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Possible Presidents and their Possible Justices

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We locate the presidential candidates, the current Justices, possible nominees to the Supreme Court, and several highly salient Court cases in the same left-right (liberal-conservative) policy space. The goal is to consider how the Court (and, ultimately, the law) could change depending on whether Hillary Clinton or Donald Trump is the next President.

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

To locate the candidates, Justices, and nominees on a left-right spectrum, we use the scaling strategy proposed in “The Judicial Common Space” (JCS).¹ That approach works as follows.

Presidential Candidates. We base Clinton’s ideology on her voting patterns as a U.S. Senator (measured by Poole’s NOMINATE Common Space score.²) Because Trump has never held federal office, we use Pence’s congressional voting patterns (again, based on Poole’s score) as a proxy for Trump’s ideology.

Current Justices. We base the Justices’ ideology also on their voting patterns (their Martin-Quinn scores).³ We use the procedure outlined in the JCS to ensure compatibility between the Justices’ and presidential candidates’ scores.

Possible Nominees. From various sources, we identified possible Clinton/Trump nomi-

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¹Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland, “The Judicial Common Space,” 23 *Journal of Law, Economics, & Organization* 303 (2007).

²At: http://voteview.com/dwnomin_joint_house_and_senate.html.

³At: <http://mqscores.berkeley.edu>.

needs.⁴ Because many are sitting U.S. Court of Appeals judges, we measure their ideology by the tried-and-true approach developed by Giles, et al.⁵

- If a judge is appointed from a state where the President and at least one home-state senator are of the same party, the judge is assigned the ideology of the home-state senator.
- If both senators are from the President’s party, the judge is assigned the average ideology of the two senators.
- If neither home-state senator is from the President’s party, the judge receives the ideological score of the appointing President.

Because Giles, et al. use Poole’s scores to measure the senators’ and Presidents’ ideology, we can easily place sitting appellate judges in the same left-right space as the Justices and Clinton/Trump.⁶ The same holds for other possible appointees who served (or serve) as a member of Congress (*e.g.*, Amy Klobuchar). But it does not hold for short-listed state judges; there is simply no good way to incorporate them in same policy space as the others and so we exclude them. (Goodwin Liu is an exception. Although he is a justice on the California Supreme Court, we were able to calculate his ideology based on the two home-state senators at the time of his unsuccessful nomination to the U.S. Court of Appeals for the Ninth Circuit.)

One final note. Poole’s scores, which are critical to our ability to place the actors’ in left-right space, are available only through 2013. To ensure that our analysis captures current realities on the U.S. Supreme Court, we use the 2015 term Martin-Quinn scores to characterize the Justices’ ideologies. We took this step because several Justices (notably Kennedy) drifted substantially to the left between the 2013 and 2015 terms.

2 Preliminaries 2: Locating Cases in Left-Right Space

Just as we use voting patterns to locate the Justices on a single liberal-conservative line, we deploy vote data to locate a few (very salient) Court cases on the same line. We summarize the cases as “cutpoints.” A cutpoint is the point on the line that separates the Justices who (our estimates show) would vote with the majority and the Justices who would vote with the minority *if the case were before them today*.⁷

⁴See, *e.g.*, “Donald J. Trump Releases List of Potential United States Supreme Court Justices”; “Clinton’s Court Shortlist Emerges.”

⁵Micheal W. Giles, Virginia Hettinger, and Todd Peppers, “Picking Federal Judges: A Note on Policy and Partisan Selection Agendas,” 54 *Political Research Quarterly* 623 (2001).

⁶Updated scores are at: <http://epstein.wustl.edu/research/JCS.html>.

⁷For a more detailed, though non-technical, explanation, see Andrew D. Martin, Kevin Quinn, & Lee Epstein, “The Median Justice on the U.S. Supreme Court,” 83 *North Carolina Law Review* 1275 (2005).

In other words, the cutpoints do not represent majority-minority voting at the time of the decision; they represent our prediction based on the Justices' current ideology. For this reason, we can use the cutpoints to consider how today's Justices might vote in future cases and, more relevant here, how possible nominees might have voted had they been on the Court.

3 The Presidential Candidates as Justices

Figure 1 shows where Clinton and Trump would fit on the current Court if they were Justices. Clinton likely would find herself aligned with the four Democrats, though closer to the moderate liberals Kagan and Breyer than to more extreme Ginsburg and Sotomayor. In contrast, Trump (Pence) would be at the very conservative end, voting more often with Alito and Thomas than Kennedy and even Roberts.

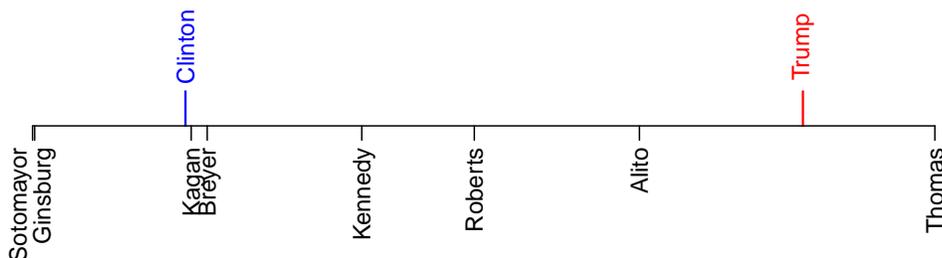


Figure 1: Left-right placement of the 2016 Justices and presidential candidates.

Though Figure 1 presents no great surprises, the analysis is nonetheless telling because modern-day Presidents have been quite successful in appointing near-ideological clones to the Court (Souter aside, of course). This much Table 1 suggests. For example, were we to use Bush 2's ideology to predict Alito's voting, we would expect Alito to vote 61.29% of the time in the conservative direction. Alito's actual percent is about 63.65%—for an error rate of 2.36%. Some Justices are even closer to their appointing President (*e.g.*, Ginsburg, Kagan, Scalia) and some slightly more distant (*e.g.*, Kennedy, Thomas) but, overall, the predictions are quite good.

Justice	President's Ideology	Predicted Percent Conservative	Justice's Percent Conservative	Error
Alito	0.729	61.29	63.65	2.36
Breyer	-0.452	37.82	41.14	3.32
Ginsburg	-0.452	37.82	37.12	-0.70
Kagan	-0.368	39.49	38.59	-0.90
Kennedy	0.688	60.47	55.42	-5.05
Roberts	0.729	61.29	58.24	-3.05
Scalia	0.688	60.47	61.23	0.76
Sotomayor	-0.368	39.49	36.93	-2.56
Thomas	0.578	58.29	64.12	5.83

Table 1. Predictions of the Justices' voting based on the ideology of their appointing President. The President's ideology is Poole's Common Space score; percent conservative calculated from the [U.S. Supreme Court Database](#), with decisionType=1 or 7 and term \geq 2005.

The implication from Table 1 is that Figure 1 may provide the best indication about where the presidential candidates' Justices will fall. If so and if Trump replaces Scalia, Kennedy will remain the median Justice; if Clinton fills Scalia's vacancy, Breyer will become the Court's new center.

Should Breyer move into the swing position, some commentators are predicting big changes in the law. We are less sure given Kennedy's recent (and seemingly unexpected) shift to the left, Consider, first, gay rights. Figure 2 makes the obvious point that either a Clinton or Trump appointee would probably not make much difference: five justices remain to the left of the *Obergefell* cutpoint, meaning they are likely to continue to support same-sex marriage and perhaps gay rights more broadly. A Clinton appointee would add a 6th vote; and a Trump appointee would not lead to any major changes (at least not in the short term).

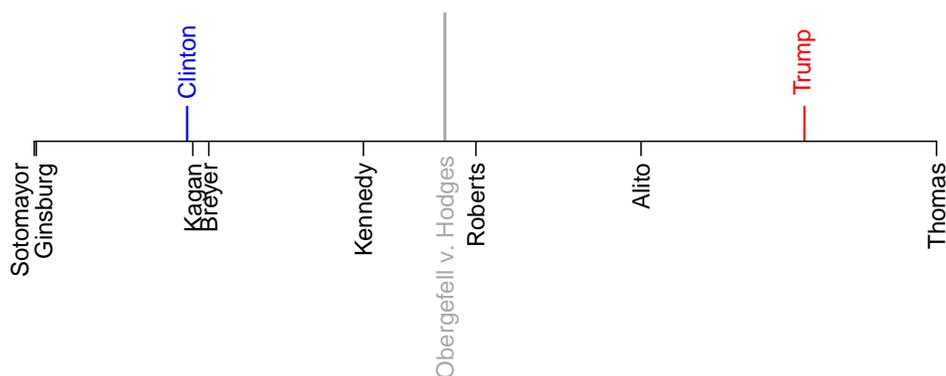


Figure 2: Left-right placement of the 2016 Justices and presidential candidates, with the *Obergefell* cutpoint. Justices to the left of the cutpoint are more likely to invalidate bans on same-sex marriage than Justices to the right of the cutpoint.

The results for cases decided in a direction favored by conservatives are less obvious.

Figure 3 focuses on two, *District of Columbia v. Heller* (2008) and *Citizens United v. FEC* (2010). (We show only *Heller*; the cutpoint for *Citizens United* is the same.)

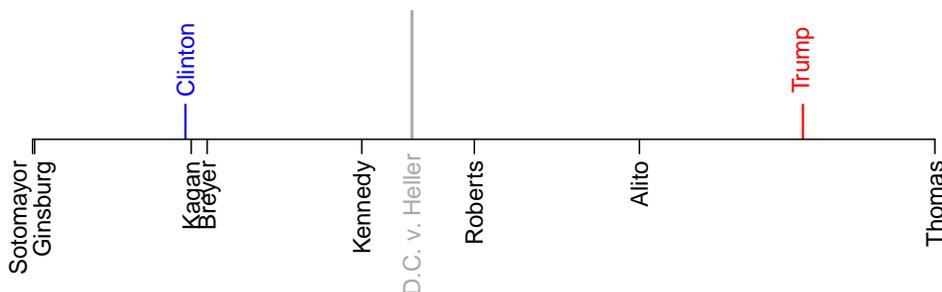


Figure 3: Left-right placement of the 2016 Justices and presidential candidates, with the *Heller* cutpoint. (The cutpoint for *Citizens United* is identical.) Justices to the left of the cutpoint are more likely to uphold restrictions than Justices to the right of the cutpoint.

Note that although Kennedy was in the majority in both, his leftward drift now puts him slightly to the left of both cutpoints. This does not mean that Kennedy—or the Democratic appointees—would vote to overrule *Heller* or *Citizens United*. But it does suggest that Kennedy may be more open than ever before to joining the Democrats to uphold restrictions on guns and campaign finance.

Kennedy’s move to the left is reminiscent of O’Connor’s. Only at the very end of her career was O’Connor to the left of cutpoints for affirmative action cases (among others). Put another way, had *Grutter v. Bollinger* come to the Court in, say, the 2000 term instead of in 2002 we estimate that O’Connor (and so the Court) would have invalidated Michigan Law’s program.⁸ The same is likely true of Kennedy, with *Fisher v. Texas II* (2016) providing some evidence of his shift. (*Whole Woman’s Health v. Hellerstedt* (2016) is another possible example.)

The long and short of it is that Kennedy may provide a 6th vote for the Democrats in several highly salient areas of the law should Clinton fill the Scalia vacancy. But voting and doctrine are, of course, two different things. Should Breyer occupy the center seat, it remains likely that the law, if not case outcomes, would tilt center-left.

4 Possible Nominees as Justices

The analysis so far assumes that Clinton or Trump Justices will be ideologically quite close to their appointing president. Table 1 suggests the plausibility of this assumption. Then again, there are differences among the candidates Clinton and Trump are considering, as Figure 4 shows.

⁸See our analysis in “The Median Justice on the U.S. Supreme Court,” note 7.

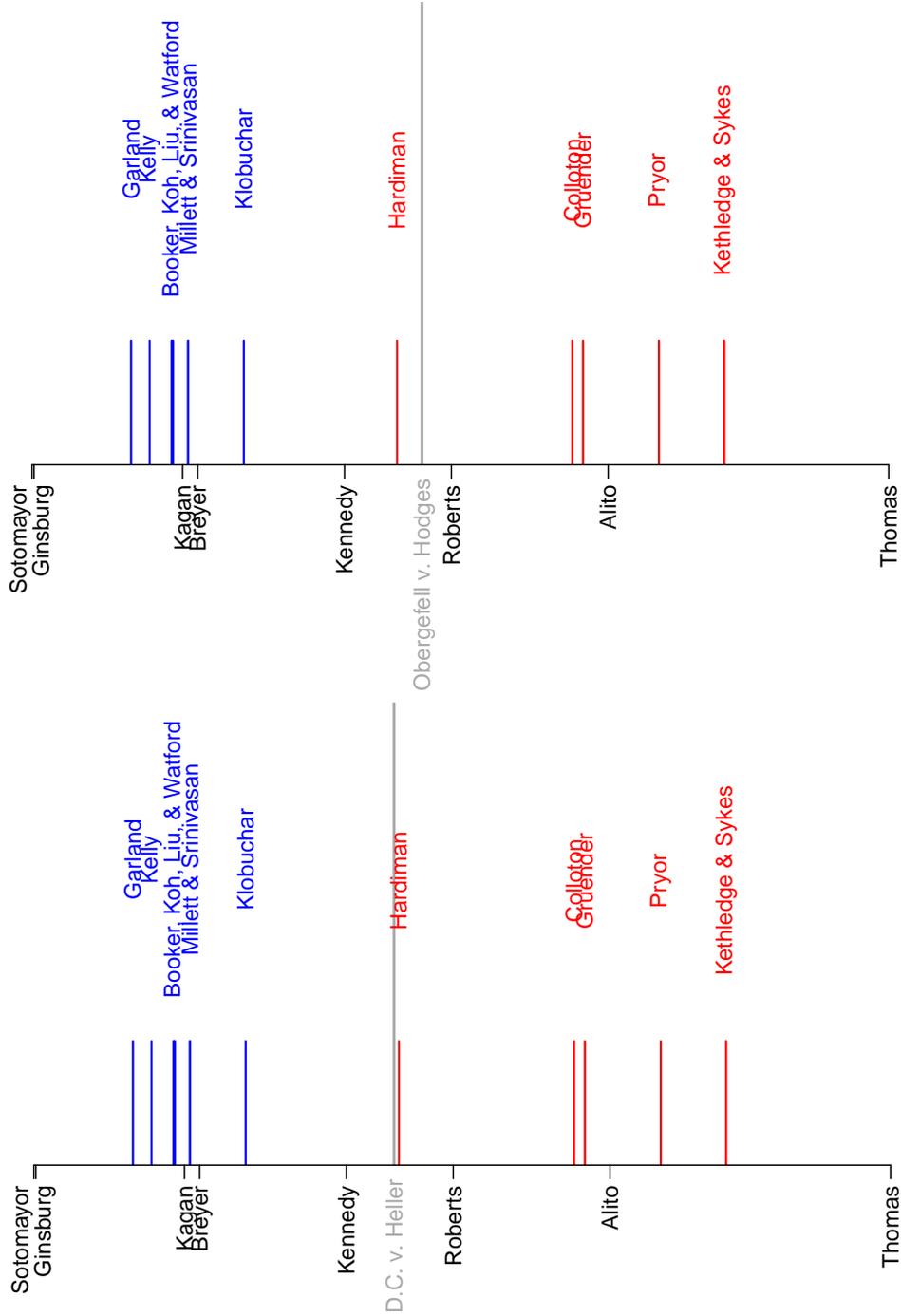


Figure 4: Left-right placement of the 2016 Justices and possible nominees to the Court, with the *Obergefell* and *Heller* cutpoints. (The cutpoint for *Citizens United* is identical to *Heller's*.) Justices/nominees to the left of the *Obergefell* cutpoint are more likely to invalidate bans on same-sex marriage than Justices/nominees to the right of the cutpoint. Justices/nominees to the left of the *Heller* cutpoint are more likely to uphold restrictions than Justices/nominees to the right of the cutpoint.

Beginning with the Democrats, we notice the following.

1. All 9 potential Democratic nominees are to the left of both cutpoints, meaning that they are more likely to support gay rights as well as regulations on guns and campaign finance.
2. Despite commentators' claims to the contrary, our estimates place Merrick Garland as the most liberal of the current crop of potential nominees. He is nearly as close to Ginsburg and Sotomayor as he is to Kagan and Breyer.
3. Only Amy Klobucher is to the right of Breyer. If Clinton were to appoint her to the Court, she would likely become the Court's new power broker (though Breyer and Kagan are close).
4. These patterns noted, it remains true that the possible Democratic appointees are bunched together, as are the current Democrats. Not much policy space separates them.

As for the Republicans:

1. Only Thomas Hardiman falls into the moderate category.⁹ Were he to replace Scalia, there is some possibility that he would relieve Kennedy of Kennedy's "super median" status.¹⁰ Hardiman or Kennedy could form majority coalitions with the left or right side of the Court—in much the same way that Kennedy and O'Connor did in the 1990s-2000s.
2. The other Republicans are more likely to vote with Alito than Roberts on the left or Thomas on the right.
3. Even with a new Republican appointee, Thomas is likely to remain somewhat isolated on the extreme right. No potential Republican nominee is as conservative as Thomas (or at least not one we were able to locate in policy space).

⁹Under the JCS, Judge Hardiman is located halfway between Senators Santorum and Spector (who was rather far to the left for a Republican).

¹⁰Lee Epstein & Tonja Jacoby, "Super Medians," 61 *Stanford Law Review* 37 (2008).