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Jurisprudence of The Nine

"The Nine: Inside the Secret World of the Supreme Court" by Jeffrey Toobin is an insightful narrative of the experiences, ideologies, personalities and procedures involved in the processes of the Supreme Court of the United States. It captures the essence of what it means to be a justice in the Supreme Court as well as the intricacies, biases, and reasoning involved in the various decisions made by each justice. However, some justices were more influential, and thus powerful, than others, such as Justices Sandra Day O'Connor and Stephen Breyer. Others had a smaller mark or influence in the scope of jurisprudence, with Justices Antonin Scalia and Clarence Thomas, despite their notoriety in the media, being the main examples. It is also evident that the various personalities, experiences, and other factors may or may not affect the decisions made by each justice, with the clear exception of cases such as *Bush v. Gore* or *Roe v. Wade*. And resulting from reading this piece, I have foregone some of my personal views on how the Supreme Court of the United States worked in favor of how it is evident that it works in terms of how decisions and compromises may be handed down. I have also learned how interest groups may even infiltrate the pervading ideologies of the court itself while my preconceptions of the Rehnquist court were far from the moderate, cautious nature that has been highlighted in most instances of this book. My view of the role of the Supreme Court as an independent, non-partisan judiciary has dramatically changed resulting from reading Toobin's work.

I admit that before reading this Toobin's work, I had almost no background knowledge whatsoever about who Justice Sandra Day O'Connor was but after reading this book, O'Connor was clearly the most influential justice in the SCOTUS in modern times, if not of all time. While the work of other justices like Breyer, Blackmun, or Rehnquist were vital for the course of many decisions, O'Connor's moderate, centrist views pervaded many decisions, especially 5-4 decisions, handed down by the Supreme Court. In fact, Toobin states that "it was O'Connor who shaped the Court's jurisprudence and, with it, the nation" as "Few associate justices in history dominated a time so thoroughly or cast as many deciding votes as O'Connor" (Toobin 8) on issues such as abortion, affirmative action, or the war powers and election of a President. For instance, in *Roe v. Wade*, although Harry Blackmun wrote the majority opinion, in the *Planned Parenthood of Southeastern Pennsylvania v. Gov. Robert P. Casey* case "the Third Circuit scarcely paid attention to Harry Blackmun's venerable landmark" but rather, "their opinions represented their best efforts at speculating how this justice – Sandra Day O'Connor – would view the case." (Toobin 45) In fact, on the issue of abortion and other controversial cases, Toobin states that "the Rehnquist Court was in fact the O'Connor Court." (45) And of course, her position at "the social as well as the political center of the Court" (Toobin 40) would also allow her a pivotal role in the bargaining process and, eventually, to decide which side on many cases would be the majority. This served her well in cases, such as the Richmond Plan, where her "position seemed to be that affirmative action was permissible, but only as redress for identifiable discrimination against specific people." (Toobin 245) Although a complaint about this reasoning included questions as to what would define "identifiable discrimination" and what could be redress, this was only a testament to her cautious centrism, as not to be too broad as to consider all race-based affirmative action as unconstitutional but also to set a limit to the what

extent of such policies could be. Also, during the Schiavo controversy, as her "radar for the political center" (Toobin 290) was not only in step with public opinion but also allowed her to avert "the real danger" that "Congress was trying to dictate to the courts how they should rule" (Toobin 291) through the joint actions both parties through the Bush administration and Congress alike in this instance. By the end of her career at the Supreme Court, O'Connor "was more influential than ever, the critical vote on issue after issue" (Toobin 274) partially because of her moderating, centrist views that were, by far, the most in-tune with broader public opinion in a court that "determined never to stray too far from what the public believed" (Toobin 274) after the paradigm shift post-*Bush v. Gore*. And in her final majority opinion in the case *Ayotte v. Planned Parenthood of Northern New England*, she enforced the "undue burden" standard that she had created in a previous opinion "And she had done it in a way that both reflected and satisfied the wishes of most Americans." (Toobin 360) Of course, her legacy of cautious centrism was not impeccable, in fact, in the court case *Bush v. Gore*, it was evident that because she "wouldn't hand her seat to a Democratic president" (Toobin 168) she saw the case as an issue of practical concern that "was more political than legal" (Toobin 188) and led her to vote along partisan lines. This was likely the result of her own political career as a state representative in Arizona and resulting loyalty to the Republican party. Ironically enough, she would come to oppose many of the new President's policies and saw him and her own beloved Republican party as powerful adversaries in "the fight for judicial independence". (Toobin 292-293) Additionally, her opinion in the *Grutter* affirmative action case was evidence that she is capable of "legislating from the bench" in that she claimed that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (Toobin 263) although, albeit measurable, such a prediction remains unenforceable. Despite that, Toobin

reminds us that "On affirmative action, she picked a result, and reached a compromise, that was broadly acceptable to most Americans." (Toobin 263) It should also be noted how an opinion by Justice Powell in *Regents of the University of California v. Bakke* served as precedent in her opinion in the *Grutter* case, evidence of her belief in both stare decisis and the idea of a living Constitution. But while her legacy is clearly vast, it is important to remember that because of "her role in 5-4 decisions", her legacy is also tenuous as these split decisions "are the most vulnerable to revision or even reversal with each new case" (Toobin 9). Nonetheless, her "uncanny ear for American public opinion" (Toobin 9) and centrist, moderate views made her the pinnacle of several of the most controversial decisions to have ever been argued in front of the SCOTUS, thus, cementing her position as one of the most influential justices to have ever served in the national tribunal. Toobin even states that "No other woman in United States history, and very few men, made such an enormous impact on their country." (360)

Although Justice Antonin Scalia was often regarded as the flagbearer of the conservative cause on the Supreme Court, Justice Clarence Thomas is much more radical, conservative, and relatively irrelevant in the jurisprudence of the court. Toobin claims that Justice Clarence Thomas "embraced an alternative model of judging, one where he viewed himself as a principled outsider who cared little whether his opinions commanded a majority or even a single additional vote" and, in fact, "was a justice neither influenced by nor with influence upon his colleagues." (116) Thus, it is safe to say that Thomas was likely the least influential of all his colleagues. His status as an ideologue on the bench meant that "Rehnquist rarely assigned important majority opinions to Thomas, because his extreme views made it difficult for him to persuade a majority of his colleagues to join him." (119) In fact, Toobin claims that "it is difficult to point to a single truly significant majority opinion Thomas had written." (119-20) One reason that Toobin gave

for his perceived radicalism is that "the greatest contrast between Thomas and his colleagues was that he fundamentally did not believe in stare decisis, the law of precedent… no one besides Thomas would have dismissed two hundred years of stare decisis in such a cavalier way." (120) But at the same time, Thomas has become known for his well-documented silence on the court, rarely asking questions due to his also well-documented scandal involving one of his former colleagues, Anita Hill, and the media onslaught which ensued afterwards. Thus, he even claims to have a sign in his office reading "To avoid criticism, say nothing, do nothing, be nothing", a clear symbol of his intent in terms of the justice's role on the bench. Although he is considered to be "ideologically isolated, strategically marginal, and, in oral argument, embarrassingly silent. He was also universally adored" (Toobin 120) and well-known for his overall good nature. And despite his relatively shallow role in jurisprudence, Clarence Thomas receives numerous financial benefits from his position as both a Supreme Court justice and a hero for the conservative cause. This position is also aided by the fact that his wife, Virginia, "was already a well=known lobbyist for the U.S. Chamber of Commerce when they married in 1987" also "became director of executive branch relations at the Heritage Foundation", thus, explaining his "close ties to the conservative political and business worlds". (Toobin 131) There is no doubt that, in the public eye, Clarence Thomas is one of the most well-known figures on the bench, as would be the case as "His unforgettable confirmation hearings in 1991 had seared his visage into the national consciousness." (Toobin 5) However, Thomas has had little influence on the actual decisions passed down by he and the other justices on the bench other than the security of his vote as a reliably conservative one. Thus, he is notorious for the fact that he rarely, if ever, asks questions during oral arguments and, during the 2006-2007 term, "Thomas had sat through one hundred and four oral arguments and had not asked a single question." (Toobin 387) Thus,

Justice Clarence Thomas has cemented his legacy as one of the least influential, and thus, least powerful justices to have ever served on the court.

The Supreme Court is meant to be an independent tribunal, ideally free from political influence (with life tenure) and outside influence. However, it is evident that the Supreme Court of the United States is not, in fact, free of partisan or ideological boundaries that do shape many of the decisions handed down by the court. One of the clearest instances of this was the decision for *Bush v. Gore*, of which Justice Souter, part of the dissent, believed "His colleagues' actions… so transparently, so crudely partisan that [he] thought he might not be able to serve with them anymore." (Toobin 208) However, Toobin states that *Bush v. Gore* also "turned O'Connor and Kennedy toward their more liberal colleagues" in addition to "the Bush administration itself." (Toobin 265) Not only had the Bush administration soured Justice O'Connor's reverence for the President and the Republican party itself, but she would also write scathing opinions, such as her majority opinion in *Rasul*, as "a testament to her growing estrangement from the Bush administration" (Toobin 274) further testament of her disdain for the administration's actions. Overall, the ideological shift to the left of the Rehnquist court served both O'Connor and Kennedy as its chief beneficiaries "as they controlled the outcome of more cases and won assignments from Stevens for such opinions as *Lawrence, Grutter,* and *Hamdi*. But in his customary quiet way, David Souter was also swept up in the change, which helped pull him out of his post-*Bush v. Gore* funk." (Toobin 283) But it should also be noted that Justices, such as O'Connor, Souter, and Kennedy believed in a "living Constitution" which included "such factors as subsequent decisions of the Court, the expectations of the public, and the underlying values in the Bill of Rights, not just its text." (Toobin 66) Thus, this perceived shift to the left was inevitable as the Bush administration would push for a politically rightward,

conservative agenda. However, it was, of course, O'Connor who is regarded as the centrist and the most influential of her colleagues especially where, in the Casey case for instance, her "solution to the problem of abortion closely reflected public opinion on the issue" (Toobin 69) as was the case with most of her opinions throughout her career on the independent tribunal. Additionally, Justices such as O'Connor and Kennedy, by far the two most well-travelled justices, used commentary and influence from international law as precedent for many of their opinions. And when the Rehnquist court began hosting various international leaders, such as Kofi Annan and Aharon Barak, as well as prominent American visitors such as Condoleezza Rice, Toobin claims that "The two-way dialogue pushed the Court – and especially Kennedy – to the left." (Toobin 217) But, in fact, Kennedy has always carved out his own path on the bench, and is known for his somewhat philosophical views on the meaning of the law as someone who "saw law as not just a collection of cases but a system that ought to be explainable to, and understood by, the next generation of lawyers" (Toobin 63) which manifests itself in the, sometimes dreaded, intellectual reasoning he would assign to his opinions. And as it turns out, with the retirement of O'Connor, Kennedy would continue the legacy of centrism that began with his relationship with O'Connor with which he "had had idiosyncratic enough views that it wasn't always clear whose vote would turn out to be dispositive." (Toobin 379) Justice Breyer also became an influential figure on the Court, during the Rehnquist years, for his alliance with O'Connor with whom he "represented the Court's swing vote" (Toobin 351) in many of the cases of that time. And in his book, *Active Liberty*, Breyer wrote about his philosophy of "active liberty" that stated that a Constitution should not only protect "citizens from government coercion" but also affirmatively gives "power to citizens themselves to participate" and that "Government existed to give everyone an equal chance to join in the political process." (Toobin

352) However, Justice Ruth Bader Ginsburg has, expectedly, been one of the strongest judicial activists on the Rehnquist Court and who, during the advent of the Roberts Court, claimed that "the majority's ruling ignored the realities of actual litigation" (Toobin 384) pertaining to the *Ledbetter* case. On the other hand, Justice Antonin Scalia, a well-known strict originalist (whose views were only matched by those of Justice Thomas) was influential, in terms of "his theatrics in oral arguments and the panache of his dissenting opinions", but did not garner that much influence upon his colleagues, especially with O'Connor as his repulsive behavior pushed "her toward her moderate, swing role" and "a similar effect on Kennedy." (Toobin 369) With the array of political ideologies and philosophies of jurisprudence that each justice brings to the table, decisions are not made in a vacuum (and rightly so) but are, instead, the culmination of the expertise that each justice on the tribunal possesses. If that were not the case, who knows where the law may be at this point? If all members of the judiciary were strict originalists, the law would likely literally resemble exactly what the Founding Fathers intended and, thus, be out of tune with modern times, tastes, and public opinion. But if every justice chose the route of judicial activism, the law would be vague and any precedent would likely be rendered meaningless. However, a balance between originalism and activism allows for the mitigation of outside influences to conquer the interests of the court, keeping in the spirit of moderation that has been established in the Rehnquist court, despite the changes made during the Roberts court wherein the Court would become "a more conservative institution, and so, it followed, were the rules of American life" (Toobin 385) enforced by the policies of the Bush administration.

Before reading this book, my perspective of what the Supreme Court did was mainly influenced by my own ideological preferences and, admittedly, what I saw on the media. I believed that the Supreme Court was a bastion of ideologies clashing with each other, one

wherein liberal and conservative justices would not, and could not, compromise because of the perception of a warring nature between such ideologies that I, personally, have indoctrinated myself with. So, when I read this book in its entirety, it was extremely surprising to see that, in even the most controversial cases, there was bargaining, compromise, and agreement amid clear tensions between the more fiercely ideological members of the Supreme Court of the United States. Of course, the influence of Justice Sandra Day O'Connor was an overwhelming factor in many such instances, as the pervading centrist of the Court, and she had a particularly interesting take, in my opinion, on the role of the Supreme Court of the United States itself. In her words, while elected officials of other branches of government are "at rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted." (Toobin 291) Thus, the independent judiciary must be able to make decisions even if they "may be contrary to the interests of other branches of government." (Toobin 291) Despite the political and ideological leanings of the court itself, I see her view of the role of the Supreme Court as ideal in the general scope of the federal tribunal, and lower courts, to serve the interests of the people. However, one of the more interesting coalitions that Toobin highlights in the book was the development of the troika among Justices Souter, O'Connor, and Kennedy in the *Planned Parenthood* case. While Justices Souter and O'Connor were dedicated to "uphold what they came to call the 'essence' of Roe, and they agreed that they should try to strike down the spousal notification provision" (Toobin 62) they only needed the vote of Tony Kennedy to secure a majority. Despite his devout Catholic faith and upbringing, Toobin states how "Kennedy knew the difference between his duties as a judge and his convictions as a Catholic" so although he had his views of personal opposition to abortion as a practice, "that did not

answer the question of whether the Constitution protected it." (63) However, I still believe that many obviously ideological and partisan effects are endemic on the bench due to the politicization of the position of justice of the Supreme Court. For instance, with the possible nominations of Miers and Gonzales by Bush, "critics on the right could not point to any unacceptable positions" taken by either person, but in either case, "White House officials watched with astonishment a colleague they knew to be one of the most fervent conservatives on the staff portrayed as a closet liberal." (Toobin 341) While such emphasis on partisanship is natural, as both liberals and conservatives aim to see justices on the bench that reflect their political leanings, I personally see it as damaging to the integrity of the court to have overtly political or ideological justices on the bench. While I see collaborations, such as the troika, as helpful because they build upon the comradery that's essential in the functioning of the court, the overtly political nature of the search for replacements in the instance of vacancies personally worries me in terms of the state of the court. To me, this takes the focus away on the jurisprudence of the court itself and unfortunately refocuses on ideological leanings, thus, making the compromises necessary for Court decisions to occur more and more difficult. In spite of the obvious political and ideological tensions, however, I now have much more faith in the inner workings of the Court and, thus, its ability to serve the interests of the people by interpreting the law.

Toobin's book, "The Nine: Inside the Secret World of the Supreme Court" was a truly intriguing read that has personally given me inside into the inner workings of the Supreme Court of the United States. It taught me about the various relationships, struggles, and external factors that the justices face in everything from making their judgments and the like to seeing as to how some jurists are more influential than others, and vice-versa, in the scope of jurisprudence. For

better or for worse, I have a better understanding of the ideological and political battles within the court, as well as the agreements, compromises, and the like necessary for decision-making. These are truly topics that I have never explored before and would never have had the opportunity to do so had I not chosen to take this course. I now have a much greater sense of reverence to the work done by the federal judiciary, resulting from both this course and this book, and I am likely to pursue more opportunities to learn more about the Court and the judicial process in general.

WORKS CITED

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