

**(BIRTH) ORDER ON THE SUPREME COURT AND ITS IMPACT ON LEGAL DOCTRINE**

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### ***ABSTRACT***

Why do some members of the U.S. Supreme Court accept new legal doctrines while others resist them? Recent advances in evolutionary theory suggest that birth order has important consequences for the willingness of individuals to adopt novel ideas. Specifically, firstborn children seek parental approval by identifying with authority and supporting existing rules. Laterborns, by contrast, realize that they cannot occupy positions already held by their older siblings and therefore be open to alternative means of securing their parents' affections. As a consequence, older siblings tend to be more rigid in their thinking while younger ones generally exhibit greater flexibility. Applying this theory to the members of the U.S. Supreme Court, I examine the impact of birth order on the justices' acceptance of innovative legal doctrine. I test the theory by gauging the extent to which the justices' birth order explains their willingness to support the application of the Bill of Rights to the states. The results show that firstborn justices have not supported the doctrine of incorporation, while laterborns have been more willing to endorse the idea that the Fourteenth Amendment binds the states to the liberties and rights contained in the first eight amendments to the Constitution.

Some legal doctrines gain currency on the U.S. Supreme Court; others do not. In writing their opinions for the Court, the justices have long sought to persuade their colleagues through the development of a wide variety of legal canons, analytical tests, and principles of interpretation. There is considerable variation, however, in the extent to which individual justices adopt these doctrines and use them to govern the resolution of subsequent cases. What explains why some members of the Court will accept and employ a new legal standard while others remain steadfast in their rejection of it?

One plausible explanation, drawn from the field of psychology, is that an individual's relative position among siblings has a formative effect on a person's receptivity to new ideas. Birth order has long been a subject of intensive study, and in recent years evolutionary psychologists have given close attention to its link to a person's openness to innovation. By positing that laterborns must be creative and adaptable as a means of distinguishing themselves from their older siblings, this research has shown that, across a wide range of human endeavor, those responsible for revolutionary ideas have disproportionately been younger siblings. Older siblings --- and firstborns

in particular --- exhibit a tendency to reject intellectual innovation, owing to their strong propensity to identify with authority and, thus, to support the status quo (Suloway 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. Leaving aside the impact that birth order may have on the ideological orientations of the justices (McGuire 2008), can birth order help account for the levels of acceptance among members of the Court for inventive ideas in legal interpretation?

To preview the test and results of this theory, I argue that the justices' micro-environments at childhood should affect their approach to legal decision making on the bench. Firstborn justices should support existing interpretive regimes, while laterborn justices should be more open to exploring and employing new alternatives. The legal context for this test is the doctrine of incorporation, the idea that the Fourteenth Amendment embraces, either in whole or in part, the substantive protections contained in the Bill of Rights, thereby applying them to the states as well as the Congress. The results demonstrate that birth order plays a prominent role in accounting for the justices' reactions to the incorporation doctrine.

### **A Theory of Birth Order and the Legal Mind**

Legal decision making requires a certain amount of creativity. Even Levi's (1948) classic *Introduction to Legal Reasoning*, which extols the virtues of reasoning by example, allows that judges must always permit the application of innovative ideas. "The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them....The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas" (p. 503). This is especially true for the U.S. Supreme

Court, where the law is so often indeterminate. The justices routinely slate for argument cases in which highly plausible legal arguments may be made for either side of a dispute. Spontaneous innovations by the Court --- i.e., landmark precedents --- become a guide for subsequent cases, but the leading precedents themselves are the product of the justices addressing a new legal issue, a new doctrine, or both. These jurisprudential innovations must spring from the intellectual ingenuity of the justices.

For some time, psychologists have known that problem solving is governed in no small degree by creativity (Getzels and Csikszentmihalyi 1976), an aptitude that is marked by a number of distinctive characteristics. “The creativity literature has identified several individual-difference variables that appear to influence creative problem solving, including divergent thinking, openness, tolerance of ambiguity, and intrinsic motivation” (Pretz, Naples, and Sternberg 2003, 21).

These qualities, which reflect a general openness to complex stimuli, are common among leaders of the artistic and scientific communities; by remaining amenable to the natural variation that runs through competing ideas, these leaders succeed in their fields by practicing a kind of Darwinian selection, continuously adapting to their current needs those ideas that are not only best suited to their present purposes but also more likely to survive over the long term (Simonton 1999).

Creativity may spring from a number of different sources. Biological attributes, such as cognitive activity in the right hemisphere of the brain, are believed to contribute to creative thinking (see Martindale 1998), but so too are the various influences of social environment (see Feldman 1998). Among these environmental factors, one of the most prominent and consistent influences is birth order. As early as the late nineteenth century, social scientists began to recognize that one’s ordinal position among siblings was associated with various personal attributes --- firstborns demonstrated higher levels of professional achievement than laterborns, for example (Galton 1874) --- and psychologist Alfred Adler (1928) was among the first to note a specific connection between

birth order and personality development. By his reckoning, the oldest child in a family places great emphasis on authority and abiding by the status quo. Younger offspring, especially the lastborns of a family, exhibit more creative traits; they are more prone to innovate in order to establish themselves as unique relative to older siblings.

The theories that account for these findings often place strong emphasis on the micro-environment --- the family setting in which children are raised --- and assume that children are motivated by a basic need for parental attention and investment. The incentives for securing that investment, however, vary dramatically depending upon the ordinal position among siblings. Stated differently, relative birth position creates a need for specialization, or “niche-seeking,” as each subsequent child recognizes that she cannot occupy the same role as her older siblings and hence searches for ways to distinguish herself (Sulloway 1996). This differentiation within the micro-environment follows regular patterns: As the sole focus on their parents’ attention, firstborns are rewarded for fulfilling (typically high) parental expectations and for deferring to their authority. Younger siblings, by contrast, must be increasingly adaptable; so, as older siblings settle into the niche of fulfilling existing expectations, the youngest must find creative ways to distinguish themselves and therefore must be the most open to life’s myriad possibilities. Lastborns, therefore, exhibit a tendency to rebel and to question authority (see also Healy and Ellis 2007; Simonton 1994). 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 diverse and non-traditional ideas, with older siblings demonstrating resistance to innovations and younger ones greater acceptance. The most exhaustive test of this proposition shows that across numerous forms of scientific innovation, firstborn scientists were the least likely to adopt new ideas while laterborn

scientists were among the first to endorse and support them (Sulloway 1996). As one synopsis of this work explains:

Frank Sulloway has conducted the most material research in this vein. He focused on why some scientists accept novel theories while others, equally notable, reject any innovations. His subjects were nearly 3,000 participants in more than two dozen controversies that deeply divided the scientific community. Among the divisive issues were the Copernican system, preformation theory, spontaneous generation, circulation of the blood, the Newtonian revolution, mesmerism, uniformitarianism, phrenology, glaciation theory, germ theory, antisepsis, psychoanalysis, relativity theory, quantum hypothesis, continental drift, and acausality in physics. Sulloway then determined whether a scientist's birth order predicted the stand taken in a debate. In general, later-born scientists were much more quick to join the scientific avant-garde. First-borns, in contrast, tended to fight rear-guard actions against the encroachment of new ideas. (Simonton 1994, 152)<sup>1</sup>

Birth order's ability to condition the acceptance of novel ideas need scarcely be restricted to the scientific community. Indeed, it could well inform the behavior of any group of individuals who deal regularly with competing notions of how best to make sense of the world. Appellate judges certainly fit the bill; in sifting through different ideas about the proper interpretation of law, they necessarily consider disparate views about the meaning and relevance of legal doctrines, arguments, and precedents of various vintage.

On the U.S. Supreme Court, of course, the need to come to terms with contending modes of legal analysis is only magnified. As the final arbiters of federal law, the justices systematically seek cases in which the law is unclear and strong arguments can be readily mustered for either side (Perry 1991; Gressman et al. 2007). Not surprisingly, disagreement among the members of the Court is common. Indeed, divisions over the proper interpretation of the Constitution as well as federal laws and regulations is the norm, driven principally by ideological differences among the justices (Maltzman, Spriggs, and Wahlbeck 2000; Segal and Spaeth 2002).

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<sup>1</sup> Simonton was commenting, in 1994, on an early, unpublished version of Sulloway's manuscript that was later published under the title *Born to Rebel* (1997).

One of the primary contexts in which the justices differ over whether to accept innovations in the law occurs in the application of precedent. In fact, some justices readily absorb new legal doctrines into their canon, while others exhibit a remarkable tenacity in opposing them, adhering steadfastly to their original opposition to the setting of precedent --- the rules of stare decisis notwithstanding, (Spaeth and Segal 2001).

The hypothesis regarding the relevance of birth order, therefore, should be obvious enough. If firstborns receive positive parental reinforcement for respecting authority and adhering to established rules, firstborn justices should exhibit a resistance to innovations in the law and oppose the development of novel legal doctrines. As Adler (1928) first observed, “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*” (p. 379, emphasis added). Laterborn justices, as children, would have found it necessary to employ “adaptive strategies” to secure parental investment by displaying an “openness to experience” and thus placing a premium on risk-taking through novel stimuli and inventive ideas (Sulloway 1996). Such justices should perforce be willing to take the road less travelled when deciding cases on the merits and support budding legal developments that may lack long-term pedigrees.

Despite the obvious testability of this linkage, scholars of the Supreme Court have not explored it. To be sure, some systematic studies have examined the connection of birth order to the Court. For example, firstborns have historically been overrepresented on the Court (Weber 1984). Given that the justices are more driven, credentialed, and accomplished than the mass public, one would expect an above average proportion of firstborns, who are high achievers rewarded for their discipline and hard work in fulfilling parental expectations. In this respect, the justices illustrate a more general tendency for firstborns to occupy positions of influence (Clark and Rice 1982; Hudson 1990; Simonton 1994). Moreover, the variation in birth order that does exist among the justices

plays an important role in explaining their political ideology and thus their voting behavior (McGuire 2008; Sulloway 1996). The ability of birth order to account for the acceptance of innovations in the law remains unexamined. What might be an appropriate setting in which to test its influence?

### **A Legal Context for Testing the Hypothesis**

Original legal ideas ebb and flow across the history of the Supreme Court. Consequently, there are numerous ways in which one might formulate an analytic strategy. Ideally, a test of the birth order hypothesis would examine its influence on the justices' acceptance of a fundamental transformation in the meaning of federal law. After all, wholesale change in the fabric of the law is more likely to provoke strong disagreement among the justices than minor alterations. Furthermore, examining the influence of birth order on major doctrinal change facilitates comparison to studies of its impact among the members of the harder sciences. Does birth order affect how the justices respond to new challenges to the law, just as it affects how scientists respond to new challenges to their leading ideas?

One of the legal contexts best suited for such an inquiry is the application of the Bill of Rights to the states via the provisions of the Fourteenth Amendment. Not only was the doctrine of incorporation a legal landmark, it also made possible a host of subsequent landmarks in which the justices protected the individual liberties enumerated in the national constitution against state encroachment. Taken together, these decisions became the basis for most of the policymaking on the modern Supreme Court. It is easy to conclude, therefore, that “[t]he most important modern development in civil liberties policy as enunciated by the United States Supreme Court has been the nationalization of the Bill of Rights” (Cortner 1975). As a case of fundamental transformation in American law, the doctrine of incorporation certainly qualifies.

Testing the birth order hypothesis, however, also requires that there be variation in the justices' support for the doctrine. Although it is now largely accepted that the states are bound by the Bill of Rights, incorporation has divided the justices --- to say nothing of lower court judges, scholars, and other members of the legal community --- since its inception (Curtis 1986).

Early in the Court's history, this question was thought to have been settled by the decision in *Barron v. Baltimore* (1833), a case in which a unanimous Court, speaking through Chief Justice John Marshall, held that the provisions of the Bill of Rights were intended to limit only the powers of Congress, not the states.<sup>2</sup> By placing new restrictions on the states, however, the Fourteenth Amendment introduced critical new language into the Constitution that, according to some, was a kind of legal conduit through which flowed the protections of the Bill of Rights. According to this view, the Fourteenth Amendment was designed to embrace those federal liberties and rights, thereby prohibiting their infringement by the states.

In 1873, in *The Slaughterhouse Cases*, the Court considered one of the provisions that served as a basis for the incorporation argument, the guarantee that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Although the Court conceded that there are privileges and immunities stemming from national citizenship that states could not infringe, it construed the notion of national rights so narrowly as to exclude any of the protections contained in the Bill of Rights.

In the years following, some supporters of expanding personal liberties turned elsewhere in the Fourteenth Amendment, advancing the position that its Due Process Clause --- which prohibits the states from depriving “any person of life, liberty, or property, without due process of law” --- was meant to ensure that the Bill of Rights was enforceable against the states. At least some justices adopted this comprehensive interpretation, most notably the elder Justice John Harlan, who argued

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<sup>2</sup> The story of incorporation is well known and ably set out in a number of sources. Richard Cortner's (1981) volume is especially useful in tracing the history of this process.

that the Due Process Clause embraced the Bill of Rights in its totality. In his dissent in *O'Neil v. Vermont* (1892), for example, he argued that “since the adoption of the Fourteenth Amendment, not one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are principally enumerated in the earlier Amendments of the Constitution” (p. 370). Harlan’s doctrine of total incorporation would have essentially erased any distinctions of federalism that might have existed in the liberties and rights in the U.S. Constitution. Although Harlan’s view never commanded a majority --- it did of course garner its supporters, most notably, Justice Hugo Black --- it helped frame the debate that took place across subsequent cases.

The result of that debate was embodied in the decision in *Palko v. Connecticut* (1937), an opinion in which the Court opted for selective incorporation, a process by which the justices would evaluate, on a case-by-case basis, whether the “immunities that are valid as against the federal government by force of the specific pledges of particular amendments [are] implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states” (pp.324-325). By employing this variant of the incorporation doctrine, the Court has come to bind the states to virtually all of the provisions of the Bill of Rights.

A number of justices remained opposed to the notion of incorporation, even as a majority of justices deployed it in a long line of cases. In *Hurtado v. California* (1884), the Court explicitly rejected any suggestion that the Fourteenth Amendment achieved any form of incorporation. Justice Stanley Matthews argued that the variation in liberties and rights across the states was a preserved element of the federal system, the Fourteenth Amendment notwithstanding. Quoting Justice Joseph Bradley, he wrote, “The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right

of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding” (p.535). Somewhat more tractably, some members of the Court were willing to allow that the concept of due process of law might include some of the protections in the Bill of Rights, but only because they were themselves a part of the due process of law that states were bound to respect, not because of any incorporation. Illustrative of this approach was the Court’s opinion in *Twining v. New Jersey* (1908), in which Justice William Moody noted that “it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law” (p. 99). Under either the *Hurtado* or the *Twining* assumption, these members of the Court rebuffed any suggested linkage between the Fourteenth Amendment and the Bill of Rights.

What accounts for such disparity in opinion among the justices? Given the radical change foreshadowed through the adoption of the doctrine of incorporation, the justices most receptive to a fundamental alternation in the relationship between the national and state governments would be those who had the greatest degree of openness, creativity, and willingness to support novel ideas. According to the birth order theory, its adherents should be laterborns, whose personalities developed out of a need to be adaptable enough to find ways to distinguish themselves from their older siblings. Firstborns, by contrast, whose parental attentions were prone to be a function of dutiful adherence to rules and authority, are the most likely candidates for rejecting incorporation. Having been rewarded as children for their support of the status quo, firstborn justices should oppose major shifts away from any longstanding conception of the law.

## Analysis

To operationalize this test, I gathered data on the expressed views of the justices on whether the Fourteenth Amendment incorporated, either through the due process clause or the privileges or immunities clause, the liberties and rights contained in the first eight amendments to the U.S. Constitution.<sup>3</sup> Justices who explicitly endorsed either total incorporation or selective incorporation were counted as supporters; justices who explicitly disavowed incorporation were counted as opponents. (Of course, the justices who have advocated incorporation have sometimes done so by degrees, a fact reflected in the several proposed legal standards for evaluating the question. For my purposes, I am simply interested in whether a justice championed some variant of the incorporation doctrine.<sup>4</sup>) Not every justice who could have necessarily staked out a position on this question. My decision rule was to code only those justices who authored a majority opinion in a case in which incorporation was at issue as well as those justices who authored or joined a concurring or dissenting opinion in such cases.<sup>5</sup>

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<sup>3</sup> My list of cases was derived from the chapter on “Amendments to the Constitution” contained in the volume entitled *Constitution of the United States: Analysis and Interpretation* (2002 edition, Washington: Government Printing Office). The chapter contains an inventory and historical review of the incorporation cases.

<sup>4</sup> Justice Cardozo endorsed the case-by-case approach of selective incorporation, while Justices Black and Harlan (the elder) defended the total incorporation of the Bill of Rights. More expansive still were the views of Brennan, Goldberg, Warren, whose believed that the Fourteenth Amendment incorporated not only the whole of the Bill of Rights but other basic, but non-explicit rights. (See O’Brien [2003, 301-315] for an analysis and discussion of these views.

<sup>5</sup> Thus, I did not count justices who merely joined a majority opinion in an incorporation case. The reason is that, unlike authoring a majority opinion or associating oneself with a distinctive view in a concurring or dissenting opinion, merely joining a majority opinion --- especially in an era when the norms of consensus frequently stifled the expression of singular viewpoints --- fails to provide sufficient and reliable information about a justice’s actual attitude on the incorporation question.

For each justice who either endorsed or opposed incorporation (N=45), I gathered additional demographic and professional data, including data on that justice's birth order.<sup>6</sup> Although birth order can be conceptualized in a number of ways, I rely upon "effective" rather than "biological" birth order (Sulloway 1996) and create a simple 3-category variable, measuring whether a justice was a firstborn child, a middleborn child in family with two or more siblings, or the lastborn in a family of two or more children.<sup>7</sup>

What do these data on birth order reveal about the justices' views on the application of the Bill of Rights to the states? A few noteworthy differences are immediately apparent. Perhaps the most striking is the contrast between the elder Justice John M. Harlan and his grandson and namesake John M. Harlan II. The elder Justice Harlan was a lastborn and as such would be expected to challenge conventional thinking. Not only was the elder Harlan supportive of incorporation, he was one of the earliest pioneers of the doctrine, serving as its standard bearer in a series of notable dissents in which he argued at length that the Fourteenth Amendment's purpose was to incorporate the Bill of Rights in its totality. In decisions such as *Hurtado v. California* (1884), *Maxwell v. Dow* (1900), and *Twining v. New Jersey* (1908), Harlan advanced the iconoclastic view that would make the explicit limitations on the federal government enforceable against the states.

The younger Justice Harlan, by contrast, was loathe to endorse his grandfather's position. As a middle child, he was less disposed to challenge longstanding legal doctrine, staunchly opposing

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<sup>6</sup> As I explain elsewhere, "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 18<sup>th</sup> and 19<sup>th</sup> centuries, periods for which dependable data may be harder to obtain" (McGuire 2008, 8 fn.4).

<sup>7</sup> As the sole focus of parental attention and expectations, only children are typically expected to exhibit the same kind of deference to existing rules and support for the status quo that is common among first borns (Sulloway 1996). Thus, I code justices who were only children (e.g., Justice Antonin Scalia) in the same category as first borns.

the incorporation doctrine. Though heir to grandfather's legacy, John Harlan II was a regular dissenter from the Warren Court's expansion of civil liberties, an expansion achieved through the use of selective incorporation (Cortner 1981). Indeed, it was his unwavering opposition to the incorporation doctrine that helped solidify his reputation as the Great Dissenter (Yarbrough 1992).

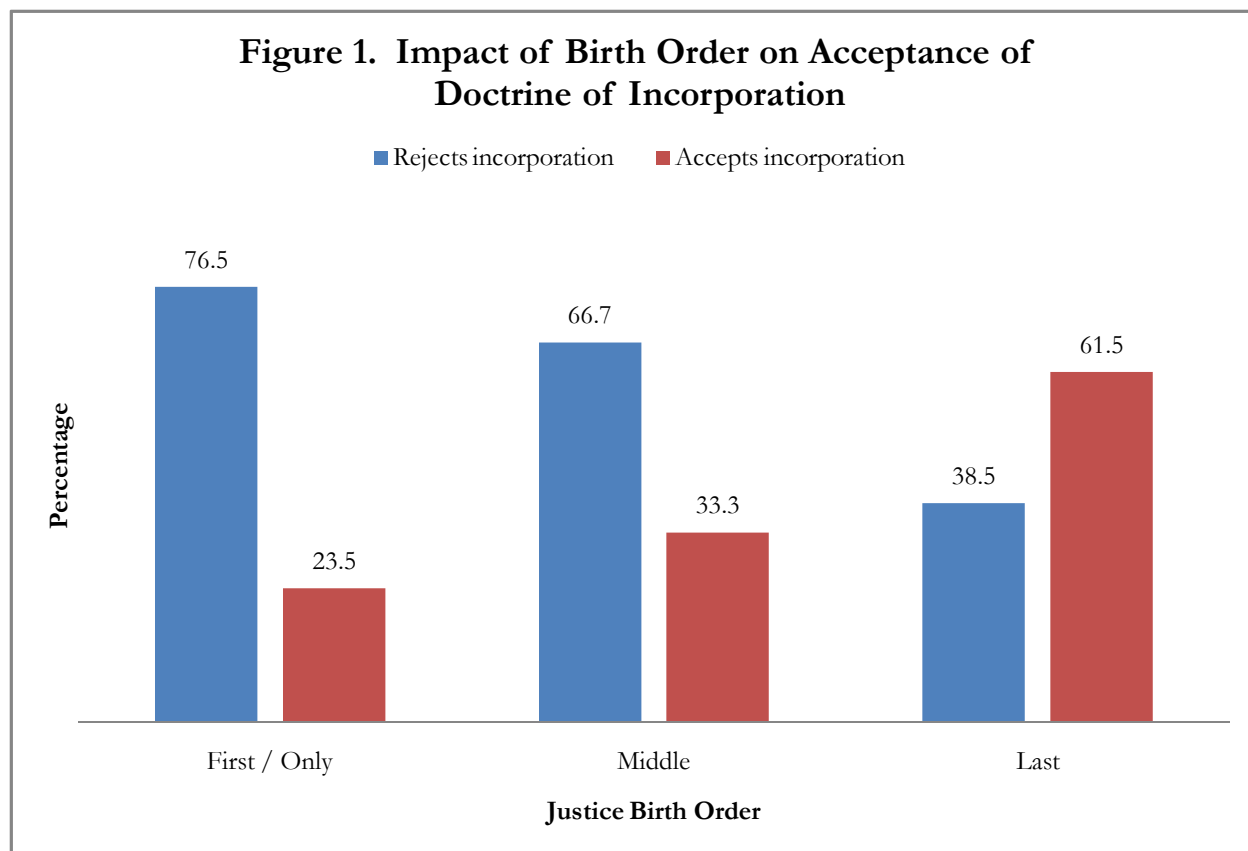
In one of the most famous of those dissents in *Duncan v. Louisiana* (1968), he wrote:

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight Amendments applicable to state action. This view has never been accepted by this Court. In my view, often expressed elsewhere, the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments. The overwhelming historical evidence...demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights....In short, neither history nor sense supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law. (174-176)

Viewed in the context of birth order, the younger Harlan would necessarily have been less enthusiastic about adopting a significant legal innovation that was more readily endorsed by his lastborn grandfather.

The contrast between the justices Harlan is merely one of numerous examples. Among the other justices in the sample, incorporation devotees include such lastborn justices as Hugo Black, Benjamin Cardozo, and Earl Warren. Among its critics were numerous firstborns, such as Oliver Wendell Holmes, Jr., Stanley Reed, and both Robert Jackson and his former law clerk William Rehnquist.

The data in Figure 1 illustrate the more general relationship of birth order to support for incorporation. Among firstborns and only children, less than 25% endorsed the application of the Bill of Rights to the states. Thus, the justices who were nurtured in an environment that reinforced their sense of responsibility and fidelity to longstanding rules exhibit only negligible degrees of readiness to uproot the traditional understanding of the Fourteenth Amendment. Compared to



their older siblings, justices who were middleborns would have had a greater need to be open to innovation in order find a niche in which they could stand apart in their parents’ eyes. Consistent with that expectation, they reveal a higher level of receptivity to incorporation than their firstborn siblings; fully one-third endorsed the doctrine of incorporation.

The greatest openness to the Fourteenth Amendment “revolution,” however, is to be found among those who, because they faced the greatest competition for parental investment, would have needed to be the most creative and unconventional, the most open to risks, adventure, and diverse alternatives. These are precisely the justices who should be predisposed to a novel interpretation of the law, one that would upset the constitutional apple cart, and the data in Figure 1 confirm that they are. More than 60% of lastborn justices endorsed the incorporation doctrine, almost twice the percentage of middleborn incorporationists and roughly two-and-a-half times the percentage found among members of the Court who were firstborns or only children.

To this point, the data suggest confirmation the birth order hypothesis. These descriptive data, however, do not consider competing causes that might undercut the impact of the personality traits formed and honed during early family life. I consider a number of plausible alternatives, therefore, and present their results in Table 1.

I begin with a bivariate probit model, labeled as Model 1, which simply confirms what was evident from Figure 1; birth order is a statistically significant predictor of a justice's endorsement of incorporation. In substantive terms, a justice otherwise indifferent to applying the Bill of Rights to the states (i.e.,  $p=.5$ ) would have only a .31 probability of supporting incorporation if she were a firstborn, but a .69 probability if she were the lastborn in the family. Measured by this basic model, the consequences of strategic adaptation by younger siblings clearly manifest themselves among the members of the Court.

A reasonable criticism of this model is that it takes no account of a justice's ideology. After all, justices who are liberal are typically protectors of civil liberties and rights and would thus favor incorporation as a natural consequence. Conservative justices would look for ways to limit those protections, and they would be natural skeptics of any expansive reading of the Fourteenth Amendment. Since firstborns and only children support the status quo and laterborns reject norms and are more open to experience, birth order may simply be a stand-in for the driving influence of ideology.

A problem with this interpretation, however, is that one's birth order temporally precedes the development of political ideology. Indeed, birth order has a systematic and significant effect on the political preferences of the justices (McGuire 2008). Seen in this way, ideology does not exercise a truly exogenous effect. Instead, its effects are governed, at least to some extent, by the personality traits imbued in the childhood environment. Birth order works indirectly on the justices' ideological behavior, conditioning their attitudes, which in turn affect their votes.

**Table 1. Explanatory Models of Support for Incorporation Doctrine**

<i>Variable</i>	(1)	(2)	(3)
Birth order	.50 * (.24)	.85 * (.45)	.54 * (.27)
Ideology	---	-.58 (1.07)	---
Age at time of appointment	---	---	-.079 * (.038)
Year of appointment	---	---	.016 * (.007)
Constant	1.30 (.52)	-.73 (1.52)	-28.28 (13.49)
Pseudo R <sup>2</sup>	.07	.15	.22
N	45	21	45
Wald Chi <sup>2</sup>	4.42 (1 d.f.) p<.04	4.25 (2 d.f.) p<.12	13.07 (3 d.f.) p<.01

**Note:** Dependent variable is coded as 1 if the justice supported incorporation, 0 if the justice opposed incorporation. Coefficients are probit estimates, with standard errors in parentheses. Birth order is coded as 1 for firstborns and only children, 2 for middle children, and 3 for lastborns. Ideology is measured as the Segal/Cover (1989) newspaper editorial scores, and the year and justice age at the time of appointment is taken from the U.S. Supreme Court Justices Database (Epstein, et al. 2007). \* p<.05 or better, one-tailed test.

Leaving that aside, it is important to exclude the possibility that birth order has no direct impact. If birth order fails to influence the justices' views on incorporation, after controlling for ideology, that would suggest that the effects of tolerance (or intolerance) of novel ideas would be exclusively channeled through the mediating force of the justices' preferences.

Unfortunately, because many of the justices who took a position on incorporation served largely in the late nineteenth and early twentieth centuries, we lack the standard ideological barometers that are commonly used to measure the justices' political preferences. Still, these data are available for a good many members of the Court who are in the sample, and this test can be constructed with that information. (I employ the ideological scores constructed by Segal and Cover [1989], which have the advantage of being completely independent of the justices' votes.)

The results of this test, which appear as Model 2 in Table 1, actually show birth order exercising the important direct influence on a justice's support for or opposition to extending the reach of the Bill of Rights; there are no discernible ideological effects. It bears emphasizing, though, that this model is not registering birth order effects that might otherwise be attributable to the justices' political preferences. A bivariate model (not shown here) in which ideology is the sole predictor of incorporation support reveals no significant relationship. Stated differently, liberals are no more likely than conservatives to endorse the doctrine of incorporation; their preferences --- at least the preferences that are readily measurable --- do not inform their judgments about the extension of the Bill for Rights.

Among the other factors that might undercut the role of birth order are variables that relate to when a justice was appointed to the Court. The age at which a justice was elevated to the Court is a potential complicating variable, since receptivity to new ideas generally declines the older one becomes (Suloway 1996, 34-36). Quite apart from a justice's age, the time period in which he came to the Court is apt to affect his views on the Fourteenth Amendment. The Court adopted selective incorporation only gradually, and once it did begin to apply the provisions of the Bill of Rights to the states, it did so in only piecemeal fashion, incorporation specific constitutional provisions on a case-by-case basis. The slow accumulation of incorporated amendments surely provided the time

necessary to weave the doctrine more fully into the fabric of the law. Surely this would reduce resistance among those reluctant to get behind “new” ideas in constitutional law.

The equation in column 3 models these effects. As expected, justices appointed to the Court at a younger age show a more ready willingness to champion the cause of incorporation than those who were not given that opportunity until later in their careers. The era in which a justice joined the Court also exercises a significant effect on a justice’s willingness to accept an extension of the Bill of Rights, irrespective of birth order. Thus, a firstborn who was appointed to the Court in, say, 1960, would be significantly more likely to support incorporation than would that same justice if he were appointed in, say, 1890. The reason is obvious; in later years, after the incorporation doctrine had gained a solid foothold in the law, it would naturally have been seen as less of a threat to the existing legal regime for a simple reason --- it *was* a part of the legal regime.

Even with these important considerations held constant, however, birth order retains its predictive power. Leaving aside when and at what age a justice joined the Court, the impact of the childhood micro-environment continues to help account for the justices’ reaction to applying the federal protections of liberties and rights to the individual states. Raised in an environment in which they did not have to compete for parental nurturing --- or alternatively, being able to dominate younger siblings who might vie for parental attentions --- justices who were only children and firstborns had incentives to identify with and support authority, thus instilling a tendency to maintain existing rules and to stand firm against potential change. It is scarcely a wonder that, as members of the Court, they would fight back against a major transformation in the fundamental law. Laterborn justices, however, aware of the need to distinguish themselves, had to remain open to finding alternative means of securing familial favor. These rebellious justices came to the Court accustomed to exploring novelty and innovation and consequently evinced greater eagerness to move the law in a new direction.

## Conclusions

“Over the millennia, children have evolved motivational systems that allow them to maximize nurturance from people around them, especially parents” (Sulloway 1996, 353). An important manifestation of that evolution is the tendency for children to seek particularized domains that systematically accord with their place in the sibling line-up. Those who are born earlier have the advantage of disproportionate parental attention and expectations. They respond by trying to fulfill those expectations and in so doing come to identify with the interests embodied in authority, placing a premium on adhering to the “rules of the game.” The later one is born relative to siblings, the greater the need to seek out creative ways of establishing a distinctive niche for oneself. These children, in particular the lastborns, have to be the most creative and maintain the greatest awareness of the varied alternatives that will enable them to develop a niche that is uniquely their own.

This basic difference in sibling strategy has lasting consequences. Older children come of age with a belief that the status quo should be preserved and that existing rules should not be changed. Younger siblings, by comparison, have learned to value differentness, since it was only by remaining open to experience that they were able to establish distinctive identities relative to their older brothers and sister. Practiced in defying convention, they grow up with more mutinous dispositions; they are iconoclastic and ready to adapt new ideas to their otherwise stolid environments.

Why are the justices so different from one another? Why would some lead a revolution in constitutional interpretation and seek to up-end established precedents in an effort to dismantle one of the foundations of the federal structure, while others cling tenaciously to the moorings of an established and undisturbed body of law? One answer is that the justices exhibit these fundamental differences in legal interpretation because, long before they became judges, they developed very different senses of how to resolve a conflict of ideas. Justices raised as firstborns and only children

developed personalities that made them predisposed to resist change. Having benefitted from steadfastly following expectations and identifying with the interests of authority, they grew to value established practices and to resist that which threatened to alter them. From their earliest days, though, laterborn members of the Court had to value divergence and adaptability, since their share of parental attention was contingent upon finding a place in the family in which they could shine. As justices, they were keen to explore new modes of constitutional interpretation.

It is easy to see why, in the context of applying the Bill of Rights to the states, *Barron v. Baltimore* (1833) would represent a venerated policy to firstborn justices. It is equally easy to comprehend why laterborns wanted to wipe the slate clean and start afresh. To be sure, the evidence presented here does not provide a complete accounting of how different justices reacted to the application of the Bill of Rights to the states. Still, it suggests that scholars that may be overlooking a basic force that structures how the justice respond to the prospects of legal change.

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