The Supreme Court: How Did We Get Here? And, What Comes Next?[*]

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Abstract: How have the politics of appointments transformed the United States Supreme Court? In this paper, we examine the past and future of the Supreme Court and the current conservative supermajority on the Court, with a particular focus on how this Court stands out from earlier courts. In particular, we trace the factors that allowed President Trump to reshape the Court with his three appointments in his first term. We also evaluate the importance of the conservative supermajority by connecting it to two important theories of collective decision making on the Court. We then show that the current court is a culmination of a "partisan sort" on the Court—a strict correlation between party and ideology—that began a few decades ago but did not crystalize until the 2020s. Finally, we summarize simulations showing that conservatives are likely to control the Court for several decades.

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Our task is to discuss how appointment politics created today's Supreme Court. Our approach slights simple chronology, as essential as that is. Instead, we focus on what we see as underlying causes: how the Founder's design interacted with an important and likely lasting change in presidential priorities, plus some brute luck in the form of the "Trump Shock"—the confluence of events in 2016 that paved the way for Donald Trump to reshape the Court—and to possibly shape it even further in his second term. Finally, we consider the likely future of the Court's make-up and the persistent legacy of the 2016 Trump Shock.

However, before we can address, "How we got here" and "What Comes Next?" , we need to be clear about "Where is here?"

Where is Here? The Court We Have Today

As a small provocation, consider the Canadian artist Anita Kunz's striking cover for *The New Yorker* in Figure 1. The cover displays a Supreme Court with six Trump clones, who contrast starkly with three justices who retain their individual faces—though they discretely wear blue neckwear. The cover, which was published in July 2024 soon after the Court granted the president a significant deal of immunity from criminal prosecution,[1] is a caricature of the current 6-3 conservative super-majority on the Court. Like any caricature, in some ways the image seriously distorts the current court: Donald Trump appointed only three of the six Republican

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[1] *Trump v. United States* No. 23–939.

Figure 1. One view of the contemporary Supreme Court. Is today's court truly six Trump clones and three unique individuals? Artwork by Anita Kunz for _The New Yorker_ July 22, 2024. (© Anita Kunz, all rights reserved.)

justices, including one woman. Moreover, big changes in the Court predated Trump's arrival on the political scene. So the figure attributes entirely too much influence to the 45th president. But the cover nevertheless illuminates one essential truth about the contemporary Court: _the ideological structure of today's Supreme Court is truly remarkable and a dramatic departure from what we have experienced for at least the last 75 years, and the Court is indeed split along party lines like it never has been before._

Ideological Structure

What do we mean by "ideological structure," and why should anyone care about it? By ideological structure, we mean the *ideological center of gravity on the Court*, which strongly affects the general tendency of the Court to favor one party over the other in cases where the parties have distinct ideological or partisan identities, and strongly affects the ideological tenor or content of majority opinions. In other words, ideological structure affects *who wins* (on average) and *the content of court-made law* (also on average).

In our book *Making the Supreme Court* (Cameron and Kastellec 2023)*,* we employ two measures of the Court's ideological structure, one standard and one unusual. Both are based on explicit—but quite different—theories about how the Court works. The first theory analogizes the Court to a legislature, or a committee, or an electorate called upon to choose between two distinct alternatives, here, which of the two litigants should prevail in their dispute (see e.g. Hammond, Bonneau and Sheehan 2005 and Epstein and Jacobi 2008). Based on this analogy, an attractive measure of ideological structure is the *ideological position of the median justice*. That is, if one arrays the justices on a left-right scale, from most liberal on the left to most conservative on the right, the median justice is Justice number 5, counting in from either pole. As the ideological location of the median shifts to the left, one might expect the Court more frequently to favor liberal-identifying litigants, and conversely with a rightward shift of the median justice. Such a shift should favor conservative-identifying litigants.[2]

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[2] That is, controlling for the ideological location of litigants and case facts. This is important because the shift in the location of the median justice may lead to different types of litigants and
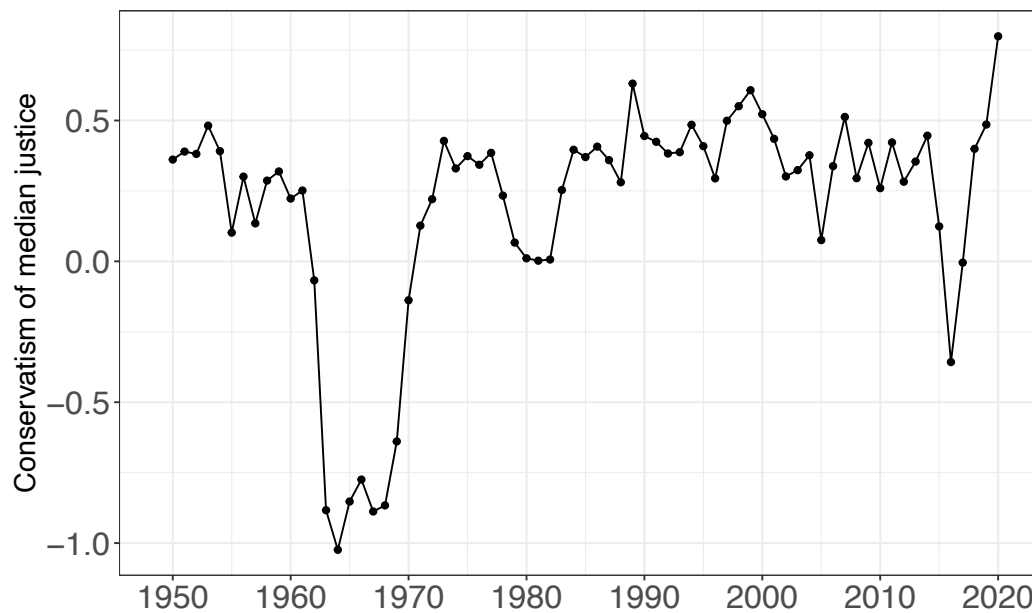
Figure 2 displays the estimated conservatism of the median justice from 1950 to 2020. Here, we rely on scores developed by political scientist Michael Bailey (2007), because Bailey's methodology tries to stabilize the ideology scale over time by tying it to congressional voting. While the scale itself is arbitrary, for our purposes all you need to know is that higher values correspond to greater conservatism. As shown, the ideology of the median justice in the early 1950s was relatively conservative. In the mid-1950s the median became more moderate, reflecting the often ideologically scrambled appointments of the Eisenhower years (e.g. Chief Justice Warren and Justice Brennan). The ideology of the Court's median justice then took a dramatic liberal turn in 1962, with President Kennedy's appointment of Justice Goldberg, which established the famous late Warren Court, the high-water mark of liberalism in the Court's history (Powe 2000). But this period was short-lived. The median's return to conservatism in the late 1960s and early 1970s was just as dramatic. This rightward movement reflected the early Nixon appointees, particularly the appointments of Chief Justice Warren Burger and Justice Harry Blackmun. A liberal movement occurred in the late 1970's, but a return to solid conservatism soon followed.

Figure 2 suggests relative stability over the next three decades, with one notable exception. As we discuss in more detail below, the Court of the 2010s was highly polarized. The death of Justice Scalia in 2016 created an eight-member Court, which temporarily moved the location of the median justice decidedly to the left.[3] If Merrick Garland had been confirmed, the location of

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cases, due to both the selection of appeals from lower court decisions and the justices' discretion over which cases they hear.

[3] Technically, the estimated median justice was an average of the most conservative liberal justice (Breyer) and most liberal conservative justice (Kennedy).

Figure 2. The estimated conservatism of the median justice, 1950-2020. The dramatic liberal swing of the late Warren Court is evident. The dip in 2016 occurred because Justice Scalia's death and the subsequent Senate blockade of Merrick Garland created an extended eight-member court, temporarily shifting the median in the liberal direction. The impact of the Trump appointees (from his first term) that followed is quite apparent. At present, the median justice is more conservative than at any time since 1950.

the 2016 median would have moved even more dramatically leftward. But the successful blockade of Garland and subsequent confirmation of Neil Gorsuch returned the median to a solidly conservative position, a dramatic movement. The final observation in the time series reflects the replacement of Justice Ruth Bader Ginsburg by Justice Amy Barrett, establishing Justice Brett Kavanaugh as the median. The ideology of the median justice of the current court is the most conservative in the entire time series. Today's Court is probably the most conservative since the 1930s.

The next measure we use seeks to summarize the ideological structure of the Court by placing each justice into one of three "blocs": liberal, moderate, and conservative. The basic idea

underlying this approach, which is drawn from a formal theory of bargaining on the Court (Parameswaran, Cameron and Kornhauser 2021), is that a majority opinion author needs to craft an opinion that will garner at least four joins beyond the author's own. Members of large ("dominant") blocs—those with five or more members—may be able to do this simply by offering their most preferred position, or something close to it. But often, opinion authors must seek out joins from their colleagues by modifying the opinion's content. This bargaining process is dramatically captured in wonderful scholarship using the private papers of the justices (Epstein and Knight 1998, Maltzman, Spriggs and Walhbeck 2000).

Let's try to make the basic intuition a little more concrete. Members of large ideological blocs often receive opinion assignments in important cases that split the Court along ideological lines, because frequently they will be in the majority dispositional coalition in such cases (of course, dissenters can't write majority opinions). Opinion assignees within large blocs, surrounded by a bevy of like-minded justices, won't have to compromise much to get the joins they need. For example, assignment to a member of the dominant liberal bloc of the late Warren Court—say, to Brennan or Marshall—would likely produce a quite liberal majority opinion. Conversely, members of small blocs like the conservative bloc on the late Warren Court are more likely to receive fewer assignments in weightier cases that split the Court; e.g. they will receive more assignments in cases with unanimous dispositions. When justices in small blocs do receive opinion assignments in more important cases, they may have a tough time assembling a join coalition with five or more members supporting their opinion. To do so, they may have to compromise on opinion content, by reaching out to more moderate justices. Or consider courts without a dominant bloc at all. In fact, some courts had nearly equally sized liberal, moderate, and conservative blocs. In such a court, regardless of which bloc receives the opinion assignment, one would expect assignees to

compromise somewhat to pick up the requisite joins from members of an adjacent bloc. So, a Court with that bloc structure will likely produce many relatively moderate majority opinions.

To convert these ideas into actual measurements, we again use the Bailey estimates of justice ideology. We use the full distribution of measures for every justice from 1950 to 2020; in other words, "justice-years" are the unit of analysis. Then we divide this distribution into thirds. Justices who in a given year fall into the bottom third are coded as the liberal bloc, justices in the middle third are coded as the moderate bloc, and justices in the top third are coded as the conservative bloc.[4]

Figure 3 displays the liberal, moderate, and conservative blocs on the Court by decade since the 1950s. For each decade, the height of the bars indicates the proportion of justice-years in each of the liberal, moderate, and conservative blocs. The *x*-axis indicates the mean ideology of the justices in a given bloc. For instance, in the 1950s about 30% of justice-years fell into the liberal bloc. Of those justices, the mean of their Bailey scores was about -1.5, which is very liberal.

Several patterns stand out. First, periods with a dominant bloc—that is, a bloc with five or more members, on average—were rare. Famously, the 1960s saw a dominant liberal bloc. But the Courts of the 1950s contained a dominant moderate bloc. Second, the Courts of the 1970s and 1980s displayed three relatively equally sized blocs. Third, courts of the 1990s displayed large moderate and conservative blocs, with a diminished liberal bloc. Fourth, the 2000s and 2010s saw

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[4] Because a justice's Bailey score can change from year to year, a justice may move from one bloc to another in different years if their score happens to cross one of the thresholds.

the emergence of a new pattern, a bimodal wing structure, with large (but not dominant) liberal

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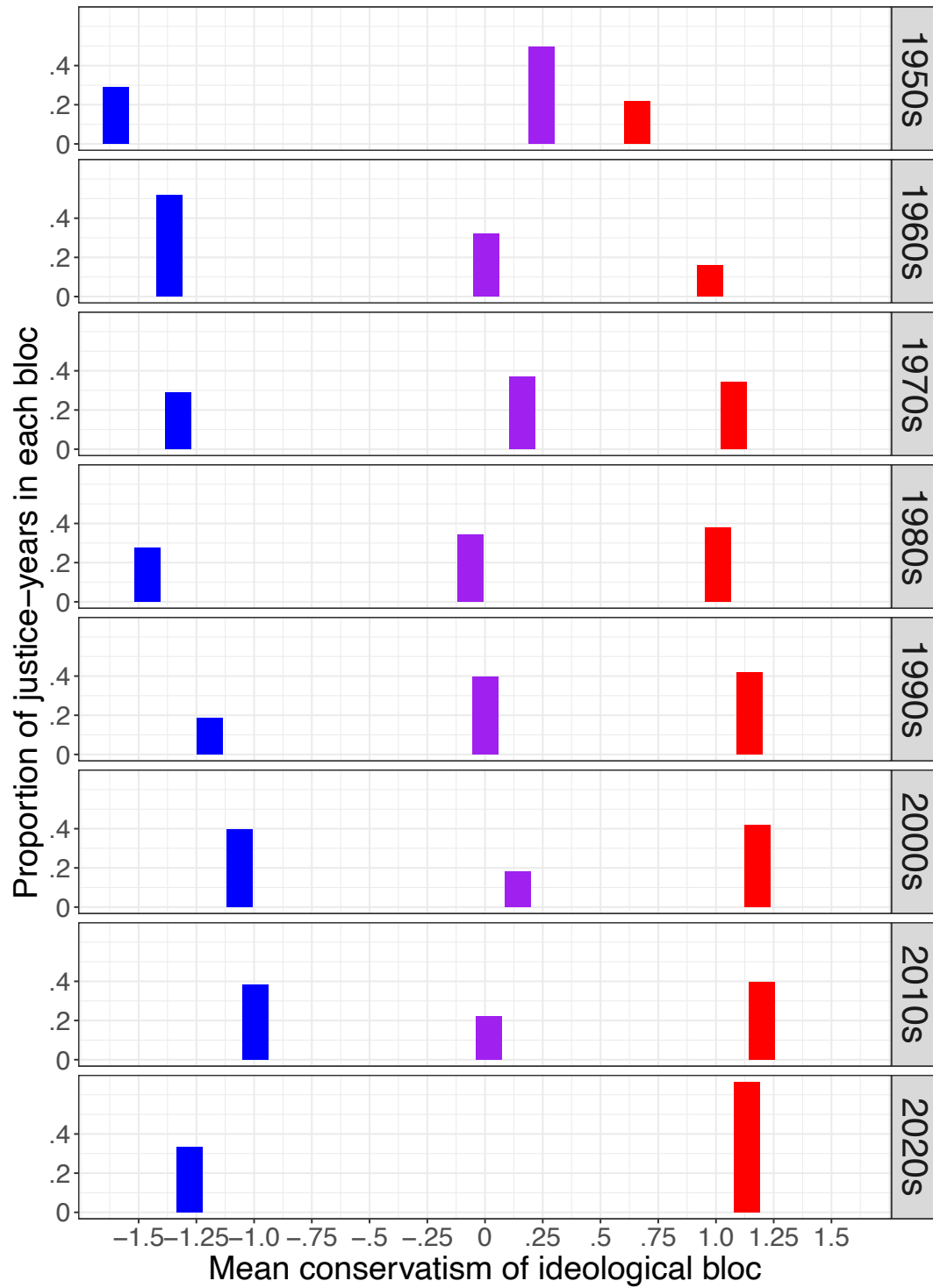
Figure 3. Liberal, Moderate, and Conservative Blocs on the Court, By Decade, 1950s-2020s. In each panel, the height of a bar depicts the percentage of justice-years in that bloc during a decade. The x-axis depicts the mean ideology of the justices in each bloc. The liberal bloc is blue, the moderate block purple, and conservative bloc, red. The underlying scores are justice-level Bailey scores.

conservative blocs and a diminished moderate bloc.

Another interesting feature is the ideological locations of the conservative and liberal blocs. The conservative bloc moved to a more conservative location in the 1960s, then slowly become even more conservative. The liberal bloc became less liberal beginning in the 1990s, reflecting the replacement of justices like Douglas, Marshall, and Brennan with moderate liberals like Breyer and Ginsburg.

Finally, we come to the ideological structure of the contemporary court, as shown in the bottom panel of Figure 3. In some sense, this picture should come as no surprise to today's court watchers. But the numbers may still be somewhat eye opening. The contemporary court is characterized by a dominant conservative wing, plus a small (almost rump) liberal bloc; the moderate bloc is completely empty. The latter feature is unprecedented in seven decades. Some observers have called the contemporary court "a conservative Warren court," but the conservative wing on today's court is even larger and more dominant than the liberal wing of the late Warrant Court. Moreover, in the late Warren courts a sizeable moderate bloc abutted the dominant liberal wing. Majority opinion assignees in the moderate bloc could reach out to either wing (depending on the majority disposition coalition), producing moderately liberal opinions or moderately conservative ones. But in the contemporary court, no opinions can be assigned to moderates who don't exist. Moreover, members of the liberal minority may have to make considerable compromises to achieve five or more joins. From the perspective of the coalition understanding of

the Court, its current highly unusual structure is geared to produce a great deal of substantively very conservative law.

How—and Especially *Why*—Did We Get Here?

This is the Court we have today. Where did it come from? In our account, the contemporary court resulted from the confluence of three factors:

1. Tendencies inherent in the Founders' design of the appointment process. These tendencies woke only fitfully until the 1970s when …

2. Presidents (especially Republicans) developed an intense and abiding interest in the ideological makeup of the Supreme Court. In our view, this interest mostly reflected larger changes in American society and politics.[5] But regardless, presidents (again, especially Republican presidents) re-tooled the appointment process to get what they wanted, with considerable success, leading up to …

3. The extraordinary Trump Shock of 2016. We argue that Trump's judicial impact arose partly from blind chance, but not wholly: some of the impact reflected painstaking preparation and the ruthless exploitation of opportunity. Boss Plunkett (of Tammany Hall ignobility) once explained his wealth thusly, "I seen my opportunities and took 'em" (Riordan 1905). So did Mitch McConnell, the Federalist Society, and operatives in the White House.[6]

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[5] We discuss these changes in Chapter 1 of *Making the Supreme Court*.

[6] As Amanda Hollis-Brusky documents in her essay for this volume, "Trumpism" and the conservative legal movement fused during his (first?) administration; as she notes, (ADD PAGE #), "public co-branding between [the Heritage Foundation], the Federalist Society and Trump

We discuss each of these factors in turn.

The Founders' Peculiar System

From the perspective of comparative institutional design, judicial appointment systems combine two distinct elements: a *selection system* (how judges are initially picked), and a *retention system* (how they keep their job). As is well documented, the system of federalism in the United States has given rise to two very distinct selection and retention regimes. On one side, more than 80% of state judges are selected and/or retained through some form of *election*—judicial elections are very uncommon in other comparable countries. On the other side, essentially no other country endows their supreme judges with unqualified life tenure, as is the case with Article III judges (short of impeachment, which is quite rare). Even among the handful of states that use appointment regimes, only one (Rhode Island) mimics what we might call the "Federalist" system of executive appointment with effective life tenure (other states have either term limits or mandatory retirement ages). [7]

What are the consequences of combining extreme executive power in selection with minimal retention requirements? Intuitively, in such a system, control of judges' behavior on the bench turns almost entirely on effective initial selection by the executive. In other words, if you want (say) a reliably liberal justice, the chief executive better find someone who is genuinely

shattered any and all perceived independence these conservative legal organizations maintained from partisan GOP politics," creating a mechanism where conservative-minded legal interest groups played a direct role in the types of judges selected to the federal bench.

[7] See Gibson and Nelson 2021, ch. 5 for a nice review of the state judicial selection and retention institutions.

liberal and apt to remain so for years or even decades into the future. Given the primacy of selection, the pressure on the executive to make an effective selection can be enormous, and at times it has been. On the other hand, left to his or her own devices, a president may care little about the actual performance of the justices, especially over time. If so, more relevant in selection may be patronage, political debts, symbolic gestures, factional rivalries or personal friendship. When presidents act from these motives, their appointees may be quite erratic ideologically.[8]

Presidential Interest in the Supreme Court

If this argument is correct, then one should see distinct patterns in Supreme Court appointments as presidential interest in the Court waxed and waned. Unfortunately, we can't just ask presidents how motivated they were to pick ideological champions for the Court—we have no time machine; even if we did, there's no reason to believe they would tell us the truth. But we can muster a variety of indirect indicators based on changes in presidential selection over time. Exhibit One is the Judicial Partisan Sort.

The Judicial Partisan Sort

Let's conduct a mental experiment. Imagine a world in which presidents of neither party care much about the subsequent behavior of the justices they pick. For them, appointing a justice is similar to appointing an ambassador to some minor principality. In such a world, one might not expect to see much correlation between the party of the appointing president and the subsequent voting behavior of the justices. Now, however, suppose presidents of both parties start to care— perhaps intensely—about the ideological behavior of the justices they appoint. Suppose they start

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[8] We formalize and empirically test this argument in Cameron, Kastellec and Mattioli (2021) and Chapter 9 of *Making the Supreme Court.*

to work hard on vetting and selecting ideological stalwarts. After a while, what would one expect to see in the voting behavior of the justices? Welcome to the world of the judicial partisan sort.

Figure 4 examines the degree of partisan sorting on the Court by decades from the 1930s through the 2020s.[9] Here we use ideal point estimates developed by Martin and Quinn (2002), which have the virtue of extending back farther in time than the Bailey scores. All one needs to understand about the measures is that, as with Figure 3, negative scores indicate more liberal voting patterns and positive scores indicates more conservative voting patterns. In each panel in the figure, the justices who served in that decade are arranged from most liberal to most conservative, based on their average Martin-Quinn scores in a given decade. The solid (blue) bars indicate Democratic-appointed justices, while the grey bars with diagonal (red) lines indicate Republican-appointed justices. If partisanship and ideology go together, the bars will separate cleanly, with the Democratic justices on the left and the Republican justices on the right.

If we consider Figure 4 closely, the emergence of the partisan sort over time is quite clear. Consider the 1930s, during which President Roosevelt and conservative justices on the Court battled over the constitutionality of the New Deal. Figure 4 suggests that the justices in this decade were relatively well sorted. Three justices stand out as non-sorted: the liberal Cardozo and moderately liberal Stone, both of whom had been appointed by Republican presidents (Hoover and Coolidge, respectively), and the arch-conservative Southern Democrat James McReynolds, who was appointed by Woodrow Wilson, a Democrat.

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[9] For other analyses of the partisan sort, see Epstein and Posner (2018) and Devins and Baum (2019).
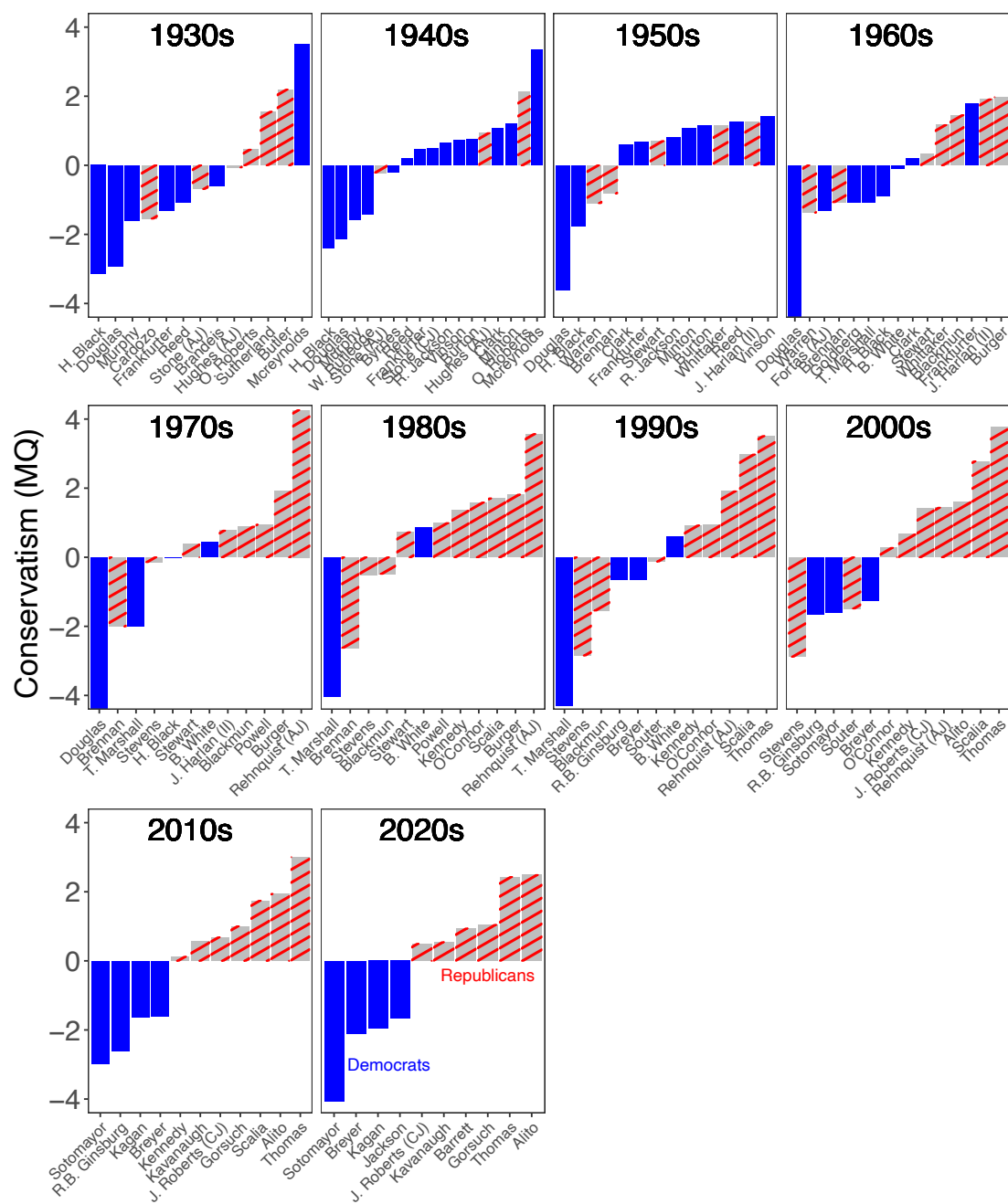
Figure 4. Voting Scores by Justice, by Decade, 1930-2020. For each panel, the bar depicts the average voting score (based on Martin-Quinn scores) of a justice who served in that decade (higher is more conservative) The justices are sorted left to right from most liberal to most conservative, with Democratic-appointed justices depicted with solid (blue) bars and Republican appointee with grey bars with diagonal (red) lines.

But the 1940s and 1950s were different. Once the Supreme Court accepted the New Deal, Presidents Roosevelt and Truman felt free to treat appointments as opportunities for patronage, cronyism, political reward, and tactical advantage. President Eisenhower followed that path with his appointments of Warren and Brennan. These appointments led to a series of poorly sorted courts, as shown in the figure. In the 1940s, a large bloc of moderately conservative Democrats stands out. In the 1950s, this mis-sorted bloc remained intact, and was then joined by the mis-sorted Republican appointees Warren and Brennan. In those decades, ideology and party simply did not go hand-in-hand.

Qualitative historical materials show presidents increasingly took selection more seriously, prioritizing ideological screening over cronyism or tactical political benefits unrelated to the Court itself.[10] The result, as seen in the Figure 4 panels for the 1960s to 1990s, was something of a return to the 1930s in terms of the partisan sort. The cast of mis-sorted justices is no surprise: Warren, Brennan, Blackmun, Stevens and Souter. Indeed, the percentage of mis-sorted justices fell every decade after the 1980s. The drop in the 2000s is notable; that decade reveals a well-sorted court, with only two anomalies: Stevens and Souter. The decades-long effort by presidents to build efficient screening procedures and carefully select candidates finally produced a perfectly sorted court in the 2010s. As shown in the figure, in that decade, Republican justices were all conservatives, and Democratic justices were all liberals. President Trump's three appointments between 2017 and 2020 (Gorsuch, Kavanaugh, and Barrett) and President Biden's one appointment (Jackson) all solidified a perfectly sorted court.

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[10] We review this material at length in *Making the Supreme Court*, Ch. 3.

The judicial partisan sort can be seen as prima facie evidence of increased presidential attention to nominee selection, and success in doing so. But it is not knock-down proof, because the evident pattern could arise from causes other than meticulous selection. For example, the pool of potential nominees may have sorted themselves and polarized by party in just such a way that random selection of co-partisans by presidents would result in the patterns of the partisan sort (although this seems rather improbable). Still, if the driver of the judicial partisan sort was mostly presidential interest in the Court, we should see additional traces, beginning in the 1970s. Here are two more such traces.

Litmus Tests

Quite curiously, given the importance of the Supreme Court, prior to the 1960s, the Republican and Democratic party platforms almost never mentioned specific Supreme Court cases, nor did they specify "litmus tests"—that is, demands for policy conformity by nominees to specific policy positions. They also did not specify other requirements, such as nominee gender or race.[11] Beginning in the mid-1960s, the platforms increasingly mentioned specific Supreme Court cases (often criticizing them) and issued demands for acceptable nominees. Such demands were particularly notable in Republican Party platforms. Indeed, explicit policy litmus tests proliferated in Republican platforms, coming to include demands for policy conformity about law and order, abortion, general conservatism, same-sex marriage, gun rights, and opposition to the Affordable

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[11] We review this material at length in Chapter 2 of *Making the Supreme Court*; see also Charles Cameron and Jonathan Kastellec. 2018. "The Litmus Test for a Supreme Court Nominee." *Vox.* www.vox.com/mischiefs-of-faction/2018/7/5/17532488/litmus-test-supreme-court-nominee (accessed 14 Oct. 2024)

Care Act. Litmus tests came later to Democratic party platforms, beginning in the 1980s. Though rarer than the Republican demands, Democratic platforms included specific policy positions on abortion and campaign finance, as well as general liberalism. In addition, while Democratic platforms often made demands about diversity among judicial nominees (in particular, with respect to race and gender), such demands rarely appeared in Republican platforms.

One can understand the party statements in different ways, for example, as meaningless campaign guff. But one can also see them as indications of demands by powerful factions within each party, in line with recent theory that views modern parties as coalitions of high demanding interest groups (Bawn et al. 2012). On this understanding, power groups in the Republican Party demanded the selection of justices with specific and unwavering commitments to particular policy positions. Power factions in the Democratic Party also wanted a few policy commitments (notably on abortion) but mostly wanted to see a more diverse Supreme Court.

Of course, just because powerful party factions make demands on presidents about nominees does not mean that presidents will heed them, or that will be able to deliver the goods even if they try. As one more indication of their efforts, let's glance at the changing nature of who presidents picked.
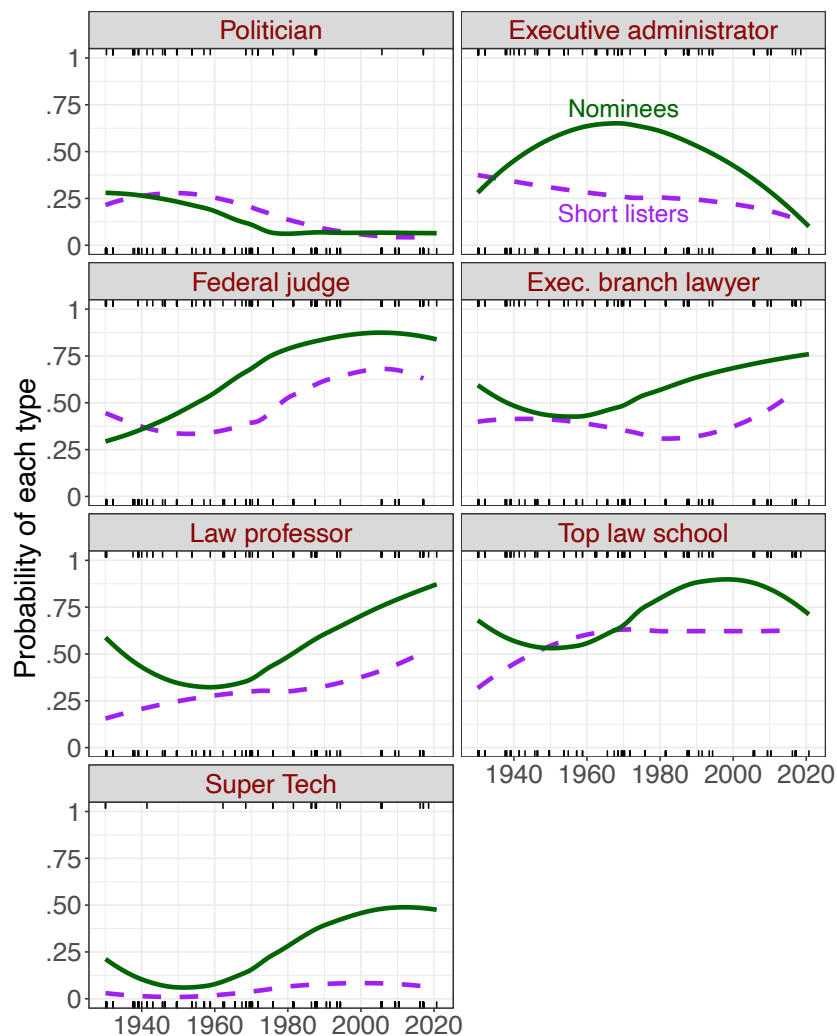
The Changing Characteristics of Nominees and "Short-listers"

Political scientist Kevin McMahon (2024, 98), in a notable contribution to the scholarship on Supreme Court appointments, offers a tongue-in-cheek "help wanted" ad for contemporary presidents seeking someone to appoint to the Court:

> The president of the United States seeks applicants for the position of Supreme Court justice. Interested candidates must have graduated from an elite private undergrad institution (preferably an Ivy League University), earned a JD from an elite private law school (preferably Harvard or Yale), and be around fifty years old.

Ideal candidates will be a judge on the Courts of Appeals, will have never sought elective office, and will have clerked for a Supreme Court justice. Professional experience in Washington, DC, is a significant plus. Ideological computability with the president is a must. All others need not apply.

Systematic data on the characteristics not only of the selected nominees but also the people on presidents' "short lists" (Nemacheck 2007)—those actively considered for selection—shows that

Figure 5. The changing characteristics of Supreme Court nominees and short list candidates over time. The ``rugs'' in each panel show instances where a candidate fell into a given category (top) or did not (bottom). The solid (green) lines depict a loess line for nominees only, while the purple (dashed) lines depict a loess line for short listers only. The y-axis depicts the probability of that type of candidate at a given point in time

McMahon's witty help-wanted ad is spot on for contemporary presidents. But it was not always so; in earlier eras, the "job applicants" looked quite different.

Figure 5 displays data on the backgrounds of the people presidents considered as well as the individuals they selected as nominees, from 1930 to 2020. For each category, the "rugs" in the top and bottom of each panel show instances where a candidate either fell into a given category (top) or did not (bottom). The green (solid) lines depict a loess line for nominees only, while the purple (dashed) lines depict a loess line for short listers only; these lines can be thought of as moving averages. The x-axis represents time, while the y-axis depicts the probability that type of individual appeared at a given point in time. "Politician" means someone who was at some point an elected official, e.g., Hugo Black and James Byrnes. "Executive administrator" means someone who worked as an administrator (not a lawyer) at an executive branch agency either at the state or federal level. For example, Fred Vinson had been Secretary of the Treasury. In contrast, "executive branch lawyer" means someone who worked specifically as a lawyer in the executive branch, for example, in the Office of Legal Counsel (OLC) in the Department of Justice. Federal judge is self-explanatory, as is law professors. "Top law school" refers to a top-14 law school.

Early on, presidents considered and nominated elected politicians, but this came to an end. The same can be said for high level administrators. Replacing them have been nominees who can be described as highly skilled legal technicians. Indeed, over time, the new kind of nominee displayed the signature of what can be called a legal "Super-Tech": the superfecta of federal judge, executive branch legal policymaker, law professor, and top law school graduate. Figure 5 shows a striking rise in such Super-Tech nominees in recent decades; conversely, there has been no corresponding increase in Super-Techs among short listers. This divergence shows that presidents did not draw randomly from the short lists, but rather winnowed them in search of nominees with

a distinct profile—a profile that reveals the policy commitments of the nominee in the past, present, and likely future.

2016 and the Trump Shock

We could offer many other indicators of transformed presidential interest in the Supreme Court, and success in selecting people likely to be consistent ideologues. But let's turn to the "perfect storm" of 2016, when the tendencies built into the Federalist system came together with greater presidential interest and selection skill in dramatic fashion.

The tale of how Donald Trump came to have the opportunity to reshape the Court is well told, and hence we offer only a brief summary here. In February 2016, Justice Scalia (aged 79) suddenly died while on a hunting trip. This gave President Obama an unexpected opportunity to make his third appointment to the Court. But whereas his first two selections—Sonia Sotomayor in 2009 and Elena Kagan 2010—did not change the ideological balance on the Court, as both replaced justices in the liberal bloc (Souter and Stevens), this vacancy presented Obama with the chance to create the first liberal majority on the Court since 1968. Yet there was a key difference between 2009/10 and 2016; during the former, Democrats had a sizable majority in the Senate, creating smooth confirmations for Sotomayor and Kagan even though each was supported by fewer than 10 Republicans. But in the 2014 elections, Republicans re-gained control of the Senate, placing them in the majority in 2016. And, within mere hours of Scalia's death, the new Senate Majority Leader, Mitch McConnell of Kentucky, issued a statement: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president" (Everett and Thrush 2016).

The following month, Obama selected Merrick Garland to replace Scalia. Garland was a widely respected judge on the U.S. Court of Appeals for the D.C. Circuit, and was largely seen as

the most moderate choice Obama could make among the pool of reasonable Democratic appointees. Nevertheless, McConnell kept to this word, and, under his leadership, the Senate took no action on Garland's nomination—the Judiciary Committee held no hearings, and no floor vote was ever scheduled. This total blockade meant that the identity of the justice to replace Scalia would depend on the outcome of the 2016 presidential election.

In November 2016, Donald Trump shocked the world and defeated Hillary Clinton. In the 2016 campaign, the successful deep-sixing of Garland had given Trump the rare opportunity to enter office with a Supreme Court vacancy in hand. During the campaign, Trump had used the vacancy as a campaign issue, pledging to appoint conservative justices in Scalia's mold if elected. To that end, Trump had taken the unprecedented step of publicizing during the campaign a list of potential nominees from whom he would choose (Rappeport and Savage 2016). On January 31, 2017, Trump kept his promise. From his public list, he picked Neil Gorsuch, a judge on the 10th Circuit Court of Appeals, to replace Scalia. Republicans still controlled the Senate, but McConnell's blockade of Garland had enraged liberal activists and groups. In response, many Democratic senators pledged to do everything they could to block Gorsuch's path. In the face of a Democratic filibuster, McConnell and his fellow Republicans exercised the "nuclear option" as applied to Supreme Court nominees in April 2017, lowering the cloture threshold to 50 votes and thus removing the filibuster as a tool for the minority party to block a nominee. Following the retirement of Anthony Kennedy in 2018 and the death of Ruth Bader Ginsburg in 2020, Trump was able to send Brett Kavanaugh and Amy Coney Barrett, respectively, to the high court. Both were confirmed on very narrow party-line votes---thereby creating the 6-3 conservative supermajority that exists today.

What Comes Next? The Legacy of the 2016 Trump Shock

An obvious question is, why did modern presidents (especially Republicans) become so fixated on the composition of the Supreme Court? [12] This is a fascinating question but it takes one somewhat afield, for instance, into the increasing power of federal courts, the emergence of the conservative legal movement, the changing nature of political parties, and revised methods of presidential selection (see e.g. Teles 2008 and Hollis-Brusky 2015). Instead, for this essay, we turn to a different but equally compelling question: what comes next?

Suppose the Federalist system remains unchanged—no term limits, no mandatory retirement age, no retention elections, or what have you. Suppose presidential interest in the Court remains keen. Suppose further that the normal patterns in American politics, such as the rhythms in party control of the White House and Senate, follow historic patterns. What are the implications for the future ideological structure of the Supreme Court, especially in the wake of the 2016 Trump Shock and Trump's re-election in 2024?

In Chapter 13 of *Making the Supreme Court,* we present a simulation analysis in which we predict the future ideological trajectory of the Court for the rest of the 21st century. We point readers interested in the statistical details of the simulations to that chapter, but here is a brief summary of our method. We started with the current justices and projected the Court forward through the year 2100. For every year, we calculated the probability a justice will leave the Court

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[12] This section is drawn in part from our December 14, 2021 post in the "Monkey Cage" post (which was published by the *Washington Post* at that time):

https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/

(accessed 8 Oct. 2024).

through death or retirement, based on age. We assumed that justices, especially older ones, would be more likely to time their retirement strategically, when the president is of the same party. Using actual past election results as a guide, for each year, we calculated the probability that the president would be a Democrat or a Republican. In line with the evidence of the judicial partisan sort presented above, we assume that each new justice would be a reliable ideologue, meaning that Republican-appointed justices would vote conservatively and vice versa.

The result of this exercise is a series of "historical courts"—that is a Court of nine justices of varying ideologies, based on the partisan composition of the Court at any given time. To get at the inherent uncertainty in modeling the future this way, we run this simulation 1,000 times, giving us 1,000 "courts" in every year, allowing for some variation in new justices' ideal points across the simulations, both because the party making the appointment will vary and because there is internal ideological variation among Democratic-appointed judges as well as among Republican appointed judges (though, on average, Democratic justices will always be more liberal than Republican justices). For each simulation, we calculate the location of the median justice.

We first conducted this simulation in 2021. Based on the historical record of presidential elections between 1948 and 2020, Democrats were predicted to retain the White House in 2024 about 70% of the time. Of course, voters returned Donald Trump to the White House, preventing Democratic presidents from any further appointments until at least 2029. In the wake of the election, we updated the simulations to account for Trump's victory, treating the 2024-2025 Court as the starting point for the simulations.

Figure 6 summarizes the results of this exercise, depicting histograms of the distributions of the projected ideology of the median justice for the rest of the century.. To make the results easier to digest, we aggregate the results by decade. For each decade, the horizontal axis captures

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the conservatism of the median justice, moving from more liberal to more conservative. Two patterns are worth noting. First, while there is effectively zero chance of a liberal median justice in this decade, in every decade after that the distribution of projected median justices is noticeably *bimodal*, with peaks in the range of [-.5,-.25] on the liberal side and [.25,.5] on the conservative side. The bimodality reflects the assumed determination of Republican presidents to nominate conservative justices and similar determination of Democratic presidents to nominate liberal ones. Second, the distributions are conservative *skewed*. Just because the distributions are bimodal—so sometimes the median justice is projected to be a conservative and sometimes a liberal—does not mean those two contingencies are equally probable. As shown by the bulkiness of the histograms in a given panel, the likelihood that the median justice will be a conservative is far greater than the likelihood the median will be a liberal, especially in the 2030s, and 2040s. The location of the median justice shows a conservative-skew as far out as the *2080s*. Largely this reflects the legacy of the Trump Shock—the emergence of a 6-3 conservative court, combined with the future likelihood of strategic retirements and justices serving very long tenures, essentially "locked in" a persistently conservative court (at least, probabilistically).
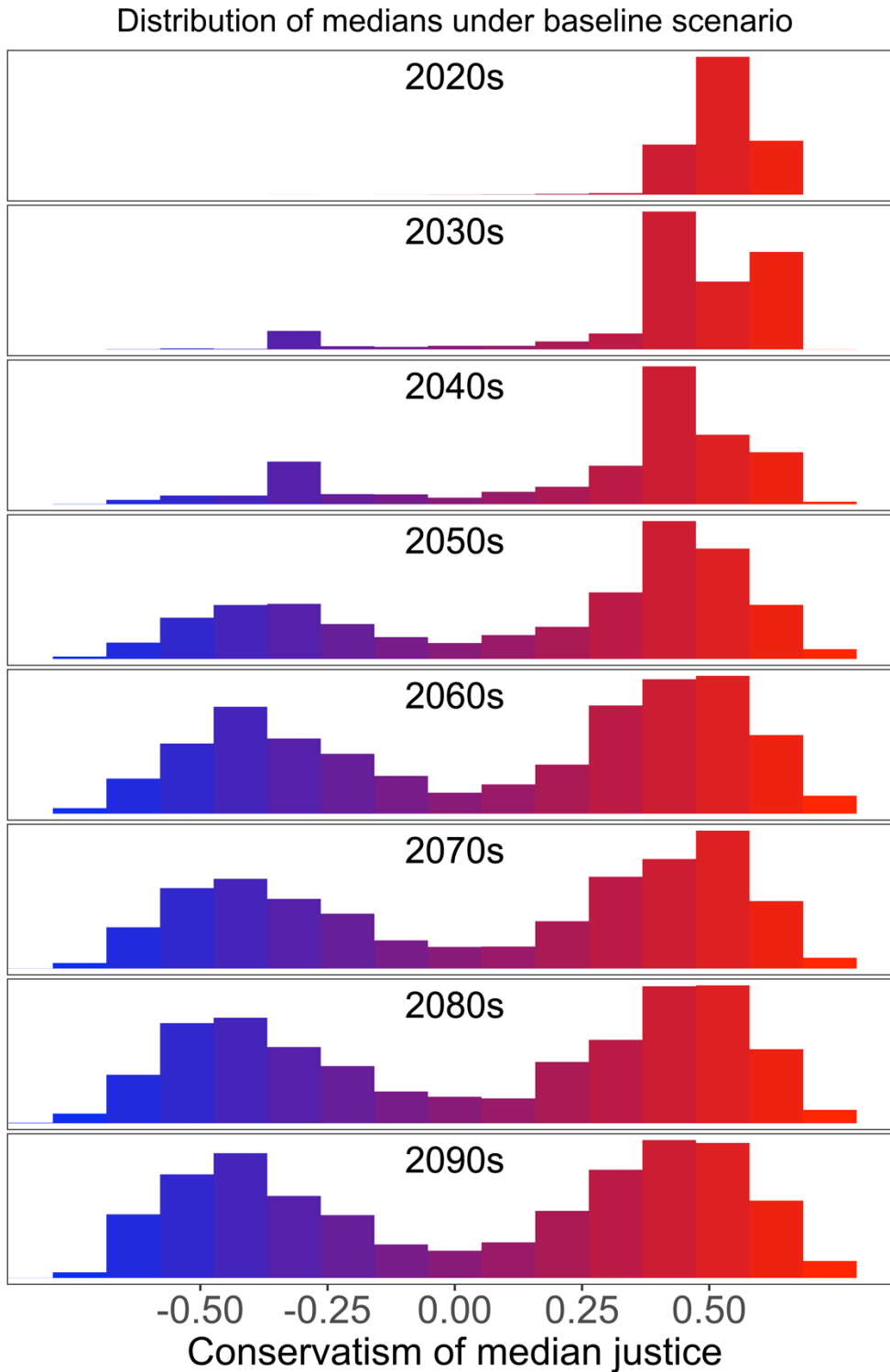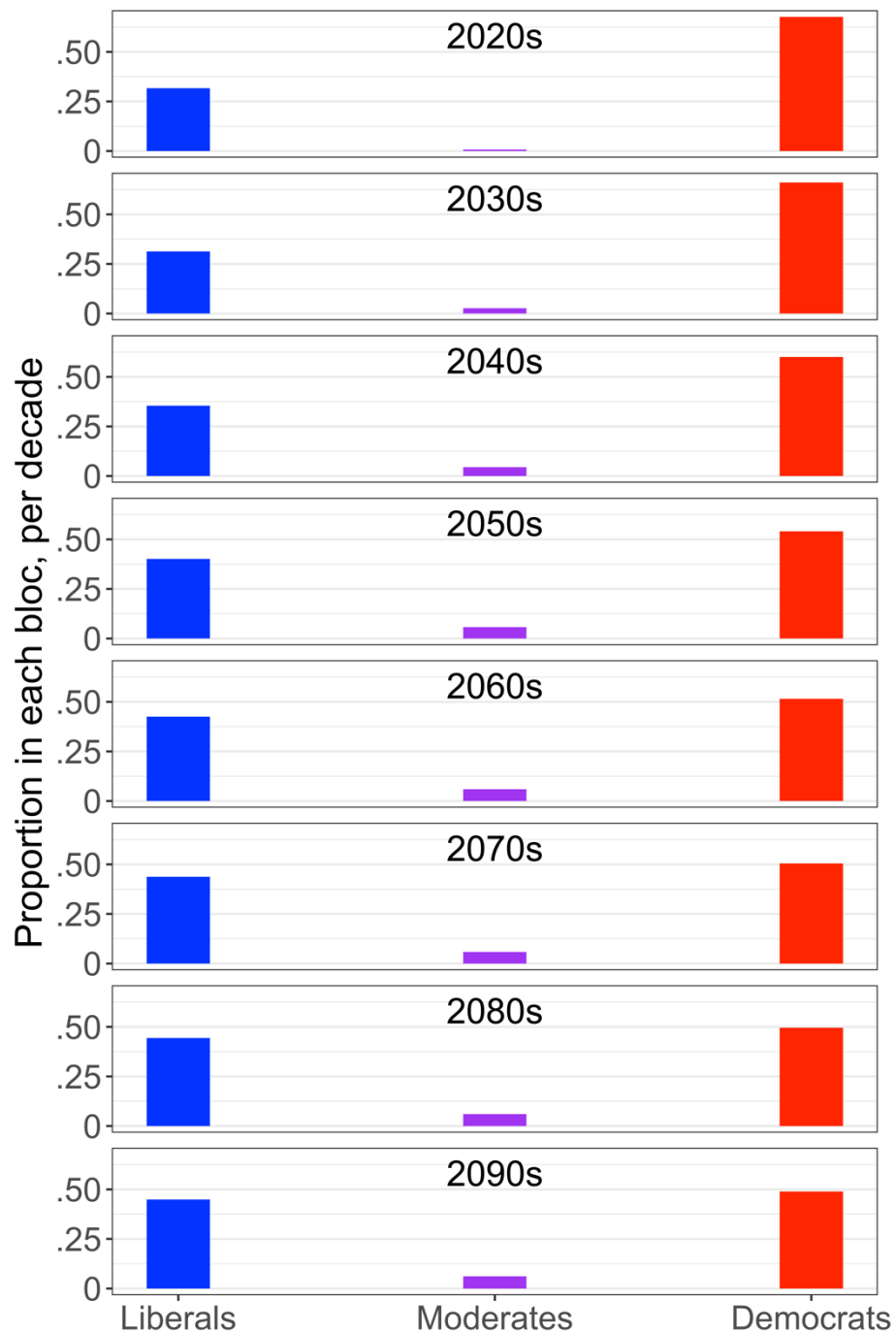
Figure 6. Projected Distribution of the ideological location of the median justice, by decade. The distribution in the 2020s heavily reflects today's court. The persistence of the impact of the 2016 Trump Shock is notable.

Figure 7 brings the bloc perspective to bear on the Court's future ideological structure. It shows the proportion of simulated justice-years that fall into the three blocs in each decade. Not surprisingly, the simulations suggest a dominant conservative bloc persisting for several decades. In other words, a conservative bloc with five or more members, an empty middle bloc and a smaller liberal bloc. As we discussed, some theories of the Court would expect this ideological structure to translate into many quite conservative majority opinions.

This persistence of a dominant conservative bloc is a testament to the sheer magnitude of the Trump Shock. If the projections are correct, the performance of the present-day court is probably a harbinger of what to expect for the next decade and half or so, at least. Gradually over time, the simulations predict the formation of two nearly equally sized and quite distant liberal and conservative blocs, with a very small moderate bloc. In other words, a return to configurations typical of the 2000s and 2010s. An example of such a configuration would be four liberal justices, one moderate justice, and four conservative justices. Some theories of the Court would expect such a court to produce both moderately conservative and moderately liberal majority opinions in approximate balance. However, given the randomness of exits and entrances, it would not be surprising sometimes to see a barely dominant liberal bloc (five justices), and sometimes a barely dominant conservative bloc (five conservatives). This scenario is in line with the projections focusing on the location of the median justice. Alternating dominant liberal and dominant conservative blocs (if this historically novel pattern actually occurs) might be expected to produce bouts of quite liberal majority opinions followed by bouts of quite conservative ones.[13] Once past the next decades, the simulations see such a scenario extending almost indefinitely into the future.

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[13] For some speculation along these lines, see Graber (2013).

Figure 7. Projected Distribution of justice bin, by decade. The graph shows the proportion of simulated justice-years that fall into the three blocs in each decade

Summary of the predicted legacy of the Trump Appointments

Arguably the single most important result from the simulations is the persistence of the 2016 Trump Shock's impact on the Court's ideological structure. Regardless of which measure of ideological structure one uses, the Trump Shock "stacked the deck" in favor of conservatives, and this advantage is likely to persist for an extended period. Very unlikely is the re-emergence of courts like those of the 1950s (dominated by moderates) or those of the 1960s (dominated by liberals).

To be clear, just because it is more probable that the median justice will be a conservative during the next several decades does not mean that it is inevitable that every median justice in every court during those years will be. A string of conservative departures from the Court combined with a string of Democratic victories at the polls could wrest control of the ideological center of the Court from conservative hands, creating a Court more favorable to liberal identifying litigants. In addition, one thing our simulations do not take into account is that a string of very unpopular conservative decisions could affect the outcomes of presidential elections themselves—for instance, as James L. Gibson (2025) argues in his essay for this volume, the Court's 2022 *Dobbs* decision apparently had the effect of systematically lowering the Court's legitimacy among the public (at least, as measured by surveys), suggesting that more high-profile decisions like this could bleed into the national electoral environment.

To be sure, simulations are no better than the assumptions behind them. The famous "GIGO Principle" holds: "garbage in, garbage out." Perhaps control of the presidency will not alternate fairly regularly between the parties. Perhaps presidents will return to the casual and often slovenly vetting and selection methods used in the mid-20th century. Alternatively, perhaps the justices will act strategically in response to threats to their legitimacy and scale back the extremity

of their decision making, compared to recent terms. If so, the projections may go seriously awry. But if presidents remain fixated on the Court and try hard and often successfully to find ideological champions, and if neither party achieves a lock on the presidency, then the patterns from the simulations seem fairly plausible.

Conclusion

The ideological structure of the contemporary court is extraordinarily conservative, at least as gauged by two measures rooted in different theories of the Court's operation. Using those measures (the ideological location of the median justice, and the ideological blocs on the Court), the contemporary court is more conservative than at any time in the last 70 years, and probably longer. If the theories of the Court underlying the measures have any merit, then one should expect this court strongly to favor conservative-identify litigants over liberal-identifying ones, and to produce many extremely conservative majority opinions—in other words, conservative law. The bloc measures suggest that labeling the contemporary court "a conservative Warren court" is somewhat inapt, because the landmark Warren courts contained a group of moderates who somewhat restrained the liberal majority as it made law. No such bloc exists on the contemporary court.

Using a variety of indicators (and many more are available), we argued that the proximal cause of the conservative transformation was two-fold: First, a revolution in presidential interest in the Court (especially among Republicans) with accompanying changes in vetting and selection, and second, brute luck in the form of the Trump Shock. We did not discuss the causes of increased presidential interest (especially among Republicans) but these probably include the increased power and scope of the federal courts, the emergence of the conservative legal movement, and the penetration of the political parties by organized interest groups.

We then reported on simulations attempting to project likely futures for the Court's ideological structure. A consistent finding is the persistent impact of the 2016 Trump Shock. A dominant bloc of six justices and a very conservative median justice is a huge legacy that will probably skew the Court's structure in the conservative direction for several decades – at least, absent a string of unlikely events (which can happen, of course). Projections farther in the future become more speculative, but one possibility is the re-emergence of courts similar to those of the 2000s and 2010s. In other words, courts with strong ideological wings and a near-empty center. But another might be alternating liberal and conservative medians and alternating dominant liberal and conservative blocs. This might be a future of instability in federal law.

We would emphasize that citizens and elites have agency. Collectively, their choices determine the future, and different choices make different futures. Time and chance do happeneth to us all, including the Supreme Court, but ultimately we—citizens and politicians alike—decide what Supreme Court we will have.

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