

public education. For that reason it rendered the decision that it did.

This has occurred in other instances throughout the Court's history. I am sure many examples come to mind, and I think by actual count they may approach about 150 instances in which the Court has reversed itself on some constitutional doctrine over the years, or in some instances doctrine or holdings that were not those of constitutional dimension.

Senator BIDEN. If I can interrupt you just for a moment, I think you are making the distinction with a difference, and I think it is an important distinction to be made. I just want to make sure that I understand what you are saying, and that is that, as I understand what you are saying, social changes—the postulates that Roscoe Pound spoke of—those societal changes that occur regarding social mores must in some way, at some point, be reflected in the law. If they are not, the law will no longer reflect the view of the people.

It seems as though we should understand that when in fact the legislative bodies of this country have failed in their responsibilities—as they did in the civil rights area—to react to the change, the change in the mores of the times, and see to it that that is reflected in the law, on those rare occasions it is proper for the Court to step in.

As Judge Colin Sites of the third circuit said, "It is understandably difficult to maintain rigid judicial restraint when presented with a citizen's grievance crying out for redress after prolonged inaction for inappropriate reasons by other branches of Government."

Judge O'CONNOR. Well, Senator, with all due respect I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed, and I did not intend to suggest that by my answer but rather to indicate that I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision. I was not intending to suggest that those changes were being made because some other branch had failed to make the change as a matter of social policy.

Senator BIDEN. Yes, I am suggesting that. My time is up. Maybe on my second round we can come back and explore that a little more.

Thank you very much, Judge.

The CHAIRMAN. Thank you.

Senator Mathias.

IMPACT OF LEGISLATIVE BACKGROUND

Senator MATHIAS. Thank you, Mr. Chairman.

Taking up, Judge O'Connor, where Senator Biden left off, I seem to recall that Blackstone—if it is not too conservative to quote Blackstone—once said that the law is the highest expression of the ethic of the Nation. Determining exactly what that law is or what that ethic is is, of course, the job that you will face.

One of the frequent tasks of the Supreme Court is to define the intent of Congress, to define the will of Congress in a given legislative expression. Senator Thurmond has pointed out that you will be the first nominee to the Court in 43 years to have had legislative experience. How do you think your legislative background is going to impact on your approach to this particular aspect of the job of a Justice?

Judge O'CONNOR. Well, I think, Senator Mathias, it would impact in much the same way it has in my role as a State court judge. I do well understand, I think, the difference between legislating and judging.

As a legislator it was my task to vote on public policy issues and to try to translate into statutory form certain precepts that were developed as a matter of social or public policy in ways which would then govern the residents of our State.

As a judge it is not my function to continue to try to develop public policy by means of making the law. It is simply my role to interpret the laws which the legislature has passed, to try to do that in accordance with the intent of the framers.

I have discovered that that is not always easy and that sometimes legislators fail to express their intention as clearly as one might like. Sometimes legislators—because all of us are human—fail to think about another situation that might arise that would be impacted by the legislation. Then the judge is left with the duty of trying to interpret the intent as best he or she can in carrying out the apparent intent of the legislature.

Senator MATHIAS. Well, of course, you are right that legislators—and I bear my full share of the responsibility for this—legislators do not always express in their drafting the precise intent of a given statutory enactment, and that casts upon the court an extra burden, a burden both in volume and in the quality of interpretation of law.

However, beyond that question of draftsmanship there is often some doubt in the minds of legislators as to the constitutionality of an enactment. I am sure this never happens in the Arizona legislature but it does occasionally happen around here, that people will say:

Well, I am not sure whether this is constitutional or not but I think it is a good idea, and therefore I am going to vote for it because there is always the Supreme Court who will make the ultimate decision about the constitutionality.

Now Chief Justice Burger has written that:

In the performance of assigned constitutional duties, each branch of Government must initially interpret the Constitution, and the interpretation of its power by any branch is due great respect from the others.

Having in mind the fact that we, as legislators, know that sometimes we make a jump in the dark on the constitutional question, how do you feel about Chief Justice Burger's statement?

Judge O'CONNOR. Senator, I appreciate the problem that you are talking about. Indeed, in the Arizona Legislature it was not uncommon that legislators would say, "Well, we have no idea if it is constitutional. Maybe it is not but we are going to pass it anyway." That, indeed, does then move the question along to the judicial branch ultimately.

I agree with what I understand Justice Berger to be saying, to wit, that each branch of Government including the legislative branch has a responsibility and a role in upholding and understanding the Constitution and in attempting to pass laws, if you will, in compliance with the intent of our Constitution. I referred to that earlier in some remarks I made. I think it is very important that each branch of Government carry out its function in preserving and complying and living within the dictates of the Constitution.

Senator MATHIAS. However, that would not prevent you from functioning with too great a respect for the views of the legislative branch if in fact you clearly felt the legislative branch had acted in either ignorance or in error?

Judge O'CONNOR. That is correct, Senator Mathias. If I were convinced, based on research that I did and the briefs and the arguments in a given case, that a particular enactment was unconstitutional, I would so hold.

CONSTITUTIONAL CONVENTION

Senator MATHIAS. Let me ask you a question that may be a little bit unfair because it is very difficult to recall all the votes that you may have cast in your legislative career. I know I would find it very difficult. However, to the best of your recollection, do you recall any votes in which you called for a constitutional convention to revise the U.S. Constitution in any particular?

Judge O'CONNOR. I am not sure that I do. We dealt over the 5-year interval in the Arizona Legislature with literally thousands of measures, and I have learned to do two things in my public life: One is to have a short memory, and the other is to have a thick skin, and they have stood me in good stead on some occasions. [Laughter.]

However, I cannot recall. I do believe, however, that we have had memorials presented during my time in the legislature which did on occasion call for a constitutional convention to address a particular measure, and I may or may not have had occasion to vote on that. At that time I think it was not generally perceived by people to present the kinds of problems that subsequent analysis by scholars has indicated might be the case if that method were pursued.

Senator MATHIAS. I appreciate that answer. Let me say that I am not so much interested in how you may have voted on any particular such memorial or resolution, as I am in whether or not you have considered that question because it seems to me that that question is one of the great unknowns that faces us today.

We are within a few States of a call for a constitutional convention. There is a great void in constitutional law as to exactly how a constitutional convention would be called, would be assembled, or would operate. Now would it be your view, if a constitutional convention were to be called—the closest call right now is on the question of a balanced budget—whether the convention would be limited to just the subject which was the occasion for the call, or could it become a general constitutional convention as happened in 1787 and look to a general revision of the entire Constitution?

Judge O'CONNOR. Senator Mathias, this is one of the intriguing and great questions of contemporary concern, I would say, because indeed as you have pointed out we are quite close to having a sufficient number of requests for a convention to consider an amendment, that consideration of these matters is now important, I think, to the Congress and to people generally.

As you are no doubt aware, in our Nation's history we have not heretofore used the convention method as a method of amending the Constitution. Therefore, we have absolutely no experience to draw upon other than that convention in which our Constitution was originally drafted.

There are a number of scholarly articles which have been written about the question, and as might be expected, the scholars differ greatly in their view of precisely the question you have asked, to wit, whether the scope of the constitutional convention can be limited or not. I think the American Bar Association did a rather thorough study on the question and reached one conclusion. Professors Gunther and van Alstein and others who have written on the subject have reached differing conclusions.

I think it simply is one of the unanswered questions. Indeed, it is even uncertain, I suppose, whether those questions raise political questions which the Supreme Court would ultimately decide or whether they do not.

Senator MATHIAS. In many respects I think that we could all hope that it will remain an unanswered question, and that you will not have to, in your days in the Court, help to provide an answer because the dangers are very real. However, I really wanted to raise the subject with you and to find out if you were troubled as I am by the possibility of a runaway convention that would go far beyond the mandate of its call.

Judge O'CONNOR. Well, Senator, it does of course pose concerns to many people, and as I have indicated, to the best of my knowledge we have no answers.

INDEPENDENCE OF FEDERAL COURTS

Senator MATHIAS. The power of the Federal judiciary has been a very controversial subject since the founding of the Republic. Thomas Jefferson, among others, was very critical of the authority granted to the Federal courts, and so throughout our history there have been periods of attempts to curb the courts, to limit the jurisdiction of the courts.

It has been suggested that Congress should have the power to overrule the constitutional decisions of the Supreme Court, and various devices to dilute or limit the power of Federal judges, attempts to limit jurisdictions of courts.

What impact do you think that proposals of this sort would have on our system of Federal Government as we have known it in our lifetime?

Judge O'CONNOR. If some of the pending proposals were adopted and jurisdiction were limited, Senator, over a given subject matter.

Senator MATHIAS. Well, let me be a little more specific: What impact on the doctrine of judicial independence would be—what do you think would flow from such decisions?

Judge O'CONNOR. Well, article 3 of the Constitution dealing with the judicial branch provides, of course, that we will have one Supreme Court and such inferior courts as Congress shall from time to time establish. That contemplates, I suppose, the capacity of Congress to determine the extent to which we will have lower Federal courts.

I am sure you are aware, also, that it has been held, I believe in the *Palmore* case, that Congress has power to withhold giving all of the jurisdiction to the lower Federal courts that it has authority to give. Congress has traditionally, I think, acted in the field of determining, for instance, statutes of limitations and length of time within which appeals may be filed, and other procedures which do impact directly on the jurisdiction of the Federal courts in one way or another. These have been traditional exercises of that power.

In section 2 of article 3 dealing with the appellate jurisdiction of the Supreme Court, again the Constitution at least refers to such exceptions and regulations as the Congress may impose, and that has not been tested often in the Nation's history. As you know, I think we have the *ex parte McCardle* case in about 1868, and I am not sure that we have much else in the way of case law defining exactly the contemplated power of Congress in that area.

Senator MATHIAS. That is exactly, of course, the point of my question, that there is a certain constitutional grant of specific authority to Congress to erect the Federal courts and generally to provide the guidelines for their jurisdiction. However, does that grant of constitutional power have to be viewed in context with the other provisions of the Constitution, the Bill of Rights included?

Again to be specific, Justice Brandeis referred to separation of powers, and he said that the doctrine of the separation of powers was adopted not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by the means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

How do you view the independence of the Federal courts as a part of that fabric of constitutional government which has to be respected?

Judge O'CONNOR. I do view the independence of the judiciary as an important aspect of our system of checks and balances. I also believe that it was at least contemplated by the framers of the Constitution, perhaps, that the judicial branch would ultimately be in a position to determine what is the supreme law of the land in the sense of interpreting, if you will, the meaning of the Constitution and interpreting, as needed, enactments of Congress.

Now to the extent that that jurisdiction is removed, that function of the judicial branch, I suppose, is no longer performed, or perhaps it freezes into place previous determinations and they simply remain on the books as the last pronouncements. These are issues, of course, that we have not faced directly.

Senator MATHIAS. I would like to pursue this with you a little but we cannot do it at the present time.

Thank you, Judge.

The CHAIRMAN. Thank you.