences or ideal points. They also fault the work of Epstein, et al, used in this study, for failing to account for uncertainty in the dependent variable which biased the standard errors downward and resulted in overly conservative assessments of preference change. Martin and Quinn put forward a Bayesian dynamic ideal point model which, in their words, "allows for ideal points to exhibit a wide range of dynamics, based on a parametric statistical model that *simultaneously* (italics theirs) estimates case stimuli and ideal points." Their model finds that preference change is a frequent phenomenon on the Supreme Court. Furthermore, Martin and Quinn suggest that, while statistical models are appropriate in determining if preference change occurs, due to the small number of

justices, historical or doctrinal analysis is a more plausible approach to explaining why change of preference occurs (Martin and Quinn, 2007). These methods and issues would have to be seriously considered in any future research.

Interagreement could be reconfigured in several different ways from the overall view presented here. Bloc voting patterns have been used by many others to explain interagreement. A justice by justice comparison to see with whom O'Connor agrees most often and on what issues could also be useful to shed some light on the reasons for the inverse relationship between her agreements and liberal votes. Such a comparison would also allow for analysis of the existence and possible moderating influence of a supposed "feminine" as opposed to "feminist" jurisprudence.

Feminist jurisprudence is based on the feminist agenda and the experiences of women in unequal and patriarchal circumstances, an agenda for which O'Connor showed little support. Feminine jurisprudence on the other hand is more about a style of judging rather than an issue driven agenda. The idea of feminine jurisprudence, or maternal legal thinking, springs from the psychological and philosophical scholarship of Carol Gilligan, Sara Ruddick and Suzanna Sherry. Gilligan conducted a study confronting a boy and a girl subject with Kohlberg's "Heinz Dilemma," where a man named Heinz has a sick wife who will die without a drug that Heinz cannot afford and whose druggist refuses to come down on the price. The boy, typically according to Gilligan, accepts the choices as presented and says that Heinz should steal the drug for his wife. The girl, however, rejects the dichotomy of stealing the drug or allowing the wife to die, suggesting that another solution might be possible if Heinz and the druggist communicate more effectively and work something out. This is the kind of thinking that characterizes feminine jurisprudence – offering concessions to both sides and coming up with new

options. Ruddick concurs with Gilligan and adds the view that feminine or maternal thinking values the facts of the case at hand rather than classification by general principles – a concrete rather than abstract approach. Sherry applies these psychological theories of masculine and feminine thought to the American legal system, which she holds is based on the masculine model of autonomy, objectivity and rights. Feminine jurisprudence focuses more on the responsibility the court has to seek justice for both sides, rather than upholding one party's rights over another's. On the basis of this scholarship by Gilligan, Ruddick, and Sherry, Susan Behuniak-Long examines the O'Connor concurrences in due process and privacy cases where she provided the fifth vote that rendered the holding of the Court unclear. In the (admittedly) very small number of cases examined (still an obvious weakness in the model), the presence of feminine jurisprudence is upheld. Behuniak-Long believes the significance of O'Connor's feminine jurisprudence is that it tends to subvert both the liberal feminist cause and the conservative cause, and by doing so, pulls each side to the center resulting in more moderate outcomes (Behuniak-Long, 1992). The description of Justice O'Connor's holdings in Beverly Cook's and Nancy Maveety's works discussed above seems to lend support to the presence of a feminine jurisprudence (although Maveety never characterizes it as such, and contends that O'Connor herself wouldn't either). While some, such as Robert van Sickle, cited above, doubt the existence of a feminine jurisprudence, and other authors, such as Sue Davis, who finds only mixed evidence for its existence (Davis, 1993), the fact that it would supposedly have a moderating effect on O'Connor's vote makes it a worthy subject for investigation in a future study. It was not included in this work because it seems to capture a different dimension of the decision making calculus than was studied here.

A newly suggested contributor to judicial decision making is the “Greenhouse effect.” Named after journalist Linda Greenhouse, this theory holds that media and policy group pressure exerts a liberalizing influence on justices’ decision making once they arrive in Washington, D.C. (Baum, 2006). Since this model suggests sensitivity to Court opinion and makeup, it would be interesting to see if susceptibility to other factors in the social environment also played a role in O’Connor’s voting pattern.

In addition, the Supreme Court database has many more variables than were used here. In light of the strong influence of interagreement reflected in the model, mining such variables as concurrences, dissents, and unanimous votes would be useful for further study. Finally, more complex logit and probit regressions are popular methods for conducting time series analysis that would be applicable and enlightening here.

Conclusion

The complexity and controversy contained in the scholarship on Justice O’Connor reviewed for this work indicate that further study is not only desirable but necessary in order to explain the significance of her tenure on the Court. Ideology is an important component of any justice’s make-up, and seems to be garnering more importance as recent confirmation hearings attest. Additionally, since Roberts and Alito joined the Court there has been a noticeable shift to the right in the Court’s decisions. Several cases have been decided by a 5-4 vote with Kennedy, more conservative than O’Connor, now being the justice in the middle. Justice Breyer stated that “It’s not often in law that so few have changed so much so quickly.” The shift has been so quick and so apparent that recent polls reflect the public belief that the Court is becoming too conservative (Flaherty, 2007) (Barnes, 2007) (Barnes and Cohen, 2007). Perhaps her absence from the Court has served to illuminate her role more clearly than many studies conducted for that

purpose have been able to do. It seems apparent that even if one resists classifying O'Connor ideologically as a moderate, one can hardly fail to concede her moderating influence on the Court.

Ideology alone, however, does not tell the complete story of Sandra Day O'Connor's tenure on the Court. Her willingness to compromise and bargain, her penchant for judging each case on its own merits, and her rejection of dichotomous ideological decisions provide an example that the current Court would do well to emulate. Once in a speech, Justice O'Connor said that a judge's job is to reconcile the irreconcilable. Her ideological stance and style of jurisprudence suggest that she tried to live up to that challenge in a way that has brought credit to the Court and to her own legacy of service on it. The title of this work asks if O'Connor is "Moderate or Something More." In light of the findings here, a better title might be "Moderate and Something More."

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