



Wide World

Justice Sandra Day O'Connor and the "Freshman Effect"

Contrary to expectations, the newest justice quickly adapted to her environment and almost immediately began participating fully in the work of the Court.

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Students of the judiciary have long been interested in the process by which new appointees are assimilated into the United States Supreme Court.¹ Some of the behavioral and biographical literature suggests the existence of a "freshman effect," that is, a distinct pattern of behavior manifested by neophyte justices. The so-called fresh-

man effect entails behaviors one might expect from a newcomer to any group where the norms of the group are peculiar to it and, at least initially, unknown to the newcomer. Such behaviors would be characterized by uncertainty, disorientation and vacillation. J. Woodford Howard has suggested that it took Justice Frank Murphy three terms to overcome

just this kind of problem in adapting to the norms and business of the Supreme Court.² On the other hand, Heck argues that Justice Brennan quickly overcame the freshman syndrome.³

The literature focuses on three aspects of the freshman effect: a subjective aspect manifested in the "feelings of the new justice himself about his new role,"⁴ an

"effect manifested in the behavior of the chief justice and other senior justice with opinion assignment responsibilities;"⁵ and, finally, an effect "manifested in the voting behavior of the new justice."⁶ This article examines the behavior of Justice Sandra Day O'Connor as displayed during her first three terms on the Court in terms of each of these aspects of the freshman effect.

The first aspect of the freshman effect is a purported sense of bewilderment experienced by the neophyte justice upon joining the highest court in the land.⁷ Justice Brennan once noted that "such factors as workload, unfamiliarity with...procedures and the unique nature of constitutional decision-making tend to create difficulties for any neophyte justice."⁸ One might think that prior judicial experience would to some degree mitigate this sense of bewilderment. However, Justice Brennan has also stated "categorically that no prior experience, including judicial experience, prepares one for the work of the Supreme Court."⁹ Heck, after studying Justice Brennan's early years on the Court found, to the contrary, that Brennan's "experience on the New Jersey Supreme Court provided a useful 'anticipatory socialization' experience, which prepared him for what lay ahead."¹⁰ Perhaps Justice O'Connor's experience as a state judge provided her some degree of "anticipatory socialization."

As yet there have been no signals that Justice O'Connor has experienced an observable sense of disorientation or bewilderment. To the contrary, there are signs that Justice O'Connor was very quick to adapt to her new environment. Admittedly, this subjective aspect of the freshman effect, i.e., "feelings of the new justice," is extremely difficult to observe. Therefore, any conclusion regarding this aspect of the freshman effect must be viewed as speculative and tentative. Fortunately, however, the other aspects of the freshman effect take the form of overt behavior which appears in the public record.

The second aspect of the freshman effect is a supposed tendency for the chief justice and other senior justices to ease the newcomer's transition by assigning "a less-than-equal share of opinion writing responsibilities."¹¹ Table 1 provides data on the number of opinions written by each justice during the 1981 and 1982

Table 1 Opinions of Justices, 1981, 1982 and 1983 terms

Justice	1981 Term			
	Opinions of Court	Concurrences	Dissents	Total
Stevens	15	15	26	56
Powell	16	13	22	51
Blackmun	14	18	12	44
Brennan	16	11	17	44
White	19	8	17	44
Rehnquist	17	7	15	39
O'Connor	13 (9th)	12 (4th)	10 (8th)	35 (7th)
Burger	16	6	12	34
Marshall	15	5	4	24
Total	141	95	135	371

Justice	1982 Term			
	Opinions of Court	Concurrences	Dissents	Total
Stevens	15	12	27	54
Marshall	17	3	27	47
Brennan	15	13	18	46
Blackmun	15	12	17	44
Rehnquist	20	5	16	41
White	19	6	11	36
Powell	18	9	8	35
O'Connor	16 (5th)	7 (5th)	11 (6th)	34 (8th)
Burger	16	3	5	24
Total	151	70	140	361

Justice	1983 Term			
	Opinions of Court	Concurrences	Dissents	Total
Stevens	16	18	34	68
Brennan	16	10	29	55
Rehnquist	19	3	14	36
Powell	18	11	7	36
O'Connor	17 (4th)	10 (tied for 3rd)	9 (tied for 5th)	36 (tied for 3rd)
White	18	6	9	33
Marshall	15	2	16	33
Blackmun	16	6	9	31
Burger	16	2	0	18
Total	151	68	127	346

Sources: Harv. L. Rev. Vol. 96, No. 1, at 304 (1982); Vol. 97, No. 1, at 295 (1983); Vol. 98, No. 1, at 307 (1984).

terms. The data for 1981 show that Justice O'Connor ranks last among the justices in terms of "opinions of the Court." This would coincide with the traditional expectations expressed in the literature. However, it is noteworthy that, in terms of separate concurring opinions, O'Connor ranks fourth for 1981. This would suggest that, while the Chief Justice and other senior justices were following the norm governing opinion assignment to freshmen, Justice O'Connor was making an effort to assert herself through separate opinions. This is hardly the kind of behavior one would expect from a bewildered, insecure or disoriented neophyte. Perhaps this assertive opinion-writing behavior in 1981 helps to explain the fact that for 1982, Justice O'Connor ranks fifth among the justices in writing

1. Snyder, *The Supreme Court as a Small Group*, 36 SOCIAL FORCES 232 (1958); Howard, *Mr. Justice Murphy: The Freshman Years*, 18 VANDERBILT L. REV. 473 (1965); Slotnick, *Judicial Career Patterns and Majority Opinion Assignment on the Supreme Court*, 41 J. OF POLITICS 640 (1979); Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan*, 10 PACIFIC L. J. 707 (1979); Heck and Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. OF POLITICS 852 (1981); Brenner, *Another Look at Freshman Indecisiveness on the United States Supreme Court*, 16 POLITY 320 (1983).

2. Howard, *supra* n. 1.

3. Heck, *supra* n. 1.

4. Heck and Hall, *supra* n. 1, at 853.

5. *Id.*

6. *Id.* at 854.

7. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA L. REV. 781 (1957).

8. Heck, *supra* n. 1, at 710.

9. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 484 (1973).

10. Heck, *supra* n. 1, at 714.

11. Heck and Hall, *supra* n. 1, at 853.

the "opinions of the Court." In 1983, Justice O'Connor's rank climbs to fourth among her colleagues in terms of majority opinions rendered. Thus whatever freshman effect may have been present in 1981 appears to have disappeared in the 1982 and 1983 terms.

Voting behavior

The third, and probably most significant, aspect of the freshman effect is manifested in the voting behavior of the new justice. The seminal study in this regard is Snyder's "small group" analysis of the Court from 1921 to 1953.¹² Snyder observed that incoming justices were "absorbed" by first joining a "pivotal clique" and later moving into a more distinctively ideological bloc. Snyder speculated that this phenomenon might be due to lack of prior ideological commitment, but was more likely the result of sociopsychological factors. "In this respect it is not altogether inconceivable that the new justice might have experienced a lack of assurance and thus responded in a neutral manner."¹³

More recently, Heck and Hall examined the voting behavior of "freshmen" on the Warren and Burger Courts.¹⁴ In contrast to Snyder, they observed that the new justices (with the notable exception of Justice Stevens) tended to vote with established ideological blocs. Heck and Hall concluded that "freshmen justices come to the Court with about the same degree of ideological and policy commitment as those justices already on the Court."¹⁵

How can the findings of Heck and Hall be reconciled with those of Snyder? Or can they? Unfortunately, Snyder is not explicit about the criteria she used to determine voting blocs. It may well be that the way she constructed her "cliques" biased her findings. On the other hand, since Snyder examined a time-frame spanning three decades and five appointing presidents, perhaps her conclusions are less time-bound than Heck and Hall's. Whatever the cause of the discrepancy, it is imperative that researchers continue to examine the

Table 2 Voting alignments on Supreme Court, 1981 Term

%	O	R	Bu	P	W	S	Bl	Br	M
O'Connor	—	81.6	77.2	72.0	64.0	53.4	60.7	48.8	46.6
Rehnquist	81.6	—	80.1	75.6	64.2	52.1	51.2	37.3	40.0
Burger	77.2	80.1	—	74.8	65.9	49.4	55.8	44.2	44.8
Powell	72.0	75.6	74.8	—	63.0	56.8	56.4	50.3	50.6
White	64.0	64.2	65.9	63.0	—	55.8	64.6	61.0	58.9
Stevens	53.4	52.1	49.4	56.8	55.8	—	61.0	59.8	61.3
Blackmun	60.7	51.2	55.8	56.4	64.6	61.0	—	75.2	72.0
Brennan	48.8	37.3	44.2	50.3	61.0	59.8	75.2	—	90.2
Marshall	46.6	40.0	44.8	50.6	58.9	61.3	72.0	90.2	—

Note: "alignments" represent the percentage of times that one Justice agreed with another Justice on the judgment of the Court in those plenary decisions where both Justices participated.

Conservative bloc: O'Connor, Rehnquist, Burger, Powell.
Average rate of agreement—76.9%
Liberal bloc: Blackmun, Brennan, Marshall.
Average rate of agreement—79.1%

Swing vote: White.

Average rate of agreement with conservatives—64.3%

Average rate of agreement with liberals—61.5%

Swing vote: Stevens.

Average rate of agreement with conservatives—52.9%

Average rate of agreement with liberals—60.7%

Source: 96 Harv. L. Rev. 306 (1982).

behavior of newly appointed justices in order to determine whether any generalizations can be made.

In this research we focus on the voting behavior of Justice O'Connor as manifested in her first three terms on



**In 1981, Justice
O'Connor voted
with the
conservative bloc
at an average
rate of
nearly 77 per cent.**



the Court. It is submitted that this time period is short enough to make the label "freshman" plausible and long enough to get a "feel" for her behavior, i.e., to minimize the impact of potentially misleading anomalies in her voting patterns. The data for this research consist of the nine current justices'

votes in all plenary decisions during the 1981, 1982 and 1983 terms. The criterion we have adopted for determining the existence of voting blocs is a 70 per cent average rate of inter-justice agreement. The reader should note that this criterion for bloc identification is not particularly stringent, especially given the inclusion of all (i.e. unanimous and non-unanimous) plenary decisions in the analysis. However, since a more demanding criterion would result in multiple alignments, we chose to utilize the less stringent approach which allows the Court to be divided into two intuitively valid ideological groups.

In the 1981 term (see Table 2), the liberal bloc is comprised of Justices Marshall, Brennan, and Blackmun, manifesting an average rate of inter-agreement of 79.1 per cent. The conservative bloc, comprised of Justices Powell, Burger, Rehnquist and O'Connor, manifests an average rate of 76.9 per cent. Justice White, who can be viewed as a "swing voter," displays an average rate of agreement with the conservative bloc of 64.3 per cent and an average agreement with the liberals of roughly 62 per cent. Justice Stevens, another swing voter, agrees with the conservatives at an average rate of 52.9 per cent and with the liberals at an average rate of 60.7 per cent. In 1981, Justice O'Connor votes with her colleagues in the conservative bloc at an average rate of nearly 77 per cent. Thus, as far as the 1981 term is concerned, Justice O'Connor can hardly be viewed as a "pivotal" or "swing" voter.

12. Snyder, *supra* n. 1.

13. *Id.* at 237.

14. Heck and Hall, *supra* n. 1.

15. *Id.* at 860.

Justice O'Connor appears to be an exception to the "freshman effect."

Table 3 Voting alignments on Supreme Court, 1982 Term

%	O	R	Bu	P	W	Bl	S	Br	M
O'Connor	—	85.7	80.7	79.7	70.8	57.8	58.4	54.7	40.8
Rehnquist	85.7	—	82.1	81.1	77.8	54.3	51.9	46.9	37.3
Burger	80.7	82.1	—	84.3	79.6	64.8	57.4	57.4	48.3
Powell	79.7	81.1	84.3	—	73.6	59.7	54.1	53.5	45.6
White	70.8	77.8	76.9	73.6	—	67.3	55.6	57.4	56.5
Blackmun	57.8	54.3	64.8	59.7	67.3	—	66.7	74.7	70.2
Stevens	58.4	51.9	57.4	54.1	55.6	66.7	—	70.4	61.5
Brennan	54.7	46.9	57.4	53.5	57.4	74.7	70.4	—	83.2
Marshall	40.6	37.3	48.4	45.6	56.5	70.2	61.5	83.2	—

Conservative bloc: O'Connor, Rehnquist, Burger, Powell, White.
Average rate of agreement—79.5%

Liberal bloc: Blackmun, Stevens, Brennan, Marshall.
Average rate of agreement—71.1%
Source: 97 Harv. L. Rev. 296 (1983).

Table 4 Voting alignments on Supreme Court, 1983 Term

%	O	R	Bu	P	W	Bl	S	Br	M
O'Connor	—	91.9	91.9	84.9	84.5	75.2	58.5	56.6	51.3
Rehnquist	91.9	—	87.5	82.4	81.1	68.9	51.6	49.7	45.5
Burger	91.9	87.5	—	89.4	87.5	77.8	55.9	60.0	55.8
Powell	84.9	82.4	89.4	—	81.0	78.3	55.6	58.5	58.8
White	84.5	81.1	87.5	81.0	—	77.8	61.0	62.3	61.2
Blackmun	75.2	68.9	77.8	78.3	77.8	—	66.3	70.9	71.7
Stevens	58.5	51.6	55.9	55.6	61.0	66.3	—	75.0	67.5
Brennan	56.6	49.7	60.0	58.5	62.3	70.9	75.0	—	94.2
Marshall	51.3	45.5	55.8	58.8	61.2	71.7	67.5	94.2	—

Conservative bloc: O'Connor, Rehnquist, Burger, Powell, White, Blackmun.
Average rate of agreement—82.6%

Liberal bloc: Stevens, Brennan, Marshall.
Average rate of agreement—71.7%
Source: 98 Harv. L. Rev. 308 (1984).

As Table 3 shows, in the 1982 term the Court becomes more polarized. Justice White no longer appears to be a swing voter; rather he joins the conservative bloc which manifests an average rate of agreement of nearly 80 per cent. Justice Stevens joins the liberal bloc, which manifests a 71 per cent rate of agreement. Again, Justice O'Connor is firmly entrenched within the conservative camp, voting at an average rate of 79 per cent with her conservative brethren. The data for the 1983 term (see Table 4) again show Justice O'Connor decidedly within the ranks of the conservatives as she manifests an average agreement rate of 85 per cent with her conservative brethren. Interestingly, the conservative bloc grows more cohesive even with the addition of Justice Blackmun.

Conclusion

Given the voting data we have examined, it seems perfectly reasonable to conclude that Justice O'Connor is behaving more in line with the tendency observed by Heck and Hall¹⁶ than with that reported by Snyder.¹⁷ It appears that she comes to the Supreme Court with a well-defined ideological orientation. Indeed, it is safe to observe that she is one of the most conservative members of the current court, voting with Justice Rehnquist well above 80 per cent of the time. Because some Supreme Court Justices have "surprised" the Presidents who appointed them,¹⁸ we surmise that President Reagan must

be very pleased with his choice of Sandra Day O'Connor.

Although it is dangerous to generalize from one case, our research would lead us to question, along with Heck and Hall, whether the "small group theory" of judicial decisionmaking is applicable to the Supreme Court. Justice O'Connor's behavior suggests that sociopsychological forces within the Court may be much less important than previously held political attitudes as determinants of decisionmaking.

In conclusion, there is substantial evidence that Justice O'Connor does not fit the traditional model of a freshman Supreme Court justice. Apparently, she comes to the Court with a clear orientation in terms of ideology and policy. She appears to have had no appreciable difficulty in adapting to the new position and began to assert herself almost immediately. If indeed there is any generalizable "freshman effect," Justice O'Connor appears to be an exception.

It is widely assumed that, given the fact that five of the current nine justices are beyond the age of 75, President

Reagan will have more opportunities to influence the direction of the Supreme Court through his power of appointment. The addition of even one more Reagan appointee of a conservative persuasion could have dramatic consequences for public policy. Undoubtedly, President Reagan would be delighted to appoint one or more justices with ideological orientations similar to those of Justice O'Connor, and who, like Justice O'Connor, would assert themselves almost immediately. □

16. Heck and Hall, *supra* n. 1.

17. Snyder, *supra* n. 1.

18. For example, Earl Warren, appointed by Eisenhower, James McReynolds, appointed by Wilson, and Oliver Wendell Holmes, appointed by Theodore Roosevelt. These justices, and perhaps others, were known to manifest decision-making behaviors both unexpected and undesired by their appointing President. This information is derived from a personal interview with Otis H. Stephens, Professor of Political Science, University of Tennessee, March 1st, 1985.

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