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The Center Folds

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**THE CENTER HOLDS:** The Power Struggle Inside the Rehnquist Court  
By James F. Simon. Simon & Schuster, 332 pp., \$ 25.

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Congress' "commerce clause" power and the separation of church and state, "The Center Holds" includes a number of now-outdated comments that Simon must be itching to revise.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 conservatives 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 the 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.

AP Photo-The Rehnquist Court in November, 1994. Front row: Antonin Scalia, John Paul Stevens, William Rehnquist, Sandra Day O'Connor and Anthony Kennedy. Back row: Ruth Bader Ginsburg, David Souter, Clarence Thomas and Stephen Breyer.