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 scores\(^2\)). 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.\(^4\)

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\(^1\)Lee 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.

\(^2\)At: http://mqscores.lsa.umich.edu.


\(^4\)Jonathan 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
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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.\(^6\)

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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.

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

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,

\(^7\)For 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.](image)

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,” 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.

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

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

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), 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.

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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* (2013)\(^{11}\) (Ginsburg dissented, though Sotomayor did not); and *Schuette 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 programs\(^{17}\)), employment discrimination suits (Black judges are more favorable to Black employees\(^{18}\)), and criminal cases (Black judges are more accepting of claims of police misconduct brought by Black defendants\(^{19}\)).\(^{20}\)

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).

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\(^{10}\)539 U.S. 244.

\(^{11}\)570 U.S. 297.

\(^{12}\)572 U.S. 291.

\(^{13}\)138 S. Ct. 1719.


\(^{15}\)Boyd, 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).


\(^{19}\)Nancy Scherer, “Blacks on the Bench,” 119 *Political Research Quarterly* 655 (2004).

\(^{20}\)For 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 has 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 scores25 (developed from the justices’ voting

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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.)

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 drift— or at least reflect greater fidelity to progressive causes. 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

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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. 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. 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. 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. Taken together, these factors suggest that lower court records may be poor, even misleading, predictors of how judges will vote as justices (and Epstein, Landes, & Posner demonstrate as much).

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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.