

Justice Harry Blackmun and the Phenomenon of Judicial Preference Change

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*“Judges, even Justices of the Supreme Court, are human and I suppose attitudes change as we go along.”*²

We are fond of putting our judges into neat adjectival boxes, particularly when they sit on the Supreme Court. These typologies often reflect perceived attitudinal or ideological preferences; some Justices are called “liberal” or “conservative” or “moderate,” or occasionally some hyphenated combination thereof. Or the labels might seek to capture variations in jurisprudential philosophy or method, such as “formalist,” “pragmatist,” “originalist,” “textualist,” or “minimalist.” No Justice is immune from this classification game, and the subject of this symposium is an apt example. From the moment of his nomination by President Nixon in 1970, Harry A. Blackmun attracted a bevy of predictive characterizations, many of which now seem almost quaint in their wrong-headedness. Contemporary court-watchers described the new Justice as “consistently . . . on the conservative side of the issues,”³ a jurisprudential twin of Chief Justice Warren Burger, and, in the ultimate compound taxonomy, a “White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs.”⁴

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2. Allan Gates, *It's Been a Great Ride: A Tribute to Justice Harry A. Blackmun*, 43 AM. U. L. REV. 717, 719 (1994) (citing *Hearing Before the Comm. On the Judiciary, United States Senate on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States*, 91st Cong. 43 (1970) (statement of Judge Blackmun)).

3. Nathan Lewin, *There is No Mistaking the Swing of the Pendulum*, N.Y. TIMES, June 27, 1971, § 4, at 8.

4. Jon R. Waltz, *The Burger/Blackmun Court*, N.Y. TIMES, Dec. 6, 1970, § 6 (Magazine), at 61. Blackmun also attracted more whimsical labels over the course of his career – Garrison Keillor called him the “shy person’s Justice.” See William H. Rehnquist, *A Tribute to Harry A. Blackmun*, 43 AM. U. L. REV. 688, 690 (1994). Others referred to him as the “Cardigan Justice.” See Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Cours Mirabeau*, 43 AM. U. L. REV. 707, 712 (1994).

Justice Blackmun confounded these and many other classifications over the course of his career. Even in the first decade of his Supreme Court tenure, he gradually moved from being a reliable vote usually aligned with Justices Burger and Rehnquist to a Justice much more likely to vote with Brennan and Marshall.⁵ I will briefly recount the evolution of Justice Blackmun on the Supreme Court here, but my primary aim in this essay is to use his career as an exemplar of the broader phenomenon of judicial preference change. Although the extent of Justice Blackmun's preference shift was unusual, the fact that his preferences changed while on the Court is not, and an emerging body of empirical research suggests that many long-serving Supreme Court Justices experience significant preference change during their tenure.⁶

The idea that preference change on the Supreme Court is widespread, or at least more widespread than commonly thought, might force some reconsideration of several leading empirical and theoretical models of judicial behavior. The labels that scholars and journalists apply to Justices reflect two impulses, the most obvious being a tendency toward oversimplification and categorical analysis. But efforts to describe and classify the Justices often rely on a second unstated presumption of preference stability: the idea that once a Justice is properly pegged, his or her ideology and judicial style is not expected to evolve much. Even more sophisticated theories of judicial behavior, while avoiding the perils of categorical oversimplification, nonetheless adopt this secondary assumption of preference stability.

For instance, many leading legal scholars advance a positive theory of "partisan entrenchment,"⁷ whereby the President and Senate effectively install their own political preferences on the federal bench by agreeing on the selection of ideologically compatible judges.⁸ A variation of this theory offers a normative defense of judicial review against charges of excessive "countermajoritarian[ism],"⁹ maintaining that life-tenured Article III judges in fact behave in accordance with quintessentially majoritarian choices, just those of a majority from a prior temporal era in the recent past.¹⁰ As the word "entrenchment" makes clear, this theory of interbranch influence assumes that judicial prefer-

5. See *infra* Part I (documenting this change in voting behavior).

6. See, e.g., Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1308-10 (2005) (discussing Justice O'Connor's "turn to the left" over time).

7. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001). See generally *infra* Part II (discussing theories of partisan entrenchment as articulated by Balkin and Levinson, Howard Gillman, and others).

8. See Balkin & Levinson, *supra* note 7, at 1067-68; see also *infra* Part III. As discussed below, achieving such President-Senate "agreement" on a nominee is often a complicated matter when the Senate's preferences differ from the President's. See *infra* Part III.

9. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 144-45 (1999).

10. *Id.*

ences remain generally fixed throughout judges' long careers. Reflecting this stability assumption, one leading constitutional law scholar recently declared, in an op-ed relating to John Roberts' nomination, that the idea of judicial preference drift was nothing more than an illusory "myth."¹¹ The possibility that judicial preferences might vary significantly over time compels reconsideration of some aspects of this entrenchment theory in ways that I will discuss below.

This essay proceeds in several parts. Part I briefly discusses Harry Blackmun's judicial career as an example of a jurist whose voting preferences¹² evolved significantly over time. Part II broadens the inquiry to a more general historical analysis of judicial preference change. This section relies upon the conclusions of several recent political science studies which suggest that many Justices in the past half-century have displayed meaningful changes in their voting behavior over time.¹³ Part III analyzes the effect of these empirical findings on various models of judicial behavior and nominating strategy, particularly the theory of "partisan entrenchment." This analysis includes a simple empirical analysis which strongly suggests that – viewed at the time of a Justice's initial nomination – a nominee's ideology and his or her propensity for future drift are distinct and independent variables unrelated to each other.¹⁴ This finding, and the possibility that some judges' preferences and voting behavior might vary significantly in their careers, is meaningful both for our consideration of new judicial nominees and for our conception of how judges behave longitudinally through time.

I. THE TRANSFORMATION OF HARRY BLACKMUN

By now, the dramatic transformation of Justice Blackmun's voting behavior during his Supreme Court tenure is well-known and well-studied.¹⁵ At the time President Nixon nominated and appointed Justice Blackmun to the Court, most commentators described him as a conservative Republican similar to his life-long friend Warren Burger.¹⁶ Blackmun's generally conserva-

11. See David A. Strauss, Op-Ed, *It's Time to Deal With Reality: The Myth of the Unpredictable Supreme Court Justice Debunked*, CHI. TRIB., Aug. 7, 2005, at C9.

12. Although I use the term "preference" here and throughout this essay, I do not intend thereby to adopt a purely attitudinalist conception of judicial behavior – to argue, in other words, that "legal" considerations (like text and precedent) are irrelevant to the Justices' decisions. For my purposes here, much of what I describe as "preference change" could equally be labeled "jurisprudence change" or "legal philosophy change." Whatever the label, however, the fact that some Justices do change over time does suggest that Supreme Court justices are often not rigidly constrained by text or precedent in any strict or mechanistic sense.

13. See *infra* Part II.

14. See *infra* Part III.

15. I will address only the broad contours and highlights of this shift here.

16. See, e.g., Stephen L. Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183, 190 (1988).

tive record as an Eighth Circuit judge, coupled with his longtime personal friendship with Burger,¹⁷ led some to characterize the new Justice as the Chief's "Minnesota Twin," or more pejoratively, as a reliable "Hip Pocket Harry" in the Chief Justice's jurisprudential camp.¹⁸ After his first term on the Court, the *Harvard Law Review* editors described Blackmun as part of a "conservative monolithic bloc" responsible for a "decisive turn toward limiting or reversing" the Warren Court's liberal constitutional rulings.¹⁹

After a few years, this predicted congruity was an artifact of history.²⁰ Almost from the beginning of his tenure, and certainly after a half-decade, Blackmun's voting pattern had drifted away from Burger's and become much more closely aligned with that of the liberals Brennan and Marshall, where it would stay for the remainder of his tenure.²¹ Commentators occasionally debate the degree of Blackmun's shift independent of other Justices, and the Justice himself offered various and occasionally contrasting explanations for his apparent change in voting patterns.²² Later in his life, Blackmun often maintained that he did not change much during his career, but that the Supreme Court around him did.²³ On another occasion, however, he intimated that his views, and perhaps those of other Justices, did evolve while on the Court.²⁴ Blackmun noted, "I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed And if one didn't grow and develop down there I would be disappointed in that person as a Justice."²⁵

Diverse evidence suggests that it was Blackmun who significantly changed, not merely the surrounding Court. New appointments by Presidents Reagan and George H. W. Bush in the 1980s and early 1990s did indeed push the Court as a whole to the right.²⁶ But even in the first decade of his service, during a period of relative membership stability on the Court, Blackmun's

17. Alan B. Morrison, *The Rehnquist Choice*, 55 STAN. L. REV. 1457, 1460 (2003) (book review).

18. Wasby, *supra* note 16.

19. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 344 (1971).

20. Blackmun had been Burger's childhood friend and best man at his wedding. Morrison, *supra* note 17. Some observers go so far as to identify this perception (and the perjorative "hip pocket" label it created) as a causal factor explaining Blackmun's shift away from Burger. *See, e.g.*, Wasby, *supra* note 16, at 196.

21. Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 & n.6 (1983).

22. *See, e.g.*, Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745, 745 (1994).

23. *See id.*

24. *See* Baier, *supra* note 4, at 714, *quoting* Justice Harry A. Blackmun, Speech at LSU Law Center, Summer Program (July 6-9, 1992, Aix-en-Provence, France)

25. *Id.*

26. *See generally* PERETTI, *supra* note 9.

voting behavior manifested a clear shift.²⁷ A simple vote pairing analysis demonstrates this trend. In his first term on the Court, of the argued cases the Court heard, Justice Blackmun voted with Warren Burger ninety percent of the time.²⁸ Over the next decade, however, this figure steadily declined.²⁹ By 1981, the Blackmun-Burger congruence was less than sixty percent.³⁰ Over the same period, Blackmun's votes gradually became more aligned with Justices Brennan and Marshall.³¹ By 1981, he voted with them almost eighty percent of the time,³² and by the late 1980s he was with them in over ninety-five percent of cases.³³ This shift was particularly stark in closely divided cases. A study by Joseph Kobylka of such cases found a clear and steady decline in the Blackmun-Burger congruence over successive five-year periods, from 87.5 percent during 1970-75, to 45.5 percent in 1976-80, to 32.4 percent in 1981-85.³⁴

More sophisticated empirical treatments confirm that Blackmun's voting preferences shifted relative to the other Justices on the Court. Lee Epstein, Valerie Hoekstra, Jeff Segal and Harold Spaeth analyzed all the votes in civil liberties cases that Justice Blackmun cast during his long career, and found that over the course of his tenure he became significantly more likely to vote in a "liberal" direction.³⁵ In a broader study of all decided cases, Andrew Martin and Kevin Quinn estimated that Blackmun's attitudinal "ideal point," (an ideological score derived from the direction of his votes in all cases) drifted steadily in a liberal direction.³⁶ So dramatic was Blackmun's evolution that Epstein and her coauthors make an additional point that refutes Blackmun's modest disclaimer that it was the Court that changed rather than him.³⁷ Their analysis suggests that, at least in the civil liberties area, Black-

27. See *The Changing Social Vision of Justice Blackmun*, *supra* note 21.

28. *Id.* at 717 n.6 (chart depicting steady increase in voting congruence with Brennan and Marshall, and a corresponding decline in congruence with Burger and Rehnquist).

29. *See id.*

30. *See id.*

31. *Id.*

32. *See id.*

33. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 235 (2005) (citing data compiled by Joseph Kobylka).

34. *Id.* at 186

35. Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal & Harold J. Spaeth, *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801, 813 (1998).

36. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANAL. 134, 147 (2002); Andrew D. Martin & Kevin M. Quinn, *Patterns of Supreme Court Decision-Making, 1937-2000* (October 29, 2002) (unpublished manuscript, on file with author).

37. Epstein et al., *supra* note 35.

mun's individual shift in voting behavior caused the Court as a whole to move in a more liberal direction.³⁸

A more focused doctrinal analysis of cases in several specific issue areas at different points in Blackmun's career confirm and enrich these generalized findings about Justice Blackmun's evolving voting behavior. Justice Blackmun's pivotal vote switch in *Garcia v. San Antonio Metropolitan Transit Authority*, in which he changed his mind about the judicial enforceability of Tenth Amendment limits on Congressional action, altered the path of the Court's federalism jurisprudence and perhaps delayed the onset of the "new federalism" revival for several years.³⁹ Further, in a focused analysis of the Justices' jurisprudence in a class of cases raising medical and psychiatric issues, Alan Stone found a marked evolution in Blackmun's voting behavior over time within that issue category.⁴⁰

The shift in Justice Blackmun's voting preferences over time is also starkly evident in death penalty cases. His votes in these cases illustrate a quite different relationship with the rest of the Court's movement than in the federalism area. While in other doctrinal areas, Blackmun moved the Court leftward as a key median voter, on the death penalty, Blackmun and the Court moved in opposite directions like two passing ships. Both early and late in his career, Blackmun typically cast his death penalty votes in dissent, including in such notable cases as *Furman v. Georgia*⁴¹ and *Callins v. Collins*.⁴² Expert commentary on Justice Blackmun's first years on the Court labeled him as "a disaster" for capital punishment opponents and in Blackmun's first decade on the Court, he voted with the death penalty claimant less than fifty percent of the time, a rate significantly lower than the Court's general outcomes in death cases over that period.⁴³ In Blackmun's second decade, however, this trend reversed – he became a reliable vote in support of death penalty claimants at the same time that the Court was becoming less hospitable to their claims.⁴⁴

38. *Id.*

39. *Compare* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (Blackmun, J., concurring) *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) *with* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) *superseded by* 42 U.S.C. § 2000d-7 (1986) (Justice Blackmun concurred in the majority opinion of *Usery* and wrote the majority opinion in *Garcia*, which overturned *Usery*).

40. *See* Alan A. Stone, *Justice Blackmun: A Survey of His Decisions in Psychiatry and Law*, 13 AM. J. L. & MED. 291, 291 (1987).

41. 404 U.S. 238, 405-14 (1972) (Blackmun, J., dissenting) (Blackmun reluctantly defended the death penalty's constitutionality).

42. 510 U.S. 1141, 1146-57 (Blackmun, J., dissenting from denial of certiorari) (Blackmun categorically refused ever to uphold a death sentence).

43. *See* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 197 (1973).

44. *See* D. Grier Stephenson, Jr., *Justice Blackmun's Eighth Amendment Pilgrimage*, 8 B.Y.U. J. PUB. L. 271, 294 (1994); *see also* Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 Mo. L. Rev. 853, 864 (1998) (describing Justice Blackmun's "death penalty odyssey").

All of the above demonstrates a clear change in Justice Blackmun's voting patterns on the Court, both as a general matter and in specific issue areas. What *caused* this change is a separate analytical inquiry, and one that I will not treat fully here. Observers have advanced a bevy of explanatory theories, including Blackmun's concern "for the little people," his empiricist bent, the strategic influence of Justice Brennan, and even Blackmun's early pique over being described as a mere "twin" of Burger.⁴⁵ One or more of these factors, or all of them together, may have played a role in Blackmun's shift.⁴⁶ I do not aim to resolve this debate here but will offer one other possible explanation that is suggested by the language of Justice Blackmun's *Furman* dissent in his early years on the Court.

As described above, Justice Blackmun's *voting* preferences clearly changed while on the Court, as his tendency to support the government's position in death penalty cases gradually gave way to a staunch defense of most defendants' claims. But while his voting changed, his own personal views on the death penalty, what political scientists would call his "sincere preferences" unburdened by any legal sources or norms, apparently did not. Blackmun's *Furman* dissent was an unusually direct condemnation of the death penalty as a criminal Justice policy choice.⁴⁷ He wrote that "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . . That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated."⁴⁸ Despite these views, Blackmun voted to uphold *Furman*'s sentence because his understanding of constitutional meaning and judicial restraint compelled him in the opposite direction.⁴⁹ Finding nothing hard and fast in the Constitution to justify invalidating the death sentence, Blackmun's conception of his own role as a jurist prevented him from voting against what he found personally repulsive.⁵⁰ As he explained then, "[w]e should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these."⁵¹

Such explicit judicial mention of personal preferences that are trumped for voting purposes by some external legal constraint is not uncommon. High profile recent instances include Justice Thomas's dissent in *Lawrence v.*

45. See Jeffrey B. King, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun*, 33 HOUS. L. REV. 277, 280, 287-88 (1996). See also LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 187-88 (2005) (describing Blackmun as "acutely sensitive" to the perception that he would be a voting "twin" of Burger)

46. See Wasby, *supra* note 16, at 196.

47. See *Furman v. Georgia*, 404 U.S. 238, 405-14 (1972) (Blackmun, J., dissenting).

48. *Id.* at 405-06.

49. *Id.* at 414.

50. See *id.* at 406, 408 n.6.

51. *Id.* at 410-11.

Texas, where he called the criminalization of sodomy an “uncommonly silly” law that he would “vote to repeal” were he a state legislator but nonetheless felt powerless to invalidate as a federal judge,⁵² and Justice O’Connor’s *Gonzales v. Raich* dissent in which she found that California’s medical marijuana law was protected against federal regulation even though she “would not have voted for” the law as a state citizen or legislator.⁵³ Judicial preference-signaling of this sort is ordinarily quite difficult to assess. In one sense, it is quintessential “cheap talk,”⁵⁴ since it is not backed up with a binding vote, and Justices might have any number of strategic or reputational reasons for claiming to hold personal views that are contrary to the direction of their actual votes.⁵⁵ There may be instances where observers of the Court are rightly skeptical of a Justice’s repeated invocation of personal preferences that are overridden by the strictures of judicial role. However, hindsight appears to validate the accuracy of Blackmun’s early self-assessment as his “abhorrence” of the death penalty expressed in his *Furman* dissent appears quite congruent with the tenor of his late-career death penalty opinions.⁵⁶

In Blackmun’s case, then, it may not be quite accurate to attribute his voting shift to “preference change” in the sense that his sincere preferences, or underlying personal views, dramatically changed during his career. His *voting* preferences in actual cases most certainly did, however, and this apparently reflects a richer multifaceted calculus embodying a mix of personal views and perceptions of legal constraints. If Blackmun’s sincere personal opposition to the death penalty did not change, his assessment of the con-

52. See Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005 (describing Justice Stevens expressing policy views contrary to the direction of his votes in recent cases, and collecting examples of other Justices’ similar statements).

53. See *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting); *Raich v. Gonzales*, 125 S. Ct. 2195, 2229 (2005) (O’Connor, J., dissenting).

54. See, e.g., Jason Scott Johnson, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 412 (1999) (“Formally, cheap talk is defined as a message that does not directly affect the payoff of either the message’s sender or receiver.”); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1445-46 (2003) (contrasting “cheap talk” with “costly signaling” in legislative deliberations).

55. Justices may wish to appeal to public opinion, or to particular public constituencies, by blunting the force of a vote that is expected to be unpopular among those groups. Additionally, there is an element of judicial character-burnishing in a Justice’s explicit invocation of a personal preference running contrary to his or her vote, and often a subtle condemnation of other Justices, who by implication (or even express accusation) are alleged to be voting in accord with their simple attitudinal preferences.

56. See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

straint that external legal norms placed on his ability to express that view in his votes on cases most assuredly did.

This is not the place to take up the question of the normative attractiveness of Blackmun's jurisprudential shift, nor, in my view, would it be accurate to describe Blackmun's evolution as a simple matter of moving from the application of something like "law" to something closer to "politics." It does appear that his own assessment of the constraints imposed on his voting by his role as an Article III judge changed over the course of his Supreme Court career. And irrespective of this or any other causal hypothesis, it is clear based on the various criteria discussed above that his voting pattern did change markedly.

II. PREFERENCE CHANGE ON THE TWENTIETH-CENTURY SUPREME COURT: THE GENERAL VIEW

The foregoing discussion of Justice Blackmun's voting shift raises the broader question of how often judicial preference occurs on the Supreme Court?⁵⁷ Is Harry Blackmun an exemplar or an anomaly? To advance this inquiry I draw upon a few recent empirical studies that explore this issue directly, by measuring individual voting changes among Justices in one or more doctrinal areas, or indirectly by longitudinally assessing individual Justices' attitudinal ideal points.⁵⁸ These studies suggest that Justice Blackmun was both anomalous *and* exemplary. While his voting preferences changed to a greater degree than others many, if not most, Justices on the Supreme Court exhibited some degree of preference shifting during their careers.⁵⁹

Empirical literature on judicial preference change is sparse, due to the fact that prevailing models of political science research on the Supreme Court assume that judicial preferences are generally fixed over time. As several leading empirical scholars recently stated in summarizing their field, "the 'stability assumption' is sufficiently widespread that almost all tests of preference-based theories of judicial decision making treat it as a given."⁶⁰ For modeling purposes, the studies treat the different Justices as having heterogeneous preferences, but generally consider each Justice's own voting behavior as fixed longitudinally through time.⁶¹ A stark example of this assumption is the prominent role that Segal/Cover scores⁶² play in attitudinal political sci-

57. An even broader question, not directly addressed here, would ask how common preference shifting is in the federal judiciary as a whole.

58. Epstein et al., *supra* note 35, at 801.

59. *Id.* at 810-12.

60. *Id.* at 802.

61. *Id.* at 802-03.

62. Two authors, "Segal and Cover[,] content-analyzed newspaper editors' assessments of justices' ideological values prior to their confirmation by the Senate. The

ence literature on the Court. Segal/Cover scores distill the assessments of expert commentary on the Justices' views *prior to their confirmation* by the Senate into numerical scores along a single linear scale ranging from -1 to 1.⁶³ The scores exemplify an assumption of post-confirmation stability very similar to the legal scholars' theory of "partisan entrenchment" discussed below because political scientists extend them forward temporally to model subsequent judicial behavior.⁶⁴

The near-hegemonic presumption of preference stability, however, is not without its critics in the political science academy.⁶⁵ A quartet of leading political science empiricists have recently found in the extant literature "scattered (but systematic) evidence indicat[ing] the presence of change for some of the justices."⁶⁶ In one broad issue category, these scholars sought to more rigorously test for voting preference changes among the sixteen Justices who, between 1937 and 1993, served on the Court for ten or more years.⁶⁷ Accordingly, They analyzed the individual Justices' votes in "civil liberties" cases to assess variation over time.⁶⁸ Even after controlling for variations in case stimuli from term to term, the authors found alterations in the voting patterns of nine of the sixteen Justices.⁶⁹ During the period of study, the civil liberties vote patterns of Justices Black, Blackmun, Douglas, Reed, Warren, and White changed significantly,⁷⁰ those of three others⁷¹ varied in minimally statistically significant fashion and seven others⁷² remained mainly constant over time. Based on these findings, the study concluded that "alterations in preference patterns are complex, far more so than much of the literature suggests."⁷³

Other recent studies have also found evidence of preference shifting over time. In their historical analysis of the twentieth-century Supreme Court, Andrew Martin and Kevin Quinn estimated each of the sitting Justice's evolving attitudinal "ideal points" based on the complete set of votes they

resulting scores range from -1 (unanimously conservative) to +1 (unanimously liberal)." *Id.* at 803 n.6.

63. *Id.*

64. *See id.* at 803.

65. *See generally id.* at 804.

66. *Id.* at 809.

67. *Id.*

68. In identifying cases in this category they followed Harold Spaeth's classification scheme, in which "civil liberties" cases included cases whose primary issues were "criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys." *Id.*

69. *See id.* at 812.

70. *See id.* at 811-12.

71. Justices Clark, Frankfurter and Powell. *Id.*

72. Justices Brennan, Burger, Burton, Harlan, Jackson, Marshall and Stewart. *Id.*

73. *Id.* at 813.

cast each term.⁷⁴ A Justice's "ideal point" is computed by a formula that starts with assessing the "liberal" or "conservative" direction of all judicial votes along a single linear scale; then the authors apply an innovative methodology to control for case mix variation to attempt to make their ideal point measures consistent over time (and thus facilitate interpersonal comparison of Justices from different eras). To be sure, assessment of judicial behavior along a single liberal/conservative spectrum may appear to many legal observers (including this one) as overly blunt, if not outright misleading, when assessing particular cases or specific areas of doctrine (imagine, for instance, coding the votes in the recent Dormant Commerce Clause case about interstate wine sales as either "liberal" or "conservative").⁷⁵ But the term-by-term historical measures that Martin and Quinn have computed are useful in assessing a Justice's stability over time relative to other members of the same Court. Because they capture every vote rendered by every Justice each year, the ideal point measures provide an illuminating picture of a Justice's generalized voting patterns. When compared with other Justices voting on the same body of cases, evidence that a particular Justice's ideal point is changing over time while others' remain largely constant is highly suggestive that some significant preference drift is occurring.

Martin and Quinn found that the voting behavior of several Justices changed over time to a greater extent, and in different directions, than the Court's collective ideal points. On a relative basis, Justice Blackmun's voting changed significantly under Martin and Quinn's analysis, as did that of current Justices Stevens and Souter (both of who have drifted in a liberal direction in the past decade or two) and Chief Justice Rehnquist (who became more centrist after becoming Chief Justice).⁷⁶ Earlier studies by Lawrence Baum, Sidney Ullmer and others have also found scattered evidence of preference change among several members of the Warren and Burger Courts.⁷⁷

74. Andrew Martin and Kevin Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANAL. 134 (2002); Andrew D. Martin and Kevin M. Quinn, *Patterns of Supreme Court Decision-Making, 1937-2000*, unpublished manuscript on file with author (October 29, 2002). A fuller description of the methodology, together with project data and working papers, is available at <http://adm.wustl.edu/supct.php> (site visited Aug. 26, 2005).

75. Because of the linear attitudinal model's difficulty in predicting actual case outcomes, Martin and Quinn and Pauline Kim and I did not use a linear model in our comparative forecasting study, but instead constructed individual decision trees for each Justice. See Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, and Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

76. See Martin and Quinn, *Patterns of Supreme Court Decisionmaking*, supra note 36, at 40-41 (charting the variation in individual ideal points over the past three decades).

77. See Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905, 909 (1988); Lawrence Baum, *Membership Change and*

In sum, this small but emerging body of empirical literature suggests that preference change is a phenomenon which affects many Justices during the course of their careers. One need not endorse the core attitudinal assumptions about judicial motivation advanced by many empirical political scientists⁷⁸ to accept the more basic findings of this research – that some Justices do change their voting behavior over time relative to other members of the Court. And although variations in case mix from term to term make precise calibrations across time difficult, broad trends of movement relative to other Justices on the Court are identifiable.⁷⁹

Beyond illustrating that the voting behavior of many Justices change over time, however, it is difficult to generalize from these studies about how, when, or to what extent such change occurs in particular individual cases. Some Justices, like Blackmun or Stevens, have moved in a liberal direction, while others, like White and Black, evidenced a relatively more conservative voting pattern as their careers progressed.⁸⁰ Perhaps unsurprisingly, there is no clear pattern in terms of the *degree* of preference change that a given Justice might demonstrate.⁸¹ In the extent to which his voting preferences shifted over two decades Justice Blackmun is notable and unusual; however, many other Justices exhibit more nuanced shifts which are nonetheless signifi-

Collective Voting Change in the United States Supreme Court, 54 J. POL. 3, 6, 17, 19 (1992); Sidney S. Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937-1971*, 1 FL. ST. U. L. REV. 131, 152-53 (1973); Sidney S. Ulmer, *Parabolic Support of Civil Liberty Claims: The Case of William O. Douglas*, in COURTS, LAW AND JUDICIAL PROCESSES 402, 404-05 (S. Sidney Ulmer ed., 1981).

78. In its purest form, the attitudinal model posits that Justices decide cases based on their sincere policy preference – that is, their personal ideological views – and are not meaningfully constrained from voting in accord with those views by doctrine, text, or institutional setting. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993). In addition, the analysis typically looks only at votes, not opinion content, and codes vote direction on a linear scale from “liberal” to “conservative,” all methodological choices that ignore significant legal nuance. See, e.g., Epstein et al., *supra* note 35, at 803 & n. 6.

79. To be sure, the changing mix of cases and issues before the Court from year to year can confound precise calibration of the extent of such individualized change. But some of the studies attempt to control for this Term to Term variation, and in any event it serves my purposes here to make a fuzzier point – that some change does occur in the voting patterns of some Justices, even relative to other Justices voting on the same cases over the same period of time.

80. Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 36. By Martin and Quinn’s account even Justice Scalia has moved in a “conservative” direction over the past fifteen years, a movement imperceptible to many observers of the Court due to his consistent position at that ideological extreme of the Court. *Id.* at 147-48.

81. See Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 36, at 147 n.13, 148.

cant.⁸² For instance, Justice Souter's preference movement is not extreme in the quantitative terms used by Martin and Quinn as his voting "ideal point" has moved slightly, from center-right to center-left of the current Court.⁸³ Because Souter's movement traversed the median of the Court, however, it is more important to Court outcomes than that of an outlier Justice becoming more or less conservative to an equally slight extent.

Also variable is the point in time within a long career when different Justices have begun to drift, or have significantly accelerated preexisting patterns of movement. Some legal and political science scholarship has posited the existence of a "freshman effect," whereby the voting patterns of many Justices in their first few years diverge dramatically from their later behavior, which itself is relatively stable.⁸⁴ John H. Clarke described this trend humorously, though perhaps with some truth, when he explained that "when a new member comes to the Supreme Court . . . he is filled with wonder and invariably asks himself, 'How did I ever attain so great a place?' . . . [but] by the end of the first year [the new justice] is wonderingly asking himself 'How did these other men ever come here?'"⁸⁵

Careful observation of the Court in recent decades and the more rigorous longitudinal studies discussed above, however, contradict any neat temporal framework where judicial preference change occurs only at the start of a judicial career. Some Justices, like Harry Blackmun, change their voting patterns early in their careers but continue to drift almost constantly throughout a decade or more. Other Justices are fairly stable for a long time but then evidence more significant drift beginning in mid-career.⁸⁶ One example is Justice Stevens, a longtime centrist judge whose voting behavior drifted in a more liberal direction most dramatically in the terms between 1989 and 1994, after he had already sat for fifteen years on the Court.⁸⁷ Similarly, from 1985 to 1989, after over a decade on the Court, Chief Justice Rehnquist's ideal

82. *See id.* at 148.

83. *Id.* at 147-48.

84. *See, e.g.,* Sandra Wood, Linda Camp Keith, Drew Noble Lanier & Ayo Ogundele, "Acclimation Effects" for Supreme Court Justices: A Cross-Validation 1888-1940, 42 AM. J. POL. SCI. 690, 691 (1998); Epstein et al., *supra* note 35, at 812.

85. Wood et al., *supra* note 84, at 691 (quoting John H. Clarke, *Reminiscences of the Courts of Law*, in STATE BAR OF CALIFORNIA 21 (1932)). Justice Blackmun admitted to a similar initial feeling (though he ever came around to the latter half of Clark's impression he was too polite to express it), recalling "'I'll never forget the 9th day of June, 1970, when I was sworn in. Immediately after the swearing in we went into 'the Conference,'" so called. I walked into that room and there was Hugo Black, William O. Douglas, William J. Brennan, Jr., John Marshall Harlan – and I said to myself 'What am I doing here.'" Baier, *supra* note 4, at 712.

86. *See* Epstein et al., *supra* note 35, at 811-12.

87. *See* Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 36, at 147-48.

point also moved in a “liberal” direction, although he moved from the Court’s far right to something closer to center-right.⁸⁸

Changes in the broader institutional features of the Supreme Court can explain the mid-career evolution of both Stevens and Rehnquist, thus underscoring the general point that shifts in the larger institutional setting both within and outside the Court can catalyze preference shifts by individual Justices. In 1986, Justice Rehnquist became Chief Justice, beginning his slight shift toward the Court’s center, and it is easy to advance explanations for why assuming the office of Chief Justice would provoke a moderating change in his jurisprudence.⁸⁹ While the factors behind Justice Stevens’ mid-career shift are less obvious, the retirements of Justices Brennan and Marshall in 1990 and 1991, respectively suggest one plausible explanation. Before their retirement, Stevens’ votes had been gradually drifting closer to those two Justices’ positions but he accelerated his movement in that direction following their retirement, and suddenly became the preference-outlier on the Court’s “liberal” wing.⁹⁰ It is plausible that – on a Court becoming more conservative in the aggregate – Justice Stevens felt a new impulse, in a handful of close cases, to give voice to some of the positions previously expressed by Justices Marshall and Brennan. The examples of Stevens and Rehnquist highlight the importance of shifts in broader institutional context for individual preference change, but also underscore that different institutional dynamics affect different Justices in different ways, thus preventing any systematic generalizations about this effect.

For all of this heterogeneity among particular Justices’ careers, occasionally preference shifts by individual Justices affect the direction of the Court as a whole. On a closely divided Court, shifts in the voting preferences of one or two Justices can significantly alter Court outcomes. Justice Blackmun’s career exemplifies this point, not only in obvious issue areas like federalism, but also in a broad area like civil liberties.⁹¹ In their longitudinal study of civil liberties, Epstein and her coauthors found that, through the decade of the 1970s, Blackmun’s shift drove the Court’s institutional ideal point in a more liberal direction.⁹²

In sum, three salient points emerge from these studies and my own historical assessment of the Court over the past half century. First, voting behavior patterns reveal some preference change among many, if not most, Justices

88. *See id.*

89. One obvious strategic consideration is the Chief’s prerogative to assign opinion authorship whenever in the majority. *See, e.g.,* Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief?: Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 421 (1996). A Chief Justice who is a preference outlier and frequently dissents deprives himself or herself of this power.

90. *See generally* Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 36, at 148.

91. *See* Epstein et al., *supra* note 35, at 809-11.

92. *See id.* at 813.

on the Court in the past fifty years. Second, individual preference change occasionally has effects on the Supreme Court as a collective institution. Third, individual changes in voting behavior have been highly diverse in terms of degree, ideological direction, and timing within a given judicial career. This may mean that preference drift is virtually random along all of these variables, or it may mean that extant research has not identified reliable determinants, and certainly more focused research would help to resolve this question. Even at the current fuzzy state of knowledge, however, the seeming prevalence of preference shifting makes it an interesting phenomenon for further study, and one that is in some tension with several leading theoretical models of judicial behavior. In the next section of this essay I will consider some further implications of judicial preference change in light of various leading theories of Supreme Court dynamics which posit a more stable preference mix.

III. THEORETICAL IMPLICATIONS OF RECURRING JUDICIAL PREFERENCE CHANGE

A common theme in much recent public law scholarship involves the institutional interaction among different branches of the federal government. One strand of this literature explores the ongoing cyclical interactions between the Federal Courts, Congress, and the Executive, as each institution seeks to move policy outcomes in its preferred direction.⁹³ Another strand, most germane to this essay, examines the constitutionally specified moment when the political branches have the most direct influence on the Article III judiciary.⁹⁴ This view typically emphasizes the attempted preference matching that the President and Senate seek to achieve with the jurists they select.⁹⁵ This account assumes judicial preference stability – the common presumption being that once installed on the bench, individual judges' views are largely fixed for the remainder of their careers.⁹⁶

The leading explication of strategic nomination/confirmation behavior illustrates these points. As articulated most prominently by Jack Balkin and Sanford Levinson, the theory of "partisan entrenchment" posits that presidents seek as much as possible to stock the federal bench with judges whose attitudinal preferences match their own.⁹⁷ As the authors state, "[w]hen a party wins the White House, it can stock the federal judiciary with members

93. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

94. See Balkin & Levinson, *supra* note 7, at 1067-68.

95. See *id.*

96. See *id.* at 1070-71.

97. See *id.* at 1068.

of its own party.”⁹⁸ As the name “entrench” implies, the theory assumes generally that judicial preferences are fixed and recognizable at the time of appointment and remain fixed throughout a judge’s career.⁹⁹ In this theory, judges are “temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution.”¹⁰⁰

Some scholars broaden this positive theory of entrenchment to provide a normative defense of judicial review against charges of excessive “counter-majoritarian[ism].”¹⁰¹ The theory goes that because judges accurately reflect the preferences of their appointing political coalitions, their decisional authority is not countermajoritarian at all, but rather reflects the majority preferences from some point in the recent or not-so-recent past.¹⁰² As Terri Peretti explains, under this view, ideological voting by judges “is not merely the arbitrary expression of [their] idiosyncratic views [but rather] is the expression and vindication of those political views deliberately ‘planted’ on the courts” by elected officials who appoint them.¹⁰³ This is a variation on the characterization of judicial review as “Peter sober” reviewing “Peter drunk” (where Peter in both cases represents “We the People”). Here the framework is that judges sometimes apply the views of Peter’s past to trump those of Peter’s present – but both viewpoints are ultimately derivative of “the People.” Judicial preference stability is important to this justificatory account of judicial review, for it depends on the notion that judges will remain faithful to the views of their democratically elected appointers.

The above points can be restated using the discourse of judicial independence. Most discussion of judicial independence in the legal academy expressly or implicitly explores “independence” of a particular sort – freedom from intrusion or sanction by forces outside of Article III. This paradigm might be termed “structural independence” in that it reflects the idea that Article III decisionmaking is, and ought to be, insulated from immediate ex-

98. *See id.* at 1067. For another sophisticated account of the entrenchment view, see Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism* (unpublished manuscript, on file with author).

99. *See Balkin & Levinson, supra* note 7, at 1070-71.

100. *See id.* at 1067

101. PERETTI, *supra* note 9, at 145.

102. *Id.* at 144-45.

103. *Id.* at 133. This is a variation on the characterization of judicial review as “Peter sober” reviewing “Peter drunk” (where Peter in both cases represents “We the People”). Here the framework is that judges sometimes apply the views of Peter’s past to trump those of Peter’s present – but both viewpoints are ultimately derivative of “the People.” Judicial preference stability is important to this justificatory account of judicial review, for it depends on the notion that judges will remain faithful to the views of their democratically elected appointers.

ternal pressures from other branches of government or the public.¹⁰⁴ Most commentators would agree that federal judges enjoy a significant amount of independence along this dimension. But under the entrenchment theories, judges are not independent of majority views in a broader sense, rather they are deeply rooted in the preferences of majoritarian actors, just ones of a few years ago. Judges enjoy structural independence, but, if preference stability is assumed, they are not independent in a linear or temporal sense from their own past attitudinal preferences, and thus derivatively, from the earlier political majority's preferences.

Preference change complicates this story by illustrating that judges can be independent on multiple dimensions, both temporal as well as structural. Judges, like Blackmun, who drift significantly while on the Court display a particular kind of judicial independence that is underrecognized and undertheorized in current discourse. They, like their colleagues, are structurally independent of the other branches of government and of current political whims. But they also display a temporal independence from their own prior judicial selves and prior voting behavior, and thus an independence from the political officials that nominated and confirmed them. Judges are not simply "temporally extended representatives of particular parties"¹⁰⁵ but rather are susceptible to unpredictable and idiosyncratic movement, which sometimes moves the Court with it.¹⁰⁶

For these reasons, a rigid "entrenchment" account overstates the Court's stability over time. Some judges do drift, and enough judges drift to occasionally pull the Court away from its original positions. Absent a hard and fast "entrenchment," the better metaphor may be nautical rather than geologic. Ex ante judicial preferences are embedded, and the starting point is important, but in the manner of an anchor on a sandy bottom – sometimes stable and sometimes drifting slowly away from the original position. The drift is not free flowing, however, and here the insight that entrenchment theory offers about appointing coalitions and original judicial preferences is important. Even in a regime of significant preference evolution the judges' original views are important, both as a starting point for modest change by some individual Justices and as a drag restraining the extent to which individualistic change can move the Court.¹⁰⁷ The antecedent preference mix fixes both a starting point and exerts a corrective tether on both the extent and direction of change. This suggests a particular kind of nautical metaphor to explain the Court's occasional drift – a ship anchored at a particular point, but

104. For a thoughtful study of the institutional independence of federal courts from the other branches of government, see Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 160-64 (2003).

105. Balkin & Levinson, *supra* note 7, at 1067.

106. See Epstein et al., *supra* note 35, at 813.

107. See generally Balkin & Levinson, *supra* note 7, at 1070-71.

anchored not in stable bedrock but rather a softer bottom that permits a meaningful, if slow, movement as currents change with time.¹⁰⁸

To say this much with respect to individual judges need not undermine the entrenchment idea. It is plausible that individual Justices' views might change significantly, but that collectively the federal judiciary as a whole would remain generally tethered to the views of the appointing President and Senate. Because judicial preference drift appears unsystematic in terms of direction, extent, and timing, it may be that variable individual drifting will pull the original anchor position in opposing directions, ultimately moving the original position very little. In this circumstance, an appointing coalition has "entrenched" judicial views at or near the original strategic point because the aggregate or collective effect on the federal courts is at or near that point. Put in concrete terms, if a given nominating coalition prefers judges at policy point X, and some judges later drift to the left of X and some to the right of X, the same general preference mix will be present on the federal bench, thus minimizing the effect of any individual preference drift.

My sense is that this aggregative effect is most important with respect to the hundreds of judges each President typically appoints to the lower federal courts. The sheer numerosity of the appointments, coupled with the fact that each judge is situated in a hierarchy with other judges, serves to blunt the effect of individualized preference change. For these lower courts, the President and Senate can effectively "entrench" particular views in the aggregate irrespective of subsequent drift by particular judges. And additionally, the fact that lower court judges are obliged to follow the legal rules set down by the Supreme Court in order to avoid reversal dampens their ability to exercise pure preferences to the extent they do drift.

Individual preference change is potentially much more meaningful on the Supreme Court. Unlike the lower federal courts, the Court is a small fixed set of nine judges, and on a closely divided Court the unanticipated movement of any one Justice can significantly alter the direction of the Court's collective jurisprudence. Justice Blackmun's career, particularly from the early 1970s to the early 1980s, provides a clear example of this dynamic. But even two Justices moving in roughly opposite directions can impact the Court relative to their original positions because no complete offsetting or averaging effect occurs. For instance, Martin and Quinn's ideal point data suggests that Justice Souter's voting behavior became subtly but steadily more liberal over the past decade, while Justice Scalia has moved slightly towards an even more conservative position over the same period of time.¹⁰⁹ While it might be possible to quantitatively aggregate the countervailing ideal point shifts and

108. To be fair, Balkin and Levinson acknowledge that some preference shifting may occur, although my impression is that they feel the phenomenon is rarer than I do. *See id.*

109. *See generally* Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 36, at 148.

posit a “cancellation” effect, such an effort would ignore the clear import of Scalia’s and Souter’s individual positions, both in terms of voting splits and in terms of opinion content and method.

It appears, then, that individual preference change matters on the Supreme Court, despite the aggregative potential that different Justices will drift in opposite directions, thus superficially canceling each other out. A different question is whether the phenomenon of preference change has significance independent of the notion of judicial “moderation” at the time of appointment. Sophisticated partisan entrenchment theory does not depend on a reflexively binary assumption that all Justices are either “liberal” or “conservative.” In periods of divided government, a hostile Senate may force the President to nominate centrist Justices who reflect some compromise position between him and the Senate majority. Balkin and Levinson and other scholars recognize this dynamic in their explication of entrenchment theory, classifying what appears to some to be judicial drift as a function of *ex ante* moderation in the original appointment.¹¹⁰

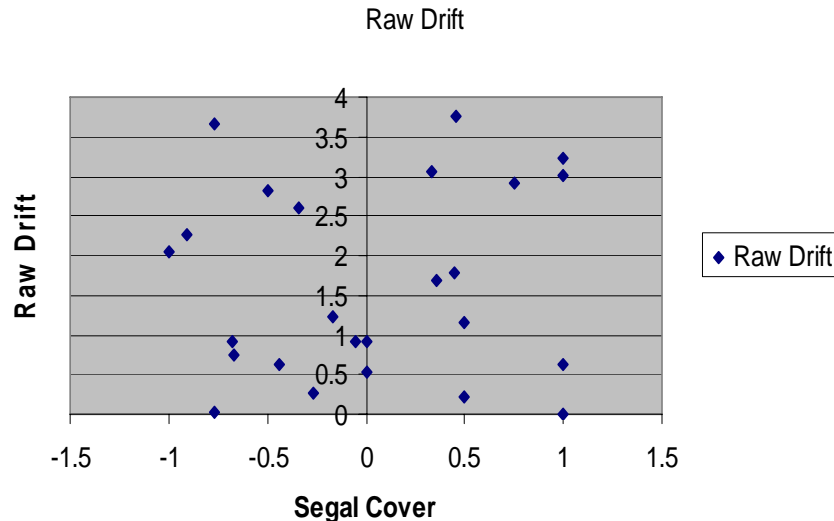
But my sense is that moderation and drift propensity – the likelihood that a judge’s views will evolve during his or her career – describe different judicial characteristics and should be conceptualized distinctly, even at the time of nomination. A fairly moderate judge, like Stevens, might start his or her career near the center of the Court and move to an outlier position, or a judge, like Souter, may remain generally moderate but traverse the Court’s median point from center-right and to the center-left. Other judges, like O’Connor and Kennedy, may be generally moderate originally and stay moderate at the center of the Court, or, like Blackmun, they may start at one side of the center and move to the other. The point is that *ex ante* moderation and drift propensity are separate factors that operate independently with respect to each nominated judge.

To test this assumption empirically, I combined the Martin-Quinn ideal point data with the Segal-Cover scores for various Justices to assess whether perceived attitudinal moderation or extremism at the time of nomination had any correlation with subsequent judicial drift. Segal-Cover scores are created by recording and coding the “expert” commentary about nominees at the time of appointment from numerous newspaper editorials, and then scaling that commentary about a judge’s perceived ideology along a liberal/conservative spectrum (ranging from 1.0 (most liberal) to –1.0 (most conservative)). Although hindsight occasionally proves the scores an imperfect predictor of subsequent behavior, they are a well-accepted metric for expert opinion about a nominee at the time of appointment, and are thus useful to assess the question I ask here: do judges perceived as “moderate” when appointed drift any more than liberal or conservative extremists, or less so? In other words, is there any correlation between perceived moderation at the time of appointment and the magnitude of subsequent judicial drift?

110. Balkin & Levinson, *supra* note 7, at 1068-69.

Figure 1 reflects a scatter plot of initial the Segal-Cover score and subsequent drift (measured by the Martin-Quinn ideal point scores) for 25 Justices in the past half century who served for at least ten years.¹¹¹ Each point represents a different individual Justice.

FIGURE 1



As the pattern – or more importantly, the lack thereof – of these data points indicates, the analysis indicates no significant correlation between perceived ex ante moderation or extremism and subsequent judicial drift. If moderate nominees drifted significantly more than extremists, one would see an arch-shaped pattern; if they evolved less a U-shaped pattern would emerge. Similarly, there is no evidence from this regression that judges perceived as liberal when appointed drifted more than conservatives, or vice versa.

Once moderation and drift propensity are recognized as separate and independent variables, it is possible to hypothesize that judges who possess either, or both, characteristics are more likely to be nominated and confirmed during periods of divided government. Under this thesis, both preference moderation and uncertainty about the evolution of future judicial behavior might facilitate bargaining between the President and Senate on particular nominees. Although occasionally (or often) overlapping with respect to particular nominees, the two variables are separate compromise-facilitating devices. There is an analog here in the legislative process that makes this point more clearly. In a divided Congress legislators have several options to reach policy compromise – either they can clearly moderate the substantive policy embodied

111. I thank Scott Johnson, a doctoral student at the Wharton School, for his assistance in the preparation of this graphic and the underlying data analysis.

in a piece of the legislation, or they can pass legislation with a degree of uncertainty about future policy direction, either by express delegation to administrative agencies or by drafting strategically ambiguous statutory text, the latter choice an implicit delegation to courts to determine future meaning. Each political actor can claim credit for a relatively acceptable bargain in the here and now, while being willing to accept the discounted risk of future policy drift in an undesirable direction. Given the costs to both to the President and the Senate in failing to reach compromise on Supreme Court appointments, it is plausible that the relevant actors are driven to ultimate agreement not just by a nominee's preference moderation but also in some cases by a degree of uncertainty about his or her future development as a jurist.

This begs the question of whether Senators or other observers can recognize tendencies toward future preference drift in individual nominees. I suspect this recognition occurs faintly, if at all – even the more rigorous empirical studies summarized above have failed to identify any clear background predictors of future drift. It may be, however, that vague perceptions of a nominee's likelihood of future change may facilitate senatorial compromise in some close cases. For example, Justice Souter attracted Democratic senators not merely because he was perceived as relatively moderate but also because his sparse record of notable opinions and extrajudicial writings made him something of an uncertain blank slate.¹¹²

The implication of recurring preference change for the allegedly “countermajoritarian” nature of judicial review presents two final points for discussion. As noted above, one extension of partisan entrenchment theory holds up entrenched and stable judicial preferences as a defense against charges of excessive “countermajoritarian” behavior in the federal judiciary.¹¹³ This theory advances the claim that judicial review is not countermajoritarian at all, but represents merely a slightly older set of majority preferences frozen in time via life tenured judges with stable preferences.¹¹⁴ This ameliorative dynamic collapses, however, to the extent that numerous Justices change their voting behavior in ways that are unsystematic and unpredictable over time. The model of judicial review transforms from past Peter reviewing present Peter to a circumstance where present Peter is subject to review by someone altogether different, and not necessarily congruent with any conception of Peter's (the people's) views, past or present.

There are, of course, numerous normative defenses of judicial review that do not depend upon this presumption of preference stability, the fact that judges may be independent of their own prior views, and thus of the majoritarian preferences that compelled their original appointment, is a clear challenge to this

112. The Senate voted 90 to 9 to confirm Justice Souter in October 1990. *See* N.Y. TIMES, Oct. 3, 1990, at A1. Democratic Senator Paul Simon later wrote that Souter appeared to be “as blank a slate as anyone ever offered by a President for a seat on the Supreme Court.” PAUL SIMON, *ADVICE AND CONSENT* 76 (1992).

113. *See supra* notes 101-102 and accompanying text.

114. *See* PERETTI, *supra* note 9, at 144-45.

particular justificatory theory. The extent of the challenge, however, depends upon the degree to which mid-career judicial preference change tends to track changes taking place in the broader political society. It may be that judges who drift significantly tend to drift together with general majority preference changes. Many scholars – most notably Robert Dahl – have advanced a version of this descriptive claim, which scholars occasionally paraphrase as the Court “following the election returns.”¹¹⁵ It may be enough, on a closely-divided Court, for one or two Justices to “follow the election returns” for the Court to generally move closer to the governing political majority.

This dynamic would suggest a Court that is more presently majoritarian than even that posited by entrenchment theories placing the Court’s views in line with the political majorities of the recent past. But it is not clear that the preference drift that has occurred on the Supreme Court in the past half-century has necessarily been of this sort. Given the idiosyncratic character of much judicial preference shifting it may be that preference drift produces a Court that is less closely tethered to any majoritarian viewpoint, past or present, than the stability assumptions of entrenchment theory.

Finally, the existence of nontrivial preference shifting is at odds with one of the assumptions underlying the various proposals for “term limiting” Supreme Court Justices that are popular in current constitutional law discourse. Some scholars, for instance, have called for a constitutional amendment limiting Justices’ terms to eighteen years, a proposal motivated in part by the perception that long-serving life tenured Justices exercise a degree of “dead hand” control that is inappropriate and was unforeseen by the Framers.¹¹⁶ It is possible to critique these proposals directly on their own terms as my colleague Stephen Burbank has done, by pointing out various undesirable consequences that might flow from such “reform.”¹¹⁷ But the idea of preference change complicates such proposals on a different dimension – if Justices change over time than long service by itself is not necessarily as problematic as some of the term limits advocates suggest.

IV. CONCLUSION

All of this suggests a number of questions that would benefit from further empirical research and analytical discussion. My aim in this essay has been to raise some of these questions rather than offer firm answers to them. I intend to expand upon the discussion here in other work, and my hope is that other scholars of the Supreme Court will also take greater account of the

115. See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (arguing that the Court rarely contradicts the views of the current political majority).

116. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered* (forthcoming 2005).

117. See Stephen B. Burbank, *Changing the Tenure of Supreme Court Justices: An Interdisciplinary Perspective* (forthcoming 2005, on file with author).

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manner in which individual preference change occurs, and the manner in which such change might affect the direction of the Court.