JUSTICE SANDRA DAY O'CONNOR: THE WORLD'S MOST POWERFUL JURIST?

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I. INTRODUCTION

Justice Sandra Day O'Connor has been called a "major force on [the] Supreme Court,"[1] the "real" Chief Justice,[2] and "America's most powerful jurist."[3] Others have referred to her as "the most powerful woman in America"[4] and even of "the world."[5] Even compared to women like Eleanor Roosevelt and Hillary Clinton, there is no one "who has had a more profound effect on society than any other American woman . . . If someone else had been appointed to her position on the court, our nation might now be living under different rules for abortion, affirmative action, race, religion in school and civil rights. We might well have a different president."[6] Former Acting Solicitor General Walter Dellinger noted, "What is most striking is the assurance with which this formerly obscure state court judge effectively decides many hugely important questions for a country of 275 million people."[7] As one journalist put it, "We are all living in

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1. David Stewart, *Holding the Center: Sandra O'Connor Evolves into Major Force on Supreme Court*, 79 A.B.A. J. 48 (March 1993).

2. Charles Lane, *Why the Chief Justice Isn't the Chief Justice*, WASH. POST, July 4, 2004, at W10. *See also* Tony Mauro, *Under Justice O'Connor's Centrist Spell, Many of the Court's Conservative Trends Seemed to Stall*, MIAMI DAILY BUS. REV., July 1, 2003, at 7; Jeffrey Rosen, *The O'Connor Court: America's Most Powerful Jurist*, N.Y. TIMES MAG., June 3, 2001, at 32.

3. Rosen, *supra* note 2, at 32.

4. *Id.*

5. Edward Lazarus, *O'Connor is the tie that binds Supreme Court*, ST. PAUL PIONEER PRESS July 18, 2000 at 9A.

6. John Yoo, *Power of the Center: Justice Sandra Day O'Connor's Swing Vote Boots the Supreme Court's Influence — and Her Own*, L.A. TIMES, Feb. 8, 2004, at M1.

7. Mauro, *supra* note 2, at 7.

Sandra Day O'Connor's America."[8] "[S]he can bend the court – and the law – to her will."[9] Thomas Goldstein, an attorney who regularly appears before the Court, said that the impact of Justice O'Connor's retirement would resemble "thermonuclear war."[10]

Drawing largely from the social science literature on judicial decision-making theory, the purpose of this analysis is to provide a statistical overview of Justice O'Connor's decision-making behavior. Using a wide variety of measures of potential influence, we look at patterns in her opinion writing and her position as a potential swing vote on the Court. A general assessment of her opinion writing suggests that she does not write any more majority or concurring opinions than her colleagues. In majority opinions, this "equality principle" rules on the Rehnquist Court. Moreover, she writes a remarkably average number of concurring opinions. But a closer assessment of particular subsets of cases, such as civil liberties decisions, 5–4 decisions, and landmark decisions, suggests a very different picture. It is in these cases, arguably the most important decisions by the Court, that she does indeed appear to be the most influential.

We concede, however, that even an in-depth statistical analysis does not tell the entire story about Justice O'Connor's possible influence on the bench and on the contours of American law. A good example of this is the Court's 2000 decision in *Stenberg v. Carhart*,[11] the most recent abortion case. Simply counting this case as one in which Justice O'Connor was in the majority in a 5–4 decision misses the fact that it was in *Stenberg* that a majority finally adopted Justice O'Connor's "undue burden" test, an approach that she had been advocating since her dissent in *Akron v. Akron Center for Reproductive Health* in 1983.[12] On the other hand, a statistical overview helps to provide a much broader context for understanding her influence, how it has evolved over time, and how her decision-making behavior compares to other Justices.[13]

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8. Rosen, *supra* note 2, at 32.
9. Lazarus, *supra* note 5, at 9A.
10. Mauro, *supra* note 2, at 7.
11. 530 U.S. 914 (2000).
12. 462 U.S. 416, 453 (1983). Interestingly, in 1989 in *Webster v. Reproductive Health Services*, Justice Scalia noted in his concurring opinion that Justice O'Connor's approach "cannot be taken seriously" 492 U.S. 490, 532 (1989).
13. One of the problems with much of what has been written about Justice O'Connor as a swing voter, for example, is that it is based on analyses of a single term, *see, e.g.*, Charles Rothfeld, *The Court on Balance: By Sometimes Leaning Left, Justice O'Connor Centers the*

II. THE "FEMININE" SWING VOTER?

A. Opinion Writing

Much attention has been paid to Justice O'Connor as the first woman to serve on the Supreme Court and the impact of gender on her decision making, with special attention given to her tendency to write concurring opinions. Shortly after her arrival on the bench, for example, Suzanna Sherry provided an analysis of Justice O'Connor's "feminine jurisprudence,"[14] borrowing from Carol Gilligan's theory of the "different voice."[15] In contrast to a traditional liberal legal approach that defines inherent rights as belonging to atomistic individuals, a "feminine jurisprudence" focuses on an individual's relationship to others and the impact of that individual's decision on the community. Feminine jurisprudence rejects "an adversarial, dichotomous, zero-sum game perspective of the issues" presented in a case, instead it offers concessions to both sides to find a compromise.[16] After comparing her to Chief Justice Rehnquist, Sherry concluded that Justice O'Connor's "emerging jurisprudence ... exhibits a characteristically feminine perspective in its emphasis on contextual

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Supreme Court, LEGAL TIMES, July 12, 2004, at 52; Marcia Coyle, *Is Rehnquist Tinkering with Revolution?* NAT'L L. J., Aug. 16, 1999, at B7; Marcia Coyle, *Swing Votes Inject Suspense Into New Term*, NAT'L L. J., Oct. 7, 1996, at A1; a particular issue, *see, e.g.*, ROBERT ZELNICK, SWING DANCE: JUSTICE O'CONNOR AND THE MICHIGAN MUDDLE (2004); or even a single case, *see, e.g., High Court Ruling: Be Prepared to Show ID*, AUSTIN AM. STATESMAN, June 22, 2004, at A8; John Dendahl, Editorial, *Sayonara, Disclosure: Big Money Back*, SANTA FE NEW MEXICAN, May 30, 2004, at F1; Michael McGough, *Top Court: Ministry Students can be Denied Scholarships*, PITT. POST-GAZETTE, Feb. 26, 2004, at A8; Bill Mears, *Disabled Win Victory in Ruling Over Access to Government Buildings*, CNN.com, May 17, 2004, *at* http://www.cnn.com/2004/LAW/05/17/scouts.disabled/index.html; Robert Greenberger and Joni James, *End Game: With Electorate Split, Presidential Drama is in Hands of Few Actors – If High Court Doesn't Have Last Word on the Race, Meet People Who Would – Justice O'Connor in Spotlight*, WALL ST. J., Dec. 11, 2000, at A1. *But see* David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310.

14. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

15. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan's work in psychology had a major impact on the development of the idea of "feminine jurisprudence." *See, e.g.* Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Kenneth Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

16. Susan Behuniak-Long, *Justice Sandra Day O'Connor and the Power of Maternal Legal Thinking*, 54 REV. OF POL. 417, 427 (1992).

decisionmaking."[17] Justice O'Connor's fact-based approach to the law, which typically articulates a "middle ground," is clearly drawn "from her femininity rather than her politics."[18]

One of the strongest pieces of evidence offered for her feminine jurisprudence was not only her propensity to write concurring opinions, but also the content of those opinions; concurring opinions provide the perfect vehicle for this different voice to be expressed.[19] Her concurring opinions in abortion cases are said to be quintessential examples of "maternal legal thinking."[20] For example, in cases involving minors and parental notification, Justice O'Connor's approach shows an "unwillingness to apply an abstract, general principle to every individual family situation" and provides a compromise.[21] Moreover, she uses this approach to provide the critical swing vote in these cases, thus increasing her influence on the Court and the law.[22]

Still others, however, have found very little evidence for a feminine voice in her jurisprudence.[23] In equal protection cases, for example, the members of the Supreme Court that did exhibit a "different voice" were some of the male Justices.[24] Moreover, the other woman on the Court, Justice Ruth Bader Ginsburg, also has shown no signs of using this approach to deciding cases.[25] Thus, Justice O'Connor's unique fact-based jurisprudence of compromise and concession is arguably not a product of her gender. Instead, it could be a reflection of the fact that she is the only justice on the Supreme Court with any legislative experience; prior to her career as a judge, she served in the Arizona state senate and became the majority leader, a position that demanded an understanding of the importance of

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17. Sherry, *supra* note 14, at 604–605.

18. *Id.*, at 613.

19. *See, e.g., id.* at 606; Behuniak-Long, *supra* note 16, at 422.

20. Behuniak-Long, *supra* note 16, at 437. *See* Patricia Sullivan and Steven Goldzwig, *Abortion and Undue Burdens: Justice Sandra Day O'Connor and Judicial Decision-Making*, 16 WOMEN AND POL. 27 (1996).

21. Behuniak-Long, *supra* note 16, at 435.

22. *See generally* Sullivan and Goldzwig, *supra* note 20; Sherry, *supra* note 14.

23. Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134 (1993); ROBERT VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE (1998).

24. *See* Jilda Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 78 JUDICATURE 232 (1995).

25. Chris Bonneau and Ralph Baker, Justice Ruth Bader Ginsburg and the "Feminine Voice," presented at the Midwest Political Science Association Annual Meeting (April 15–17, 1999) (on file with author).

compromise and concession.[26] In fact, Justice O'Connor herself has been very critical of the idea that her jurisprudence, or any other woman judge's for that matter, can be called "feminine" and attributed to gender. She considers this "New Feminism" quite troubling, "because it so neatly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long."[27] She argues that, "Asking whether women attorneys speak with a 'different voice' than men do is a question that is both dangerous and unanswerable."[28]

Regardless of whether they exhibit a different voice or not, much has been made about Justice O'Connor's tendency to write concurring opinions.[29] In fact, Justice O'Connor has been called "the great concurrer."[30] There is some debate, however, about what concurring opinions really mean. Nancy Maveety, for example, has argued that, for Justice O'Connor, concurring opinions are a conscious strategy to maximize her power and leadership on the Court.[31] Writing a concurring opinion is "a tactic of influence that permits both alliance with the winning coalition and assertion of one's own distinctive legal reasoning."[32] Justice Scalia has commented that separate opinions

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26. In fact, she was the first woman in the country to ever be the majority leader of a state legislature. NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT (1996). *See also* Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134 (1993); ROBERT VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE (1998).

27. Sandra Day O'Connor, Address to New York University Law School, *reprinted as The Wisdom of Women*, THE RECORDER, December 20, 1991 at 6.

28. *Id.* Regardless of whether her opinions reflect a different voice or not, what is clear is that Justice O'Connor's presence has had an impact on the Court's approach to sex-discrimination cases. In the wake of her appointment, the Court's overall support for women's claims in sex-discrimination cases increased from 63% to 75%, and there was a noticeable change in support among the male Justices. Karen O'Connor and Jeff Segal, *Justice Sandra Day O'Connor and the Supreme Court's Reaction to Its First Female Member*, 10 WOMEN AND POL. 95 (1990). Justice O'Connor has voted for the "pro-equality" position in over 80% of these women's rights cases and has written more opinions in this area than all of the current justices, more than would be expected based on the length of her tenure on the Court. Barbara Palmer, *Justice Ruth Bader Ginsburg and the Supreme Court's Reaction to Its Second Female Member*, 24 WOMEN AND POL. 1, 8 (2002). But for more critical analyses of her written opinions in this area, *see also* Nadine Taub, *Sandra Day O'Connor and Women's Rights*, 13 WOMEN'S RTS. L. REP. 113 (1991); Margaret Miller, *Justice Sandra Day O'Connor: Token or Triumph from a Feminist Perspective*, 15 GOLDEN GATE U. L. REV. 493 (1985).

29. *See, e.g.*, Robert Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 BYU L. REV. 1 (1983); Miller, *supra* note 28; Stuart Taylor, *Swing Vote on the Constitution*, AM. LAW., June 1989, at 66.

30. Alexander Wohl, *O'Connor, J., Concurring*, 75 A.B.A. J. 42, 42 (1989).

31. MAVEETY, *supra* note 26, at 49.

32. *Id.* at 61.

"augment ... the prestige of the Court" and keep "the Court in the forefront of the intellectual development of the law."[33]

In fact, Justice O'Connor "has spoken most effectively in her concurring voice."[34] Her separate opinions have had a major impact in a wide variety of civil rights and civil liberties cases.[35] An excellent example of this is Justice O'Connor's undue burden test in abortion cases, which was originally articulated in a dissenting opinion,[36] then a concurring opinion,[37] and eventually a majority opinion.[38]

Others have a much different view of concurring opinions, that they are actually a reflection of "judicial ego."[39] Concurring opinions reflect a lack of judicial restraint and are "unnecessary nitpicking."[40] C. Herman Pritchett has argued that concurring opinions weaken the Court's "institutional ethos"[41]as "they invite uncertainty and confusion about the Court's rulings, interpretation of the law, and policy-making."[42] Even when Justice Ginsburg was on the Court of Appeals for the District of Columbia, she suggested that "appellate judges might profitably exercise greater restraint before writing separately."[43] The bottom line is that concurring opinions have no immediate precedential value.[44] Even Chief Justice Rehnquist once lamented that the Court was a "virtual Tower of Babel, from which no definite principles can be drawn."[45] Thus, rather than an indication of influence, Justice O'Connor's concurring opinions have also been used as evidence that she is "unskilled or uninterested in bargaining, [a] stubborn[] individual[] unwilling to compromise."[46]

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33. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 39, 41–42 (1994).

34. MAVEETY, *supra* note 26, at 69.

35. *Id.* at 62–68.

36. Akron v. Akron Center for Reproductive Health, 462 US 416, 453 (1983).

37. Webster v. Reproductive Health Services, 492 U.S. 490, 522 (1989)

38. Stenberg v. Carhart, 530 U.S. 914 (2000).

39. MAVEETY, *supra* note 26, at 53.

40. JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 277 (1993). *See also* Robert Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255 (1991).

41. C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 22 (1954).

42. DAVID O'BRIEN, STORM CENTER 336 (1996).

43. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH L. REV. 133 (1990).

44. See Igor Kirman, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995).

45. Metromedia v. City of San Diego, 453 U.S. 490, 569 (1981).

46. Segal & Spaeth, *supra* note 40, at 296.

What seems clear is that concurring and dissenting opinions can be an indicator that a Justice has particularly strong feelings or a different approach to an issue within a case.[47] Whether Justice O'Connor actually writes separate opinions any more often than her colleagues still needs to be determined. If nothing else, assessing patterns in her opinion writing can provide some insights into whether or not she does take a different approach more often than the other Justices and her potential influence on the Court.[48]

B. Swing Voters and 5–4 Decisions

Justice O'Connor's power has been attributed to her being the "swing" or "key" vote on the Court.[49] Attorneys who bring cases to the Court are often said to write their briefs and tailor their oral arguments to her.[50] Jay Sekulow, from the American Center for Law and Justice, remarked that, "I do think O'Connor is the pivotal vote on any case before the Supreme Court."[51] As Thomas Goldstein noted, "Justice O'Connor decides all the cases."[52] There are a variety of ways to define "swing vote," but typically there are two factors that are used as an indicator: the position of the Justice in 5–4 decisions and the ideological position of the Justice relative to the rest of the bench. The idea is that the Justice is typically a moderate that the Court pivots around in close cases.[53] Justice Powell was considered by many to be the perfect example of a swing voter; he was an ideological moderate and often provided the key vote in 5–4 decisions

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47. MAVEETY, *supra* note 26, at 53. *See also* Lewis Kornhauser & Lawrence Sage, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT (1983).

48. *See, e.g.*, Harold Spaeth & Michael Altfeld, *Influence Relationships within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 W. POL. Q. 70 (1985); Michael Altfeld & Harold Spaeth, *Measuring Influence on the U.S. Supreme Court*, 24 JURIMETRICS J. 236 (1984).

49. *See, e.g.*, Charles Kelso and Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915 (2001). *See also id.* at 921 n.13.

50. Lane, *supra* note 2, at W10.

51. Marcia Coyle, *Swing Votes Inject Suspense Into New Term*, NAT'L L. J., October 7, 1996, A1.

52. Interview with Thomas Goldstein, Founding Partner, Goldstein & Howe, P.C., in Washington, D.C. (October 8, 2004).

53. *See, e.g.*, Robert Riggs, *When Every Vote Counts: 5–4 Decisions in the United States Supreme Court, 1900–90*, 21 HOFSTRA L. REV. 667 (1993); Janet Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?* 52 J. POL. 532 (1990).

in civil liberties cases.[54] On the other hand, other analyses have indicated that this was, in fact, a myth, given his consistently conservative voting record.[55] In fact, in one study of all 5–4 decisions and ideological voting patterns from 1900 to 1990, none of the Justices since 1940 could be classified as a swing voter, but there have been some Justices who have held this position on the Court for a single term.[56]

Like the history of writing separate opinions, 5–4 decisions are also a relatively recent phenomenon on the Court. In fact, the number of cases decided by a single vote increased simultaneously with the number of concurring and dissenting opinions written by the Justices; this is considered another indicator of the decline in consensual norms on the Court that occurred during the 1940s.[57] Five to four decisions, like separate opinions, are also considered by some to be an indication of institutional weakness: "a 5–4 decision emphasizes the strength of the losing side and may encourage resistance and evasion. The greater the majority, the greater the appearance of certainty."[58] Cases decided by "minimum winning coalitions" produce "unstable precedents" that are more easily overturned in the wake of membership changes.[59]

In addition to 5–4 decisions being unstable over subsequent terms, there is evidence that such decisions are unstable even within a single case. For example, during the Warren Court, in 20% of 5–4 cases, the original coalition in the initial vote on the merits broke apart during the opinion drafting process and the majority became the minority in the Court's final decision.[60] In cases with larger

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54. *See, e.g.*, Anthony Lewis, *Strength at the Center*, N. Y. TIMES, June 30, 1987, at A31; Stuart Taylor, *Justice Powell Shaping Law as Swing Man on High Court*, N. Y. Times, April 26, 1987, at A1; David O'Brien, *The Reagan Judges: His Most Enduring Legacy?*, *in* THE REAGAN LEGACY: PROMISE AND PERFORMANCE (Charles O. Jones ed., 1988) ("Powell was not just the pivotal vote on the Court; in his last two terms, the justices ruled 5 to 4 in eighty-one cases, and Powell had the controlling vote over 75 percent of the time.").

55. Blasecki, *supra* note 53. *See also* Riggs, *supra* note 53.

56. Riggs, *supra* note 53, at 707–08.

57. *Id.* at 712 tbl 1.

58. WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY 66 (1964).

59. Saul Brenner, Timothy M. Hagle, & Harold J. Spaeth, *Increasing the Size of Minimum Winning Original Coalitions on the Warren Court*, 23 POLITY 309, 307 (1990).

60. Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72, 77 (1988). *See also* Saul Brenner, Timothy M. Hagle & Harold J. Spaeth, *The Defection of the Marginal Justice on the Warren Court*, 42 W. POL. Q. 409 (1989). Typically, opinion writers produce about three drafts for a case, but Justice Brennan is said to have circulated as many as ten drafts of one case before one was accepted by the majority, O'Brien, *supra* note 54, at 307.

majorities, the original coalition only broke up 1% of the time.[61] During the opinion drafting process, the majority opinion author is mindful that Justices can switch sides at any time before the final decision is announced, and there is a great deal of evidence that this does occur with some regularity.[62] During the Burger Court, for example, in over one-third of all cases, at least one Justice changed his vote during the course of exchanging opinion drafts.[63]

Unfortunately, recent data on the "vote fluidity" of Justice O'Connor is not available. It should be noted, however, that during her first decade on the Court, almost one-fourth of all cases were decided by a 5–4 vote.[64] For example, in *Gebser v. Lago Vista Independent School District*[65] and *Davis v. Monroe County Board of Education*,[66] two of the Court's landmark Title IX cases, Justice O'Connor wrote the majority opinions. In these 5–4 decisions that were only a year apart, the minority in *Gebser* became the majority in *Davis*. She was clearly the "pivot point" on the Court. At any rate, an examination of her ideology, voting behavior, and opinion writing in 5–4 decisions can provide more insight into her influence on the bench.[67]

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61. Brenner & Spaeth, *supra* note 60, at 77.

62. *See e.g.*, J. Woodford Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968); WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

63. Forrest Maltzman & Paul Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996). Switching sides is an integral part of the process of "negotiation and accommodation" during opinion writing. In order to prevail on the merits, majority opinion writers know they must convince at least four of their colleagues to agree with them. Thus, Justices pursue their policy goals by negotiating over the language in a written opinion and accommodating requests from their colleagues to change everything from punctuation to footnotes to entire opinions. "For Justices, bargaining is a simple fact of life." MURPHY, *supra* note 58, at 57. *See also* David Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court*, 16 MIDWEST J. POL. SCI. 208 (1972); WILLIAM REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (William Morrow 1987); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (Oxford University Press 1993); BERNARD SCHWARTZ, DECISION (Oxford University Press 1996); James Spriggs, Forrest Maltzman, & Paul Wahlbeck, *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485 (1999); Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294 (1998) (showing that accommodation is influenced strongly by strategic concerns of the majority opinion author); PHILLIP COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT (1995) (describing how members of the Supreme Court find ways to work together in a conflict-ridden environment).

64. Riggs, *supra* note 53, at 668.

65. 524 U.S. 274 (1998).

66. 526 U.S. 629 (1999).

67. Justice Powell's papers, available at Washington and Lee University, have the most complete docket books which provide information about initial conference votes which can be

III. ANALYSIS

In our attempt to determine whether Justice O'Connor is indeed as powerful as court-watchers proclaim, we developed several measures of judicial influence. These measures include general indicators of opinion writing and voting behavior, as well as more specific analyses of 5–4 decisions and landmark cases. Most of our research covers the 1994–2002 terms, which covers almost all of the current natural court.[68] In some instances, we provide data since Justice O'Connor's appointment in 1981 to assess possible changes over time.

A. Justice O'Connor's Opinion Writing

Before we look at separate opinions, it is useful to assess majority opinion writing to provide an overall context and baseline for comparison. Thus, our initial examination of patterns in opinion writing focuses on majority opinions for all cases from the 1994–2002 terms. The results are featured in the first column of Table 1, in which the Justices are listed in descending frequency of their majority opinion writing. The "equality principle" suggests that majority opinion writing should be distributed equally among the nine Justices, i.e. the workload is shared.[69] Chief Justice Rehnquist has remarked that he has tried to "be as evenhanded as possible" with his opinion assignments.[70] The exception to this is landmark decisions, when the Chief Justice tends to self-assign more often.[71]

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compared to final votes on the merits. Thus, an assessment of Justice O'Connor's early years on the bench can be conducted with data from Justice Powell's papers. Thus, in future research, we hope to assess whether Justice O'Connor was more likely to change her mind in 5–4 decisions, or in general, compared to her colleagues.

68. A "natural court" refers to a group of justices who serve together between personnel changes. In other words, there is no change in the justices, so we do not have to control for length of service. Where we go beyond the current natural court, we do account for length of service in our calculations. When Justice Rehnquist retires, this will be the end of one of the longest natural courts in the Supreme Court's history. Our analyses stop with the 2002 term, because this is the most recent term that data are available.

69. *See, e.g.*, Elliot Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 AM. J. POL. SCI. 60, 62–66 (1979).

70. REHNQUIST, *supra* note 63, at 297.

71. Slotnick, *supra* note 69, at 67; REHNQUIST, *supra* note 63, at 297.

Table 1. Opinion Writing for the Court on All Cases for 1994–2002 Terms.

Justice	Majority	Concurrence	Dissent
Rehnquist	12.8 (89)	1.5 (11)	4.5 (34)
O'Connor	**11.8 (82)**	**6.4 (48)**	**4.9 (37)**
Ginsburg	11.2 (78)	5.8 (43)	6.4 (48)
Stevens	11.0 (77)	7.8 (58)	19.9 (149)
Kennedy	11.0 (77)	6.2 (46)	3.9 (29)
Scalia	10.9 (76)	10.4 (78)	11.5 (86)
Breyer	10.6 (74)	6.2 (46)	10.4 (78)
Souter	10.5 (73)	5.1 (38)	8.2 (61)
Thomas	10.2 (71)	7.1 (53)	9.5 (71)
Total Decisions	697	747	747
Equality Principle (dividing total by 9)	11.1 (77)	---	---

Cell entries are column percentages with actual number of opinions in parentheses. Justices are listed by their ranking in majority opinion writing (from most to least). Data taken from *Harvard Law Review*, 1995–2003, Statistics, Table IA Actions of Individual Justices (see footnote in originals for detailed definition of opinion writing categories).

During the 1994–2002 terms, 697 cases were decided with full plenary review.[72] Thus, under the equality principle, each Justice should have written 11%, or approximately 77 opinions of the Court. In general, we find substantial support for the equality principle, with four Justices (Ginsburg, Stevens, Kennedy, and Scalia) falling within one opinion of the expected number. Only Chief Justice Rehnquist has written slightly more than the equality principle would suggest; he has written 12.8% of the majority opinions. Justice O'Connor ranks second after the Chief Justice; she has written 11.8% of majority

72. *The Statistics*, 108 HARV. L. REV. 372, 372 (1994–1995); *The Statistics*, 109 HARV. L. REV. 340, 340 (1995–1996); *The Statistics*, 110 HARV. L. REV. 367, 367 (1996–1997); *The Statistics*, 111 HARV. L. REV. 431, 431 (1997–1998); *The Statistics*, 112 HARV. L. REV. 366, 366 (1998–1999); *The Statistics*, 113 HARV. L. REV. 400, 400 (1999–2000); *The Statistics*, 114 HARV. L. REV. 390, 390 (2000–2001); *The Statistics*, 115 HARV. L. REV. 539, 539 (2001–2002). From 1994–2002, the Court issued 50 per curiam decisions. *The Statistics*, 108 HARV. L. REV. 372, 372 (1994–1995); *The Statistics*, 109 HARV. L. REV. 340, 340 (1995–1996); *The Statistics*, 110 HARV. L. REV. 367, 367 (1996–1997); *The Statistics*, 111 HARV. L. REV. 431, 431 (1997–1998); *The Statistics*, 112 HARV. L. REV. 366, 366 (1998–1999); *The Statistics*, 113 HARV. L. REV. 400, 400 (1999–2000); *The Statistics*, 114 HARV. L. REV. 390, 390 (2000–2001); *The Statistics*, 115 HARV. L. REV. 539, 539 (2001–2002).

opinions during this time, which is only five more opinions than predicted by the equality principle. Justices Breyer, Souter, and Thomas fall just below the predictions, writing 10.6%, 10.5%, and 10.2% of majority decisions respectively. Thus, the data confirm that the Court follows the equality principle in majority opinion assignment.[73]

Of course, Justices are free to write separately if they wish. As noted earlier, there is some disagreement on what concurring opinions really mean, but they do give us some insight into Justice O'Connor's potential influence, or at least how she compares to other Justices' opinion writing behavior. The second column of Table 1 features the number of concurring opinions written by each Justice during the 1994–2002 terms.[74] The percentage refers to the number of concurrences written in the total number of decisions during this time period. Although the conventional wisdom suggests that Justice O'Connor concurs more than other Justices, our data do not support this assumption. In fact, for the years included here, Justice O'Connor's concurrence rate of 6.4% puts her near the middle of the pack. Justice Scalia, however, stands out as the leader with a rate of

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73. Opinion *assignment*, of course, is not evenly distributed. If the Chief Justice is in the majority, he assigns the opinion. If he is not in the majority, the most senior justice assigns the opinion. For example, during the 2001 and 2002 terms, Chief Justice Rehnquist was in the majority in the final opinion issued on the merits in 79.6% of all of the cases decided during those two terms. *The Statistics,* 114 HARV. L. REV. 390, 390 tbl. 1–D (2000–2001); *The Statistics,* 115 HARV. L. REV. 539, 539 tbl. 1–D (2001–2002). This suggests that in almost 80% of the cases, Chief Justice Rehnquist is assigning the majority opinion. It is probably a safe assumption that Justice Stevens, who is the next most senior justice and one of the most ideological distant justices from Rehnquist, is assigning the opinions in the other 20% of cases. Although data beyond the 2001 and 2002 terms are not readily available, it appears that Chief Justice Rehnquist does assign the vast majority of opinions, and as a result, can enforce the equality principle. It is important to keep in mind, however, that we do not know how often Chief Justice Rehnquist had initially voted in conference in the minority and then changed his vote to be in the majority; in those instances, he would not have assigned the opinion. And we do know that justices change their minds relatively often. Even conceding that, Chief Justice Rehnquist controls the opinion assignment in the vast majority of cases. And even if he does not, the data in Table 1 suggest that a commitment to the equality principle is shared by the most senior members of the Court. The authors would like to thank Dean Richard Boldt for raising this issue during the Town Hall meeting.

74. Data compiled from *The Statistics*, 108 HARV. L. REV. 372, 372 (1994–1995); *The Statistics*, 109 HARV. L. REV. 340, 340 (1995–1996); *The Statistics,* 110 HARV. L. REV. 367, 367 (1996–1997); *The Statistics,* 111 HARV. L. REV. 431, 431 (1997–1998); *The Statistics,* 112 HARV. L. REV. 366, 366 (1998–1999); *The Statistics*, 113 HARV. L. REV. 400, 400 (1999–2000); *The Statistics,* 114 HARV. L. REV. 390, 390 (2000–2001); *The Statistics,* 115 HARV. L. REV. 539, 539 (2001–2002). Opinions that concurred in part and dissented in part were counted as dissents exclusively.

10.4%. On the opposite end of the spectrum, Chief Justice Rehnquist has a concurrence rate of merely 1.5%.

With regard to dissenting opinions, Justice Stevens ranks far ahead of the other Justices, dissenting in nearly one-fifth of all cases and writing almost twice as many dissents as his colleagues (as evidenced in the final column of Table 1). The only other Justices dissenting in more than 10% of all cases are Scalia and Breyer. By contrast, Justice O'Connor, Justice Kennedy, and Chief Justice Rehnquist rank at the bottom, each writing dissents in less than 5% of the Court's decisions.

We expanded our analysis to cover Justice O'Connor's full tenure on the Court to see if there have been any changes in her separate-opinion writing behavior. Table 2 displays the concurrence rates for the fifteen Justices who served since 1981.[75] The rates were calculated by dividing each Justice's total number of concurring opinions by the total number of decisions for his/her years of service. Two striking findings emerge from Table 2. Once again, there is little evidence, at least in terms of frequency, that Justice O'Connor is "the great concurrer."[76] In fact, she ranks sixth among the fifteen Justices who served during this time, with a concurrence rate of 6.6%. Most of the Justices concurred in 5–7% of the Court's decisions, and Justice O'Connor is squarely within this range.

75. *The Statistics,* 96 HARV. L. REV. 304, 304 (1982–1983); *The Statistics,* 97 HARV. L. REV. 295, 295 (1983–1984); *The Statistics,* 98 HARV. L. REV. 307, 307 (1984–1985); *The Statistics,* 99 HARV. L. REV. 322, 322 (1985–1986); *The Statistics,* 100 HARV. L. REV. 304, 304 (1986–1987); *The Statistics,* 101 HARV. L. REV. 362, 362 (1987–1988); *The Statistics,* 102 HARV. L. REV. 350, 350 (1988–1989); *The Statistics,* 103 HARV. L. REV. 394, 394 (1989–1990); *The Statistics,* 104 HARV. L. REV. 359, 359 (1990–1991); *The Statistics,* 105 HARV. L. REV. 419, 419 (1991–1992); *The Statistics,* 106 HARV. L. REV. 378, 378 (1992–1993); *The Statistics,* 107 HARV. L. REV. 372, 372 (1993–1994).

76. Wohl, *supra* note 30, at 42.

Table 2. Concurrence Rates for all Justices for 1981–2002 Terms.

Justice	Concurrence rates	Years of Service*
Scalia	12.3 (217)	1986–2002
Stevens	8.3 (213)	1981–2002
Brennan	7.0 (97)	1981–1989
Thomas	6.7 (71)	1991–2002
Kennedy	6.6 (106)	1987–2002
O'Connor	**6.6 (169)**	**1981–2002**
Blackmun	6.3 (115)	1981–1993
Ginsburg	6.3 (53)	1993–2002
Breyer	6.2 (46)	1994–2002
Powell	6.1 (58)	1981–1986
White	5.4 (93)	1981–1992
Burger	5.4 (43)	1981–1985
Souter	5.3 (63)	1990–2002
Marshall	2.7 (40)	1981–1990
Rehnquist	1.6 (40)	1981–2002

Justices are listed by their ranking in concurrence opinion writing (from most to least). Cell entries reflect the number of concurrences divided by the total number of decisions during each Justice's time on the Court during the 1981–2002 terms. Numbers in parentheses are the total number of concurrences written by a Justice. Data compiled from HARVARD LAW REVIEW, 1982–2003, Statistics, Table IA Actions of Individual Justices (see footnote in originals for detailed definition of opinion writing categories).

*Years of service refer only to the years served during the 1981–2002 terms, overlapping with Justice O'Connor's years on the bench.

The other interesting finding from Table 2 is the remarkably high concurrence rate for Justice Scalia. At 12.3%, he concurs more frequently than any other Justice by a wide margin. In fact, Justice Scalia concurs nearly one and a half times more often than the second most frequent concurrer, Justice Stevens. Further, Justice Scalia concurs nearly twice as often as most other Justices.

In order to gain a better understanding of Justice Scalia's remarkably high concurrence rate and Justice O'Connor's surprisingly average concurrence rate, we compared the annual concurrence rates for these two Justices. The results appear in Table 3. In every year except 1994, Justice Scalia wrote a concurring opinion more often than Justice O'Connor.[77] Over time, Justice O'Connor's concurrence rate has remained substantially unchanged.

77. In 1994, Justice O'Connor concurred in 15.1% of the Court's decisions, by far her highest rate of concurrence during her time on the bench.

Table 3. Annual Concurrence Rates of Justices O'Connor and Scalia for 1981–2002 Terms.

Term	Justice O'Connor	Justice Scalia
1981	7.2 (12)	----
1982	4.3 (7)	----
1983	6.1 (10)	----
1984	7.3 (11)	----
1985	7.5 (12)	----
1986	7.2 (11)	11.2 (17)
1987	5.6 (8)	10.6 (15)
1988	8.4 (12)	16.1 (23)
1989	5.0 (7)	12.9 (18)
1990	3.3 (4)	15.0 (18)
1991	9.5 (11)	13.8 (16)
1992	6.1 (7)	11.4 (13)
1993	10.3 (9)	21.8 (19)
1994	15.1 (13)	10.5 (9)
1995	2.5 (2)	8.9 (7)
1996	7.0 (6)	10.5 (9)
1997	3.2 (3)	11.8 (11)
1998	3.7 (3)	8.6 (7)
1999	7.8 (6)	10.4 (8)
2000	3.5 (3)	12.8 (11)
2001	7.4 (6)	11.1 (9)
2002	7.7 (6)	9.0 (7)
Average (all years)	5.9	---
Average (1986–2002)	5.7	12.1

Cell entries reflect the number of concurrences for the term divided by the total number of decisions during each term. Numbers in parentheses are the number of concurrences written by a Justice. Data compiled from HARVARD LAW REVIEW, 1982–2003, Statistics, Table IA Actions of Individual Justices (see footnote in originals for detailed definition of opinion writing categories).

Given Justice Scalia's past public remarks about concurring opinions and their contributions to the prestige of the Court, perhaps this is not unexpected.[78] While he votes with the majority frequently,

78. Another interpretation might be that Justice Scalia is the Justice with the most "different voice" on the Court.

he often has different reasons for his vote than the other Justices in the majority.

Our findings with regard to overall opinion writing indicate first that the equality principle applies to majority opinions; Justice O'Connor, for the most part, writes her share of majority opinions, as do the other Justices. Further, our analyses of separate opinions find that Justice O'Connor is hardly the "great concurrer," writing a strikingly average number of concurring opinions relative to her colleagues. The data indicate that Justice Scalia is, in fact, more deserving of this title.

B. Justice O'Connor and Swing Voting

The preceding analyses indicate that Justice O'Connor's opinion writing places her in an average position of influence on this Court. Yet, judicial influence can also be measured by voting behavior, particularly swing voting. One indicator of whether Justices are swing voters is their ideology relative to their colleagues; the idea is that a swing voter is in the ideological center of the Court. One way of assessing relative ideology is agreement rates. We begin by looking at Justice O'Connor's agreement rates with the other Justices during the 1994–2002 terms, using the data from the HARVARD LAW REVIEW. Agreement rates are defined as "the number of times that one Justice voted with another in full opinions, including ... per curiam decisions containing sufficient legal reasoning to be considered full opinions."[79] High agreement rates with many Justices suggest a possible position of influence. Conversely, lower agreement rates indicate potentially less influence. Table 4 shows Justice O'Connor's annual agreement rates with each of the other Justices for the 1994–2002 terms.[80]

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79. *The Statistics,* 109 HARV. L. REV. 340, 341–342 (1995–1996). "Two Justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a Justice in the body of his or her own opinion. The table does not treat two Justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement." *Id.* at 342.

80. *The Statistics,* 109 HARV. L. REV. 340, 341 (1995–1996); *The Statistics,* 110 HARV. L. REV. 367, 368 (1996–1997); *The Statistics,* 111 HARV. L. REV. 431, 432 (1997–1998); *The Statistics,* 112 HARV. L. REV. 336, 367 (1998–1999); *The Statistics,* 113 HARV. L. REV. 400, 401 (1999–2000); *The Statistics,* 114 HARV. L. REV. 390, 391 (2000–2001); *The Statistics,* 115 HARV. L. REV. 539, 540 (2001–2002); *The Statistics,* 116 HARV. L. REV. 453, 454 (2002–2003).

Table 4. Agreement Rates Between Justice O'Connor and Other Justices for the 1994–2002 Terms.

Term	Rehnquist	Stevens	Scalia	Kennedy
1994	**76.7**	55.3	68.2	75.6
1995	**79.7**	59.7	72.2	78.5
1996	78.8	55.3	78.8	**80.0**
1997	84.8	62.0	72.8	**85.9**
1998	**82.5**	46.3	77.5	80.0
1999	**88.0**	26.0	50.0	72.0
2000	**81.0**	57.1	71.4	79.8
2001	72.7	61.0	61.8	72.7
2002	**79.2**	61.0	64.9	72.7
Average	80.4	53.7	68.6	77.5
Term	Souter	Thomas	Ginsburg	Breyer
1994	**76.7**	67.4	64.7	74.4
1995	78.5	71.8	68.4	74.7
1996	70.6	**80.0**	69.4	67.1
1997	72.8	78.3	65.2	75.0
1998	68.8	75.0	62.5	68.4
1999	44.0	58.0	48.0	58.0
2000	65.1	72.6	66.7	67.5
2001	**77.9**	57.1	62.3	65.8
2002	74.0	63.2	67.5	73.7
Average	69.8	69.3	63.8	69.4

Entries show percentage of agreement. Bold entries indicate the Justice(s) with the highest agreement rate with Justice O'Connor for each year. Data compiled from *Harvard Law Review*, 1995–2003, Statistics, Table IB, Voting Alignments, Percentages (see footnote in originals for detailed definition of agreement).

Justice O'Connor's agreement rates suggest that she may indeed be in a powerful position. In an average year, six Justices agreed with Justice O'Connor more than two-thirds of the time. Chief Justice Rehnquist and Justice O'Connor have the highest average agreement rate[81] at 80.4%; these two Justices have the highest annual agreement rate in six of the nine years examined here. The average annual agreement rate between Justices Kennedy and O'Connor is also

81. The average agreement rate is the mean of the annual agreement rates.

quite high at 77.5%. Four other Justices agree with O'Connor more than two-thirds of the time – Souter 69.8%; Breyer 69.4%; Thomas 69.3%; and Scalia 68.6%. Justice Ginsburg had a slightly lower agreement rate of 63.8%. Only Justice Stevens seemed to be at odds with Justice O'Connor for nearly half of the Court's decisions during this time; their agreement rate was just 53.7%.[82] Taken together, these agreement rates suggest that Justice O'Connor holds a potentially powerful position on the Court.

While agreement rates are revealing and provide us with one indication of Justice O'Connor's possible influence, another more direct measure of ideology has been developed by Segal and Cover.[83] The Segal-Cover score is derived from content analyses of newspaper editorials written by each Justice prior to confirmation; scores range from -1.00 (extremely conservative) to 1.00 (extremely liberal). The value of this measure is that it is independent of the Justice's case votes, and thus, can be used to explain and predict their votes. While the scores in Table 5 suggest unexpected positions for a few of the Justices,[84] they do provide one way of comparing the Justice's ideologies relative to each other. Few people would be surprised to find Justice Scalia with the most conservative score, followed by Chief Justice Rehnquist and Justice Thomas, and Justices Breyer and Ginsburg with the most liberal scores.

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82. During the 1999 term, Justices Stevens and O'Connor had an astoundingly low agreement rate of 26.0%. If we consider the 1999 figure to be an outlier and recalculate the average agreement rate without it, the result is 57.2%, still below the average agreement rates with the other Justices.

83. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). *See also* Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 816 tbl. 2 (1995).

84. For examples of other scholars who have used the Segal-Covers scores, see Terry Bowen, Ideology and Non-Traditional Policies: Energy, the Environment and Technology in the Supreme Court, presented at the Southern Political Science Association Annual Meeting (1992) (on file with author); Richard Kearney and Reginald Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008 (1992); William Mishler and Reginald Sheehan, *The Supreme Court as a Countermajoritarian Institution?*, 87 AM. POL. SCI. REV. 87 (1993); Jeffrey Segal, Charles Cameron and Albert Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992); Reginald Sheehan, William Mishler, and Donald Songer, *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464 (1992). For a critique of the Segal-Cover Scores and this approach in general, see Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996); LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (2000).

Based on the Segal-Cover scores, Justice O'Connor, with a -0.17, is not in the ideological center of this natural Court, but rather the third most liberal member of the bench, behind Justices Ginsburg and Breyer. This would suggest that she is not the "pivot point" that would be expected of a Justice who is a swing vote on the Court.

Table 5. Justices' Ideological Value and Civil Liberties Vote.

Justice	Ideological Value	Civil Liberties Vote
Scalia	-1.00	31.2 (3rd)
Rehnquist	-0.91	28.5 (1st)
Thomas	-0.68	29.2 (2nd)
Stevens	-.50	71.7 (9th)
Souter	-.34	63.6 (8th)
Kennedy	-.27	39.7 (5th)
O'Connor	**-.17**	**37.3 (4th)**
Breyer	-0.05	62.7 (7th)
Ginsburg	0.36	58.8 (6th)

Justices are listed in order of their ideological values, from most conservative to least conservative. The Ideological Value, also known as the Segal-Cover score, is derived from content analyses of newspaper editorials prior to confirmation. It ranges from -1.00 (extremely conservative) to 1.00 (extremely liberal). Civil Liberties Vote represents the percent of liberal (pro-plaintiff) votes for that justice in this issue area for the 1993–1999 terms. Numbers in parentheses are the rankings of support for civil liberties (from least to most supportive).

Ideological values from Jeffrey A Segal, Lee Epstein, Charles M. Cameron, and Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 816 (1995).

Civil Liberties Votes from Karen O'Connor and Barbara Palmer, *The Clinton Clones: Ginsburg, Breyer, and the Clinton Legacy*, 84 JUDICATURE 267 (2001), Table 4, Pro-Civil Liberties Voting of the Justices, 1993–1999 terms, at 267. Data for Justice Breyer are for the 1994–1999 terms.

Further analysis, however, suggests that at least in some cases, such as those involving civil liberties, Justice O'Connor might be the swing vote. The second column of Table 5 presents the percent of liberal votes on civil liberties cases for the 1993–1999 terms.[85] Justice Stevens has the highest level of liberal votes (of the Justices included in the analyses) with a score of 71.7%; Chief Justice Rehnquist, and Justices Thomas and Scalia take the liberal, pro-liberties position the

85. See Table 5 for a complete description of the data. Liberal civil liberties votes are defined as "those that favor the criminally accused, the civil liberties/rights claimant indigents, and Native Americans, and that are against the government in due process and privacy litigation." Segal, *supra* note 83, at 815.

least often, with rates of 28.5%, 29.2%, and 31.2% respectively. Justice O'Connor follows Justice Scalia, casting pro-civil liberties votes in 37.3% of these cases. The fifth rank or median position in these cases is held by Justice Kennedy, with a rate of 39.7%.[86] The remaining three Justices are clustered together with strongly pro-civil liberties voting rates. Taken together, the ideological positioning measures suggest that Justice O'Connor does not occupy the exact middle of the Court, yet her position is not far from the center. Combined with her agreement rates, this does suggest that she has a position of power on the Court.

Beyond ideological position, analyses of swing voting often focus on 5–4 decisions. Table 6 shows how often each of the Justices voted in the majority in cases decided by a 5–4 vote during the 1994–2002 terms. In these cases, Justice O'Connor leads the Court in frequency of voting with the majority, with 76.9%.[87] In other words, over three-fourths of the time, Justice O'Connor is on the winning side in cases decided by one vote. Justice Kennedy followed closely with 74.4%. The bottom of the list features the four relatively "liberal" Justices (Stevens, Souter, Breyer, and Ginsburg), who only voted with the majority in 5–4 decisions approximately 40% of the time.

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86. While Justice Kennedy's median position is found at 39.7%, the mean or average position on this message is actually 46.9%. Thus, the ideological center of the Court on civil liberties cases falls somewhere between Justices Kennedy and Ginsburg, but somewhat closer to Justice Kennedy.

87. *The Statistics,* 108 HARV. L. REV. 372, 375 (1994–1995); *The Statistics,* 109 HARV. L. REV. 340, 343 (1995–1996); *The Statistics,* 110 HARV. L. REV. 367, 370 (1996–1997); *The Statistics,* 111 HARV. L. REV. 431, 434 (1997–1998); *The Statistics,* 112 HARV. L. REV. 366, 371 (1998–1999); *The Statistics,* 113 HARV. L. REV. 400, 405 (1999–2000); *The Statistics,* 114 HARV. L. REV. 390, 395 (2000–2001); *The Statistics,* 115 HARV. L. REV. 539, 544 (2001–2002); *The Statistics,* 116 HARV. L. REV. 453, 458 (2002–2003). Partial dissents were counted as voting with minority. *The Statistics,* 108 HARV. L. REV. 372, 372 n.e (1994–1995); *The Statistics,* 109 HARV. L. REV. 340, 340 n.e (1995–1996); *The Statistics,* 110 HARV. L. REV. 367, 367 n.e (1996–1997); *The Statistics,* 111 HARV. L. REV. 431, 431 n.e (1997–1998); *The Statistics,* 112 HARV. L. REV. 366, 366 n.e (1998–1999); *The Statistics,* 113 HARV. L. REV. 400, 400 n.e (1999–2000); *The Statistics,* 114 HARV. L. REV. 390, 390 n.e (2000–2001); *The Statistics,* 115 HARV. L. REV. 539, 539 n.e (2001–2002); *The Statistics,* 116 HARV. L. REV. 453, 453 n.e (2002–2003).

Table 6. Percentage of Votes with Majority in 5–4 Decisions for 1994–2002 Terms.

Justice	Votes with majority in 5–4 cases	Number of cases
O'Connor	**76.9**	**120**
Kennedy	74.4	116
Rehnquist	64.7	101
Thomas	63.5	99
Scalia	60.9	95
Stevens	40.4	63
Souter	40.4	63
Breyer	39.7	62
Ginsburg	37.8	59

Justices are listed by their ranking in votes with majority (from most to least). There were 156 5–4 decisions in the years examined. Data compiled from *Harvard Law Review*, 1995–2003, Statistics, Table ID 5–4 Decisions (partial dissents counted as voting with minority).

Although the evidence in Table 6 suggests that Justice O'Connor is potentially the key vote more often than her peers, the fact remains that Justice Kennedy is in essentially the same position as she is. Consequently, we expanded our assessment of 5–4 decisions for Justices O'Connor and Kennedy; their annual majority voting rates in 5–4 decisions for their entire tenure on the Court appear in Table 7. The annual rates for each Justice show that Justice O'Connor cast more majority votes in 5–4 decisions in some years, while Justice Kennedy did so in other years. The bottom row of Table 7 provides each Justice's total average rate for the entire length of their time together on the bench (1987–2002 terms). Justice O'Connor's average rate for this time period is 70.7%, while Justice Kennedy's average rate is slightly higher at 72.5%. Clearly, by being in the majority in 5–4 decisions almost three-quarters of the time, both Justices have demonstrated their potential power in close cases, which suggests that Justice Kennedy may also hold a key position on the Court.

Table 7. Votes with majority in 5–4 decisions for Justices O'Connor and Kennedy for 1981–2002 Terms.

Term	O'Connor voting with majority in 5–4 decisions	Kennedy voting with majority in 5–4 decisions	5–4 Cases
1981	41.9 (13)	---	31
1982	63.6 (21)	---	33
1983	60.7 (17)	---	28
1984	52.6 (10)	---	19
1985	75.0 (27)	---	36
1986	60.0 (27)	---	45
1987	66.7 (8)	66.7 (8)	12
1988	75.8 (25)	84.8 (28)	33
1989	69.2 (27)	66.7 (26)	39
1990	71.4 (15)	61.9 (13)	21
1991	57.1 (8)	64.3 (9)	14
1992	44.4 (8)	66.7 (12)	18
1993	53.8 (7)	92.3 (12)	13
1994	68.7 (11)	68.7 (11)	16
1995	81.8 (9)	81.8 (9)	11
1996	72.2 (13)	77.8 (14)	18
1997	66.7 (10)	86.7 (13)	15
1998	68.7 (11)	68.7 (11)	16
1999	83.3 (15)	72.2 (13)	18
2000	77.8 (21)	77.8 (21)	27
2001	80.9 (17)	71.4(15)	21
2002	92.9 (13)	50.0 (7)	14
Average (all years)	67.5 (333)	------	498
Average (1987–2002)	70.7 (218)	72.5 (222)	337

Cell entries are the number of votes with majority in 5–4 decisions divided by the total number of 5–4 decisions for the year. Actual numbers of votes with majority in these decisions appear in parentheses. Data compiled from *Harvard Law Review*, 1982–2003, Statistics, Table ID 5–4 Decisions (partial dissents counted as voting with minority).

Continuing our examination of Justice O'Connor's role in 5–4 decisions, we change our focus to opinion writing in these decisions. As suggested earlier, Table 1 revealed that, in general, the Court follows the equality principle. However, a very different pattern emerges in 5–4 decisions. While Justice O'Connor writes about as many majority opinions as the other Justices, Table 8 shows that she

writes substantially more than expected in 5–4 decisions.[88] Once again, Chief Justice Rehnquist leads the Court in majority opinion writing with 17.2% of the opinions written in 5–4 decisions (see the first column of Table 8). Justices Kennedy and O'Connor follow closely with 15.9% and 15.2% respectively. Justice Ginsburg has the distinction of writing the fewest majority opinions in 5–4 decisions, with just 4.0%. If the equality principle was utilized in 5–4 decisions, only Justice Breyer is within 1% of the predicted result (11.1%) for opinion writing in these cases. Apparently, in the most divisive cases, majority opinions are not distributed equally, and Justices Kennedy and O'Connor write more than their share.

88. *The Statistics,* 96 HARV. L. REV. 304, 307 (1982–1983); *The* Statistics, 97 HARV. L. REV. 295, 298 (1983–1984); *The Statistics,* 98 HARV. L. REV. 307, 310 (1984–1985); *The Statistics,* 99 HARV. L. REV. 322, 325 (1985–1986); *The Statistics,* 100 HARV. L. REV. 304, 307 (1986–1987); *The Statistics,* 101 HARV. L. REV. 362, 365 (1987–1988); *The Statistics,* 102 HARV. L. REV. 350, 353 (1988–1989); *The Statistics,* 104 HARV. L. REV. 359, 362 (1990–1991); *The Statistics,* 105 HARV. L. REV. 419, 422 (1991–1992); *The Statistics,* 106 HARV. L. REV. 378, 381 (1992–1993); *The Statistics,* 107 HARV. L. REV. 372, 375 (1993–1994); *The Statistics,* 108 HARV. L. REV. 372, 375 (1994–1995); *The Statistics,* 109 HARV. L. REV. 340, 343 (1995–1996); *The Statistics,* 110 HARV. L. REV. 367, 370 (1996–1997); *The Statistics,* 111 HARV. L. REV. 431, 434 (1997–1998); *The Statistics,* 112 HARV. L. REV. 366, 371 (1998–1999); *The Statistics,* 113 HARV. L. REV. 400, 405 (1999–2000); *The Statistics,* 114 HARV. L. REV. 390, 395 (2000–2001); *The Statistics,* 115 HARV. L. REV. 539, 544 (2001–2002); *The Statistics,* 116 HARV. L. REV. 453, 458 (2002–2003). Partial dissents were counted as voting with minority.

Table 8. Opinion Writing for the Court in 5–4 Decisions for 1994–2002 Terms.

Justice	Majority	Concurrence	Dissent
Rehnquist	17.2 (26)	0.6 (1)	7.7 (12)
Kennedy	15.9 (24)	9.0 (14)	8.3 (13)
O'Connor	**15.2 (23)**	**11.5 (18)**	**12.2 (19)**
Breyer	10.6 (16)	3.8 (6)	22.4 (35)
Souter	9.9 (15)	0.6 (1)	23.1 (36)
Stevens	9.3 (14)	6.4 (10)	30.1 (47)
Scalia	9.3 (14)	9.0 (14)	17.9 (28)
Thomas	8.6 (13)	9.0 (14)	14.1 (22)
Ginsburg	4.0 (6)	3.2 (5)	17.3 (27)
Total Decisions	151	156	156
Equality Principle (dividing total by 9)	11.1 (17)	----	----

Five of the 5–4 cases were Per Curiam decisions. Cell entries are percentages of total decisions with actual number of opinions in parentheses. Justices are listed by their ranking in majority opinion writing (from most to least). Data compiled from *Harvard Law Review*, 1995–2003, Statistics, Table ID 5–4 Decisions. 5–4 decisions identified from Table ID notes. Opinion writing information gathered through Lexis.

The second column of Table 8 shows the concurrence rates for the Justices during the 1994–2002 terms in 5–4 decisions. As with majority voting patterns, the findings here are at odds with our earlier findings for opinion writing in all cases during this time frame. Although Justice O'Connor has written an average number of concurring opinions in general, she led her colleagues in concurrences in 5–4 decisions. Justice O'Connor's concurrence rate in these cases was 11.5%. Our previous analysis of concurrences in all cases found that Justice Scalia was the leading concurrer by a wide margin, yet in 5–4 decisions, his concurrence rate drops to 9.0%, the same rate reached by Justices Kennedy and Thomas.[89] What all of this suggests is that when the Court is closely divided, Justice O'Connor not only speaks for the Court in majority opinions more often than many of her colleagues, but she also feels compelled to distinguish her reasoning in cases with the smallest of majorities.

89. Chief Justice Rehnquist and Justice Souter each wrote only one concurring opinion, thus concurring in less than 1% of the 5–4 decisions.

The pattern of dissenting opinions for 5–4 decisions shows some similarities to what we found for opinion writing in all cases. Once again, Chief Justice Rehnquist and Justices Kennedy and O'Connor dissent less frequently than their colleagues, while Justice Stevens writes dissenting opinions far more frequently than the other Justices (30.1%). While one might expect the Justices at the ideological extremes to dissent more frequently than their peers, in fact, Justices Scalia and Ginsburg ranked fourth and fifth, writing dissenting opinions in 17.9% and 17.3% of 5–4 decisions respectively.[90]

Finally, we examined one more indicator of judicial influence, her behavior in landmark decisions. For this measure, we borrowed from *Congressional Quarterly's* list of "the Major Decisions of the Court."[91] Table 9 shows how often each of the current Justices was in the majority in major decisions. Once again, Justices Kennedy and O'Connor have the highest level of majority votes among their colleagues. Justice Kennedy voted with the majority in these cases 89.8% of the time; Justice O'Connor did the same 80.5% of the time. When considered with our previous findings, this measure suggests that both Justices O'Connor and Kennedy have a substantial level of influence in the Court's most important cases, with Justice Kennedy clearly having the edge over Justice O'Connor here.

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90. As one would expect, every Justice's dissent rate increased in 5–4 decisions relative to their rates for all decisions of the Court.

91. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 133–140 tbl. 2–12 (3d ed. 2003). The two sets of cases, 5–4 decisions and "Major Decisions of the Court," obviously overlap somewhat. *Bush v. Gore,* 532 U.S. 98 (2000), for example, was a 5–4 decision that, surprisingly, was not considered a "Major Decision of the Court" for the 2000 term. Nonetheless, some 5–4 decisions were not considered to be "Major Decisions of the Court" by CQ, and some of CQ's Major Decisions were not 5–4 decisions. For the 1994–2002 terms, the total number of cases included by CQ (88) is considerably smaller than the number of 5–4 decisions (156). *Id.*

CQ's Major Decisions of the Court are differentiated from other decisions of the Court based on whether the decision goes beyond the immediate impact of answering the individual's claims in the case. A major decision has "larger significance, upholding or striking down similar laws or practices or claims, establishing the Court's authority in new areas, or finding that some areas lie outside its competence." JOAN BISKUPIC AND ELDER WITT, THE SUPREME COURT AT WORK 334 (1997).

Table 9. Majority Votes in *Congressional Quarterly's* "Major Decisions of the Court" for 1994–2002 Terms.

Justice	Majority votes in CQ's "Major Decisions of the Court"
Kennedy	89.8 (79)
O'Connor	**80.5 (70)**
Rehnquist	70.4 (62)
Thomas	66.7 (58)
Scalia	62.5 (55)
Breyer	61.4 (54)
Souter	57.9 (51)
Ginsburg	54.5 (48)
Stevens	50.0 (44)

Percentages are calculated based on total cases for which each justice participated—O'Connor and Thomas each sat out for one "major case". Actual numbers of majority votes appear in parentheses. The total number of cases included in the table is 88. Data compiled from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium* (CQ Press, 2003) Table 2–12, at 133–140.

The data for majority opinion writing in major decisions is presented in Table 10. In these cases, the equality principle is not applied. Chief Justice Rehnquist was the most frequent majority opinion writer, penning 19.8% of the opinions, which is not surprising, given that he is the Chief.[92] But Justice O'Connor ranked second, writing majority opinions for 17.6% of the landmark cases in which she participated. Ranking a very close third is Justice Stevens, with a rate of 17.4%.[93] Justice Kennedy rounds out the group of Justices who wrote more majority opinions than the equality principle predicts. The remaining Justices wrote majority opinions in less than 9% of the major decisions of the Court.

The data for majority opinion writing in major decisions (Table 10) allow for some comparisons with the data for majority opinion writing in 5–4 decisions (first column of Table 8). As expected, Chief Justice Rehnquist ranks first in majority opinion writing across the board; he writes more majority opinions in 5–4 decisions and landmark cases than all of his colleagues. Justice O'Connor also ranks near the top according to both measures, third in 5–4 decisions, and

92. Slotnick, *supra* note 69, at 67; REHNQUIST, *supra* note 63, at 297.

93. Justice O'Connor and Justice Stevens actually wrote the same number of majority decisions in these cases. However, because Justice O'Connor sat out for one case, she has a slightly higher percentage of the majority opinion writing share.

second in landmark decisions. Justice Kennedy ranked just behind the Chief Justice in majority opinion writing in 5–4 decisions, but he drops to fourth place in landmark cases.[94]

Our assessment of Justice O'Connor's role in landmark decisions is that she does exercise a substantial level of influence in her voting and opinion writing behavior. While Justice Kennedy might have slightly more influence according to our voting analysis for these cases, Justice O'Connor has more influence on the development of the law by writing more than her share of majority opinions in the most important cases decided by the Court.

Table 10. Percentage of Majority Opinion Writing in *Congressional Quarterly's* "Major Decisions of the Court" for 1994–2002 Terms.

Justice	Majority opinion writing in CQ's "Major Decisions of the Court"
Rehnquist	19.8 (17)
O'Connor	**17.6 (15)**
Stevens	17.4 (15)
Kennedy	12.8 (11)
Thomas	8.2 (7)
Scalia	8.1 (7)
Souter	7.0 (6)
Ginsburg	5.8 (5)
Breyer	3.5 (3)

Percentages are calculated based on total cases in which each justice participated — O'Connor and Thomas each sat out for one of these major cases. There were 86 cases used in this table (after 2 Per Curiam decisions were excluded). Data compiled from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium* (CQ Press, 2003) Table 2–12, at 133–140.

IV. CONCLUSIONS

In terms of overall opinion writing, Justice O'Connor writes neither more nor fewer majority opinions than her colleagues for all cases decided by the Court. Her concurrence rates are similarly unremarkable; she writes concurring opinions at approximately the same rate as most of the other Justices throughout her tenure on the

94. Somewhat surprisingly, Justice Stevens ranked third in majority opinion writing in landmark decisions, despite ranking sixth for 5–4 decisions.

bench. Thus, at least based on the numbers, she hardly deserves the title "great concurrer,"[95] a title she should hand over to Justice Scalia, who truly concurs more frequently than all other Justices.

On the other hand, Justice O'Connor's position as a potential swing voter indicates that she is in a position to exercise considerable power. She may not be at the exact ideological center of the Court, but she is close enough to play a key role, particularly on cases with fragile coalitions, and the bottom line is that most of the time, most of the other Justices agree with her. Her voting behavior in 5–4 and landmark decisions indicates that she does vote with the majority more often than most of her colleagues. Yet, it is important to keep in mind that we also found that Justice Kennedy votes with the majority in these decisions slightly more frequently than Justice O'Connor does. Finally, our assessment of opinion writing for these two important classes of cases finds that the equality principle does not apply; Justice O'Connor writes more than her predicted share of the majority opinions in 5–4 and landmark decisions. Additionally, we identified a circumstance under which Justice O'Connor could earn the "great concurrer" title after all; in 5–4 decisions she concurred more frequently than all of her colleagues.

Ultimately, we conclude that the evidence regarding Justice O'Connor's position and influence on the Court is, to some extent, mixed. Our initial analysis of overall opinion writing shows that she is one of nine, having no more or less influence than her colleagues. However, further analyses of particular types of decisions, such as civil liberties, cases decided by one vote, and landmark opinions, suggest a very different picture. It is in these cases, arguably the most important decisions by the Court, that she takes the lead.

Given that these are precisely the kinds of cases that receive the most media attention, all the hyperbole in the press about her as "the most powerful jurist/woman in America/the world" is perhaps not unexpected. On the other hand, it is clear that Justice Kennedy ranks as high as O'Connor does on some of our indicators of judicial influence, yet the media have never proclaimed that "we are all living in Justice Anthony Kennedy's America." Justice Kennedy has never been referred to as "the real chief." It seems that journalists are much more inclined to ascribe tremendous power to Justice O'Connor.

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95. Wohl, *supra* note 30, at 42.

A possible explanation for this may lie within the political psychology literature on media impact. Shanto Iyengar and Donald Kinder explain that the media are quite effective in influencing what people will consider as important issues by setting the agenda through the editorial process of story selection.[96] In other words, the media cannot make the public more liberal or more conservative on, for example, crime issues, but if the number of stories on crime increases, people will think that the crime rate is increasing.[97] A similar phenomenon may have happened with Justice O'Connor. She is a compelling story: she grew up on a ranch in the southwest, and she graduated at the top of her law school class, but could not find a job because she was a woman. Moreover, her presence on the Court has a clear visual impact – she was the first female U.S. Supreme Court Justice. Justice Kennedy, in contrast, came to the Court as President Reagan's third choice after the failed nominations of Robert Bork and Douglas Ginsburg. Given this contrast, it is not surprising Justice O'Connor has been the beneficiary of substantial media coverage since her nomination to the Court in 1981.[98] And since she receives more press coverage proclaiming that she is the most powerful justice, then this will be the public's perception of her, regardless of the statistics.

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96. SHANTO IYENGAR AND DONALD KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN PUBLIC OPINION (1987).

97. *See, e.g.*, Mark Warr, *The Accuracy of Public Beliefs about Crime*, 59 SOC. FORCES 456 (1980).

98. This sizeable media coverage probably explains why Justice O'Connor is the best known among the Justices. According to a 1989 survey that asked people to name Supreme Court Justices, she was the most frequently named Justice, with 23% of respondents naming her. Chief Justice Rehnquist lagged behind substantially with just 9%, followed by Justice Kennedy at 7%, Justice Scalia at 6% and the others with 5% or less. Justice Stevens was named by merely 1% of the respondents. Of the 1005 respondents to the survey, 71% could not name any Justice and only 2 respondents correctly identified all nine Justices. *See* EPSTEIN, *supra* note 91, at 741.