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James Simon's exploration of "the power struggle inside the Rehnquist Court"[1] provides an intriguing glimpse of the Court's internal deliberations. Its behind-the-scene stories are irresistible to Supreme Court watchers, myself included. The story of Justice Brennan wiggling his fingers in the air as he told each new generation of law clerks that "[f]ive votes can do anything around here"[2] explains, in a single phrase, both Justice Brennan's personal charm and his remarkable success as a savvy courthouse politician who, especially during the last decade of his career, was able to fashion liberal majorities on a conservative court by stitching together increasingly incongruous coalitions.

Just as Justice Brennan's charm served a larger political purpose, each anecdote in Jim Simon's book also serves a larger purpose. Simon freely concedes that he began his research expecting to write about a right wing judicial counterrevolution and ended by concluding that the counterrevolution never occurred.[3] Within limits, I share that conclusion. However, the limits are important. I am reminded of the famous exchange between Louis XVI and the Duc de la Rochefoucauld. Upon hearing that the Bastille had fallen, the King turned to Rochefoucauld and asked: "Is it a revolt?" "No," the Duke supposedly replied, "it is a revolution." Here, the opposite is true. The Rehnquist Court may not have achieved the counterrevolution that its chief justice had hoped to achieve. But I fear that it has engaged in more of a revolt than Jim Simon admits.

I should begin with a few disclaimers. Since 1987, I have supervised the work of the American Civil Liberties Union (ACLU) in the Supreme Court. I have been personally involved, therefore, with many of the cases discussed in *The Center Holds: The Power Struggle Inside The Rehnquist Court*. Several were direct ACLU cases and the ACLU submitted amicus

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

2. *Id.* at 54.

3. James Simon originally set out to write a book about what he thought would be a "successful conservative judicial revolution." *See* 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). Instead, *The Center Holds* turned out to be "the story of a conservative judicial revolution that failed." THE CENTER HOLDS, *supra* note 1, at 11.

curiae briefs in most of the others. We won more cases than we lost during those years. Nevertheless, every lawyer has a tendency to describe any loss as an abandonment of principle by judges intent on turning back the clock. In short, I am a close observer of the Supreme Court but not a dispassionate one. In addition, Jim Simon was kind enough to ask me to read an early draft of his First Amendment chapter and even kinder to mention me in his acknowledgements. My public comments are offered in the same constructive spirit as my earlier, private comments and with even greater admiration for the finished product and the accomplishment it represents.

One of my duties at the ACLU is to prepare a summary at the end of each Supreme Court term of the year's important civil liberties decisions. In preparation for writing this piece, I went back and reviewed those summaries, beginning with the October 1988 term. As Jim Simon reminds us in his Solomon lecture,[4] the headline in *The New York Times* that year read, "The Year the Court Turned Right."[5] My summary of the term struck a similar tone. At the end of the October 1994 term, most of the commentary again focused on the Court's rightward drift. Largely because of the Court's decisions on race, to which I will return later, I described the term as a major setback for civil liberties. I continue to believe that description was apt.

Between 1988 and 1994, the picture was murkier. During the October 1991 term, the Supreme Court refused to overturn *Roe v. Wade*[6]

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4. Simon, *supra* note 3, at 865.

5. Linda Greenhouse, *The Year the Court Turned Right,* N.Y. TIMES, July 7, 1989, at A1.

6. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845-46 (1992) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

In *Roe v. Wade*, the Supreme Court struck down a Texas statute that made abortion a crime except when necessary to save the life of the mother. 410 U.S. 113, 164 (1973). Recognizing a woman's fundamental right to control her own child-bearing decisions, the *Roe* Court held: (1) the decision to perform an abortion remains with a woman and her physician for the first trimester of the woman's pregnancy; (2) the state may regulate abortions in manners reasonably related to the mother's health for the stage "subsequent to approximately the end of the first trimester"; and (3) once the fetus is viable, the state may regulate or proscribe abortions unless an abortion is necessary "for the preservation of the life or health of the mother." *Id.* Although *Casey* retained "the essential holding of *Roe*," it replaced *Roe*'s trimester analysis with an "undue burden" standard that is designed to be more sympathetic to government regulatory efforts. *Casey*, 505 U.S. at 846, 876; *see infra* note 37.

and refused to condone prayer at a high school commencement.[7] The Court's 5-4 decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[8] and *Lee v. Weisman*[9] were hailed by many as signalling the emergence of a moderate middle consisting of Justices O'Connor, Souter, and Kennedy. These three justices were linked together primarily on the strength of their remarkable joint opinion in *Casey*[10] and the fact that they voted together in *Weisman*.[11]

By the following year, however, it was difficult to find anyone still referring to these three justices as a voting bloc. Since then, Justice Souter has been increasingly characterized as a member of the Court's liberal wing and Justices O'Connor and Kennedy have vied for the title of the Court's most influential justice in end-of-the-year analyses. Those who favor anointing Justice Kennedy with the title correctly note that he is rarely on the losing side in 5-4 cases. Those who believe that Justice O'Connor is the Court's pivotal fifth vote note, also correctly, that the Court's reliance on the undue burden test in abortion cases,[12] the endorsement test in Establishment Clause cases,[13] and the use of strict scrutiny in affirmative action[14] and redistricting cases,[15] all reflect Justice O'Connor's influence.

What is one to make of all this? One lesson surely is that Supreme Court watching, like Kremlin watching, is endlessly fascinating but notoriously unreliable. This is not because any of the observations noted above is incorrect. Rather, it is because the Supreme Court is far too complex a body to be captured by a single phrase embodied in a single year's headline (or book title). Indeed, even the well-ingrained habit of defining Supreme Court eras by the identity of the chief justice is inherently misleading. We speak, for example, of the "Rehnquist Court."

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7. *See* Lee v. Weisman, 505 U.S. 577, 597-98 (1992). This case involved the use of invocation and benediction prayers at formal school graduation ceremonies. *Id.* at 580. The Court held that such activity violated the Establishment Clause of the United States Constitution. *Id.* at 598.

8. 505 U.S. 833.

9. 505 U.S. 577.

10. 505 U.S. at 843-901.

11. 505 U.S. at 579-99.

12. *See, e.g.*, *Casey*, 505 U.S. at 879, 880, 887, 895.

13. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2447 (1995).

14. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-95 (1989).

15. *See, e.g.*, Miller v. Johnson, 115 S. Ct. 2475, 2490 (1995); Shaw v. Reno, 113 S. Ct. 2816, 2830 (1993).

But five of the eight justices who were on the Court when Rehnquist was elevated to the position of chief justice have since retired. Among other changes, Thurgood Marshall has been replaced by Clarence Thomas and Byron White has been replaced by Ruth Bader Ginsburg. Both in terms of personnel and doctrine, the Court is constantly evolving.

One consequence of this evolution is that it makes it more difficult to define where the center lies and what the appropriate reference points should be. By entitling his book *The Center Holds*, Jim Simon appears to be speaking in terms of the Court's current personnel. By that definition, it is fair to say that Justices O'Connor and Kennedy occupy the Court's ideological middle. But it is equally clear that the Court's ideological middle has shifted to the right since the retirement of Justices Brennan, Marshall and Blackmun (and shifted even more if one goes back to include Justice Douglas, whose tenure on the Court overlapped with Justice Rehnquist for three years). Alternatively, the center of the Court can be defined in relation to the nation's current political mood. But, there too, there is little doubt that the nation's political mood has also grown more conservative in recent years.

This poses a central dilemma for Jim Simon's thesis. Because the center of any spectrum necessarily moves as the spectrum moves, he and his critics may both be correct. That is to say, the center of the Court has held by one definition and moved to the right by another. The ongoing debate over "welfare reform" illustrates the same problem in another context. Proposals that are now described as middle of the road would have been viewed as extreme only a short time ago. Has the center held if aid to dependent children is no longer seen as an entitlement but unwed mothers are spared some of the punitive sanctions that have been recently suggested? It is, as they say, all a matter of perspective and perspective inevitably changes depending on where one stands.

In the end, therefore, characterizing the Court as centrist or extremist is less useful than describing what the Court has and has not done. Jim Simon has chosen to focus on what the Court has not done, and that is fair enough. The opening section of his book describes Chief Justice Rehnquist's unsuccessful effort in *Patterson v. McLean Credit Union*[16] to overrule *Runyon v. McCrary*,[17] an important 1976 decision that permitted federal court suits against private employers for racial

16. 491 U.S. 164, 171-75, 179-80 (1989) (refusing to overrule *Runyon v. McCrary* and holding that racial harassment relating to employment conditions is not actionable under 42 U.S.C. § 1981), *discussed in* THE CENTER HOLDS, *supra* note 1, at 19-61.

17. 427 U.S. 160, 170-71 (1976) (holding that 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts), *discussed in* THE CENTER HOLDS, *supra* note 1, at 19-61.

discrimination in the making of contracts.[18] That defeat was a significant one for the Chief Justice. Even more significantly, there was broad speculation after Ronald Reagan's election that a transformed Supreme Court would eliminate the exclusionary rule, reinstitute school prayer, and reverse *Roe v. Wade*.[19] None of those things has happened, and none is likely to happen in the near future.

What the Rehnquist Court has done is disturbing enough, however, even if it has fallen short of the judicial counterrevolution that its conservative sponsors had sought and expected. Race is a useful place to begin, as it so often is in American life. From *Dred Scott v. Sandford*[20] to *Plessy v. Ferguson*[21] to *Brown v. Board of Education*,[22] no issue has done more to define the role of the Supreme Court in our constitutional system.

Where does the Rehnquist Court stand on issues of race? First, it has led the retreat on affirmative action by holding that programs designed to remedy discrimination must be judged by the same strict scrutiny applied to programs designed to perpetuate discrimination.[23] Second, it has critically wounded the Voting Rights Act—probably the most successful piece of civil rights legislation enacted in this century—by holding that white voters have standing to challenge the constitutionality of redistricting plans drawn to insure minority representation even in the absence of any allegation that white voting strength has been diluted.[24] As a result, virtually every congressional district in the South represented by a minority is now being challenged in court. Third, it has signaled its eagerness to get out of the school desegregation business by holding, with increasing regularity, that the states can no longer be held responsible for the ongoing problems of school segregation.[25] Fourth, it has chosen to

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18. *See* THE CENTER HOLDS, *supra* note 1, at 19-61.

19. 410 U.S. 113 (1973).

20. 60 U.S. (19 How.) 393 (1856) (holding that a slave was the property of his owner and thus did not have the right to sue for his freedom as a citizen even when brought by his owner into a slave-free state).

21. 163 U.S. 537 (1896).

22. 347 U.S. 483 (1954).

23. *See* Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

24. *See* Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 113 S. Ct. 2816 (1993).

25. *See, e.g.*, Missouri v. Jenkins, 518 S. Ct. 2038 (1995) (holding that district court exceeded the scope of its remedial authority by designing order intended to lure white children from the suburbs back into the Kansas City school system); Freeman v. Pitts, 503 U.S. 467, 491 (1992) (holding that "upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all

ignore blatant evidence of racial discrimination in the criminal justice system by upholding the constitutionality of the death penalty despite irrefutable proof that defendants are much more likely to be sentenced to die if their victims are white than if their victims are black.[26] Fifth, it has consistently adopted the narrowest possible interpretation of civil rights legislation, making it more difficult to prove discrimination in a variety of contexts.[27] Twice within the past decade, Congress has responded by enacting "Civil Rights Restoration Acts" intended to restore the status quo.[28] The unifying theme in all of these cases is that this is a Court that seems more concerned with racial neutrality than racial equality. The appearance of fairness becomes more important than fairness itself.

It is no doubt true, as Jim Simon reminds us in his Solomon lecture, that the results in all of these cases could have been worse if the center had not "held." Justice Scalia's position, for instance, is that affirmative action programs are never a justifiable response to past discrimination and thus can never survive strict scrutiny.[29] Justice O'Connor has not been willing to go that far. She has insisted on strict scrutiny but has insisted, as well, that strict scrutiny need not be "'fatal in fact.'"[30] Thus, presumably, there is a subset of affirmative action cases that Justice Scalia would strike down but that Justice O'Connor would uphold under strict scrutiny. What is not known is how many cases will fit into that category.

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areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved"); Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (holding that school desegregation orders should be dissolved if school district has taken all "practicable" steps to eliminate legacy of segregation, even if segregation remains).

26. *See* McCleskey v. Kemp, 481 U.S. 279, 286-91 (1987).

27. *See, e.g.*, Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1505, 1508 (1994) (holding that the statute authorizing compensatory and punitive damages in Title VII actions does not apply retroactively); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (stating that in a Title VII claim, the plaintiff must identify a specific employment practice that caused a disparate impact); Patterson v. McLean Credit Union, 491 U.S. 164, 179-80 (1989) (holding that 42 U.S.C. § 1981 only bars discrimination in the making of a contract, not discrimination in the terms and conditions of continued employment which is covered by Title VII).

28. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (rejecting the rationale of six Supreme Court decisions); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (rejecting the limited application of Title IX in Grove City v. Bell, 465 U.S. 555 (1984)).

29. *See Adarand Constructors*, 115 S. Ct. at 2118-19 (Scalia, J., concurring).

30. *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J. concurring)).

One may get some insight into the answer to that question by looking at two other areas where Justice O'Connor's "centrist" position has become Supreme Court doctrine. In Establishment Clause cases, the Court has come to rely more and more on Justice O'Connor's endorsement test.[31] Under that test, the government may not engage in any action that a reasonable person would regard as an endorsement of religion.[32] The key, of course, is how one measures "endorsement." In the October 1994 term, Justice O'Connor provided the fifth vote in favor of government funding for a religious student publication at the University of Virginia.[33] In typical fashion, Justice O'Connor tried to narrow the scope of the majority holding by writing a separate concurring opinion that may or may not prove significant in future cases.[34] Yet the fact remains, as the dissent pointed out, that this was the first time that the Supreme Court had ever upheld direct government funding for a religious activity.[35]

Similarly, Justice O'Connor has steadfastly refused to overturn *Roe v. Wade* and gradually convinced the Court to adopt the undue burden test that she has championed for years.[36] The refusal to overrule *Roe* is an important victory and I do not intend to underestimate its significance, either legally or politically. But it would be equally wrong to ignore the fact that the undue burden test has enabled the Court to sustain a whole series of abortion regulations that had been struck down when *Roe* was applied in its undiluted form.[37] This diluted version of *Roe* can only be described as "centrist" if *Roe* itself is described as extreme.

More generally, the Rehnquist Court can be described as moderate only if whittling away at constitutional doctrine, rather than whacking away, can be described as a centrist response in these political times. It

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31. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990); Wallace v. Jaffree, 472 U.S. 38 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984).

32. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

33. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2525-28 (1995) (O'Connor, J., concurring).

34. *Id.*

35. *Id.* at 2533 (5-4 decision) (Souter, J., dissenting, joined by Justices Stevens, Ginsburg and Breyer).

36. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring).

37. *Compare* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (upholding statute requiring physician to inform pregnant woman of the health risks associated with abortion and childbirth, as well as the probable gestational age of the fetus), *with* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down a similar ordinance).

is fashionable nowadays to say that big government has to shrink. The Court seems to take the same approach to its role in protecting constitutional rights. Every other Court since the New Deal has expanded our vision of constitutional liberty. It was, for example, the Burger Court, not the Warren Court, that applied heightened scrutiny to gender discrimination to claims under the Fourteenth Amendment,[38] and decided *Roe*. What constitutional rights have the Rehnquist Court championed? Two come to mind. First, and most prominently, the present Court has breathed new life into the Takings Clause.[39] Second, it has vigorously supported the rights of commercial speakers.[40] This is not the place to debate the merits of those developments. But in attempting to place the Rehnquist Court in context it is important to note that the moral passion that previous Courts reserved for individual rights has been most often expressed by the Rehnquist Court on behalf of property rights.

Finally, it would be a mistake to ignore two cases from last year that may turn out to be idiosyncratic or, alternatively, may signal the beginning of a new and truly conservative revolution on the Court. In *United States v. Lopez*,[41] a 5-4 majority ruled that Congress had exceeded its constitutional authority by attempting to ban all guns within 1000 feet of

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38. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

39. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (holding that requiring a private property owner to dedicate land to a public rather than private greenway is not rationally related to the city's interest in flood control); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (stating that a state cannot merely declare that an owner's proposed use of private land is inconsistent with the public interest, but that it must identify principles in law to prohibit that proposed use); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that the government can only forbid particular land use in order to advance a legitimate police power including a concession of property rights, "so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use").

40. *See, e.g.*, Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (stating that a ban on allowing alcohol content to be printed on beer labels was a violation of First Amendment protection of commercial speech because the ban did not advance the government's interest in suppressing the "strength wars" in a direct and material way); Edenfield v. Fane, 507 U.S. 761 (1993) (holding that a ban on in-person solicitations by CPAs failed to advance the government's substantial interest in protecting consumers from fraud and overreaching by CPAs and therefore violated the First Amendment); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (holding that a city regulation of newsracks was invalid because it was predicated on the content of the publications being restricted and those that were not, and therefore violated the First Amendment).

41. 115 S. Ct. 1624 (1995).

any public, private, or parochial school. It was the first time since 1936 that a federal statute had been ruled invalid under the Commerce Clause.[42] In *United States Term Limits, Inc. v. Thornton*,[43] the Court ruled that states could not alter the "qualifications" for congressional officeholders by imposing term limits.[44] That ruling was expected. What was not expected was the close 5-4 vote or Justice Thomas' dissenting opinion, which questioned the very premises of the federal union and the notion of national citizenship.[45]

Taken together, *Lopez* and *Thornton* have led some to conclude that the issue of states' rights will once again become a significant one for the Court. If so, many of the Court's civil rights decisions may be in jeopardy. I do not expect that to happen. I believe this is a Court that has too much allegiance to *stare decisis* to permit such a precipitous shift in the Court's constitutional jurisprudence.[46] On this issue, I agree that the center will hold. But as long as the center keeps moving to the right, I take less comfort in that fact than some others might.

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42. *See generally* Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 71 (1995) (discussing Carter v. Carter Coal Co., 298 U.S. 238 (1936)).

43. 115 S. Ct. 1842 (1995).

44. *Id.* at 1871.

45. *Id.* at 1875.

46. *See, e.g.*, *Casey*, 505 U.S. at 868 ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.").