

**THE ADAPTED JUDICIAL MIND:
PREFERENCES, NORMS, AND BIRTH ORDER ON U.S. SUPREME COURT**

ABSTRACT

The members of the U.S. Supreme Court have different ideas about what constitutes good judicial policy as well as how best to achieve that policy. From where do these ideas originate? Evolutionary psychology suggests that an answer may lie in early life experiences in which siblings assume roles that affect an adult's likely acceptance of changes in the established order. According to this view, older siblings take on responsibilities that make them more conservative and rule-bound, while younger ones adopt roles that promote liberalism and greater rebelliousness. Applying this theory to the Court, I show that these childhood roles manifest themselves in later life in the decisions of the justices. Birth order explains not only the justices' policy preferences but also their acceptance of one important norm of judicial decision making, specifically their willingness to exercise judicial review.

Introduction

The principles of the American legal tradition are thought to place limits on the members of the U.S. Supreme Court. Fidelity to written law, support for the doctrine of stare decisis, and deference to elected majorities are among the standard elements of the judicial canon. It is clear, however, that the justices make decisions with an eye toward achieving their policy goals and that they vary considerably in the extent to which they support judicial norms in their resolution of cases. How do the justices form their ideas about what constitutes good judicial policy and how judges should achieve it?

One plausible explanation, drawn from the field of evolutionary psychology, suggests that a process of socialization determines one's attitudes toward norms, rules, and authority. This socialization takes place long before assuming adult roles, such as judging. Indeed, it occurs during childhood, governed by an individual's relative position among siblings. Birth order has long been a subject of intensive study, and in recent years researchers have given close attention to its link to a person's receptivity to change. Specifically, evolutionary psychologists posit that, early in life, individuals engage in adaptive behaviors that are conditioned by the presence of siblings and seek certain niches that maximize parental investment. Older siblings --- firstborns in particular --- are

thought to identify with and emulate their parents and are thereby rewarded for their conscientiousness and respect for authority. As a consequence of these behavioral adaptations, firstborns develop not only ideologically conservative preferences but also a tendency to reject intellectual innovation, owing to their strong propensity to support the status quo. Laterborns, by contrast, must be creative and adaptable as a means of distinguishing themselves from their older siblings. Their openness to new ideas is revealed by more liberal political preferences, and across a wide range of human endeavor, laterborns have taken the lead in rebelling against convention (Sulloway 1996).

This logic is easily extended to the members of the Supreme Court, where differences over the applicability of precedent, the advisability of judicial review, and the appropriate level of judicial scrutiny mark just a few of the sharp divisions that exist between the justices. Can birth order help account for the choices the justices make and, in particular, their acceptance of the standards of legal interpretation?

Applying the birth order thesis to the Court, I argue that the justices' micro-environments during childhood should affect their approach to legal decision making on the bench. First, birth order should explain the justices' ideological orientations; older siblings on the Court should have more conservative preferences; younger siblings, more liberal attitudes. Second, the impact of birth order should also be revealed in the justices' approaches to competing forms of judicial policymaking. Owing to their deference to authority, firstborn justices should support existing interpretive regimes, while laterborn justices, being less bound to traditional approaches to legal problem-solving, should be more open to defying those traditions by exploring and employing new alternatives. Testing this theory, I find clear support for birth order effects. Not only does birth order explain the policy ends that the justices pursue, it also accounts for the means by which they pursue them. Thus, quite apart from birth order's ability to explain the justices' policy preferences,

birth order also accounts for the justices' decisions about how they realize their policy goals. The results suggests that, in neglecting the psychological sources of political decision making, scholars of the U.S. Supreme Court may be overlooking a fundamental force that conditions judicial behavior.

JUDICIAL BIOGRAPHY AND SOCIAL BACKGROUNDS

Backgrounds matter. The dispositions and actions of adults can often be traced to childhood experiences. For their part, students of judicial decision making have traditionally drawn on this linkage. Not so long ago, in fact, judicial biography was at the center of the study of the U.S. Supreme Court. Some of the most important studies of leadership on the Court --- Alpheus T. Mason's biographies of Chief Justices Stone (1956) and Taft (1965), as well as Carl B. Swisher's volumes on Justice Field (1930) and Chief Justice Taney (1935) --- developed their insights from life histories, and these studies remain classics within the field. In a sense, these biographers were conducting a type of social background analysis, connecting a justice's attitudes, professional demeanor, or leadership style to earlier life experiences.

Gradually, however, these works gave way to empirical research, whereby political scientists would quantify many of the details that were embedded within these thick descriptive studies and deploy them in more parsimonious statistical models.¹ Despite their differences in approach, these traditions moved along remarkably similar trajectories. "Both study the same universe of behavior as reflected in votes and opinions, and therefore select the same phenomena as dependent variables to be explained. Both tend to treat the same phenomena as distinctive causes and therefore tend to specify from an indeterminate number the same causal or independent variables" (Howard 1971, 708).

¹ Biographies of the justices continue to inform the study of the Court, however, as more recent volumes on such justices as Douglas (Murphy 2003), Powell (Jeffries 1994), and O'Connor (Biskupic 2005) clearly attest.

For quantitatively-oriented scholars, the use of biographical characteristics is best exemplified in the use of social background models. Employing such factors as age, religious affiliation, previous governmental experience, socioeconomic status, and father's occupation, researchers were able to trace various paths to the bench as well as subsequent voting behaviors of federal judges generally and justices of the U.S. Supreme Court in particular (see, e.g., Goldman 1972; Hall 1976; Tate 1981; Tate and Hanberg 1991; Ulmer 1973). Proceeding on the assumption that these background characteristics would dispose judges to vote on an ideological basis, these models often generated impressive results.

There were, of course, skeptics of this approach (see Grossman 1972), but even those who shared the belief that members of the Supreme Court are motivated by factors outside the law were uneasy about representing social background attributes as causal factors. At best, they argued, social attributes were imperfect proxies for the principal determinant of the justices' votes, that is, their policy preferences (Segal and Spaeth 1993, 232). Scholars of the Court had already suggested, if only indirectly, that attitudes explained the justices' behavior (Pritchett 1963; Schubert 1965), even if those attitudes were not necessarily observed, and these characteristics, they argued, merely replicated the underlying ideology that motivated the justices. So, for example, that a justice's father was a prosecutor or that a justice grew up under modest economic circumstances were mere stand-ins for a justice's disposition to vote, respectively, in a conservative or liberal direction.

The development of more direct measures of the justices' preferences --- such as ideological scores derived from newspaper editorials (Segal and Cover 1989) --- obviated the need for further reliance upon background characteristics; to the extent that social attributes were proxies for the attitudes of the justices, there was little need to employ them. Why utilize crude indicators when more reliable and valid measures were available? Whether these background characteristics might

themselves be responsible for the justices' dispositions was more or less disregarded, and political scientists largely eschewed any exploration of the sources of the justices' attitudes.

Of course, the use of attitudes in statistical models has the great virtue of parsimony, but it also comes at a cost: to the extent that there are social attributes responsible for the formation of the justices' dispositions, scholars have not fully addressed the causes of the justices' behavior. Preferences are vitally important, to be sure. But if the justices have life experiences that, in turn, systematically determine those preferences, then attributing the justices' behavior *solely* to those attitudes --- that is, to the exclusion of their antecedents --- paints an incomplete causal picture. Under typical causal modeling strategy, the impact of social attributes must necessarily be channeled through the preferences of the members of the Court. A fuller accounting might assess the causal consequences of the social forces that shape the justices' outlooks. From where do the justices' political preferences originate?

Traditionally, political preferences have been thought to be the product of inter-generational transmission (Campbell et al., 1960), and the current thinking among students of mass behavior is that at least some degree of the public's political orientations --- most notably, partisan affiliation --- is governed by youthful exposure to parental partisanship (Green, Palmquist, and Schickler 2004; Jennings and Niemi 1981). Younger voters, often lacking prior information and thus needing a standard for making voting decisions, often rely upon the partisanship of their parents (Achen 2002). In this way, early social experiences play a role in forming political dispositions.

What sorts of social experiences are likely to shape the preferences of future members of the U.S. Supreme Court? Judicial biographers have been well-situated to delve into their subjects' early life experiences and the developmental effects wrought on their personalities. Ironically, many biographies have not exploited these linkages to full effect. Surveying the then-current crop of such books, Howard (1971) noted "the limited yield of descriptive biography concerning the personality

determinants of judicial behavior,” despite the obvious connections between early life experiences and psychological traits:

No Freudian inferences, adolescent identity crises, or psychosomatic illnesses jar these pages, though such concepts are central in psychological analyses of other political leaders, and we know that judges underwent similar experience. Can Justice Miller’s intense abolitionist commitment be traced to a childhood trauma of watching his Mammy being flogged? Can Chief Justice Fuller’s skill as a presiding officer be attributed to ingratiating traits developed as a result of his parents’ 1833 divorce? Individually, biographers suggest several scraps and clues but make little of them. (p.711)

Illustrations such as these suggest a more common connection between the justices’ social experiences and their political attitudes as adults; as children, the justices have no particular immunity to the formative forces that pattern personalities more generally. Thus, to the extent that various patterns of social experiences capture such causal variables, it may be possible to assess their influence on the justices’ attitudes as well as their approach to judging. Such an assessment would require both a theory about social backgrounds that could be generalizable across justices --- even those serving in different time periods --- and a mechanism for measuring those backgrounds and subjecting them to statistical tests. It is to those two related topics that I now turn.

BIRTH ORDER AND THE NICHE-SEEKING HYPOTHESIS

One of the social science’s most widely studied background characteristics is birth order. Psychologists and sociologists, in particular, have long been interested in sibling relationships and their influence on, among other things, ambition, intelligence, and overall personality.² At least since psychologist Alfred Adler (1928) observed the linkage between birth order and a variety of personality attributes, the order of siblings within families has been a topic of intense scholarly interest. Although the topic has not garnered comparable attention from political scientists, it has

² The size of the literature is staggering; more than 2,000 articles and books address the subject of birth order (Somit, Peterson, and Arwine 1993). A useful summary of some of the leading findings can be found in Freese, Powell, and Steelman (1999).

still informed at least two distinct areas of research (Somit, Peterson, and Arwine 1993). The first concerns the correlates of political recruitment and whether birth order is connected to office-seeking: are certain siblings (most often firstborns) overrepresented among elected and appointed office both in the United States and abroad (see, e.g., Andeweg and Van De Berg 2003; Hudson 1990; Newman and Taylor 1994; Rejai and Phillips 1988; Stewart 1992)? The second addresses the influence of birth order on the political preferences of the mass public, assessing its impact on different facets of ideological thinking (Abramowitz and Abramowitz 1971; Broh 1981; Wisdom and Walsh 1975).

Empirically, the ability of birth order to provide a more informed understanding of political life is by no means clear. The results are frequently inconsistent across studies, many of which are evidently dogged by methodological inadequacies (Somit, Peterson, and Arwine 1993). Perhaps more important, these studies have lacked a clear theoretical foundation upon which to build.

Recent advances in the field of evolutionary psychology, however, offer some significant theoretical insights. Evolutionary psychology posits that, just like biological attributes, the human psyche is the product of historical adaptation to changing circumstance; regardless of whether the adaptations are biological or psychological, “the causal process of natural selection builds organic machines that are ‘designed’ to serve only one very specialized end: the propagation into subsequent generations of the inherited design features that comprise the organic machine itself” (Tooby and Cosmides 1995, 53) Thus, how people engage in, say, problem solving, communication, or mate selection is due in large measure to a series of individual adaptations, each of which takes place because it is best suited to a particular environment (Barkow, Cosmides, and Tooby 1995). Rather than take as a given the circumstances under which social behaviors obtain, adherents of this theory first ask what preconditions would produce that context --- and why.

The relevance of this theoretical orientation to the question of birth order has been examined most extensively by Frank J. Sulloway (1996). By his accounting, the psychological variations that are so common among siblings are the product of their competition for the scarce resources of parental investment, a competition in which firstborns have historically been heavily favored. “Prior to 1800, roughly half of all children succumbed to diseases of childhood.... Having already survived some of the lethal diseases of childhood, elder children were generally better Darwinian bets for passing on their parents’ genes to the next generation” (Sulloway 2007, 298). As privileged family members, firstborns (including only children) are disproportionately rewarded for pleasing their parents, and the combined relative advantages of size, strength, and intelligence, enable firstborns not only to solidify their importance by assuming a variety of parental roles but also to dominate their younger siblings who might otherwise seek to displace them (Sulloway 1996, 68-69). For their part, laterborns realize that they cannot occupy the same position --- or niche --- as their firstborn siblings. As a result, they are forced to seek different ways of maximizing parental attentions by establishing their own niches through distinctive (and sometimes risky) behaviors (Sulloway 1996, 112-117).

These niches, it turns out, have consequences for the political orientations of siblings within a family. Because of the different values that siblings must assume when occupying their respective niches, they are necessarily socialized into different forms of ideological thinking:

Firstborns...show a strong motivation to fulfill parental expectations.... Consequently, firstborns tend to be more amenable to their parents’ wishes, values, and standards than their laterborns siblings, as well as...more traditional, conservative, and more likely to endorse conventional morality....Laterborns tend to identify less with their parents and are often subject to domination or bullying by older siblings, which is hypothesized to make them...more likely to empathize with the downtrodden, to be supportive of egalitarian social change, to question the status quo, [and] to resist authority and pressure to conform...(Healy and Ellis 2007, 55)

So, being conscientious rule-followers who are anxious to satisfy authority, firstborns tend to exhibit conservative political preferences, while laterborns --- who are rebellious, apt to challenge the

status quo, and naturally sympathetic to underdogs --- exhibit more liberal attitudes. Some social scientists find support for this linkage (see, e.g., Zweigenhaft and Von Ammon 2000), while others have been skeptical of such a connection (see, e.g., Freese, Powell, and Steelman 1999).

Like much research that posits birth order effects, the niche thesis has attracted its share of critics and remains a source of controversy among psychologists and sociologists (see, e.g., Conley 2004; Harris 2009; Townsend 2000). Whatever the scholarly disagreements may be, the relevance of birth order has not been widely tested in political contexts.

With respect to the Supreme Court, birth order does seem to have a bearing on who is nominated --- firstborns and only children are clearly overrepresented (Weber 1984) --- and it is strongly correlated with at least one measure of the justices' votes (Sulloway 1996, 294-296). Social background models of the Court have occasionally included birth order in their analyses, typically as an indicator of the justices' preferences (Tate and Handberg 1991; Ulmer 1986). Still, as long as birth order is utilized as a surrogate for the justices' preferences --- rather than as a predictor of those preferences --- it is impossible to sort out its causal impact more precisely. Just what role does birth order play in setting the preferences of the justices?

EVIDENCE OF NICHE-SEEKING AMONG THE JUSTICES

To test the application of the niche-seeking hypothesis, I examine data on the birth order of the justices who were appointed to the U.S. Supreme Court from the beginning of the 20th century to 2006 (N=54).³ If the theoretical orientations about niche-seeking apply, then the experiences that

³ The data on birth order were very generously provided to me by Professor Frank J. Sulloway, who was remarkably thorough in culling relevant data sources. Although Weber (1984) reports data on the birth order of the members of the Court, Sulloway's replication revealed a non-trivial number of errors in Weber's original analysis. Of course, electronic data sources now facilitate the collection of such information. Nevertheless, birth order data are not always reliably recorded in biographical sources, and this problem is exacerbated for justices appointed in the 18th and 19th centuries, periods for which dependable data may be harder to obtain.

firstborn justices undergo as children --- aligning themselves with parental authority --- should manifest themselves in conservative attitudes later in life. Liberal ideological thinking should be prevalent among laterborn justices, a lingering consequence of their youthful efforts to distinguish themselves by deviating from the “conservative” niches already occupied by their older siblings.

Birth order and political ideology

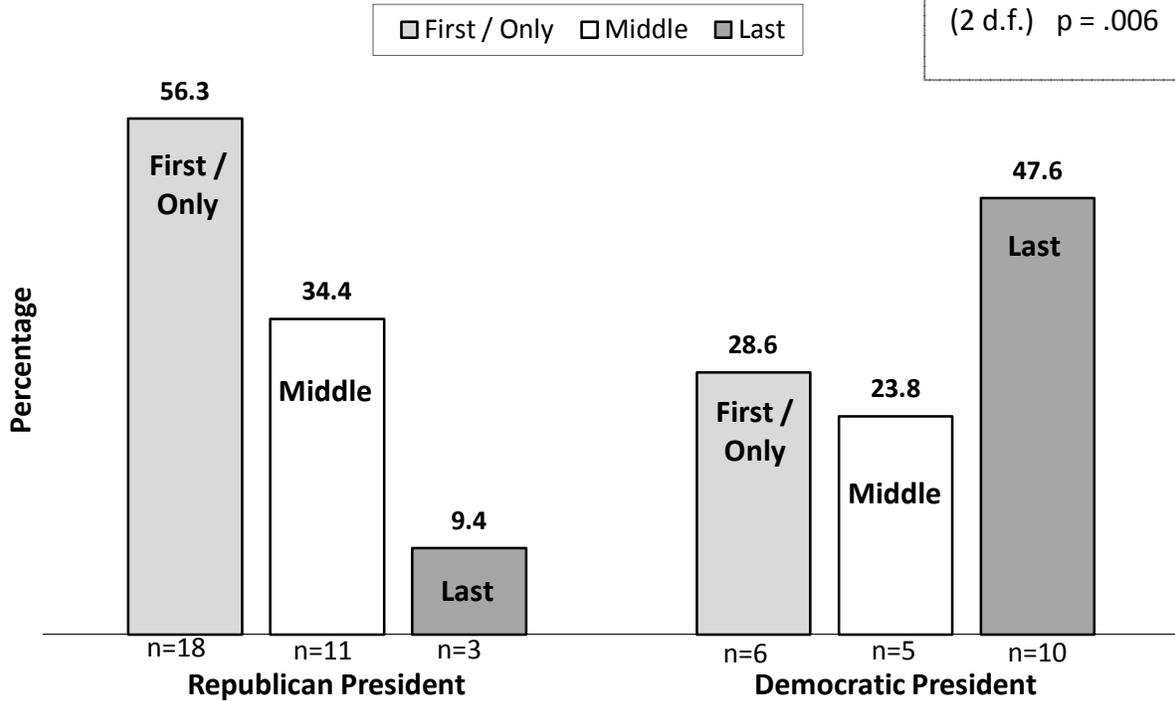
A simple way to begin the analysis is to survey the justices’ birth orders by the political party of their appointing president. The logic here is simple: if presidents select members of the Court based largely upon ideological considerations (Nemacheck 2007; Yalof 1999), then Republican presidents should favor firstborns and only children; Democrats, lastborns. These data ($N=53$) are presented in Figure 1, with birth order represented as a three-category variable.⁴

As expected, the decisions of presidents to seek like-minded justices appear to be reflected systematically in the birth order of the justices. Almost 60% of Republican appointees are firstborns and only children. These numbers include Justice Samuel Alito, Chief Justices William Rehnquist and John Roberts, and Justice Antonin Scalia, each of whose conservative bona fides are well established. At the same time, the most likely liberals are rarely tapped by GOP Presidents; less than

⁴ Because of their similarity in parental investment, only children usually exhibit social attitudes similar to firstborns (Sulloway 1996, 23). Depending upon the specific research question, researchers will simply compare firstborns to laterborns or treat birth order as a linear variable, trichotomizing it into firstborns, middleborns, and lastborns. Occasionally, middleborns are hypothesized to exhibit distinctive effects (see Sulloway 1996, 302), but researchers most often expect them to reveal more differentiation, risk-seeking, and openness to experience than firstborns but not as much as lastborns.

Given the niche-seeking hypothesis, I employ “effective birth order,” which is more common to this research literature, instead of “biological birth order.” After all, there no *genetically-based* firstborn traits; personality is assumed to be a product of family socialization. In light of that assumption, even though Justice Ginsburg was the latterborn of two children, the death of her six-year-old sister, when she herself was only one-year-old, rendered Ginsburg an effective only child (Salokar 1996, 79). The same is true of Justice Thomas; though biologically a middleborn, he was raised as a firstborn by his maternal grandfather from the age of seven (Thomas 2007). On the most recent natural Courts, the effective birth order of the justices has been as follows: firstborns/only children (Alito, Breyer, Ginsburg, Scalia, Sotomayor, Souter, Thomas); middleborns (Roberts, Kagan, Kennedy) and lastborns (Stevens).

**Figure 1. Birth Order of Justices
by Appointing President's Party, 1900 - 2006**



10% of these justices are lastborns. The last two Republican-appointed lastborns are especially noteworthy; one was Chief Justice Earl Warren, easily one of the most liberal justices in the Court's history, and the other is Justice John Paul Stevens, who was also highly liberal (albeit largely in the context of the Court's more recent composition).

For Democratic presidents, by comparison, the modal birth order category is lastborns. Nearly half, in fact, have been individuals whom one would expect to be sympathetic to the interests of ideological underdogs. That so many of these individuals are elevated to the Court is significant, because educational achievement is strongly tied to birth order. Being conscientious and keen to secure parental approval, firstborns tend to reach higher levels of academic success (see, e.g., Parker

1998), and they are, therefore, disproportionately represented in positions of leadership and influence (Clark and Rice 1982; Hudson 1990; Simonton 1994; Stewart 1992).⁵

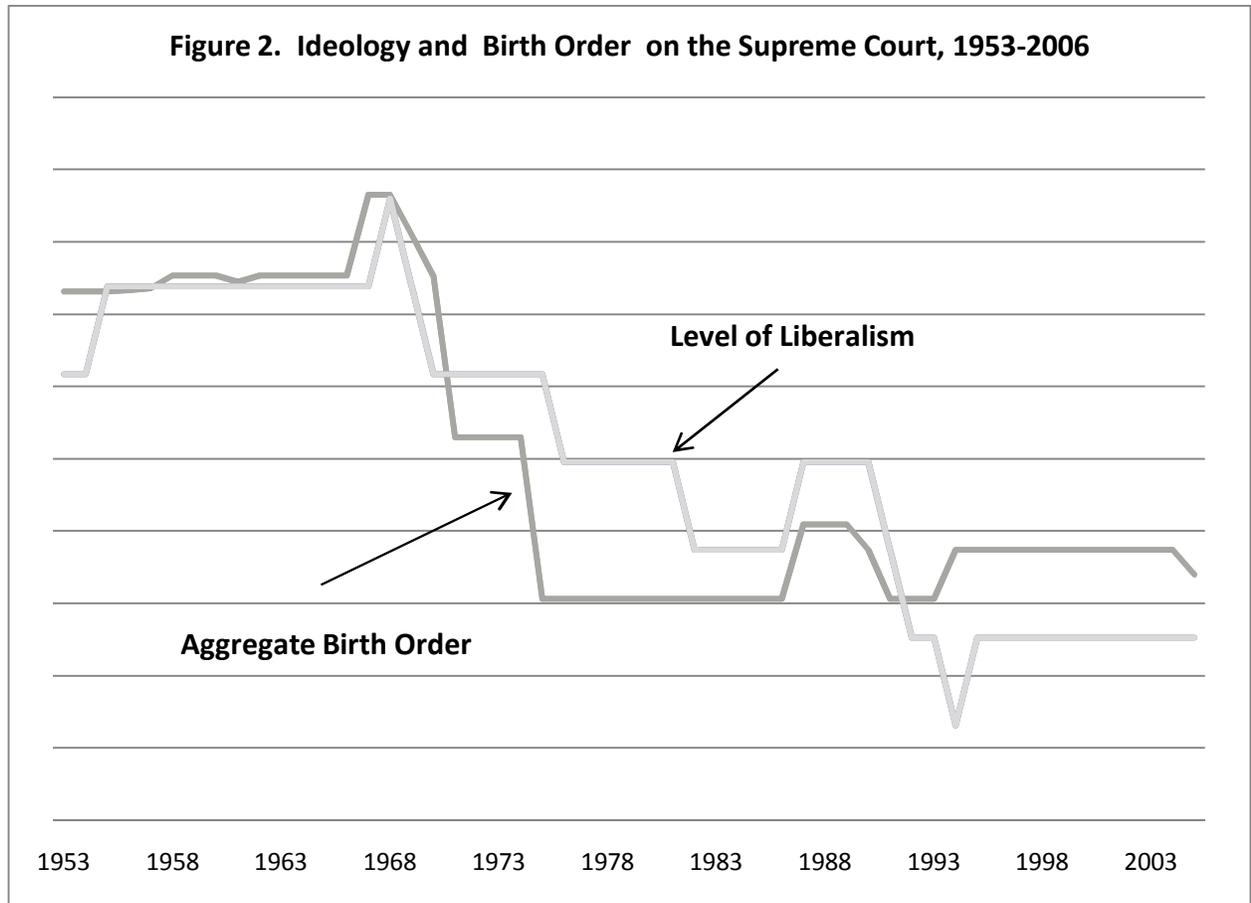
So, all else being equal, one would expect to see few lastborns on the Court. Democratic presidents, though, select able jurists --- nominees who are highly successful, their lastborn niche, notwithstanding --- whom one would expect to embrace liberal social values. In fact, in their search for liberal nominees, Democratic presidents are five times more likely to name lastborns, such as Justices Abe Fortas, Arthur Goldberg, and Thurgood Marshall, than are Republican presidents. Based on this evidence, birth order clearly reveals a good deal about the likely preferences of the justices.

A chi-square test on these data shows that the null hypothesis, which posits no relationship between this presidential partisanship and the birth order of a nominee, is easily rejected. Clearly, there is a strong connection between the ideology of the nominating president and the likely ideology of a justice, as indicated by birth order.

An alternative means of inspecting the relationship between the justices' birth order and their preferences is to examine these two variables longitudinally. Does aggregate birth order on the Court follow the ebb and flow of the Court's ideological orientation? In Figure 2, I graph two time-series that reflect the Court's liberalism; one is the ideology of the Court, as measured by the Segal/Cover scores derived from newspaper editorials, and the other is the annual percentage of justices who are lastborns. In each case, higher values should reflect higher levels of liberalism.

For measures derived from such entirely different sources, these two variables show a remarkable correspondence with one another. Both suggest high degrees of liberalism during the tenure of Chief Justice Warren, moving in parallel toward increased conservatism when the Court was led by Chief Justices Burger and Rehnquist. The two series are so highly correlated with one

⁵ This helps explain the large share of firstborns and only children whom Democrats name to the Court.



Note: Liberalism is the Court's median Segal/Cover score. Birth order is the percentage of justices who were lastborns. To facilitate comparison, both variables are standardized to a mean of 0 and standard deviation of 1. The y-axis values are not presented, since they have no interpretable meaning.

another ($r = .83, p < .001$) that it would be difficult to dismiss the relevance of childhood niche-seeking to understanding the ideological orientations of the justices on the Court. Although one ought not to make causal inferences based strictly on the visual inspection of these data, they certainly conform to expectations: ideology travels with birth order, and very closely indeed. Whether birth order contributes directly to the justices' preferences and, in turn, to their votes is addressed in the next section.

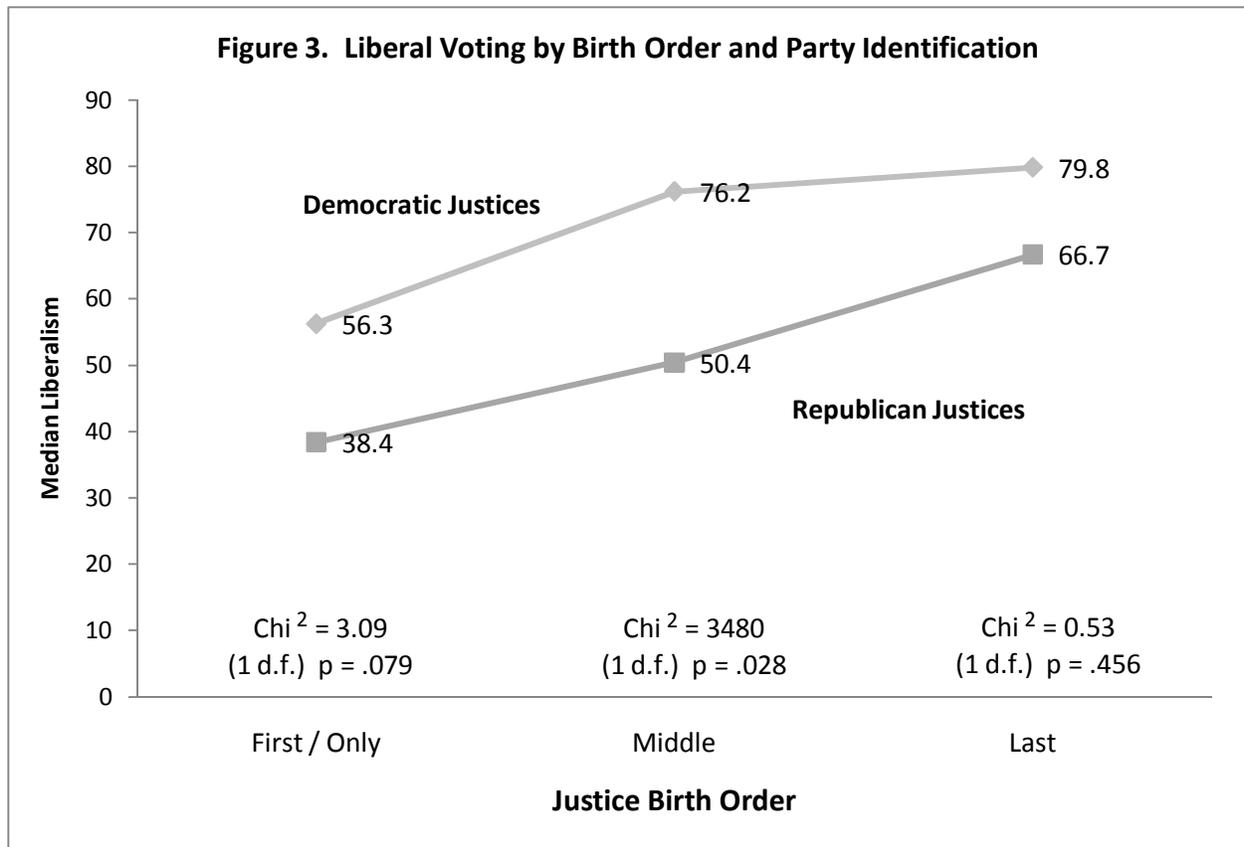
Causal linkages

The story to this point suggests a connection between birth order and the attitudes of the members of the Court, but it leaves a good deal of causal inquiry unexamined. As researchers have shown, birth order can shape a number of different personal values, including support for democratic ideals and the active use of governmental power, as well as a general receptivity to new ideas (Suloway 1996, 284-305). So there are strong theoretical reasons to expect that birth order is an important causal variable in explaining variation in the justices' political attitudes. At the same time, because birth order has been shown to capture more general features of individual personality, it is possible that it exercises an independent influence on the justices' behavior on the Court.

As a preliminary matter, an effective way to proceed is to separate the justices by their partisan affiliation and examine the voting behavior of the justices in each birth cohort. As an indicator of political preferences, party identification is admittedly limited, but if birth order is merely an indicator of ideology, then there should be no differences within parties for justices of different birth orders. The data in Figure 3, however --- which compares the median liberalism for each place in the birth order for Democratic and Republican justices --- indicates this is clearly not the case; birth order provides information that party alone does not.⁶ (Note that the lack of readily available voting data for several justices whose served in the early 20th century requires that a number of observations be sacrificed. Thus, these data should be viewed with caution. Still, as the results in Figure 3 attest, the sample sizes are sufficient to produce some meaningful statistical comparisons.⁷)

⁶ The justices' partisan affiliations are found in *The Supreme Court Compendium*. The voting data are lifetime liberalism, measured as the percentage of votes cast in a liberal direction as coded in the *U.S. Supreme Court Judicial Database*. Because a justice's liberalism has been shown to be more accurately reflected in the subset of cases in which that justice votes to reverse the lower court (McGuire, Vanberg, Smith, and Caldeira 2009), I calculate lifetime liberalism based on those votes.

⁷ In Figure 3, the Ns for Democratic justices are 6 firstborns, 3 middleborns, and 5 lastborns. The corresponding Ns for Republican justices are 7 firstborns, 6 middleborns, and 3 lastborns. Justice Frankfurter, who had no known partisan affiliation, is not included in these data.



Regardless of political party, the justices vote more liberally within each successive category of birth order. Firstborns and only children show the highest rate of conservatism among both Democratic and Republican justices; middleborns are the more moderate; and lastborns are the most liberal in both parties. The independent effect of birth order is dramatic and consistent across justices of both political parties. Indeed, by these estimates, Republican lastborns vote more liberally than Democratic firstborns! Thus, birth order would help to explain the liberal voting record of a lastborn Republican (such as John Paul Stevens) as well as the conservative behavior of a firstborn Democrat (such as Robert Jackson). Among firstborns, the difference in median liberalism between Democrats and Republicans is significant, just as it is among middleborns. (The difference between lastborns of the two parties is consistent with expectations, albeit not significantly so.⁸) Birth order

⁸ The same results obtain if one substitutes average liberalism for median liberalism and compares them with a difference of means test.

effects manifest themselves in predictable ways, then, even when compared across different ideological orientations. That birth order effects persist within justices of the same political party suggests that birth order may have an independent impact on judicial decision making, over and above its role in forming the justices' preferences.

Does birth order actually influence the justices' behavior, and, if so, in what ways? Path analysis can help sort out this issue. In Table 1, I present a simple recursive system, one in which birth order is completely exogenous, exercising its influence indirectly (by shaping the policy preferences upon which members of the Court make decisions) and directly (by capturing a disposition that is orthogonal to policy attitudes). The beta weight along each of the paths is represented by a standardized regression coefficient.

The first column represents birth order's indirect impact. In this model, I regress the justices' policy preferences (as measured by their Segal/Cover [1989] scores) on their respective birth orders. The results confirm what was implicit from the previous analyses: the justices' preferences are determined by their relative placement among siblings. The measure of attitudes ranges from 0 (extremely conservative) to 1 (extremely liberal). So, an otherwise moderate justice with an ideological score of .5 would have a predicted ideology of .35, if that justice were a firstborn or only child, or .65, if that same justice were a lastborn. By way of substantive illustration, such justices might include, respectively, only child David Souter and lastborn Earl Warren.⁹ To be sure, birth order leaves a good deal of the justices' preferences unexplained. Still, this model provides

⁹ A common complication in birth order models is a failure to take account of family socioeconomic status and the number of siblings in the family (or sibship). The less affluent tend to have larger families, thereby increasing the likelihood of someone raised in such circumstances being a laterborn. In the absence of such controls, birth order by itself may be a proxy for socioeconomic circumstance, which is often related to political ideology. Although birth order effects often evaporate when these controls are introduced, that is not the case here. Neither variable is significant, and they leave the impact of birth order unaffected. These results, as well as the data to replicate them, are available from the author.

Table 1. Causal Effects of Birth Order on Voting on U.S. Supreme Court

<i>Variable</i>	<u>Indirect effect</u>		<u>Direct effect</u>	
	<i>b</i>	<i>Beta</i>	<i>b</i>	<i>Beta</i>
Birth order	.15 ** (.07)	.38	6.46 ** (2.60)	.30
Ideology	---	---	35.14 *** (6.60)	.64
Constant	.24 (.14)		28.13 (5.06)	
R-squared	.15		.65	

Note: N=31; dependent variable in Indirect effect Model is the Segal/Cover ideology score for each justice serving from 1953 to 2008; dependent variable in Direct effect Model is a justice's lifetime percentage of votes cast in a liberal direction; birth order is coded as firstborn/only child (1), middleborn (2), lastborn (3); $p < .05$ **, $p < .01$ ***.

good preliminary evidence that niche-seeking in different family environments has lasting and significant consequences.

Taken by itself this finding is important, because it suggests, consistent with the niche-seeking hypothesis, that the justices' ideological orientations are a direct result of the micro-environmental influences of childhood. No less significant, they indicate that birth order has a significant indirect effect on the justices' voting, an effect channeled through the justices' policy attitudes. So, to the extent that preferences affect the justices' votes, that effect will be a consequence of the justices' birth order.

The second column tests the direct influence of both variables on the justices' voting behavior, modeling votes as a function of both birth order and policy attitudes. This model reveals

that, even after controlling for preferences, birth order still exercises a statistically significant impact on the justices' decisions. Clearly, birth order provides important information for understanding the Supreme Court that preferences alone do not.

To calibrate the impact of birth order more precisely, the magnitude of its indirect effect can be expressed as the product of the beta weights along the compound path (i.e., birth order's influence on ideology, deflated by ideology's influence on votes), which is $.38 \times .64$, or $.24$. Birth order's direct effect, captured in the second model, suggests only a modest impact; its beta weight of $.30$ is less than half the magnitude of the beta associated with the justices' policy preferences ($.64$). Viewed in isolation, however, the second model is somewhat misleading. The total causal effect of birth order --- the combined indirect ($.24$) and direct ($.30$) betas --- is $.54$, which indicates that it plays a highly prominent role as a determinant of judicial behavior.

The nature of that role, however, remains less clear. Having controlled for the justices' preferences, the second equation indicates that birth order is likely to measure features of the justices' thinking that are unrelated to ideology and yet still exercise a significant effect on their behavior. The research literature offers ample clues as to the nature of that effect. In particular, it suggests that birth order accounts not only for political liberalism but a more general openness to alternatives and a readiness to defy the status quo (Suloway 1996). Obviously, tolerance of diverse and competing ideas is a part of political liberalism, but it may be only one manifestation of a broader willingness to entertain and accept non-traditional ideas. If birth order serves as a proxy for how one views original approaches to problems in various fields of human endeavor, it should reflect itself in how judges approach the specific task of legal decision making. All that is required is the development of theoretical expectations and a relevant context in which to examine birth order's impact.

BIRTH ORDER AND THE LEGAL MIND

Psychologist Alfred Adler was among the first to note a specific connection between birth order and personality development. As he explained, “When [a firstborn] grows up, he likes to take part in the exercise of authority and exaggerates the importance of rules and laws. *Everything should be done by rule, and no rule should ever be changed*” (1928, 379, emphasis added). By his reckoning, the oldest child in a family places great emphasis on authority and abiding by the status quo. As the sole focus on their parents’ attention, firstborns are rewarded for fulfilling (typically high) parental expectations and for deferring to their parents’ judgments. Support for rules, however, ebbs among laterborn siblings: as older siblings settle into the niche of fulfilling existing expectations, each subsequent child recognizes that she cannot occupy the same role as her older siblings and thus must be open to a wider range of life’s possibilities, including niches of nonconformity. The adoption of non-conventional roles manifests itself in attitudes that are less absolutist; laterborns consequently exhibit tendencies to rebel and to question authority (Sulloway 1996; see also Healy and Ellis 2007; Simonton 1994). Again, the theories underlying these findings typically assume that children are motivated by a basic need for parental attention and investment and that the incentives for securing that investment vary dramatically depending upon ordinal position among siblings. Because the structure of incentives varies so significantly across the birth order, the variation in personality and disposition among siblings of the same family is generally greater than the variation among similar siblings between families.

Birth order, therefore, should play a prominent role in the acceptance of norms, with older siblings demonstrating a propensity to follow tradition and younger ones exhibiting greater independence. The most exhaustive test of this proposition shows that across numerous forms of scientific innovation, firstborn scientists were the least likely to abandon time-worn theories while laterborns scientists flouted convention by challenging the scholarly establishment (Sulloway 1996).

Birth order's ability to condition the acceptance of institutionalized ideas and processes need scarcely be restricted to the scientific community. Since birth order is connected to acceptance of authority, it has obvious implications for legal interpretation, where reliance upon various rules of jurisprudence and institutional norms are central to the business of judging. Cases arrive at the Supreme Court with a good deal of legal ambiguity. In resolving this ambiguity, some justices will fall back on various traditions of legal analysis; others will challenge them. Birth order may govern which path a justice will choose to follow. Firstborn justices should be expected to exercise restraint and to emphasize such norms as deference to the authority of precedent. As firstborn Oliver Wendell Holmes explained:

I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results....I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province..., and because I believe that the claim of our especial code to respect is simply that it exists...and not that it represents an eternal principle, I am slow to consent to overruling a precedent. (1899, 460)

By contrast, laterborn justices should evince greater skepticism about following these traditions and should perforce be willing to take the road less travelled when deciding cases on the merits. Being less constrained by existing norms, they should adopt positions of activism and more readily support challenges to established democratic and legal processes. One laterborn justice, William O. Douglas, illustrates this view:

It is easy...to overemphasize stare decisis as a principle in the lives of men....The place of stare decisis in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him. (1949,736)

Disagreement among the justices is of course the norm on the Court, and as Holmes and Douglas illustrate, much of that disagreement is over whether the Court should take a proactive role

in solving the societal conflicts brought before the Court or defer to existing rules put in place by either elected official or previous judicial decisions. Seen in this way, decisions regarding whether to exercise judicial review or to follow established precedent are decisions about whether to challenge the status quo or to bring new ideas to bear in resolving the problems the Court confronts. The attributes associated with birth order should therefore help to account for these decisions.

TESTING THE IMPACT OF NICHE-SEEKING

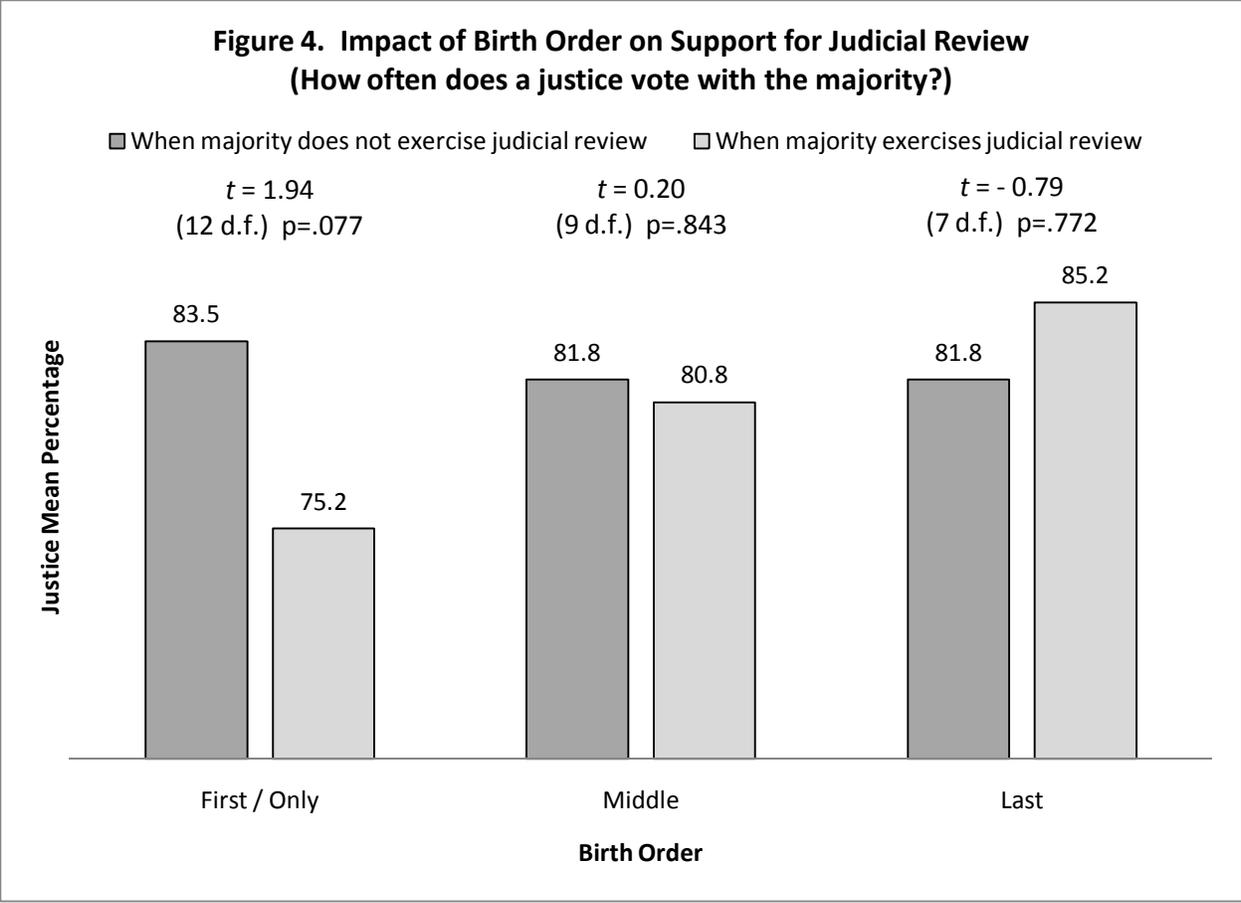
By now, the expectations regarding birth order's influence on the Court should be obvious. If firstborns have incentives to respect authority and adhere to established rules, firstborn justices should exhibit a resistance to deviating from those rules. If laterborns must select less traditional roles and thus be more open to challenging the status quo, laterborns justices should question that authority.

To test for these effects, I examine the impact of birth order in one significant context --- support for the exercise of judicial review. My initial analytic strategy is straightforward; for each member of the Court, I determine how often that justice joined a majority coalition that invalidated a federal or state law.¹⁰ Since this decision represents a challenge to the status quo, firstborn justices should be reluctant to join their colleagues in making such policies, while laterborns should have fewer misgivings about changing the establishment. As a control, I calculate how frequently each justice joined the majority coalition when that condition was not present. Assuming that, over the course of their careers, the justices vote with the majority for largely ideological reasons, there is no reason to expect that this decision should vary as a function the majority's use of judicial review. If there are no birth order effects, then the justices should vote with the majority at similar rates across each place in the birth lineup.

¹⁰ These data were obtained from the *U.S. Supreme Court Judicial Database*.

The data in Figure 4 provide clear evidence of the effects of the justices having adapted to their micro-environment in predictable ways. Members of the Court who are firstborns and only children, having been socialized into following established rules, show a considerable reluctance to join their colleagues in uprooting existing federal and state laws. In cases where the Court does not exercise the power of judicial review, these justices support the majority decision nearly 85% of the time. That support, however, drops to 75% when the majority invokes its authority to invalidate popular decision makers. This difference is not trivial; a paired t-test, testing the hypothesis that the difference between each justice's voting across these two categories is equal to zero, is rejected ($t = 1.94, p < .077$).

Laterborn justices show signs of greater adaptability. Middleborns, for example, vote to join the majority with nearly identical frequency, regardless of whether the Court exercises judicial review. Unlike the eldest siblings who place a premium on authority, middleborns are somewhat more flexible, since they must seek niches within the family that are unoccupied by older children. Because of their openness to alternatives, they have fewer misgivings about altering the rules. It is the lastborns, however, who must be the biggest risk-takers; driven by the need to distinguish themselves by assuming unclaimed roles, they have the least regard for power and authority. As justices, these individuals are perfectly willing to question the decisions of elected officials. In fact, they vote to invalidate laws at the highest rate (85%), joining the majority in such cases even more often than they do otherwise (82%). (This difference, though, is not statistically significant.) Thus, like much research on birth order, these results suggest that the most important differentiation exists between firstborns and laterborns (see Freese, Powell and Steelman 1999; Sulloway 1996).



Of course, these data do not take account of the various other factors that might affect a justice’s vote to invalidate legislation. To determine whether the effects of birth order persist in the face of competition from other explanatory variables, I construct a multivariate predictive model, one that relies upon both the data and theoretical insights of Lindquist and Solberg’s (2007) recent analysis of the justices’ votes to exercise judicial review.¹¹ Lindquist and Solberg gathered data across the Burger and Rehnquist Courts for every case in which the justices examined the constitutional validity of a federal, state, or local law. Across the time period spanning 1969 through 2000, they identified some 796 cases in which the constitutionality of a law was at issue. Using the individual justice’s vote as the unit of analysis, Lindquist and Solberg found that “the justices’

¹¹ I am especially grateful to Professors Stefanie A. Lindquist and Rorie Spill Solberg for kindly making their data available to me for this portion of the analysis.

ideological responses to the challenged statutes, the extent of amicus support for the statute, the support of the solicitor general, congressional preferences, and the existence of a civil liberties challenge to the statute are all significantly related to the justices' votes to invalidate or uphold statutes" (p.71). Armed with their data, I can take account of these particular forces and compare their composite effects between firstborn and laterborn justices.

One approach might be to replicate Lindquist and Solberg's basic model and include a dummy variable to indicate whether, all else being equal, firstborns were significantly less likely than laterborns to vote to strike down challenged legislation. This approach, however, would assume that firstborn and laterborn justices evaluate all other explanatory variables in the same fashion, attaching the same weight to, say, their personal policy preferences, as well as the positions of the solicitor general and the Congress. But of course firstborn and laterborn members of the Court may well exhibit important differences in their responses to these factors.

Conducting individual analyses for justices of different birth orders can provide this clarity, but separate equations frustrate direct inter-model comparisons. An effective way to facilitate those comparisons is to implement a conditional model, a form of fixed-effects estimation that calculates differential effects (or "dummy slopes) within the same equation (Wright 1976). Constructing this model is a straightforward matter: one creates a dummy variable for each condition of interest (i.e., one for firstborns and one for laterborns) and then interacts that dummy with all other regressors. Thus, in addition to a single birth order parameter, each independent variable appears in the model twice --- once for firstborn justices and once for laterborns --- and is "switched on," depending on whether the justice was a firstborn or laterborn.

Implementing this model with Lindquist and Solberg's data, I estimate the impact of their key variables --- the justices' preferences, the position of the solicitor general, the preferences of Congress, amicus support of the statute, and civil liberties challenges --- on the vote of the individual

justices to the strike the law under review. These measures are amply explained elsewhere (Lindquist and Solberg 2007, 77-79), so I only summarize them briefly here. Ideological support for a statute is assessed by the intensity of the justice's ideological preference, relative to the whether the law in question embodied a liberal or conservative policy. So, for example, larger positive values for a justice's or congressional support for a statute indicate more strongly liberal preferences when reviewing a liberal law (or, alternatively, more conservative preferences when reviewing a conservative law). Negative values, by contrast, signify increasing liberalness (or conservatism) when reviewing a conservative (or liberal) law, respectively.¹² Support by the solicitor general, as either a party or an amicus curiae, assumes a value of 1 if the federal government argued in support of the law, -1 if it argued against it, and 0 otherwise. Overall amicus support is operationalized as the number of amicus briefs filed in support of the law minus the number filed arguing for invalidation. A civil liberties challenge is coded as 1 if the case raised an issue of civil liberties or civil rights, 0 otherwise. Finally, I include Lindquist and Solberg's statistical control for the Court's propensity to review decisions it intends to reverse, measured by whether the lower court had already invalidated the statute (coded as 1, and 0 otherwise); if the Court's tendency is to reverse lower court decisions, then a lower court's exercise of judicial review should make a justice more likely to vote to uphold the law (and vice versa).

¹² The ideological orientation of the statute is measured by the Supreme Court's vote on whether to strike the law, relative to ideological direction of the Court's decision (e.g., when the justices voted to *strike down* a law and decided the case in a *liberal direction*, the law is presumed to have been *conservative*, while the law under review is coded as *liberal* if the law was *upheld* and the Court's decision was *liberal*). The ideology of the individual justices and the Congress, both measured at the time of the Court's decisions, are derived from the Judicial Common Space Scores (Epstein et al. 2007). Data on the number of amicus briefs were derived from Lexis and Westlaw, and measures of a case's issue area and disposition are taken from the *U.S. Supreme Court Judicial Database* (see Lindquist and Solberg 2007, 77-79).

Table 2. Conditional Model of Impact of Birth Order on Vote to Strike Challenged Statute/Ordinance

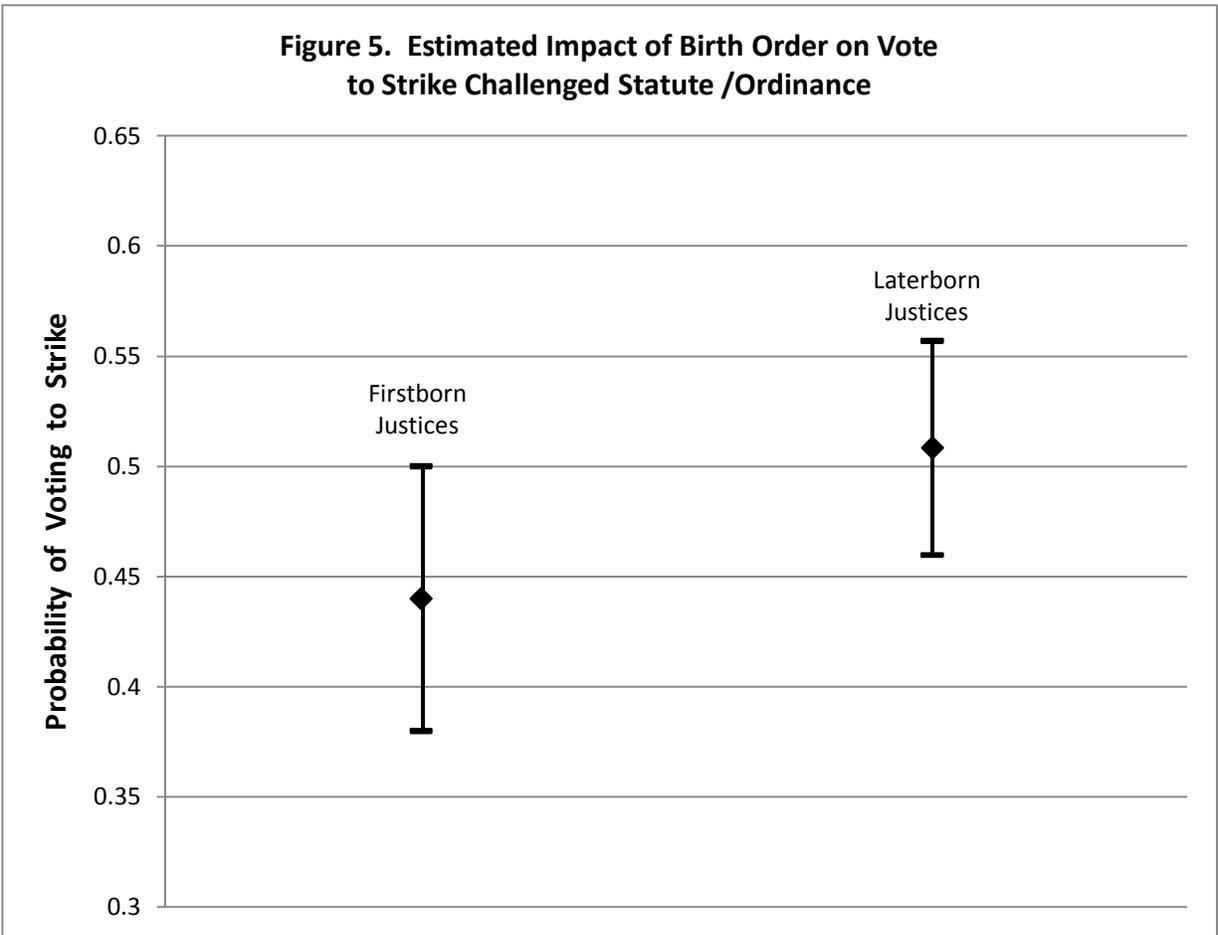
<i>Variable</i>	<i>Firstborn Justices</i>	<i>Laterborn Justices</i>
Firstborn justice	-.28 * (.17)	----
Justice's ideological support for statute	- 1.01 *** (.08)	- 1.20 *** (.05)
Solicitor general support for statute as a party	-.38 *** (.12)	-.53 *** (.05)
Congressional support for statute	-.49 (.40)	-.37 (.25)
Amicus curiae support for statute	-.024 ** (.009)	-.028 ** (.010)
Solicitor general support for statute as an amicus	-.46 *** (.05)	-.31 *** (.08)
Civil liberties challenge	.24 *** (.06)	.22 *** (.07)
Lower court invalidated statute	-.15 *** (.04)	-.29 *** (.05)
Constant		.12 (.08)
Log likelihood		- 3,818.72
Wald Chi-square		4,743.07 (p<.001)
% correctly classified		66.7
PRE		31.4

N = 6,407. Dependent variable equals 1 if the justice voted to invalidate the statute, 0 if the justice voted to uphold the statute. Firstborn justice is coded as 1 if the justice was a firstborn or only child, 0 if the justice was a later born. Variables in the “Firstborn Justices” column are interacted with the firstborn justice dummy variable. Variables in the “Laterborn Justices” column are interacted with an (excluded) laterborn justice dummy variable, coded as 1 if the justice was a laterborn, 0 if the justice was a firstborn or only child. All coefficients are probit estimates. Robust standard errors, which appear in parentheses, are calculated by clustering on individual justices. **p*<.05, ***p*<.01, ****p*<.001, one-tailed test.

The results of the probit model, presented in Table 2, show the estimated impact of a dummy variable to pick up the overall effect of birth order --- coded as 1 for firstborns and only children and 0 for laterborns --- together with the effects for the independent variables, each one conditional on the value of birth order. Overall, the model largely confirms Lindquist and Solberg's findings, even when tested under the constraints of a conditional model: every predictor (save congressional support for the statute) exercises a statistically significant effect on the vote to invalidate federal, state, and local laws.

My principal interest is not in the substantive influence of the independent variables themselves but rather whether, holding such factors constant, firstborns vote to invalidate laws less often than their laterborn counterparts. The estimates in Figure 5 reveal that they do. These data represent the estimated likelihood of a justice voting to invalidate a law, after setting each of the relevant control variables to its mean in the overall sample. Aside from the statistically significant estimate for birth order in Table 2, which suggests that laterborn justices are more likely than their firstborn brethren to vote to invalidate challenged laws, the estimated probability for each group --- .44 and .51, respectively --- falls outside the 95% confidence interval of the other.¹³ So, even in the face of a variety of factors that might well undermine its impact, birth order remains an important force that differentiates the behavior of the justices. The lingering effects of childhood socialization affect the justices' orientation to the exercise of judicial review; those who were rewarded for adhering to rules are noticeably more restraintist and thus reluctant to challenge the authority of

¹³ These are "effective" 95% confidence intervals. Since there is a theoretical expectation that firstborns will vote to strike laws less often than laterborns, however, I report the 90% rather than the 95% confidence intervals. Comparing the slightly more conservative 95% confidence intervals is appropriate if one wants to test whether there is a .05 probability that the two estimates differ from one another, *regardless of the direction of the difference* (i.e., the interval covers 95% of the area under the normal curve, with .025 probability on either side). The 90% confidence intervals preserve the .05 probability and simply allocate all of the 5% of the area to under the normal curve to one side of the distribution. Thus, the confidence intervals in Figure 5 indicate that there is a 95% likelihood that the estimate for firstborns is *not greater than* the upper limit of its interval and that the estimate for laterborns is *not less than* the lower limit of its interval.



popular decision makers. Laterborns, who resist conformity, display greater activism and have fewer qualms about defying legislative majorities.

It bears emphasizing that these estimates control for the justices’ policy preferences, the force that animates their decisions more generally (Segal and Spaeth 1993). Consequently, these differences should not emerge unless birth order has genuine relevance for their decisions. Stated differently, the justices can be expected to act in ways that advance their policy goals, but the *means* by which they seek to achieve those goals are not consistent across the birth order. Those who are psychologically most averse to change are less likely to support it.

To test the robustness of birth order’s impact and to illustrate its conditional effect when taken in conjunction with other predictors, Figure 6 charts the impact of birth order for different

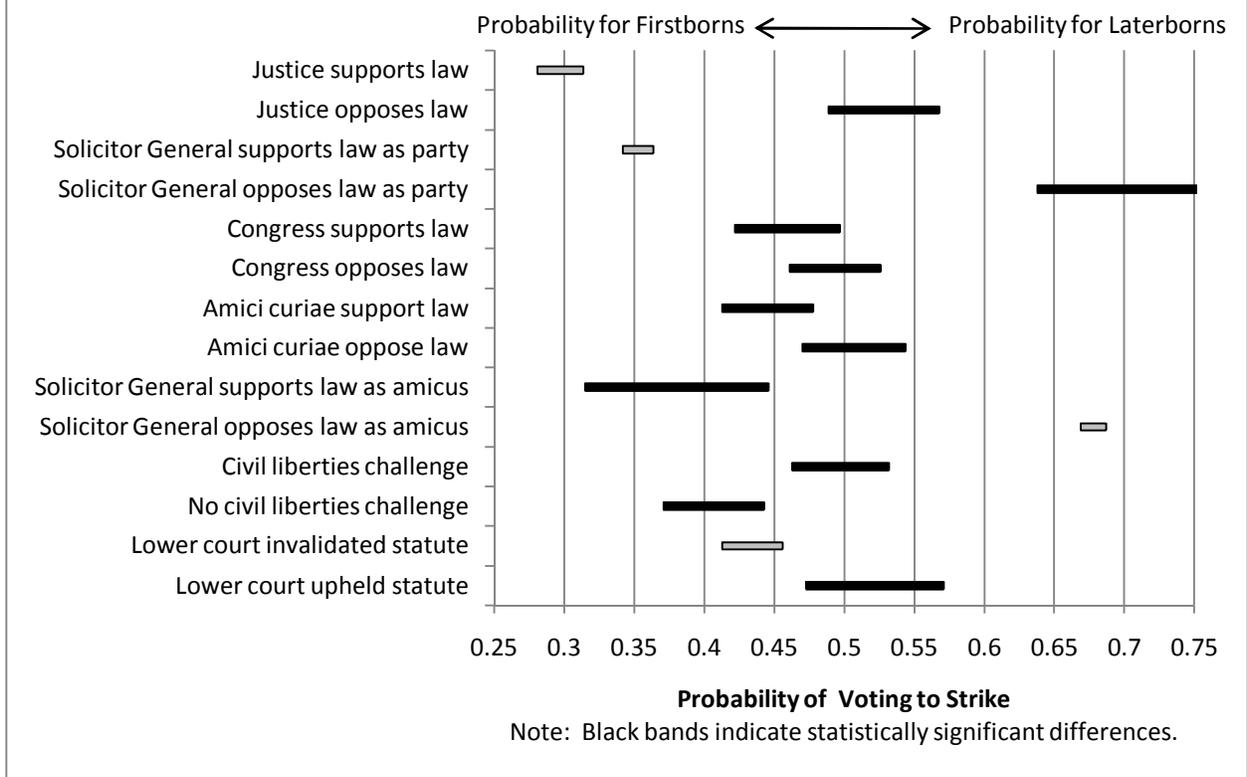
values of the independent variables. This figure presents a series of “bands,” each of which marks the difference in the estimates of the probability of firstborns and laterborns voting to invalidate legislation. Narrow bands, therefore, indicate that the estimated effects for the two types of justices are closer to one another; wider bands indicate that the probabilities are farther apart.¹⁴

Several features of these estimates merit emphasis. First, in every instance, the estimate for lastborn justices exceeds the estimate for firstborns. So, across a wide range of case scenarios, the justices are estimated to behave as the theory of niche-seeking across different ordinal positions among siblings would suggest: the laterborn risk-takers who challenge the status quo are invariably more prone to strike laws than firstborns, their more rule-bound counterparts. Second, in most cases, these differences in behavior are significantly different from one another; a black band in the figure signifies that each of the two estimates falls outside the 95% confidence interval of the other, a result that obtains in 10 of 14 instances.

Finally, the data illustrate that birth order exercises its effects in highly intuitive ways. Regardless of birth order, for example, justices are more likely to strike laws that they find ideologically incompatible than those for which they have ideological sympathy. But, the impact of birth order is much less in the latter category than in the former: if a justice agrees with a challenged law, it should matter little whether she is a firstborn or laterborn; she will vote to uphold it. In this condition, a firstborn justice need not exercise restraint (because she *supports* the law) any more than a laterborn need challenge the status quo (again, because it is a status quo she regards as ideologically favorable). By contrast, ideological disagreement with a law promotes more marked differences in

¹⁴ These estimates were generated using Clarify, setting non-relevant variables equal to their mean for the overall sample. In order to represent the specific conditions for continuous variables --- i.e., the variables measuring the preferences of the justices, Congress, and amici curiae --- the estimates were generated by setting the variable of interest one standard deviation above or below its mean value to reflect support or opposition. The variables measuring support (or opposition) from the solicitor general *as a party* were set at 1 (or -1), with the variables for the solicitor general’s position *as an amicus curiae* simultaneously set to 0, since the solicitor general cannot be both a party and an amicus curiae in the same case; to generate the estimates for the amicus filings of the solicitor general, this calculation was reversed.

Figure 6. Impact of Birth Order on Vote to Strike Selected Categories of Challenged Statutes/Ordinances



behavior. In this condition, all justices are naturally more inclined to strike the law, but actually voting to do so is clearly much easier for laterborns (or much more difficult for firstborns). Stated differently, when faced with a law that is equally disagreeable on ideological grounds, a laterborn justice is significantly more likely to vote to invalidate it than is a firstborn justice.

Majoritarian support for (or opposition to) the law, measured either by existing congressional preferences or the relative strength of the voice of organized interests, moves the probability of a vote to exercise judicial review in the expected direction, but in each instance it is the laterborn justices who are significantly more willing to overturn it. As a litigant, the solicitor general's opposition to the law provides a strong voting cue that the justices should strike down the law, but even here firstborn justices are much more reticent than laterborns to challenge the decisions of lawmakers. As an amicus curiae, the solicitor general conveys similarly important

information to the Court, but its support for a law has significantly less influence on laterborn justices; they remain far more disposed to invalidate a law, that advice notwithstanding. Moreover, the heightened scrutiny that typically makes legislation more vulnerable in cases involving civil liberties and rights is evident in the model, but even here the respect for the decisions of popular policy makers restrains the behavior of firstborn justices who, as children, were rewarded for their respect for the authority of others. Likewise, the Court's error-correction strategy manifests itself as one would expect. If the Court takes cases in which it doubts the lower court outcome, it makes sense that the likelihood of a vote to strike a law would be greater in those cases in which the lower court upheld it. That likelihood is substantially higher, however, for laterborns than for firstborns.

Taken together, these statistical results support the idea that judges are subject to the same influences that affect other human beings (Baum 2006). To be sure, judges, like lawyers more generally, are strongly socialized through education and professional practice to defer to the decisions of elected officials and to avoid declaring their acts unconstitutional (Mertz 2007). Some evidently attach greater significance to this norm than others, however, and the degree of respect for this norm seems to be explained, at least in part, by the lingering but potent effects of childhood socialization. So, when deciding whether to exercise judicial review, the justices do not simply pursue their policy goals; rather, they do so in ways that fit their view of how judging should be done. In short, firstborns show a good deal of evidence of judicial restraint and laterborns appear more prone to judicial activism.

CONCLUSIONS

Birth order is prominent in a number of different contexts within the social sciences, and it may be no less relevant to understanding political behavior. The theoretical account offered here suggests that the micro-environment of the family creates incentives for siblings to be adaptive and

systematically seek to occupy different niches, and applying that theory to the justices on the U.S. Court generates two empirical insights. First, the effects of niche-seeking can be seen in the development of the most important determinant of the justices' behavior --- their policy preferences. Firstborns, who as children likely aligned themselves with the authority of their parents and were rewarded for their conformity, end up as political conservatives. By contrast, in their search for distinctive and unoccupied family roles, laterborns must remain open to life's non-traditional possibilities and are consequently less rule-bound. Aside from their willingness to challenge the status quo, laterborns are also prone to empathize with the disadvantaged, having themselves been dominated by older and stronger siblings. Not surprisingly, as justices these individuals adopt more liberal political attitudes.

This finding is significant, inasmuch as it suggests that policy preferences alone provide a somewhat incomplete picture of judicial decision making. Preferences are a vital predictor of the justices' behavior, to be sure, but those preferences are but one manifestation of more general set of personality traits born of childhood socialization. Moreover, birth order provides additional and significant explanatory power, quite apart from those policy attitudes, when modeling judicial choices. Seen in this way, the psychological effects of birth order are a driving force in the Supreme Court; policy attitudes are simply one part of a larger engine.

Second, quite apart from its impact on the justices' political preferences, birth order also seems to condition how the members of the Court understand their role as judicial policymakers. Birth order affects one's propensity to defer to (or, alternatively, to defy) established rules, a fact reflected in the justices' varying degrees of readiness to challenge laws laid down by legislative majorities. After all, statutes codify the established order, and whether an existing legislative regime should be replaced with an alternative vision crafted by the Court should be driven, at least in part, by a justice's openness to alternatives. Motivated by a commitment to the established order,

firstborns vote to strike down popular majorities less often, while laterborns have fewer qualms about upending existing laws.

This finding should be of particular interest to scholars who are interested in the concepts of judicial activism and judicial restraint. The search for empirical indicators of these judicial dispositions has long been elusive. Indeed, some have concluded that, when justices invoke these judicial norms, it is a mere mask for a decision grounded in policy preferences (see, e.g., Segal and Spaeth 1993). The impact of birth order, and the theory of niche-seeking that undergirds it, suggests that the norm of judicial restraint may be quite genuine, inasmuch as birth order seems clearly to condition the justices' willingness to strike down the actions of majoritarian decision makers, even after the justices' policy preferences are held constant.

It would be easy to dismiss any one of these findings as idiosyncratic, but the evidence taken as a whole provides substantial reason to think that the effects of birth order are very real and operate in predictable ways on the choices the justices make. In each analytic setting, the results confirm the niche-seeking hypothesis, suggesting that the members of the Court are not unlike the population more generally. Justices who are older siblings display an unwillingness to deviate from the status quo; justices who are younger siblings are less constrained by existing norms.

This explanation invites judicial scholars to think more carefully about the sources of the justices' attitudes. Rather than take them as a given, I have sought to examine what might have produced those preferences and whether that explanation holds promise for accounting for different facets of the justices' behavior. The findings suggest not only that the birth order of the justices has, in fact, shaped the contours of their attitudes but that it may also provide additional clues to better understanding other aspects of their decision making.

Social background models are not as fashionable as they once were in judicial politics. To the extent that social attributes were once simply serving as proxies for other unmeasured variables,

the decline of such models is quite understandable. Scholars have since devised ways to tap into those previously elusive qualities. Yet the decision to abandon judicial biography and the study of background characteristics may have come at a cost. Scholars of the Court may be overlooking a basic force that structures how the justices respond to the prospects of legal change.

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