

# Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices “Evolve” and Others Don’t?

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## I. INTRODUCTION

Why do some Republican Supreme Court Justices “evolve” over time, becoming more liberal than they were—or at least more liberal than they were thought likely to be—when they were appointed, while others prove to be every bit as conservative as expected? For nearly four decades, one single factor has proven an especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal: experience in the executive branch of the federal government. Those who lack such experience evolve; those who have had it do not. This Essay documents the phenomenon, offers an explanation for it, and draws some tentative lessons.

Since President Nixon took office in 1969, the Senate has confirmed twelve Supreme Court nominees of Republican Presidents. Of these, six have had no substantial federal executive branch experience: Blackmun, Powell, Stevens, O’Connor, Kennedy, and Souter. The six successful Republican nominees who have had substantial executive branch experience are Burger, Rehnquist, Scalia, Thomas, Roberts, and Alito. Although it is too soon to make firm judgments about the two most recent appointees, it is notable that every one of the Justices on the first list has been less conservative than every one on the second list. And preliminary evidence indicates that the pattern will also hold for Chief Justice Roberts and Justice Alito. To be sure, the Court’s size means that we are dealing with small numbers, but the pattern is sufficiently striking as to warrant the hypothesis that Republican Justices with prior substantial executive branch experience have enduring commitments to conservative jurisprudential princi-

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ples, while those without such experience either lack such commitments when appointed or lose them over time.

Why should prior federal executive branch experience correlate strongly with steadfast conservatism? Perhaps the experience of serving in the executive branch makes people sensitive to the difficult tasks faced by elected officials and thus later reluctant, as Justices, to invalidate the efforts of such officials. If so, we might expect to find committed conservatives among Republican (and perhaps Democratic) Justices with similar formative experiences, such as careers in state government. Yet we do not.

Instead, it seems that Republican Presidents have been using federal executive branch experience as a means of pre-screening nominees for ideological dedication. The people who chose, and were chosen, to work in the federal executive under recent Republican Presidents were and are likely to remain more committed to a conservative viewpoint than those chosen from beyond the Beltway. In the rare instances in which a moderate or liberal held a position of substantial responsibility in a Republican administration, that person's views would likely have become known to her co-workers, and so a Republican President looking for a reliable conservative would not have nominated her.

But why have none of the Washington outsiders named to the Court by Republican Presidents during this period proven to be reliably conservative? I contend that, for various reasons, including the desire to avoid a confirmation battle, the Presidents who named these Justices were not, at the time, looking for reliable conservatives.

Although my thesis accounts perfectly for all twelve Justices appointed by Republican Presidents since the 1960s, I do not offer it as anything like an iron rule. No doubt, idiosyncratic factors play an important role in explaining the evolution or non-evolution of individual Justices. For example, one might think that the popular reaction to *Roe v. Wade*<sup>1</sup>—which, at the time it was decided, was not perceived within the Court to be a conservative/liberal litmus test case<sup>2</sup>—spurred in Justice Blackmun a counter-reaction, transforming him from the more or less reliable “hip-pocket Harry” he had been into a nearly across-the-board liberal,<sup>3</sup> who, by the end of his tenure, concluded that the death penalty was categori-

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> As Linda Greenhouse shows through extensive quotation of internal documents, debate within the Court on *Roe* was cordial and nonideological, with then-Justice Rehnquist sending Justice Blackmun a note congratulating the latter “for marshalling as well as . . . could be done the arguments on [his] side.” LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 95 (2005) Further, the other *Roe* dissenter, Justice White, pronounced himself “liberal” on the abortion question as a matter of policy. *Id.* at 94.

<sup>3</sup> Greenhouse writes that “Warren Burger could never have suspected that in turning to his reliable friend for one unwelcome assignment, he was launching Blackmun on a journey that would open him to new ideas and take him far from their common shore of shared assumptions.” *Id.* at 251.

cally unconstitutional.<sup>4</sup> Likewise, the politically charged and deeply personal nature of Justice Thomas’s confirmation hearings may have spurred him to react against the liberals he saw as out to get him. He reportedly commented, pithily and accurately, that he is “not evolving.”<sup>5</sup> In calling attention to the importance of experience in the federal executive branch, I do not deny the significance of numerous other factors in shaping any given Justice’s judicial philosophy over time.

Moreover, the relatively short period of study, and the exclusive focus on Republican appointees, limits the scope of the conclusions I am able to draw. Yet, while my study is accordingly modest, it nonetheless provides an important lesson for the public and for the Senate when trying to ascertain a nominee’s likely voting pattern if confirmed: Pay less attention to what nominees say in interviews and their confirmation hearings, and pay more attention to where they worked in their pre-judicial careers. Based on the evidence presented here, it appears that Republican Presidents have already absorbed this lesson.

The balance of this Essay consists of three principal parts. Part II establishes the correlation between executive branch service and reliable conservatism. Part III explains the correlation as the product of a presidential pre-screening mechanism rather than the residue of a Justice’s experiences while serving in the executive branch. After very briefly considering a few Justices outside the last four decades, Part IV draws some general inferences about the relevance of pre-judicial experience to later jurisprudential views.

## II. THE CORRELATION

This Part establishes a strong correlation between federal executive branch experience and persistently conservative voting on the Supreme Court. For each of the twelve Justices under study, I briefly describe federal executive branch experience, if any, and provide a measure of ideological orientation as recorded by political scientists using what is sometimes called the “attitudinal” model. This model describes Supreme Court decision making as the aggregation of the ideological preferences (or “attitudes”) of individual Justices, rather than as the collective application of legal norms.<sup>6</sup>

In the attitudinalist view, Justice Ginsburg votes to strike down restrictive abortion laws and to sustain race-based affirmative action, while

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<sup>4</sup> See *Callins v. Collins*, 510 U.S. 1141, 1157 (1994) (Blackmun, J., dissenting) (“The death penalty cannot be administered in accord with our Constitution.”).

<sup>5</sup> Clarence Page, *Extending An Olive Branch (With Pits) to Justice Thomas*, CHI. TRIB., June 3, 1998, at 19.

<sup>6</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002); see also LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 3 (2005).

Justice Scalia votes the other way on both issues, because of their respective attitudes towards abortion and affirmative action. Although I have elsewhere expressed modest skepticism about the reductionism inherent in the attitudinalists' approach,<sup>7</sup> its categorization of Justices along a liberal/conservative spectrum closely corresponds with the less systematic observations of nearly all well-informed observers.

*A. Nominees with Substantial Federal Executive Branch Experience*

Beginning with the Nixon Administration, six of the Justices appointed by Republican Presidents have had substantial experience working in the executive branch of the federal government. I consider them here in order of appointment, starting with Chief Justice Burger.

Warren Burger's federal executive service came relatively late in his career as a lawyer. By the time he was appointed to head what became the Justice Department's Civil Division in 1953, he had been practicing law for over two decades. However, Burger had been active in Republican politics for most of that time,<sup>8</sup> and in the Justice Department, he strongly defended conservative positions, famously filling in for the Solicitor General when the latter refused to defend the government's actions in dismissing a consultant to the U.S. Public Health Service as disloyal.<sup>9</sup>

Like Burger, William H. Rehnquist came to the federal executive branch relatively late in his pre-judicial career. After completing his clerkship for Justice Jackson, Rehnquist worked as a private lawyer in Phoenix, with a brief stint as a special state prosecutor. He came to Washington in 1969 as head of the Office of Legal Counsel, a division of the Justice Department known both for the professionalism of its attorneys and for its strong tendency to find legal support for the policies favored by the President.<sup>10</sup>

Antonin Scalia was a Washington insider for much of his pre-judicial career. Scalia began his career working in private practice and legal academia, taking a leave of absence at one point to work on telecommunications policy for the Nixon Administration. Then, in 1972, he went to serve in the executive branch full time, first in administrative law, and then, following in Rehnquist's footsteps, to run the Office of Legal Counsel. Dur-

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<sup>7</sup> See Michael C. Dorf, *Whose Ox is Being Gored?: When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497 (2007).

<sup>8</sup> See Charles M. Lamb, *Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 129, 129 (Charles M. Lamb & Stephen C. Halpern eds., 1991) ("A lifelong Republican, Burger . . . worked closely with Harold Stassen in Minnesota politics from the late 1930s until the early 1950s . . .").

<sup>9</sup> See TINSLEY E. YARBROUGH, THE BURGER COURT: JUSTICES, RULINGS, AND LEGACY 78–80 (2000).

<sup>10</sup> See *id.* at 94–96.

ing the Carter years, Scalia went back into legal academia, before being named a judge and then a Justice by President Reagan.<sup>11</sup>

With the exception of a two-year stint in private practice for the Monsanto Company, Clarence Thomas spent his entire pre-judicial career as a government attorney, first for the State of Missouri, and then in Washington. He became the Assistant Secretary for Civil Rights in the Education Department in the early Reagan White House, and then served as Chairman of the U.S. Equal Employment Opportunity Commission from 1982 to 1990 under President Reagan and the first President Bush.<sup>12</sup>

John G. Roberts, Jr., joined the Reagan Administration after he completed his clerkship for Chief Justice Rehnquist. He served as Special Assistant to the Attorney General from 1981 to 1982, moved to the White House Counsel’s Office from 1982 to 1986, spent a few years in private practice, and then returned as Principal Deputy Solicitor General, where he remained throughout the first Bush Administration.<sup>13</sup>

Finally, Samuel A. Alito, Jr., has spent his entire legal career in the judicial and executive branches of the federal government. Following his Third Circuit clerkship, he served as an Assistant U.S. Attorney in New Jersey for four years. During much of the Reagan Administration he worked in the Justice Department, first in the Solicitor General’s office and then as a Deputy Assistant Attorney General. For the three years preceding his nomination to the Third Circuit, he was the United States Attorney for New Jersey.<sup>14</sup>

#### *B. Nominees Without Federal Executive Branch Experience*

None of the remaining Republican appointees since the start of the Nixon Administration served in the federal executive branch prior to joining the Supreme Court. Justice Stevens was a member of the Attorney General’s National Committee to Study Antitrust Law from 1953 through 1955,<sup>15</sup> but this was merely an advisory body on which he served while practicing antitrust law in Chicago and teaching, first at Northwestern University School of Law and then at the University of Chicago Law School.<sup>16</sup>

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<sup>11</sup> See THOMAS R. HENSLEY, *THE REHNQUIST COURT: JUSTICES, RULINGS, AND LEGACY* 70–72 (2006).

<sup>12</sup> See *id.* at 87.

<sup>13</sup> The Justices of the Supreme Court, [http://www.supremecourtus.gov/about/biographies\\_current.pdf](http://www.supremecourtus.gov/about/biographies_current.pdf) (last visited Apr. 5, 2007).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> ARTHUR L. GALUB, *THE BURGER COURT 1968–1984*, 313 (1986); HENSLEY, *supra* note 11, at 63.

*C. Ideology of Republican Appointees of the Last Four Decades*

Which of the Republican nominees over the last four decades have been steadfastly conservative, and which have proven to be moderate or liberal, either from the beginning or over time? Recognizing that terms like “conservative,” “liberal,” and “moderate” are imprecise and relative, we can nonetheless make some reasonably reliable judgments by looking at the voting patterns of the Burger and Rehnquist Courts, as well as the early data from the Roberts Court. At almost any given moment in our period of study, aligning the Justices on an ideological spectrum will place all of the Republican appointees without prior federal executive experience to the left of all of the Republican appointees with such prior experience. I call this the “executive branch experience hypothesis,” and as the following analysis shows, it holds consistently.

The relevant Republican appointees on the Burger Court can be represented graphically as follows:

Blackmun Stevens O’Connor Powell | Burger Rehnquist<sup>17</sup>

As noted in Part I, each of the Justices to the left of the vertical line lacked federal executive branch experience when appointed. Voting patterns on the Burger Court show that each of these Justices was also more liberal than the two Justices to the right of the line, as predicted by the executive branch experience hypothesis.

Beginning with the three most conservative Justices of the Burger Court—Burger, Rehnquist, and Powell—statistical analysis of the voting patterns of the Court confirms the rough conventional wisdom that Burger, while very conservative, was not quite as conservative as Rehnquist, while Powell was more moderate than either of them.<sup>18</sup> Relative to Powell, Burger voted conservatively in a higher percentage of cases involving criminal procedure, civil rights, the First Amendment, due process, the right of privacy, unions, and judicial power, although Powell voted conservatively in a higher percentage of cases involving federalism and taxation.<sup>19</sup> Rehnquist in turn voted more consistently conservatively than Burger

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<sup>17</sup> Because they were appointed before the period under study, I have not included Justices Stewart and Brennan in this analysis, although they were both appointed by Republican President Eisenhower.

<sup>18</sup> See GALUB, *supra* note 16, at 307 (“Powell is among the centrists on the [Burger] Court . . .”); see also YARBROUGH, *supra* note 9, at 83 (“In the main Chief Justice Burger developed a conservative record during his seventeen years on the supreme bench. . . . Indeed, next to William Rehnquist, the Burger Court’s chief justice compiled its most conservative voting record.”).

<sup>19</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 248–49 tbl.6.7 (1993). Segal and Spaeth include one additional category of cases, those involving economic activity, in which Burger and Powell finish in a dead heat, with Burger voting for liberal outcomes in 42.8% of such cases, and Powell voting for liberal outcomes in 42.5%.

in every category of case except those involving unions, and more consistently conservatively than Powell in every category except taxation.<sup>20</sup>

The executive branch service hypothesis also holds for Blackmun and Stevens during the Burger Court period. Blackmun and Stevens both voted more consistently liberal than either Burger or Rehnquist in every area except taxation and federalism.<sup>21</sup> Moreover, the finding with respect to federalism undoubtedly under-emphasizes the era’s most important decision on that subject: *Garcia v. San Antonio Metro. Transit Authority*, in which Blackmun wrote and Stevens joined an opinion reversing the Court’s previous position that the Tenth Amendment limited the scope of federal power over states in areas of traditional state sovereignty.<sup>22</sup> Burger and Rehnquist dissented along with Powell and O’Connor.

Admittedly, during the Burger Court, O’Connor was more of a moderate conservative than a centrist or liberal.<sup>23</sup> Indeed, one could arguably classify O’Connor as to the right of Powell during this period, but that may simply reflect the fact that she evolved slowly over the course of her Supreme Court career.<sup>24</sup> As we shall see, under Chief Justice Rehnquist, who presided for most of her tenure on the Court, Justice O’Connor became more liberal than her colleagues with prior executive branch experience in Republican administrations.

The executive branch experience hypothesis continued to hold during the Rehnquist Court, when substantial federal executive branch experience closely correlated with the likelihood that a Republican Justice would cast consistently conservative votes. Consider the following chart of the Republican appointees to the Rehnquist Court:

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<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> 469 U.S. 528 (1985).

<sup>23</sup> *See* SEGAL & SPAETH, *supra* note 18, at 248–49 tbl.6.7.

<sup>24</sup> Consider three domains of evolution. First, whereas in her dissent in *City of Akron v. Akron Center for Reproductive Health*, Justice O’Connor declared that *Roe v. Wade* was on a “collision course with itself,” 462 U.S. 416, 458 (1983), by 1992, she co-authored an opinion reaffirming *Roe*’s “central holding,” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992). Second, while Justice O’Connor joined the majority opinion in *Bowers v. Hardwick*, finding a right to same-sex intimacy “facetious,” 478 U.S. 186, 194 (1986), almost two decades later, in *Lawrence v. Texas*, she reached the opposite conclusion as a matter of equal protection, 539 U.S. 558, 579–85 (2003) (O’Connor, J., concurring). Third, despite her decision in *Penry v. Lynaugh* that the Eighth Amendment permits execution of the mentally retarded, 492 U.S. 302 (1989), thirteen years later she joined Justice Stevens’s majority opinion reaching the opposite conclusion in *Atkins v. Virginia*, 536 U.S. 304 (2002). Officially, the nation’s standards of decency had evolved in the intervening period. *See id.* at 321. It appears, however, that Justice O’Connor had evolved with them.

Blackmun Stevens Souter O'Connor Kennedy | Rehnquist Scalia Thomas<sup>25</sup>

As explained in Part I, only the Justices to the right of the vertical line had substantial executive branch experience. The vertical line also divides liberals and moderates from consistent conservatives. From the time of Justice Thomas's appointment in 1991 through Chief Justice Rehnquist's death in 2005, Rehnquist, Scalia, and Thomas—the only Republican appointees with substantial federal executive branch experience on the Court during that period—were clearly the three most conservative Justices.

Statistics confirm what unguided observation suggests. Among the Justices considered, the troika of Rehnquist, Scalia, and Thomas voted most consistently for the conservative outcome in cases involving the Establishment Clause,<sup>26</sup> freedom of expression,<sup>27</sup> capital punishment,<sup>28</sup> takings,<sup>29</sup> and sex discrimination.<sup>30</sup> Further, in *every* major category of cases, Rehnquist, Scalia, and Thomas cast a higher percentage of conservative votes than Blackmun or Stevens.<sup>31</sup>

To be sure, the statistics do appear to show that in some areas O'Connor and/or Kennedy proved as conservative as, or even more conservative than, one or more of the three most conservative Justices. O'Connor proved slightly more conservative than Thomas on obscenity;<sup>32</sup> O'Connor and Kennedy were both more conservative than Scalia in Sixth Amendment fair trial cases;<sup>33</sup> O'Connor and Kennedy were roughly as conservative as Rehnquist, Scalia and Thomas on federalism cases;<sup>34</sup> and O'Connor and Kennedy joined Rehnquist, Scalia and Thomas to form the majority in *Bush v. Gore*.<sup>35</sup> Justice O'Connor even cast a slightly higher percentage of conservative votes on race discrimination issues than Justice Thomas.<sup>36</sup> However, in light of their respective positions in *Grutter v. Bollinger*,<sup>37</sup> by the end of her service on the Court, she was more liberal on questions of race

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<sup>25</sup> I have omitted Justice Powell from this diagram because he served only very briefly during the Rehnquist Court.

<sup>26</sup> HENSLEY, *supra* note 11, at 106 tbl.3.2.

<sup>27</sup> *Id.* at 124 tbl.3.5.

<sup>28</sup> *Id.* at 195 tbl.3.22.

<sup>29</sup> *Id.* at 209 tbl.3.24.

<sup>30</sup> *Id.* at 233 tbl.3.29.

<sup>31</sup> *See id.* at 101–294.

<sup>32</sup> *Id.* at 138.

<sup>33</sup> *Id.* at 181.

<sup>34</sup> *Id.* at 278.

<sup>35</sup> 531 U.S. 98 (2000).

<sup>36</sup> HENSLEY, *supra* note 11, at 221.

<sup>37</sup> 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”); *id.* at 350 (Thomas, J., concurring in part and dissenting in part) (“The Constitution does not . . . tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination.”).

than he. More broadly, nothing in these statistics belies the conventional wisdom that O’Connor and Kennedy were the “swing votes” of the Rehnquist Court. On the contrary, these clarifications merely show that O’Connor and Kennedy are better described as moderates than as liberals. On the hot-button issues of abortion, gay rights, and the war on terror, they were clearly less conservative than Rehnquist, Scalia, and Thomas.<sup>38</sup> Indeed, there is hardly any area of the law in which any of the other Republican Justices was as conservative as Rehnquist, Scalia and Thomas, even if, in individual cases, the jurisprudential commitments to formalism of Justices Scalia and Thomas sometimes led them to vote for liberal results.<sup>39</sup>

Analysis of the Roberts Court must be tentative because, as this Essay went to press, Chief Justice Roberts had served only one full term, and Justice Alito had not yet served a single full term. Subject to that disclaimer, the preliminary evidence suggests that, as predicted by their substantial federal executive experience, both of the new Justices will prove very conservative throughout their careers. If so, the alignment of the Republican Justices on the Roberts Court will look something like the following:

Stevens Souter Kennedy | Roberts Alito Scalia Thomas

As with the Burger and Rehnquist Courts, so too here, the Justices on the left side of the line, all of whom lacked federal executive experience before their appointment by Republican Presidents, all appear to be less conservative than all of the Justices on the right side of the line, all of whom had federal executive experience before joining the Court.

The voting patterns for the first Term of the Roberts Court bear out this inference. In non-unanimous cases for the 2005–06 Supreme Court Term, Roberts agreed most frequently on the bottom line with Alito (89%) and agreed next most frequently with Scalia (79%).<sup>40</sup> In nearly two thirds of the Court’s non-unanimous decisions, Roberts disagreed with Stevens (64%).

Justice Alito’s record thus far suggests that he too will align himself with the conservative members of the Court. After Roberts, the Justice with

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<sup>38</sup> In each of these areas, O’Connor and Kennedy voted with the Court’s more liberal Justices to form a majority, whereas Rehnquist, Scalia, and Thomas dissented. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>39</sup> Most notably, Scalia and Thomas have been in the majority in cases requiring the use of juries in sentencing, while Justices O’Connor and Kennedy have dissented. *See United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Justice Scalia also joined the majority in striking down flag-desecration laws, while Justices Stevens and O’Connor dissented. *See United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>40</sup> The percentages reported in this paragraph and the next can be found in *The Statistics*, 120 HARV. L. REV. 372, 375 tbl.I(B2) (2006).

whom Alito agreed most frequently on the bottom line in non-unanimous cases was Kennedy (75%), followed by Thomas (71%), and Scalia (68%). Although one could argue from these numbers that Alito will emerge as a moderate like Kennedy, Alito's closer alignment with Roberts suggests that a full Term of cases may well produce a voting pattern that more closely tracks that of the full-throated conservative Justices. Moreover, Alito disagreed with Stevens in a full three-quarters of the Court's non-unanimous decisions. Only Thomas disagreed with Stevens more consistently, and then only ever so slightly (76%).

Perhaps most telling has been the performance of the new Justices in high profile cases. In what was arguably the October 2005 Term's most ideologically charged case, *Hamdan v. Rumsfeld*, Alito joined Scalia, and Thomas in dissent.<sup>41</sup> Chief Justice Roberts would likely have also dissented had he participated in the decision, but he was recused because he had ruled against Hamdan's claims as a circuit judge.<sup>42</sup> Likewise, in the most prominent October 2006 Term case decided as of the time this Essay went to press, the Justices divided exactly along the lines predicted by the executive branch experience hypothesis. In *Massachusetts v. EPA*, the Court ruled 5-4 that Massachusetts had standing to challenge the Environmental Protection Agency's failure to regulate greenhouse gas emissions from new motor vehicles, and that the agency had not provided a legally sufficient justification for that failure. Chief Justice Roberts and Justice Alito joined Justices Scalia and Thomas in dissenting from both the standing and merits determinations.<sup>43</sup>

Although it is too soon to say that neither Alito nor Roberts will ever defy the pattern of prior Republican appointees with substantial federal executive branch experience, preliminary evidence suggests that they will further confirm the executive experience hypothesis.

### III. DO REPUBLICAN PRESIDENTS USE EXECUTIVE BRANCH EXPERIENCE TO PRE-SCREEN SUPREME COURT NOMINEES FOR IDEOLOGICAL PURITY?

What accounts for the strong correlation between Republican Supreme Court appointees' prior executive branch service and steadfast conservatism? This Part considers two hypotheses: first, that the experience of working in the executive branch itself influences Justices' ideologies and second, that the people who choose and are chosen for important legal positions in the executive branch of Republican administrations tend to have the qualities that will lead them to remain steadfastly conservative throughout their Supreme Court careers. I find the second hypothesis more plausible. I then ask why none of the Republican appointees without federal executive branch

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<sup>41</sup> 126 S. Ct. 2749, 2810, 2823 (2006).

<sup>42</sup> See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

<sup>43</sup> 127 S. Ct. 1438 (2007).

service has proven reliably conservative. I explain that, for a variety of reasons, the Presidents who chose the six Justices in this second group were not seeking reliable conservatives.

*A. Why Federal Executive Branch Experience Correlates with Steadfast Conservatism*

One can readily imagine how prior experiences in the executive branch of the federal government might lead a Justice to vote conservatively on a consistent basis once on the Court. Whether working for Republican or Democratic Administrations, federal government lawyers must defend (in court and in legal memoranda for their superiors) government policies against varied claims of individual rights and other legal constraints. Despite the popular characterization of lawyers as hired guns, most experienced attorneys know that nearly the opposite is true: sustained work for a particular client or position tends to lead the attorney to believe in the justice of her cause, or at least its correctness as a legal matter.<sup>44</sup>

Psychological studies have documented the human mind's efforts to avoid cognitive dissonance in other contexts.<sup>45</sup> The phenomenon seems likely to be especially pronounced for professionals working for substantially less money than they could earn in private practice, and for an office called the Department of *Justice*. These attorneys will likely perceive themselves as engaged in an altruistic endeavor. A lawyer faced with a conflict between her values and the position she must defend on behalf of the government could well think that her values need adjusting, especially if the lawyer has little or no practical ability to change the government policy.

But the foregoing may be little more than a just-so story. There are persuasive reasons to doubt that the actual experience of working in the executive branch of the federal government (even for a conservative administration) accounts for the steadfast conservatism of Republican-appointed Justices.

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<sup>44</sup> Lon Fuller provides a hypothetical example drawn from his own experiences and observations, in which a young lawyer gradually loses his qualms about representing clients whose causes he finds unjust, as he comes to identify with the causes of the clients on whose behalf he labors. See Lon L. Fuller, *Philosophy for the Practicing Lawyer*, in PRINCIPLES OF SOCIAL ORDER, 282, 287–88 (Kenneth I. Winston ed., 1981). Citing psychological evidence, David Luban deems Fuller's composite story a “shrewdly perceptive fable.” David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 283 (2003).

<sup>45</sup> See Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 *J. ABNORMAL & SOC. PSYCH.* 203, 209 (1959) (“If a person is induced to do or say something which is contrary to his private opinion, there will be a tendency for him to change his opinion so as to bring it into correspondence with what he has done or said.”); Eddie Harmon-Jones et al., *Evidence that the Production of Aversive Consequences is Not Necessary to Create Cognitive Dissonance*, 70 *J. PERSONALITY & SOC. PSYCH.* 5, 16 (1996) (“[C]ognitive dissonance theory . . . predicts that attitude change and other cognitive adjustments may occur when sufficient dissonance is aroused . . .”).

To begin, if government lawyering breeds conservatism, then one would expect government lawyering to have this effect whether undertaken at the federal or at the state level. Lawyers in the executive branch of state governments, no less than their federal counterparts, must defend government polices. Likewise, state lawyers, too, receive substantially less money than their private-sector counterparts. Yet two of the most notorious examples of Republicans turning to the left are Earl Warren (admittedly outside our period of study) and David Souter, who were, respectively, Attorney General and then Governor of California, and Attorney General of New Hampshire. Or, to take an example of federal executive service by a Democratic appointee, as Solicitor General of the United States, Thurgood Marshall argued to the Supreme Court in the companion case to *Miranda v. Arizona*<sup>46</sup> that the question of whether a confession is coerced under the Fifth Amendment should be resolved by a multi-factor balancing test, a position the Court rejected as insufficiently protective of suspects' rights.<sup>47</sup> Yet, as a Justice, far from hardening into a *Miranda* critic, Justice Marshall strongly supported its application and extension.<sup>48</sup> Evidently, service in Republican state executive administrations and Democratic federal administrations did not, in these instances, create anything resembling a lifelong sympathy for conservative positions.

Furthermore, if the experience of defending the government accounted for later conservatism, we would expect federal government service to make government lawyers protective of federal power against claims of state sovereignty. After all, even conservative Republican administrations defend the constitutionality of federal statutes challenged on federalism grounds, whether in court or in dealings with state officials.<sup>49</sup> Yet the Justices with prior executive branch experience have been at the forefront of the effort to limit federal power in favor of the states over the last decade and a half.<sup>50</sup>

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<sup>46</sup> 384 U.S. 436 (1966).

<sup>47</sup> Brief for the United States at 17–22, *Westover v. United States*, *decided sub nom. Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>48</sup> For example, Justice Marshall dissented in *New York v. Quarles*, which permitted the use of statements obtained in violation of *Miranda* to be used to cross-examine a testifying defendant. *See* 467 U.S. 649, 674 (1984) (Marshall, J., dissenting).

<sup>49</sup> For example, the George W. Bush administration (successfully) urged the Supreme Court to uphold Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131–12165. (2000), *Tennessee v. Lane*, 541 U.S. 509 (2004). The government's brief was signed by Solicitor General Theodore Olson and Deputy Solicitor General (now Solicitor General) Paul Clement. Because of his relative youth, Clement is a potential nominee to the Court in a Republican administration; the fact that he defended a broad notion of congressional power under Section Five of the Fourteenth Amendment as a government lawyer is unlikely to tarnish his conservative credentials, even with respect to issues of federalism.

<sup>50</sup> In this effort, they have usually been joined by Justices O'Connor and Kennedy. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598 (2000) (majority consisting of Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.); *Printz v. United States*, 521 U.S. 898 (1997) (same, with majority opinion by Scalia, J.); *United States v. Lopez*, 514 U.S. 549 (1995) (majority consisting of Rehnquist, C.J., joined by O'Connor, Scalia, Ken-

Thus, we must consider the alternate hypothesis of a selection effect: during Republican administrations over the last four decades, to be eligible for appointment to an elite position in the Justice Department or other agency responsible for legal policy, a lawyer needed not only to be highly qualified, but also strongly committed to conservative legal ideology. The selection effect works both ways: committed conservative lawyers must find the prospect of working in elite executive branch positions appealing, notwithstanding the substantial pay cut relative to private sector employment; in turn, the most senior members of an administration seek out committed conservatives among the otherwise qualified applicants.

While principles of separation of powers render it at least bad form for a President (or a Senator) to require that a judicial nominee hold a particular ideological view, no such stricture applies to applicants for positions within the executive branch. Indeed, precisely because executive branch officials execute the President’s policy choices, some degree of commitment to those choices seems desirable, if not strictly necessary.<sup>51</sup> Accordingly, a President selecting a Supreme Court nominee from a pool of persons who previously worked in a simpatico administration need not inquire about the nominee’s ideological bona fides, because the nominee comes, in effect, pre-screened.

To be sure, the pre-screening strategy is not foolproof. An occasional moderate or even liberal lawyer may seek and land a position in the high ranks of a Republican administration, but unless such a person is a deep-cover mole, her dissenting views will likely become known to her true-believing colleagues, thus disqualifying her from nomination by a later Republican administration.<sup>52</sup> Still, a previously committed conservative with

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nedy, and Thomas, JJ.).

<sup>51</sup> See *Myers v. United States*, 272 U.S. 52, 136 (1926) (“[C]abinet officers must do [the President’s] will. He must place in each member of his official family, and his chief executive subordinates, implicit faith.”)

<sup>52</sup> I have no inside information about deliberations within the Bush White House about whom to nominate to succeed Justice O’Connor, but the initial choice of Harriet Miers hints at the phenomenon I have described in the text. A loyalist to President Bush and a reasonably successful private practice lawyer, Miers nonetheless did not have the stellar professional credentials of Roberts or Alito. Yet under some pressure to name a woman to the Court, Bush initially chose the lackluster Miers, and then chose Alito in her stead, despite the availability of a superbly qualified woman with substantial federal executive branch experience. Maureen Mahoney had been a law clerk to Chief Justice Rehnquist and was a Deputy Solicitor General in the administration of President George H. W. Bush. See Maureen Mahoney—Attorney Search Results, [http://www.lw.com/attorney/attorneysearch\\_rofile.asp?selDepartment=&selPractice=&attno=00571&tmpName=Mahoney%2C+Maureen%20Maureen&q=letter\\*\\*M](http://www.lw.com/attorney/attorneysearch_rofile.asp?selDepartment=&selPractice=&attno=00571&tmpName=Mahoney%2C+Maureen%20Maureen&q=letter**M) (last visited Apr. 9, 2007). Mahoney’s conservative bona fides were in doubt, however, because she successfully defended the constitutionality of affirmative action at the University of Michigan Law School in *Grutter v. Bollinger*, 539 U.S. 306 (2003). See Neil A. Lewis, *Court in Transition: Court Candidates; Bush is Not Expected to Feel Need to Pick a Woman Again*, N.Y. TIMES, Oct. 28, 2005, at A18 (observing that while Mahoney’s professional profile resembles that of John Roberts, her role in the Michigan case might make her “unacceptable to social conservatives . . .”). We can only speculate about such matters, but it is possible that these public doubts were confirmed for Bush by private

executive branch experience might drift to the center or left later in his or her career, and thus could be “mistakenly” nominated to the Court by a Republican President seeking a reliable conservative. But at least among those past executive officials deemed by Republican Presidents to be sufficiently conservative for a Supreme Court nomination on the face of the matter, our sample contains no such cases.

*B. Why Outside-the-Beltway Republicans End Up as Moderates or Liberals*

Perhaps the deeper puzzle is why the Republican nominees without executive branch experience uniformly stray from steadfast conservatism. Certainly, it is possible for a top-notch lawyer to be a committed conservative without ever working in the executive branch. The ranks of private practice, state government, academia, conservative NGOs, and Republican congressional staff undoubtedly include such people. Why, then, have Republican Presidents over the last four decades been unable to find any?

The answer appears to be that when Republican Presidents chose nominees from outside the Beltway, they were not looking for staunch conservatives.<sup>53</sup> First consider Justices Blackmun and Kennedy. At the time of their respective appointments, each had substantial experience as a circuit judge, and neither could be categorized as rigidly ideological. But each was a third choice at a time when Democrats controlled the Senate. President Nixon chose Blackmun after the Senate rejected two nominees who were seen as sympathetic to segregation, and President Reagan chose Kennedy after the Senate had rejected a strongly ideological nominee with substantial executive experience, Robert Bork. Thus, lacking political capital, Presidents Nixon and Reagan were not looking for strongly identifiable conservatives when they respectively nominated Blackmun and Kennedy.

Likewise, President Nixon’s attitude toward Justice Powell’s appointment may have been colored by the contentious battles that preceded

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questioning of Mahoney’s conservative commitments from those who had previously served with her.

<sup>53</sup> Lawrence Baum’s analysis of roughly the same data supports this hypothesis. Looking at Republican appointees from Earl Warren through Clarence Thomas, he notes that “Republican newcomers” to Washington “were more moderate than the D.C. Republicans from the start.” LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 150 (2006). Baum also suggests “that residency had a greater impact on voting change than initial ideological positions.” *Id.* Because, as Baum acknowledges, moderation and Washington newcomer status are themselves highly correlated, that fact also supports, rather than undercuts, my hypothesis. *See id.* Although Baum does not consider executive branch experience as an independent variable, for all of the Justices in my sample, except perhaps Alito, it correlates with insider status. Thus, the bottom line we can derive from Baum’s study strongly confirms my analysis: Republican Justices who came to the Court without prior federal executive branch experience began as moderates and tended to become more liberal over the course of their judicial careers, while those who came to the Court with such prior experience began as conservatives and tended to become more conservative over the course of their judicial careers. *See id.* at 147 tbl.5.2, 148 tbl.5.3.

Blackmun’s confirmation. Nixon’s motives and the impact of that saga on his political capital are not entirely known, but in selecting Powell, he undoubtedly signaled to the Senate that he wished to avoid a fight. As a highly regarded former President of the American Bar Association, Powell had the backing of the legal profession across the ideological spectrum, and while Nixon may have been encouraged by Powell’s statements expressing sympathy for government against civil liberties claims, he also must have been aware that Powell was, by the standards of his era and region, a moderate on questions of race relations.<sup>54</sup> Perhaps Nixon hoped Powell would be a more reliably conservative Justice, but he cannot reasonably have expected that result.

Similarly, President Ford “was pursuing a politics of harmony” when, in the wake of Watergate, he nominated Justice Stevens, who had a solid reputation as a moderate circuit judge.<sup>55</sup> Further, in pursuing a consensus nominee, President Ford may have been trying to distance himself from his somewhat intemperate remarks as minority leader of the House of Representatives, when he had called for the impeachment of Justice Douglas. Although Ford had, even at the time, expressly disavowed any power to remove a Justice because of disagreement with the Justice’s legal views, he had also stated that his study of past impeachments led him to conclude that “an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history.”<sup>56</sup> By nominating the highly regarded Stevens, Ford eliminated any doubt about his commitment to an independent judiciary.

Justice O’Connor is yet another special case. President Reagan wanted to make history by naming the first woman to the Supreme Court. However, in 1981, because of past (and ongoing) sex discrimination, the pool of elite female lawyers was relatively small. Consequently, in seeking a highly qualified conservative woman, President Reagan may have chosen to settle for someone whose views were not uniformly conservative. Reagan expected O’Connor to sympathize with claims of states’ rights, but anti-abortion activists opposed her confirmation because of her moderation on that issue while a member of the Arizona legislature.<sup>57</sup> Both Reagan’s hopes and pro-lifers’ fears ultimately proved justified.

The remaining Justice without federal executive branch experience is David Souter. Although John Sununu, the Chief of Staff to the first President Bush, characterized Souter as a “home run” for conservatives,<sup>58</sup> Sununu

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<sup>54</sup> See YARBROUGH, *supra* note 9, at 92.

<sup>55</sup> *Id.* at 100.

<sup>56</sup> Gerald R. Ford, Speech on the Floor of the U.S. House of Representatives (Apr. 15, 1970), in 116 Cong. Rec. 11, 912–13, available at <http://www.ford.utexas.edu/library/speeches/700415a.htm> (speech made while Republican Leader).

<sup>57</sup> See YARBROUGH, *supra* note 9, at 107.

<sup>58</sup> Philip Shenon, *Conservative Says Sununu Assured Him on Souter*, N.Y. TIMES, Aug. 24, 1990, at A15.

lacked any clear basis for that assertion. Sununu, a former New Hampshire Governor, had learned about Souter through New Hampshire Senator Warren Rudman. Rudman himself was hardly a down-the-line conservative, however, and there is no evidence that he represented to Sununu that Souter was.<sup>59</sup> During Souter's confirmation hearings, Souter told the Senate that he had made no promises to Sununu about any future votes.<sup>60</sup> It is possible, therefore, that Bush was hoping for a reliable conservative in Souter but was undone by Sununu's bungling of the job.

It seems more likely, however, that Bush was not seeking a dedicated conservative in Souter because he lacked the political strength to win a direct confrontation with a Democratically controlled Senate. The Democrats continued to control the Senate a year later, when Bush nominated the reliably conservative Clarence Thomas, but, by then, circumstances had changed: Bush had political capital to spend because his approval ratings had improved dramatically in the wake of the successful first Persian Gulf War. In addition, the fact that Thomas was African American helped Bush garner enough votes for confirmation from southern Democrats whose constituents wished to see Thomas confirmed. Bush could not count on racial politics to neutralize ideology in Souter's case.<sup>61</sup> Thus, Bush may well have chosen Souter precisely because Souter was not staunchly conservative, and thus would be more easily confirmed.<sup>62</sup>

We thus have a rough-and-ready explanation for the striking pattern observed in Part I: Republican Presidents seeking reliable conservatives tap former federal executive branch lawyers, while Republican Presidents who give higher priority to some other concern—such as easy confirmation—look elsewhere. I have not suggested that Republican nominees without federal executive branch experience could never prove to be staunchly conservative. Indeed, they could be. However, individual analysis of each of the six outside-the-Beltway nominees under consideration indicates that the respective nominating Presidents were looking for and found moderates.

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<sup>59</sup> Cf. Linda Greenhouse, *Souter Anchoring the Court's New Center*, N.Y. TIMES, July 3, 1992, at A1 ("Nothing in David Souter's previous career as Attorney General of New Hampshire and as a member of the state's Supreme Court suggested that he was an ideological crusader:").

<sup>60</sup> See HENSLEY, *supra* note 11, at 83.

<sup>61</sup> For a prescient analysis of the racial politics of the Thomas nomination that appeared in print the day that President Bush nominated Thomas, see Richard Benedetto, "Quota" Talk Clouds Bush's Search, USA TODAY, July 1, 1991, at A2. Benedetto noted that Bush's seventy-five percent approval rating gave him the flexibility to resist calls for a minority successor to Thurgood Marshall, but also mentioned Thomas as a possible nominee should Bush decide to heed them. A year earlier, when Bush nominated Souter, his approval rating was measured at only fifty percent. See Bob Twigg, *Poll: Bush Approval "Melting"*, USA TODAY, July 20, 1990, at A1.

<sup>62</sup> See HENSLEY, *supra* note 11, at 80 ("Attempting to avoid conflict, President Bush nominated . . . Souter:").

#### IV. CAN WE GENERALIZE BEYOND REPUBLICAN APPOINTEES SINCE NIXON?

This Essay has examined Republican Supreme Court appointees beginning with the Nixon Administration. To what extent, if any, does the executive branch experience hypothesis apply more broadly? A complete answer to that question is beyond the scope of this Essay, but anecdotal evidence suggests a number of generalizations and limits.

If a selection effect explains the correlation between executive branch service and steadfast conservatism among recent Republican Supreme Court Justices, other selection effects might also be observed and exploited. Do former prosecutors tend to be less sympathetic to rights claims pressed by criminal defendants? Do judges who have spent substantial portions of their pre-judicial careers representing corporations tend to be more sympathetic to business interests than their colleagues without such experience? Such correlations have been found among appointees to lower courts,<sup>63</sup> for which large samples are available.

Sticking more narrowly to our present topic, there is no reason to expect a correlation between executive branch service and ideology where Justices served in administrations whose lawyers were not committed to a particular ideological vision. Nor is it clear that a Justice will share the ideology of the party that nominated him or her on issues that were not politically salient when the Justice served in the executive branch.

With respect to the latter point, consider the examples of Felix Frankfurter and William O. Douglas. Both were committed New Dealers who were closely connected to the highly ideological Democratic administration of President Franklin D. Roosevelt.<sup>64</sup> Yet once on the Court, Douglas was largely liberal and Frankfurter largely conservative.<sup>65</sup> This is not par-

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<sup>63</sup> One researcher found that former prosecutors were significantly more likely to vote against the defense in criminal cases. See Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333, 336 (1962). The same researcher later noted “a positive correlation between a judge’s not having been a former businessman (for example, a director, executive or proprietor) and his support for the economic underdog.” Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U. L. REV. 258, 269 (1974).

<sup>64</sup> Douglas was a member and later chair of the Securities and Exchange Commission and he had “intimate connections with the Roosevelt White House.” YARBROUGH, *supra* note 9, at 43. Though Frankfurter turned down the President’s offer to be Solicitor General, Roosevelt “relied heavily on him for his advice and scholarship.” Albert Sacks, *Felix Frankfurter*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2401, 2405 (Leon Friedman & Fred Israel eds., 1969).

<sup>65</sup> See MICHAEL R. BELKNAP, *THE VINSON COURT: JUSTICES, RULINGS, AND LEGACY* 64 (2004) (“As a freewheeling activist, Douglas embodied everything Frankfurter detested, and they voted together in only 35 percent of nonunanimous cases during the 1946-1948 terms and 40 percent during the 1949-1952 terms.”); SEGAL & SPAETH, *supra* note 18, at 246-47 tbl.6.6 (ranking the liberal policy outputs of the seventeen Justices who served during the Warren Court and finding Douglas ranked most or second-most liberal in five of these, with Frankfurter among the most conservative in all but two areas).

ticularly surprising, however, when one considers that the New Deal was almost entirely silent on the key questions that split the Court during their tenure in the 1950s and 1960s: civil rights and civil liberties. On the core issue for New Dealers—deference of courts to state and national elected officials with respect to the management of the economy—both Douglas and Frankfurter remained steadfast.<sup>66</sup>

Justice Byron White's ideological solidarity with the administration that appointed him fits this same pattern. White had close ties with the Kennedy administration and served as deputy attorney general for almost a year.<sup>67</sup> Throughout his career on the Court, White remained loyal to the Democratic Party platform circa 1960: he was pro-labor, generally moderate on civil rights, and supportive of the federal government as against claims of states' rights. However, White was conservative on issues like abortion and the rights of criminal suspects, which were not politically salient at the time he served the Kennedy Administration.<sup>68</sup>

These examples suggest that even where a strong selection effect predisposes a class of nominees towards particular ideological views, the emergence of new issues can lead a Justice to take a stance at odds with his or her former sponsors.<sup>69</sup> That observation no doubt serves as a limit on our ability to generalize from the experience of the last four decades, but it is also important not to overstate the limit itself. Issues on the national agenda have changed substantially even during the period under study, and yet we still see a strong correlation.

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<sup>66</sup> This agreement is easy to overlook because it is so complete that the sorts of questions that dominated the pre-1937 Court did not arise much during the long period during which President Roosevelt's Justices continued to serve. See RICHARD A. EPSTEIN, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, in *THE WARREN COURT: A RETROSPECTIVE* 159, 159 (Bernard Schwartz ed., 1996) ("The question of property rights, their status, and protection, was not an issue that much troubled or preoccupied the Warren Court."). On those rare occasions when the formerly divisive issue of state regulation of the economy arose, Douglas, Frankfurter, and the rest of the Court were in harmony. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (Douglas, J., for a unanimous Court) (rejecting constitutional challenge to Oklahoma law regulating eyeglass sales).

<sup>67</sup> See YARBROUGH, *supra* note 9, at 67–68.

<sup>68</sup> See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 338–39 (1992) (observing that "White, the old Kennedy Democrat," opposed affirmative action but "when old-fashioned racial discrimination arose . . . was still with the liberals," and also "could be counted on to uphold the acts of the Democratic Congress"); SEGAL & SPAETH, *supra* note 18, at 248–49 tbl.6.7 (noting that, with respect to liberal policy outputs, of thirteen Justices to serve on the Burger Court, White ranked third most liberal with respect to unions, fifth with respect to civil rights, sixth with respect to federalism, ninth with respect to privacy, and ninth with respect to criminal procedure).

<sup>69</sup> See Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 *YALE L.J.* 1283, 1293 (1986) (reviewing LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985)) ("A Justice is likely to sit on the Court long after the issues that raged at the time of his nomination have faded, indeed, the issues that are uppermost in the minds of the President and the public at the time of the nomination might be only a small part of the Court's work even during the years immediately following.") (internal citation omitted).

Furthermore, perhaps political movements today are more successful than in years past at linking issues that, on the surface, have nothing to do with one another, so that, for example, someone who believes that individuals ought to be able to carry firearms for self-defense is more likely to oppose legal abortion than is someone who favors strict gun control.<sup>70</sup> During our period the Federalist Society emerged on the right and (more recently) the American Constitution Society emerged on the center/left to help define for legal elites—including judges—the constellation of positions and issues that are linked to an overall ideology.

That is not to say that judges or Justices consult the secret protocols of the Federalist Society or the American Constitution Society in deciding cases. But the susceptibility of the human mind (including the judicial human mind) to “framing” of individual issues as connected to a larger world-view—and the increased awareness by both major political parties of the utility of frames<sup>71</sup>—suggests that we may have entered an era in which even those who see themselves as independent thinkers find that their core ideological commitments keep them in touch with their roots, even as new issues emerge. If so, then we can expect the strong ideological commitments of Justices to retain some predictive value even as new issues become legally and politically salient. More broadly, the linking of positions on issues that have no necessary coherence would mean that ideologically salient experiences such as federal executive branch service could continue to function as a pre-screening mechanism for presidents selecting judicial nominees.

## V. CONCLUSION

The extent to which Presidents and Senators may properly consider the legal philosophy, and not just the professional qualifications, of prospective Supreme Court Justices, continues to be a question for public debate.<sup>72</sup> Because of the politically self-serving nature of that debate, the issue

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<sup>70</sup> See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 461 (1999) (describing the political tactic of gun control opponents in the House of Representatives as “linking gun control to abortion, promiscuity, irreligiosity, and myriad other practices and policies perceived to be threatening to their constituents’ cultural identities”); see also Representative J.C. Watts, *A Call to Arms: Renewing America*, Keynote Address at the NRA Annual Convention in Charlotte, North Carolina (May 20, 2000) (arguing that gun violence in schools is a result of “easy divorce,” the lack of a “male influence” in families, “extremely liberal abortion laws,” “well-intentioned but harmful public welfare policies,” a lack of “real pro-family tax relief,” and “a society which undermines parental authority, which marginalizes religion, and which steeps its children in a violent and sexually obsessed popular culture”), available at <http://www.nra.org/News/Read/Speeches.aspx?ID=11>.

<sup>71</sup> See George Lakoff, *Framing the Dems: How Conservatives Control Political Debate and How Liberals Can Take It Back*, AM. PROSPECT, Sept. 1, 2003, available at <http://www.prospect.org/print/V14/8/lakoff-g.html>.

<sup>72</sup> Compare Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (arguing that consideration of a nominee’s judicial ideology is both inevitable and,

will likely never be resolved, but in the meantime, Presidents and Senators who do wish to take account of legal philosophy need some method of gauging roughly where, on the ideological spectrum, a Justice will fall.

Republican Presidents, it appears, have found a winning formula. What about the Senate?

As Senate confirmation hearings have become, in Senator Biden's memorable phrase, a "kabuki dance,"<sup>73</sup>—with Senators pretending not to ask how nominees will rule on key issues and nominees pretending to answer the questions the Senators purport to ask—the Senate and the public will need to look elsewhere to predict a nominee's ultimate votes. This Essay has shown that, at least for Republican nominees over the last four decades, executive branch service is an especially reliable predictor of whether a Justice will remain steadfastly conservative or prove to be more moderate to liberal. Liberal to moderate Senators and citizens ignore this effect at their peril.

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given the political divisiveness of the time, necessary for ensuring a Court representative of the country's "core values") with John Manning, *Balancing Act*, N.Y. TIMES, Nov. 10, 2005, at A29 (arguing that a nominee should be confirmed based on temperament, intelligence and judicial integrity rather any commitment to ideological "balance").

<sup>73</sup> See *Confirmation Hearing on the Nomination of John Roberts to be Chief Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2005) (statement of Senator Biden, Member, Senate Comm. on the Judiciary), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html>.