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THE CENTER MOVES, THE CENTER REMAINS

LYLE DENNISTON*

> Definitely, the center always holds. It takes five to decide, and some are always in the middle. But the people in the center now are significantly more conservative than those in the center in 1971.[1]

> If Justice O'Connor were available to talk to us, I think she would say—and say sincerely—that she makes no effort to create coalitions, to mass the Court, to move the Court in any direction. It is rather as if she has simply gone along with what she so firmly intends to do, and the shifting views and balances of her coming-and-departing colleagues ultimately have left her where she now is: dominant.[2]

Anyone who walks up those lengthy and imposing front steps of the Supreme Court Building in Washington is likely to feel some assurance that what goes on inside must be awesome indeed. The sheer weight of those columns, the awesome burden of that chiseled commandment, "Equal Justice Under Law;" they are palpable there. If law is ever to become majestic, if (with apologies to Swift) law could "extract[] sunbeams out of cucumbers,"[3] surely it may do so within such a place.

What, then, shall we make of a Supreme Court that is beginning to gain a reputation, in some quarters, for terminal blandness? A Court where power has flooded into the center, there to be emptied of its vigor, its color, its grandeur. It is tempting, on some days at least, to speculate that the institution's grandest days have gone, perhaps to mourn that they may not come again within present lifetimes. The adventure junkies in the Court's Press Room find themselves longing achingly for another *Brown v. Board of Education*,[4] a *Steel Seizure Case*,[5] a *Roe v. Wade*,[6] even (on

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* Supreme Court Reporter, The Baltimore Sun.

1. Mark Tushnet, professor and associate dean, Georgetown University Law Center, at a briefing for Supreme Court Reporters, September 21, 1995.

2. From a story memo by the author to *Baltimore Sun* editors, August 2, 1995. The final story, entitled "The Pivotal Vote," was published by *The Baltimore Sun* on October 1, 1995, and is reproduced in full as an appendix to this article, with permission from *The Baltimore Sun*.

3. JONATHAN SWIFT, GULLIVER'S TRAVELS 197 (The New American Library of World Literature 1960) (1726).

4. 347 U.S. 483, 495 (1954) (holding that a policy of separate but equal public educational facilities for blacks and whites is unconstitutional).

the press' more intellectually pretentious days) for a *Baker v. Carr*.[7] Or, for a William O. Douglas, running for the vice presidency while sitting in a high-backed chair![8]

Now, the Court is not the vivid exhibition it would be if Justice Antonin Scalia had not been shunted to the margins, there to make such one-liner merriment as might titillate the public audience. If the Court has a symbolic visage these days it could be the scowl of Chief Justice William H. Rehnquist as he gratingly orders the spectators into silence between oral arguments, as if awe had to be commandeered.

In some sense, this is a Court that—whatever its ideology, whoever its pilot—is in the fullness of retreat, in earnest and apparently intentional withdrawal from the central public combat of its day. It is hard to conclude much else about a Court that, in the present term, will decide fewer than half the number of disputes it did a mere half-generation ago.[9] It is a Court on which the in-chambers staffs remain inexplicably large while the decisional workload continues to shrink (perhaps polishing up that old saw about the law clerks doing the work).[10]

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5. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (holding that the President did not have authority to nationalize the steel industry during a strike).

6. 410 U.S. 113, 147-64 (1973) (holding that a woman has a constitutional right to obtain an abortion).

7. 369 U.S. 186, 208-37 (1962) (holding that inequality of population in voting districts is subject to judicial review and is not a non-justiciable "political question").

8. *See generally* Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 102-03 (1988) (discussing William Douglas's consideration for vice presidential nomination in 1944, and President Harry S. Truman's offer of the nomination in 1948, which Justice Douglas turned down).

9. By the conclusion of the October 1995-96 term, the Court will have issued no more than 74 signed opinions. In the early 1980s, the Court issued as many as 155 signed opinions per term. The decline has been continuous in recent terms. *See generally* Joan Biskupic, *Case Summaries*, 1990-91 SUP. CT. Y.B., 39 (1992) (outlining the decline in number of signed opinions through the October 1990-91 term).

10. The decline has now passed the point of being a mere statistical fortuity. And yet, the Court has not offered an objective explanation for the phenomenon, leaving outsiders to speculate among various imaginative theories. Whatever its causes, the decline may now have proceeded far enough that one may appropriately wonder whether a precious national resource is being wasted. It is demonstrably not true that there are few "certworthy" disputes to engage the Court today. A reminder from the late Justice Potter Stewart may well be in order. In an interview after his retirement, he remarked: "[A]nother great tradition to bear in mind is the Court's accessibility—the fact that any poor wretch can send us a handwritten note and get attention. These are precious qualities: If the Court ever loses simplicity and accessibility, it will be a dying institution." ROBERT SHNAYERSON, ILLUSTRATED HISTORY OF THE SUPREME COURT OF

Until it takes itself all the way to the sidelines of the nation's public theater,[11] the Court will remain a central topic of America's public conversation. Those whose livelihood or avocation depends upon an awareness of the Court and an appreciation of what it is and how it is yet evolving will remain fascinated by it. The fascination is heightened from time to time by the appearance of a new study of the institution, such as James F. Simon's compelling and eminently readable volume, *The Center Holds: The Power Struggle Inside the Rehnquist Court.*[12] What Simon has done for us (among other contributions) is to remind us that the Supreme Court is a very human institution, and how the qualities of individual personality and judgment affect so deeply and decisively the Court's ultimate declarations of law. One can sit in ivied isolation in Ann Arbor, or Austin, or Cambridge, or Palo Alto, and monkishly pore over the nicely nuanced outcomes as compiled in the United States Reports, and miss the essence of the Court as an institution. The Court, when seen up close, is not defined by the structure of the law it erects, nor by the uplifting architecture of its front facade. Rather, the Court is the bargaining justices, the humans, who with remarkable seriousness of purpose and (most of the time) intellectual honesty, do the nation's most important judicial labor. "The ornament of a house," Ralph Waldo Emerson has told us, "is the friends who frequent it."[13]

The "friends" who now frequent this house are no less interesting, and as a group, no less worthy than any of those who have been there before.[14] Aside from its ever-shrinking willingness to decide

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THE UNITED STATES 44 (1986).

11. Perhaps it could be argued that the decisional caseload has now reached an irreducible minimum level. That is unknowable, and given recent trends, it is certainly unpredictable.

12. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 37, 303 (1995).

Simon's work suffers somewhat, though not fatally, from his considerable exaggeration of William Rehnquist's supposed agenda to drive the Court hard to the Right. *See id.* Even in his heyday as the Court's most conservative ideologue, before he happily yielded that role to Scalia and/or Justice Clarence Thomas, Rehnquist's Rightness always was more personal than institutional. Even at a personal level, it is much diluted now, as the claims of future reputation begin to assert themselves upon a history-sensitive Chief Justice. *See, e.g.,* Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2523-30 (1994) (delivering the opinion of the Court, Rehnquist was joined by Justices Blackmun, O'Connor, Souter, and Ginsburg, some of the more liberal justices on the Court, in upholding an injunction against antiabortion demonstrators).

13. RALPH WALDO EMERSON, *Domestic Life, in* SOCIETY AND SOLITUDE 101, 128 (AMS Press 1968) (1904).

14. Over a 38-year period, the author as a journalist has covered approximately one out of every four Justices who have served on the Court: 27 of the 108.

controversies that indubitably are worth its time, this Court has much about it that is deserving of note, perhaps even praise. The intellectual swiftness of its public arguments has no match within lengthy memory; Felix Frankfurter himself would have had to stay alert to keep up. How pitiable a dim-witted or ill-prepared lawyer at the lectern can be, trying to navigate the combined interrogation of David H. Souter, Stephen G. Breyer and (when he is not essaying to argue one side himself) Antonin Scalia. The incisive questioning of Sandra Day O'Connor, Anthony M. Kennedy and Ruth Bader Ginsburg is a separate, demanding challenge.

But what most redeems the sitting Court is its utter unpredictability. And that is a mark of character, not of weakness. One may immediately dismiss the ninth-grade civics explanation that the Court is unpredictable because it no longer is a result-driven tribunal, but rather it has become one that judiciously withholds judgment until the process has run its course. The process has never been so mindlessly mechanistic as that, and it certainly is not now.

It is unpredictable precisely because it is a center-dominated Court, enhancing the importance of the bargaining that goes on from the beginning of the process to its end. It is this type of bargaining, of course, that James Simon has so tantalizingly reconstructed or richly documented in *The Center Holds*. Unfortunately, the details of the bargaining remain largely beyond public notice until one or more Justice's private papers become publicly available, and no such papers are available after the 1990-91 Term. A contemporary scholar, or journalist, cannot possibly know this institution unless she or he has spent weeks working in the Library of Congress Manuscript Division with the Thurgood Marshall Papers (and with other such collections, most notably the William O. Douglas Papers).[15]

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15. The controversy over the public release of the Marshall Papers—a controversy nurtured from within the Court itself—was a profound threat to scholarly and journalistic inquiry into the Court's process. It may well have discouraged others from making their papers available at any early point. The petty, indeed selfish, restrictions upon access to Justices' papers are quite without justification. There is nothing there to arouse shame or shock—or even to excite much envy. That they are considered to be private property is but a comical legal fiction. The controversy involved the Library of Congress's release of Justice Marshall's papers to the general public immediately following his death. Justice Marshall had instructed the Library to exercise discretion in selecting a release date and the early release was criticized by members of the Court and Justice Marshall's friends and family. *See generally* Bruce Fein, *The Marshall Papers. Was it a Mistake for the Library of Congress to Release Them? Yes: An Abuse of Discretion*, A.B.A. J., Sept. 1993, at 48; Kenneth Jost, *The Marshall Papers. Was it a Mistake for the Library of Congress to Release Them? No: More Respect for the Court*, A.B.A. J., Sept. 1993, at 49; Henry J. Reske, *A Court's Deliberations Revealed*, A.B.A. J., Aug. 1993, at 26.

On any closely divided decision of the Court (and virtually every decision of historic consequence, and of more than passing notice, will be divided in some way), the votes must be gathered from the center outward. That means that one must start by knowing—or predicting—what will energize Sandra Day O'Connor's vote, then move on to the same kind of calculus for Anthony Kennedy's vote.[16] The endeavor may well be forlorn if one tries to win a 5-4 decision in this Court, without one or the other of these two, and especially without O'Connor.

But the votes of O'Connor and Kennedy must be bargained for in a process that is vastly more complex than simple barter. The mere fact that their votes are available for a very wide range of outcomes (some of which might seem mutually exclusive) makes the bargaining even more of an adventure in creativity and persuasion. Philosophical abstraction is not a very useful coin in this bargaining: O'Connor and Kennedy are too hard-headed and real-worldly for that. And, as Justice Scalia could testify, coercion and accusation will not work at all with either of them.

It is in this kind of bargaining, of course, that the human dimension of this Court (and of its predecessors, for that matter) most vividly emerges. However, it is a mistake to assume that this process is conducted entirely behind closed doors during the Court's secret deliberations that remain out of public view perhaps well beyond the emergence of a decision. In fact, the bargaining begins at the oral argument, and lawyers who wish to energize that process and incline it toward their side of a case, fully appreciate that. It is a reality that oral argument of a case is the beginning point of the Court's internal conversation about it. When certiorari is granted, or jurisdiction noted, the Court does not go deeply into the merits of a case, even when it has been on the "discuss list" for the Justices' Conference.[17] The serious conversation starts when the Justices take to the bench and, quite literally, open the bidding among themselves at that point. At that point, the advocates at the lectern can play a central and influential role—especially with a centrist Court.

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16. Elsewhere, the author has made a fuller argument about Justice O'Connor's primacy on this Court, and remains firmly convinced that she is, indeed, the holder of "the pivotal vote." *See* Denniston, *The Pivotal Vote*, *supra* note 2, at 1A (attached as appendix). *See generally* SIMON, *supra* note 12.

17. There is even less meaningful discussion of cases at this early point, one supposes, in view of the fact that eight of the nine Justices depend upon a "*cert* pool" of clerks to recommend cases for grants. Only Justice John Paul Stevens keeps that selection process within his own chambers. The pooling process, inevitably, dilutes its importance to the Justices themselves, and surely dilutes the content of the *cert* memoes.

An illustration perhaps makes the point more clearly. The Supreme Court's enormously important abortion decision in 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[18] is a classic example of how internal bargaining has functioned within this centrist Court, and James Simon has chronicled it expertly in his book.[19] That bargaining, however, was initially stimulated by the stubborn commitment of an attorney, Kathryn Kolbert, then of the American Civil Liberties Union, to the issue she wished the Court to decide: the continuing vitality of *Roe v. Wade*.[20] Despite efforts from the bench, including most notably a brusque attempt by Justice O'Connor, to move Kolbert away from that core issue, she held to it with remarkable tenacity and verve.[21] There can be no doubt that this concentrated the Court's mind and made it very difficult for the Justices to avoid the kind of bargaining that later ensued over the fate of *Roe*. Kolbert must be given credit, perhaps not simply for taking the dare, but for believing that she needed to force the Court's hand, and for sensing that she could. As she told reporters on the day she filed the petition, "Some may argue that this is a risky endeavor . . . [but] it is absolutely critical for the American public to understand what is at stake here."[22] The vindication of her strategy perhaps is plain in the opening line of the Court's final opinion: "Liberty finds no refuge in a jurisprudence of doubt."[23]

Ms. Kolbert has not been alone in seizing the moment and thereby helping to set the Court's bargaining agenda. In another major case, an attorney from Durham, North Carolina, Robinson O. Everett took a similar dare that led the Court to reexamine fundamentally the

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18. 505 U.S. 833 (1992).

19. *See* SIMON, *supra* note 12, at 144-67.

20. 410 U.S. 113 (1973). Kolbert's *certiorari* petition in *Casey* presented a single question: "Has the Supreme Court overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?" Certiorari Petition, at i, *Casey* (No. 91-744) (citation omitted). (Ms. Kolbert is now vice president of the Center for Reproductive Law and Policy, based in New York City.).

21. Simon has given some of the flavor of the oral argument. SIMON, *supra* note 12, at 154-55; *see also* Lyle Denniston, *The Judicial Politics of Abortion*, AM. LAW., June 1992, at 95 (reporting a fuller account, focusing heavily upon Kolbert's tactic).

22. From the author's notes of a press conference in Washington, D.C., November 7, 1991. *See generally* Lyle Denniston, *Pa. Abortion Case Sets Stage for Test of* Roe vs. Wade; *High Court Review Possible by Summer*, BALTIMORE SUN, Nov. 8, 1991, at A1.

23. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992).

constitutional dimensions of "racial gerrymandering" in congressional redistricting.[24]

What is required of such a gesture, before this Court, is that it must aim pointedly at the center. It must engage O'Connor and Kennedy in particular, and it must do so convincingly. One of the identifying characteristics of the centrist Justices is their innate caution, their unwillingness to unduly lengthen the Court's reach, and their studied search—always—for limiting principles. If they are to be moved to what they perceive to be the outer edge of existing doctrine, or perhaps even a little beyond that, they must be more than merely tempted: they must be carried away with conviction. A flaccid presentation to the centrists of a bold jurisprudential idea is nothing short of foolhardy.

A recent illustration here makes the point. On January 17, 1996, the Court heard the case of *United States v. Virginia*.[25] The federal government together with many of its supporting *amici* urged the Court to establish "strict scrutiny" as the constitutional standard for gender discrimination.[26] It was bold, but it was not outwardly foolish. The Court had repeatedly said that this remained an open question, and Justice Ginsburg—an apostle of that idea throughout her career as a women's rights lawyer—had all but invited litigants to bring it up again.[27] But, when Paul Bender, deputy U.S. solicitor general, argued the case for the government, he did not press the issue; indeed, he did not even raise it off-handedly. Ten minutes into the argument, however, the following exchange ensued:

> O'CONNOR: . . . I notice that in your brief the Solicitor General urges the Court to adopt the highest standard of strict scrutiny to decide this case. Does your case depend on that?
>
> BENDER: No.

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24. Shaw v. Reno, 113 S. Ct. 2816 (1993). With regard to this author's premature dismissal of Robinson's tactic, see Lyle Denniston, *Accepting A Constitutional Dare*, AM. LAW., Sept., 1993, at 78. *Shaw* was argued April 20, 1993.

25. Nos. 94-1941, 94-2107, 1996 WL 16020 (U.S.Oral.Arg. Jan. 17, 1996).

26. *See id.* at 11-12. The case tested the constitutionality of excluding women, solely because of their gender, from a state-financed military college, the Virginia Military Institute.

27. *See* Harris v. Forklift Systems, 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring) (joining the Court's opinion reaffirming Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), and stating that harassment need not seriously affect the employee's psychological well-being or lead the employee to suffer injury).

O'CONNOR: Can it be decided, as the lower courts did, on the basis of intermediate scrutiny --

BENDER: Yes.

O'CONNOR: -- as the Court has done in the past?

BENDER: Yes, absolutely.

O'CONNOR: Well, why is this case singled out, then, for urging us to adopt some different standard? What advantage is there --

BENDER: The Court --

O'CONNOR: -- to that?

BENDER: Justice O'Connor, the Court has said repeatedly, I think on five different occasions over the last 10 years or so, that the question of the standard to be applied to gender discrimination is an open question, and so we thought that the question might come up of asking us what we thought the right standard is.[28]

Several things might be said about that exchange, but it means at least this: Bender showed no enthusiasm for the idea; provided no defense for it despite the openings obviously created by O'Connor's questions; gave O'Connor no cover if she were anticipating an assault from the Right on that issue during the coming bargaining; and gave no impetus to Ginsburg, for example, to carry the issue forward into the bargaining.

A superficial observer might read the exchange as indicating that O'Connor, by her tone and her manner of expression, was trying to eliminate the strict scrutiny issue altogether. But, to a more seasoned Court-watcher, O'Connor's style during oral argument often will be read as indicating very little about where she will be when the internal bargaining begins, and the final outcome emerges. She has a genuine curiosity about adventuresome ideas when they are offered to the Court, even though that might not come through atmospherically at oral argument. An advocate putting forth such an idea might well ponder, at a minimum, the costs of abandoning a bargaining chip that O'Connor

28. Transcript of oral argument at 11-12, United States v. Virginia, Nos. 94-1941, 94-2107, 1996 WL 16020 (U.S.Oral.Arg. Jan. 17, 1996).

might want to put on the table later.[29] Recall the O'Connor-Kathryn Kolbert exchange in the *Casey* argument, and Kolbert's persistence in the face of seeming disapproval.[30]

Among the overall implications of this phenomenon are that it is more difficult to make a case to a centrist-dominated Court, craft an argument before it, and win a decision from it. O'Connor and Kennedy, to some extent, have severe critics among lawyers, academics and yes, courthouse journalists, for seeming to evade definition. In the coarsest of terms it is suggested that O'Connor does not stand for anything, that there are no core principles there.[31] The criticism may well be founded on no more than the reality that, in this Court, it is far easier to count to three or four Justices likely to take a particular stance than it is to count to five. For example, take an advocate who is reasonably sure of a Breyer-Ginsburg-Souter-Stevens combination, or one reasonably confident of getting a Rehnquist-Scalia-Thomas combination. That advocate may be quite uncomfortable, and perhaps significantly challenged, trying to divine how to get O'Connor, or Kennedy, or both of them, into the combination.

Let us again take the Virginia Military Institute (VMI) case, for example.[32] It was quite easy, for nose-counters hoping for a decision to strike down the men-only admissions policy at VMI, to sort out the likely votes of six Justices on that: four liberals/moderates against the VMI policy, two conservatives for VMI (a third conservative, Justice Thomas, was recused). In this instance, the votes of O'Connor and Kennedy might well be decisive, since even on an eight-Justice Court, it still takes five to prevail.

Kennedy was perhaps the least predictable. He does not have a strong record on sex equality issues, although he did write expansively about women's rights in concurrence when the Court struck down the use of peremptory challenges based solely on gender.[33] O'Connor, on the other hand, has been a leader in galvanizing protection for women's rights, most

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29. As of this writing, the Court had not decided the case. Should a "strict scrutiny" standard emerge in the end, it would have to be in spite of, not because of, its presentation to the Court by government counsel.

30. SIMON, *supra* note 12, at 154-58.

31. Some of the negative comments are reported in Denniston, *supra* note 2.

32. United States v. Virginia, Nos. 94-1941, 94-2107, 1996 WL 16020 (U.S.Oral.Arg. Jan. 17, 1996).

33. J.E.B. v. Alabama *ex rel.* T.B., 114 S.Ct. 1419, 1433-34 (1994) (Kennedy, J. concurring).

notably with her first significant ruling as a Justice.[34] The meaning of that ruling, in fact, has been centrally at issue throughout the VMI litigation.

To assemble a majority in the VMI case, an advocate fighting VMI had to appeal to either O'Connor or Kennedy, while an advocate on VMI's side would have to try to draw both of them (to attain a 4-4 split, thus affirming VMI's partial victory in the lower courts). The reality facing advocates on both sides was that neither O'Connor's nor Kennedy's was a sure vote, on either side, and that the way to get the vote of either was not at all self-evident.[35]

This is not to argue, though, that this centrist Court is necessarily more difficult to persuade than were past Courts on which centrists or moderates held the balance of voting power. If as James Simon's basic thesis suggests, the "center" has been holding for quite a while, then there surely will be interesting parallels between past and present. And, certainly, there are.

Staying within the field of gender discrimination, one turns back to a time when only one member of today's Court, Justice Rehnquist, was serving and the influential centrists (they were thought of then as moderates, although there is not a lot of difference between the two labels, then and now) were Justices Lewis F. Powell, Jr. and Potter Stewart. It was 1973 and the case in point was *Frontiero v. Richardson*.[36] Ruth Bader Ginsburg, then a women's rights lawyer for the American Civil Liberties Union, had urged the Court to use the case to establish "strict scrutiny" as the constitutional standard by which to judge unequal treatment of the sexes.[37]

When Justice William J. Brennan, Jr.'s first draft of a majority opinion was circulated, it proposed to decide the case against the unequal

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34. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727-31 (1982) (concluding that Mississippi's policy of excluding males from Mississippi University for Women's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment).

35. Of course, while an advocate ponders the two centrists' interests and inclinations, holding together the rest of a potentially prevailing coalition has to be kept in mind as well. The balancing act grows more difficult.

36. 411 U.S. 677, 690-91 (1973) (holding that differential treatment of women in the military violates the Due Process Clause of the Fifth Amendment).

37. *See* Brief of American Civil Liberties Union, *amicus curiae*, 411 U.S. 677 (1973) (No. 71-1694); *reprinted in* 76 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 739, 798-99 (1975); *see also* Arthur Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1049 n.312 (1985).

treatment then under review[38] without applying strict scrutiny.[39] Brennan noted that Justice Stewart had recently circulated a memo in another pending case, stating some general views on equal protection analysis, and said those might provide the basis for addressing the strict scrutiny issue in a future case. When the initial Brennan draft drew a tepid response, and Justices Marshall and Byron R. White urged Brennan to adopt a strict scrutiny approach for *Frontiero*, Brennan did so in his second draft. It borrowed heavily from Ruth Ginsburg's brief, especially its historical analysis of the unequal treatment of women—an analysis Ginsburg had been pressing before the Court since *Reed v. Reed*[40] in 1971, the first decision to find any form of gender discrimination unconstitutional.

Justices Powell and Stewart advised Brennan they would support the judgment, but not the strict scrutiny rationale for it. Powell, in particular, did not want the Court to move out ahead of the ratification process then unfolding on the proposed Equal Rights Amendment. Ultimately, the strict scrutiny approach emerged in a plurality opinion representing the views of Brennan, Douglas, Marshall and White. (Justice Rehnquist was the lone dissenter on the judgment.)

Ginsburg's strong advocacy and her persistence had nearly paid off. It certainly had shaped the behind-the-scenes bargaining, but it had not been able to overcome the institutional caution that had led moderates Powell and Stewart to hold back. In other words, one might say, the center held.

Are the historical parallels close? The Court that sat in 1973 and the Court that sits now, 23 years later, are very different institutions. The Warren Burger Court of a quarter-century ago was a somewhat pale echo, ideologically, of the Earl Warren Court; Justice Rehnquist was virtually isolated in his predictable conservatism. Now, Rehnquist is in the center chair of a Court that, as a whole, has moved rightward from the Burger

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38. In *Frontiero*, the unequal treatment under review concerned United States statutes providing that a serviceman could claim his wife as a "dependent," while a servicewoman could not claim her husband as a "dependent" unless he is in fact dependent upon her for over one-half of his support. 411 U.S. at 678-79. The Court held that the differential treatment of women in the military violated the Due Process Clause of the Fifth Amendment. *Id.* at 690-91.

39. The material in this and the following paragraph on the Court's internal deliberations is drawn from the papers of William O. Douglas and Thurgood Marshall, Manuscript Division, Library of Congress.

40. 404 U.S. 71, 75-77 (1971) (holding that § 15-314 of the Idaho probate code, giving preference to men over women for appointment as administrator of a decedent's estate, is inconsistent with the Equal Protection Clause of the Fourteenth Amendment).

years. He leads a Court on which the dominant centrists are themselves—much of the time—a part of the new conservatism.

The center has moved, the center has remained. If Georgetown's Mark Tushnet is correct,[41] it always will hold. It is not beyond imagining that a future president with a very strong inclination Right, or Left, could nominate enough Justices sympathetic to the president's views to shift the center again. But, with the Twenty-Second Amendment maintaining a two-term limit on any president's tenure, a wholesale shift of the Court to one or the other philosophical extremes is not likely.

The bargaining center will persist unless there is a cataclysm in the Court's future in which, as Yeats warned, "[t]hings fall apart; the centre cannot hold."[42] The center that now stands may not be wildly popular among some of its auditors these days, but it is in control, and very successful in what it does; perhaps it is better off in not having to bear "the added ignominy of popular applause."[43]

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41. *See supra* text accompanying note 1.

42. W.B. YEATS, THE SECOND COMING (n.d.), *reprinted in* THE BOOK OF IRISH VERSE, at 238-39 (John Montague ed., 1974).

43. ROBERT B. C. GRAHAM, SUCCESS AND OTHER SKETCHES 1, 7 (photo. reprint 1969) (1902).

APPENDIX

*The Pivotal Vote**

Sunday, October 1, 1995

Supreme Court: When the Court opens its new session tomorrow, the vote of Justice Sandra Day O'Connor will carry the most influence.

By Lyle Denniston
Sun National Staff

The woman who breached the male bastion of the Supreme Court 14 years ago is not ready, at age 65, to retreat to the place history has reserved for her. Justice Sandra Day O'Connor is at the peak of her power on the court and over the lives of Americans.

She has converted her one vote on the court into a formidable authority—and has done so almost by accident. Achieving the pinnacle of influence without obviously seeking it, Justice O'Connor has outlasted the rapid changes at the court to emerge as first among equals.

Fervently independent, the product of a hardy and isolated upbringing in Arizona amid Old West traditions, she attracts allies with great regularity. With her at the pivot, compromise on a frequently divided court can come more easily—often on her terms.

Her style of crafting open-ended, broadly phrased doctrine, unsettling to those legal experts who prefer a court that speaks with precision, helps her draw a struggling court toward common ground.

In short, the tribunal that starts a new term tomorrow most reflects Justice O'Connor's personality, her philosophy, her dominance. The court has shifted more to the right, and her basic conservative instincts put her nearer the center among the nine on the bench.

Tulane University political science professor Nancy Maveety, who is now finishing a book on Justice O'Connor, says that the justice has become "very influential in a way that has not been noteworthy to court observers; she is sort of a neglected figure."

The fact that Justice O'Connor was the first woman on the court, Professor Maveety suggests, "has overshadowed a lot of what she has done" in moving to the forefront. The judicial strategy that has worked best for Justice O'Connor, the professor says, is "working from the outside of coalitions" rather than lobbying from within to collect majorities around her positions.

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University of Minnesota law professor Suzanna Sherry, who has closely followed Justice O'Connor's rise to eminence, sums her up this way: "She is less likely to adopt bright-line rules, she works to create balancing tests, and she tends to be a compromiser—and that is what is making her the pivotal vote."

The professor adds: "Am I impressed? Yes, I'm not only impressed: I admire her. She is judging, not just applying principles."

Georgetown law professor L. Michael Seidman, who does not share others' admiration of Justice O'Connor and who sharply criticizes much of her work, nonetheless concludes that "she is perhaps the most influential justice, she has the most power."

The O'Connor moment in the court's history, however, may not last. It might be at risk if, after next year's presidential election, new appointees to the court tug it sharply to the extremes—beyond the range of the subtle, quiet power she now wields.

At stake when new justices arrive over the next five years will be some of the philosophical positions that Justice O'Connor has held and championed for years, and now sees enshrined in the law of the land.

Some of the most significant of those doctrines:

** Women have a limited right to abortion, subject to close restrictions by the state legislatures or Congress.

** "Affirmative action" programs that allot public benefits on the basis of race must remain an exception, enacted only for the strongest public policy reasons.

** Racial gerrymandering of election districts, to make them safe for black candidates, promotes racial discord and should seldom be used.

** Single-sex education at public colleges or universities cannot be justified by biased assumptions about what men or women are capable of doing.

** Religious devotion, including prayers, rituals and displays, must be allowed in the nation's public life unless the government is the visible sponsor or endorses it.

** Death row inmates convicted in imperfect trials are to be spared only if they can prove they actually were innocent.

** Prison inmates must not get multiple chances to raise legal or constitutional challenges to their state convictions in federal court—unless they can show they were innocent, after all.

** State governments have the right to expect full respect for their powers and their options from the federal government and federal intrusions are to be allowed only to serve the most demanding national needs.

** Lawyers have a right to free speech, but not when they use it for blatant self-promotion or outright huckstering.

The decisive fifth vote

On those issues, and many hard questions on which the court is likely to split, lawyers tend to pin their hopes—and sometimes their strategies—on their chances of winning Justice O'Connor's vote.

"Over the last six or seven years, she probably has been the key person," according to James F. Simon, a New York Law School professor and author of "The Center Holds," a new book about how the middle bloc on the court—including Justice O'Connor—has consolidated its control.

Some analysts of the court's work tend to pair Justices O'Connor and Anthony M. Kennedy in discussing the power of "the center," especially because those two agree on legal outcomes so often. But Justice Kennedy does not match her in flexibility, and he has not compiled an array of personal monuments to his views equal to hers.

Georgetown law professor David D. Cole is among the experts who maintain that it is often crucial for lawyers to try to persuade Justice O'Connor. The professor, who as an attorney argues before the court, says "she is more flexible, more pragmatic than Kennedy"—and thus, apparently, a more available vote.

Paul T. Cappuccio, a Washington attorney and former court law clerk, agrees: "There's no question that she provides a decisive fifth vote in a lot of cases." Moreover, he said, she provides "a limiting vote"—that is, one that keeps the court from shifting too sharply to left or right.

A current example shows what he means. Women's rights lawyers, preparing their plea in the effort to get women into the men-only Citadel military college, consciously tailored their appeal to fit Justice O'Connor's record on sex discrimination.

Although those lawyers definitely want the court to declare a sweeping new constitutional doctrine of equality for the sexes, and did insert a few pages along that line, they intentionally minimized that part of their appeal paper. Instead, they framed the bulk of their argument to stay within the far narrower position that Justice O'Connor outlined 13 years ago, questioning but not outlawing all single-sex education.

Kinship with Powell

Being the target of such strategies goes with being the court's key justice, the one most firmly in the middle.

It is by now a familiar role for Justice O'Connor. She had been on the court less than two months when she found herself caught between liberal and conservative blocs in a closely divided case.

Conservative Justice William H. Rehnquist dropped her a private note: "I am sure you realize . . . that you are 'in the middle,' where you will probably find yourself on more than one occasion."

In that position she has found and strengthened her authority, as retired Justice Lewis F. Powell Jr.—a well-known centrist and one of her mentors—did for years.

No other justice—including Stanford law classmate Rehnquist, now chief justice—seems to have had the intellectual kinship with Justice O'Connor that Justice Powell had. And in similar fashion (but on quite different courts), both gained significant authority by acting as balancers.

For example, she and Justice Powell saw a need to balance a general opposition to racial preferences in affirmative action programs with a desire to make sure that racial bias, when proven, does get remedied. The strong views Justice O'Connor ultimately put forward against preferences are adapted from ideas she picked up from a 1986 opinion by Justice Powell.

She hardened those views, illustrating that—as a balancer—she has leaned more than Mr. Powell did to notably conservative outcomes.

"She is still very conservative," says Georgetown professor Cole. "It is a mistake to paint her as a moderate; she looks moderate on today's court"—made up of a solid bloc of deeply committed conservatives and "no strong liberal voices."

Court liberals gone

Some court analysts suggest it is easier for Justice O'Connor to follow her conservative leanings because she does not have to contend with strongly committed liberals like retired Justice William J. Brennan Jr. and the late Justice Thurgood Marshall.

The four justices who vote liberal much of the time—Justices Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens—follow a more moderate version of liberalism than did Justices Brennan or Marshall and seem uninterested in the wheeling and dealing that enabled Mr. Brennan to pull together coalitions.

The changing court not only has allowed Justice O'Connor to follow the philosophical instincts that place her to the right of center, but also has made her position a magnet for majorities.

Perhaps the clearest example is the path of her work on the abortion issue, which has hung over much of Justice O'Connor's career, just as it did over the career of retired Justice Harry A. Blackmun.

She and Mr. Blackmun were on the court together for 13 years. Behind the scenes, they waged their own private war about abortion, in the wake of his majority opinion in the court's landmark 1973 decision in Roe vs. Wade establishing a constitutional right to abortion.

At one point, when he thought she had been recruited to complete a five-justice majority to overturn the Roe ruling, he circulated a bitter complaint to his colleagues, meant in part as a stern rebuke of the first woman justice. "I rue the violence that has been done to the liberty and

equality of women. I rue the violence that has been done to our legal fabric and to the integrity of this court."

From an early point, Justice O'Connor had argued within the court that Roe—decided eight years before she arrived—had gone too far, but it is not clear whether she was ever strongly tempted to cast it aside totally.

Back in 1981, when she was named to the court, it had been expected that—as a woman and as a former state legislator who had acted to protect abortion rights in Arizona—she would vote as a justice in favor of abortion rights.

Her new colleague, Justice Blackmun, quickly developed doubts. At the end of their first term together, he told friends that she seemed to be a justice in a hurry, driven by a political agenda—an agenda he identified as the conservative platform of the president who appointed her, Ronald Reagan. That platform included aggressive challenges to Roe vs. Wade.

Roe vs. Wade

The court, Mr. Blackmun and the nation did not have to wait long for Justice O'Connor to begin taking a public position—and, to this day, she still holds to the core of that position.

Near the end of her first term on the court, the justices agreed to rule on a half-dozen unanswered questions about the scope of Roe vs. Wade—posing the first test of Justice O'Connor's views.

As the court moved slowly during her second term toward a decision, Justice O'Connor circulated privately a first draft of a dissenting opinion. Her May 5, 1983, draft was a response to the votes of a majority of six to strike down most of the limits on abortion at issue at that time.

She lashed out at Roe as originally written, calling its three-stage definition of abortion rights "completely unprincipled and unworkable." Limits on abortions, she argued, should be judged by a legal formula that should apply "throughout the entire pregnancy." That formula: an abortion restriction would be unconstitutional only if it imposed an "undue burden" on a woman's right to abortion.

That would mean a considerable weakening of Roe, which Justice Blackmun and a court majority had believed made unconstitutional *any* burden put on abortion rights in the early stages of pregnancy.

In a clever piece of judicial word-juggling, Justice O'Connor and her staff in 1983 had traced the "undue burden" phrase back through prior court opinions, and located its origin: an opinion Justice Blackmun himself had written in 1976. He had not used it there as she was using it in her 1983 opinion, to narrow the right that had been declared under Roe. But for her, it had a legitimate pedigree.

For Justice O'Connor, then and later, it was a phrase with no fixed definition. Its primary significance, however, was that it definitely would

allow more legislative limits on abortion than the Roe standard would—such as waiting periods for abortion, and mandatory anti-abortion advice before the procedure could occur. Only twice, in fact, have abortion restrictions been nullified by use of her standard.

The court changes

Her challenge to the Roe formula had further significance: It demonstrated that Roe had become something of a shaky precedent, vulnerable if the court membership changed.

And the court did change. One of the new arrivals, conservative Justice Antonin Scalia, began working behind the scenes to get Roe overruled, lobbying later appointees on the subject.

No colleague has ever criticized Justice O'Connor as severely as Justice Scalia did in 1989, when he thought her vote finally would be available to overturn Roe, but it turned out not to be. Justice O'Connor's view that Roe should not be reconsidered at that point, Justice Scalia wrote, "cannot be taken seriously." Her view on how to limit abortions, he said, was "irrational."

Beginning in 1983, Justice O'Connor's handling of the abortion issue has provided one of the best continuing examples of her particular style of judging in major constitutional cases. The first step is to define a "workable" standard, or a rule, or a test—one that leaves a considerable amount of flexibility so it can be applied readily as new cases come up—then stick with it until there are enough votes to make it the law.

In 1992, that finally happened with the "undue burden" test Justice O'Connor had been promoting for nine years to measure the constitutionality of abortion restrictions.

Picking up the votes of Justices Kennedy and Souter for that approach in a Pennsylvania abortion case, Justice O'Connor was able to get it written into law. (Although their three-way opinion actually had only their three votes formally behind it, it provided the controlling doctrine: it did not go as far to protect abortion rights as two other justices—Mr. Blackmun and Mr. Stevens—wanted, but it was what they had to settle for, and thus it was decisive.)

Her abiding commitment to one of he formulas, or "tests," parallels what she once described in a speech as her technique: "When I'm at the court faced with a case, I try to find everything out about that case that I can. I do as much research as I possibly can do and then I make my decision and I don't look back."

Don't look back

In one area after another of the court's toughest decision-making tasks, Justice O'Connor has taken a position, defined a standard, and not looked back.

Another example is her handling of the relationship between government and religion—an area in which she began developing her views as early as her second term.

Government aid to religion should be struck down, she said in 1983, only when it conveys "a message of [government] endorsement or disapproval of religion." That is a more lenient standard than the sweeping ban the court began using in 1971, 10 years before she became a justice. That ban had swept away many significant links between government and religion, such as most forms of public subsidy for parochial schools.

If the government did not seem to be endorsing religion, according to Justice O'Connor's view, it could provide aid for religion, or allow religious use of public property. She gathered a majority of five in 1989, and, today, it is the controlling doctrine.

She applied the doctrine again this past June, in two major cases: one that for the first time allowed some government financial aid to a Christian religious organization, another permitting a Christian cross to be placed on the lawn of a government building.

Leaving options open

But, as the phrases "undue burden" and "government endorsement" themselves indicate, they are flexible, even imprecise legal standards. Some lawyers and scholars suggest that may be the real key to her emergence as the leader she now is even though it is an approach other legal professionals find unsatisfactory.

An attorney who appears before the court and is a close student of its work, and who asked not to be identified, said that attorneys face a dilemma when they try to shape their pleas to attract Justice O'Connor's support. "How do you pitch cases to her? . . . How far she is prepared to go is in doubt—always."

A problem for lawyers and lower court judges, the attorney said, is that Justice O'Connor states legal principles and then "tries to temper the principles to such an extent" when she applies them that more cases have to be brought in the future to find out what they mean.

For example, Justice O'Connor first spelled out her strong opposition to racial gerrymandering in election districting in 1993. Since then the court has ruled on two new cases on the same question, from Louisiana and Georgia, and next term will face two more, from North Carolina and Texas—all seeking to get her views clarified.

Georgetown professor Seidman, although conceding Justice O'Connor's current power, argued that "one way of getting power is to take a position that doesn't bind her for the future." Some of her formulas, he argued, only look like legal standards or tests, but actually serve to leave her options open for another day.

He suggest that the "undue burden" standard for judging abortion restrictions is an example. That, the professor argues, is so imprecise it "is not a test at all."

Other court observers give differing reasons why Justice O'Connor's style contributes to her strong influence. University of Minnesota professor Sherry commented: "If a case has gotten all the way to the Supreme Court, there probably are competing [legal] principles [at stake]. Some justices will pick one or the other; O'Connor is more likely to find some middle ground."

By avoiding the declaration of "bright-line rules," Justice O'Connor is able to attempt compromises by "splitting the difference" between two positions on critical legal questions, professor Sherry added. "She is able to stick to flexible principles because they are flexible."

Tulane professor Maveety argues that it is a key part of Justice O'Connor's judicial strategy, "her method of influencing her colleagues," to avoid hard-and-fast legal declarations and to stay away from continuing allegiance to ideological coalitions, preserving her chance to be a "non-threatening" influence from the outside.

An attorney who is a frequent advocate before the court, who asked for anonymity, said that Justice O'Connor's consistent devotion to the legal formulas she devises has a significant impact on other justices, tending to draw them toward her.

When a given case comes up, involving one of her chosen formulas, "there's not much negotiating or compromise" with her, that lawyer said. Other justices "have got to come up with something that takes hers into account."

Tough on clerks

However imprecise some of the measuring sticks that Justice O'Connor has fashioned during 14 years may be, in other areas of her work she is said to be addicted to precision.

That shows publicly when she is on the bench foe hearings. She comes armed with precise questions—and demands precise answers. A lawyer who tries to be evasive is likely to get a prompt, sharp reprimand from her.

Justice O'Connor, court insiders say, is as demanding of her staff as she is of lawyers standing in front of her. It is part of the lore of the courthouse, in fact, that she pushes her law clerks more than perhaps any other justice.

While she is very cordial with her clerks—will bake a cake for them, help them celebrate a major event (or perform a wedding), or cook lunch for them on a Saturday—she also can and frequently does give grueling assignments, according to former clerks.

She tends to know, early in the process of deciding a case on which she is writing an opinion, where she wants to come out in the end. After that, there is something of a free-for-all in the actual opinion-drafting process, with clerks doing the bulk of the writing, followed by her editing.

Sometimes a sweeping opinion will emerge from her chambers—and be issued publicly—without the qualifying phrases she normally prefers. One notable example, insiders say, was her 1993 ruling denouncing the creation of black-controlled congressional election districts to assure that black candidates get elected.

Some lower courts interpreted that ruling as broadly as it was written. This year, when the issue came back to the court, Justice Kennedy wrote a decision building directly upon the forceful phrases of the O'Connor opinion.

That prompted Justice O'Connor to write a short separate opinion of her own—a frequent occurrence on major decisions where she is not writing the main court opinion. Soothing those who might worry about the scope of the decision, she wrote that the court was not trying to "throw into doubt the vast majority of the nation's 435 congressional districts."

In the most important decision she wrote last term, laying down a tough new constitutional standard that threatens most race-based "affirmative action" programs of the federal government, she put the usual limiting qualification right into the opinion, in a single, telling sentence:

"The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."

That statement has allowed President Clinton, and many others who support affirmative action, to argue that the court did not mean to scuttle most such programs.

Both instances, Georgetown professor Seidman suggested, show Justice O'Connor "looking for a middle position. She was not comfortable with saying race can never be used [in congressional redistricting or in affirmative action], but she also was not comfortable with using it."

Some of this in her work, the professor adds, "has the mark of the politician."

Others say it simply has the mark of Justice Sandra Day O'Connor.

(The above article was accompanied in The Sun by a separate article dealing more with Justice O'Connor's personal life and history.)