

MEMO TO THE PRESIDENT (AND HIS OPPONENTS): IDEOLOGY STILL COUNTS

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The impressive article by Lee Epstein, Andrew Martin, Kevin Quinn, and Jeffrey Segal tells us something illuminating about the behavior of Supreme Court Justices.¹ But I do not believe that the article tells us what it seems to tell us. Professor Epstein and her co-authors seem to say that Justices routinely change their views, so that a President should not be too concerned about the ideology of prospective appointees, and the people who might oppose those appointees should not be too concerned, either. As Professor Farnsworth demonstrates in his excellent commentary,² the Epstein et al. paper does not justify such a conclusion, and the authors' explicit claim is more modest than the tone of the article perhaps suggests.

In any event, I do not think that the Epstein et al. paper refutes, or—again contrary perhaps to appearances—even purports to refute the most plausible version of the “conventional wisdom” that the authors say they are challenging. I actually think the conventional wisdom is much closer to the view that Epstein et al. embrace—that Justices are systematically unpredictable—than it is to the view they reject. But whatever the conventional wisdom is, the most accurate account is more complex than either “they all change” or “they never change.”

I think the best description is this: When a President has an agenda—when he appoints a Justice because he wants to influence the way the Court will decide a specific issue, or set of related issues—the President is hardly ever disappointed. Many of the Justices who supposedly disappointed the President who put them on the Court were not appointed primarily because of their views; they were appointed to pay off a political debt, or for electoral reasons of the kind Epstein et al. mention.³ But other examples of Justices who “changed” involve something more interesting. These are instances in which the Justices' opinions did not change in any discernable

¹ Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 102 NW. U. L. REV. (forthcoming 2007). For a preview of that article, see Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. COLLOQUY 127 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/8/> (link).

² Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. COLLOQUY 143 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/11/> (link).

³ See Epstein et al., *supra* note 1 (manuscript at 17–18, 43–44, on file with *Colloquy*).

way, but new issues emerged—issues on which the Justices’ previous views were not known, or in any event did not play a role in the President’s decision to appoint them.

When this happens, Justices may change in the sense that Justices who were expected to be “conservative” will cast “liberal” votes in some cases, and vice versa. But the conclusion that Epstein et al. suggest—that Presidents should not pay much attention to ideology in appointing Justices⁴—does not follow. On the contrary: Presidents who have an ideological agenda almost always get what they want on the issues they care about.

In the last hundred years, the President with the clearest agenda for the Supreme Court—Franklin Roosevelt—also, as it happens, made the most appointments, and Roosevelt’s appointees illustrate how Presidents with an agenda will not be disappointed even if their nominees do “drift.” The basic story is well known. In Roosevelt’s first term as President, the Supreme Court declared unconstitutional some of the central features of Roosevelt’s New Deal.⁵ No one left the Court in Roosevelt’s first term, and after Roosevelt won by a landslide in 1936, he proposed legislation that would have allowed him to appoint additional justices, thereby assuring a majority in favor of his legislative program. The so-called Court packing legislation was not enacted, but soon there were vacancies on the Court, and by the end of his long tenure in office Roosevelt had named eight new Justices.⁶

Two of Roosevelt’s earliest appointments were Hugo Black and Felix Frankfurter. Both were dyed-in-the-wool supporters of the New Deal and relentless critics of the Court that struck down Roosevelt’s legislation. But Black and Frankfurter became adversaries in one of the central constitutional controversies of the mid-twentieth century, the extent to which the provisions of the Bill of Rights, particularly those having to do with criminal procedure, should apply to the states.⁷ Black and Frankfurter also disagreed over the scope of the constitutional guarantee of freedom of speech,⁸ and over such issues as whether the Constitution required states to reapportion their legislatures.⁹ The general view—affirmed by Professor Epstein

⁴ See *id.* (manuscript at 58–59, on file with *Colloquy*).

⁵ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (link) (invalidating the Bituminous Coal Conservation Act of 1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (link) (invalidating the National Industrial Recovery Act of 1933); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (link) (invalidating Railroad Retirement Act of 1934).

⁶ The story of the Court-packing fight is told in many places; a standard account is WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995).

⁷ See, e.g., *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring) (link); *id.* at 68 (Black, J., dissenting).

⁸ See, e.g., *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring) (link); *id.* at 579 (Black, J., dissenting).

⁹ *Baker v. Carr*, 369 U.S. 186, 187 (1962) (Black, J., joining in the majority) (link); *id.* at 266 (Frankfurter, J., dissenting).

and her co-authors¹⁰—is that Frankfurter became more “conservative” while Black remained “liberal” (before turning “conservative” later in his career, after Frankfurter had left the Court). And in a sense that is true: in the criminal procedure cases, the First Amendment cases, the reapportionment cases, and others, Black took positions that were generally regarded as liberal, and Frankfurter disagreed.

Roosevelt’s appointees diverged in a similar way on the single most important question of mid-twentieth century constitutional law—the constitutionality of state-imposed racial segregation. Black was unequivocal in his support for the decision the Court eventually reached in *Brown v. Board of Education*.¹¹ Frankfurter and Robert Jackson (Roosevelt’s Solicitor General and Attorney General, whom he appointed to the Court in 1941) were more hesitant, for institutional reasons; they were not sure the Court, as opposed to Congress (in Jackson’s view, at least) could or should be the institution to end segregation.¹² Stanley Reed—Roosevelt’s second appointee to the Court, after Black—was the most reluctant of the Justices to join the *Brown* opinion.¹³ James Byrnes, who was also appointed to the Court by Roosevelt in 1941 but resigned a year later (to become a close aide to Roosevelt in the White House), was the Governor of South Carolina in 1954—and a defender of segregation.¹⁴

In a recognizable sense, then, Roosevelt’s appointees moved all over the place ideologically, just as Epstein and her colleagues suggest. Does this mean that it was pointless for Roosevelt, or his opponents, to have concerned themselves with the views of his nominees? Not at all. Roosevelt’s agenda concerned federal power over the national economy. On issues relating to his agenda, he got exactly what he wanted. None of his appointees ever cast a vote for limiting federal power over the economy. That issue—an intensely controversial one in the first third of the twentieth century—became totally settled in favor of Roosevelt’s position in a strikingly short time.¹⁵ Roosevelt had an agenda for the Court, made appointments accordingly, and his agenda prevailed unequivocally. Over the course of their ca-

¹⁰ See *supra* note 1 (manuscript at 30–32, on file with Colloquy).

¹¹ 347 U.S. 483 (1954) (link). On Black’s views, see, for example, RICHARD KLUGER, *SIMPLE JUSTICE* 594–98 (1975).

¹² See KLUGER, *supra* note 11, at 599–611.

¹³ See *id.* at 598.

¹⁴ See *id.* at 333, 335.

¹⁵ Compare the cases cited in note 5, decided before any Roosevelt appointments, with cases decided after Roosevelt had appointed a majority of the Justices: *United States v. Darby*, 312 U.S. 100 (1941) (link) (unanimously upholding the Fair Labor Standards Act and overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (link), which had invalidated the Child Labor Act); and *Wickard v. Filburn*, 317 U.S. 111 (1942) (link) (unanimously upholding Congress’s power under the Interstate Commerce Clause to enact the Agricultural Adjustment Act, even as applied to home-consumed wheat). On the evolution of the law during this period, and the influence of the Roosevelt appointees, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 208–24 (1998).

reers, the Roosevelt appointees did diverge; but they diverged on issues that were not salient at the time of their appointment and that were not of primary importance to the President.

This pattern repeated itself, later in the twentieth century, with Richard Nixon. In the 1968 Presidential campaign, Nixon criticized the Supreme Court for decisions that, he said, were unduly favorable to criminal defendants.¹⁶ Nixon also signaled sympathy for Southerners who objected to the pace of desegregation.¹⁷ Nixon made four appointments early in his administration, and the direction of the Court shifted on both of these issues. The Court became much less aggressive about desegregation and undertook no new initiatives to protect criminal defendants' rights.¹⁸ But the most controversial issue of the next generation turned out to be neither criminal justice nor race—it was abortion. Three of Nixon's appointees voted in favor of reproductive rights in *Roe v. Wade*.¹⁹ A Kennedy appointee, Byron White, dissented. The intellectual foundations of *Roe* were laid by Justice John Harlan's dissenting opinion in *Poe v. Ullman*²⁰—and Harlan had been the most "conservative" Justice on the Warren Court in the 1960s.

Again, there was, in a sense, rampant ideological drift—from right to left for three Nixon appointees, from left to right for White. (Harlan went from being a conservative force to a liberal avatar without doing anything!). But again the lesson is not that Justices' views should not matter to the President or to the President's opponents. It is that sometimes issues change in ways that scramble previous political alignments. On abortion, the Nixon "conservatives" voted with the "liberals" Douglas, Brennan, and Marshall, and the Kennedy "liberal," White, voted with the conservative Rehnquist. This supposed shift will be reflected in the Martin-Quinn scores (if I understand that method correctly), and might be perceived by Court-watchers. But the real shift was in what issues became prominent. Nixon got what he wanted on the issues he cared most about.

Once in a while, of course, Justices who are appointed because of their views on particular issues will cast votes on those issues that disappoint the President who chose them. Justice Harry Blackmun is a dramatic example, wonderfully described in Linda Greenhouse's biography.²¹ But, pace Epstein et al., instances of genuine change of that kind are, I believe, rare. Other Justices whom Epstein et al. discuss, such as Sandra Day O'Connor and Anthony Kennedy, were not the product of President Reagan's agenda:

¹⁶ See JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1975–1974 701–02 (1996).

¹⁷ *Id.*

¹⁸ See *id.* at 732–34.

¹⁹ 410 U.S. 113 (1973) (link) (Chief Justice Burger and Justices Blackmun and Powell were nominated by Nixon).

²⁰ 367 U.S. 497, 539–55 (1961) (link).

²¹ LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005).

O'Connor was appointed, of course, because she was a woman,²² and Kennedy was chosen in part because he would be acceptable to a Senate that was controlled by Democrats and that had just rejected an "agenda" nominee, Robert Bork.²³ It is not at all surprising that O'Connor and Kennedy adopted positions that were somewhat different from the Reagan administration's policy preferences.

President George W. Bush's two appointees, John Roberts and Samuel Alito, were, according to published accounts, chosen after a careful and highly ideological search.²⁴ There is no reason at all to expect that they will disagree with the views of the Bush Administration on the issues that matter to that administration—abortion, gay rights, affirmative action, criminal justice, and government aid to religion. This does not mean that neither will ever cast a vote that could be called "liberal." On issues that were not central to the administration that appointed them—issues like, perhaps, federalism, freedom of speech, or the scope of the Free Exercise Clause—they may (or may not) cast such votes. To the extent those issues become prominent, the Martin-Quinn index might register what Epstein et al. call ideological change or drift. But that will not mean that President Bush and the members of his administration wasted their time and political capital in securing the appointments of Roberts and Alito.

Presidents, like the rest of us, cannot always foresee what issues will become important in the future; even if they could, they might not know what position they would take on those issues themselves. More to the point, a President is likely to care much more about getting the decisions he wants from the Supreme Court on the issues he is engaged with than he is about decisions on questions that might arise after he has left office. And Presidents, as well as the people who work for them, *are* likely to be good at knowing who their friends are on the issues of the day. If a President has the desire and the ability to appoint to the Court people who agree with him on the issues he cares most about, he is likely to get what he wants from the Court on those issues. Whatever we are to make of the Martin-Quinn scores, they do not disprove the lesson of at least seventy years' experience: if a President has strong views about how the Supreme Court should rule on some set of issues, there is every reason for that President, and his political opponents, to concern themselves with prospective Justices' ideology.

²² MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 52 (2005) (asserting that "O'Connor understood that she had been appointed because she was a woman, not because of her stellar academic credentials and reputation among those who knew her").

²³ *Id.* at 173–74.

²⁴ See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT* 188–89, 313–14 (2007).