

# Colloquy Essays

## JUSTICES WHO CHANGE: A RESPONSE TO EPSTEIN ET AL.<sup>†</sup>

Linda Greenhouse\*

The growing recognition by political scientists and law professors that Supreme Court Justices can and do change while on the bench is a breath of fresh air on a subject that for much too long has been in the grip of abstract academic thinking and untested assumptions.<sup>1</sup>

My own interest was sparked by my research into the life and career of that paradigmatically “evolutionary” Justice, Harry A. Blackmun,<sup>2</sup> as well as by nearly thirty years of covering the Supreme Court. For nearly one-third of my tenure on the Supreme Court beat, there was no change in the Court’s membership, and yet clearly the Court changed between 1994 and 2005. Who could have predicted, for example, that Chief Justice William H. Rehnquist, the very embodiment of Supreme Court conservatism in the late twentieth century, would eventually be one of the dozen “trending to the left” Justices in Figure 5 of Professor Epstein’s article?<sup>3</sup> His place there is well deserved, despite the fact that I am quite certain that Rehnquist never actually changed his mind about anything that he deemed important. The “attitudinal model” indeed!<sup>4</sup>

Turning from the recent past to the immediate present, the article also shines valuable light on Justice Anthony M. Kennedy. He is commonly de-

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\* Supreme Court correspondent, *The New York Times*.

<sup>1</sup> For other recent treatments of “preference change” or “ideological drift,” see LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006). See also Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices “Evolve” and Others Don’t?*, 1 HARV. L. & POL’Y REV. 457 (2007); Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209 (2005).

<sup>2</sup> LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* (2005).

<sup>3</sup> Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1505–06 (2007).

<sup>4</sup> The reference is to the once-prevailing political science view that Justices simply seek to advance their own policy preferences. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

pictured as having stepped into Justice Sandra Day O'Connor's role as the "swing" Justice.<sup>5</sup> But Epstein and her co-authors demonstrate that in fact, Kennedy has changed very little since 1990 in any doctrinal area, and that on the subject of affirmative action, still a volatile issue for the Court, he has never shown evidence of shifting from his view that government policy should simply not take race into account for any reason. The article thus offers a valuable corrective to sloppy thinking and writing about the current Court.

Epstein and her colleagues prove conclusively that preference change, at least among long-serving Justices, is the rule rather than the exception.<sup>6</sup> Data of the sort they compile, of course, go only so far, raising rather than answering the further question of why this should be so. That is the question that Robert H. Jackson posed on the eve of his own appointment to the Supreme Court. In the preface to his book *The Struggle for Judicial Supremacy*, published in 1941, Jackson reflected, as a veteran of the battle over FDR's failed court-packing plan, on the fact that "history shows repeated disappointment of liberal Presidents in their efforts to effect a permanent or even long-enduring change of attitude or philosophy of the Court by additions to its personnel."<sup>7</sup> And then he asked the question that remains pertinent today: "Why is it that the Court influences appointees more consistently than appointees influence the Court?"<sup>8</sup> Little did Jackson know when he wrote those words in September 1940 that they would come to apply with full force to his own Supreme Court tenure.

The answer to the "why" question is not one that can be teased from data or charts, and I mean no criticism by raising it. It simply points to another line of inquiry, one based on insights from personal history and psychology. This Gestalt-centered rather than data-driven inquiry is necessarily anecdotal and more open to conflicting interpretations. It may even be a question without a general answer, inviting us to look at members of the Court in all the fullness and quirkiness of their individual personalities. Since none of us can ever really know another person, let alone one we have not met, this is a perilous enterprise—but an irresistible one.

It makes sense to suppose that an individual's response to the awesome experience of serving on the Supreme Court will depend on a particular mix of personal and institutional factors unlikely to be replicated precisely, either across the bench or across time. Based on my work in the Blackmun papers, I have suggested that his post-1973 development was an example of

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<sup>5</sup> See, e.g., Bill Mears, *Justice Kennedy Works On His Swing*, CNN.COM, Sept. 29, 2006, <http://www.cnn.com/2006/LAW/09/25/scotus.kennedy/index.html> (quoting a Supreme Court practitioner, Thomas Goldstein, as explaining, "The basic principle is, it's Justice Kennedy's world and you just live in it.").

<sup>6</sup> Epstein et al., *supra* note 3, at 1503–19.

<sup>7</sup> ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* vii (1941).

<sup>8</sup> *Id.*

path dependence: that being vilified by one side of the abortion debate and lionized by the other in the aftermath of *Roe v. Wade*<sup>9</sup> led him to become more and more entrenched in his defense of *Roe*. As a result, he eventually came to embrace a unified jurisprudence of women's rights and abortion rights that was almost completely foreign to the medical model of abortion with which he began.<sup>10</sup> Blackmun was a brooder who took things personally. It is hard to imagine Justice William Brennan sitting in his chambers at night reading through the tens of thousands of pieces of hate mail that poured into the Blackmun chambers. Blackmun read all those letters and saved them all; in their way, they helped make him the Justice he became.

And how about Chief Justice Rehnquist? There is no reason to suppose that when he declared for the Court in *Dickerson v. United States* in 2000 that the Miranda warnings "have become part of our national culture" and should be preserved,<sup>11</sup> he liked *Miranda v. Arizona*<sup>12</sup> any better than he ever had. But his policy preference was not the question in *Dickerson*. Rather, the question of the fate of the *Miranda* doctrine had become subsumed into the ongoing struggle between the Court and Congress over which was entitled to the last word in constitutional interpretation,<sup>13</sup> and preserving the Court's turf was more important to the Chief Justice than the symbolic remnants of a doctrine that had been whittled away through intervening decisions, a number of them at his own hand.<sup>14</sup> In other words, Rehnquist hadn't changed his mind. Rather, a particular context caused him to change his perspective and his priorities. And *Dickerson* was only one of several important cases in which the Chief Justice turned back from following the logical implications of his own opinions.<sup>15</sup>

Following Justice Thurgood Marshall's retirement, Justice O'Connor published a tribute in which she described the experience of having sat with him at the conference table for ten years, listening to the stories of his amazing life. By recounting his life experiences, O'Connor wrote, Marshall was "constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth."<sup>16</sup>

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<sup>9</sup> 410 U.S. 113 (1973).

<sup>10</sup> Linda Greenhouse, *Harry Blackmun, Independence and Path Dependence*, 56 HASTINGS L.J. 1235, 1235–36 (2005). See also GREENHOUSE, *supra* note 2, at 207–27.

<sup>11</sup> 530 U.S. 428, 443 (2000).

<sup>12</sup> 384 U.S. 436 (1966).

<sup>13</sup> For the contemporary context of this interbranch struggle, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

<sup>14</sup> See, e.g., *Michigan v. Tucker*, 417 U.S. 433 (1974).

<sup>15</sup> See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004) (rejecting a Free Exercise claim to state-subsidized tuition for religious study); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (rejecting Eleventh Amendment immunity under the Family and Medical Leave Act).

<sup>16</sup> Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

And then, in this little essay, O'Connor said something quite remarkable. She found herself still listening for Marshall's voice, she said, "hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world."<sup>17</sup> This was a surprising statement coming in 1992 from a Justice whose jurisprudence bore, to say the least, little of Marshall's imprint. Recall that the following year, she would go on to write for the Court in *Shaw v. Reno*,<sup>18</sup> launching a reappraisal of racially conscious electoral districting that would have enraged Marshall (and, indeed, this five-to-four decision, with Marshall's successor, Justice Clarence Thomas, in the majority, would not have been possible without his retirement).

But "by and by" did, in its way, come to pass, in O'Connor's opinion for the Court a decade later in *Grutter v. Bollinger*,<sup>19</sup> upholding affirmative action in university admissions. There is little doubt that O'Connor's experiences on and off the bench changed her profoundly. She used her abundant energy to travel widely, interacting with judges of other constitutional courts and working through the American Bar Association to advance the rule of law in the emerging democracies of Eastern Europe. She opened herself to new experiences that, taken as a whole over a Supreme Court career of twenty-four years, did change the way she saw the world.

What predictions do these observations enable us to make about the kinds of Justices most likely to experience "ideological drift"? The Epstein et al. data suggest that those who serve more than ten years (that is, nearly every Justice these days) are likely to shift preferences to some degree.<sup>20</sup> Lawrence Baum suggests that those who come from outside Washington, at least among Republican-appointed Justices since Earl Warren, will drift left, while those selected from among Washington insiders will not.<sup>21</sup> Looking at the same data through a slightly different lens, Michael Dorf finds that Republican Justices with executive branch service will remain stable, while those without it will move to the left.<sup>22</sup>

By these measures, neither Chief Justice John G. Roberts Jr. nor Justice Samuel A. Alito Jr. is likely to change. (Although Alito spent fifteen years as a federal judge with chambers in New Jersey, his formative legal experiences were in the executive branch, as an assistant to the Solicitor General, and in the Office of Legal Counsel.) On the other hand, both are likely to serve on the Court for decades.

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<sup>17</sup> *Id.* at 1220.

<sup>18</sup> 509 U.S. 630 (1993).

<sup>19</sup> 539 U.S. 306 (2003).

<sup>20</sup> Epstein et al., *supra* note 3, at 1503–19.

<sup>21</sup> BAUM, *supra* note 1, at 144.

<sup>22</sup> Dorf, *supra* note 1, at 457–58. Looking at the twelve appointees of Republican presidents beginning with Richard Nixon, the six who had executive branch experience were Burger, Rehnquist, Scalia, Thomas, Roberts, and Alito. *Id.* The six who did not were Blackmun, Powell, Stevens, O'Connor, Kennedy, and Souter. *See id.*

In his recent book, *Private Lives, Public Consequences: Personality and Politics in Modern America*, the historian William Chafe presents portraits of national leaders from FDR to Clinton and tries to identify the connection between the personal and the political.<sup>23</sup> Most of these individuals endured some crisis that had the result of causing or forcing them to see things in a new way. Chafe does not look at the Supreme Court, but there is no reason his observations should not be transferable. For Blackmun, the crisis was certainly the trauma of his early years on the Court, including *Roe v. Wade* and its aftermath. For O'Connor, it was the experience of leaving all that was comfortable and familiar in Arizona to become, overnight, an icon, a figure of history as the first female Justice. I am not aware of a crisis in the lives of John Roberts or Samuel Alito that would have shattered their received notions of how the world works. At least, not yet.

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<sup>23</sup> WILLIAM H. CHAFE, *PRIVATE LIVES/PUBLIC CONSEQUENCES: PERSONALITY AND POLITICS IN MODERN AMERICA* (2005).

