Making the Supreme Court: The Politics of Appointments 1930-2020

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New Politics, New Justices, New Policies: The Courts That Politics Made

The politics of Supreme Court appointments underwent a revolution over the last 80 years—that is a nutshell summary of the empirical evidence presented in Part I. Part II analyzed why the revolution took place. But we have yet to address a fundamental question: So what? What difference did it make? That is the subject of this chapter.

Our answer proceeds in stages. First, we document how the new politics of Supreme Court appointments led to a *partisan sort* on the Court: Republican justices increasingly were conservatives and Democratic justices increasingly were liberals, in a way that earlier appointees were not.¹ In fact, from the 1930s to the 1970s—and especially in the 1940s and 1950s—Republican and Democratic justices were "jumbled" across the ideological spectrum, as measured by their policy-making behavior. But subsequently, partisan sorting led to crisp distinctions. Today, Republican justices and Democratic justices sort perfectly by ideology in their policy making behavior; there is no over-lap across party lines. We document the Judicial Partisan Sort in Section 1 of this chapter.

Second, we analyze the origins of the Judicial Partisan Sort. What caused it? The Sort went hand-in-hand with heightened *ex ante* policy reliability in nominees, as measured in Chapter 4. But is this correlation merely an accident or was it causal? An instrumental variables analysis suggests that the relationship is more than a correlation: presidential selection for policy reliability probably *caused* the Judicial Partisan Sort. Thus, the Judicial Partisan Sort was a direct consequence of the changes documented in Chapters 3 and 4 and explained in Chapter 10. Section 2 of this chapter scrutinizes the link between the Sort and

¹We deliberately echo the title of Matt Levendusky's insightful study of the mass electorate *The Partisan* Sort: How Liberals Became Democrats and Conservatives Became Republicans (2011). But we invert Levendusky's ordering, to emphasize the completely different causal mechanism: the Judicial Partisan Sort was driven by presidential selection of co-partisans, not by party switching among sitting justices. The partisan sort on the Supreme Court is the subject of Neal Devins and Lawrence Baum's book, *The Company They Keep: How Partisan Divisions Came to the Supreme Court*. Our analyses in this chapter both complement and extend their research by empirically tying the emergence of the partisan sort to an increased emphasis on the Supreme Court by the two parties.

the policy reliability index.

Third, the new politics of Supreme Court nominations also featured explicit litmus tests about specific policies, particularly for Republican nominees (recall Chapter 2). An obvious question is: Do policy litmus tests work? This is the subject of Section 3. The data is most abundant for anti-abortion litmus tests and law-and-order litmus tests, so we focus on these arenas. Again, methodological caveats are necessary, and the structure of the observational data frustrates rigorous causal identification. But, analyses using two relatively strong research designs strongly suggest that, indeed, *policy litmus tests work*. Overall, justices selected by Republican presidents pledged to anti-abortion voted differently in those areas than justices selected by Republican presidents not pledged to those tests—this is especially the case with respect to abortion. Because Democrats focused almost exclusively on diversity pledges rather than policy goals, we cannot say what would have happened if Democratic presidents had pledged themselves to policy rather than, or in addition to, diversity.

Fourth, the Judicial Partisan Sort affected not just the voting of individual justices but the overall makeup—that is, the *ideological structure*—of the Court as a whole. Section 4 scrutinizes the ideological structure of the Court. To frame the analysis more clearly, we briefly discuss two contending theories of judicial policy making on collegial courts. We then focus on the measures of structure suggested by the two theories. In line with the disproportional number of Republican appointees since 1970, the ideological location of the median justice moved gradually to the right. But, more consequentially, throughout the 2000s and 2010s, the Court featured two distinct ideological bloc occupying the left and right wings, with a depleted or sometimes even missing center, which we call a *bi-modal wing structure*. However, President Trump's appointment shifted the Court to one firmly dominated by conservatives (as of 2021).

Still, does the Court's ideological structure matter for the substance of judicial policy making? In the penultimate section of this chapter, we examine how the changing structure of the Court affected Supreme Court policy. We rely on an innovative effort by other scholars to place majority opinions on a left-right scale (Clark and Lauderdale 2010). Many methodological caveats are in order, and the data only allow us to examine one policy arena, search-and-seizure law. Still, the main story is fairly clear and consistent with contemporary theory and qualitative histories of doctrine in specific arenas: A large liberal bloc conduces toward liberal case dispositions and left-leaning majority opinions; a large conservative bloc does the opposite. The changing make-up of the Court mattered greatly for Supreme Court policy.

In sum, the impulses that drove activists and interest groups to appointment politics appear well-grounded. The pressure they brought to bear on presidents led to the selection of more reliable justices. Specific policy litmus tests appear to have worked. More than that, the ideological distribution of the newly reliable justices altered the ideological structure of the Court. The new ideological structure translated directly into the ideological distribution of the judicial policies they created (at least where we can measure them). In a nutshell: the new politics of Supreme Court nominations brought new types of justices justices; new justices made new courts; and the new courts enacted new policies in a predictable and understandable way.

1 The Judicial Partisan Sort

In Chapter 4, we used multiple measures of estimated nominee ideology to document an increasingly sharp division between Democratic and Republican nominees, starting around 1970. These measures, however, all reflected perceived or imputed ideology *at the time of the nomination*. Partisan division in nominees is important, of course, but the key question for "consequences" is whether the partisanship of nominees translates into actual policy-making behavior on the Court—recall the Republican motto of "No more Souters!" after Justice David Souter's policy choices frequently dismayed conservatives. To address this issue, we examine the Judicial Partisan Sort.

By "Judicial Partisan Sort" we mean the following. First, array the justices from left

to right on a sensible ideological scale based on their actual policy-making behavior on the Court. If partisanship and ideology go hand-in-hand, the justices on the left will tend to be Democratic appointees and the justices on the right will tend to be Republican appointees. But if ideology and partisanship are only loosely connected to policy-making, the justices will be "jumbled"—some Republicans will lie on the left and some Democratic on the right and perhaps some of both in the center.

We use several scales to study policy-making and the Judicial Partisan Sort. Understanding what these scales measure, and what they don't, requires some understanding of how the Court operates, and how each scale works.

1.1 Scaling Judicial Votes

Broadly speaking, the U.S. Supreme Court functions in a three-stage manner: 1) agenda setting, 2) case disposition/dispute resolution, and 3) policy determination. In each stage, the justices vote.

Agenda setting is important because, with few exceptions, the Court has a "discretionary docket"—it chooses which cases to hear from among the multitude appealed to it by losing litigants. The justices select cases via voting, so one could construct ideological scores for each justice based on their agenda-setting votes. But no such scale is in common use.²

Case disposition refers to which of the two sides prevails in the litigation. Above all else, courts resolve legal disputes between litigants, so every case must be definitively resolved by creating a winner and a loser. Again, the justices create this resolution by voting. Readers are probably familiar with dispositional votes (sometimes called "votes on the merits") because the press often reports them in high profile cases. For example, when one hears of a 5-4 vote, this means that five justices voted in favor of one litigant and four voted in favor of the other.³ If one assumes that these dispositional votes have some ideological meaning, one

²Accessing cert votes is not straight-forward, but some scholars have compiled datasets of cert votes based on the justices' private papers (see e.g Provine 1980, Boucher Jr and Segal 1995, Epstein and Knight 1997). To the best of our knowledge, the only effort to scale these votes is Johnson (2018).

³The votes of the minority are called "dissents." The votes of the majority include both "joins" and "concurrences," relating to the policy content of the candidate majority opinion. Often times the Court does not directly resolve the dispute but instead orders a lower court to rehear a case—this is called a "remand."

may treat a dispositional vote for one litigant as a liberal vote and a dispositional vote for the other as a conservative vote. One can then derive ideological scores for the justices based on a tendency to favor certain litigants over others in resolving disputes.

Policy determination is distinct from case disposition. In fact, unlike most courts, the U.S. Supreme Court's main job is not to resolve legal disputes but to create new legal policy. To do so, the justices in the majority dispositional coalition bargain among themselves, a designated opinion author offers a candidate majority opinion, and the justice vote by endorsing or refusing to endorse the candidate majority opinion.⁴ One could scale the endorsement votes to create ideology scores for policy-determination. But no such scores are in use at the time we write.

Thus, political scientists have focused their scaling efforts almost exclusively on dispositional votes. Consequently, we use those scores to study the Judicial Partisan Sort. We suspect that an analysis of agenda-setting votes and policy endorsement votes would tell a similar story, but we don't know that for sure.

Three sets of dispositional vote scores are in common use. The first is included in the Supreme Court Database, known colloquially as the "Spaeth database."⁵ This database has the advantage of extending back to the nation's founding. For (nearly) every case heard by the Supreme Court, the database codes every dispositional vote by the justices as either "liberal" or "conservative" based on the nature of the favored litigant. For example, in civil rights cases, votes in favor of a "person accused or convicted of crime, or denied a jury trial," are coded as liberal, while in economic regulation cases, votes against unions are coded as conservative.⁶ Because the Spaeth scores are based on classifying litigants, unanimous

Such a decision still counts as a disposition since it alters the status quo ante.

⁴Journalistic accounts of the Court or the memoirs of former clerks offer vivid accounts of bargaining (citations). More scholarly accounts using the papers of the justices include Epstein and Knight (1997) and Maltzman, Spriggs and Wahlbeck (2000). Carrubba et al. (2012) and Cameron, Kornhauser and Parameswaran (2018) explore the incentives created by the voting rules used on the Court.

⁵The database, which is available at http://scdb.wustl.edu/, was first created by the pioneering political scientist Harold Spaeth, who hand-coded decades of Supreme Court cases.

⁶Some scholars have argued that there exist systematic biases in the directional coding of votes in the Spaeth database (Shapiro 2008, Harvey and Woodruff 2013). In the present context, miscodes of individual dispositions are not likely to significantly affect the substantive conclusions we draw below, because the

opinions still contribute to a justice's ideology score. In addition, every case contributes equally to the score. Here, we calculate the percentage of conservative votes cast by each justice during an indicated time period.⁷

Several scholars have developed alternatives to the Spaeth scores that do not rely on Spaeth's occasionally debatable and surely time-bound classification of litigants. Instead, these scholars take advantage of scaling techniques developed by educational psychologists and statisticians for analyzing standardized tests. These approaches rely purely on the votes themselves, plus statistical assumptions. Under specific maintained assumptions about voting choices, the resulting scores can be interpreted as similar to the "ideal points" in the standard spatial theory of voting.⁸ Hence, the scores are somewhat comparable to other familiar and widely used ideology scores, like the NOMINATE Scores for members of Congress, derived by scaling roll call votes.⁹

The first of the two scores, the Martin-Quinn (MQ) Scores, apply the scaling techniques exclusively to the justices' dispositional votes.¹⁰ At the time we write, the MQ Scores cover the 1937-2019 terms, an extended period. During this lengthy period, the scale may subtly shrink, expand, warp, or change meanings. To assure stability in the scale over time, the MQ Scores rely exclusively on the overlap of justices over time. The resulting "bridging" may not be sufficient to achieve stability in the face of a changing Supreme Court agenda.¹¹ To address this concern, Michael Bailey has developed an additional set of ideal points that employs a different methodology (2007). Critically, the scores cross-walk votes in the

justice-level scores aggregate across many cases.

⁷Analyses that rely on the Spaeth database typically calculate percent liberal votes rather than conservative votes, but the latter facilitates comparison with the two other voting scores we use in this chapter, for which higher scores mean more conservative voting.

⁸Clinton, Jackman and Rivers (2004) offer one set of assumptions, but for policy voting rather than dispositional voting. Fischman (2007) supplies an alternative set of assumptions specifically tailored for dispositional voting on courts. In the latter interpretation, the "ideal points" correspond to most-preferred doctrinal standards in a one-dimensional fact or case space. The best cut-point between pro-plaintiff and pro-defendant votes corresponds to the case location.

⁹On the history and use of NOMINATE, see Poole and Rosenthal (1997).

¹⁰The scores, which were originally developed in Martin and Quinn (2002), can be found at https: //mqscores.lsa.umich.edu/.

¹¹Ho and Quinn (2010) provides an accessible discussion of a rather technical issue.

Supreme Court with matching votes in Congress and with presidential position-taking, and then scale all of the votes simultaneously. This cross-institutional bridging supplements the over-time bridging on the Court and arguably better stabilizes the scale. If so, the Bailey Scores may provide superior comparability over time. However, one disadvantage of the Bailey scores is that they cover a shorter period than the MQ scores: 1951-2020.

For both the MQ and Bailey scores, the statistical techniques they employ cannot differentiate liberal and conservative votes when the disposition is unanimous; they therefore discard such votes. Since unanimity is often the most common disposition in a term, much data is lost. In addition, some votes closely link to left-right ideology (e.g., social policy cases) and therefore ideologically discriminate among the justices very well. Other cases, however, only loosely align with left-right ideology (e.g., tax cases).¹² These cases do not help in differentiating the justices from one another on the basis of ideology. The statistical methods used in both scores weigh votes more heavily if the votes in the case discriminate well on the basis of the assumed underlying ideological scale. Discarding unanimous cases and weighing votes by discrimination may exaggerate policy differences on the Court.¹³

The following point about voting on the Court is is also important: until the 1940s, the Court displayed a "norm of consensus." In this period, justices in the minority behind closed doors would switch to join the majority in public (the official votes reported in the United States Reports).¹⁴ This means both that public dissents were quite rare and seemingly reserved for serious differences in important cases. The vote switching behavior—a form of strategic dispositional voting—suppressed actual policy differences and may distort the voting scores. During the 1940s, vote switching apparently declined, because public dis-

 $^{^{12}}$ On this point, see Epstein and Mershon (1996).

 $^{^{13}}$ For thoughtful discussions of judicial voting scores, see Farnsworth (2007), Fischman and Law (2009), and Ho and Quinn (2010).

¹⁴We know these switches took place because some justices maintained records of the behind-the-scenes votes in their personal "docket books." Epstein, Segal and Spaeth (2001), an essential study of the "norm of consensus," is a fascinating examination of one docket book. Unfortunately, these private records are scattered throughout many depositories and archives. No one, to the best of our knowledge, has collected them systematically and scaled the closed-door votes using modern techniques.

sents increased dramatically.¹⁵ By the late-1940s, the so-called norm of consensus seemingly collapsed, and thus the public votes were almost always identical to the private votes.

1.2 Detecting the Judicial Partisan Sort

Figure 1 examines partian sorting on the Court by decade from the 1930s through the 2010s. Here, we utilize the MQ Scores, but very similar results emerge from the other scores. In each panel in the figure, the justices who served in that decade are arranged from most liberal to most conservative, based on their average MQ score in a given a decade. That average is indicated by the height of a justice's bar—positive scores indicate a propensity for conservative case dispositions, negative scores a propensity for liberal case dispositions. A convenient baseline is the 0 mark on the scale, which corresponds to about a 50 percent chance of voting conservatively on case dispositions. The color of the bars indicates the party of the appointing president, red for Republicans and blue for Democrats.¹⁶ If partianship and ideology go together, the blue bars in a panel will lie on the left and red bars on the right, and the red and blue bars will not jumble together but separate cleanly.

Table 1 uses a simple classification method to derive a misclassification score for each decade. For each justice, we calculated their average MQ score by decade. Under our classification rule is, a justice is "conservative" if the average score is greater than 0 and "liberal" if the average score is less than 0. Again, the zero point approximates a 50 percent conservative voting rate. Accordingly, a justice is misclassified if "liberal" and appointed by a Republican president or "conservative" and appointed by a Democrat. The indicated misclassification rate is the percentage of misclassified justices per decade.¹⁷ The table also identifies the non-sorted or aberrant justices, for each decade, broken down by the party of

 $^{^{15}}$ For a classic discussion of the growth of dissents in this period, see Pritchett (1948).

¹⁶For every justice, we identified the party of their appointing president from Epstein et al. (2015). Two chief justices who were internally promoted, Edward Douglass White and Harlan F. Stone, were appointed by presidents of different parties when they were promoted to Chief. We treat their tenures as associate and chief justice separately for the purpose of identifying their party.

¹⁷Using Bailey Scores rather than MQ Scores results in the identification of the same justices and the same misclassification rate in the decades where the two overlap. The Spaeth Scores yield broadly similar results, except for the 1930s where inclusion of unanimous decisions results in much higher rates of conservative voting and hence many more misclassified justices.



Figure 1: MQ Scores By Justice, by Decade, 1930-2020. For each panel, the bars depict the average MQ score of justices who served in that decade. The justices are sorted from most liberal to most conservative, with Democratic-appointed justices depicted with blue bars and Republican appointees with red bars.

Decade	Percent	Mis-sorted	Mis-sorted		
	misclassified	Democratic justices	Republican justices		
1930s	31	McReynolds	Cardozo, Hughes (AJ), Stone (AJ)		
1940s	59	Burton, Clark, Frankfurter,	Stone (AJ)		
		McReynolds, Minton, Jackson,			
		Reed, Stone (CJ), Vinson			
1950s	64	Burton, Clark, Frankfurter,	Brennan, Warren		
		Minton, Jackson, Reed, Vinson			
1960s	26	Clark, Frankfurter	Brennan, Warren		
1970s	25	White	Brennan, Warren, Stevens		
1980s	33	White	Blackmun, Brennan, Stevens		
1990s	33	White	Blackmun, Souter, Stevens		
2000s	16	—	Souter, Stevens		
2010s	0	—	—		

Table 1: Misclassification Scores and Non-sorted Justices By Decade, based on Martin-Quinn scores. See text for details.

the appointing president.

Consider the 1930s, the decade that saw intense conflict between FDR and conservatives on the Court over the constitutionality of the New Deal legislation. Figure 1 suggests that the justices in this decade were actually relatively well sorted. The misclassification score for the decade is 23 percent. Three justices stand out as non-sorted: the liberal Cardozo and moderately liberal Stone, both of whom had been appointed by Republican presidents (Hoover and Coolidge, respectively), and the arch-conservative Southern Democrat James McReynolds, who was appointed by Woodrow Wilson, a Democrat.

But, the 1940s and 1950s were ... different. As discussed in Chapter 3, once the Court accepted the New Deal, Presidents Roosevelt and Truman felt free to treat Supreme Court appointments as opportunities for patronage, cronyism, political reward, and tactical political advantage. President Eisenhower followed that path with his appointments of Warren and Brennan. The result, as shown in Figure 1, was very poorly sorted courts in those decades. In the 1940s, a large block of moderately conservative Democrats stands out. In the 1950s, this non-sorted block remained intact, and was then joined by the aberrant Republican appointees Warren and Brennan. Overall, the misclassification score was 59% in the 1940s percent and an amazing 64% in the 1950s.

The gradual departure of moderately conservative Democratic justices created the possibility for a better sorted court, if presidents desisted from cronyism and tactical politics and undertook meticulous ideological screening and selection. As we discussed earlier in the book, many tried to do so. The results are on display in Figure 1, in the panels for the 1960s to 1990s. In terms of partian sorting, these decades saw something of a return to the 1930s with misclassification scores between 25 percent and 33 percent. The names of the aberrant justices carry no surprises, including Warren, Brennan, Stevens and Souter.

Notably, the misclassification score fell every decade after the 1980s (see Table 1). The drop to 18 percent in the 2000s is notable, with the 2000s panel in Figure 1 revealing a well-sorted Court, with only two aberrant standouts: Stevens and Souter.

The decades-long effort by presidents to build efficient screening procedures and carefully nurtured farm teams in the lower courts paid off in the 2010s, with a perfectly sorted Court. As shown in Figure 1, Republican justices were all conservatives, and Democratic justice all liberals.¹⁸

1.3 Partisan Polarization

Another way to think about the Judicial Partisan Sort is that it dramatically increased partisan polarization on the Court. Here, we briefly examine this aspect of the Sort, by tackling the voting data in a different way.

We turn to the Spaeth data base, which only allows us to look at voting on the Court all the way back to 1866, or the entire era of the modern two party-system. For each term from 1866 to 2019, we calculated the average percentage of conservative votes for Democratic- and Republican-appointed justices, separately. The results are presented in Figure 2. The top panel is based on all cases in the Spaeth database. The solid (blue) line shows the percentage of conservative votes by Democratic justices, while the dashed (red) lines depicts the results for Republicans. The shaded regions show the 95% confidence intervals of the loess line for

¹⁸While Justice Kennedy's mean score in the 2010s was above zero, he actually had a few terms with a score below 0. His retirement in 2018 and subsequent replacement by Justice Kavanaugh further solidified the partisan sort, as every indication is that Justice Kavanaugh will vote in a broadly consistent conservative direction. Two years later, the death of Justice Ginsburg and subsequent appointment of Justice Barrett was also consequential in terms of the balance of the Court, but since Ginsburg was a reliable liberal the overall sorted-ness of the Court was not really affected. We address the implications of the now-perfect sort both below and in Chapter 14.



Figure 2: Percent of conservative votes broken down by Republican and Democratic justices, by term, 1866-2019. The top panel uses all cases, while the bottom panel uses cases decided by either a 5-4 or 5-3 vote. The solid (blue) line shows the percentage of conservative votes by Democratic justices, while the dashed (red) lines depicts the results for Republicans. The shaded regions show the 95% confidence intervals of the loess line for each trend—we suppress the actual loess line for clarity.

each trend—we suppress the actual loess line for clarity. The graph shows clear that there was virtually no systematic separation by party between 1866 and 1950—the two trends nearly perfectly overlap.

As discussed earlier, the public face of the Court was different from its private one, where disagreement among the justices was far more frequent than the public unanimous dispositions would suggest. Nonetheless, Figure 2 again shows that beginning in about 1950, the justices began to sort by party. The data belie a simple explanation that the demise of private-to-public vote switching explains the emergence of this polarization. Epstein, Segal, and Spaeth show the public unanimity broke down very quickly in the 1940s—by the end of that decade, roughly 70% of cases featured at least one dissent, compared to fewer than 40% of cases 10 years prior (Epstein, Segal and Spaeth 2001). Conversely, the separation in liberal versus conservative voting by partisan block increased over time since 1950.

Another way to account for changes in consensus voting is to select only "close" cases. The bottom panel does that, showing the results when we only examine cases decided by either a 5-4 or 5-3 margin. In these cases, every justice is pivotal—a switch from liberal to conservative or vice versa would either change the outcome of the case or results in a tied vote (in the case of an 8-member decision), which has the effect of upholding the lower court's decision.¹⁹ The number of such cases is considerably smaller than the entire universe of cases the Court hears, and hence the trends are much noisier. But they nevertheless are revealing. As in the top panel, we see the emergence of systematic partian polarization in voting on the Court in the middle of the 20th century. But the magnitude of the divide is (not surprisingly) much starker in closes cases.²⁰ In the 21st century, Republican justices have voted for the conservative litigant over two-thirds of the time, on average, while Democratic justices have voted in favor of the conservative litigant fewer than 30% of the time.

The same analysis can be conducted using the MQ and Bailey Scores. Figure 3 presents a similar analysis to Figure 2, this time focusing on the two ideal point estimates. For the relevant terms for each measure, we calculated the average ideal point of Democratic and Republican justices, respectively. The top panel shows the results using the Martin-Quinn scores, while the bottom panel shows the results for the Bailey scores (note the scales of the

 $^{^{19}}$ This graph was inspired by the graph presented in Epstein and Posner (2018), though the authors only examine the post-1953 period.

²⁰The percentage of conservative votes cast by Democratic justices spikes in the early 1990s. This is because following the retirements of Justice Brennan and Thomas, Byron White remained the only Democratic appointee on the Court until he was replaced by Ruth Bader Ginsburg in 1993. Justice White was a moderate justice over the course of his tenure, and voted much more conservatively than his fellow Democratic appointees appointed during the 1960s. (Note this same spike occurs in Figure 3 below.)



Figure 3: Mean ideology broken down by Republican and Democratic justices, by term. The top panel shows the results using the Martin-Quinn estimates (1937-2019), the bottom panel using the Bailey estimates (1951-2011).

two measures are arbitrary, and hence are not directly comparable). Note that the procedure by which the ideal point estimates are constructed inherently ignores unanimous cases—for this reason, these results will more closely align with the 5-4/5-3 analysis in Figure 2.

There are subtle differences between the patterns revealed by the Martin-Quinn Scores and Bailey Scores. But the overall picture is quite similar: ideology and party align quite well on the modern Supreme Court, but they did not in earlier times.

All in all, the three different measures tell the same story. Figure 4 summarizes this



Figure 4: Polarization index for all four measures of partian differences in voting on the Supreme Court. Each measure is rescaled to be distributed between 0 and 1. The lines are loees lines with 95% confidence intervals indicated by the respective shadings.

evidence. For each measure, we create a polarization index by subtracting the mean score for Democrats from the mean score for Republicans, for a given term. To make the measures comparable, we rescale each so they are distributed between 0 and 1. We also display only the loess trends for visual clarity. The overall rise in polarization since the middle of the 20th century is quite clear. It would be an overstatement to say that the modern Supreme Court inevitably displays perfect partian sorting. The justices are not partian robots. At the same time, the magnitude of the partian differences are deep and unprecedented in the post-Civil War era. The contemporary Court features two partian and ideologically distinct blocs.

2 What Caused the Judicial Partisan Sort?

Now we turn from describing the partisan sort to attempting to explain it. To do so, we begin with presidential demand for policy reliability. In Chapter 10, we noted that our conception of policy reliability captures the idea that a confirmed nominee can be expected to advance the president's policy agenda on the Court." We hypothesized that more reliable nominees will display "less deviation from the president's preferences." But, we did not examine whether the justices we scored as *ex ante* more reliable, based on their background and career experience, actually behaved differently on the Court relative to justices we rated as *ex ante* less reliable.

We now investigate the relationship between *ex ante* reliability, as measured in Chapter 10, and *ex post* performance. So, we distinguish *ex ante* reliability (nominees whose characteristics guarantee known views) from *ex post* reliability (subsequent behavior of the justice on the Court, conforming to putative goals of the president). In particular, we examine whether more reliable justices vote more congruently with the preferences of their appointing president.

2.1 PRI Revisited

In Chapter 10 we constructed an index for every nominee, the Policy Reliability Index (PRI). The index reflects the experience and professional background of each nominee. We define the PRI as $PRI = \sum_{i} \rho_i$, where ρ_i indicates the four attributes that we saw as conducive to policy reliability: service as a federal judge, service as an executive branch lawyer, service as a law professor, and graduation from a top law school. Figure 5 depicts a dotplot of the Policy Reliability Index (PRI) for every justice confirmed between 1930 and 2020. While there are some exceptions, the measure displays considerable face validity. "Politicos" like Hugo Black and James Byrnes score low on the measure, while legal Super Techs like John Roberts and Brett Kavanaugh receive the highest score.

2.2 Justice-President Policy Congruence

The Bailey Scores jointly scale justices and presidents. To do so, Bailey employs interinstitutional bridging observations—for example, a presidential statement agreeing with or criticizing a Supreme Court decision is treated like a justice's dispositional vote in the case. In a clever study, Matthew Hitt (2013) used the joint scaling to measure the alignment of a justice's actual voting behavior and the expressed policy positions of the appointing president on relevant bills and cases. We follow Hitt in using the Bailey Scores to measure president-justice congruence.

To measure congruence, we match available justices with their appointing presidents.



Figure 5: Policy reliability index for individual justices, 1930-2020.

The Bailey scores run from 1951 to 2020 and thus include every justice who served in that period. The ideal points for justices vary by terms, and so the data for justices whose tenure began before 1951 is truncated. The ideal points of presidents, by contrast, are static. To measure congruence, we calculate the absolute value of the appointing president's ideal point minus the ideal point of a respective justice, for each year; we then invert these scores so that higher scores mean more congruence (the maximum value of this measure is zero, which means perfect congruence). Because of the truncation of the data, we do not have congruence



Figure 6: Justice-president congruence, based on Bailey scores, 1951-2019. For each justice, the graph shows a box-and-whisker plot that depicts the distribution of congruence across their tenure.

scores for any justices appointed by Hoover or Franklin Roosevelt.

Figure 6 presents a box-and-whisker plot that depicts the distribution of congruence for each justice, across his or her tenure on the Court (the variance here, of course, is affected in part by how many terms a justice appears). The plot shows fairly wide variation in congruence. Can we explain that variation?

2.3 Congruence and Reliability Together

In his innovative study, Hitt argued that both federal judicial experience and executive branch experience should lead to higher ideological congruence between presidents and their nominees.²¹ And, he found evidence supporting that conjecture. This kind of prior experience for justices is folded into our PRI measure. More broadly, we can directly investigate

 $^{^{21}\}mathrm{Hitt}$'s conceptual framework bears some resemblance to the characteristics approach formalized and tested in Chapter 10.



Figure 7: Policy reliability and justice-president congruence, based on Bailey scores, 1951-2019. The left plot includes Justice Stevens, while the right plot excludes him For each justice, the graph shows a box-and-whisker plot that depicts the distribution of that justices' ideal points across his or her tenure. The loess line depicts the general trend across the justices.

how well higher reliability, as captured by PRI, translates into higher ideological congruence.

Figure 7 depicts the descriptive connection between our reliability index and nomineeappointer congruence. The vertical axis sorts justices from higher to lower reliability, with the number in parentheses indicating their score on the PRI index. For each justice, we display a box-and-whisker plot that depicts the distribution of that justices' ideal points across their tenure in the data. The solid (purple) loess line depicts the general trend across the justices. If PRI predicts actual future behavior, justices who tend to score higher on reliability should also tend to be more congruent with their appointing president. Instead, the solid loess Figure 7 portrays a decidedly non-monotonic relationship between the two.

	(1)	(2)	(3)	(4)
Reliability index	0.13	0.12	0.18^{*}	0.54^{**}
	(0.07)	(0.10)	(0.03)	(0.17)
Intercept	-0.94^{*}	-0.86^{*}	-1.04^{*}	-1.39^{*}
	(0.19)	(0.14)	(0.08)	(0.35)
Year fixed effects?	No	Yes	No	Yes
Model type	OLS	OLS	IV	IV
Ν	524	524	524	524
\mathbb{R}^2	0.09	0.17	_	_

Table 2: Reliability regressions using Bailey data. In each model, the dependent variable is justice congruence. * p < 0.05. Standard errors clustered on justice. Justice Stevens excluded from each model.

However, close inspection of the plot reveals that the negative slope in the left half of the graph is driven almost entirely by Justice John Paul Stevens. Stevens scores perfectly on the PRI and thus is at the top of the vertical axis, but his voting record was quite incongruent with his appointing president's (President Ford) ideal point, as Stevens famously voted more liberally over his time on the Court.²² The dashed (green) loess in Figure 7 excludes Justice Stevens. Without him, we can see that while there is considerable heterogeneity in the data, there exists a positive relationship between *ex ante* reliability and policy congruence, particularly in the right half of the plot, where most of the data falls (from -1 to 0 on the congruence scale). Note here that the justices toward the top of the scale cluster toward maximum congruence (in the top-right corner).

Table 2 presents four regressions that examine this relationship more systematically. In each regression the dependent variable is justice congruence, with standard errors clustered by justice to account for non-independence across congruence within a given justice. We exclude Justice Stevens from each model.

We begin with Models (1) and (2), which are OLS models. Model (1) only includes the reliability index as a predictor. It shows a positive, though somewhat noisy, relationship

²²There is reason to believe that the quantitative measures do not tell the whole story here. Ford was a moderate Republican and hence the Bailey measures place Stevens as quite incongruent with Ford in the later stages of Stevens' career. Yet, in 2005—well after Stevens become a reliable liberal vote on the Court—Ford wrote a letter marking the 30th anniversary of Stevens' appointment in which he stated, "I am prepared to allow history's judgment of my term in office to rest (if necessarily, exclusively) on my nomination 30 years ago of Justice John Paul Stevens to the U.S. Supreme Court" (Liptak 2019).

between reliability and congruence. In this regression, the identification of the reliability effect comes from comparing justices across the entire 1951 to 2019 period. While the scores are designed to account for changes in the Court's agenda over time, unmeasured heterogeneity may confound the bivariate relationship. To account for this, Models (2) add year fixed effects. Here, identification comes from comparing the congruence of the nine justices at a given point in time—this also means that changes in cases across time will be accounted for, since in a given year the same nine justices will generally hear every case (except for abstentions and when exits and entrances occur in a given year). Because the fixed effects mean the variation is more restrictive, it is perhaps not surprising that the coefficient on reliability is measured slightly less precisely in Model (2) compared to Model (1), though the magnitude is basically unchanged.

Can we improve upon this evidence, which is purely correlational and rather imprecise? Perhaps the biggest threat to causal inference in this setting is the presence of some other, unobserved variable that actually drives both PRI and policy congruence. If so, the correlation between the two may be spurious. What such a factor might be is rather unclear, but omitted variable bias is always a concern in observational studies. Instrumental variable estimation offers a potentially powerful way to address concerns about omitted variable bias and spurious correlation.²³

To construct an instrument, we return to the platform data we analyzed in Chapter 2. Recall that for each presidential election year, we developed a variety of measures of party and presidential interest in the Supreme Court, including policy- and diversity-based litmus tests for new justices. Our strategy is to use the number of demands made on the appointing president by the party platform as an instrument for the reliability index. The exclusion restriction is straightforward here: there is no reason to think that party platforms affect how justices vote, except as mediated through the reliability index, given that the justices

 $^{^{23}}$ For discussion, see Cunningham (2021, Ch. 7). The logic is that a good instrument imbues the endogenous treatment variable (here, PRI) with enough independent shocks to distinguish the impact of the endogenous variable on the outcome, from the impact of the unobserved variable. Here the outcome is policy congruence.



Figure 8: Policy reliability versus total platform demands. The correlation between the two measures is .53, suggesting that the platforms measure is a sufficiently strong instrument.

enjoy life tenure and thus effectively complete job security.²⁴

In addition, for this strategy to work, the number of platform demands must actually predict *ex ante* reliability (in other words, the platform measure must be a "strong instrument"). To test for instrument strength, we calculated for each justice the total number of platform demands faced by their appointing president; specifically, we use the sum of all the demands examined in Chapter 2, including cases mentioned, appointment statements, policy litmus tests, ideological statements, and diversity litmus tests). For example, for Nixon's appointments to the Court in his first term, we use the measures from the 1968 Republican platform and convention speech. Figure 8 depicts the relationship between policy reliability and the platforms, for all the justices for which we have sufficient voting data. The figure shows a strong positive relationship between the two (the pairwise correlation is .53), suggesting that the platforms measure is a sufficiently strong instrument.

 $^{^{24}}$ The "exclusion restriction" is a theoretical argument indicating the instrument affects the endogenous treatment variable (PRI) but does not itself directly affect the outcome, here, policy congruence.

Return again to Table 2. Models (3) and (4) are the second stage estimates from twostage least squares models in which we allow the platform measure to instrument for the reliability index. Model (3) parallels Models (1) by just employing the reliability index as the main predictor, while Model (4) adds year fixed effects. Note that the coefficients on reliability index are even larger in magnitude and now statistically significant at the .05 level, compared to the OLS models. This lends confidence to the claim that the increased focus by presidents on policy reliability caused greater policy congruence in voting by the justices they appointed.²⁵

3 The Impact of Litmus Tests

The increase in demand in reliability likely contributed a great deal to the partian sort. We can also point to the rise in litmus tests by as a chief contributor to greater sorting on the Court.

Consider the following. The 1984 Republic Party platform proclaimed policy litmus tests for Supreme Court appointees in four areas: abortion, family values, law and order, and overall conservatism. Over the next four years, President Reagan had the opportunity to place two new justices on the Court—Scalia and Kennedy—and elevate an associate justice to become chief justice (William Rehnquist). In selecting these justices, did the Reagan Justice Department take the litmus tests seriously? In other words, did they meticulously screen appointees in terms of these specific criteria? If so, one would expect the three appointees actually to vote in accord with the litmus tests. Did they in fact vote pro-life, anti-criminal, and conservatively? Or were they somewhat errant or even stubbornly independent? In this section, we present systematic evidence on the conformity of appointees to the policy demands of the appointing party.²⁶

 $^{^{25}}$ The F-statistic for the platform instrument is 247 in Model (3) and is 13 in Model (4), again strongly suggesting (in tandem) with 8 that we don't have to worry about a weak instrument problem;

²⁶There is a small literature on the extent to which the voting behavior of Supreme Court justices jibes with the political ideology of the appointing president (Segal, Timpone and Howard 2000, Cameron and Park 2009); see also Epstein and Posner (2016) on personal loyalty. Although there are famous examples of appointees who disappointed the appointing president in specific cases, in general appointee voting appears in accord with the appointing president's ideology, especially in the years immediately after appointment.

Before turning to the tests, we should clarify the underlying logic. Like our argument with respect to reliability, the idea is *not* that a litmus test exercises an independent force on a justice. Justices have life tenure, and shouldn't care about the motivations or incentives of the presidents who appointed them. Presumably, a justice serving on the Court votes the same way regardless of words in an old party platform. Rather, a litmus test is a treatment applied to a *president*. Powerful groups within a party press specific judicial policy demands on presidents, who then (we argue) use the litmus test in selecting justices. The posited causal effect—the president selects a justice with different policy commitments than the president would have done otherwise—then manifests itself in the voting behavior of justices selected by treated presidents relative to the voting behavior of justices selected by nontreated presidents.

Nonetheless, as a convenient short-hand, we define a *litmus justice* as a justice who was appointed by a president committed to a policy test in a given issue area. For example, Justice Powell, appointed by Richard Nixon in 1973, was a law-and-order litmus justice but not an abortion litmus justice, because in 1972 the Republican platform committed Nixon to a law-and-order litmus test but not an abortion test. Conversely, Justices Roberts and Alito, both nominated by George Bush in 2005, were abortion litmus justices but not law-and-order litmus justices.

3.1 Data

Detecting the effects of a litmus test on justice voting requires rather stringent data. First, the Court must have heard a sufficient number of cases in the litmus area, in order to enable statistical analysis of votes in such cases. Second, both litmus and non-litmus justices must have cast relatively many votes on the cases, and preferably in the same cases. Which litmus areas meet these stringent data requirements?

Figure 9 reproduces Figure ?? from Chapter 2. The litmus "grid" reveals two areas that And, the tendency toward policy conformity has risen noticeably over time, perhaps reflecting greater care in selection. However, these studies do not test for the downstream effects of specific policy litmus tests or ideological demands contained in the party platforms and presidential acceptance speeches.



Figure 9: Litmus tests, 1928-2020. The dashed (red) boxes indicate Republican mentions, while the solid (blue) boxes indicate Democratic mentions.

satisfy both criteria: abortion and law and order.²⁷ The omnipresence of abortion litmus tests is not surprising, but the earliest litmus tests—announced by Richard Nixon and the Republican Party in 1968 and 1972—actually focused on law-and-order concerns.²⁸

For every justice, we identified whether they were appointed under an abortion test or under a law-and-order litmus test. We coded the critical variable, *litmus justice*, slightly differently for the two litmus tests. Only Republican presidents used the law-and-order litmus test, and the test always called for justices who would vote in a conservative fashion in criminal justice cases. Accordingly, in such cases, *litmus justice* takes the value of 1 whenever a justice was appointed under the law-and-order litmus test, and zero otherwise. By contrast, abortion litmus tests have been applied by both parties—but in the opposite

 $^{^{27}}$ The litmus tests of general conservatism and liberalism were also issued in a number of years, but we think that focusing on specific issue areas is more revealing of the potential effects of litmus tests. However, recall from above that the instrumental variables regressions in the reliability section leverage the entire range of litmus tests.

²⁸The emergence of this test was due, at least in part, to the sharp increase in crime in the United States that began in the late 1960s. President Nixon and the Republican Party used the rise in crime—and the resulting public turn toward punitiveness (Enns 2016)—as part of their "Southern Strategy," which, according to Gottschalk (2016, 148), "centered on employing coded race-based appeals to law-and-order and launching attacks on welfare to woo Southern and working-class white voters."

Justice	Party	Abortion	Law & Order
Burger	Republican		1969 - 1986
Blackmun	Republican		1970 - 1994
Powell	Republican		1971 - 1986
Rehnquist (AJ)	Republican		1971 - 1986
Stevens	Republican		1975 - 2010
O'Connor	Republican	1981 - 2005	1981 - 2005
Rehnquist (CJ)	Republican	1986 - 2005	1986 - 2005
Scalia	Republican	1986 - 2016	1986-2016
Kennedy	Republican	1987 - 2018	1987-2018
Souter	Republican	1990-2009	1990-2009
Thomas	Republican	1991-	1991-
Ginsburg	Democrat	1993 - 2020	
Breyer	Democrat	1994-	
J. Roberts	Republican	2005-	
Alito	Republican	2006-	
Gorsuch	Republican	2017-	2017-
Kavanaugh	Republican	2018-	2018-

Table 3: List of justices who were subject to abortion and law and order litmus tests. The years show each justices' tenure on the Court.

directions. Republican litmus tests call for justices to vote in a more pro-life direction, while Democratic litmus tests call for more pro-choice voting. Accordingly, in abortion cases, we code *litmus justice* as 1 if a Republican justice was nominated under a litmus test, -1 if a Democratic justice was appointed under the test, and 0 otherwise (that is, for all justices not appointed under abortion litmus tests). This operationalization allows us to include both Democratic and Republican justices in a single regression framework.

Table 3 depicts the specific justices that were appointed under one or both of the abortion and law and order litmus tests, along with the years in which they served on the Court, and the party of their appointing presidents. As it turns out, only two Democratic justices— Ginsburg and Breyer—were appointed under an abortion litmus test.

We next associate cases with the appropriate litmus test. We do so using the issue/legal provision codes in the Spaeth database.²⁹ The unit of analysis is individual justices' votes. Again we use the Spaeth database, coding as 0 those dispositional votes the data base scores as liberal and coding as 1 those votes the data base scores as conservative.

²⁹Specifically, we use the Justice-Centered Database, with cases organized by Issue/Legal Provision. To identify abortion cases, we select cases where the *issue* variable is coded "abortion." To identify law and order cases, we select cases where the *issueArea* variable is coded "Criminal Procedure."

	(1)	(2)	(3)	(4)
Abortion litmus justice	1.42^{*} (0.46)	1.80^{*} (0.62)		
Law & Order litmus Justice	(0.10)	(0.0_)	0.96^{*}	0.91
			(0.39)	(0.56)
Intercept	-0.21	-0.42	-0.31	-0.26
	(0.40)	(0.48)	(0.30)	(0.50)
Which justices?	All	Republicans	All	Republicans
Ν	747	564	$15,\!498$	11,212

Table 4: Litmus test logistic regressions. In each model, the dependent variable is whether the justice voted in the conservative direction, with standard errors clustered by justice. *p < .05.

3.2 Descriptive Analysis

We begin with a simple descriptive analysis that relies mainly on the data to tell the story of the effectiveness of litmus tests. Table 4 presents four logistic regression models, in which the dependent variable is whether the justice voted in the conservative direction. There are two models for each litmus test; in each, we subset the data to focus on the respective issue areas. Because the first litmus test was not issued until 1968, we restrict our analyses to cases decided from the 1969 term forwards. For each model in this section, we again cluster the standard errors by justice to account for non-independence across votes.³⁰

Let's begin with the abortion results. Models (1) and (2) include only abortion-related cases decided after 1969. Model (1) presents a very simple test for the effectiveness of litmus tests. It includes just the indicator for *litmus justice* as a predictor—recall that this is coded so that higher values should make a justice more likely to vote in the conservative direction. That is what we see in Model (1), as the coefficient on litmus justice is positive and statistically significant. (We will describe the substantive magnitude of this difference shortly). Because most justices appointed under litmus tests were Republican justices, Model (2) in Table 4 includes only Republican justices. The results are unchanged; indeed, the magnitude of the coefficients is even larger. All in all, the results are consistent with the

³⁰For some models, the number of unique justices (i.e. clusters) is lower than the informally recommended threshold of 30-40 (Angrist and Pischke 2008, 319). The results are generally robust to an alternative strategy of using varying intercepts ("random effects") for justices, but some of the models presented below do not converge with random effects, so we choose to present models with clustered standard errors.



Figure 10: Predicted probability of voting conservatively, by litmus test. Estimates and uncertainty based on Models (1) and (4) in Table 4. Vertical lines depict 95% confidence intervals.

hypothesis that abortion litmus tests "worked" in the sense that they led to the appointment of justices who were systematically less supportive of abortion.

The last two models in Table 4 presents parallel regression models, this time focusing on the law-and-order litmus test. Again we see that justices appointed under a law-and-order litmus test voted more conservatively than those who were not. The coefficient on litmus justice is somewhat noisier in Model (4), when we restrict our analysis to Republican justices, which could reflect the smaller sample size.

How much do these differences matter substantively? Figure 10 converts the relevant

coefficients into predicted probabilities, based on Model (1) in Table 4 for abortion and Model (4) for law-and-order (this provides the cleanest comparison, given the absence of law-and-order litmus tests for Democratic justices). For each issue area, we calculate the predicted probability of voting conservatively based on whether or the not a justice was appointed under a litmus test, along with 95% confidence intervals.³¹

We begin with abortion results. There, we see that the probability of a Democratic justice appointed under a pro-choice litmus test voting conservatively was only about 19%. For justices not appointed under either abortion test, that percentage rose to about 45%. Finally, for Republican justices appointed under a pro-life litmus test, the probability of voting in the pro-life direction rose to 76%. These differences are obviously quite substantial.³²

Turning to law and order, we only have two comparisons to make, because the law-andorder litmus test was applied only to Republican justices. But again the pattern is quite clear. For justices not appointed under that litmus test, the probability of voting conservatively is about 42%. This percentage rises to about 66% for Republicans appointed under the litmus test—again, a substantial difference.³³

3.3 Two Stronger Research Designs

Although this simple descriptive analysis is suggestive, in our view it falls short of a convincing demonstration of causality, because the regressions in Table 4 pool justices making decisions across many years and cases. In this subsection, we pursue two research designs that come closer to plausibly identifying the causal effect of litmus tests on justices' voting choices. Table 5 presents these models. For simplicity, we restrict the analysis to Republican justices.

Our first design employs *case-level* fixed effects. These fixed effects account for a key

 $^{^{31}}$ As in Chapter 10, we use the postsim function from the MORE_CLARIFY package (Pena 2014) to generate simulations of the coefficients.

³²The confidence intervals for the estimates are wide, but in 100% of simulations the predicted probability of voting conservatively is higher for Republican litmus justices compared to the no-litmus test justices. The same is true when we compare no-litmus test justices to Democratic litmus test justices.

 $^{^{33}}$ The predicted probability for a Republican litmus test justice is greater than the predicted probability for a non-litmus justice in 99% of simulations.

	(1)	(2)	(3)	(4)
Abortion litmus justice	0.32^{*}		0.70^{*}	
	(0.08)		(0.24)	
Abortion case			-0.46	
			(0.32)	
Abortion case \times justice			1.33^{*}	
			(0.47)	
Law & order litmus justice		0.26		0.62^{*}
		(0.14)		(0.31)
Law & order case				0.03
				(0.22)
Law & order case \times justice				0.41
				(0.26)
Intercept	0.26	0.49^{*}	0.16	-0.02
	(0.14)	(0.20)	(0.21)	(0.21)
Case fixed effects?	Yes	Yes	No	No
Model type	OLS	OLS	Logit	Logit
N	747	11212	52,794	52,794

Table 5: Litrus test regressions. In each model, the dependent variable is whether the justice voted in the conservative direction, with standard errors clustered by justice. *p < .05.

source of confounding: because we examine a long period of time, both the Court's membership and its agenda vary over the period of study, creating the possibility of omitted variable bias. Employing case-level fixed effects means that the identification of the litmus effect comes entirely from comparing litmus justices to non-litmus justices *in the same case*—by construction, neither membership nor agenda changes can affect this within-case variation. And, to the extent that certain case-level factors might induce spurious correlation between litmus tests and voting, the case fixed effects also account for those factors.

Models (1) and (2) present this analysis. Estimating such a large number of case fixed effects presents some computational hurdles, so we use OLS to estimate these models. Beginning with abortion cases in Model (1), we see that even with the case-specific fixed effects, Republican justices who were appointed under a pro-life Republican litmus test were significantly more likely to vote in the conservative direction, compared to Republican justices who were not appointed under an abortion test. In Model (2), we see a similar positive effect in law-and-order cases, although the coefficient is estimated less precisely (p = .09). Still, given the demanding nature of this specification, we view this result as supportive evidence for the effectiveness of law-and-order litmus tests.

A second strong research design would be a "differences-in-differences" design, combining same-unit before-and-after-treatment information with cross-unit treated/untreated information.³⁴ Unfortunately, such a design is impossible here, because justices are always either treated (that is, selected by a president committed to a policy test) or untreated. Hence, one cannot observe before-and-after-treatment behavior for the same justice. However, we can employ a "near" difference-in-differences design. This design is weaker than a true "diffin-diff" but still much stronger than the simple descriptive analysis. It compares how litmus justices voted in cases in litmus areas relative to non-litmus-justices (as in the simple analysis) but also examines how both voted in non-litmus-cases. Specifically, we use the following regression framework:

 $Pr(con. vote) = logit^{-1}(\beta_0 + \beta_1 * litmus case + \beta_2 * litmus justice + \beta_3 [litmus case \times litmus justice])$

Models (3) and (4) in Table 4 present the result of this design, with Model (3) examining abortion litmus tests and Model (4) examining law-and-order litmus tests. We return to logit models, so as to generate predicted probabilities. Because *litmus case* does not vary within a given case, we cannot employ case fixed effects in these models. Instead we employ term-level fixed effects. While this strategy is not as "tight" as case-level fixed effect, it nevertheless means that we compare justices who are broadly hearing the same set of cases in a given term.

Given the interaction term in Models (3) and (4), interpreting the coefficients is tricky. Fortunately, a graphical presentation clarifies the meaning of the results. For each model, we generated 1,000 simulations of each coefficient. From these simulations, we can generate the average predicted probability of a conservative vote across every combination of litmus justice and litmus case, along with confidence intervals, based on the underlying uncertainty in the parameters.

These estimates are depicted in Figure 11, along with 95% confidence intervals. The top 34 On this design, see Angrist and Pischke (2014, ch. 5) and Cunningham (2021, ch. 9).



Figure 11: Predicted probabilities of voting across litmus cases and justices in TOP) Abortion cases; and BOTTOM) Law and order cases. The estimates are based on simulating the coefficients in Table 5. 95% confidence intervals depicted by vertical lines.

panel shows the results for abortion cases. We can see that for Republican litmus justices, the probability of voting conservatively in abortion cases is about 85%. For non-litmus justices, the equivalent probability drops to about 43%, a stunning difference of about 40 percentage points.

Of course, it could be the case that Republican justices who were appointed under a pro-life litmus test just tended to vote more conservatively in all cases, not only abortion cases, compared to justices without the litmus test. The benefit of the specification in Table 5 is that we can benchmark the difference in abortion cases against all *other* cases. We see in Figure 11 that in non-abortion cases, it was indeed the case that abortion litmus justices voted more conservatively than non-litmus justices (70% versus 54%). Notice however, that the difference is significantly smaller in magnitude—16 percentage points compared to 43. Employing logic somewhat similar to the "parallel trends" assumption in the difference-indifferences design, one might see the causal impact of the litmus test as about (.85 - .43) -(.70 - .54) = .42 - .16 = 26 percentage points.³⁵ Needless to say, this is a remarkably large effect. More generally, the difference between litmus and non-litmus justices in abortion cases is greater than the difference in non-abortion cases in 99% of the simulations (in other words, the 43 percentage point difference is statistically larger than the 17 percentage point difference).³⁶ The conclusion is again clear: the Republican Party's emphasis on appointing pro-life justices eventually paid substantial dividends.

The picture for law-and-order cases is similar, though again the differences are not quite as stark as in the abortion arena. As one might expect, Republican justices appointed under a law-and-order litmus test voted conservatively in 74% of cases, compared to about 51% for non-litmus justices in such cases, or a 23-percentage point difference. For other types of cases, we see a 15-percentage point difference (64% compared to 49%). Employing a "parallel trends" logic suggests a causal effect of about (.74 - .51) - (.64-.49) = .23 - .15 =.08 percentage points. Even though this difference in differences is comparatively modest compared to the that shown in abortion cases, the 23-point difference between litmus and non-litmus justices in law and order cases cases is still greater than the 15-point difference in non-law-and-order cases in 93% of simulations.

³⁵On the parallel trends assumption in actual difference-in-differences designs, see Cunningham (2021, 414). In the "near" diff-in-diff design, the idea is that if litmus Republican justices were somewhat more conservative than non-litmus Republican justices on non-abortion cases, then they would have been that much more conservative in the abortion cases as well, absent the litmus test. Hence, the causal effect of the litmus test is the additional amount of conservatism above the baseline. Given the structure of the data, it is not obvious how to test this assumption. This is the primary reason why the feasible "near" diff-in-diff design is weaker than the infeasible true diff-in-diff design.

³⁶Note in addition that all of the pairwise comparisons in Figure 11 are statistically different from each other.

3.4 Summary: Do Policy Litmus Tests Work?

Do policy litmus tests work? In the two areas where we have enough data to investigate matters quantitatively, the best evidence and strongest research designs we can muster indicate, "Yes, litmus tests worked." This is particularly true for abortion. Republican justices appointed by presidents pledged to litmus tests voted dramatically more conservatively on abortion cases than Republican justices appointed by presidents not pledged to an anti-abortion litmus test—about 40 percentage points more conservatively in the "near" difference-in-differences design. Adjusting for the apparently greater conservatism of the litmus justices across the board, points to a causal effect from the litmus test of about 26 percentage points. The anti-abortion activists who worked so doggedly to change Republican judicial nominees may take some satisfaction in these numbers. Their efforts apparently caused substantial changes in voting among Republican justices in abortion cases.

While the evidence for the effectiveness of the law-and-order litmus test is less dramatic, we nonetheless see a similar pattern. Republican justices appointed under the law-and-order litmus test voted more conservatively in criminal justice cases than did non-litmus justices, even taking into account the overall difference in conservative voting across litmus and nonlitmus justices.

In sum, Republican Party activists demanded results on specific policies, Republican presidents strove to comply, and apparently as a result the justices they appointed were considerably more likely to deliver the demanded votes.

4 The Ideological Structure of the Court

Up to this point, we have focused on the behavior of individual justices. In this and the following section, we transition from individual behavior to collective choice. The collective choice of greatest import is the Court's definitive policy pronouncements in majority-endorsed majority opinions. First, though, we introduce the concept of the Court's overall make-up or *ideological structure*, which lies between the disparate ideologies of the individual justices and the Court's collective policy choices.



Figure 12: The Linkage Between Individual Ideologies and Collective Policy Choices: The Key Role of Ideological Structure.

Figure 12 conveys the essential idea. At any given time, nine justices sit on the Court and each justice has his or her own political orientation (the left-hand box in the figure). This brute fact is important for their individual actions—for example, their votes on which cases to hear, their dispositional votes on which litigant should prevail in the dispute before the Court (including on litmus test cases like abortion or law-and-order cases), and their votes whether to endorse ("join") the policy expressed in the majority opinion. Critically, in this framework individual ideologies aggregate into an overalleasure, "ideological structure" (the middle box in the figure). Ideological structure is a summary statistic that captures the essence of the nine ideologies for what really matters, collective policy choice. A good measure of ideological structure will correlate with the liberalism or conservatism of majority opinions (the right-hand box in the figure). This policy content is our ultimate concern, for a majority opinion obliges lower courts and the executive branch to respect the opinion's policy and enforce it with the full power of the state.³⁷ In sum, the nine ideologies aggregate into an overall ideological structure, then structure affects policy, as expressed in the content of majority opinions. In some sense, the ideology-structure-policy linkage offers a "bottom line" for appointment politics.

An obvious question is: What is the best measure of the Court's ideological structure? This apparently simple question turns out to be rather complicated, because the best measure of ideological structure depends on your theory of Supreme Court policy making. Without, we hope, placing an undue burden on the reader's patience, we provide a quick guide of the

 $^{^{37}}$ Justice Brennan famously called this the "Rule of Five." As summarized by Cole (2015), this axiom states that "whatever five justices agree to, by definition, becomes law."

main theories and the associated empirical measures of Court structure.

4.1 The Median Justice Approach

The Median Justice (MJ) Approach is the oldest and still-dominant approach to collective choice on the Supreme Court.³⁸ Work in this vein invokes the celebrated "median voter theorem" (MVT) of political economy, which identifies as decisive the policy preferences of the median member of a multi-member body like an electorate, committee, or legislature—at least under certain circumstances.³⁹ For the Supreme Court, the MJ Approach holds that the median justice determines which side prevails in the Court's judgment and then controls the policy content of the majority opinion.⁴⁰

The MJ Approach identifies with crystalline clarity the best summary measure of the Court's ideological structure: the ideology of the median justice, Justice 5, as expressed on a left-right scale. In the MJ Approach, the ideologies of the other justices simply do not matter, other than for determining the identity of the critical "swing justice."

The dispositional voting scores reviewed earlier allow easy identification of the median justice in each term in the post-war period, along with his or her score. Figure 13 depicts the estimated location of the median justice from 1950 to 2020. Here and for the rest of the chapter we rely on the Bailey scores to measure ideology, as the bridging mechanisms used in construction of those scores makes them more suitable for dynamic comparisons of

 $^{^{38}}$ As we noted in Chapter 1, move-the-median theory as applied to nomination politics was first developed in a pair of unpublished papers by Peter Lemieux and Charles Stewart (1990*a*, 1990*b*). However, to the best of our knowledge, it was not until the 2000s that systematic attempts were made to actually estimate the location of the median justice—see e.g. Grofman and Brazill (2002) and Martin, Quinn and Epstein (2004). While these papers did not make many theoretical claims, theory was advanced in later papers, e.g. Hammond, Bonneau and Sheehan (2005) and Jacobi (2009). These papers thus departed from earlier, behavior-oriented work that tended to focus exclusively on justice-level behavior (e.g., the "attitudinal model" of Segal and Spaeth (2002)), not collective choice

³⁹For a clear exposition of the Median Voter Theorem, see McCarty and Meirowitz (2007, 101-107).

⁴⁰As discussed in Chapter 1, the MJ Approach leads to a complete and internally consistent theory of Supreme Court appointment politics, Move-the-Median Theory. As noted in Cameron and Kastellec (2016), the detailed and elaborate predictions of this elegant theory do not fare well when confronted with data about presidential selection and senatorial voting on nominees. However, this is a separate question from whether the median justice theorem helps explain *voting patterns* on the Court itself; there is, indeed, evidence that changes in the median justice do in fact lead to changes in how the Court as a whole votes (Krehbiel 2007, Cottrell, Shipan and Anderson 2019). Below, we examine how well changes in the median predicts voting, with an important distinction between dispositional voting and the location of the majority opinion.



Figure 13: The location of the median justice, 1950-2020. The values are based on the Bailey scores. The top axis depicts the name of the justice who is the median in that year.

the structure of the Court.⁴¹ The names at the top of the graph show who the estimated median justice was in a given year; years with two names indicate years in which there were co-medians due to extended vacancies.

As shown in Figure 13, the ideology of the median justice in the early 1950s was solidly conservative. In the mid-1950s it became more moderate, reflecting the often strange appointments of the Eisenhower years. The ideology of the Court's median justice then took a dramatic, in fact jaw-dropping, liberal turn in 1962, with the appointment of Justice Goldberg to the Court. This appointment established the famous late Warren Court, perhaps the high water mark of liberalism in the Court's entire history. But, this period was shortlived. The median's return to conservatism in late 1960s/early 1970s was just as dramatic as the liberal shift in the early 1960s. This right-ward movement reflected the early Nixon appointees, particularly the double-play nominations of Burger and Blackmun. A liberal movement occurred in the late 1970s but a return to solid conservatism soon followed. The figure suggests relative stability over the next three decades with one notable exception. Given the Judicial Partisan Sort, the Court of the 2010s was highly polarized. The death of Justice Scalia in 2016 flipped the median into the yawning ideological gap in the ensuing

⁴¹For example, Bailey (2007, 436) notes that the median justice as identified by Martin-Quinn is estimated to be as conservative in the early 1970s as it was in the early 2000s, a result that does not seem facially valid, given the ideological trajectory of the Court.

8-member Court. The dramatic dip in the 2016 data reflects this event. We note that if Merrick Garland had been confirmed, the location of the 2016 median would have moved dramatically leftward. But the successul blockade of Garland and subsequent confirmation instead of Neil Gorsuch returned the median to a solidly conservative position, a dramatic movement.⁴² The final observation in the time series reflects the replacement of Justice Ruth Bader Ginsburg by Justice Amy Barrett, establishing Justice Brett Kavanaugh as the median.⁴³ The ideology of this median is the most conservative in the entire time series, and is probably the most conservative since the 1930s.

Of course, the scores in the figure correspond to those of specific people. The medians in the 1950s varied over a collection of conservative Democrats and moderate Republicans, including Justice Tom Clark on four occasions. But then, almost shockingly, ultra-liberal Democrat William Brennan became the median justice with the emergence of the mid-60s Warren Court. Chief Justice Warren and Justice Hugo Black briefly held sway as the median during the Court's transformation away from liberalism. Starting in the early 1970s through the mid-1980s, conservative Democrat Byron White rarely left the middle position on the Court. Then, in the mid-1980s through the early 1990s, several other justices sometimes displaced White, particularly Lewis Powell. During a notably long run from 1993 to 2004, moderate Republican Sandra Day O'Connor rarely left the median position. Following her, Justice Anthony Kennedy held that position almost uninterrupted for 13 terms. After his departure, and then the subsequent death of Ruth Bader Ginsburg, Chief Justice Roberts and then Justice Kavanaugh have taken on the mantle of the median justice.

4.2 Majority Coalition Approach

The Median Justice Approach is wonderfully simple and captures the dramatic swings of the 1960s and early 1970s. But in considering the content of majority opinions, it presents

 $^{^{42}\}mathrm{We}$ return to events of 2016/2017 and what they meant for the ideological trajectory of the Court in future years in Chapter 14.

 $^{^{43}}$ The Bailey scores only run through 2019, and hence there is no data for Barrett, as of this writing. However, if we assume that Barrett is at least as conservative as Kavanaugh, which seems reasonable, then Kavanaugh is estimated as the median justice.

many difficulties, both logical and empirical (Lax and Cameron 2007). On the empirical side, it predicts:

- Who serves with the median justice does not affect the content of the majority opinion;
- Whether the vote on the case disposition was liberal or conservative has no impact on majority opinion content;
- Neither does the makeup of the majority dispositional coalition; this means, for example, that a unanimous dispositional vote, a 5-4 vote, and a 4-5 vote all result in the same opinion;
- Opinion authorship doesn't matter—the content of the majority opinion is the same whether it was written by Justice Scalia or Justice Stevens, for example;
- Which case the Court chooses to hear does not affect the content of the majority opinion.

Close watchers of the Court typically find these predictions so counter-factual as to be risible, if not bizarre.

On the logical side, the actual procedures used on the Court fit very poorly with those required by the Median Voter Theorem. To be sure, the justices use pure majority rule in the binary choice of a case's disposition, so a median voter result seems natural and plausible there. But members in dissent from the case's disposition do not participate in crafting or endorsing the majority opinion. Members in the majority, who do participate in policy making, do not use pure majority rule to vote over competing majority opinions. And so on.⁴⁴ Given these unusual procedures, there is simply no reason to expect a median-voter result for majority opinion content.

Attempts to go beyond the ill-fitting MVT usually start with procedures actually used on the Court, and then attempt to deduce the incentives for the individual justices and the implications for collective choice. The many twists and turns in attempts to do this are a matter of concern mostly to specialists, and we spare the reader an exegesis.⁴⁵ Instead we focus on the most promising class of recent theories: the Majority Coalition (MC) Approach

 $^{^{44}}$ In addition, the justices do not use pure majority rule to select cases; under the "Rule of Four," the votes of only four justices are required to grant certiorari and thus hear a case (Lax 2003).

 $^{^{45}\}mathrm{See}$ Clark (2012) for an accessible review of this literature.

(Carrubba and Clark 2012, Parameswaran, Cameron and Kornhauser 2021). This approach tries to capture the most important of the Court's actual procedures and leads to clear and arguably plausible results about opinion content

The starting place for the Majority Coalition Approach is the observation that dissenting from the majority disposition effectively removes a justice from the policy bargainers.⁴⁶ The content of the majority opinion will then reflect the bargaining protocol used by the justices in the majority disposition. Different versions of the MC Approach make somewhat different assumptions about the bargaining protocol, but they all predict that bard bargaining will tend to drive the content of the majority opinion toward the center of the majority dispositional coalition, *not* the center of the Court as a whole. Unanimous case dispositions can lead to a centrist opinion, but cases where the Court is narrowly divided on the disposition, (especially 5-4 decisions) are apt to produce opinions on the wings of the Court.

With respect to opinion content, the MC Approach sidesteps the logical and empirical embarrassments of the MJ Approach.⁴⁷ But for present purposes, the key question is: from a Majority Coalition viewpoint, what is the best measure of the ideological structure of the Court? Strictly speaking, the answer is: the exact distribution of all nine members, for they all matter.

We suggest a simpler and more tractable formulation: the size of liberal, moderate, and conservative blocs on the Court. Using this approach, one would expect a Liberal Blocdominated Court like the late Warren Court to favor liberal case dispositions, and then produce quite liberal majority opinions within those liberal dispositions. The less frequent conservative dispositions would result in relatively moderate majority opinions. Conversely, a Moderate-Conservative oriented Court would tend to produce conservative dispositions

⁴⁶The rationale for this procedure is that the majority's favored disposition must result from applying the policy in the majority opinion to the case in hand, and the dissenters disagree with that disposition. Hence, only those who agree with the disposition are allowed to directly craft the opinion (though justices in the majority opinion will often respond to arguments raised in dissenting opinions).

⁴⁷With respect to case disposition, the MC Approach derives a median voter result. However, in some versions the location of the instant case affects which judgment the median prefers. Case selection is important for both dispositions and opinion content but remains at the research frontier in the MC Approach—see Sasso and Judd (2020) for a recent application.

but some liberal ones as well. Then, in the conservative dispositions, one would expect to see moderately conservative majority opinions produced by the members of the Conservative Bloc joined by some moderates. In the liberal dispositions, one would expect rather moderate opinions produced by the moderates and the handful of liberals in those majorities. Balanced courts would produce both types of dispositions with distinctly different majority opinions across them, but relatively rare extreme majority opinions. And so on. If these conjectures are correct, the three-bloc formulation offers a relatively simple but nonetheless nuanced characterization of the ideology-structure-output linkage, as suggested by the MC Approach.

To estimate these blocs, we return to the Bailey data. We use the full distribution of ideal points for every justice from 1950 to 2019; in other words, "justice-years" are the unit of analysis. Then we divide this distribution into thirds: justice who, in a given year, fall in the bottom third are coded as being the liberal bloc, justices who fall into the middle third are coded as being in the moderate bloc, and justices who fall into the top third are coded as being in the conservative bloc. Because the Bailey scores are dynamic, it's possible for a given justice to appear in different blocs in different years, if his or her score happens to cross one of the thresholds over time.

Figure 14 displays Liberal, Moderate, and Conservative blocs on the Court by decade since the 1950s. To make the display manageable, we organize the data by decade. For each decade, we display the proportion of justice-years that fall into each of the liberal (blue), moderate (purple), and conservative (red) blocs; this is indicated by the height of the bars. The horizontal axis indicates the mean ideology of the justices in a given bloc. For instance, in the 1950s, about 30% of justice-years fell into the liberal bloc. Of those justices, the mean of their Bailey scores was about -1.5.

Several patterns are notable in Figure 14. First, periods with a *one-bloc dominant structure*—that is, a bloc with 5 or more members, on average—were rare. However, the 1950s saw a dominant Moderate Bloc, while the 1960s displayed a dominant Liberal Bloc. Second, the 1970s and 1980s display a *Balanced Bloc structure*, with each of the three blocs



Figure 14: Liberal, Moderate, and Conservative Blocs on the Court, by Decade, 1950s-2010s. In each panel, the height of the bars depict the percentage of justice-years in each bloc during a decade, while the horizontal axis depicts the mean ideology of the justices in each bloc. The liberal bloc is blue, the moderate bloc purple, and the conservative bloc red. The underlying scores are individual Bailey Scores.

containing about the same number of justices, on average. Third, the 1990s displayed a *Bi-modal Moderate-Conservative structure*, featuring a large Moderate Bloc, a large Conservative Bloc, and a diminished Liberal Bloc. No period displayed the opposite Bi-modal Moderate-Liberal structure. Fourth, the 2000s and 2010s saw the emergence of a *Bimodel Wing structure*, with large Liberal and large Conservative blocs but a diminished Moderate bloc; here we can see the consequences of the judicial partian sort. Fifth, the Liberal bloc became less liberal over time, particularly after the 1980s. This reflected the departure of

fiery liberals like Douglas, Marshall, and Brennan and their replacement with justices like Breyer and Ginsburg. Sixth, the Conservative bloc became more conservative over time, with the right-ward shift established by the 1990s.

5 Court Structure and Collective Choice: Fourth Amendment Law

How do changes in the ideological structure of the Court translate into changes in judicial policy? As we noted at the beginning of the chapter, answering this question quantitatively presents a thorny social science problem because measuring judicial doctrine is so difficult. Due to this difficulty, quantitative judicial politics has focused primarily on the analysis of dispositional votes. Although the doctrine announced in a case and the case's disposition must be compatible with one another, relying solely on dispositional votes cannot capture the content of doctrine. For most of us, doctrine, rather than dispositions, is what is interesting and important about Supreme Court cases.

Fortunately, political scientists Benjamin Lauderdale and Tom Clark (2012) devised a clever way to estimate the ideological location of majority opinions. To do so, they develop a method that uses citation patterns across a set of cases to estimate which majority opinions are "closer" or "farther" to other opinions. So if one opinion cites another opinion positively (i.e. by using it as a precedent in the writing of the instant opinion), those cases are estimated as being closer in ideological space than two opinions that do not cite each other. The result is a set of estimated opinion locations that are assumed to exist in a one-dimensional ideological space.

To be sure, there are limitations to the Clark-Lauderdale method. First, like any statistical model, it relies on certain assumptions (for instance, the meaning of an opinion does not change over time) that may not be true, or only partially true, in the real world. Second, it necessitates hand-coding citations, a labor-intensive procedure. Because of this, Clark and Lauderdale developed estimates for opinion location in only two policy areas: search and seizure, and freedom of religion. In addition, the sample size is unequal across these two areas. The Clark and Lauderdale data contains 291 search and seizure majority opinions,

versus only 78 for freedom of cases. (The data run from 1954 to 2008).⁴⁸ Because, as explained below, we break down our analysis by liberal versus conservative dispositions, the freedom of religion cases quickly run into statistical power issues. So for our analyses we focus solely on the search and seizure cases.

The Court's turn to the right in search and seizure law beginning in the 1970s has been well documented, both quantitatively (see e.g. Segal 1984, Kritzer and Richards 2005) and qualitatively (see e.g. Seo 2019, Cohen 2021). But, for our purposes, no quantitative analysis has really shown how changes in the composition of the Court map into changes into the Court's *policies* (as opposed to dispositions), to which we now turn.⁴⁹

We begin with a descriptive look at the data. The top panel in Figure 15 examines changes in the Court's dispositional voting over time. In search and seizure cases, a conservative disposition, broadly speaking is one in which the Court rules in favor of the state—for example, allowing evidence from a search without warranted to be used against the defendant. A liberal disposition is one in which the Court rules in favor of a criminal defendant—for example, ruling evidence as inadmissible from a questionable search or seizure.⁵⁰ The figure uses a rug plot to show the incidence of conservative decisions (on the top axis) and liberal decisions (on the bottom axis). The line is a loess line that summarizes the temporal trends; it can be thought of as summarizing the probability of a conservative decision at any given point in time.

The figure illustrates the stark conservative shift in the Court's voting on search-andseizure cases over time. Around 1960, the probability of a conservative decision was only about 35%. From then, it rose steadily, peaking around 1990. Since then, it has declined

⁴⁸Both the sample sizes and the years covered in the replication data provided by Clark and Lauderdale differ very slightly from the listed numbers in the published article.

⁴⁹In addition to developing their measures of opinion location, Clark and Lauderdale use these measures to test whether the median justice, the median of the majority coalition, or the opinion author bests predicts the location of the majority opinion. This is a related, though distinct question, to the one we pursue. Kastellec (2010) uses classification trees to statistically visualize how the Court's search and seizure doctrine evolved between the 1960s and 1980s, but this is more of a descriptive enterprise than a rigorous attempt to understand the mapping between ideological structure and collective choice.

⁵⁰Clark and Lauderdale use the Spaeth database coding to code the disposition of the search and seizure cases in their decisions.



Figure 15: Summarizing the Court's Search-and-Seizure decisions, 1954-2008. The top panel depicts changes in the court's dispositional voting. The top and bottom rugs depict conservative and liberal dispositions, respectively, while the loess line summarizes the probability of a conservative decision at any given point in time. The middle panel present a box-and-whisker plot that summarizes the distribution of opinions within each year; the he loess line summarizes the general trend of the overall opinion locations. The bottom panel does the same but breaks down the data into conservative and liberal dispositions.

slightly, but the average probability of a conservative decision was around 70% as of 2008.

What about majority opinion locations? The Clark-Lauderdale scores are ordered such that higher scores mean more conservative opinions. The middle panel in Figure 15 depicts a year-by-year box-and-whisker plot that summarizes the distribution of opinions within each year. Here we pool both liberal and conservative dispositions together. The loess line summarizes the general trend of the overall opinion locations, which tracks fairly well with the location of the median justice: average opinion locations became more liberal in the 1980s, before becoming steadily more conservative beginning with the advent of the Burger Court in the 1970s.

Unlike with binary dispositions, the Clark-Lauderdale scale itself is not intuitive. To give some sense of the substantive difference in opinion locations, the majority opinion in the Court's landmark decision in the 1961 case of *Mapp v. Ohio* (367 U.S. 643), which extended the exclusionary rule to the states, has a score of -.7. Conversely, the Court's opinion in the 1983 case of *Illinois v. Gates* (462 U.S. 213), which greatly weakened protections for criminal defendants by implementing a "totality of the circumstances" test for evaluating whether evidence allegedly obtained in violation of the Fourth Amendment should be excluded, has a score of 1.3.

Finally, the bottom panel in Figure 15 breaks down opinion locations by conservative and liberal dispositions. Interestingly, the average location of majority opinions in conservative dispositions remained fairly stable between 1954 and 2008,⁵¹ while the average location of liberal dispositions actually became slightly less liberal.

At first glance, these trends might seem inconsistent with the judicial partian sort that we documented above. But this is actually not the case. First, notice that because courts decide both cases and policies, it's important to keep both in mind. Even if the average location of conservative dispositions did not increase over time, the top of Figure 15 shows that the Court was increasingly likely to reach the conservative disposition, meaning the scope of

 $^{^{51}{\}rm The}$ downward trend at the end of the time series is driven by 2005, where the Court heard only two Fourth Amendment cases.

	(1)	(2)	(3)
Median justice	1.50^{*}		0.23
	(0.29)		(0.58)
N. justices in liberal bin		-0.29^{*}	-0.25
•		(0.12)	(0.16)
N. justices in conservative bin		0.43^{*}	0.39^{*}
Ū		(0.12)	(0.17)
Intercept	0.35^{*}	0.16	0.14
-	(0.13)	(0.62)	(0.62)
Observations	291	291	291
Log Likelihood	-177.00	-173.00	-173.00

Table 6: Disposition logistic regressions. In each model the dependent variable is coded 1 if the Court reached a conservative disposition, and 0 if it reached the liberal disposition. * indicates significance at p < .05.

those majority opinions increased over time. Second, it's important to remember that since 1970, liberal justices have never enjoyed an outright majority on the Court. Which means that even in cases where the Court reached the liberal disposition, at least one moderate or conservative justices had to be a member of the majority coalition, which would constrain the ability of the liberal bloc to pull policy leftward (or even maintain the status quo). On top of that, recall from Figure 14 that the justices in the liberal bin actually became more moderate over time, which would also mean less liberal policy in majority opinions with liberal dispositions.⁵²

5.1 Modeling Court Structure and Case Dispositions

We now move to a systematic analysis of the relationship between structure and outcomes. We begin by modeling the Court's dispositional voting in search and seizure cases. Table 6 presents three logistic regression models; in each the dependent variable is coded 1 if the Court reached a conservative disposition, and 0 if it reached the liberal disposition.

Model (1) in Table 6 solely includes the location of the median justice at the time the case was heard, as a predictor. Not surprisingly, the coefficient is positive and significant. Model

 $^{^{52}}$ To give one concrete example of this shift that is apposite here, Justice Breyer has voted very conservatively in Fourth Amendment cases, relative to other reliable members of the Court's liberal bloc in the last few decades (Newton 2017).

(2) includes as predictors the number of justices in the conservative bin and the number of justice in the liberal bin, at the time the case was heard. The omitted category is the number of justices in the moderate bin.⁵³ These coefficients work as expected: increasing the number of justices in the liberal bin decreases the likelihood of a conservative disposition, while increasing the number of justices in the conservative bin increases that likelihood. Finally, Model 3 is a "horse-race" regression that pits the Court structure indicated by Median Justice theory against the structure suggested by the Majority Coalition viewpoint. Quite interestingly, when we do this, the location of the median justice is no longer a significant predictor of dispositional voting. Conversely, the coefficient on the number of justices in the conservative bin remains unchanged from Model 2. The coefficient on the number of justices in the liberal bin loses statistical significance (p = .12), but it still negative and of similar magnitude to Model (2). All told, these results demonstrate the need for going beyond the location of the median justice when considering the relationship between the Court's structure and case dispositions.

To give a sense of the substantive differences implied by the model, we present probabilities of dispositions. Figure 16 depicts the probability of a conservative decision, based on Model (2) in Table 6 (we ignore uncertainty here for presentational clarity). Beginning with the left panel, the horizontal axis depicts the number of justices in the liberal bin, going from 1 to $6.^{54}$ Then, we vary the number of justices in the conservative bin from 1 to 6. The individual lines show the predicted probability of a conservative decision for a given number of conservative justices; we truncate the lines where necessary to account for the fact that the number of liberal plus conservative justices cannot exceed nine. The right plot is similar, except now the number of conservative justices is now on the horizontal axis and the lines vary across the number of justices in the liberal bin.

 $^{^{53}}$ We can't include all three in the same regression, since the number of justices in one bin is a linear function of the other two, which would induce singularity.

⁵⁴Six is the maximum number of justices that appear in the liberal bin in the Bailey data. There have never been more than five justices in the conservative bin; however, in the right plot where the number of conservative justices is on the x-axis, we extend it to 6 to make the two plots directly comparable.



Figure 16: Predicted probability of a conservative decisions, sequentially varying the number of justices in the liberal and conservative bins. See text for more details

Together, the panels in Figure 16 show how altering the composition of the Court has two effects on the likelihood of the Court reaching the conservative dispositions. (We will use the left panel to make this point but the argument is symmetric with respect to liberals and conservatives.) First, fixing the number of justices in the liberal bin but increasing the number of conservative justices shifts the "intercept" up—that is, the baseline probability of the Court reaching the conservative outcome. Second, the slope on the curves is negative, meaning that adding more liberals reduces the chance of a conservative outcome, at any level of the number of conservative justices. From these pictures we can now see how the broad shift over time from a Court composed predominantly of liberals and moderates to one controlled firmly by conservatives translated into conservative dispositions in search and seizure cases.

5.2 Court Structure and Majority Opinion Content

Next we analysis how changes in the structure of the Court translate into changes in the content of majority opinions. Table 7 presents nine OLS regression models. In each, the dependent variable is the Clark-Lauderdale estimate in the location of the majority opinion. The nine models compromise three sets of three models, each of which are parallel in the structure of their covariates. The first three models include all dispositions, the second three

	A	ll dispositi	ons	Conservative dispositions Liberal dis		ral disposi	lispositions		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Median justice	0.77^{*} (0.10)		0.10 (0.20)	0.49^{*} (0.14)		-0.02 (0.25)	$\begin{array}{c} 0.37^{*} \\ (0.09) \end{array}$		0.17 (0.22)
N. justices in lib. bin		-0.14^{*} (0.04)	-0.12^{*} (0.05)		-0.09 (0.05)	-0.09 (0.06)		-0.07 (0.05)	-0.03 (0.06)
N. justices in con. bin		0.22^{*} (0.04)	0.19^{*} (0.06)		0.15^{*} (0.05)	0.15^{*} (0.07)		0.10^{*} (0.05)	$0.06 \\ (0.06)$
Intercept	0.12^{*} (0.05)	-0.002 (0.21)	-0.01 (0.22)	0.52^{*} (0.06)	0.40 (0.24)	$\begin{array}{c} 0.39 \\ (0.24) \end{array}$	-0.47^{*} (0.05)	-0.49^{*} (0.25)	-0.53^{*} (0.25)
Observations R ²	$289 \\ 0.18$	289 0.21	289 0.22	181 0.06	181 0.10	181 0.10	108 0.13	$\begin{array}{c} 108 \\ 0.13 \end{array}$	$\begin{array}{c} 108 \\ 0.14 \end{array}$

Table 7: OLS regressions of opinion location. * indicates significance at p < .05.

include only conservative dispositions, and the final three include only liberal dispositions.

Let's begin with Model (1), whose sole predictor is the location of the median justice. The model indicates a strong and statistically significant relationship with majority opinion content. Next, Model (2) includes only the number of justices in the liberal and conservative bins. As with dispositions, we see the expected relationships. Increasing the number of liberal justices results in majority opinions moving to the left, while increasing the number of conservatives is associated with a right-ward shift in opinion content. Finally, Model (3) presents the "horse-race" model: again, we find that while the number of liberal and conservative justices is a statistically significant predictor of opinion content, the location of the median justice is not.

When we separate the cases into conservative and liberal dispositions, we see the same basic patterns. However, some of the coefficients on the bins are now measured imprecisely, particularly for liberal dispositions (note the sample size is much more smaller, compared to conservative dispositions). Yet even here, the "horse race" somewhat favors the more nuanced view of Court structure rather than just the location of the median justice. The coefficient on the location of the median justice is not statistically distinguishable from zero when we account for the overall structure of the court.

We examine the substantive significance of these results in a manner similar to the models



Figure 17: Predicted ideological location of majority opinions in search-and-seizure cases. probability of a conservative decisions, sequentially varying the number of justices in the liberal and conservative bins. See text for more details

of case dispositions. Figure 17 depicts the predicted location of majority opinions. For clarity, we break the results down into conservative and liberal dispositions; the left column employs Model (5) from Table 7, while the right column employs Model (8). We again allow both the number of liberal and conservative justices to vary (subject to the constraint that there can be no more than nine justices). Comparing the four panels in Figure 17 reveals the subtleties of how composition affects outcomes. First, we can see that policy varies greatly across liberal and conservative dispositions. Second, even within liberal and conservative dispositions, changes in the relative composition of the ideological blocs leads to significant predicted changes in the content of the Court's majority opinions.

5.3 Simulating Changes in Court Structure and Policy Output

As a final illustration of the substantive changes in the law over the past 60 years, we use simulations to visualize what happens when the composition of the court changes. We consider three different "types" of Courts. The first is what we call a "Liberal Dominant" court, which is what we observed at the height of the 1960s liberal Warren Courts. Specifically, we assume a 5-3-1 Court: five justices in the liberal bin, three in the moderate bin, and one in the conservative bin. The second type we call a "Bi-modal Wing," court, which matches the makeup of the Supreme Court in the 2000s and 2010s. In this period, either Justice O'Connor or Kennedy occupied the center of the Court (even though they tended to lean right more left in many issue areas, including search-and-seizure law). We assume a 4-1-4 court: four justices each in the liberal and conservative bins, and one in the moderate bin. The final type we call a "Conservative Dominant," court, which reflects the Court in 2021. It is a 3-0-6 court: three liberals, zero moderates, and six conservatives.

For each scenario, we use Models (5) and (8) in Table 7 to generate the predicted location of majority locations, conditional on the number of justices in the liberal and conservative bins, for conservative and liberal dispositions, respectively. We simulate these predictions 1,000 times, based on the underlying uncertainty in the regression coefficients, in order to generate distributions of predictions.⁵⁵

The results are displayed in Figure 18. For each scenario, the left histogram depicts the distribution of majority opinions under liberal dispositions, while the right histogram depicts the distribution under conservative dispositions. We order the scenarios such that "time" moves from top to bottom. Fixing the composition of the Court, the distribution of majority opinion locations in conservative dispositions is always to the right of the distribution in liberal dispositions. But as the Court shifts to the right, both distributions also move to the right. The result is that doctrine set under *liberal* dispositions under the Conservative Dominant court (bottom panel) is effectively the same as doctrine set in *conservative* dipo-

⁵⁵We use the sim function in the ARM package in R to do this Gelman et al. (2015).



Figure 18: Simulated majority opinion locations.

sitions in the Liberal Dominant court (top panel). The policies in the Bi-Modal Wing court tend to be more centrist than in the other two types—the distribution of policies in liberal dispositions are less liberal than the equivalent ones in the Liberal Dominant Court and less conservative than those in the Conservative Dominant Court, and similarly for policies in conservatively disposed cases.

The simulations do not address the frequency of liberal and conservative dispositions, but of course liberal dispositions decrease dramatically while conservative ones increase, in the move from a 5-3-1 court to a 4-1-4 court, to a 3-0-6 court.

These results vividly illustrate the policy consequences from the slow but steady replace-

ment of liberal justices with reliably conservative ones beginning in 1969, and the subsequent alteration in the ideological structure of the Court.

6 Conclusion: Judicial Personnel Is Judicial Policy

A famous mantra of the Reagan revolutionaries who often faced hostile Washington bureaucrats was, "Personnel is Policy." In other words, if you select the right people and put them in the right jobs, the right policies will flow almost automatically. This insight grounds the presidential management tactic known to political scientists as "agency politicization."⁵⁶

Does the famous maxim apply to the Supreme Court? In other words, does presidential politicization of appointments work on the Supreme Court like it does with (say) the Environmental Protection Agency and the Veterans Administration? The evidence presented in this chapter suggests that the answer is *Yes*—at least to a degree.

As shown in earlier chapters, beginning in the 1960s presidents—especially Republican presidents—worked hard and increasingly effectively to select justices who would be faithful agents of an ideological orientation. Accomplishing this was not easy. It took decades of effort to build lower court farm teams and organize skillful White House selection operations. Then, it took years to actually staff the Court with the new products of the selection machine. But, hard work and persistence paid off. Justices selected for policy reliability actually voted more reliably. Justices selected for specific policy views usually adhered to them when deciding cases on the Court.

As a consequence, during the 2000s and 2010s, the Court sorted into two distinct partian blocks with very different ideological commitments. The Judicial Partian Sort hollowed out the Court's ideological middle. The result was a new ideological structure on the Court, a Bi-Modal wing structure. A Conservative Dominant court finally emerged in the Trump administration.

In turn, the new Courts produced new policies. Systematic data is limited, but so far

 $^{^{56}}$ On agency politicization as a key tool of presidential management of the administrative state, see Moe (1985) and Lewis (2008).

as we can measure, judicial policy tracked the changes in the Court's ideological structure. More specifically, more conservative Courts were more likely to produce conservative case dispositions. Even more strikingly, the policies hammered out within the liberal and conservative majority dispositional coalitions reflected the makeup of the coalitions. So, as the Court moved from a Liberal Dominant Court to a Bi-modal Wing Court, liberal dispositions became less frequent, the policies from liberal dispositional coalitions tended to become less liberal, and the policies from conservative dispositional coalitions tended to become more conservative. A Court solidly dominated by the conservative wing promises to produce a lop-sided distribution of very conservative policies, a mirror-image of the Liberal Dominant late Warren Courts.

What implications follow for the future of the Court? We now turn to this question in the next chapter.

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