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## SPEECH: POLITICS AND THE REHNQUIST COURT

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## POLITICS AND THE REHNQUIST COURT\*

JAMES F. SIMON\*\*

Jeffrey Toobin in his review of my book in *The New Yorker* said that *The Center Holds: The Power Struggle Inside the Rehnquist Court*<sup>1</sup> provided “fascinating” detail of the inner workings of the Rehnquist Court.<sup>2</sup> He also said that I was wrong, dead wrong, in my conclusion that the center has held.<sup>3</sup> He then discussed decisions from last term which, he conceded, were not decided when my book went to press. Nonetheless, Toobin concluded those decisions completely undermined my thesis.

Jeffrey Rosen in his review of my book in the *Sunday New York Times* wrote that *The Center Holds* was “a fine book,” “lively and accessible” and “meticulously researched.”<sup>4</sup> It was, however, his sad duty to report that I was wrong, at least in the civil rights field, as a result of last term’s conservative decisions.<sup>5</sup>

Daniel Kornstein in his review of my book in *The Baltimore Sun* wrote that *The Center Holds* was “a superb book,” full of insights into the working and direction of the Rehnquist Court.<sup>6</sup> Happily, Kornstein did not say I was wrong, but he did write that I had put forward a “radical” view.<sup>7</sup>

Ladies and gentleman I come here today unrepentant, prepared to defend my “radical” thesis that there has been no conservative judicial revolution, even considering the Supreme Court’s decisions last term, as well as the decisions of the previous eight terms that I discussed in my book.<sup>8</sup>

When I speak of a conservative revolution, I mean a sudden and momentous change in the direction of the Court’s civil rights and liberties

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\* Professor Simon delivered these remarks at the Sixth Annual Solomon Lecture at New York Law School on October 31, 1995.

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

2. Jeffrey Toobin, *Chicken Supreme*, *THE NEW YORKER*, Aug. 14, 1995, at 81-82.

3. *Id.*

4. Jeffrey Rosen, *Disorder in the Court*, *N.Y. TIMES*, Aug. 20, 1995, §7, at 11.

5. *Id.*

6. Daniel Kornstein, *The Rehnquist Court: High on the Middle Ground*, *THE BALT. SUN*, Aug. 29, 1995, at 4F.

7. *Id.*

8. SIMON, *supra* note 1.

decisions such as Chief Justice Rehnquist has been advocating since taking his seat on the Court in 1972.<sup>9</sup> Rehnquist's conservative activism is to be distinguished from the judicial conservatism of, say, Justice John Marshall Harlan, who emphasized continuity with the Court's past decisions.<sup>10</sup> Rehnquist's conservative vision would severely limit the protections of civil rights litigants under the Fourteenth Amendment and civil rights statutes, and, in general, approve governmental authority at the expense of individual rights.

What is remarkable about the Rehnquist Court, which is led by the outspoken conservative Chief Justice and whose membership includes seven appointees of conservative Republican presidents, is that the Justices have not, in Mr. Dooley's well-worn phrase, "follow[ed] th[e] 'iliction returns."<sup>11</sup> Nor have the Justices always done the bidding on the Court for the presidents who appointed them. In short, there has not been a wholesale conservative revolution on the Court to match what appears to be happening in the Congress of the United States.

In fact, most of the decisions of the past three decades that expanded civil rights and liberties have been preserved. And those that have been successfully challenged by conservative Rehnquist Court majorities have usually resulted in the narrowing of liberal precedents rather than outright reversals.

The key to the Court's philosophical direction is not the conservative hardliners—Rehnquist, Scalia and Thomas. Rather, the critical battle continues to be for the minds and votes of the two pivotal Justices, Anthony Kennedy and Sandra Day O'Connor. They contributed the key

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9. See, e.g., Bernard Schwartz, *Rehnquist, Runyon, and Jones - The Chief Justice, Civil Rights, and Stare Decisis*, 31 TULSA L.J. 251 (1995) (describing the Chief Justice's conservative attitude towards civil rights and his attempts to overturn leading civil rights decisions); Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L.J. 557, 561 (1994) (stating that the Chief Justice seeks to "restore a balance which, in his view, has been lost or distorted in decades of judicial activism"); Benno C. Schmidt Jr., *The Rehnquist Court: A Watershed*, N.Y. TIMES, June 22, 1986, § 4, at 27 (discussing the "reactionary conservative constitutional" views of, at the time, newly nominated Chief Justice Rehnquist). Elevated to the position by President Reagan, Rehnquist became Chief Justice in 1986.

10. See, e.g., Stephen M. Dane, *'Ordered Liberty' and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545, 562-68 (1982) (describing Justice Harlan's emphasis on judicial self-restraint, as opposed to favoring the Court's own preference for a particular public policy, as being essential to sound judicial administration, the integrity of the judiciary, and the stability of the federal government). Appointed by President Eisenhower, Justice Harlan served on the Court from 1955 to 1971.

11. FINLEY P. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (Edward J. Bander ed., 1963).

votes for conservative majorities during the last term, as they have in previous terms. But significantly, both have shown a reluctance to take the Court as far to the right as their more conservative brethren.

Before I begin to discuss the Court's decisions, I want to make clear that neither my book, nor this lecture, is meant to provide a definitive study of the Rehnquist Court which, of course, is still in session. Instead, I will focus on key decisions in four areas of civil rights and liberties—racial discrimination, abortion, criminal procedure, and First Amendment freedoms. These decisions, to a significant degree, have determined the Court's philosophical direction. I should add that in many of the cases discussed I was fortunate to have been given extraordinary access to internal Court sources that illuminated the Justices' deliberative process.

"The Year the Court Turned Right," was the *New York Times* headline above the story at the end of the Supreme Court's term that included a series of rulings rejecting the claims of civil rights and liberties litigants. While you might assume that article ran four months ago, in fact, it ran in July of 1989.<sup>12</sup> The headline appeared to sum up the Court's rulings that term when the Justices rejected a black woman's claim of racial harassment in the work place,<sup>13</sup> struck down Richmond's affirmative action program in the construction industry,<sup>14</sup> and served notice that at least a plurality of the Court considered *Roe v. Wade*<sup>15</sup> to be fatally flawed.<sup>16</sup> The Court's four most conservative members, speaking through the dissent of the Court's newest member, Justice Anthony Kennedy, moreover, suggested that Jefferson's metaphorical wall of separation between church and state was outmoded and that serious revision of the modern Court's Establishment Clause jurisprudence might well be imminent.<sup>17</sup>

A few months after those decisions had been announced, I began to explore the possibility of doing a book on what I presumed would be a successful conservative judicial revolution. The apparent success of the conservative majority during the previous term, though only by the

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12. Linda Greenhouse, *The Year the Court Turned Right*, N.Y. TIMES, July 7, 1989, at A1, A10 (describing the 1989 Supreme Court term as one controlled by a conservative majority on important issues including abortion, the death penalty, race and sex discrimination, and the immunity of state and local governments from lawsuits by their citizens).

13. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

14. *City of Richmond v. J.H. Croson Co.*, 488 U.S. 469 (1989).

15. 410 U.S. 113 (1973).

16. *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989).

17. See *Allegheny County v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 656 (1989) (Kennedy, J., dissenting).

narrowest five-vote margin in most cases, seemed only the beginning. After all, the Court was now led by Chief Justice William Rehnquist, the first conservative ideologue to preside over the modern Supreme Court. And Rehnquist appeared to have a working majority in most civil rights and liberties cases, as the past term had demonstrated.

The year 1989 also marked the end of a decade in which American politics had taken a sharp turn to the right. By that time, conservative Republican presidents had appointed eight consecutive members to the Supreme Court. It seemed, therefore, that I could confidently develop my thesis—that a conservative judicial revolution was in progress.

But almost immediately after I began my research and interviews on the Court's internal decision-making process, doubts arose in my mind about my thesis. It was true, for example, as the *New York Times* and other members of the media had reported, that in the decision of *Patterson v. McLean Credit Union*<sup>18</sup> a five member conservative majority had rejected the civil rights claim of racial harassment by the plaintiff, Brenda Patterson, and that the Court's opinion, written by Justice Kennedy, had given the Civil Rights Act of 1866 an exceedingly narrow interpretation.<sup>19</sup> But as I dug into the internal Court documents in the *Patterson* case, I discovered that Kennedy, who wrote the majority opinion, had originally supported the position of the Court's leading liberal, Justice Brennan.<sup>20</sup> Late in the term, Kennedy switched his position and vote to produce the conservative victory. The solid conservative majority reported in the media was not so solid after all.

I discovered, further, that the Chief Justice had been frustrated in what liberals on the Court privately considered Rehnquist's larger purpose: to overrule the critical civil rights precedent, *Runyon v. McCrary*,<sup>21</sup> which had provided protection under the 1866 Civil Rights Act against private employment discrimination. If *Runyon* had been overruled, it would have truly signaled a *revolutionary* conservative movement. But that did not happen.<sup>22</sup>

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18. 491 U.S. 164 (1988).

19. See *Patterson*, 491 U.S. at 171 (holding that the Civil Rights Act of 1866 bars racial discrimination in hiring individuals but does not race-based harassment while *on-the-job*).

20. See SIMON *supra* note 1, at 19-81.

21. 427 U.S. 160 (1976).

22. See SIMON, *supra* note 1, at 47 (stating that "[w]hen the final votes were tallied, even the chief justice had backed away from insisting on an outright reversal of *Runyon*. A unanimous court . . . reaffirmed the Court's holding in *Runyon v. McCrary*.").

No one, however, could doubt the Chief Justice's triumph in *Webster v. Reproductive Health Services*,<sup>23</sup> the 1989 decision in which a five-member majority upheld a series of Missouri statutory restrictions on a woman's constitutional right to have an abortion.<sup>24</sup> The Chief Justice's plurality opinion unleashed a savage attack on Justice Blackmun's analysis in *Roe v. Wade*.<sup>25</sup> The Rehnquist attack on *Roe* had prompted one of *Webster*'s dissenters, Justice Stevens, to write Rehnquist privately (after he had received Rehnquist's first draft). If Rehnquist intended to overrule *Roe* (as Stevens thought that he did), Stevens wrote that he "would rather see the Court give the case a decent burial instead of tossing it out the window of a fast-moving caboose."<sup>26</sup>

As it turned out, the Chief's main problem in *Webster* was not with Justice Stevens, a dissenter, but with Justice O'Connor, the critical fifth member of his majority that had voted to uphold the Missouri regulations. O'Connor simply refused to join that part of Rehnquist's opinion attacking *Roe*. And this refusal sent the Chief's ally, Justice Scalia, into paroxysms of rage against O'Connor's restraint, which Scalia ridiculed in his *Webster* concurrence.<sup>27</sup> The split between O'Connor and Scalia in *Webster* was deep and would have profound repercussions in the next direct challenge to *Roe* three years later, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>28</sup>

On First Amendment issues, the Court sent mixed constitutional messages in 1989. In *Texas v. Johnson*,<sup>29</sup> a five-member majority led by Justice Brennan struck down a Texas statute that had penalized the burning of the American flag as a violation of the First Amendment's protection of political speech. The decision, however, contained several surprising ideological crossovers. Justices Kennedy and Scalia joined Brennan's majority opinion, and Justice Stevens, usually aligned with liberals in civil

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23. 492 U.S. 490 (1989).

24. See SIMON, *supra* note 1, at 127-43 (discussing the *Webster* decision).

25. 410 U.S. 113 (1973). In *Webster*, Chief Justice Rehnquist wrote:

The rigid *Roe* framework is hardly consistent with the notion of a constitution cast, in general terms, as ours is, and usually speaking in general terms, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a Constitutional principle.

*Id.* at 518.

26. SIMON, *supra* note 1, at 135-36 (quoting Justice Stevens).

27. *Webster*, 492 U.S. at 532 (Scalia, J., dissenting) ("Justice O'Connor's assertion, that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe* cannot be taken seriously."); see also SIMON, *supra* note 1, at 137.

28. 112 S. Ct. 2791 (1992).

29. 491 U.S. 397 (1989).

liberties cases, dissented as did, more predictably, Chief Justice Rehnquist.

In the Court's most important Establishment Clause case that term, *Allegheny County v. Greater Pittsburgh ACLU*,<sup>30</sup> a narrow majority declared that a crèche displayed in the Allegheny County, Pennsylvania courthouse violated the First Amendment. At the same time the Court upheld another government-sponsored holiday display which included a Christmas tree and a menorah. In his dissent to the crèche portion of the majority's decision, Justice Kennedy complained bitterly about the majority's failure to follow Chief Justice Burger's Establishment Clause analysis in a 1984 decision, *Lynch v. Donnelly*,<sup>31</sup> in which the Court had declared that a government-sponsored crèche display on private property was constitutional. In *Lynch*, Burger had dismissed Jefferson's wall of separation metaphor as "a useful figure of speech" but "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."<sup>32</sup> In his *Allegheny County* dissent, Kennedy suggested that the debate among the Justices of the Rehnquist Court as to the appropriate Establishment Clause doctrine to apply was far from over.<sup>33</sup>

During the following terms, the Rehnquist Court continued to move unevenly in its civil rights and liberties decisions. In *U.S. v. Fordice*,<sup>34</sup> the Court refused to distinguish colleges and universities from primary and secondary schools in holding that the state college and university system of Mississippi had the same affirmative obligation to dismantle its dual system that the state's primary and secondary public schools had under *Green v. County School Board*.<sup>35</sup> But later, a five-member majority pointedly questioned North Carolina's attempt at redistricting along racial lines that would have given African-Americans representation in Congress more in line with their actual state population.<sup>36</sup>

In the criminal procedure area, the Court majority issued a series of unmistakably pro-prosecution rulings that, among other things, narrowed the opportunity for death row inmates to successfully appeal their convictions in federal courts in habeas corpus petitions and, more

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30. 492 U.S. 573 (1989).

31. 465 U.S. 668 (1984).

32. *Id.* at 673.

33. *Allegheny County*, 492 U.S. at 656 (Kennedy J., dissenting) (stating that "[s]ubstantial revision of our Establishment Clause doctrine may be in order, but it is unnecessary to undertake that task today"); see also SIMON, *supra* note 1, at 256.

34. 505 U.S. 717 (1992).

35. 391 U.S. 430 (1968).

36. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

generally, expanded police and prosecutors' authority.<sup>37</sup> In one decision, *Arizona v. Fulminante*,<sup>38</sup> the Court reversed its long-standing doctrine insisting that a coerced confession could never be "harmless error" and, therefore, was always grounds for the reversal of a conviction.<sup>39</sup> At the same time, the majority said that the coerced confession by Fulminante was not "harmless error" and so the defendant would have to be tried again and convicted on other evidence.<sup>40</sup> All the while, the Warren Court's most controversial criminal procedure decisions, such as *Mapp v. Ohio*<sup>41</sup> and *Miranda v. Arizona*,<sup>42</sup> remained on the books and did not appear to be in peril.

The same five-member majority that struck down Texas's flag-burning statute in 1989 again found a First Amendment violation in 1990 when a federal flag-burning statute was at issue.<sup>43</sup> But in another civil liberties area, the constitutional right to privacy, the Court upheld abortion restrictions in Minnesota and Ohio, and appeared to be preparing to overrule *Roe*.<sup>44</sup>

By 1992, the Court's most liberal members, Brennan and Marshall, had been replaced by President Bush's two appointees, David Souter and Clarence Thomas, the ninth and tenth successive Justices appointed by conservative Republican presidents. The numbers alone suggested that Chief Justice Rehnquist would succeed in his judicial revolution to uproot basic civil rights and liberties decisions of the past thirty years.

After the Court's *Webster* decision, it had generally been assumed that the Court would eventually overrule *Roe*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>45</sup> appeared to provide the Rehnquist Court with that opportunity. The retirement of Brennan and Marshall

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37. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (life imprisonment without parole or consideration of mitigating factors not violative of Eighth Amendment); *Coleman v. Thompson*, 501 U.S. 722 (1991) (denying writ of habeas corpus); *Florida v. Bostick*, 501 U.S. 429 (1991) (random consensual searches not per se unconstitutional); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (capital punishment); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (execution of mentally retarded persons convicted of capital offenses not categorically prohibited by Eighth Amendment).

38. 499 U.S. 279 (1991).

39. *Id.* at 285.

40. *Id.* at 302.

41. 367 U.S. 643 (1961).

42. 384 U.S. 436 (1966).

43. *United States v. Eichman*, 496 U.S. 310 (1990).

44. See *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

45. 112 S. Ct. 2791 (1992).

meant that only one member of the original majority in *Roe v. Wade*, Harry Blackmun, would hear *Casey*, the 1992 challenge to *Roe*.

But as we now know, the joint opinion by Justices Kennedy, O'Connor and Souter in *Casey* preserved *Roe* and a woman's constitutional right to control her own body, though O'Connor's "undue burden" standard applied in *Casey* would allow more state regulations of abortion than under *Roe*'s analysis.<sup>46</sup>

In exploring the internal dynamic of *Casey*, I came to realize just how extraordinary the joint opinion by O'Connor, Kennedy and Souter was. At the Justices's *Casey* conference seven members of the Court voted to uphold most of Pennsylvania's restrictions on abortion.<sup>47</sup> Originally, the Chief Justice had assigned himself the majority opinion which, it was assumed, would be written along the lines of his *Webster* plurality.<sup>48</sup> Since *Roe*, Rehnquist had contended that so long as a state regulation of abortion was reasonable, it was constitutional. It was this rational basis standard that Justice Stevens had attacked privately in a letter to the Chief after he had received Rehnquist's *Webster* draft. Stevens wrote: "If a simple showing that a state regulation 'reasonably furthers the state interest in protecting potential human life' is enough to justify an abortion regulation, the woman's interest in making the abortion decision apparently is given no weight at all."<sup>49</sup> Stevens suggested further that "[a] tax on abortions, a requirement that the pregnant woman must be able to stand on her head for fifteen minutes before she can have an abortion, or a criminal prohibition would each satisfy your test."<sup>50</sup>

There is no reason to doubt that Rehnquist in *Casey* intended to finish the demolition job on *Roe* that he had started in *Webster*. But as it developed, Kennedy, O'Connor and Souter had other ideas. Unknown to the Chief Justice or any other member of the Court, the three Justices took it upon themselves in a private meeting after the Justices's conference to write a separate joint opinion.<sup>51</sup> As a result, they snatched the Court's

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46. *See id.* at 2821. The joint opinion stated that:

[t]o protect the central right recognized in *Roe* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis . . . . An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

*Id.*

47. *See* SIMON, *supra* note 1, at 163-67.

48. *Id.* at 163.

49. *Id.* at 135 (quoting Justice Stevens).

50. *Id.*

51. *Id.* at 163-66.

opinion away from the Chief and preserved the essential holding of *Roe*.<sup>52</sup>

The joint opinion by Kennedy, O'Connor, and Souter included these words:

A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.<sup>53</sup>

If the *Casey* decision produced a more conservative result than *Roe*'s author, Justice Blackmun, would have wished, it, nonetheless, showed that the three pivotal Justices, Kennedy, O'Connor and Souter, were no revolutionaries.

During the same term that *Casey* was decided, the authors of the *Casey* joint opinion were joined by the Court's two most liberal members, Blackmun and Stevens, in *Lee v. Weisman*,<sup>54</sup> a decision striking down a Providence, Rhode Island middle school commencement prayer as a violation of the First Amendment's Establishment Clause. Justice Kennedy, who had written the 1989 *Allegheny* dissent that had been so critical of Blackmun's Establishment Clause analysis, now joined Blackmun and wrote for a five-member majority. In his opinion for the Court, Kennedy quoted Madison on the dangers of government support for religion,<sup>55</sup> and cited approvingly the Warren Court's controversial 1962 decision, *Engel v. Vitale*,<sup>56</sup> which had struck down New York's Regent's Prayer as a violation of the Establishment Clause.<sup>57</sup> In *Lee*, Kennedy emphasized continuity with the Court's past decisions, as he had done in the joint opinion in *Casey* that same term.<sup>58</sup>

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52. *Id.*; see also *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2811-16 (1992) (reaffirming the essential holding of *Roe*).

53. *Casey*, 112 S. Ct. at 2816.

54. 112 S. Ct. 2649 (1992).

55. *Id.* at 2657.

56. 370 U.S. 421 (1962).

57. *Lee v. Weisman*, 112 S. Ct. 2649, 2657 (1992) (citing *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

58. *Id.* at 2657-58; see also *Casey*, 112 S. Ct. at 2814-16.

The first three words of the *New York Times's* 1991 term wrap-up story read "The Center Held."<sup>59</sup> The newspaper's fine Supreme Court reporter, Linda Greenhouse, wrote that the centrist coalition of Kennedy, O'Connor and Souter were primarily responsible for "the story of this surprising and fascinating Supreme Court term, a term that appeared only months ago to have all the makings of a conservative counterrevolution but that in the end produced powerful, if qualified, reaffirmations of some of the Court's most important modern precedents."<sup>60</sup>

The next two terms were relatively quiet, with no radical shifts revealed in the Court's civil rights and liberties decisions in the areas that had been the focus of my book. When my book went to press in the early spring of this year, I was confident that I had backed up my revised thesis—that there had been no conservative judicial revolution and that there was an effective center on the Rehnquist Court—with documentation that covered the eight terms that Rehnquist had presided as Chief Justice.

Last June, the Court issued a series of civil rights and liberties decisions that appeared to call into question the title of my book and its conclusion. On July 2, 1995, the *New York Times's* headline for the story about the Court's term read: "Farewell to the Old Order in the Court: The Right Goes Activist and the Center Is a Void."<sup>61</sup> The accompanying story pointed to a series of decisions, including the Court's ruling that political redistricting plans based on race were presumptively unconstitutional, and that federal affirmative action programs would have to satisfy the highest constitutional standard of strict scrutiny.<sup>62</sup> Further, the Court ruled that state universities could not discriminate against student religious publications by denying funding for printing expenses that was available to non-religious publications.<sup>63</sup>

The first noteworthy fact about all three of those 1995 civil rights and liberties decisions was that the conservative victory was accomplished by the narrowest majority of five Justices, including Kennedy and O'Connor, who *still* hold the balance of power on this Court, as they have since Kennedy took his seat in 1988. If you look closely at O'Connor's opinions, moreover, you will find that she has taken significantly more

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59. Linda Greenhouse, *Slim Margin Moderates On Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1.

60. *Id.*

61. Linda Greenhouse, *Farewell to the Old Order in the Court: The Right Goes Activist and the Center Is a Void*, N.Y. TIMES, July 2, 1995, § 4, at 1.

62. *Id.*; see also *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (applying strict scrutiny to a challenge of redistricting legislation); *Adarand Constructors, Inc., v. Peña*, 115 S. Ct. 2097 (1995) (applying strict scrutiny to a challenge of a federal program issuing highway contracts to minority-owned businesses).

63. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995).

moderate positions in all of the cases than those of her more conservative colleagues. In her concurrence in the redistricting decision, *Miller v. Johnson*,<sup>64</sup> for example, O'Connor made the point that "customary and traditional" factors could legitimately be taken into consideration in redistricting as well as could race.<sup>65</sup> How she will parse the facts and constitutional issues raised in this term's redistricting challenges from Texas<sup>66</sup> and North Carolina<sup>67</sup> is, I think, impossible to know. And just where O'Connor comes out in these redistricting cases will determine the prevailing constitutional law on the issue.

In *Adarand Constructors v. Peña*,<sup>68</sup> the 1995 federal affirmative action decision, O'Connor took a noticeably more moderate position than the more ideologically-committed conservative, Justice Scalia. Scalia wrote in his *Adarand* concurrence that it was his view that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination."<sup>69</sup> That is not O'Connor's position. In *Adarand* she cited approvingly Justice Powell's opinion in the Burger Court's *Regents of University of California v. Bakke*<sup>70</sup> decision for the proposition that there can be government-sponsored affirmative action programs that meet the Court's strict scrutiny standard.<sup>71</sup> And strict in theory does not, in O'Connor's view, necessarily mean fatal in fact.<sup>72</sup>

Justice O'Connor's concurrence in *Rosenberger v. Rector & Visitors of the University of Virginia*<sup>73</sup> suggested that the Court's ruling in favor of university funding of printing expenses for student religious publications should be confined narrowly to the facts in that case. She concluded that in the context of *Rosenberger* "[it is] improbable [that there will be] any perception of government endorsement of the religious message."<sup>74</sup>

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64. 115 S. Ct. 2475 (1995).

65. *Id.* at 2497 (O'Connor, J., concurring).

66. *See* Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *prob. juris. noted sub nom.* Bush v. Vera, 115 S. Ct. 2639 (1995) (action for injunctive and declaratory relief from Texas redistricting plan).

67. *See* Shaw v. Hunt, 861 F. Supp. 408 (E.D. N.C. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995) (action challenging constitutionality of North Carolina's redistricting plan).

68. 115 S. Ct. 2097 (1995).

69. *Id.* at 2118 (Scalia, J., concurring) (citation omitted).

70. 438 U.S. 265 (1978).

71. *Adarand*, 115 S. Ct. at 2108-09.

72. *Id.* at 2117.

73. 115 S. Ct. 2510 (1995).

74. *Id.* at 2527 (O'Connor, J., concurring).

Again, it seems clear that O'Connor is striking a noticeably more moderate chord than the more conservative members of the Court majority.

Stuart Taylor Jr., a former Supreme Court correspondent for the *New York Times* and now a senior writer for *The American Lawyer* and columnist for *Legal Times*, noted in a recent *Legal Times* column that much of the commentary about the Court's past term implies that O'Connor and Kennedy have gone over to the hard right.<sup>75</sup> Taylor disagreed, writing that "neither of them have budged an inch from where they have long been."<sup>76</sup> He noted that O'Connor's opinion in *Adarand* is "quite consistent with her previous opinions on racial preferences" and that her concurrence in the *Rosenberger* case "gave religious conservatives far less than they wanted."<sup>77</sup>

Taking public opinion as his frame of reference for measuring the Court's decisions, Taylor wrote, "The Court's current majority comes up about in the center or even, in the cases of abortion and religion in the schools, a bit to the left of center."<sup>78</sup> "The bottom line," Taylor concluded, "is that it's hard to think of a single big issue on which the policy judgments implicit in the decisions of the Rehnquist Court are clearly to the right of center, measured by public opinion."<sup>79</sup>

Public opinion, of course, may move to the right. The Rehnquist Court is more conservative than its predecessors, the Warren and Burger Courts. To some extent, the Court may reflect the more conservative political mood in the country today than the one that prevailed in the sixties and seventies. This Court also reflects the values of seven members of the current Court who were appointed by conservative Republican presidents.

Why, then, hasn't the conservative judicial revolution succeeded? I have no facile explanation, but I do have a few suggestions. First, the votes of most members of the Rehnquist Court in any given civil rights and liberties case are no more predictable than the votes of justices on Courts that have preceded this one. Certainly there are appointees who have fulfilled the expectations of the presidents who appointed them. Chief Justice Rehnquist comes to mind, as do Justices Scalia and Thomas. But for every predictable justice, there is usually one who confounds the prognosticators. When he retired in 1994, Justice Blackmun, a Nixon

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75. Stuart Taylor Jr., *Looking Right at the Justices*, LEGAL TIMES, Oct. 2, 1995, at S27.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at S33.

appointee, was the Court's most liberal member. Justice Stevens, appointed by Gerald Ford, has become increasingly liberal in civil rights and liberties issues. Justice Souter, Bush's first appointee, has consistently taken forthright civil rights and liberties positions, voting regularly with Stevens and President Clinton's two appointees, Ruth Bader Ginsburg and Stephen Breyer.

This leaves Kennedy and O'Connor. Although both Kennedy's and O'Connor's values are essentially conservative, they have frequently resisted pressures from the right wing of the Court, namely Rehnquist, Scalia and Thomas, to commit themselves to a resolute conservative constitutional vision. As Stuart Taylor wrote: "The conservatives win only when they get the votes of *both* of the justices in the Court's center, Sandra Day O'Connor and Anthony Kennedy. And those votes almost always come with a hedge."<sup>80</sup>

In sum, the center of gravity on this Court is not located on the right wing, where Rehnquist, Scalia and Thomas reside, but, instead, where O'Connor and Kennedy sit. Their influence is reinforced by the Court's internal decision-making process, which encourages compromise, at least in close decisions. Kennedy and O'Connor have often used their strong negotiating positions effectively when their votes have been needed for a conservative majority.

In 1995, retired Justice Brennan's famous five-finger exercise is still relevant. Early in a term, usually after one of Brennan's new law clerks had raged over a hopelessly wrongheaded majority opinion by one of Brennan's more conservative colleagues, Brennan would treat his incensed clerk to his five-finger exercise. Raising his hand, Brennan would wiggle his five fingers and say, "Five votes, five votes around here can do anything."<sup>81</sup> But today the correlative proposition—less than five votes can do very little—works in Kennedy's and O'Connor's favor.

Brennan is gone, but his lesson endures. It still takes five votes to advance, or reverse, constitutional doctrine. And that is why the internal struggle for the ideological soul of the Rehnquist Court is fierce but, by no means, over.

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80. *Id.* at S27.

81. SIMON, *supra* note 1, at 54 (quoting Justice Brennan).

