

Articles

IDEOLOGICAL DRIFT AMONG SUPREME COURT JUSTICES: WHO, WHEN, AND HOW IMPORTANT?

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I. INTRODUCTION

When the U.S. Supreme Court invalidated the use of military commissions for 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 it 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 of an underlying belief that the Justices themselves do not exhibit ideological change over the course of their tenures.⁵ To paraphrase the old

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 REPUBLIC 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 For example, 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 Takings 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 eighteen); *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).

⁴ Commentary on *Hamdan* and the ideological composition of the Court appears on numerous blogs. See, e.g., John Eastman, *Five, Wrong on Hamdan: An NRO Symposium*, NAT'L REV. ONLINE, June 30, 2006, <http://article.nationalreview.com/?q=NzZmOTBhMzFIY2VIMzI5NjYyNzZmZWVINTAwbNzZmMWM=> ("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."); Today's Hamdan Decision, Applied Epistemology, <http://appliedepistemology.com/node/96> (June 30, 2006, 4:36 PM) ("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.").

⁵ We develop these points *infra* Part II.A; 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 the 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, 378 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 643-45 (1991); Pablo Spiller & Rafael Gely, *Congressional Control of Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, RAND J. ECON. 463, 466 (1992) (all three detailing how the Court's sincere or raw preferences move with membership changes but explaining why the Court

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:

As Americans try to figure out what Judge John G. Roberts Jr. will be like as a U.S. Supreme Court [J]justice, one idea seems to [be] that whatever Judge Roberts is now, once he is on the [C]ourt 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 [J]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 from their preferred ideological courses. 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 Justice Harry A. Blackmun. While

may not act on those preferences). Likewise, some adherents of the attitudinal model of judicial decisions, which holds that Justices vote on the basis of their ideologies, describe attitudes as "relatively enduring." See DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 75 (1976).

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

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, at C9.

⁸ See *infra* Part II.A.

⁹ Louis Kohlmeier, *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 is 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.

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 reporter¹¹—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 statutes¹³ wrote, in 1994, "[f]rom this day forward, 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, could not be clearer: 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 appointments to the Court and the doctrine they develop once confirmed. As to the first, we show that Presidents hoping to create lasting legacies in the form of Justices who share their ideologies can be reasonably certain that their appointees will behave in line with expectations—at least during the Justices' first terms 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: contrary to the claims of prominent scholars, the President and his supporters in the Senate cannot guarantee the "entrenchment" of their ideology on the Court in the long, or even medium, term.¹⁵

In a post on his blog, Balkinization, on March 6, 2007, Jack Balkin wrote that he "coined the term [ideological drift] back in 1990 to describe the changing political valence of certain ideas and policies as they are repeatedly introduced into new contexts." He went on to note that in this Article, we use "the term in an importantly different way—to describe how particular Justices move from the left to the right or the right to the left during their years on the Supreme Court." Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com> (Mar. 6, 2007, 6:39 PM). Professor Balkin is correct; that is precisely how we are using the term.

¹¹ John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, at 26.

¹² See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 235 (2005) (presenting data documenting Justice Blackmun's movement); RUGER, *supra* note 10, at 1212 ("[D]iverse evidence suggests that . . . Blackmun significantly changed."); 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").

¹³ *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

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

¹⁵ See, for example, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (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

As a result, the President may be best off placing comparatively greater emphasis on advancing the interests of his political party—rather than his 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 itself 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 is 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 ideological outlook with time, he expresses the conventional view of judging. Indeed, even before their confirmation, journalists, scholars, and, naturally enough, policymakers, place Justices into one ideological box or another and assume that they will stay put over the course of their tenures.¹⁷

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.

Id. at 1067 (internal citations omitted). As other scholars have recognized, a finding of widespread preference change would present a serious challenge to theories of partisan or ideological entrenchment. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENT* 141 (2005) (“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).

¹⁷ See, e.g., 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) (“[A]ssigning ideological labels” is appropriate because “during most Terms, most Justices voted consistently with their labels.”); Ruger, *supra* note 10, at 1209–10 (“We are fond of putting our [Justices] into neat adjectival boxes. . . . These typologies of-

To see the point we need only consider the most recent appointee, Samuel A. Alito Jr. From the day President George W. Bush announced the nomination, newspapers as ideologically disparate as the *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’ play-book 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 tenures. 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 of the lack of ideological movement and challenges to it. We end with a consideration of why this debate is worth resolving.

ten 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 her ideology . . . is not expected to evolve much.”); Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2003 Term*, 32 HASTINGS CONST. L.Q. 769, 776 (2005) (“[B]oth the media and academicians are fond of attaching ideological labels to the Court and its personnel.”).

¹⁸ *A Fight Worth Having*, WALL ST. J., Nov. 1, 2005, at A16.

¹⁹ *Another Lost Opportunity*, N.Y. TIMES, Nov. 1, 2005, at A26.

²⁰ *Hot Topic: Stare Indecisis*, WALL ST. J., Jan. 14, 2006, at A8.

²¹ *Senators in Need of a Spine*, N.Y. TIMES, Jan. 26, 2006, at 22A. 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.” *Id.*

²² See *infra* Part II.B.

²³ See *infra* Part II.B.

A. The Conventional View

As 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, which 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 tenures.²⁵

The genesis of this view seems to lie both in intuition and empirical observation. Intuitively, it seems implausible to believe that Justices would take pause to rethink their presumably well-entrenched beliefs over matters jurisprudential. Consider Justice 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

²⁴ President George W. Bush, Press Conference (Oct. 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 II.B, we wholeheartedly concur with Ruger’s sentiment. The assumption lies at the core of many theories of judicial decisionmaking, or at least the tests of those theories. For examples, see *supra* note 5, as well as Ruger, *supra* note 10, at 1217–18. It has been repeated in many scholarly studies of the Court, as well as in more informal commentary. See, e.g., GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED* 159 (1974) (presents data showing a high level of stability in voting for Justices serving from 1946 to 1968); Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905, 907 (1988) (develops a method for assessing policy change based on the assumption that Justices’ preferences “remain[] constant throughout [their] career”); Strauss, *supra* note 7.

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. WOMEN’S L. 19 (1978), and *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 For example, on the attitudinal model of judging, Justices vote on the basis of their sincerely held ideological attitudes in 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* 86, 93–96 (2002).

Justice Ginsburg, of course, is not alone. In looking at the thirty-six Justices appointed since 1937,²⁹ twenty were law professors or judges at the time of their nominations³⁰—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, and Ginsburg, worked in the academy for a combined total of thirty-seven years.³¹

A wealth of behavioral data lends weight to these intuitions about the entrenchment of ideology, and thus to the implausibility of change. Particularly impressive from this data is the extent to which initial impressions of the ideology of many Justices, as nominees, correlate with their subsequent voting on the Court. At the time of Justice Alito's appointment, as we noted, journalists deemed him 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% of the 694 discrimination suits in which he participated.³⁵ That figure for Justice Brennan was nearly the reverse: in only 20% 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

(explaining that the attitudinal "model holds that the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the [J]ustices" and providing reasons why Justices are free to vote their sincere preferences).

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*, tbl.4-12 (2007).

³¹ Justice Breyer at Harvard, 1967–70; Justice Ginsburg at Rutgers, 1963–72, and Columbia, 1972–80; and Justice Scalia at Virginia, 1967–74, and Chicago, 1977–82. We include in our calculation only full-time service. Justice Alito served as an Adjunct Professor at Seton Hall, 1999–2004; Justice Kennedy lectured at the University of the Pacific, 1965–68; and Chief Justice Roberts was an adjunct at Georgetown in 2005. Justice Stevens lectured at Northwestern, 1950–54, and Chicago, 1954–58.

³² See *supra* notes 18–21.

³³ *The Court Nominations*, N.Y. TIMES, Oct. 22, 1971, at 38.

³⁴ See *infra* Figure 1.

³⁵ We computed the figures in this paragraph from Harold J. Spaeth's U.S. Supreme Court Database, with *anal*=0 and *dec_type*=1, 6, or 7. The S. Sidney Ulmer Project for Research in Law and Judicial Politics, U.S. Supreme Court Databases, <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> (last visited May 17, 2007).

³⁶ According to Spaeth's database, in the 2005 term Alito supported criminal defendants in 16.7% of twelve cases in which he participated; he supported civil rights plaintiffs in three of five cases. *Id.* See also *infra* Figure 19.

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 appointments. Nonetheless, the newspaper editors generally meet that more rigorous standard, as Figure 1 shows. There we draw a comparison between the editors' initial brandings of the Supreme Court nominees and the votes that 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 votes are nearer the top (e.g., Rehnquist) than those who cast a low percentage (e.g., Brennan).

If the editors' ideological assessments successfully predict 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.

³⁷ Jeffrey A. Segal et al. analyze and summarize editors' initial characterizations of the Supreme Court nominees. They create their editors' ideology scores by analyzing the content of 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 0.5 (moderate) to 1 (very liberal). Jeffrey A. Segal et al., *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005*, <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, at 110. 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. Conservative votes are those against defendants in criminal cases; women and minorities in civil rights cases; individuals (against the government) in First Amendment, privacy, and due process cases; unions (over individuals) and individuals (over business) in labor cases; and the government (over businesses) in economic regulation litigation. Liberal decisions are the reverse.

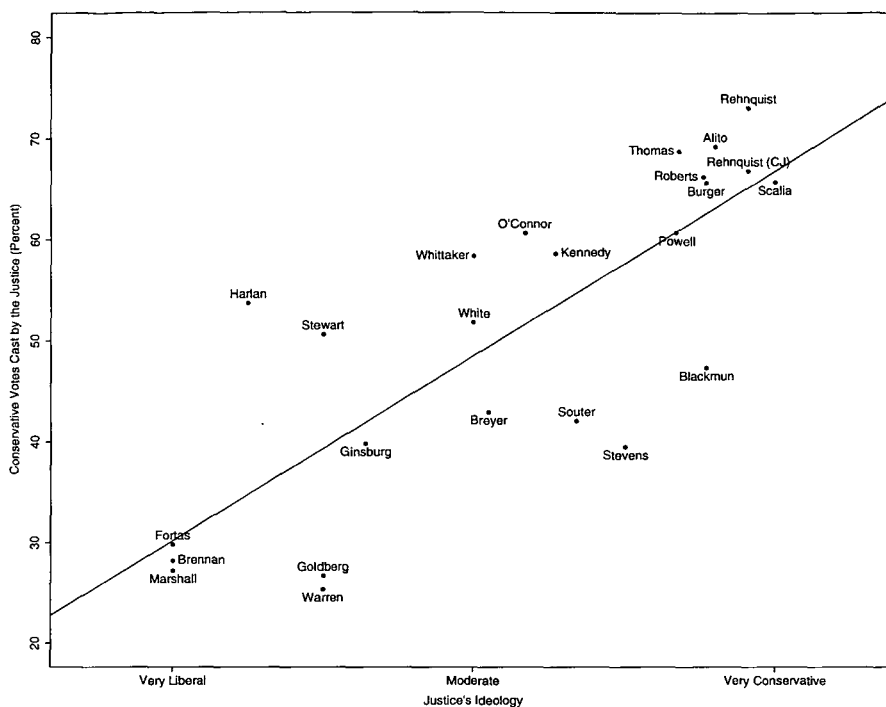


Figure 1: The relationship between newspaper editors' characterizations of Justices' ideologies prior to their appointments and the Justices' votes, 1953–2005 terms. The superimposed line represents a regression-based prediction of the Justices' votes based on their ideologies. The closer a point to the line, the stronger the association between the Justice's ideologies 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' ideologies and their votes is .797.⁴⁰

These are the very patterns we observe in Figure 1.⁴¹ Indeed, with only scattered exceptions, such as the unexpected liberal voting of Justice Blackmun, press characterizations prior to appointment turn out to be remarkably good predictors of future voting. To take one example, Justice Ginsburg reaches liberal decisions in about 60% 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

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, at 126–27.

out of every ten cases he decides. Seen in this way, Ginsburg's vote against the military commissions at issue in *Hamdan*⁴² was entirely as predictable as Scalia's vote for them.

B. *Challenges to Conventional Views*

In light of these findings, it is no wonder that scholars such as Professor Strauss tell us to disbelieve the possibility of moderation on the part of Chief Justice Roberts.⁴³ Newspaper editors characterized him as a conservative at the time of nomination—in the range of a Clarence Thomas or Warren E. Burger⁴⁴—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.⁴⁵ 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's] support for civil liberty was stable."⁴⁶

⁴² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

⁴³ Strauss, *supra* note 7.

⁴⁴ Chief Justice Roberts's 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.

⁴⁵ 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) [hereinafter Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black*]; S. Sidney Ulmer, *Parabolic Support of Civil Liberty Claims: The Case of William O. Douglas*, in *COURTS, LAWS, AND JUDICIAL PROCESSES* 397 (S. Sidney Ulmer ed., 1981).

⁴⁶ Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black*, *supra* note 45, at 144.

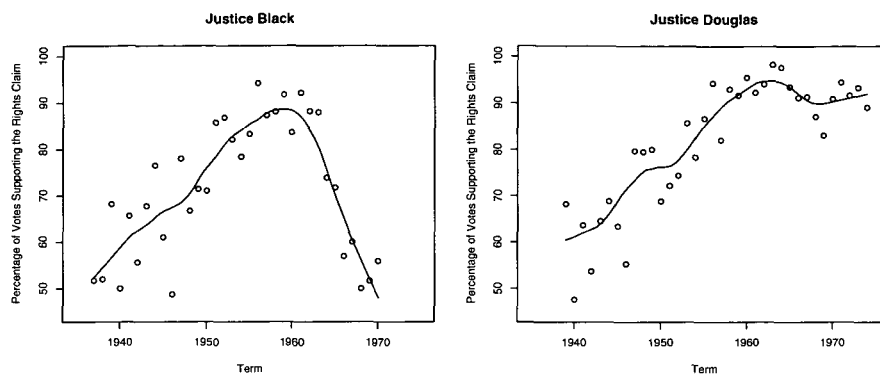


Figure 2: Support for civil liberties claims: the career voting records of Justices Hugo L. Black and William O. Douglas. This Figure reports the percentage of votes cast each term in which Justices Black (left panel) and Douglas (right panel) supported defendants in criminal cases; women and minorities 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 = 0.33.⁴⁷

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.⁴⁸ 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 nine “changed in significant linear or nonlinear ways.”⁴⁹ In other words, most of the Justices in their sample grew increasingly liberal, conservative, or shifted between the two over the course of their careers. Especially noticeable to Epstein and her colleagues, as we show in Figure 3, was Justice Blackmun’s near complete flip, from one of the Court’s most conservative members to among its most consistent civil libertarians.

⁴⁷ This is an attempt to reproduce Ulmer’s analyses, *supra* note 45, 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>.

⁴⁸ Epstein et al., *supra* note 47.

⁴⁹ *Id.* at 812.

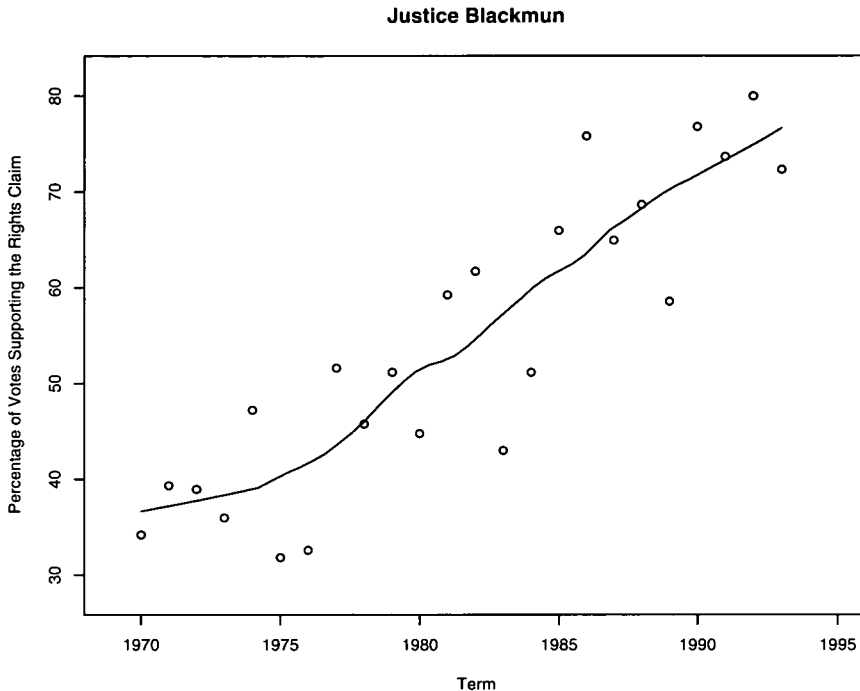


Figure 3: Support for civil liberties claims: the career voting record of Justice Harry A. Blackmun. This figure reports the percentage of votes cast each term in which Justice Blackmun supported defendants in criminal cases; women and minorities in civil rights cases; and individuals against the government in First Amendment, privacy, and due process cases. The superimposed line is a first-degree loess smooth with span = 0.45.⁵⁰

Both Ulmer and the Epstein team speculate on explanations for the trends they observed, but neither puts those explanations to the test. That 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 differences in the cases as in the Justices' underlying preferences.⁵¹

⁵⁰ We calculated the percentages depicted in Figure 3 from Spaeth, *supra* note 35, with value ≤ 6 , $\text{analu} = 0$, $\text{dec_type} = 1, 6, \text{ or } 7$. See also *supra* note 39.

⁵¹ Epstein et al., *supra* note 47, 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*, 23 J. L. ECON. & ORG. 365, 368–70 (2007).

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% in favor of defendants to 90% against them. But, as Lawrence Baum points out, that conclusion would be premature.⁵² 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, illustrates this problem. Here the horizontal line represents a single issue dimension: Fourth Amendment search and seizure cases.⁵³ Along that dimension we have ordered the facts of two cases (as well as three Justices) from most liberal (most supportive of defendants) to most conservative (least supportive of defendants).⁵⁴ In both Cases, Case 1 (search warrant) and Case 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 the left of Case 2.

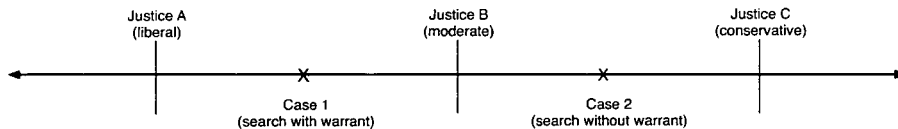


Figure 4: Hypothetical Fourth Amendment search and seizure cases and Justices in ideological space. In this depiction, Justices vote to uphold any search to their left and void any search to their right.⁵⁵

Turning to the Justices, Figure 4 represents 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* is moderate, and *C* is the most conservative. But what conclusions 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 points and void any search to the right. In words, Justice *A* will vote to strike

⁵² Baum, *supra* note 25, at 905–06.

⁵³ We adapt this example from Harold J. Spaeth, *The Attitudinal Model*, in *CONTEMPLATING COURTS* 306–07 (Lee Epstein, ed. 1995), and Baum, *supra* note 25, at 905–06.

⁵⁴ To keep the example simple we display only three Justices, but it easily generalizes to nine, and we could easily add cases.

⁵⁵ See *supra* note 53.

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 defendants' Fourth Amendment interests. 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

The fact 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 the 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 tenures on the Court, and often moved quite a bit. If the law reviews are any indication, Justice Blackmun appears to be one. His jurisprudential turns—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 stability.⁵⁶ And if legal historians are right, Justice 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.⁵⁷ Whether Roberts's “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

⁵⁶ See, e.g., Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, MO. L. REV. 853, 854 (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, 278 (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.”); see generally Ruger, *supra* note 10.

⁵⁷ Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 974 n.9 (2000) (describing history of phrase “switch in time that saved Nine”).

views of the anti-New Deal Justices, or both, is still a matter of considerable debate.⁵⁸ What is now seemingly settled is that Roberts did move,⁵⁹ the Justice himself implied as much when asked about his historic shift some years later.⁶⁰

But are the Robertses and 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. 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 that received wisdom.

Further, the debate over preference stability is not merely one of academic or theoretical interest. It also holds tangible consequences. To see this, we need only imagine a Court full of Blackmuns—that is, Justices who began their careers espousing one set of ideological values and ended with another. If that were the true state of the world, as opposed to the stability more conventionally envisaged, we might reconsider the criteria emphasized during the appointments process and pay heed to 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.⁶¹ In some instances, the “right” nominee has little to do with the President’s own ideological preferences; superior credentials may come into play.⁶² 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 progressive at that. But “politics aside,” as Professor Mark Silverstein tells us, “there was much to recommend Cardozo”:

⁵⁸ The literature along these lines is vast. As Barry Friedman 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.’” Friedman, *supra* note 57, at 1048 (citation omitted).

⁵⁹ As Friedman 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.” *Id.* at 1050 n.361.

⁶⁰ Justice Owen 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.” Merlo J. Pusey, *Justice Roberts’ 1937 Turnaround*, 1983 Y.B. SUP. CT. HIST. SOC’Y 106 (quoting Justice Roberts in a confidential interview conducted on May 31, 1946).

⁶¹ See, e.g., EPSTEIN & SEGAL, *supra* note 15; DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES* (1999).

⁶² For more on the goals of Presidents when selecting Justices, see generally EPSTEIN & SEGAL, *supra* note 15; SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* (1997).

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 of residence, religion, or party affiliation . . .⁶³

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 D. 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 heavyweight, but because the President thought he could gain the support of Catholic voters.⁶⁴

Other Justices may have been appointed for similar reasons, but truth be told, Brennan and Cardozo are probably the exceptions. In most instances, Presidents search long and hard for nominees who are political allies, not political pawns or prodigious legal minds. Why this is the case is no great mystery: appointing a Justice who shares the President's ideological values and, crucially, who 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.⁶⁵ Perhaps that is why Richard Nixon once said that "the most important appointments [a President] makes are those to the Supreme Court of the United States."⁶⁶ He would know. Although 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 or 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 superior quality, as did Hoover, or those who might improve the party's electoral fortunes, as did Eisenhower.

⁶³ MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS 2* (1994).

⁶⁴ EPSTEIN & SEGAL, *supra* note 15, at 121 ("[C]ertainly electoral considerations [played a role in Eisenhower's selection] of the Democrat and Catholic Brennan.")

⁶⁵ See, e.g., Balkin & Levinson, *supra* note 15, at 1067–68.

⁶⁶ *Transcript of President's Announcement's*, N.Y. TIMES, Oct. 22, 1971, at 24.

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 posts⁶⁷ but about one out of every five would-be Justices.⁶⁸ What accounts for the comparatively high rate of failure? Surely one factor is the Constitution's grant of life tenure for federal judges in Article III. With removal for political reasons a near impossibility,⁶⁹ senators seem to appreciate the long-term implications of their decisions.

But would life tenure carry as much weight with legislators if their confirmees voted unpredictably, sometimes even from one term to the next? We suspect not, and extant studies are consistent with our suspicion. Most show that a candidate's ideology is a, if not the, primary consideration for senators when they cast their votes.⁷⁰ 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 .90.⁷¹ To put it another way, virtually all the senators who cast yea votes for Samuel A. Alito Jr. 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.⁷²

A similar calculus, it is worth noting, operates for the many interest groups who lobby against (or 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 that the groups have accurately predicted the nominee's ideology and that the

⁶⁷ 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. U.S. Senate, Nominations, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited Aug. 14, 2007).

⁶⁸ A list of candidates rejected by the Senate is available at U.S. Senate, Supreme Court Nominations, present–1789, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Aug. 14, 2007).

⁶⁹ For more on this point, see EPSTEIN & SEGAL, *supra* note 15, at 31–34; Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 111 (1996) (claiming that Chief Justice John Marshall helped to avert the establishment of a norm of impeachment on ideological or partisan grounds); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 110–11 (1996) (explaining why, at least as a practical matter, there can be no impeachment for “mere policy difference” (internal quotation marks omitted)).

⁷⁰ See, e.g., Charles M. Cameron, Albert D. Cover & Jeffrey A. Segal, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525, 525 (1990); 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, 113–14 (1992).

⁷¹ Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 301 (2006).

⁷² See, e.g., Balkin & Levinson, *supra* note 15, at 1066–83.

nominee, as a Justice, will continue to espouse that ideology.⁷³ While the former seems quite possible,⁷⁴ the latter is precisely what we question here—and with good reason at that. The many civil rights groups who lobbied against Justice Rehnquist may have guessed right—once appointed, he was no friend to their cause—but they were wrong with regard to Justice David H. Souter.⁷⁵ In discrimination cases, Justice Souter supports the plaintiff almost as often as the current Court’s most liberal member, Justice John Paul Stevens.⁷⁶

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.⁷⁷

*Hamdan v. Rumsfeld*⁷⁸ provides one example, but it is hardly unique. Perhaps the quintessential case along these lines is *Roe v. Wade*.⁷⁹ 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 Justice Lewis F. Powell Jr. announced his resignation in 1987, journalists emphasized his “crucial” role in retaining the 1973 precedent.⁸⁰ Two decades later, they said much the same about Justice Sandra Day O’Connor:

Justice O’Connor’s retirement will not end the [C]ourt’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

⁷³ 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).

⁷⁴ For evidence of the predictability of nominees during their first terms in office, see *infra* Figure 13.

⁷⁵ 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 *Confirmation Hearings on the Nomination of Judge David H. Souter: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 777–80, 783–85, 803–05 (1990) (statements of Haywood Burns, on behalf of the National Lawyers Guild; Christopher F.D. Ryder, on behalf of Supreme Court Watch; and Paula L. Etlebrick, Legal Director, Lambda Legal Defense and Education Fund).

⁷⁶ In the 2004 term, Chief Justice Rehnquist voted in favor of civil rights litigants in only 33% of the nine cases in which he participated; those figures for Justice Souter were 83.3% (N=12) and 91.7% for Justice Stevens (N=12). Figures are from Epstein et al., *supra* note 30, tbl.6-5.

⁷⁷ See *supra* notes 5 and 25.

⁷⁸ 126 S. Ct. 2749 (2006).

⁷⁹ 410 U.S. 113 (1973).

⁸⁰ 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.”).

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.⁸¹

The assumption here is that *Roe* cannot be overturned, or even be narrowed in application, unless the Court experiences a change in its membership. The same is true for the affirmative action case, *Grutter v. Bollinger*;⁸² death penalty doctrine beginning with *Gregg v. Georgia*;⁸³ the controversial takings decision in *Kelo v. City of New London*⁸⁴—or, really, any other line of precedent, regardless of its degree of notoriety.

We explore the accuracy of this view more fully in Part IV. The point here is that there are definite implications of the assumed ideological stasis, regardless of whether or not it is accurate. First, it politicizes the confirmation process—if Justices were less predictable over the long term, battles over their appointment should 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 at least fifty-fifty,⁸⁵ there would be little reason to challenge 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. But should existing Justices experience changes in their jurisprudential outlooks, such that the odds of winning fluctuate, litigation strategy would follow suit, with petitions flowing 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 and work of the Justices but (3) is tricky to assess empirically. The primary difficulty is how to solve the

⁸¹ Robin Toner, *After a Brief Shock, Advocates Quickly Mobilize*, N.Y. TIMES, July 2, 2005, at A1. The same article reports the reaction of interest groups: “At the abortion rights group Nara 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.” *Id.*

⁸² 539 U.S. 306 (2003).

⁸³ 428 U.S. 153 (1976).

⁸⁴ 545 U.S. 469 (2005).

⁸⁵ 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, 4–5 (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.

vexing problem of variation in case content, and how to solve it on a large-scale basis.⁸⁶

These questions have perplexed scholars for decades, but, fortunately for us, Martin and Quinn, two co-authors of this Article, have devised a satisfactory solution.⁸⁷ Using data derived from 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 high-quality intra-Justice comparisons (e.g., is Justice Souter more liberal now than he was in 1992?) without having to speculate whether the changes we observe are the result of differences in the content of cases or changes in the Justice's revealed preferences.⁸⁸

⁸⁶ 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.

⁸⁷ Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). 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. See, e.g., Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 134–36 (2003) (relying on the Martin-Quinn scores to measure the ideology of Justices in a study of whether the Supreme Court responds to ideological changes in Congress); Ruger, *supra* note 10, 1227–28 (using the Martin-Quinn scores to “assess whether perceived attitudinal moderation or extremism at the time of nomination had any correlation with subsequent judicial drift”); Paul J. Wahlbeck, *The Chief Justice and the Institutional Judiciary: Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1754 (2006) (using the Martin-Quinn scores to show that the Court's median “grows significantly more conservative from the 1986 Term to the 1993 Term”). For media reports of their research as it was applied in subsequent publications, see, for example, Jess Bravin, *Politics & Economics: High Court's Changes May Just Be First Act—More Striking Shift Could Ensnare if Any of the Court's Four Remaining Liberal Justices Depart on Bush's Watch*, WALL. ST. J., Feb. 1, 2006, at A4; Charles Lane, *Justices Too Tighlipped on Their Health?*, WASH. POST, Nov. 1, 2004, at A19. We too have deployed the Martin-Quinn scores in a study of the median Justice on the Supreme Court. See Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005). Martin and Quinn have even invoked them to analyze change on the Court for a limited set of Justices. Martin & Quinn, *supra* note 51, at 8–11. 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. All the data used in this Article is available at Lee Epstein: Ideological Drift Among Supreme Court Justices web page, <http://epstein.law.northwestern.edu/research/ideodrift.html> (last visited May 19, 2007). The Martin-Quinn estimates, as well as annual updates, are housed at <http://mqscores.wustl.edu>. See also *supra* notes 85, 86.

⁸⁸ Because, as we mention in the text, the Martin-Quinn method has been described elsewhere, see Martin & Quinn, *supra* note 87, at 134, 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) 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. For more details, see *infra* note 156. 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

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,⁸⁹ and the 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 tenures.⁹⁰ Twelve moved to the left,⁹¹ seven to the right,⁹² and three in more exotic ways.⁹³

A. Trending to the Left

We begin in Figure 5 with the twelve Justices who grew more liberal during their tenures. That we find Justice Blackmun among this group is hardly surprising. Although Blackmun once quipped that it was not he but the Court that changed, 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."⁹⁴ Quite clearly, the latter is more descriptive of his career.

achieves intertemporal comparability by assuming that ideal points can only change 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.

⁸⁹ 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 profiles appear in Figures 6, 8, and 10. The full complement is available on the project's web site, <http://epstein.law.northwestern.edu/research/ideodrift.html>, as is a description of the procedures we used to identify significant drift.

⁹⁰ The four are Justices Breyer, Murphy, Stewart, and Thomas. *See infra* Part III.C.

⁹¹ Justices Blackmun, Brennan, Clark, Ginsburg, Kennedy, Marshall, O'Connor, Powell, Souter, and Stevens, and Chief Justices Rehnquist and Warren. *See infra* Part III.A.

⁹² Justices Black, Burton, Frankfurter, Jackson, Reed, Scalia, and White. *See infra* Part II.B.

⁹³ Chief Justice Burger, and Justices Douglas and Harlan. *See infra* Part III.C.

⁹⁴ Ruger, *supra* note 10, at 1212 (quoting Justice Harry A. Blackmun, Speech at Louisiana State University Law Center, Summer Program (July 6–9, 1992)).

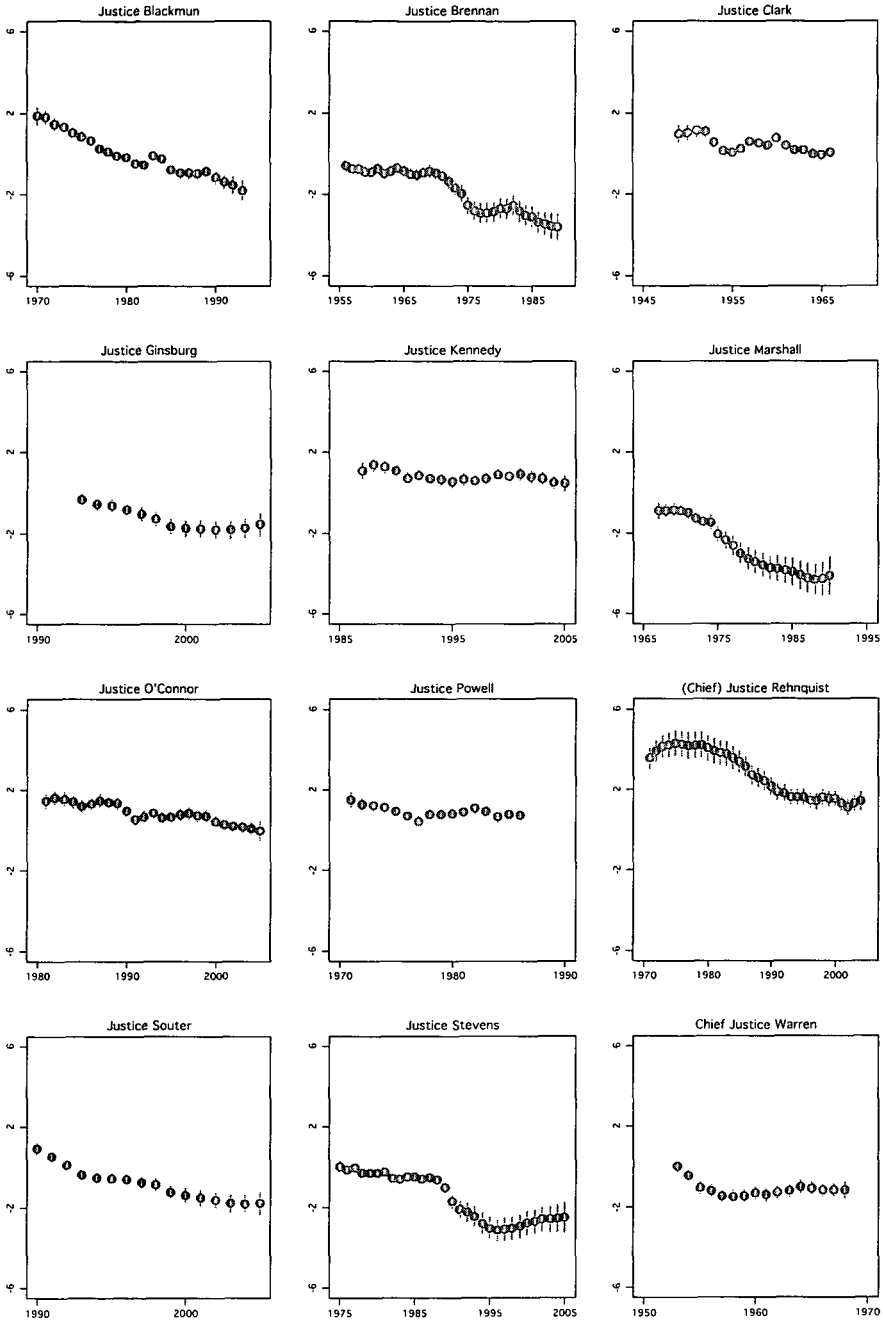


Figure 5: Estimated ideal points of the Justices who served ten or more terms between 1937 and 2005 and trended left. The vertical axis in all plots is the Justice's

*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.*⁹⁵

Also less than startling in light of contemporary commentary is Justice O'Connor's behavior.⁹⁶ 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. 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.

⁹⁵ For more details on the estimated ideal points, see *supra* notes 87–88.

⁹⁶ 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 [C]ourt's 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.”).

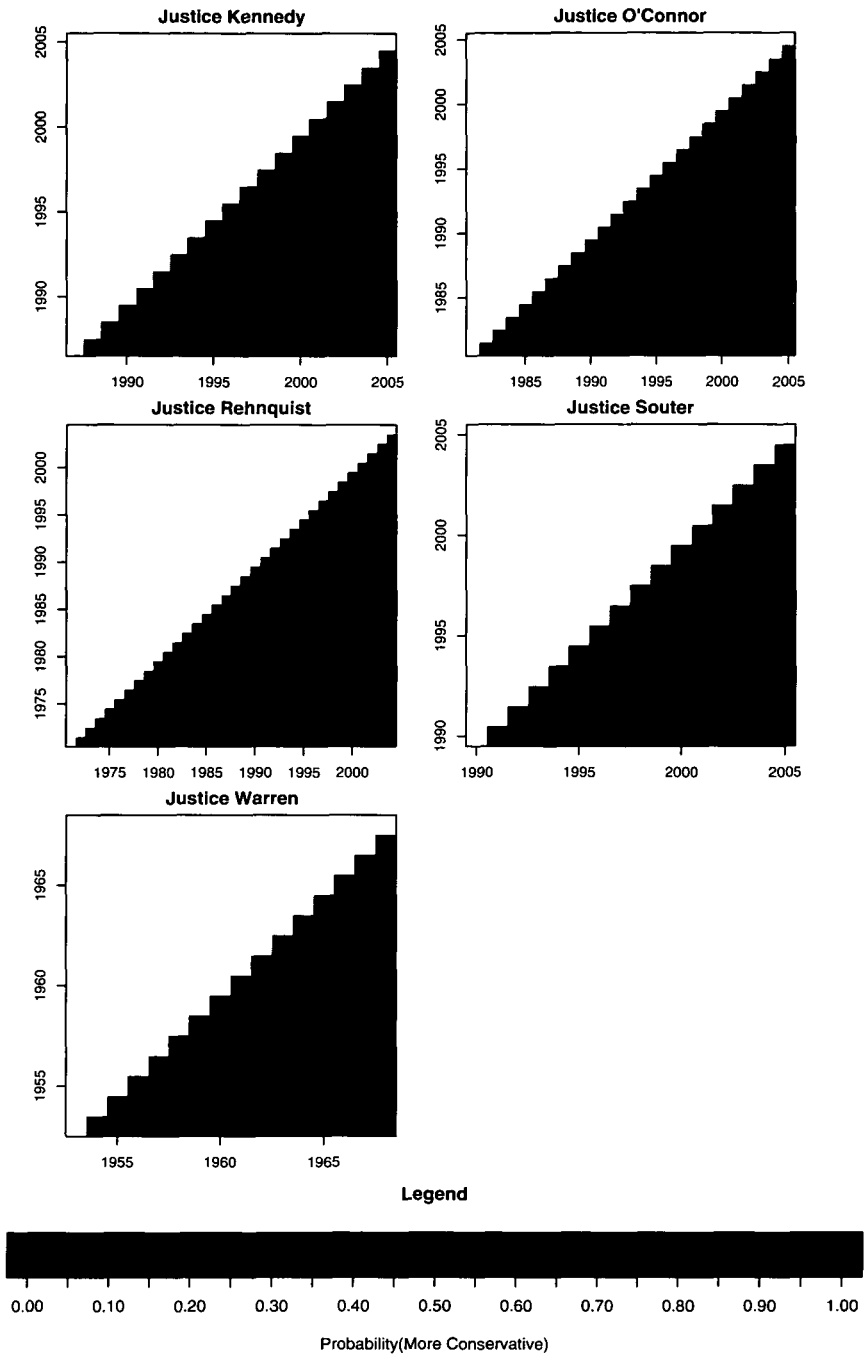


Figure 6: Estimated preference change profiles for five left-trending Justices. The baseline term is on the vertical axis, and the comparison term is on the horizontal.

For example, 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.

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 not have opted for an even more reliable solid conservative; in fact he considered several, including Edith Jones.⁹⁷ But by most accounts Souter was reliable enough.⁹⁸ Even newspaper editors of all ideological stripes 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.⁹⁹

Figure 5 reveals that the President and the editors were not wrong—at least not initially. For the 1990 term, Justice 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, and Marshall). During his first two terms, Souter was the Court's likely median, or swing, Justice.¹⁰⁰ That Justice Souter's ideal point is now closer to the most liberal member of the Court (Justice Stevens) than to the middle (Justice Kennedy) has not been missed by Court observers.¹⁰¹ Indeed, Souter is the new Blackmun—

⁹⁷ For an account of the Souter nomination, see YALOF, *supra* note 61, at 190–92.

⁹⁸ On her blog, the conservative commentator Ann Coulter provides quote after quote attesting to Souter's conservative credentials at the time of his appointment. AnnCoulter.com, <http://www.anncoulter.com> (July 27, 2005). For example, according to Coulter, Newt Gingrich claimed that “[v]irtually every conservative who knows him trusts him and thinks he’s a competent guy.” *Id.* Coulter also notes that 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.” *Id.*

⁹⁹ See *supra* Figure 1 and *supra* note 37.

¹⁰⁰ Using the Martin & Quinn scores, Martin et al., *supra* note 87, 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). *Id.* at 1303.

¹⁰¹ See, e.g., Erwin Chemerinsky, *The Rehnquist Court and the Death Penalty*, 94 GEO. L.J. 1367, 1368 (2006) (placing Souter in the Court's “liberal wing”); Richard H. Fallon, Jr., *The “Conservative” Path of the Rehnquist Court’s Federalism Decision*, 69 U. CHI. L. REV. 429, 448 n.101 (2002) (deeming

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*¹⁰² and *Roper v. Simmons*,¹⁰³ some analysts have asserted much the same about Justice Kennedy.¹⁰⁴ While it is true, as Figure 6 shows, that Kennedy drifted to the left early in his career—he is now significantly more liberal 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 IV.

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 in Figure 5, Warren’s revealed preferences appear quite stable. 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 Chief Justice Rehnquist’s ideal point estimates—estimates that are perhaps the most unexpected of all the liberal-trending Justices. When President Nixon appointed Rehnquist to the Court in 1971, newspaper editors and scholars alike agreed on his ideological propensities: Without a doubt, they said, he was a solid, if not an extreme, conservative. When President 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.”¹⁰⁵ Even when Rehnquist died in September 2005, the press continued to label him the “architect of [a] conservative [C]ourt.”¹⁰⁶ In short, for over thirty years Rehnquist was tagged as one the Court’s most reliable right-of-center votes.

Souter a “liberal”); 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.”).

¹⁰² 539 U.S. 558 (2003).

¹⁰³ 543 U.S. 551 (2005).

¹⁰⁴ See, e.g., Lawrence Friedman, *The Limitations of Labeling: Justice Anthony M. Kennedy and the First Amendment*, 20 OHIO N.U. L. REV. 225 (1993) (arguing that Kennedy has become more liberal in some legal areas); Thomas Sowell, *Justice Kennedy’s New Move Left: Soft on Crime*, HUM. EVENTS, Aug. 18, 2003, <http://humanevents.com>.

¹⁰⁵ Editorial, *Toward a Rehnquist Court*, N.Y. TIMES, June 18, 1986, at 34A.

¹⁰⁶ See, e.g., Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at 16A.

The story emerging from Figures 5 and 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 Justice Clarence Thomas—today's most extreme conservative—is now.¹⁰⁷ But when Rehnquist was promoted to Chief Justice and Scalia joined the Court, Rehnquist began to drift left. Note the bright red coloring in Figure 6, indicating that in every term between 1986 and his death in 2005, Rehnquist's preferences were significantly more liberal than in 1985.

Of course, this is not to say that Chief Justice Rehnquist swung as far to the left as Justice Blackmun; he did not. However, in the Chief Justice's last term in office, his ideal point estimate is closer to the centrist Justice Kennedy's than to the extreme conservative position that he once held or that Justices Scalia and Thomas now anchor.¹⁰⁸

B. Trending to the Right

That Chief Justice 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 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 L. Black, Harold H. Burton, Felix Frankfurter, Robert H. Jackson, Stanley F. Reed, Antonin Scalia, and Byron R. White.

¹⁰⁷ For example, Rehnquist's estimated ideal point in 1975 is 4.22 versus Thomas's, thirty years later in 2004, of 3.45.

¹⁰⁸ See *infra* Figure 19.

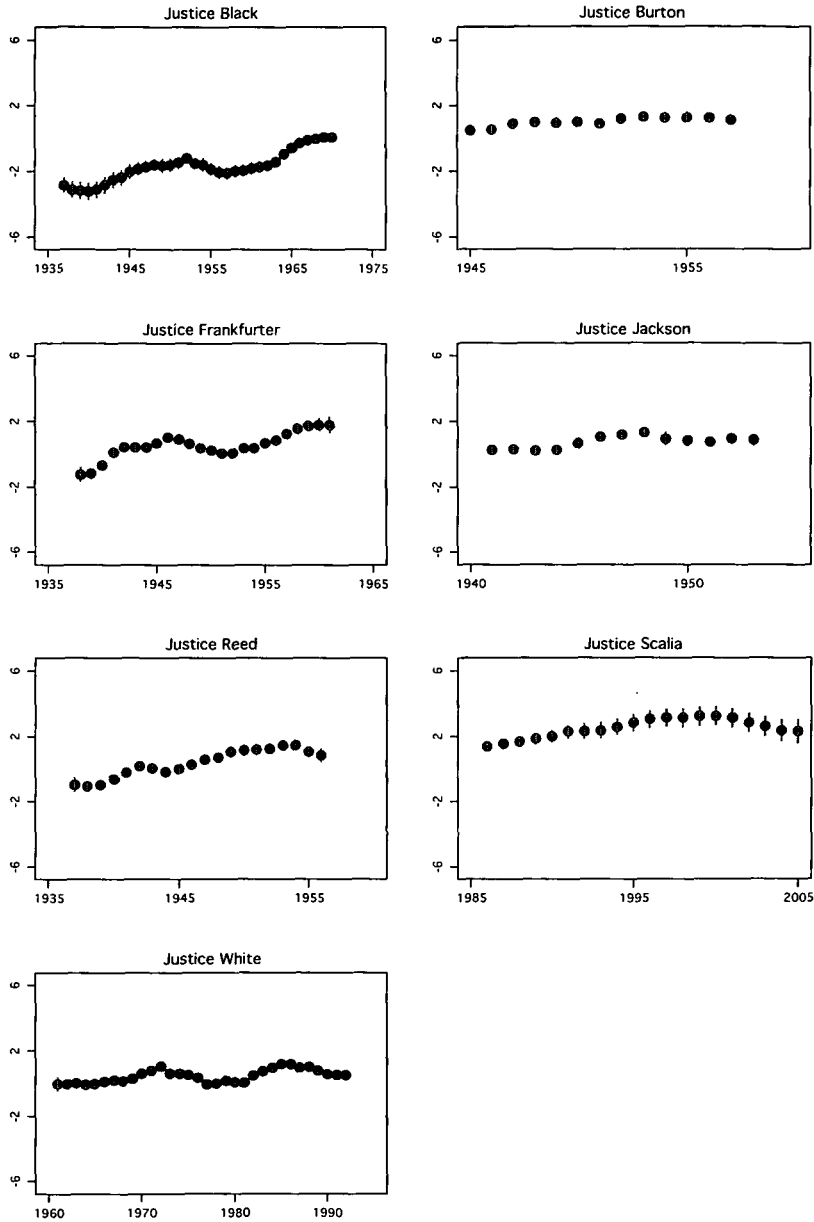


Figure 7: Estimated ideal points of the Justices who served ten or more terms between 1937 and 2005 and trended right. The vertical axis in all plots is the Justice's estimated ideal point. Higher values are more conservative. The dots are

*the estimated ideal points and the vertical error bars in each plot are 95% credible intervals.*¹⁰⁹

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 O'Connors. Some analysts have concluded that Justices, if they move, nearly always turn left.¹¹⁰ 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 careers, including all but three members of the current Court—but nonetheless, movement to the right is no small phenomenon.

Even so, close Court watchers will likely not see big surprises in Figure 7. Four decades ago, the political scientist Harold J. Spaeth¹¹¹ debunked the oft-repeated claim that Justice Frankfurter was one of the “most *ardent and consistent* advocates of judicial restraint.”¹¹² After demonstrating that Frankfurter’s judicial restraint was “thoroughly subordinated” to his conservative values, Spaeth’s response was succinct: “Ardent? Perhaps. Consistent? Not at all.”¹¹³ 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, Justice Hugo L. Black on the left and Justice James McReynolds on the right. Virtually from the start of his second term, however, Frankfurter appears to have drifted 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 M. Harlan II as the Court’s most extreme conservative voter; he actually ended his service more firmly planted on the right than Chief Justice Rehnquist.

¹⁰⁹ For more detail on the estimated ideal points, see *supra* notes 87–88.

¹¹⁰ See, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 149 (2006) (“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.”); Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, *BOSTON REV.*, Jan./Feb. 2006, at 23 (“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.”).

¹¹¹ Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality*, 8 *AM. J. POL. SCI.* 22 (1964).

¹¹² Henry J. Abraham, *Line-Drawing between Judicial Activism and Restraint: A Centrist Approach and Analysis*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 201, 203 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (emphasis added).

¹¹³ Spaeth’s claim grows out of Spaeth, *supra* note 111, but appears in SEGAL & SPAETH, *supra* note 28, at 409 n.6.

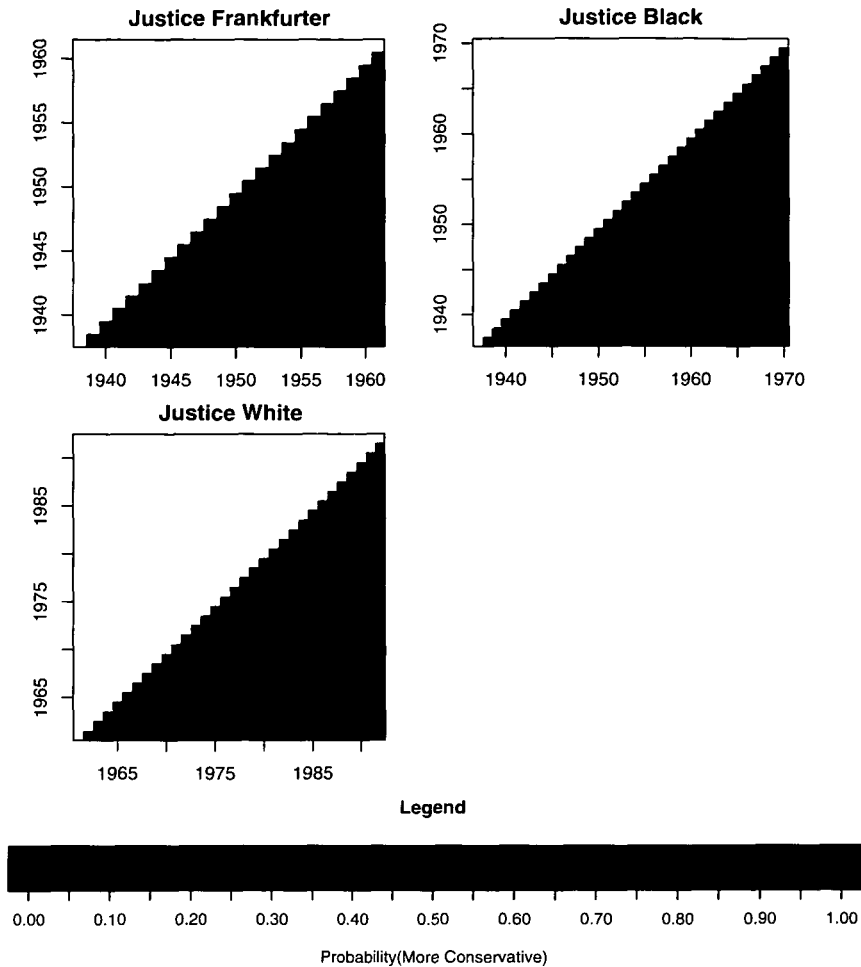


Figure 8: Estimated preference change profiles for three right-trending Justices. The baseline term is on the vertical axis, and the comparison term is on the horizontal axis. For more details on how to interpret the figure, see Figure 6.

Likewise, despite “categorical[] deni[als] that he had changed his constitutional philosophy,”¹¹⁴ Justice 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.¹¹⁵ The results depicted in Figures 7 and 8

¹¹⁴ GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 413 (1977).

¹¹⁵ 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

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 R. White. Justice Scalia is the only member of the current Court to have grown consistently more conservative with time, an interesting pattern that we investigate more closely in Part IV. Justice White too moved to the right, but his revealed preferences in Figure 8 are more intriguing. 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 a turn to the right during the onset of the Rehnquist Court.

Some analysts claim that that these changes are illusory. They say that Justice White "ardently supported individual rights over the claimed rights of the states to abridge citizens' liberties" but that "on issues of law enforcement . . . [he] voted conservatively."¹¹⁶ Others, however, contend that White was, in fits and starts, more conservative over time.¹¹⁷ Two authors of this Article even speculated that his level of conservatism varied by the President in office.¹¹⁸ 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 Justices William O. Douglas, John M. Harlan II, and Chief Justice 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 changes to the left. The depth of their ideological commitments was quite distinct: for his last two decades on the Court, Douglas was its most liberal member; Harlan's

more conservative, Thurgood Marshall replaced [Tom C.] Clark, and the Court retained its reliable five-vote liberal majority.").

¹¹⁶ D. Wes Sullenger, *Burning the Flag: A Conservative Defense of Radical Speech and Why It Matters Now*, 43 BRANDEIS L.J. 597, 619 (2005).

¹¹⁷ 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"); 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); Jeffrey Rosen, *The Next Justice*, NEW REPUBLIC, Apr. 12, 1993, at 21, 24 (arguing that White moved to the ideological right).

¹¹⁸ Lee Epstein, Jack Knight & Andrew Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L. J. 583, 605-07 (2001).

liberalism never surpassed, say, Justice O'Connor's. Nonetheless, their trends are similar.

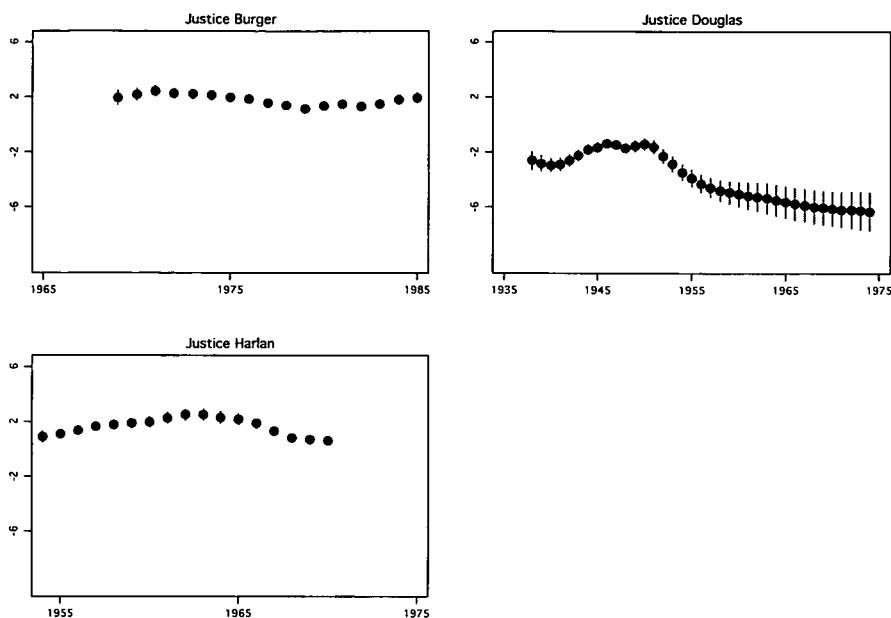


Figure 9: Estimated ideal points of Justices serving ten or more terms between 1937 and 2005 and who moved to the left and right. The vertical axis in all plots is the Justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points and the vertical error bars in each plot are 95% credible intervals.¹¹⁹

Relative to Justice Douglas, Chief Justice Burger's ideal point appears to be consistently conservative, as virtually all previous analyses suggest.¹²⁰ 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

¹¹⁹ For more detail on the estimated ideal points, see *supra* notes 87–88.

¹²⁰ 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: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 *IOWA L. REV.* 883, 968 n.171 (1996) ("Chief Justice Burger and his conservative colleagues clearly wished to tighten legal controls on obscenity" (quoting Joel Feinberg, *Pornography and the Criminal Law*, 40 *U. PITT. L. REV.* 567, 600 (1978))); Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967–1991: The View from the Marshall Papers*, 36 *WM. & MARY L. REV.* 473, 482 n.47 (1995) ("Chief Justice Burger, of course, had more conservative instincts than many of the Justices on the Court when he arrived . . .").

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.

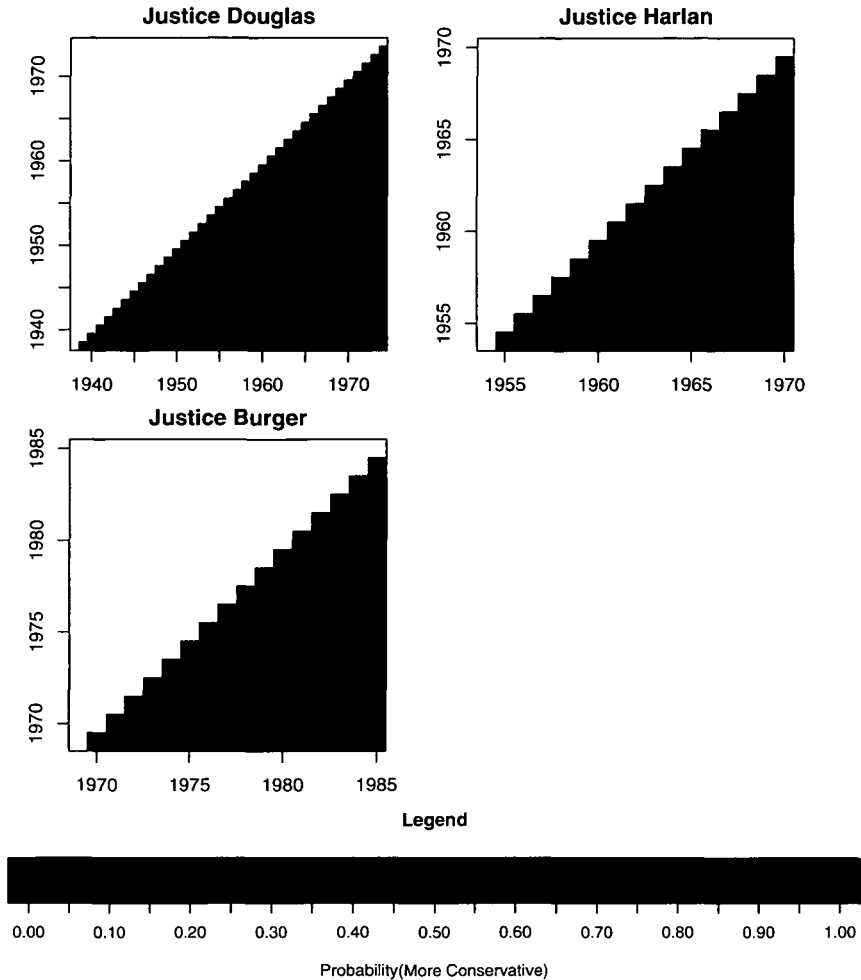


Figure 10: Estimated preference change profiles for three right- and left-trending Justices. The baseline term is on the vertical axis, and the comparison term is on the horizontal axis. For more details on how to read the figure, see Figure 6.

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.¹²¹ While it is true, as we show in the left panel of Figure

¹²¹ LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE 807 (6th ed. 2007) (deeming the Burger and Rehnquist Courts “Repub-

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 about the growing rift between the boyhood friends from Minneapolis, Blackmun and Burger,¹²² 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.

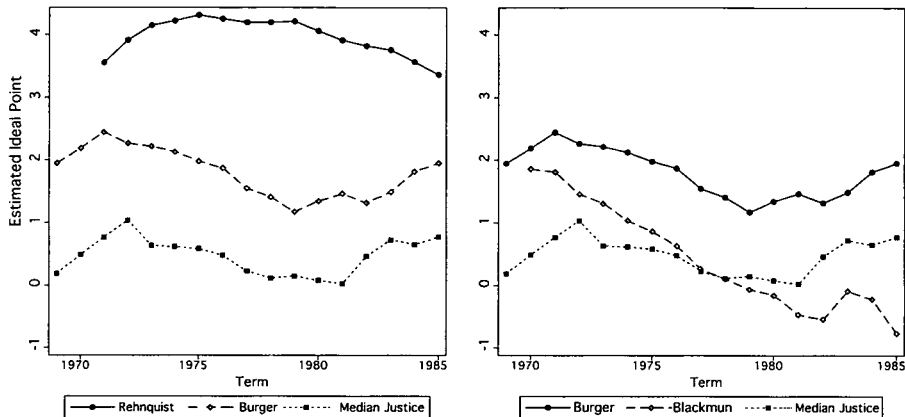


Figure 11: Estimated ideal points of Chief Justice Burger, the median Justice, and Justices Blackmun and Rehnquist, 1969–1985 terms. The vertical axis in both plots is the Justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points.¹²³

This finding may signal the need to revisit legal commentary of the day (and even of today) equating the ideological tendencies of Chief Justices Burger and Rehnquist. And even more in need of revisiting is the account that motivated our project here: that Justices generally do not change in their ideological outlooks over time. According to this account, it is only a handful of anomalies, the very few Blackmun, who exhibit fluctuation; the balance remain stable. As it turns out and as we show in Figure 12, pre-

ican Court Eras"); 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, 1686 (2006) ("Justice Rehnquist is regarded as more conservative than Justice Burger . . .").

¹²² See GREENHOUSE, *supra* note 12.

¹²³ For more detail on the estimated ideal points, see *supra* notes 87–88.

cisely the opposite is true. Only four of the twenty-six Justices serving since 1937 remained relatively stable.

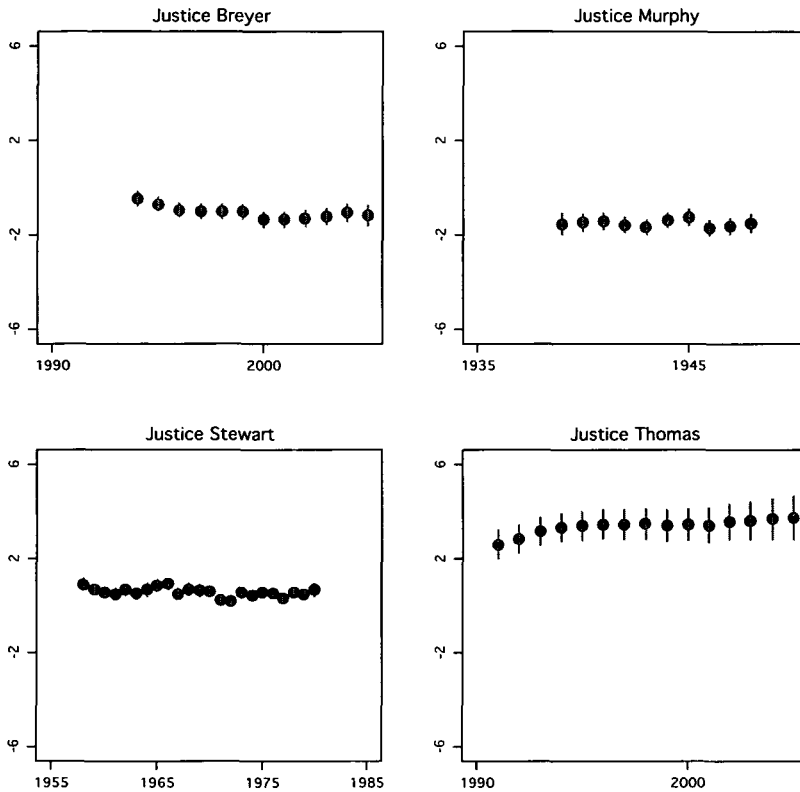


Figure 12: Estimated ideal points of Justices serving ten or more terms between 1937 and 2005 and who remained relatively stable during their service on the Court. The vertical axis in all plots is the Justice's estimated ideal point. Higher values are more conservative. The dots are the estimated ideal points and the vertical error bars in each plot are 95% credible intervals.¹²⁴

Two of the four, Justices 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.¹²⁵ On today's Court, Murphy would be approximately slightly to the right of Souter but to the left of Breyer. As for

¹²⁴ For more detail on the estimated ideal points, see *supra* notes 87–88.

¹²⁵ For example, in the 1947 term, Black was the most liberal, with an estimated ideal point at -1.727; Murphy's was -1.640.

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 the right, Thomas can declare victory. In the 2004 term Scalia was nearly as close to Chief Justice Rehnquist as he was to Thomas, who clearly anchored the extreme right; and in the 2005 term Scalia was further from Thomas than Scalia was from Alito.¹²⁶

Potter Stewart and Stephen Breyer are the remaining Justices who fail to exhibit much in the way of preference change. Juxtaposed against Justices Thomas and Murphy, the two held more centrist 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, Justice O'Connor, would push the Court to the right.¹²⁷ 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% of the 473 cases; that figure for Stevens, the most liberal Justice during those terms, was over 70%.¹²⁸ A term later, in 2005, Justice Breyer again found himself in the liberal wing, though its most moderate member.¹²⁹

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 pos-

¹²⁶ See *infra* Figure 19.

¹²⁷ David S. Broder, *Doing Justice to the Poor*, WASH. POST, June 24, 1981, at 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."); Stuart Taylor, Jr., *Rather an Unknown*, N.Y. TIMES, July 8, 1981, at 13A ("[I]t 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."); Steven R. Weisman, *Reagan Nominating Woman*, N.Y. 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.")

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 . . ." *Stewart's Session with Reporters*, N.Y. TIMES, June 20, 1981, at 9.

¹²⁸ Computed using Spaeth, *supra* note 35, with `dec_type=1, 6, or 7`; `analu=0`; and `value ≤ 6`.

¹²⁹ See *infra* Figure 19.

sible, it was likely. Only four of the twenty-six Justices examined did not exhibit significant fluctuations.

Certainly the patterns of change differ. While the plurality shifted to the left, a consequential number moved to the right or swung back and forth. Further, change occurred at different points in the Justices' careers. More than a few exhibit what political scientists call the "first-year," "freshman," or "newcomer" effect; that is, an initial period of volatile or uncharacteristic behavior followed by stability in preferences.¹³⁰ Chief Justice Earl Warren falls 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 Justice Blackmun's rift with Chief Justice 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 Presidents John F. Kennedy and Lyndon B. Johnson were in office and increasingly conservative during the Nixon and Reagan years.¹³¹

Additional explanations abound,¹³² 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 See, e.g., 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. BEHAV. 1 (1993); Timothy M. Hagle, "Freshman Effects" for Supreme Court Justices, 37 AM. J. POL. SCI. 1142 (1993); J. Woodford Howard, *Justice Murphy: The Freshman Years*, 18 VAND. L. REV. 473 (1965).

¹³¹ See Epstein et al., *supra* note 118, at 607.

¹³² 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 "Greenhouse" effect (Justices move to the left to win the approval of the *New York Times's* Supreme Court reporter, Linda Greenhouse). See, e.g., Ruger, *supra* note 10; BAUM, *supra* note 110; Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black*, *supra* note 45; Epstein et al., *supra* note 47.

A. *The Appointments Process and the Timing of Change*

Why the appointment of Supreme Court Justices is, and always has been, a process rife with political considerations is a question with many answers. Perhaps the most important 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.

Our results suggest that predicting the future ideology of any given nominee may be a risky business, but how risky? 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 then 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 compares the Justices’ first- and tenth-term ideal point estimates (see Figures 5–12) with newspaper editors’ assessments of the Justices’ ideologies at the time of appointment (see Figure 1).¹³³ The closer a Justice is to the line, the better the initial ideological assessment corresponds to the Justice’s first- (top panel) or tenth- (bottom panel) term revealed preferences.

¹³³ 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’ ideologies 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 (0.193)	0.367 (0.267)
Predicted Ideal Point	1.602 (0.294)	1.464 (0.427)
	N=28	N=26
	Residual Standard Error = 1.021	Residual Standard Error = 1.402

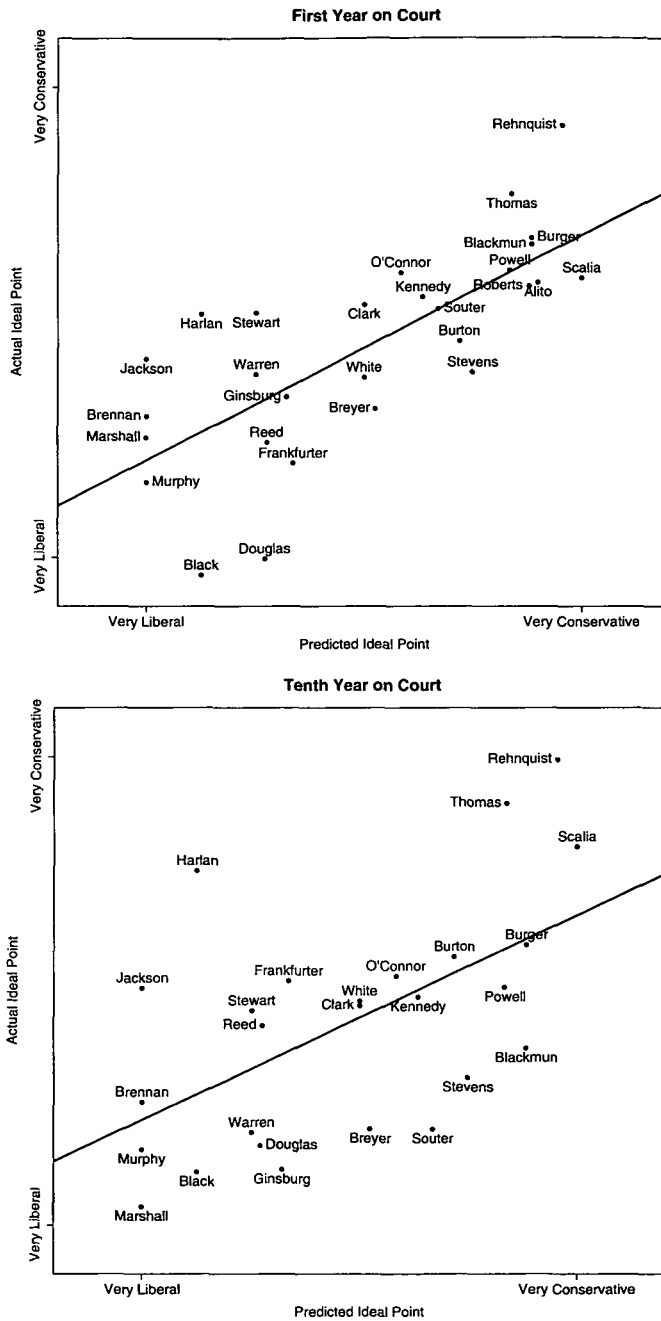


Figure 13: Actual (Martin-Quinn) ideal points during a Justice's first and tenth terms plotted against predicted ideal points (based on newspaper editors' assessments of ideology prior to confirmation). The superimposed lines are from least

*squares linear regressions fit to these data.*¹³⁴ *The closer a point is to the line, the better the prediction. The scale of axes in each plot is identical.*¹³⁵

If we assume that newspaper editors accurately capture senators' and the President's beliefs about the ideologies 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.¹³⁶ 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 1.69¹³⁷—a trivial difference between the actual and predicted values. Thus, President 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. Under-scoring this point is the bottom 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 given by the amount of variability around the regression line) increases substantially.¹³⁸ This 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

¹³⁴ See *supra* note 133.

¹³⁵ For more detail on the actual (Martin-Quinn) estimated ideal points, see *supra* notes 87–88; for information on the editors' assessments, see *supra* note 37. We generated the predictions via Clarify software. See Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000) (providing information on the authors' Clarify software).

¹³⁶ 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.

¹³⁷ We estimated this prediction using Clarify, King, Tomz & Wittenberg, *supra* note 135. The 95% confidence interval is [1.05, 2.33].

¹³⁸ The table depicted in *supra* note 133 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.

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 the Justice's tenth year of service.

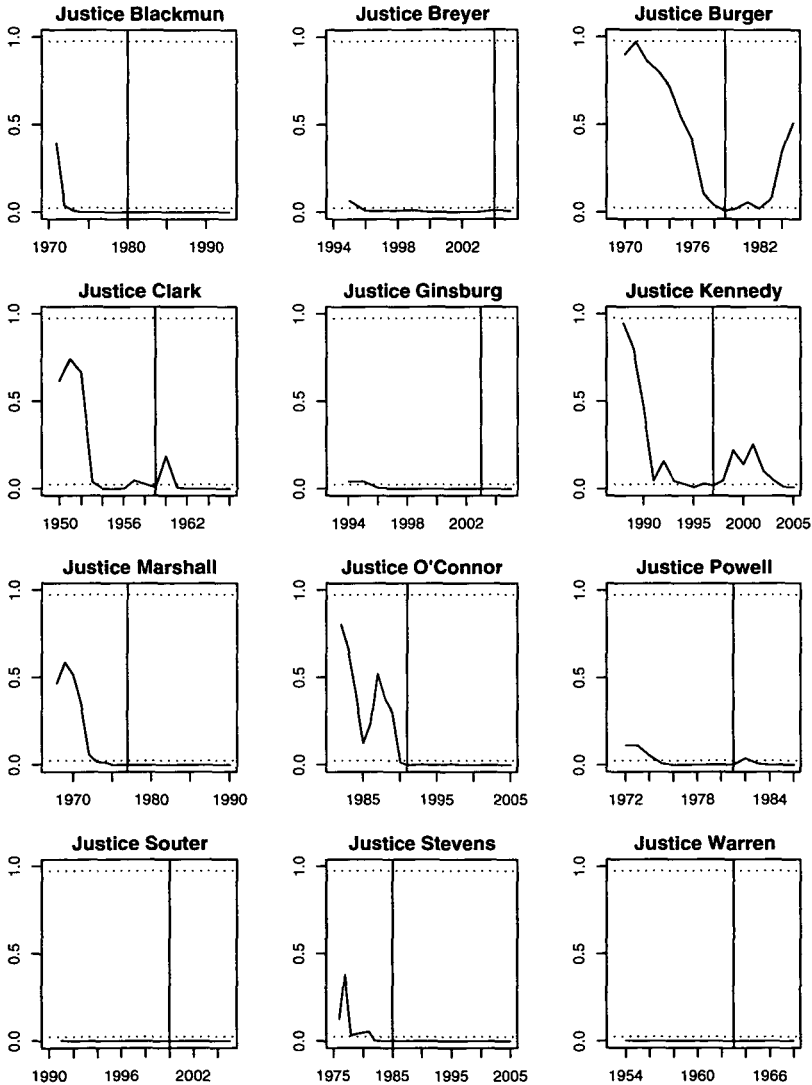


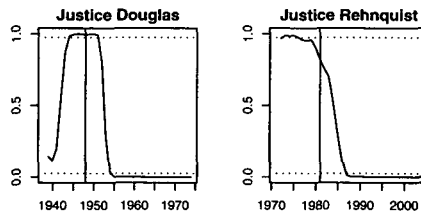
Figure 14: The probability that a Justice is more liberal or conservative in subsequent terms than in his or her first term. The vertical axis denotes the estimated

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 terms 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 years 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 139).

Relative to their first years, all but three Justices (Brennan, Murphy, and Stewart) were significantly more liberal or conservative by their tenth years.¹³⁹ 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 dissipated shortly thereafter. Also, to be sure, some Presidents would not have objected to the drift exhibited by their Justices. Justice Scalia is a prime example. We can hardly imagine his appointing President, Ronald Reagan, arguably the most conservative President of the twentieth century,¹⁴⁰ complaining about Scalia's rather quick, significant, and enduring turn to the right. Nor do we suspect that Justice Thurgood Marshall's move to the left would have disturbed Lyndon B. Johnson, among the most liberal Presidents of the last five decades.¹⁴¹

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 Warren to fulfill a campaign promise—not exclusively to advance his ideological agenda—neither the President nor the press deemed the new Chief an extreme liberal; in-

¹³⁹ As shown in the plots below, Justice Douglas and Chief Justice Rehnquist, on the other hand, were both more conservative and more liberal.



¹⁴⁰ We base this claim on Poole's NOMINATE Common Space scores. See generally Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998) (providing a scaling algorithm for generating an ideal point for all representatives, senators, and Presidents in two-dimensional Downsian issue space). The scores are available on Poole's website. Data Download Front Page, <http://voteview.com/dwnl.htm> (scroll to 4. Common Space Scores) (last visited May 20, 2007).

¹⁴¹ See Poole, Data Download Front Page, *supra* note 140.

deed, the editors' initial characterization of Warren was almost identical to their assessment of the moderate Potter Stewart.¹⁴² In his first term, Warren lived up to expectations: his ideal point estimate puts him closer to the center of the Court (Justice Tom C. 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 forecasted 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 we know, Justice 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.¹⁴³ For those in our data set, the length of tenure was, on average, 21.4 years (with a standard deviation of 7.9). Only five Justices have served fewer than fifteen terms—and two of the five remain on the Court.¹⁴⁴

Given the trend toward longer terms,¹⁴⁵ the message for Presidents, senators, and interest groups is clear: those believing that they can entrench their views in the Court for the decades to come are occasionally mistaken.¹⁴⁶ 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,

¹⁴² See *supra* Figure 1.

¹⁴³ Justices James Byrnes, Wiley B. Rutledge, Fred Vinson, Sherman Minton, Charles Whittaker, Arthur Goldberg, and Abe Fortas.

¹⁴⁴ The five are Justices Breyer, Burton, Ginsburg, Jackson, and Murphy.

¹⁴⁵ See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y, 769, 771–72 (2006) (arguing that “the increase in the longevity of Justices’ tenure,” among other trends, counsels for a change in the life tenure rule for Justices).

¹⁴⁶ Jeffrey A. Segal et al., *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. 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, “[J]ustices on average appear to deviate . . . away from the Presidents who appointed them.” *Id.*

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 merit than ever before.¹⁴⁷ 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 exert influence on the law well after the President leaves office, a nominee's professional merit should be a crucial consideration. To be sure, some twentieth century appointees thought to be lacking in the requisite qualifications went on to be great Justices. But most of those universally acclaimed as great Justices were also universally perceived as exceedingly well-qualified at the time of their nominations: Oliver Wendell Holmes, Benjamin Cardozo, William J. Brennan Jr., and Antonin Scalia, to name just a few. While the long-term ideological direction of their doctrinal paths may have been hard to predict, 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 an emphasis on candidates who can advance the President's or his party's electoral interests. This was the path followed by some past Presidents, including Eisenhower with his nominations 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.¹⁴⁸ Indeed, in Justice O'Connor's case, President Reagan was actually fulfilling a campaign promise to appoint the first female Justice¹⁴⁹—a promise his advisors thought would not only promote Reagan's candidacy but also advance the future electoral prospects of the Republican party.¹⁵⁰

¹⁴⁷ Epstein et al., *supra* note 71.

¹⁴⁸ Some might argue that George H.W. Bush's appointment of Clarence Thomas, President Bill 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, David Alistair Yalof's account, *supra* note 61, supports our suspicions. In both instances, the administrations considered but rejected candidates who may have been of greater value to their party's cause. Because of its recentness, 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.

¹⁴⁹ 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." ELDER WITT, *A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT* 33 (1986) (quoting Ronald Reagan).

¹⁵⁰ Worth noting, Reagan's speech of October 14, 1980 in which he pledged to appoint a woman to the Court, *see id.*, was designed to counter accusations that, as Reagan phrased them, he is "somehow

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 David Alistair Yalof's account, 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.¹⁵¹ 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 of ideological drift, not to mention studies suggesting the importance of symbolic politics to electoral constituencies,¹⁵² perhaps Presidents should 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 on the bench, Justices will behave in ways anticipated at the time of their appointments. Figure 13 documents the strong relationship between initial ideological assessments of the Justices as nominees and the Justices' revealed preferences during their first terms. For some Presidents, senators, and interest groups, these short-term payoffs may be sufficient to justify emphasis on ideology over credentials—especially if particular nominees can work to generate *quick* doctrinal change in specific areas of the law.

B. *The Possibility and Importance of Doctrinal Change*

This 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, hows, and whens, but we have reserved for now perhaps the most fundamental questions of all: Does the ideological drift matter? To what extent can it lead to doctrinal fluctuations among individual Justices and on the Court as a whole?

1. *Doctrinal Change and Individual Justices.*—The import of individual-level shifts depends on the direction and magnitude of the ideological movement. Consider, first, an Antonin Scalia, that is, an extreme

opposed to full and equal opportunities for women in America." *Id.* at 33 (quoting Ronald Reagan); see also YALOF, *supra* note 61, at 135–36.

¹⁵¹ YALOF, *supra* note 61, at 204.

¹⁵² Think: Reagan's appointment of the first female Justice or President Bush's ability to speak Spanish. 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, Mass., Aug. 29–Sept. 1, 2002).

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 and the "cutpoint" lines for three cases implicating different areas of the law: *Lawrence v. Texas*,¹⁵³ *Grutter v. Bollinger*,¹⁵⁴ and *Shafer v. South Carolina*.¹⁵⁵ 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*).¹⁵⁶ For ideal points below the line, we predict odds greater than .50 that the Justice will rule in the liberal direction (i.e., in favor of *Lawrence*, the Michigan Law School, and *Shafer*).

¹⁵³ 539 U.S. 558 (2003) (striking down sodomy laws).

¹⁵⁴ 539 U.S. 306 (2003) (upholding Michigan Law School's affirmative action program).

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

¹⁵⁶ We derive these cut points using the Martin-Quinn method. *See supra* note 87.

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 observing multiple cases, however, and when 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. 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 and 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.

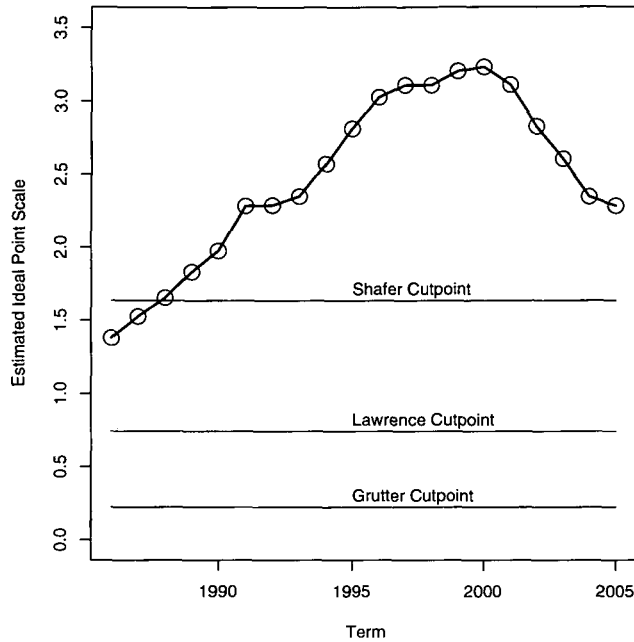


Figure 15: Time series plot of Justice Scalia's estimated ideal points, 1986–2005 terms. The horizontal lines are the cut points for *Grutter v. Bollinger*, *Lawrence v. Texas*, and *Shafer v. South Carolina*, such that points above the line indicate a probability of greater than .50 of voting conservatively. Points 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).¹⁵⁷

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; 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 likely would have voted to uphold the sodomy law. His ideological change, in other words, failed to translate into important legal change. More generally, looking at the three cases depicted in Figure 15, in only *Shafer* and for only three terms 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 Justice Scalia joined the Court. But we suspect that additional analyses would confirm the basic lesson of Figure 15. Be-

¹⁵⁷ For more detail on cut points, see *id.*

cause Scalia was so extreme in his preferences from the start of his service, his turn to the right indicates only a marginal change in his jurisprudence. The same likely holds for Justices Brennan and Marshall—other 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, Justice Blackmun provides the most obvious case in point; Figure 16 provides but one example. There we display his ideal points along with the estimated cut points for two landmark death penalty cases, *Furman v. Georgia* and *Gregg v. Georgia*.¹⁵⁸ 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* cut-point 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.

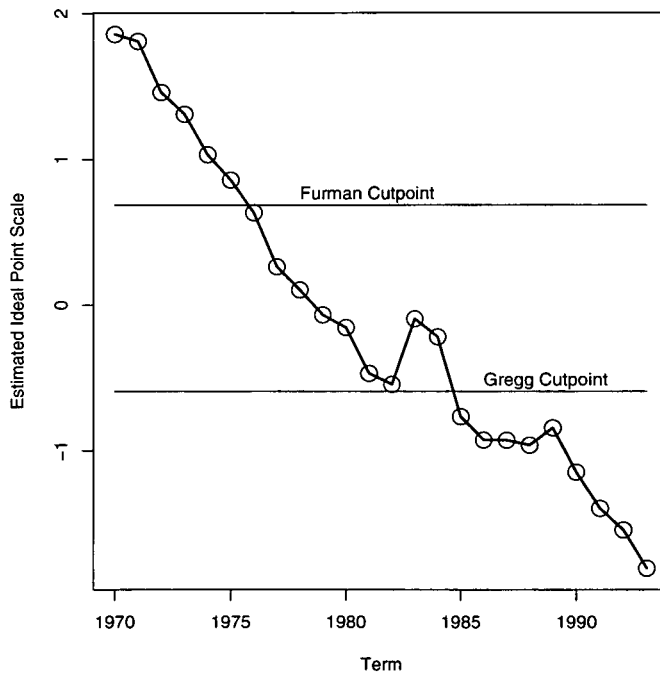


Figure 16: Time series plot of Justice Blackmun's estimated ideal points, 1970–1994 terms. The horizontal lines are the cut points for *Furman v. Georgia* and *Gregg v. Georgia*, such that points above the line indicate a probability of greater than .50 of voting against the defendant (as the Court did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

¹⁵⁸ *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

the line indicate a greater than .50 probability of voting for the defendant (as the Court did in *Furman*).¹⁵⁹

Seen in this way, Justice 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. 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 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 down the new statutes.

Because Blackmun moved from a rather extreme conservative position to a rather extreme liberal one, the effect of his ideological turnabout on doctrine is especially noticeable. But the drift 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 cut points for *Lawrence*, *Grutter*, and *Shafer*, as well as for *Wiggins v. Smith*,¹⁶⁰ in which the Court held that the defendant's attorney had failed to provide effective counsel during the sentencing phase of a 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 invalidate 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. In fact, in both *Shafer* and *Wiggins*, Rehnquist cast votes against the government.

¹⁵⁹ For more detail on cut points, see *supra* note 156.

¹⁶⁰ 539 U.S. 510 (2003).

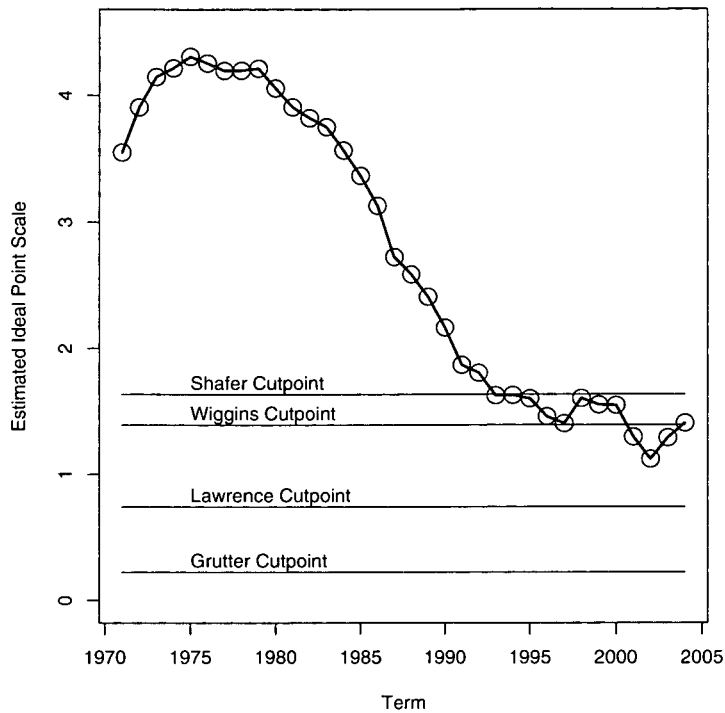


Figure 17: Time series plot of Justice Rehnquist's estimated ideal points, 1970–2004 terms. The horizontal lines are the cut points for *Grutter v. Bollinger*, *Lawrence v. Texas*, *Wiggins v. Smith*, and *Shafer v. South Carolina* such that points above the line indicate a probability of greater than .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).¹⁶¹

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 unnecessary 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 consequential.

Not so of the more centrist Justices. Take Justice Sandra Day O'Connor. As we already noted, over the last decade or so, Justice O'Connor trended to the left. Less obvious from our analysis, though widely acknowledged, is that O'Connor was the likely median or swing Justice for over a third of her service on the Court, or nine of twenty-five

¹⁶¹ For more detail on cut points, see *supra* note 156.

terms. Further, she managed to hold that crucial position for seven consecutive terms.¹⁶²

Undoubtedly, these two phenomena—O'Connor's move to the left and her role as the swing Justice—coalesced to produce noticeable and consequential precedent during the later Rehnquist Court years. Figure 18 makes the point for two cases, *Lawrence* and *Grutter*. Here we show ideal point estimates for Justice O'Connor and for the median Justice over the last two decades. Solid black circles indicate terms when Justice O'Connor was the median. We also show the cut points for *Grutter* and *Lawrence*.

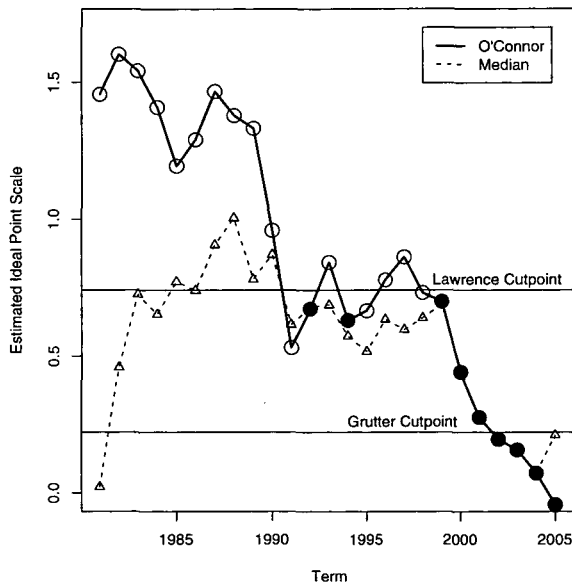


Figure 18: Time series plot of Justice O'Connor's and the median's estimated ideal point, 1981–2005 terms. The solid black circles indicate that Justice O'Connor is most likely the median Justice. The horizontal lines are the cut points for *Grutter v. Bollinger* and *Lawrence v. Texas* such that points 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).¹⁶³

¹⁶² See Andrew D. Martin & Kevin M. Quinn, Martin-Quinn Scores—Measures, <http://mqscores.wustl.edu/measures.php> (data found under “the Court Data Files”) (last visited June 12, 2007).

¹⁶³ For more detail on cut points, see *supra* note 156. Note that 2005 has a black circle, indicating that Justice O'Connor was the median, as well as a triangle, indicating that Justice Kennedy moved into the median position when O'Connor departed.

Figure 18 should once again dispel any doubt that fluctuation in preferences, and significant fluctuation at that, is possible. But more, it illustrates the potential importance of shifts when it is the median Justice who is shifting. Beginning with *Lawrence*, note that in the early part of the natural Court period that began in 1994 (and did not end until 2005), Justice O'Connor's ideal point estimate is close to the cutpoint line, though occasionally above it. In other words, had *Lawrence* come to the Court in, say, the 1997 term, the odds are that Justice 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, considerably increased the odds of the Court striking the sodomy law—a step it eventually took.

Justice O'Connor's role in the *Grutter* litigation was even more crucial.¹⁶⁴ In the 1994 term, when Kennedy was the Court's most likely median Justice, the probability of the Court supporting the law school's affirmative action program was just .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'Connor's turn to the left and into the median position seven terms later, in 2001, proved decisive to the outcome of the case.

O'Connor's growing liberalism, coupled with her role as the swing Justice, provide at least a partial explanation for the decisions in *Lawrence* and especially *Grutter*. This brings us to a crucial point. Of the sixteen 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 H. Jackson—served as the median Justice.¹⁶⁵ If they took the Court with them as they moved, then these Justices 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 impossibility of legal change during periods of membership stability to their own disservice. Figure 18 forcefully drives this point home. While the period between the 1994 and 2004 terms may have been one of the longest natural Courts in American history, the revealed preferences of individual Justices, including the median, changed rather markedly. Not surprisingly, important doctrinal shifts came in the wake.

¹⁶⁴ We make a similar point in Martin et al., *supra* note 87, at 1309–11.

¹⁶⁵ See Martin & Quinn, *supra* note 162.

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. First, while both new Justices, not unexpectedly, have emerged as conservatives (see Figure 19), our results here suggest that ideological drift is not only possible but likely. Whether one or both will exhibit abrupt change, as did Chief Justice Warren, or a more gradual trend, as did Justice 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 Justice is likely to stay his current ideological course for a decade or longer.

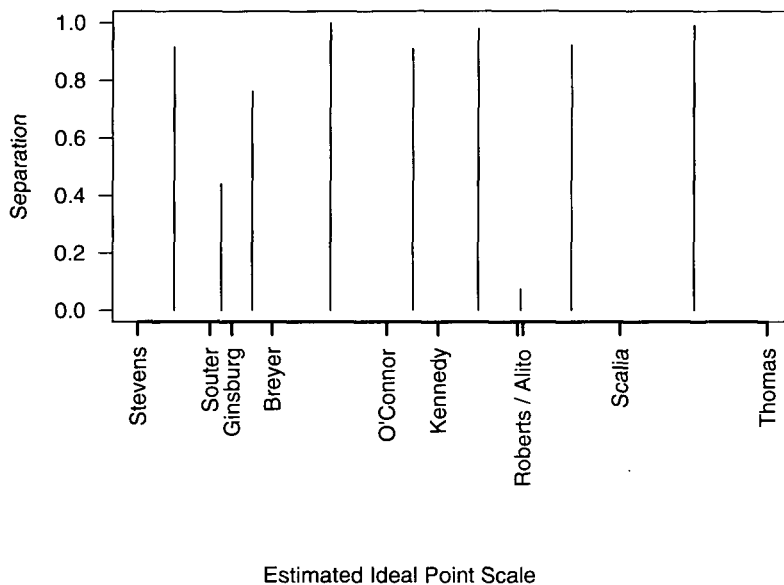


Figure 19: Justices serving in the 2006 term and Justice O'Connor, arrayed according to their 2005 term ideal point estimates. The vertical lines are at the midpoints between contiguous pairs of Justices, and the height of these vertical lines gives the separation between these two Justices. Here we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

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 Justice O'Connor to Justice 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 (contrary 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 doctrinal development rests largely on his shoulders.¹⁶⁶ More specifically, for areas of the law in which both he and Justice O'Connor were below (or above) various cut points, we would predict minimal legal change. One example is *Lawrence*. The odds in 2003 were far greater than fifty-fifty that both would vote to strike down the law; in 2006, as we show in Figure 20, Kennedy remains well south of the *Lawrence* cutpoint line.

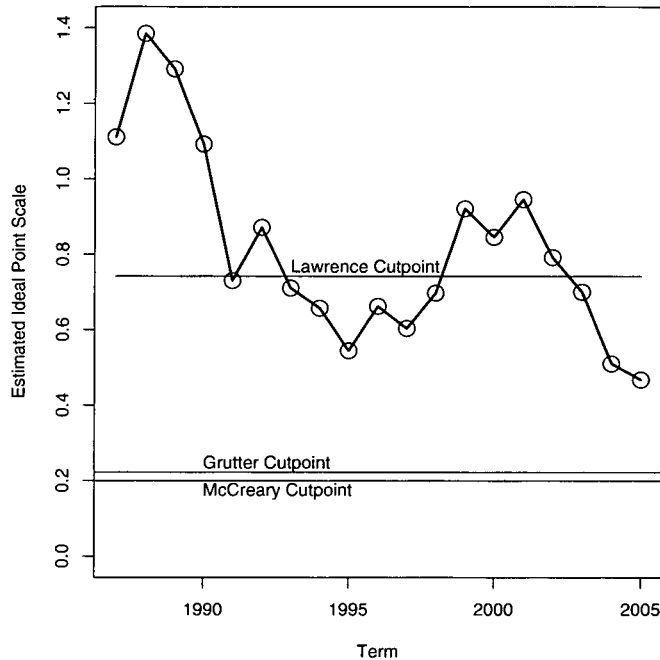


Figure 20: Time series plot of Justice Kennedy's estimated ideal point, 1986–2005 terms. The horizontal lines are the cut points for *Grutter v. Bollinger*, *Lawrence v.*

¹⁶⁶ 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, at 16 (“The Supreme Court has nominally been the Roberts Court since last fall, when John Roberts arrived as [C]hief [J]ustice. But as a practical matter, the recently completed term marked the start of the Kennedy Court.”).

Texas, and *McCreary County v. American Civil Liberties Union*¹⁶⁷ 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*).¹⁶⁸

Legal change in this area of the law is thus highly unlikely, but not so for affirmative action. As Figure 20 displays, at no point in his career did Justice Kennedy's revealed preferences fall below the *Grutter* line. Indeed, today the odds are only about 34% that he would vote to uphold a *Grutter*-like program. Given his current role as the median Justice, and again assuming no preference change 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 offer 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 perhaps even surprising stability) is possible if Kennedy continues to drift to the left.

Or, more precisely, if Kennedy *renews* his leftward drift. As noted earlier, while Justice 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 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 would have to be rather dramatic for it to exert influence on the course of doctrine. To return to *Lawrence*, the odds today of Kennedy voting in favor of at least certain kinds of laws discriminating against gays are so slim that only a seismic shift (and to the right, at that) would reverse them.

In other legal areas, however, even a small leftward movement on Justice Kennedy's part may be noticeable. For Justice O'Connor, and possibly for Justice Kennedy, one of those areas was affirmative action (see Figure 18). While our current estimates place Kennedy above the *Grutter* cutpoint line, the distance between it and his revealed preferences is narrowing in much the same way as it did for O'Connor over time. In other words, should Kennedy trend left, concerns about the demise of affirmative action

¹⁶⁷ 545 U.S. 844 (2005).

¹⁶⁸ For more detail on cut points, see *supra* note 156.

may dissipate. Even assuming that the two new Justices would 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*, a five-to-four Court held that the display of the Ten Commandments in county courthouses violated the Establishment Clause.¹⁶⁹ Because Justice O'Connor was in the majority and Justice Kennedy in the dissent,¹⁷⁰ some commentators have suggested that this is an area ripe for legal change.¹⁷¹

Based on our analysis, they are not wrong. Both the new Justices and Kennedy himself are above the *McCreary* cutpoint line (see Figure 20), indicating that, in all likelihood, the *McCreary* dissenters would prevail if the case were reheard today. However, should Justice Kennedy renew his drift to the left, *McCreary* and its progeny may be in less jeopardy than some suspect. As Figure 20 indicates, Kennedy's revealed preferences are creeping promisingly or perilously, depending on one's perspective, toward the cutpoint 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

¹⁶⁹ 545 U.S. at 881.

¹⁷⁰ 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 Gewirtz, *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 to allow the display in one case, and the decisive fifth vote to disallow it in the other.").

¹⁷¹ Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1207 (2006) ("Three [J]ustices, 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."); Erwin Chemerinsky, *The End of an Era*, 8 GREEN BAG 2d 345, 352 (2005) ("With four Justices—Rehnquist, 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 (noting that the differences between the majority and dissenters in *McCreary* are "stark," and that "the next [J]ustice of the Supreme Court, who replaces Justice O'Connor, will have the power to shift the doctrine either way."); 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.").

the standard it uses to resolve these disputes.¹⁷² 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.¹⁷³ In 2005 President George W. Bush asked Americans to trust that Harriet Miers would not change once appointed to the Court.¹⁷⁴ And in the same year Professor David Strauss told us to disbelieve claims that John G. Roberts Jr. would become more liberal upon his elevation to the high Court.¹⁷⁵

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 he or she reveals during the first few terms in office. Data from newspaper editorials suggested that Earl Warren and David Souter would be moderate-to-conservative in their ideological outlooks, and they were right. In their respective freshman years, both voted in accord with that label. Thus, predictions of stability might be right in the short term.

On the other hand, our results indicate those predictions may not survive in the longer term. The ideological boxes into which Presidents, senators, and the public place Justices at the time of their nominations are not so tightly sealed. Drift to the right or, more often, to 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, but it is by no means the only one.

¹⁷² 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, 659 (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.,* William Van Alstyne, *Nine Judges, and Five Versions of One Amendment—The First* ("Now What?"), 14 WM. & MARY BILL 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."); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1624 (2006) ("In the late 1980s, Justice Anthony Kennedy put forward the concept of coercion as the gauge for an Establishment Clause violation, and Justice Kennedy's 'coercion test' has recently caught on.").

¹⁷³ *See* Jenkins, *supra* note 11.

¹⁷⁴ *See supra* note 24.

¹⁷⁵ Strauss, *supra* note 7.

And because we suspect it is not the last one either, Presidents would serve themselves well 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.¹⁷⁶ Certainly, the two are not always in conflict. With the nomination of Samuel A. Alito Jr., 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 may label William J. Brennan Jr. or Sandra Day O'Connor failures from the point of view of their appointing Presidents, but both served crucial partisan interests. The real failures from the Presidents' perspectives are those, like Justice Blackmun, who drift in the long run from their initial preferences without ever having provided electoral benefits.

¹⁷⁶ Alternatively, given the prominence of leftward drift among recent Justices, Presidents ought consider nominees more conservative than their ideal points.

