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# Mavericks, Moderates, or Drifters?

## Supreme Court Voting Alignments, 1838-2009

Christine Kexel Chabot\*  
Benjamin Remy Chabot\*\*

### ABSTRACT

We introduce a new data set recording the vote of every Justice in 18,812 Supreme Court cases decided between 1838 and 1949. When combined with existing data sets, our new data allow us to examine votes in all cases through 2009. We use this data to address previously unanswerable questions about the president's ability to appoint Supreme Court Justices of similar ideology. Surprisingly, history shows that the president's odds of appointing a Justice who sides with appointees of his party have been no better than a coin flip. We find no evidence that divided government at the time of nomination increased the rate of appointees who voted across party lines. These findings cast doubt on the hypothesis that appointments bring the Court in line with majoritarian views. Indeed, many failed appointments occurred when a majority of the Senate and the president were of the same party. These mavericks are not outliers, but rather are part of a larger pattern of appointees whose votes departed or drifted away from executive expectations at remarkable frequency throughout our nation's history.

### I. INTRODUCTION

*"I could carve out of a banana a Judge with more backbone than that!"* – A disappointed Theodore Roosevelt, after hearing of Justice Holmes's vote in *Northern Securities Co. v. United States*<sup>1</sup>

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1. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 55 (5th ed. 2008).

Can the president confidently predict the ideology of a Supreme Court appointee? Voters seem to think so. In 2008, polls found that the majority of voters considered appointments to the Court an “important factor” in determining their votes.<sup>2</sup> More than one in six voters considered it the most important factor, ahead of even war and the economy.<sup>3</sup> The desire to control the nomination process is not a recent phenomenon. More than two-thirds of registered voters listed Supreme Court appointments as an important factor in deciding their vote in the 2000 presidential election, and the Supreme Court has been a plank on presidential platforms since 1896.<sup>4</sup>

Voters’ desire to influence the Court stands in tension with the notion that the Court is a counter-majoritarian institution. This view of the Court has fueled the legal academy’s “obsessive” discourse<sup>5</sup> on the counter-majoritarian difficulty.<sup>6</sup> Still, political scientists and a number of legal scholars have questioned whether the Court is, in fact, counter-majoritarian.<sup>7</sup> Though Justices themselves are not elected, elected officials appoint them. Thus, at the time of appointment, Justices should reflect dominant political views.<sup>8</sup> Most ar-

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2. John Von Kanel, *Exit Poll: Supreme Court Factor*, CNN POLITICS: POLITICAL TICKER (Nov 5, 2008, 2:26 AM), <http://politicalticker.blogs.cnn.com/2008/11/05/exit-polls-the-supreme-court>.

3. *Toplines – Supreme Court Justices – May 19-20, 2008*, RASMUSSEN REP., (May 19-20, 2008) available at [http://www.rasmussenreports.com/public\\_content/politics/questions/pt\\_survey\\_questions/may\\_2008/toplines\\_supreme\\_court\\_justices\\_may\\_19\\_20\\_2008](http://www.rasmussenreports.com/public_content/politics/questions/pt_survey_questions/may_2008/toplines_supreme_court_justices_may_19_20_2008) (survey of 800 likely voters).

4. *Supreme Court Nominations Important to Presidential Race, Poll Says*, ASSOCIATED PRESS ARCHIVE, July 1, 2000, available at [http://infoweb.newsbank.com/iw-search/we/InfoWeb?p\\_product=NewsBank&p\\_theme=aggregated5&p\\_action=doc&p\\_docid=0F89C1B4EF4A620B&p\\_docnum=13&p\\_queryname=9](http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=NewsBank&p_theme=aggregated5&p_action=doc&p_docid=0F89C1B4EF4A620B&p_docnum=13&p_queryname=9). Searchable text of presidential Platforms is available at the American Presidency Project. *Political Party Platforms*, AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/platforms.php> (last visited Sept. 15, 2011).

5. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 161 (2002).

6. Alexander Bickel famously coined the phrase “counter-majoritarian difficulty” in his 1962 book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1986). The difficulty arises when unelected judges override actions of elected officials, and attempts to justify this aspect of judicial review have gripped the legal academy. See Friedman, *supra* note 5, at 155, 161.

7. Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 105 (describing this position).

8. In his seminal 1957 article, majoritarian Robert Dahl asserted that frequent appointments ensure “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.” Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-85 (1957), reprinted in 50 EMORY L.J. 563, 570 (2001); see also Jack M. Balkin, *Framework Originalism and the Living*

guments for a majoritarian Court depend on the president's and Senate's ability to appoint Justices whose decisions reflect their views.<sup>9</sup>

The president's ability to appoint ideologically compatible Justices is a critical issue for both voters and Supreme Court scholars. Is there any reason to think presidents actually possess this power? If they do, one would expect Justices appointed by the same president, and perhaps by presidents of the same party, to vote together at a higher rate. Likewise, if appointments bring the Court in line with majoritarian views, then at least in times of unified government one would expect Justices to align with appointees of the same president or party more often than not.<sup>10</sup>

But the results of presidents' Supreme Court appointments are mixed. Consider the different experiences of George H.W. Bush and his son. Both of George W. Bush's appointees, John Roberts and Samuel Alito, have similar voting records, which are thought to align with executive preferences. The first Bush Administration did not fare as well. While Justice Clarence Thomas votes with Republican appointees at a high rate, David Souter voted with Democratic appointees at just as high a rate.<sup>11</sup> It is no surprise that appointees sometimes will deviate from executive preferences, but how often are such disappointments likely to occur? Was Souter's appointment a product of divided government, or was it part of a larger pattern of Justices who depart from executive preferences no matter who controls the Senate?

Unfortunately, the data available to previous researchers have been too limited to answer this question. Leading Supreme Court scholars have been "especially handicapped" in their ability "to offer information on voting behavior prior to the Vinson Court era."<sup>12</sup> Indeed the "greatest single resource of data on the Court,"<sup>13</sup> Harold J. Spaeth's U.S. Supreme Court Database,

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*Constitution*, 103 NW. U. L. REV. 549, 605 (2009) (noting role of judicial appointments in constitutional change).

9. Pildes, *supra* note 7, at 139-40.

10. That is, on contested issues, Justices should align most closely with others appointed by presidents or parties reflecting like majoritarian views.

11. The "first President Bush's selection of Justice Souter highlight[s] the risk that agents can deviate from the policy preferences of their principals." HAROLD KRENT, *PRESIDENTIAL POWERS* 25 (2005).

12. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* xxiii (4th ed. 2007) [hereinafter *COMPENDIUM*].

13. Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 848 (2002) (quoting Lee Epstein, *Social Science, the Courts, and the Law*, 83 JUDICATURE 224, 225 (2000)). The Database's standardized coding and machine-readable format makes it the go-to source for most studies. *See id.* at 830-31. In addition to the Supreme Court Database, the *Harvard Law Review* publishes information on Justices' decisional patterns for each term. *See, e.g., The Supreme Court, 2009 Term – the Statistics*, 124 HARV. L. REV. 411 (2010). Although the *Harvard Law Review* began publishing annual statistics in 1929, versions published through 1940 did not include detailed voting records. *See* Herbert M. Kritzer, *Empirical Le-*

offers Justice-centered voting records dating back to only 1946.<sup>14</sup> With just twenty-seven Supreme Court appointments since this time, the sample of Justices whose voting records are available to empirical legal scholars is too small to draw statistically confident conclusions about the president's probability of failure.<sup>15</sup> Scholars have begun making inroads by looking as far back as the 1930s.<sup>16</sup> Still, existing studies leave almost twice as many appointments unexamined as examined. They omit several appointments made during earlier periods of divided government.

Our Article addresses this shortcoming. We introduce a new data set containing the Supreme Court voting alignments for every written opinion issued from 1838 through 1949. This data set contains 18,812 cases and represents an approximate three-fold increase in quantitative voting data available to Supreme Court scholars. We build on past historical studies<sup>17</sup> and make possible the first comprehensive study of precise voting coalitions for early Supreme Court cases.<sup>18</sup>

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*gal Studies Before 1940: A Bibliographic Essay*, 6 J. EMPIRICAL LEGAL STUD. 925, 949-50 (2009).

14. Harold J. Spaeth, *Current Dataset: 2011 Release 03*, SUPREME CT. DATABASE, <http://scdb.wustl.edu/data.php> (last visited Sept. 24, 2011) [hereinafter SUPREME COURT DATABASE].

15. Assume that an appointment can be classified as one of two possibilities – success or failure. With only 27 observations, the confidence interval on any estimate of the president's unobservable probability of success will always be between 10.5% and 29.5% wide. Our count excludes the very recent appointment of Justice Kagan and Justice Rehnquist's elevation to Chief Justice.

16. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) [hereinafter *Drift*]; Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

17. Some studies tally authors of different types of opinion. See ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 87-102 (1987); SUPREME COURT OF THE UNITED STATES 1789-1980: AN INDEX TO OPINIONS ARRANGED BY JUSTICE (Linda A. Blanford & Patricia Russell Evans eds., 1983) [hereinafter, SUPREME COURT OF THE UNITED STATES]. Others present general voting trends or data for more limited groups of cases. We do not attempt to include a complete list, but examples of this literature include: DREW NOBLE LANIER, *OF TIME AND JUDICIAL BEHAVIOR* 129-75 (2003) (studies generally liberal or conservative voting trends from 1888-1997); C. Herman Pritchett, *Divisions of Opinion Among Justices of the U. S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890 (1941); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460 (1991).

18. To date, this has been an important but neglected area of study. The National Science Foundation recently awarded Professors Epstein, Martin, Ruger, Segal, Spaeth and Whittington a collaborative research grant to backdate the Supreme Court Database. See, e.g., *Award Search*, NAT'L SCI. FOUND., <http://nsf.gov/awardsearch/> (search awards SES 0921869, SES 0923665, SES 0919149, & SES 0918613) (last

Our new data allow us to address previously unanswerable questions about the president's power to appoint Justices with the Senate's "Advice and Consent."<sup>19</sup> A powerful Senate could either keep a nominee off the Court or drive the president to nominate a more moderate Justice than he would otherwise prefer. Historical accounts of failed nominees make clear that we cover a contentious period in which divided government often led to a nominee's defeat.<sup>20</sup> We know far less, however, about the Justices who made it on the Court. Did the confirmation process make it more difficult for a president to appoint Justices who shared his ideology?

The literature on Supreme Court appointees is rife with competing anecdotes of executive success rates. To be clear, our discussion of satisfaction or disappointment in overall voting records focuses on a single measure, ideology. It does not account for merit or other factors relevant to evaluating a Justice. But assessments of ideology alone provoke considerable differences of opinion. Some scholars highlight presidents disappointed with their appointees' treatment of key executive policies,<sup>21</sup> and luminaries such as John Hart Ely have wondered whether disappointment should be considered the "rule rather [than] the exception."<sup>22</sup> Others claim that these accounts are "more myth than reality"<sup>23</sup> or find it difficult to set a clear benchmark for measuring

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visited Sept. 19, 2011). The Supreme Court Database contains a link to the collection status for this project. See *Collection Status*, SUPREME CT. DATABASE, <http://scdb.wustl.edu/about.php?s=2> (last visited Sept. 19, 2011). This comprehensive historical database will provide a "treasure trove" of data for all full opinion cases going back to 2 U.S. Reports and enable further work in this area.

19. U.S. CONST. art. II, § 2, cl. 2.

20. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 383 (2010); Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 412 (2006). Our time period is also dynamic, as "one-fourth of the total" nominations from 1811 to 1894 "went down to defeat" before the long period of acquiescence in the twentieth century. MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 9 (2004).

21. Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1387 (1998); see Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283, 1294, 1297, 1298-99 (1986).

22. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 47 (1980); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 111-12 (1999) (gathering this and similar statements by Charles Warren and Alexander Bickel).

23. Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 324 (2001); see LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 50 (1985); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2372 (2006) (citing LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 130-32 (2005)); David A. Strauss, *Memo to the President (and His Opponents): Ideology Still*

executive disappointment.<sup>24</sup> Still others blame disappointment on the constraining effect of an opposing-party Senate<sup>25</sup> or warn against omitting the Senate when crafting proxies for an appointee's ideology.<sup>26</sup>

Our extended time period allows us to compute clear benchmarks and conduct the first quantitative examination of presidential success rates over a 170-year period.<sup>27</sup> We proceed as follows: In Part II, we describe our data collection process and methodology for measuring voting alignments. We also show that our measures of agreement based on count data reflect the information contained in another leading measure of judicial ideology, Martin-Quinn scores.

In Part III, we present our general results. Aggregate voting records show that Justices generally agree with appointees of the same party about as often as they agree with appointees of the other party. Most surprising, however, are the voting records of individual Justices. They show that presidents fare far better with certain appointees than others, and that they often have appointed ideologically incompatible Justices. Just under half of the Justices we studied sided with appointees of *the other party* most of the time.

We find no evidence that this outcome can be attributed solely to divided government, and most of our results remain stable over time. In very re-

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*Counts*, 102 NW. U. L. REV. COLLOQUY 49, 49-50 (2007), <http://www.law.northwest.edu/lawreview/Colloquy/2007/22/>.

24. PERETTI, *supra* note 22 at 114-15, 130 (finding disappointment "perhaps up to 25 percent of the time" but noting methodological difficulties of distinguishing among presidential surprises, mistakes, and failures).

25. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068-69 (2001); see also CHRISTINE L. NEMACHECK, STRATEGIC SELECTION 140 (2007); Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 157-58 (2009).

26. Lee Espstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 95-96 (2002).

27. We build on earlier studies that measure Justices' ideology based on liberal or conservative case outcomes. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 312-26 (2002); Jeffrey A. Segal et al., *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 567 tbl.4 (2000). Although we do not generally address studies of federal courts of appeals, the same measures have been applied to those judges as well. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998) (measuring deference to conservative or liberal agency decisions); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 314-15 (2004) (measuring ideological voting in a wide array of cases). For a recent study measuring ideology with a method agnostic to case outcomes in federal courts of appeals, see Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1151 (2010).

cent years, though, the Court has become more polarized as the magnitude of Justices' agreement with one side or the other has increased. Thus, while the stakes in a given appointment are higher than ever, history gives no assurance that a Justice will side with the party of his or her appointing president.

In Part IV, we apply these individual voting records to three lines of historical inquiry. First, we assess prominent examples of disappointment, including Justice Salmon Chase in 1870 and Justice Oliver Wendell Holmes in 1904. As Felix Frankfurter recounted, these Justices let down Presidents Abraham Lincoln and Theodore Roosevelt on key executive policies:

Chief Justice Chase declared unconstitutional the Legal Tender Act of the President who appointed him and of the Administration of which he was a member. So also Mr. Justice Holmes decided against the Government in the *Northern Securities* case, Roosevelt's pet litigation, although the latter thought it his duty to put on the Supreme Bench only men who would sustain "My Policies."<sup>28</sup>

Historical accounts differ as to whether Holmes let down Roosevelt in just the *Northern Securities* case or with his voting record as a whole.<sup>29</sup> We also do not know how his complete voting record compares to that of Justice William Day, who also was thought to have disappointed Roosevelt. Overall voting records allow us to identify whether these and other executive disappointments hinged on a few key cases or on overall voting records.

Our second historical inquiry is a comprehensive examination of individual voting records for Justices nominated during times of divided government in the nineteenth century. Again, our data offer the first opportunity to assess Justices' overall voting records during this important but previously inaccessible time period. Like our general findings, these records fail to show that divided government led to Justices with significantly more moderate voting records.

Our last historical inquiry is a preliminary measure of whether past voting patterns are consistent with ideological drift. This phenomenon, in which Justices' ideologies change over time, has been documented in contemporary data.<sup>30</sup> Our records show that Justices' historical voting patterns also are consistent with ideological drift.

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28. Felix Frankfurter, Book Review, 44 HARV. L. REV. 661, 662-63 (1931) (footnotes omitted) (citing *N. Securities Co. v. United States*, 193 U.S. 197 (1904); *Hepburn v. Griswold*, 75 U.S. 603 (1870)).

29. ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 135 (Samuel Krislov ed., 1971) (explaining that while "Holmes apparently failed Roosevelt but once on a matter of major concern," Roosevelt still claimed him a "bitter disappointment . . . because of his general attitude." (internal quotation marks omitted)); see also ABRAHAM, *supra* note 1, at 128.

30. See *Drift*, *supra* note 16, at 1485-87.



In Part V, we conclude that a large percentage of Justices have disappointed presidents with their overall voting records. This outcome has continued to occur at a high and stable frequency since 1838. We find no correlation between an opposing-party Senate and the rate of appointees who vote across party lines. Indeed, many prominent historical examples of failed appointments occurred when the Senate and president were of the same party. These mavericks are not outliers. Instead, they are part of a larger pattern of appointees whose votes depart or drift away from executive expectations more often than voters may think.

## II. METHODOLOGY

We compiled a comprehensive record of votes for every written opinion the Supreme Court issued from 1838 to 1949. There are 18,812 case citations for this time period. We relied on the previous work of the Supreme Court Historical Society and eighteen University of Michigan students to help gather and code voting records.

We tailored our data collection strategy to meet two primary goals. The first goal was to facilitate comparison with leading studies of contemporary voting alignments. The second goal was to ensure accuracy by eliminating as much discretion as possible in our students' coding.<sup>31</sup> As a further guarantee of accuracy, we used a double-entry system that required two students to independently review and code each entry.

With these goals in mind, we assembled our database in four main steps:

1. To obtain a complete list of written opinions that the Court issued between 1838 and 1949, we consulted the Case Citation Finder on the United States Supreme Court's website.<sup>32</sup> It sets forth the official citations, "in the form recommended by the Reporter of Decisions, for every signed, per curiam, or in-chambers opinion published (or soon to be published) in the United States Reports."<sup>33</sup> This listing yielded 18,812 case citations for our review.

2. Next, we identified the subset of non-unanimous cases. To do so, we used an index created by the Supreme Court Historical Society to identify every case in which any Justice authored a non-

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31. Thus we avoid more nuanced coding decisions that are part of the broader information contained in the Supreme Court Database. See Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 480, 517 (2009) (critiquing "issue" coding in the Supreme Court Database).

32. See *Case Citation Finder*, SUPREME CT. U.S., <http://www.supremecourt.gov/opinions/casefinder.aspx> (last visited Oct. 12, 2011).

33. *Id.*

majority opinion.<sup>34</sup> The index provides a comprehensive list of opinions authored by each Justice.<sup>35</sup> It further classifies the opinions into seven different categories: opinions of the Court, opinions announcing judgment, concurrences, dissents, separate opinions, statements, and opinions authored as circuit justices.<sup>36</sup>

3. The index identified 2,117 non-unanimous cases that the Supreme Court's Case Citation Finder listed for our time period. For each of these non-unanimous cases, we turned to LEXIS's on-line database<sup>37</sup> to identify specific Justices joining each concurrence, dissent, statement, or separate opinion. To ensure accuracy we hired eighteen student research assistants to double enter the voting coalitions. We assigned each case to two students via a random assignment algorithm. The students did not know which other student received the same case.

We instructed the students to read each case in LEXIS and code the votes in machine-readable form. We wrote code in MATLAB<sup>38</sup> to compare coding across students and flag cases in which the coding disagreed. Cases with disagreement were forwarded to a third student. If this student's coding agreed with one of the original two, the coding was accepted. If the votes remained unclear, one of the authors of this Article read the case and coded votes accordingly.

4. For all opinions announcing judgment or majority opinions (including those in unanimous cases), we coded voting coalitions by listing all Justices currently on the Court who had not joined or authored another opinion.

We drew information about the president and the Senate at the time of nomination from the U.S. Supreme Court Justices Database.<sup>39</sup> This database

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34. See SUPREME COURT OF THE UNITED STATES, *supra* note 17.

35. *Id.* at xvii-xxiii.

36. *Id.* at xviii-xxii. A separate opinion "express[es] the view of a single Justice" and includes opinions "concurring in part and dissenting in part." *Id.* at xx. In a statement, a Justice publishes his views by issuing a short statement "in the third person," rather than a traditional concurring or dissenting opinion written in the first person. *Id.* at xiii-xiv.

37. We used the following LexisNexis database: United States Supreme Court Cases, Lawyers' Edition.

38. MATLAB is a statistical software and programming language.

39. Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, U.S. SUPREME CT. JUSTICES DATABASE (Jan. 26, 2010), *available at* <http://ep>

documents (1) the name of the nominating president, (2) the political party affiliation of the nominating president, and (3) the dominant political party of the U.S. Senate at the time of nomination.<sup>40</sup> For all Justices who were nominated to Chief Justice at the time they were sitting as an Associate Justice, we use data reflecting the Justice's initial appointment to the Court.<sup>41</sup>

Readers interested in a detailed description of our data collection process should consult the Appendix.

*A. Our Data Set Compares Directly to a Well-Defined Subset of the U.S. Supreme Court Database*

The 18,812 decisions we code represent a substantial body of the Court's work – and also one most likely to reveal philosophical divides between Justices. Our data compare directly to a clearly-defined subset of cases in the U.S. Supreme Court Database. Like our data set, the Supreme Court Database reports voting records arranged by case citation.<sup>42</sup> The Supreme Court Database covers all “full opinion cases” as well as all per curiam opinions for cases in which the Court held an oral argument or provided a summary or opinion explaining its reasoning.<sup>43</sup>

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[stein.usc.edu/research/justicesdata.html](http://stein.usc.edu/research/justicesdata.html) [hereinafter THE U.S. SUPREME COURT JUSTICES DATABASE].

40. Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *Codebook: U.S. Supreme Ct. Justices Database*, U.S. SUPREME CT. JUSTICES DATABASE 95-96 (2010), available at <http://epstein.usc.edu/research/justicesdata.pdf> (explaining variables 207, 208, and 212). Some contemporary studies measure the Senate's influence by looking to the “‘filibuster pivot’ (or the sixtieth most liberal or conservative senator)” rather than the median senator. See, e.g., Timothy R. Johnson & Jason Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS AND PRESIDENCY 31 (2005). This is not an appropriate measure for most of our time period. First, the Senate did not have a cloture rule allowing a super majority to end debate until 1917. See *Filibuster and Cloture*, U.S. SENATE, [www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) (last visited Sept. 20, 2011). Moreover, the filibuster was never used to block a Supreme Court appointment until Abe Fortas was nominated for Chief Justice in 1968. EPSTEIN & SEGAL, *supra* note 23, at 24.

41. We provide separate data for each nomination of Charles Evans Hughes, who served as an Associate Justice but then left to run for president in 1916. 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 448-49 (1922). Hughes was later appointed Chief Justice in 1930. *Supreme Court Nominations, Present-1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Sept. 20, 2011).

42. See SUPREME COURT DATABASE, *supra* note 14.

43. HAROLD SPAETH ET AL., SUPREME COURT DATABASE CODEBOOK: RELEASE 01, at 59 (2011), available at <http://scdb.wustl.edu/documentation.php?s=2> [hereinafter CODEBOOK] (explaining variable 43 – decisionType”). Our historical dataset may cover a slightly broader range of per curiam decisions. See *infra* Appendix. Because

These similarities allow us to link our historical measure of the president's appointment power to contemporary voting records in the U.S. Supreme Court database.<sup>44</sup>

*B. Our Measure of Agreement Based on Count Data Captures Much of the Information Reflected in Martin-Quinn Scores*

Our measure of voting behavior is straightforward and time-honored.<sup>45</sup> We count (a) the total number of times Justices agreed and (b) the total number of opportunities these Justices had to agree. Here, Justices agree when they both vote for the majority or minority on a judgment. Thus, we employ a simple formula to calculate percentage of agreements: percentage of agreement = (a) number of times Justices agreed / (b) number of opportunities to agree. This percentage allows us to see who votes together and at what rate. For purposes of our inquiry, we also can compare the percentage of times a Justice agrees with appointees of the same president or party to percentages of agreement with appointees of a different president or party.

To measure percentages of agreement between the Justices, we consider each opportunity two Justices had to agree in a particular case. In a case decided by nine Justices, there are thirty-six total opportunities to agree. To illustrate this point, Figure 1 below shows how votes are counted for the landmark First Amendment case, *Abrams v. United States*.<sup>46</sup> The decision split 7-2 with Justices Clarke, White, Pitney, Day, Van Devanter, McReynolds, and McKenna voting to affirm and Justices Holmes and Brandeis dissenting.<sup>47</sup>

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any additional decisions of this sort are almost certain to be unanimous, they will not affect our study of non-unanimous decisions.

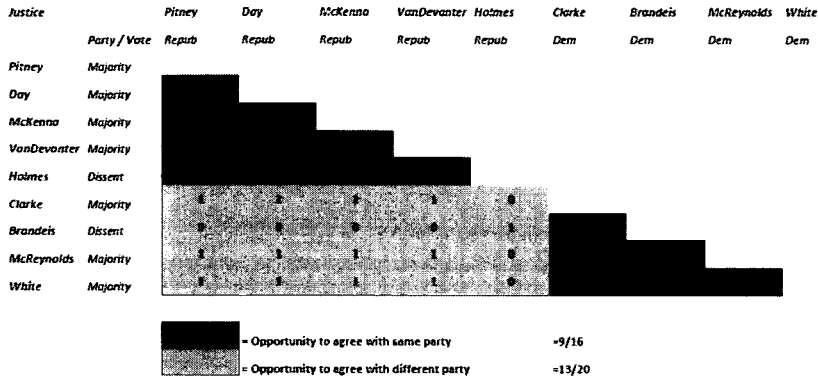
44. Although contemporary records were very recently expanded to include decisions through 1946, this paper relies on an earlier version of the U.S. Supreme Court Database containing decisions in cases through 1953.

45. See C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890, 894 (1941); see also GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES* 97 (1965); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 163-64 (2009) (discussing Pritchett study); Stefanie A. Lindquist et al., *The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting with Presidential Blocs*, 53 POL. RES. Q. 795, 797 (2000) ("bloc-formation analysis has enjoyed a long and noble history in the study of judicial politics").

46. 250 U.S. 616 (1919).

47. *Id.* Although the issue is not present in this case, we count Justices joining a majority, plurality, or concurring opinion as part of the majority coalition and Justices joining a dissent as part of the minority coalition.

**Figure 1:**  
**Agreement Matrix**  
**Abrams v. United States**



Here Justice Clarke agreed with his own party two out of three opportunities (67%) and with the other party four out of five opportunities (80%). By counting agreements between different pairs of Justices, we can calculate the percentage of times they vote with different groups of appointees in all cases.

The percentage of agreement for the entire group of non-unanimous cases shows whether appointees of certain presidents or parties are more like-minded than others. Of course, this percentage alone does not demonstrate presidential success, as a president could be disappointed in the similar voting records of all his appointees. This concern vanishes when voting records are viewed in context, as we do in Parts III and IV, below. The literature rarely asserts that a president has failed to appoint ideologically compatible Justices in every case. And failure never extends to Justices of an entire party.<sup>48</sup>

Our voting analysis captures much of the information reflected in a leading measure of judicial ideology, Martin-Quinn scores.<sup>49</sup> Andrew Martin and Kevin Quinn use observable agreement data – votes for a majority or minority on the judgment<sup>50</sup> – to fit a parametric model.<sup>51</sup> The model maps Justices' voting behavior to a set of numbers, or "ideal points," that can be arranged on the real line from closest to farthest apart.<sup>52</sup> Justices who vote together fre-

48. Even Hoover's Republican appointees, whom Terri Peretti claims failed Hoover as a group, still sat with some of Harding's Republican appointees, whom Peretti labels a success. PERETTI, *supra* note 22, at 114 n.261.

49. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002); see generally Fischman & Law, *supra* note 45, at 185; Carolyn Shapiro, *The Context of Ideology: Law Politics and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 112 (2010).

50. See Martin & Quinn, *supra* note 49, at 137 n.3.

51. See *id.* at 147.

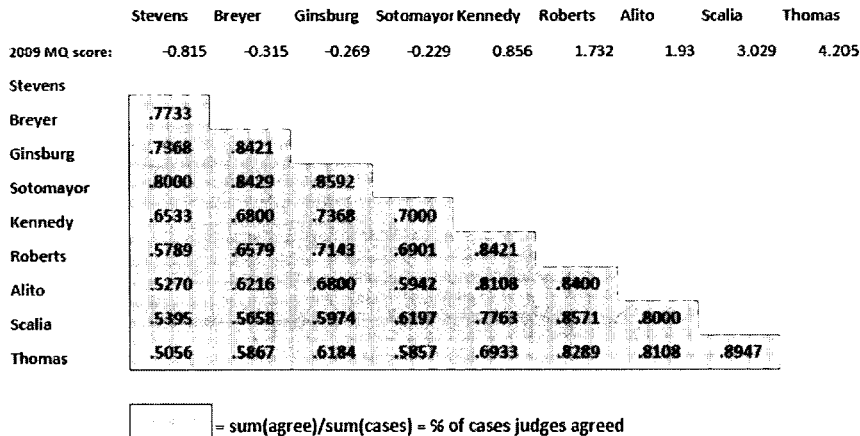
52. See *id.* at 147-51.

quently (such as Scalia and Thomas) are close together on the line. Justices who seldom vote together (such as Breyer and Thomas) are farther apart. As Ward Farnsworth explains:

The [Martin-Quinn] model studies all the cases it is fed – all the patterns of voting, all the coalitions in the cases as just described – and then assigns a number to each Justice. You can plug those numbers into a formula and ask the formula to generate the votes you would expect the numbers to produce.<sup>53</sup>

Figure 2 below compares our measures of agreement and the Martin-Quinn distance between Justices in 2009:

**Figure 2:**  
**2009 MQ-scores and Rates of Agreement**



Justices with lower rates of agreement have Martin-Quinn scores that are farther apart while those Justices with higher rates of agreement have Martin-Quinn scores that are closer together.

This similarity is even more apparent when we aggregate our count data over votes between 1937 and 2009, all years Martin-Quinn scores are available. The Figure below plots average percentages of agreement across ranked pairs of Justices. The pairs are ordered from closest to farthest Martin-Quinn distance, and the average is computed from the time series. For example, the first pair of Justices has the closest Martin-Quinn scores for a given year. In 2009, this pair was Ginsburg and Sotomayor, who agreed with each other 85.92% of the time. In 2008, Souter and Ginsburg were the closest pair and

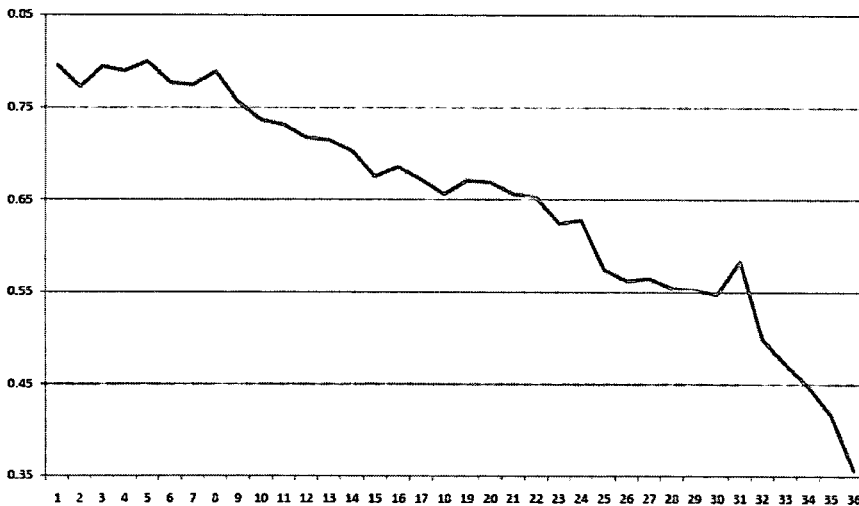
53. Ward Farnsworth, *The Uses and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, With Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891, 1893 (2007).

agreed with each other 81% of the time. In 2007, the closest pair was Souter and Ginsburg, who agreed 78% of the time.

We continue computing the agreement rate for the closest pair for each year until we reach 1937 (Brandeis and Hughes, who agreed 85% of the time). The result is a time series of agreement rates for the pair of Justices closest together in Martin-Quinn space. We then compute the average of the time series and find that the closest pair agrees on average 79.6% of the time. We repeat this computation for the second closest pair and so on until we reach the thirty-sixth closest pair.

The average agreement rates for pairs of Justices ranked by Martin-Quinn distance are graphed below in Figure 3. The Martin-Quinn model predicts that Justices who lie close to each other in Martin-Quinn ideal space should agree more. In other words, the graph of ranked pairs should decline monotonically, or continue to move downward, over pair rankings.

**Figure 3:**  
*Average Agreement Rate of Justice Pairs Ranked by MQ-Distance*  
*Closest (Pair 1) to Farthest (Pair 36)*



As the Figure shows, the highest aggregate percentage of agreement aligns with the two Justices closest together in Martin-Quinn space, and these percentages of agreement fall as Justices move farther away in Martin-Quinn space. Not surprisingly, the Martin-Quinn scores do an excellent job of predicting relative agreement rates. Our ranking of Justices based on agreement rate reflects the information contained in Martin-Quinn distance.

A key advantage of both our method and Martin-Quinn distance is that each method records Justices' patterns of agreement without attempting to

pass judgment on the ideological direction of their votes.<sup>54</sup> Voting records also provide more up-to-date information about Justices' ideologies (or jurisprudential views) than ideological proxies fixed at the time of confirmation.<sup>55</sup> Thus, our study improves on earlier work which uses ideologically-coded voting records or fixed proxies to evaluate presidential success in contemporary appointments.<sup>56</sup> We learn a great deal by looking at Justices' voting coalitions.

Like Martin-Quinn scores, our analysis focuses on non-unanimous cases.<sup>57</sup> These cases provide the best measure of Justices' relative positions on the Court.<sup>58</sup> To be sure, in our newly-coded historical time period, Justices may have voted unanimously due to consensual norms rather than their views of a case.<sup>59</sup> Even today, Justices' agreement may reflect strategic voting rather than their own attitudes.<sup>60</sup> Regardless of the reasons for the outcome,

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54. An objective measure of coding conservative or liberal outcomes may be an impossible feat. See Fischman & Law, *supra* note 45, at 162; William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 778-79 (2009); Anna Harvey, What Makes a Judgment "Liberal"? Coding Bias in the United States Supreme Court Judicial Database (June 15, 2008) (unpublished manuscript) (available at [www.as.nyu.edu/docs/IO/2787/harveymeasurementerror.pdf](http://www.as.nyu.edu/docs/IO/2787/harveymeasurementerror.pdf)).

55. Two leading ideological proxies of this sort are Segal-Cover scores, which are based on news media's accounts of a Justice at the time of confirmation, and appointing president or party of appointing president. See Fischman & Law, *supra* note 45, at 170-73. Here, of course, we do not use the president as a proxy but look to voting records to determine similarity between particular presidents' appointees.

56. Thus, we differ from past studies of the appointments power which code Justices' behavior by coding their votes as liberal or conservative. See DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 107 (1976); Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801 (1998). Other studies rely on Segal-Cover scores rather than voting records. Timothy R. Johnson & Jason Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS AND PRESIDENCY 31, 34 (2005); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1078 (1999).

57. See Martin & Quinn, *supra* note 49, at 137 n.3.

58. Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 850 (2010).

59. See Fischman & Law, *supra* note 45, at 165.

60. See generally Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1733-34, 1743 (2003) (discussing the attitudinal model and its alternatives); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 3-4 (2009) (measuring whether case outcomes are consistent with a strategic, collegial, or attitudinal model of decision-making).



however, votes in unanimous cases contain no additional information about the relative differences between Justices.<sup>61</sup>

Moreover, looking at all decisions would produce a large decrease in overall agreement rates during the last part of our time period. The overall rate of dissent started to rise in 1925 and skyrocketed to approximately 50% by 1945.<sup>62</sup> The rise in dissents has been attributed to changes in the Court's workload or practices of joining opinions,<sup>63</sup> and our data do not suggest a different cause.

### III. WHAT DO HISTORICAL VOTING ALIGNMENTS SHOW?

Our data record every time that two Justices sitting together agreed or disagreed in a vote on the judgment of a non-unanimous case. We begin with a comprehensive summary of majority and minority voting coalitions from 1838 to 2009. We then turn to individual voting records. They allow us to assess how often presidents appoint Justices who fail to vote along party lines. They also reveal the magnitude of Justices' ideological preferences for or against appointees of the same president or party.

Our most surprising finding is the high percentage of Justices who favored appointees of the opposite party. Throughout our time period, this outcome occurred just under half of the time. Control of a majority of the Senate did not improve materially the odds of appointing Justices that sided with fellow party appointees.

Patterns we identify in individual voting records remain stable, with the exception of the twelve most recent appointments in our study.<sup>64</sup> The magnitude of these Justices' ideological preferences has increased over historical levels and reflects a more polarized Court. Thus, history shows that presidents have been disappointed just under half the time, but now the stakes are much higher. A disappointing Justice likely will vote against executive interests in a greater percentage of cases.

In the aggregate, appointees of the same president agree with one another at a small but materially higher rate than they agree with appointees of a different president. Justices' aggregate rates of agreement with appointees of the same party, however, are roughly the same as rates of agreement with appointees of another party. While most of our findings are stable over time, we find one significant change since the 1950s: Justices nominated to the

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61. See Ho & Quinn, *supra* note 58, at 850.

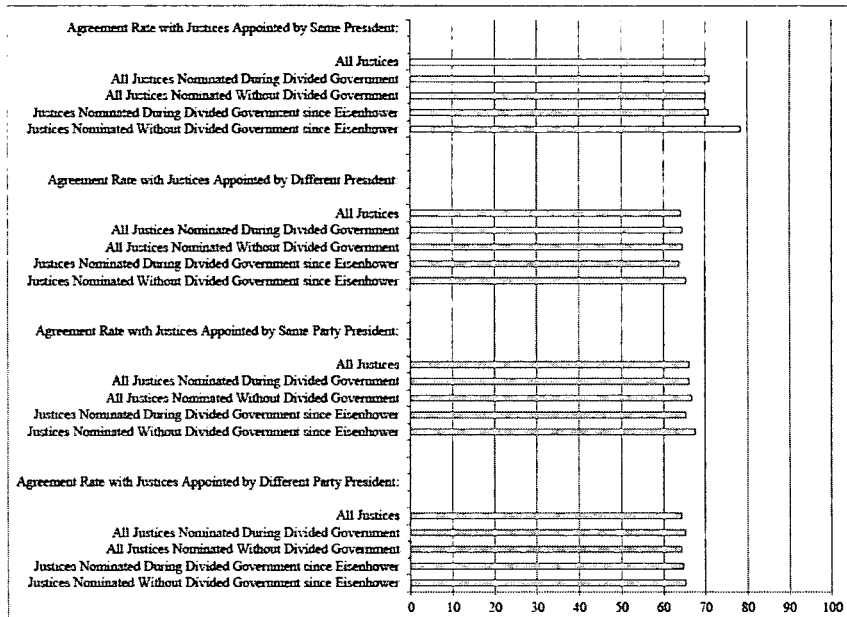
62. Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 363 & fig.1 (2001); Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471, 476, 478-80 & figs.1-3 (1977); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 162, 166 (1999).

63. See sources cited *supra* note 62.

64. Our time period does not include Justice Kagan.

same-party Senate as the president vote with their co-appointees at a substantially increased rate.

**Figure 4:**  
**Aggregate Rates of Agreement**



Justices agreed with fellow appointees of the same president 70% of the time and appointees of another president 64% of the time. The spread is much closer on a party level. Justices appointed by presidents of the same party voted together 66% of the time while voting with appointees of the other party 64% of the time.

One might expect the numbers to tell a different story for Justices nominated during times of divided government. If presidents are forced to nominate more moderate Justices when they face an opposing-party Senate, these Justices might tend to vote with appointees of other presidents or parties more frequently. Our aggregate voting statistics do not show evidence of moderation. In fact, the numbers barely change.

Justices nominated to an opposing-party Senate sided with fellow appointees of their president 71% of the time and voted with appointees of the other presidents 65% of the time. The difference between the rates of agreement along party lines declined from 2% to 1%: Justices appointed during periods of divided government voted with fellow party appointees 66% of the time and agreed with appointees of other parties 65% of the time. The aggregate voting behavior of Justices nominated during periods of divided government is statistically indistinguishable from the behavior of Justices nominated when one party controlled the Senate and White House.

Most of these results do not appear to change over time. From the Eisenhower Administration on, Justices sided with appointees of the same and different parties at rates similar to their historical counterparts. Agreements with appointees of the same president change, however, when the same party as the president controls the Senate. In this circumstance, the rate that appointees of the same president vote together has increased significantly since the 1950s.<sup>65</sup>

Aggregate records tell us only so much. The recent increase in presidential success for Justices confirmed by a same-party Senate may reflect a number of different factors. It may be that presidents have a higher rate of success in appointing Justices who favor the president's other appointees. Or the rate of successful appointments may remain the same while Justices that do side with their co-appointees do so in a much higher percentage of cases. Also, aggregate records are weighted in favor of Justices who spend a longer time on the bench. This factor is largely beyond the president's control and varies across time periods.

Likewise, the lack of strong party or presidential effect in our aggregate voting records does not necessarily imply that presidents or parties are irrelevant. The aggregate numbers could reflect votes of many Justices who are equally likely to agree regardless of party affiliation. Or they may reflect the average across individual Justices with extreme voting records. Consider two explanations for voting patterns in which Justices agree with appointees of the same party 65% of the time. First, one might observe this rate of agreement because each Justice votes with his party approximately 65% of the time. Alternatively, one might observe this rate because two out of every three Justices vote with their party 80% of the time, while one out of three "switches" and votes with his party only 35% of the time. The latter explanation should be much more worrisome to a president because there is a one-third probability of making a huge mistake.

We turn to individual voting records to identify which explanation best fits our data. The answer turns on two variables key to assessing presidential success: (1) How often does the president appoint a Justice who switches

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65. The president's greater success generally coincides with executive deployment of more extensive bureaucratic machinery to select nominees. See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES* 12-13 (1999). This phenomenon started during the administration of Franklin Roosevelt. See *id.* Christine Nemacheck builds on this analysis and argues that presidents have the ability to nominate candidates with more extensive track records when they face a same party Senate. See NEMACHECK, *supra* note 25, at 131-32. This is also consistent with Ryan Owens' and Justin Wedeking's recent working paper finding that, in recent times, unconstrained presidents are more successful at nominating Justices with ideological preferences that are less likely to drift away from executive preference. Ryan J. Owens & Justin Wedeking, *Picking an Unsettled Brain: The Role of Cognitive Complexity in Ideological Drift on the United States Supreme Court* 21 (unpublished manuscript) (available at <http://ssrn.com/abstract=1738309>).

sides? That is, how frequently do presidents appoint Justices like Souter? (2) What is the magnitude of each Justice's preference for one side or the other? Has the president appointed a Justice like Thomas, who strongly aligns with appointees of the same party, or like Kennedy, who aligns with the same party only moderately?

Table 1 compares the percentages of times each Justice voted with appointees of the same president and with appointees of a different president. The percentages in Table 1 show that a different picture emerges when one considers the voting patterns of individual Justices. Presidents fare better with some appointees than others.

**Table 1:**  
**Rate of Agreement with Appointees**  
**of the Same and Different Presidents**

	Same President	Different President	Difference		Same President	Different President	Difference
JMcLean	79.58	79.18	0.4	WHTaft	84.51	68.77	14.75
HBaldwin	74.53	71.17	3.36	GSutherland	85.79	66.11	19.69
JMWayne	84.57	80.16	4.41	PButler	87.99	62	25.99
RBTaney	82.08	78.97	3.11	ETSanford	84.38	66.9	17.49
PPBarbour	78.72	81.08	-2.36	CEHughes2	76.68	60.63	16.05
JCatron	72.34	71.47	0.87	OJRoberts	72.79	62.77	10.02
JMcKinley	71.93	87.09	-15.16	BNCardozo	65.98	63.69	2.29
PVDaniel	71.93	57.89	14.04	HLBlack	68.23	63.07	5.16
LWoodbury	68	72.37	-4.37	SFReed	65.35	71.4	-6.05
RCGrier	68	75.66	-7.66	FFrankfurter	57.52	67.66	-10.15
NHWayne	69.07	74.19	-5.12	WODouglas	65.24	54.44	10.8
SFMiller	66.99	65.99	1	FMurphy	69.95	53.65	16.3
DDavis	68.94	69.38	-0.44	JFByrnes	69.23	73.04	-3.81
SJField	66.05	63.63	2.42	RHJackson	66.53	71.95	-5.42
SPChase	69.58	65.06	4.52	WBRutledge	73.34	56.3	17.04
WStrong	70.31	70.65	-0.34	HHBurton	72.41	60.2	12.22
JPBradley	69.09	64.89	4.20	FMVinson	90.63	60.1	30.53
WHunt	75.15	71.61	3.54	TCClark	71.65	66.4	5.25
MRWaite	75.43	66.67	8.76	SMinton	72.05	60.39	11.66
JHarlan1	69.79	57.22	12.57	EWarren	67.26	73.55	-6.29
WBWoods	69.79	76.46	-6.67	JHarlan2	61	56.43	4.57
HGray	84.48	69.79	14.69	WJBrennan	68.65	64.13	4.52
SBatchford	84.48	77.19	7.29	CEWhittaker	65.38	58.8	6.58
IGLamar	90.54	71.86	18.68	PSewart	68.31	67.32	0.99
MWFeller	70.79	68.25	2.54	BRWhite	73.03	68.52	4.51
DJBrewer	65.44	61.95	3.49	AJGoldberg	73.03	72.35	0.68
HBBrown	61.57	59.77	1.80	AFortas	89.87	72.04	17.83
GSiras	63.89	69.26	-5.37	TMarshall	89.87	60	29.87
HELackson	62.86	72.22	-9.37	WEBurger	81.1	60.62	20.48
EDEWhite	64.84	65.99	-1.15	HABlackmun	69.35	64.21	5.14
RVPeckham	70.96	66	4.96	LPowell	77.64	63.9	13.74
OWHolmes	67.55	63.15	4.39	WHRehnquist	72.63	61.07	11.56
WRDay	67.11	68.77	-1.67	SDOConnor	77.08	65.65	11.43
WHMoody	70.43	68.09	2.35	AScalia	76.44	61.28	15.16
HHLurton	75	75.46	-0.46	AMKennedy	78.66	66.38	12.28
CEHughes1	70.18	77.14	-6.96	DHSouter	52.39	68.43	-16.04
WVanDevanter	74.42	72.97	1.46	CThomas	52.39	64.64	-12.25
JRLamar	71.04	66.78	4.26	RBGinsburg	80.83	63.24	17.59
MPitney	65.12	62.85	2.28	SGBreyer	80.83	62.58	18.25
JCMcReynolds	39.03	64.41	-25.38	JGRoberts	87.27	66.63	20.64
LDBrandeis	45.12	61.76	-16.64	SAAIto	87.27	63.05	24.22
JHClarke	52.09	51.67	0.43				

= Nominated During Divided Government

= Voted With Appointees of Other Presidents a Majority of the Time

Of the eighty-three Justices who sat with another appointee of the same president, sixty, or just under three-quarters, voted with their co-appointees more frequently. Only twenty-three Justices (28%) sided with appointees of other presidents a greater percentage of the time.<sup>66</sup> These numbers line up well with past studies speculating that approximately 20-25% of Justices will disappoint their appointing presidents.<sup>67</sup> The magnitude of agreement also is skewed toward fellow appointees. Just over one-third of the Justices (twenty-eight out of eighty-three) voted with their fellow appointees at least 10% more often than they voted with other appointees. Only six out of eighty-three Justices voted with other presidents' appointees at least 10% more than they voted with fellow appointees.

Appointees of the same party show significantly less cohesive voting records. Table 2, below, compares the percentage of times a Justice voted with appointees of the same party versus appointees of a different party.<sup>68</sup>

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66. Interestingly, we have the opportunity to measure agreements between Chief Justice Taft and two of the Justices he appointed when he was president: Van Devanter and Pitney. See *Supreme Court Nominations, Present-1789*, *supra* note 41 (listing all Justices and the presidents who appointed them). Both voted with Taft at a high rate: Out of all the non-unanimous cases in which Taft and Van Devanter sat together, they agreed 95% of the time. Out of all the non-unanimous cases in which Taft and Pitney sat together, they agreed 82% of the time. Taft voted with Van Devanter a greater percentage of time than he voted with any other Justice.

67. Studies that attempt comprehensive analyses of presidential successes and failures include: PERETTI, *supra* note 22, at 118 (indicating that presidents fail "up to 25 percent" of the time); ROHDE & SPAETH, *supra* note 56, at 107-08 ("[L]ess than one-fourth of the nominees of both Democratic and Republican presidents can be said to have generally voted contrary to the appointing president's views," as measured by liberal, moderate, or conservative voting patterns from 1909 to 1971.); SCIGLIANO, *supra* note 29, at 147 ("[O]ne justice in four . . . did not conform to the expectations of his appointer.").

68. As these results are not weighted by case, some high percentages reflect voting records for a small number of opportunities to vote with Justices appointed by an opposing party president. See our discussion of Justice Woods *infra* Part III.B.1. We exclude two Justices who sat only with Justices of the same party (Vinson and Woodbury) and Benjamin Curtis, who did not sit with any other Justices appointed by a president of the same party.

**Table 2:**  
**Rate of Agreement with**  
**Appointees of Same and Different Party**

	Same Party	Different Party	Difference		Same Party	Different Party	Difference
JMcLean	77.71	89.57	-11.86	JHClarke	49.34	53.05	-3.72
HBaldwin	78.47	61.64	16.83	WHTaft	80.16	58.72	21.44
JAMHayne	81.14	84.55	-3.41	GSutherland	73.60	62.26	11.34
RBTaney	80.32	79.33	0.99	PButler	70.95	58.75	12.20
PPBarbour	77.19	85.19	-7.99	ETSanford	77.56	61.06	16.50
JCatron	72.10	69.72	2.38	HStone	64.38	67.22	-2.84
JMcKinley	84.55	94.34	-9.79	CEHughes2	70.34	50.62	19.72
PVDaniel	58.32	65.57	-7.25	OJRoberts	73.15	57.73	15.41
SNelson	75.90	77.04	-1.14	BNCardozo	63.01	67.06	-4.05
RCGrier	76.51	72.73	3.78	HLBlack	65.88	63.07	2.80
JACampbell	69.53	72.73	-3.20	SFrederick	67.38	69.24	-1.86
NCIfford	71.40	59.48	11.91	FFrankfurter	59.38	69.01	-9.63
NHSwayne	72.75	70.29	2.46	WODouglas	61.21	53.02	8.19
SFMiller	67.30	61.55	5.75	FMurphy	68.37	56.19	12.18
DDavis	68.47	71.02	-2.54	JFBrynes	69.23	73.04	-3.81
SJField	63.44	67.28	-3.85	RHJackson	67.40	70.60	-3.20
SPChase	67.89	66.42	1.47	WBRutledge	71.99	58.06	13.92
WStrang	71.36	66.03	5.33	HHBurton	61.20	65.07	-3.87
JPBradley	66.76	59.42	7.34	TCClarke	63.18	70.32	-7.14
WHunt	73.84	65.93	7.91	SMinton	63.13	65.02	-1.89
MRWaite	70.06	58.28	11.79	EWarren	67.26	73.55	-6.29
JHarlan1	58.30	54.98	3.32	JHarlan2	62.14	55.46	6.68
WBWoods	75.37	100.00	-24.63	WBrennan	58.35	74.93	-16.58
SMatthews	74.73	90.91	-16.18	CEWhittaker	65.38	58.80	6.57
HEHay	70.04	73.06	-3.03	PSewar	70.17	64.38	5.79
SBotchford	76.87	86.52	-9.64	BRWhite	61.99	70.57	-8.58
LCLamar	90.54	71.86	18.68	AJGoldberg	71.72	73.13	-1.41
MWFuller	70.79	68.25	2.54	AFortas	72.34	73.47	-1.13
DJBrewer	60.69	66.50	-5.81	TMarshall	63.16	59.51	3.65
HBBrown	60.65	59.24	1.41	WEBurger	71.59	58.81	12.78
GShiras	65.36	72.59	-7.23	HABlackmun	65.83	65.48	0.35
HEJackson	67.04	74.44	-7.40	LPowell	71.62	62.17	9.45
EDEWhite	63.76	66.43	-2.67	WRHennquist	67.24	54.28	12.96
RWPickham	70.96	66.00	4.96	JPStevens	56.02	66.95	-10.93
JMcKenna	64.74	65.00	-0.26	SDOConnor	69.24	62.02	7.22
OWHolmes	62.85	65.14	-2.29	AScalia	67.86	54.12	13.75
WRDay	70.54	64.97	5.57	AMKennedy	70.81	63.89	6.92
WHMoody	67.48	70.89	-3.40	DHSouter	62.72	79.87	-17.15
HHLurton	75.07	76.47	-1.40	CThomas	67.80	49.66	17.63
CEHughes1	72.73	80.77	-8.04	RBGinsburg	81.18	63.02	18.16
WVanDevanter	76.42	65.07	11.35	SGBreyer	81.06	62.35	18.71
JRLamar	67.84	72.22	-4.38	JGRoberts	73.40	58.05	15.35
MPitney	64.81	61.01	3.80	SAAlito	70.67	54.44	16.22
JCMcReynolds	44.39	66.35	-21.96	SSotomayor	85.11	66.51	18.60
LDBrandeis	49.78	61.62	-11.84				

-Nominated During Divided Government

-Voted With Appointees of a Different Party a Majority of the Time

Out of the eighty-nine Justices who sat with appointees of their own and opposing parties, forty-two (47%) voted with appointees of the opposite party more frequently than they voted with their own party.<sup>69</sup> This is just under half the time. This finding is surprising and should rattle any strong expectations about the president's ability to influence the Court.

69. While this may reflect changes in party values over time, we control for this to some extent by comparing only Justices who sit together. Democrats appointed in 1888 and 1895 (during the first and second Cleveland Administrations) are likely to have more in common than they do with Democrats appointed during the Clinton Administration.

To be sure, many of the Justices who switch sides are more moderate than extreme, as they do not exhibit a strong preference for the other party. Of the forty-two Justices who side with the other party, only eight (19%) side with appointees of the opposite party at least 10% more often than they side with appointees of their own party. But even moderation may disappoint voters or presidents hoping to influence the Court.<sup>70</sup>

Control of a majority of the Senate does not materially improve the odds of appointing Justices that side with fellow party appointees. Of the sixty-seven Justices who were nominated while the president's party controlled the Senate, thirty-two (48%) voted with appointees of the opposite party more frequently than they voted with their own party. Of the twenty-two Justices nominated during divided government, ten (45%) voted with appointees of the opposite party more frequently than they voted with their own party. The rate at which presidents nominate a Justice who subsequently aligns more closely with Justices of the other party remains about the same no matter which party controls the Senate.

Our findings are difficult to square with a majoritarian Court whose policy views are updated by new appointments. The fact that a high percentage of Justices prefer to vote with appointees of the other party – even when nominated to a same-party Senate – casts doubt on the hypothesis that appointments bring the Court in line with dominant political views.

Most of the individual findings discussed above remain constant over time. Presidents have had about the same rates of success in appointing Justices who will agree with others of the same administration or party. The significant change is the magnitude of individual Justices' preferences for joining appointees of the same or other party. When we compare historical voting alignments to those starting with the Supreme Court Database in 1953, alignments become more polarized near the end of the twentieth century. Ten of the past twelve Justices have at least a 10% spread between rates of agreement with appointees of the same and other party. In other words, very recent appointees either vote strongly with appointees of the same party or strongly with appointees of the other party. In the 133 years before Rehnquist's initial appointment, only twenty of the seventy-seven appointees (26%) voted strongly one way or another.

Also, of these last twelve Justices, only two (Souter and Stevens) have aligned most often with appointees of another party. This low number might lead one to question whether the frequency of presidential disappointments also has diminished recently. Given that presidents missed in only two out of the last twelve appointments, this frequency is unlikely to remain as high as it was in the past. Based on this small sample of Justices, however, it is too

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70. The magnitude of agreement is more pronounced for Justices who agree with other appointees of the same party. Of the forty-seven Justices who voted with their fellow party appointees more often, twenty-two (47%) joined Justices of their party at least ten percent more often than they joined Justices of a different party.

soon to state confidently that disappointments are now occurring at a dramatically lower rate. We are eager to see if this pattern continues in future appointees, and, if so, how great the change turns out to be.

Presidential success or failure demonstrated by the Justices' overall voting records is now likely to be more pronounced, but presidents have not seen great improvement in their odds of appointing an ideologically compatible Justice. Throughout history, Justices have favored appointees of the opposite party just under half of the time. An opposing party Senate has no effect on this outcome. History provides ample reason to question whether appointments bring the Court into line with majoritarian views. Voters should think twice before assuming that control of the White House or Senate will allow them to influence the overall voting records of the Court.

#### IV. MAVERICKS, MODERATES, OR DRIFTERS

Although historical voting records reveal a remarkable level of judicial independence, they also reflect conventional wisdom about particular appointees thought to have disappointed executive expectations. It should come as no surprise that the following Justices sided with appointees of other presidents or parties: McLean, Wayne, Holmes, McReynolds, Reed, Frankfurter, Clark, Warren, Brennan, Stevens, and Souter.<sup>71</sup> While the list also excludes others whom we might expect to see, such as Justices Chase, Day, and Blackmun, looking to agreement with appointees of the same president or party is only one measure of success. This measure does not address whether a decision was salient to the president. What is missing historically, however, is the ability to compare anecdotes to overall voting records.

Our voting records suggest three lines of historical inquiry. First, what do the data tell us about leading anecdotes of presidential disappointment? Second, when viewed in light of individual voting records, how significant is the moderating effect of an opposing-party Senate? Last, because disappointed presidential expectations are often studied as problems of ideological drift, how do voting records change over time? Our data double the current number of years considered in studies of drift. They allow for a preliminary measure of whether historical voting patterns also provide evidence of drift.

##### *A. Disappointed Presidents*

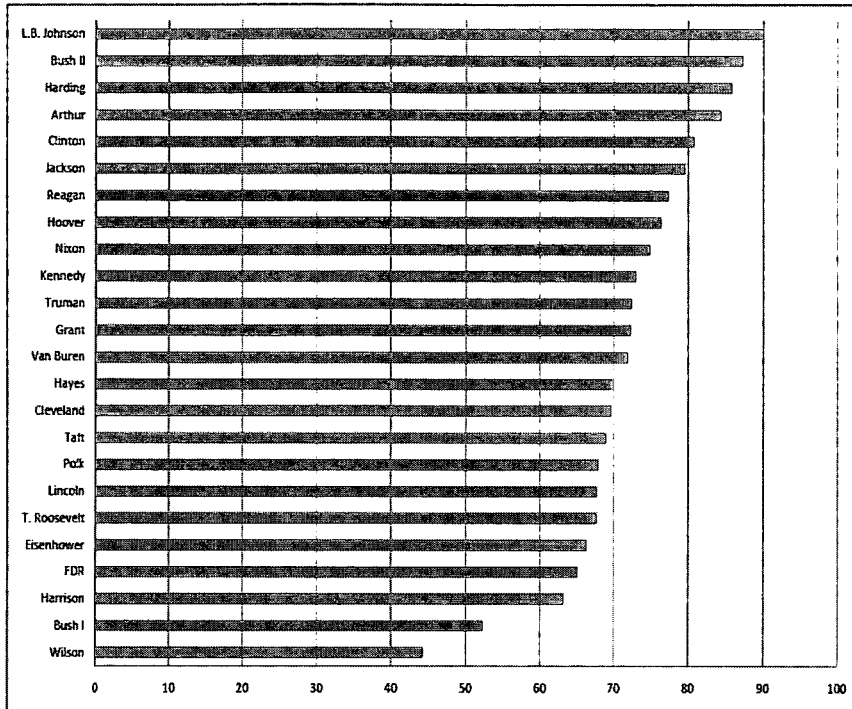
To view Justices' performance through the lens of an appointing president, we begin with a bar chart listing every president with two or more appointees and the overall percentage of times these appointees voted together.

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71. See *supra* Tables 1-2.



**Figure 5:**  
***Rates of Agreement with Justices Appointed by Same President***



Presidents with the lowest rates of agreement have well-documented instances of disappointment or success in one but not all appointees: Woodrow Wilson (44%) and George H.W. Bush (52%).<sup>72</sup> Presidents near the top of the list, George W. Bush (87%) and Warren Harding (86%), are thought to have succeeded in all appointments to the Court.

Overall levels of agreement shed little light on debates about Abraham Lincoln's and Theodore Roosevelt's appointees. Take Roosevelt: the conventional wisdom is that he regretted appointing William Day but was delighted to have appointed William Moody.<sup>73</sup> He complained vociferously about Oliver Wendell Holmes' ruling in *Northern Securities*, an antitrust case of great "political excitement" in which "Republican and Democratic Judges united in both the majority and the minority opinions."<sup>74</sup> Still, scholars debate whether Roosevelt had grounds for complaining based on Holmes' overall record.<sup>75</sup>

72. See PERETTI, *supra* note 22, at 114 n.261 (identifying Thomas, Brandeis, and Clarke as successes and McReynolds as a clear disappointment).

73. See *id.*; SCIGLIANO, *supra* note 29, at 135-36.

74. See SCIGLIANO, *supra* note 29, at 135; 3 WARREN, *supra* note 41, at 444.

75. ABRAHAM, *supra* note 1, at 128; SCIGLIANO, *supra* note 29, at 135.

Lincoln presents a similar problem, as scholars offer different accounts of how he fared. Did Lincoln get “from his five justices what he wanted when he needed it,”<sup>76</sup> or did all but Chief Justice Salmon P. Chase meet expectations?<sup>77</sup> Again this assessment should reflect whether Chase disappointed Lincoln in only key cases or in his overall voting records.

We address these questions by constructing a more detailed measure of the individual voting records of Justices who sat with at least two other appointees of the same president. Table 3, below, shows a Justice’s marginal effect on rates of agreement. We define a Justice’s marginal effect as the percentage increase or decrease in agreement that would occur if a particular Justice were not sitting with a president’s other appointees.

For example, President Wilson appointed three Justices – James McReynolds, Louis Brandeis, and John Clarke.<sup>78</sup> They sat together and had 627 opportunities to agree, of which they agreed 277 times (44.2%). Obviously, President Wilson did not do a good job of selecting Justices with similar ideologies.

But why is the agreement rate so low? Two explanations come to mind. Perhaps all three Justices are far apart from each other in ideological space; therefore, the agreement rate between any pair will be low. If this is the case, President Wilson could have matched no more than one of the three Justices to his preferred ideology since, by definition, two of the three Justices are always far away from any single Justice.

Alternatively, President Wilson may have selected two Justices close to his preferred ideology but failed on a third Justice. This possibility is still consistent with a low overall rate of agreement. For this explanation, however, individual rates of agreement should follow a different pattern. They should reveal two Justices who agree with each other at a high rate while agreeing with a third Justice at a low rate. By computing the marginal effect for each of President Wilson’s appointees, we can identify which of these explanations is likely to generate the low overall agreement rate.

Recall that the marginal effect is defined as the percentage increase or decrease in agreement that would occur if a particular Justice were not sitting with the president’s other appointees. The set of Wilson appointees agreed 44.2% of the time. If we exclude Justice McReynolds and compare the agreement of the remaining Wilson appointees we find the following: Justices Brandeis and Clarke had 106 opportunities to agree with each other, and they did agree seventy-one times (67%). Adding Justice McReynolds to the set of Wilson Justices decreases the overall level of agreement by 23% (from 67% in the absence of McReynolds to 44% with all Justices included). We therefore conclude that Justice McReynolds has a marginal effect of -23%.

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76. SCIGLIANO, *supra* note 29, at 131.

77. See PERETTI, *supra* note 22, at 114 n.261.

78. See *Supreme Court Nominations, Present-1789*, *supra* note 41.

We compute the marginal effect in this manner for every Justice who sat with at least two other Justices appointed by the same president. By comparing the marginal effects, we can identify whether diverse views of a single Justice or an entire group of appointees cause the low rates of agreement.

**Table 3:**  
**Marginal Rates of Agreement**

<i>President</i>	<i>Justice</i>	<i>MAR</i>	<i>President</i>	<i>Justice</i>	<i>MAR</i>
Jackson	JMcLean	-0.02	Harding	WHTaft	-0.99
Jackson	HBaldwin	-0.59	Harding	GSutherland	-0.13
Jackson	JMWayne	4.8	Harding	PButler	3
Jackson	RBTaney	2.22	Harding	ETSanford	-1.01
Jackson	PPBarbour	-0.04	Hoover	CEHughes2	7.26
Jackson	JCatron	-5.19	Hoover	OJRoberts	3.26
Lincoln	NHSwayne	0.95	Hoover	BNCardozo	-10.71
Lincoln	SFMiller	-0.82	FDR	HLBlack	1.84
Lincoln	DDavis	0.61	FDR	SFReed	-0.14
Lincoln	SJField	-1.76	FDR	FFrankfurter	-4.29
Lincoln	SPChase	0.49	FDR	WODouglas	-0.38
Grant	WStrong	-1.82	FDR	FMurphy	1.01
Grant	JPBradley	-4.41	FDR	JFByrnes	0.11
Grant	WHunt	2.47	FDR	RHJackson	0.18
Grant	MRWaite	2.89	FDR	WBRutledge	1.17
Cleveland	LQLamar	1.86	Truman	HHBurton	-0.04
Cleveland	MWFuller	2.58	Truman	FMVinson	0.77
Harrison	DJBrewer	3.35	Truman	TCClark	-2
Harrison	HBBrown	-3.55	Truman	SMinton	-0.32
Harrison	GShiras	0.39	Eisenhower	EWarren	0.56
Harrison	HEJackson	-0.16	Eisenhower	JHarlan2	-4.17
Cleveland	EDEWhite	-8.37	Eisenhower	WJBrennan	2.62
Cleveland	RWPeckham	1.56	Eisenhower	CEWhittaker	-0.18
T Roosevelt	OWHolmes	-1.23	Eisenhower	PStewart	1.83
T Roosevelt	WRDay	-4.2	Nixon	WEBurger	5.48
T Roosevelt	WHMoody	0.96	Nixon	HABlackmun	-6.57
Taft	HHLurton	1.14	Nixon	LFPowell	2.36
Taft	CEHughes1	-0.65	Nixon	WHRehnquist	-2.51
Taft	WVan Devanter	4.86	Reagan	SDOConnor	-0.51
Taft	JRLamar	0	Reagan	AScalia	-2.22
Taft	MPitney	-4.35	Reagan	AMKennedy	2.5
Wilson	JCMcReynolds	-23.18			
Wilson	LDBrandeis	6.19			
Wilson	JHClarke	4.39			

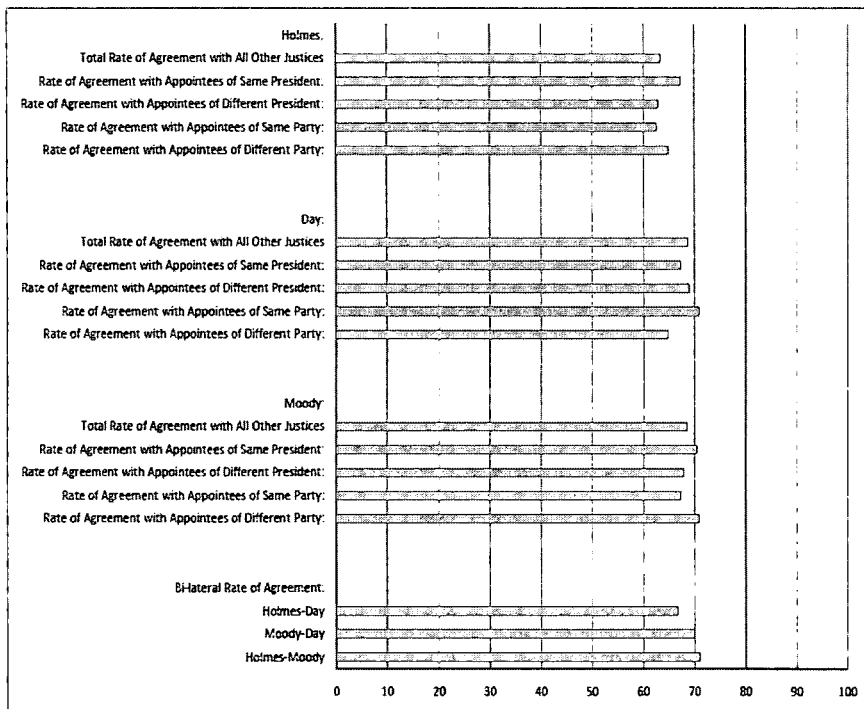
Combined with information on Justices' voting alignments and appointees overall rates of agreement, marginal rates of agreement add new insights for Theodore Roosevelt's, Abraham Lincoln's, and Woodrow Wilson's appointees.

## 1. Theodore Roosevelt

Results for Theodore Roosevelt's appointees are interesting and unexpected. His appointees' overall rate of agreement, 68%, places him in the bottom third of all presidents with two or more appointees. One might expect this low rate of agreement is attributed to individual voting patterns consistent with his purported views of the Justices. That is, Day would vote with non-Roosevelt appointees and Democrats more frequently than Moody. Holmes would align with one or the other in a way that would make clear whether he met Roosevelt's expectations or not.

But voting data for individual Justices show no clear patterns along these lines.

**Figure 6:**  
*Justices Appointed by Theodore Roosevelt*



Day was the only one of the three to side with non-Roosevelt appointees more often than not, but he also was the only one to favor fellow Republican appointees. Holmes and Moody agreed with Democrats more frequently than Republicans. These results are mixed, and overall voting records do not show that Roosevelt got what he wanted from Moody but not Day. While Holmes aligned with Moody, he did so by crossing party lines at a higher frequency. This mixed voting record should not count as a success.

Moreover, marginal rates of agreement do not reveal a strong division of opinion among the three. Holmes and Day agreed 67% of the time, Holmes and Moody agreed 72% of the time, and Day and Moody agreed 69% of the time. Justice Day shows the greatest marginal effect but at the low rate of -4%. Holmes is just shy of Day with a marginal effect of -1%.

Despite Roosevelt's different views of these Justices, their voting behavior is remarkably similar. Roosevelt had very little to complain about regarding Holmes or Day as compared to Justice Moody.<sup>79</sup> Their marginal effects on rates of agreement were close to zero. This low marginal effect shows that none made much difference in overall rates of agreement. The data suggest Roosevelt's expressed disappointment with Holmes and Day should be attributed to their rulings in particular cases such as *Northern Securities* (for Holmes)<sup>80</sup> and *Hammer v. Dagenhart* (for Day).<sup>81</sup>

## 2. Abraham Lincoln

Marginal rates of agreement illuminate Justice Chase's performance relative to other Lincoln appointees. Did Chase generally side with favorable rulings made by Lincoln's other appointees and disappoint in only key decisions involving the Legal Tender Acts? Or did Chase disagree with other Lincoln appointees in a large number of cases?

Chase played two prominent roles in the Legal Tender Acts. These Acts made paper currency legal tender and were "the fiscal keystone of Lincoln's Administration."<sup>82</sup> As Lincoln's Secretary of the Treasury, Chase helped draft the Legal Tender Acts.<sup>83</sup> Indeed, Chase placed his own portrait on one-dollar bills that these Acts authorized.<sup>84</sup> Lincoln appointed Chase to the Court "in large part because of his presumed reliability on the legal tender issue."<sup>85</sup> Lincoln expressed his desire for an appointee who would "sustain what has been done with regard to . . . the legal tenders," and thought that Chase's "known" opinions on this issue were a reason in favor of his ap-

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79. See SCIGLIANO, *supra* note 29, at 135-36.

80. *Id.*

81. See *Hammer v. Dagenhart*, 247 U.S. 251 (1916) (striking down Child Labor Law of 1916), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); R. Friedman, *supra* note 21, at 1299.

82. R. Friedman, *supra* note 21, at 1297.

83. *Id.*

84. See Stephen L. Goldsmith, *Symbols on American Money*, FED. RES. BANK OF PHILA., 4, available at <http://www.philadelphiafed.org/publications/economic-education/symbols-on-american-money.pdf> (last visited Sept. 25, 2011) ("The \$1 legal tender note, issued by the United States during the Civil War, was the first widely circulated U.S. \$1 bill . . . It features Salmon P. Chase, Secretary of the Treasury.")

85. R. Friedman, *supra* note 21, at 1297.

pointment.<sup>86</sup> Once on the bench, however, Chief Justice Chase voted contrary to Lincoln's interests. He joined a 4-3 majority invalidating the Legal Tender Acts.<sup>87</sup>

Beyond issues of monetary policy, Lincoln's appointees confronted fundamental questions of executive power in times of war. They ruled favorably on some leading disputes, such as the *Prize Cases*,<sup>88</sup> during the war. In later years and after Lincoln's death, they refused to sanction some of his wartime policies in cases such as *Ex parte Milligan*.<sup>89</sup>

Overall, Lincoln's appointees found less to agree about than other presidents' appointees. Their general rate of agreement, 68%, put them in the bottom third of our ranking. One explanation might be that Chase voted at odds with other Lincoln appointees Field, Davis, Miller, and Swayne, giving credence to the view that Chase alone let down Lincoln.<sup>90</sup> However, individual voting records do not support this view.

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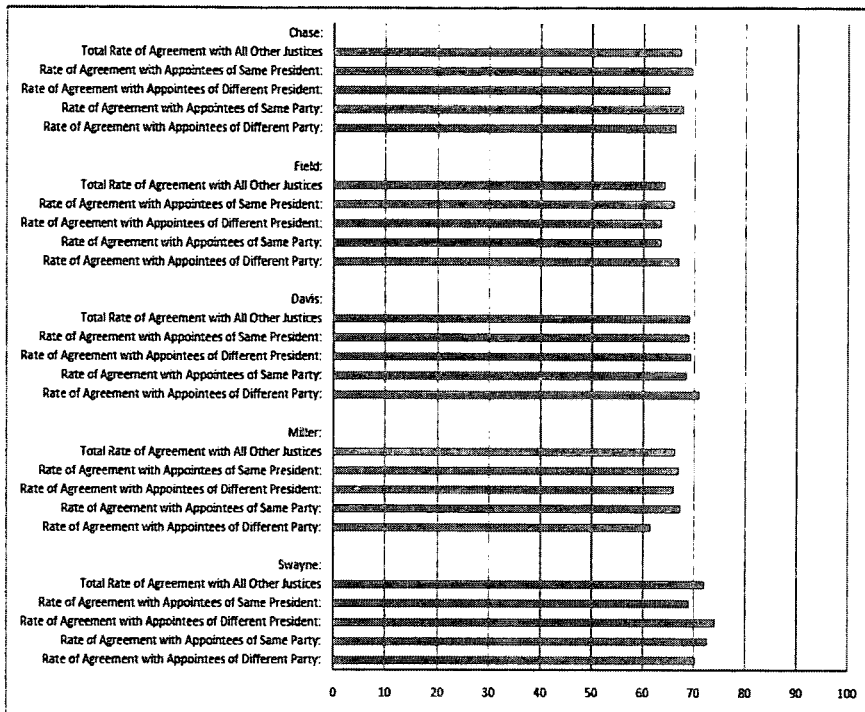
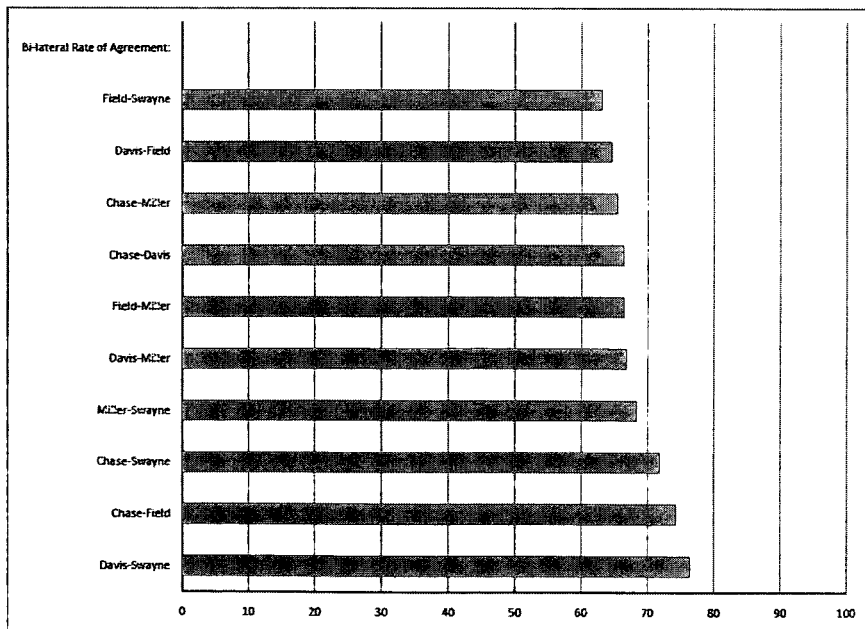
86. 3 WARREN, *supra* note 41, at 123. Lincoln's main reservation about the nomination focused on Chase's presidential ambitions. *Id.* at 122-23.

87. *Hepburn v. Griswold*, 75 U.S. 603 (1869), *overruled in part by* *The Legal Tender Cases*, 79 U.S. 457 (1870).

88. 67 U.S. 635, 659 (1863); ABRAHAM, *supra* note 1, at 96.

89. 71 U.S. 2, 129-31 (1866) (holding unlawful, military commissions that were authorized by the president in areas where Article III courts were open and functioning).

90. *See* PERETTI, *supra* note 22, at 114 n.261.

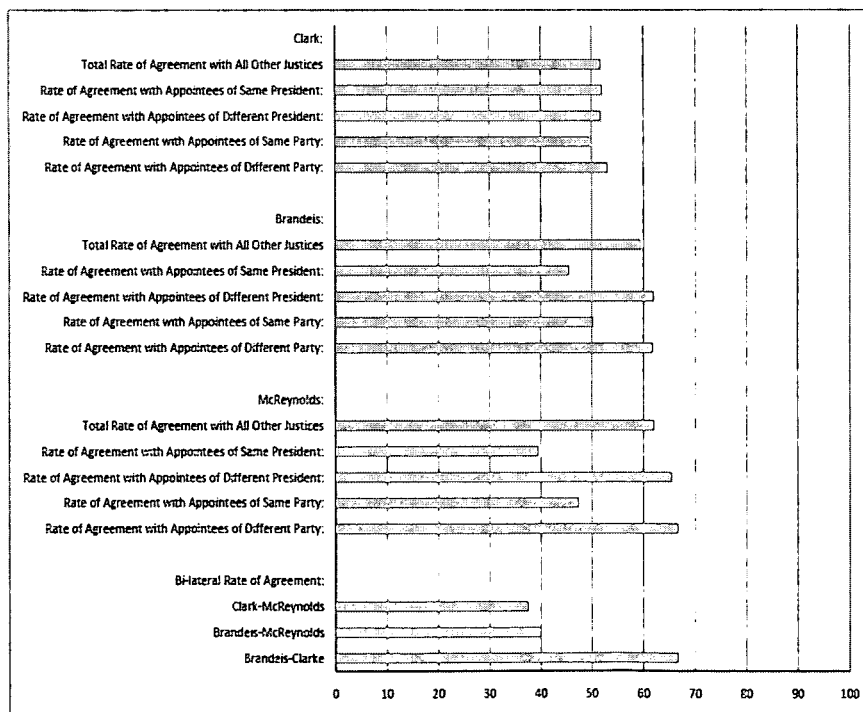
**Figure 7: Justices Appointed by Abraham Lincoln****Figure 8: Justices Appointed by Abraham Lincoln**

Chase's marginal effect on the overall rate of agreement was zero. He voted with Lincoln's party and Republican appointees more often than not. Swayne was the only one to materially side with Lincoln appointees less frequently than with appointees of other presidents, and Davis and Field were the only two to break rank on party. Chase agreed with Swayne 72% of the time, Miller 65% of the time, Davis 66% of the time, and Field 74% of the time. Their overall rates of agreeability (from 72-64%) put them in the average range for this measure. While Chase may have let Lincoln down in cases involving the Legal Tender Acts, Chase's general pattern of voting did not stray far from that of Lincoln's other appointees.

### 3. Woodrow Wilson

We end with Wilson because his appointees present the most striking example of failure in terms of overall voting records.

**Figure 9:**  
*Justices Appointed by Woodrow Wilson*



All of Wilson's appointees voted with appointees of other parties more often than not. Justice McReynolds' marginal effect adds much to our understanding of the low rate of overall agreement for his appointees. McReynolds' marginal effect, -23%, dwarfs the absolute marginal effects of all other Justices. It is almost double the absolute value of the closest marginal effect,



-11% by Justice Cardozo. As a whole, Wilson's appointees voted together only 44% of the time. Again, this low rate reflects a strong division of opinion between McReynolds and his fellow appointees. McReynolds agreed with Brandeis only 40% of the time and Clarke only 38% of the time, while Clarke and Brandeis voted together 67% of the time. McReynolds provides strong evidence of a Justice whose overall record gives a president much ground for disappointment.

McReynolds' performance may not have been a complete surprise to Wilson, however. McReynolds had been an attorney general in the Taft administration before he broke ranks to campaign for Wilson.<sup>91</sup> Wilson appointed him as his Attorney General.<sup>92</sup> In that role, McReynolds built a strong record as a trust-buster, and Wilson had some reason to believe McReynolds shared his Progressive views. Wilson "assumed [McReynolds] would be a liberal generally because he was a liberal in anti-trust policy."<sup>93</sup> Others, however, have attributed the appointment to Wilson's desire to get rid of McReynolds.<sup>94</sup> Even if McReynolds "was impossible to live with, Wilson rationalized, that did not mean he was not politically progressive."<sup>95</sup> The divisive voting pattern between McReynolds and Brandeis probably reflects personal animosity as well. McReynolds was an anti-Semite who refused to talk to Brandeis for three years after his appointment.<sup>96</sup>

Given McReynolds' background, one might expect him to be the least agreeable Justice, in terms of his overall rate of agreement with all Justices with whom he sat. In fact, this dubious distinction goes to Clarke. His average rate of agreement with all other Justices was only 52%. Henry Abraham recounts that he was "unhappy on the Court" and resigned after only six years of service.<sup>97</sup> Abraham attributes Clarke's resignation to disillusionment with the Court's "failure to embrace a genuinely liberal approach to public policy," as well as a "gentle" personality that could not cope with McReynolds' "antics and hostilities."<sup>98</sup>

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Our data provide a more complete picture of disappointing votes cast by Justices Chase and Holmes. Neither Lincoln nor Roosevelt had reason to single them out based on their overall voting behavior. These disappointments stem from votes in a few important cases, yet another way that Justices

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91. ABRAHAM, *supra* note 1, at 139.

92. *Id.*

93. SCIGLIANO, *supra* note 29, at 157.

94. ABRAHAM, *supra* note 1, at 139.

95. *Id.*

96. *Id.* at 140.

97. *Id.* at 145.

98. *Id.* at 145.

can fall short of executive expectations.<sup>99</sup> Other times, as was the case with President Wilson, an appointee's overall voting record falls short of expectations.<sup>100</sup>

### *B. Divided Government and Moderation*

Justices nominated when the president faces an opposing-party Senate do not show significantly more moderate aggregate voting patterns.<sup>101</sup> Nor does divided government make these appointees any more likely to side with appointees of the other party. Our discussion below provides a more detailed examination of Justices nominated in times of divided government during the heretofore unexamined nineteenth century. Once again, we do not find strong evidence of a moderating Senate effect.

#### 1. Hayes, Garfield, and Arthur Administrations

Republican President Rutherford B. Hayes' nomination of William Woods marks the beginning of a series of appointments made during divided government.<sup>102</sup> Hayes appointed two Justices, John Marshall Harlan and Woods.<sup>103</sup> The Republicans controlled the Senate when he nominated Harlan, but Democrats controlled the Senate when Hayes nominated Woods.<sup>104</sup> Harlan and Woods agreed 70% of the time, placing Hayes near the middle range on this statistic.

In the next three appointments after Woods, Republican presidents faced a Democratic or evenly divided Senate. President James A. Garfield nominated Stanley Matthews to an opposing-party Senate, and President Chester A. Arthur nominated Horace Gray and Samuel Blatchford to an evenly divided Senate.<sup>105</sup> Woods, Matthews, Gray, and Blatchford all voted with Democratic appointees at a higher rate than Republican appointees.

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99. See *supra* notes 80, 87 and accompanying text.

100. See *supra* notes 91-96 and accompanying text.

101. See *supra* Tables 1-2.

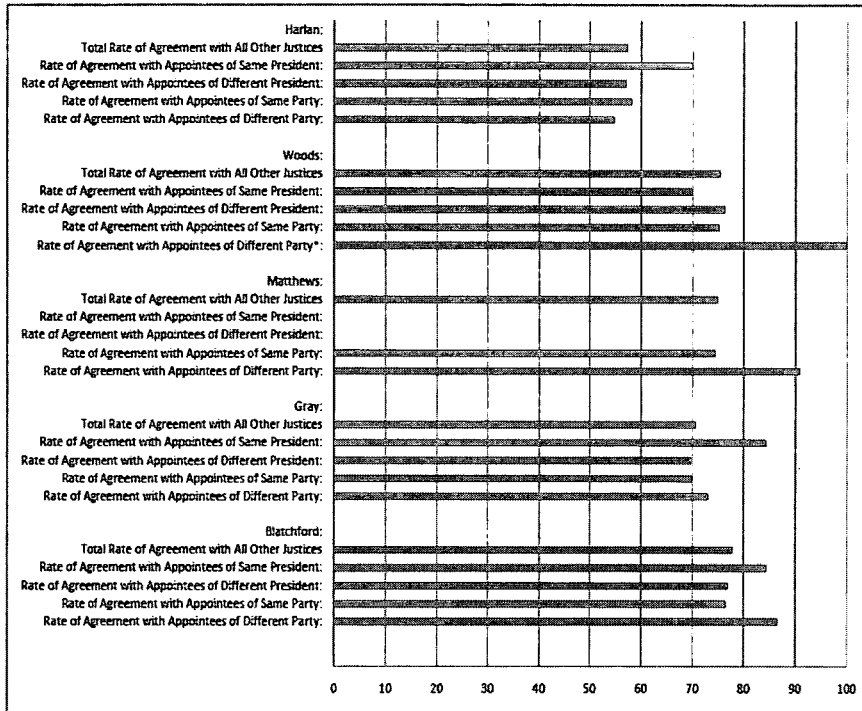
102. See *Supreme Court Nominations, Present-1789*, *supra* note 41.

103. See *id.*

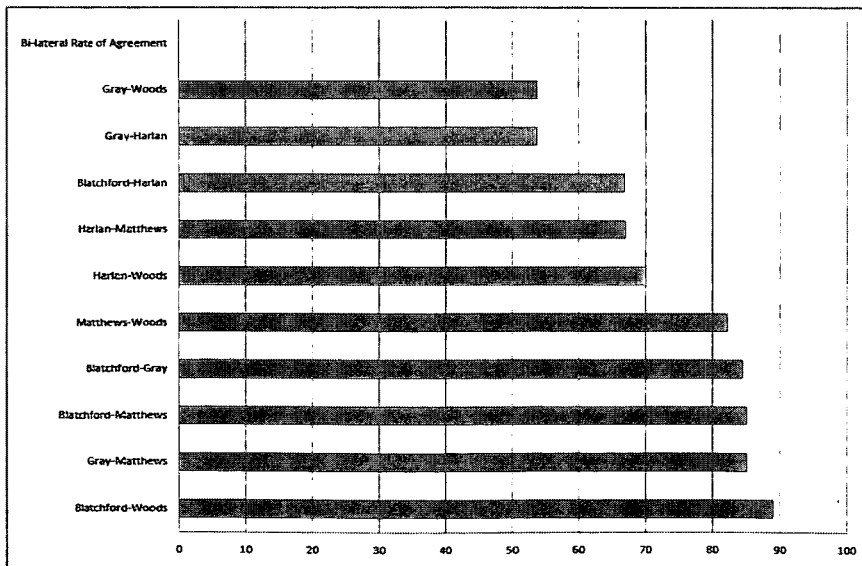
104. See THE U.S. SUPREME COURT JUSTICES DATABASE, *supra* note 39.

105. See *id.*

**Figure 10:**  
*Justices Appointed by Presidents Hayes, Garfield, and Arthur*



**Figure 11:**  
*Justices Appointed by Presidents Hayes, Garfield, and Arthur*



Still, it is hard to draw a strong conclusion of moderation here. Woods' and Matthews' records should be discounted as they had only limited opportunities to agree with a Democratic appointee (seven for Woods and twenty-two for Matthews).<sup>106</sup> Gray barely voted across party lines, leaving Blatchford as the only Justice to agree with Democratic appointees at the relatively high rate of 87%. Rates of agreement between Justices Harlan through Blatchford also carry little information. Rates of agreement between Woods, Matthews, Gray, and Blatchford all hovered around the 80% range. While Harlan agreed with all four at a consistently lower rate (70-50%), Harlan agreed with all Justices only 57% of the time.

## 2. Cleveland Administrations

Democratic President Grover Cleveland had the chance to appoint four Justices during his two non-consecutive terms of office. He nominated Justices Lucius Q.C. Lamar, Melville Fuller, and Rufus Peckham to a Republican-controlled Senate.<sup>107</sup> Justice Edward White was his only appointee nominated to a Democratic Senate.<sup>108</sup> The overall rate of agreement for Cleveland's appointees was 70%, and the general consensus is that Cleveland succeeded in these appointments to the Court.<sup>109</sup> Still, one wonders whether the Republican Senate led Cleveland to nominate more moderate Justices than when Democrats were in control.

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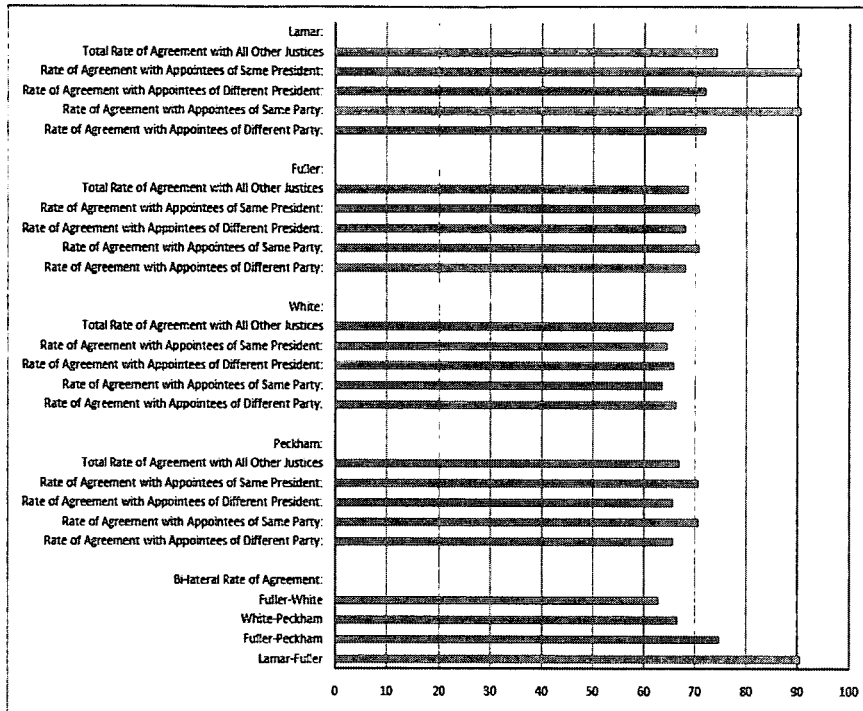
106. This was because their Court was dominated by Republican appointees. Woods overlapped with only one Democratic appointee, Clifford, for a few months in 1881. See *Supreme Court Nominations, Present-1789*, *supra* note 41. Likewise, Matthews overlapped with only Clifford and Lamar for short periods of time. See *id.*

107. See THE U.S. SUPREME COURT JUSTICES DATABASE, *supra* note 39.

108. *Id.*

109. PERETTI, *supra* note 22, at 114 n.261.

**Figure 12:**  
***Justices Appointed by Grover Cleveland***



Our results fail to support this hypothesis for Cleveland. Of his four appointees, White was the only one to agree with appointees of other presidents or parties at a higher rate (65%/66% for presidents and 64%/66% for party). Indeed, he went on to secure Republican President Taft's nomination for Chief Justice.<sup>110</sup> President and party splits for Lamar, Fuller, and Peckham showed that they favored with Justices appointed by Cleveland or Democrats. With splits of 91%/72%, Lamar was near the top of the range for agreements with appointees of the same president and party. Fuller and Peckham were just above average in this dimension. (Fuller's votes split 71%/68% for both presidents and party, and Peckham's votes split 71%/66% for both presidents and party.) These results are the opposite of what one would expect if the Senate had a moderating influence. All Justices' rates of agreement with all other Justices were in the average range of 66 to 74%.

Inter-Justice and marginal agreement rates confirm White's distinctive voting pattern. He agreed with Fuller and Peckham only 63 and 67% of the time (and did not sit with Lamar). These rates are the lowest percentages of agreement for all pairs of Cleveland appointees. Rates of marginal effect for

110. 3 WARREN, *supra* note 41, at 442-43.

Justices Lamar, Fuller, and Peckham fall between 1-3%.<sup>111</sup> Justice White, however, depressed the overall rate of agreement among Cleveland appointees at a marginal rate of -8%. Excluding White, the other Justices would have had a high overall agreement rate of 78%.

Despite this voting record, the lack of any clear Senate effect should be considered in context. Historically, the Senate's confirmation decisions may have turned on political concerns other than judicial ideology.<sup>112</sup> And although Democrats controlled the Senate when Cleveland nominated White, they did not have a large margin over Republicans.<sup>113</sup> White's nomination followed on the heels of two failed nominations, so that "Cleveland was anxious to find someone whom the Senate would approve."<sup>114</sup> Likewise, Republicans did not have large margins over Democrats when the Senate confirmed Lamar, Fuller, and Peckham.<sup>115</sup> Thus, Cleveland may not have tended toward moderation in those cases. The Senate's effect in this case seems more closely tied to close margins and refusals to confirm two of Cleveland's nominees.

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By extending Justices' voting records back another hundred years, we see a more complete picture of how divided government affects the president's appointments power. Our historical study shows that control of the Senate has mattered little, at least in terms of its ability to alter the odds that an appointee will vote across party lines once on the bench. Furthermore, the Senate's lack of influence over Justices who are confirmed is stable across time.

The Senate's inability to enhance its role is curious in light of the fact that confirmation procedures have changed dramatically. David Stras has provided a detailed account of changes that started in the twentieth century and are thought to have politicized the Senate's confirmation process.<sup>116</sup> For

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111. Lamar sat with only Fuller. See *Supreme Court Nominations, Present-1789*, *supra* note 41.

112. See Whittington, *supra* note 20, at 436.

113. There were only 44 Democrats, compared to 40 Republicans and four Senators of other parties. See *Supreme Court Nominations, Present-1789*, *supra* note 41; see also *Party Division in the Senate, 1789-Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_tasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm) (last visited Sept. 25, 2011) (listing the party make-up of the Senate).

114. SCIGLIANO, *supra* note 29, at 158.

115. When Lamar and Fuller were appointed in 1888, Democrats held 37 seats and Republicans held 39 seats. See *Party Division in the Senate, 1789-Present*, *supra* note 113. When Peckham was appointed in 1895, Democrats held 40 seats to Republicans' 44 seats and other parties' six seats. *Id.*

116. See generally David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008).

example, the early divided government appointments we study precede the Seventeenth Amendment (1913), as well as requirements of roll call voting, opening “all sessions on the debate of a judicial nominee to the public,” and requesting “that nominees personally appear before the Senate Judiciary Committee.”<sup>117</sup>

Whatever the effect of these heightened Senate procedures in other areas, our data do not show evidence that these procedures increased the odds of an opposing party obtaining a moderate Justice. The Senate’s failure to gain influence leaves interesting questions for future research. Have the odds stayed the same because the Senate’s modern procedures are more window dressing than substance? Or have both the Senate and the president become more powerful in their ability to influence appointees’ ideology?

Modern presidents have the benefit of far more sophisticated bureaucratic machinery with which to inform their choice of Justice.<sup>118</sup> When they face a same party Senate, they now appoint Justices who vote with their other appointees at significantly higher rates in the aggregate.<sup>119</sup> The Senate may be playing a more powerful role by keeping rates of agreement to normal levels in times of divided government.

### C. Ideological Drift

Leading contemporary studies argue that ideological drift can be a frequent source of votes contrary to executive expectations.<sup>120</sup> Drift might occur, for example, when a Justice’s initial voting record meets executive expectations but then deteriorates in later years. Justice Blackmun’s voting records provide a good example of this phenomenon.<sup>121</sup> Thus, as Lee Epstein and her co-authors assert, while presidents can be “reasonably certain” of how Justices will vote during their first terms in office, “most Justices fluctuate” in their voting patterns “before hitting the first-decade mark.”<sup>122</sup> Ideological drift means that presidents “cannot guarantee the ‘entrenchment’ of their ideology on the Court in the long, or even medium, term.”<sup>123</sup> A recent working paper attributes the propensity to drift to an opposing-party Senate: if an opposing Senate forces the president to nominate a “stealth” candidate with a short paper trail, that Justice may be more likely to drift once on the Court.<sup>124</sup>

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117. *Id.* at 1058-62.

118. *See supra* note 65.

119. *See supra* Figure 4.

120. *See, e.g., Drift, supra* note 16, at 1486-87.

121. *Id.* at 1494.

122. *Id.* at 1486.

123. *Id.*

124. Owens & Wedeking, *supra* note 65, at 20.

The statistics we present above cannot be used to draw inferences about the possibility of drift. In almost all cases we report votes cast during a Justice's entire time on the bench. Aggregate agreement rates cannot be used to differentiate between a constant rate of agreement (no drift) or satisfactory votes early on and disappointing ones later (drift). Still, we wonder whether disappointing votes occur early on, consistently throughout a Justice's career, or only after many years on the bench. Our voting records can be used to construct a measure of one of the empirical implications of drift, and our new records go back far enough to more than double the current voting data brought to bear on this question.

We extend our analysis to offer a measure of how voting patterns in our dataset evolve. The measure we construct is based on the insight that, in the presence of drift, if a president chooses Justices with similar location in ideological space, agreement rates with groups of appointees should decline over time.

Consider the Martin-Quinn score. If a president always can appoint Justices with a Martin-Quinn score reflecting his own preferences, the Justices are likely to exhibit a high rate of agreement with each other. Drift can be modeled as a random walk in Martin-Quinn scores where the score at time  $t+1$  is equal to the score at time  $t$  plus a mean zero random independent and identically distributed shock.<sup>125</sup> Under the hypothesis of no drift, the random shock is set to zero and the Martin-Quinn scores are constant. Under the alternative hypothesis of drift, the random shock is mean zero with positive variance, and, as time evolves, the Justices almost surely drift apart in Martin-Quinn space. Therefore, under the null hypothesis of no drift, the Justices the same president appoints are likely to agree with each other at a high rate and the rate of agreement should not change over time. Under the alternative hypothesis of drift, the agreement rates should start off high and then decline as the Justices drift apart.

To test this hypothesis, we compute the time series of agreement rates for each presidential group and then average across groups. Specifically, we identify each president who had more than one appointee sit together. We define year one to be the first year the president's appointees sat together and year two to be the second year they sat together. We continue in this manner until we exhaust voting records for cases where at least two appointees of the same president remain on the bench.

President Richard Nixon's appointees provide a helpful example. Here, year one is 1970 – the first year Justice Burger had the opportunity to vote

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125. The random walk is a common statistical model of the path of an object that is equally likely to move in any direction. It derives, literally, from a study of a random or "drunkard's" walk in the 1905 edition of *Nature*. See Karl Pearson, *The Problem of the Random Walk*, 72 NATURE 294, 318, 342 (1905), available at <http://www.nature.com/physics/looking-back/pearson/index.html>. Today, the random walk has been widely adopted by the physical and social sciences and is routinely used to model drift in biology, physics, economics and political science.



with a second Nixon appointee (Justice Blackmun).<sup>126</sup> In year two, 1971, we continue with records for Burger and Blackmun and also add records for new appointees, Powell and Rehnquist.<sup>127</sup> We proceed with records for these four through Burger's retirement in 1986.<sup>128</sup> We then keep calculating agreements between remaining Nixon appointees (Blackmun, Powell, and Rehnquist) in the same fashion. Our records for Nixon appointees end in 1995, the year after Justice Blackmun retired to leave Rehnquist as the last Nixon appointee remaining on the bench.<sup>129</sup>

We extend this method to each president appointing two or more Justices and compute the aggregate rates of agreement for all Justices sitting together in a given year.<sup>130</sup> The result is a time series of agreement rates for each presidential group. Turning back to Nixon appointees, for instance, in year two they agreed 92% of the time. By year five, this rate declined to 84%, and by year ten it continued to fall to 77%. To compare numbers for all presidents, we average the separate time series in event time. Thus, the year one average plotted below reflects an average of all year one agreement rates across presidents, and the year two average reflects an average of all year two agreement rates across presidents, and so on.

Figure 13 below plots average percentage of agreement by a president's appointees on the vertical axis against time they sit together on the horizontal axis.

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126. See *Supreme Court Nominations, Present-1789*, *supra* note 41.

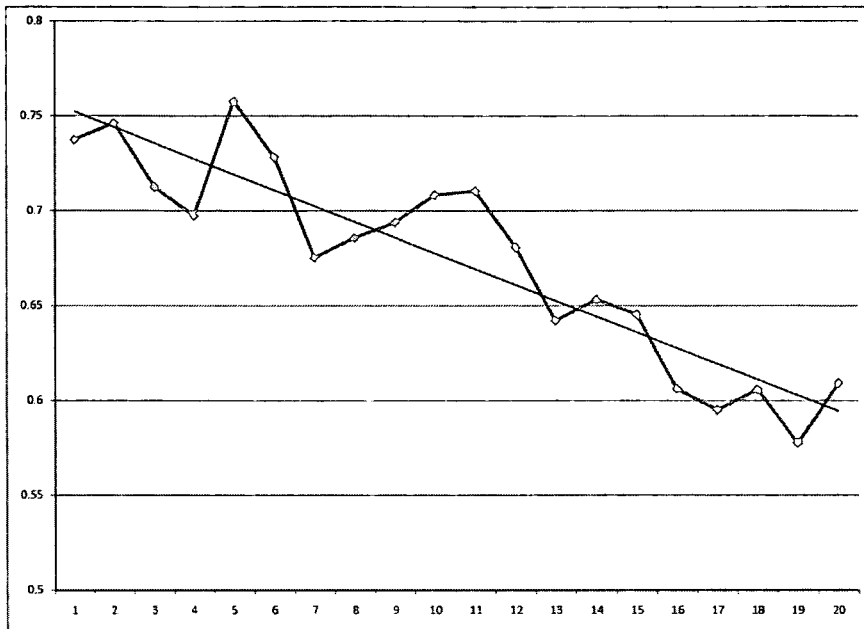
127. *Id.*

128. See *Rehnquist Court (1986-1987)*, OYEZ: U.S. SUPREME CT. MEDIA, <http://www.oyez.org/courts/rehnquist/rehn1> (last visited Sept. 20, 2011).

129. See *Rehnquist Court (1994-2005)*, OYEZ: U.S. SUPREME CT. MEDIA, <http://www.oyez.org/courts> (last visited Sept. 20, 2011).

130. As before, this agreement rate reflects only non-unanimous cases.

**Figure 13:**  
*Average Rate of Agreement with Fellow Justices  
 Appointed by Same President by Years since Appointment*



As the plot shows, percentages of agreement follow a general downward trend. Justices the same president appoints tend to agree at a 70-75% rate during their first five years on the bench together. This rate falls into the 65-70% range during years six through fifteen and declines to around 60% for groups of appointees with paired voting records exceeding fifteen years. We base these calculations on records for appointees of thirteen presidents whose voting records extended past year fifteen.<sup>131</sup> And, at the ten and five year levels, we use records for appointees of nineteen and twenty presidents, respectively.

These results are consistent with the hypothesis that Justices drift. On average, groups of appointees vote together more frequently during their initial years on the bench than they do later on. Our study of drift reveals another dimension in which Justices' voting patterns depart from executive preferences.

131. The thirteen presidents are: Andrew Jackson, Abraham Lincoln, Ulysses Grant, Benjamin Harrison, Grover Cleveland (both administrations), Theodore Roosevelt, Woodrow Wilson, Warren Harding, Dwight Eisenhower, Richard Nixon, Ronald Reagan, George H.W. Bush, and William Clinton. A few of these records, such as those for FDR's appointees, have gaps for years between the end of our data (1949) and the beginning of the version of Spaeth's Justice-centered data used for our calculations (1953).

## V. CONCLUSION

Supreme Court appointments are one of the most important questions facing a president. Alexander Bickel captured the sense of uncertainty surrounding appointments long ago: “You shoot an arrow into a far-distant future when you appoint a Justice . . . . And not the man himself can tell you what he will think about some of the problems that he will face.”<sup>132</sup> We now know that this uncertainty is empirically well-founded. It is borne out by Justices’ overall voting records since at least 1838. The president’s odds of appointing a Justice who sides with appointees of his party have been no better than a coin flip. By extending the study of voting records to a longer historical time period, we also show that these odds have not changed during periods of divided government.

Many prominent examples of presidential disappointments on overall votes or key cases were not the product of an opposing-party Senate. Instead these examples are a part of a larger trend of failure in a significant portion of appointments. Justices whose votes are at odds with executive preferences may tend to grow more extreme over time. When we plot patterns of agreement over time, we also see declines in percentages of agreement that are consistent with contemporary accounts of ideological drift.

Justices who disappoint presidents with their overall voting records are not historical aberrations. Instead, this phenomenon has continued to occur at a high frequency since 1838. History provides ample reason to question assertions that appointments bring the Court in line with majoritarian views. It should give serious pause to voters who go the polls expecting to elect the Supreme Court.

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132. PERETTI, *supra* note 22, at 112 (quoting *Judgment on a Justice*, TIME, May 23, 1969, at 23, 24) (internal quotation marks omitted).

### APPENDIX: DETAILED DESCRIPTION OF DATA COLLECTION PROCESS

We deployed eighteen University of Michigan students to gather and code voting records for each of these cases. We used a double-entry coding system to ensure the accuracy of our students' work.<sup>133</sup>

We started by looking up each case listed on the Supreme Court's Citation Finder<sup>134</sup> in an index of opinions the Supreme Court Historical Society prepared.<sup>135</sup> The index provides a comprehensive list of opinions each Justice authored. It further classifies the opinions into seven different categories: opinions of the court, opinions announcing judgment, concurrences, dissents, separate opinions, statements, and opinions authored as circuit justices.<sup>136</sup>

We used this information to sort our cases into two broad categories: unanimous and non-unanimous decisions. We treated all cases with a non-majority opinion as non-unanimous. This method allows us to compare our cases with an identically sorted subset of cases in the Supreme Court Database.<sup>137</sup>

Our data set may be broader than the Supreme Court Database in two minor dimensions. First, we found a handful of decisions listed on the Case Citation Finder that are orders rather than full opinions.<sup>138</sup> Because older Reporters did not publish these decisions separately at the back of the book, authors of the Case Citation Finder sorted through Reporters and, where possible, excluded orders or short per curiam opinions without substantial legal reasoning.<sup>139</sup> This sorting also means that the Citation Finder's list of histori-

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133. This required at least two students to independently review and code voting information for each case. If both students independently entered matching code for a case, it was included in the data set without further review. If two students coded a case differently, a third student reviewed the case for coding errors and attempted to resolve the coding dispute. If the third student could not resolve the coding dispute, he or she left a detailed note and the case was reviewed and coded by a co-author of this Article.

134. See *supra* note 32 and accompanying text.

135. See generally SUPREME COURT OF THE UNITED STATES, *supra* note 17.

136. *Id.* at xviii-xxii.

137. Thus, we reject unanimity where a Justice issues a "regular concurrence" – i.e., joins the majority opinion but concurs to note some exception from the majority's reasoning. Although the Supreme Court Database treats such cases as unanimous, see CODEBOOK, *supra* note 43, at 73 its detailed coding allows us to treat them as non-unanimous for purposes of our analysis.

138. See, e.g., *Wood v. Richards*, 131 U.S. Appx. Xcviii (1870) (Citation Finder lists this "opinion" postponing hearing on motion for additional security due to lack of proper notice.).

139. Interview with Kristine Fallen, Co-Author of the Case Citation Finder at the Supreme Court's Reporter of Decisions (Nov. 5, 2008) (notes on file with author).

cal per curiam opinions is close to the subset of per curiam opinions in the Supreme Court database. (The Supreme Court Database includes all per curiam opinions for cases in which the Court held oral argument or provided an explanation of its reasoning.<sup>140</sup>) Thus, any difference in coverage that exists is likely minimal, and so is its effect. Cases that result in orders or cursory per curiam opinions are likely to be unanimous. They would not have any effect on data showing levels of agreement in non-unanimous decisions.

For all non-unanimous decisions, we looked up each dissent, concurrence, separate opinion, or statement on-line in the LEXIS United States Supreme Court Digest, Lawyers' Edition. We coded all Justices agreeing with a non-majority opinion other than a judgment. To simplify students' work, we instructed them to follow the following conventions: 1. Code agreement only for Justices who had not themselves written an opinion.<sup>141</sup> 2. Look for agreement with a particular author, rather than opinion, to avoid confusion in cases where the index labeled an opinion differently than LEXIS.

The cornerstone of this analysis is agreement between two Justices. Our coding uses a strict and readily comparable measure. For our data, we coded a Justice as agreeing with another Justice's opinion only if he himself had not written an opinion. This coding identifies not only votes on the disposition of a case<sup>142</sup> but also includes valuable information about coalitions of Justices who adopted the exact same rationale for resolving a case. The same test can

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140. See CODEBOOK, *supra* note 43, at 59 (describing variable 43 – decision-Type).

141. A Justice who was not listed as authoring an opinion by silently agreeing with two other opinions was coded as joining a separate opinion. In *Southern Pacific Co. v. Jensen*, for example, four dissenting Justices would have rejected the argument that the New York Workmen's Compensation Act conflicted with federal law. 244 U.S. 205, 219-55 (1917). We coded Brandeis and Clarke as joining a statement because they were the only Justices who joined Holmes' and Pitney's separate dissents silently and without qualification. *Id.* at 255. This provides a precise record of voting coalitions in cases where neither Holmes nor Pitney managed to write an opinion capturing his colleagues' complete rationale. We applied the same analysis to a handful of cases in the Supreme Court Database where a Justice was listed as dissenting without authoring or joining an opinion. In those cases, we treated the Justice as the author of his own opinion.

142. We present votes on the judgment for the majority or minority for over 95% of cases in which Justices joined a majority opinion, opinion announcing judgment, concurrence, or dissent. This excludes a relatively small category of cases where the index listed Justices as issuing separate opinions or statements without specifying whether they voted to affirm or reverse a particular decision. We did not ask our undergraduate students to make this complex legal determination for these cases. Thus, we did not count votes on these separate opinions or statements in our results looking at majority and minority coalitions formed by votes to affirm or reverse.

be applied to data in the Supreme Court Database, as it also records all Justices who wrote opinions and all votes in agreement with a particular opinion.<sup>143</sup>

Our coding of non-unanimous cases left a body of unanimous decisions, which did not require students to code individual Justices' votes. We determined and coded these unanimous voting coalitions based on the membership of the Court at the time of its decision. Thus, we presumed agreement among Justices if they were sitting on the Court at the time it issued a unanimous decision. We used the same method to identify Justices joining a majority opinion or an opinion announcing judgment (as LEXIS typically did not list individual Justices joining this second type of opinion).

We identified the group of Justices on the Court as of the date of a particular decision according to records on the composition of the Court and dates of decisions. While the Court typically has had nine seats, this number fluctuated in the 1860s.<sup>144</sup> In 1863, Congress added a tenth seat.<sup>145</sup> Three years later it attempted to cut the Court back to seven seats (by taking away Andrew Johnson's power to fill vacancies).<sup>146</sup> Congress restored the Court to nine seats in 1869.<sup>147</sup> The number of Justices voting on a particular case also depends on how quickly a vacancy is filled and the number of recusals.<sup>148</sup>

We calculated the composition of the Court using information that the Oyez Project's Supreme Court website provides about different natural courts.<sup>149</sup> Oyez records a new natural court each time a Justice joins or leaves the Court.<sup>150</sup> We did not code a Justice as joining a majority or plurality deci-

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143. The Supreme Court Database's detailed voting records show (1) whether a Justice wrote his or her own opinion; (2) his or her vote in the case (majority, plurality, dissent, or concurrence) and (3) for concurring and dissenting opinions, which Justices joined a concurrence or dissent authored by a particular Justice. CODEBOOK, *supra* note 43, at 65 (describing variable 49 – voteUnclear), 73-74 (describing variables 57 and 58 – vote and opinion), 77-78 (describing variables 61 and 62 – firstAgreement and secondAgreement).

144. COMPENDIUM, *supra* note 12, at xxiii.

145. *Id.*

146. *Id.*

147. *Id.*

148. We coded recusals that we found in the course of reviewing votes for select cases. Lack of uniform language reporting recusal precluded us from running a comprehensive search for all recusals.

149. *Browse Justices*, OYEZ: U.S. SUPREME CT. MEDIA, <http://www.oyez.org/courts/> (last visited Sept. 25, 2011). We turned to the *Compendium*'s listing of retirement and death dates (in its table of natural courts) to resolve what appeared to be two discrepancies in departure dates Oyez listed for Justices Bradley and Hughes (first departure). See COMPENDIUM, *supra* note 12, at 405 tbl.5-2.

150. This is known as a strong natural court. CODEBOOK, *supra* note 43, at 38. As noted in the Codebook, "no convention exists as to the dates on which" natural courts begin and end. *Id.* For our purposes, however, Oyez's listing of strong natural courts was most helpful because it focuses on Justices who are actually serving at the time of a particular decision. *Id.*

sion if it was issued on the day he joined the Court, retired, resigned, or died. As a further check on accuracy, we reviewed cases to see that they had the proper number of Justices for a given year.

We also gathered more detailed information about the date the Court issued a decision for years when the Court's composition changed. Dates of decision allowed us to identify which decisions pre- and post-dated a particular judicial appointment. For decisions issued through 1881, we used "Dates of Supreme Court Decisions and Arguments," a database on the Supreme Court's website.<sup>151</sup> For later-decided cases, we looked up dates of decision for all non-unanimous cases used in our study.<sup>152</sup> We also looked up specific dates for a series of appendix cases in Reporter 131, because they were decisions issued many years before the reporter was published. Gathering additional information about dates of decision allowed us to calculate coalitions of Justices for majority and plurality opinions.

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151. See Anne Ashmore, U.S. SUPREME COURT LIBRARY, DATES OF SUPREME COURT DECISIONS AND ARGUMENTS (2006), *available at* <http://www.supremecourt.gov/opinions/datesofdecisions.pdf> (last visited Oct. 12, 2011).

152. We looked up dates of decisions from 1882 to 1892 on Westlaw and all later decisions on Findlaw.