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THE LEGAL CULTURE

John P. Mackenzie

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JOHN P. MACKENZIE*

It was plain folly for James Simon to declare, in the very title of his book about the Supreme Court under Chief Justice William Rehnquist, that "*The Center Holds.*"[1] The preface announces the book and the blurb on the dust jacket promotes it as the inside "story of a conservative judicial revolution that failed."[2] That judgment—not that the center had held but that the center holds—was premature when written and inaccurate by publication time. It was risky and pretentious as journalism, to say nothing of serious legal scholarship. It was pointless and improvident to pronounce for even the short-range future on the basis of a few decisions, even the centerpiece 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] decision in which the Court refused to overturn *Roe v. Wade*.[4]

Daily journalists like me, and weekly journalists such as Professor Simon[5] once was, are obliged to observe more self-restraint. Journalists generally do not consider their job finished just because they deem their reports accurate when written. They and their editors must worry the copy through so that it is accurate upon publication. Authors of books, tethered to the tyrannical lead time of book production, must take even more pains. Theirs is the second draft of history, which ought to be more accurate, more telling, than the first or journalistic draft, not less. Linda Greenhouse, whose stunning 1992 story for *The New York Times* on the eve of the *Casey* abortion decision captured the ideas and all but predicted

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* John P. MacKenzie, an editorial writer for *The New York Times*, covered the Supreme Court for *The Washington Post* from 1965 through 1976. He has taught law without a license at New York University and SUNY Buffalo. He wrote *The Appearance of Justice* (Scribners 1974) about ethical problems with Justices and Judges.

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

2. *Id.* (front dust jacket flap).

3. 505 U.S. 833 (1992) (affirming the central holding of *Roe*, and upholding a woman's qualified right to choose an abortion without "undue burden" from the state by striking down certain restrictions of the Pennsylvania abortion statute, while upholding others).

4. 410 U.S. 113 (1973) (holding unconstitutional a Texas law which criminalized abortion and establishing a woman's qualified right under the Due Process clause of the Fourteenth Amendment to choose an abortion).

5. James F. Simon was a correspondent and contributing editor at *Time* magazine from 1969 to 1974 and is currently Martin Professor of Constitutional Law at New York Law School.

the result,[6] also had it right later as she summed up the Court's term.[7] "The center held," her story reported[8]—and we'll see whether it continues to hold. Professor Simon took several more years to get it wrong.

There would be no need to dwell on this criticism if Professor Simon would stop insisting on his shattered thesis. Simon begins his defensive Solomon Lecture by chiding a reviewer, Jeffrey Toobin[9] of the *New Yorker*, for taxing him with other decisions "which, he [Toobin] *conceded* were not decided when my book went to press."[10] That is an amazing defense. Of course the Court decisions that disproved Professor Simon's claim for a stabilized center were issued after the *Casey* ruling and another highly contested case of the October 1991 term, the graduation prayer case of *Lee v. Weisman*,[11] a case he cites as further evidence of the center's holding.[12] Mr. Toobin and others have issued a very broad, blunt, and accurate criticism, which is that Professor Simon's thesis was dead upon announcement. The fascinating truth is that the center is still under siege and it only sometimes holds.

Professor Simon's first defense is that if there was a revolution, it didn't happen on his watch, which ended before publication. His second defense, that even if there was a revolution, it has failed because it hasn't fully succeeded yet, is somewhat more tenable. Yet what constitutes success? Take a few of those cases that followed *Casey*.[13] Racing

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6. *See* Linda Greenhouse, *Changed Path for Court? New Balance Is Held by Three Cautious Justices*, N.Y. TIMES, June 26, 1992, at A1 (discussing the moderate trend of Justices O'Connor, Kennedy, and Souter in recent decisions and describing this as a new phase for the Court which just one year earlier appeared to have a conservative majority). The *Casey* decision was announced 3 days later, on June 29, 1992.

7. *See* Linda Greenhouse, *Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1.

8. *Id.*

9. *See* Jeffrey Toobin, *Chicken Supreme*, NEW YORKER, Aug. 14, 1995, at 81.

10. 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) (emphasis added).

11. 112 S. Ct. 2649, 2661 (1992) (declining to revisit or expand the definition or scope of Establishment Clause principles, and instead applying controlling precedents in holding that commencement prayer violated the Establishment Clause).

12. *See* SIMON, *supra* note 1, at 281.

13. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (requiring strict scrutiny in all racial classifications, whether imposed by a federal, state, or local government actor); U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (denying a state's right to impose qualifications for senators and congressman in addition to those prescribed by the Constitution; Justices Thomas, Rehnquist, O'Connor and Scalia dissented); Holder v. Hall, 114 S. Ct. 2581 (1994) (denying a vote dilution

rightward, in *U.S. Term Limits, Inc. v. Thornton*, the Court came within one vote of casually standing federalism on its head, as four dissenters argued that the states had the power to limit the terms of members of the national legislature.[14] In *Holder v. Hall* it mugged, then nearly gutted, the Voting Rights Act, in utter contempt of Congress.[15] In *Adarand Constructors, Inc. v. Pena*, it ruled that efforts to racially and otherwise diversify the work force must be subjected to the same judicially jaundiced review previously reserved for hate-based racial discrimination.[16]

After the *Casey* decision the Court has actually managed to raise a question thought settled five decades ago when Justice Harlan Fiske Stone observed in *United States v. Carolene Products Co.*[17] that the Court's priorities place more value on civil rights and individual liberties than on claims based on property, contract, and commerce.[18] Decades of deference to Congress over the scope of the power to regulate interstate commerce were called into question as the Court struck down a federal law, admittedly on the fringe of that power, forbidding possession of a gun near a school.[19] As we go to press, the same majority's surprising sweep in ruling for the state in *Seminole Tribe of Florida v. Florida*[20] shows that the center is not only not holding, it is being battered.

The vapidity of Professor Simon's explanation for the alleged failure of the conservative revolution should have warned everyone, including Simon, of just how shaky his thesis is. Simon says, "The center held largely because liberal Justices were able to attract support from their more moderate brethren who refused to join the ideologically committed conservatives on the right wing of the Court."[21] That is not analysis, nor is it a conclusion that exploits the author's access to newly available Court papers or his own reporting. It was illuminating, though painful, to

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challenge brought by black voters and the local chapter of the NAACP under § 2 of the Voting Rights Act).

14. *See U.S. Term Limits,* 115 S. Ct. at 1875.

15. *See Holder*, 114 S. Ct. 2581.

16. *See Adarand Constructors,* 115 S. Ct. 2097.

17. 304 U.S. 144 (1938).

18. *Id.* at 152 n.4 (Justice Stone's famous footnote called for "more searching judicial inquiry" where there are claims of prejudice against "discrete and insular minorities").

19. *See* United States v. Lopez, 115 S. Ct. 1624 (1995) (limiting the scope of Congressional power under the Commerce Clause by holding that possession of a gun within a school zone is not an economic activity that substantially affects interstate commerce).

20. 64 U.S.L.W. 4167 (Mar. 27, 1996).

21. SIMON, *supra* note 1, at 12.

observe the reaction of Richard Bernstein who reviewed the book in *The New York Times*: "There is, after all, a circularity to that overall conclusion in which Mr. Simon says not much more than that the center held because there was always a majority at the center."[22] There is not much point in telling "the inside story," to refer again to the dust jacket blurb,[23] if the story is about something that did not happen.

So much for what did not happen. What did? And since we now know that the struggle is not over, what is this struggle about, anyway? Tell us something positive, Mr. Critic. We know what you're against. What are you for? I'll respond briefly, though it risks perpetrating a hated reviewer's ploy: criticizing the author for not writing the book the critic had wanted to read rather than the one that the author wrote. Mine is only an example of what might make more effective use of the fascinating subject matter Professor Simon treats.

I would begin by broadening the inquiry from the narrowly political. *Politics and the Rehnquist Court*, the title of the lecture we are commenting upon, betrays that narrowness. I see the Center not so much as a place useful for winning cases, but as the place where the law should be. The right-wing challenge is not merely to overrule a few cases. It is rather, as Robert Bork defined it during his confirmation fight, "[a] battle [over] . . . our legal culture."[24] The assault on centrist law, as it developed for over half a century, goes well beyond civil rights and civil liberties. It embraces the entire nature of the federal system, even the constitutional basis of federal commerce power, until recently assumed settled. The new revolutionaries claim not only the votes to upset old precedents, but more basically the high intellectual and moral ground. Witness, for example, the profusion of right-wing think-tanks,[25] "public interest" law firms and symposia that parody the institutions of civil rights and liberties organizations.[26] Notice also the windy, scholarly looking

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22. Richard Bernstein, *How Nino, Tony, the Chief et al. Make Decisions*, N.Y. TIMES, Sept. 1, 1995, at C26.

23. *See* SIMON, *supra* note 1.

24. *See Bork Lashes out at Liberals, Media*, UPI, Feb. 13, 1988, *available in* LEXIS, Nexis Library, UPI File. Robert Bork is quoted as saying, "[M]y nomination became the battle ground in a campaign for control of our legal culture." *Id.*

25. *See generally* DAVID M. RICCI, THE TRANSFORMATION OF AMERICAN POLITICS (1993) (documenting the multiplication and expansion of the right-wing think-tanks in Washington since the 1970s).

26. *See generally* Richard Perez-Pena, *A Rights Movement That Emerges From the Right*, N.Y. TIMES, Dec. 30, 1994, at B6 (discussing conservative groups claiming to be fighting for the rights of oppressed people, although the represented people are not normally associated with oppressed status but instead are whites, men, and property owners); *see also* Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law*

dissents of Justice Clarence Thomas[27] and the tank of right-wing commentators lauding his sound scholarship.[28] The old centrist law journals and most commentators seem not to have bothered much with the merits of the Thomas dissents. They should, though, for the opinions embody many a revolutionary idea, however impoverished their reasoning. His arguments supporting state-imposed term limits on Congress,[29] for repudiating civil rights remedies[30] and for striking down the Voting Rights Act[31] are tedious and silly—but not to be ignored, if only because today's dissent can, without being a great dissent, become tomorrow's law.

Result-oriented from start to finish, Professor Simon fails to treat the intellectual ingredients of the decisions he studies. If he took on the merits more thoroughly, he would not hold still while the right-wing jurisprudes claim intellectual superiority. He could also help us understand why the fight is worth fighting. I will rest my case on one example, but one that is typical of his treatment of cases, issues, legal arguments and the merits of overrulings or of adherence to precedent.

His opening case, *Patterson v. McLean Credit Union*,[32] serves well. To say that the issue was whether to overrule the 1976 case of *Runyon v.*

Firms, N.Y. TIMES, July 8, 1995, at A1 (discussing "religious conservatives . . . creating their own legal organizations to combat what they see as a broad assault on religious liberties").

27. *See, e.g.*, Thompson v. Keohane, 116 S. Ct. 457, 467 (1995) (Thomas, J., dissenting) (arguing that a state trial judge is in the best position to decide the question of *Miranda* custody); Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (Thomas, J., dissenting) (dissenting from the denial of certiorari in a case where the Army Corps of Engineers asserted jurisdiction over private property under the Clean Water Act).

28. *See, e.g.*, Edwin Meese, *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) (applauding President Bush's appointment of Clarence Thomas as "[giving] the Country a Supreme Court Justice who is unsurpassed by any present or prior member of the Court in his understanding of, and fidelity to, the Constitutional role of the Judiciary"); *see also* Garry Wills, *Clarence Thomas, Out of Touch*, TIMES UNION (Albany, NY), Sept. 23, 1995, at A7 (discussing Thomas's right-wing and conservative supporters).

29. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting).

30. *See Thompson*, 116 S. Ct. at 467 (Thomas, J., dissenting).

31. Holder v. Hall, 114 S. Ct. 2581, 2591 (1994) (Thomas, J., concurring) (issuing a 34-page opinion, joined by Justice Scalia, stating that the Voting Rights Act should not have been used to create new voting districts, that the Court had misused the law for the past 30 years).

32. 491 U.S. 164 (1989).

McCrary[33] almost trivializes what was at stake when *Patterson* was argued twice and decided in 1992. At stake was a basic approach to the realization, a century after the post-Civil War amendments, of the constitutional promise that had been dishonored by the nineteenth century Supreme Court. Those amendments provided not only for racial equality but for Congressional power to enforce that value.[34] The Court had made the enforcement provisions dead letters, leaving for dead statutes like the 1866 law granting equal rights "to make and enforce contracts."[35] The Supreme Court's recognition of this broad congressional power in the mid-1960s came nearly a century late, but in time to spur on the efforts of other branches of government to carry forward the rights advances the Court itself had begun with *Brown v. Board of Education*[36] and subsequent cases. In civic terms this was judicial responsibility at its best, judicial restraint as the right wing never recognizes it, a deference to the legislature that encourages democratic processes and does the judiciary proud. In the 1968 case *Jones v. Mayer*,[37] the High Court thrillingly gave new life to those enforcement sections and applied the century-old law to a modern case of discrimination in real estate dealings.[38] In *Runyon*,[39] the Court extended the equal contractual right to employment relationships, posing the *Patterson*[40] issue of whether the 1866 law forbade racial *harassment*, a species of job discrimination.[41] After oral argument, the Court set the case for reargument, adding the question whether *Runyon* should be overruled.[42] More than *Runyon* was at stake. Its underpinnings in *Jones v. Mayer*[43] and its principle that Congress should be given broad leeway to vindicate civil rights—to go beyond even what the courts had had

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33. 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 prohibits private discrimination in making and enforcing contracts); *compare Patterson*, 491 U.S. at 172.

34. U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2.

35. Civil Rights Act of 1866, 14 Stat. 27 (codified at 42 U.S.C. § 1981); *compare Patterson*, 491 U.S. at 180-81.

36. 349 U.S. 294 (1955).

37. 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 bars private as well as public discrimination with regard to the sale or rental of property and that the enactment of this legislation was a valid exercise of Congressional power under the Thirteenth Amendment).

38. *Id.* at 413.

39. Runyon v. McCrary, 427 U.S. 160 (1976).

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

41. *Id.* at 170.

42. *Id.* at 188-89.

43. 392 U.S. 409 (1968).

occasion to declare—were up for grabs. Congress, shamefully dormant for decades in this century, risked being put to sleep again only a few years after being roused to pass the 1964 Civil Rights Act, the 1965 Voting Rights Act, and other advances.

Against this background, the Court's ultimate adherence to *Runyon*[44] was a relief, but Justice Anthony Kennedy's surrender to *stare decisis*[45] was disappointingly, and ominously, grudging. Still more disappointing was his majority judgment that although the 1866 law did indeed still cover job discrimination, it did not cover Ms. Patterson's situation.[46] If she suffered harassment in the workplace, said the Court, it did not interfere with her ability "to make and enforce contracts."[47] That was an absurd, counter-factual reading of contractual arrangements, effectively ruling that Ms. Patterson could make a contract for a decent place to work but could not enforce it through a lawsuit. That interpretation was so far out of the legal mainstream that within two years Congress reversed it,[48] along with several other 1989 Supreme Court misinterpretations of civil rights law, with clear strengthening language.[49] If that string of erroneous job discrimination decisions was not part of a revolution that was succeeding, it is only because the rulings were so revolting that Congress legislatively repudiated them.

Other cases deserve comparable broad treatment so that the "conservative" revolution is understood as the multi-front war that it is. *Roe v. Wade*[50] has proved a centrist opinion, a creative balance of rights among the woman, the state and the developing fetus, and the *Casey*[51] decision coincided with widening public and political awareness of that centrism. If abortion were all, the center has held for a few years. But why are the Justices bolting rightward on other fronts? The holding pattern of the October 1991 term does not cover all realms of ideology. Perhaps Justices Kennedy and O'Connor no longer find the Court's reputation for judicial independence and integrity on the line when, as

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44. *Patterson*, 491 U.S. at 171.

45. *Id.* at 172.

46. *Id.* at 177-80.

47. *Id.* at 179.

48. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 171 (codified at 42 U.S.C. § 1981 (1988 & Supp. V 1993)). Congress added subsections (b) and (c) which define the term "make and enforce contracts" and specifically protect against non-governmental discrimination.

49. *See* 42 U.S.C § 1981(b), (c).

50. 410 U.S. 113 (1973).

51. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

opposed to the long-contested abortion issues, the questions are about term limits, voting rights, and economic federalism, even though those issues implicate the ongoing would-be revolution. The judiciary needs a progressive centrism— not "dead center" where nothing moves, but a rational, moderate view of the Constitution and a faithfulness to laws that informs, and is informed by, a worthy legal culture.