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Is there virtue in a center that holds, or should we again hold out hope that the progressive liberal wing itself may once become resurgent? At the outset, I must admit bias.

As a Jew who grew up in the heart of the Bible Belt, I prayed in my public school and frequently invoked the name of Jesus. "In Jesus' name we pray," somehow made its way to the end of the otherwise dualistic "Lord's Prayer," as it was known to gentiles, and the "23rd Psalm," as it was known to me. Around Christmas time, the thirty other children in my class sang "Silent Night." My father had requested that I not participate, so my teachers, not knowing what else to do with me, stuck me in the hallways of the Perrymont Elementary School, where I paced until the religious exercise was done. Nowadays, I frequently remind my Bible-thumping friends, of which I have many, that my sin-filled past is the result of an environment that permitted prayer in the public schools.[1]

In the late 1950s, while this was happening, the attitude of the United States Supreme Court, then much under the sway of our great Jewish hero Felix Frankfurter, was that the Court should defer to the states on political matters.[2] But, like the citizens of many other southern states, we Virginians were not exactly under a legislature that was a model of democratic government, as Frankfurter's philosophy so frequently seemed

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1. For the most part, school districts in the South simply ignored Supreme Court decrees on school prayer. *See* Diane Henry, *Prayer: An Issue Without an Amen*, N.Y. TIMES, Apr. 20, 1980, at 3 (claiming that organized prayer is practiced everyday in public schools across the country). I cannot recall any assembly or football game in which prayer was not invoked. The fact that prayer was allowed in the schools, I am told, accounts for the fact that no crime, drinking, or immorality existed in the South.

2. *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946). Frankfurter's plurality opinion in *Colegrove* declared the Illinois Congressional election apportionment controversy to be essentially political in nature and therefore not an issue for the Court to address. *Id.* at 552. Sixteen years later, Frankfurter remained steadfast in his commitment to judicial restraint when he refused to join the Court's opinion in Baker v. Carr, 369 U.S. 186 (1962), which held that an equal protection claim regarding the apportionment of Tennessee state elections constituted a justiciable issue for federal courts. *Id.* at 209. In his lengthy dissent to that case, Frankfurter again stressed that the judiciary has no authority to interfere with "political entanglements." *Id.* at 267. Despite the fact that history now correctly judges Frankfurter as the purest disciple of judicial restraint, the liberal glow from his pre-Court career, particularly his defense of Sacco and Vanzetti, blinded many to the reality that his ideological ground had shifted to the right.

to presume.[3] Not only did literacy tests and the poll tax effectively ban most blacks from voting, but malapportionment gave vast amounts of political influence to small counties in rural Virginia while keeping representation from such bastions of liberalism as Alexandria and Norfolk at bay. Even my city of Lynchburg, where urban renewal was viewed as an attempt by Communists to get a foothold in the Blue Ridge, seemed like Athens, compared to the attitudes in surrounding Bedford and Campbell Counties, which had grossly disproportionate representation in the legislature.[4]

So there we were: a state government dominated by undemocratic parochial interests and a federal Congress much controlled by southern senators like our own Harry Flood Byrd and A. Willis Robertson, father of Pat.[5] The end of the seniority system, which would partially end their control, was still years away. And we had a Supreme Court that until 1962 extolled judicial restraint and refused to throw itself into the "political thicket."[6]

In 1954, when the Supreme Court shocked the world by its dramatic ruling in *Brown v. Board of Education*,[7] it marked more of a realization of what was possible than a dramatic sea-change. I was in kindergarten when the *Brown* decision came down, but had no black classmates. Nor would I share a classroom with black students until eighth grade, some seven years later. By the time I emerged from high school, some eleven years after *Brown*, my town still had a dual school system and virtually the only blacks who made it to the white high school were specially-

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3. *See Colegrove*, 328 U.S. at 554 (Frankfurter, J., plurality) ("If Congress failed in exercising its powers [to secure fair representation by the States], . . . the remedy ultimately lies with the people."); *Baker*, 186 U.S. at 270 (Frankfurter, J., dissenting) ("In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.").

4. Unlike the arrangement in most states, incorporated cities in Virginia are not part of counties, but jurisdictional islands. Lynchburg was nested between three counties, Arnherst, Bedford, and Campbell. Before the Civil War, Lynchburg was one of the wealthiest communities in the United States, and although today it is best known as the home of evangelist Jerry Falwell, in former days the town was better known as an industrial giant on the James producing primarily steel and shoes. Much of its wealth was derived from the fact that many Appalachian coal barons made it their home.

5. Byrd was chairman of the Senate Finance Committee. Robertson was the longtime head of the Senate Banking Committee.

6. *See supra* note 2 and accompanying text.

7. 347 U.S. 483 (1954).

recruited star athletes, who helped us win the state championship in football.[8]

Throughout the late 1950s, black residents of our town could be picked up and arrested for nothing more than being somewhere they were not supposed to be. Then, in a heralded case in the 1960s, sixteen-year-old Thomas Carlton Wansley was tried, convicted, and sentenced to death in one afternoon for the rape of a fifty-four year old woman during a drizzly December night.[9] The defendant's family members were required to view the trial from the courtroom's blacks-only section, otherwise known as the balcony. No one found that strange.

At the Paramount Theater on Main Street, well into the 1960s, black movie-goers were confined not only to a balcony, but to the second balcony where their heads nearly scraped against the roof of the building. As late as 1970, long after Congress had passed public accommodations laws, I can remember restaurants that tried to get around the law by splitting into halves and seating black customers in one half and white customers in the other. And rather than integrate public swimming pools, local leaders had them bulldozed and filled.[10] Private pools were then built in white neighborhoods, while the city spent public money to build new roads that led to them. I suspect that intellectuals at places such as Harvard Law School argued endlessly in the mid 1950s and early 1960s, as the Warren Court gained its stride, that the center was not holding; that for years under the influence of Frankfurter and his allies, the Court had

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8. I am specifically thinking of linebacker Carl Crennell who later went on to be an All-American at West Virginia and led his professional team to the Canadian Football League's Gray Cup. As a senior in high school, Crennell appeared in a school assembly in KKK robes, although until he took off the hood, no one realized who he was. It is doubtful that such a humorous and good-spirited display of racial awareness could take place in today's more sensitive atmosphere. In fact, it's doubtful that anything involving the Klan would find its way into a school skit.

9. Wansley's life was saved when his court-appointed lawyer died of a heart attack shortly before Wansley's scheduled execution. Family members then hired William Kunstler who won a new trial based on the fact that the trial court had failed to keep a written record or transcript of the proceedings. In the mid 1980s, Wansley was paroled from prison and now still works for a state road crew, but not as a convict. Wansley v. Virginia, 368 F.2d 71, 72-73 (4th Cir. 1966), provides a summary of the facts surrounding Wansley's conviction.

10. Lynchburg at least kept its public schools open when the federal government finally forced it to desegregate. In the neighboring Prince Edward County, the supervisors simply closed the school system. The Supreme Court addressed this very issue in Palmer v. Thompson, 403 U.S. 217 (1971) (5-4 decision). In *Palmer*, the Court held that the city council of Jackson, Mississippi did not deny petitioners' right to equal protection when the city closed several public pools after being ordered to desegregate them. *Id.* at 226.

been a bastion of restraint and consistency, but was then careening dangerously to the left.[11]

Who would have imagined that Earl Warren's failure to achieve his dream of the presidency in 1952 would have resulted in a stewardship that would not have the restrictions of an eight-year presidency, nor require the approval of Congress for virtually every action he would want to take?

Nor did there seem to be a particular reason to suspect, at the time of his appointment, that the fires of justice and social change would burn so passionately in Chief Justice Warren. Most of us would not begin to know Earl Warren until that great day in 1954 when the world changed and "separate but equal" was exposed as the great lie that it was.[12]

Overnight Warren became a hated man, and in our area, like much of the South, it did not take long for the big billboards to go up along the highways: "Impeach Earl Warren."[13]

From 1954 until his retirement from the Court in 1969, Warren gave hope that the United States Supreme Court could be used as an instrument of social change, one that could short-circuit the inadequacies of legislative rule. Let scholars argue about how the Supreme Court had become too powerful, an unelected Congress legislating from the bench. For those of us at Ground Zero, the Court was our only hope, so tight were the forces of conservatism that held down alternative non-violent methods of change. No one can seriously doubt that had our country not been blessed with a leader like Earl Warren, the civil rights revolution would have been far bloodier, far uglier, than it was.[14]

I recite this personal recollection to illustrate that this argument over the shifting power blocs and the direction of the Court is anything but theoretical or academic. To argue whether or not the "center holds" invites much semantical bickering: What is the center? What positions represent the center at different points of time? What does it mean to

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11. If one searches Frankfurter's letters, collected at the manuscript room of the Library of Congress, not only would a wonderful, fascinating afternoon speed by, but one would find many letters expressing this viewpoint from Frankfurter to his former teaching colleagues and star students, particularly former Yale professor Alexander Bickel.

12. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)). I do not think this contradicts what I have said about an immediate sea-change. True, the decision did not immediately integrate the schools, but in terms of symbolism, it was obviously stunning.

13. When President Kennedy was killed in 1963, I was a patrol boy. Schools were let out early, and kids ran by yelling, "The nigger lover is dead."

14. I honestly do not think anyone can quarrel with this point. The Civil Rights Movement was bloody. Lives were given in the struggle. Yet as difficult as it was, compared to the South African model, things could have been so much worse.

hold? To use a football analogy, the defense can hold by yielding only a field goal. But some defenses hold with heroic goal-line stands that give up no points. How much ground can the left yield and still feel it has held? Is there inherent virtue in moderation? What about expectations? Holding ground against a Court full of Scalias might be quite different than holding ground against a Court full of O'Connors. Goalposts move.

After arguing about semantics, many will turn to cases—and anyone taking any position can find four cases that support either premise. Because of my background, I look at the Court from a much broader perspective. Will it be there for us when we need it again? Obviously with the makeup of the current Court, one cannot have a lot of confidence. But neither am I ready to give up, nor concede that the now likely re-election of President Clinton, free in his second term to do his will without regard to politics, will not move the Court again towards the left.[15]

It is easy to be fooled into thinking that the great majesty of the Warren Court derived from its long list of landmark opinions. But what that Court really accomplished was creating an atmosphere of justice at a pivotal moment in American history. They put the fear of justice into small-minded despots at every level of local and state government, as well as in business and industry. Suddenly, during the 1960s and 1970s, local politicians and governments began trying to anticipate what the Court might do. The fear of an action filed by a civil rights lawyer became an important lever for justice, and moved the progress of the country far beyond even what was mandated by the Court. Affirmative action was certainly a necessity, and thousands of employers began to take it upon themselves to make sure blacks were hired and visible, whether or not such employers had an official affirmative action plan filed with the Justice Department.[16]

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15. My reading of the Court from Washington is that the next President may have as many as three more appointments to the Supreme Court. Justice Stevens, 76, is certain to retire. Rehnquist, 71, and O'Connor, 65, are likely to call it quits. Both have been beset by medical problems, and O'Connor did not help things recently by breaking her shoulder in a skiing accident.

16. No modern political issue is filled with more hypocrisy than the one over affirmative action and preferential hiring. No one believes in the concept of a color-blind society more than I do. When I first became a newspaper reporter in Mississippi in 1975, I attempted for a time to write stories that never directly identified or revealed a person's race. This was a reaction to the policy of my home town paper in which everyone was identified by race. This idea failed when I was accosted by an angry group of black "concerned citizens," who called me a racist for not identifying a policeman as black who had saved a child's life in a fire. But what I find amusing is when politicians argue, for example, that firemen should be hired on their merits and minorities should not be promoted simply because of their race. The fact is that for

For those who did not feel that way, the federal courts certainly got their attention. And at the end of the Great Society pipeline, there was always a local government that would award the contracts and appropriate the money. Yet in places like my home town, as noted, even urban renewal funds were rejected as "red."

In places like Shelby, Mississippi, local county supervisors refused to expend money even to pave streets in black neighborhoods. Yet courageous federal judges, such as the legendary William Keady of the Northern District of Mississippi, stepped in to become de facto city managers, housing czars, and road builders. Did Keady and his colleagues stretch the role of the federal judiciary? You bet. Was there any nonviolent alternative to get done what was necessary? There was not.

My perception of judicial restraint, as seen from the South upwards, has been that too much injustice can be excused by the mere warmth of democracy. But we were not always a democratic country, because large numbers were historically disenfranchised. Furthermore, we still are not a democratic country, because the founding fathers deliberately structured the government in Republican form to minimize the power and influence of an elitist majority. And finally, even if we were a truly democratic country, without the Bill of Rights we would have no better a system of government than any other; we would have simply a rationalization for a tyranny of the majority.

Yet one who watches our elected leaders attempt to "spread democracy" throughout the world must wonder if anyone realizes the mistake: It is not "democracy" that needs to be shipped to Haiti, Eastern Europe, and Africa, it is the Bill of Rights. Nothing short of planet-wide adherence to its principles should be accepted.

But much of the history that brought on the Great Society and the power of the federal courts to implement the Bill of Rights is forgotten. As a result, we now face a rising conservative tide that, because of its ignorance of history, declares the Warren Court and the Great Society a failure. We have faced such conservative threats before and the liberal wing has held. Now it seems the best we can hope for is that the *center* will hold. But that in itself is a loss of yards.

When Warren Burger replaced Earl Warren as Chief Justice, one had to believe that the era of liberal Court activism was over. Yet even with

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some 200 plus years of our country's history, people have not been hired on merit, and there is no employer more guilty of patronage and nepotism than local government-run fire, police and road departments. The idea that by eliminating racial preferences we will move to a system where people are hired for positions strictly on merit is an absurdity. We will simply go back to a system where people can hire friends, relatives, and people who look like them.

Burger's commitment to assigning opinions to the least persuaded and his stern belief in writing the most narrow opinions possible, the Court forged on. In women's rights and employment discrimination, and in ensuring that aliens received social and educational benefits, the Supreme Court remained the rock of justice in our country. Surely the high-water-mark of Court liberalism came on that historic day of June 29, 1972, when the Supreme Court invalidated every death penalty law in the United States in *Furman v. Georgia*.[17]

Somewhere along the way, however, further progress became unthinkable; maybe it began in 1991 when the great Justice Brennan left the Court.

Now we are told to be grateful that the "center has held," because expectations in Brennan's absence have so dramatically fallen. To imagine that any Court in the near future would stop even such obviously disgusting displays as hangings and public shootings, as repulsive as they are, seems to be asking too much. If now we could just argue that the left has held, perhaps that would be a source of pride and accomplishment. Rather, we are told to just be glad that the center has held, as if there is virtue in mediocrity.

What I am suggesting was perhaps more clearly emphasized by Justice Black, who during his tenure often decried the mentality of lower court judges. They weigh everything, he would complain to the clerks. When you start weighing the public interest against a constitutional right, Black worried, justice is compromised.[18]

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17. 408 U.S. 238 (1972). Even though *Furman* invalidated death penalty laws in existence at that time, it did not outlaw the death penalty *per se*. Rather, the *Furman* Court, through five separate concurring opinions, leaned toward the view that legislatures had placed too much unguided discretion in the hands of juries to decide the fate of defendants, *see id.* at 246-47 (Douglas, J., concurring), and that courts had allowed the death penalty to be applied arbitrarily and non-uniformly. *See id.* at 256 (Douglas, J., concurring). During the several years after *Furman*, at least thirty-five state legislatures, as well as Congress, enacted modified death penalty statutes which accounted for the concerns addressed by the *Furman* Court. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 179-80, 186-87 (1976) (validating one such statute enacted after *Furman* and holding that the death penalty did not always constitute cruel and unusual punishment).

The barbarism of execution rolls on across the country. I might be willing to entertain an argument that in the 1990s lethal injection will be construed by the Supreme Court as not cruel or unusual. 'Darn civilized, as far as such things go,' I would say. But electric chairs, hangings, and shootings continue to occur in America in the 1990s and no one says anything!

18. KIM I. EISLER, A JUSTICE FOR ALL 121 (1993). Other than in my own book, I am not sure if this has been documented. But the sourcing is through interviews with clerks to whom Justice Black spoke directly. It is interesting to note that none of the members on the historic Supreme Court that Justice Brennan joined in 1956 were career

The path that the Supreme Court has followed mirrors that of the more overtly political branches. The election of Jimmy Carter, a man who professionally had never been to Washington, marked the beginning of a long period in which the American people would cry for limited federal government.[19] Carter never had the opportunity to make a Supreme Court appointment. It would fall on President Reagan to appoint three new Justices to the Court: O'Connor, Scalia, and Kennedy. Yet historically, none of those three appointments would have as much significance as the one Justice he failed to place on the Court, Robert Bork.

Despite the furor that raged around the nomination of the arch-conservative Bork,[20] when one peers through the cannon smoke, one conclusion is inescapable: He was clearly qualified by experience and intellect to serve as a Justice. In fact, judging from his enthusiasm and intellectual vigor, misguided as it may be, Bork would have been a dynamic Justice. Words once spoken of Theodore Roosevelt come to my mind when I think about Bork: "Sometimes wrong, sometimes right, but always in the fray."

Looking at what happened from a short-term basis, we ended up of course with the appointment of Justice Anthony Kennedy. He seems like a nice man, but I cannot separate him in my mind from any of the other thousand or so members of fancy Olympic Country Club in San Francisco.

The legacy of the Bork fight reached its fullest flower with the appointment by President Bush of stealth nominee David Souter. By the time of Souter's appointment, it had become accepted conventional wisdom in Washington that no nominee in the post-Bork world could have a paper trail or have expressed strong opinions on anything. When Democrats reassumed control of the Supreme Court appointment process in 1992, with the election of Bill Clinton, influential Republicans like Utah's Orrin Hatch were outspoken that any ideologically liberal

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judges. The mix was wonderful: former senators, former attorney generals, former law professors, a former governor, and one of the most outstanding former corporate lawyers in the nation. Now we have a Court where virtually every member is a career judge. I happen to believe this pattern of modern appointment, that a person has to have judicial experience to be on the Supreme Court, is at the heart of the current Court's mediocrity.

19. It is interesting to note that until the election of Mr. Carter in 1976, every one of our post-war presidents, Ford, Nixon, Johnson, Kennedy, Eisenhower, and Truman, had come from the Washington establishment. Since Carter, only President Bush fit the insider mold, and he failed to last long.

20. *See* Joel Brinkley, *Angry Bork Says He Will Not Quit Nomination Fight*, N.Y. TIMES, Oct. 10, 1987, at 1, 13.

appointees would be "Borked," as the Capitol's favorite new verb went.[21]

If there is an irony in any of this, it is that strong personalities in the cloistered world of the Court are often not born. The lives and careers of Justices Brennan and Powell seem fitting illustrations of this point. Brennan was a man who had never been involved in politics. He was a pipe-smoker and reader who often took the bus home from work. Powell was equally quiet and reserved. So was the second Justice Harlan. Yet each of these men grew to become an influential figure on the Court.

Contrast their roles with that of Justice Douglas, who for his liberal bluster may have been an influential public figure but was never to be an influential Justice. Indeed the very ambition that characterized his precocious public career made him a very unhappy Justice, and as late as 1964, he was still thinking about how he could use the Supreme Court as a stepping-stone to the Presidency. But would we have wanted a Court without his brilliance?[22] The Court should have the advantage of having both extremes represented. Yet we now live in a world where the very type of Justices that Black warned of—the "weighers"—dominate the Court. No longer is the leading university professor in the land, the leading appellate lawyer, or the leading social activist material for the Court. The nominees are now all cut from the same cookie dough: former appellate level judges who by their instinct and nature seek compromise. But we are so much richer as a people and culture for having had a Douglas or a Black or a Frankfurter, three men who did not serve as judges before joining the Court.

It is possible to imagine, in fact, that had Bork won appointment to the Court, he might have been so strong a figure as to alienate his colleagues. His mental strength and stubbornness, rather than enabling him to dominate the Court, might have bonded his opponents together. Yet we have denied ourselves his intellectual vigor and the inevitable sparkle of public debate he would have brought to the Court. And as Senator Hatch has made clear, in doing so we have denied ourselves a host of original thinkers, such as Harvard Professor Lawrence Tribe, who is now deemed likewise unconfirmable.

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21. *See* Anna Quindlen, *Public & Private; Justice for Justice Barkett*, N.Y. TIMES, Feb. 16, 1994, at A21 (discussing how a nominee to a federal circuit court was being "Borked" and "Thomased" by Senators Hatch and Thurmond as well as other members of the Senate Judiciary Committee).

22. In Douglas's papers at the Library of Congress, there is a folder of correspondence with his close friend and advisor, Clark Clifford. Douglas and Clifford corresponded about how they might maneuver Douglas onto the ticket with Lyndon Johnson in 1964. In 1968, Douglas would have been only 70, still younger than candidate Robert Dole is today.

We have seen the phenomenon of alienating colleagues in the past. The personalities and practices of two Justices come immediately to mind. One of course is Justice Frankfurter.

No sooner had a new Justice arrived on the Court than Justice Frankfurter would begin plotting to put that Justice's votes in his pocket. With Harry Truman's political appointees, like former Senators Harold Burton and Sherman Minton, and former Attorney General Tom Clark, Frankfurter's strategy was effective. None of those men came to the Court with much confidence, not when they suddenly encountered an ego and intellect of Frankfurter's size and majesty.

Yet Frankfurter had little impact on those who were his intellectual equals, such as Justice Black or Chief Justice Warren, whom he tried to undercut at every turn. It was widely assumed when Justice Brennan joined the Court in 1956 that he would be in Frankfurter's pocket. Indeed, that was probably a large part of the motivation for the appointment of Brennan. He would be another whom Frankfurter could control in his crusade for judicial restraint.

Frankfurter tried hard with Brennan, finding him an apartment, providing his law clerks, even placing his own person in as Brennan's secretary. What he did not appreciate was that Brennan, the product of a strong Irish family from Newark, had a reserve of inner calm and self-confidence that is rarely found in Washington. A man of little pretension and striking integrity and humility, Brennan won over the clerks and eventually would marry the secretary.[23]

Frankfurter's efforts during the 1962 case of *Baker v. Carr*[24] became so headstrong that he alienated even his own fellow conservatives, Clark and Whittaker. Whittaker himself would find working with Frankfurter so unpleasant, he quit the Court after *Baker v. Carr*.[25]

One of today's Justices most after the Frankfurter mold is Antonin Scalia. Like Frankfurter, Scalia was best known as an intellectually-minded professor who shuttled in and out of government jobs. And like

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23. Frankfurter arranged for his friend Paul Freund, a former Brennan classmate, to send clerks. Frankfurter assumed the clerks would function as a pipeline and control mechanism for Brennan whom Frankfurter did not initially give much respect. The clerks found Brennan so engaging and he inspired such loyalty that Frankfurter was frustrated. Upon the death of Brennan's wife, Marjorie, in 1982, Brennan married his secretary, Mary Fowler. They are still together and live near Alexandria, Virginia.

24. 369 U.S. 186 (1962).

25. As I argue in my book, *Baker v. Carr*'s significance lies not so much in what it did: set the state for reapportionment; but in what it resulted: the loss of two conservative judges. *See* EISLER, *supra* note 18, at 126. Whittaker quit and Frankfurter suffered a stroke, presumably related to the stress of the defeat. Frankfurter was replaced by Justice Goldberg who became Warren's reliable fifth vote.

Frankfurter's, Scalia's own self-confidence and arrogance more than occasionally rankles his colleagues, particularly Justice O'Connor. It is noteworthy that Scalia's closest friend on the Court is probably Justice Ginsburg, with whom he served on the D.C. Circuit and who shares his love of opera.[26]

There seems to be no current member of the Court who serves the role Brennan played for so many years: that of conciliator and consensus seeker. And part of the reason is that the muted personalities of the Court no longer call for such a person. Brennan operated on a Court that featured such irascible personalities as Marshall, Douglas, Frankfurter, Burger, and Black. Brennan's role, as often as not, was to get the headstrong liberals to adopt a more centrist position in order to possibly win over the vote of Byron White or, more often, Potter Stewart.

But in the wake of the post-Bork attitude—that justice must come from the non-descript center—the Brennan function becomes superfluous. There is certainly no extreme left on the Court anymore, and the bland personalities of the four "liberal leaning" Justices, Breyer, Ginsburg, Souter, and Stevens, hardly seem the type that need a calming influence. The withdrawal during the Reagan years of nominee Douglas Ginsburg illustrates just how vacuous one has to be to get a Court appointment. Ginsburg was adventurous enough to try smoking pot during his younger years,[27] like more than 66 million other people.[28] That was no good. He could not serve on the Supreme Court.

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26. Things have gotten to the point where, on occasion, Scalia and Ginsburg dress up and appear onstage with the Washington Opera Society.

27. Linda Greenhouse, *Nominee for Supreme Court Says He Used Marijuana and Regrets It*, N.Y. TIMES, Nov. 6, 1987, at A1; Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamour,'* N.Y. TIMES, Nov. 8, 1987, at 1.

28. According to a study conducted in 1990 by the National Household Survey on Drug Abuse, more than 66 million Americans by that time had tried marijuana at least once, and 20.5 million of those people were using the drug regularly. Joseph P. Treaster, *Costly and Scarce, Marijuana Is a High More Are Rejecting*, N.Y. TIMES, Oct. 29, 1991, at A1, B4. More than 31.5 million people used marijuana at least once in 1979 alone, *id.*, which was the last year of the decade during which Ginsburg admitted to having used marijuana on a few occasions. *See* Greenhouse, *supra* note 27, at A1. Interestingly enough, while Ginsburg was in the hot-seat for his past marijuana experimentation, several prominent politicians also admitted to "inhaling" during their younger years, including Bruce Babbitt and our now Vice-President, Albert Gore, Jr. Todd Gitlin & Ruth Rosen, *Give the 60's Generation a Break*, N.Y. TIMES, Nov. 14, 1987, § 1, at 27. Even our beloved Speaker, Newt Gingrich, has admitted to smoking marijuana. Robin Toner, *Incoming Speaker Sharply Scolded*, N.Y. TIMES, Dec. 6, 1994, at A1, B8.

Rehnquist, the only current Justice not to come directly from the appellate bench, is a decent man. That is why it is often hard to figure out why his conservatism is so consistent and doctrinaire. My image of him is formed by a wonderful scene I witnessed at a Washington, D.C. intersection one fine afternoon, when a motorist stopped, rolled down the window, and called out to the then newly appointed Chief Justice. I was a few steps behind him on the street and my reaction at first was how horrible that the man could not walk down the street without people honking and bothering him. But the Chief Justice stuck his head inside the window and though I could not hear the conversation, I could see him gesturing. Then the window rolled up and the car ventured off. By that time I had caught up with him on the corner. Rehnquist looked at me sheepishly and said, "He wanted to know how to get to Georgetown."

If the word that is most often used to describe Brennan is "conciliator," Rehnquist's legacy will certainly be one of "consistency"—a harsher judgment might be "arrested growth development." No Justice in history has changed less on the bench during his or her tenure. Most are like painters who start with self-portraits and end up with Cubism. Rehnquist started out drawing still-lifes and ended up with still-lifes. In the last few years, Rehnquist has not totally enjoyed his life on the Court. Unable to change on the Court, he is now said to realize that the only way he can move on is by leaving the Court, after which he hopes to indulge his love of writing history. He has stayed on the Court as long as he has, it is fair to say, at the request of clerks who do not want his successor to be appointed by a Democratic president. The 1996 election will determine that, because Rehnquist will not last another four years.

Whether Rehnquist will leave the Court, when will he go, and questions that surround him show the folly of the argument about shifting power blocs and the virtuousness of a center that only "holds." It was believed in some circles that when Reagan took over and the Court was old, new conservative Justices would undo the liberal reforms of the Warren-Brennan Court. But several Justices, particularly Souter, Kennedy, and O'Connor, have been wise enough to realize that that is no way to run a nation of law.[29]

Are we to have a Court that will overturn *Roe v. Wade*[30] by a 5-4 vote, only to have another Court ten years hence put it back by a 5-4 vote? If there is anything the new centrist Justices seem to understand, it is that to overturn such a controversial precedent there must be popular support, and the division among the Justices must be slight, 7-2 at worst.

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29. It is amazing to contemplate how O'Connor and Souter have already journeyed a greater distance philosophically in just a few years, while Rehnquist never went anywhere. But that is a subject for another essay.

30. 410 U.S. 113 (1973).

At the end of the October 1994 term, it seemed to many liberals that the sky was falling.[31] One decision during that term involved the drawing of weirdly shaped black majority congressional districts.[32] But while this seemed to be a conservative ruling, it may well have a centrist effect. Integrating black voters among many districts will mitigate the extremes and in the long run work to fulfill this nation's commitment to a multi-racial society. Ironically, the liberal-sponsored solution, all-black districts, was nothing more than a throwback to apartheid, especially in southern states such as Virginia, where the election of Douglas Wilder to the governorship has already demonstrated that black state officials can be elected without special gerrymandering.

At the end of the October 1994 term, it was fashionable to argue that James Simon's thesis had been outrun by events. But the October 1995 term seems to have put it back on track again. What has most characterized the High Court in recent times is not the decisions it hands down, but how few cases the Court is taking. The Court, like the political bodies, seems intent on playing a lesser role in people's lives. It seems likely to remain that way for the immediate future; it will neither forge a conservative era, nor seriously undo the Warren-Brennan legacy.

What is lost, of course, is our confidence that the Court will do the right thing. This lack of confidence is a nervousness that for the first forty years of my life I did not have to experience.

What is intriguing, however, is what will happen as Congress "devolves" more and more power to the states. The 1950s and 1960s issues of states' rights may well flare up again. What happens when states refuse to spend money on "devolved" federal programs? What happens when prisons again become inhumane? The federal courts will again be asked to step in and force small-minded legislatures to do their duty. Then we will find out what kind of Supreme Court we have and whether the powerful federal morality of Justice Warren survives or dies.

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31. I don't know what is liberal and conservative anymore. Sometimes I get the feeling that there are just two long lists and everybody has to pick one or the other. During the Nixon years, wasn't it liberals who wanted to spend money at home and not fight foreign wars? Why were liberal groups pounding on my door last year demanding that I support intervention in Bosnia? Why were Republicans sounding like George McGovern? I used to think that conservatives wanted the government out of the lives of ordinary citizens. So why do they want to post sentries in our bedrooms? Couldn't a person oppose abortion and the death penalty? It doesn't seem to work that way, but it's logical.

32. Miller v. Johnson, 115 S. Ct. 2475, 2490-91 (1995) (holding that Georgia's redistricting legislation, which segregated its citizens primarily on the basis of race, was a violation of the equal protection clause).