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A COURT WITHOUT A COMPASS

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In their letter inviting me to contribute to a dialogue on Professor James F. Simon's recent book, *The Center Holds: The Power Struggle Inside the Rehnquist Court*, the editors of this *Law Review* advised me that the issue of the *Review* in which the dialogue would appear would be devoted to constitutional law. I was disappointed because I would rather have contributed to an issue devoted to the Constitution. Nevertheless, I shall write about constitutional law, the subject of Professor Simon's book and his subsequent Solomon Lecture, because it will enable me shortly to write about my preferred subject.

A. *Politics and the Court*

As its title suggests, the thesis of Professor Simon's book is this: despite five successive appointments to the Supreme Court by the conservative Reagan and Bush administrations and active efforts by the Court's conservatives to reverse the liberal legacy of the Warren and Burger Courts, which had given "the broadest scope in the nation's history to the civil rights and civil liberties protections of the Bill of Rights and the Fourteenth Amendment,"[1] the ideological "center" of the Court has largely held. Focusing primarily on the six Court terms that begin in 1986, when Justice Rehnquist was elevated to chief justice, and end in 1992, the end of the Republican years, Simon recounts the internal Court debates that produced "key decisions in four areas of civil rights and liberties—racial discrimination, abortion, criminal procedure, and First Amendment freedoms"—decisions that, "to a significant degree, have determined the Court's philosophical direction."[2] By way of analysis, Simon concludes that the influence of centrists like Justices O'Connor and Kennedy is reinforced "by the Court's internal decision-making process, which encourages compromise, at least in close decisions."[3]

Although reviewers of Simon's book have suggested that he may have gone to press too soon—that several decisions late in the Court's 1994

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1. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 11 (1995) [hereinafter THE CENTER HOLDS].

2. 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) [hereinafter *Politics and the Rehnquist Court*].

3. *Id.* at 875.

Term, especially in the areas of race and religion, may have undermined his thesis[4]—Simon used his recent Solomon Lecture, "Politics and the Rehnquist Court," to reassert "that there has been no conservative judicial revolution, even considering [those 1994] decisions."[5] Pointing to the closeness of three such 5-4 decisions,[6] he notes that Kennedy and O'Connor still hold the balance of power on the Court. Moreover, O'Connor's opinions take "significantly more moderate positions in all of the cases than those of her more conservative colleagues."[7] At most, Simon concludes, there has been a narrowing of liberal precedents, not a "wholesale conservative revolution."[8]

Thus qualified, Simon's assessment, I would argue, is essentially correct. Even on a subject of political interest that Simon does not discuss, the reach of Congress's regulatory power, where the 1994 Court found, for the first time in nearly 60 years, that Congress's power under the Commerce Clause is not plenary,[9] the majority was slim, 5 to 4, and the concurrence of Kennedy, joined by O'Connor, was considerably more tepid than Rehnquist's opinion for the Court, to say nothing of Justice Thomas's concurrence. And in the much-anticipated term-limits decision,[10] it was the vote of Kennedy that saved the Washington political establishment from the wrath of the voters. Thus, in case after case in recent years, O'Connor, Kennedy, and, quite often, Justice Souter are the only votes that count, for as they go, so goes the Court. And they are hardly revolutionaries.

B. *A Morality Play*

But what are we to make of this? Unfortunately, Simon makes very little. This is reportage—well-written, to be sure, but reportage all the same—some level above a *Time* magazine account, where Simon once worked, but only that. What is missing from the story is serious analysis.

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4. See, e.g., reviews as diverse as those in *The Wall Street Journal*, David A. Price, *Looking Closely at the High Court*, WALL ST. J., Aug. 16, 1995, at A8 and *The Nation*, Mary Ellen Gale, *Supreme Reactionaries*, THE NATION, Sept. 11, 1995, at 242.

5. *Politics and the Rehnquist Court*, *supra* note 2, at 863.

6. Miller v. Johnson, 115 S. Ct. 2474 (1995); Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995); Rosenberger v. Rectors & Visitors of Univ. of Va., 115 S. Ct. 2150 (1995).

7. *Politics and the Rehnquist Court*, *supra* note 2, at 873-74.

8. *Id.* at 864.

9. United States v. Lopez, 115 S. Ct. 1624 (1995). For my commentary on the case, see Roger Pilon, *It's Not About Guns: The Court's Lopez Decision Is Really About Limits On Government*, WASH. POST, May 21, 1995, at C5.

10. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

In particular, one wants to know more fully just why so much was promised by the conservative judicial revolution and so little delivered—beyond the simple explanation that the Court's internal decision-making process encourages compromise, or that Justice Brennan, unlike Justice Scalia, is a skillful diplomat.[11] To be sure, Simon must work with the material he is given, and that is certainly part of the problem; for the Court for too long has been less an intellectual feast than a political maelstrom. But Simon could have helped us to understand why, could have placed his thesis instructively within the larger climate of ideas of which it is a part, then plumbed the deeper themes at issue.

Instead, he is content to stage a one-dimensional morality play, with liberals in white, conservatives in black. Rehnquist is straight out of Central Casting, of course, doubtless with reason. But the rest of the cast too performs over a stage of axioms planted uncritically, stretching back in history all of 40 years. The principal author of the Constitution, James Madison, enjoys but a cameo appearance. His colleagues, save for Jefferson and his wall of separation, enjoy not even that. This is recent constitutional history as contemporary politics—yet without insight as to why that is so.

But even then the politics is, well, "political." Thus, late in the play we find Judge Thomas's performance before the Senate Judiciary Committee compared unfavorably to that of Judge Ginsburg. "In her statement, Judge Ginsburg selected her judicial heroes carefully . . . [for their] judicial restraint"[12] (this from an author who has just devoted more than 80 pages to commending the Court for upholding that singular example of judicial restraint, *Roe v. Wade*). Again, "Judge Ginsburg built her answers to committee members' questions organically, from basic premises to general conclusions—in contrast to Judge Thomas, whose prepackaged responses seemed calculated to pass the committee's examination with the minimum amount of intellectual effort."[13]

In drawing his Thomas/Ginsburg contrast—here barely sketched—Simon seems to have forgotten the small matter of context—the very different political climates that surrounded the two nominations. Following the tumultuous Bork hearings, after all, Republican nominees were under explicit instruction to be guarded—witness the Souter "stealth" nomination. Thus, Thomas was in hostile territory from the start—the more so because a black conservative had been named to fill the seat of the sainted Thurgood Marshall—whereas Ginsburg appeared before a committee of her own party. None of this and more finds its way into Simon's black-and-white account, which credits Ginsburg's relatively easy

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11. THE CENTER HOLDS, *supra* note 1, at 138.

12. *Id.* at 299.

13. *Id.*

hearings to her having "traversed the nation's political spectrum."[14] One can only wonder how differently the Bork-through-Breyer hearings might have gone had they proceeded before the first Republican Congress in 40 years.

C. *The Roots of Modern Constitutional Law*

Underlying his easy analysis, then, is Simon's altogether uncritical posture toward today's conventional legal wisdom, as refined through the culture that has long dominated modern legal education in America. Its occasional pretense to the contrary notwithstanding, that culture finds its roots rather less in the Constitution than in the ideas of the Progressive Era—and in the idea, in particular, that it is the function of government to solve our social and economic problems, including, more recently, the problem of inequality. Standing in stark contrast to the quaint idea of limited government that is found in the Constitution, especially as amended after the Civil War, the active-government themes of the Progressive Era have given us, over time, what today we call "constitutional law"—a body of doctrine connected to its putative source by lines so tenuous that only those paid to discern them can do so.

Yet it is even earlier, in 1872, that we find the practical roots of the modern era, with the loss through the *Slaughter House* cases[15] of the Privileges and Immunities Clause of the Fourteenth Amendment. That amendment was written to empower federal courts, through section 1, or Congress, through section 5, to negate state violations of individual rights—rights that were outlined in the Civil Rights Act of 1866, reenacted in 1870,[16] immediately after the amendment was ratified. Of the three fonts in the amendment, the Privileges and Immunities Clause was meant to serve as the principal authority for substantive rights.[17] But only two years after the amendment's ratification, a bitterly divided 5-4 Court effectively eviscerated the clause, leaving courts thereafter to discern rights by drawing upon the less fertile Due Process and Equal Protection Clauses.

By the turn of the century and the rise of political activism in the name of progressive ideas, especially at the state level, courts were

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14. *Id.* at 300. *But see* Roger Pilon, *Ginsburg's Troubling Constitution*, WALL ST. J., June 17, 1993, at A10.

15. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

16. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144, codified at 42 U.S.C. § 1982 (1988)).

17. *See* Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 387-88 (1993).

increasingly called upon to judge whether such measures were violating individual rights. Never having crafted a comprehensive theory of rights, and no longer having a Privileges and Immunities Clause and the debate that surrounded it to help in the task, judicial majorities cobbled a theory of "substantive due process," against which their progressive brethren urged "judicial restraint."[18] Over the course of such cases, the inconsistency of ignoring the rights of southern Negroes while defending the rights of businessmen seems not often to have concerned either side, since neither seems often to have discerned much less sustained a unifying principle in the matter. Nevertheless, with the exception of segregation in the South, state and federal morals legislation (including Prohibition), and the many draconian measures that surrounded the First World War[19]—all of which were certainly important to those affected by it—government remained relatively limited and hence, to that extent, unobtrusive.

That all changed with the New Deal, of course, when federal activism exploded on the scene, leading eventually to the revolution that is modern constitutional law. Before that activism could unfold, however, there was standing in its way the small matter of the Constitution and its centerpiece, the doctrine of enumerated powers, which the Tenth Amendment made clear was nothing less than a matter of legitimacy.[20] If a power had not been delegated by the people and enumerated in the Constitution—and most powers had instead been reserved by the people or the states—any federal exercise of that power would be illegitimate. So confident were the Framers in the doctrine of enumeration that they thought a bill of rights superfluous, if not dangerous.[21] And in the early years of the New

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18. The paradigmatic case, of course, was Lochner v. New York, 198 U.S. 45 (1905).

19. *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1987).

20. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. I have discussed the amendment's focus on legitimacy more fully in *The Federalism Debate: Why Doesn't Washington Trust the States? Hearings Before the Subcomm. on Human Resources and Intergovernmental Relations*, 104th Cong., 1st Sess. (1995), *reprinted in* Roger Pilon, *On the First Principles of Federalism*, CATO POL'Y REP., Nov./Dec. 1995, at 1.

21. "[W]hy declare that things shall not be done which there is no power to do?" THE FEDERALIST No. 84, at 559 (Alexander Hamilton) (Modern Library ed., 1937). The Framers concern that the enumeration of certain rights might be construed as the surrender of others was addressed—or so they thought—by the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. *See* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT

Deal, the doctrine, as invoked by the Court, did in fact frustrate the activism of the political branches, leading President Roosevelt, in 1937, to unveil his notorious Court-packing scheme. Learning of that plan to add six new members to the Court, even Congress balked.[22] But the threat worked as an intimidated Court stepped aside, giving the political branches free rein over much of our lives. Judicial restraint would thereafter be the order of the day.

D. *Politicizing the Constitution*

In all of this, the question of legitimacy did not disappear, of course. Rather, the idea took on a new, political meaning as progressives on the Court tried mightily to tie what was going on to the Constitution.[23] That process had already begun, in fact, in 1936, even before Roosevelt unveiled his scheme. Thus, in the *Butler* case[24] the Court raised a question not immediately before it, namely, whether the General Welfare Clause of Article 1, section 8, was best viewed as a limit on Congress's power to spend as it exercised its various enumerated powers—as Madison,[25] Jefferson, and others had held—or whether Congress instead

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(Randy E. Barnett ed., 1989); Roger Pilon, *The Forgotten Ninth and Tenth Amendments*, CATO POL'Y REP., Sept./Oct. 1991, at 1.

22. *See* MERLO J. PUSEY, THE SUPREME COURT CRISIS (Da Capo Press 1973) (1937).

23. One of the more candid assessments of what was going on at the time, made some thirty years after the fact, came from one of the principal architects of the New Deal, Rexford G. Tugwell: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." Rexford G. Tugwell, *A Center Report: Rewriting the Constitution*, CTR. MAG., Mar. 1968, at 18, 20.

24. United States v. Butler, 297 U.S. 1, 65-66 (1936). I have discussed the issues that follow more fully in Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993); and "A Government of Limited Powers," ch. 3 (pp. 17-34) CATO Handbook For Congress (1995) (reprinted as "Restoring Constitutional Government," Cato's Letters No. 9 (1995)).

25. James Madison, *Report on Resolutions, in* 6 THE WRITINGS OF JAMES MADISON 357 (Gaillard Hunt ed., 1906):

> Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made.

had an independent power to spend for the general welfare, limited only by the word "general"—as Hamilton had held.[26] While finding the Agricultural Adjustment Act of 1933 unconstitutional, the Court came down on Hamilton's side of the question. Then a year later, in *Helvering v. Davis*,[27] the Court went Hamilton one better when it said that although Congress's now independent power to spend for the general welfare was still limited by the word "general," the Court would not itself police that limitation but would instead defer to Congress as to whether any expenditure was general or particular—the very Congress that was already raiding the Treasury and redistributing its contents with ever greater particularity.

The foundations of the modern welfare state thus secured, the Court turned next, that same year, to securing the foundations of the modern regulatory state. Those were located in the Commerce Clause, of course, which authorized Congress, in relevant part, to regulate commerce among the states. Intended primarily as a negative against protectionist barriers that states had erected under the Articles of Confederation—measures that impeded the free flow of commerce among the states—the commerce power enabled Congress to frustrate those impediments, thus making commerce "regular." So conceived, it was anything but a power to affirmatively regulate for all manner of social and economic ends, which the guarded founding generation would hardly have authorized. Yet the New Deal Court found just such a grant in the famous *Jones & Laughlin* case.[28] And shortly thereafter it authorized Congress to regulate anything that even "affects" interstate commerce[29]—which in principle is everything.

In thus eviscerating the doctrine of enumerated powers, the Court turned shields into swords, giving rise to a fundamental question: If the Framers had intended for Congress to be able to do virtually anything it

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Id.

26. *See* Alexander Hamilton's 1791 *Report on Manufactures*, *in* INDUSTRIAL AND COMMERCIAL CORRESPONDENCE OF ALEXANDER HAMILTON 293 (Arthur Harrison Cole ed., 1968). One of the most telling responses to Hamilton's view was given by South Carolina's William Drayton in 1828: "[I]f Congress can determine what constitutes the general welfare, and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money?" 4 CONG. DEB. 1632 (1828).

27. 301 U.S. 619, 640 (1937).

28. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

29. *See* Wickard v. Filburn, 317 U.S. 111 (1942). *See generally*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Glenn H. Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?*, CATO POL'Y ANALYSIS, No. 216, Oct. 10, 1994.

wanted under the General Welfare and Commerce Clauses alone, why would they have enumerated Congress's other powers—or defended the doctrine of enumerated powers throughout the *Federalist Papers*? Needless to say, modern progressives have shown little interest in addressing that question. In the end, however, it cannot be ignored, as critics are increasingly recognizing that "[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."[30]

Before the revolution could be completed, however, there remained the sticky business of rights. If not handled carefully, future Courts might recognize rights that could undermine the just-fashioned redistributive and regulatory powers. That potential was addressed by the Court in 1938 in the famous *Carolene Products* case[31]—especially in footnote four, a note not long ago called "[t]he great and modern charter for ordering the relations between judges and other agencies of government."[32] In a nutshell, the *Carolene* Court distinguished two "kinds" of rights—fundamental and nonfundamental—and two "levels" of judicial review—strict and minimal. Measures affecting "discrete and insular minorities" or implicating such "fundamental" rights as speech or voting would get strict scrutiny by the Court, leading almost invariably to a finding of unconstitutionality. By contrast, measures affecting "ordinary commercial transactions"—implicating property and contract rights, for example—would be presumed constitutional and receive minimal judicial scrutiny. What it all meant in practice was that the political branches—now unrestrained by the doctrine of enumerated powers—and states could henceforth redistribute and regulate with all but judicial impunity, for rights too, unless they were deemed "fundamental," would be ignored.

That bifurcated theory of rights and review—today, more than bifurcated[33]—is nowhere to be found in the Constitution, of course,

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30. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994). *See also* Epstein, *supra* note 29, at 1388: "I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so . . . ."

31. United States v. Carolene Prod. Co., 304 U.S. 144 (1938). For a devastating critique of the politics behind the case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (1987).

32. Owen M. Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979).

33. For a critique of the four levels of review that came recently from Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), and scrutiny theory generally, see Roger Pilon, *A Modest Proposal on 'Must-Carry,' the 1992 Cable Act, and*

which speaks simply of rights. It was a theory made of whole cloth by a recently chastened Court—to pave the way for the New Deal agenda. That the result was a thoroughly politicized Constitution is no better shown than by comparing judicial methodologies before and after the revolution.

Under the Constitution as written, judicial methodology—however difficult in certain contexts, and however rarely practiced well—was a relatively straightforward matter. One asked first whether a power had been granted. If not, that ended the matter. If yes, the next question was whether the means employed, under the Necessary and Proper Clause, were both necessary and proper.[34] If not necessary, that too ended the matter. If necessary, the final question (regarding "proper") was whether the measure violated rights—enumerated and unenumerated alike—that had not been alienated, by implication, by the original grant of power. If so, accommodation by the government would be required. Again, however difficult that methodology may have been to apply in certain contexts, those are relatively straightforward questions of principle, not questions primarily about values.

Look, however, at the modern methodology. Judges now ask not whether a power is legitimate by virtue of having been granted—for Congress's power today is virtually plenary, and state police power is almost as broad—but whether the public ends at issue are "compelling" or merely "important" or something else, and whether the means are "narrowly tailored" or merely "rational" or something in between, and whether, in general, the scrutiny required should be "strict" or "mid-level" or "relaxed" or "minimal," which itself is a function of whether the rights at issue—seldom distinguished from interests—are "fundamental" or not. Those are not questions of principle, set forth in a founding document. They are questions requiring value judgments, concerning which different judges, understandably, will reach different conclusions, depending on their personal moral, political, and economic views.

In the end, the decision to fundamentally rewrite the Constitution—without changing as much as a word in the document—was a political decision. The resulting rewrite politicized the document. And the result over time has been the growth of a body of constitutional law that is largely politics by another name. Is it any wonder that Simon's

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Regulation Generally: Go Back to Basics, 17 HASTINGS COMM. & ENT. L.J. 41 (1994).

34. I have discussed the Necessary and Proper Clause more fully, including its loss early in our history in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), in Roger Pilon, *On the Folly and Illegitimacy of Industrial Policy*, 5 STAN. L. & POL'Y REV. 103, 110-11 (1993). *See also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope Of Federal Power: A Jurisdictional Interpretation Of The Sweeping Clause*, 43 DUKE L.J. 267 (1993).

account makes it seem that almost all on the Court is politics? It is. Say what you will about Robert Bork's thesis[35]—and I have criticized his conception of the Constitution, with its emphasis on democracy rather than liberty, as fundamentally wrong[36]—he is absolutely right in holding that if this judicial business is to be little more than politics, then better to leave it to the people than to five unelected, unaccountable men and women to make, as Simon puts it, "the most basic judgments about the direction of our constitutional democracy."[37] The Framers, however, did not envision that we would be put to a choice between an all but unbridled majority and an all but unbridled judiciary. Rather, the Constitution they wrote was meant precisely to avoid that dilemma—by leaving most power in free, private hands.

E. *Shifting Sands*

In subscribing so uncritically to the modern view, then, what Simon has done is deny himself any point of principle on which to stand, any point from which to leverage a principled argument. He has his values, conservatives have theirs, but as between those respective sets of subjective values, there is no matter of principle. Nor can he rest on the Constitution, which today empowers government far more than it restrains it. Instead, he must stand on the shifting sands of modern constitutional law—on "constitutional values," in the modern jargon—where so much appears to be, because it is, result-oriented.

Thus, in his discussion of whether the Civil Rights Act of 1866 prohibits private discrimination, Simon finds himself recounting—and plainly defending—Justice Brennan's efforts in *Patterson v. McLean Credit Union*[38] to move the Court to an affirmative conclusion on the question, "even though the plain language of the statute appeared to be directed exclusively against discriminatory state laws."[39] Notwithstanding that plain language, the Court had only recently come down on the affirmative side in other contexts;[40] thus the question of stare decisis arose as well,

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35. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

36. Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39-41; Roger Pilon, *Rethinking Judicial Restraint*, WALL ST. J., Feb. 1, 1991, at A10.

37. THE CENTER HOLDS, *supra* note 1, at 54.

38. 491 U.S. 164 (1989).

39. THE CENTER HOLDS, *supra* note 1, at 27.

40. *See, e.g.*, Runyan v. McCrary, 427 U.S. 160 (1976) (holding unconstitutional commercially operated nonsectarian schools' denial of admission to students based on race); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding unconstitutional

which Justice Stevens, not surprisingly, was only too anxious to grasp: were the Court to reverse those recent cases, Stevens said, that act would be perceived by the public to be "an exercise of pure political power by an institution that was assumed to decide cases on judicial grounds, with due respect for precedent."[41] Never mind that the Court had recently ignored the law in order to reach the "politically correct" result; now it must confirm that mistake in the name of "the law," lest it be perceived by the public as "political."

What we have here is neither law nor the application or finding of law, a point drawn most generally, perhaps, in the very definitions Simon gives us for "liberal" and "conservative" judges:

> The term "liberal" is used to describe a justice who gives the political branches a wide latitude to effect social and economic reform while insisting that those political branches do not interfere with individual rights. Conceding the deficiencies in such one-word descriptions of judicial philosophies [Is Simon or Rehnquist making that concession?], Chief Justice Rehnquist, nonetheless, distinguished "liberal" from "conservative" in describing the justices of the Court in the early 1950s this way: "[Justice] Black was regarded as a member of the Court's 'liberal' wing—a wing that conceded to the government great authority under the Constitution to regulate economic matters, but which sharply circumscribed that power when it was pitted against claims of individual rights. The 'conservative' wing, on the other hand, was inclined to sustain government action pretty much across the board."[42]

To be sure, those definitions do capture, in large measure, the behavior of the respective camps today. But look at the problems inherent in those behaviors.

In their deference to the political branches, both liberals and conservatives have essentially abandoned the idea of limited government that is at the heart of the Constitution, as reflected in the doctrine of enumerated powers. Although Rehnquist, unlike Simon, does not prejudice his deference by dressing it in the robes of "social and economic *reform*" (if a measure is "regressive," does Simon's deference cease?), if pressed he would doubtless justify his posture with arguments from Borkian democracy, Tenth Amendment state power, and stare decisis—none of which, of course, should trump an argument from

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refusal to sell home in private subdivision based on race).

41. THE CENTER HOLDS, *supra* note 1, at 38-39.

42. *Id.* at 14-15 n.*.

individual liberty under the classical, post-Civil-War-Amendments Constitution.

As a constitutional matter, then, neither side has any real difficulty with the size and scope of modern government. But once government is unleashed, the implications for individual rights are inescapable—and here the two sides part. Liberals seem to want to have it both ways—big government, with all it entails for the violation of rights, and rights too—whereas conservatives are content to ignore claims of rights unless those claims can be grounded explicitly in the Constitution. Yet the issue is more complicated than that, for modern liberals are not so much rights people as *selective* rights people: they discover "rights" not normally included among even our unenumerated rights—such as rights against private discrimination[43]—while ignoring rights explicitly in the Constitution—such as property rights.[44] And conservatives, for their part, not only ignore the unenumerated rights that are explicitly a part of the Constitution, through the Ninth Amendment, but fail too often to appreciate that rights, in their particular contextual descriptions, are seldom enumerated—or better, are "discovered" only after doing the work of derivation that is part of the judicial function, which those enamored of judicial restraint are reluctant to do.

Thus, on both sides we find a failure to take the Constitution on its terms—a document of enumerated powers, the exercise of which is restrained by enumerated and unenumerated rights, which restrain state power as well. Regarding powers, both sides play the "judicial restraint" card—thus ignoring their responsibilities as judges. Regarding rights, liberal judges politicize the law by imposing their values on the rest of us in the name of "rights" selectively discovered or ignored; conservative judges politicize the law by allowing majorities—or, more likely, special interests operating through the political branches[45]—to impose their values on us directly. On neither side are the actions "constitutional."

We come, then, to the question of just why the conservative judicial revolution failed, insofar as it did, just why so much was promised and so little delivered. The process on which Simon has focused is an important part of the answer, to be sure, but by no means is it the whole answer. At a much deeper and more important level, conservatives have failed

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43. For why there are no such rights, see Roger Pilon, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 45 AM. U. L. REV. 775 (1996).

44. For example, in Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992), as straightforward a property rights case as one could hope to find, the Court's liberals opposed Lucas's Fifth Amendment Takings Clause claim for denial of all economic and productive use of his land.

45. *See generally* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS (James D. Gwartney & Richard E. Wagner eds., 1988); Miller, *supra* note 31.

because they have yet to get their philosophical act together. All their substantive talk of smaller government notwithstanding, too many have bought into the post-New Deal vision of the Constitution that New Deal liberals bequeathed us and the judicial methodology that goes with it—a political agenda passing as law that strips conservatives of the principles and the tools that are needed to restore the nation to firm constitutional footing. When the best the Court can do in the name of "First Principles" is add the value-laden "substantial" to the test for when Congress may regulate an activity—when it "substantially" affects interstate commerce[46]—and when that same Court, in the name of stare decisis, can find no constitutional ground on which to overturn our bizarre body of civil forfeiture law,[47] then we have good evidence that we are looking at a Court without a compass. In the 1994 Term that was thought by some to have challenged Simon's thesis, there were two glimmers of hope, both from Justice Thomas—his concurrence in *Lopez*, and his powerful dissent, for four justices, in the term-limits case.[48] Those are moves in the right direction, but there is much further to go before Americans can truly say that they are living under constitutional government.

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46. *See* United States v. Lopez, 115 S. Ct. 1624, 1630 (1995).

47. *See* Bennis v. Michigan, 64 U.S.L.W. 4124 (U.S. Mar. 4, 1996); *cf.* REPRESENTATIVE HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995); Roger Pilon, *Can American Asset Forfeiture Law Be Justified?* 39 N.Y.L. SCH. L. REV. 311 (1994).

48. *See* Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1, B8.