

## The Center Cannot Hold

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Evan Thomas, [First: Sandra Day O'Connor](#) (2019).

At the end of the Supreme Court's October 2010 Term, George Washington University law professor (now President and CEO of the National Constitution Center) Jeffrey Rosen wrote a pointed essay for *The Atlantic* titled [Why I Miss Sandra Day O'Connor](#). Justice O'Connor retired from the Court in January 2006, and Rosen was writing to bemoan the sharp conservative turn that he believed the Court had taken over the five years since Justice Samuel Alito had been confirmed as her successor. Although Rosen had strongly criticized O'Connor's "pragmatic, split-the-difference jurisprudence while she was on the Court," the utility of that approach—and the centrism it bespoke—had not only become increasingly clear in hindsight, but its absence in cases such as [Citizens United v. FEC](#) had become increasingly noticeable, and, to Rosen, distressing.

Eight years later, at the end of the Court's first Term with its new, solidified five-Justice conservative majority, Evan Thomas's breezy, thoughtful, and incisive new biography of Justice O'Connor leaves the same impression. The monograph, which the Justice authorized and in which she and her family encouraged colleagues and clerks to cooperate, is more than just a recounting of the high (and lower) points of Justice O'Connor's remarkable (and remarkably well-documented) life and career and an engaging study of the first woman appointed to the highest Court in the land. It is also an elegy—for a moment in the political life of the country and in the perception (and internal politics) of the Supreme Court that has clearly passed. Exactly 100 years after William Butler Yeats warned that "[the centre cannot hold](#)," Thomas's volume is not just an accessible "intimate portrait" of someone who, in his words, "is easy to caricature and harder to understand;" it is a powerful reminder of the increasingly forgotten virtues of moderation, compromise, and civility—not just within the marble halls of One First Street, but on Main Street, as well.

O'Connor, as Thomas exhaustively documents, brought pragmatic sensibilities to the Court when she was appointed by President Reagan in 1981—sensibilities informed by her experience as both a state judge and state senator in Arizona. A judge as much as she was a Supreme Court Justice, that pragmatism often led her to decisions that eschewed broad theories in favor of formulations that appropriately balanced her view of the competing interests, even at the expense of (her own) analytical consistency. For instance, Thomas recounts some of what occurred behind the scenes in [Central Virginia Community College v. Katz](#)—what turned out to be the final decision in which Justice O'Connor participated. In that case, a 5-4 majority held that Congress has the power to subject non-consenting states to damages liability in federal court—to abrogate their sovereign immunity—when it enacts bankruptcy legislation under Article I of the Constitution. O'Connor, who had joined a series of earlier 5-4 majorities holding that Congress generally lacked the power to subject non-consenting states to such suits, had changed her mind—and joined Justice John Paul Stevens' majority opinion without separate comment. As Thomas writes, "her reasoning was simple and, as ever, pragmatic: Bankruptcy laws cannot work unless states are treated like other creditors" Full stop.

Although other examples abound, Thomas also singles out O'Connor's opinion for a four-Justice plurality in one of the "enemy combatant" cases, [Hamdi v. Rumsfeld](#). Writing for herself, Chief Justice William Rehnquist, and Justices Anthony Kennedy and Stephen Breyer, O'Connor concluded that Congress had authorized the detention of U.S. citizens captured while allegedly fighting for the Taliban in Afghanistan when it authorized the use of military force in the fall of 2001, but that, balancing the detainee's rights against the government's interests, the Due Process Clause required more proof for the government's case against the detainee before indefinite military detention could be authorized.

Dissenting (for once, from Justice O'Connor's left), Justice Scalia did not pull his punches, decrying O'Connor's opinion as "an approach that reflects what might be called a Mr. Fix-it Mentality."<sup>1</sup> As Scalia wrote, O'Connor "seems to view it as [her] mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions."<sup>2</sup> And yet, O'Connor's careful, nuanced analysis has withstood the test of time. Not only have no U.S. citizens been subject to military detention on U.S. soil in the 15 years since that ruling, but, as Justice Breyer pointed out [last month](#), the plurality's nuanced analysis did not pre-judge an array of harder questions that have arisen in cases involving non-citizen detainees. As Thomas writes, "the *Hamdi* decision cemented O'Connor's status as the true rudder of the Court"

Yet when O'Connor prematurely stepped down from the bench in 2006 to help care for her ailing husband, control of that rudder passed to Kennedy. Although it was clear by the mid-1990s that the Court's ideologically divisive cases would typically come down to how Kennedy and O'Connor voted, they often took radically different paths even when reaching the same destination. Thus, although the Court clearly moved to the right in at least some respects when Alito replaced O'Connor, the real movement may have been the oscillations between the landmark cases in which Kennedy sided with the increasingly solid bloc of progressive Justices and those in which he sided with the conservatives. Thus, the period after O'Connor's departure not only brought [Heller](#), [Citizens United](#), and [Shelby County](#), but also [Boumediene](#), [Windsor](#), and [Obergefell](#). The Justices may not have agreed with Kennedy, but it was in their interests to placate him—or, at the very least, to not alienate him.

On the far side of the October 2018 Term, it is impossible not to notice the absence of more moderate voices on the Court. From the highly unusual [public airing in April](#) of a months-long behind-the-scenes dispute in a series of capital cases to the tenor of some of the Justices' higher-profile rulings in June, it is clear that "the justices have less reason to be conciliatory in either their reasoning or their tone in ideologically divisive cases."<sup>3</sup> In the process, the Court has come to resemble the country—two deeply entrenched blocs, each having a hard time seeing the arguments and principles that define the other side. And the Court may have reinforced such increasing polarization on multiple levels in its [sharply divided ruling](#) that challenges to partisan gerrymandering present non-justiciable political questions—a result from which Justice Elena Kagan and her three progressive colleagues dissented "with deep sadness." These developments would not have sat well with O'Connor, a Justice for whom "[c]ivility, not snark, was the currency of discourse. Extremism of any kind was to be avoided. Absolutism was for demagogues." (P. 360.)

In that respect, it is O'Connor, more than Kennedy, who is missing. More alarmingly, it is hard to imagine a scenario in the near or medium term in which it will be in any President's political interest to try to bridge that gap, rather than appointing the most ideologically extreme candidate capable of gaining Senate confirmation.

O'Connor may have been "First," but Thomas's book all but hits readers over the head with the troubling specter that she might also have been the last of her kind. Her colleagues knew it, too. In a note to the Justice shortly after she announced her retirement in August 2005, Justice Scalia wrote that she had been "the forger of the social bond that has kept the Court together." He wondered, "who will take that role when you are gone?" (P. 378.)

Fourteen years later, that question remains unanswered.

1. *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

2. *id.*

3. Stephen I. Vladeck, [It's Neil Gorsuch's Supreme Court Now, Not Anthony Kennedy's](#), *Politico Mag.* (April 2, 2019).

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