

Replacing Justice Breyer*

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Objective. In the same left-right (liberal-conservative) policy space, we locate President Biden’s possible nominees to the Supreme Court and the current justices (Section 1). The goal is to consider how the Court (and ultimately the law) could change depending on Biden’s pick to replace Justice Breyer.

Basic Findings. Because the possible Biden nominees are ideologically close to Breyer (and Kagan), the Court’s center of power (Roberts + the Trump appointees) is unlikely to shift to the left in the next few years (Section 2). Nonetheless, change in the longer term is possible in light of research showing differences in the voting patterns of Black/female judges versus white/males (Section 3).

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*This is an update of previous studies on replacing departing Supreme Court Justices. Others include [Replacing Justice Ginsburg](#), covered in the [Guardian](#), October 26, 2020; [Wall Street Journal](#), September 26, 2020; [Washington Post](#), September 26, 2020; [Replacing Justice Kennedy](#), which was reported in the [Washington Post](#), October 2, 2018; [Wall Street Journal](#), August 31, 2018; [New York Times](#), July 9, 2018; [President-Elect Trump and his Possible Justices](#), which was reported in the [New York Times](#) on February 1, 2017; and [Possible Presidents and their Possible Justices](#), which was reported in the [New York Times](#) on September 25, 2016.

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

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

Current Justices. We base the justices’ ideology on their voting patterns (their Martin-Quinn scores²). We apply the procedure outlined in the JCS to ensure compatibility between the justices’ and possible nominees’ scores.

Possible Nominees. We include six names mentioned as potential Biden nominees, plus Kamala Harris (see Table 1).³ All are Black women in line with Biden’s campaign promise.⁴

¹Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, & Chad Westerland, “The Judicial Common Space,” 23 *Journal of Law, Economics, & Organization* 303 (2007). Some commentators suggest that expert judgment or a careful reading of the judges’ opinions would be a better approach to locating the potential appointees and decisions in ideological policy space. For our response to this suggestion, see the Appendix.

²At: <http://mqscores.lsa.umich.edu>.

³See, e.g., Jonathan Martin, “How Democrats Are Already Maneuvering to Shape Biden’s First Supreme Court Pick,” *New York Times*, June 14, 2021 (updated); Ruth Marcus, “Opinion: You Probably Haven’t Heard of Judge Ketanji Brown Jackson. That’s Going to Change,” *Washington Post*, February 5, 2021.

⁴Jonathan Martin, “How Democrats Are Already Maneuvering to Shape Biden’s First Supreme Court Pick,” updated June 14, 2021.

Name/ Current Position	Year/Age & State of Birth	Law School	Clerkships
J. Michelle Childs DC Circuit Nominee (Biden)	1966 (55) Michigan	South Carolina	
Leslie Abrams Gardner GA Dist. Judge (Obama)	1974 (47) Wisconsin	Yale	Garbis (DCt)
Kamala Harris Vice President	1964 (57) California	Hastings	
Ketanji Brown Jackson DC Circuit Judge (Biden)	1970 (51) Washington, D.C.	Harvard	Saris (DCt), Seyla (CoA), Breyer (SCt)
Candace Rae Jackson-Akiwumi 7th Circuit Judge (Biden)	1979 (42) Virginia	Yale	Coar (DCt), Gregory (CoA)
Leondra R. Kruger CA Sup. Ct. Justice	1976 (45) California	Yale	Tatel (CoA), Stevens (SCt)
Wilhelmina Wright MN Dist. Judge (Obama)	1964 (57) Virginia	Harvard	Keith (CoA)

Table 1: Possible Biden nominees. Age (in parentheses) is age at the end of 2021. Childs is currently a judge on the U.S. District Court for the District of South Carolina. Sources include the [Federal Judicial Center’s Biographical Directory of Federal Judges](#) and court websites.

1.1 Possible Nominees Serving as Federal Judges

Because five of the seven possible nominees are sitting federal judges (see Table 1), we measure their ideology via the the tried-and-true approach developed by Giles, et al.⁵

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

Giles, et al. use Lewis, et al.’s NOMINATE scores to measure the senators’ and presidents’ ideology, and so we can place federal judges in the same left-right space as the current justices.⁶

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

⁶Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, & Luke Sonnet, Voteview: Congressional Roll-Call Votes Database, <https://voteview.com/>. Updated scores for the court of appeals judges are at: <https://www.epstein.wustl.edu/jcs>. Christina L. Boyd maintains the district judges’ scores at <http://clboyd.net/ideology.html>.

Of course, it’s difficult to say with any degree of (un)certainty whether our ideological placements of the sitting federal judges will predict their behavior on the U.S. Supreme Court; none are justices (yet). What we can say is that the ideological scores produce fairly accurate predictions for justices serving since the 2010 term, as Table 2 shows.⁷ For example, based on Breyer’s lower court ideology we would expect him to vote 37.1% of the time in the conservative direction. Breyer’s actual percentage is 41.0%—for an error rate of under 4 percentage points. For some justices the fit is tighter; notably, two of the Trump appointees, Gorsuch and Kavanaugh, yield error rates < 3. For other justices the fit is looser (*e.g.*, Alito, Barrett [based on a small number of votes], and Sotomayor). Overall, though, a strong and statistically significant relationship ($p < 0.05$) exists between the justices’ lower court JCS scores and their voting on the Supreme Court.

Justice (N Votes)	Justice’s Ideology Score	Predicted % Conservative	Actual % Conservative	Error
Alito (682)	0.557	58.3	63.8	5.5
Barrett (42)	0.464	56.3	66.7	10.4
Breyer (683)	-0.413	37.1	41.0	3.9
Ginsburg (636)	-0.438	36.6	35.4	-1.2
Gorsuch (232)	0.572	58.6	58.2	-0.5
Kagan (646)	-0.343	38.7	37.5	-1.2
Kavanaugh (159)	0.692	61.3	59.1	-2.2
Kennedy (519)	0.506	57.2	52.2	-5.0
Roberts (684)	0.692	61.3	55.3	-6.0
Scalia (353)	0.692	61.3	57.2	-4.1
Sotomayor (680)	-0.301	39.6	35.2	-4.4
Thomas (686)	0.557	58.3	63.1	4.8

Table 2: Predictions of the justices’ voting based on their lower court ideology (JCS) score (for Kagan, Obama’s score). The number of votes is in parentheses. Percentage conservative calculated by Lee Epstein, Andrew D. Martin (both at Washington University in St. Louis) and Kevin Quinn (University of Michigan) from the [U.S. Supreme Court Database](#), with decisionType=1 or 7 (orally argued cases resulting in a signed opinion or judgment) and term ≥ 2010. $R^2=0.81$; RMSE=5.3.

1.2 The Remaining Nominees: Harris and Kruger

Because Giles, et al. use the NOMINATE scores to measure the senators’ and presidents’ ideology, we can easily place Kamala Harris, a former senator, in the same left-right space as the current justices. Kruger presents more of a challenge because there is no equally dependable method of including state justices in same policy space as Supreme Court justices. To avoid excluding Kruger,

⁷For all but Kagan we use the justice’s lower court score; for Kagan, who did not serve as a federal judge, we use her appointing president’s—Obama’s—score.

we rely on the average of the ideology score of the two judges for whom she clerked (Tatel and Stevens).

Using clerkships to assess state justices’ ideology is novel, and so we must emphasize that this measurement strategy has not been validated. Nonetheless, the results appear plausible (see Figures 1).

2 Possible Nominees as Justices

Figure 1 shows where the possible Biden nominees would fit on the current Court if they were to become justices.

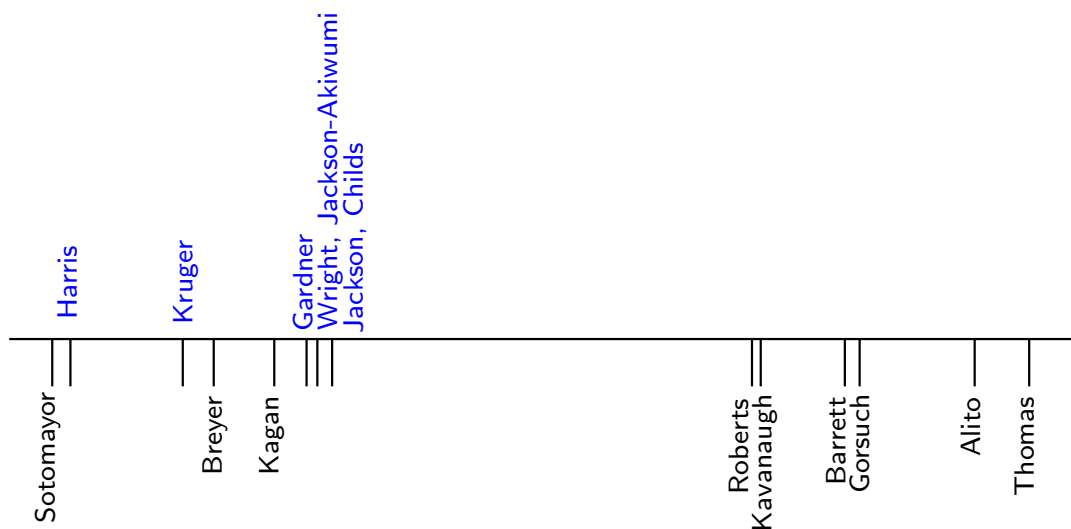


Figure 1: Left-right placement of the 2021-22 term justices and seven possible Biden nominees to the Court.

3 Implications of Breyer’s Departure

Because all the potential nominees are ideologically fairly close to Breyer and Kagan, none are well-positioned (at least in the short term) to move the Court’s center of power to the left. The implication, in turn, is that there are no implications of Breyer’s departure.

Conventional measures would seem to support this conclusion. Consider voting behavior. Despite Breyer’s claim that judges are not (or, at the least, should not be caricatured) as “politicians in robes,”⁸ his votes are in step with the other Democratic appointees relative to the Republican appointees. For example, as Table 3 shows, Breyer’s percentage of liberal votes (66.3%) is significantly higher than the average of 49.0% ($p \leq 0.05$); it is also higher than all the Republican appointees except Stevens and Souter.

⁸Justice Stephen G. Breyer, “The Authority of the Court and the Peril of Politics,” at <https://www.youtube.com/watch?v=bHxTQxDVTdU>.

	% Liberal Votes	N Votes
Stevens	80.9	692
Sotomayor	75.6	418
Ginsburg	73.8	1053
Kagan	72.5	363
Souter	71.9	652
Breyer	66.3	1070
Kennedy	39.3	978
Kavanaugh	38.1	97
Gorsuch	37.8	143
Roberts	37.5	595
O'Connor	37.1	480
Barrett	34.8	23
Alito	26.1	579
Scalia	24.9	886
Rehnquist	23.8	475
Thomas	21.5	1076
Average/Total	49.0	9580

Table 3: Percent liberal voting in non-unanimous cases by justice, 1994-2020 terms. Justice Breyer joined the Court in the 1994 term. Republican appointees are in red; Democratic appointees are in blue. Percentage liberal calculated by Lee Epstein, Andrew D. Martin (both at Washington University in St. Louis) and Kevin Quinn (University of Michigan) from the [U.S. Supreme Court Database](#), with decisionType=1 or 7 (orally argued cases resulting in a signed opinion or judgment).

Then again, of the three Democrats serving with Breyer, he cast the lowest percentage of liberal votes over his 27 (completed) terms. Drilling down into the data, a comparison of Breyer and Kagan shows that when the two disagreed, Breyer tended to vote in the conservative direction (46 of 70 disagreements, or 65.7%). Ditto for Sotomayor (70 of 100 disagreements, or 70%) and Ginsburg (167 out of 253 disagreements, or 66%).

These conservative (Breyer) - liberal (the other Democrats) disagreements, moreover, tended to fall disproportionately in the area of criminal procedure. Looking at the 26 cases in which Ginsburg, Kagan, and Sotomayor were on the liberal side and Breyer was on the conservative side, 13 (50%) involved defendants' rights. Disagreements in search and seizure cases were the most common, and included several important disputes. In *Maryland v. King* (2013),⁹ for example, Breyer joined the 5-person majority allowing police to take DNA samples from people arrested for serious offenses. Ginsburg, Kagan, and Sotomayor (along with Scalia) were in dissent.

⁹569 U.S. 435.

Also notable were divides between Breyer and one or more of the Democratic appointees in civil rights litigation. Falling into this category are the affirmative-action related cases of *Gratz v. Bollinger* (2004)¹⁰ (Ginsburg, Souter, and Stevens dissented); *Fisher v. Univ. of Texas 1* (2013)¹¹ (Ginsburg dissented, though Sotomayor did not); and *Schuetz v. Coalition to Defend Affirmative Action* (2014)¹² (Ginsburg and Sotomayor dissented). Then there's *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (2018)¹³ in which Breyer (and Kagan) joined the majority but Ginsburg and Sotomayor dissented.

Were the Biden appointee to hold views closer to Ginsburg, Sotomayor, and/or Kagan in these and others areas, the left side of the Court would pick up a vote. This may be especially likely in civil rights and criminal cases implicating gender and race. Research shows that female appellate judges are more likely to favor plaintiffs alleging gender-based employment discrimination and sexual harassment;¹⁴ and equally noteworthy, when a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant.¹⁵ Likewise in Voting Rights Act cases, Black judges vote more frequently for plaintiffs of color; and again "panel effects" exist: white judges are more likely to find liability when they sit with Black judges.¹⁶ Research also shows race effects in affirmative action litigation (Black judges are more supportive of diversity programs¹⁷), employment discrimination suits (Black judges are more favorable to Black employees¹⁸), and criminal cases (Black judges are more accepting of claims of police misconduct brought by Black defendants¹⁹).²⁰

Almost needless to write, many of these findings (mostly from studies of lower court judges) don't aptly characterize the votes of the only Black member of the current Court (Clarence Thomas).

¹⁰539 U.S. 244.

¹¹570 U.S. 297.

¹²572 U.S. 291.

¹³138 S. Ct. 1719.

¹⁴Christina L. Boyd, Lee Epstein, & Andrew D. Martin, "Untangling the Causal Effects of Sex on Judging," 54 *American Journal of Political Science* 389 (2010); Laura P. Moyer and Holley Tankersley, "Judicial Innovation and Sexual Harassment Doctrine in the US Courts of Appeals," 65 *Political Research Quarterly* 784 ((2012); Jennifer L. Peresie, "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts," 114 *Yale Law Journal* 1759 (2005) . The same holds on the European Court of Human Rights and the Supreme Court of Canada. See respectively Eric Voeten, "Gender and Judging: Evidence from the European Court of Human Rights," 28 *Journal of European Public Policy* 1453 (2021) and Susan W. Johnson and Donald R. Songer, "Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts", 30 *Justice System Journal* 265 (2009).

¹⁵Boyd, Epstein, & Martin, note 14; Peresie, note 14. See also Kimi Lynn King, James D. Meernik, & Eliza G Kelly, "Deborah's Voice: The Role of Women in Sexual Assault Cases at the International Criminal Tribunal for the Former Yugoslavia," 98 *Social Science Quarterly* 548 (2016) (finding that panels with one of more female judges on international criminal tribunals give substantially longer sentences to sexually violent offenders than all-male panels (about 35 months longer).

¹⁶Adam B. Cox & Thomas J. Miles, "Judging the Voting Rights Act," 108 *Columbia Law Review* 1 (2008).

¹⁷John P. Kastellec, Racial Diversity and Judicial Influence on Appellate Courts," 57 *American Journal of Political Science* 167 (2013).

¹⁸Jason L. Morin 2014. "The Voting Behavior of Minority Judges in the U.S. Courts of Appeals: Does the Race of the Claimant Matter?," 42 *American Politics Research* 34 (2014)

¹⁹Nancy Scherer, "Blacks on the Bench," 119 *Political Research Quarterly* 655 (2004).

²⁰For a review of this literature, see Allison P. Harris & Maya Sen. "Bias and Judging," 22 *Annual Review of Political Science* 241 (2019).

But they may hold for more traditional Democratic appointees in the mold of Thurgood Marshall, Ginsburg, Sotomayor, and Kagan.

Also, almost needless to write, an additional vote in these areas may not make much difference on the current Court. But considering the age of some of Biden’s nominees a more left-leaning voice could well matter in the long term.

4 Ideological Drift

Predictions about the future behavior of nominees—such as those we offer in Figure 1— mostly assume that once on the Court, the Biden appointee will not be a turncoat (e.g., Warren, Souter) or leftward drifter (e.g., Blackmun, O’Connor, Kennedy). Empirical studies, however, question this assumption. They’ve found that as many as half of all justices serving since 1937 diverged from their president’s ideology or otherwise drifted to the right or, more typically, to the left.²¹

Why? Epstein, Landes, & Posner tested, and ultimately confirmed, the hypotheses that justices are less likely to drift if they were a federal official (including a judge) working in the District of Columbia at the time of their appointment.²² Perhaps the president has better information about potential appointees who are inside the Beltway. Or perhaps newcomers to Washington are more vulnerable to criticism, and more grateful for praise, from (some left-leaning) reporters.²³ As Judge Silberman of the D.C. Circuit put it, “I do not think I fully appreciated until I became a judge . . . how much an impact press coverage can have on judges. [I] understand better today the reason for the evolution of some judges. More often than not it is attributable to their paying close attention to newspaper accounts of their opinions.”²⁴

Whatever the reason, the relationship between proximity to the District and stability in voting may explain why five of the eleven most recent justices were working in Washington at the time of their nomination (Ginsburg, Kagan, Kavanaugh, Roberts, and Thomas); and two were close by in New York (Sotomayor) and New Jersey (Alito). Note too Obama’s nomination of Merrick Garland and his serious consideration of Sri Srinivasan—both judges on the D.C. Circuit—not to mention Trump’s appointment of Gorsuch (a former Deputy Associate General in Bush 2’s Justice Department).

Perhaps as a result of recent presidents’ consideration of location, significant *against*-type drift has virtually disappeared on the Roberts Court. Now only the Chief himself falls in this category, as Figure 2 suggests. There we show the [Martin-Quinn scores](#)²⁵ (developed from the justices’ voting

²¹*E.g.*, Andrew D. Martin & Kevin M. Quinn, “Assessing Preference Change on the U.S. Supreme Court,” 23 *Journal of Law, Economics, & Organization* 365 (2007); Lee Epstein, et al., “Ideological Drift Among Supreme Court Justices,” 101 *Northwestern University Law Review* 1883 (2007); Lee Epstein, Willam M. Landes, & Richard A. Posner, *The Behavior of Federal Judges* (Harvard University Press, 2013).

²²Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006), 144; Linda Greenhouse, “Justices Who Change: A Response to Epstein, et al.” 101 *Northwestern University Law Review* 1885 (2007).

²³This is known as the “Greenhouse Effect,” named for the former Supreme Court correspondent for the *New York Times*, Linda Greenhouse. For an analysis, see Baum, note 22. Perhaps the emergence of conservative and libertarian blogs has worked to offset this effect.

²⁴Quoted in Baum, note 22, 139.

²⁵Andrew D. Martin & Kevin M. Quinn, “Dynamic Ideal Point Estimation via Markov Chain Monte Carlo

patterns) for the 2020 term justices. (Of course, it’s too soon to say much about three Trump appointees.)

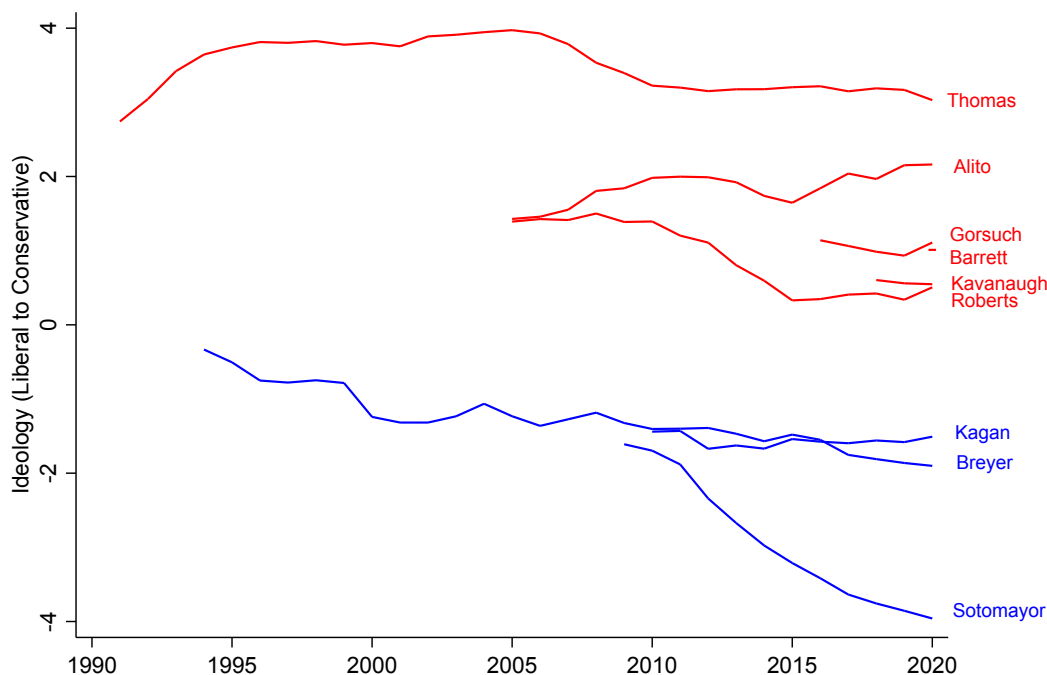


Figure 2: Ideology (Martin-Quinn Scores) Over Time, 1991-2020 Terms. We show only members of the 2020 term Court. Plotted data are the [Martin-Quinn scores](#). Republican appointees are in [red](#); Democratic appointees are in [blue](#).

As for the potential Biden nominees: Only Harris and Jackson now work Washington. Kruger served in a Democratic administration in Washington, which may mitigate the risk of drift²⁶—or at least reflect greater fidelity to progressive causes.²⁷ Alito provides an example. He was not living in Washington at the time of his nomination, but he came to the Court with substantial executive branch experience in D.C.: assistant to the Solicitor General and deputy assistant attorney general during the Reagan years. Unlike Kennedy or Souter, neither of whom ever worked in Washington, Alito shows no signs of drift against type. (Actually, he has moved significantly to the right over time, as Figure 2 suggests.)

Turning to the remaining four possible Biden nominees, they mostly spent their careers outside of Washington. That’s certainly true of Childs whose [bio](#) at the Federal Judicial Center lists

for the U.S. Supreme Court, 1953-1999,” 10 *Political Analysis* 134 (2002).

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

²⁷Dorf, note 26, 458.

professional positions only in South Carolina. Wright was in private practice in Washington from 1991-1995 but otherwise has worked in Minnesota. Gardner was mostly in the Washington-area from 2003-10 in private practice but since then has been in Georgia. Finally Jackson-Akiwumi spent her entire (post-clerk) career in Illinois except for the year preceding her appointment to the bench when she was in private practice in Washington.

Emerging from this analysis and the existing literature is a straightforward prediction: Were Biden to reach into the heartland or the South, and select a nominee with little or no connection to Washington, D.C., the odds of ideological divergence from his ideology increase.

5 Appendix. Other Approaches to Locating Judges in Ideological Policy Space

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

For three reasons, we respectfully disagree.

1. Meehl's meta-analysis of more than six decades ago demonstrated that expert judgment is almost always inferior to systematic scientific assessment; it may be even worse than novice evaluations.²⁸ Many follow-up studies have endorsed or confirmed Meehl's conclusions. For a review relevant to law, we recommend Caldeira's commentary on a competition between a statistical model and legal experts over predicting Supreme Court outcomes.²⁹ That the model generally outperformed the experts hardly surprised Caldeira. In light of the long line of literature demonstrating that "human judges are not merely worse than optimal regression equations; they are worse than almost any regression equation," Caldeira would have been astonished had the competition come out the other way.
2. As for a close reading of the judges' opinions: We know that federal judges who have a realistic prospect of promotion to the Supreme Court (now all the judges on Trump's short list) alter their judicial behavior in order to improve their chances—in other words, they "audition" for an appointment to the Court.³⁰ We also know that on the U.S. Courts of Appeals there is substantial "dissent aversion" (a reluctance by some judges to dissent publicly even when they disagree with their colleagues' decision), which means that the ideological composition of the judges' circuits (and so the panels on which they serve) will affect their votes.³¹ Taken together, these factors suggest that lower court records may be poor, even misleading, predictors of how judges will vote as justices (and Epstein, Landes, & Posner demonstrate as much³²).

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

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

³⁰Epstein, Landes, & Posner, *The Behavior of Federal Judges*, note 21, especially Chapter 8.

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

³²Epstein, Landes, & Posner, *The Behavior of Federal Judges*, 279-281.

3. See Table 2. Although we don't know, and can't know yet, whether the predictions will be as accurate for the Biden appointee as they are for recent justices, the strong fit between the lower court scores and Supreme Court voting is encouraging.