NEW YORK LAW SCHOOL

NYLS Law Review

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

Article 16

January 1996

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Recommended Citation
David M. O'Brien, *CHARTING THE REHNQUIST COURT'S COURSE: HOW THE CENTER FOLDS, HOLDS, AND SHIFTS*, 40 N.Y.L. SCH. L. REV. 981 (1996).

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CHARTING THE REHNQUIST COURT'S COURSE: HOW THE CENTER FOLDS, HOLDS, AND SHIFTS

DAVID M. O'BRIEN*

"Power, not reason, is the new currency of this Court's decisionmaking."[1] Those are the words of the last liberal on the Supreme Court, Justice Thurgood Marshall. In his last opinion issued from the bench, dissenting in *Payne v. Tennessee*, Justice Marshall lamented the majority's overturning of two precedents, *Booth v. Maryland*[2] and *South Carolina v. Gathers*,[3] in which bare majorities barred the use of "victim-impact" statements during the sentencing stage of capital trials.[4] Predicting that scores of other liberal precedents were now in jeopardy, he castigated the newly emergent majority on the "Rehnquist Court,"[5] observing that, "Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."[6]

Within hours of handing down his dissent in *Payne v. Tennessee*, Justice Marshall announced that he would retire upon the confirmation of his successor.[7] Appointed in 1967, at the height of the liberal-egalitarian revolution forged in constitutional law by the Warren Court, Justice

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1. Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

2. 482 U.S. 496 (1987).

3. 490 U.S. 805 (1989).

4. *Booth*, 482 U.S. at 504; *Gathers*, 490 U.S. at 811.

5. The convention of referring to the "Rehnquist Court" is followed here, but note that this convention often creates confusion by suggesting too great an influence of the Chief Justice and greater stability on the Court than in fact exists. This convention also distracts from the fact that every time there are changes in the composition of the bench the Court changes, even if the Chief Justice remains the same. Political scientists generally analyze the Supreme Court in terms of "natural courts," periods in which the Court's personnel remain stable. Accordingly, there have been six "Rehnquist Courts." The first Court was the 1986 Term and the first part of the 1987 Term. The second Court followed the appointment of Justice Kennedy, the second half of the 1987 Term and the 1988 and 1989 Terms. The third Court was the 1990 Term which included the seating of Justice Souter. The fourth Court was after the arrival of Justice Thomas, the 1991 and 1992 Terms. Finally, the fifth and sixth Courts were in the 1993 and 1994 Terms, which each began with the addition of a new Justice—Ginsburg and Breyer, respectively.

6. *Payne*, 501 U.S. at 844.

7. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 210 (1995).

Marshall witnessed a gradual 180-degree turn in direction in a number of areas of civil rights and liberties.[8] Between 1961 and 1969, more than seventy-six percent of the Warren Court's decisions each term went in a liberal direction, protecting individuals and minorities against the government.[9] Then, during the Burger Court years, in spite of *Roe v. Wade*[10] and some other rulings,[11] the percentage of liberally inclined decisions dropped below fifty percent each term, with one exception.[12] Perhaps even more disturbing for Justice Marshall, who as a young attorney spear-headed the NAACP Legal Defense and Education Fund's drive to end racial discrimination and argued before the Court the landmark case of *Brown v. Board of Education*,[13] was the constitutional counterrevolution that the emerging Rehnquist Court threatened to put in place on race relations.

In his last term on the bench, Justice Marshall no longer had the support of his closest ally, Justice William J. Brennan, Jr., who retired at the end of the preceding term. Justice Brennan's absence from the bench amounted to more than the loss of yet another vote for liberals. During the course of more than three decades, Justice Brennan championed liberal legalism and proved to be a master of coalition building within the Court.[14] Moreover, in the 1990 term the Court's working majority no longer appeared compelled to take liberal arguments seriously. More often than not, they were preoccupied with fighting among themselves over how far to shift to the right. Justice Antonin Scalia, in particular, appeared so concerned with taking on more moderate conservatives, like

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8. William J. Daniels, *Justice Thurgood Marshall: The Race for Equal Justice*, *in* THE BURGER COURT 212, 212-37 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

9. *See, e.g.*, Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 JUDICATURE 83, 89 tbl. 1 (1993) (showing that decisions in civil liberties cases went in a liberal direction 71.4% of the time during the Warren Court era).

10. 410 U.S. 113 (1973).

11. *See* Charles M. Lamb & Stephen C. Halpern, *The Burger Court and Beyond*, *in* THE BURGER COURT, *supra* note 8, at 433, 436. The Burger Court also brought us well-known decisions in the area of women's rights such as Frontiero v. Richardson, 411 U.S. 677 (1973), Craig v. Boren, 429 U.S. 190 (1976), and Roberts v. United States Jaycees, 468 U.S. 609 (1984).

12. Smith & Hensley, *supra* note 9, at 89 tbl. 2 (showing that less than 50% of the Burger Court's decisions went in a liberal direction each Term, with the exception of the 1971-1972 Term).

13. 347 U.S. 483 (1954).

14. Stanley H. Friedelbaum, *Justice William J. Brennan, Jr.: Policy-Making in the Judicial Thicket*, *in* THE BURGER COURT, *supra* note 8, at 100.

Justice Sandra Day O'Connor, that he had little time for troubling with Justice Marshall's protestations.

For his part, Chief Justice William H. Rehnquist had waited almost forty years for the Court's composition to move in his direction. As a law clerk to Justice Robert H. Jackson during the 1952 term, he wrote a memo dismissing Marshall's arguments in *Brown* by stating his view that the "separate but equal" doctrine should be upheld.[15] Later, during his sixteen years as an Associate Justice on the Burger Court, he staked out other positions on the far right and became known as the "Lone Ranger" for filing the largest number of solo dissents.[16] Then, in his first four terms in the center chair, Chief Justice Rehnquist battled for influence with Justice Brennan over the votes of the Court's centrists. Finally, with Justice Brennan's departure from the bench and the arrival of the fifth consecutive appointee, Justice David H. Souter, by a Republican President since his own appointment in 1972, Chief Justice Rehnquist presided over an increasingly conservative Court that promised the potential for moving constitutional law toward his own well-established positions.

Besides *Payne* in the 1990 term, the Chief Justice commanded a majority in *Board of Education v. Dowell*,[17] which held that school districts previously required by law to eliminate racial segregation could end forced busing of students in favor of neighborhood schools, even though that entailed returning to a system of schools enrolling overwhelmingly either black or white students. And again dissenting, Justice Marshall was relegated to protesting, in vain, that "vestiges of past discrimination" remain in many parts of the country.[18] Justice Marshall's dissents in *Payne* and *Dowell* marked the growing distance between, on the one hand, his and past majorities' liberal vision of constitutional law and construction of social reality, and, on the other hand, the emerging majority on the Rehnquist Court.

Dowell, Justice Marshall understood, signaled the beginning of the end of the *Brown* era. The Court was carrying over on its docket from past terms several other school desegregation cases,[19] including *Freeman v.*

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15. DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1334 (2d ed. 1995) (reproducing Rehnquist's memo).

16. *See* A.E. Dick Howard, *The Supreme Court*, A.B.A. J., Oct. 1995, at 68 (stating that Justice Rehnquist "lacked jurisprudential soul mates so often on the Burger Court that at one point, his law clerks gave him a Lone Ranger doll").

17. 498 U.S. 237 (1991).

18. *Id.* at 262.

19. *See, e.g.*, Board of Educ. v. Brown, 892 F.2d 851 (10th Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3775 (U.S. Apr. 26, 1990) (arising from the protracted litigation that began with Brown v. Board of Education, 347 U.S. 483 (1954)); Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990), *sub nom* U.S. v. Mabus, 499 U.S. 958 (1991),

Pitts[20] and *Board of Education v. Brown*.[21] *Freeman* was scheduled to be heard the first Monday in October, 1991. When the controversy over Anita Hill's allegations of sexual harassment prolonged the confirmation process for the already controversial nomination of Clarence Thomas as Justice Marshall's successor,[22] Marshall had no alternative other than to abruptly send a letter informing President George Bush of his decision to retire immediately, thereby allowing the Justice to avoid participating in the oral arguments in *Freeman*.

As Justice Marshall foresaw, in *Freeman* the Rehnquist Court continued to press *Dowell*'s message that lower federal courts should begin withdrawing from their supervision of school desegregation efforts and return complete authority to local school boards.[23] Justice Anthony Kennedy's opinion for an ostensibly unanimous Court represented a rough compromise on the closing of the *Brown* era, though another incremental step in that direction. Less strident and more moderate than either the Chief Justice or Justice Scalia, Justice Kennedy held simply that lower federal courts may withdraw from supervising discrete categories of school operations, as identified in 1968 in *Green v. County School Board*,[24] once school districts show compliance with desegregation orders.[25] Lower courts, moreover, need not wait for a specified period of years before doing so or await desegregation in all areas of a school system before disengaging.[26] Justice Kennedy's failure to lay down any guidelines for ending federal courts' supervision of school desegregation prompted Justice Scalia in a concurring opinion to call for an immediate end to all

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petition for cert. filed, 60 U.S.L.W. 3027 (U.S. Jan. 28, 1991), *and* Ayers v. Mabus, 499 U.S. 958 (1991), *petition for cert. filed*, 60 U.S.L.W. 3027 (Dec. 17, 1990); *In re* Louisiana, 501 U.S. 1229 (1991), *petition for writ of mandamus filed*, 59 U.S.L.W. 3754 (U.S. Apr. 23, 1991); Freeman v. Pitts, 887 F.2d 1438 (11th Cir. 1989), *petition for cert. filed*, 60 U.S.L.W. 3027 (U.S. Feb. 12, 1990).

20. 503 U.S. 467 (1992) (1969 desegregation case over which the Court retained jurisdiction to oversee implementation of the desegregation plan).

21. 503 U.S. 978 (1992) (remanding case in light of decision in *Freeman v. Pitts*).

22. Adam Clymer, *Delaying the Vote: How Senators Reached Accord*, N.Y. TIMES, Oct. 9, 1991, at B15.

23. *Freeman*, 503 U.S. at 498.

24. 391 U.S. 430 (1968) (reviewing desegregation plan for local school district and holding that it failed to comply with the mandate of Brown v. Board of Education, 349 U.S. 294 (1954)).

25. *Freeman*, 503 U.S. at 490.

26. *Id.* at 490-91.

judicial supervision of schools that no longer intentionally discriminate.[27] Justice Kennedy's opinion, however, appeared to go too far for Justices Souter, Blackmun, Stevens and O'Connor. They countered in separate concurrences (which read like dissents) that the lower federal courts should undertake a probing analysis before abandoning their judicial supervision.[28]

Three years later, in the 1994 term, the working majority on the Rehnquist Court continued down the road of *Dowell* and *Freeman* in *Missouri v. Jenkins*.[29] In the meantime, Justice Thomas had joined the Court as did Justices Ruth Bader Ginsburg and Stephen Breyer, the first appointees of a Democratic President in over a quarter of a century, indeed, since Justice Marshall's appointment. This time around, Chief Justice Rehnquist commanded only a bare majority to rebuff a federal district court for exceeding its remedial powers, and to lay down some guidelines for lower federal courts' withdrawing from supervision over efforts to integrate public schools.[30] The four dissenters—Justices Breyer, Ginsburg, Souter, and Stevens—countered that the majority overreached and firmly rejected the majority's conclusion that lower courts possess no authority to order improvements in school districts so as to make them more attractive to white students.[31] "Given the deep, inglorious history of segregation in Missouri," observed Justice Ginsburg, "to curtail desegregation at this time and in this manner is an action at once too swift and too soon."[32]

Missouri v. Jenkins was, of course, only one of three important decisions handed down in the 1994 term in which the working majority on the Rehnquist Court continued to advance its "Constitution is colorblind" doctrine.[33] The two other decisions dealt with voting rights and affirmative action, but also built on the Rehnquist Court's earlier rulings. In 1993, writing for a bare majority in *Shaw v. Reno*,[34] Justice O'Connor held that the Fourteenth Amendment forbids racial gerrymandering in

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27. *Id.* at 506 (Scalia, J., concurring) (arguing that it is absurd to assume that the current operation of schools is marred by the long latent constitutional violations).

28. *Id.* at 507 (Souter, J., concurring); *id* at 509 (Blackmun, J., concurring in which Stevens & O'Connor, JJ., joined).

29. 115 S. Ct. 2038 (1995).

30. *Id.* at 2051.

31. *Id.* at 2073 (Souter, J., dissenting).

32. *Id.* at 2091 (Ginsburg, J., dissenting).

33. The three cases were Missouri v. Jenkins, 115 S. Ct. 2038 (1995), Miller v. Johnson, 115 S. Ct. 2475 (1995), and Adarand Constructors, Inc., v. Pena, 115 S. Ct. 2097 (1995).

34. 113 S. Ct. 2816 (1993).

electoral redistricting unless the government demonstrates a "compelling reason" for creating so-called minority-majority districts.[35] That ruling was reaffirmed in *Miller v. Johnson*[36] by another bare majority in an opinion authored by Justice Kennedy that concluded that the creation of three minority-majority congressional districts in Georgia was not required under the Voting Rights Act.[37]

A majority of the Rehnquist Court turned the corner on affirmative action in *Richmond v. J.A. Croson*,[38] making it much more difficult for states and localities to defend such programs, and in *Northeastern Florida Contractors v. Jacksonville*[39] making it easier for white-owned businesses to attack the constitutionality of such programs. However, in 1990 Justice Brennan mustered a bare majority in *Metro Broadcasting, Inc. v. Federal Communications Commission*[40] to reaffirm earlier decisions holding that Congress has broader latitude than states and localities when authorizing affirmative-action programs. But by the 1994 term Justice Stevens was the only Justice on the bench who voted with the majority. The other four Justices—Brennan, Marshall, White, and Blackmun—comprising the majority in *Metro Broadcasting*, had retired. With the Court's composition so dramatically changed in four short years the Rehnquist Court decided, not surprisingly, to revisit the controversy in *Adarand Constructors, Inc. v. Pena*.[41] There, a bare majority, in an opinion announced by Justice O'Connor, discarded *Metro Broadcasting*,[42] holding instead that the "strict scrutiny" standard applied in *Croson* to state and local affirmative-action programs also applies to federal programs.[43]

Notably, *Missouri v. Jenkins*,[44] *Miller v. Johnson*,[45] and *Adarand Constructors, Inc. v. Pena*[46] were decided by the same bare majority: Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. That bloc prevailed in six of the sixteen five-to-four decisions

35. *Id.* at 2828.
36. 115 S. Ct. 2475 (1995).
37. *Id.*
38. 488 U.S. 469 (1989).
39. 113 S. Ct. 2297 (1993).
40. 497 U.S. 547 (1990).
41. 115 S. Ct. 2097 (1995).
42. *Id.* at 2113.
43. *Id.* at 2118.
44. 115 S. Ct. 2038 (1995).
45. 115 S. Ct. 2475 (1995).
46. 115 S. Ct. 2097 (1995).

in the 1994 term and voted most frequently together.[47] By contrast, the four dissenting justices—Breyer, Ginsburg, Souter, and Stevens—were able to prevail only if they swung either Justice Kennedy or O'Connor over to their side.[48] But, they were able to do so in only four of the sixteen five-to-four splits.[49] Not surprisingly, the vote of either or both Justices Kennedy and O'Connor proved pivotal in determining the outcome of five-to-four splits; Justice Kennedy was on the winning side in thirteen and Justice O'Connor in eleven of the sixteen bare majority decisions.[50]

The point of reviewing this recent history is, of course, to underscore the fundamental problem with Professor James Simon's thesis. In his book *The Center Holds*,[51] Simon argues that the record of the first eight terms of the Rehnquist Court was that of "a conservative judicial revolution that failed."[52] And he persists in his Solomon lecture.[53] That he does so seems all the more strange given the Court's major rulings in its 1994 term.[54] Simon does note that *The New York Times* end-of-the-term article took the contrary view—it is summed up in its title "Farewell to the Old Order on the Court: The Right Goes Activist and the Center Is a Void"[55]—and that a good number of the reviewers of his book were quick to point out that the term's decisions undermined his thesis.[56] Far

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47. *The Supreme Court, 1994 Term-Leading Cases*, 109 HARV. L. REV. 111, 343 tbl. I(D) (1995).

48. *Id.*

49. *Id.*

50. *Id.*

51. SIMON, *supra* note 7.

52. *Id.* at 11.

53. *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) ("I . . . [remain] . . . unrepentant . . . even considering last term's Court decisions . . . .").

54. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038 (1995); Miller v. Johnson, 115 S. Ct. 2475 (1995); Adarand Constructors, Inc., v. Pena, 115 S. Ct. 2097 (1995).

55. Linda Greenhouse, *Farewell to the Old Order on the Court: The Right Goes Activist and the Center Is a Void*, N.Y. TIMES, July 2, 1995, at E4 (suggesting that the Supreme Court "reexamin[ed]" basic Constitutional principles in the 1994-95 Term).

56. *See, e.g.*, Richard Bernstein, *How Nino, Tony, the Chief, et. al., Make Decisions*, N.Y. TIMES, Sept. 1, 1995, at C26 (ridiculing the proposition that "the center held because there was always a majority in the center"); David C. Frederick, *The Documents in the Case*, WASH. POST BOOK REV., Sept. 17, 1995, at 6 (suggesting that "decisions handed down last term cast doubt on the proposition that the 'center' has held"); Curtis Gannon, *Instructive Glimpses of an Evolving Court*, WASH. TIMES, Sept. 9, 1995, at D3 (noting that conservative decisions on affirmative action and on

from undermining his thesis, though, he counters that the 1994 term's rulings and the Justices' voting patterns support his conclusion that "the center of gravity on this Court is not located on the right wing, where Rehnquist, Scalia, and Thomas reside, but, instead, where O'Connor and Kennedy sit."[57]

The fundamental problem with Simon's thesis stems from his failure to analyze how the center of the Court shifts with changes in the composition of the bench. He correctly notes that on several major issues Justices Kennedy and O'Connor cast the deciding votes.[58] They are also more moderately conservative jurists—in the tradition of, for example, Justice Felix Frankfurter—than Chief Justice Rehnquist and Justices Scalia and Thomas. The latter appear to share a conservative vision that opposes liberal legalism and lends itself to judicial activism—activism whether in terms of overturning precedents or second-guessing elected representatives and the democratic process, as in last term's decisions in *Miller v. Johnson*[59] and *Adarand Constructors*.[60]

Compared to the three justices on their right, who might be deemed "visionaries" of a kind of conservative judicial activism (comparable, but running contrary to liberal visionaries such as Justices Brennan and Marshall), Justices Kennedy and O'Connor are "legal technicians" without rigid agendas. As such, they are more deferential to precedents and far more moderate in their opinion writing, as their opinions in the above cases demonstrate. That is also to agree with Simon, among others, that Justices Kennedy and O'Connor have moderated (and will continue, in the near term at least, to moderate) the march to the right on abortion, racial

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Congressional power over interstate commerce in the last term portend for "another right turn"); David J. Garrow, *The Center Folds*, NEWSDAY, Aug. 13, 1995, at 33 (arguing that recent decisions injure Professor Simon's otherwise "admirable" book); David Andrew Price, *Looking Closely at the High Court*, WALL ST. J., Aug. 16, 1995, at A8 (suggesting that "pity" is in order for Professor Simon's thesis following recent decisions); Jeffrey Rosen, *Disorder in the Court*, N.Y. TIMES BOOK REV., Aug. 20, 1995, at 10 (suggesting that the conservatives on the Court have cemented their majority).

57. Simon, *supra* note 53, at 875.

58. SIMON, *supra* note 7, at 163 (Planned Parenthood v. Casey, 505 U.S. 833 (1992) (judgment limiting state regulations of abortions before viability to those which did not place an "undue burden" on a woman)); *id.* at 63, 64 (Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 did not apply to acts of racial harassment committed in connection with employment)); *id.* at 287 (Lee v. Weisman, 505 U.S. 577 (1992) (holding that a commencement prayer violated the First Amendment's Establishment Clause)).

59. 115 S. Ct. 2475 (1995).

60. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

gerrymandering, affirmative action, judicial supervision of school desegregation, and other issues.

To argue, as Simon does, however, that "the center of gravity on this Court is not located on the right wing, . . . but, instead, where O'Connor and Kennedy sit"[61] does not support the thesis that the Rehnquist Court's record is that of "a conservative judicial revolution that failed."[62] When the Court is sharply split on highly contested issues, one or two Justices at the center inexorably determine the outcome. Justice Potter Stewart played that role for a while,[63] whereas Justices Lewis F. Powell, Jr. and Byron White later came to play that role in the 1980s on a large number of social-civil rights issues.[64] Still, it is trivial, indeed tautological, to argue that centrists control the Court when the Justices are otherwise sharply divided. Moreover, the critical and moderating role that Justices Kennedy and O'Connor have come to play does not *prove* that "the conservative judicial revolution"[65] failed. At most, they have tempered the Rehnquist Court's rulings and its movement to the right.

Part of Simon's problem stems from his failure to analyze (and in his Solomon lecture to concede) how much the balance of power within the Court has shifted in recent years. In other words, he fails to analyze the Rehnquist Court within the broader context of the institutional dynamics of judicial politics brought by changes in the Court's composition and appears to underestimate the doctrinal changes forged in any number of areas. In contrast to *The Los Angeles Times* reporter David Savage's, 1992 book, *Turning Right*,[66] *The Center Holds* aims to persuade the reader that the Rehnquist Court has not turned that far to the right. As such, Simon is a kind of apologist for the Rehnquist Court, for what the centrists achieved and what they prevented.

The fact is that the Court and its centrists have become more and more conservative over the last quarter of a century. While the Burger

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61. Simon, *supra* note 53, at 875.

62. SIMON, *supra* note 7, at 11.

63. Ben W. Heineman, Jr., *A Balance Wheel on the Court*, 95 YALE L.J. 1325 (1986) (describing Justice Stewart as a "moderate, swing vote, pithy and witty writer").

64. Burt Neuborne, *Lewis F. Powell, Jr.*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS 1630, 1632 (Leon Friedman & Fred L. Israel eds., 1997) (stating that "[o]perating from the center, Justice Powell often casts the balance-of-power vote that controlled the Court"); Robert H. Freilich, *Reagan's Legacy: A Conservative Majority Rules on Civil Rights, Civil Liberties and State and Local Government Issues*, 21 URB. L. 633, 669 (1989) (describing Justice White as the swing vote on Eleventh Amendment issues).

65. SIMON, *supra* note 7, at 11.

66. DAVID SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT (1995).

Court extended the right of privacy in *Roe v. Wade*[67] and expanded protection under the Fourteenth Amendment, as well as approved busing[68] and most affirmative-action programs,[69] the Warren Court's "revolution in criminal procedure"[70] came to a halt after Republican President Richard M. Nixon's four appointees and, then the retirement of Justice William O. Douglas and the appointment of his replacement, Justice Stevens, in 1975. With Ronald Reagan's first appointee, Sandra Day O'Connor, in 1981, the Court became even more conservative on most matters of criminal procedure[71] and has largely remained so, if not become increasingly so, in the last decade.

Then, in 1986, Reagan, in a symbolic and strategic move, elevated Rehnquist from Associate to Chief Justice and named the no less conservative Scalia to fill his seat. Precisely because Justice Powell had cast the crucial fifth vote on abortion,[72] affirmative action,[73] and other

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67. 410 U.S. 113 (1973).

68. Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971) (holding that courts have broad equitable powers to remedy past wrongs, including the use of busing to remedy past discriminatory state legislation).

69. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that federal statute requiring 10% set-aside of federal grants for minority businesses in public works projects was constitutional); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that a state university may take race into account in its admissions standards). *But cf.* Wygant v. Jackson, 476 U.S. 267 (1986) (holding that teachers' collective bargaining agreement which provided for the maintenance of racial proportions without reference to seniority during periods of layoffs violated the Fourteenth Amendment).

70. *See, e.g.*, G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175, 1209 (1995); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 408 (1995).

71. *See, e.g.*, California v. Ramos, 463 U.S. 992 (1983) (holding that Eighth and Fourteenth Amendments do not prohibit jury instructions informing jury of Governor's power to commute capital sentence); Tibbs v. Florida, 457 U.S. 31 (1982) (holding that reversal of felony conviction based on weight of evidence does not preclude retrial on double jeopardy principles); *see also* Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134, 137 (1993) (stating that "O'Connor and Rehnquist voted together in a greater percentage of cases involving criminal procedure (87.2 percent) than they did in cases concerning either civil rights (62.2 percent) or the Establishment Clause (52.9 percent).").

72. Roe v. Wade, 410 U.S. 113 (1973).

73. *Bakke*, 438 U.S. 265.

social-civil rights issues in the mid-1980s,[74] Reagan's nomination of the well-known hard-line conservative critic of the Warren and Burger Courts, Judge Robert H. Bork,[75] set off a storm of controversy that contributed to ultimately defeating his confirmation.[76] Although not a conservative visionary of the law like Bork or Scalia, Justice Kennedy was, nonetheless, more conservative than the justice he replaced. And that is the point: As more conservatives joined the Court, its jurisprudential center shifted—in decided and lasting ways. Old alignments and centers of agreement folded; new ones emerged and shifted, holding momentarily, until the Court's composition further changed.

None of this analysis is new, though its significance appears either to escape Simon or he has sought to evade fully coming to terms with it. The center has not held, except in the trivial sense noted above. Instead, "the center of gravity" on the Court shifted to the right, and along with it the Court's centrists have become more conservative, even while declining to always go as far as the Court's right wing. The Court's right wing, moreover, has grown from one to three, Chief Justice Rehnquist and Justices Scalia and Thomas.

Measured in terms of decisions in which the Justices split five-to-four, and thus representing the sharpest ideological divisions, the Court has rather steadily moved in Chief Justice Rehnquist's direction, except for one term.[77] Not surprisingly, the Justices voting most often with the majority shifted from Justices Powell and White to Justices Kennedy and O'Connor. Still, as indicated below, Chief Justice Rehnquist in the last three terms was on the prevailing side of bare majority decisions an average of sixty-eight percent of the time, slightly down from the seventy

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74. *See, e.g.*, Booth v. Maryland, 482 U.S. 496 (1987) (holding that introduction of victim-impact statement at sentencing phase of capital trial violated Eighth Amendment); Solem v. Helm, 463 U.S. 277 (1983) (holding that life sentence without parole for seventh nonviolent felony conviction, imposed by state recidivism statute, violates Eighth Amendment); Plyler v. Doe, 457 U.S. 202 (1982) (holding that state statute denying free public education to illegal alien children was unconstitutional).

75. Former Judge Robert H. Bork served on the United States Court of Appeals for the District of Columbia from 1982 to 1988.

76. President Reagan nominated Judge Bork for the United States Supreme Court on July 1, 1987. Beginning on September 15, 1987, the Senate Judiciary Committee elicited twelve days of testimony as to the nomination, and on October 6, voted to recommend the rejection of the nominee by a vote of 9-5. The Senate formally rejected the nomination by a vote of 42-58 on October 23, 1987, after 23 hours of floor debate. GERALD GUNTHER, CONSTITUTIONAL LAW app. B-6, 7 (12th ed. 1991).

77. In 1991, Chief Justice Rehnquist voted with the minority in approximately 72% of the decisions in which the Court acted upon a bare majority. Since his ascension to Chief Justice in 1986, 1991 remains the only year in which Rehnquist found himself in the minority in those cases commanding a 5-4 split.

percent average during his first five years as Chief Justice but well above his average of fifty-five percent during the last five years of the Burger Court:

Table I[78]

Term	Number of 5:4 Decisions	Frequency Percentage Rehnquist in Majority	Justice & Frequency Percentage in Majority	
1994	15	60	Kennedy	86
1993	13	69	Kennedy	92
1992	18	77	Scalia	77
1991	14	28	Souter	92
1990	21	71	O'Connor	71
1989	39	66	White	76
1988	33	81	White	78
1987	12	75	White	91
1986	45	60	Powell	75
1985	36	63	Powell/O'Connor	75
1984	19	57	Powell	73
1983	28	60	White	78
1982	33	57	White	75
1981	31	38	Stevens	74

. Simon is no doubt wedded to his thesis because his book is based on a series of anecdotes about how Justices Kennedy and O'Connor, along with Justice Souter, in *Planned Parenthood of Southeastern Pennsylvania*

78. *The Supreme Court, 1994 Term-Leading Cases*, 109 HARV. L. REV. 111, 343 tbl. I(D) (1995); *The Supreme Court, 1993 Term-Leading Cases*, 108 HARV. L. REV. 139, 372 tbl. I(D) (1994); *The Supreme Court, 1992 Term-Leading Cases*, 107 HARV. L. REV. 144, 372 tbl. I(D) (1993); *The Supreme Court, 1991 Term-Leading Cases*, 106 HARV. L. REV. 163, 378 tbl. I(D) (1992); *The Supreme Court, 1990 Term-Leading Cases*, 105 HARV. L. REV. 177, 419 tbl. I(D) (1991); *The Supreme Court, 1989 Term-Leading Cases*, 104 HARV. L. REV. 129, 359 tbl. I(D) (1990); *The Supreme Court, 1988 Term-Leading Cases*, 103 HARV. L. REV. 137, 394 tbl. I(D) (1989); *The Supreme Court, 1987 Term-Leading Cases*, 102 HARV. L. REV. 143, 350 tbl. I(D) (1988); *The Supreme Court, 1986 Term-Leading Cases*, 101 HARV. L. REV. 119, 362 tbl. I(D) (1987); *The Supreme Court, 1985 Term-Leading Cases*, 100 HARV. L. REV. 100, 304 tbl. I(D) (1986); *The Supreme Court, 1984 Term-Leading Cases*, 99 HARV. L. REV. 120, 322 tbl. I(D) (1985); *The Supreme Court, 1983 Term-Leading Cases*, 98 HARV. L. REV. 87, 307 tbl. I(D) (1984); *The Supreme Court, 1982 Term-Leading Cases*, 97 HARV. L. REV. 70, 295 tbl. I(D) (1983); *The Supreme Court, 1981 Term-Leading Cases*, 96 HARV. L. REV. 62, 304 tbl. I(D) (1982).

v. Casey,[79] declined to march in step with Chief Justice Rehnquist and Justice Scalia and, after his arrival on the bench in 1991, Justice Thomas.[80] The stories are engaging and lively, based on internal memoranda located in Justice Marshall's papers at the Library of Congress and Simon's interviews with "confidential sources."[81] But, the problem remains that Simon overstates his argument and minimizes the broader drift to the right, along with its significance for the Court and the country.

Simon, for instance, ably describes the power struggles within the Court over whether it should reach out in *Patterson v. McLean Credit Union*[82] to overrule *Runyon v. McCrary*,[83] a 1976 Burger Court ruling holding that the Civil Rights Act of 1866 extends to private schools that refuse to admit blacks.[84] In the end, writing for a bare majority, Justice Kennedy declined both to overturn *Runyon* or to extend the Act's coverage beyond barring discrimination in hiring and firing to also bar racial harassment and discrimination as a condition of employment.[85] The result was decidedly conservative, even though it did not go as far as Chief Justice Rehnquist and Justice Scalia wanted to go.[86] But, Simon concludes, "if *Runyon* had been overruled, it would have truly signaled a *revolutionary* conservative movement."[87] Well, yes and no. The hard push in the conservative direction was in fact signaled when the Rehnquist Court (without Justice Kennedy, who was yet to be nominated and confirmed) heard oral arguments in *Patterson* in 1987 and then (after Justice Kennedy's confirmation) a bare majority voted to carry the case over to the next term for reargument and directed counsel to consider whether *Runyon* should be reversed. Four justices—Blackmun, Brennan, Marshall, and Stevens—dissented from that order, warning of the emergence of a new majority that threatened to no longer take precedents seriously.[88] Even though the final result fell short of overturning *Runyon*, the result was nonetheless a victory for conservatives, which, as

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79. 505 U.S. 833 (1992).

80. SIMON, *supra* note 7, at 154-67.

81. SIMON, *supra* note 7, at 305-17.

82. 491 U.S. 164 (1989).

83. 427 U.S. 160 (1976). *See* SIMON, *supra* note 7, at 305.

84. *Runyon*, 427 U.S. at 174.

85. *Id.* at 177.

86. SIMON, *supra* note 7, at 67.

87. Simon, *supra* note 53, at 866 (emphasis added).

88. *Patterson*, 485 U.S. 617, 619 (Blackmun, J., dissenting).

Simon notes, Congress overruled with the enactment of the Civil Rights Act of 1991.[89]

The controversy over *Patterson*'s possible reversal of *Runyon* and the potential reversal of *Roe v. Wade*[90] in *Webster v. Reproductive Health Services*[91] continued two years later in *Payne v. Tennessee*[92] and into the following term in *Planned Parenthood v. Casey*.[93] The Rehnquist Court became deeply embroiled over the controversy, attracting the attention of scholars and the media.[94] No less angry than Justice Marshall's dissent in *Payne*,[95] Justice Scalia's concurrence in *Webster* was especially biting in its attack of Justice O'Connor's reluctance to overrule *Roe*.[96] Moreover, the controversy over the doctrine of *stare decisis* grew so hot that even the retired (and reserved conservative) Justice Powell entered the fray. In his 1989 lecture before the Association of the Bar of the City of New York, Justice Powell addressed the controversy and cautioned that abandoning the doctrine "would undermine the rule of law."[97] As the controversy played out, it undoubtedly contributed to the fragmentation (and concomitantly, to the subsequent moderation) of the Rehnquist Court, and also inspired the plurality opinion issued by Justices Kennedy, O'Connor, and Souter in *Casey*.[98]

Patterson[99] and its attendant controversy over the Rehnquist Court's reversal of precedents, according to Simon, counts as evidence supporting his thesis that the conservative revolution failed.[100] And in his Solomon lecture, he further emphasizes that "most of the decisions of the past three decades . . . have been preserved."[101] Yet, once again, he minimizes the

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89. SIMON, *supra* note 7, at 80 (the Civil Rights Act of 1991, amending both the Civil Rights Acts of 1866 and 1964, effectively overruled *Patterson* by barring racial harassment and other forms of bias even after a person is hired. Pub. L. No. 102-66, 105 Stat. 1071).

90. 410 U.S. 113 (1973).

91. 492 U.S. 490, 521 (1989).

92. 501 U.S. 808 (1990).

93. 505 U.S. 833 (1992).

94. *See* SIMON, *supra* note 7, at 163-65.

95. 501 U.S. at 844 (1991) (Marshall, J., dissenting).

96. 492 U.S. at 532 (1989) (Scalia, J., concurring).

97. Lewis F. Powell, Jr., *Stare Decisis and Judicial Self-Restraint*, 44 REC. ASS'N B. CITY OF N.Y. 813 (1989).

98. *See* SIMON, *supra* note 7, at 163-66.

99. 491 U.S. 164 (1989).

100. SIMON, *supra* note 7, at 79-81.

101. Simon, *supra* note 53, at 864.

broader context of the controversy over *Patterson* and other cases in order to minimize the shift to the right and thereby manufacture support for his thesis. In the first years of the Rehnquist Court, there was a push—a hard push by the Reagan administration, in both its judicial appointments and litigation strategies—to reverse liberal precedents. As evident below, Chief Justice Rehnquist and Justice Scalia had considerable success in marshalling the Court in that direction, particularly after the addition of Justices Kennedy, Souter, and Thomas. In the first four terms of the Rehnquist Court, eleven precedents were abandoned and fourteen more in the next three terms. There were none in the 1993 term and only one in the 1994 term. But that does not show that the center held. To the contrary, the center folded, shifted with the new appointments of Presidents Reagan and Bush, and then drew the line anew.

Table II
The Rehnquist Court's Reversal of Precedents

Newly Appointed Justice	Term	Precedents Overturned	Retiring Justice
	1986	3	Powell
Kennedy	1987-1989	8	Brennan
Souter	1990	7	Marshall
Thomas	1991-1992	7	White
Ginsburg	1993	-	Blackmun
Breyer	1994	1	

In historical perspective, the Rehnquist Court's reversal of prior rulings registers the politics of changes in the composition of the bench.[102] And in this regard the Rehnquist Court's record remains far from exceptional. When the Court's composition changes dramatically in a short period of time, or a pivotal Justice leaves the bench, the Court tends to overturn prior rulings.[103] The Warren Court's record, like the Rehnquist Court's, underscores how crucial the timing of one or two changes on the bench may prove for the Court's direction and its reconsideration of precedents. From its landmark 1954 school

102. *See* Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262 (1992); *see, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (1996).

103. *See* David M. O'Brien, *The Nation; After a Furious Battle for Control, Centrists Win Out on High Court*, L.A. TIMES, Oct. 23, 1994, at 2.

desegregation ruling in *Brown*,[104] to the appointment of Justice Stewart in 1959, only six precedents were reversed.[105] With Justice Stewart's arrival, six more were overturned in the next four years.[106] In 1962, the composition of the bench changed again with Democratic President John F. Kennedy's appointments of Justices White and Goldberg. In the remaining seven years, another twenty were reversed[107] as the Warren Court pushed constitutional law in even more liberal and egalitarian directions and forged its so-called "revolution in criminal procedure" with decisions like *Mapp v. Ohio*,[108] *Gideon v. Wainwright*,[109] and *Miranda v. Arizona*.[110] During Chief Justice Burger's tenure, the Court became more conservative, particularly in the area of criminal procedure.[111] And as its composition changed, the Burger Court also continued reconsidering precedents—though typically liberal ones—reversing a total of fifty-two prior rulings.[112]

Besides minimizing or otherwise dismissing the Rehnquist Court's reversal of precedents, Simon considers as support for his thesis that the Rehnquist Court more often merely narrowed precedents. Specifically, in his Solomon lecture, he contends that "the Warren Court's most controversial criminal procedure decisions, such as *Mapp v. Ohio* and *Miranda v. Arizona*, remained on the books and did not appear to be in peril."[113] Yet, once again, Simon underestimates the toll taken on the Fourth and Fifth Amendment rights of the accused and the reversal of direction taken by the Rehnquist Court.

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104. Brown v. Board of Educ., 347 U.S. 483 (1954).

105. *See, e.g.*, Banks, *supra* note 102, at 262-66.

106. *Id.*

107. *Id.*

108. 367 U.S. 643 (1961) (holding that evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in a state court).

109. 372 U.S. 335 (1963) (holding that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and consistent with the Fourteenth Amendment).

110. 384 U.S. 436 (1965) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way, unless the prosecution demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination).

111. *See* SIMON, *supra* note 7, at 171-72.

112. Banks, *supra* note 102, at 266 (stating that "the Burger Court had more overturns (52) than [the Warren Court] (45)").

113. Simon, *supra* note 53, at 869.

Although *Mapp* and *Miranda* survive, their importance has been diminished by rulings of the Burger Court[114] and, to an even greater extent, the Rehnquist Court.[115] Simply put, they are unlikely to be overruled precisely because the Rehnquist Court sees no need to do so since it has sharply cut back on the scope of the Fourth and Fifth Amendments, as well as carved out numerous exceptions to *Mapp* and *Miranda*.[116] For example, *Mapp*'s exclusionary rule is no longer triggered when, in cases like *California v. Hodari D.*,[117] a majority of the Rehnquist Court denies that a "search or seizure" within the meaning of the Fourth Amendment occurred when *undercover* police, without even a "reasonable suspicion" for questioning or detaining an individual, chased a youth who ran away at the sight of them and after tackling him to the ground discovered drugs, which were introduced as evidence against him at his trial.[118] *Hodari D.* is but one of many rulings in which the Rehnquist Court has contracted the scope of the Fourth Amendment's guarantee against "unreasonable searches and seizures."[119] Notably, in its 1994 ruling, the Rehnquist Court also extended the "good-faith exception" to the exclusionary rule in *Arizona v. Evans*[120] to include police reliance on mistaken computer records of an outstanding arrest warrant.[121] Much the same has occurred with respect to *Miranda*. *Pennsylvania v. Bruder*,[122] for example, held that police do not have to honor *Miranda* when making routine traffic stops that result in a driver's arrest.[123] Nor do police any longer have to use the exact language of *Miranda* when informing suspects of their rights, according to the Rehnquist Court in *Duckworth v. Eagan*.[124]

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114. *Court Didn't Shift to Right, Powell Says: Justices Under Burger Extended Liberal Rulings, He Declares*, L.A. TIMES, Aug. 12, 1986, at 2.

115. *See* Glen Elsasser, *Supreme Court Says Juveniles Can be Executed*, CHI. TRIB., June 27, 1989, at 1.

116. *See, e.g.*, Ronald Collins, *Bork and Miranda: Distorting Precedent to Overrule It*, CHRISTIAN SCI. MONITOR, July 30, 1987, at 13.

117. 499 U.S. 621 (1991).

118. *Id.* at 623.

119. Ruth Marcus, *Rights Discarded With Evidence, Court Says*, WASH. POST, Apr. 24, 1991, at A4.

120. 115 S. Ct. 1185 (1995).

121. *Id.* at 1193.

122. 488 U.S. 9 (1988).

123. *Id.* at 11 (holding that ordinary traffic stops do not involve custody for the purposes of *Miranda*).

124. 492 U.S. 195 (holding that the specific warnings contained in *Miranda* need not be applied in the exact form as described in that decision).

Rather than outrightly reversing precedents, the Rehnquist Court has more frequently narrowed them or reinterpreted them in ways that nevertheless virtually reverse them without explicitly saying so. The strategy has also prevailed in other areas besides *Mapp* and *Miranda*. In *Wards Cove Packing Co. v. Atonio*[125]—an important ruling making it more difficult for minorities to prove on-the-job bias and a ruling which was subsequently overridden by Congress in the Civil Rights Act of 1991[126]—a bare majority of the Rehnquist Court held that statistics could no longer be used to prove discrimination, and further stated that earlier decisions such as *Griggs v. Duke Power Company*,[127] "should have been understood to mean" that![128]

Simon, however, minimizes or dismisses the significance and the cumulative effect of these shifts to the right. Although he tells engaging stories of the Rehnquist Court's years, he offers less than a critical and probing analysis and miscalculates in concluding that "Justices Ginsburg and Breyer have solidified the moderate center of this Court."[129] That, of course, was not borne out in the 1994 term, as the Rehnquist Court continued doggedly down the road charted in earlier terms, though, admittedly, more slowly and cautiously, due to Justices Kennedy and O'Connor, than desired by Chief Justice Rehnquist and Justices Scalia and Thomas. While Simon remains "unrepentant"[130] about his analysis, conservatives have much less cause for their disappointment with the Rehnquist Court than they think; liberals have more cause for discomfort than they take from Simon's book; and all have reason to doubt the soundness of his conclusions about changes in constitutional law and judicial politics.

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125. 490 U.S. 642 (1989).

126. 42 U.S.C. § 2000(e) (1991).

127. 401 U.S. 424 (1971).

128. *Wards Cove*, 490 U.S. at 660.

129. SIMON, *supra* note 7, at 303.

130. *See* Simon, *supra* note 53 and accompanying text.