Simulating the Future Ideological Composition of the Supreme Court

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Abstract

This is a draft chapter from our book project, "Making the Supreme Court: The Politics of Appointments, 1930-2020." In this chapter we use simulations to project the probable ideological composition of the Court for the rest of the 21st century, as well as to study how specific shifts in norms and institutions may affect that composition. We show that under the status quo of nomination politics, conservative justices are likely to control the Court for several decades. We examine several possible changes to nomination politics, including having no appointments under divided government, term limits and court packing. *Comments welcome.*

In the previous chapters of this book, we've looked to the past, examining how Supreme Court appointment politics changed, why, and with what consequences. Now we turn our eyes to the future. Of course, no one can say with certainty how appointment politics—and the Supreme Courts they make—will unfold over the coming years. But we can offer educated guesses. In particular, we can use computer simulations to project the probable ideological composition of the Court, and we can study how specific shifts in norms and institutions may affect that composition. The result is, in truth, a kind of social-science fiction. But by solidly grounding the underlying assumptions in historical patterns and the specific mechanisms studied in earlier chapters, we can offer—we hope!—plausible speculation with real bite.

In modeling the future of the Supreme Court using computer simulations, we build upon four earlier efforts. First, Michael Bailey and Albert Yoon (2011) used simulations to examine how strategic retirements on the Court and term limits would affect the makeup of the Court. They found modest overall effects from strategic retirements but larger potential effects from term limits. More specifically, they found that the location of the median justice is more responsive to the president's party when justices face term limits (relative to life tenure) and when justices are more sensitive to ideology (so strategic retirement is more attractive to them).

Second, Jonathan Katz and Matthew Spitzer (2014) examined how the recent tendency of Republican presidents—in contrast to Democratic presidents—to appoint younger nominees influences the location of the median justice in the long run. They found, not surprisingly, that such an asymmetry would shift the median in a conservative direction. However, they also found that the introduction of 18-year term limits would cancel out the effect of an appointing age imbalance.

Finally, in a pair of papers, Adam Chilton, Daniel Epps, Kyle Rozema, and Maya Sen used simulations to examine two policy interventions. Chilton et al. (2021a) examined how various term limit proposals might affect the composition of the court, while Chilton et al. (2021b) studied how tit-for-tat court packing would affect the size of the Court. The term

limits paper applied their simulations to the past, and thus took historical elections as given. The simulations did not model control of the branches. A nice feature of the paper is the care in modeling specific proposals for implementing term limits, thereby allowing for a comparative assessment of the different proposals. In contrast to the term limits paper, Chilton et al. (2021*b*) did simulate the future, trying to predict the consequences of of tit-for-tat court packing. The simulations indicated that court packing would, in short order, lead to a Supreme Court with an astoundingly large number of seats.[1]

Our simulations share some commonalities with the approaches in these papers but, we suggest, are richer and more ambitious. Rather than examining one or two "histories," we examine a range of counterfactuals based on potential changes in norms and practices. In addition, the empirical foundations of our simulations are tethered more closely to the realities of the modern confirmation process than some of the earlier efforts. For example, in modeling the ideology of incoming justices, both Bailey and Yoon (2011) and Katz and Spitzer (2014) take inspiration from Move-the-Median Theory. As we discussed in Chapter 1, MTM Theory does a poor job predicting nominee ideology and understates the ability of contemporary presidents to shape the Court, at least under unified party government. All of the previous simulations examine the long run location of the median justice, as do we, but none examine the evolution of ideological blocs on the Court. We showed in Chapter 13 that such blocs predict the ideological direction of case dispositions and the content of majority opinions. Accordingly, we present measures of bloc size over time.[2] None of the previous simulations examine the fate of the Court if confirmations grind to a halt during divided party government. We regard this scenario as disturbingly plausible and explore it in some depth. We also explore "reforms" like court packing and term limits. Finally, we present an innovative comparison of the "stickiness" of the Court across multiple scenarios.

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[1] These brief descriptions only scratch the surface of the many design choices in each of these papers. Table A-1 in the Appendix presents a more complete summary, as well as comparisons with our approach.

[2] Like the earlier efforts, we ignore race and gender in order to focus on ideology. However, no theoretical obstacle prevents use of the richer characteristics approach presented in Chapter 10. Using it, one could examine the likely long-run diversity of the Court. Here, however, for clarity we treat all the counterfactuals and policy experiments as variants on a single "baseline" approach.

The chapter proceeds as follows. In Section 2, we carefully lay out the design choices in our simulation, which we call the Making [the] Supreme Courts (MSC) Simulator. In Section 3 we present a core set of simulations. We begin with a rather straightforward projection of the present into the future, a baseline case. The key result is "conservative lock-in"—in all likelihood, the 2021 conservative majority on the Court will persist for decades to come.

We then explore the genesis of conservative lock-in. First, we examiner the importance of increased justice longevity and, more subtly, strategically timed retirements. Both enhance lock-in. Then we return to the ideological reliability of incoming justices, a theme emphasized in previous chapters. We construct a counterfactual in which new Supreme Court justices are much less reliable than recent nominees suggest is likely—that is, closer to the nominees of the 1940s and 1950s than the carefully groomed and vetted ones of the 21st century. We show that a degree of unreliability would soon entail an ideologically balanced court, not the polarized conservative dominant one emerging from the baseline scenario. Of course, future presidents are unlikely to abandon the meticulous selection process that yields predictable justices, at least so long as party factions demand results from presidents.

Section 3.5 examines how the events of 2016 created a historical pivot point for the Court. Here we develop a counterfactual simulation that explores what would have happened had the Senate confirmed Merrick Garland in 2016 and if Hillary Rodham Clinton had defeated Donald J. Trump in the 2016 election. The results are dramatic: a Clinton win would likely have led to liberal Courts for many years to come. But of course that is not what happened. The 2016 election thus stands out as transformative for the likely future of the Supreme Court.

We next undertake a series of simulations that explore the consequences of plausible changes in norms or practices. changes that would *not* require statutory or constitutional changes. First, in Section 4, we examine a very plausible change: what if the Garland blockade of 2016 becomes the norm and confirmations grind to a halt under divided party government? What are the implications for extended vacancies and, perhaps, even the ability

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of the Court to reach a quorum?

In Section 5, we examine two potential institutional changes to selection and tenure. First, we perform a thought experiment to examine how the short-term trajectory of the Court would have changed had the Democratic party pursued and implemented court packing in 2021. We then examine how the introduction of term limits would affect the long-run trajectory of the Court.

Finally, in Section 6 we use a regression approach to evaluate how the responsiveness of the Court to presidential elections would change under the various experiments. We find that having more heterogeneous nominees would produce the lowest degree of responsiveness, while the introduction of term limits would lead to much higher responsiveness than what is expected under the baseline scenario.

2 Modeling the Future: The MSC Simulator

2.1 The Basic Idea

The essential insight in simulating the future make-up of the Supreme Court is that each seat on the Court is a *stochastic process*, a family of random variables produced by the exit-and-replacement process. So, a seat progresses through time, moving somewhat randomly from one "state" to another, with the transitions governed by exits from the Court (via death and retirement) and entrances (via appointments). Modeling the future make-up of the Court means 1) conceptualizing the states (typically, the ideology and age of the seat holder); 2) specifying the probabilities that govern exits and entrances and hence movements of each seat from state to state, 3) keeping track of all the seat-states as they move through time, and then 4) investigating the dynamic properties of the system as a whole. The latter means the ideology of the median justice, the size of liberal-moderate-conservative blocs, the number of justices, the age distribution of the justices, and the long-run tendencies of those variables.

Because the Court has nine seats (and, under court-packing possibly many more), and the entrance and exit processes are quite complex, the third step—keeping track of all the

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moving parts—is challenging. As a practical matter, doing so with pencil and paper is impossible. Furthermore, trying to intuit the overall properties of a complex stochastic system using one's "gut-o-meter" is hopeless. Fortunately, a computer can perform the intricate accounting with ease. Then, one can see the behavior of the Court as a whole, given the design choices underlying the simulation.

The basic idea behind the MSC simulator is that we examine several different scenarios in which simulate every future year (extending to 2100) 1,000 times, generating various summary statistics across every analysis we perform. For linguistic clarity, we call each individual run of this procedure a "simulation," and we denote the collective scenario explored as a "policy experiment." For example, the baseline scenario employs 1,000 simulations; each simulation contains information on the justices (and thus the Court as a whole) for every year through 2100.

In considering the evolution of the Court in the experiments, the following points are worth keeping in mind. First, under almost any reasonable set of assumptions, the *near-future make-up of the Court is extremely sensitive to its starting composition.* The starting court in the MSC Simulator is the actual 2021 Court, which has six reliable conservatives and three reliable liberals.[3] This make-up affects the composition of the Court for years into the future in most of the simulations. The practical consequences are enormous.

Second, we assume that at any given time, the significance of the Court's make-up is *state-dependent*, not path-dependent. In other words, the Court's ideological tendency is well-captured by the current values of the median justice's ideology and the size of the Court's ideological blocs. The prior history of these variables doesn't matter as such, except as the vehicle that brought the present.[4]

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[3]In the parlance of Chapter 13, it is a 3-0-6 Court, or conservative-wing dominant.

[4]One might argue that a long series of (say) conservative medians limits the potential doctrinal impact of a later liberal median, due to stare decisis. Whether horizontal stare decisis *binds* the justices is a matter of long controversy among scholars of the Court. In our view, the bulk of the systematic empirical evidence suggests that prior precedents of the Court act at best as a weak constraint on the justices' exercise of their policy preferences. The most forceful form of this argument can be found in Spaeth and Segal (1999) and Segal and Spaeth (2002).

Third, the details of the entrance and exit processes are extremely consequential for the Court's path through time, but the processes themselves are assumed to be predictable and relatively stable. For example, the death probability for 83 year-olds does not change within the simulations—no medical miracles occur in the simulated future. As a result, the transition probabilities from one state to another are largely time-invariant or "stationary." Furthermore, given the entrance and exit processes, it is theoretically possible for the Court to move from any given state to any other state over time. For example, a 0-0-9 bloc Court (uniformly conservative) could conceivably eventually transform into a 9-0-0 Court (uniformly liberal), though this might be quite improbable in any reasonable length of time. Technically, the simulated Court is an "ergodic" process—there are no "absorbing states" that forever freeze the the Court's make-up.[5]

Together, these seemingly technical features imply a very practical consequence. The Court's make-up tends to a unique long-run distribution over possible compositions—i.e. ideologies of the median justice or sizes of liberal-moderate-conservative blocs.[6] To be clear, this mathematical fact does not mean that the Court tends toward a *unique* ideology for the median justice. To foreshadow one key result, the baseline scenario shows that the long-run ideology of the median justice displays a bimodal distribution. So there is a (smaller) long-run probability of a liberal Court (as it were) and a (larger) long-run probability of a conservative Court, with specific long-range probabilities.

In sum, from a "30,000 feet" perspective, as one examines the scenarios analyzed in the simulations, one should ask: 1) What is the implication for *the long-run distribution* of the Court's make-up? 2) *How fast* will the Court tend to get there? and 3) *How variable* is the Court's make-up in the near-term and the long-term? Of course, partisan advocates typically care only about short-term political gain or loss. But big choices, or even seemingly small

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[5]Tit-for-tat court packing presents an exception, with respect to the size of the Court. There, the court's size is assumed to be a one-way street—once one faction boosts the size of the Court, no later one can shrink it (though movements in both directions did happen during the Civil War and Reconstruction).

[6]This is a consequence of the Ergodicity Theorem, in the theory of dynamic processes. See e.g. Norris (1997, Section 1.10).

ones, can carry major long-term consequences.

2.2 Key Design Choices

One can imagine entirely different systems for selecting high court judges, such as those used in the American states.[7] But all current simulators of the U.S. Supreme Court assume presidential selection with Senate confirmation, and take life-time tenure as a baseline. So do we.

Consequently, design choices fall into four broad categories. First, what is the initial Court (the starting place) and what are the relevant characteristics of its sitting justices (e.g., their ages and ideologies)? Second, who controls the elected branches, especially the presidency and the Senate? How will this develop over time? Third, what do entering justices probably look like, conditional on control of the elected branches and the existence of a vacancy? Fourth, how are exits from the Court, due to death and retirement, likely to play out? Let's consider each of these in turn.

2.2.1 The Initial Court

We take the initial Court to be the U.S. Supreme Court as it actually existed in 2021. So, the nine starting justices in the simulation have exactly the same ages and the same ideology scores as the sitting justices in 2021.[8]

Table 1 shows the 2021 Court, including the names, age, year confirmed, appointing president, ideology score, and ideological bin for each of the nine justices; the latter two are explained shortly. An obvious point (hardly lost on contemporary observers) was the advanced age of some justices and the much less advanced age of others. Further, as noted, the 2021 Court skewed conservative, as a 3-0-6 or 2-1-6 conservative dominant Court, depending

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[7]According to the National Center for State Courts, 87 percent of all state court judges face elections, and 39 states elect at least some of their judges (Liptak 2008). Among the states that employ judicial elections, one finds considerable institutional variation, including partisan, non-partisan, and retention elections. See Shugerman (2012) for an excellent historical review of the development of judicial elections in the American states.

[8]Other simulations make somewhat different choices. For example, Chilton et al. (2021a) take as their starting point the 1937 Court, then "back-cast" the subsequent history of the Court, while changing key institutional features (mainly, the implementation of term limits). Bailey and Yoon (2011) utilize a kind of ideal baseline court, with justices evenly spaced by ideology and with a given age distribution. Chilton et al. (2021b) start with the 2021 Court, but then add four Democratic seats as an opening salvo of court packing.

Justice	Age	Year confirmed	Appointing President	NSP score	Ideological Bin
Thomas	72	1991	George H.W. Bush	0.54	Conservative
Breyer	82	1994	Clinton	-0.15	Moderate
Roberts	65	2005	George W. Bush	0.64	Conservative
Alito	70	2006	George W. Bush	0.65	Conservative
Sotomayor	66	2009	Obama	-0.30	Liberal
Kagan	60	2010	Obama	-0.29	Liberal
Gorsuch	53	2017	Trump	0.58	Conservative
Kavanaugh	55	2018	Trump	0.67	Conservative
Barrett	48	2020	Trump	0.45	Conservative

Table 1: Summary of justices on Court as of 2021, who serve as the starting justices in our simulations. The justices are ordered by year of confirmation.

on how one classifies Justice Breyer.[9]

2.2.2 Control of the Presidency and the Senate

One might expect the stochastic properties of party control of the U.S. presidency and the U.S. Senate to be well-studied and thoroughly understood. But this turns out not to be the case.[10] Consequently, designers of Supreme Court simulators must devise their own set of assumptions about the likelihoods of institutional control.[11]

We treat presidential party control as a simple Markov process. In the period 1948 to 2020, the historical record reveals the following transition probabilities:

- If a party controlled the White House for a single term, it had about a 78% chance of winning a second term.

- Correspondingly, if a party had been out of power for a single term, it had about a 22% chance of reclaiming the White House in the next election.

- If a party had controlled the White House for two terms, it had about a 20% chance of winning a third term.

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[9]As we explain shortly, we use the NSP score of the current justices to define their ideal points. These display some minor discrepancies with actual voting patterns among the conservatives, e.g., NSP inaccurately places Justice Thomas to the left of most his Republican colleagues. In addition, as we discuss below, Breyer's NSP score is a bit more moderate than his overall voting record would reflect. However, since we focus on the ideological structure of the Court as a whole (as discussed in Chapter 13) and not that of individual justices, these discrepancies are inconsequential for the results.

[10]There are few exceptions; see e.g. Stokes and Iversen (1962), Gans (1985), Erikson, MacKuen and Stimson (2002), and Geruso, Spears and Talesara (2019). Also, as usual, David Mayhew is penetrating on party history; see Mayhew (2021).

[11]For example, Bailey and Yoon (2011) assume a 50-50 chance of party control of the presidency and do not directly model control of the Senate, but instead assume it imposes some randomness on the president's choice of nominee. Chilton et al. (2021b) assume a simple Markov process for control of the presidency, then add a fixed 30% chance of unified control of the Senate.

- Correspondingly, if a party had been out of power for two terms, it has about a 80% of winning the next election.

These probabilities are hardly natural laws. They reflect the noticeably "thermostatic" quality of public sentiment (as discussed in Chapter 1), plus learning and re-calibration by the elites who control the political parties.

We implement these probabilities in every simulation. So, for example, if a party is in its second term of White House control, the probability it wins a third term is .20. These assumptions allow a party to control the presidency for more than two consecutive terms, but such an occurrence is relatively rare.[12]

Second, we treat Senate control as another Markov process, but keyed to unified and divided party control. From this perspective, in each election year—presidential or midterm—the Senate stands in either a unified or divided party posture relative to the president. Between 1948 and 2020, the historical probabilities of a switch in this stance during presidential election years were

- unified government, presidential election year: .38 probability of switch to the divided party position
- divided government, presidential election year: .18 chance of switch to the unified party position

Similar probabilities during the mid-term election years were:

- unified government, midterm year: .42 probability of switch to divided
- divided government, midterm year: .17 probability of switch to unified

Unfortunately, we have too few elections to allow for confident calculations of transition probabilities separately for each party. However, as has been widely recognized, the Senate

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[12]The transition probabilities do not distinguish Democratic from Republican presidents, due to limited data. At the time we write, some observers believe the Electoral College is somewhat biased in favor of Republican presidential candidates. So, in a near dead-heat, a Republican may tend to win the Electoral College despite losing the popular vote, a so-called "inversion," as occurred in 2000 and 2016 (and nearly occurred in 2020). While the Republican advantage in these recent elections is undeniable, careful studies show that presidential partisan advantage of this kind depends sensitively on the closeness of the election and precisely which states are swing states. Moreover, partisan advantage in the Electoral College tends to be transitory (Geruso, Spears and Talesara 2019). Accordingly, we do not build such an advantage into our simulations.
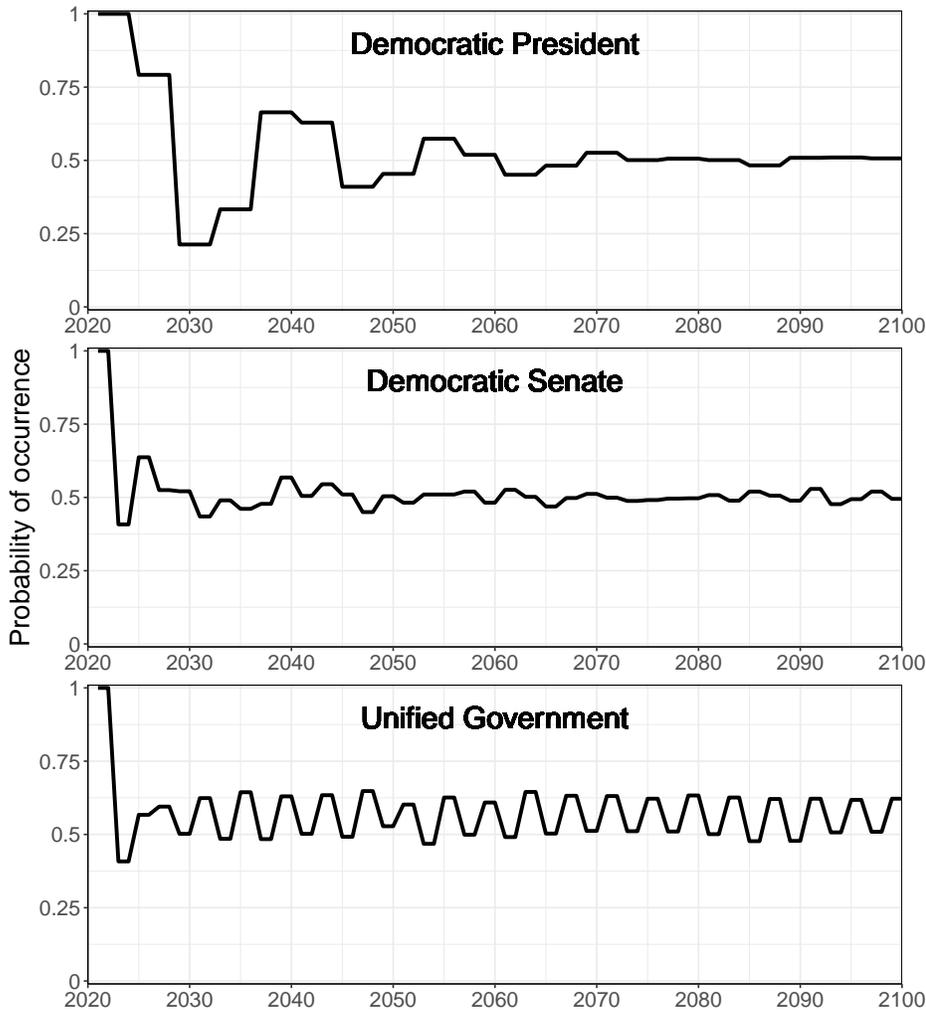
Figure 1: The average probability of Democratic control of the presidency, Democratic control of the Senate, and unified government, based on our assumed transition probabilities.

"map" has tilted noticeably in favor of the Republicans, due to the geographic distribution of party members across states (see e.g. Rodden 2019). To capture this bias, in some simulations we allow an asymmetric likelihood of Senate control by Republicans.

For every simulation, we run "presidential elections" every four years and "Senate elections" every two years. These determine party control of the White House and the Senate. In other words, for every year in every simulation, the president is either a Democrat or a Republican, and the Senate is controlled by either the president's party or the opposition. Determining the "election results" are draws from Bernoulli distributions, using the above transition probabilities. Institutional control of the branches varies across simulations due to the random draws.

To get a feel for how the simulated "elections" work in practice, consider Figure 1. The figure displays the *average* probability of a Democratic president, a Democratic Senate, and unified party government from 1000 simulations in the baseline scenario (defined below). As shown in the top panel, presidential control after the 2020 election is assumed Democratic, and in a majority of simulations the Democrats retain the presidency in 2024. But then, on average, in 2028 control tends to switch to the Republicans, reflecting the difficulty of holding the presidency for an extended run. Also noticeable is how the long-run average Democratic control of the White House tends to about 50 percent, though this process takes about 40 to 50 years. Thus, over a decade or two, party control of the presidency is quite sensitive to its initial starting condition.

The middle panel in the figure displays a similar average for Democratic control of the Senate. Here, the impact of the initial state is much less persistent, with the average probability of Democratic control rapidly converging to about a 50% probability.

Finally, the bottom panel indicates the average probability of unified party government. Again, the average value rather quickly converges on a long-run figure of about 55% to 60%. The relative frequency of divided party government has large implications if confirmations become impossible during divided government.

2.3 Exits

Justices exit from the Court in either of two ways: death or retirement.[13] So, in every year, a simulation must account for both modes of departure.

For death probabilities, we use actuarial data provided by the Social Security Administration.[14] For a justice of age a, we utilize the probability of dying in a given year, conditional (of course) of having lived to age a.[15] For example, the probability that an 80-year individual

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[13] We do not consider impeachment as sufficiently probable or predictable to warrant simulation. While a few lower court judges have been impeached and removed by Congress, no Supreme Court justice has ever suffered this fate. (One Supreme Court justice, Samuel Chase, was impeached by the House in 1804, but was acquitted by the Senate.)

[14] Specifically, we use the 2016 period life table for the Social Security area population, as provided at this url: https://www.ssa.gov/oact/STATS/table4c6.html#fn1 (last accessed 28 November 2019).

[15] The SSA provides separate probabilities for males and females, but the gender differences are small enough that, for simplicity, we use the average of the two for every given age.
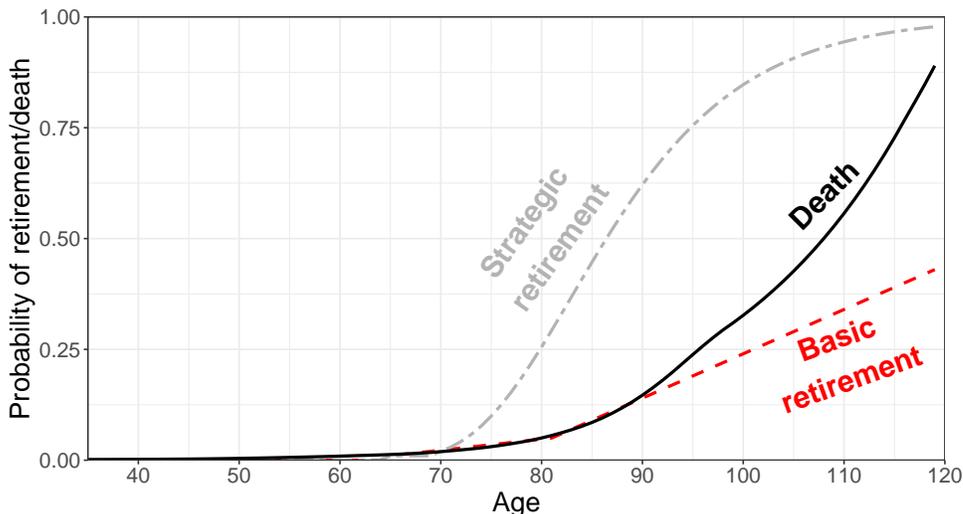
Figure 2: The probability of death by age, along with the probability of "basic" and "strategic" justice retirements in our baseline simulations. As explained in the text, the death probabilities are based on actuarial data, while the retirement probabilities are assumed.

will die in the next year is about .05. Denote this variable the "death probability," as $d(a)$. The solid line in Figure 2 depicts $d(a)$.[16]

We calculate the probability of retirement as follows. We divide the probability of retirement into two components, baseline and strategic. First, we assume there is a "basic" probability (denoted $b(a)$) that a justice of a given age will choose to leave the court, either because of the declining appeal of the job (e.g., David Souter) or because they simply believe it's time to depart. The dashed (red) line in Figure 2 depicts this basic probability. We assume it is zero until age 65, increases slowly in a linear manner through age 80, then increases more sharply after that.[17] (We graph the probabilities through age 120, but of

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[16] As is well known, higher socioeonomic status individuals display lower death rates than others, and of course Supreme Court justices are highly educated, high social class individuals. To account for such differences, Chilton et al. (2021a) use death rates for a comparable SES group, federal judges, in their backcast simulation from 1937 to 2020. Therefore, our use of standard death tables may somewhat exaggerate death probabilities. Notably, however, SES differences compress dramatically for older individuals (Angela and Lynch 2018). Consequently, the high-SES effect is likely quite small for those justices at greatest risk of mortality. In any case, using socioeconomic adjusted rates would simply result in slightly longer tenures (absent strategic retirement considerations), and would not affect the overall picture of our results.

[17] This assumption inherently makes it very unlikely that a justice will exit the Court very soon after joining, which accords with modern practice. However, up until the middle of the 20th century, many justices served relatively short terms before resigning and moving to a different position (Crowe and Karpowitz 2007). James Byrne, for example, served for just one year before resigning from the Court in 1942 to lead the Office of Economic Stabilization. The last justice who left the Court for a different position was Arthur Goldberg, who resigned in 1965 to become U.N. ambassador. Since then, every justice has either exited the Court into retirement, or died while still on the Court.

course the actuarial tables will assert their iron logic for justices who steadfastly refuse to leave the Court and end up departing "feet first.")[18]

Next, the simulations accounts for the possibility of strategic retirement by justices. By strategic retirement, we mean timing the departure to coincide with favorable control of the presidency to assure the selection of a favorable successor. It will be seen that strategic retirement probably implies an earlier exit to take advantage of a lucky window of opportunity to have a president of the same party appoint one's successor.

A relevant question is whether Supreme Court justices have historically engaged in strategic retirement. Statistical studies on on this question yield decidedly mixed results. Some studies find evidence that justices are more likely to retire when a president aligns with them, via party or ideology, (see e.g. King 1987, Hagle 1993, Stolzenberg and Lindgren 2010). Other studies find little evidence of strategic retirement (see e.g. Squire 1988, Brenner 1999, Zorn and Van Winkle 2000, Peretti and Rozzi 2011). Qualitatively, it is easy to find clear examples of strategic retirement. Most recently, for example, Justices Souter and Stevens both appeared to time their departures to allow a Democratic president to choose liberal successors (both justices, somewhat ironically, were appointed by Republican presidents). But many counter-examples also present themselves. Chief Justice Rehnquist, for example, declined to retire before the 2004 election despite his declining health (President Bush's re-election nevertheless resulted in Rehnquist's replacement by a Republican nominee, after Rehnquist death in 2005). Most notoriously, Ruth Bader Ginsburg declined to retire when Democrats controlled both the White House and the Senate from 2009 to 2014, a decision that ultimately led to her replacement by Republican Amy Coney Barrett in 2020.

In short, one can't predict with much certainty whether a given justice will retire strategically; the decision appears highly idiosyncratic. Going forward, however, it seems possible that on average more justices will opt for a strategic departure, given their strong ideological

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[18]We owe this colloquialism to Justice Brennan. According to Perry (2019), "As Justice William Brennan aged, inevitable questions about his retirement grew more insistent. With his Irish wit still intact, he quipped about his intention to leave the court 'feet first.'" In fact, Brennan's declining health compelled him to leave the Court "head first" in 1990, seven years before he died.

convictions and the stakes of each appointment.

Accordingly, we create a strategic retirement function that accounts for an increased tendency to retire by a justice when the current president is the same party as the one who appointed the justice. This function, denoted $s(a)$, is "turned on" when this condition holds. (In one policy experiment we show how the Court's makeup would evolve in a world without strategic retirement.) The grey dashed line in Figure 2 depicts the strategic retirement "boost" given a compatible president. The strategic retirement function takes the value zero until age 65, increases to .01 through age .69 conditional on a compatible president, then increases sharply after that. Thus, we assume the incentive for strategic retirement increases with a justice's age.

Given these building blocks, the *total retirement probability*, $\rho(a)$ equals $b(a) + \mathbb{1} * s(a)$, where $\mathbb{1}$ is an indicator function for when the party of the justice coincides with that of the current president. With this probability in hand, in every year we draw the justice's retirement decision from a Bernoulli distribution; for example, if the total retirement probability is .2 in a given simulation for a given year, the justice will retire with a 20% probability and will remain on the Court onto the next year with an 80% probability. Thus, the total *exit probability*, which we denote $e(a)$, equals $Pr(d(a)) + Pr(\rho(a)) * (1 - Pr(d(a)))$, where $1 - d(a)$ gives the probability that the justice does not die at at the given age.

If a justice does not exit, the justice's service continues into the next year. If a justice does exit the Court, a vacancy occurs.[19]

2.4 Entrances

When a new justice takes the bench, she enters with an age and an ideology. We must make assumptions about both these characteristics.

Let's consider age. For each new justice, we assume their entering age is distributed

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[19]To avoid the potential issue of "double-counting," we assume that when a justice exits, if his or her replacement is "confirmed," the replacement takes the bench *in the next year*. For instance, if a Democratic justice exits in 2028 during a Democratic presidency, the new Democratic justice enters the Court in 2029— this is so even if a Republican president takes office in 2029. However, in some scenarios explored below, we assume vacancies remain open during divided government. Thus, in these instances it will be possible in a given year that fewer justices serve than there are seats on the Court.

normally (in fact, $\mathcal{N}(52,3)$). This assumption reflects the likelihood that future presidents will emphasize the appointment of younger nominees in order to maximize the length of tenure. (Recall in Chapter 4, we showed that the average age of nominees has been fairly steady over time, and tends to fall in the range of 50-55 years old.)

Assumptions about ideology require more thought. For the current justices, we use the NSP-measure of ideology we employed in Chapters 4 and 10; recall this measure is scaled in NOMINATE space, which runs from -1 (most liberal) to 1 (most conservative).[20] For the baseline scenario we assume that the current era of polarization is here to stay, as is careful vetting of nominees. The implication is that, while there may be some variation among the justices within each party, the cross-party differentiation will be large. We are unlikely to see much if any overlap among justices appointed by Democratic presidents and justices appointed by Republican presidents. To reflect this assumption, we assume that judicial ideology is drawn from a beta distribution, with shape parameters $\alpha = 3$ and $\beta = 11$. We rescale this distribution so that it is bounded by -1 and 1 (rather than 0 and 1), and adjust the parameters so Democrats and Republicans are symmetrically distributed around zero, with Republicans more conservative and Democrats more liberal (as with NOMINATE). The top panel in Figure 3 shows what these distributions looks like for Democratic and Republican appointees. Note that the distributions do not rule out the possibility of "moderate" justices—however, most of the density lies on the "wings" of the NOMINATE space. More specifically, the means of these Beta distributions are -.57 and .57 for Democratic and Republican justices, respectively, while the standard deviation for each is .21.

This exercise results in a simulated ideology for each justice, given by an ideal point. In our view, such ideal points are not so interesting in and of themselves. But recall we showed in Chapter 13 that changes in ideal points *on the Court as a whole* in the form of medians and bloc sizes do translate into changes in judicial policy, the object of ultimate interest. Changes in the distribution of simulated ideal points therefore imply substantive changes in

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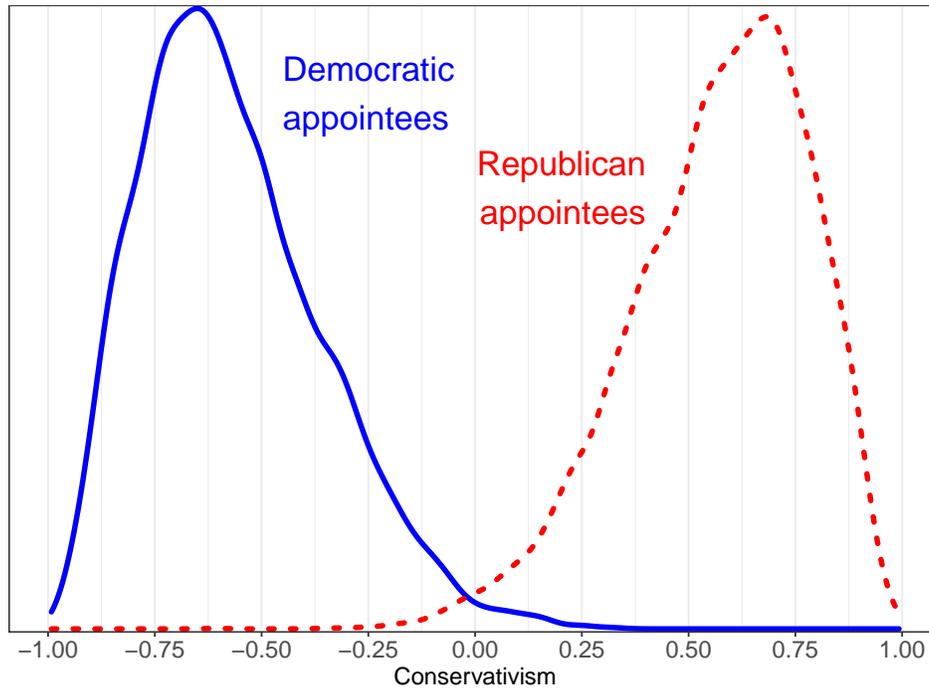[20]Note that our results are unchanged in we employ the Nemacheck measure of ideology instead.

Figure 3: The assumed distribution of ideology for Democratic and Republican appointees, based on our baseline assumption (a Beta distribution with shape parameters $\alpha = 3$ and $\beta = 11$.

judicial policy—in particular, in the probability of liberal and conservative case dispositions and the ideological content of majority opinions.

Two additional points about the ideology assumptions are worth noting. First, as shown below, the means of these distributions result in (on average) future justices who are even more extreme than the 2021 justices. Whether this tendency plays out in fact is, of course, unknowable—but our interest is more in describing how the central tendencies of the Court change *across* different counter-factual scenarios.

Second, we assume that while the initial ideology of a new justice is a draw from a random distribution with a mean and standard deviation, the ideology of a given justice is forever fixed by the draw. This assumption also encompasses the initial justices—we assume their ideology remains their NSP score until they exit the Court. The constancy assumption rules out the possibility of random bumps in a given justice's ideology, as well as more systematic "drift" in a liberal or conservative direction. Such possibilities can be substantively interesting in some contexts. But here we are primarily interested in the aggregate composition of the Court, as measured by the ideology of the median justice and the size of the liberal, moderate,

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and conservative blocs. Consequently, we opt for the simplicity of fixed ideology. (Of course, the ideology of a justice in a given policy-experiment will vary across simulations, reflecting the draw at time of entrance.)

3   The Baseline Scenario

We begin with the baseline scenario, a framework based on a continuation of current politics. Consequently, we assume polarized nomination politics, with Democratic and Republican presidents working hard to find and nominate consistently liberal and conservative justices (respectively). We also assume continuation of the institutions and norms governing confirmation and retention of justices, so divided party confirmations remain viable, for example. Of course, nothing in politics stays the same for decades! But the baseline scenario provides a useful benchmark for comparison in the policy experiments. (Table 2 summarizes all the policy experiments that appear in the chapter.)

3.1   The Median Justice

Let's consider the year-by-year location of the Court's median justice. In a given year, the location of the median justice differs somewhat across the simulations, due to randomness in the control of the presidency and the Senate, randomness in exits, and randomness in the ideology of entrants. Figure 4 depicts histograms of the resulting distributions of the ideology of the median justice. To make the presentation manageable, we aggregate the results by decade, as we did in Chapter 13.[21]

Two features emerge clearly in Figure 4. First, in every decade the distribution of the median justice is noticeably bimodal, with peaks in the range of [-.5,-.25] on the liberal side and [.25,.5] on the conservative side.[22] Needless to say, this feature of the simulated Court compositions follows from the assumptions about the random distributions generating ideal points for Democratic and Republican entrants. But the exact shape of the bimodal distri-

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[21]Because the distributions are bimodal, box plots and 95% confidence intervals do a poor job summarizing the data. The decade-by-decade histograms are much more informative.

[22]The relative lack of randomness in the 2020s histogram reflects the deterministic ideal points of the justices on the initial court. Greater randomness in the histograms results as the initial justices exit and are replaced with simulated entrants.

Policy experiment	Starting Court	Ideology	Strategic retirements	Senate control	Norms/practices	Number of seats	Tenure
Baseline	2021 justices	Reliable ideologues ($\alpha = 3$) and $\beta = 11$)	Standard	Historical	Standard	99	Life
No strategic retirements	–	–	None	–	–	–	–
Less predictable nominees	–	Heterogeneous nominees ($\alpha = 4$) and $\beta = 6$)	–	–	–	–	–
2016 counterfactual	Garland + 2016 justices	–	–	–	–	–	–
No divided government confirmations	–	–	–	–	No confirmations under DG	–	–
No DG, fixed Republican advantage	–	–	Fixed Republican advantage	Fixed Republican advantage	No confirmations under DG	–	–
No DG confirmations, ↑Republican advantage	–	–	Increasing Republican advantage	Increasing Republican advantage	No confirmations under DG	–	–
Dem. court packing, 2 seats	–	–	–	–	–	11	–
Dem. court packing, 4 seats	–	–	–	–	–	13	–
Dem. court packing, 6 seats	–	–	–	–	–	15	–
Tit-for-tat court packing	–	–	–	–	–	↑ over time	–
Term limits, 18 years	–	–	N/A	Irrelevant	–	–	18 years
Term limits, 9 years	–	–	N/A	Irrelevant	–	–	9 years

Table 2: *Summary of policy experiments. If a cell is blank, that mean it takes on the same value as in the baseline scenario.*
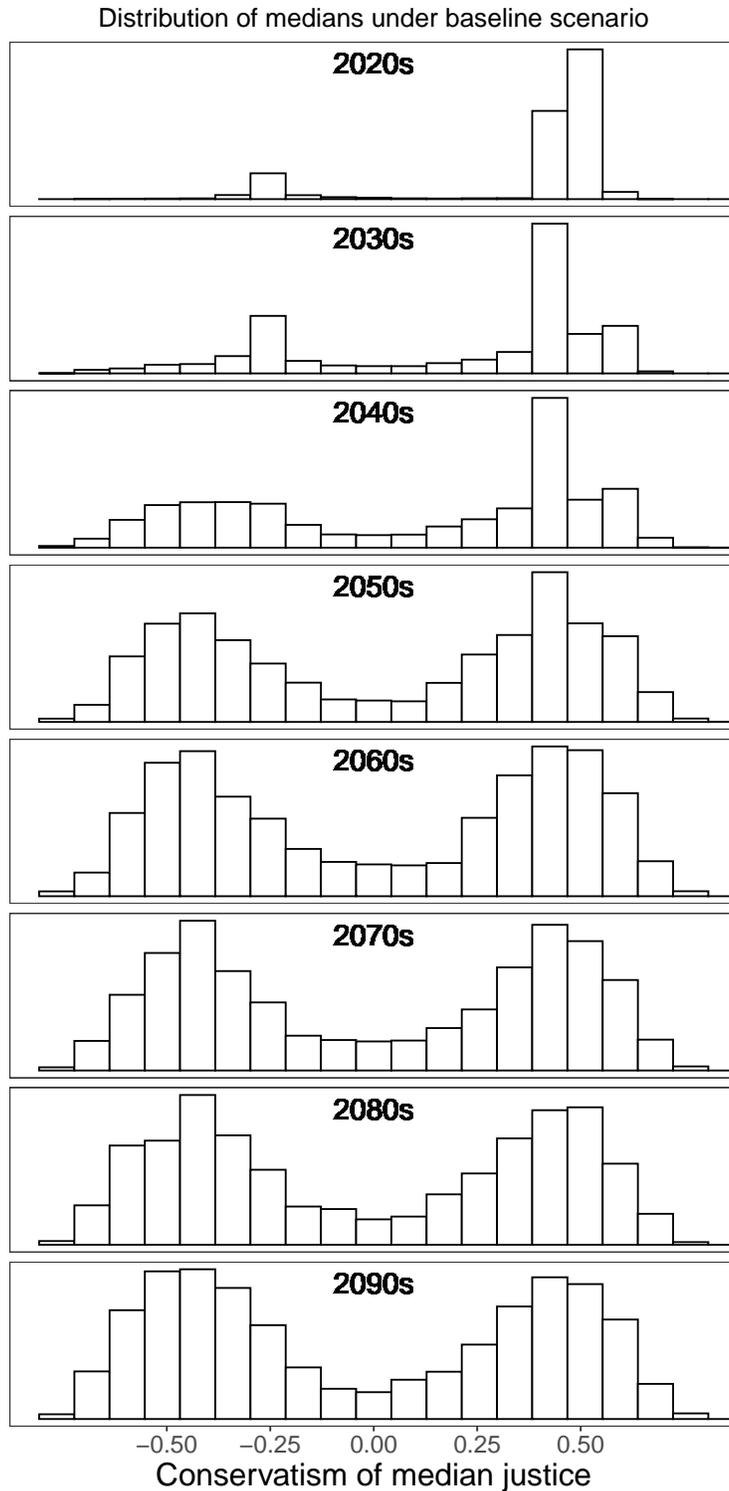
Figure 4: Distribution of medians under baseline scenario, by decade.

butions reflects electoral outcomes and the timing of exits from the Court. An important consequence of the bimodality is the following: the actual median justice at any point in

time is almost always either a reliable liberal or a reliable conservative. Very rarely in the simulations is the median justice an ideological moderate.

Second, in the early decades the distribution of medians tilts heavily to the conservative side of the ideological spectrum. This is arguably the single most important result in the baseline scenarios. The current conservative domination of the Court (3-0-6 as of 2021) means that the "deck is stacked" towards a conservative median for years to come. To be sure, knowledgeable observers of the Court in the 2020s would expect nothing less. But the simulations go much further than this intuition, showing that the conservative "bias" in the location of the median justice is likely to persist *through the 2050s*. It is only in the 2060s that the distribution of medians becomes roughly symmetric, as the initial ideological skew vanishes and the long-run electoral probabilities come to dominate.

It is important to remember that averages are not destiny. The distributions in Figure 4 show that a minority of simulated courts do have liberal median justices, even in the decade of the 2020s (note the small block at about -.3 in the top panel of the figure). Simulations that yield such a median typically involve Democratic presidents winning the 2024 and/or 2028 election, combined with unusually early exits (via death or basic retirements) for several of the Republican justices. Such combinations can occur. However, the distinguished Princeton statistician J. Stuart Hunter used to admonish his students, "Remember: Rare events don't happen to me!"[23] Perhaps a string of rare events will play out and produce a liberal median justice in the not-too-distant future—but following Professor Hunter's mantra, Figure 4 shows that that is not the way to bet.

Figure 5 cuts the distributions of median justices a different way, displaying the mean value of the 1,000 medians for each year. For reference, we also depict the mean ideology of all the Democratic justices on the Court and the mean of all the Republican justices on the Court, in a given year. In some ways, this way of summarizing the overall median is a bit reductive, because in any given year the median is almost always either a conservative

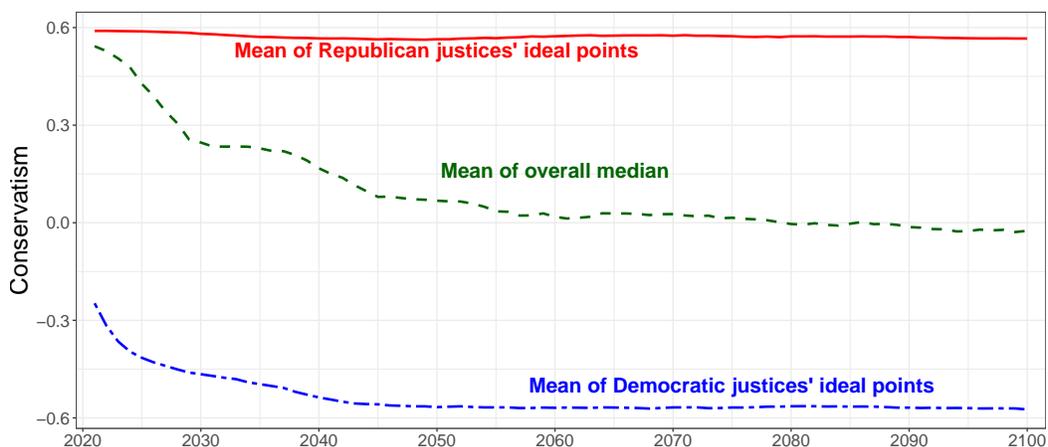---

[23]One of us vividly recalls this classroom scene.

Figure 5: The Average Median Justice in the Baseline Scenario.

Republican or a liberal Democrat, not a moderate. However, the pace of the movement from a very conservative average median justice early in 2020s to a moderate one (i.e. a Court with a median justice that on average takes on the mid-point of zero) by about 2060 serves as a useful benchmark in the later policy experiments.

3.2   Bloc Sizes

A complementary and more nuanced measure of the ideological structure of the Court is the size of the liberal, moderate, and conservative blocs. We place justices with ideal points less then -.2 in the liberal bloc, justices above .2 in the conservative bloc, and justices in between in the moderate bloc.[24] This division has a degree of facial plausibility and works well with the 2021 initial Court. On the liberal side, both Justices Sotomayor and Kagan have NSP scores of roughly -.3, so these cutoffs place them in the liberal bloc, which accords with qualitative assessments of their decision making. Justice Breyer's NSP score, by contrast is only -.15, putting him in the moderate bloc. While this score is perhaps a bit too conservative for him, nearly every observer of the Court would agree that he has been the most moderate member of the liberal bloc since the Court sorted cleanly on partisan

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[24]In Chapter 13, we defined cutpoints that divided the observed distribution of all ideal points between 1950 and 2019 equally into the three bins. This allowed comparisons that highlighted the extremely different distributions of entering justices across seven decades. In contrast, the simulations employ fixed distributions for drawing justices. Accordingly, fixed cutpoints with a substantively intuitive interpretation make more sense.
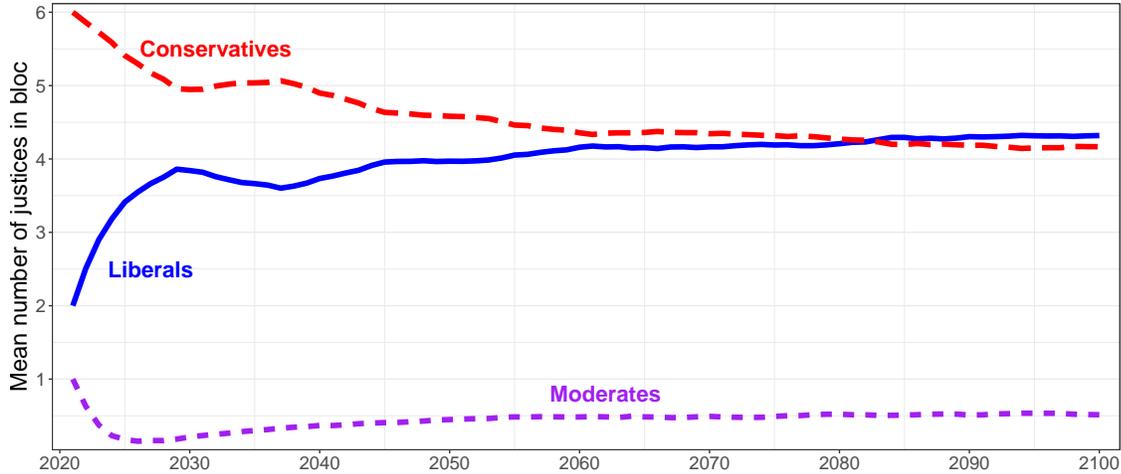
Figure 6: Distribution of medians under baseline scenario, by decade.

lines in 2010. Turning to the current conservative justices, all have NSP scores above .2, placing them firmly in the conservative bloc.

Figure 6 depicts the mean number of justices in each bloc in every year in the baseline simulations. Consistent with the earlier figures, Figure 6 shows that the average number of conservatives in the simulations exceeds the average number of liberals until about 2045. Indeed, even with a Democratic president and Senate in 2021, the average number of conservative justices is projected to exceed four for the remainder of the 2020s. After about 2060, the average size of the liberal and conservative blocs achieves parity at about four. Thus, the "average" Court seems likely ultimately to become a 4-1-4 Court.

3.3   Strategic Retirements and Tenure Length

What drives the persistence of conservative control in the coming decades, as predicted in the baseline simulations? In this and the next section, we address this question.

One brutally simple reason for the persistence domination of the conservative bloc is the justices' longevity. Supreme Court justices now serve for extremely long periods—much longer than they used to. Figure 7 depicts this change in two ways. For each year, we calculated the average tenure of the justices on the bench at that time. Then for each decade, beginning with the 1790s and continuing through the 2010s, we calculated the average tenure across that 10-year span. The results from this are presented in the top graph in Figure 7.
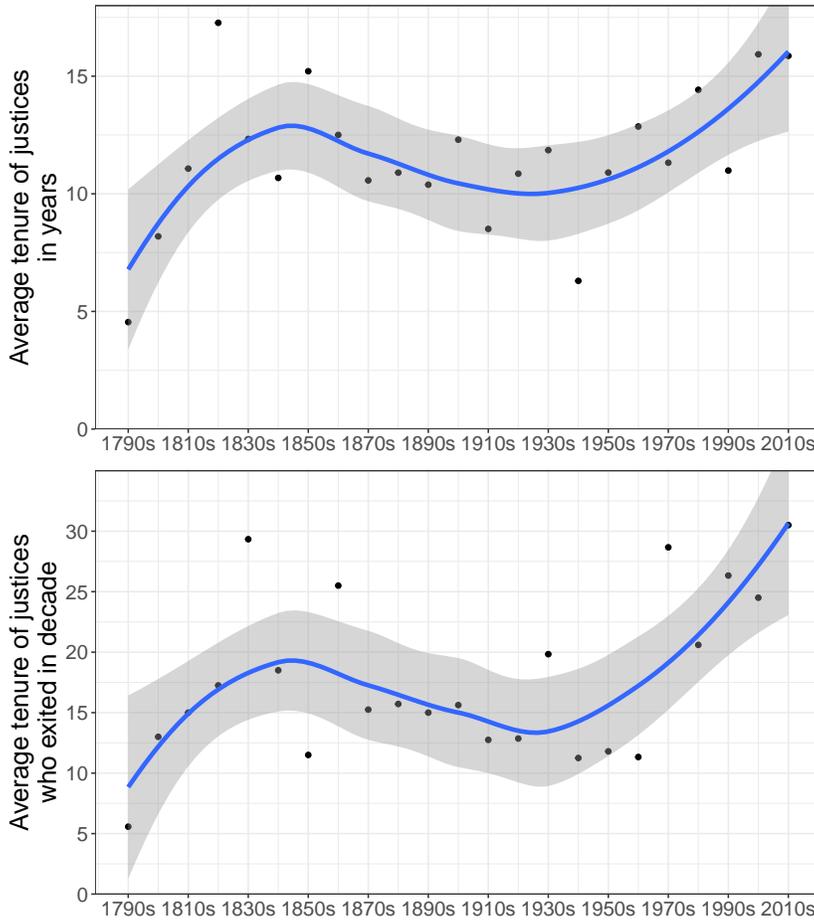
Figure 7: Average Supreme Court tenure, by decade.

The points depict the decade-by-decade average, while the line depicts a loess line. Early on there is a "floor" effect, since the clock starts at zero for all of the initial justices in 1790. Interestingly, early on in the 19th century, the average tenure was quite long—about 18 years in the 1820s.[25] But following this period, until the 1970s average tenure hovered in the 8-12 year range. Since then, we have seen a significant upward trend in tenure. In the 2010s, the average tenure was about 16 years, compared to a low of six in the 1940s.

The bottom graph in Figure 7 cuts the data slightly differently. For each decade, we calculated the average tenure among the justices who exited the Court in that decade. Here the results are even more dramatic. At the turn of the 20th century, the average tenure of

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[25]Three justices served lengthy terms in this era. Bushrod Washington served from 1799-1829, John Marshall from 1801–35, and William Johnson from 1804–34.

exiting justices was around 14 years. Since the 1940s, that number has steadily increased, and in recent decades the average tenure has been well over 20 years. As we discussed earlier, this average longevity now encourages presidents to seek relatively younger nominees in order to perpetuate the president's impact on the Court far past a four or eight year term in office.

But in projecting the trajectory of the Court beyond the immediate future, a more subtle factor comes into play: the role of strategic retirements. Strategic retirement dampens random turnover in individual seats, so that a seat has a tendency to remain "in the family." Recall that the baseline scenario incorporates a strategic retirement parameter that increases the probability of a justice retiring from the bench, conditional on their age, at moments when the current president shares their partisan affiliation.

To evaluate the long-term effects of strategic retirements, we can run a policy experiment in which strategic retirements *never* occur; that is, the strategic retirement parameter is "turned off," so that exits are only a function of "basic" retirements and death. We label this experiment *no strategic retirements*.

Figure 8 helps illustrate the interplay of tenure length and strategic retirements. We plot the nine justices on the Court as of 2021, in order of year of appointment. (This order roughly correlates with age, though not perfectly; Breyer was the oldest member of the Court in 2021.) For each justice, we calculate their mean year of departure, across all the simulations, for both the baseline scenario and the scenario without strategic retirements. For example, Clarence Thomas held the longest tenure of the Court as of 2021, having taken the bench in 1991. In the baseline simulations, he is projected to serve on the Court, on average, until about 2028, when he would be 80. In the scenario without strategic retirements, he is projected to serve an additional two years on average, until 2030.

Two important patterns emerge from Figure 8. First, regardless of whether the justices engage in strategic retirements, the justices of the 2021 Court are projected to serve for many years. This pattern is particularly true of Trump's three appointees (Gorsuch, Kavanaugh, and Barrett), none of whom were older than 52 at the time of appointment. All three are
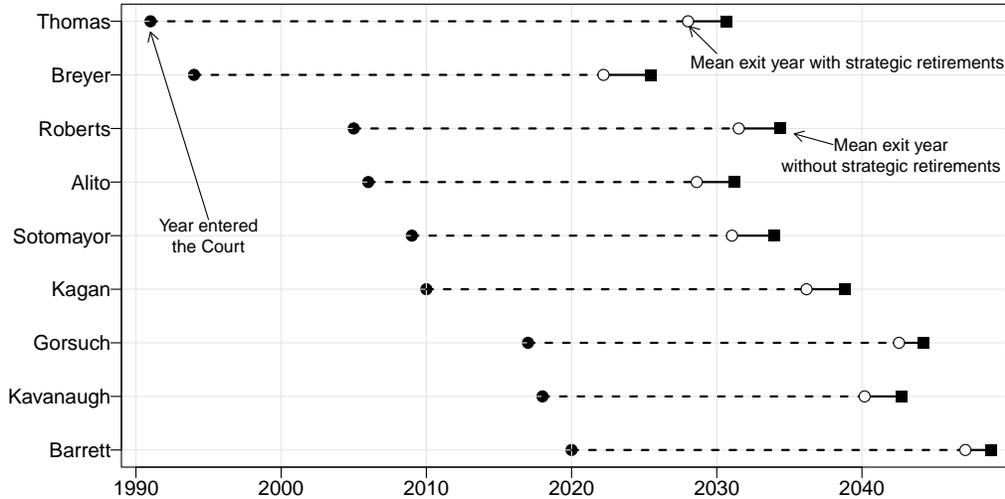
Figure 8: Predicted exit year for 2021 justices, with and without strategic retirement.

likely to serve at least through the latter portion of the 2030s. The other three Republican appointees are significantly older, but still all three are projected to serve at least through the majority of the decade. Thus, in the majority of simulations in the baseline scenario, the Court remains dominated by the conservative bloc for the rest of this 2020s by virtue of the conservative justices' age and the mortality tables.

Second, under our assumptions, strategic retirement always leads to briefer tenures, since it induces justices to retire earlier under a co-partisan president than they would otherwise. If we compare the differential in Figure 8 between the average exit year with and without strategic retirement, we can see the differential increases slightly among the younger justices. The increase reflects their greater exposure to opportunities to stage an advantageous exit.

If we project farther into the future, we can see that strategic retirements tend to stabilize the location of the median voter and maintain the Court's bloc structure. This phenomenon occurs because a strategic retirement, by definition, gifts to a co-partisan president the opportunity to appoint the justice's successor, thereby perpetuating the Court's ideological structure. Hence, strategic retirements dampen swings in the ideology of the median justice and limit changes in the relative sizes of the ideological blocs.

To illustrate this point, we calculate the proportion of simulations in which each justice
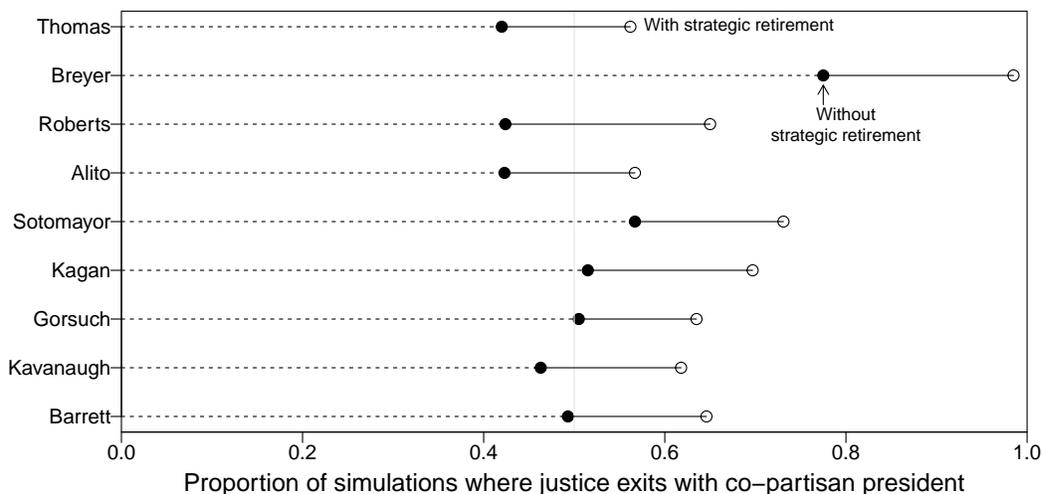
Figure 9: Exits of 2021 justices under a co-partisan president, with and without strategic retirement.

leaves the Court under a co-partisan president, for both the baseline scenario and the scenario without any strategic retirements. Figure 9 presents the results. Consider the scenario without strategic retirements. In the figure, solid circles indicate the proportion of projected co-partisan exits without strategic retirement. We observe that Justice Breyer stands out, as he is projected to retire under a Democratic president 80% of the time, even without strategic retirement. This proportion reflects his advanced age in the initial Court, implying a high baseline probability of retirement between 2021 and 2024. The rest of the justices cluster around 50%. This pattern emerges because, without strategic retirements, their retirement dates are random with respect to control of the White House. On average they will be about equally likely to fall under a Democrat as a Republican president.

Conversely, under the scenario with strategic retirements, the probability of an exit under a co-partisan president is always higher. For example, both Sotomayor and Kagan are predicted to leave the Court under a Democratic president 80% of the time. To be sure, even under our assumptions, strategic retirements are hardly a guarantee of a co-partisan exit, for sometimes death intervenes (as with Justice Ginsberg) or retirement becomes extremely compelling even when an anti-partisan president is in the White House (as with Justice Thurgood Marshall). The flip side of the Sotomayor and Kagan results is that in 20% of
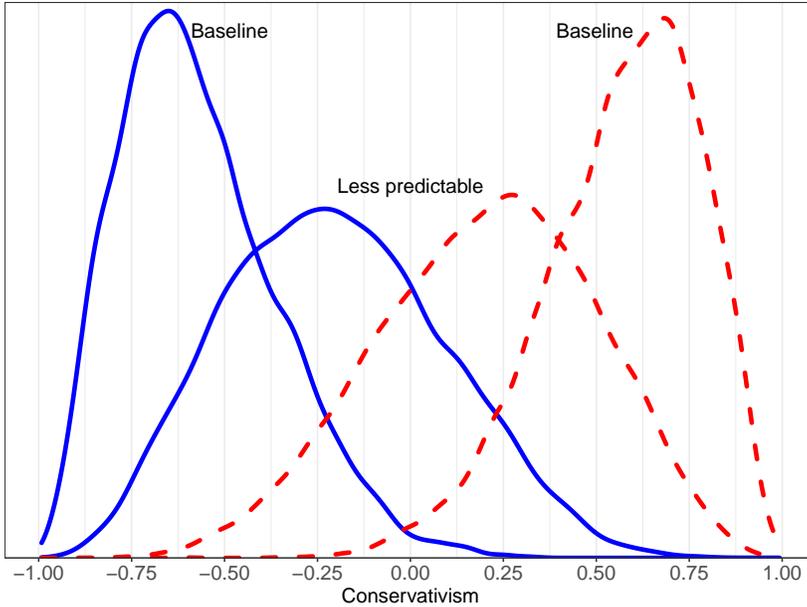
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Figure 10: Distribution of assumed ideal points under baseline and less predictable scenarios. The solid (blue) lines show the distributions for Democratic nominees, the dashed (red) for Republican nominees.

simulations they are replaced by Republican nominees. But, all told, the simulations make clear how strategic retirements help lock in the ideological status quo on the Court. This phenomenon contributes to the projected long dominance of conservatives in the baseline scenario.

3.4 The Importance of Ideological Reliability

Another factor contributing to the the conservative domination of the Court for many years to come is entrant ideology. We assume future Democratic and Republican nominees will be highly ideologically reliable. The distributions in Figure 5 mean that relatively few justices will be moderates.

How important is nominee reliability in perpetuating conservative lock-in? Suppose instead presidential picks were as ideologically unreliable as they were in the 1940s and 1950s. What then? To help quantify the impact of reliability, we undertake a policy experiment in which future nominees are less predictable than in the baseline scenario. We call this experiment "less predictable nominees." To model this increased hetereogeneity, we alter the assumed distribution of nominees to a Beta distribution with shape parameters $\alpha = 4$ and

$\beta = 6$. (Again, we rescale this distribution so that it is bounded by -1 and 1, and adjust the parameters so that Democrats and Republicans are symmetrically distributed around zero.) The means of the two distributions are -.2 for Democratic appointees and .2 for Republican appointees, with a standard deviations of .3.

Figure 10 presents the distributions for Democratic and Republican justices under the less predictable scenario. For comparison, the figure also reproduces the distributions assumed in the baseline scenario. Compared to the assumed baseline distributions, the distributions in the less predictable nominee scenario are less extreme (means closer to zero) and have much greater density on the "opposite" side of zero. So, a Democratic president may inadvertently appoint a justice who subsequently votes rather conservatively, and a Republican president may make the converse blunder.

The right-hand plots in Figure 11 present the resulting distribution of medians under the less predictable scenario. We reproduce the baseline results on the left-hand plots, for comparison. Because the alternative scenario does not affect the ideology of the initial 2021 justices, the plots under both scenarios are very similar during the 2020s. On average, the location of the median is predicted to be quite conservative under either scenario. The situation changes quite dramatically, however, once replacements for the 2021 justices start entering the Court. As early as the 2030s, the distribution of medians becomes much less bimodal. Indeed, with "noisier justices," the distribution of medians becomes unimodal and roughly symmetric by the 2040s. The ideological trajectory of the Court becomes much more moderate compared to the baseline scenario, and much less susceptible to wild swings in the median.

It is hardly surprising that reliably extreme entrants translate into more ideological polarization on the Court. But the simulations help clarify how scrupulous vetting and careful selection contribute to the "lock in" of the current conservative majority on the Court. Meticulous and focused selection procedures are likely to perpetuate the conservative majority for decades.
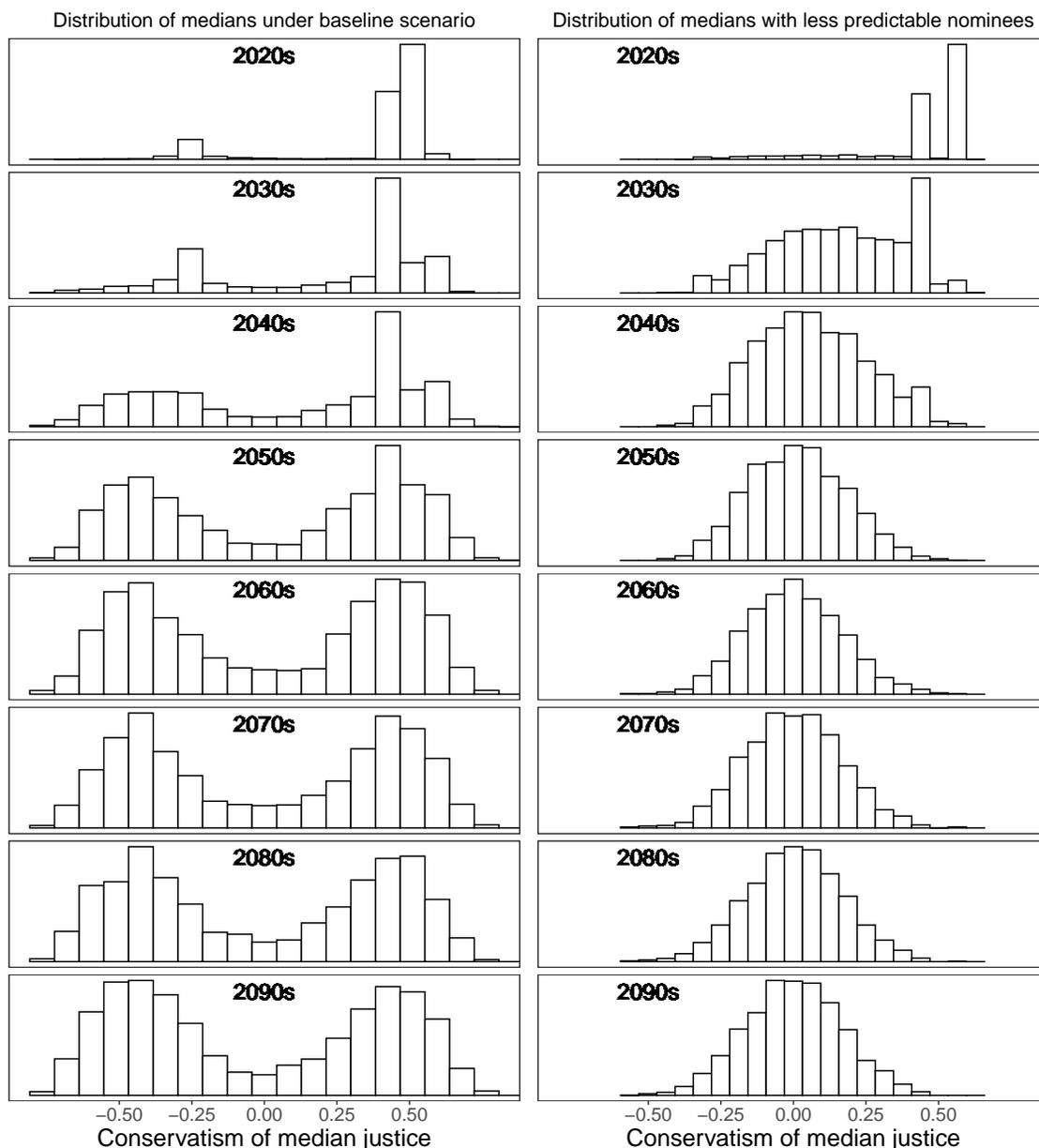
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Distribution of medians under baseline scenario | Distribution of medians with less predictable nominees

2020s — 2030s — 2040s — 2050s — 2060s — 2070s — 2080s — 2090s

−0.50 −0.25 0.00 0.25 0.50
Conservatism of median justice

−0.50 −0.25 0.00 0.25 0.50
Conservatism of median justice

Figure 11: Distribution of medians under baseline scenario and less predictable nominees, by decade.

3.5   The Transformative Election of 2016

Simulations offer a new way to appraise the transformative impact of a presidential election. The MSC Simulator allows us to alter the outcome of a single presidential election and then construct explicit counter-factual paths of the Court's future composition. These alternative paths incorporate the likely subsequent trajectory of institutional control tripped off by the counter-factual election. The subsequent sequences of exits also incorporate different

sets of strategic retirements, reflecting the altered future of institutional control. So does the ideology of future entrants. So, the single counter-factual event creates quite nuanced alternative futures for the Court.[26]

We use this approach to appraise the impact of the events of 2016; namely, Senate Leader Mitch McConnell's success in blocking the confirmation of Merrick Garland, followed by the shock victory of Donald J. Trump in the presidential election. Suppose instead McConnell had allowed a floor vote on Garland, which almost certainly would have led to his confirmation (indeed, the looming confirmation was the rationale for blocking the floor vote).[27] Then, suppose Hillary Clinton had prevailed in the all-important Electoral College, rather than only in the popular vote. Plausibly, what would have transpired for the Court's subsequent make-up? Compared to the road not taken, was Trump's election transformative for the Court?

The opening part of the story is well known. President Obama's first two nominees (Sotomayor and Kagan) replaced two liberal justices (Souter and Stevens, respectively), leaving the Court with either a 4-0-5 conservative majority, or a 4-1-4 bimodal split, depending on how one characterizes Justice Kennedy. But no matter the exact characterization of Kennedy, the appointment of Kagan in 2010 marked the first time partisanship and ideology became perfectly correlated in aggregate voting on the Court. The subsequent death of conservative stalwart Antonin Scalia in 2016 afforded Obama the chance to shift the Court's balance rather dramatically. The analyses in Chapter 13 suggest these changes would have substantially altered case dispositions and majority opinions, in a liberal direction. McConnell's decisive action blocked these possibilities, at least in the short term. But what happened next depended on the outcome of the 2016 presidential election.

The shock outcome meant that Donald Trump rather than Hillary Clinton became the

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[26]An interesting (and sometimes amusing) sub-genre of historical studies considers counter-factual histories. But rarely are these based on explicit models of underlying micro-processes. On counterfactual or "virtual" history see e.g. Ferguson (2008).

[27]At the time, we used the regression models of Chapter 8 to predict the likely outcome of a floor vote. The statistical models suggested that the vote would be tight in the closely divided Senate but that Garland would ultimately gain confirmation (Cameron and Kastellec 2016).
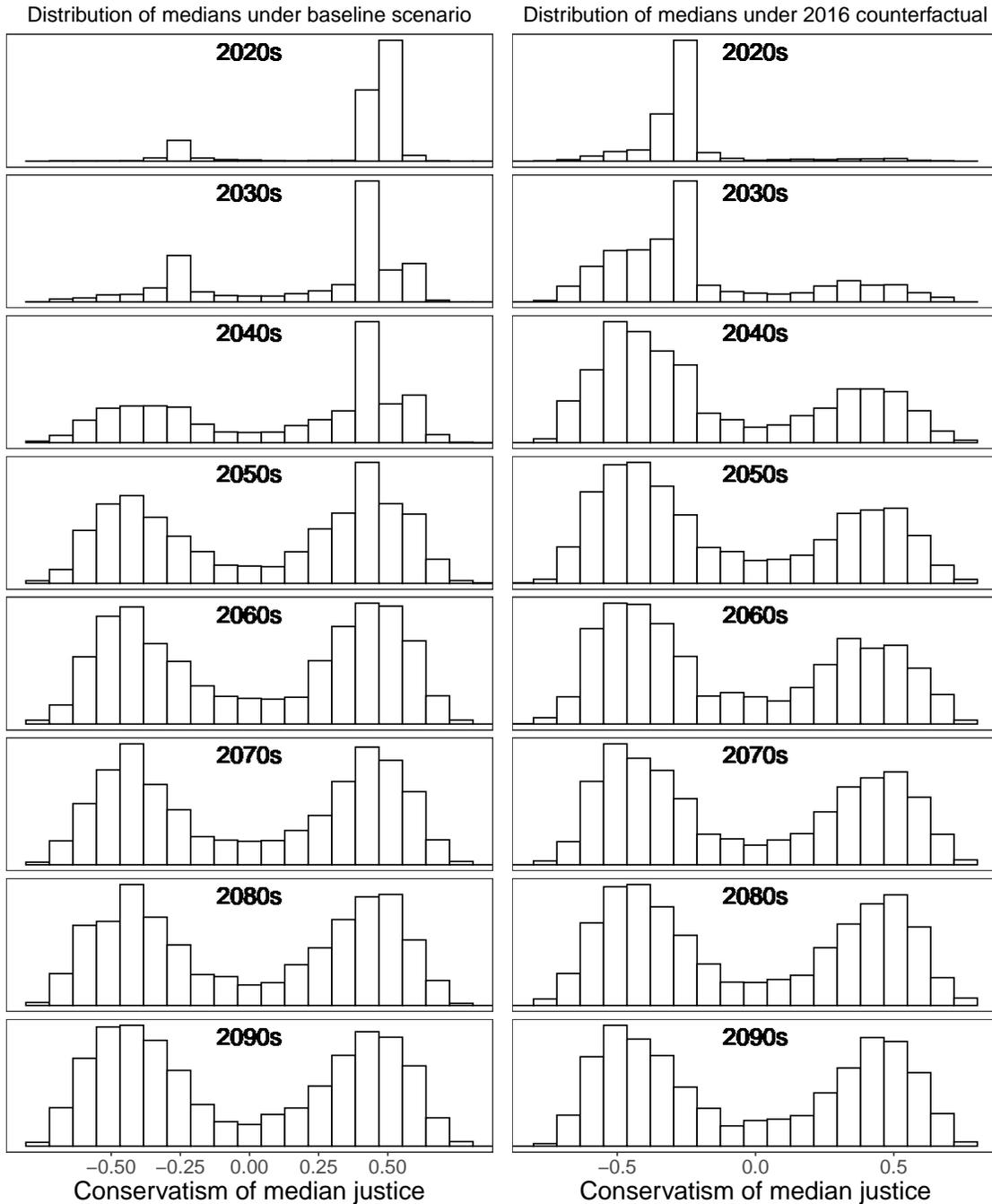
Figure 12: *Distribution of medians under baseline scenario and 2016 counterfactual, by decade.*

chief executive who selected Scalia's replacement, as well as the successors to Justice Kennedy in 2018 and Justice Ginsburg in 2020. (Trump chose Neil Gorsuch, then Brett Kavanaugh and Amy Barrett). The result was the conservative-dominated Court Court of the baseline scenario, as shown in Table 1.

How much did the events of 2016 change the future trajectory of the Court? To answer the

question, we developed a policy experiment that starts in 2017, but assumes confirmation of Garland, followed by a Clinton victory and a Republican Senate. Then, using the underlying assumptions of the baseline scenario, we run the simulations from that point forward, just as we did using the reality of 2021 in the baseline scenario. Of course, we can't know for sure what would have happened in a Hillary Clinton term. Justice Kennedy, for example, might have opted to remain on the Court in the hope of a Republican replacement in 2021. But the simulations handle these contingencies probabilistically, just as they do in the baseline scenario.[28]

The results of this counter-factual analysis may be seen in Figure 12. For comparison purposes, the left panel reproduces Figure 4, the distribution of median justices under the baseline scenario. The right panel shows the distribution under the 2016 counter-factual. Strikingly, the two columns display near mirror or inverse images of one another in the early years. Under the 2016 counter-factual, the Court's center is on average quite liberal, not conservative, in the majority of simulations of the 2020s. It remains so through the 2050s. At that point, the long steady-state emerges in both scenarios and two balanced wings confront one another.

The bottom line is clear: Donald Trump's election in 2016 was indeed a transformative election for the U.S. Supreme Court. The election of 2016 presented a cross-roads. One path led to likely liberal dominance of the Court for decades. The other path led to conservative dominance over the same horizon. Determining the road taken was no convulsion in the public's understanding of the meaning of the Constitution (Ackerman 2000). Rather, the definitive choice arose from a bold gambit in the Senate, an unlikely electoral outcome, and a string of exits from the Court.

Viewing these events, liberals may well recall the words of the medieval poem *Carmina Burana*:

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[28]Justice Ginsburg, who died in 2020, might have retired strategically under President Hillary Clinton (though not certainly!). But whether she would have been replaced by a Democrat depends on whether the Republican Senate would have confirmed a Clinton-initiated replacement. We investigate divided government stasis in Section 4.

I bemoan the wounds of Fortune
with weeping eyes,
for the gifts she made me
she perversely takes away

Conservatives, on the other hand, may savor Seneca's famous observation, "Luck is what happens when preparation meets opportunity."

4 A Plausible Future: The End of Divided Government Appointments

So far we have assumed the Senate always allows the sitting president to fill a vacant seat. The events of 2016, however, raise the possibility that a Senate controlled by the opposition will categorically refuse to confirm the president's nominee. Under this permanent "Garland scenario," a vacant seat would remain vacant until a shift in either the presidency or Senate flips the two from divided to unified party control.[29] To see what might happen if such blanket opposition became the norm, we develop a policy experiment that assumes no entrances on the Court during president-Senate divided party government. Any vacancies that arise under divided government remain unfilled until the next bout of unified government (regardless of party control), for as long as the transition takes. We label this experiment *No divided government confirmations*.

Before getting into the details, the first question is: How plausible is this scenario? During the Garland blockade, partisans on both sides ransacked history for justifications. Republicans claimed that divided party confirmations were rare in presidential election years. Democrats called the blockade "unprecedented." Both claims are somewhat contestable, but the scenario goes much farther than the 2016 blockade. It assumes no confirmations at any point in a president's tenure during divided party government. So a seat could remain vacant not for a brief period but from the president's Inauguration Day until his final hours in office, and beyond. That would indeed be unprecedented and until recently absolutely unthinkable for the Supreme Court.

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[29]The Garland scenario did not arise with any of President Trump's three nominees, because all occurred under unified Republican control.

However, the recent experience of the Court does not afford the best precedents. For that, one might look instead to less sacrosanct independent agencies caught up in intense partisan polarization. Prime examples include the Federal Elections Commission (FEC) and the National Labor Relations Board (NLRB). Broadly speaking, the former regulates money in federal elections, the latter sets the rules for labor-management disputes. Given these missions, both agencies generate intense partisan warfare. In recent years, appointments to both have been subject to hold-up during divided party government—so much so, that at times vacancies imperil their boards' ability to reach a quorum (Lander and Greenhouse 2013, Ackley 2020).[30] The political logic of hold-up is transparent: the party controlling the Senate calculates that it prefers the current board with a vacancy (or even non-functioning due to quorum problems), to the board filled by the opposition president. Presidents respond with aggressive but temporary (and sometime dubiously legal) recess appointments.[31] The ultimate result is agency chaos, incapacity, and a diminished American government. But the brutal partisan logic trumps concerns over good governance. The scenario we explore merely ports the experience of these unhappy victims of partisan polarization to the U.S. Supreme Court. In essence, the policy experiment posits the "NLRB-ization" of the High Court. The confluence of ferocious partisan polarization with the greatest period of divided party government in American history makes this scenario far from impossible, at least in our view.

4.1 The Incredible Shrinking Supreme Court?

We begin with what is perhaps the first order issue: vacancies. Under a norm of no divided government appointments, vacancies could persist for long periods, leaving the Court without a full complement of nine justices. Indeed, such an event occurred in 2016-17, as the Court operated with eight members between Justice Scalia's death in February 2016 and

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[30]Because the boards of the FEC and NLRB are small (five for the NLRB and six for the FEC) even a few vacancies can block a quorum. The Supreme Court's statutory quorum requirement is six.

[31]In 2014, for example, the Supreme Court ruled in the case of *National Labor Relations Board v. Noel Canning* (573 U.S. 513) that recess appointments to agencies under very short recesses of the Senate (a 3-day recess in the events that led to Canning's lawsuit) were unconstitutional.
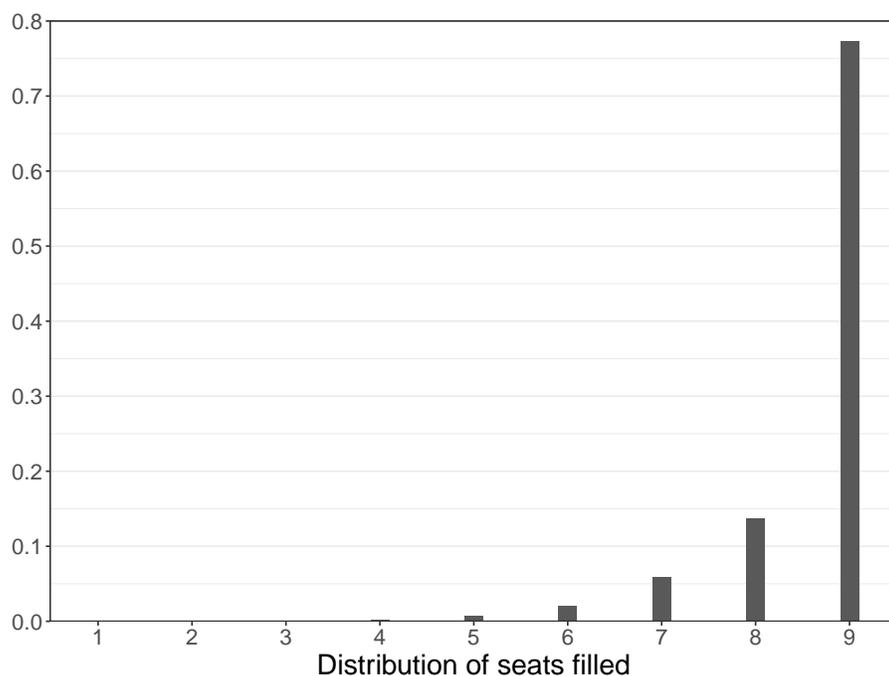
Figure 13: The average number of vacant 'seat-years' in the scenario where no divided government confirmations occur. The solid (blue) line depicts the mean number of vacant seat-years, across all simulations, while the shaded region depicts 95% confidence regions.

Justice Gorsuch's confirmation in April 2017.

For each simulation under this counterfactual scenario, we calculate when a seat remains open due to divided government. (Recall that in our original baseline scenarios, there are technically no "vacancies" *per se* since a justice is counted as serving for an entire year if his or her tenure extends to a given year, with replacements counted as entering the year after an exit). We then count the number of seats filled in a given seat-year combination.

Figure 13 depicts the distribution of seats filled over the entire 2021-2200 period. We can see the majority of the time (about 75%), the simulations predict a full 9-member court. This is because when vacancies occur, they "transition" into appointments upon the very next instance of unified government, which occur frequently in the simulations.

Still, the results show that under the norm of no divided governments confirmations, courts with less than a full complement of nine justices occur almost 25% of the time, a huge change from historical practice. Moreover, while courts with fewer than seven members would be rare, they are predicted to occur about 9% of the time. And courts that that only

minimally meet the statutory quorum of six justices occur about 3% of the time. Thus, the Court does not empty out when unified government is needed to fill a vacancy. Nonetheless, it is quite possible that the Court would end up hearing many cases with a bench of 8 members or less. For a majority opinion to have precedential value, it must attract five "joins" (including the opinion author), and this might be quite challenging in a shrunken and polarized Court.

4.2 Vacancies and Ideological Structure

Because our baseline assumption assumes symmetric election probabilities, having no divided government confirmations would not privilege one side or the other, because divided government would be equally likely under Democratic and Republican presidents. We show below in Figure 16 that the average location of the median justice under the baseline scenario and the no divided confirmation confirmations scenario track each other very closely over the rest of the century. (We save extended discussion of the figure until we present the next two policy experiments.)

4.3 The Senate Map: Greater Republican Advantage

The passage of time has little impact on the vacancy profiles shown above. Because the probabilities of divided government are symmetric across the parties and stationary with respect to time, presenting the distributions seen in Figure 13 decade-by-decade changes little.[32]

Yet there is good reason to believe our assumption of symmetric probabilities for controlling the Senate may prove untenable in future decades. Instead, the Senate map seems increasingly likely to favor the Republican Party. Critically, Democrats cluster more and more in a few large urban states, but the Constitution guarantees each state two senators. As Jonathan Rodden (2019, 2) notes:

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[32]The probability of divided government is slightly higher in the 2020s compared to the remaining decades; this is because we use the fixed reality of unified government of 2021 in the simulations, thereby probabilistically increasing the chance of divided government following the 2022 elections. This factor translates into slightly more years with fewer than nine justices in the 2020s compared to later decades, in which the transition probabilities fully kick in, but the differences are not dramatic.
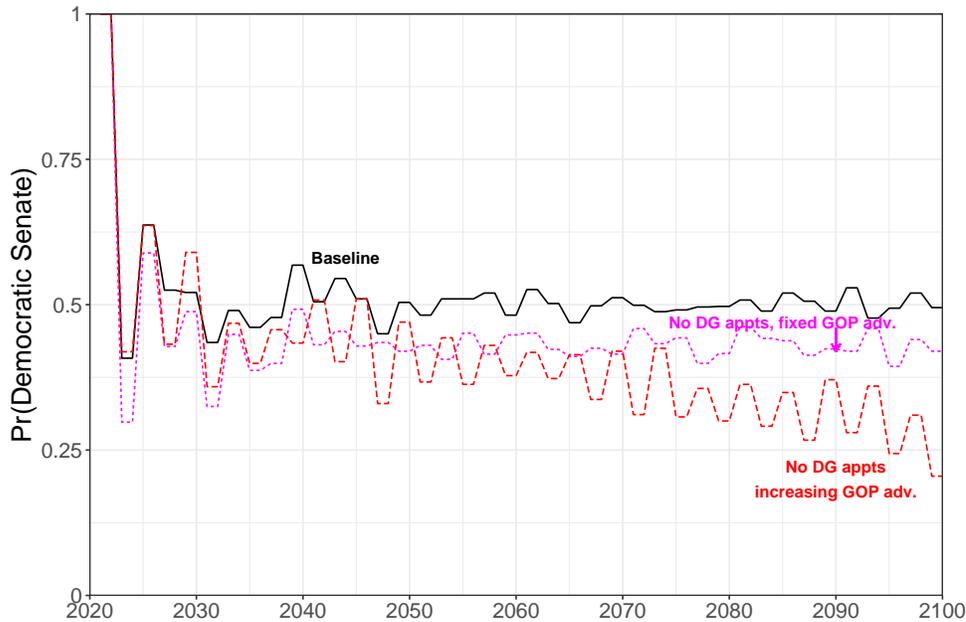
Figure 14: Probability of Democratic control of the Senate, for baseline scenario and scenarios with fixed and increasing Republican advantage.

> Democrats have won more votes than Republicans in elections for eleven of the fifteen Senates since 1990 [as of 2019], but they held a majority of seats on six occasions. [U]derrepresentation of Democrats in the US Senate is no mystery. It happens, because, as a legacy of the bargain made at the Constitutional Convention in the eighteenth century, large Democratic states like California and New York have the same Senate representation as small Republicans states such as Wyoming and the Dakotas.

Indeed, this discrepancy between votes and seats became a talking point during the nominations of President Trump's three nominees. Brownstein (2018), for example, noted that if one assigned half of each state's population to a given senator, the 51 Republican senators at the time of Brett Kavanaugh's nominations represented about 143 million Americans, compared to the 182 million represented by the 49 Democratic senators.[33] Moreover, the electoral bias of the Senate is only likely to increase in the coming decades (Bump 2017). In some sense, the Constitution created the Senate as a "rotten borough."[34]

To understand the potential effects of the changing Senate dynamics, we modeled bias

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[33]In the end, Democratic Senator Joe Manchin of West Virginia voted to confirm Kavanaugh while Republican Sen. Lisa Murkowski of Alaska opposed him, but the basic point holds.

[34]One way to offset the Republican tilt would be to admit new Democrat-leaning states, e.g., Puerto Rico, the District of Columbia, and the Virgin Islands. We do not model this scenario which we see as improbable. But, if such state additions came to pass, it would most likely alter future control of the presidency and the Senate in some elections, with large implications for the Court's ultimate make-up.

in the control of the Senate in two ways. First, we simulated a fixed bias in favor of Republicans. Specifically, we moved each of the Senate transition probabilities described above by .05 in the direction of Republicans. Second, we simulated a linearly increasing Republican bias. Here for each year we multiplied the transition probabilities by .005 and added that amount to the base probability. We then implemented both policy experiments under the assumption of no divided government confirmations. We label these experiments *No divided government confirmations, fixed Republican advantage* and *No divided government confirmations, increasing Republican advantage*. Figure 14 shows how the average probability of Democratic control of the Senate is decidedly smaller in the Republican advantage scenarios, compared to the baseline scenario.

There are two related quantities of interest to examine under these scenarios. The first is how often vacancies would likely occur under the Republican advantage, and how that compares to vacancies under the basic no divided government confirmations scenario. The second is the partisan consequences for the Court. To get at both, we calculate the average number of vacant seats per year, broken down by simulations in which the president is a Democrat and those in which the president is a Republican. In other words, we distinguish the seats that can't be filled by virtue of a Democratic president facing a Republican Senate from those that can't be filled because a Republican President faces a Democratic Senate.

Figure 15 presents the results of this analysis. For visual clarity, we omit the fixed Republican advantage, as the results under this scenario do not differ significantly from the symmetric no divided government confirmation scenario. Let's begin with the symmetric scenario, which is shown in the left panel in Figure 15. The solid (blue) line depicts the average number of vacancies under Democratic presidents, while the dashed (red) line depicts the average under Republican presidents. In the scenario where the Senate election probabilities are symmetric, we see no clear partisan advantage over time. Sometimes more vacancies would have been filled by Democrat presidents, sometimes more would have been filled by Republican ones. This reflects the "natural" variation in party control of the presidency and
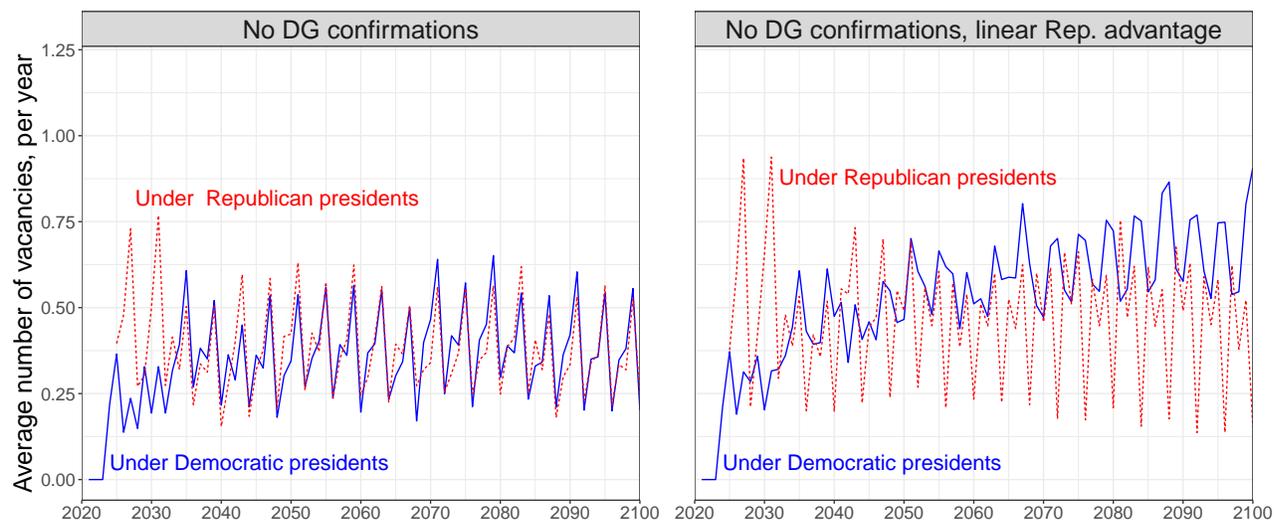
Figure 15: The average number of vacancies per year, broken down by simulations where the president is a Democrat or a Republican.

the incidence of divided government.

The picture is quite different when we turn to the scenario where Republicans have an increasing electoral advantage in the Senate. The right-hand panel in Figure 15 examines this scenario. Here, we assume the Senate maps increasingly tilts Republican though a relatively gradual pace. The simulations show little partisan advantage induced by vacancies, in the early decades. But towards the end of the century, the figure shows a pronounced Republican advantage. In other words, the average number of vacancies is systematically higher under Democratic presidents than Republican presidents. By 2095, the average number of vacancies per year exceeds 1 for Democratic presidents, compared to fewer than .5 for Republican presidents. (Note of course this is an average over many simulations, in which the differential can be extreme.)

Assuming the Court can muster a quorum, the number of vacancies in a given year is hardly decisive in itself. But if vacancies have a partisan skew, then they may affect the overall composition of the Court at any moment in time. To illustrate, we again calculate the average annual location of the median justice, under each of the three no divided government confirmation scenarios.
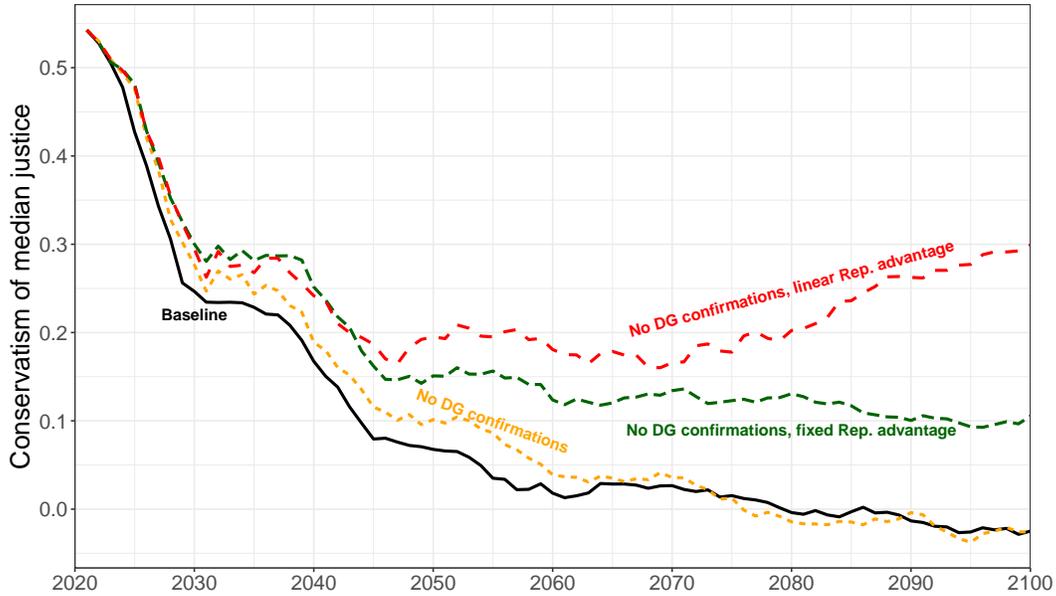
Figure 16: Average location of median justice, under baseline scenario and no divided government confirmation scenarios.

The results are shown in Figure 16. We also include the results from the baseline scenario for reference. We begin with the symmetric no divided government confirmation scenario; recall that this scenario assumes symmetric Senate election probabilities. As we discussed briefly above, because the probabilities are symmetric, there is little difference in the average location of the median justice between the baseline scenario and the symmetric no divided government confirmation scenario.

The picture is quite different once we assume a Republican advantage in the Senate. Because the fixed advantage is relatively small, in addition to the fact the Court is controlled by conservatives in the early period, little change occurs in the early decades. This reflects the very substantial initial conservative advantage. But farther in the future, after the starting Court turns over, both the assumed fixed Republican Senate advantage and (especially) the increasing advantage imply a conservative-dominated Court in the majority of the simulations for the rest of the century. In other words, the partisan advantage in vacancies translates into a substantial partisan advantage on the Court.

Crucially, this effect occurs despite symmetric probabilities for control of the presidency. It arises because of differential control of the Senate. To put it another way, Democratic

and Republican presidents are equally likely to make a *nomination* to the Court (conditional on the incidence of strategic retirements). But Republican presidents would be much more likely to see their nominees *confirmed* under a norm of no divided government appointments. Democratic presidents would find themselves hamstrung in actually filling vacancies, because divided government would be much more likely to occur in their administrations than in Republican ones.

5 Statutory and Constitutional Reforms

Following the Garland blockade of 2016 and President Trump's subsequent appointment of three justices, discussion of reforming the selection and retention institutions of the Supreme Court moved from the pages of law reviews into mainstream discussions of American politics. In this section, we examine the two most widely discussed reform proposals: court packing and term limits.

We continue with the baseline assumption that presidents from both parties will appoint highly reliable ideologues. As shown in Section 3.4, were presidents to revert to appointing ideologically heterogeneous nominees, depolarization of the Court would follow. Of course, such a contingency is extremely unlikely. Consequently, the effects from changing formal selection and/or tenure institutions become of great interest.

5.1 Court packing

We begin with an institutional change long regarded as the third rail of nomination politics: court packing. In fact, court packing has been relatively routine in the lower federal courts. In an important paper, De Figueiredo and Tiller (1996) show that Congress has been much more likely to increase the number of judges on the district and circuit courts during unified government compared to divided government, even when accounting for possible caseload concerns. Unified government, of course, allows a president and Senate to work in tandem to appoint like-minded judges to the federal bench.

While Congress has expanded the lower courts nearly 30 times since 1789, changes in the number of seats on the Supreme Court have been much less frequent. Between 1789 and

1869 the number of seats on the high Court—set by statute—fluctuated between six and ten. During Reconstruction, Republican Party efforts to deny appointments to Andrew Johnson and facilitate ones by Ulysses Grant were particularly dramatic. Since 1869, however, the bench has remained at nine despite the introduction of many bills that would change this (Clark 2011). The most serious threat came in 1937, when President Roosevelt famously proposed expanding the Court in order to reinvigorate it, a transparent ploy to break the majority's opposition to the New Deal. FDR's too-clever-by-half plan exploded in his face, proving extremely controversial even within his own party. Ultimately the Senate rejected it in a 70-20 vote.[35] Despite this humiliating legislative defeat, FDR won the larger battle. First, a narrow majority on the Court softened its opposition to key New Deal measures (Caldeira 1987). Then, Roosevelt filled a flood of seats, making an amazing nine appointments to the Court in his 15 years in office. Some of these were encouraged by improvements in the justices' pension plan, a deft alternative to crude court packing.

Despite Roosevelt's ultimate success, it seems fair to say that the received wisdom about the 1937 episode was that court packing is "box-office poison." However, the events of the last decade rehabilitated the notion among among some activists and politicians. First, the Court made several rulings that seemed to advance the partisan interests of the Republican party. Among those most infuriating to liberals were the 2010 decision in *Citizens United* that prohibited the government from restricting independent expenditures for political communications by corporations, the 2013 decision in *Shelby County v. Holder* striking down key portions of the Voting Rights Act, and the 2019 decision in *Rucho v. Common Cause* that held that claims of partisan gerrymandering are non-justiciable in federal courts. These cases soon appeared in Democratic presidential platforms as examples of judicial perfidy (see Chapter 2). Combined with the McConnell gambit of 2016 and 2017, the pronounced tilt in the judicial playing field led some liberal politicians and advocates to call for a "hard ball" response the next time Democrats regained the White House. As Ian Millhiser (2019), a

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[35]See Shesol (2011) for an excellent history of the lead-up to and defeat of the court packing plan.

liberal writer who covers the Supreme Court, wrote in 2019:

> Just two years ago, this would have been an extraordinarily radical essay. Its premise is that court-packing—increasing the number of seats on the Supreme Court to change its ideological makeup—is, in certain limited circumstances, justified. And it is not unlikely that those circumstances will arise soon. Long seen as an unacceptable tactic, court-packing is now increasingly viewed as the least-bad option by an array of scholars and activists fearful that the Supreme Court has become a wholly owned subsidiary of the Republican Party.

Court packing emerged as a central talking point in the 2020 Democratic primary (Levy 2019). Pete Buttigieg, for example, endorsed a plan to increase the court to 15 members, with a third of the Court selected by the other 10 justices (who would be selected via the existing selection procedure).[36] In the summer of 2019, Senator Kamala Harris also endorsed packing the court (Biskupic 2019). So did presidential contenders Senator Elizabeth Warren, Senator Cory Booker, and Governor Steve Bullock of Montana, in various versions (Ayesh and Perano 2019).

As it turned out, the push for court packing quickly fizzled. Democrats won control of the presidency and both chambers of Congress in the 2020 elections, but their majorities in the House and especially the Senate were razor thin, effectively crushing radical change.[37] In addition, President Joe Biden seemed lukewarm about the idea. Biden came out against court packing in 2019; then, in 2021 he appointed a bipartisan commission of law professors to study Supreme Court reform. (The commission made no formal recommendation for or against expanding the Court, as the issue divided the members.[38]) The future may bring a surprising turn of fortune, but at the time we write the prospects for expanding the Supreme Court appear very dim.

Still, there is value in asking how the Court would be affected in the event of court packing.

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[36] Buttigieg's plan was based on the proposal in Epps and Sitaraman (2019).

[37] Even if every Democrat had supported court packing, which was not the case in 2021, under any plausible scenario changing the size of the Supreme Court would have necessitated eliminating the legislative filibuster. A significant number of Democrats adamantly opposed this change.

[38] The final commission report is available at https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf. See Savage (2021) on the committee's divide over the wisdom of court packing.
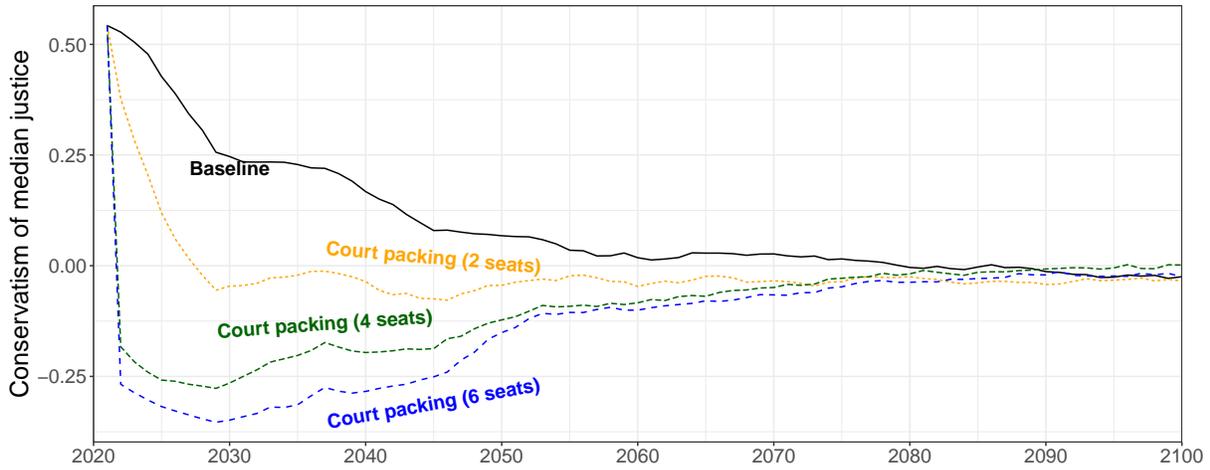
Figure 17: The average location of the Court's median, under the baseline scenarios and three hypothetical court packing plans implemented by Democrats in 2021.

Accordingly, we develop three policy experiments in which we assume that the Court was expanded in 2021, under unified Democratic government. In the three experiments, we separately assume an increase of two, four, or six seats, which would bring the total number of justices to 11, 13, and 15, respectively. These changes are assumed to take place in 2022, meaning the additional justices are all Democratic appointees. Other than this, we assume everything else remains as in the baseline scenario. For the moment, we assume (probably unrealistically) that court packing would be a one-time event, with the size of the court forever fixed after a one-shot increase in seats. (We consider tit-for-tat court packing momentarily).

Figure 17 depicts the average ideology of the median justice under each court-packing scenario; we also show the baseline results for comparison. Not surprisingly, Democratic court packing would shift the median of the Court to the left, compared to the baseline scenario of a conservative median justice. Because the real Court in 2021 had six conservatives and three liberals, allowing for either four or six new Democratic appointments would have an immediate and lasting impact on the average location of the median, shifting it to the liberal wing of the Court. But notice that under the scenario where "only" two seats would be added, it still takes several years for the average location of the median to approach the centrist zero-mark. Moreover, from 2030 to 2060, while the median would be liberal for most years,

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the deviation from zero would actually be much smaller compared to the conservative "bias" that we observe in the baseline scenario. Thus, while adding more than two seats would likely mean a dramatic and prolonged liberal Court, adding only two seats would move the ideological trajectory of the Court to a rough balance.

Of course, politics is a dynamic process, not a static one. It seems likely—in fact, virtually certain—that a Democratic expansion would provoke a Republican response. Indeed, some liberals worry about tripping off a cycle of court packing that could weaken the legitimacy of the Supreme Court. "My worry," said left-wing standard bearer Senator Bernie Sanders in April 2019, "is that the next time the Republicans are in power they will do the same thing, I think that is not the ultimate solution" (Ayesh and Perano 2019). More recently, Sanders elaborated his point: "We add two more judges. The next guy comes in—maybe a Republican—somebody comes in, you have two more [and before you know it] you have 87 members of the Supreme Court. And I think that delegitimizes the Court" (quoted in Millhiser 2020).

What would a cycle of tit-for-tat court-packing look like? To investigate the "Sanders scenario," we begin with the policy experiment in which two Democratic seats were added to the Court in 2021. We then suppose that every time a unified government emerges in which the majority party is opposite from the one that existed at the last occurrence of unified government, two additional seats are added to the Court, to be filled by an ideological judge aligned with the sitting president (again using the baseline simulation). Because we assume court packing first occurs in 2021 under unified Democrat government, the implication is the next round of Court packing would occur the first time Republicans gain unified control of the White House and Senate. In simulations where the Democrats lose the White House in 2024 and Republicans control the Senate, the tit-for-tat occurs as early as 2025-26. This cycle continues with every switch. (In the Sanders Scenario, we assume court packing does *not* occur when there is a shift from divided government back to the type of unified government that previously existed. For instance, if Republicans take control of the Senate in 2023 and
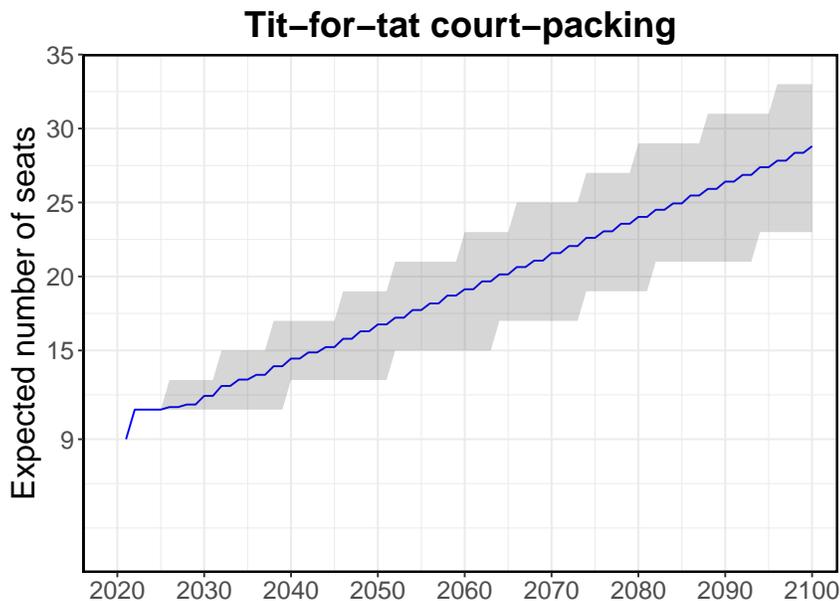
Figure 18: How tit-for-tat court packing would affect the size of the Court.

2024, but then Democrats retake the Senate in 2025, court packing is not implemented in 2025, since Democrats were responsible for the last expansion in 2021.)

Modeling the composition and ideology of the Court under this cycle of tit-for-tat court packing quickly becomes quite involved. Instead, we pursue a simpler but important question: how many seats would the Court have over the course of the 21st century? For every simulation, we recorded the number of seats in every year. Then, for every year we calculated the average number of seats, along with 95% confidence intervals. Those results are displayed in Figure 18.[39]

The upshot is straightforward but nevertheless stark. The number of seats on the Court would rise in a roughly linear fashion, reaching nearly 30 seats by the end of the century. This number is less than Senator Sander's conjecture of "87 members," but still entails a more than 300% increase in the size of the Supreme Court. There are high courts of comparable size, for example; the Indian Supreme Court has 33 members at the time we write. But such a bulky Court would be a complete departure from the American experience. The largest state supreme court has nine members, and many are as small as give. A 30-member body

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[39]Chilton et al. (2021*b*) perform a very similar analysis, though their assumptions about under which conditions court packing occurs differ slightly from ours.

would resemble less a traditional American court than a legislature, requiring radical changes in procedure and operation. We would truly be off the edge of America's constitutional map.

5.2   Term limits

Court packing is and likely will remain highly contentious and bitterly partisan. An alternative is far less controversial, receiving endorsements from academics and politicians across the political spectrum: term limits for the justices.

Article III of the Constitution states that "the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour," a clause that effectively provides Supreme Court judges with life tenure, short of impeachment. During the constitutional conventions, the institutions for selection and retention of federal judiciary were the subject of much debate—particularly the appointment mechanism. But the historical record suggests that there was little disagreement over the wisdom of life tenure (Crowe 2012, 26-28). Most famously, Alexander Hamilton argued in Federalist 78 that if "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty." This sentiment was joined by Hamilton's frequent nemesis, Thomas Jefferson, who wrote, "The judges ...should not be dependent upon any man or body of men. To these ends they should hold their estates for life in their offices, or in other words, their commissions should be during good behavior" (quoted in Haynes (1944, 93)).[40]

Whatever the wisdom of life tenure in 1789, several modern-day realities may suggest the wisdom of a reappraisal. First, almost no other judicial system at either the state level in the United States or in other countries provides for life tenure. Yet these courts appear to function reasonably well without it.

In addition, as Calabresi and Lindgren (2005) note, some of Hamilton's empirical claims

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[40]Upon assuming the presidency in 1801, Jefferson would flatly reverse this position in the face of a hostile Federalist-controlled Supreme Court.

simply don't hold water today. Perhaps most prominently, the institution that Hamilton called "the least dangerous branch" now exercises sweeping authority and influence across a stunning range of policy domains. Indeed, "the Supreme Court is far more powerful today than Hamilton could ever have imagined in the 1780" (Calabresi and Lindgren 2005, 822). Accordingly, a somewhat greater degree of democratic accountability and responsiveness to the public may be in order. Moreover, Supreme Court justices simply serve much longer, on average, than they used to. As we documented in Figure 7, the average tenure of Supreme Court justices increased dramatically over time. In the early Republic, the average tenure of justices was less than a decade, and throughout the 19th century only somewhat longer. Recent exiters had average tenures of about 25 years. Decades-long tenures substantially increase the political stakes of each appointment. Briefer tenures might dial down the heat in nominations (we return to this point in the final chapter).

In light of these developments, it is probably not surprising that many commentators have called for an end to life tenure, replacing it either with a mandatory retirement age or, much more prominently, fixed terms. To the best of our knowledge, the earliest term limit proposal in the modern era came from Oliver (1986). In recent years, similar calls have come from DiTullio and Schochet (2004), Calabresi and Lindgren (2005), Greenhouse (2012), Chemerinsky (2013) and Klein (2018), *inter alia*. In addition, a number of 2020 Democratic presidential candidates either expressed outright support for term limits or indicated an openness to the idea (Washington Post 2020). So have senators from both parties (Wheeler 2018). Finally, a majority of the American public seems to support the idea: a poll taken in July 2018 (the month Brett Kavanaugh was nominated) found that 61% of registered voters, including 67% of Democrats and 58% of Republicans, support term limits for the justices (Wheeler 2018).

Imposing term limits might prove a knotty problem. Given the "good behavior" clause in Article III, such a plan would likely require a constitutional amendment, a formidable hurdle in the American system (see e.g. Calabresi and Lindgren 2005). Some scholars, however, have

advanced ingenious arguments for a statutory route (see e.g. Cramton 2007). Of course, a statutory plan would inevitably wend its way to the Supreme Court itself. Cynical observers may question the willingness of a majority on the Court ever to accept such a curtailment of their personal power. Only time holds the answer to such imponderables. On the other hand, the MSC simulator offers a way to gauge the likely impact of term limits, if ever implemented.

The precise details of the plans to implement fixed terms differ, and the details matter. However, all the proposals share some basic features. In place of life tenure, justices would serve fixed and non-renewable terms, typically an 18-year term. The terms would be staggered in such a way that each president would receive several appointment opportunities during a four-year term, for example, two appointments in the 18-year plan. They might receive more should a justice die or retire prior to the expiration of the specified term.

Proponents of 18-year terms argue that they would provide several benefits. First, even such lengthy term limits would reduce the chance of justices lingering past the point at which physical infirmity and mental incapacity (the notorious "mental decrepitude" phenomenon) render them unfit for the demands of the job. Second, staggered terms would smooth out the appointment process so that the number of appointments received by a given president would no longer be the hostage of fate or the beneficiary of strategic exits. As Oliver (1986, 810-11) notes:

> As voters have historically changed the occupants of the White House, they have, indirectly but inexorably, changed the makeup of the Court. But it is (at best) random chance that determines which presidential elections will be important in affecting the Court, and which will have little or no effect. There is no great triumph of logic in a system under which, for example, President Nixon in five and one half years named four Justices, President Ford in two and one half years named one, and President Carter in four years named none. Despite being President for only a single term, President Taft named six Justices, more than any President in history with the exceptions of Presidents Washington and Franklin Roosevelt.

Advocates emphasize the impact of even lengthy limits on the incentives for strategic

retirements. A justice whose extended stay on the Court has exhausted its pleasures, may well see a strategic exit as attractive since she can then bequeath the seat to an ideological soulmate. But a younger justice who still savors the job may eschew that ideological bonus in favor of a few years more on the world's most powerful and esteemed judicial body. [41]

Simulating term limits How would term limits change the path of the Court? Implementing term limits would require many detailed design choices about how to phase in staggered terms, plus what to do when justices depart before the end of their appointed term. As we noted earlier, Chilton et al. (2021a) model the specifics of several different term limit proposals. Our goal is more modest. We set up a very simple term limits policy experiment so that we can compare the ideological composition of the Court under such a "plain vanilla" plan to the other experiments we have examined in this chapter.

Under the experiment, we imagine a constitutional amendment passed in 2021 and implemented in 2022. The amendment states that the sitting justices (as of 2021) are ordered by their tenure on the bench (see Figure 8 above). The longest-tenured justice (Clarence Thomas) would be replaced in 2022, with a new justice taking over in 2023. This process would be repeated sequentially every two years, until the junior justice in 2021 (Barrett) is replaced in 2040. Thus, this design implements rolling 18-year terms.

We make several simplifying assumptions. First, for each vacancy that arises at the start of a new term, the new justice is appointed by the sitting president. This means that the outcomes of presidential elections are still important, because they determine which party gets to make an appointment when a vacancy arises. This is particularly true for the phase-in period when the current justices are replaced. For example, John Roberts would leave the Court in 2027 under this scenario, meaning the winner of the 2024 elections would get to pick his successor.

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[41]Depending on the mechanisms for handling vacancies before an 18-year term ends, a small incentive for strategic retirement might still remain. Consider, for example, a justice who was originally appointed by a Democratic president. Suppose the justice was in the 10th year of her term and was either ill or tired of the job. If the president in that year was also a Democrat, she might be more inclined to retire than if the president were a Republican. Even in this case, however, the seat would still turn over at the end of the 18-year term, so the incentives here are quite weak compared to the status quo.

Second, we assume that once a seat on the Court transitions into the term limits phase, it is "assigned" to the appointing party for the duration of its 18-year term, even if the justice holding it leaves the Court before her term expires. For instance, by assumption, Justice Thomas is replaced by a Democratic president in 2023, because we start with the reality of a Democrat president in that year. If the entering justice left the bench before their term expires in 2041, we assume she would be replaced by a Democrat. Again this could be part of the institutional design of the amendment.[42] To be clear, this rule does not mean that a seat is assigned to the Democrats or Republicans forever; which party fills the expiring Thomas term in 2042 would be determined by the outcome of the 2040 election. Accordingly, our experiment does *not* specify that the a certain number of Democratic or Republican justices will be on the Court at any one time, as that distribution is still determined by presidential elections. But it does mean, among other things, that sitting justices cannot engage in strategic retirements by retiring early when a co-partisan president is in the White House in order to ensure their seat remains within the same party.

Third, we assume the Senate confirmation is effectively certain, meaning that all nominees are confirmed. In reality, a term limits design would have to deal with the possibility that divided government confirmations might cease, which would obviously frustrate the intended goals of term limits. One way around this problem would be to remove the Senate's role in the confirmation process altogether. Another alternative would be to require a super-majority vote in the Senate to *reject* a nominee. Such a rule would hardly impede qualified nominees but would prevent the president from appointing a unqualified crony, for example.

Most proposals take 18 years as the specified term. Two reasons stand out. First, a lengthy term represents only a modest departure from the current status quo, so the proposal seems less radical. Second, it dovetails neatly with a nine-member Court and four-year presidential terms. Staggered eighteen year terms allow for two appointments every

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[42]Many quasi-judicial agencies such as the Federal Election Commission have partisan balance requirements that establish that some proportion of commissioners on the agency must hail from one party or the other (Feinstein and Hemel 2018). A term limits plan could use these statutory designs as a model, but that is not the design we model.
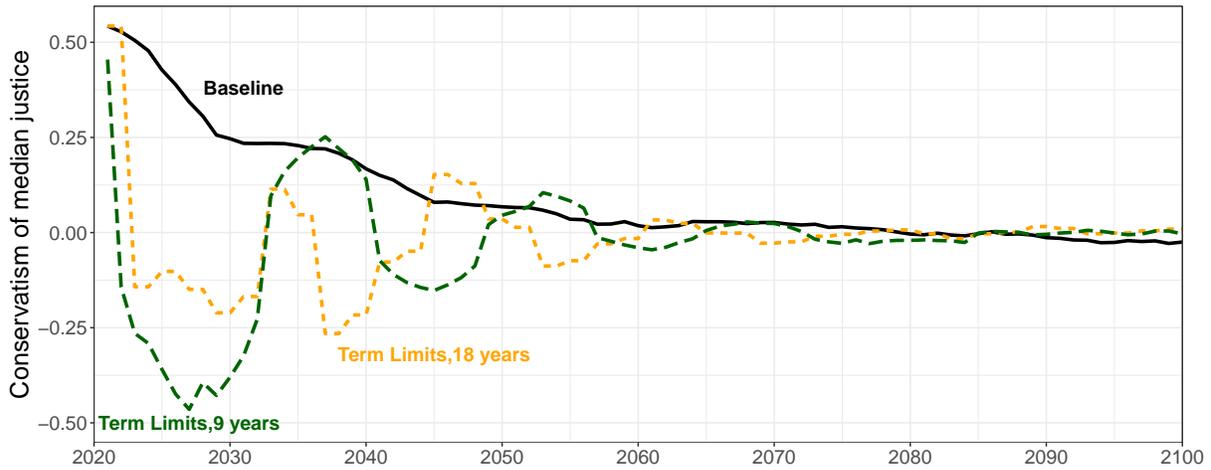
Figure 19: The average location of the Court's median, under the baseline scenarios and 18- and 9-term limits.

four years, meaning that every president would be guaranteed two appointments during every four-year term. Of course, Congress can set the size of the Supreme Court bench to any size it desires and terms could be of any length.

In a second experiment, we retain the assumption of nine justices but instead assume nine-year staggered terms. So, a president would make an appointment every year of his time in office. The other assumptions of this experiment remain the same as with 18-year terms, except we assume the current justices exit one per year starting in 2023, with the new justices serving 9-year terms. This means each president would gain four appointments per term, beginning in 2025.

Figure 19 displays the average median justice under both 18-year and 9-year term limits; we also show the results under the baseline scenario for comparison. The results are dramatic. Because the Democrats are predicted to likely retain control of the White House in 2024, in both the 9-year and 18-year term limits experiments, the median swings to the left, especially in the 9-year scenario. The swings continue for a few decades until the terms limits scenario converges (on average) to the baseline scenario around 2060.

Figure 20 presents the mean number of justices in the liberal, moderate, and conservative blocs for the three policy experiments. Again we see much more volatility with term limits compared to the baseline scenario.
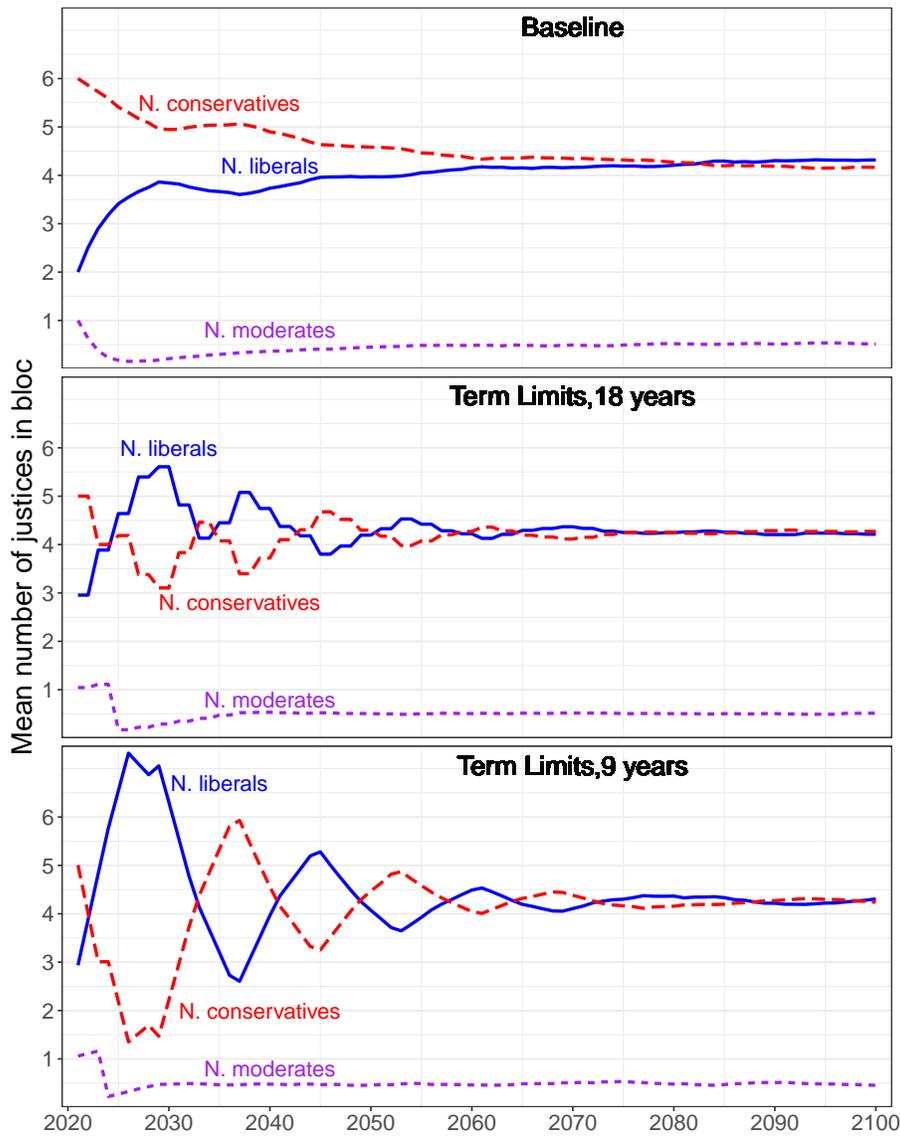
Figure 20: The average number of justices in the liberal, moderate, and conservative blocs, under the baseline scenarios and 18- and 9-term limits.

Why is this happening? Because term limits produce shorter tenures compared to the status quo, they would lead to many more appointments in a given period of time. This, in turn, means that the location of the median is more "jumpy" compared to the baseline scenario, under which replacements occur more slowly and less predictably in time. The volatility is especially notable under 9-year terms, which feature a new justice every year. The fact that the median would likely shift back-and-forth more dramatically under term limits has implications for how we think about the "responsiveness" of the Court, a topic to which we now turn.

6 Comparing the Policy Experiments: Democratic Responsiveness

The policy experiments illuminate many possible paths for future Courts. In concluding, we try to tie the pieces together more systematically. We do so by treating each experiment as a data generating process, whose output can be described and neatly summarized via simple regression analyses.[43]

We focus on the Court's *democratic responsiveness* within and across the policy experiments. By democratic responsiveness, we mean the linkage between party control of the presidency and ideological makeup of the Court. While the Senate has the important role of "advise and consent," the mapping between party control of the White House and the Court's ideological structure strikes us as the most direct gauge of the impact of the tides of democracy on the Court. Recall from Chapter 13 that the ideological makeup of the Court in turn strongly affects the ideological direction of case dispositions and the ideological content of majority opinions.

We employ as dependent variables two measures of the Court's ideological structure. The first is the estimated location of the median justice in a given year. Of course, the location of the median is a function of all the justices on the Court, so a president's ability to move the median through an appointment or two is typically quite limited. Following the analyses in Chapter 13, we also examine the proportion of justices who fall into the conservative bloc, as defined earlier in the chapter. This measure of ideological structure, which strongly correlates with the ideological content of majority opinions, is much more sensitive to appointments.

We set up the regressions as follows. We treat every simulation in all the policy experiments as essentially a time series. So, for example, the baseline scenario has 1,000 time series, with an estimated median location in every year in each of the 1,000 simulations. Because presidential appointments are limited by circumstances, it makes little sense to examine the relationship between presidential control and Court compositions in a year-to-year

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[43]Within the simulation community, this approach– building a statistical "metamodel" of a simulation model– is standard. See e.g. Barton and Meckesheimer (2006).

Regression label	Dependent variable	Responsiveness predictor	Lags included on right-hand side
Medians, 5 years	Location of median justice	Proportion of years in past 5 with GOP president	Median, lagged 5 years
Medians, 10 years	Location of median justice	Proportion of years in past 10 with GOP president	Median, lagged 10 years
Conservative justices, 5 years	Proportion of justices in conservative bloc	Proportion of years in past 5 with GOP president	Proportion of justices in conservative bloc, lagged 5 years
Conservative justices, 10 years	Proportion of justices in conservative bloc	Proportion of years in past 10 with GOP president	Proportion of justices in conservative bloc, lagged 10 years

Table 3: Summary of structure of regressions

manner. Instead, for each simulation, we calculate five- and 10-year rolling averages of the proportion of years in which the president was a Republican. The five-year measure captures rather short-term responsiveness. Because, by construction this measure includes fewer appointments on average, it is rather noisy. The 10-year measure, by contrast, expands the responsiveness window and capture somewhat longer term responsiveness. However, because we can begin the 10-year averages only in 2030, this measure excludes observations from the 2020s.

Finally, in each regression, to capture the "stickiness" of membership on the Court, we also include lagged values of the dependent variable. We use the same lag structure as the number of years used to calculate the rolling average of the relevant dependent variable. For example, in the regressions in which the dependent variable is the location of the median and the key predictor is the proportion of Republican presidents in the past 10 years, we also include as a predictor the location of the median lagged 10 years (i.e. the value of the median 10 years before the year under analysis). So, the regression indicates today's ideological structure as a function of the ideological structure from a decade ago plus the proportion of Republican control of the White House during the ensuing decade. The coefficient on proportion of White House control provides the measure of the democratic responsiveness of the Court's ideological structure; the coefficient on lagged structure is a measure of the inherent persistence of ideological structure within a scenario.
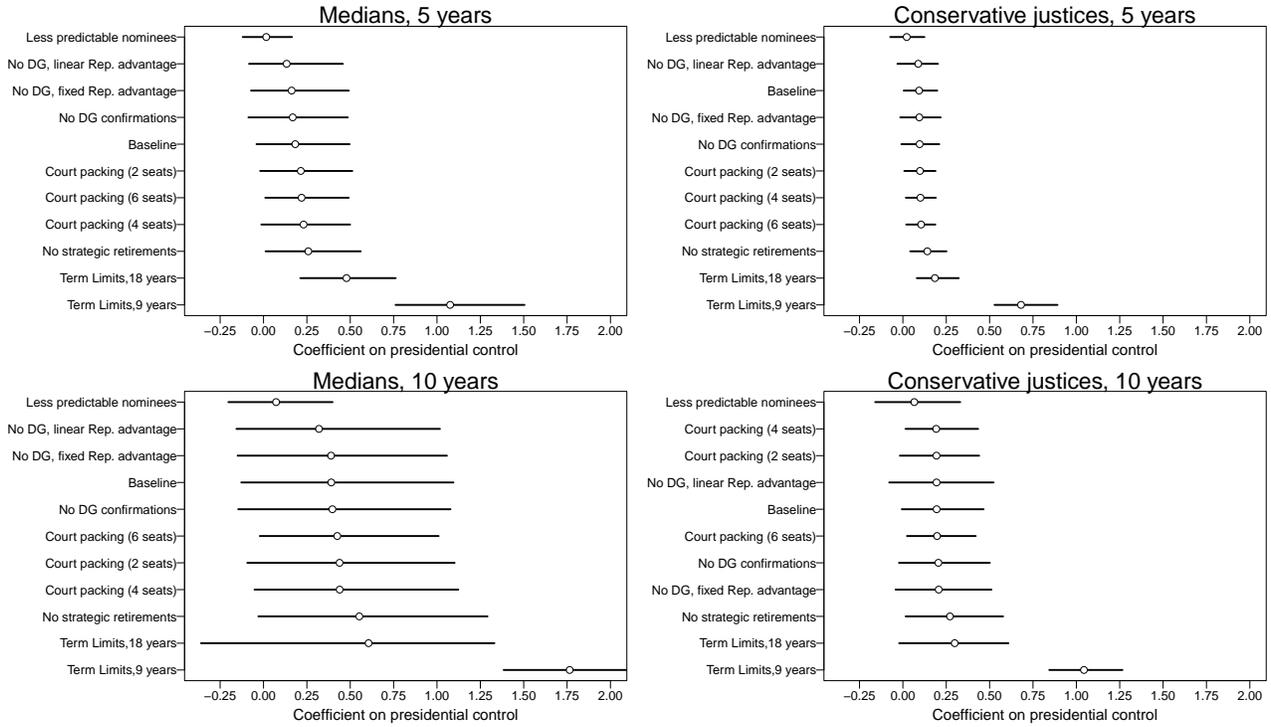
Figure 21: Summary of responsiveness coefficients from regression analyses.

Thus, we have four sets of regressions, the structure of which is summarized in Table 3. Using each set of four, we analyze each of the 11 policy experiments, running one regression for every simulation. The end product is thus four sets × 11 policy experiments × 1,000 simulations, resulting in a total of 44,000 regressions.

Figure 21 presents the results of four sets of regressions. For now we focus just on the responsiveness coefficients—that is, the coefficients on presidential control (we consider persistence in the next chapter). Each plot presents the results from the respective sets of regressions. The points depict the median coefficient among the set of coefficients from the 1,000 regressions for a given analysis. The horizontal lines connect the .025 percentile to the .975 percentile. Within each panel, we order the experiments by increasing responsiveness from top to bottom; this means that the order of the experiments can vary across plots.

It is important to note that the figure does *not* display traditional confidence intervals. Rather, the figure summarizes the spread of the responsiveness coefficients, without regard to the standard errors of the individual coefficients. Because we are working with simulated

data, a frequentist approach to statistical significance is not particularly interesting, in our view. Of greater interest is the rank ordering of the experiments, which affords a summary descriptive comparison of the scenarios in terms of democratic responsiveness.[44]

Across the four sets of analyses, several minor differences stand out. For example, the range of coeficients is wider with the 10-year window compared to the 5-year window. In addition, in the "middle" of the ordered experiments one sees some variation; for example, the baseline experiment ranks fourth in responsiveness in the "Median, 5 years" analysis, compared to third in the other three analyses.

Overall, however, each panel leads to the same substantive conclusions. First, *less predictable nominees always produces the least amount of democratic responsiveness*. This is intuitive, because in this scenario the relationship between presidential control and nominee ideology is weak. The result is more heterogeneity in the composition of the Court relative to the baseline ideology assumptions.

Second, *the baseline scenario generally displays low levels of democratic responsiveness*. As we have discussed throughout the chapter, the Court's ideological makeup (especially in early decades) is extremely sticky under the baseline assumptions, driving down responsiveness. Perhaps surprisingly, in some of the analyses the no divided government confirmation scenarios actually display higher responsiveness on average, though the difference in the median coefficients is quite small.

Third, *the no strategic retirements experiment is always ranks third on responsiveness*, out-ranking even court packing in every analysis. This result reinforces how strategic retirements effectively frustrate presidential ability to alter the composition of the Court. In a practical sense, strategic retirements remove some control of the Court's composition from the hands of the people, and place a portion of it in the hands of the justices themselves.

Finally, and not surprisingly, *the term limits experiments always score highest on respon-*

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[44]For those interested in a more traditional analysis, Table A-2 in the appendix presents the median coefficient and median standard error from all 44 policy-experiment/regression combination, along with the same for lag predictors.

siveness. For 9-year terms, the coefficients on presidential control are strikingly large. This makes intuitive sense, of course. Affording a president an appointment every year allows him quickly to mould the Court in his own image. To give a sense of the scale here, the median coefficient on presidential control in the "Medians, 10 years analysis" is 1.75. This means that a one-unit shift in the proportion of the last decade with a Republican president would predict a 1.75 increase in the location of the median justice. A one-unit shift means zero years with a Republican to 10 years with a Republican, meaning Republican presidents would have appointed all nine justices on the Court. The NOMINATE scale for medians runs from -1 to 1, so a 1.75 nearly covers the entire ideological spectrum. Needless to say, the responsiveness coefficients from 18-year terms are much smaller in magnitude but still indicate a large increase in democratic responsiveness relative to the baseline.

7   Conclusion

"Never make predictions—especially about the future," Hollywood mogul Samuel Goldwyn once advised. In this chapter, we violated with gusto this undoubtedly wise injunction. To discipline our computer simulations of future Courts, we built them on clear microfoundations, reflecting the historical experience and arguably plausible projections.

We see one very large point for the analysis and at least four subsidiary ones. The large and quite robust point is:

- The events of 2016 locked into place a solid conservative majority on the Court. Barring a string of unlikely events, this majority will persist until the 2050s.

The additional points are:

1. The Court is quite likely to remain polarized into two ideologically distant and rather distant blocs, with a near-empty center. As the conservative majority slowly dissipates, the median justice will probably swing regularly across the two blocs.

2. A plausible future involves the end or near-end of divided government confirmations. If Supreme Court appointments come to resemble those of the NLRB and FEC, at least one seat is likely to be vacant a substantial portion of the time, and on occasion, multiple seats will sit empty. Forging majority opinions endorsed by five or more justices may become difficult.

3. Court packing is an unlikely eventuality, but if initiated could trip off tit-for-tat cycles creating a Court with as many as 30 members by the end of the century.

4. Staggered term limits would substantially increase the democratic responsiveness of the Court.

The analysis focused mainly on the ideological structure of the Court itself, not the politics that will likely accompany the most likely futures. In addition, our focus has been positive, not normative. We asked only, What future are we likely to have? We did not ask, What future should we want, and how can we get it? The finding that term limits would greatly increase the responsiveness of the Court points in the direction of endorsing them on normative grounds. Yet, there are certainly tradeoffs to consider; namely, *too much* responsiveness might mean that the Court's center could swing wildly back-and-forth in ways that complicate the Court's ability to function by establishing law that is predictable for other judges and actors to follow. We turn to evaluating tradeoffs such as these in the concluding chapter of the book.

8   Appendix

Table A-1 presents a full summary of the design choices made in prior papers that use simulations to study the Supreme Court, as well the choices we make in designing our simulations.

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Design Element	Bailey & Yoon (2011)	Katz & Spitzer (2014)	Chilton et al (2021a)	Chilton (2021a)	Cameron & Kastellec
Court size	Fixed 9	9	Fixed at 9	Varies depending on unified control	May vary depending on unified control & court make-up
Initial Court make-up	Artificial (evenly spaced ideology age profile)	Random draws uniform distribution on [-1,1]	1937	2021 + 4 new Dem judges	2021
Probability of death	Life tables	Weibull distribution, tuned in some fashion	Historic + Federal judge historic age specific rate, for non-historic justices	Federal judge age specific historic rate	SSA age specific death tables
Probability of retirement	Increases with age, also strategic (a varying parameter)	Does not distinguish between retirement & death	Historic	Strategic after 18 years, depends on pres control	Strategic after 18, depends on pres control
Probability of filling vacancy	100%	100%	100%	100%	Depends on unified (scenarios)
Ideology of entering justice	Close to president, some randomness	MTM (so, weakly toward president but may not move median)	Historic + 2 bins (lib/con) corresponding to party of president	2 bins (lib/con) corresponding to party of president	Continuous random distribution depending on pres party
Probability of control of presidency	50-50	Pres ideal point drawn from uniform on [-1,1]	Historic	Simple Markov process (one term, two term)	Markov process (one term, 2 term)
Probability of control of Senate	No Senate	Median senator drawn from uniform on [-1,1] (no midterms)	Historic	Based on pres control, fixed 30% prob of unified	Markov process, midterm/pres election, increasing party advantages
Probability of unified party control	100% (with ad hoc randomness in justice ideology)	No party effects	Historic	Based on pres control, fixed 30% prob of unified	Endogeneous based on simulated presidential and Senate control
Measure of Ideological structure of Court	Median, sd of median	Median	2 Bin sizes, bin containing median	2 Bin sizes, bin containing median	Median, plus 3 bloc sizes
Doctrinal Implications	No	No	No	No	Dispositions & doctrine location conditional on disposition

Table A-1: Summary of design choices in papers using simulations to study the Supreme Court.

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	Baseline	Court packing (2 seats)	Court packing (4 seats)	Court packing (6 seats)	No DG confirmations	No DG, fixed Rep. advantage	No DG, linear Rep. advantage	Less predictable nominees	No strategic retirements	Term Limits, 18 years	Term Limits, 9 years
Medians, 5 years											
Intercept	-0.108	-0.156	-0.169	-0.184	-0.103	-0.06	-0.003	-0.009	-0.145	-0.257	-0.536
	(0.055)	(0.051)	(0.047)	(0.044)	(0.059)	(0.059)	(0.061)	(0.024)	(0.057)	(0.058)	(0.056)
Lag coef	0.652	0.587	0.597	0.621	0.605	0.606	0.589	0.62	0.648	0.303	0.461
	(0.091)	(0.091)	(0.09)	(0.087)	(0.094)	(0.096)	(0.098)	(0.067)	(0.089)	(0.096)	(0.079)
Response coef	0.173	0.219	0.224	0.221	0.174	0.166	0.137	0.013	0.255	0.473	1.064
	(0.077)	(0.077)	(0.073)	(0.068)	(0.082)	(0.078)	(0.08)	(0.035)	(0.083)	(0.091)	(0.095)
Medians, 10 years											
Intercept	-0.227	-0.302	-0.314	-0.349	-0.24	-0.146	-0.037	-0.041	-0.298	-0.326	-0.879
	(0.088)	(0.08)	(0.076)	(0.074)	(0.088)	(0.09)	(0.091)	(0.035)	(0.092)	(0.097)	(0.065)
Lag coef	0.345	0.297	0.325	0.355	0.308	0.289	0.282	0.326	0.352	0.189	0.016
	(0.107)	(0.105)	(0.107)	(0.104)	(0.109)	(0.113)	(0.114)	(0.072)	(0.107)	(0.119)	(0.062)
Response coef	0.384	0.46	0.44	0.434	0.424	0.389	0.33	0.067	0.527	0.579	1.754
	(0.143)	(0.14)	(0.136)	(0.13)	(0.149)	(0.142)	(0.145)	(0.061)	(0.154)	(0.176)	(0.121)
Conservative justices, 5 years											
Intercept	0.078	0.075	0.067	0.061	0.083	0.117	0.125	0.072	0.049	0.112	-0.109
	(0.049)	(0.046)	(0.043)	(0.04)	(0.054)	(0.06)	(0.061)	(0.033)	(0.05)	(0.047)	(0.047)
Lag coef	0.724	0.717	0.718	0.73	0.702	0.682	0.695	0.717	0.741	0.558	0.525
	(0.084)	(0.086)	(0.085)	(0.082)	(0.087)	(0.091)	(0.092)	(0.068)	(0.083)	(0.09)	(0.067)
Response coef	0.094	0.098	0.101	0.105	0.103	0.096	0.088	0.028	0.137	0.179	0.675
	(0.026)	(0.024)	(0.023)	(0.022)	(0.031)	(0.032)	(0.034)	(0.027)	(0.029)	(0.028)	(0.045)
Conservative justices, 10 years											
Intercept	0.173	0.169	0.146	0.128	0.16	0.218	0.254	0.136	0.121	0.159	-0.044
	(0.067)	(0.061)	(0.058)	(0.053)	(0.072)	(0.077)	(0.083)	(0.046)	(0.069)	(0.068)	(0.035)
Lag coef	0.432	0.415	0.429	0.45	0.399	0.368	0.381	0.445	0.44	0.333	0.01
	(0.104)	(0.105)	(0.105)	(0.102)	(0.107)	(0.112)	(0.114)	(0.084)	(0.104)	(0.114)	(0.039)
Response coef	0.19	0.188	0.191	0.203	0.225	0.201	0.198	0.07	0.26	0.283	1.037
	(0.05)	(0.046)	(0.044)	(0.043)	(0.06)	(0.059)	(0.066)	(0.052)	(0.057)	(0.056)	(0.042)

Table A-2: Full regression results for simulations. The table displays the median coefficient and standard error for every set of regressions. The "response coef" rows display the coefficients that capture responsiveness to control of the presidency, while the "lag coef" rows displays the coefficients on the lagged dependent variables.