

# President-Elect Trump and his Possible Justices\*

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December 15, 2016

In the same left-right (liberal-conservative) policy space, we locate President-Elect Trump’s possible nominees to the Supreme Court, the current justices, and several highly salient decisions. The goal is to consider how the Court (and, ultimately, the law) could change depending on Trump’s picks to replace Justice Scalia and other justices who may depart during his presidency.

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

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

*Current Justices.* We base the justices’ ideology on their voting patterns (their Martin-Quinn scores<sup>2</sup>). We apply the procedure outlined in the JCS to ensure compatibility between the justices’ and possible nominees’ scores.

So 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, even though the scores for the nominees (outlined below) end in 2013. We took this step because several justices (notably Kennedy) drifted substantially to the left between the 2013 and 2015 terms.

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\*This is a follow-up to our study, [Possible Presidents and their Possible Justices](#), which was covered in *New York Times* on September 25, 2016.

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

<sup>2</sup>At: <http://mqscores.berkeley.edu>.

*Possible Nominees Holding Federal Positions.* Donald Trump released two lists of Supreme Court picks, for a total of 21 names.<sup>3</sup>

The majority (11/21) are sitting federal judges, as Table 1 shows. For these judges, we measure their ideology by the tried-and-true approach developed by Giles, et al.<sup>4</sup>

- 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 NOMINATE Common Space scores to measure the senators’ and presidents’ ideology, we can easily place federal judges in the same left-right space as the current justices.<sup>5</sup> The same holds for Mike Lee, the lone U.S. Senator on Trump’s list, and Charles Canady, a former member of the U.S. House of Representatives (currently a state supreme court justice) (see Table 1).

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<sup>3</sup>The first list (May 18, 2016) is at <https://www.donaldjtrump.com/press-releases/donald-j.-trump-releases-list-of-names-of-potential-united-states-supreme-c>; the second list (September 23, 2016) is at <https://www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks>.

<sup>4</sup>Micheal W. Giles, Virginia Hettinger, & Todd Peppers, “Picking Federal Judges: A Note on Policy and Partisan Selection Agendas,” 54 *Political Research Quarterly* 623 (2001).

<sup>5</sup>Poole’s scores are at: [http://voteview.com/dwnomin\\_joint\\_house\\_and\\_senate.htm](http://voteview.com/dwnomin_joint_house_and_senate.htm). Updated scores for the court of appeals judges are at: <http://epstein.wustl.edu/research/JCS.html>. Christina L. Boyd maintains the district judges’ scores at <http://clboyd.net/ideology.html>.

| Name/<br>Position (Appointing President)                         | Year/Age &<br>State of Birth | Law School               | Clerkships                                |
|--|------------------------------|--------------------------|---|
| Charles Canady<br>Former MC; current FL SCt Justice              | 1954 (62)<br>Florida         | Yale                     | None                                      |
| Steven M. Colloton<br>8 <sup>th</sup> Circuit Judge (Bush 2)     | 1963 (53)<br>Iowa            | Yale                     | Silberman (CoA),<br>Rehnquist (SCt)       |
| Neil M. Gorsuch<br>10 <sup>th</sup> Circuit Judge (Bush 2)       | 1967 (49)<br>Colorado        | Harvard                  | Sentelle (CoA),<br>White/Kennedy (SCt)    |
| Raymond W. Gruender<br>8 <sup>th</sup> Circuit Judge (Bush 2)    | 1963 (53)<br>Missouri        | Washington<br>University | None                                      |
| Thomas M. Hardiman<br>3 <sup>rd</sup> Circuit Judge (Bush 2)     | 1965 (51)<br>Massachusetts   | Georgetown               | None                                      |
| Raymond M. Kethledge<br>6 <sup>th</sup> Circuit Judge (Bush 2)   | 1966 (50)<br>New Jersey      | Michigan                 | Guy (CoA),<br>Kennedy (SCt)               |
| Mike Lee<br>U.S. Senator (R-Utah)                                | 1971 (45)<br>Arizona         | BYU                      | Benson (DCt), Alito<br>(CoA), Alito (SCt) |
| Federico A. Moreno<br>S. Dist. FL Judge (Bush 1)                 | 1952 (64)<br>Venezuela       | Miami                    | None                                      |
| William H. Pryor, Jr.<br>11 <sup>th</sup> Circuit Judge (Bush 2) | 1962 (54)<br>Alabama         | Tulane                   | Wisdom (CoA)                              |
| Margaret A. Ryan<br>Armed Forces Judge (Bush 2)                  | 1964 (52)<br>Illinois        | Notre Dame               | Luttig (CoA),<br>Thomas (SCt)             |
| Diane S. Sykes<br>7 <sup>th</sup> Circuit Judge (Bush 2)         | 1957 (59)<br>Wisconsin       | Marquette                | Evans (DCt)                               |
| Amul R. Thapar<br>E. Dist. KY Judge (Bush 2)                     | 1969 (47)<br>Michigan        | Berkeley                 | Spiegel (DCt),<br>NR Jones (CoA)          |
| Timothy M. Tymkovich<br>10 <sup>th</sup> Circuit Judge (Bush 2)  | 1956 (60)<br>Colorado        | Colorado                 | Erickson (CO SCt)                         |

**Table 1.** Federal judges and legislators on the President-Elect’s short list. Age (in parentheses) is age at the end of 2016, which may not be the judge’s current age. Source for all but Canady, Lee, and Ryan is the [Federal Judicial Center’s Biographical Directory of Federal Judges](#). Because Lee and Canady are (were) legislators and Ryan serves on an Article I court, they are not listed in the FJC’s directory. We obtained information from various websites, including [Lee’s Senate site](#), [Ballotpedia](#), and [Pace Law](#).

Of course, we can’t say with any degree of (un)certainly whether our ideological placements of Canady, Lee, and the federal judges will predict their behavior on the U.S. Supreme Court; none are justices (yet). What we can say is that the ideological scores yield reasonably accurate predictions for Scalia and the current justices who served as appellate judges, as Table 2 shows. For example, based on Alito’s lower court ideology we would expect him to vote 60.9% of the time in the conservative direction. Alito’s actual percentage is 63.7—for an error rate of 2.8 percentage points. For some justices the fit is even better (*e.g.*, Ginsburg and Scalia) and for some slightly worse (*e.g.*, Sotomayor and Thomas) but, overall, there’s a strong and significant relationship between the justices’ lower court scores and their voting on the Supreme Court.

| Justice   | Justice's Lower Court Ideology | Predicted Percent Conservative | Justice's Percent Conservative | Error |
|-----------|--------------------------------|--------------------------------|--------------------------------|-------|
| Alito     | 0.492                          | 60.87                          | 63.65                          | 2.78  |
| Breyer    | -0.380                         | 38.78                          | 41.14                          | 2.36  |
| Ginsburg  | -0.502                         | 35.69                          | 37.12                          | 1.43  |
| Kennedy   | 0.372                          | 57.83                          | 55.42                          | -2.41 |
| Roberts   | 0.486                          | 60.72                          | 58.24                          | -2.48 |
| Scalia    | 0.538                          | 62.04                          | 61.23                          | -0.81 |
| Sotomayor | -0.291                         | 41.03                          | 36.93                          | -4.10 |
| Thomas    | 0.492                          | 60.87                          | 64.12                          | 3.25  |

**Table 2.** Predictions of the justices' voting based on their lower court ideology score. Percent conservative calculated from the [U.S. Supreme Court Database](#), with decisionType=1 or 7 and term $\geq$  2005.  $R^2=0.94$ ; RMSE=3.04.

*Possible Nominees Serving as State Judges.* The remaining eight names on Trump's list are state supreme court justices (see Table 3). Unfortunately, there is no equally tried-and-true method of including these justices in same policy space as Supreme Court justices and their decisions. To avoid excluding them, we rely on the JCS score of the federal judge/justice for whom they clerked (or the average score if they clerked for more than one judge). Using this approach we are able to incorporate all but Young who never served as a clerk. (Neither did Canady. But, recall, we measured his ideology with his score as a member of the House of Representatives.)

| <b>Name/<br/>State Supreme Court</b> | <b>Year/Age &amp;<br/>State of Birth</b> | <b>Law School</b>        | <b>Clerkships</b>                             |
|--------------------------------------|--|--------------------------|---|
| Keith R. Blackwell<br>Georgia        | 1974* (42)<br>Georgia                    | Georgia                  | Edmondson (CoA)                               |
| Allison Eid<br>Colorado              | 1965 (51)<br>Washington St.              | University of<br>Chicago | JE Smith (CoA),<br>Thomas (SCt)               |
| Joan Larsen<br>Michigan              | 1968 (48)<br>Iowa                        | Northwestern             | Sentelle (CoA),<br>Scalia (SCt)               |
| Thomas R. Lee<br>Utah                | 1964 (52)<br>Arizona*                    | University of<br>Chicago | Wilkinson (CoA),<br>Thomas (SCt)              |
| Edward Mansfield<br>Iowa             | 1956* (60)<br>Massachusetts              | Yale                     | Higginbotham (CoA)                            |
| David Stras<br>Minnesota             | 1974 (42)<br>Kansas                      | Kansas                   | Brunetti (CoA), Luttig<br>(CoA), Thomas (SCt) |
| Don Willett<br>Texas                 | 1966 (50)<br>Texas                       | Duke                     | JS Williams (CoA)                             |
| Robert P. Young<br>Michigan          | 1951 (65)<br>Iowa                        | Harvard                  | None  |

**Table 3.** Sitting state supreme court justices on the President-Elect’s short list. We exclude Canady because he was a former member of Congress (see Table 1). Age (in parentheses) is age at the end of 2016, which may not be the judge’s current age. \* indicates difficult-to-verify information. Sources include state supreme court and the Federalist Society websites, Ballotpedia, and [TIFIS](#).

Relying on clerkships to assess the state justices’ ideology is novel, and so we must emphasize that this measurement strategy has not been validated, much less extensively scrutinized. Nonetheless (and with the possible exception of Willett), the results appear plausible, as we’ll see in Section 3.

## 2 Preliminaries 2: Locating Cases in Left-Right Space

Just as we use voting patterns to locate the U.S. Supreme Court justices on a single liberal-conservative line, we deploy vote data to locate three (very salient) Court cases on the same line.

*Whole Woman’s Health v. Hellerstedt* (2016), invalidating (5-3) two requirements in a Texas abortion law: (1) physicians who perform abortions must have admitting privileges at a nearby hospital and (2) abortion clinics must meet the minimum standards for ambulatory surgical centers. Breyer, Ginsburg, Kagan, Kennedy, and Sotomayor were in the majority; Alito, Roberts, and Thomas dissented.

*Fisher v. University of Texas-Austin* (2016), upholding (4-3) the University’s race-conscious admissions program. Breyer, Ginsburg, Kennedy, and Sotomayor were in the majority; Alito, Roberts, and Thomas dissented. (Kagan did not participate.)

*Obergefell v. Hodges* (2015), requiring (5-4) states to license marriages between two people of the same sex and to recognize same-sex marriages when they are lawfully licensed and performed in another state. Breyer, Ginsburg, Kagan, Kennedy, and Sotomayor were in the majority; Alito, Roberts, Scalia, and Thomas dissented.

We summarize these cases as “cutpoints.” A cutpoint is the point on a 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*.<sup>6</sup> Figure 1 provides an example. There we show the left-right (liberal-conservative) placement of the current justices (plus Scalia); we also show the *Fisher* cutpoint, such that justices to the left of the cutpoint are more likely to uphold affirmative action plans than justices to the right of the cutpoint.

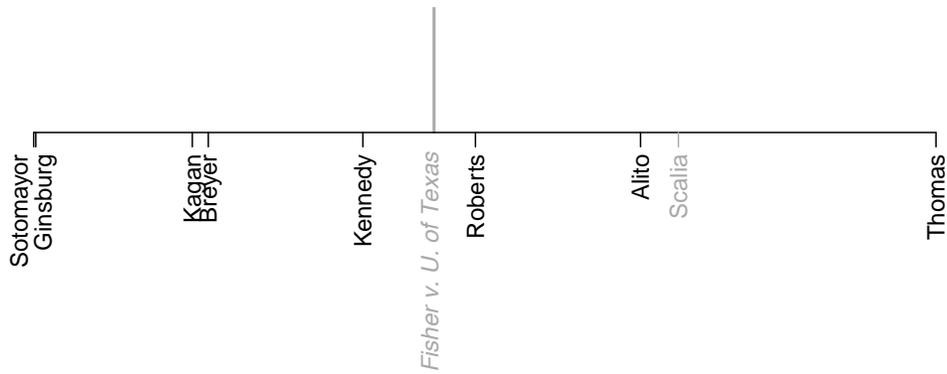


Figure 1: Left-right placement of the 2016 term justices (plus Scalia), with the *Fisher* cutpoint. Justices to the left of the cutpoint are more likely to uphold affirmative action plans than justices to the right of the cutpoint.

Note that although Kagan did not participate in *Fisher*, our analysis suggests that she would have voted with the majority to uphold the university’s race-conscious admissions program had she participated; and Ginsburg confirmed as much in an interview with Adam Liptak of the *New York Times*.<sup>7</sup> Likewise, we make the (uncontroversial) prediction that Scalia would have joined Alito, Roberts, and Thomas to invalidate the program had he been alive when the Court issued its decision.

The larger point is that 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 not only to consider how justices might have voted in the case (or future cases) had they participated but also, and more relevant here, how possible nominees might have voted had they been on the Court.

<sup>6</sup>For 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).

<sup>7</sup>She told Liptak: “If Justice Kagan had been there, it would have been 5 to 3.” In Adam Liptak, “Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term,” *New York Times*, July 10, 2016.

### 3 Possible Nominees as Justices

Figure 2 shows where Trump's candidates would fit on the current Court if they were to become justices. The top and bottom panels are the same except that the top panel shows the cutpoint for *Obergefell* and the bottom, for *Whole Woman's Health*. (We do not show the *Fisher* cutpoint because it is identical to *Whole Woman's Health's*.)

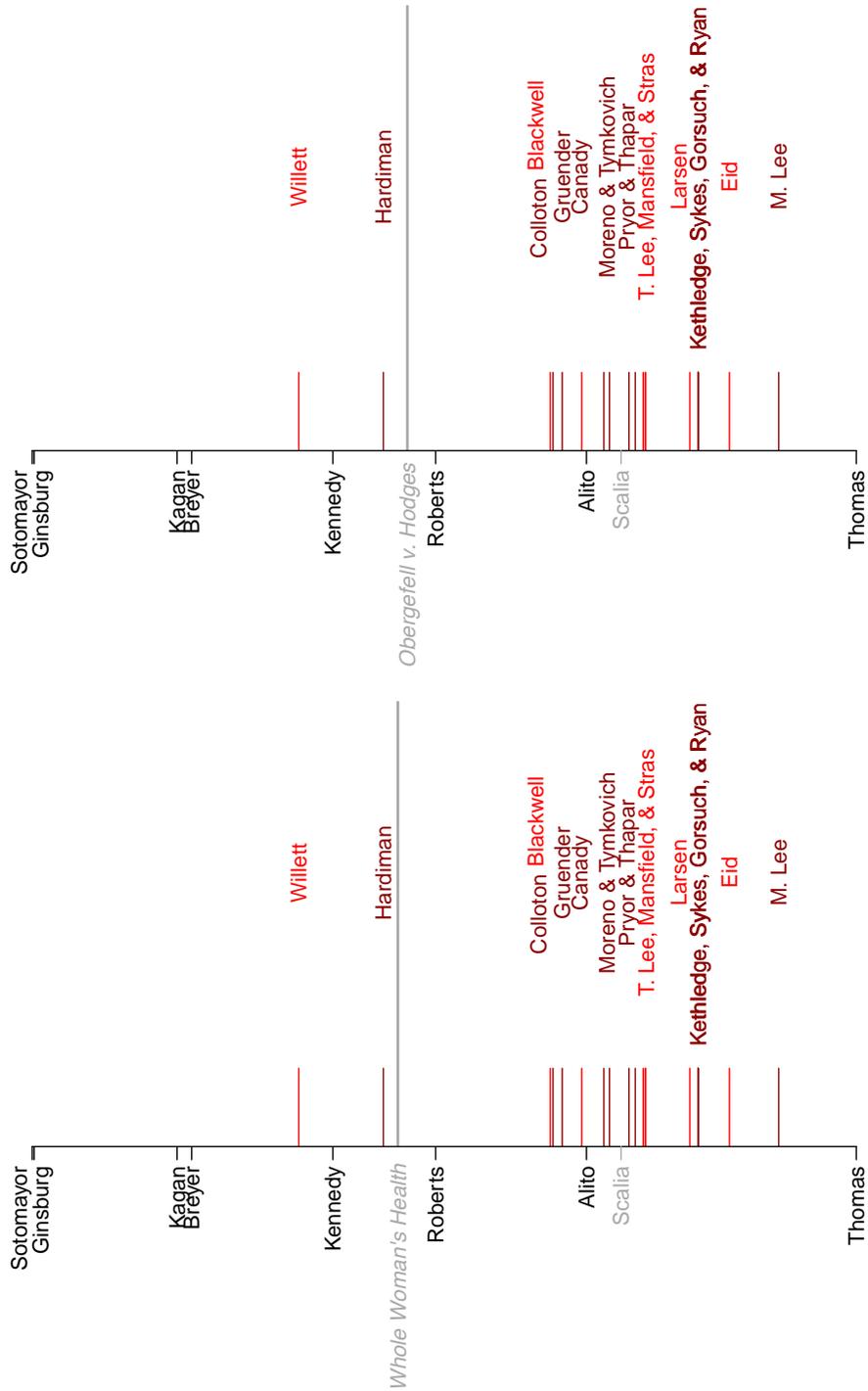


Figure 2: Left-right placement of the 2016 justices (plus Scalia) and 20 possible nominees to the Court, with the *Obergefell* and *Whole Woman's Health* (*WWH*) cutpoints. Candidates holding a federal office are in maroon, as is Canady who served in Congress; state supreme court justices are in red. 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 *WWH* cutpoint are more likely to invalidate restrictions on abortion than justices/nominees to the right of the cutpoint. The cutpoint for *Fisher*, shown in Figure 1, is identical to *WWH*'s.

All but one of the potential Trump nominees are to the right of (more conservative than) Kennedy, but their ideological range is greater than it is for current Democratic appointees.<sup>8</sup>

1. *Moderately Conservative.* Hardiman<sup>9</sup> and Willett fit this description (though we again emphasize that we base Willett’s score on an unverified measurement strategy). Were either to replace Scalia, he may be sufficiently close to the center to relieve Kennedy of Kennedy’s “super median” status.<sup>10</sup> Hardiman/Willett 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 throughout the 1990s and early 2000s. Note too that Hardiman and Willett are the only Trump picks possibly to the left of the *Obergefell* cutpoint.<sup>11</sup>
2. *Conservative.* 16 of short-listed judges fall into this category—roughly the same category (or ideological range) as Alito-Scalia. The possibility of ideological drift aside (more on drift below), we predict that all 16 would be reliable conservatives, voting to limit gay rights, uphold restrictions on abortion, and invalidate affirmative action programs (as Alito does and Scalia did throughout his career). More generally, if we use Alito as our guide, we would expect these 16 candidates to reach conservative decisions in 64% of all cases and in 73% of non-unanimous decisions. The percentages for Kennedy, by comparison, are 55% and 59%.<sup>12</sup> (The differences between Alito and Kennedy are statistically significant at  $p < .01$ .)
3. *Extremely Conservative.* This description fits Lee—the most conservative member of the U.S. Senate according to Poole’s scores—and, to a lesser extent, Eid. As long as Thomas remains on the Court, we do not predict that Lee (or Eid) would become the most conservative member of the Court. But should either get the nod, Thomas would be less isolated on the extreme right.

With regard to short-term changes on the Court and for the law, we observe the following.

1. No matter who replaces Scalia, at least five justices will remain to the left of the *Obergefell* cutpoint. This means that a majority of the Court will likely continue to support same-sex marriage and perhaps gay rights more broadly. In other words, Trump’s first appointee will not move the Court to the right in this area.
2. Five justices also are to the left of the *Whole Woman’s Health* and *Fisher* cutpoints. The suggestion here is that the Court will continue to invalidate restrictions on abortion and uphold affirmative action programs regardless of the next justice. But these predictions hinge entirely on Kennedy.

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<sup>8</sup>It is also possible that Young is to the left of Kennedy but our measurement procedures do not allow us to place him on the lines in Figure 2.

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

<sup>10</sup>Lee Epstein & Tonja Jacoby, “Super Medians,” 61 *Stanford Law Review* 37 (2008).

<sup>11</sup>But see note 8.

<sup>12</sup>We used the [Supreme Court Database](#) to calculate these percentages. We base them on the 2005-2015 terms in orally argued cases resulting in a signed opinion of the Court or a judgment.

- (a) On the one hand, Kennedy has drifted substantially to the left in recent years suggesting that he will continue to the join the Democratic side of the bench in affirmative action and abortion cases—and perhaps too in disputes involving restrictions on guns and campaign finance, as we noted in our [earlier report](#).<sup>13</sup>
- (b) On the other hand, it is possible that Kennedy will proceed on a program-by-program and restriction-by-restriction basis, judging some to pass constitutional muster and others, not. It is also possible that the addition of another conservative justice will push Kennedy to the right, although Epstein, Landes, & Posner find little evidence of group effects on the Court.<sup>14</sup>

In the longer term, the picture for the Court and the law changes dramatically.

1. Because three justices are now over (Ginsburg), at (Kennedy) or near (Breyer) 80 years of age, Trump probably will have an opportunity to appoint another justice(s) over the next four years.
2. If Trump replaces any justice to the left of Roberts (the liberals plus Kennedy), substantial legal change would likely follow. Roberts (or one of the Trump justices) would become the Court’s new center, meaning that a majority would be well positioned to upend the liberal agenda (*e.g.*, by returning abortion to the states, shuttering affirmative action programs, limiting gay rights) and cement conservative victories in the areas of campaign finance, voting, religion, and gun ownership, among others.
3. More generally, *all 41 “liberal” decisions in which the Court divided 5-4 (or 5-3 last term) with Kennedy in the majority and Roberts in dissent could come under discussion should Roberts move into the center seat.* These include *Whole Woman’s Health* and *Fisher* of course but also liberal wins in cases involving climate change,<sup>15</sup> the death penalty,<sup>16</sup> alien detainees,<sup>17</sup> judicial recusals,<sup>18</sup> and prison overcrowding,<sup>19</sup> to name just a few.

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<sup>13</sup>We also note there that 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 (see our analysis in “The Median Justice on the U.S. Supreme Court,” note 6). The same may be true of Kennedy, with *Fisher* providing some evidence of his shift. (*Whole Woman’s Health* is another possible example.)

<sup>14</sup>Lee Epstein, William M. Landes, & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational Choice* (Harvard University Press, 2013).

<sup>15</sup>*Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>16</sup>*E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

<sup>17</sup>*Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>18</sup>*Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

<sup>19</sup>*Brown v. Plata*, 563 U.S. 493 (2011).

## 4 Ideological Drift

These predictions assume that once on the Court, the first Trump appointee will not be a turncoat (e.g., Warren, Souter) or leftward drifter (e.g., Blackmun, O’Connor, Kennedy). Empirical studies, however, question this assumption. They have found that as many as half of all justices serving since 1937 diverged from their president’s ideology or otherwise drifted to the right or, more typically, to the left.<sup>20</sup>

Why? Epstein, Landes, & Posner tested, and ultimately confirmed, the hypotheses that justices are less likely to drift to the right if they were a federal official (including a judge) working in the District of Columbia at the time of their appointment.<sup>21</sup> Perhaps the president has better information about potential appointees who are inside the Beltway. Or perhaps newcomers to Washington are more vulnerable to criticism, and more grateful for praise, from (some left-leaning) reporters.<sup>22</sup> As Judge Silberman of the D.C. Circuit put it, “I do not think I fully appreciated until I became a judge . . . how much an impact press coverage can have on judges. [I] understand better today the reason for the evolution of some judges. More often than not it is attributable to their paying close attention to newspaper accounts of their opinions.”<sup>23</sup>

Whatever the reason, the relationship between proximity to the District and the lack of drift may explain why five of the nine most recent justices were working in Washington at the time of their nomination (Ginsburg, Kagan, Roberts, Scalia, and Thomas); and two were close by in New York (Sotomayor) and New Jersey (Alito). It also may account for Obama’s nomination of Merrick Garland and his serious consideration of Sri Srinivasan—both judges on the D.C. Circuit.

As Table 4 shows, only two nominees now working in Washington appear on Trump’s list (Lee and Ryan)— even though there are other plausible D.C. candidates (notably former Solicitor General Paul Clement and Judge Brett M. Kavanaugh of the D.C. Circuit<sup>24</sup>). Apparently, the idea is to “send a message that [the Trump administration] is an outside-the-Beltway organization.”<sup>25</sup>

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<sup>20</sup>E.g., Andrew D. Martin & Kevin M. Quinn, “Assessing Preference Change on the U.S. Supreme Court,” 23 *Journal of Law, Economics, & Organization* 365 (2007); Lee Epstein, et al., “Ideological Drift Among Supreme Court Justices,” 101 *Northwestern University Law Review* 1883 (2007); Epstein, Landes, & Posner, note 14.

<sup>21</sup>Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006), 144; Linda Greenhouse, “Justices Who Change: A Response to Epstein, et al.” 101 *Northwestern University Law Review* 1885 (2007).

<sup>22</sup>This is known as the “Greenhouse Effect,” named for the long-serving Supreme Court correspondent for the *New York Times*, Linda Greenhouse. For an analysis, see Baum, note 21. Perhaps the emergence of conservative and libertarian blogs have worked to offset this effect.

<sup>23</sup>Quoted in Baum, note 21, 139.

<sup>24</sup>For possible reasons for their exclusion, see Adam Liptak, “Trump’s Supreme Court List: Ivy League? Out. The Heartland? In.,” *New York Times*, November 14, 2016.

<sup>25</sup>John G. Malcolm, a director and fellow at the Heritage Foundation, who suggested some of the names on Trump’s shortlist, quoted in Liptak, note 24.

| Name                  | Washington, D.C. Work Connections  |
|-----------------------|--|
| Keith R. Blackwell    | None   |
| Charles Canady        | None   |
| Steven M. Colloton    | Special Assistant to the Attorney General, Office of Legal Counsel, 1990-91  |
| Allison Eid           | None   |
| Neil M. Gorsuch       | Deputy Associate Attorney General, 2005-06   |
| Raymond W. Gruender   | None   |
| Thomas M. Hardiman    | None   |
| Raymond M. Kethledge  | None   |
| Joan Larsen           | Assistant Attorney General, Office of Legal Counsel, 2002-03   |
| Mike Lee              | Currently works in Washington as a U.S. Senator (R-Utah)   |
| Thomas R. Lee         | Deputy Assistant Attorney General, Civil Division, 2004-05   |
| Edward Mansfield      | None   |
| Federico A. Moreno    | None   |
| William H. Pryor, Jr. | None   |
| Margaret A. Ryan      | Currently works in Washington as a Judge   |
| David Stras           | None   |
| Diane S. Sykes        | None   |
| Amul R. Thapar        | Assistant U.S. Attorney, District of Columbia, 1999-2000   |
| Timothy M. Tymkovich  | None   |
| Don Willett           | Special Assistant to the President (George W. Bush), 2001-02<br>Deputy Assistant Attorney General, Office of Legal Policy, 2002-03 |
| Robert P. Young       | None   |

**Table 4.** Working in Washington, D.C. or work experience in the executive branch in Washington, D.C. Canady worked in Washington when he was a member of Congress but no longer lives there; and he never held a federal executive position in D.C. Between college and law school, Eid worked as an assistant and speechwriter to the U.S. Secretary of Education. For sources, see Tables 1 and 3.

Note, though, that six of the short-listers worked under Republican presidents in the executive branch in Washington, which may mitigate the risk of drift<sup>26</sup>—or at least reflect greater dedication to conservative causes.<sup>27</sup> Alito provides an example. He was not living in Washington at the time of his nomination, but he came to the Court with substantial executive branch experience in D.C.: assistant to the Solicitor General and deputy assistant attorney general during the Reagan years. Unlike Kennedy or Souter, neither of whom ever worked in Washington, Alito shows no signs of drift or divergence.

Emerging from this analysis and the existing literature is a straightforward prediction: Were Trump to reach into the heartland or the South, and select a nominee with little or no connection to Washington, D.C., he might well trade off elitism and insiderism in favor

<sup>26</sup>See Michael C. Dorf, “Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and Others Don’t?,” 1 *Harvard Law & Policy Review* 457 (2007), at 457 (“[A]n especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal [is] experience in the executive branch of the federal government. Those who lack such experience evolve; those who have it do not.”).

<sup>27</sup>Dorf, note 26, 458.

of (possible) short-term electoral benefits, as well as incur the policy costs of ideological divergence or drift. Aside from minimizing drift altogether by appointing M. Lee or Ryan (both now working in Washington), the suggestion here is that Trump take an especially close look at the five former executive branch officials who also fall within the Scalia-Alito ideological range (Colloton, Gorsuch, Larsen, T. Lee, and Thapar).

## Appendix. Other Approaches to Locating Judges (and Cases) in Ideological Policy Space

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

For three reasons, we respectfully disagree.

1. Meehl's meta-analysis of more than six decades ago demonstrated that expert judgment is almost always inferior to systematic scientific assessment; it may be even worse than novice evaluations.<sup>28</sup> Many follow-up studies have endorsed or confirmed Meehl's conclusions. For a review relevant to law, we recommend Caldeira's commentary on a competition between a statistical model and legal experts over predicting Supreme Court outcomes.<sup>29</sup> That the model generally outperformed the experts hardly surprised Caldeira. In light of the long line of literature demonstrating that "human judges are not merely worse than optimal regression equations; they are worse than almost any regression equation," Caldeira would have been astonished had the competition come out the other way.
2. As for a close reading of the judges' opinions: We know that federal judges who have a realistic prospect of promotion to the Supreme Court (now all the judges on Trump's short list) alter their judicial behavior in order to improve their chances—in other words, they "audition" for an appointment to the Court.<sup>30</sup> We also know that on the U.S. Courts of Appeals there is substantial "dissent aversion" (a reluctance by some judges to dissent publicly even when they disagree with their colleagues' decision), which means that the ideological composition of the judges' circuits (and so the panels on which they serve) will affect their votes.<sup>31</sup> Taken together, these factors suggest that lower court records may be poor, even misleading, predictors of how judges will vote as justices (and Epstein, Landes, & Posner demonstrate as much<sup>32</sup>).
3. See Table 2. Although we don't know, and can't know yet, whether the predictions will be as accurate for the candidates on Trump's short list as they are for the current justices, the strong fit between the lower court scores and Supreme Court voting is encouraging.

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<sup>28</sup>Paul Meehl, *Clinical versus Statistical Prediction: A Theoretical Analysis and Review of the Evidence* (original copyright, 1954).

<sup>29</sup>Gregory A. Caldeira, "The Supreme Court Forecasting Project: Prediction versus Explanation and Statistical Models versus Expert Judgments," 2 *Perspectives on Politics* 777 (2004).

<sup>30</sup>Epstein, Landes, & Posner, *The Behavior of Federal Judges*, note 14, especially Chapter 8.

<sup>31</sup>Id., Chapter 6. See also Lee Epstein, William M. Landes & Richard A. Posner, "Why (and When) Judges Dissent," 3 *Journal of Legal Analysis* 101-137 (2011).

<sup>32</sup>Id., 279-281.