SIMPLE SIMON: SUPREMELY SANGUINE, SUPREMELY STUBBORN*

DAVID J. GARROW**

Published in August 1995, James F. Simon's *The Center Holds: The Power Struggle Inside the Rehnquist Court*,[1] appeared just two months after the conclusion of one of the Supreme Court's two most surprising terms in the last two decades.[2] At least a trio of heavily publicized decisions—*United States v. Lopez*,[3] *Adarand Constructors v. Pena*,[4] and *Miller v. Johnson*[5]—suggested to many commentators that the October 1994 term had witnessed a dramatic change in some of the most politically important aspects of the Court's behavior.[6]

Given such an unpredictable and unavoidable accident of timing with regard to the already scheduled publication of *The Center Holds*, Simon's publisher took the highly unusual step of sending out advance letters of reassurance to newspaper book review editors, "in case you and your reviewer have the feeling that the book has been overtaken by events."[7]

But even before the book's actual publication, fellow Supreme Court scholars, such as the University of Virginia's David O'Brien, were mockingly suggesting, as would early reviewers, that the events of the October 1994 term ought to have persuaded Simon to change his title to "The Center Folds."[8] Professor Simon, however, beginning with late July comments to Tony Mauro of *Legal Times*, stubbornly insisted that his

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

2. *See* Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, § 4, at 1. The second such term was of course October 1991. *See* Linda Greenhouse, *Slim Margin: Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1 (describing the October 1991 term as "surprising and fascinating").

3. 115 S. Ct. 1624 (1995).

4. 115 S. Ct. 2097 (1995).

5. 115 S. Ct. 2475 (1995).

6. *See, e.g.*, Tony Mauro, *Tug of War*, LEGAL TIMES, July 31, 1995, at S23 (describing the October 1994 term as "a dramatic, landmark term").

7. Letter from Victoria Meyer, Vice President and Director of Publicity, Simon & Schuster, to Jack Schwartz, Newsday (July 11, 1995) (copy on file with the *New York Law School Law Review*).

8. Mauro, *supra* note 6; David J. Garrow, *The Center Folds*, NEWSDAY, Aug. 13, 1995, at 32.

book's thesis required no alterations or updating in light of the October 1994 term, and he strenuously rebutted other commentators who might now be more inclined than ever to "write off the Court as a conservative Court. It's not true."[9]

In light of this background, Professor Simon's ongoing and "unrepentant"[10] insistence in his October 31st Solomon Lecture, *Politics and the Rehnquist Court*, that the center continues to hold, unfortunately comes as no surprise to those of us who have held out faint but flickering hope that Simon would pull back from his defensively untenable position and acknowledge that the October 1994 term did indeed represent a notably significant alteration from the Rehnquist Court's prior 1986-1994 behavior.

In his Solomon Lecture, Professor Simon seeks some degree of definitional refuge behind a gentle rhetorical shift. Previously, in *The Center Holds*, Simon had forthrightly declared that the Rehnquist Court represented "a conservative judicial revolution that failed."[11] Now, while nonetheless continuing to claim that "there has been no conservative judicial revolution, even considering the last term's Court decisions,"[12] Simon has pulled back just a bit. He carefully stresses that a "conservative judicial revolution" would mean "a sudden and momentous change in the direction of the Court's civil rights and civil liberties decisions,"[13] a standard—vis-a-vis both "sudden and momentous" and also "direction"—that quietly enlarges and improves Simon's defensive position.

But that slight rhetorical improvement notwithstanding, Simon still remains painfully trapped—whether he elects to acknowledge it or not—within an awkward circumstance that was not initially of his own making but that is now very much of his own choosing. Virtually *all* other well-informed commentators on the Court readily acknowledge, especially with regard to cases involving race—*Adarand*,[14] *Miller*,[15] and also less dramatically *Missouri v. Jenkins*[16]—that the October 1994 term witnessed more notably successful conservative activism than any prior

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9. Mauro, *supra* note 6, at S26 (quoting Simon).

10. James F. Simon, *Politics and the Rehnquist Court*, 40 N.Y.L. SCH. L. REV. 863 (1996).

11. SIMON, *supra* note 1, at 11.

12. Simon, *supra* note 10, at 863.

13. *Id.*

14. 115 S. Ct. 2097 (1995).

15. 115 S. Ct. 2475 (1995).

16. 115 S. Ct. 2038 (1995).

term of the Rehnquist Court.[17] In the face of this conflict, Professor Simon in his Solomon Lecture has made two essential choices. The first, which is readily visible and largely uncontroversial, involves contending not so much that "the center holds" but that Justices Sandra Day O'Connor and Anthony M. Kennedy undeniably still represent the center of the Rehnquist Court.[18] The second, which is confronted at the outset of Simon's Solomon Lecture but then not addressed further, involves acknowledging fully and frankly just how large and wide a range of reviewers have politely rejected Simon's thesis as unpersuasive and incorrect.[19]

Simon is simply voicing agreement with the almost universally-shared conventional wisdom when he emphasizes that within the Court, "the critical battle continues to be for the minds and votes of the two pivotal Justices, Anthony Kennedy and Sandra Day O'Connor."[20] When Simon, in the last quarter of his Solomon Lecture, finally confronts the spiraling conservative activism of the October 1994 term, he returns again and again to this same point, stressing that Justices Kennedy and O'Connor "*still* hold the balance of power on this Court, as they have since Kennedy took his seat in 1988."[21] In his July interview comments to Mauro, Simon conceded that when Justices Kennedy and O'Connor "are swayed to the right, it is a right-wing majority,"[22] but in his Solomon Lecture, Simon regrettably returns to a stance of understating the extent to which Justices Kennedy and O'Connor, particularly in the October 1994 term, have been voting with the Court's three most resolutely conservative members, Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas. Although "both Kennedy's and O'Connor's values

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17. *See Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, 64 U.S. L.W. 2240 (Oct. 24, 1995); *cf.* A.E. Dick Howard, *Chief Enigma*, 81 A.B.A. J. 66, 69 (Oct. 1995) (asserting that the October "1994 term brought the Court closer to a working conservative majority," and that "the more conservative justices have mounted increasingly aggressive challenges to much of the judicial landscape . . .").

18. *See* Marcia Coyle, *An Emboldened Majority Breaks Ground*, NAT'L L.J., July 31, 1995, at C2; Stuart Taylor, Jr., *Looking Right at the Justices*, LEGAL TIMES, Oct. 2, 1995, at S27.

19. *See* David C. Frederick, *The Documents in the Case*, WASH. POST BK. WORLD, Sept. 17, 1995, at 6; John Gamino, *In the Center of Things, Judicially Speaking: A Reporter Argues that the U.S. Supreme Court is Shunning Conservatism*, DALLAS MORNING NEWS, Sept. 17, 1995, at 8J; E. Nathaniel Gates, *The Lawyer's Bookshelf*, N.Y. L.J., Oct. 17, 1995, at 2; David Andrew Price, *Looking Closely at the High Court*, WALL ST. J., Aug. 16, 1995, at A8.

20. Simon, *supra* note 10, at 864.

21. *Id.* at 872.

22. Mauro, *supra* note 6, at S26.

are essentially conservative," Simon correctly concedes, "they have *frequently* resisted pressures from the right wing of the Court . . . to commit themselves to a resolute[ly] conservative constitutional vision."[23]

Here Simon errs, for while one can—as he indeed does—invoke Justice O'Connor's reliance upon what Mauro terms "her now trademark fretful concurrences"[24] as powerful evidence that any five-vote majority in which Justice O'Connor is the fifth vote may well stand for something less than it ostensibly holds,[25] in the October 1994 term Justice O'Connor—like Justice Kennedy, with one very notable exception[26]—was a consistent, if sometimes ambivalent, member of the Rehnquist Court's conservative majority. Thus, any assertion that Justices O'Connor and Kennedy "frequently" refuse to join with their three most conservative brethren is now inescapably incorrect and out of date.

Part of the problem here, not just for Professor Simon but for many other Court commentators as well, is the interpretive mind-set that understandably arose in the wake of the October 1991 term's two most heralded and surprising decisions, *Lee v. Weisman*[27] and the landmark ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[28] In both *Lee* and *Casey*, much to the dismay of the Court's most conservative justices and much to the astonishment of many observers, both Justices Kennedy and O'Connor sided with the more moderate trio of Justices Souter, Stevens, and the now-retired Harry Blackmun to frustrate the conservatives' hopes.[29]

In the wake of *Lee* and especially *Casey*, Court watchers celebrated the triumph of moderation—a soothing reaction that was best symbolized

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23. Simon, *supra* note 10, at 875 (emphasis added).

24. Mauro, *supra* note 6, at S26.

25. See particularly Jeffrey Rosen's excellent "op-ed" essay, *Make Up Our Mind, Justice O'Connor*, N.Y. TIMES, Dec. 26, 1995, at A21 (describing how in *Miller v. Johnson*, for example, O'Connor "added an anguished concurring opinion that denied the logical implications of the decision she had joined."). *See also* Lyle Denniston, *The Pivotal Vote*, BALT. SUN, Oct. 1, 1995, at A1.

26. In *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), the heavily-publicized Arkansas "term limits" case, Justice Kennedy concurred with the more "moderate" foursome of Justices Stevens, Souter, Ginsburg, and Breyer, rather than with the Chief Justice and Justices O'Connor, Scalia, and Thomas.

27. 505 U.S. 577 (1992).

28. 505 U.S. 833 (1992).

29. *See* Ronald Dworkin, *The Center Holds!*, N.Y. REV. OF BOOKS, Aug. 13, 1992, at 29 (describing how the Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey* astounded many observers); Linda Greenhouse, *Changed Path for Court? New Balance is Held by 3 Cautious Justices*, N.Y. TIMES, June 26, 1992, at A1 (describing how the Court's ruling in *Lee v. Weisman* defied expectations).

and represented by Ronald Dworkin's essay in the *New York Review of Books* entitled "The Center Holds!"[30] (and note the exclamation mark!). But we—and I use that word most inclusively—have to varying degrees made more of *Lee* and *Casey* in seeking to understand the behavior of the Rehnquist Court—and particularly Justices O'Connor and Kennedy—than should be the case. I would yield to no one in reiterating once again the truly landmark stature of the "trio" opinion of Justices O'Connor, Kennedy, and Souter in *Casey*,[31] an opinion that both protects and enshrines the constitutional core of *Roe v. Wade*[32] and that may also represent the most important statement about the Court's own institutional role in the American political system since at least *Cooper v. Aaron*,[33] but the record now shows us—especially the record of the October 1994 term—that the behavior of Justice O'Connor and particularly Justice Kennedy in those two highly controversial October 1991 term cases was *unrepresentative rather than typical* of how they would vote in non-abortion and non-school prayer disputes during the three successive terms. As Professor Simon rightly says, "the center of gravity" on the Rehnquist Court lies "where O'Connor and Kennedy sit"[34]—but he needs to acknowledge that of late the center of gravity has indisputably moved rightward. As he notes, "both Justice O'Connor and Justice Kennedy's values are essentially conservative."[35] The exceptional events of the October 1991 term should not blind us to, or distract us from, this unavoidable and now undeniable fact.

Let me cavil briefly with three passing particulars in the text of Professor Simon's Solomon Lecture before returning to the larger issue of *The Center Holds*. First, when speaking implicitly of *Shaw v. Reno*[36] (a leading and well-known Rehnquist Court voting rights decision that is never mentioned in *The Center Holds*), Simon asserts that the congressional districting plan at issue in *Shaw* "would have given"[37] Black North Carolinians increased representation by Black Members of

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30. Dworkin, *supra* note 29, at 29-33.

31. *See, e.g.*, David J. Garrow, *A Landmark Decision*, 39 DISSENT 420, 427-29 (Fall 1992); David J. Garrow, *A Deadly, Dying* [Anti-Abortion] *Fringe*, N.Y. TIMES, Jan. 6, 1995, at A27; David J. Garrow, *From* Brown *to* Casey: *The U.S. Supreme Court and the Burdens of History*, *in* RACE, LAW AND CULTURE: REFLECTIONS ON *Brown v. Board of Education* (Austin Sarat ed., forthcoming 1996).

32. 410 U.S. 113 (1973).

33. 358 U.S. 1 (1958).

34. Simon, *supra* note 10, at 875.

35. *Id.*

36. 113 S. Ct. 2816 (1993).

37. Simon, *supra* note 10, at 868.

Congress, rather than correctly noting that in 1992 the plan's First and Twelfth Districts *had already done so*—newly elected Black Representatives Eva Clayton and Melvin Watt, respectively.[38]

Second, I believe Professor Simon unintentionally errs when seeking to describe the path of his own research concerning *Patterson v. McLean Credit Union*.[39] After indicating that he first began his research for *The Center Holds* in the fall of 1989 (some four months after the decision in *Patterson*), he goes on to say that "as I dug into the internal Court documents" concerning *Patterson* "I discovered" that "liberals on the Court privately considered" that Chief Justice Rehnquist's "larger purpose"[40] in *Patterson* was to attain an overruling of the Court's 1976 decision in *Runyon v. McCrary*.[41] However, from the very day—April 25, 1988—that the Court by a five to four margin publicly announced that *Patterson* was being set down for reargument to examine the question of whether or not the Court's interpretation in *Runyon* that the statutory language of 42 U.S.C. 1981, first enacted in the Civil Rights Act of 1866, did indeed apply to acts of racial discrimination in private employment should be reconsidered,[42] a plethora of journalists and commentators expressed surprise and alarm at the agenda that the Chief Justice and his allies had propounded so explicitly.[43]

Third, Simon passingly asserts, early in his Solomon Lecture, that the Republican-appointed justices of the Rehnquist Court "have not . . . 'follow[ed] th[e] 'iliction returns.'"[44] Simon subsequently does not

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38. For information on Clayton, Watt, and their districts, see CONG. Q. WKLY. REP.: SPECIAL REPORT, Jan. 16, 1993, at 118-19; and THE ALMANAC OF AMERICAN POLITICS 1996 at 993-95, 1016-18 (Michael Barone et al. eds., 1995).

39. 491 U.S. 164 (1989).

40. Simon, *supra* note 10, at 866.

41. 427 U.S. 160 (1976).

42. 485 U.S. 617 (1988).

43. *See, e.g.*, Stuart Taylor Jr., *Court, 5-4, Votes To Restudy Rights In Minority Suits*, N.Y. TIMES, Apr. 26, 1988, at A1, A24; Stuart Taylor Jr., *One Vote Tips a Balance on Civil Rights*, N.Y. TIMES, May 1, 1988, § 4, at 28; Stuart Taylor Jr., *High Court Getting Unusual Plea Not to Reverse Key Rights Ruling*, N.Y. TIMES, June 24, 1988, at A1, B5; Linda Greenhouse, *Justices Seem Unswayed by Civil Rights Debate They Sought*, N.Y. TIMES, Oct. 13, 1988, at A23; *see also* Marvin E. Frankel, Runyon v. McCrary *Should Not Be Overruled*, 67 WASH. U. L.Q. 1 (1989); Paul Reidinger, Runyon *Under the Gun*, A.B.A. J., Nov. 1, 1988, at 78; Mark Tushnet, Patterson *and the Politics of the Judicial Process*, SUP. CT. REV. 43 (1988). Also note John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135 (July 1990) and Kenneth L. Karst, *Private Discrimination and Public Responsibility:* Patterson *in Context*, SUP. CT. REV. 1 (1989).

44. Simon, *supra* note 10, at 864.

argue or explicate this contention in any further detail, but as Jeffrey Toobin pointed out in a brief early review of *The Center Holds* in *The New Yorker*, here again Simon is "dead wrong,"[45] for the October 1994 term's *Adarand Constructors v. Pena*,[46] just like the 1991 October term's *Casey*,[47] actually illustrates how "[o]nce more, the Justices have fallen smartly in step with the voters."[48]

In his Solomon Lecture, the "unrepentant"[49] Professor Simon seems to seek glory for his wounds by proudly highlighting both Toobin's declaration that the central thesis of *The Center Holds* was "dead wrong"[50] and Jeffrey Rosen's reminder in the *New York Times Book Review* that the time lag between *The Center Holds* and the events of the October 1994 term exemplify "the dangers of generalizing from a few prominent cases about the success or failure of judicial revolutions."[51]

But Professor Simon does not seek further glory in the similar wounds he has suffered at the hands of numerous additional reviewers. Many, like Rosen, apologetically noted how Simon was a victim of unfortunate timing, with his book appearing just "two months after the conservative judicial revolution finally succeeded."[52] David Andrew Price, writing in the *Wall Street Journal*, advised readers to "[p]ity the poor author" who "is indeed a victim of bad luck,"[53] and Kim Isaac Eisler, reviewing *The Center Holds* for *Legal Times*, warned subscribers that "Simon's thesis . . . is already dated" because of the "flurry of conservative rulings that seemed to make a lie of his title."[54] Eisler speculated in print about "rumors that the title would be changed or even that the publication date would be postponed until major revisions were made[,] . . ."[55] and in *The Nation*, Mary Ellen Gale, stressing how the October 1994 term's race

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45. Jeffrey Toobin, *Chicken Supreme*, THE NEW YORKER, Aug. 14, 1995, at 81.

46. 115 S. Ct. 2097 (1995).

47. 505 U.S. 833 (1992).

48. Toobin, *supra* note 45, at 82.

49. Simon, *supra* note 10, at 863.

50. Toobin, *supra* note 45, at 81.

51. Jeffrey Rosen, *Disorder in the Court*, N.Y. TIMES BK. REV., Aug. 20, 1995, at 10, 11.

52. *Id.* at 10; *see also* Frederick, *supra* note 19; Gamino, *supra* note 19.

53. Price, *supra* note 19.

54. Kim Isaac Eisler, *The Shifting Power Blocs of the High Court*, LEGAL TIMES, Aug. 28, 1995, at 54; *see also* Erwin Chemerinsky, *Book Reviews*, TRIAL, Dec. 1995, at 53 (asserting that Simon's "overall conclusion is questionable . . . [and] [o]ne wonders whether Simon would modify his conclusion in light of the just-completed Supreme Court term. . . .").

55. Eisler, *supra* note 54.

cases "starkly contradict the thesis of Simon's book," termed *The Center Holds* "wistfully anachronistic."[56]

At the opposite end of the political spectrum, Curtis Gannon in the *Washington Times* echoed Jeffrey Rosen in calling *The Center Holds* "an object lesson in the dangers of Supreme Court prognostication . . ."[57] Gannon uncharitably dismissed the book as "too premature to qualify as history and too dated to be journalism[,] . . ."[58] but in the *New York Law Journal*, Professor Nathaniel Gates of Cardozo Law School implicitly disagreed, saying that *The Center Holds* unfortunately was "celebratory history."[59] Gates pronounced Simon guilty of "a hapless confounding of fact and sentiment," and proclaimed that Simon seemed "oblivious to the vortex of error into which he has so publicly fallen."[60] Gates termed Simon's thesis "a jazzed-up, book-length version of an argument put forth in a slew of articles published" soon after the Court's unexpectedly moderate October 1991 term,[61] and contended that had Simon looked less selectively at the Rehnquist Court's first eight terms (1986 to 1993), such a more comprehensive survey "would have revealed the Court majority's unmistakable commitment to the continued advance of crucial aspects of a broad conservative agenda."[62]

Concluding, like so many others, that "Simon's claim that the center holds will not bear scrutiny," Gates branded Simon's tome "a failure characterized by enviable style and aplomb."[63] But *savoir-faire* is an inadequate surrogate for scholarly sagacity, and wishful thinking, while often reassuring, is an insufficient substitute for tough-minded candor and can mislead the unwary. Kim Eisler, after acknowledging how Simon's basic thesis was "already dated,"[64] nonetheless confessed that from his own resolutely liberal perspective, "I don't believe that one can step away from *The Center Holds* without feeling optimistic that . . . [Justices] Kennedy and O'Connor will continue to come through when the chips are down."[65] Here once again, the 1992 moral of *Casey*[66] is unfortunately

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56. Mary Ellen Gale, *Supreme Reactionaries*, THE NATION, Sept. 11, 1995, at 242, 243-44.

57. Curtis Gannon, *Instructive Glimpses of an Evolving Court*, WASH. TIMES, Sept. 9, 1995, at D3.

58. *Id.*

59. Gates, *supra* note 19, at 2.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Eisler, *supra* note 54.

65. *Id.*

being applied far too broadly. Indeed, in what I believe is undeniably far and away the most memorable single comment on Professor Simon's book, Eisler ends his *Legal Times* essay by concluding that "*The Center Holds* makes it easier to sleep."[67] With praise like that, being called "dead wrong" may not be bad at all.

In short, Professor Simon's Solomon Lecture represents a missed opportunity to update, improve, and make amends for some overstatements in *The Center Holds*. Simon may not be cavalier in his contentions, but by reiterating the now-obsolete perspective of *The Center Holds*, he regrettably restates what is in its essence an overly simple and overly sanguine view of the present-day Rehnquist Court.[68]

66. 505 U.S. 833 (1992).

67. Eisler, *supra* note 54.

68. Even as this essay goes to press, ongoing decisions from October 1995 term continue to suggest that "the center" of Justices O'Connor and Kennedy has indeed "folded." *See, e.g.*, Seminole Tribe of Fla. v. Florida, 64 U.S.L.W. 4167 (Mar. 27, 1996) (O'Connor & Kennedy join Chief Justice Rehnquist and Justices Scalia and Thomas in a five to four holding that *The New York Times* terms "a revolutionary, indeed reactionary, interpretation of federalism." N.Y. TIMES, Mar. 29, 1996, at A20).

APPENDIX

"The Center Folds"

By David J. Garrow

Newsday, 13 August 1995, pp. 32, 34.

Poor Jim Simon! Six years ago, now-retired U.S. Supreme Court Justice Harry Blackmun exclaimed "Poor Joshua!" while dissenting from a decision involving a young boy who had been violently abused by his father. James Simon, a professor and former dean at New York Law School, hasn't suffered any physical harm, but the damage that the Supreme Court's new shift to the right may do to Simon's admirable book on the Court certainly involves insult if not injury.

Simon concentrates on the Court's evolution since 1986, when William Rehnquist replaced Warren Burger as Chief Justice. He devotes particular attention to several five-to-four decisions from 1990 and 1992 that turned back conservative efforts to undercut the First Amendment and to overrule *Roe v. Wade*. One of those cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, may well go down in history as the most important Supreme Court decision in a generation, but Simon's understandable desire to extrapolate broadly from the events of several years ago has left him wide open to grave embarrassment at the hands of the Court's newly energized five-member conservative majority.

Most unfortunately, Simon's chagrin begins with the very title that he and his publishers several months ago chose: "The Center Holds." Given what the conservative bloc (Chief Justice Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas) has done in the interim, "The Center Folds" would have been far better, and might have generated additional orders from uninformed readers expecting to enjoy the photos.

In the wake of the starkly conservative, five-to-four rulings that the Court handed down in April, May and June, involving a raft of issues ranging from affirmative action and voting rights to Congress' "commerce clause" power and the separation of church and state, "The Center Holds" includes a number of now-outdated comments that Simon must be itching to revise. He sanguinely terms the Rehnquist Court's pre-1995 record "a conservative judicial revolution that failed," never mentioning a landmark 1994 property rights decision, *Dolan v. City of Tigard*, which was a dramatic precursor to the Court's 1995 handiwork. Simon likewise prematurely concludes that "the conservative on the Rehnquist Court did not create a revolution in civil rights law," a conclusion rendered utterly obsolete by the Court's newest holdings concerning affirmative action programs and racially designed congressional districts.

"The Center Holds" includes several extremely proficient 'inside the Court' narratives of the justices' private debates over important late-1980s cases such as *Patterson v. McLean Credit Union*, accounts that are based largely on the files of former Justice Thurgood Marshall, which were opened to researchers following Marshall's death in 1993. The book also visibly benefits from interviews that Simon has had with both former Justice Lewis Powell, who retired in 1986, and with Harry Blackmun, who retired in 1994. Concerning the Court's youngest justice, Clarence Thomas, Simon reports that "One member of the Court said that he did not know Thomas any better after serving with him for several terms than he did when Thomas first joined the Court."

Simon is usually a dependable and perceptive student of the Court. His embarrassing vulnerability to predictive errors brought about by this year's dramatic shift, however, stems principally from one mistake: his erroneous expectation that the two newest justices, Ruth Bader Ginsburg and Stephen Breyer, both moderate Democrats appointed by President Clinton, would prove more influential in determining the Court's lineup than would the two most unpredictable members, Anthony Kennedy and Sandra O'Connor.

In 1992, in *Planned Parenthood v. Casey*, both Kennedy and O'Connor joined with the Court's two most pronounced moderates, John Paul Stevens and David Souter (and the now-retired Harry Blackmun) to reaffirm *Roe v. Wade*. Ginsburg and Breyer's additions may give *Roe* six supporters out of nine, but abortion aside, on most hotly contested issues O'Connor and Kennedy now side with the highly conservative trio of Rehnquist, Scalia and Thomas. As a result, in important case after important case, the five-to-four tally is identical—with Ginsburg, Breyer, Stevens and Souter on the short end of the count.

Reasoning that Ginsburg's and Breyer's arrivals "solidified the moderate center" of the Court, Simon mistakenly predicted that their votes would strengthen "the prevailing judicial ethos of moderation" and "virtually assure the denouement of the conservatives' revolution." The error was two-fold: first in failing to emphasize that on any issue within a divided Court, the fifth vote is of course the most crucial; and, second, that on today's Supreme Court, either Sandra Day O'Connor or Anthony Kennedy would represent the fifth vote in almost every closely divided case.

"The center" *hasn't* held because of two people: first Anthony Kennedy, whose surprising 1992 vote to reaffirm *Roe* was a highly atypical move by a thoroughly conservative jurist, and second Sandra Day O'Connor, a hesitant and irresolute justice who is often uncertain of her vote not only before but also *after* she casts it. Several weeks ago, in the end-of-term skit where the justices' clerks poke fun at their bosses, the "O'Connor" character, faced with conflicting invitations from different

colleagues, was portrayed as being unable to decide even whom to join for lunch.

James Simon is a fine student of the Supreme Court, and "The Center Holds" is an informative and valuable book, but when the Supreme Court unexpectedly moves as far and as fast as this one has over the past four months, even top-notch work can be rendered partially obsolete before the books reach the shelves.