Ideological Drift among Supreme Court Justices: Who, When, and How Important?*

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Abstract

When President George W. Bush declared that his Supreme Court nominee, Harriet E. Miers, was "not going to change, that 20 years from now she'll be the same person with the same philosophy that she is today," no one should have been shocked. To the contrary: The President was merely reiterating a claim dominant in public and scholarly discourse over the Supreme Court—that justices come to the Court with robust ideological outlooks and do not veer from them over the course of their tenure. Nonetheless, and despite the commonplace nature of the claim, it is not without its share of skeptics; indeed, some commentators now contend that ideological drift among Supreme Court justices is not just possible but likely.

Using systematically developed data and sophisticated statistical tools, we address the question of whether justices remain committed to a particular doctrinal course over time. The results, as it turns out, could not be clearer: Contrary to the received wisdom, *virtually all justices serving since 1937 grew more liberal or conservative* during their tenure on the Court.

Finding that change is the rule, not the exception, we develop the implications of our findings for the justices' appointment to the Court and the doctrine they develop once confirmed. We show, for example, that Presidents hoping to create a lasting legacy in the form of justices who share their ideology can be reasonably certain that their appointees will behave in line with contemporaneous expectations—*at least during the justice's first term in office.* But because most justices fluctuate soon thereafter, Presidents emphasize ideology to the neglect of other considerations—such as the advancement of their political party's electoral ambitions—at their own peril.

We conclude with a discussion of the prospects for legal change among the justices of the Roberts Court. Here we consider two plausible scenarios, one in which the justices remain relatively true to their current doctrinal inclinations and another in which members drift. Either way, we find that legal change may be possible—a finding that defies contemporary expectations about the inertia of justices and, by implication, the Court in the absence of membership turnover.

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I Introducton

When the U.S. Supreme Court invalidated the Bush administration's plan to use military commissions to try enemy combatants in *Hamdan v. Rumsfeld*,[1] the decision fueled more than a national debate over the powers of the President. It also generated commentary about the ideological composition of the Court. Conservatives proclaimed that they were just one justice, *just one vacancy*, away from victory in *Hamdan*[2] and a handful of other recent decisions that worked against their interests.[3] Liberals worried about just as much.[4]

The commentary over *Hamdan* reflects a widely shared belief among journalists, politicians, scholars, and even judges: alterations in the Court's jurisprudence are unlikely in the absence of membership change. That is because the justices themselves *do not* exhibit ideological change over the course of their tenure.[5] To paraphrase the old proverb, once a conservative, always a conservative. Likewise for liberals.[6]

Why the assumption of stable preferences is so deeply held is open to speculation. Some analysts suggest it would defy logic to expect mature persons, with years of experience in the legal world, to revisit their jurisprudential views. Would a John G. Roberts, Jr.—a justice who has studied, litigated, or adjudicated court cases for over half his life—alter his ideological preferences? The answer, according to Professor David A. Strauss, is that he would not:

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[1] 126 S. Ct. 2749 (2006).

[2] The vote in *Hamdan* was five-to-three. Because he served on the appellate court panel that had upheld the commissions, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), Chief Justice Roberts recused himself. Had he participated, many commentators assume he would have once again supported the administration. See, e.g., Cass Sunstein, *The Court's Stunning Hamdan Decision,* New Rep. Online, June 30, 2006, http://www.tnr.com/ ("The current Court itself remains badly divided. We should emphasize that *Hamdan* was decided by a narrow margin of 5-3, and we should not neglect the fact that Chief Justice Roberts did not participate in the decision; the reason is that he was part of the three-judge lower court, now reversed, which had ruled broadly in the President's favor.")

[3] E.g., the five-to-four decisions in *Kelo v. City of New London*, 545 U.S. 469 (2005) (taking of property for economic development does not violate the "public use" restriction of the Fifth Amendment's Taking Clause); *Grutter v. Bollinger,* 539 U.S. 306 (2003) (a law school's use of race in admissions decisions does not violate the Fourteenth Amendment's Equal Protection Clause; *Roper v. Simmons,* 543 U.S. 551 (2005) (the Eighth Amendment prohibits the imposition of the death penalty for crimes committed when the defendant was under the age of 18).

[4] Commentary on *Hamdan* and the ideological composition of the Court appears on numerous blogs. See, e.g., the Journal of Applied Episdemology, *Today's Hamdan Decision*, June 30, 2006, http://appliedepistemology.com/node/96 ("The scary lesson that Hamdan teaches us is that the only thing currently standing between American democracy and an executive branch autocracy is John Paul Stevens' bath mat."); the National Review Online, *Five, Wrong on Hamdan*, June 30, 2006, http://article.nationalreview.com/ ("The Mystery Five [justices] have simply practiced once again the utterly lawless willfulness that they have proclaimed to be their mission. And they undoubtedly know that they will receive ample cover, in the form of fawning accolades, from legal academia and the liberal media.").

[5] We develop these points *infra* Part IIA; see also *infra* note 25. Suffice it to note here that the claim of ideological consistency not only appears in commentary on the Court but undergirds many important theories of judicial decisions, or at least tests of those theories. Consider "separation of powers" theories, which suggest that the Court takes into account the preferences and likely actions of Congress when it interprets statutes. The typical assumption is that the *sincere* preferences of Court do not change unless the center of the Court (the median) changes as a result of membership turnover. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions,* 101 Yale L. J. 331 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game,* 79 Calif. L. Rev. 613 (1991); Pablo Spiller & Rafael Gely, *Congressional Control of Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988,* 23 RAND J. Econ. 463 (1992) (all three detailing how the Court's sincere or raw preferences move with membership changes but explaining why the Court may not act on those preference). Likewise, some adherents of the attitudinal model of judicial decisions, which holds that justices vote on the basis of their ideology, describe attitudes as "relatively enduring." See David W. Rohde & Harold J. Spaeth, Supreme Court Decision Making (1976), 72.

[6] The proverb is "Once a thief, always a thief".

> As Americans try to figure out what Judge John G. Roberts Jr. will be like as a U.S. Supreme Court justice, one idea seems to [be] that whatever Judge Roberts is now, once he is on the court he might develop into something different. In particular, the thinking goes, even if he is the intense conservative suggested by his Reagan-era memoranda, he may become more moderate as a justice.
>
> Don't believe it.[7]

Shoring up intuitions about the implausibility of preference change is empirical support in the form of a William H. Rehnquist on the right and a Thurgood Marshall on the left—justices who never seemed to veer much from their preferred ideological course. When President Richard Nixon appointed Rehnquist to the Court, virtually all observers of the day deemed the nominee a reliable conservative.[8] Likewise at the time of his appointment, the press declared Justice Marshall a probable addition to the Court's "liberal bloc."[9] That these initial ideological labels well characterized the justices' future behavior only serves to confirm Professor Strauss's claim about the unlikelihood of change. Or so the argument goes.

And yet, despite the commonplace nature of the claim, it is not without its share of skeptics. Whether pointing to anecdotes or more systematic evidence, several analysts now contend that ideological drift is not just possible but likely.[10] Exhibit A, they say, is Harry A. Blackmun. While the justice himself maintained that it was the Court, not he, that moved—"I don't believe I'm any more liberal, as such, now than I was before," Justice Blackmun once told a reporter[11]—many scholars disagree.[12] To them, it is hard to believe that the same justice who dissented from the Court's 1972 decision to strike down existing death penalty statutes[13] wrote, in 1994, "From this day foward, I no longer shall tinker with the machinery of death."[14]

But is Justice Blackmun the rule or the rare exception? Do most justices remain committed to a particular doctrinal course throughout their careers, as Strauss and others contend, or do the skeptics have the better case? After reviewing the relevant commentary in Part II, we deploy state-of-the-art methods to address these questions. The results, as it turns out, are striking: Contrary to the received wisdom, *virtually every justice serving since the 1930s has moved to the left or right or*, in some cases, *has switched directions several times.*

Finding that ideological drift is pervasive, in Part IV we develop the implications of our results for two moments in the justices' career cycle: the events surrounding their appointment to the

[7] David A. Strauss, *It's Time to Deal with Reality: The Myth of the Unpredictable Supreme Court Justice Debunked,* Chi. Trib., Aug. 7, 2005.

[8] See *infra* Part IIA.

[9] Louis Hohlmeier, *Thurgood Marshall Chosen for High Court; First Negro will Bolster Liberal Segment*, Wall St. J., June 14, 1967, at 3.

[10] See Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change,* 70 Mo. L. Rev. 1209, 1220 (2005) (a "small but emerging body of empirical literature suggests that preference change in a phenomenon which affects many justices over the course of their careers."). See also *infra* Part II for a review of studies suggesting that justices change over time.

[11] Quoted in John A. Jenkins, A Candid Talk with Justice Blackmun, NY Times, Feb. 20, 1983, 26.

[12] See, e.g., Note, *The Changing Social Vision of Justice Harry A. Blackmun: The Conscientious Conscience,* 96 Harv. L. Rev. 717, 717 (1983) ("Harry A. Blackmun has undergone a remarkable transformation"); Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 235 (2005) (presenting data documenting Blackmun's movement.); Ruger *supra* note 10, at 1212 ("diverse evidence suggests that . . . Blackmun significantly changed.").

[13] *Furman v. Georgia*, 404 U.S. 238 (192)

[14] *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

Court and the doctrine they develop once confirmed. As to the first, we show that Presidents hoping to create a lasting legacy in the form of justices who share their ideology can be reasonably certain that their appointees will behave in line with expectations—*at least during the justice's first term in office.* But, even before hitting the first-decade mark, most justices fluctuate, leading to a degradation of the relationship between their preferences and their votes. The implication is clear: the President and his supporters in the Senate may be unable to guarantee the "entrenchment" of their ideology on the Court in the long or even medium term.[15] As a result, Presidents may be best off placing comparatively greater emphasis on advancing the interests of their political party—rather than their own ideological interests—through the appointment of justices designed to appease particular constituencies.

As for the development of doctrine, contrary to the prevailing wisdom, we find that ideological movement can manifest in important legal change. To provide but one example, had Justice Sandra Day O'Connor's initial preferences remained stable, odds are that she would not have provided the fifth vote to uphold Michigan Law School's affirmative action program in the 2003 case, *Grutter v. Bollinger*.[16] The implications of this finding are many, not the least of which is that attorneys' expectations about success (or failure) with particular justices may rest on shakier ground than they suspect.

We conclude, in Part V with a discussion of the prospects for legal change among the justices of the Roberts Court. Here we consider two plausible scenarios, one in which the current justices remain relatively true to their current doctrinal inclinations and another in which members move. Either way, we find that legal change (or, in some instances, surprising stability) may be possible—a finding that defies contemporary expectations about the inertia of justices and, by implication, the Court in the absence of membership turnover.

II Change on the Court: Conventional Views, Challenges, and Implications

When Professor Strauss implies that John G. Roberts, Jr. will not and, in fact, most justices do not change their ideological outlook with time, he expresses the conventional view of judging. Indeed, even before their confirmation, journalists, scholars, and naturally enough policy makers place justices into one ideological box or another, and assume that they will stay put over the

[15]See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution,* 87 Va. L. Rev. 1045, 1067 (2001) who explain their theory of partisan entrenchment in the following terms:

> When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate. They will serve for long periods of time because judges enjoy life tenure. On average, Supreme Court Justices serve about eighteen years. In this sense, judges and Justices resemble Senators who are appointed for 18-year terms by their parties and never have to face election. They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution. The temporal extension of partisan representation is what we mean by partisan entrenchment.

As other scholars have recognized, a finding of widespread preference change could present a challenge to theories of partisan or especially ideological entrenchment. See, e.g., Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointment (2005), 141 ("Whether or not packing the courts is a laudable goal, a variety of factors can conspire against Presidents seeking to achieve it," including "changing attitudes."); Ruger, *supra* note 10, at 1211 ("The possibility that judicial preferences might vary significantly over time compels reconsideration of . . . entrenchment theory.")

[16]539 U.S. 306 (2003).

course of their tenure.[17]

To see the point we need only consider the most recent appointee, Samuel A. Alito, Jr. From the day President Bush announced the nomination, newspapers as ideological disparate as *Wall Street Journal* and the *New York Times* deemed Alito a "right-of-center" nominee. "With yesterday's nomination of Sam Alito to the Supreme Court," wrote the *Journal's* editors, "President Bush reached into his John Roberts' playbook to name a judicial conservative with impeccable credentials."[18] The liberal *Times* agreed:

> The [President's] solution to almost every problem seems to be either to rely on a close personal associate or to pander to his right wing. When the first tactic failed to work with the Harriet Miers nomination, Mr. Bush resorted to the second. The Alito nomination has thrilled social conservatives, who regard the judge to be a surefire vote against abortion rights."[19]

After the Senate's hearings, the editors of both papers became even more secure in their predictions. "What we're confident Judge Alito won't do," proclaimed the *Journal*, "is join the Court's liberal wing on cases such as *Lawrence* [*v. Texas*], and intrude willy-nilly into social matters best left to legislatures to solve."[20] The *Times* even advocated a filibuster because of "Judge Alito's refusal to even pretend to sound like a moderate."[21]

Clearly the assumption that Alito was a conservative and *would remain* a conservative dominated contemporary discourse, as it has over so many recent nominations. Nonetheless, at least some commentators question the assumption of ideological stability.[22] Both doctrinal and empirical analyses, they assert, support the view that justices can and do change over the course of their tenure. They even contend that ideological movement is possible for those justices, such as Alito, who appear solidly in one ideological camp or the other.[23]

In what follows we briefly consider the conventional assumption about the lack of ideological movement and challenges to it. We end with a consideration of why this debate is worthwhile to resolve.

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[17] See, e.g., Richard G. Wilkins, et al. *Supreme Court Voting Behavior: 2003 Term, 32 Hastings Const. L.Q. 769, 776* ("both the media and academicians are fond of attaching ideological labels to the Court and its personnel."); Ruger, *supra* note 10, at 1209-1210 ("We are fond of putting our [justices] into neat adjectival boxes. ... These typologies often reflect perceived attitudinal or ideological preferences: some justices are called 'liberal' or 'conservative' or 'moderate' .... But efforts to describe and classify the Justices ... often rely ... on the idea that once a Justice is properly pegged, his or ideology ... is not expected to evolve much."); Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90,* 21 Hofstra L. Rev. 667, 701 (1993) ("assigning ideological labels" is appropriate because "during most Terms, most Justices voted consistently with their labels.")

[18] *A Fight Worth Having*, Wall St. J., Nov. 1, 2005, at A16.

[19] *Another Lost Opportunity*, NY Times, November 1, 2005, at A26.

[20] *Hot Topic: Stare Indecisis*, Wall St. J., January 14, 2006, at A8.

[21] The editorial continued: "A filibuster is a radical tool. It's easy to see why Democrats are frightened of it. But from our perspective, there are some things far more frightening. One of them is Samuel Alito on the Supreme Court." *Senators in Need of a Spine,* NY Times, Jan. 26, 2006, 22A.

[22] CITE needed here. See infra.

[23] See *infra*, Part IIB.

A The Conventional View

As even our brief discussion thus far suggests, no one should have been shocked when President George W. Bush declared that his Supreme Court nominee, Harriet E. Miers, was "not going to change, that 20 years from now she'll be the same person with the same philosophy that she is today."[24] To the contrary: The President was merely reiterating an assumption dominant in public and scholarly discourse on the Supreme Court—what we call the assumption of stability, or the idea that justices come to the Court with robust ideological outlooks and do not veer from them over the course of their tenure.[25]

The genesis of this view seems to lie both in intuition and empirical observation. Intuitively, it seems implausible to believe that justices would have pause to rethink their presumably well-entrenched beliefs over matters jurisprudential. Consider Ruth Bader Ginsburg. As a former law professor, she presumably held strong views about the areas of law in which she taught, wrote, and litigated; it is the odd law professor who does not, and Ginsburg appears to be no exception.[26] As a U.S. Court of Appeals judge, she likely held or developed preferences over the wide array of legal matters she adjudicated; it is the odd judge who does not.[27] Moving up to the Supreme Court, under most theories of judging, would give her even more freedom to act on those preferences, and act on them term after term.[28]

Justice Ginsburg, of course, is not alone. In looking at the thirty-six justices who have served since 1937,[29] twenty were law professors or judges at the time of their nomination[30]—including each and every member of the current Court. On average, the justices serving in the 2006 term sat as federal appellate judges for seven years. The three former law professors, Justices Scalia, Breyer, Ginsburg, worked in the academy for a combined total of thirty-seven years.[31]

[24]Press conference, October 4, 2005. Transcript available at: http://www.whitehouse.gov/news/releases/2005/10/20051004-1.html.

[25]Ruger, *supra* note 10, at 1218, deems the assumption of preference stability "near hegemonic." With the scattered exceptions we review in *infra* Part IIB, we wholeheartedly concur with Ruger's sentiment. The assumption lies at the core of many theories of judicial decision making, or at least the tests of those theories. For examples, see *supra* note 5, as well as Ruger, *supra* note 10, at 1217-1218. It has been repeated in many scholarly studies of the Court, as well as in more informal commentary. See, e.g., Strauss, *supra* note 7; Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court,* 82 Am. J. Pol. Sci. 905, 907 (develops a method for assessing policy change based on the assumption that justices' preferences "remain constant throughout [their] career"); Glendon Schubert, The Judicial Mind Revisited (1974), 159, (presents data showing a high-level of stability in voting for justices serving from 1946-1968). .

[26]Actually, prior to her service on the U.S. Court of Appeals for the District of Columbia, Justice Ginsburg was a prominent and unabashed supporter of women's rights and a pro-choice advocate. Among her many writings on these subjects are *The Equal Rights Amendment is the Way,* 1 Harv. Womens L. 19 (1978); *Sexual Equality Under the Fourteenth and Equal Rights Amendments,* 1979 Wash. U. L. Q. 161 (1979).

[27]For analyses of the effect of ideology or partisanship on judging at the federal appellate level, see Cass R. Sunstein, et al. Are Judges Political: An Empirical Analysis of the Federal Judiciary (2006); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals,* 107 Yale L. J. 2155 (1998).

[28]E.g., on the attitudinal model of judging, justices vote on the basis of their sincerely held ideological attitudes toward cases before them. Freeing justices from considerations other than ideology, according to attitudinalists, is the lack of electoral accountability and ambition for higher office, the control they enjoy over their agenda, and the dearth of judicial superiors. See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).

[29]To derive the figure of thirty-six we count Chief Justice Rehnquist only once.

[30]Data in this paragraph are derived from Lee Epstein, et al., The Supreme Court Compendium (2007), Table 4-12.

[31]Justice Breyer, at Harvard from 1967-70; Justice Ginsburg at Rutgers, 1963-72 and Columbia 1972-80; and

Lending weight to intuitions about the entrenchment of ideology, and thus the implausibility of change, comes a wealth of behavioral data. Particular impressive is the extent to which initial impressions of the ideology of the justices, as nominees, correlate with their subsequent voting on the Court. At the time of his appointment, as we noted, journalists deemed Samuel Alito a conservative.[32] Three decades earlier, newspaper editors wrote much the same of the Richard Nixon nominee, William H. Rehnquist. "Mr. Rehnquist," according to the *New York Times* was "a Goldwater conservative [with] a brilliant professional background but a questionable record on civil liberties."[33] And twenty years before Rehnquist, the press pigeon-holed William J. Brennan, Jr. as a liberal.[34]

The newspaper editors were hardly in error. Over the course of his thirty-five years of service Chief Justice Rehnquist supported defendants in only two out of every ten criminal cases, and civil rights plaintiffs in but 27 percent of the 694 discrimination suits in which he participated.[35] Those figures for Brennan were nearly the reverse. In only 20 percent of the cases did he vote *against* defendants or civil rights plaintiffs. As for Justice Alito, his voting in the 2005 term places him closer to a Rehnquist than a Brennan, just as the editors predicted.[36]

It is one thing, of course, for the press to forecast accurately the behavior of a few seemingly extreme ideologues, the Rehnquists and Brennans, and quite another to predict the voting of the balance of nominees—some of whom had said or written little prior to their appointment. Nonetheless, the newspaper editors generally meet that more rigorous standard, as Figure 1 shows. There we draw a comparison between the editors' initial branding of the Supreme Court nominees (as analyzed and summarized by Jeffrey A. Segal, et al.) and the votes they, as justices, later cast.[37] Specifically, on the horizontal axis we display the editors' ideological assessments, ranging from very liberal to very conservative.[38] Note that nominees deemed conservative by the journalists appear toward the right of the figure (e.g., Chief Justice Rehnquist); liberals are toward the left (e.g., Justice Brennan). On the vertical axis we show the percentage of conservative votes cast by the justice over the course of his or her career.[39] Justices who cast a high percentage of conservative

Justice Scalia at Virginia, 1967-74 and Chicago, 1977-82. We include here only full-time service. Justice Alito served as an Adjunct Professor at Seton Hall from 1999-04; Justice Kennedy lectured at the University of the Pacific between 1965-68; and Chief Justice Roberts was an adjunct at Georgetown in 2005. Justice Stevens was a lecturer at Northwestern, 1950-54 and at Chicago 1954-58.

[32] See *supra* notes 18, 19, 20, and 21.

[33] *The Court Nominations*, NY Times, Oct. 22, 1971, at 38.

[34] See *infra* Figure 1.

[35] We computed the figures in this paragraph from the Harold J. Spaeth's U.S. Supreme Court Database, with analu=0 and dec_type=1, 6, or 7, available at http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm.

[36] According to Spaeth's database, *supra* note 35, in the 2005 term Alito supported criminal defendants in 16.7 percent of 12 cases in which he participated; he supported civil rights plaintiffs in 3 of 5 cases. See also *infra* Figure 19.

[37] Jeffrey A. Segal, et al. create their editors' ideology scores by content analyzing the editorials in four newspapers—two with liberal leanings and two, conservative—between the time the justice is nominated and the Senate's vote. The resulting scores range from 0 (very conservative) to .5 (moderate) to 1 (very liberal.), and are available at: http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf. Segal (and Cover) initially developed them in Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of Supreme Court Justices,* 83 Am. Pol. Sci. Rev. 557 (1989); an updated version appears in Epstein & Segal. *supra* note 15. We computed the votes cast by justices from Spaeth, *supra* note 35

[38] See *supra* note 37.

[39] We derived the votes from Spaeth, *supra* note 35. Liberal votes are those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals against the government in First Amendment, privacy, and due process cases; of unions over individuals and individuals over business in labor cases; and the government over businesses in economic regulation litigation. Conservative decisions are the reverse.

votes are nearer the top (e.g., Rehnquist) than those who cast a low percentage (e.g., Brennan).

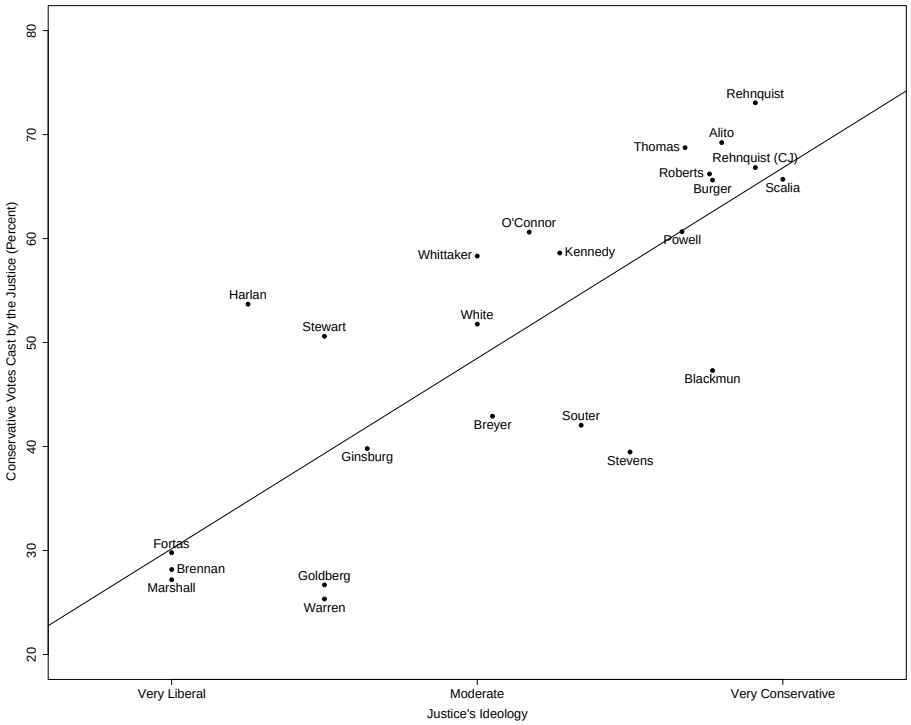


Figure 1: The relationship between newspaper editors' characterizations of justices' ideology prior to their appointment and the justices' votes, 1953-2005 terms. The superimposed line represents a regression-based prediction of the justices' votes based on the their ideology. The closer a point to the line, the stronger the association between the justice's ideology and the justice's votes. Justices above the line voted more conservatively than predicted; justices below the line voted more liberally than predicted. The correlation between the justices' ideology and their votes is .797.[40]

If the editors' ideological assessments do a good job predicting votes, then those justices initially characterized as conservative, such as Rehnquist, should cast the highest percentage of conservative votes. Those to the left of center, such as Brennan, should cast the lowest percentage of conservative votes. Nominees labeled "moderates" by the editors ought be near the center, casting neither many nor few conservative votes.

These are the very patterns we observe in Figure 1.[41] Indeed, with only scattered exceptions (e.g., the unexpected liberal voting of Harry Blackmun), press characterizations prior to appointment turn out to be remarkably good predictors of future voting. To take one example, Ruth Bader Ginsburg reaches liberal decisions in about 60 percent of the Court's cases—almost exactly the percentage we would expect from a justice with her moderately left-of-center political outlook. Likewise, Antonin Scalia, assessed by all newspaper editors as a conservative at the time of his nomination, votes precisely as that label would suggest, reaching right-of-center results in almost seven out of every ten cases he decides. Seen in this way, Ginsburg's vote against the military

[40]See *supra* notes 35, 37, and 39 for information about the data depicted in Figure 1.

[41]We adapt the discussion in this paragraph from Epstein & Segal, *supra* note 15.

commissions at issue in *Hamdan*[42] was entirely as predictable as Scalia's to allow them.

B Challenges to Conventional Views

In light of these findings, it is no wonder why scholars such as Professor Strauss tell us to disbelieve the possibility of moderation of the part of Chief Justice Roberts. Newspaper editors characterized him as a conservative at the time of nomination—in the range of a Clarence Thomas or Warren E. Burger[43]—and if the results in Figure 1 are any indication Roberts will vote as such over the course of his career. Given the new Chief's presumably well formed views, and his experience as a constitutional lawyer and appellate judge, to expect otherwise would be foolhardy.

Or would it?

Despite the strong consensus over the assumption of stability, several reasons exist to question it. One prominent challenge comes from a handful of quantitative studies of the justices' voting. Rather than summarizing the ideological direction of voting in a single percentage (as we do in Figure 1), these studies examine the percentage each term. Only by proceeding in this way, the authors argue, can we detect changes in preferences over time.

S. Sidney Ulmer's analysis of the voting patterns of Justices Hugo L. Black and William O. Douglas is illustrative.[44] After plotting their term-by-term support for civil liberties claims, Ulmer concluded that the two justices evinced substantial change over time: Both began their careers as relative moderates but grew increasingly willing to support litigants alleging a violation of their rights—at least until their final years on the bench when their support tapered off a bit (Douglas) and more than a bit (Black). A replication of Ulmer's analysis, displayed in Figure 2, seems to confirm his conclusion that "it cannot be said that Black's [and Douglas'] support for civil liberty was stable."[45]

[42] 126 S. Ct. 2749 (2006).

[43] Chief Justice Roberts' score of .120 is slightly less conservative than Chief Justice Burger's (.115) and slightly more liberal than Justice Thomas's (.160). For more details, see *supra* note 37 and Figure 1.

[44] S. Sidney Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937-1971,* 1 Fla. St. U. L. Rev 131 (1973); S. Sidney Ulmer, *Parabolic Support of Civil Liberty Claims: The Case of William O. Douglas,* in Courts, Law, and Judicial Processes, (S. Sidney Ulmer, ed., 1981).

[45] Ulmer, "The Longitudinal Behavior of Hugo Lafayette Black," *supra* note 44.

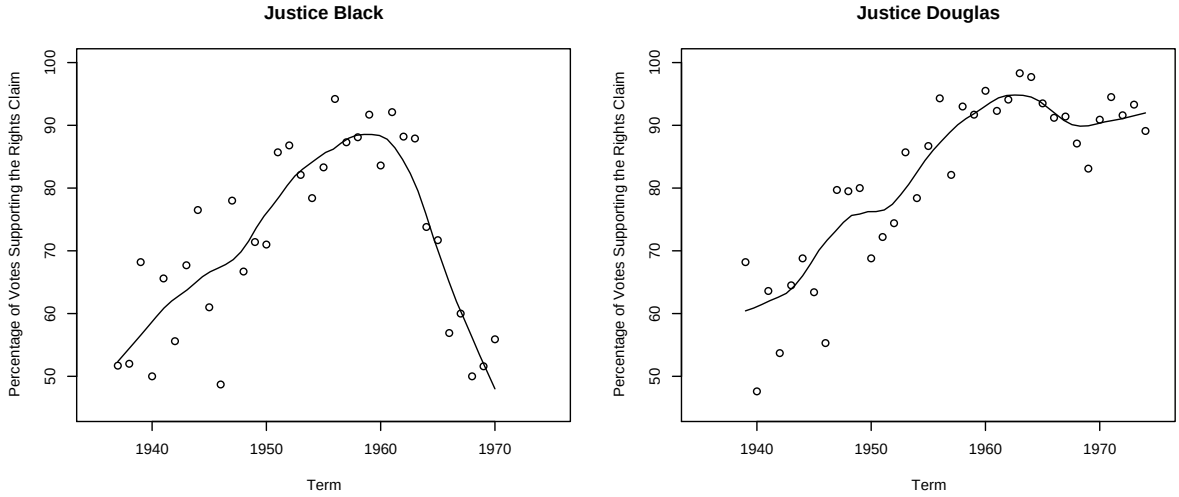


Figure 2: Support for civil liberties claims: The career voting records of Justices Hugo L. Black and William O. Douglas. This figure reports the percentage of votes cast each term in which Justices Black (left panel) and Douglas (right panel) supported defendants in criminal cases; women and minorities in civil rights cases; and individuals against the government in First Amendment, privacy, and due process cases. The superimposed line is a first degree loess smooth with span =0.33.[46]

Epstein and her colleagues reached much the same conclusion in their study of the sixteen justices who sat on the Court for ten or more terms and who began and completed their service between the 1937 and 1993 terms.[47] At least in the area of civil liberties, the authors concluded that the "preferences of seven justices (Brennan, Burger, Burton, Harlan, Jackson, Marshall, and Stewart) remained constant over the course of their careers. [But the remaining eleven] changed in significant linear or nonlinear ways."[48] In other words, most of the justices in their sample grew increasingly liberal, conservative, or shifted between the two over the course of their career. Especially noticeable to Epstein and her colleagues, as we show in Figure 3, was Harry A. Blackmun's near complete flip, from one of the Court's most conservative members to among its most consistent civil libertarians.

[46]This is an attempt to reproduce Ulmer's analyses, *supra* note 44, using data from Lee Epstein, et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices,* 60 J. Pol. 801 (1998), available at: http://epstein.law.northwestern.edu/research/prefchange.html.

[47]Epstein, et al., *supra* note 46.

[48]Epstein, et al., *supra* note 46.

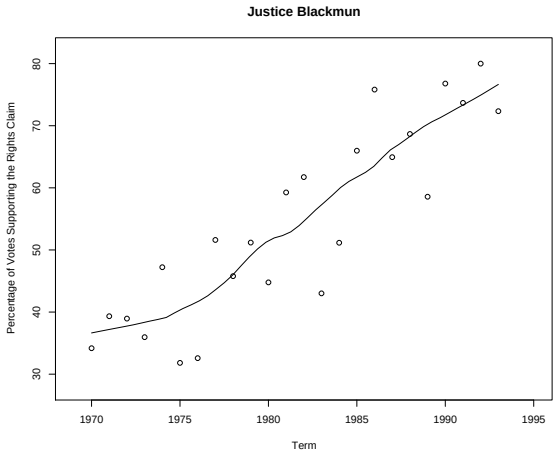


Figure 3: Support for civil liberties claims: The career voting record of Justice Harry A. Blackmun. This figure reports the percentage of votes cast each term in which Justice Blackmun supported defendants in criminal cases; women and minorities in civil rights cases; and individuals against the government in First Amendment, privacy, and due process cases. The superimposed line is a first-degree loess smooth with span = 0.45.[49]

Both Ulmer and the Epstein et al. team speculate on explanations for the trends they observed but neither puts those explanations to the test. Which may be just as well since their analyses have their share of problems. Primarily, both studies examine voting records without satisfactorily attending to the content of the litigation they analyze. As a consequence any observed shifts in voting could be as much a result of alterations in the cases, as in the justices' underlying preferences.[50]

To begin to see the problem, consider a justice—call her Justice B—who has served on the Court for two terms. Suppose that in her first term, Justice B was quite supportive of defendants in Fourth Amendment cases casting nine out of every ten votes in their favor. In the next term, however, Justice B voted to support defendants in only one of ten cases. If we looked only at her votes, we might conclude that our Justice indeed shifted, and shifted to the right: from 90 percent in favor of defendants to 90 percent against them. But, as Baum points out,[51] that conclusion would be premature. It fails to consider the possibility that the content of the cases varied from one term to the next—a real possibility, and one with real implications for how we interpret change (or the lack thereof) on the Court.

Figure 4, to continue with our example, shows why. Here the horizontal line represents a single issue dimension, Fourth Amendment search and seizure cases.[52] Along that dimension we have ordered the facts of two cases (as well as three justices) from most liberal (most supportive

[49]We calculated the percentages depicted in Figure 3 from Spaeth, *supra* note 35, with value ≤ 6, analu=0, dec_type=1, 6, or 7. See also *supra* note 39.

[50]Epstein et al., *supra* note 46, attempt to account for changes in "issue stimuli" but the approach they use has its share of problems. Primarily, it is based on a method that assumes preference stability throughout a justice's career. For more details, see the critique and reproduction of the Epstein, et al. analysis in Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the U.S. Supreme Court,* working paper available at: http://adm.wustl.edu/papers.php.

[51]Lawrence Baum, *Measuring Policy Change in the United States Supreme Court,* 82 Am. Pol. Sci. Rev. 905 (1988).

[52]We adapt this example Harold J. Spaeth, *The Attitudinal Model,* in Contemplating Courts (Lee Epstein, ed.

of defendants) to most conservative (least supportive of defendants).[53] In both cases, 1 (search warrant) and 2 (no search warrant), the police conducted a search of a home, and in both cases the searches yielded incriminating evidence. But only in Case 1 did police obtain a warrant. Owing to the presence of the warrant, Case 1 is more protective of the defendant's rights than Case 2, and so we place it to Case 2's left.

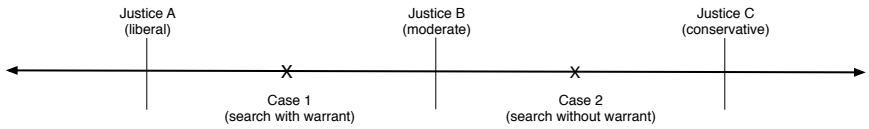


Figure 4: Hypothetical Fourth Amendment search and seizure cases and justices in ideological space. In this depiction, justices vote to uphold any search to their left and void any search to the right.[54]

Turning to the justices, in Figure 4 we have represented their "most preferred position" or "ideal point" (i.e., how they would vote in the absence of any internal or external constraints). Here, as we can see, A is the most liberal, B moderate, and C most conservative. But what conclusion will Justices A, B, and C reach in the two cases? The answer, under this depiction, is that they will vote to uphold any search to the left of their ideal point and void any search to the right. In words, Justice A will vote to strike down the searches in both cases; neither was protective enough of the defendants' rights for his taste. Justice C, on the other hand, will vote to uphold both searches; both, he believes, sufficiently safeguarded the Fourth Amendment. As for our Justice B, she will agree with C on the warrant case but with A on the warrantless case.

With this example in mind, we can begin to see the consequences of relying on the percentage of votes cast, whether in the liberal or conservative direction, to assess preference change among the justices. Perhaps in Justice B's first term, nine of the ten cases involved warrantless searches; but in her second term, nine of the ten cases involved searches with warrants. If that were the case, then Justice B's preferences did not necessarily move; rather the content of the cases changed—and changed in a way that made it more difficult for her to cast a liberal vote in her second term relative to her first.

C Importance of Resolving the Debate

That published studies of ideological movement fail to take into account changes in case content may render their specific conclusions suspect. Nonetheless, we ignore the potential challenge they pose to assumption of stability in judicial preferences at our own peril.

Why? Put simply, and our quibbles with existing studies aside, it is hard to ignore the fact that by virtually all accounts—from the quantitative to the qualitative, from the historical to the doctrinal—some justices did move to the left or right during their tenure on the Court, and moved quite a bit. If the law reviews are any indication, Harry Blackmun appears to be one. His jurisprudential turn—from a supporter of the death penalty to an opponent, from an advocate of states' rights to a proponent of federal power, and from an unwillingness to elevate standards in sex discrimination litigation to an ardent supporter of women's rights—are hardly indices of

1995) and Baum, *supra* note 51, at 905-906.

[53]To keep the example simple we display only three justices but it easily generalizes to nine, and we could easily add cases.

[54]See *supra* note 52.

stability.[55] And if legal historians are right, Owen Roberts was another. In what commentators in 1937 described as "the switch in time that saved Nine," Justice Roberts moved from the anti-New Deal wing of the Court to join President Franklin D. Roosevelt's four supporters. Whether Roberts' "switch" was a response to political pressures of the day (i.e., the President's plan to add one new seat on the Court for every justice who attained the age of seventy), a growing disenchantment with the hard-line views of the anti-New Deal justices, or both is still a matter of considerable debate.[56] What is now seemingly settled is that Roberts did move;[57] the justice himself implied as much when asked about his historic shift some years later.[58]

But are the Robertses and the Blackmuns anomalies, as the stability assumption would suggest, or are they the rule, as the Epstein research team might argue? This is the threshold question we consider, and it is one worthy of sustained attention. Most obviously, it remains an open question. While the conventional view holds that justices remain committed to the ideological values they brought to the Court, exceptions are sufficiently numerous and challenges sufficiently compelling to revisit the received wisdom.

Second, the debate over preference stability is not only or merely one of academic or theoretical interest. It is also holds interesting and non-trivial consequences. To see this, we need only imagine a Court full of Blackmuns, that is, justices who began their career espousing one set of ideological values and end with another. If that were the true state of the world, rather than the one more conventionally envisaged, we might reconsider the criteria emphasized during the *appointments process* and the possibility of *doctrinal change*. Both deserve consideration.

1 The Appointment of Justices

Beginning with the appointment of justices, we know from historical and contemporary accounts that most Presidents invest considerable personal energy in selecting the "right" nominee for the Court.[59] In some instances the "right" nominee has little to do with the President's own ideological preferences; superior credentials may come into play.[60] When the Republican Herbert Hoover chose Benjamin Cardozo to fill Oliver Wendell Holmes's seat, the President had no reason to believe that Cardozo shared his political values. Actually quite the opposite: Cardozo was a Democrat and a

[55] See, e.g., Ruger, *supra* note 10; Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment,* 63 Mo. L. Rev. 853, 853 (1998) ("Over the course of his thirty-five years as a judge, Justice Harry A. Blackmun seemed to change his views on the death penalty."; Jeffrey B. King, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun,* 33 Hous. L. Rev. 277, 277 (1996 ("Blackmun very well may have undergone one of the most marked ideological changes the United States has seen in a public figure during this century."

[56] The literature along these lines is vast. As Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics,* 148 U. Pa. L. Rev. 971, 1048 (2000), puts it, "since 1937, scholars have debated what happened and why, combing the historical record in order to ascertain the motives of key players, such as Justice Owen Roberts, whose possible change of votes in key cases was 'the switch in time that saved Nine.'"

[57] As Friedman, *supra* note 56, 1050, notes "Many scholars simply assume a switch occurred." These days, only "legalists argue at least that no switch occurred in response to politics, and perhaps also that no switch at all occurred in 1937."

[58] Justice Roberts's response was not particularly informative but neither did he deny the move: "Who knows what causes a judge to decide as he does. Maybe the breakfast he had has something to do with it." Quoted in Merlo J. Pusey, *Justice Roberts' 1937 Turnaround,* 1983 Y.B. Sup. Ct. Hist. Soc'y 107 (1983).

[59] See, e.g., David Alistair Yalof, Pursuit of Justices (1999); Henry J. Abraham, Justices, Presidents, and Senators (1999); Epstein & Segal, *supra* note 15.

[60] For more on the goals of Presidents when selecting Justices, see Epstein & Segal, *supra* note 59; Sheldon Goldman, Picking Federal Judges (1997).

progressive at that. But "politics aside," as Silverstein tells us, "there was much to recommend Cardozo":

> Cardozo was a highly distinguished jurist, and Hoover was conscious of the potential ignominy in being remembered by history as the President who filled the Holmes seat on the Court with an unknown. [Besides,] William Borah, the powerful Republican senator from Idaho . . . championed Cardozo as the best candidate regardless or residence, religion, or party affiliation.[61]

From Hoover's perspective, thus, Cardozo was the "best candidate," not because of his ideology but because of his stellar credentials.

In other instances, the best candidate might be the one most able to advance the President's or his party's electoral goals. The moderate Republican Dwight Eisenhower appointed the liberal Catholic Democrat William J. Brennan, Jr. not because he believed that Brennan shared his political values or that he was an intellectual heavy weight, but because the President thought he could gain the support of Catholic voters.[62]

Surely other justices have been been appointed for similar reasons but, truth be told, Brennan and Cardozo are the exceptions. In many, actually most, instances Presidents search long and hard for nominees who are political allies, not political pawns or prodigious legal minds.[63] Why this is the case is no great mystery: appointing a justice who shares his ideological values and, crucially, will espouse those values long after he vacates office can result in an unparalleled legacy to the nation. Some scholars refer to this as "entrenchment," or the idea that Presidents, in cooperation with the Senate, can extend their ideological or partisan reach into the federal judiciary not only at the time of appointment but for the decades to come.[64] Perhaps that is why Richard Nixon once said that, "the most important appointments a President makes are to the Supreme Court of the United States."[65] He would know. While Nixon left office in 1974, one of his legacies, in the form of William H. Rehnquist, remained on the Court for three more decades.

But would Nixon or any other President deem Supreme Court appointments their "most important" if ideological drift, even among seemingly rock-solid conservatives (liberals) were the norm, and not the exception? Unless the President's goals are more electorally and less ideologically oriented—not often the case—we suspect not. Presidents typically fret so much about their nominees because they want to ensure a legacy. But if that were a Quixotic project, their time might be more efficiently spent on advancing other objectives such as appointing justices of superiority quality, as did Hoover, or those who might improve the party's electoral fortunes, as did Eisenhower.

Much the same logic applies to the Senate. Relative to all other positions in the executive branch, the Senate is far more likely to turn back candidates for the Supreme Court: Since 1789 it has rejected only nine nominees for cabinet posts[66] but about one out of every five would-be

[61] Mark Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations (1994).

[62] Epstein & Segal, *supra* note 59, at 58.

[63] Epstein & Segal, *supra* note 59, at 60; Yalof, *supra* note 59; Brian J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Choice and Constraints,* 43 Am. J. Pol. Sci. 1069.

[64] See, e.g., Balkin & Levinson, *supra* note 15.

[65] Appears in *Transcript of President's Announcement's,* N.Y. Times, Oct. 22, 1971, at 24.

[66] Roger B. Taney, Treasury in 1834; Caleb Cushing, Treasury in 1843; David Henshaw, Navy in 1844; James M. Porter, War in 1844; James S. Green, Treasury in 1844; Henry Stanbery, Treasury in 1868; Charles Warren, Justice in 1925; Lewis Strauss, Commerce in 1959; John G. Tower, Defense in 1989. Data available at: http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm.

justices.[67] What accounts for the comparatively high rate of failure? Surely one factor is the Constitution's grant of life tenure for federal judges. With removal for political reasons a near impossibility,[68] senators seem to appreciate the long-term implications of their decisions.

On the other hand, would life tenure carry as much weight with legislators if their confirmees voted unpredictably, and unpredictably from one term to the next? We suspect not, and extant studies are consistent with our suspicion. Most show that a candidates' ideology is a, if not the, primary consideration for senators when they cast their votes.[69] In fact, the probability of a very liberal senator voting for a moderately qualified but extremely conservative nominee is under .10; the likelihood of a very conservative senator voting for that nominee is close to .90.[70] To put it another way, virtually all the senators who cast yea votes for Samuel Alito knew (or at least hoped) they were voting for a conservative, and hoped they were voting for a conservative for the years to come. This is the very idea of partisan or ideological entrenchment.[71]

A similar calculus, it is worth noting, operates for the many interest groups who lobby against (for) Supreme Court nominees. From their perspective, spending money to defeat (or support) a life-long enemy (or ally) on the Court seems a rational course of action—that is, assuming the groups have accurately predicted the nominee's ideology and that nominee, as a justice, will continue to espouse that ideology.[72] While the former seems quite possible,[73] the latter is precisely what we question here—and with good reason at that. The many civil rights groups who lobbied against William Rehnquist may have guessed right—once appointed, he was no friend to their cause—but they were wrong with regard to David H. Souter.[74] In discrimination cases, Justice Souter supports the plaintiff almost as often as the current Court's most liberal member, John Paul Stevens.[75]

2 The Possibility of Doctrinal Change

Battles over the appointment of justices are not the only context for which the assumption of ideological stability has consequences. Another is more doctrinal in nature. It has been commonplace for years, and remains so today, for commentators to promote the idea that legal change can only come about with membership change or, alternatively, to downplay the possibility of legal

[67] A list of candidates rejected by the Senate is available at: http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm.

[68] For more on this point, see Epstein & Segal, *supra* note 59, 31-34; Emily Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992,* 142 U. Pa. L. Rev. 333 (1993); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy* 30 L. & Soc'y Rev. 87 (1996).

[69] See, e.g., Jeffrey A. Segal, Charles M. Cameron, & Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations,* 36 Am. J. Pol. Sci. 96 (1992); Charles M. Cameron, Albert D. Cover, & Jeffrey A. Segal, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model,* 84 Am. Pol. Sci. Rev. 525 (1990).

[70] Lee Epstein, et al. *The Changing Dynamics of Senate Voting on Supreme Court Nominees,* 68 J. Pol. 296 (2006).

[71] See, e.g., Balkin & Levinson, *supra* note 15.

[72] See, e.g., Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate,* 42 Am. J. Pol. Sci. 499 (1998).

[73] For evidence of the predictability of nominees during their first term in office, see *infra* Figure 13.

[74] Among the civil rights groups testifying against David H. Souter were the National Lawyers Guild, Supreme Court Watch, and Lambda Legal Defense and Education Fund. See S. Hrg. S.Hrg. 101-1263, Sept. 13, 14, 17, 18, 19, 1990.

[75] In the 2004 term, Chief Justice Rehnquist voted in favor of civil rights litigants in only 33 percent of the nine cases in which he participated; those figures for Souter were 83.3 (N=12) and 91.7 for Stevens (N=12). Figures are from Epstein, et al. *supra* note 30, Table 6-5.

change in the absence of turnover.[76]

Hamdan v. Rumsfeld provides an example but it is hardly the only one. Perhaps the quintessential case along these lines is *Roe v. Wade*.[77] While the decision has been controversial almost since the day the Court handed it down, it rises in prominence each time a justice retires. When Lewis Powell announced his resignation in 1987, journalists emphasized his "crucial" role in retaining the 1973 precedent.[78] Two decades later, they said much the same about Sandra Day O'Connor:

> Justice O'Connor's retirement will not end the court's majority for Roe, which stands at 6 to 3. But her successor could narrow that majority, and open the door to new abortion restrictions. For example, the Supreme Court ruled by only 5 to 4 that a "partial birth abortion" ban was unconstitutional; Justice O'Connor's vote was among the five in the majority.[79]

The assumption here is that *Roe* cannot go, or even be narrowed in application, unless the Court experiences a turnover in its membership. Ditto for the affirmative action case, *Grutter v. Bollinger*;[80] death penalty doctrine beginning with *Gregg v. Georgia*;[81] the controversial takings decision in *Kelo v. New London*[82]—or, really, any other line of precedent, regardless of its degree of notoriety.

The accuracy of this view is an open matter, and one we explore more fully in Part IV. The point here is that its implications are clear. Not only does it work to politicize the confirmation process—if justices were less predictable over the long term, battles over their appointment ought diminish as interest groups expend relatively greater resources elsewhere. It also may well affect the calculus of litigators. If they file petitions only in cases in which their odds of winning are 50-50,[83] why bother challenging the right to abortion, the constitutionality of capital punishment, the taking of private property for economic development, or the use of race in university admissions in the absence of a membership change? There would be little reason. But should existing justices experience a change in their jurisprudential outlook, litigation strategy would follow suit, with petitions continuing to flow in these seemingly closed areas.

III Analyzing Preference Change on the Supreme Court, 1937-2005 terms

Three critical points emerge from our discussion thus far. The assumption of stability (1) is commonplace (though not unchallenged) and (2) has important implications for the appointment

[76] See *supra* notes 25 and 5.

[77] 410 U.S. 113 (1973).

[78] See, e.g., Linda Greenhouse, *Powell: Moderation amid Divisions,* N.Y. Times, June 27, 1987, at 32. ("His vote was crucial in key areas. ... On abortion he remained committed, with a shrinking majority, to the 1973 precedent that established it as a constitutional right.").

[79] Robin Toner, *After a Brief Shock, Advocates Quickly Mobilize*, N.Y. Times, July 2, 2005, at 1A. The same article reports the reaction of interest groups: "At the abortion rights group Naral Pro-Choice America, organizers were sending e-mail alerts to 800,000 activists within 15 minutes after the announcement of Justice Sandra Day O'Connor's resignation. 'Don't let Bush take away your choice!' they declared."

[80] 539 U.S. 306 (2003).

[81] 428 U.S. 153 (1976).

[82] 126 S. Ct. 24 (2006).

[83] The Priest-Klein model of litigation predicts that plaintiffs only will go into litigation if they believe that they have roughly a fifty percent chance of winning. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation,* 13 J. Legal Stud. 1, 45 (1984). This prediction is contingent on the decision standard, the parties uncertainty of estimating case quality, and the degree of stake asymmetry across the parties.

and work of the justices but (3) is tricky to assess empirically. The primary difficulty is how to solve the vexing problem of variation in case content, and how to solve it on a large-scale basis.[84]

These questions have perplexed scholars for decades but, fortunately for us, Martin and Quinn, two coauthors of this article, have devised a satisfactory solution.[85] Using data derived from the votes cast by the justices and a Bayesian modeling strategy, they have generated term-by-term ideal point estimates for all the justices appointed since the 1937 term—estimates that *attend to variation in case content*. In other words, using the Martin-Quinn approach we can offer intra-justice comparisons (e.g., is Justice Souter more liberal now than he was in 1992?) without having to consider whether the changes we observe are the result of differences in the content of cases or changes in the justice's revealed preferences.[86]

Not surprisingly, the products of the Martin-Quinn method–i.e., their ideal point estimates—have received a good deal of play both in the popular press and in scholarly journals.[87] We too have deployed them in a study of the median justice on the Supreme Court;[88] and Ruger, along with Martin & Quinn,[89] have even invoked them to analyze change on the Court, though for a limited set of justices. Hence, in an effort to conserve space, we direct readers interested in learning more about the Martin-Quinn procedures to these other sources, as well as to web sites housing the data.[90] The important point to underscore here is that their estimates overcome major obstacles of the past and thus allow us to make high-quality inferences about justices' voting over time.

What are those inferences? What can we learn about preference change on the Court from the Martin-Quinn estimates? Are the justices as stable as most commentators seem to assume? Or is change the rule, not the exception? Figures 5, 7, 9, and 12 address these questions,[91] and the

[84]Some scholars, most notably, Jeffrey A. Segal, *Measuring Change on the Supreme Court: Examining Alternative Models,* 29 Am. J. Pol. Sci. 461 (1985), have developed area-specific solutions; in Segal's case, Fourth Amendment search and seizure litigation. But we know of no work that satisfactorily tackles the problem across the range of legal areas.

[85]Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999,* 10 Political Analysis 134 (2002).

[86]Because, as we mention in the text, the Martin-Quinn method has been described elsewhere, see Martin & Quinn, *supra* note 85 and *infra* note 87, suffice it to note here that their method simultaneously provides comparable estimates of ideal points and cut points (the midpoint between the status quo policy and the potential policy under review; for more details, see *infra* note 157) by (1) exploiting the overlapping service records of justices and (2) assuming that model parameters governing the cut points are drawn from a common distribution. Overlapping service records allow for model-based comparisons of justices who never served together. For instance, Martin and Quinn use the fact that Chief Justice Warren served with Justice Brennan who served with Justice Scalia to place the ideal points of Chief Justice Warren and Justice Scalia (who never served together) on a comparable scale. The approach achieves intertemporal comparability by assuming that ideal points can onlychange smoothly through time and that any voting records that are consistent with *all* justices moving *equally* to the right or *equally* to the left are the result of changes in the cut points rather than Court-wide changes in preferences.

[87]See, e.g., Ruger *supra* note 10; Barry Friedman & Anna L. Harvey, *Electing the Supreme Court,* 78 Ind. L.J. 123 (2003).; Paul J. Wahlbeck, *The Chief Justice and the Institutional Judiciary: Strategy and Constraints on Supreme Court Opinion Assignment,* 154 U. Pa. L. Rev. 1729 (2006). For media reports of their research see, e.g., the Wall. St. J., February 1, 2006, at A4; Wash. Post, November 1, 2004, at A19.

[88]Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. Rev. 1275 (2005).

[89]Ruger, *supra* note 10; Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the U.S. Supreme Court,* unpublished ms. available at http://adm.wustl.edu/papers.php

[90]`http://epstein.law. northwestern.edu/research/ideodrift.html` contains all the data used in this article. `http://adm.wustl.edu/supct.php` also houses the Martin-Quinn estimates, as well as annual updates. See also *supra* note 85 and *supra* note 86.

[91]More specifically, Figures 5, 7, 9, and 12 depict the estimated ideal points over time for each justice. To reach conclusions about ideological drift, we examined the preference change profiles for each justice. Examples of these

answer could not be clearer. Of the twenty-six justices who served on the Court for ten or more terms since 1937, all but four exhibit ideological drift over the course of their tenure.[92] Twelve moved to the left;[93] seven to the right;[94] and three in more exotic ways.[95]

A Trending to the Left

We begin, in Figure 5, with the twelve justices who grew more liberal during their tenure. That we find Harry A. Blackmun among this group is hardly surprising. Blackmun may have once quipped that it was not he but the Court that changed, but he also said, "I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed. . . And if one didn't grow and develop down there I would be disappointed in that person as a Justice."[96] Quite clearly, and just as most analysts would have predicted, the latter is more descriptive of his career.

profiles appear in Figures 6, 8, and 10. The full complement is available on the project's web site, as is a description of the procedures we used to identify significant drift.

[92]The four are Justices Breyer, Murphy, Stewart, and Thomas. See *infra* Part IIIC.

[93]Justices Blackmun, Brennan, Clark, Ginsburg, Kennedy, Marshall, O'Connor, Powell, Souter, and Stevens, and Chief Justices Rehnquist and Warren. See *infra* Part IIIA.

[94]Justices Black, Burton, Frankfurter, Jackson, Reed, Scalia, and White. See *infra* Part IIIB.

[95]Chief Justice Burger, and Justices Douglas and Harlan. See *infra* Part IIIC.

[96]Ruger, *supra* note 10, at 1212 quoting Justice Harry A. Blackmun, Speech at Louisiana State University Law Center, Summer Program (July 6-9, 1992, Aix-en-Provence, France).

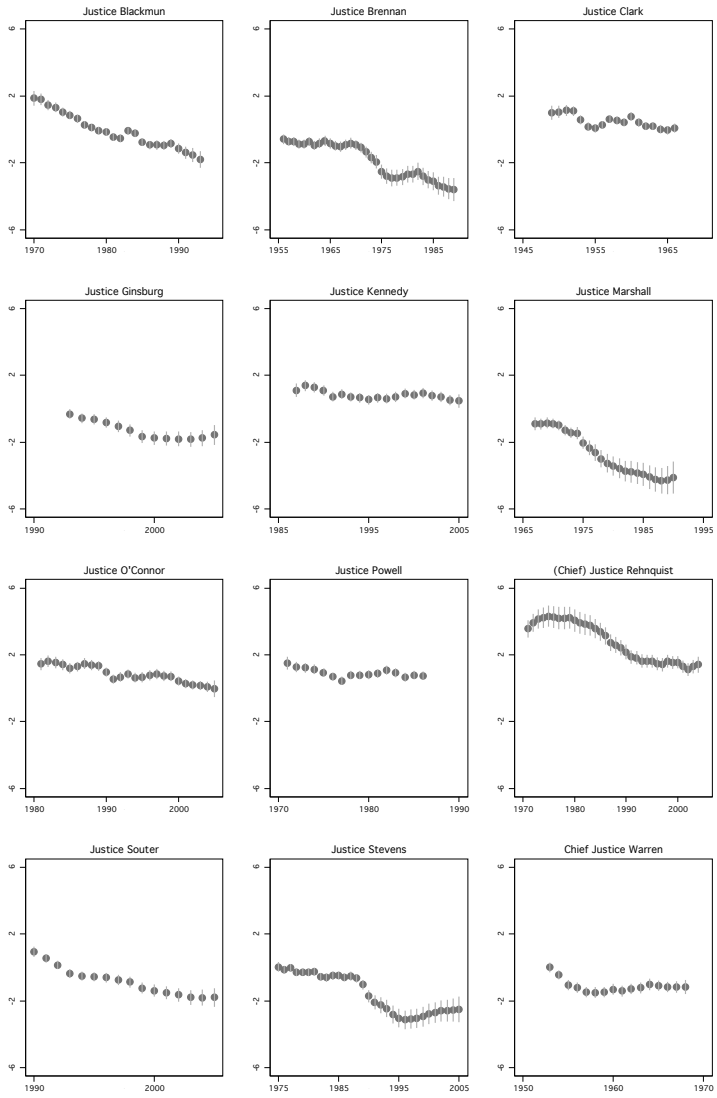


Figure 5: Estimated ideal points of the justices who served ten or more terms between 1937 and 2005, and trended left. The vertical axis in all plots is the justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points and the vertical error bars in each plot are 95% credible intervals. [97]

Also less than startling in light of contemporary commentary is Justice O'Connor's behavior.[98] While the data displayed in Figure 5 seem to show relatively consistent preferences over time, further analysis depicts a justice who in fact trended to the left. To see this consider Figure 6, in which we display the probability that O'Connor was more conservative in any given term than in all others. Within the figure, the baseline term is on the vertical axis and the comparison term

[97]For more details on the estimated ideal points, see *supra* notes 85 and 86.

[98]See, e.g., Joan Biskupic, *O'Connor Not Confined by Conservatism*, USA Today, June 24, 2004, at 4A ("Although O'Connor usually votes with the courts conservative wing, she increasingly has sided with liberals in significant cases that have been decided by 5-4 votes. It's led some conservative observers to wonder whether O'Connor, at 74, is turning to the left."); Charles Rothfeld, *The Court on Balance; By Sometimes Leaning Left, Justice O'Connor Centers the Supreme Court*, Legal Times, July 12, 2004, at 52 ("The liberals dominated in the eight civil cases decided by 5-4 votes, winning six of them. O'Connor voted with the liberal majority in four of these cases.").

is on the horizontal axis. E.g., if O'Connor was equally as conservative in 2000 as she was say, in 1985 then beginning at the 1985 mark on the vertical axis and moving to the right, we would expect to see neither bright red (indicating that she grew significantly more liberal) nor bright blue (indicating a significant move to the right) but a blackish color. That we do not see. Beginning in the early 1990s, only red appears, indicating a significant turn to the left relative to her voting in the 1980s. Of course scholars and journalists not only took note of this trend but also speculated on its doctrinal consequences (a subject to which we return in Part IV).

While the increasing liberalism exhibited by Justice O'Connor, not to mention Justices Blackmun and Stevens, may come as a surprise to very few, we cannot say precisely the same of the others depicted in Figure 5, especially David H. Souter, Anthony Kennedy, and two of the three most recent chief justices, Rehnquist and Warren. When George H.W. Bush selected Souter to serve on the Court in 1990, the President had any number of reasons to believe he was appointing a justice who would cast consistently conservative votes, whether over abortion, prayer in school, criminal rights, or affirmative action. This is not to say that Bush could have opted for an even more reliable solid conservative; in fact he considered several, including Edith Jones.[99] But by most accounts Souter was reliable enough.[100] Even newspaper editors (and editors of all ideological stripes at that) thought as much. Before Souter joined the Court, they deemed him even more conservative than two of Ronald Reagan's appointees, Sandra Day O'Connor and Anthony Kennedy at the time of their nominations.[101]

Figure 5 reveals that the President and the editors were not wrong—at least not initially. For the 1990 term Souter's ideal point estimate places him far closer to, say, Justices O'Connor and Kennedy than those on the extreme left (Justices Blackmun, Stevens, Marshall). Actually during his first two terms, Souter was the Court's likely median, or swing, justice.[102] That Souter's ideal point is now closer to the the most liberal member of the Court (Stevens) than to the middle (Kennedy) has not been been missed by Court observers.[103] But the extreme leftward movement is notable. Indeed, Souter is the new Blackmun; that is, a justice who, as Figure 6 shows, has grown strikingly more liberal with nearly each passing term.

Pointing to his pivotal role in establishing liberal majorities in *Lawrence v. Texas*[104] and *Roper v. Simmons*,[105] some analysts have asserted much the same about Anthony Kennedy, that he has moved significantly to the left.[106] While it is true, as Figure 6 shows, that Justice Kennedy drifted

[99]For an account of the Souter nomination, see Yalof, *supra* note 59.

[100]On her blog, at http://www.anncoulter.com/cgi-local/article.cgi?article=67, the conservative commentator, Ann Coulter, provides quote after quote attesting to Souter's conservative credentials at the time of his appointment. E.g., Newt Gingrich claimed that "Virtually every conservative who knows him trusts him and thinks he's a competent guy." The National Right to Life's John Willke said, "(He) seems to be a judicial conservative, what we call a constitutional constructionist.. . . That's satisfactory with us, if that's true."

[101]See *supra* Figure 1 and *supra* note 37.

[102]Using the Martin & Quinn scores, Martin, et al., *supra* note 88, have calculated the justice most likely to have been the median for each term. Souter is that justice for the 1990 and 1991 terms, though the probability that he was the median is reasonably weak (.48 in 1990 and .34 in 1991). Data appear in Martin, et al., *supra* note 88.

[103]E.g., Richard H. Fallon, Jr., *The "Conservative" Path of the Rehnquist Court's Federalism Decision,* 69 U. Chi. L. Rev. 429, 494 (deeming Souter a "liberal"); Erwin Chemerinsky, *The Rehnquist Court and the Death Penalty,* 94 Geo. L.J. 1367, 1368 (2006) (placing Souter in the Court's "liberal wing"); Scott P. Johnson & Robert M. Alexander, *The Rehnquist Court and the Devolution of the Right to Privacy,* 105 W. Va. L. Rev. 621, 645 (2003) (Justice Souter has "surprised many conservatives with his moderate to liberal voting record.").

[104]539 U.S. 558 (2003).

[105]543 U.S. 551 (2005)

[106]e.g., Thomas Sowell, *Justice Kennedy's New Move Left: Soft on Crime*, Hum. Events, Aug. 18, 2003; Lawrence Friedman, *The Limitations of Labeling: Justice Anthony M. Kennedy and the First Amendment*, 20 Ohio N.U. L.

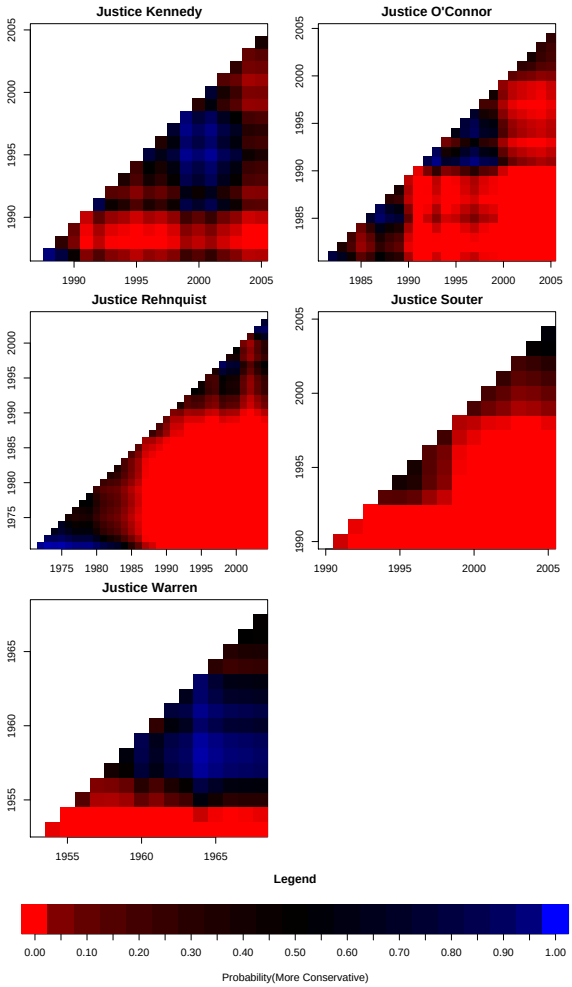


Figure 6: Estimated preference change profiles for five left-trending justices. The baseline term is on the vertical axis, and the comparison term is on the horizontal. E.g., suppose we are interested in whether Justice O'Connor is more conservative in terms subsequent to 1985 than in the 1985 term. Begin at the 1985 mark on the vertical axis, and read the colors across from left to right. Then consult the legend to see how the probabilities are encoded in the colors, from bright red (indicating that the justice is significantly more liberal) through bright blue (indicating that the justice is significantly more conservative). As for Justice O'Connor, the bright red tells us that in many terms after 1985 she was significantly more liberal than she was in that term.

to the left early on his career—he is now significantly more liberal now than he was in, say, 1988—since the early 1990s his ideal point has remained flat. Given Kennedy's crucial role as the pivotal justice on the current Court, this is a finding replete with interesting implications, and we consider them in some detail in Part V.

Equally interesting are the patterns of the two chief justices depicted in Figures 5 and 6, Warren and Rehnquist. Juxtaposed against each other we observe change, though the trends differ. At first blush, Warren's revealed preferences appear quite stable (see Figure 5). The more detailed analysis depicted in Figure 6 confirms a high degree of consistency, though with two important exceptions: his first two terms on the Court. Note the bright red color at the bottom of Warren's panel, revealing that the Chief Justice became far more likely to exhibit liberal preferences as time marched on. In this way, he resembles Souter, another justice whose behavior altered after his early years on the Court. Unlike Souter, however, Warren did not continue to waiver: By 1955 he became a consistent liberal, neither veering much to the left or right thereafter.

By contrast come Rehnquist's ideal point estimates—estimates that are perhaps the most unexpected of all the liberal-trending justices. When Nixon appointed Rehnquist to the Court in 1971, newspaper editors and scholars alike agreed on his ideological propensities: Without doubt, they said, he was a solid, if not an extreme, conservative. When Ronald Reagan elevated Rehnquist to Chief Justice in 1986, the refrain was similar: the *New York Times* declared him a member of the Court's "extreme right wing."[107] Even when Rehnquist died in September of 2005, the press continued to label him the "architect of [a] conservative court."[108] In short, for over thirty years Rehnquist was tagged as one the Court's most reliable right-of-center votes.

The story emerging from Figures 5 and Figure 6 is more complicated. To be sure, when he joined the Court, Rehnquist's ideal points placed him as the most extreme (conservative) justice. In fact during the mid-1970s he was to the right of where Clarence Thomas—today's most extreme conservative—is now.[109] But, when Rehnquist was promoted to Chief Justice and Scalia joined the Court, Rehnquist begin to drift left. Note the bright red coloring in Figure 6, indicating that in every term between 1986 and his death in 2004, Rehnquist's preferences were significantly more liberal than in 1985.

Of course, this is not to say that Rehnquist swung as far to the left as Harry Blackmun; he did not. On the other hand, in the Chief Justice's last term in office his ideal point estimate is closer to the centrist Kennedy's than to the extreme conservative position that he once held or that Scalia and Thomas now anchor.[110]

B Trending to the Right

That Rehnquist trended to the left is interesting if only because our results refute portrayals of his voting as monolithically conservative over the course of his tenure. Of even greater interest, of course, is whether his movement affected his decisions. Was it the case that Rehnquist was so far to the right that his liberal turn simply made him a less extreme conservative or are traces of the

Rev. 225 (1993) (Kennedy has become more liberal in some legal areas).

[107] *Toward a Rehnquist Court,* June 18, 1986, at 34A.

[108] E.g., Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, September 5, 2005, at 16A.

[109] E.g., Rehnquist's estimated ideal point in 1975 is 4.22 versus Thomas's, thirty years later in 2004, of 3.45.

[110] See *infra* Figure 19.

turn reflected in his jurisprudence?

We address that important question momentarily. For now, consider those justices who, in contrast to Rehnquist and the others, trended to the right. Falling into this category, as we can see in Figure 7, are Justices Hugo Black, Harold Burton, Felix Frankfurter, Robert Jackson, Stanley Reed, Antonin Scalia, and Byron White.

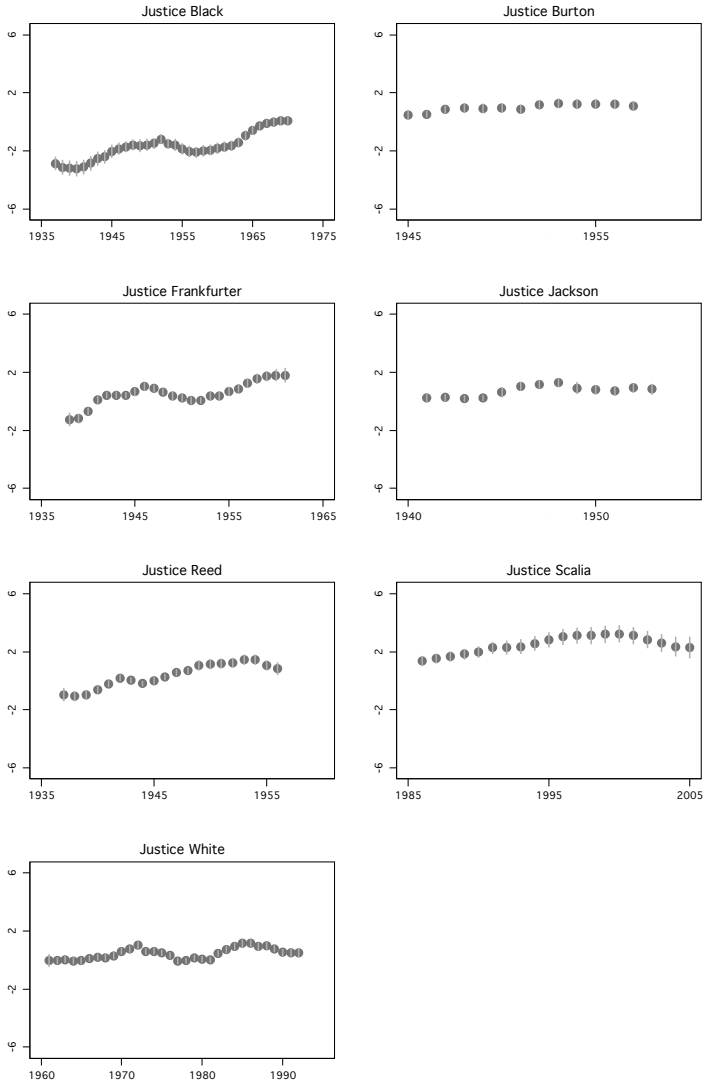


Figure 7: Estimated ideal points of the justices who served ten or more terms between 1937 and 2005, and trended right. The vertical axis in all plots is the justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points and the vertical error bars in each plot are 95% credible intervals.[111]

That even seven justices drifted to the right may, in and of itself, be notable. When commentators describe ideological change on the Court, they often speak of those who grew more liberal, the Blackmuns and the O'Connors. Some analysts have concluded that justices, if they move, nearly always turn left.[112] To be sure, this is the dominant pattern among the justices we study—eleven of the twenty-six became significantly more liberal at some point in their career (including all but

[111]For more detail on the estimated ideal points, see *supra* notes 85 and 86.

[112]E.g., Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal,* Boston Rev. (January/February 2006) ("While there have been a number of relatively reliable conservative justices over the years . . . the tendency in recent decades to drift leftward has been strong enough to gain both popular and scholarly attention."); Lawrence Baum, Judges and Their Audiences (2006, 149) ("Among the nine Republicans who moved to Washington to join the Supreme Court, there were clear and substantial increases in liberalism in four and more limited or ambiguous increases for three others.").

three members of the current Court)—but movement to the right is no small phenomenon in our data set.

Even so, close Court watchers will likely see no big surprises in Figure 7. Four decades ago,[113] the political scientist Harold J. Spaeth debunked the oft-repeated claim that Frankfurter was one of the "most *ardent and consistent* advocates of judicial restraint."[114] After demonstrating that Frankfurter's judicial restraint was "thoroughly subordinated" to his conservative values Spaeth's response was succinct: "Ardent? Perhaps. Consistent. No."[115] Our results here show that Frankfurter was no more consistent with regard to his ideology. He began his career, in the 1938 term, as a slightly left-of-center justice, closer to the term's likely median Chief Justice Stone than to either of the extremes, Hugo Black on the left and James McReynolds on the right. Virtually from the start of his second term, however, Frankfurter appears to drift right—a trend Figure 8 confirms. Note the bright blue at the bottom of his panel, indicating a near 1.0 probability that he was more conservative in later terms relative to his first few years on the Court. By the conclusion of his tenure, Frankfurter was second only to John Harlan as the Court's most extreme conservative voter; and he actually ended his service more firmly planted on the right than Chief Justice Rehnquist.

[113]Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality,* 8 Am. J. Pol. Sci. 22 (1964).

[114]Henry J. Abraham, *Line-Drawing between Judicial Activism and Restraint: A Centrist Approach and Analysis,* in Supreme Court Activism and Restraint (Stephen C. Halpern & Charles M. Lamb, eds. 1982) (our emphasis).

[115]Spaeth's claim grows out of Spaeth, *supra* note 113, but appears in Segal & Spaeth, *supra* note 28, at 409, n. 6.

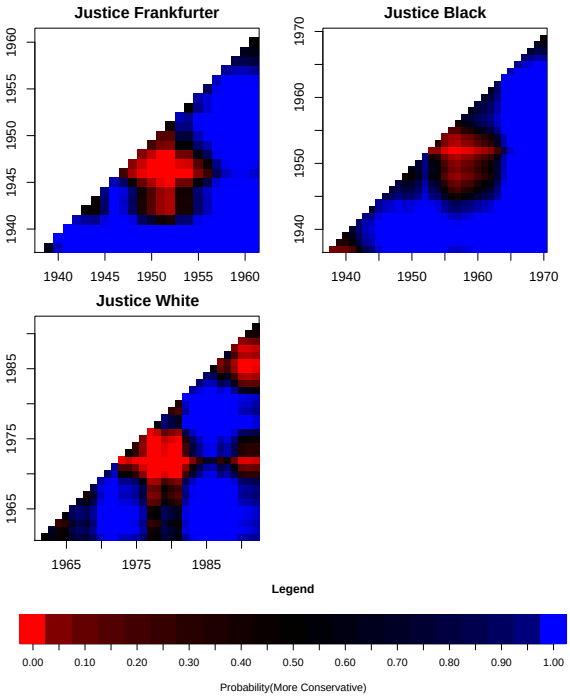


Figure 8: Estimated preference change profiles for three right-trending justices. The baseline term is on the vertical axis, and the comparison term is on the horizontal. For more details on how to interpret the figure, see Figure 6.

Likewise, despite "categorical denial[s] that he had changed his constitutional philosophy,"[116] Hugo L. Black's movement to the right was not missed by some commentators. As James F. Simon once wrote, Black's "increasingly brittle, unmistakably conservative tilt," actually proved embarrassing to many of his admirers.[117] The results depicted in Figures 7 and 8 confirm the rightward trend throughout Black's career and especially since the 1960s. Note that in every term after 1960 the probability that Black was more conservative bordered on 1.0.

Justice Black served on the Court between the 1938 and 1970 terms. The other justices displayed in Figure 7 are of an equally old vintage, all completing their tenures prior to Black—with two notable exceptions: Antonin Scalia and Byron White. Justice Scalia is the only member of the current Court to have grown consistently more conservative with time, an interesting pattern we investigate more closely in Part V. White too moved to the right but his revealed preferences are more intriguing (see Figure 8). Compared with the early 1960s, he grew significantly more conservative at the start of the Burger Court era; then relative to the early 1980s, he once again took turn to the right during the onset of the Rehnquist Court.

Some analysts claim that that these changes are illusory. They say that White "ardently supported individual rights over the claimed rights of the states to abridge citizens' liberties" but

[116] Gerald T. Dunne, Hugo Black and the Judicial Revolution (1977), 413.

[117] James F. Simon, *Judging the Justices*, 49 Stan. L. Rev. 173, 176 (1996). See also Jed Handelsman Shugerman, *A Six-Three Rule*, 37 Ga. L. Rev. 893, 922 (2003), ("From 1962 to 1969, the liberals gained their fifth vote, first with Arthur Goldberg and then Abe Fortas. As Justice Black became more conservative, Thurgood Marshall replaced Clark, and the Court retained its reliable five-vote liberal majority.").

that "on issues of law enforcement ... [he] voted conservatively."[118] Others, however, contend that Justice White was, in fits and starts, more conservative over time.[119] Two authors of this article even speculated that his level of conservatism varied by the President in office.[120] Whether this hypothesis holds we cannot say without more analysis. But our data do lend support to claims about Justice White's rightward drift at various points throughout his career.

C The Remaining Justices

Exhibiting even more exotic patterns than Justice White are William O. Douglas, John Harlan, and Warren E. Burger. As we can see in Figures 9 and 10, both Harlan and Douglas made early and significant moves to the right, followed by change to the left. The depth of their ideological commitment was quite distinct: For his last two decades on the Court, Douglas was its most liberal member; Harlan's liberalism never surpassed, say, O'Connor's. Nonetheless, their trends are similar.

Relative to Douglas, Chief Justice Burger's ideal point appears to be consistently conservative, as virtually all previous analyses suggest.[122] As we can see in Figure 10, however, the Chief's ideological inclinations were more volatile than many contend. Relative to the early 1970s, Burger was significantly less likely to reveal conservative preferences in the late 1970s; but compared with the early 1980s he was significantly more right-of-center at the end of his tenure, that is, by the late Reagan years.

Seen in this way our analysis presents something of a challenge to analyses that cluster Burger and his successor, Rehnquist—or, at least the Courts they led.[123] While it is true, as we show in the left panel of Figure 11, that both Chiefs were more conservative than the Court's median (typically Justice White), Burger was considerably more moderate than Rehnquist. In fact, though much has been made, and rightfully so, about the growing rift between the boyhood friends from

[118]D. Wes Sullenger, *Burning the Flag: A Conservative Defence of Radical Speech and Why It Matters Now,* 43 Brandeis L.J. 597, 619 (2005).

[119]David O. Stewart, *White to the Right?*, A.B.A. J. July 1990, at 40 (arguing that Justice White assumed more conservative positions over time); David D. Meyer, *Justice White and the Right of Privacy: A Model of Realism and Restraint,* 52 Cath. U.L. Rev. 915 915 (2003) ("popular accounts" portray "White as the increasingly conservative curmudgeon on matters of individual liberty, wielding traditional morality or his own crusty predilections to repel the claims of modern society"); Jeffrey Rosen, *The Next Justice*, New Republic, Apr. 12, 1993, at 21, 24 (White moved to the ideological right).

[120]Lee Epstein, Jack Knight, & Andrew Martin, *The Supreme Court as a Strategic National Policy Maker,* 50 Emory L. J. . 583 (2001).

[121]For more detail on the estimated ideal points, see *supra* notes 85 and 86.

[122]Craig M. Bradley & Joseph L. Hoffmann *"Be Careful What You Ask For": The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 Ind. L.J. 889, 893 (2001) (deeming Burger a "consistent conservative"); Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap*, 81 Iowa L. Rev. 883, 968 (1996) ("Chief Justice Burger and his conservative colleagues clearly wished to tighten legal controls on obscenity"); Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers,* 36 Wm & Mary L. Rev. 473 ("Chief Justice Burger, of course, had more conservative instincts than many of the Justices on the Court when he arrived.").

[123]Charles M. Lamb, *Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times*, in The Burger Court: Political and Judicial Profiles 129, 132 (Charles M. Lamb & Stephen C. Halpern eds., 1991); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act* 57 Rutgers L. Rev. 945, 990 (2005) ("the Court took a more conservative turn under the leadership of Burger and Rehnquist"). But see Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice,* 154 U. Pa. L. Rev. 1665, 1685 (2006) ("Justice Rehnquist is regarded as more conservative than Justice Burger).

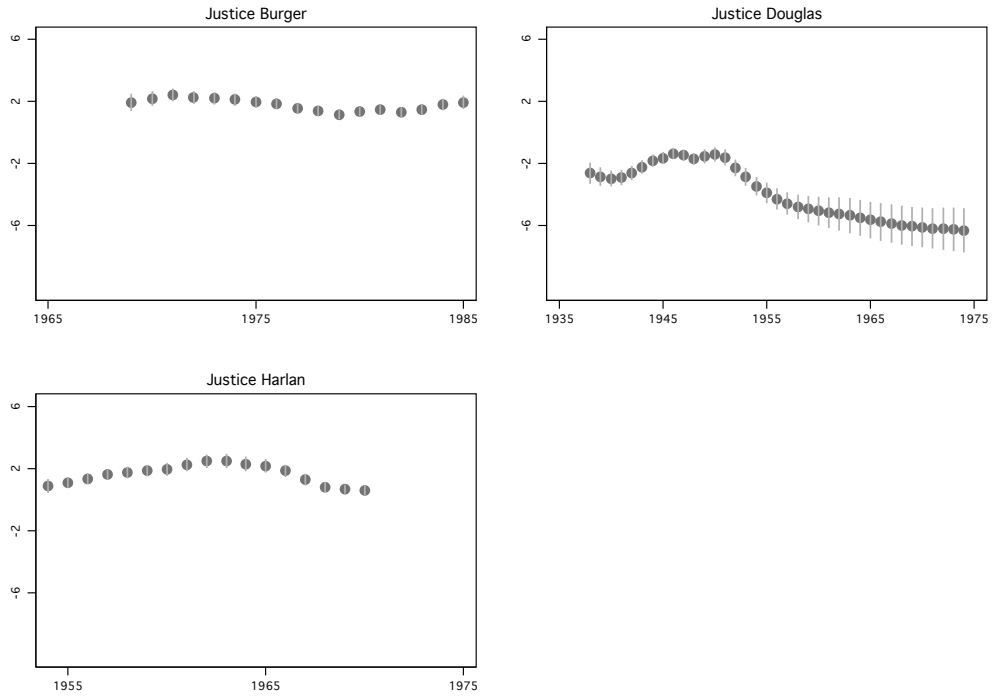


Figure 9: Estimated ideal points of justices serving ten or more terms between 1937 and 2005 and who moved to the left *and* right. The vertical axis in all plots is the justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points and the vertical error bars in each plot are 95% credible intervals. [121]

Minneapolis, Blackmun and Burger,[124] the two generally remained ideologically closer than Burger and Rehnquist. Only in Burger's last two terms in office, as the right panel of Figure 11 makes clear, were the present and future chiefs as aligned in ideological space as the "Minnesota twins," Blackmun and Burger.

This finding may signal the need to revisit legal commentary of the day (and even today) equating the ideological tendencies of Chief Justices Burger and Rehnquist. Even more in need of revisiting is the account that motivated our project here: that justices generally do not change in their ideological outlook over time. According this account, it is only a handful of anomalies, the very few Blackmun's, who exhibit fluctuation; the balance remain stable. As it turns out and as we show in Figure 12, precisely the opposite is true. Only four of the twenty-six justices serving since 1937 remained relatively stable.

Two of the four, Frank Murphy and Clarence Thomas, were consistently extreme—Murphy on the left and Thomas on the right. Justice Murphy may never have been the Court's most liberal member during any term on which he served (Black or Douglas held that distinction), but in several he came quite close.[127] On today's Court, Murphy would be approximately slightly to right of Souter but to the left of Breyer. As for Thomas, ever since he joined the Court in the 1991 term he and Scalia have vied for the most conservative spot. But these days, even with Scalia's turn to

[124]See, especially, Greenhouse, *supra* note 12.
[125]For more detail on the estimated ideal points, see *supra* notes 85 and 86.
[126]For more detail on the estimated ideal points, see *supra* notes 85 and 86.
[127]E.g., in the 1947 term, Black was the most liberal, with an estimated ideal point at -1.727; Murphy's was -1.640.

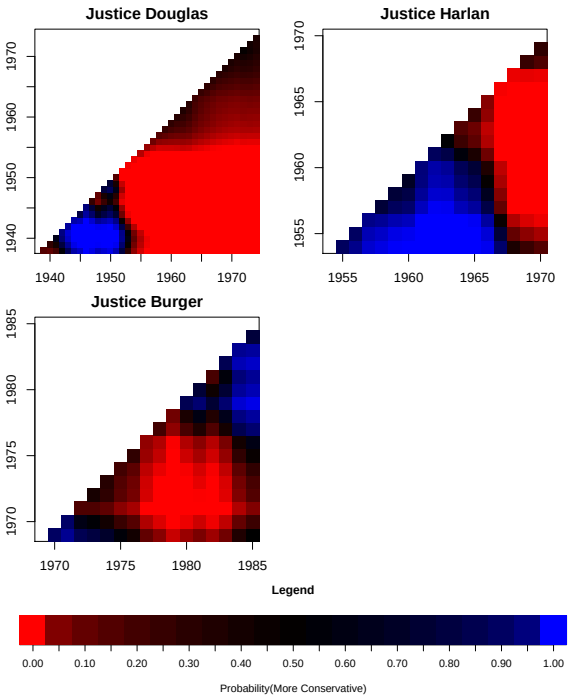


Figure 10: Estimated preference change profiles for three right- and left-trending justices. The baseline term is on the vertical axis, and the comparison term is on the horizontal. For more details on how to read the figure, see Figure 6.

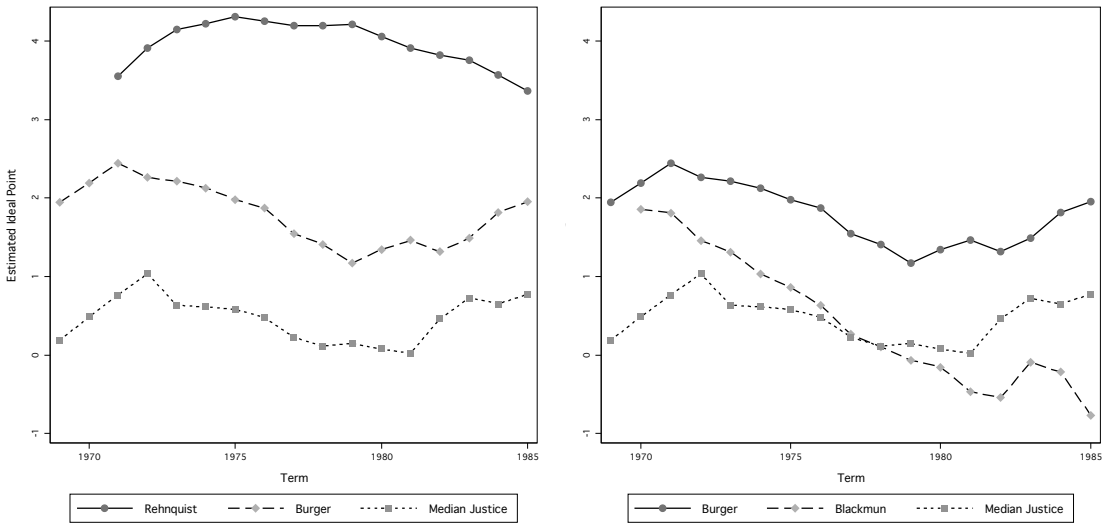


Figure 11: Estimated ideal points of Chief Justice Burger, the median justice, and Justices Blackmun and Rehnquist, 1969-1985 terms. The vertical axis in both plots is the justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points.[125]

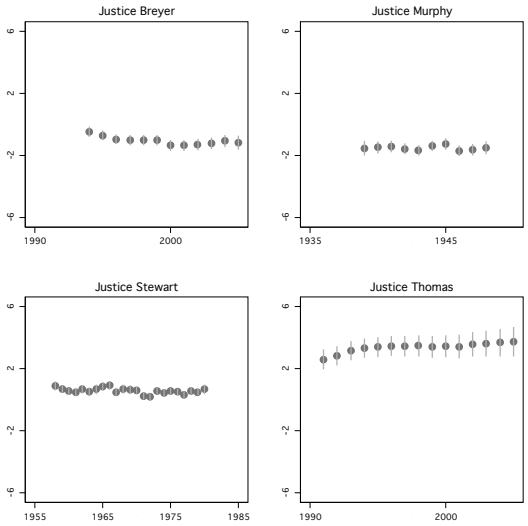


Figure 12: Estimated ideal points of justices serving ten or more terms between 1937 and 2005 and who remained relatively stable during their service on the Court. The vertical axis in all plots is the justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points and the vertical error bars in each plot are 95% credible intervals. [126]

the right, Thomas can declare victory. In the 2004 term Scalia was nearly as close to Rehnquist as he was to Thomas who clearly anchored the extreme right; and in 2005, Scalia was further from Thomas than Alito[128]

Stewart and Breyer are the remaining justices who fail to exhibit much in the way of preference change. Juxtaposed against Thomas and Murphy, the two held more centrists ideal points. At the time of his retirement, Stewart's pivotal role on the Court moved to the fore, leading to speculation about the extent to which his eventual replacement, O'Connor, would push the Court to the right.[129] Justice Breyer, while never finding himself in the Court's center, is hardly an extremist in the mold of a Murphy or Thomas. During the 1994-2004 terms, a period of stability in the Court's membership, Breyer supported litigants alleging an abridgment of their rights or liberties in about 60 percent of the 473 cases; that figure for Stevens, the most liberal justice during those terms, was

[128]See *infra* Figure 19.

[129]Steven R. Weisman, *Reagan Nominating Woman*, NY Times, July 8, 1981, at 1A. ("White House officials were hopeful that Judge O'Connor's appointment could be historic not only because she is a woman but also because her presence on the Court, as a replacement for Associate Justice Potter Stewart, who was often a swing vote between ideological camps on the Court, could shift the Court's balance to the right."); Stuart Taylor, Jr., *Rather an Unknown*, NY Times, July 8, 1981, 13A ("it appears to be far too early to determine whether the ideologically divided Court will become more conservative or more liberal if Judge O'Connor fills the vacancy created by the retirement of Justice Potter Stewart, who has been viewed as a moderate leaning to the conservative side of the Court's delicate philosophical balance."); David S. Broder, Doing Justice to the Poor, Wash. Post, June 24, 1981, A21 ("The fact that the President, who does not see any compelling need for the continuation of the Republican-created program of legal services for the poor, is the same President who will soon be filling Potter Stewart's "swing seat" on the Supreme Court is something to give you pause.")

Worth noting is that Stewart himself rejected the title "swing justice." When asked at a news conference before his retirement, "You are regarded as a 'swing' Justice, one whose opinions are not easily predictable. Do you think you should be succeeded by someone like that?" Stewart responded: "I've never thought of myself as a swing Justice. I've thought of myself as deciding every case correctly, and I've never thought in terms of putting a label on myself." Excerpts from *Stewart's Session with Reporters*, NY Times, June 20, 1981, at 9.

over 70.[130] A term later, in 2005, Justice Breyer again found himself in the liberal wing, though its most moderate member.[131]

IV The Implications of Ideological Change

The patterns revealed in Figures 5, 7, and 9, however disparate, are conclusive in one important regard: They cast serious doubt on the commonplace assumption of stable preferences among Supreme Court justices. At least for justices serving since 1937, ideological drift was not only possible, it was likely. Of the 26 justices we examined only four did not exhibit significant fluctuation.

Certainly the patterns of change differ. While the plurality shifted to the left, a consequential number moved to right or swung back and forth. Further, change appears to occur at different points in the justices' careers. More than a few exhibit what political scientists call, alternatively, the "first-year," "freshman," or "newcomer" effect; that is, an initial period of volatile or uncharacteristic behavior followed by stability in preferences.[132] Earl Warren may fall into this category. After his first term or so, he moved to the left—and never turned back.

These patterns deserve consideration, as does the question of what precipitated the observed changes. In other words, apart from idiosyncratic factors—such as Blackmun's rift with Burger—can we identify any underlying, and universal, explanations of change on the Court? We have hinted at some throughout this article, chiefly the political environment in which the justice operates. Is it a coincidence that Chief Justice Burger's most liberal terms came while Jimmy Carter, the only Democratic President during Burger's tenure, was in office; and that his most conservative overlapped with the Reagan years? Likewise, researchers have speculated that both Justices Black and White may have engaged in "strategic adaptation": the former moved to the right during the Nixon presidency; the latter grew more liberal when Kennedy and Johnson were in office and increasingly conservative during the Nixon and Reagan years.[133]

Additional explanations abound,[134] and we certainly commend to others the task of exploring them. For now we focus on the implications of our findings—implications that require only evidence of change to develop, and not an underlying causal explanation (assuming one exists). Returning to our earlier discussion, we see two as particularly intriguing: the consequences of change for *the appointment of justices* and for *doctrinal change*. The first implicates the timing of ideological drift and the second, its importance.

[130] Computed using Spaeth, *supra* note 35, with dec_type=1, 6, or 7; analu=0; and value ≤ 6.

[131] See *infra* Figure 19.

[132] See, e.g., J. Woodford Howard, Justice Murphy: The Freshman Years, 18 Vand. L. Rev. 473 (1965); Timothy M. Hagle, "Freshman Effects" for Supreme Court Justices, 37 Am. J. Pol. Sci. 1142 (1993); Terry Bowen & John M. Scheb, II, *Reassessing the "Freshman Effect": The Voting Bloc Alignment of New Justices on the United States Supreme Court, 1921-90,* 15 Pol. Behavior 1 (1993).

[133] See Epstein, et al., *supra* note 120.

[134] These include context (the justices push and pull each other to the right or left), public opinion (the justices fluctuate in line with the public's ideological mood), election returns (the justices follow the election returns), and the "(Linda) Greenhouse" effect (justice move to the left to win the approval of the New York Times's Supreme Court reporter). See, e.g., Ruger, *supra* note 10; Baum, *supra* note 112; Ulmer, "The Longitudinal Behavior of Hugo Lafayette Black," *supra* note 44; Epstein, et al., *supra* note 46.

A The Appointments Process and the Timing of Change

Why the appointment of Supreme Court justices is now, and always has been, a process rife with political considerations is a question with many answers. But surely one, as we noted earlier, is the belief among all the relevant actors—the President, senators, interest groups, and the public—that their choice is particularly weighty. "Because it is nearly impossible to remove a justice, we must go to lengths to ensure the appointment of the right person, that is, the justice who shares our ideological commitments, and will for the foreseeable future." Or so the calculus goes.

What our results suggest is that predicting the future ideology of any given nominee may be a risky business, but how risky? That is to say, we know predictions about the long-term ideology of justices may be highly uncertain in the presence of change. But suppose the relevant political actors are interested in appointing justices who will reflect their ideological values for, say, a decade. Is it possible to make accurate forecasts? Succinctly, are the changes we observe in Figures 5, 7, and 9 more likely to occur later, rather than sooner, in a justice's tenure?

As it turns out, the news for political actors is mixed. On the upside, senators and the President can be reasonably certain that the justice they appoint will behave in line with their expectations—*at least during the justice's first term in office.* Nicely making this point is Figure 13, which plots the results of comparing the justice's first- and tenth-term ideal point estimates (see Figures 5-12) with newspaper editors' assessments of the justices' ideology at the time of appointment (see Figure 1).[135] The closer a justice is to the line, the better the initial ideological assessment corresponds to the justice's first- (left panel) or tenth- (right panel) term revealed preferences.

[135]To derive Figure 13 we use linear regression to predict the Martin-Quinn estimates of justices in the first and tenth terms using newspaper editors' assessments of the justices' ideology at the time of appointment (see Figure 1). The table below presents the results (standard errors are in parentheses); a visual depiction of this relationship appears in Figure 13.

	First Term	Tenth Term
Intercept	0.386	0.367
	(0.193)	(0.276)
Predicted Ideal Point	1.602	1.464
	(0.294)	(0.427)
	$n = 28$	$n = 26$
	Residual standard error = 1.021	Residual standard error = 1.402

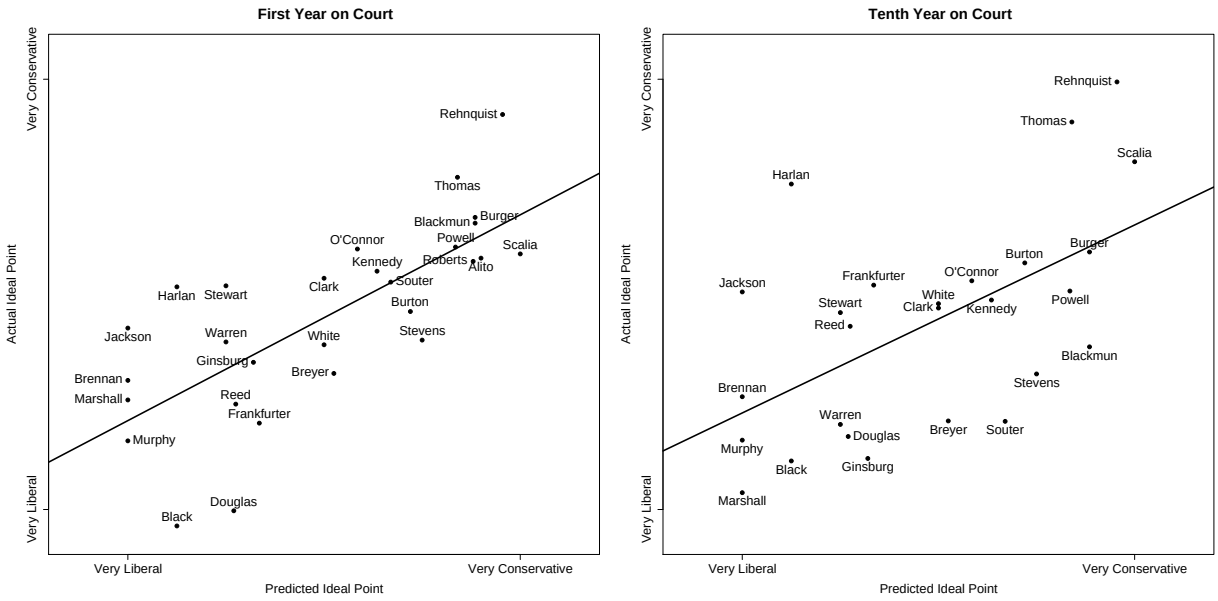


Figure 13: Actual (Martin-Quinn) ideal points during a justice's first and tenth terms plotted against predicted ideal points (based on newspaper editors' assessments of ideology prior to confirmation). The superimposed lines are from least squares linear regressions fit to these data (see *supra* note 135). The closer a point is to the line, the better the prediction. The scale of axes in each plot is identical.[136]

If we assume that newspaper editors accurately capture senators' and the President's beliefs about the ideology of their appointees—and there is little reason to think otherwise—then Figure 13 suggests that these elected actors can have some confidence in their beliefs in the very short term (i.e., the first-year of service). Note how tightly most justices cluster around the first term regression line—even those justices who later made significant moves to the right or left.[137] Justice Blackmun provides a case in point. Martin and Quinn estimate his ideal point in 1970, his first term on the Court, at a relatively conservative 1.86. Based on the newspaper editors' assessments, we would expect an ideal point of 1.69[138]—a trival difference between the actual and predicted values. In words, Richard Nixon was not wrong, at least not initially, to think that in Blackmun he was naming a moderately conservative justice to the Court.

Ten years after appointment, the picture clouds considerably. Underscoring this point is the righthand panel of Figure 13 in which we can observe that while the *aggregate* relationship (as given by the regression line) between editorials at the time of appointment and revealed preferences remains about the same, the amount of uncertainty about the location of an *individual* justice (as

[136]For more detail on the actual (Marti-Quinn) estimated ideal points, see *supra* notes 85 and 86; for information on the editors' assessments, see *supra* note 37. We generated the predictions via Clarify. See Gary King, Michael Tomz, & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation,* 44 Am. J. Pol. Sci. 341 (2000).

[137]Further, the most notable departures from the regression line are for justices predicted to be at the extremes of the ideological spectrum. This is largely due to the fact that the editorial predictions are bounded above and below with many justices at either the maximal or minimal value, while the Martin-Quinn ideal points are theoretically unbounded. In other words, much of the variability in the plot is likely an artifact of the scaling of the x and y variables.

[138]We estimated this prediction using Clarify, King et al., *supra* note 136. The 95% confidence interval is [1.05, 2.33].

given by the amount of variability around the regression line) increases substantially.[139] Which brings us to the downside for the appointing President and his supporters in the Senate: Even though the association remains fairly strong, we observe a degradation in the relationship between the justices initial attitudes and their ideological preferences as soon as ten years out.

Further proof of the obstacles confronting Presidents in seeking to establish enduring legacies comes in Figure 14. There we visually depict the probability that the justices were more conservative (or liberal) in the balance of their terms than in their first. If the solid line in each panel is above the top dashed line, then the justice is significantly more conservative. If that line is below the bottom dotted line, then the justice is significantly more liberal. The vertical line represents their tenth year of service.

[139]The table depicted in *supra* note 135 confirms this visual analysis more formally. Note that the slope estimate is quite similar in both the first term and tenth term regressions. The residual standard error, however, increases from 1.021 in the first term regression to 1.402 in the tenth term regression. In other words, the predicted error around the regression line increased by 37.3% after ten terms.

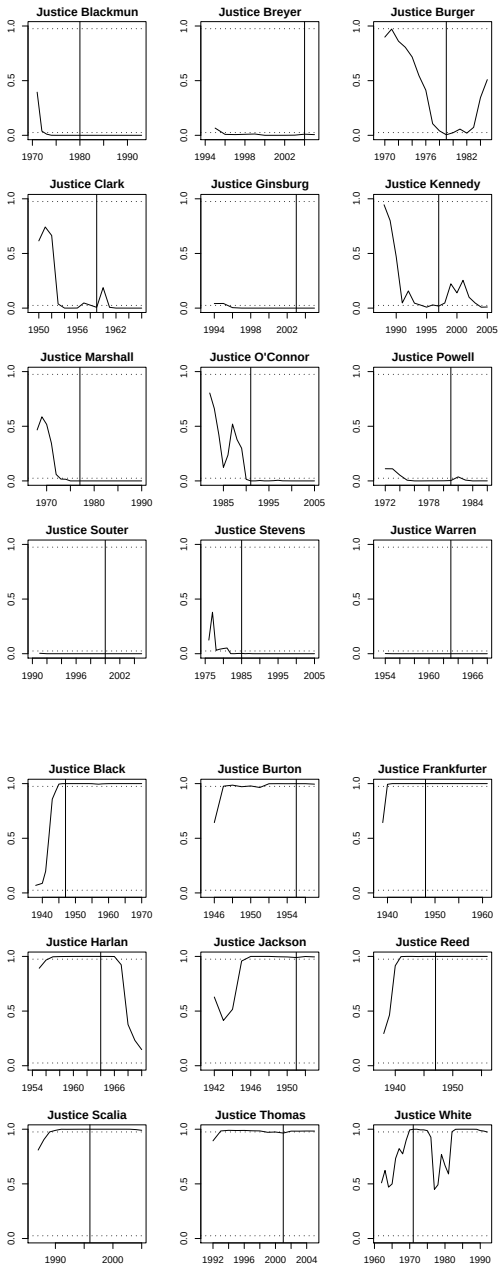


Figure 14: The probability that a justice is more liberal or conservative in subsequent terms than in their first term. The vertical axis denotes the estimated probability. If the solid line in each panel is above the top dashed line, then the justice is significantly more conservative. If that line is below the bottom dotted line, then the justice is significantly more liberal. The vertical line within each panel represents the tenth term of service. The top grouping shows justices who were significantly more liberal by their tenth term relative to their first; the second grouping, significantly more conservative. We exclude the three justices (Brennan, Murphy, and Stewart) who were neither significantly more liberal nor conservative by their tenth year compared to their first. We also exclude the two justices who were both more liberal and more conservative (Douglas and Rehnquist) (for their displays see *infra* note 140).

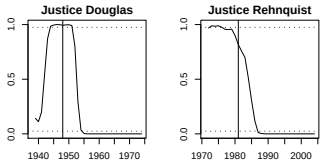
Relative to their first year, all but three justices (Brennan, Murphy, and Stewart) were significantly more liberal or conservative by their tenth year.[140] Certainly, in some instances the observed trends are fairly trivial; for example, compared to his first year, Justice Kennedy was more liberal by his tenth but the effect dissipates shortly thereafter. Also, to be sure, some Presidents would not have objected to the drift exhibited by their justices. Scalia is a prime example. We can hardly imagine his appointing President, Ronald Reagan, arguably the most conservative President of the 20th century,[141] complaining about Scalia's rather quick, significant, and enduring turn to the right. Nor do we suspect that Thurgood Marshall's move to the left would have disturbed Lyndon Johnson, among the most liberal Presidents of the last five decades.[142]

For other justices, however, the change was neither trivial, nor one that the appointing President would have applauded. Chief Justice Warren illustrates both points. When Eisenhower nominated him was to fulfill a campaign—not exclusively to advance his ideological agenda—neither the President nor the press deemed the new chief an extreme liberal; indeed, the editors' initial characterization of Warren was almost identical to their assessment of the moderate Potter Stewart.[143] In his first term, Warren lived up to expectations: His ideal point estimate puts him closer to the center of the Court (Justice Clark) than to the then-extreme liberals Douglas and Black. Note too how close Warren is to the line in Figure 13 indicating that newspaper editors of the day rather accurately forecast his first year behavior. But few predicted what would happen next; relative to his first term, Warren was significantly more liberal in all others.

Justice O'Connor may provide an even more interesting case, and one not atypical in our data. Up until she reached about the ten-term mark, the difference between the preferences she revealed in her first year and all others was inconsequential. Thereafter she made a slow and gradual move to the left, never to return to the high level of conservatism she exhibited during the years Ronald Reagan, her appointing President, served. To think about it another way, if Reagan officials believed O'Connor would retire after a decade of service, their choice was safe: the justice they nominated and the justice who served were ideologically identical. But, as know, O'Connor remained on the Court another fifteen years, during which time she moved significantly to the left.

More generally, if all justices served for ten or fewer terms, preference change would be less of a concern: It was only by (or close to) the decade mark that we observe behavior significantly different than the first term for nearly ten justices. The fact of it is, however, that most contemporary justices remain on the Court far longer. Of the thirty-two justices appointed between 1937 and 2004, only seven served fewer than ten terms.[144] For those in our data set, the length of tenure was, on

[140] As shown in the plots below, Justice Douglas and Chief Justice Rehnquist, on the other hand, were both more conservative and more liberal.



[141] We base this claim on Poole's NOMINATE Common Space scores. See Keith T. Poole, *Estimating a Basic Space From a Set of Issue Scales,* 42 Am. J. Pol. Sci. 954 (1998). The scores are available on Poole's website, at http://voteview.com/dwnl.htm.

[142] See Poole, *supra* note 141.

[143] See *supra*, Figure 1.

[144] Justices James Byrnes, Wiley B. Rutledge, Fred Vinson, Sherman Minton, Charles Whittaker, Arthur Goldberg,

average, 21.4 years (with a standard deviation of 7.9). Only five justices served fewer than fifteen terms—and two of the five remain on the Court.[145]

Given the trend toward longer terms,[146] the message for Presidents, senators, and interest groups moves into relief: Those believing that they can entrench their views in the Court for the decades to come are occasionally mistaken.[147] In turn, because these political actors cannot always accurately predict the future, our results may counsel against ideological appointments—at the least, ideological appointments to the neglect of other factors but especially a *nominee's qualifications* and his or her ability to *advance electoral goals*. Let us consider each.

In previous work, we demonstrated that senators (and perhaps their constituents as well) are now placing greater weight on a candidate's ideology and less on their merit than ever before.[148] Our results here ought prompt a reevaluation of that balance: While ideology can and does change with time, background credentials do not. We might even go further and suggest that for a President seeking to leave a lasting legacy to the nation in the form of justices who will continue to exert influence on the law well after he leaves office, then a nominee's professional merit should be a crucial consideration. To be sure, some 20th century appointees thought to be lacking in the requisite qualifications went on to be great justices. But many more universally acclaimed as great justices were also universally perceived as exceedingly well qualified at the time of their nomination: Oliver Wendell Holmes, Benjamin Cardozo, William Brennan and Antonin Scalia, to name just a few. While the ideological direction of their doctrinal path may have been hard to predict over the long term, and not always to the President's liking, their ability to influence the direction of the law, based in some part on their intellect, was not.

Perhaps a bit riskier but nonetheless advisable in light of ideological drift may be a (re)emphasis on candidates who can advance the President's or his party's electoral interests. Of course, this was the path followed by some past Presidents, including Eisenhower with his nomination of both Brennan and Warren. Anecdotal and historical evidence, however, suggests that not since the appointment of Sandra Day O'Connor has a President placed more weight on partisan-electoral motivations than on other considerations.[149] Indeed, in O'Connor's case, Ronald Reagan was actually fulfilling a campaign promise to appoint the first female justice[150]—a promise his advisors thought would not only promote Reagan's candidacy but also advance the future electoral prospects

and Abe Fortas.

[145]The five are Justices Breyer, Burton, Ginsburg, Jackson, and Murphy.

[146]See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered,* 29 Harv. J. L. & Pub. Pol'y, 770 (2006).

[147]Jeffrey A. Segal, et al., *Buyer Beware? Presidential Success through Supreme Court Appointments,* 53 Pol. Research Q. 557, 557 (2000) make a similar point about the President. They demonstrate that in the short run Presidents often succeed in appointing ideologically like-minded justices but over time "justices on average appear to deviate . . . away from the Presidents who appointed them."

[148]Epstein, et al, *supra* note 70.

[149]Some might argue that George H.W. Bush's appointment of Clarence Thomas, Clinton's of Ruth Bader Ginsburg, and George W. Bush's of Samuel Alito were all designed to advance partisan interests. But we suspect otherwise, and in the cases of Thomas and Ginsburg, Yalof's account, *supra* note 59, supports our suspicions. In both instances, the administration considered but rejected candidates who may have been of greater value to their party's cause. Because of its recency, no studies yet exist on the calculus behind Alito's nomination. While we suppose it is possible that the record will eventually show that partisan concerns (e.g., appeasing the right wing) guided the selection of Alito, far more likely—given the fit between Alito's and the President's preferences—is that ideology was the *primary* motivating force.

[150]On October 14, 1980, Reagan promised that "one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find, one who meets the high standards I will demand for all my appointments." Quoted in Elder Witt, A Different Justice: Reagan and the Supreme Court (1986), 33.

of the Republican party.[151]

This is not to say that contemporary Presidents have failed to consider candidates who could have advanced their party's electoral interests. They have. According to Yalof's account,[152] in 1994 the Clinton administration shortlisted two candidates designed to enhance the Democrats' commitment to particular constituencies: Judges Jose Cabranes, who had the support of influential Hispanic organizations, and Amalya Kearse, a black woman. That the nomination ultimately went to Stephen Breyer, however, shores up our point: electoral considerations often give way to others—in Breyer's case, his political values and his support in the Senate. Given our findings here of ideological drift, not to mention studies suggesting the importance of symbolic politics to particular electoral constituencies (think: Reagan's appointment of the first female justice or President Bush's ability to speak Spanish),[153] perhaps Presidents ought actually appoint and not just consider appointing justices primarily for electoral reasons.

Recommendations about emphasizing or, more precisely, *re*emphasizing qualifications and partisan interests pertain to Presidents seeking to create lasting legacies. For those political actors more interested in the short term, our findings suggest a different response: it is possible, even likely, that during their first few years in office, justices will behave in ways anticipated at the time of their appointment. This is the primary lesson of Figure 13, documenting the strong relationship between initial ideological assessments of the justices, as nominees, and revealed preferences during their first term. Of course, for some Presidents, senators, and interest groups these short-term payoffs may be sufficient to continue to place emphasis on ideology over credentials—especially if particular nominees, in particular areas of the law, can work to generate *quick* doctrinal change.

B The Possibility and Importance of Doctrinal Change

Which brings us to a critical juncture in our analysis. We have now spent many pages documenting ideological movement among the justices. In so doing we have noted the whos, the hows, and the whens but we have reserved for now perhaps the most fundamental question of all: Does the ideological drift matter? To what extent can it lead to doctrinal fluctuations among individual justices and even for the Court as a whole?

1 Doctrinal Change and Individual Justices

Turning first to the question of individual-level shifts, their import depends on the direction and magnitude of the ideological movement. Consider, first, an Antonin Scalia, that is, an extreme conservative who has grown more extreme with time. Was the move of any doctrinal consequence?

The answer, as Figure 15 indicates, is probably not much. Here we display Scalia's term-by-term ideal point estimates; we also display the "cut point" lines for three cases implicating different

[151] Worth noting, Reagan's speech of October 14, 1980 in which he pledged to appoint a woman to the Court, see *supra* note 150, was designed to counter accusations that, as Reagan phrased them, he is "somehow opposed to full and equal opportunities for women in America." Quoted in Witt, *supra* note 150, at 33. See also Yalof, *supra* note 59, at 135-136.

[152] Yalof, *supra* note 59, at 204-205.

[153] For an examination of the importance of symbolic politics, see Stephen P. Nicholson, et al., *Ich bin ein Latino! Sophistication, Symbolism, Heuristics, and Latino Preferences in the 2000 Presidential Election,* presented at the 2002 annual meeting of the American Political Science Association, Boston, MA, August 29-September 1.

areas of the law: *Lawrence v. Texas*,[154] *Grutter v. Bollinger*,[155] and *Shafer v. South Carolina*[156] These lines provide information about the likely behavior of justices above and below it, such that if a justice's ideal point is above the line, the probability is greater than .50 that she or he will cast a conservative vote (i.e., against Lawrence, the Michigan Law School, and Shafer).[157] For ideal points below the line, we predict odds greater than 50-50 that the justice will rule in the liberal direction (i.e., in favor of Lawrence, the Michigan Law School, and Shafer).

In the case of *Lawrence*, we know the Court struck down the sodomy law at issue—an outcome correctly anticipated by our ideal point estimates: at least five justices fell below the cutpoint line. We also know that Scalia was not among this group; his estimated ideal point in 2003 was above the line and, in fact, he dissented in *Lawrence*. But also note the location of his ideal points in all previous years. Because they are above the line, we can safely conclude that even at his most moderate moment—coinciding with the onset of his tenure—Scalia would have likely voted to uphold the sodomy law. His ideological change, in other words, failed to translate into important legal change. More generally, in looking at all three cases depicted in Figure 15, in only *Shafer* and for only three terms at that would we predict a different response had the case come earlier in Scalia's tenure.

Of course we have not scrutinized the cut points of all cases resolved since the 1986 term when Scalia joined the Court. But we suspect that additional analyses would only confirm the basic lesson of Figure 15. Because Scalia was so extreme in his preferences from the start of his service,

[154]539 U.S. 558 (2003) (striking down sodomy laws).

[155]539 U.S. 244 (2003) (upholding Michigan Law School's affirmative action program).

[156]532 U.S. 36 (2001) (ruling that under the state's capital sentencing scheme jurors should be informed of a defendant's parole ineligibility).

[157]We derive these cut points using the Martin-Quinn method. Under their approach, the data and modeling assumptions determine the joint distribution of the ideal points and the cut points. While this joint distribution is large and complex, it is possible to use the conditional distributions of the ideal points—given the cut points—and the cut points—given the ideal points—to fit the model, as well as to gain some intuition about how Martin & Quinn determine the cut points and ideal points.

To begin, suppose we know the locations of all the cut points. In other words, we know that all justices with an ideal point to the left of the cut point will be more likely to vote in the liberal direction and all justices to the right of the cut point will be more likely to vote in the conservative direction. If we observe only one case, then knowledge of the lone cut point tells us only that some justices (those who voted in the liberal direction on the case) are likely to be to the left of the cut point and other justices (those who voted in the conservative direction) are likely to be to the right of the cut point; we cannot infer the location of each justice other than that they are probably somewhere to the left or right of the cut point. When observe multiple cases, however, and the cut points are treated as known, more (probabilistic) constraints are applied to the location of the ideal points and tighter estimates of the ideal points become possible.

On the other hand, if we treat the ideal points as known we can make inferences about the likely location of the cut points. To see this, suppose we observe the following sequence of votes (ordered from left to right), where L denotes a liberal vote and C a conservative vote:

L L L C C C C C C C

From this sequence, we would infer that the most likely place for the cut point would be somewhere between the third and the fourth justice. (The exact location is determined by the particular modeling assumptions employed but it is qualitatively similar across a range of reasonable alternative assumptions.) Cases with equivalent observed voting patterns will have the same estimated cut points.

By alternately conditioning on the cut points to infer the conditional distribution of the ideal points and conditioning on the ideal points to infer the conditional distribution of the cut points Martin & Quinn are able to take a sample that is approximately from the joint distribution of the ideal points and cut points given the observed votes on the merits.

[158]For more detail on cut points, see *supra* note 157.

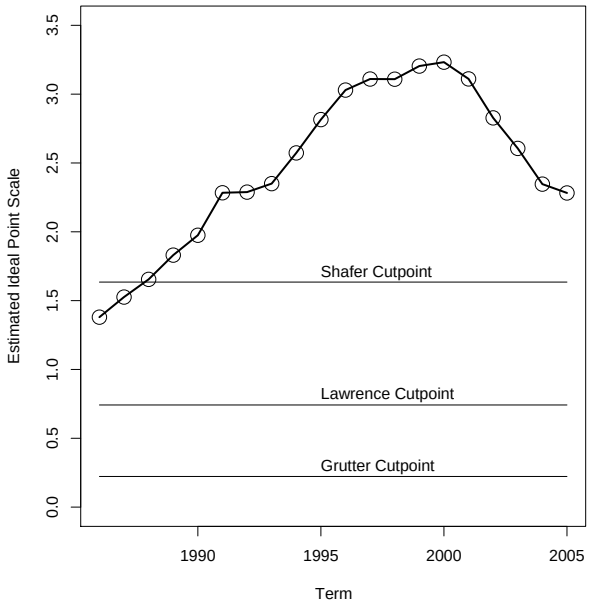


Figure 15: Time series plot of Justice Scalia's estimated ideal points, 1986-2005 terms. The horizontal lines are the cut points for Grutter v. Bollinger, Texas v. Lawrence, and Shafer v. South Carolina such that points above the line indicate a probability of greater than .50 of voting conservatively; those below the line indicate a greater than .50 probability of voting in the liberal direction (as the Court did in each of the depicted cases).[158]

his turn to the right indicates only a marginal change in his jurisprudence. The same likely holds for Justices Brennan and Marshall—other rather extremists (though liberals) who only grew more extreme over time.

For the balance of our justices, however, ideological fluctuations may well have precipitated doctrinal change of some consequence. Again, Harry Blackmun provides the most obvious case in point—with Figure 16 providing but one example. There we display his ideal points along with the estimated cutpoints for two landmark death penalty cases, *Furman v. Georgia*[159] and *Gregg v. Georgia*.[160] When the Court decided in *Furman* to strike down all existing death penalty statutes, Blackmun dissented. Given that his revealed preferences for the 1971 term were north of the *Furman* cutpoint line, the dissent was not a surprise. And neither, for that matter, was his concurrence in *Gregg* supporting the Court's decision to uphold newly fashioned capital punishment laws. His ideal point remained above the *Gregg* cutpoint line.

Seen in this way, Blackmun provides an example of how Presidents, allied senators and supporting organized interests can gain short-term policy benefits from appointing ideologically compatible nominees. When Nixon nominated Blackmun to the Court, the President believed his new justice was committed to a law-and-order stance, and newspaper editors of the day agreed. In *Furman* and *Gregg*, Blackmun did not disappoint. Note, though, that by 1976 Blackmun's ideological shift began to seep into his death penalty jurisprudence. Had the Court decided *Furman* in 1976, the

[159]408 U.S. 238 (1972).
[160]428 U.S. 15 (1976).
[161]For more detail on cut points, see *supra* note 157.

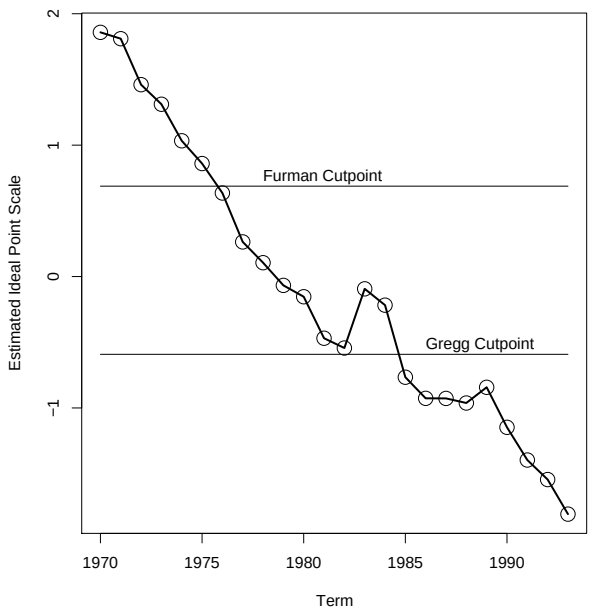


Figure 16: Time series plot of Justice Blackmun's estimated ideal points, 1970-1994 terms. The horizontal lines are the cut points for *Furman v. Georgia* and *Gregg v. Georgia* such that points above the line indicate a probability of greater than .50 of voting against the defendant (as the Court did in *Gregg*); those below the line indicate a greater than .50 probability of voting for the defendant (as the Court did in *Furman*).[161]

probability of Blackmun upholding Georgia's death penalty law would have fallen below .50; and had it decided *Gregg* after 1985, Blackmun would likely have voted to strike the new statutes.

Because Blackmun moved from a rather extreme conservative to a rather extreme liberal, the effect of his ideological turnabout on doctrine is especially noticeable. But the trend need not be as dramatic as Blackmun's for it to manifest in legal change. Chief Justice Rehnquist's turn to the center, as we show in Figure 17, provides an interesting example. Here we display cutpoints for *Lawrence, Grutter*, and *Shafer*, as well as for *Wiggins v. Smith*,[162] in which the Court held that the defendant's attorney had had failed to provide effective counsel during the sentencing phase of his capital case. Observe that in neither *Grutter* nor *Lawrence* did Rehnquist's leftward trend translate into doctrinal change: Odds are that at no point in his career would he have voted to strike the sodomy law at issue in *Lawrence* or uphold the affirmative action program in *Grutter*. And, in fact, he dissented in both cases. The two capital cases present a different picture. Had either been before the Court prior to the early 1990s, we predict that Rehnquist would have ruled for the state in both. But thereafter he had moved sufficiently to the left that the odds shifted in favor of the defendant. And, in fact, in both *Shafer* and *Wiggins* Rehnquist cast votes against the government.

[162]539 U.S. 510 (2003).

[163]For more detail on cut points, see *supra* note 157.

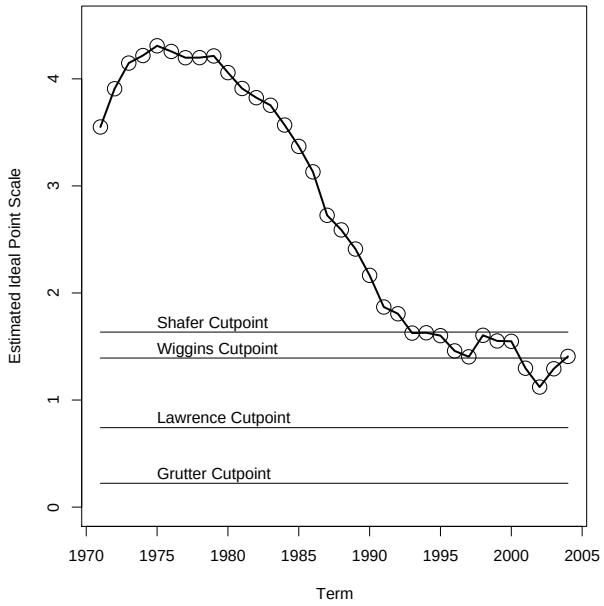


Figure 17: Time series plot of Justice Rehnquist's estimated ideal points, 1970-2004 terms. The horizontal lines are the cut points for *Grutter v. Bollinger, Texas v. Lawrence, Wiggins v. Smith*, and *Shafer v. South Carolina* such that points above the line indicate a probability of greater than .50 of voting conservatively; those below the line indicate a greater than .50 probability of voting in the liberal direction (as the Court did in each of the depicted cases).[163]

2 Doctrinal Change and the Court's Center

Rehnquist's shift is interesting if only because it is so unexpected, but its impact on the establishment of precedent is far from clear. Because both *Shafer* and *Wiggins* were decided by 7-2 majorities, the Chief's vote was likely not necessary for the creation of precedent. More generally, because Rehnquist never served as the Court's median or swing justice, even as he grew less extreme, his shift was less than consequential.

Not so of the more centrists justices. Take Sandra Day O'Connor. As we already noted, over the last decade or so, O'Connor trended to the left; less obvious from our analyses, though widely acknowledged, is that O'Connor's was the likely median (or swing) justice for over a third of her service on the Court (nine of twenty-five terms). Even more impressively, she managed to hold that crucial position for an extraordinary seven consecutive terms.[164]

With little doubt these two phenomena—O'Connor's move to the left and her role as the swing justice—coalesced to produce noticeable and consequential doctrine during the latter Rehnquist Court years. Figure 18 makes the point for two cases, *Lawrence* and *Grutter*. Here we show ideal point estimates for O'Connor and for the median Justice over the last two decades. (Solid black circles indicate terms when O'Connor was the median.) We also show the cutpoints for *Grutter* and *Lawrence*.

[164]See Martin, et al., *supra* note 88.

[165]For more detail on cut points, see *supra* note 157. Note that 2005 has a black circle indicating that O'Connor was the median, as well as a triangle indicating that Kennedy moved into the median position when O'Connor departed.

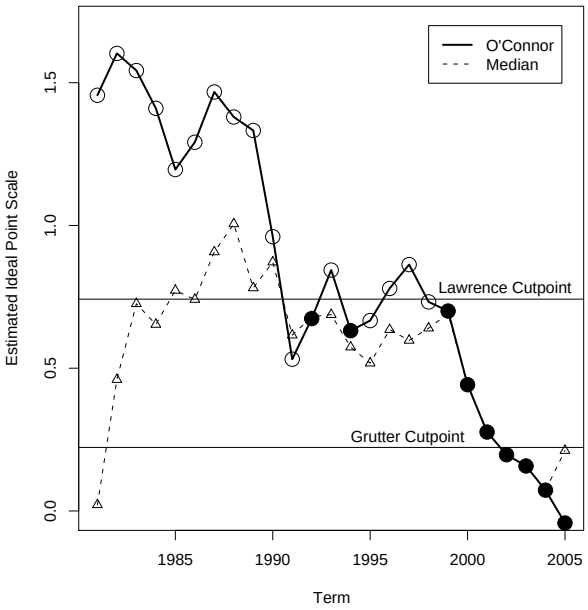


Figure 18: Time series plot of Justice O'Connor's and the median's estimated ideal point, 1981-2005 terms. The solid black circles indicate that Justice O'Connor is most likely the median Justice. The horizontal lines are the cut points for *Grutter v. Bollinger* and *Lawrence v. Texas* such that points above the line indicate a probability of greater than .50 of voting to strike down the program (*Grutter*) and uphold the law (*Lawrence*); those below the line indicate a greater than .50 probability of voting to uphold the program in *Grutter* (as the Court did in the 2002 term) and strike down the law in *Lawrence* (again as the Court did in the 2002 term).[165]

Certainly Figure 18 should once again dispel any doubt that fluctuation in preferences, and significant fluctuation at that, is possible. But more that it illustrates, to varying degrees, the potential importance of shifts when it is the median justice who is shifting. Beginning with *Lawrence*, notice that in the early part of the natural court period that began in 1994 (and did not end until 2005), O'Connor's ideal point estimate is close to the cutpoint line, though occasionally above it (indicating a greater than 50 percent likelihood of upholding the sodomy law). In other words, had *Lawrence* come to the Court in, say, the 1987 term, the odds are that O'Connor would have voted with the dissenters (note that the median in 1997 is below the cutpoint line). By the 1999 term her gradual turn to the left, coinciding with her capture of the median position, increased the odds considerably of the Court striking the sodomy law—a step it eventually took.

O'Connor's role in the *Grutter* litigation was even more crucial.[166] In the 1994 term (when Kennedy was the Court's most likely median) the probability of the Court supporting the the law school's affirmative action program was just 0.32. In other words, neither the Court nor O'Connor would likely have voted in Michigan's favor had *Grutter* come in 1994 or even as late as 2000. But O'Connors turn to the left and into the median position, seven terms later, in 2001, proved decisive to the outcome of the case.

It was O'Connor's growing liberalism, coupled with her role as swing justice, that provides, at the least, a partial explanation for the decisions in *Lawrence* but especially *Grutter*. Which brings

[166]We make a similar point in Martin, et al., *supra* note 88.

us to a crucial point. Of the 16 justices in our data set who exhibited significant change and no longer remain on the Court, all but five—the three chief justices (Warren, Burger, and Rehnquist) and associates William O. Douglas and Robert Jackson—served as the median justice.[167] If as the moved they took the Court with them, then they provide the clearest evidence of ideological change translating into doctrinal change.

The implications of these results are several, but surely one is that lawyers make assumptions about the (im)possibility of legal change during periods of membership stability to their own disservice. Figure 18, we believe, drives home this point with force. The period between the 1994 and 2004 terms may have been one of the longest natural courts in American history but the revealed preferences of individual justices, including the median, changed rather markedly. Not surprisingly, important doctrinal shifts came in their wake.

V Preference Change and Doctrinal Development on the Roberts Court

With the arrival of Chief Justice Roberts and Justice Alito, will more shifts follow—*even in the absence of further membership change*? We suspect so. In the first place, while both new justices, not unexpectedly, have emerged as conservative figures (see Figure 19), ideological drift is hardly impossible; actually, based on our results here, it is likely. But whether one or both will exhibit abrupt change, as did Earl Warren or a more gradual trend, as did O'Connor, or even in what direction they will move, we cannot say in the absence of a theory of preference change. All we can suggest for now is that neither is likely to stay his current ideological course for a decade or longer.

Second, and here we can be more concrete, with the arrival of Roberts and Alito, the Court's center has shifted slightly to the right—from O'Connor to Kennedy (see Figure 19). With that shift, doctrinal change is likely to follow *regardless of whether Kennedy adheres to his current doctrinal posture or drifts further to the left.*

To see why, first consider a scenario under which no new justices join the Court. Also assume (in contrast to our overall findings here) that the justices' current ideal point estimates remain relatively stable. Under these assumptions, and given the configuration of preferences displayed in Figure 19, Justice Kennedy will hold the swing position for the foreseeable future—meaning that doctrinal development rests largely on his shoulders.[168] More specifically, for areas of the law in which he and O'Connor were below (or above) various cut points, we would predict minimal legal change. Along these lines is *Lawrence*. The odds in 2003 were far greater than 50-50 that both would vote to strike down the law; and, now in 2006, as we show in Figure 20, Kennedy remains well south of the *Lawrence* cut point line.

Legal change here is thus highly unlikely but not so for affirmative action. As Figure 20 also displays, at no point in his career did Kennedy's revealed preferences fall below the *Grutter* line. Indeed, today the odds are only about 34 percent that he would vote to uphold a *Grutter*-like program. Given his current role as the median justice, and again assuming no preference change

[167] See Martin, et al., *supra* note 88.

[168] Some commentators have gone so far as to deem the 2005 term the onset of the Kennedy—and not Roberts—Court era. See, e.g., *The Fragile Kennedy Court,* N.Y. Times, July 7, 2006, 16A ("The Supreme Court has nominally been the Roberts Court since last fall, when John Roberts arrived as chief justice. But as a practical matter, the recently completed term marked the start of the Kennedy Court.").

[169] For more detail on cut points, see *supra* note 157.

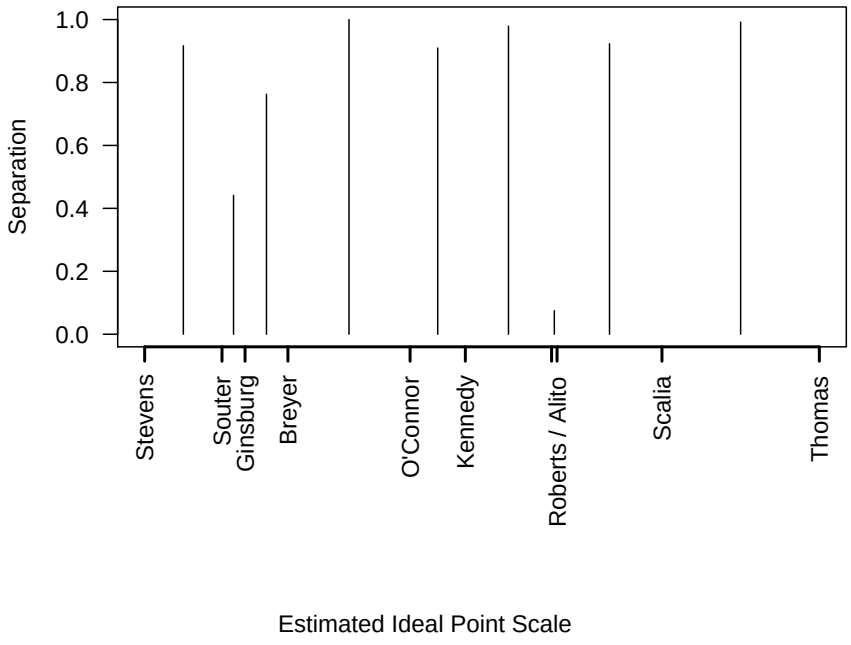


Figure 19: Justices serving on the 2006 term Court, and Justice O'Connor, arrayed according to their 2005 term ideal point estimates. The vertical lines are at the mid points between contiguous pairs of justices and the height of these vertical lines gives the *separation* between these two justices. Here we define separation as $2 \times$ [Pr(justice $i + 1$ is to the right of justice i) - 0.5]. Thus, a separation of 0 indicates the justices occupy the same position and a separation of 1 indicates there is no overlap whatsoever.

among the existing justices, this will come as disturbing news for supporters of affirmative action in education and, of course, a promising development for opponents.

And yet, the evidence of widespread ideological drift we have offered here suggests that this status quo scenario, while not impossible, is unlikely. Far more plausible is a scenario in which at least one justice exhibits ideological fluctuation. New Court members are always prime suspects. As we have seen, it is difficult to make inferences about their long-term patterns based on their first-year preferences. But even setting aside Alito and Roberts, doctrinal change (or, in some instances, surprising stability) is possible if Kennedy continues to drift to the left.

Or, more precisely, if Kennedy *renews* his leftward drift. As we noted earlier, while Kennedy is significantly more liberal now than in the late 1980s, his ideal point has remained relatively flat over the last decade or so. Hence, whether Kennedy has reached the zenith of liberalism or will come to resemble an an O'Connor—a justice who exhibited a gradual, though highly consequential, shift—we cannot say. What we can claim is that at least in some areas of the law, change on Kennedy's part must be rather dramatic for it to exert influence on the course of doctrine. To return to *Lawrence*, the odds today are so slim of Kennedy voting in favor of at least certain kinds of laws discriminating against gays that only a seismic shift (and to the right, at that) would reverse them.

In other legal areas, however, even small leftward movement on Kennedy's part may be no-

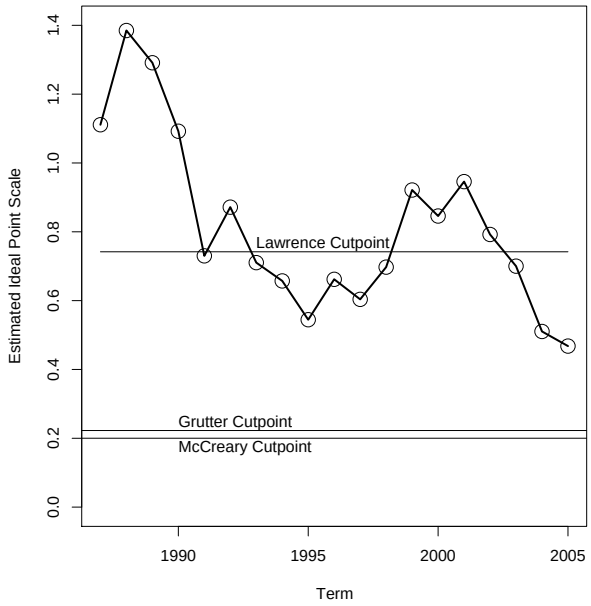


Figure 20: Time series plot of Justice Kennedy's estimated ideal point, 1986-2005 terms. The horizontal lines are the cutpoints for *Grutter v. Bollinger, Lawrence v. Texas,* and *McCreary County v. American Civil Liberties Union* such that points above the line indicate a probability of greater than .50 of voting to strike down the program (*Grutter*), uphold the law (*Lawrence*) or allow the display (*McCreary*); those below the line indicate a greater than .50 probability of voting to uphold the program in *Grutter* (as the Court did in the 2002 term), strike down the law in *Lawrence* (again as the Court did in the 2002 term), or disallow the display (the step taken by the Court in *McCreary*).[169]

ticeable. For O'Connor one of those areas was affirmative action (see Figure 18), and we might say the same of Kennedy. While our current estimates place him above the *Grutter* cut point line, the distance between it and his revealed preferences is narrowing in much the same way as did O'Connor's over time. In other words, should Kennedy trend left, concerns about the demise of affirmative action may dissipate. Even assuming that the two new justices prefer to overturn *Grutter*, the Court's new center could preserve it, thereby generating doctrinal stability rather than change.

Surprising stability also might result in yet another contentious area, religious establishment, particularly the display of religious symbols. In the 2005 case of *McCreary County v. American Civil Liberties Union*,[170] a five-to-four Court held that the display of the Ten Commandments in county courthouses violated the establishment clause. Because Justice O'Connor was in the majority, and Justice Kennedy, in dissent,[171] some commentators have suggested this is an area ripe for legal change.[172]

[170]545 U.S. 844 (2005).

[171]Interestingly, commentators do not regard Justice O'Connor as the swing vote in the case; they, instead, point to Justice Breyer. The reason is that on the same day the Court handed down *McCreary*, it also decided *Van Orden v. Perry*, 545 U.S. 677 (2005), in which it upheld the display of the Ten Commandments on the grounds of the Texas state capitol. Breyer was the only justice in the majority in both. See, e.g., Paul Gewitz, *The Pragmatic Passion of Stephen Breyer* 115 Yale L.J. 1675,1693 (2006) ("The Ten Commandments cases are especially noteworthy because Breyer ended up being the pivotal Justice in each case, providing the decisive fifth vote.").

[172]Erwin Chemerinsky, *The End of an Era*, 8 Green Bag 2d 345, 352 (2005) ("With four Justices—Rehnquist,

Based on our analysis, they are not wrong. Both new justices, and Kennedy himself are above the *McCreary* cut point line (see Figure 20), indicating that, in all likelihood, the *McCreary* dissenters would prevail if the case were reheard today. On the other hand, should Justice Kennedy renew his drift to the left, *McCreary* and its progeny may be in less jeopardy than some suspect. As we show in Figure 20 Kennedy's revealed preferences are creeping promisingly or perilously, depending on one's perspective, toward the cut point line. This is not to suggest that doctrine governing this area will remain unchanged. In fact, if Kennedy has his way, the Court will revisit the standards it uses to resolve these disputes.[173] It is rather to suggest that, even with a new test, the outcomes may be less dramatically different than some predict.

VI Conclusion

Throughout his tenure Justice Harry A. Blackmun repeatedly told interviewers that it was the Court, and not he, who had changed.[174] In 2005 President Bush asked Americans to trust him, that Harriet Miers would not change once appointed to the Court.[175] And in the same year Professor David Strauss told us to disbelieve claims that John G. Roberts, Jr. would moderate upon his elevation to the high Court.[176]

Does the evidence bear out their claims? Yes and no. On the one hand, our results suggest that a close relationship exists between our expectations about a nominee's ideology and the ideology they reveal during the first few term in office. Data from newspaper editorials suggested that Earl Warren and David Souter would be moderate-to-conservative in their ideological outlook, and they

Scalia, Kennedy, and Thomas—eager to overrule the Lemon test and allow a much greater presence of religion in government, this is an area where Justice O'Connor's successor could have an immediate and dramatic effect on the law."); Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement,* 2004-05 Cato Sup. Ct. Rev. 159, 184 (2004/2005) (noting that the differences between the majority and dissenters in *McCreary* are "stark," and that "and the next justice of the Supreme Court, who replaces Justice O'Connor, will have the power to shift the doctrine either way."); Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis,* 40 Ga. L. Rev. 1171, 1207 (2006) ("Three justices, Justices Scalia, Kennedy, and Thomas have already indicated that they think the Lemon test should be overruled, and the addition of two new Justices, both sharing this view, could cause the Lemon test to turn sour."); Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU*, 71 Mo. L. Rev. 317, 348 (2006) ("The appointment of Chief Justice Roberts and Justice Alito to fill the vacancies left by Chief Justice Rehnquist and Justice O'Connor likely will alter the Court's Establishment Clause jurisprudence and produce decisions that conform to the teachings of the accommodation approach. Last term, the neutrality approach enjoyed majority support by the slimmest of margins, and one of the supporters of that approach, Justice O'Connor, has since left the Court.")

[173]Justice Kennedy has advocated a coercion test to resolve religious establishment disputes. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise"); *County of Allegheny v. ACLU,* 492 U.S. 573, 660 (1989) ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"). Under this approach, he has voted to uphold (*Allegheny*) and strike down (*Lee*) practices challenged under the establishment clause. See, e.g., Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. Davis L. Rev. 1621 (2006); William Van Alstyne, *Nine Judges, and Five Versions of One Amendment,* 14 Wm. & Mary Bill of Rts. J. 17, 29 (2005) ("Justice Kennedy, while generally more disposed to the generic view common to Rehnquist, Scalia, and Justice Thomas, is nevertheless quite at odds with them when he finds evidence that government has brought some degree of 'coercion' to bear in its various religious preferments.").

[174]See Jenkins, *supra* note 11.

[175]See *supra* note 24.

[176]Strauss, *supra* note 7.

were not wrong. In their freshman year, both voted in accord with that label. So when Professor Strauss tells us to ignore predictions about the possibility that Roberts will moderate he may well be right in the short term.

On the other hand, our results indicate that Professor Strauss may be mistaken in the longer term. The ideological boxes into which Presidents, senators, and the public place justices at the time of their nomination are not so tightly sealed. Drift to the right or, more often, the left is the rule, not the exception. In some instances, the movement may be relatively inconsequential but in others substantial doctrinal change may result. *Grutter* provides a powerful example, and it is by no means the only one.

And because, we suspect, it is by no means the last one, Presidents would well serve themselves by considering the possibility of drift when making appointments to the Court. Given the potential tradeoff between long-term ideological control and shorter-term electoral gain, our evidence speaks to placing comparatively greater emphasis on the latter.[177] Certainly, the two are not always in conflict. With the nomination of Samuel Alito, President Bush appointed a justice who *may* or *may not* remain right-of-center well into the 2010s. Either way, though, the nomination managed to placate his conservative base. Likewise, even if an Emilio M. Garza or an Edward C. Prado were to drift from their conservative roots, the President would still have captured the benefits of nominating the first Latino to the Court—benefits that could have multiplied if the Democrats chose to fight the nomination. Scholars can label William J. Brennan or Sandra Day O'Connor failures from the point of view of their appointing President, but both served crucial partisan interests. The real failures, from the President's perspective, are those, like Harry Blackmun, who in the long run drift from their initial preferences without ever having provided electoral benefits.

[177] Alternatively, given the prominence of leftward drift among recent justices, Presidents ought consider nominees more conservative than their ideal points.