

## THE GREENING OF HARRY BLACKMUN

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Long before there was talk of a “Greenhouse effect,”<sup>1</sup> there was talk of Harry Blackmun changing color. Or at least there was in the chambers of Chief Justice Warren Burger, where I was a law clerk during the October Term 1974.<sup>2</sup> The inspiration for the image we used to describe the 1974 Term came not from the distinguished journalist, only then beginning her career and not yet covering the Court, but from a book by Charles Reich.<sup>3</sup> Our view of the cause of Blackmun’s metamorphosis lacked grounding in a theory more general (or elegant) than the susceptibility, particularly of the insecure, to Irish charm. We had no doubt that Justice Brennan had made Harry Blackmun his project, and we thought (without seeking systematic empirical evidence) that the object of his attentions found them difficult to resist. I well recall my co-clerk’s remark upon seeing a letter from Justice Brennan joining, with praise that seemed excessive, an opinion by Justice Blackmun. Noting that the join letter arrived within minutes of the opinion, he speculated that they had passed in the halls.

For one exposed to such powerful anecdotal evidence early in his career, it has been difficult to accept what Lee Epstein, Andrew Martin, Kevin Quinn, and Jeffrey Segal describe as the conventional view about judicial preferences, namely that they are fixed, invariant or entrenched.<sup>4</sup> Indeed, I long regarded such claims as wishful thinking, either of scholars whose theories of judicial behavior could not accommodate changing preferences, or of political actors (both elected politicians and interest groups) seeking to project fixed preferences on to others. My view about the scholarly claims has been powerfully reinforced by the evidence that Epstein and her co-

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<sup>1</sup> This putative phenomenon, named after the *New York Times* correspondent, Linda Greenhouse, posits the influence of the media on judicial behavior. *See infra* note 12.

<sup>2</sup> Burger himself never talked of such things to me. Indeed, unlike Blackmun himself, *see, e.g.*, LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY *passim* (2005) (noting, for example, Blackmun’s critique of other Justices written on draft opinions), Burger never said a mean-spirited word about any of his colleagues in my presence, either when I was his clerk or in many meetings during the ensuing years.

<sup>3</sup> CHARLES A. REICH, THE GREENING OF AMERICA (1970).

<sup>4</sup> *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. (forthcoming 2007) (manuscript at 5–7, on file with the *Colloquy*) (link).

authors provide in their paper.<sup>5</sup> The recent history of judicial selection and the larger political context in which it has unfolded<sup>6</sup> have made me less sanguine about such claims by political actors.

Increasingly since the 1980's, some political actors have sought to make their wishes come true by insisting that judges be reliable policy agents.<sup>7</sup> Moreover, their efforts in the appointments area can be seen as part of larger campaigns, affecting both the federal and state judiciaries, to insulate today's majority against the past, by disregarding precedent, and the future, by refusing to acknowledge evolving standards. Whether the effort is to place those with fixed preferences on the federal courts, to pin down candidates for state judicial office on highly salient issues through questionnaires, to strip the federal courts of jurisdiction to decide certain types of cases, or to "punish" the federal courts for refusing to reexamine the merits in the *Schiavo* litigation, the impulse is the same.<sup>8</sup>

Of course, whether political actors could succeed in making their wishes come true, and hence whether I should be worried, depends upon why preferences change and whether recent strategies, or some others, could be effective in entrenching them. As Epstein and her co-authors observe, we need a theory of preference change.<sup>9</sup>

<sup>5</sup> See *id.*; see also, e.g., Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209 (2005) (link).

<sup>6</sup> See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEORGETOWN L.J. (forthcoming 2007) (link).

<sup>7</sup> Their efforts in that regard may help to explain why all of those recently appointed to the Supreme Court have had judicial experience—and judicial records—and why some presidents seem to have put a premium on prior executive branch experience as well.

<sup>8</sup> See Editorial, *The War on Courts and Other Wars*, 90 JUDICATURE 148 (2007), available at [http://www.ajs.org/ajs/ajs\\_editorial-template.asp?content\\_id=581](http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=581) (link) ("However various the manifestations of these current calls for judicial accountability, they reflect one common—and very pernicious—idea, namely that judges are policy agents whose job is to implement the will of today's majority on particular issues."). The author of this Post is chair of the Editorial Committee of the American Judicature Society.

<sup>9</sup> See Epstein et al., *supra* note 4 (manuscript at 31–32). We may also need a dose of realism about preference formation. It is not a criticism of Epstein and her co-authors that their paper, like the work of most political scientists, is based on only a slice of the work of only one court (and an unusual one at that). Moreover, even recognizing that all current Justices had judicial experience before their appointment to the Court, the notion that they all had clearly formed preferences, even as to all of that slice of work, seems to me either naïve or, more likely, another artifact of the limitations of models of judicial behavior. Finally, inferior courts lack the (relative) freedom, as well as the ultimate responsibility, of the Supreme Court. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 168–69 (2006) (noting that "[t]he scrutiny that the justices receive may heighten their sense of accountability" and that, as a result, "the bases for the justices' choices may differ systematically from those of judges on lower courts—including themselves, if they had lower-court experience").

In his interesting new book,<sup>10</sup> Lawrence Baum has offered such a theory. It has the attraction of recognizing that, like all human beings,<sup>11</sup> judges have a number of audiences that may influence them. Professor Baum discusses the possibility that Justice Blackmun's changing preferences reflected his response to his social environment, including the media—the “Greenhouse effect.”<sup>12</sup> He also notes, however, a number of other possible influences, including that suggested by my experience as a law clerk: collegial influence.<sup>13</sup> Linda Greenhouse suggests a similar phenomenon in discussing Justice O'Connor, who appears to have been influenced by Justice Marshall.<sup>14</sup>

A theory of preference change presumably should distinguish between sincere and strategic behavior,<sup>15</sup> although positing a sharp dichotomy between the two may neglect both human nature and the impact of other influences, including precedent and other institutional considerations.<sup>16</sup> Could it be that the drift observed after Justice Rehnquist became Chief Justice Rehnquist<sup>17</sup> reflected in part his desire to assign majority opinions and to do so without engaging in the alleged behavior for which his predecessor was criticized?<sup>18</sup> Does the desire to exercise the power of being the “swing justice” lead to strategic behavior, and for how long should adherence to the

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<sup>10</sup> See BAUM, *supra* note 9. For a similar perspective on judicial behavior in the United Kingdom, employing role analysis, see ALAN PATERSON, *THE LAW LORDS* (1982); *id.* at 9–34 (chapter entitled “Who Influences Law Lords?”).

<sup>11</sup> WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7 (link) (“All the world’s a stage, And all the men and women merely players: They have their exits and their entrances; And one man in his time plays many parts . . .”).

<sup>12</sup> See BAUM, *supra* note 9, at 139–57.

<sup>13</sup> See *id.* at 152.

<sup>14</sup> See Linda Greenhouse, *Justices Who Change: A Response to Epstein et al.*, 101 NW. U. L. REV. (forthcoming 2007), 101 NW. U. L. REV. COLLOQUY 132, 134–135, <http://www.law.northwestern.edu/lawreview/colloquy/2007/9/> (link) (citations *infra* will refer to the *Colloquy*).

<sup>15</sup> *But see* Epstein et al., *supra* note 4 (manuscript at 31) (conflating strategic with sincere behavior in discussing “the political environment in which the justice operates” as one of the “underlying, and universal, explanations of change on the Court”). Professor Baum discusses strategic behavior prompted by “concern for the regard of colleagues,” distinguishing it from the “standard conception, [in which] judges act strategically within their courts only because they care about the content of court decisions.” BAUM, *supra* note 9, at 55.

<sup>16</sup> See Greenhouse, *supra* note 14, at 134–135 (discussing Chief Justice Rehnquist’s vote in *Dickerson v. United States*, 530 U.S. 428 (2000) (link)).

<sup>17</sup> See Epstein et al., *supra* note 4 (manuscript at 24).

<sup>18</sup> See *id.* (manuscript at 42) (discussing votes by Chief Justice Rehnquist that appear to reflect changing preferences but likely did not contribute to doctrinal change). For allegations that Chief Justice Burger acted both insincerely and disingenuously in order to assign opinions, see, for example, BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 64–65, 170–72, 179–81, 417–22 (1979).

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positions that enable continued exercise of that power be deemed strategic rather than sincere?<sup>19</sup>

Any theory of judicial preference change must have room for individuals some of whose preferences are immutable. This group would include judges who are ideologues in the strong sense of that word, because their preferences “hold sway with such power as to be impervious to adjudicative facts, competing policies, or the governing law as it is generally understood.”<sup>20</sup> I have argued that ideology, in this sense, is akin to non-ideological pre-commitment to legal positions for the purpose of securing or retaining a judicial position, in that both are the enemies of judicial independence.

Judges whose belief systems are hard-wired are likely to be eager lawmakers; those who are pre-committed for reasons of personal advancement may or may not be. In any event, the same qualities that render them unfit to serve as judges from a traditional perspective, which views law as determinate knowledge to be discovered, render them equally unfit in a world that acknowledges the indeterminacy of much (not all) law and the importance of dialogue in arriving at solutions that serve the common weal. True believers, no matter what their beliefs or political persuasion, know what is right, and the brighter, the more self-confident and the more energetic they are, the more likely they are to regard processes and institutions of dialogue and accountability as obstructions and to endeavor to render them irrelevant. Non-ideological pre-commitment forecloses dialogue, and although motivated by a vision of accountability, contributes to its degradation.<sup>21</sup>

Like all of us, judges who are strong ideologues probably enjoy, and may actively seek, friendly audiences. But preaching is not dialogue, and an audience of the converted is unlikely to stimulate change.<sup>22</sup>

In this light, the implications of the findings reported by Epstein and her co-authors for the judicial appointment process may not be as reassuring as they appear. Consider, for example, how many of the appointments that resulted in drift to the left resulted from a political environment that constrained a president<sup>23</sup> and/or from a president’s choice to pursue a personal

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<sup>19</sup> A related question, suggested by Epstein’s and her co-authors’ speculations about the voting behavior of Justice Kennedy going forward, is whether the assumption of the role of swing justice, whether or not sought, prompts strategic (as opposed to sincere) behavior. See Epstein et al., *supra* note 4 (manuscript at 43–44).

<sup>20</sup> Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUMBIA L. REV. 1971, 1999 (1997). In my view, ideological stability over time need not reflect or result from ideological rigidity.

<sup>21</sup> Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 48–49 (2005).

<sup>22</sup> See BAUM, *supra* note 9, at 164–71 (discussing appearances of justices before various groups outside of Washington, D.C.); *id.* at 167 (noting that Justices Scalia and Thomas made the greatest number of appearances before policy groups outside of Washington).

<sup>23</sup> I would include in this group the nominations of Justices Blackmun, Kennedy, Powell, Rehnquist, and Stevens.

or partisan, as opposed to a pure policy, agenda.<sup>24</sup> The more constrained a president is by the opposition party, campaign promises, the desire to appeal to certain voters, or friendship, the less room there may be to nominate a reliable policy agent.

In recent decades, however, the growing influence of interest groups in judicial appointments and partisan politics has blurred distinctions among different appointment strategies.<sup>25</sup> As a result, a single-minded president with a clear policy agenda and a compliant Senate might be foolish to abandon (or compromise on) the quest for reliable policy agents. Thus, I remain worried both that the quest will continue and that it will continue to pollute our politics by encouraging the public to regard *Bush v. Gore*<sup>26</sup> not as an anomaly but rather as emblematic of what judicial appointments are all about—specific results on specific issues.<sup>27</sup>

By now, of course, my legal colors are showing, and the reader will understand why I am uncomfortable with the connection that Epstein and her co-authors draw between changing ideological preferences and changing doctrine.<sup>28</sup> I believe that all members of the Court, including its strong ideologues, are imbued to some extent with Rule of Law values, and that almost all of them understand the importance of adherence to, or rational explanations for departures from, precedent.<sup>29</sup> My own experiences as a law clerk, as an arbitrator, and as a Special Master have shown me that some opinions, as they say, simply will not write. Those experiences and exposure to cases in which a justice voted one way in conference only to be persuaded to change by a draft opinion (or dissent) convince me that the traditional gap between the legal and political science approaches to judicial

<sup>24</sup> I would include in this group the nominations of Justices Brennan, Clark, O'Connor and Warren. The typology comes from SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 3–4 (1997).

<sup>25</sup> See Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1545 (2006). Epstein and her co-authors neglect this phenomenon (i.e., the links between ideological and partisan considerations) in their discussion of the appointment of Justice Alito. See Epstein et al., *supra* note 4 (manuscript at 6).

<sup>26</sup> 538 U.S. 98 (2000) (link).

<sup>27</sup> See Burbank, *supra* note 25, at 1543–44 (“I have suggested that some distinctions between the attentive and nonattentive public might disappear (or that the definition of ‘attentive public’ might change) with greater attention to the Court that was promoted and framed by interest groups. In that regard, the explanation other scholars have offered for the correlation between awareness and diffuse support involves exposure to ‘legitimizing messages.’ If, on the other hand, greater awareness of the Court were brought about by delegitimizing messages (i.e., those framed in terms of results), would there not be less diffuse support? Indeed, whatever the dynamic between diffuse and specific support, if the frame were altered, might there not be less of both?”) (footnotes omitted).

<sup>28</sup> See Epstein et al., *supra* note 4 (manuscript at 5–6).

<sup>29</sup> Adrian Vermeule, *Connecting Positive and Normative Legal Theory* 7 (2007) (unpublished manuscript, on file with author) (“To make sense of doctrinal scholarship, one must assume either that the justices are directly interested in creating good law, or else that the justices are indirectly interested in doing so, because they care about their reputation with (among others) the law professors who care about good law.”) (footnote omitted).

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behavior, which has been narrowing in recent years, will not be closed until we find a way to model law.<sup>30</sup> In sum, I doubt that either an attitudinal or a strategic model of judicial behavior can explain a decision like *Jones v. Bock*.<sup>31</sup>

Perhaps, however, Epstein and her co-authors do not disagree. For, after all, they believe that their findings “counsel against ideological appointments—at the least, ideological appointments to the neglect of other factors but especially a *nominee’s qualifications . . .*”<sup>32</sup> And what would attention to qualifications (or, as they also put it, “merit”) accomplish? It would provide greater assurance, if not of the “ideological direction of [nominees’] doctrinal path,” then of “their ability to influence the direction of the law, based in some part on their intellect.”<sup>33</sup> One need not endorse Epstein’s and her co-authors’ peculiar sample of those “universally acclaimed as great justices [who] were also universally perceived as exceedingly well qualified at the time of their nomination”<sup>34</sup> to see in their formulation room for recognition that mastery of law and of legal culture matters, and that any attempt to store them in a compartment (or model) sealed off from ideological preferences is, well, artificial.

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<sup>30</sup> BAUM, *supra* note 9, at 172 (“Scholars have made progress in measuring the influence of various aspects of the law on judicial behavior. They have given particular attention to the impact of a court’s own precedents, which are easier to measure than some other legal considerations. But broad measures of the law’s impact remain elusive.”) (citations omitted). *See id.* at 160 (discussing incentives “to take the law seriously”). For an interesting paper discussing the use of classification trees “[t]o study the mapping from case facts to judicial outcomes,” see Jonathan P. Kastellac, *The Structure of Legal Rules and the Analysis of Judicial Decisions 9* (Jan. 30, 2007), available at <http://ssrn.com/abstract=960190>. As the author notes, however, “a study of legal rules can proceed without joining th[e] debate [between the attitudinal model and the legal model]”. *Id.* at 4 n.5.

<sup>31</sup> 127 S. Ct. 910 (2007) (link)(unanimously rejecting three separate “procedural rules” by which the Sixth Circuit made it more difficult for prisoners to maintain civil rights actions). This “liberal” decision confounds the assumptions of the attitudinal model with respect to many of the Justices. The recent elections might provide some basis for concern, from a strategic perspective, about a legislative override. Yet, that concern is barely plausible with respect to prisoner legislation and wholly implausible as to all of the three rules struck down. As to one of them, the Court’s reliance on precedent invalidating judge-made heightened pleading requirements should be taken at face value.

<sup>32</sup> Epstein et al., *supra* note 4 (manuscript at 37).

<sup>33</sup> *Id.* at 37. Doubt about the prospects for appointing a reliable policy agent might, however, cause a risk averse president *not* to choose a person with such qualifications, or to hedge his bets in other ways (as by nominating an older person).

<sup>34</sup> *Id.* at 36. The authors include “Oliver Wendell Holmes, Benjamin Cardozo, William Brennan and Antonin Scalia, to name just a few.” *Id.* at 36–37. However, Cardozo is not widely regarded, let alone “universally acclaimed,” as a great justice, in part because he served for such a short period, and in part because his strength lay in the common law. There is likely to be greater disagreement about Scalia. Arguably, however, he has largely failed to fructify his undoubted “ability to influence the direction of the law” precisely because he is a strong ideologue who is not interested in dialogue, statesmanship, compromise or any of the other qualities that can make the law–politics equation a counsel of hope rather than despair. *See* Burbank, *supra* note 21, at 46; Stephen B. Burbank, *Making Progress the Old-Fashioned Way*, 149 U. PA. L. REV. 1231, 1234–35 (2001).