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AFTERWORD

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JAMES F. SIMON*

Following the retirement in 1969 of Chief Justice Earl Warren, conservative Republican Presidents Richard M. Nixon and Gerald R. Ford appointed five members to the Supreme Court within a five-year period. In the more conservative political climate of the nineteen-seventies, it was widely predicted that the new appointees would lead the Burger Court in uprooting the most sweeping civil rights and liberties doctrines established by the liberal Warren Court. But that counter-revolution did not take place.[1]

Despite the ideological pressures from the right (Justice Rehnquist) and the left (Justices Brennan and Marshall), the balance of power on the Burger Court firmly resided with the pragmatists who operated between the ideological extremes. That did not necessarily mean that the Burger Court exercised judicial restraint. Far from it. This was the Court that produced *Furman v. Georgia*,[2] striking down state death penalty statutes, and *Roe v. Wade*,[3] among other interventionist decisions.

Measured by the Warren Court legacy, the Burger Court was more conservative than its predecessor. But its style and character were set by the Court's pragmatists, not its ideologues. As Professor Vincent Blasi has written, the Burger Court lacked the Warren Court's moral vision and agenda. Instead, Blasi wrote, the Burger Court's decisions "reflect no deep-seated vision of the constitutional scheme or of the specific constitutional clauses in dispute. In each area, the line-drawing aspect of the process of doctrinal formulation has come to dominate the endeavor."[4]

It is useful, I think, to compare the Burger and Rehnquist Courts, not just their style and results, but also the pragmatists on each Court who have held the balance of power. The pivotal opinions of the Burger Court were frequently written by its centrist leaders, Justices Potter Stewart and Lewis F. Powell, Jr. Stewart wrote the opinion in *Furman* that held unconstitutional the death penalty as then administered in all the states; nonetheless, Stewart left open the possibility that states could pass death penalty statutes with procedures that complied with the Constitution.[5]

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* Martin Professor of Law, New York Law School.

1. *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed., 1983) [hereinafter THE BURGER COURT].

2. 408 U.S. 238 (1972).

3. 410 U.S. 113 (1973).

4. THE BURGER COURT, *supra* note 1, at 212.

5. *Furman*, 408 U.S. at 306.

Four years later, the Court with Stewart in the majority upheld state death penalty statutes with revised procedures.[6] Powell wrote the pivotal *Bakke* opinion that struck down racial quotas in public graduate school admissions programs while allowing race to be taken into consideration as a factor in admissions.[7] In their *Furman* and *Bakke* opinions, Stewart and Powell demonstrated that they were cautious, fact-driven Justices who understood the complexities of the constitutional issues presented and were determined to eschew doctrinaire constitutional solutions.

I agree with Lyle Denniston that the Rehnquist Court, like its predecessor, is "center-dominated,"[8] giving disproportionately greater influence to those Justices, like Stewart and Powell on the Burger Court and Kennedy and O'Connor on the Rehnquist Court, who so often represent the fifth vote for a majority. There are, to be sure, obvious differences, both in personnel and direction, between the two Courts. The right wing of the Rehnquist Court has been strengthened with the appointments of Justices Scalia and Thomas while, at the same time, the left wing has disappeared with the retirements of Justices Brennan and Marshall. Those changes alone suggested that the center on the Rehnquist Court was likely to be more conservative than that of the Burger Court. And, indeed, as both David O'Brien and Steven Shapiro demonstrate, the Rehnquist Court's center is more conservative than its predecessor on a broad range of civil rights and liberties issues.

O'Brien is incorrect in suggesting that I failed in my book, *The Center Holds*, to recognize that the Rehnquist Court's center has moved to the right. To the contrary, I readily conceded that fact and devoted much of my book to documenting it. O'Brien makes an additional mistake of assuming that the Marshall Papers were the primary source of my research; as a sophisticated scholar, he should have realized that much of my documentation could not have come from the Marshall Papers for the simple reason that Marshall was not privy to the documents.

I do not understand how O'Brien could have missed my extensive discussion of the conservative direction of the Rehnquist Court beginning with *Patterson v. McLean Credit Union*,[9] the primary focus of the first section of my book, in which I thoroughly documented the Court majority's unwillingness to interpret the Civil Rights Act of 1866 as

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6. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

7. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

8. Lyle Denniston, *The Center Moves, The Center Remains*, 40 N.Y.L. SCH. L. REV. 877 (1996).

9. 491 U.S. 164.

broadly as had majorities on both the Warren and Burger Courts.[10] I also discussed a series of other civil rights decisions in the 1988 term, including *City of Richmond v. J.A. Croson*,[11] *Wards Cove v. Antonio*[12] and *Martin v. Wilks*,[13] that underscored the Rehnquist Court's conservative cast. In section two of my book, moreover, I traced the retreat from *Roe v. Wade* that the Rehnquist Court's decisions from *Webster v. Reproductive Health Services*[14] to *Planned Parenthood of Southeastern Pennsylvania v. Casey*[15] demonstrated. In section three of my book, discussing the Rehnquist Court's criminal procedure rulings, I wrote that those decisions were "assertively conservative rulings,"[16] giving constitutional endorsement to more aggressive police work against criminal suspects, sanctioning in some cases the admission into evidence of coerced confessions and systematically blocking off the federal courts from claims of convicted criminals in state prisons.[17]

For purposes of my book and my Solomon Lecture, I thought there was a more significant point to be made than that the Rehnquist Court was more conservative than its predecessor. Despite the addition of five appointees by conservative Republican Presidents Reagan and Bush, there still was no counter-revolution, i.e., a wholesale uprooting of civil rights and liberties precedents. Using internal Court documents and interviews to provide an in-depth study of cases in four crucial areas of civil rights and liberties over an eight-year period, I concluded that, while the Rehnquist Court was more conservative than its predecessor, it was not revolutionary.[18]

In my Solomon Lecture, I apparently astounded some of my critics by refusing to concede, after the decisions of the 1994 term, that the

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10. 491 U.S. 164. For a discussion of the Rehnquist Court majority's narrow reading of the Civil Rights Act of 1866 see JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT, 62-63, 73-75 (1995).

11. 488 U.S. 469 (1989).

12. 490 U.S. 642 (1989).

13. 490 U.S. 755 (1989).

14. 492 U.S. 490 (1989).

15. 505 U.S. 833 (1992).

16. SIMON, *supra* note 10, at 172.

17. For a discussion of the Rehnquist Court's criminal decisions, see SIMON, *supra* note 10, at 172-73, 209-11, 225-26.

18. David Garrow writes that I attempted to enlarge my position by offering *The American Heritage Dictionary* definition of "revolution" in my Solomon Lecture; actually my purpose was to emphasize the difference between a gradual shift to the right and a revolution, a distinction that still seems to be lost on Garrow. David J. Garrow, *Simple Simon: Supremely Sanguine, Supremely Stubborn*, 40 N.Y.L. SCH. L. REV. 969 (1996).

conservative revolution had succeeded.[19] My position, nonetheless, remains unchanged: I am no more prepared to draw such a conclusion on the basis of the opinions of the Court's most doctrinaire Justices in the 1994 term than I was in the 1988 or 1991 terms.

Just as the Burger Court was not defined by its most ideologically-committed Justices, neither should the Rehnquist Court, unless, of course, there are five solid votes for a single doctrinaire position. My thesis throughout *The Center Holds* was that no such ideological solidarity existed; I wrote about the internal deliberations of the Justices to show how and why that was so. In every major case I discussed, the balance of power rested with the pragmatists, not the ideologues.

In *Patterson*, for example, Kennedy, the elusive fifth vote for Justice Brennan's early majority, rejected the Chief Justice's long-standing position that the Civil Rights Act of 1866 did not cover private conduct. Instead, Kennedy struggled with the issue of what private contractual conduct was covered by the statute. At first Kennedy accepted Brennan's broad interpretation, then rejected it.[20] Kennedy's vacillation did not reveal the work of a close-minded ideologue, but that of a cautious conservative jurist. Last term, as I suggested in my Solomon Lecture, O'Connor's concurrences in *Miller v. Johnson*[21] and *Rosenberger v. Rector & Visitors of University of Virginia*[22] exhibited a similar reluctance to take extreme doctrinaire positions.

Kennedy and O'Connor are, as Lyle Denniston suggests, the institutional successors to the Burger Court's centrists, Powell and Stewart. All four—Powell, Stewart, Kennedy and O'Connor—can be characterized as pragmatic jurists, essentially fact-driven in their analysis, willing to accept accommodations between competing constitutional visions and reluctant to overturn established precedents. I do not mean that Kennedy and O'Connor opinions reflect exactly the same values as those of Powell and Stewart; Kennedy and O'Connor are more conservative. At this stage in their service on the Court, moreover, Kennedy and O'Connor do not occupy the same high place that most scholars have accorded to Powell and Stewart.

But Kennedy and O'Connor often share with Powell and Stewart the uncomfortable center that is regularly attacked by those on their right and

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19. Garrow is particularly incensed, taking comfort—and cover—in cropped quotes from selected book reviews. I do not think his exercise furthers the dialogue but it does appear to satisfy his bizarre standard for intellectual discourse.

20. For a discussion of Kennedy's struggle in *Patterson*, see SIMON, *supra* note 10, at 56-79.

21. 115 S. Ct. 2475 (1995).

22. 115 S. Ct. 2510 (1995).

their left.[23] Presumably, Powell's and Stewart's position supporting Justice Blackmun's *Roe* opinion would provoke the same condemnation from Jay Sekulow and John Tuskey that Kennedy, O'Connor and Souter did for their *Casey* joint opinion, and for the same reasons. These accommodationist Justices, in *Roe* as well as *Casey*, simply got it wrong. On the other side, the unabashed liberal Kim Eisler finds nothing to respect or admire at the center of the Rehnquist Court and candidly yearns for the moral imperatives of the Warren Court era.

In *The Burger Court: The Counter-Revolution That Wasn't*, Vincent Blasi wrote that the Burger Court centrists contributed to what he termed a "rootless activism."[24] He, nonetheless, conceded that there was virtue in their pragmatic approach. "Seldom, if ever, in the Court's history has there been a period when the pivotal justices were as intelligent, open-minded, and dedicated as Potter Stewart, Byron White, Harry Blackmun, Lewis Powell, and John Paul Stevens[,]" Blasi wrote.[25] "An advocate faced with the challenge of changing judicial minds with sound arguments would do better to attempt the task in front of that group than almost any other that has in the past held the balance of power on the Court."[26]

Can the same be said of Justices Kennedy and O'Connor? Certainly any lawyer arguing before the Supreme Court who can count knows that to win on a closely-contested civil rights or liberties issue she/he must persuade either Kennedy or O'Connor. Kennedy and O'Connor are usually paired in discussions of the balance of power on the Court, but, as Lyle Denniston has written, O'Connor has shown more flexibility on most issues than Kennedy and, therefore, is more likely to be seen as the single-most important Justice on the Rehnquist Court. "Her style of crafting open-ended, broadly-phrased doctrine, unsettling to those legal experts who prefer a Court that speaks with precision, helps her draw a struggling Court toward common ground[,]" Denniston wrote.[27]

O'Connor's opinions have drawn scornful criticism from Jeffrey Rosen who has found her fact-driven opinions maddeningly unpredictable. Surveying her positions in racial and religious cases, where her votes have come to define the constitutional boundaries of the debate, Rosen wrote:

> she seems to believe that by rejecting the extreme conservative and liberal position in each case, and trying to stake out a

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23. On Powell, see JOHN JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994); on Powell and Stewart, see THE BURGER COURT, *supra* note 1, at 210-11.

24. *See* THE BURGER COURT, *supra* note 1, at 198-217.

25. *Id.* at 210-11.

26. *Id.*

27. Lyle Denniston, *The Pivotal Vote*, BALT. SUN, Oct. 1, 1995, at 1A.

> judicious compromise, she is acting as a voice of principled moderation.
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> But there is nothing moderate or restrained about Justice O'Connor's jurisprudence. Rather than being guided by consistent legal rules, lawyers and judges must try to read her mind before they can be confident about what the law requires. This increases Justice O'Connor's authority, but it undermines the stability and predictability that define the rule of law.[28]

In his commentary for this issue of the law review, Rosen deplores the fact that there is no coherent center on the Court, that the opinions of Justices Kennedy and O'Connor do not represent "a genuinely centrist alternative to the more extreme positions of Brennan and Rehnquist."[29] Fair enough, but I wonder if Rosen would have found a coherent center among the pragmatists on the Burger Court. Did Stewart and Powell, or more broadly, Stewart, Powell, White, Blackmun and Stevens (the Burger Court centrists identified by Blasi) represent a genuinely centrist alternative to Rehnquist and Brennan? I think Rosen would be hard-pressed to find the jurisprudential thread that bound the Burger Court's centrists.

I'm not certain that there is a better argument for, say, Blackmun's, Stevens's or White's consistency than for Kennedy's or O'Connor's. Powell's biographer, John Jeffries, Jr., makes a good case for Powell's principled pragmatism. Still, even with Powell, the pragmatist's calculus can produce surprising and not altogether persuasive results. How do you reconcile Powell's support for a woman's privacy interests in *Roe* with his concurring opinion and decisive fifth vote in *Bowers v. Hardwick*, upholding a Georgia sodomy statute?[30]

In reading John MacKenzie's essay, I thought of Justice Robert Jackson's observation about Supreme Court Justices: "We are not final because we are infallible, but we are infallible only because we are final."[31] MacKenzie goes Jackson and the other Justices one better. As an editorial writer for *The New York Times*, he is both infallible and final, perfectly accustomed to unchallenged pontification. When facts don't fit his opinions, he simply shifts the facts, as he did in inaccurately describing the purpose of my book. I made it very clear at the outset that I was making judgments about the Rehnquist Court based on cases in four areas of civil rights and liberties that were decided during a specific time

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28. Jeffrey Rosen, *Make Up Our Mind, Justice O'Connor*, N.Y. TIMES, Dec. 26, 1995, at A21.

29. Jeffrey Rosen, *Who Cares?*, 40 N.Y.L. SCH. L. REV. 899 (1996).

30. 478 U.S. 186, 197-98 (1986) (Powell, L., concurring).

31. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

period, 1986-1992. There is nothing pretentious about making such judgments, based on solid documentation; scholars as well as journalists do it all the time.

MacKenzie, on the other hand, has no compunction about speaking in grand generalities about "progressive centrism,"[32] based on nothing more tangible than his lofty opinion of "where the law should be."[33] He suggests that *Casey* fits within his definition of "progressive centrism," where there is "a rational, moderate view of the Constitution and a faithfulness to law that informs, and is informed by a worthy culture."[34] But he does not explain why a compromise opinion, like *Casey*, is necessarily more worthy than a principled conservative opinion that fully protects the fetus (as Sekulow and Tuskey advocate).

MacKenzie's result-oriented approach raises more problems when he discusses *Patterson*. He deplores Kennedy's *Patterson* opinion, because he believes that Kennedy mistakenly read the language of the post-civil war statute narrowly, resulting in a severely limited application in cases of private employment discrimination. But respected Justices of the modern Supreme Court have interpreted the post-civil war statutes even more narrowly than Kennedy. Dissenting Justice John M. Harlan, for example, castigated the Warren Court's decision in *Jones v. Alfred H. Mayer Co.*,[35] which MacKenzie found so thrilling. Harlan wrote that the *Jones* majority's interpretation was "almost surely wrong, and at the least is open to serious doubt."[36] MacKenzie's "progressive centrism" appears to be open only to those Justices who come to his "worthy" conclusions.

In Kim Eisler's poignant essay on the importance of the Warren Court decisions to southern liberals, he refuses to engage in the debate over whether there is a center, progressive or otherwise, on the Rehnquist Court. The pivotal Justices have abandoned the liberal role that the Warren Court and the Burger Court, in decisions like *Furman*, best exemplified. I doubt that Eisler's admiration for the Burger Court extends beyond the result in *Furman* to later death penalty decisions when the majority, including *Furman*'s pivotal Justice Stewart, upheld revised state death penalty statutes.

Eisler finds today's Justices pale imitations of the great Justices of old, particularly Douglas, Black and Frankfurter, whom he compares to Antonin Scalia. Frankfurter? True, Frankfurter, like Scalia, had a

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32. John P. MacKenzie, *The Legal Culture*, 40 N.Y.L. SCH. L. REV. 903 (1996).

33. *Id.* at 906.

34. *Id.*

35. 392 U.S. 409, 449 (1968) (Harlan, J. dissenting).

36. *Id.* at 450.

formidable intellect and a fiery personality. But unlike Scalia, he was no ideologue. On the contrary, Frankfurter was the quintessential "balancer," who signaled his determination to avoid constitutional absolutes his first major civil liberties opinion, *Minersville School District v. Gobitis*.[37]

Like Kim Eisler, Roger Pilon finds the Rehnquist Court rather besides the point he wants to make: that the Justices (except Clarence Thomas) have shirked their responsibility to interpret the Constitution. Instead, they have imposed their subjective political values in judicial opinions masquerading as constitutional interpretations. I am reminded of John Marshall's famous observation that "we must never forget that it is a *constitution* we are expounding."[38] I had always thought that Marshall had meant that the broad language of the Constitution does not lend itself to self-evident interpretation, and that the Justices were obligated to use interpretative tools—text, history, precedent, constitutional structure—to render well-reasoned, persuasive judgments. I do not think the language of Article III clearly gives the Supreme Court the authority to review an act of Congress, as Marshall concluded in *Marbury v. Madison*.[39] Nor do I think the necessary and proper clause or the commerce clause of Article I can be reduced to a single interpretation of Congress's enumerated powers; yet, Marshall's opinions in *McCulloch v. Maryland* and *Gibbons v. Ogden*[40] are, to me, entirely persuasive. On the basis of his essay, I'm not sure that Pilon would give Marshall particularly high marks as an interpreter of the Constitution. And though he does not specifically subject Marshall's opinions to his interpretative model, I would suppose that he would disagree with Marshall's reminders in both *McCulloch* and *Gibbons* that the most effective restraint on a runaway Congress are the voters, not five members of a Court majority.

Among the commentators, only Edwin Meese gives the Rehnquist Court an unqualified rave review. In Meese's essay there is no mention of the constitutional compromises forged by the Court's pragmatists; indeed, he finds unseemly the suggestion that the Court is a political institution in which the give-and-take among those Justices who hold the balance of power usually dictates the result in closely-argued cases. For Meese, the Rehnquist Court decisions are a triumph of pure constitutional interpretation, replacing more than a quarter century of what Meese dismisses as judicial activism. The primary problem of the Rehnquist Court predecessors, according to Meese, was that they misunderstood their

37. 310 U.S. 586 (1940).

38. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

39. 5 U.S. (1 Cranch) 137 (1803).

40. 22 U.S. (9 Wheat.) 1 (1824).

role; the Justices imposed their will on the majoritiarian branches of government instead of deferring to the popular will.

Meese offers *United States v. Lopez*[41] as the prime example of the Rehnquist Court's fidelity to the Constitution. In that decision a five-member majority ruled that Congress had exceeded its constitutional authority under the commerce clause in regulating the possession of guns near public schools.[42] *Lopez*, it seems to me, is a singularly inappropriate example of the judicial restraint that Meese claims he so admires. In *Lopez* the majority brazenly ignored a consistent line of modern commerce clause precedents and, as a result, imposed their will on Congress. It was just such lack of judicial restraint that provoked a widespread reaction to the anti-New Deal Court of the mid-thirties and led the modern Supreme Court to defer to congressional judgment on economic and social legislation. *Lopez* turned the modern commerce clause doctrine on its head. Instead of showing deference to Congress, the majority opinion by the Chief Justice gave a new, expansive reading of state sovereignty under the Tenth Amendment.

Meese writes that he most admires Justice Clarence Thomas's concurring opinion in *Lopez*, which he considers a brilliant example of a Rehnquist Court Justice showing fidelity to the Constitution, while checking the judiciary's activist ambitions. In his *Lopez* concurrence Thomas announces a constitutional doctrine far more radical than the Chief Justice's, basing his conclusion on what he claims is an original understanding of the scope of Congress's authority to regulate commerce.[43]

Thomas scolds *Lopez*'s dissenters, as well virtually every Justice of the modern Supreme Court, for misinterpreting Congress's constitutional power to regulate commerce. Their collective error, according to Thomas, was to ignore the framers' intent and misconstrue Chief Justice John Marshall's seminal opinion in *Gibbons v. Ogden*.[44] Thomas proposes to set the record straight, offering a constitutional interpretation that gives Congress the narrowest authority to regulate commerce since the discredited conservative decisions of the mid-thirties.[45] Thomas's interpretation presents an interesting question for Meese: if Thomas has shown fidelity to the Constitution, does that make the dozens of Justices of the modern Supreme Court who disagree with him (including four members of the *Lopez* majority) constitutional interlopers?

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

42. *Id.* at 1634.

43. *Lopez*, 115 S. Ct. at 1642, 1649 (Thomas, J., concurring).

44. *Id.* at 1646.

45. *Id.* at 1648-49.

Whatever the merits of Thomas's opinion—and I confess I do not find it persuasive—it is important to note that his interpretation of the commerce clause does not represent the prevailing constitutional law in *Lopez*. Instead, scholars must look to the significantly more moderate concurring opinion of Justice Kennedy (joined by O'Connor).[46] Unlike Thomas, Kennedy wrote approvingly of the development of the modern commerce clause doctrine in which the Court has consistently deferred to congressional judgment. For Kennedy, the Court's decision in *Lopez* turned primarily on the particular facts in the case; he could not find what he considered the requisite link between the statute's regulation and Congress's broad authority to regulate interstate commerce.[47] To my mind, that is a pragmatist's opinion, not an ideologue's, and is consistent with Kennedy's (and O'Connor's) approach to a broad range of civil rights and liberties issues as well.

The *Lopez* decision, together with a series of conservative civil rights and liberties decisions including *Miller v. Johnson*[48] and *Rosenberger v. Rector & Visitors of University of Virginia*[49] at the end of the 1994 term, caused many members of the media (and reviewers of my book) to proclaim that the Rehnquist Court had lurched irrevocably to the right. But I think a careful reading of Kennedy's concurrence in *Lopez* as well as the O'Connor's concurrences in *Miller* and *Rosenberger*, suggest that these pragmatists, albeit more conservative than their predecessors on the Burger Court, are still in control of the pace and direction of the Rehnquist Court.

46. *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring).

47. *Id.* at 1641-42.

48. 115 S. Ct. 2475 (1995).

49. 115 S. Ct. 2510 (1995).