

IDEOLOGICAL DRIFT AMONG SUPREME COURT JUSTICES: WHO, WHEN, AND HOW IMPORTANT?

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INTRODUCTION

When the U.S. Supreme Court invalidated the Bush administration's plan to use military commissions to try enemy combatants in *Hamdan v. Rumsfeld*,¹ the decision fueled more than a national debate over the powers of the President. It also generated commentary about the ideological composition of the Court. Conservatives proclaimed that they were just one Justice, just *one vacancy*, away from victory in *Hamdan*² and a handful of other recent decisions that worked against their interests.³ Liberals worried about just as much.⁴

¹ 126 S. Ct. 2749 (2006) (link).

² The vote in *Hamdan* was five-to-three. Because he served on the appellate court panel that had upheld the commissions, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (link), Chief Justice Roberts recused himself. Had he participated, many commentators assume he would have once again supported the administration. See, e.g., Cass Sunstein, *The Court's Stunning Hamdan Decision*, NEW REPUBLIC ONLINE, June 30, 2006, <http://www.tnr.com/doc.mhtml?i=w060626&s=sunstein063006> (link) ("The current Court itself remains badly divided. We should emphasize that *Hamdan* was decided by a narrow margin of 5-3, and we should not neglect the fact that Chief Justice Roberts did not participate in the decision; the reason is that he was part of the three-judge lower court, now reversed, which had ruled broadly in the president's favor.").

³ E.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (link) (a five-four decision affirming the taking of property for economic development does not violate the "public use" restriction of the Fifth Amendment's Taking Clause); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (link) (holding that a law school's use of race in admissions decisions does not violate the Fourteenth Amendment's Equal Protection Clause); *Roper v. Simmons*, 543 U.S. 551 (2005) (link) (concluding that the Eighth Amendment prohibits the imposition of the death penalty for crimes committed when the defendant was under the age of eighteen).

⁴ Commentary on *Hamdan* and the ideological composition of the Court appears on numerous blogs. See, e.g., Applied Epistemology, <http://appliedepistemology.com> (June 29, 2006, 18:37 EST) (link) ("The scary lesson that *Hamdan* [sic] teaches us is that the only thing currently standing between American democracy and an executive branch autocracy is John Paul Stevens' bath mat."); *Five, Wrong on Hamdan*, NAT'L REV. ONLINE, June 30, 2006, <http://article.nationalreview.com/?q=NzZmOTBhMzFhY2VIMzI5NjYyNzZmZWVINTAwNzZhMWM=> (link) ("The Mystery Five [Justices] have simply practiced once again the utterly lawless willfulness that they have proclaimed to be their mission. And they undoubtedly know that they will receive ample cover, in the form of fawning accolades, from legal academia and the liberal media.").

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The commentary over *Hamdan* reflects a widely shared belief among journalists, politicians, scholars, and even judges: alterations in the Court's jurisprudence are unlikely in the absence of membership change. That is because the Justices themselves, according to these commentators, do *not exhibit ideological change over the course of their tenure*.⁵ To paraphrase the old proverb, once a conservative, always a conservative. Likewise for liberals.⁶

Why the assumption of stable preferences is so deeply held is open to speculation. Some analysts suggest it would defy logic to expect mature persons, with years of experience in the legal world, to revisit their jurisprudential views. Would a John G. Roberts, Jr.—a Justice who has studied, litigated, or adjudicated court cases for over half his life—alter his ideological preferences? The answer, according to Professor David A. Strauss, is that he would not:

As Americans try to figure out what Judge John G. Roberts Jr. will be like as a U.S. Supreme Court Justice, one idea seems to [be] . . . that whatever Judge Roberts is now, once he is on the court he might develop into something different. In particular, the thinking goes, even if he is the intense conservative suggested by his Reagan-era memoranda, he may become more moderate as a justice.

Don't believe it.⁷

Shoring up intuitions about the implausibility of preference change is empirical support in the form of a William H. Rehnquist on the right and a Thurgood Marshall on the left—Justices who never seemed to veer much from their preferred ideological course. When President Richard Nixon ap-

⁵ We develop these points in our article to appear in the *Northwestern University Law Review*. Epstein et al., *Ideological Drift among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. (forthcoming 2007). Suffice it to note here that the claim of ideological consistency not only appears in commentary on the Court but undergirds many important theories of judicial decisions, or at least tests of those theories. Consider "separation of powers" theories, which suggest that the Court takes into account the preferences and likely actions of Congress when it interprets statutes. The typical assumption is that the *sincere* preferences of the Court do not change unless the center of the Court (the median) changes as a result of membership turnover. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 378 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 643–45 (1991) (link); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988*, 23 RAND J. ECON. 463, 466 (1992) (all three detailing how the Court's sincere or raw preferences move with membership changes but explaining why the Court may not act on those preferences). Likewise, some adherents of the attitudinal model of judicial decisions, which holds that justices vote on the basis of their ideology, describe attitudes as "relatively enduring." See DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 75 (1976).

⁶ The proverb is "Once a thief, always a thief."

⁷ 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 (link).

pointed Rehnquist to the Court, virtually all observers of the day deemed the nominee a reliable conservative.⁸ Likewise at the time of his appointment, the press declared Justice Marshall a probable addition to the Court's "liberal bloc."⁹ That these initial ideological labels well characterized the Justices' future behavior only serves to confirm Professor Strauss's claim about the unlikelihood of change. Or so the argument goes.

And yet, despite the commonplace nature of the claim, it is not without its share of skeptics. Whether pointing to anecdotes or more systematic evidence, several analysts now contend that ideological drift is not just possible but likely.¹⁰ Exhibit A, they say, is Harry A. Blackmun. While the Justice himself maintained that it was the Court, not he, that moved—"I don't believe I'm any more liberal, as such, now than I was before," Justice Blackmun once told a reporter¹¹—many scholars disagree.¹² To them, it is hard to believe that the same Justice who dissented from the Court's 1972 decision to strike down existing death penalty statutes,¹³ wrote, in 1994, "From this day forward, I no longer shall tinker with the machinery of death."¹⁴

But is Justice Blackmun the rule or the rare exception? Do most Justices remain committed to a particular doctrinal course throughout their careers, as Strauss and others contend, or do the skeptics have the better case? In our Article, forthcoming in the *Northwestern University Law Review*,¹⁵ we deploy state-of-the-art methods to address these questions. The results, as it turns out, are striking: Contrary to the received wisdom, *virtually every Justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times.*¹⁶

⁸ See, e.g., *The Court Nominations*, N.Y. TIMES, Oct. 22, 1971, at 38 ("Mr. Rehnquist [is] a Goldwater conservative [with] a brilliant professional background but a questionable record on civil liberties.").

⁹ Louis M. Kohlmeier, *Thurgood Marshall Chosen for High Court; First Negro will Bolster Liberal Segment*, WALL ST. J., June 14, 1967, at 3.

¹⁰ See Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1220 (2005) (link) (a "small but emerging body of empirical literature suggests that preference change is a phenomenon which affects many Justices during the course of their careers").

¹¹ Quoted in John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES MAG., Feb. 20, 1983, at 26.

¹² See, e.g., Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 717 (1983) ("Harry A. Blackmun has undergone a remarkable transformation"); LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 235 (2005) (presenting data documenting Blackmun's movement.); RUGER, *supra* note 10, at 1212 ("[d]iverse evidence suggests that . . . Blackmun . . . significantly changed").

¹³ *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting) (link).

¹⁴ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (link).

¹⁵ Epstein et al., *supra* note 5.

¹⁶ Epstein et al., *supra* note 5 (manuscript at 1, on file with Colloquy).

Finding that ideological drift is pervasive, we develop the implications of our results for the Justices' appointment to the Court and the doctrine they develop once confirmed. As to the first, we show that Presidents hoping to create a lasting legacy in the form of Justices who share their ideology can be reasonably certain that their appointees will behave in line with expectations—at least during the Justice's first term in office. But, even before hitting the first decade mark, most Justices fluctuate, leading to a degradation of the relationship between their preferences and their votes. The implication is clear: the President and his supporters in the Senate may be unable to guarantee the "entrenchment" of their ideology on the Court in the long or even medium term.¹⁷ As a result, Presidents may be best off placing comparatively greater emphasis on advancing the interests of their political party—rather than their own ideological interests—through the appointment of Justices designed to appease particular constituencies.

As for the development of doctrine, contrary to the prevailing wisdom, we find that ideological movement can manifest in important legal change. Consider Figure 1, which provides our estimates of the probability of Justice O'Connor siding with the University of Michigan Law School in *Grutter v. Bollinger*¹⁸ and with the defendants in *Lawrence v. Texas*.¹⁹ Note that from about 1990 through 1999, that probability for *Lawrence* hovered around, but only occasionally surpassed, 0.50. After the 1999 Term, the odds steadily increased such that a vote cast by O'Connor against *Lawrence* would have been unlikely. On the other hand, the probability of a vote in favor of *Bollinger* does not rise above 0.50 until the 2002 Term—meaning that had Justice O'Connor's initial preferences remained stable, odds are that she would not have provided the fifth vote to uphold Michigan Law School's affirmative action program. The implications of findings of this

¹⁷ See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1065 (2001) (link), who explain their theory of partisan entrenchment in the following terms:

When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate. They will serve for long periods of time because judges enjoy life tenure. On average, Supreme Court Justices serve about eighteen years. In this sense, judges and Justices resemble Senators who are appointed for 18-year terms by their parties and never have to face election. They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution. The temporal extension of partisan representation is what we mean by partisan entrenchment.

(internal citations omitted).

As other scholars have recognized, a finding of widespread preference change could present a challenge to theories of partisan or, especially, ideological entrenchment. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENT* 141 (2005) ("Whether or not packing the courts is a laudable goal, a variety of factors can conspire against presidents seeking to achieve it," including "changing attitudes."); Ruger, *supra* note 10, at 1211 ("The possibility that judicial preferences might vary significantly over time compels reconsideration of . . . entrenchment theory.").

¹⁸ 539 U.S. 306 (2003) (link).

¹⁹ 539 U.S. 558 (2003) (link).

sort are many, not the least of which is that attorneys' expectations about success (or failure) with particular Justices may rest on shakier ground than they suspect.

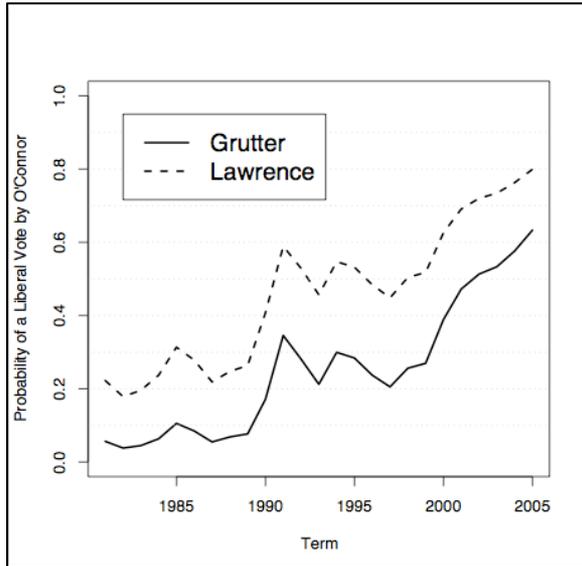


Figure 1: The estimated probability of a liberal vote by Justice O'Connor in *Grutter v. Bollinger* and *Lawrence v. Texas* over time. These predicted probabilities are based on the statistical model we describe in the full *Northwestern Law Review* article.

We conclude with a discussion of the prospects for legal change among the Justices of the Roberts Court. Here we consider two plausible scenarios, one in which the current Justices remain relatively true to their current doctrinal inclinations and another in which members move. Either way, we find that legal change (or, in some instances, surprising stability) may be possible—a finding that defies contemporary expectations about the inertia of Justices and, by implication, the Court in the absence of membership turnover.