Replacing Justice Ginsburg[*]

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In the same left-right (liberal-conservative) policy space, we locate President Trump's possible nominees to the Supreme Court and the current justices. The goal is to consider how the Court (and, ultimately, the law) could change depending on Trump's pick to replace Justice Ginsburg.

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1 Preliminaries: Locating the Actors in (the Same) Left-Right Space

To locate the current justices and possible future appointees on a left-right spectrum, we use the scaling strategy proposed in "The Judicial Common Space" (JCS).[1] That approach works as follows.

Current Justices. We base the justices' ideology on their voting patterns (their Martin-Quinn scores[2]). We apply the procedure outlined in the JCS to ensure compatibility between the justices' and possible nominees' scores.

Possible Nominees. Donald Trump released four lists of Supreme Court picks,[3] with the two most recent lists released on November 17, 2017[4] and September 9, 2020.[5]

Of the 24 names on the November 2017 list (excluding now-Justice Kavanaugh), we eliminated the six candidates over the age of 60.[6] Nominees over 60 are not unknown (Ginsburg was 60 and Merrick Garland was 63) but they are rare. Since 1970, nominees are, on average, 54[7]—a figure slightly higher than both Trump appointees (Gorsuch, at 49 and Kavanaugh at 53).

We included all 20 names on the September 2020 list, for a total of 38 possible nominees. For purposes of comparison, we also include in the analysis two names often mentioned as potential Biden nominees: Ketanji Brown Jackson (DC U.S. District Court judge) and Leondra Kruger (California Supreme Court justice)

1.1 Possible Nominees Serving as Federal Judges/U.S. Senators

Because 25 of the 38 possible nominees are sitting federal judges (see Table 1), we can measure their ideology using the tried-and-true approach developed by Giles, et al.[8]

1. If a judge is appointed from a state where the president and at least one home-state senator are of the same party, the judge is assigned the ideology of the home-state senator.

2. If both senators are from the president's party, the judge is assigned the average ideology of the two senators.

3. If neither home-state senator is from the president's party, the judge receives the ideological score of the appointing president.

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[1]Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, & Chad Westerland, "The Judicial Common Space," 23 *Journal of Law, Economics, & Organization* 303 (2007). Some commentators suggest that expert judgment or a careful reading of the judges' opinions would be a better approach to locating the potential appointees and decisions in ideological policy space. For our response to this suggestion, see Appendix A.

[2]At: http://mqscores.lsa.umich.edu.

[3]May 18, 2016; September 23, 2016; November 17, 2017; September 9, 2020.

[4]President Donald J. Trump's Supreme Court List, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/

[5]Additions to President Donald J. Trump's Supreme Court List, https://www.whitehouse.gov/briefings-statements/additions-president-donald-j-trumps-supreme-court-list/.

[6]Age at the end of 2020 in parentheses: Canady (66), Mansfield (62), Moreno (68), Sykes (63), Tymokovich (64), and Young (68).

[7]With a standard deviation of 5.7; the median is 53.5.

[8]Micheal W. Giles, Virginia Hettinger, & Todd Peppers, "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas," 54 *Political Research Quarterly* 623 (2001).

Name/ Current Position	Year/Age & Place of Birth	Law School	Clerkships
Bridget Bade 9th Circuit Judge (Trump)	1965 (55) Arizona	Arizona State	E Jones (CoA)
Amy Coney Barrett 7th Circuit Judge (Trump)	1972 (48) Louisiana	Notre Dame	Silberman (CoA) Scalia (SCt)
Keith R. Blackwell Former Georgia Justice	1975 (45) Georgia	Georgia	Edmondson (CoA)
Daniel Cameron AG Kentucky	1985 (35) Kentucky	Louisville	Van Tatenhove (DCt)
Steven M. Colloton 8th Circuit Judge (Bush 2)	1963 (57) Iowa	Yale	Silberman (CoA) Rehnquist (SCt)
Paul Clement Private-Practice Lawyer	1966 (54) Wisconsin	Harvard	Silberman (CoA) Scalia (SCt)
Tom Cotton U.S. Senator (R-Ark)	1977 (43) Arkansas	Harvard	J Smith (CoA)
Ted Cruz U.S. Senator (R-Texas)	1970 (50) Canada	Harvard	Luttig (CoA) Rehnquist (CoA)
Stuart Kyle Duncan 5th Circuit Judge (Trump)	1972 (48) Louisiana	LSU	Duhe (CoA)
Allison Eid 10th Circuit Judge (Trump)	1965 (55) Washington St.	Chicago	JE Smith (CoA) Thomas (SCt)
Steven Engel Asst AG, OLC	1974 (46) New York	Yale	Kozinski (CoA) Kennedy (SCt)
Noel Francisco Private-Practice Lawyer	1969 (51) New York	Chicago	Luttig (CoA) Scalia (SCt)
Britt Grant 11th Circuit Judge (Trump)	1978 (42) Georgia	Stanford	Kavanaugh (CoA)
Raymond W. Gruender 8th Circuit Judge (Bush 2)	1963 (57) Missouri	Wash U	None
Thomas M. Hardiman 3rd Circuit Judge (Bush 2)	1965 (55) Massachusetts	Georgetown	None
Josh Hawley U.S. Senator (R-Missouri)	1979 (41) Arkansas	Yale	McConnell (CoA) Roberts (SCt)
James C. Ho 5th Circuit Judge (Trump)	1973 (47) Taipei, Taiwan	Chicago	J.E. Smith (CoA) Thomas (SCt)
Gregory Katsas DC Circuit Judge (Trump)	1964 (56) Massachusetts	Harvard	Becker/Thomas (CoA) Thomas (SCt)
Raymond M. Kethledge 6th Circuit Judge (Bush 2)	1966 (54) New Jersey	Michigan	Guy (CoA) Kennedy (SCt)
Barbara Lagoa 11th Circuit Judge (Trump)	1967 (53) Florida	Columbia	None
Christopher Landau Ambassador	1963 (57) Spain	Harvard	Thomas (CoA) Scalia/ Thomas (SCt)
Joan Larsen 6th Circuit Judge (Trump)	1968 (52) Iowa	Northwestern	Sentelle (CoA) Scalia (SCt)

Mike Lee	1971 (49)	BYU	Benson (DCt)
U.S. Senator (R-Utah)	Arizona		Alito (CoA, SCt)
Thomas R. Lee	1964 (56)	Chicago	Wilkinson (CoA)
Utah Justice	Arizona?		Thomas (SCt)
Carlos Muñiz	1969 (51)	Yale	Cabranes (CoA)
Florida Justice	Illinois		
Kevin C. Newsom	1972 (48)	Harvard	O'Scannlain (CoA)
11th Circuit Judge (Trump)	Alabama		Souter (SCt)
Martha Pacold	1979 (41)	Chicago	Randolph/Bybee (CoA)
N. Dist IL Judge (Trump)	Virginia		Thomas (SCt)
Peter Phipps	1973 (47)	Stanford	Cole (CoA)
3rd Circuit Judge (Trump)	Texas		
Sarah Pitlyk	1977 (43)	Yale	Kavanaugh (CoA)
E. Dist MO Judge (Trump)	Indiana		
William H. Pryor, Jr.	1962 (58)	Tulane	Wisdom (CoA)
11th Circuit Judge (Bush 2)	Alabama		
Allison Jones Rushing	1982 (38)	Duke	Gorsuch/Sentelle (CoA)
4th Circuit Judge (Trump)	North Carolina		Thomas (SCt)
Margaret A. Ryan	1964 (56)	Notre Dame	Luttig (CoA)
Former Armed Forces Judge (Bush 2)	Illinois		Thomas (SCt)
David Stras	1974 (46)	Kansas	Brunetti/Luttig (CoA)
8th Circuit Judge (Trump)	Kansas		Thomas (SCt)
Amul R. Thapar	1969 (51)	Berkeley	Spiegel (DCt)
6th Circuit Judge (Trump)	Michigan		NR Jones (CoA)
Kate Todd	1975? (45)	Harvard	Luttig (CoA)
Deputy WH Counsel	Indiana?		Thomas (SCt)
Lawrence VanDyke	1972 (48)	Harvard	JR Brown (CoA)
9th Circuit Judge (Trump)	Texas		
Don Willett	1966 (54)	Duke	JS Williams (CoA)
5th Circuit Judge (Trump)	Texas		
Patrick R. Wyrick	1981 (39)	Oklahoma	Payne (DCt)
W. Dist OK Judge (Trump)	Texas		

Table 1: Entries on Trump's lists under the age of 60. Age (in parentheses) is age at the end of 2020, which may not be the judge's current age. Sources include the Federal Judicial Center's Biographical Directory of Federal Judges, Senate questionnaires and various websites, including Ballotpedia. ? indicates difficult-to-verify or questionable information.

Giles, et al. use Lewis, et al.'s NOMINATE scores to measure the senators' and presidents' ideology, and so we can place federal judges in the same left-right space as the current justices.[9] The same holds for the four U.S. Senators on Trump's list. Katsas, Larsen, Stras, and VanDyke present more of a challenge. All fall into category 3 above and so normally we would use Trump's ideology score. Because it isn't yet available, we substitute Vice President Pence's score developed from his votes as a member of the House.

Of course, it's difficult to say with any degree of (un)certainty whether our ideological placements of the senators and the federal judges will predict their behavior on the U.S. Supreme Court; none are justices (yet). What we can say is that the ideological scores produce reasonably accurate predictions for the current justices (plus Ginsburg, Scalia, and Kennedy), as Table 2 shows.[10] For example, based on Breyer's lower court ideology we would expect him to vote 36.7% of the time in the conservative direction. Breyer's actual percentage is 40.3%—for an error rate of 3.6 percentage points. For some justices the fit is tighter; notably, the two Trump appointees, Gorsuch and Kavanaugh, yield error rates < 2. For some justices the fit is looser (*e.g.,* Alito and Sotomayor). Overall, through a strong and statistically significant relationship ($p < 0.01$) exists between the justices' lower court scores and their voting on the Supreme Court.

Justice	Justice's Ideology Score	Predicted % Conservative	Actual % Conservative	Error
Alito	0.557	56.4	63.5	7.0
Breyer	-0.413	36.7	40.3	3.6
Ginsburg	-0.504	34.9	35.4	0.5
Gorsuch	0.693	59.2	58.0	-1.2
Kagan	-0.354	37.9	36.6	-1.3
Kavanaugh	0.693	59.2	58.3	-0.9
Kennedy	0.506	55.4	52.2	-3.2
Roberts	0.693	59.2	54.5	-4.7
Scalia	0.692	59.2	57.2	-2.0
Sotomayor	-0.301	39.0	34.5	-4.5
Thomas	0.557	56.4	63.0	6.6

Table 2: Predictions of the justices' voting based on their lower court ideology score (for Kagan, Obama's score). Percentage conservative calculated from the U.S. Supreme Court Database, with decisionType=1 or 7 and term≥ 2010. R^2=0.87; RMSE=4.29.

1.2 The Other Nominees

The remaining nine potential nominees are a mix of state judges, lawyers, and other office holders (see Table 1). Unfortunately, there is no equally tried-and-true method of including these justices in same policy space as Supreme Court justices. To avoid excluding them, we rely on the JCS score of the federal judge/justice for whom they clerked.

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[9]Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, & Luke Sonnet, Voteview: Congressional Roll-Call Votes Database, https://voteview.com/. Updated scores for the court of appeals judges are at: http://epstein.wustl.edu/research/JCS.html. Christina L. Boyd maintains the district judges' scores at http://clboyd.net/ideology.html.

[10]For all but Kagan we use the justice's lower court score; for Kagan, who did not serve as a federal judge, we use her appointing president's—Obama's—score.

Using clerkships to assess state justices' ideology is novel, and so we must emphasize that this measurement strategy has not been validated. Nonetheless, the results appear plausible (see Figures 1 and 2 below).

2 Possible Nominees as Justices

Figure 1 shows where some of Trump's more likely candidates—including apparent front-runners, Barrett and Lagoa—would fit on the current Court if they were to become justices. It also depicts the two possible Biden picks, Kruger and Jackson.
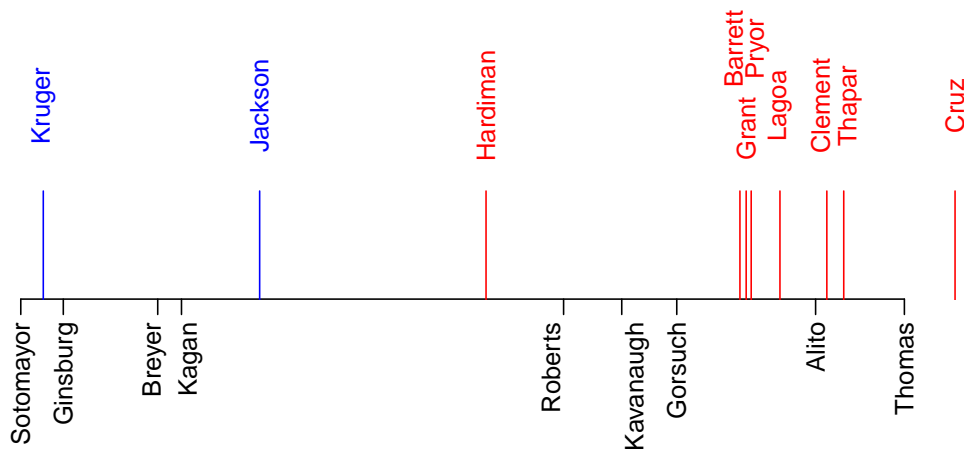

Figure 1: Left-right placement of the 2019-20 term justices, some of Trump's more likely nominees to the Court, and two possible Biden nominees.

As for the other nominees: Because it's cumbersome to display all of them in the same graph, Figure 2 provides a sense of where they fit relative to the current justices using proportions. For example, the area under the red curve between Kavanaugh and Gorsuch shows the proportion of nominees whose ideology puts them between those two justices. Note, though, that many more potential nominees are located between Alito and Thomas than between Kavanaugh/Gorsuch. The two equal-size blue curves indicate Kruger and Jackson.
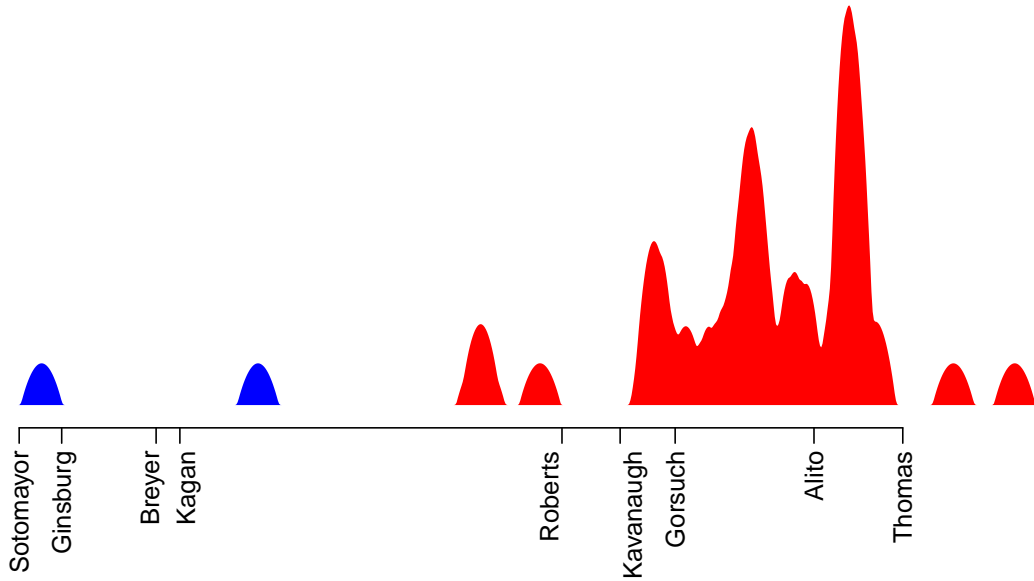
Figure 2: Left-right placement of the 2019-20 term justices, Trump's nominees to the Court (represented as proportions), and two possible Biden nominees.

Taken together, the figures show that the two potential Biden nominees are ideologically fairly close to RBG, whereas all potential Trump nominees are way to the right of Ginsburg. Most are also more conservative than the current median justice, John Roberts.[11] The implication here is that the third Trump justice will likely push the median to the right.

More specifically, four scenarios seem possible.

2.1 Roberts Remains the Median Justice

To the extent that their estimates are to the left of the current median (Roberts) only Muñiz, Hardiman,[12] and Engel fall into a moderate-*ish* category. Were any of the three to replace Ginsburg, the Chief would remain at the Court's center.

2.2 The Median Shifts Slightly into the Roberts-Kavanaugh-Gorsuch Range

The four possible nominees in the interval between Roberts and Gorsuch (Blackwell, Gruender, Colloton, Bade) could be characterized as moderate conservatives assuming they are more likely to join Roberts-Kavanaugh-Gorsuch than Alito-Thomas. Still, if any one of the four replaces Ginsburg, *the Court's center likely would shift to the right—from Roberts to one of the Trump appointees.* Under this scenario, the Roberts Court may be more aptly called the Trump Court.

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[11]The exceptions are Hardiman (labeled in Figure 1), along with Muñiz and Engel (included in Figure 2).

[12]Under the JCS procedure, Hardiman is located halfway between Senators Santorum and Spector (who was rather far to the left for a Republican).

2.3 Power Moves Substantially to the Right

Another 16 of the names on Trump's lists, *including the frontrunners Barrett and Lagoa*, fall into the "clear conservative" category—roughly in the same ideological range as Gorsuch-Alito.[13] The possibility of ideological drift aside (more on drift below), we predict that all 16 will be reliable conservatives voting to limit gay rights, uphold restrictions on abortion, and invalidate affirmative action programs and campaign finance regulations (as Alito has done throughout his career).[14] More generally if we use Alito as our guide, we would expect these seven candidates to reach conservative decisions in **71%** of all cases and in **84%** of non-unanimous decisions. The percentages for Ginsburg are nearly the reverse: **23%** and **11%**.[15] (The differences between Alito and Ginsburg are statistically significant at $p < 0.01$.)

Under this scenario, Kavanaugh would remain the Court-wide median, but the center of power within the five-member conservative majority would shift from Gorsuch to somewhere between Gorsuch and Alito.[16] Also plausible is that Kavanaugh and Gorsuch (and perhaps even Roberts) shift to the right, aligning themselves with Trump 3. Figure 3 depicts these various possibilities.

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[13]From left to right: Daniel Cameron, Noel Francisco, Allison Jones Rushing, Allison Eid, Amy Coney Barrett, Britt Grant, Kevin Newsome, William Pryor, Kate Todd, Sarah Pitlyk, Thomas Lee, Stuart Kyle Duncan, Barbara Lagoa, Tom Cotton, Patrick Wyrick, and Josh Hawley.

[14]We base this claim on a cut-point analysis, available on request.

[15]We used the Supreme Court Database to calculate these percentages. We base them on 2019 term orally argued cases resulting in a signed opinion of the Court or a judgment.

[16]See Carruba, et al., "Who Controls the Content of Supreme Court Opinions", 56 *American Journal of Political Science* 400 (2011), for an account of why the median of the majority coalition holds considerable power.

Figure 3: Ideology of the Median Justice, 1953-2020 Terms. Median ideology is based on the Martin-Quinn score *med* score. The median (Kavanaugh-Gorsuch) in the 2020 term is projected based on Gorsuch's 2019 term Martin-Quinn *post_mn*. The dashed line above and below Gorsuch shows the low and high range for Gorsuch based on his Martin-Quinn post_025 and post_975 (which is somewhat more liberal than Alito's *post_mn*). Kennedy, not O'Connor, is used as the median for the 2005 term. The light grey lines indicate the terms of chief justice eras: Warren (1953-68), Burger (1969-85), Rehnquist (1986-04), and Roberts (2005-2019).

2.4 Power Moves to the Extreme Right

Mike Lee—the most conservative member of the U.S. Senate[17]—is also the most extreme of the potential nominees, to the right of even Thomas, as is Cruz (see Figure 1). But 13 others, we estimate, would vote about as conservatively as Thomas.[18]

In other words: Should any of the 13 get nod, not only would Alito and Thomas be less isolated on the extreme right; Alito would become the median within the five-member conservative majority. *Together with Gorsuch, possibly Kavanaugh, and the third Trump appointee, the five could create a stable, enduring, and extremely conservative voting bloc capable of unwinding the administrative state,*[19] *weaponizing the First Amendment in expression and religion cases,*[20] *elevating the Second*

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[17]According to Lewis et al.'s scores (see note 9).

[18]From left to right: Paul Clement, Christopher Landau, Amul Thapar, Peter Phipps, David Stras, Joan Larsen, Lawrence VanDyke, Martha Pacold, Gregory Katsas, James Ho, Don Willett, Raymond Kethledge, and Margaret Ryan.

[19]See, *e.g.,* Elbert Lin, "At the Forefront of the Train: Justice Thomas Reexamines the Administrative State," 127 *Yale Law Journal Forum* 182 (2017).

[20]See, *e.g.,* Adam Liptak, "How Conservatives Weaponized the First Amendment," *New York Times,* June 30,

Amendment,[21] *upholding restrictions on abortions,*[22] *pushing back on Congress' commerce clause power,*[23] *and empowering the President*[24]—among other items on Thomas' agenda. Along the way, many precedents, laws, and agency interpretations may well fall.

To develop a more precise estimate of how the law could change under a new (extreme) conservative regime, we conducted two analyses. Our report, Justice Ginsburg's (Court) Legacy and the Potential Implications of Her Departure,[25] explains both in some detail so suffice it to note here that the first analysis focused on cases in which Thomas and Alito (and, for the 2017-2019 terms, Gorsuch and Kavanaugh) dissented on the theory that the conservatives could now pick up enough votes (with Trump3) to form a majority. For the second, we analyzed especially salient precedents[26] established since 1993 by a one-vote margin with Ginsburg voting in the majority and Scalia, Thomas, *and* Alito (and Gorsuch/Kavanaugh), if on the Court, dissenting—in other words, precedents perhaps particular prized by RBG.

Taken collectively, the analyses suggest that *at least* 115 precedents could be reconsidered in the next few years (see Appendices 2 and 3). The "at least" is an important caveat because on the conservatives' list of incorrectly-decided cases are many that predate Ginsburg's appointment. They include, to name just a few, the abortion decisions *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992),[27] Chevron deference,[28] the *Gingles* test in voting rights cases,[29] the commerce clause case *Wickard v. Filburn* (1942),[30] and even the long-standing "reasonable expectation of privacy" approach of *Katz v. United States* (1967)[31] applied most recently in *Carpenter v. United States* (holding that the government generally needs a warrant to obtain cell-site location data).[32]

3 Ideological Drift

These predictions assume that once on the Court, the third Trump appointee will not be a turncoat (e.g., Warren, Souter) or leftward drifter (e.g., Blackmun, O'Connor, Kennedy). Empirical studies, however, question this assumption. They have found that has many as half of all justices serving since 1937 diverged from their president's ideology or otherwise drifted to the right or, more typically, to the left.[33]

2018.

[21]See, *e.g.,* Thomas' dissents from the denial of certiorari in *Silvester v. Becerra*, 17-342; *Peruta v. California*, 16-894 (joined by Gorsuch).

[22]See Kavanaugh's dissent in *June Medical Services v. Russo,* 2020 U.S. LEXIS 3516 (2020), pointing out that five members of the Court reject *Whole Women Health's* approach.

[23]See *e.g.,* Thomas' dissent from the denial of certiorari in *Baston v. United States,* 16-5454; and his concurring opinion in *United States v. Lopez,* 514 US 549 (1995).

[24]See *e.g.,* Thomas' separate opinions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Zivotofsky v. Kerry,* 2015 U.S. LEXIS 3781 (2015).

[25]Available at: http://epstein.wustl.edu/research/RBGLegacy.html.

[26]These are decisions the *New York Times* reported on its front-page on the day after they were issued. See Lee Epstein & Jeffrey A. Segal, "Measuring Issue Salience," 44 *American Journal of Political Science* 66 (2000).

[27]410 U.S. 113 and 505 U.S. 833.

[28]*Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

[29]*Thornburg v. Gingles*, 478 U. S. 3 (1986).

[30]317 U.S. 111.

[31]389 U. S. 347

[32]2018 U.S. LEXIS 3844.

[33]*E.g.,* Andrew D. Martin & Kevin M. Quinn, "Assessing Preference Change on the U.S. Supreme Court," 23 *Journal of Law, Economics, & Organization* 365 (2007); Lee Epstein, et al., "Ideological Drift Among Supreme Court Justices," 101 *Northwestern University Law Review* 1883 (2007); Lee Epstein, Willam M. Landes, & Richard A. Posner, *The Behavior of Federal Judges* (Harvard University Press, 2013).

Why? Epstein, Landes, & Posner tested, and ultimately confirmed, the hypotheses that justices are less likely to drift if they were a federal official (including a judge) working in the District of Columbia at the time of their appointment.[34] Perhaps the president has better information about potential appointees who are inside the Beltway. Or perhaps newcomers to Washington are more vulnerable to criticism, and more grateful for praise, from (some left-leaning) reporters.[35] As Judge Silberman of the D.C. Circuit put it, "I do not think I fully appreciated until I became a judge ... how much an impact press coverage can have on judges. [I] understand better today the reason for the evolution of some judges. More often than not it is attributable to their paying close attention to newspaper accounts of their opinions."[36]

Whatever the reason, the relationship between proximity to the District and stability in voting may explain why five of the ten most recent justices were working in Washington at the time of their nomination (Ginsburg, Kagan, Kavanaugh, Roberts, and Thomas); and two were close by in New York (Sotomayor) and New Jersey (Alito). Note too Obama's nomination of Merrick Garland and his serious consideration of Sri Srinivasan—both judges on the D.C. Circuit—not to mention Trump's appointment of Gorsuch (a former Deputy Associate General in Bush 2's Justice Department).

Perhaps as a result of recent presidents' consideration of location, significant *against*-type drift has virtually disappeared on the Roberts Court. Now only the Chief himself falls in this category, as Figure 4 suggests. There we show the Martin-Quinn scores[37] (developed from the justices' voting patterns) for the 2019 term justices.

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[34]Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006), 144; Linda Greenhouse, "Justices Who Change: A Response to Epstein, et al." 101 *Northwestern University Law Review* 1885 (2007).

[35]This is known as the "Greenhouse Effect," named for the former Supreme Court correspondent for the *New York Times,* Linda Greenhouse. For an analysis, see Baum, note 34. Perhaps the emergence of conservative and libertarian blogs have worked to offset this effect.

[36]Quoted in Baum, note 34, 139.

[37]Andrew D. Martin & Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999," 10 *Political Analysis* 134 (2002).
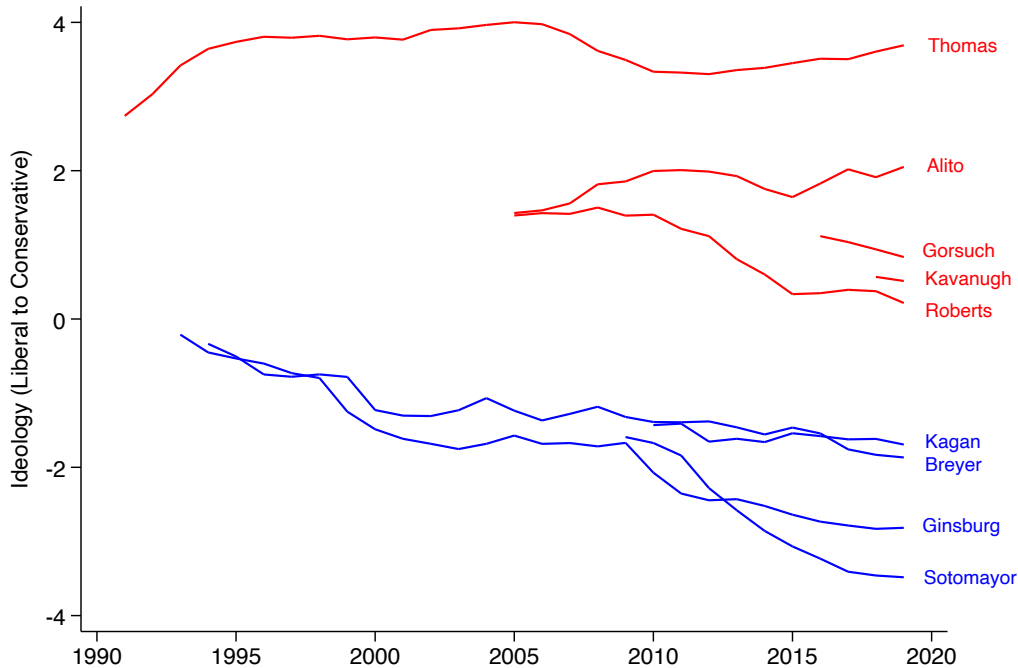
Figure 4: Ideology (Martin-Quinn Scores) Over Time, 1991-2019 Terms. We show only members of the 2019 term Court. Plotted data are the Martin-Quinn scores. Republican appointees are in red; Democratic appointees are in blue.

As for the potential Trump nominees: Ten (26%) now work in Washington[38]; and other ten worked for Republicans in Washington (as did Gorsuch and Kavanaugh), which may mitigate the risk of drift[39]—or at least reflect greater fidelity to conservative causes.[40] Alito provides an example. He was not living in Washington at the time of his nomination, but he came to the Court with substantial executive branch experience in D.C.: assistant to the Solicitor General and deputy assistant attorney general during the Reagan years. Unlike Kennedy or Souter, neither of whom ever worked in Washington, Alito shows no signs of drift against type. (Actually, he has moved significantly to the right over time, as Figure 4 suggests.)

Emerging from this analysis and the existing literature is a straightforward prediction: Were Trump to reach into the heartland or the South, and select a nominee with little or no connection to Washington, D.C.—*say, Barrett or Lagoa*—he might well trade off elitism and insiderism in favor of (possible) short-term electoral benefits, as well as incur the policy costs of ideological divergence or drift.

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[38]Paul Clement, Tom Cotton, Ted Cruz, Steven Engel, Noel Francisco, Josh Hawley, Gregory Katsas, Mike Lee, Margaret Ryan (senior judge), and Kate Todd.

[39]See Michael C. Dorf, "Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices 'Evolve' and Others Don't?," 1 *Harvard Law & Policy Review* 457 (2007), at 457 ("[A]n especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal [is] experience in the executive branch of the federal government. Those who lack such experience evolve; those who have it do not.").

[40]Dorf, note 39, 458.

4 Appendix A. Other Approaches to Locating Judges in Ideological Policy Space

Some commentators suggest that expert judgment or a careful reading of the judges' opinions would be a better approach to locating the potential appointees in ideological policy space.

For three reasons, we respectfully disagree.

1. Meehl's meta-analysis of more than six decades ago demonstrated that expert judgment is almost always inferior to systematic scientific assessment; it may be even worse than novice evaluations.[41] Many follow-up studies have endorsed or confirmed Meehl's conclusions. For a review relevant to law, we recommend Caldeira's commentary on a competition between a statistical model and legal experts over predicting Supreme Court outcomes.[42] That the model generally outperformed the experts hardly surprised Caldeira. In light of the long line of literature demonstrating that "human judges are not merely worse than optimal regression equations; they are worse than almost any regression equation," Caldeira would have been astonished had the competition come out the other way.

2. As for a close reading of the judges' opinions: We know that federal judges who have a realistic prospect of promotion to the Supreme Court (now all the judges on Trump's short list) alter their judicial behavior in order to improve their chances—in other words, they "audition" for an appointment to the Court.[43] We also know that on the U.S. Courts of Appeals there is substantial "dissent aversion" (a reluctance by some judges to dissent publicly even when they disagree with their colleagues' decision), which means that the ideological composition of the judges' circuits (and so the panels on which they serve) will affect their votes.[44] Taken together, these factors suggest that lower court records may be poor, even misleading, predictors of how judges will vote as justices (and Epstein, Landes, & Posner demonstrate as much[45]).

3. See Table 2. Although we don't know, and can't know yet, whether the predictions will be as accurate for the candidates on Trump's short list as they are for recent justices, the strong fit between the lower court scores and Supreme Court voting is encouraging.

5 Appendix B. 101 At-Risk Roberts Court Precedents

Note: These are decisions in in which Scalia, Thomas, *and* Alito dissented. (For the 2017-2019 terms, we also include dissenting votes by Gorsuch and Kavanaugh.) Excluded are two decisions in which RBG was also in dissent: *Carr v. United States*, 560 U.S. 438 (2010) and *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).

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[41]Paul Meehl, *Clinical versus Statistical Prediction: A Theoretical Analysis and Review of the Evidence* (original copyright, 1954).

[42]Gregory A. Caldeira, "The Supreme Court Forecasting Project: Prediction versus Explanation and Statistical Models versus Expert Judgments," 2 *Perspectives on Politics* 777 (2004).

[43]Epstein, Landes, & Posner, *The Behavior of Federal Judges,* note 33, especially Chapter 8.

[44]Id., Chapter 6. See also Lee Epstein, William M. Landes & Richard A. Posner, "Why (and When) Judges Dissent," 3 *Journal of Legal Analysis* 101-137 (2011).

[45]Epstein, Landes, & Posner, *The Behavior of Federal Judges,* 279-281, note 33, 279-281.

United States v. Gonzalez-Lopez	548 U.S. 140 (2006)
LULAC v. Perry	548 U.S. 399 (2006)
Hamdan v. Rumsfeld	548 U.S. 557 (2006)
Marrama v. Citizens Bank	549 U.S. 365 (2007)
Massachusetts v. EPA	549 U.S. 497 (2007)
Abdul-Kabir v. Quarterman	550 U.S. 233 (2007)
Brewer v. Quarterman	550 U.S. 286 (2007)
Smith v. Texas	550 U.S. 297 (2007)
Panetti v. Quarterman	551 U.S. 930 (2007)
Gall v. United States	552 U.S. 38 (2007)
Kimbrough v. United States	552 U.S. 85 (2007)
Begay v. United States	553 U.S. 137 (2008)
Boumediene v. Bush	553 U.S. 723 (2008)
Dada v. Mukasey	554 U.S. 1 (2008)
Sprint v. APCC	554 U.S. 269 (2008)
Kennedy v. Louisiana	554 U.S. 407 (2008)
Altria Group v. Good	555 U.S. 70 (2008)
Corley v. United States	556 U.S. 303 (2009)
Nken v. Holder	556 U.S. 418 2009)
Haywood v. Drown	556 U.S. 729 (2009)
Caperton v. Massey Coal Co.	556 U.S. 868 2009)
United States v. Denedo	556 U.S. 904 (2009)
Yeager v. United States	557 U.S. 110 (2009)
Cuomo v. Clearing House	557 U.S. 519 (2009)
Johnson v. United States	559 U.S. 133 (2010)
Graham v. Florida	560 U.S. 48 (2010)
Christian Legal Society v. Martinez	561 U.S. 661 (2010)
Pepper v. United States	562 U.S. 476 (2011)
Skinner v. Switzer	562 U.S. 521 (2011)
Brown v. Plata	563 U.S. 493 (2011)
J. D. B v. North Carolina	564 U.S. 261 (2011)
Turner v. Rogers	564 U.S. 431 (2011)
Freeman v. United States	564 U.S. 522 (2011)
Douglas v. Independent Living Center	565 U.S. 606 (2012)
Lafler v. Cooper	566 U.S. 156 (2012)
Missouri, v. Frye	566 U.S. 134 (2012)
Vartelas v. Holder	566 U.S. 257 (2012)
Dorsey v. United States	567 U.S. 260 (2012)
Arizona v. United States	567 U.S. 387 (2012)
Miller v. Alabama	567 U.S. 460 (2012)
United States v. Alvarez	567 U.S. 709 (2012)
NFIB v. Sebelius	567 U.S. 519 (2012)
Bailey v. United States	568 U.S. 186 (2013)
Henderson v. United States	568 U.S. 266 (2013)
US Airways v. McCutchen	569 U.S. 88 (2013)
Missouri v. McNeely	569 U.S. 141 (2013)
Moncrieffe v. Holder	569 U.S. 184 (2013)
McQuiggin v. Perkins	569 U.S. 383 (2013)
Trevino v. Thaler	569 U.S. 413 (2013)
Peugh v. United States	569 U.S. 530 (2013)
Arizona v. Inter Tribal Council	570 U.S. 1 (2013)
Hollingsworth v. Perry	570 U.S. 693 (2013)
United States v. Windsor	570 U.S. 744 (2013)
Rosemond v. United States	572 U.S. 65 (2014)
Hall v. Florida	572 U.S. 701 (2014)
Scialabba v. De Osorio	573 U.S. 41 (2014)
Abramski v. United States	573 U.S. 169 (2014)

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Utility Air Regulatory v. EPA	573 U.S. 302 (2014)
ABC v. Aereo	573 U.S. 431 (2014)
Kansas v. Nebraska and Colorado	574 U.S. 445 (2015)
N. Car. Bd. of Dental Examiners v. FTC	574 U.S. 494 (2015)
Teva Pharmaceuticals v. Sandoz, inc.	574 U.S. 318 (2015)
Jennings v. Stephens	574 U.S. 271 (2015)
Ala. Legislative Black Caucus v. Alabama	2015 U.S. LEXIS 2122 (2015)
United States v. Kwai Fun Wong	2015 U.S. LEXIS 2809 (2015)
Mellouli v. Lynch	2015 U.S. LEXIS 3716 2015)
Texas Dept of Housing v. Inclusive communities	2015 U.S. LEXIS 4249 (2015)
Rodriguez v. United States	2015 U.S. LEXIS 2807 (2015)
Arizona State Legislature v. Arizona Redistricting Commission	2015 U.S. LEXIS 4253 (2015)
Los Angeles v. Patel	2015 U.S. LEXIS 4065 (2015)
King v. Burwell	2015 U.S. LEXIS 4248 (2015)
Williams-Yulee v. Florida Bar	2015 U.S. LEXIS 2983 (2015)
Brumfield v. Cain	2015 U.S. LEXIS 4058 (2015)
Kimble v. Marvel Enterprises	2015 U.S. LEXIS 4067 (2015)
Kingsley v. Hendrickson	2015 U.S. LEXIS 4073 (2015)
Obergefell v. Hodges	2015 U.S. LEXIS 4250 (2015)
Montgomery v. Louisiana	2015 U.S. LEXIS 1942 (2016)
Tyson Foods v. Bouaphakeo	2016 U.S. LEXIS 2134 (2016)
Fisher v. University of Texas	2016 U.S. LEXIS 4059 (2016)
Heffernan v. City of Paterson	2016 U.S. LEXIS 2924 (2016)
Williams v. Pennsylvania	2016 U.S. LEXIS 3774 (2016)
Whole Woman's Health v. Hellerstedt	2016 U.S. LEXIS 4063 (2016)
Encino Motorcars v. Navarro	2016 U.S. LEXIS 3924 (2016)
Pena-Rodriguez v. Colorado	2017 U.S. LEXIS 1574 (2017)
Manuel v. City of Joliet	2017 U.S. LEXIS 2021 (2017)
Czyzewski v. Jevic Holding Corp.	2017 U.S. LEXIS 2024 (2017)
Bank of America v. City of Miami	2017 U.S. LEXIS 2801 (2017)
Moore v. Texas	2017 U.S. LEXIS 2185 (2017)
Murr v. Wisconsin	2017 U.S. LEXIS 4046 (2017)
Lee v. United States	2017 U.S. LEXIS 4045 (2017)
McWilliams v. Dunn	2017 U.S. LEXIS 3876 (2017)
Buck v. Davis	2017 U.S. LEXIS 1429 (2017)
Wilson v. Sellers	2018 U.S. LEXIS 2496 (2018)
Artis v. District of Columbia	2018 U.S. LEXIS 762 (2018)
Carpenter v. United States	2018 U.S. LEXIS 3844 (2018)
Florida v. Georgia	2018 U.S. LEXIS 4027 (2018)
McCoy v. Louisiana	2018 U.S. LEXIS 2802 (2018)
Madison v. Alabama	2019 U.S. LEXIS 1595 (2019)
Department of Commerce v. New York	2019 U.S. LEXIS 4402 (2019)
Department of Homeland Security v. Regents	2020 U.S. LEXIS 3254 (2020)
June Medical Services v. Russo	2020 U.S. LEXIS 3516 (2020)

6 Appendix C. 34 At-Risk Salient Precedents

Note: These are one-vote margin decisions issued between the 1993-2019 terms that the *New York Times* reported on its front page, and in which RBG was in the majority and Scalia, Thomas, *and* Alito (if on the Court) were in dissent. (For the 2017-2019 terms, we also include dissenting votes by Gorsuch and Kavanaugh.) Meeting these criteria are 34 precedents but *Citizens United v. FEC*, 558 U.S. 310 (2010) overruled *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) and *Gonzales v. Carhart*, 550 U.S. 124 (2007) arguably overruled *Stenberg v. Carhart*, 530 U.S. 914 (2000).

U.S. Term Limits v. Thornton	514 U.S. 779 (1995)
Bragdon v. Abbott	524 U.S. 624 (1998)
Davis v. Monroe County Board of Education et al.	526 U.S. 629 (1999)
Legal Services Corporation v. Velazquez	531 U.S. 533 (2001)
Easley v Cromartie, et al.	532 U.S. 234 (2001)
INS v. St. Cyr	533 U.S. 289 (2001)
Zadvydas v. Davis	533 U.S. 678 (2001)
Rush Prudential v. Moran	536 U.S. 355 (2002)
Grutter v. Bollinger	539 U.S. 306 (2003)
United States v. Booker	543 U.S. 220 (2005)
Roper v. Simmons	543 U.S. 551 (2005)
Jackson v. Birmingham Board of Education	544 U.S. 167 (2005)
Kelo v. City of New London	545 U.S. 469 (2005)
McCreary County v. ACLU	545 U.S. 844 (2005)
LULAC v. Perry	548 U.S. 399 (2006)
Hamdan v. Rumsfeld	548 U.S. 557 (2006)
Massachusetts v. EPA	549 U.S. 497 (2007)
Boumediene v. Bush	553 U.S. 723 (2008)
Kennedy v. Louisiana	554 U.S. 407 (2008)
Caperton v. Massey Coal Co.	556 U.S. 868 (2009)
Brown v. Plata	563 U.S. 493 (2011)
Lafler v. Cooper	566 U.S. 156 (2012)
Missouri v. Frye	566 U.S. 134 (2012)
Arizona v. United States	567 U.S. 387 (2012)
Miller v. Alabama	567 U.S. 460 (2012)
NFIB v. Sebelius	567 U.S. 519 (2012)
United States v. Windsor	570 U.S. 744 (2013)
Hall v. Florida	572 U.S. 701 (2014)
Obergefell v. Hodges	2015 U.S. LEXIS 4250 (2015)
Fisher v. University of Texas	2016 U.S. LEXIS 4059 (2016)
Whole Woman's Health v. Hellerstedt	2016 U.S. LEXIS 4063 (2016)
Carpenter v. United States	2018 U.S. LEXIS 3844 (2018)
Department of Homeland Security v. Regents	2020 U.S. LEXIS 3254 (2020)
June Medical Services v. Russo	2020 U.S. LEXIS 3516 (2020)