NEW YORK LAW SCHOOL

NYLS Law Review

Volume 40
Issue 4 *Volume XL, Number 4, 1996*

Article 9

January 1996

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Recommended Citation
Jeffrey Rosen, *WHO CARES?*, 40 N.Y.L. SCH. L. REV. 899 (1996).

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WHO CARES?

JEFFREY ROSEN*

I continue to admire Jim Simon's book; but his argument about the center holding strikes me as the least interesting part of it. Stated tentatively in the book, and more tendentiously in these pages, Simon's thesis seems to be that the conservative judicial revolution "failed" because two vacillating justices, Sandra Day O'Connor and Anthony Kennedy, tried to split the difference between the liberal and conservative positions in several hotly contested cases during the late 1980s and early 1990s.[1] Put so baldly, the thesis is uncontroversial and, in fact, rather obvious. If one decides to measure the success or failure of judicial revolutions by the fate of the abortion and school prayer decisions,[2] then the conservative judicial revolution did indeed fail.

But setting up the argument in such an unsubtle way trivializes the more important insights that Simon's meticulous archival research helps to reveal. I found the most illuminating part of Simon's book, for example, to be his careful reconstruction of the internal debates in *Patterson v. McLean Credit Union*.[3] Simon's narrative shows that the conservative judicial revolution changed the terms of debate on the Court sufficiently to force the liberal and moderately conservative justices, such as William Brennan and Anthony Kennedy, to make detailed historical arguments about the intentions of the framers of the Civil Rights Act of 1866,[4] rather than appealing to fundamental principles of justice, as their predecessors on the Warren and Burger Courts had done.[5] (One of the funniest moments in the book is Kennedy's ostentatiously huffy note to Brennan calling the historians' amicus brief signed by Eric Foner "highly misleading" because Kennedy thought it was inconsistent with Foner's published scholarship.)[6] The bottom line in *Patterson* was liberal, not

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1. JAMES F. SIMON, THE CENTER HOLDS 156 (1995). *See, e.g.*, Patterson v. McLean Credit Union, 49 U.S. 164 (1988); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

2. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Lee v. Weisman, 505 U.S. 577 (1992) (holding that prayer at a school graduation ceremony violates the Establishment Clause).

3. 491 U.S. 164 (1988). *See* SIMON, *supra* note 1, at 40.

4. 42 U.S.C. § 1981 (1991).

5. *See* SIMON, *supra* note 1, at 72-81.

6. *See id.*, at 55.

conservative: *Runyon v. McCrary*[7] was upheld, not reversed. But to focus on the bottom line misses the much larger intellectual shift precipitated by the conservative judicial revolution: Liberal and conservative justices are beginning to address each other in an entirely new language.

The innocuous observation that Kennedy and O'Connor "still hold the balance of power on this Court," as Simon puts it in his Solomon lecture,[8] and that their positions are sometimes more moderate than those of their conservative colleagues, is hardly enough to sustain the argument that there is a coherent "center" on the Rehnquist Court, and that it is "holding" in any meaningful way. To convince us of *that* argument, Simon would have to demonstrate that the jurisprudence of Justices Kennedy and O'Connor represents a genuinely centrist alternative to the more extreme positions of Brennan and Rehnquist. But Simon never tries to demonstrate this. Because of the limitations of the archival record, Simon doesn't attempt to cast any light on why Justices O'Connor and Kennedy decided to cast their tie-breaking votes with the liberals rather than the conservatives in the abortion and prayer cases; nor does he explain how their reasons (rather than their results) can be considered "centrist" in any traditional sense. *The Center Holds* merely confirms the impression, easily gleaned from the published opinions themselves, that Justices Kennedy and O'Connor are more concerned about playing the role of tie-breaker, and cultivating the appearance of moderation, than about giving reasons for their positions that are intelligible to the legal community.

Why the jurisprudence of Justice O'Connor, for example, should be considered moderate, rather than simply self-aggrandizing, strikes me as a serious question that Simon needs to address if he is committed to his thesis about judicial centrism. In some cases, O'Connor endorses a principle and then attempts to deny its logical implications; in other cases, she endorses a particular result and refuses to commit herself to a supporting principle. But neither of these positions can be easily described as occupying a coherent "center." (The mysteries of Justice O'Connor's jurisprudence are known only to Justice O'Connor.) By contrast, if there really is a stable center on the Rehnquist Court, and if that center is holding, then it should be possible to identify a series of

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7. 427 U.S 160 (1976) (holding that the 1866 civil rights statute, from which § 1981 is derived, applies to racial discrimination by a private employer as well as to acts of racial discrimination by state governments).

8. 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).

centrist principles that command the support of more than one justice on a regular basis.

I can't get very worked up, in the end, by the descriptive question about whether the center of the Rehnquist Court held or didn't hold during the past few years. Because of the quirks of the docket, some terms will be more moderate than others (October 1995 term already looks less conservative than October 1994 term); and with two retirements likely in the near future, the 1996 election will define the character of the Court for a good long time.[9] In the meantime, as we struggle to understand the intellectual legacy of the conservative judicial revolution begun by President Nixon and consummated by Presidents Reagan and Bush, conventional vote counting seems less fruitful than scrutinizing the unpublished and published reasons offered by the Justices themselves. Simon's archival research uncovers a good deal of useful information about the Court's public and private deliberations, sparse as they are. This is why I think the book itself makes an important contribution, and why the title strikes me as a red herring.

9. *See* SIMON, *supra* note 1, at 303. Chief Justice Rehnquist, who has been on the Court since 1972, and Justice Stevens, on the Court since 1975, are both expected to retire during the next presidential term. *Id.*