

January 1996

INTRODUCTION

Nadine Strossen

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Recommended Citation

Nadine Strossen, *INTRODUCTION*, 40 N.Y.L. SCH. L. REV. 855 (1996).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

INTRODUCTION

NADINE STROSSEN*

The following "Dialogue" consists of ten essays by expert Supreme Court-watchers from a broad range of professional and ideological perspectives. The essays focus on Professor James Simon's important and provocative book about the Rehnquist Court, *The Center Holds: The Power Struggle Inside the Rehnquist Court*,¹ and on his even more provocative Solomon Lecture.² In the Solomon Lecture, Simon defends and extends the book's central thesis that the Rehnquist Court has not sharply limited prior rulings protecting constitutional rights.³ While the book had assessed the Court's record through its 1993-94 Term, the Solomon Lecture, delivered in October 1995, defends the book's conclusion even in light of the Court's 1994-95 Term,⁴ with its series of decisions that curbed constitutional rights in several key areas,⁵ notably racial justice.⁶

In light of the widely varying perspectives of the Dialogue's contributors, it is not surprising that they differ dramatically in their assessments of Simon's analysis, and also offer widely divergent analyses

* Professor of Law, New York Law School; National President, American Civil Liberties Union (ACLU). Professor Strossen gratefully acknowledges the research and administrative assistance of Raafat (Ralph) S. Toss, a 1995 graduate of New York Law School. Although Strossen is the National President of the ACLU, which has participated in many of the Supreme Court cases discussed in this Dialogue, the purpose of this Introduction is not to set forth Strossen's (or the ACLU's) views, but rather, to provide a neutral overview of the Dialogue.

1. JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995).

2. James F. Simon, *Politics and the Rehnquist Court*, delivered as the Sixth Annual Solomon Lecture at New York Law School (Oct. 31, 1995), in 40 N.Y.L. SCH. L. REV. 863 (1996).

3. *Id.* at 1-2.

4. *Id.* at 8-10.

5. See, e.g., Charles Fried, *The Supreme Court, 1994 Term: Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995); Linda Greenhouse, *High Court, Changing Recent Course, Makes it Harder for Prisoners to Sue*, N.Y. TIMES, June 20, 1995, at B7; Linda Greenhouse, *Justices, 5 to 4, Cast Doubts on U.S. Programs That Give Preferences Based on Race*, N.Y. TIMES, June 13, 1995, at A1; Linda Greenhouse, *Justices Say Making State Pay in Desegregation Case was Error*, N.Y. TIMES, June 13, 1995, at A1; Linda Greenhouse, *In Step on Racial Policy*, N.Y. TIMES, June 14, 1995, at A1.

6. See, e.g., *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

of their own. The Dialogue's distinguished contributors include: leading Supreme Court journalists who write for publications with, and who themselves espouse, starkly contrasting ideological orientations; the legal directors of two leading advocacy organizations that often appear before the Supreme Court, usually on the opposite sides of the same case—the American Civil Liberties Union (ACLU), which appears before the Supreme Court more frequently than any entity other than the U.S. government, and the American Center for Law and Justice (ACLJ), the legal arm of the Christian Coalition, which Pat Robertson deliberately created to be the “counter-ACLU,” as indicated by its intentionally similar initials;⁷ scholars who analyze the Court from the vantage-point of their different academic disciplines—history, political science, and philosophy; and a former United States Attorney General who played an active role in the judicial selection process during the Reagan Administration, and who has spoken and written extensively about the Court.

While centering on whether the Rehnquist Court's center is, in fact, holding, the Dialogue encompasses broader issues as well, about both the Rehnquist Court and the role of the Supreme Court in general. Given the contributors' vigorous defense of strongly differing perspectives and conclusions on every topic addressed, perhaps the only safe overarching conclusion is the observation by Steven Shapiro, Legal Director of the ACLU, that “Supreme Court watching, like Kremlin watching, is endlessly fascinating but notoriously unreliable.”⁸

Shapiro's reason for this conclusion, and for his accordingly ambivalent answer to the question whether “the center holds,” is that “the Supreme Court is far too complex a body to be captured by a single phrase embodied in a single year's headline (or book title).”⁹ Despite their very different ideological perspective, Jay Sekulow, Legal Director of the ACLJ, and his co-author John Tuskey, nevertheless share Shapiro's ambivalence toward this core question, explaining that “the ‘center’ lies in the eye of the beholder.”¹⁰

The range of the thought-provoking, opinionated essays in this collection is indicated by the following sampling of the many questions they explore, all of which are answered and analyzed in widely varying ways by the different contributors:

7. See Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at A12; Michael deCourcy Hinds, *Robertson Trying Again to Put Prayer in Schools*, N.Y. TIMES, Apr. 16, 1993, at A12.

8. Steven R. Shapiro, *The Center Holds, But Where is the Center? A Response to James Simon*, 40 N.Y.L. SCH. L. REV. 935 (1996).

9. *Id.* at 937.

10. Jay Alan Sekulow & John Tuskey, *The “Center” is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945 (1996).

- How should one mark “the center” in assessing the Supreme Court? Should it be measured in terms of public opinion, Congressional views, past Courts, and/or in other terms?
- Is the Court’s center “holding,” as Simon maintains? Or, rather, has the Court moved too far to the right? Or too far to the left?
- Was the Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹¹ a victory for the center? Or for the “pro-life” right? Or for the “pro-choice” left?¹²
- Regardless of how one assesses *Casey* itself, how typical was it, and how indicative of the Court’s overall (non)movement regarding constitutional rights? In other words, was *Casey* either a *centrist* ruling or a *central* one?
- Are other controversial decisions that the Court has recently issued—for example, in the areas of race, religion, and federalism—right or wrong? Right or left? Or moderate?
- Are the Justices who are most commonly described as “centrist”—Justices O’Connor, Kennedy, and Souter—really moderate? Or are they, rather, conservative, liberal, or in some other category altogether?
- Is our nation best served by a centrist Court? Or would we be better served by a Court that moves toward either the left or the right?
- To what extent should the Court be bound by *stare decisis*? Has the Rehnquist Court overturned precedents more often than it should do so, or less often? And has the Rehnquist Court overturned precedents more often than previous Courts, or less often?

11. 505 U.S. 833 (1992).

12. I put the terms “pro-life” and “pro-choice” in quotes to indicate that these are the preferred labels that many advocates on each side use to describe their respective positions. Recognizing that advocates in both camps have criticized their adversaries’ labels as inaccurate and misleading, I’m following the neutral approach of honoring each group’s preferred self-description.

- To what extent is the Court actually overturning more precedents than those it explicitly reverses, by severely curtailing their scope?
- To what extent should the Court interpret the Constitution in light of historical understandings, and to what extent in terms of conceptions of justice or other considerations?
- Does the Court's significant reduction in the number of cases it has been hearing in recent terms constitute an abandonment of its responsibility to enforce constitutional rights?

To illustrate the divergent views that the Dialogue contributors espouse on the foregoing questions and others they address, I'll cite some examples here:

- Whereas Meese,¹³ and Sekulow and Tuskey¹⁴ criticize the Rehnquist Court for interpreting constitutional rights too broadly, Eisler,¹⁵ MacKenzie¹⁶ and Shapiro¹⁷ make the opposite critique.
- Whereas Sekulow and Tuskey assail *Planned Parenthood of Southeastern Pennsylvania v. Casey* as an extreme pro-choice ruling,¹⁸ Shapiro criticizes it as severely limiting the rights of reproductive freedom¹⁹ recognized in *Roe v. Wade*.²⁰
- Whereas MacKenzie defends the Court's fifty-year-old pattern, set in *United States v. Carolene Products Co.*,²¹ of "valu[ing] . . . civil rights and individual liberties [somewhat higher] than claims based on property, contract and commerce,"²² Pilon castigates

13. Edwin Meese III, *The Illusion of the Rehnquist Court's Political Agenda: A Return to Constitutional Interpretation From Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925 (1996).

14. Sekulow & Tuskey, *supra* note 10.

15. Kim I. Eisler, *A Defense of Activism*, 40 N.Y.L. SCH. L. REV. 911 (1996).

16. John P. MacKenzie, *The Legal Culture*, 40 N.Y.L. SCH. L. REV. 903 (1996).

17. Shapiro, *supra* note 8.

18. Sekulow & Tuskey, *supra* note 10, at 960.

19. Shapiro, *supra* note 8, at 941.

20. 410 U.S. 113 (1973).

21. 304 U.S. 144 (1938).

22. MacKenzie, *supra* note 16, at 905.

this “bifurcated theory of rights and review.”²³ Accordingly, while MacKenzie laments the current Court’s willingness to elevate the importance of property, contract, and commerce relative to human rights, Pilon praises that development.

- Whereas Pilon reads the Court’s recent moves toward curbing the power of federal government as “glimmers of hope”²⁴ and “moves in the right direction,”²⁵ a judgment joined in by Meese,²⁶ in contrast, MacKenzie²⁷ and Shapiro²⁸ regard these same developments as alarming danger signals.
- Whereas Sekulow and Tuskey applaud the Court’s decision in *Rosenberger v. Rectors & Visitors of the University of Virginia*,²⁹ ordering the University of Virginia to fund a student evangelical magazine and overturning the lower courts’ rulings that such funding would violate the Establishment Clause,³⁰ and describe this ruling as “centrist or moderate,”³¹ Shapiro characterizes it as significantly departing from constitutional principles and precedents, and as “the first time that the Supreme Court had ever upheld direct government funding for a religious activity.”³²
- Indeed, Sekulow and Tuskey maintain that notwithstanding *Rosenberger* and a series of other recent cases upholding free speech rights for religious expression in public institutions and rejecting arguments that such expression violates the Establishment Clause,³³ the Court still does not sufficiently

23. Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999 (1996).

24. *Id.* at 1011.

25. *Id.*

26. Meese, *supra* note 13, at 925.

27. MacKenzie, *supra* note 16, at 909-10.

28. Shapiro, *supra* note 8, at 942-43.

29. 115 S. Ct. 2510 (1995).

30. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995).

31. Sekulow & Tuskey, *supra* note 10, at 946.

32. Shapiro, *supra* note 8, at 941.

33. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

protect religious expression, and gives too broad a scope to the Establishment Clause.³⁴ In contrast, Shapiro intimates that the Court has over-protected religious expression and under-enforced Establishment Clause principles.³⁵

- Whereas MacKenzie³⁶ and Shapiro³⁷ criticize the Court's recent decisions striking down legislative redistricting plans drawn to insure minority representation as endangering racial justice, Eisler applauds these rulings, because he regards the embattled redistricting plans as "a throwback to apartheid."³⁸
- Whereas Garrow chastises most observers for having overstated the significance of the *Casey* decision in assessing the Rehnquist Court's overall direction, since he regards that ruling as "unrepresentative rather than typical,"³⁹ Sekulow and Tuskey see *Casey* as "an example of the 'abortion distortion' that has infected" the Court's entire constitutional jurisprudence.⁴⁰
- Whereas Meese praises Chief Justice Rehnquist and his allies for their "dedication to precedent and stability,"⁴¹ MacKenzie upbraids them as "[t]he new revolutionaries" who "upset old precedents."⁴²
- Whereas Meese lauds the Rehnquist Court for respecting precedent⁴³ and assails the Warren Court for "engaging in the wholesale upheaval of existing law,"⁴⁴ O'Brien maintains that

34. Sekulow & Tuskey, *supra* note 10.

35. Shapiro, *supra* note 8, at 941.

36. MacKenzie, *supra* note 16, at 905.

37. Shapiro, *supra* note 8, at 939.

38. Eisler, *supra* note 15, at 923.

39. David J. Garrow, *Simple Simon: Supremely Sanguine, Supremely Stubborn*, 40 N.Y.L. SCH. L. REV. 969 (1996).

40. Sekulow & Tuskey, *supra* note 10, at 946.

41. Meese, *supra* note 13, at 931.

42. MacKenzie, *supra* note 16, at 906.

43. Meese, *supra* note 13, at 927.

44. *Id.*

the Rehnquist Court has been overturning precedents at a faster rate than the Warren Court did.⁴⁵

- Whereas Denniston praises the current Justices as “no less interesting, and as a group no less worthy,” than those on any previous Court,⁴⁶ Eisler pillories the current Court’s “mediocrity,”⁴⁷ and characterizes the seated Justices as “non descript,”⁴⁸ “bland,”⁴⁹ and “vacuous.”⁵⁰
- Whereas Denniston celebrates the unpredictable nature of the Court’s centrist Justices, and hence the Court itself, as “a mark of character, not of weakness,”⁵¹ Rosen lambastes the unpredictability of one of the centrist Justices, Sandra Day O’Connor, as “simply self-aggrandizing.”⁵²
- Whereas Eisler praises Justices O’Connor and Souter for their philosophical evolutions since joining the Court,⁵³ Meese complains “that Justice Souter has not always met the high hopes of his appointer.”⁵⁴

Regardless of Eisler’s and Meese’s contrasting views about Justice Souter’s rulings, surely they would both have to agree with his concluding observation in his dissenting opinion in *United States v. Lopez*,⁵⁵ since it underscores the difficulty of predicting the long-run significance of any Supreme Court decision, and hence serves as an appropriate epigraph for this Dialogue: “[T]oday’s decision may be seen as only a misstep, . . .

45. David M. O’Brien, *Charting the Rehnquist Court’s Course: How the Center Folds, Holds, and Shifts*, 40 N.Y.L. SCH. L. REV. 981 (1996).

46. Lyle Denniston, *The Center Moves, The Center Remains*, 40 N.Y.L. SCH. L. REV. 877 (1996).

47. Eisler, *supra* note 15, at 917.

48. *Id.* at 921.

49. *Id.*

50. *Id.*

51. Denniston, *supra* note 46, at 880.

52. Jeffrey Rosen, *Who Cares?*, 40 N.Y.L. SCH. L. REV. 899 (1996).

53. Eisler, *supra* note 15, at 922 n.29.

54. Meese, *supra* note 13, at 930.

55. 115 S. Ct. 1624 (1995).

but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings."⁵⁶

Likewise, regardless of the contributors' divergent views about Professor Simon's book and lecture—indeed, precisely *because of* those richly varied views stimulated by Simon's observations—they, along with all other Court-watchers, would have to agree that Simon has provided an intellectual feast, as the following pages attest.

56. *Id.* at 1657.