

Change and Continuity on the Supreme Court[†]

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When two new Justices joined the Supreme Court during the 2005 term, the longest period of membership stability in the Court's modern history came to an end. The eleven years without personnel change, from 1994 until 2005, made this the longest "natural court," as scholars call the period during which the same Justices serve together, since the 1820s. And not since the 1971 Term, a generation ago, when Justices Lewis Powell and William Rehnquist took their seats, have two new Justices joined the Court during a single term.

With personnel change, of course, comes institutional change. Justice Byron White, who served on the Court for thirty-one years and witnessed the arrival of thirteen new colleagues, once said that "every time a new justice comes to the Supreme Court, it's a different court."¹ My interest today is actually better expressed not so much by that comment of Justice White's, but by a question posed years earlier by Justice Robert Jackson. "Why is it," Jackson asked in the preface to his book *The Struggle for Judicial Supremacy*, published shortly before he joined the court in 1941, "that the Court influences appointees more consistently than appointees influence the Court?"²

Indeed, what makes the Court so fascinating as an exercise in small group dynamics is the relationship between personal and institutional change. Justices have an impact on the institution, obviously. That is why a Supreme Court nomination is such a major event, and why it is so often followed by a contentious confirmation

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1. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 467 (1998).

2. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* vii (Octagon Books/Farrar, Straus & Giroux 1979) (1941).

process. But the impact of the institution on the individual justice is a bit more elusive, less obvious but no less important.

My own work in the papers of Justice Harry Blackmun, which led to my book, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*, published in 2005,³ brought this subject home to me and whetted my appetite for a broader ranging examination of personal change on the Supreme Court. It is a very rich subject, and obviously a timely one. I plan to explore it with you, first by looking in some detail at the case, and career, of Harry Blackmun, and then by offering some general observations that might be worth keeping in mind as we watch the unfolding of the new Roberts Court, a Court that is still very much a work in progress as we await the decisions that will define at least this early period.

Robert Jackson had no reason to suppose, when he raised his provocative question, how close to home it would come, in that he himself would personify the kind of personal and intellectual change that can occur on the Supreme Court. So before turning to more current events, let me speak for a few moments about one of the Twentieth Century's most interesting Supreme Court justices.

Robert Jackson took his seat on the Supreme Court on July 11, 1941, and served until his death on October 9, 1954 at the age of sixty-two.⁴ Thirteen years is not a long tenure on the Supreme Court, and Jackson's thirteen years included a year of service as the chief prosecutor at the Nuremberg war crimes trials.⁵ It was an amazingly consequential period in the life of the country with Pearl Harbor at the beginning, World War II and the start of the Cold War, including the Korean War, in the middle, and *Brown v. Board of Education*⁶ at the end. The country changed, the Court changed, and there is no doubt that Robert Jackson changed as well.

Two opinions, one from the beginning of his tenure and one from near the end, demonstrate how much Jackson changed. The later opinion, his concurrence in the steel seizure case of 1952,

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

4. EUGENE C. GERHART, *ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA'S ADVOCATE* 233 (2003).

5. See GERHART, *supra* note 4, at 253, 467.

6. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Youngstown Sheet & Tube Co. v. Sawyer,⁷ is very famous. The earlier one is almost unknown except to scholars, because it was never issued. It was a separate opinion he wrote and then decided not to publish in the summer of 1942, when the Court was considering *Ex parte Quirin*,⁸ concerning the constitutionality of the wartime military commission that tried and sentenced to death eight Nazi saboteurs who were captured after entering the United States in June of that year.

As a case about the dimensions of the wartime powers of the president, the *Quirin* case remains relevant. The Court unanimously upheld President Roosevelt's use of the military commission that tried the saboteurs, finding, in contrast to the Court's conclusion in June 2006 in the *Hamdan* case,⁹ that the commission had been lawfully constituted by Congress. The Court in *Quirin* thus did not have to reach or resolve the deeper question of whether, in the absence of congressional authorization, the president would have possessed the inherent authority to proceed as he wished.

Jackson believed that the Court should have reached this question and should have decided it in the affirmative.¹⁰ The saboteurs, he wrote in his unpublished opinion, "are prisoners of the President by virtue of his status as the constitutional head of the military establishment."¹¹ And, he added, "[t]he custody and treatment of such prisoners of war is an exclusively military responsibility."¹² In other words, it was the President's business, not the business of Congress or the federal courts. Jackson's suggestion was that the Supreme Court should not even have undertaken to review Roosevelt's exercise of his commander-in-chief authority.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

8. *Ex parte Quirin*, 317 U.S. 1 (1942).

9. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759–60 (2006).

10. See Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 223 (2006) (the author reproduces and analyzes Justice Jackson's draft opinion in *Ex parte Quirin*); see also Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: *Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 458–59 nn.21–24 (2002).

11. GOLDSMITH, *supra* note 10, at 237.

12. *Id.*

Yet just ten years later—a blink of an eye in Supreme Court terms, or maybe that is just my perspective, having covered the court for twenty-nine years—Robert Jackson expressed a very different view of presidential authority. During the Korean War, acting in what he deemed to be the national interest, President Truman seized the steel mills to prevent the nation’s manufacturing capacity, especially its wartime armaments-manufacturing capacity, from being crippled by a steel industry strike. Truman invoked his inherent authority as chief executive and commander-in-chief. The Supreme Court ruled that, lacking congressional authorization, the action was invalid.¹³ Justice Jackson wrote a concurring opinion that has come to be seen as the most eloquent expression of limitations on presidential authority, an opinion that has lost none of its relevance and that was cited by the Supreme Court as recently as the final day of its 2005 term.¹⁴ When the President acts pursuant to an express authorization from Congress, Jackson said, his power is at its peak, “for it includes all that he possesses in his own right plus all that Congress can delegate.”¹⁵ When the President acts without congressional authorization, Jackson said, he enters a “zone of twilight” and uncertainty.¹⁶ And “when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”¹⁷

Was this the same Robert Jackson, the president’s man in the *Quirin* case? Clearly, his trajectory calls for some sort of explanation. One explanation is that in the *Quirin* case, arising as it did during the first year of his tenure on the Court, Jackson was still very much President Roosevelt’s man. Arriving in Washington from Western New York, early in the Roosevelt administration, to be chief counsel of the Internal Revenue Service, he had spent his entire Washington career in the administration’s service, quickly becoming head of the Justice Department’s Tax Division; then head of its Antitrust Division; then Solicitor General; and then Attorney General.¹⁸ It was

13. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 579.

14. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part).

15. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

16. *Id.* at 637.

17. *Id.*

18. See GERHART, *supra* note 4, at 62–229.

certainly natural for him to view the exercise of government authority from the perspective of the executive branch.

However, by 1952, he was a seasoned Supreme Court Justice who had seen at first hand, during his year at Nuremberg, the dire consequences of concentrated and unchallenged executive power. Not to equate Harry Truman with Adolf Hitler, as obviously Jackson did not, but Jackson certainly had a different perspective by the time he encountered the steel seizure case. As he had so presciently observed eleven years earlier, the institution and the life experience he had gained while serving there had changed him.

The topic of personal change on the Supreme Court, although of obvious interest, largely has been ignored in scholarly literature. The study of judicial behavior long has been in the grip of political science theories that go under the names of “partisan entrenchment” or “the attitudinal model.”¹⁹ Political scientists had assumed, despite abundant evidence to the contrary, that judges go on the bench with fixed ideas that they strive to implement for the remainder of their careers. But scholars have recently begun to apply some welcome and overdue skepticism to these assumptions. “[M]any, if not most, Justices on the Supreme Court exhibited some degree of preference shifting during their careers,” Professor Theodore W. Ruger of the University of Pennsylvania Law School, wrote in a recent law review article.²⁰ He proposed that instead of the “entrenchment” image, which suggests hard rocks and geology, we should use a nautical metaphor, in which judicial preferences are “anchored not in stable bedrock but rather a softer bottom that permits a meaningful, if slow, movement as currents change with time.”²¹

Lee Epstein, Jeffrey A. Segal, and their co-authors have concluded in a recent empirical study of “ideological drift” among Supreme Court justices that change is the rule, not the exception, and that “contrary to the received wisdom, virtually every Justices serving since the 1930s has moved to the left or right or, in some cases, has

19. See, e.g., HAROLD J. SPAETH, *SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION* (Richard J. Lamb et al. eds., 1979).

20. Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 M. L. REV. 1209, 1217 (2005).

21. *Id.* at 1225.

switched directions several times” during their tenure on the Court.²² The database compiled by Epstein and her co-authors provides support for a phenomenon that has been obvious to the most casual court-watcher, one that led President Bush to declare, defensively, when he nominated his White House counsel, Harriet Miers, to the Court that “I know her well enough to be able to say she’s not going to change.”²³ With a barely disguised reference to conservatives’ disappointment in his father’s nomination of Justice David H. Souter, the President said: “I don’t want to put somebody on the bench who is this way today, and changes.”²⁴

To see how Supreme Court justices change, we do not have to go back as far as Robert Jackson, or even as far as Harry Blackmun, who retired from the court in 1994.²⁵ We can look at Justice Sandra Day O’Connor, whose tenure on the Court at twenty-four years was almost exactly as long as Blackmun’s, and who retired in January 2006. Justice O’Connor ended her tenure on the Supreme Court as a very different Justice from the one who arrived from Arizona in 1981, or the one who spoke disparagingly of *Roe v. Wade* in 1983,²⁶ or even the one who in 1992 published a tribute to the newly retired Thurgood Marshall in which she described Marshall as an embodiment of “moral truth.”²⁷ The experience of knowing and working with Thurgood Marshall, O’Connor said then, of sitting with him at conference for ten years, listening to him tell stories from his

22. Lee Epstein et al., *Ideological Drift among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. COLLOQUY 127 (2007).

23. Press Release, President George Bush, Press Conference at the Rose Garden (Oct. 4, 2005), <http://www.whitehouse.gov/news/releases/2005/10/print/20051004-1.html>.

24. *Id.*

25. *But see* David A. Strauss, *It’s Time to Deal With Reality: The Myth of the Unpredictable Supreme Court Justice Debunked*, CHI. TRIB., Aug. 7, 2005, at C9 (“The idea that judges change their basic philosophical views once they are on the bench is a myth”).

26. *Compare* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting) (criticizing the “Roe framework” as “clearly on a collision course with itself” in the first abortion-related case she encountered after joining the Court), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (participating in the joint opinion, O’Connor reaffirmed the “Roe framework”).

27. Sandra Day O’Connor, *Thurgood Marshall: The Influences of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

amazing life, “would, by and by, perhaps change the way I see the world.”²⁸

It seemed an odd sentiment from a Justice whose jurisprudence at that time appeared to bear little of Thurgood Marshall’s imprint, certainly not in the core areas of voting rights and racially conscious affirmative action.²⁹ Yet “by and by,” as we all know, came to pass. In 2003, Sandra O’Connor led the Court in reasserting a role for affirmative action in university admissions in *Grutter v. Bollinger*,³⁰ the University of Michigan Law School case. Now, with Justice O’Connor gone, it may be no coincidence that the Court quickly agreed to revisit the question of race and education, in the two cases it decided in June 2007 on the constitutionality of race-conscious student assignment policies adopted by public school systems struggling to maintain hard-won integration.³¹ I do not have much doubt that early in her career, Justice O’Connor would have found these policies highly problematic if not constitutionally unacceptable. Later, however, she would probably have agreed with Judge Alex Kozinski’s view, expressed in an opinion concurring with the en banc Ninth Circuit in the Seattle case, that this was the kind of pragmatic policy decision, taken by democratically accountable officials, with which federal judges should be very reluctant to interfere.³² If my assumption is correct, the cases would have been decided 5 to 4 the other way: the challenged plans in Louisville and Seattle would have been upheld rather than invalidated under the 14th Amendment.

I will return in a moment to Harry Blackmun, but first, it must also be acknowledged that change during a justice’s career on the Supreme Court is not universal. Let me offer you a dissenting opinion from the 2004 Term that bears the name of Justice Clarence Thomas.

28. *Id.* at 1220.

29. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995).

30. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

31. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. Jun. 5, 2006) (No. 05-908); *Meredith v. Jefferson County Bd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. Jun. 5, 2006) (No. 05-915).

32. *Parents Involved in Cmty. Sch. II*, 426 F.3d 1162, 1193 (9th Cir. 2005) (en banc), (Kozinski, J., concurring).

The question in *Deck v. Missouri*³³ was the constitutionality of shackling a defendant in the presence of the jury during the capital sentencing phase of a criminal trial. The defendant had been convicted of shooting an elderly couple to death in the course of robbing them.³⁴

The routine use of visible shackles during the guilt phase of a criminal trial has long been forbidden under a rule that has deep roots in English common law, based on the presumption that the sight of a defendant tied up like a mad dog would naturally prejudice the jury. But surprisingly, the use of shackles during the punishment phase of a capital case was an open question in American law. By a majority of seven to two, Thomas and Scalia dissenting, the Court ruled in *Deck v. Missouri* that for constitutional purposes, the two situations were the same, and that the use of shackles during the sentencing phase without special justification violates the defendant's right to due process.³⁵

We know that Justice Thomas is a traditionalist and self-described "originalist," but he argued in his dissenting opinion that tradition should not apply.³⁶ Modern day shackles were different from the pain-inducing shackles of olden times, he said.³⁷ "The belly chain and handcuffs are of modest, if not insignificant weight," he wrote.³⁸ "Neither they nor the leg irons cause pain or suffering, let alone pain or suffering that would interfere with a defendant's ability to assist in his defense at trial."³⁹ Given that a defendant during a sentencing hearing stands before the jury as one who has already been found guilty, he said, "the court's holding defies common sense."⁴⁰

I found this opinion quite startling, yet it received very little attention in the press, on the blogs, or among academic commentators. Perhaps that is because we are all inured to Justice

33. *Deck v. Missouri*, 544 U.S. 622 (2005).

34. *Id.*

35. *Id.* at 635.

36. *Id.* at 635–51.

37. *Id.* at 640.

38. *Id.*

39. *Deck*, 544 U.S. at 640.

40. *Id.* at 636.

Thomas. After all, it was in *Hudson v. McMillian*,⁴¹ during his first term on the Court, that he dissented from a decision holding that the use of excessive force against a prison inmate can violate the Eighth Amendment's prohibition on cruel and unusual punishment even if no serious injury results. The Framers, Thomas said, "simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment."⁴² The forty-five year-old Clarence Thomas let us know then, in the opening months of his tenure, what kind of Justice he would be.

This brings us back to Harry Blackmun, and the Justice he became. Harry Blackmun was sixty-one years old when Richard Nixon, in an increasingly desperate search for a confirmable law-and-order nominee, named him to the Supreme Court in 1970. Before the choice was final, Attorney General John Mitchell had asked a young Justice Department lawyer to vet Blackmun's record on the Eighth Circuit. Assistant Attorney General William H. Rehnquist, discharging that assignment, pronounced Blackmun acceptable—that is, professionally respectable and reliably conservative.⁴³

Indeed, the early Justice Harry Blackmun offered few surprises. The first major constitutional confrontation during his tenure on the Supreme Court was over the death penalty, and when the Court invalidated every death penalty statute in the country in *Furman v. Georgia* in 1972,⁴⁴ Blackmun dissented. When the Court ruled against the Nixon Administration's effort to stop publication of the Pentagon Papers,⁴⁵ Blackmun dissented.

In 1973, he wrote the opinion for the Court in *United States v. Kras*,⁴⁶ a bankruptcy case that challenged the constitutionality of requiring a fifty dollar fee as a condition of filing for bankruptcy. Could the statute be applied to one who was too poor to pay? Blackmun was skeptical of respondent Robert Kras's claim that he

41. *Hudson v. McMillian*, 503 U.S. 1, 17–18 (1992) (Thomas, J., dissenting).

42. *Id.* at 19.

43. GREENHOUSE, *supra* note 3, at 46–47. Harry A. Blackmun, Harry A. Blackmun Papers (1970) (unpublished manuscript, on file with Library of Congress, Manuscript Division Box 1360) [hereinafter HAB Papers].

44. *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

45. *N.Y. Times v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting).

46. *United States v. Kras*, 409 U.S. 434 (1973).

could not afford the fifty dollars. Blackmun noted in the memo he wrote to himself before the argument in the fall of 1972, that Kras had turned down the chance to pay the fee in installments, \$1.28 a week for nine months.⁴⁷ In his opinion for the Court rejecting the constitutional challenge to the filing fee, he wrote dismissively that Kras could have paid the fee for a weekly installment of “less than the price of a movie and little more than the cost of a pack or two of cigarettes.”⁴⁸

The dissents were stinging. “[T]he desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity,” Thurgood Marshall wrote.⁴⁹ William O. Douglas, another of the four dissenters, wrote about the case some months later in his memoir, *Go East, Young Man*, observing that “Never did I dream that I would live to see the day when a court held that a person could be too poor to get the benefits of bankruptcy.”⁵⁰

Blackmun was undeterred. He was gratified more than a year later to hear from the government lawyer who had argued the case that Kras had paid the fifty dollars in full barely a month after the decision. “I always had a feeling that there was something wrong with this case,” Blackmun responded to the lawyer.⁵¹ In an “I-told-you-so” gesture, he then circulated the lawyer’s letter to the dissenters.

Yet barely four years later, we see a very different Harry Blackmun, one who confronted the rights of the poor in another context that evoked from him a much different response. A trio of cases reached the Court during the 1976 term on the question of the government’s obligation to pay for abortions for women who could not afford them. The *Roe v. Wade* majority of three years earlier, Potter Stewart, Lewis Powell, and Warren Burger, fractured over this question and left Blackmun alone in dissent. John Paul Stevens, the newest member of the Court, who had succeeded Douglas, also abandoned Blackmun. Blackmun was left to speak for the poor in his

47. See GREENHOUSE, *supra* note 3, at 108; HAB Papers, *supra* note 43, at Box 156.

48. *Kras*, 409 U.S. at 449.

49. *Id.* at 460 (Marshall, J. dissenting).

50. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS 175* (1974).

51. See GREENHOUSE, *supra* note 3, at 109–10; HAB Papers, *supra* note 43, at Box 156.

dissenting opinion in *Beal v. Doe*,⁵² one of the most powerful dissents of his career. “There is another world ‘out there,’ the existence of which the Court, I suspect, either chooses to ignore or fears to recognize” he wrote.⁵³ Was this the same Justice whose tone had been so dismissive, even smug, in the bankruptcy case just four years earlier? What was happening to Harry Blackmun?

It is the thesis of my book that what transformed him was the fortuity of having been assigned by his childhood friend, Chief Justice Burger, to write for the Court in *Roe v. Wade*.⁵⁴ Blackmun was shocked by the public response to *Roe*—not only by the criticism of the opinion and its outcome, but by the way in which he personally was vilified and lionized. He was the one who got the hate mail, letters by the tens of thousands (he saved them all and gave them to the Library of Congress, which decided to preserve only a random sample), the death threats, and the pickets wherever he went for the rest of his career.⁵⁵ Yet on the other side, he was the one who became a hero to women’s groups in whose cause he was at most a reluctant foot soldier, if that: *Roe*, after all, was about the rights of doctors, and only incidentally about the rights of women.

Initially, Blackmun resisted the efforts by both sides to attach *Roe* to him personally. It’s not my opinion, he would say. It was the opinion of the Court. The vote was seven to two. He received the assignment and he fulfilled it. But the personification was so relentless that eventually, perhaps inevitably, Blackmun did incorporate *Roe v. Wade* into his self-image in a profound way. He was not only the father of abortion rights in America, in his own mind, but he devoted himself to becoming the defender of those rights as the climate changed both outside the Court and within it. I say “perhaps inevitably” because someone with a different personality structure might have reacted differently. It is hard to imagine a William Brennan collecting his hate mail and brooding over it. But throughout his life, Blackmun displayed a tendency to

52. *Beal v. Doe*, 432 U.S. 438 (1977) (Blackmun, J., dissenting).

53. *Id.* at 463 (Blackmun, J., dissenting).

54. See GREENHOUSE, *supra* note 3, at 82.

55. *Id.* at 134–35.

personify events around him.⁵⁶ He dwelled, he brooded, he was in pain—and in the process, he became attuned to the pain of others: to “poor Joshua” of the *DeShaney* case,⁵⁷ tragic victim of an abusive father and an inadequate government safety net; to those who found their way to death row through incompetent legal counsel and judicial shortcuts; to women who were victims of sex discrimination, a concept for which the Court had no constitutional language at the time it confronted the abortion cases, and to which Harry Blackmun eventually came around in a quite grudging and ultimately rather improbable alliance with his future colleague, Ruth Bader Ginsburg.

How might the Harry Blackmun of 1970 have evolved had Warren Burger chosen someone else for the assignment in *Roe v. Wade*,⁵⁸ if *Roe* never became for Blackmun more than just another case? Or if *Roe* had not become so embattled both inside the Court and out, leading Blackmun to assign himself the mission of defending it against all enemies? Of course we will never know the answer to any of those questions,⁵⁹ but there are major areas of his jurisprudence that can plausibly be seen as grounded in *Roe*, or at least in how he experienced *Roe*. Commercial speech is one example.

Without *Roe*, would the commercial speech claim in *Bigelow v. Virginia*⁶⁰ have caught his interest? The speech at issue in that case was an advertisement for an abortion referral service.⁶¹ In writing for the Court that the advertisement was deserving of First Amendment protection, Blackmun launched a reappraisal of commercial speech that went on to bring us, for better or worse, advertising by lawyers, doctors, and other professionals, and the robust and sometimes controversial corporate speech that fills the airwaves today.⁶² It was one of his most important doctrinal contributions.

56. See GREENHOUSE, *supra* note 3, at 134–35.

57. *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189 (1989).

58. *Roe v. Wade*, 410 U.S. 113 (1973).

59. The concept of “path dependence,” from economics comes to mind; see Linda Greenhouse, *Harry Blackmun, Independence and Path Dependence*, 56 HASTINGS L.J. 1235 (2005).

60. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

61. *Id.*

62. See GREENHOUSE, *supra* note 3, at 116–21.

I think it is unlikely, based on his earlier opinions, that he would have so passionately taken up the cause of poor women except for the context in which the question arose: abortion funding. Nevertheless, these later cases helped move him away from his initial doctor-centered view of the abortion right and toward his eventual embrace of a unified jurisprudence of women's rights and abortion rights. How he eventually got there is a long story, but I will give you just one example from his papers of how far he had to come. Early in the Court's 1973 term, a pair of cases arrived at the Court challenging the then common practice by public school systems of requiring teachers to take unpaid maternity leaves midway through their pregnancy, before their vulnerable young students could notice anything. Presumably, it was less traumatic for the students if their invisibly pregnant teachers suddenly disappeared rather than grow visibly larger and give birth.⁶³ Most of the Justices thought these policies were unfair, but three years before *Craig v. Boren*⁶⁴ made sex discrimination subject to heightened judicial scrutiny, these Justices lacked the constitutional vocabulary to express what, exactly, the problem was. In a memo that Blackmun wrote to himself while preparing for argument, we can see him struggling to get a handle on the issue:

It is easy to say initially that any regulation which relates to pregnancy is automatically and per se sex discriminatory. I am not at all certain that this is necessarily so. Actually, what the regulation does is to draw distinctions between classes of women, that is, those who are pregnant and those who are not pregnant, rather than between male and female. It is somewhat similar to an Army regulation requiring that enlisted men be shaved and not wear beards or mustaches. Such a regulation discriminates between one class of men and another class of men, and not as between men and women.⁶⁵

63. See GREENHOUSE, *supra* note 3, at 213–15. *Cleveland Bd. of Educ. v. LaFleur* and *Cohen v. Chesterfield County Sch. Bd.* were consolidated for decision at 414. U.S. 632 (1974).

64. *Craig v. Boren*, 429 U.S. 190 (1976).

65. HAB Papers, *supra* note 43, at Box 203.

At the top of this typewritten memo, Blackmun added a handwritten note: “Not sex related.”⁶⁶ He eventually joined a majority opinion that invalidated the mandatory leave policies on the basis of due process. The word “discrimination” did not appear in Potter Stewart’s majority opinion in *Cleveland Board of Education v. LaFleur*.⁶⁷ So, Blackmun did have far to go, but so did the Court. Blackmun did not instinctively grasp what the young Ruth Bader Ginsburg was trying to convey to the Court during her carefully constructed strategic litigation campaign of the 1970s, but neither did he close his eyes and turn away from it, even when his law clerks advised him to do so.⁶⁸ During this period, the Court was gradually constructing a language and jurisprudence of women’s rights. Blackmun was not a leader. However, it is fairly clear that the more entrenched he became in his defense of *Roe*, the more receptive he became to the claims of women’s equality. By 1986, in his opinion in the *Thornburgh*⁶⁹ case, we see a description of what it means to a woman to have the right to decide whether to terminate a pregnancy, a description very different in tone from the doctor-centered language of *Roe*: “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy”⁷⁰

Toward the end of his career, Blackmun would occasionally deny that he had changed very much, but the statistics tell the story. In closely divided cases, he voted with Burger 87.5% of the time during his first five terms and with Brennan only 13%.⁷¹ During the next five years, 1975–1980, he voted with Brennan 54.5% of the time and

66. *Id.*

67. *Roe*, 414 U.S. at 633.

68. *See, e.g.*, Memorandum from law clerk to Justice Blackmun, on *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Dec. 23, 1974) (unpublished manuscripts, on file with Library of Congress); *see also* GREENHOUSE, *supra* note 3, at 216–17 (discussing the law clerk’s memorandum).

69. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

70. *Id.* at 772.

71. GREENHOUSE, *supra* note 3, at 186 (citing Joseph Kobylka, Speech at the Midwest Political Science Association: Discovering Judicial Compassion: The Evolving Egalitarianism of Harry A. Blackmun (Apr. 2001) (on file with author) (compiling data based on annual statistical summary); *see also* Ruger, *supra* note 20, at nn.21, 27, 35, 36 (collecting statistical studies of voting patterns).

Burger 45.5%.⁷² During the final five years that Blackmun and Burger served together, 1981–1986, Blackmun joined Brennan in 70.6% of the divided cases and Burger in only 32.4%.⁷³

So this is the question: Which types of Justices are open to change, and which are not? Can we draw conclusions from our recent and not so recent experience as we wait for the Roberts Court to reveal itself more fully?

Predictions are as dangerous as they are irresistible. As a starting point, we might do well to consider a new Justice's stance toward the body of law of which he or she is now a guardian. Although Blackmun developed a sense of mission and was propelled by it in the way I have just described, it is important to note that he did not arrive at the Court with any agenda (beyond survival, which early in his tenure, he doubted). Neither did Justice O'Connor; instead she concentrated on climbing the steep learning curve required to make the transition from the Arizona Court of Appeals and her earlier career in elective politics.

Both Blackmun and O'Connor experienced the personal disruption of a midlife move to a distant city and culture with which they were almost entirely unfamiliar. This mind-bending experience, and their lack of a personal agenda, left each of these Justices open to new and unexpected influences in a way that Clarence Thomas, for example, has not been. The world of Clarence Thomas, a product of bureaucratic Washington by the time he was named to the Court at the age of forty-three, has become more insular and self-reinforcing, while the worlds of Harry Blackmun and Sandra O'Connor became ever more open.

For seventeen summers, Blackmun left Washington for the Aspen Institute, where he would conduct a seminar in which people from around the country and the world would wrestle with age-old debates about justice and society.⁷⁴ Justice O'Connor traveled widely, interacting with judges of other constitutional courts and spending

72. *Id.*

73. *Id.* (citing data compiled by Joseph F. Kobylka, based on the annual statistical summary in the Harvard Law Review; Ruger, *op. cit.*, at nn.21, 27, 35, and 36 (collecting other statistical studies of voting patterns)).

74. See Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUP. CT. REV. 307, 310–11 (2005).

many hours working with the American Bar Association's project on the rule of law in central and eastern Europe.⁷⁵ She became a champion of the idea that American courts benefit from studying and acknowledging legal developments in the rest of the world.⁷⁶

I should note that I am not the first or only observer of the Court to see a correlation between a mid-life move to Washington and a new Justice's amenability to change. "Newcomers to Washington are risks," one conservative commentator, Terry Eastland, observed in 1993, with reference to Anthony Kennedy, David Souter, and Sandra Day O'Connor.⁷⁷ Lawrence Baum, a political scientist who specializes in judicial behavior, notes in an interesting new book that a statistical analysis of the voting patterns by Republican-appointed Supreme Court Justices since Earl Warren demonstrates that "residency had a greater impact on voting change than initial ideological positions."⁷⁸ Justices appointed from outside Washington were more likely to become more liberal on civil liberties issues, Baum observes, noting that on this scale, "the difference between the most conservative and least conservative Republican appointee in voting change was not nearly as great as the difference between Washington residents and newcomers."⁷⁹

Professor Michael Dorf of Columbia Law School has come to the same conclusion through a slightly different lens. Looking at the twelve Justices appointed by Republican Presidents beginning with Richard Nixon's appointment of Warren Burger, he observes that the six who had Executive Branch experience before joining the Supreme Court (Burger, Rehnquist, Scalia, Thomas, and—projecting—Roberts and Alito) changed very little,⁸⁰ while the six who had never served in the Executive Branch of the federal government (Blackmun,

75. See, e.g., Elizabeth F. Defeis, *A Tribute to Justice Sandra Day O'Connor from an International Perspective*, 27 SETON HALL L. REV. 391 (1997).

76. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (O'Connor, J., dissenting).

77. Terry Eastland, *The Tempting of Justice Kennedy*, AM. SPECTATOR, Feb. 1993, 37 n.3, cited in LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 144 (2006).

78. BAUM, *supra* note 77, at 150–51.

79. *Id.* at 150–51.

80. Michael Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices 'Evolve' and Others Don't?*, 1 HARV. L. & POL'Y REV. 457–76 (2007).

Powell, Stevens, O'Connor, Kennedy, and Souter) became more liberal during their Supreme Court service.⁸¹ It is an interesting chicken-and-egg problem. Executive Branch service, at least among ambitious young conservatives, seems to serve as a proxy for Washington experience. These individuals engaged in self-selection and were then, of course, selected by Presidents who might have seen their Executive Branch service as a good indicator of ideological commitment and reliability.

Our new Chief Justice, John Roberts, fits this pattern to a striking degree. He does not face a notably steep learning curve. Few people have come to the Court as familiar with the institution and the docket. Between his service as a government lawyer—in the Justice Department and the White House—and his distinguished career in private practice before the Court, there are few issues he has not confronted.⁸² He did not have to go through the challenging experience of a mid-life move to a distant city.⁸³ In moving from one federal courthouse to another, his daily commute from his close Maryland suburb grew by only six blocks.

For Roberts, the forces for change that confronted Blackmun and O'Connor may be absent. David Strauss of the University of Chicago, for one, wrote shortly after Roberts was nominated that “whatever his views are now, the Senate, and the American people, should count on his being the same person throughout the thirty or so years he is likely to spend on the Court if he is confirmed.”⁸⁴ I think that is a little categorical, but it is not completely unfounded. Although Samuel Alito came to the Court after fifteen years as a federal appeals court judge with chambers in New Jersey, the formative period of his early legal career was spent in Washington, including arguing before the Supreme Court as a young lawyer in the Solicitor General’s office.⁸⁵ The discourse of the Court, and the legal community that centers around it, is certainly familiar to him. Whether by the Baum residency measure, or Michael Dorf’s focus on

81. *Id.*

82. SUPREME COURT OF THE UNITED STATES, BIOGRAPHIES OF CURRENT JUSTICES 1 (2006), <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

83. *Id.*

84. See Strauss, *supra* note 25.

85. SUPREME COURT OF THE UNITED STATES, *supra* note 82, at 3.

prior Executive Branch service, neither of the new Justices fit the pattern of those likely to display significant ideological drift.

Of course, that tentative conclusion begs the question of the location of their starting points. While there is little doubt that they are on the conservative side of the Court's current spectrum, are either of these new Justices on a mission, in service of a personal agenda to remake constitutional law? I strive to remain agnostic. On the one hand, I see insiders, comfortable with the status quo that has brought them success and professional fulfillment. I do not sense the anger and axe-grinding of a Thomas or Scalia. Or, to go back just a bit further, I do not see a Warren Burger, who had been at war with the liberals on the D.C. Circuit while he served there, and approached the Chief Justiceship girded for continued battle and seeing enemies all around him, as his correspondence at the time with his friend Harry Blackmun makes dramatically evident.⁸⁶ Nor do I see a young William Rehnquist, who emerged from a Supreme Court clerkship and lived through the 1950s and 1960s deeply persuaded that constitutional law was on the wrong course and needed to be wrenched back.⁸⁷ On the other hand, I see young Justices in a hurry to reshape the law to their liking across doctrinal areas from Equal Protection to standing.⁸⁸

Another new book, not about the Court at all, offers some insight as we consider the forces for personal change that operate on Supreme Court Justices. In *Private Lives, Public Consequences: Personality and Politics in Modern America*, historian William Chafe presents portraits of national leaders from Franklin D. Roosevelt to Bill Clinton and tries to identify the connection between the personal and the political.⁸⁹ Most of these individuals endured some crisis that had the result of causing or forcing them to see things in a new way. Looking at the Supreme Court through the same lens, I think it is clear that for Blackmun, the crisis was the trauma of his early years at the Court, a period that included *Roe v. Wade*⁹⁰ and its aftermath. I

86. GREENHOUSE, *supra* note 3, at 44; HAB Papers, *supra* note 43, Boxes 50 and 51.

87. See generally CRAIG BRADLEY, THE REHNQUIST LEGACY 1-5 (2006).

88. See *Hein v. Freedom from Religion Foundation*, 127 S. Ct. 2553 (2007).

89. WILLIAM H. CHAFE, PRIVATE LIVES, PUBLIC CONSEQUENCES: PERSONALITY AND POLITICS IN MODERN AMERICA (2006).

90. See generally *Roe*, 401 U.S. 113.

am not aware of a crisis in the lives of John Roberts or Sam Alito that would have shattered their received notions of how the world works.

Let me conclude on a note of modesty about the dangers of predictions and generalizations. The Court's very recent history should warn us against jumping to quick conclusions about what lies ahead, especially when we are considering the future tenure of relatively young men who are likely to still be on the Court when my twenty-one year-old daughter is approaching middle age. We thought we knew William Rehnquist pretty well by the time he approached his third decade on the Court. Who would have imagined that it would have been Rehnquist, at war with the *Miranda* doctrine for much of his judicial career, who on a June morning seven years ago would announce the court's judgment in *Dickerson v. United States*,⁹¹ and reaffirm the *Miranda* decision and describe it as "part of our national culture?"⁹²

I was equally surprised four years later to hear Chief Justice Rehnquist announce the Court's judgment in *Locke v. Davey*,⁹³ rejecting the argument that a state that provided financial aid at the college level to needy and deserving students had to provide the same basis of support for students studying for the ministry. This underestimated decision put the brakes on the school voucher movement, of which Chief Justice Rehnquist was the doctrinal godfather in a series of Establishment Clause rulings going back to *Mueller v. Allen*,⁹⁴ decided twenty years earlier, and continuing through the Ohio school voucher case, *Zelman v. Simmons-Harris*,⁹⁵ in 2002. And recall Chief Justice Rehnquist's surprising opinion for the Court in the 2003 Family and Medical Leave Act case, *Nevada Department of Human Resources v. Hibbs*,⁹⁶ in which the Court rejected the state's claim of Eleventh Amendment immunity from suit after having accepted such claims in a series of cases challenging

91. *Dickerson v. United States*, 530 U.S. 428 (2000).

92. *Id.* at 443.

93. *Locke v. Davey*, 540 U.S. 712 (2004).

94. *Mueller v. Allen*, 463 U.S. 388 (1983).

95. *Zelman v. Simmons-Harris*, 534 U.S. 1111 (2002).

96. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

congressional efforts to extend federal civil rights protections to state employees.⁹⁷

The William Rehnquist of the final years of his tenure, in other words, was not necessarily the Justice we thought we knew from the beginning, middle, or even late middle of his career.⁹⁸ The question is, what happened? I do not think Rehnquist changed his views in any fundamental way; in fact, I don't think he changed his views about anything that was really important to him during his adult lifetime. What I think he acquired, however, was a different perspective, one that included not only his personal agenda but the long-term institutional interests of the Supreme Court. He was a very smart man whose effectiveness derived in no small part from his ability to see around corners, and in the cases I have mentioned, that kind of vision told him that it was time to hold back—to mix metaphors, that it was not the time to follow the logical implications of the Court's recent precedents right off a cliff. The last few years of the Rehnquist Court provide us with a case study of the impact of the institutional on the personal. It is worth noting, of course, that Chief Justice John Roberts clerked for Rehnquist, who still is his mentor, and Rehnquist himself clerked for Robert Jackson, so we are back where we started.⁹⁹

It is also worth observing of another Chief Justice, Earl Warren, that his first term was a very poor predictor of the kind of justice that he would become. Warren had spent twenty-three years of his life as a local prosecutor and state attorney general.¹⁰⁰ During his first term on the Court, 1953, he voted against criminal defendants and civil rights litigants most of the time.¹⁰¹ But over the next fifteen years, as we know, he became their champion.¹⁰²

97. See, e.g., Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. REV. 1 (2003).

98. See, e.g., Linda Greenhouse, *Foreword to CRAIG M. BRADLEY, THE REHNQUIST LEGACY*, at xiii to xii (2006); Erwin Chemerinsky, *Just Right? Assessing the Rehnquist Court's Parting Words on Criminal Justice: The Rehnquist Court and the Death Penalty*, 94 GEO. L.J. 1367 (2006).

99. SUPREME COURT OF THE UNITED STATES, *supra* note 82, at 1.

100. See JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 45–87 (2006).

101. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. (forthcoming 2007).

102. Epstein, *supra* note 22, at Fig. 6.

That is, of course, another story.¹⁰³ The point is that every Supreme Court Justice will have his or her own story—a story that, just maybe, will surprise us.

103. See JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* (2006).