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## **The Center Holds: The Power Struggle Inside the Rehnquist Court**

James F. Simon

# THE CENTER HOLDS

**The Power Struggle  
Inside the Rehnquist  
Court**

**JAMES F. SIMON**

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# C O N T E N T S

Preface	11
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## **P A R T I** RACE 17

1. A Dream Destroyed	19
2. "Five Votes Can Do Anything Around Here"	43
3. Fine Phrases	62

## **P A R T II** ABORTION 83

4. A Bull by the Tail	85
5. Anyone Who Can Count	116
6. A Neutron Bomb	144

## **P A R T III** CRIME AND PUNISHMENT 169

7. A Fatal Mistake	171
8. "Guilty as Sin"	190
9. Depreciating Liberty	212



**PART IV**  
**THE FIRST AMENDMENT 235**

10. Jefferson's Wall	237
11. "America, the Red, White and Blue, We Spit on You"	257
12. History Lessons	276

**EPILOGUE 295**

13. Beyond the Rehnquist Court	297
Afterword	305
Source Notes	309
Acknowledgments	321
Index	323

## CHAPTER ONE

# A DREAM DESTROYED

The case of Brenda Patterson, a black woman who charged that she had been harassed and subsequently fired from her job with a North Carolina credit union because of her race, was argued before the Rehnquist Court in February 1988 and reargued eight months later. The fact that the justices selected the case for oral argument in the first place, from more than five thousand petitions, suggests that Brenda Patterson had raised an important legal question that the Court wanted to resolve. After reading the thick legal briefs from the opposing sides in the case and hearing a full hour's oral argument, the justices requested a second set of briefs and arguments.

As is true of most important decisions of the Supreme Court of the United States, the case of *Patterson v. McLean Credit Union* began quietly, when Brenda Patterson went to a lawyer after she was dismissed from her clerical job at the McLean Credit Union in Winston-Salem, North Carolina. Patterson told attorney Harvey Kennedy that her white supervisor had continually harassed her during her ten-year employment at the credit union, had given her demeaning tasks (dusting, for example) not assigned to white workers, and had denied her



training and promotion opportunities that were offered to white employees with Patterson's skills.

Kennedy brought a lawsuit on behalf of Patterson against the credit union in federal district court in North Carolina, charging racial harassment, failure to promote and, finally, the illegal discharge of Brenda Patterson in violation of the nation's first civil rights statute, the Civil Rights Act of 1866. That post-Civil War statute gave blacks the same rights "to make and enforce contracts . . . as is enjoyed by white citizens."

There were several pragmatic reasons for Harvey Kennedy to bring the Patterson suit under the 1866 law rather than Title VII of the Civil Rights Act of 1964. Procedurally, the older statute offered Patterson advantages, including a jury trial. Most importantly, the 1866 law provided Patterson with a substantially greater monetary remedy; she could sue the McLean Credit Union for back pay beyond the two-year limitation of Title VII as well as for punitive damages, which were barred by the 1964 statute.

The federal district court judge rejected Patterson's argument that racial harassment could be the basis for a claim under the 1866 statute, and a jury then ruled against Patterson on her promotion and discharge claims. Patterson later lost her appeal in the U.S. Court of Appeals for the Fourth Circuit, setting the stage for the first Supreme Court argument on February 29, 1988.

Two months after the Court first heard arguments in the Patterson case, a narrow Court majority made up of its five most conservative members (Rehnquist, White, O'Connor, Scalia and Kennedy) created panic among civil rights attorneys by requesting reargument in *Patterson* to focus on the issue of whether a critical twelve-year-old civil rights precedent, *Runyon v. McCrary*, should be overruled. *Runyon* had held that the 1866 civil rights statute applied to racial discrimination by a private employer as well as to official acts of racial discrimination by state governments. If the Court's conservatives carried through on their threat to reverse *Runyon*, private employment discrimination could be cut off from the statute's coverage.

The Rehnquist Court announcement was perceived by the civil rights community as not only a threat to Brenda Patterson's case,

which was bad enough, but to one of the foundation decisions in civil rights in which the Warren and Burger Courts had provided broad legal protection for racial minorities over three decades. Most of the *amicus curiae* (friend of the court) legal briefs filed by interested parties that flooded into the justices' chambers during the summer of 1988—not just from civil rights organizations, but also from Reconstruction-era historians, constitutional scholars, congressmen and state attorneys general—urged the Court to preserve *Runyon*.

When the justices heard the second argument in *Patterson* on October 12, 1988, the case was already being heralded by the media as the most important of the term. *Patterson* not only presented an unusual claim of racial harassment in the workplace, but, more broadly, offered the Rehnquist Court its first serious opportunity to chart a new course in civil rights law.

The tension among observers and lawyers in the courtroom was palpable during the second *Patterson* oral argument, and that tension later carried over to the justices, who fought over the resolution of the *Patterson* case for the next eight months. For *Patterson* presented the Court's conservatives with the chance to exploit their majority and pursue a very different civil rights path from the one that had been taken by the Court for more than three decades. Civil rights progress during that period was often measured by decisions of the modern Supreme Court, which had become the crucial American institution in the civil rights revolution, inspiring, nurturing and finally demanding the elimination of racial discrimination in the United States.

Many of those civil rights decisions had been written by the Court's liberal leader, Justice William Brennan. But with the *Patterson* challenge, it appeared that the Court's leadership, and Brennan's, might be relegated to no more than a historic relic. By the late 1980s, the nation's political mood had turned decidedly more conservative, and so had the Supreme Court, led by Chief Justice Rehnquist. The struggle within the Court over *Patterson*, therefore, assumed large political, as well as judicial, overtones. If the chief justice succeeded in achieving his conservative goals, the Court would no longer offer the broad-based legal remedies that had been crucial to modern civil rights reform.

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