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Revisiting the Ideology Rankings of Supreme Court Justices

Lee Epstein, William M. Landes, and Richard A. Posner

ABSTRACT

This paper addresses the two main criticisms made by Cass Sunstein of the ideological rankings of justices in our book on federal judicial behavior. The first was that ranking justices from different time periods is problematic because the justices faced a different mixture of cases. The second questioned our implicit assumption that cases are fungible for the purpose of calculating a justice's ideology. To address the first criticism, we use the votes of moderate justices to create an adjusted voting index for each justice that controls for the influence of nonideological factors (for example, changes in the characteristics of cases). We respond to the second criticism by ranking justices on the basis of their votes in the most significant and controversial cases—5–4 decisions and cases reported in the *New York Times*. Overall, these adjustments result in only minor changes in the rankings in our book.

1. INTRODUCTION

In his review of our book *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, Sunstein (2013) questions our ideological rankings of Supreme Court justices from 1937 to 2009 (see Epstein, Landes, and Posner 2013, table 3.2) on two grounds. One is that justices who sit on the Court in different time periods face a different mixture of cases, so that simply tallying up the fraction of conservative or liberal votes in nonunanimous cases from different time periods to generate an ideological ranking of justices is problematic. For example, it would be incorrect to conclude that Justice Thomas, just because he voted conservatively in 81 percent of the cases compared with Chief

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Justice Burger's 79 percent, is more conservative than Burger was; they voted on different cases. In contrast, a comparison between Thomas (81 percent conservative) and Kennedy (65 percent conservative) is proper because the two justices have sat together since 1991 and throughout this period have voted on the same cases except in the few instances in which one of them was recused.¹

Sunstein's other objection is to weighting all observations equally, as we did—treating all votes as fungible. As he says, “It is one thing to vote to uphold a particular restriction on abortion: it is quite another to overrule *Roe v. Wade*. The ‘percentage of conservative votes’ metric will not pick up such differences” (Sunstein 2013, p. 56). Sunstein's second objection holds even when we rank justices who, because they overlapped in service on the Court, voted on the same cases during the period of overlap. Suppose that in their overlap period two justices both voted conservatively in 70 percent of the cases, but one voted conservatively in 90 percent of the important cases and the other in only 75 percent of those cases. A conclusion that the two justices were equally conservative would be unsound.

To evaluate Sunstein's first criticism, Section 2 of this paper develops an index of conservative votes (analogous to a consumer price index) that allows us to rank justices across different time periods, holding constant a conservative index that implicitly adjusts for differences in the case mixture and other factors (such as changes in the fraction of conservative decisions in the lower courts from which the cases the justices vote on come) that may cause justices to be coded as voting more or less conservatively over different time periods even if their ideology has not changed. This allows us to adjust our ideology ranking to meet Sunstein's criticism.

In Section 3 we respond to Sunstein's second criticism by developing ideological rankings based on justices' votes in only the most significant and controversial cases. Instead of treating votes in all nonunanimous cases equally (after making the Section 2 adjustment), we base our rankings on votes in 5–4 and 6–3 decisions and compare the justices' votes in these cases with their votes in the other nonunanimous decisions. We experiment with an alternative measure of importance as well—cases reported in the *New York Times*.

1. Kennedy was appointed to the Court in 1987 and thus served four terms before Thomas's appointment. If we confine our attention to Kennedy's votes to the same terms as Thomas (1991–2012), he voted conservatively 62 percent of the time.

2. ADJUSTED IDEOLOGY RANKINGS

On the basis of studies by other students of the Supreme Court, our book identified 11 justices in the 1937–2009 terms as moderates: Hughes, Owen Roberts, Frankfurter, Byrnes, Jackson, Whittaker, Stewart, White, Blackmun, Powell and O'Connor (Epstein, Landes and Posner 2013, p. 115). Our use of the word “moderate” may mislead, however, as it suggests a justice who has no strong ideological preference, so although each of his or her votes will be classified as either conservative or liberal (because these are the only two classifications in the Spaeth Supreme Court database), his or her total votes will be more evenly divided than the total votes of liberal and conservative justices. Thus, for example, the percentage of votes classified as conservative in the Spaeth database of Supreme Court cases for the relevant terms is significantly lower for moderates (60.4 percent) than for conservatives (71.6 percent) but significantly higher than for liberals (25.1 percent).²

Figure 1 reveals substantial variation in the percentage of conservative votes by term for each of the three groups of justices. (We have updated the data from our book to include the 2010–12 terms.) The percentage of conservative votes by conservative justices varied from 35.4 percent in 1940 to 91.5 percent in 1971 and then fell to 75.2 percent in 1977 and 64.1 percent in 2012. For liberal justices the percentages varied from 12.4 percent in 1955 to 39.2 percent in 1964, falling to 16.8 percent in 2003 but rising to 38.0 percent in 2009 and falling to 23.1 percent in 2012. For moderates the percentages varied from 37.0 percent in 1937 to 78.3 percent in 1958, then back down to 39.9 percent in 1991 and up to 76.7 percent in 1998.

One reason for such swings is that the identities of justices that make up the conservative, moderate and liberal wings of the Court change over time as justices retire or (rarely nowadays) die and are replaced. Since not all conservatives are equally conservative, all liberals equally conservative or all moderates equally conservative, changes in the composition of the groups will lead to changes in voting behavior—as will (a second reason) changes in the mixture of cases from term to term.³ For moderates,

2. Although our data cover the 1937–2012 terms, the data for moderates end with the 2005 term because there have been no moderates since O'Connor, who retired in January 2006. But the percentages in the text would change only slightly if we restricted analysis to the 1937–2005 terms.

3. A third but minor reason is changes in a justice's ideology during his time on the Court (ideological drift). Although we found significant ideological drift (see Epstein, Landes, and Posner 2013, pp. 116–23) for 12 of the 23 justices who served at least 15

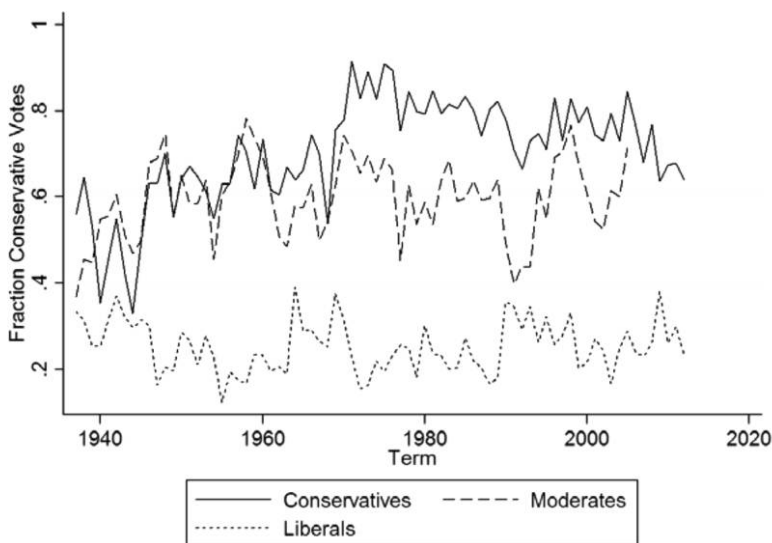


Figure 1. Fraction of conservative votes in nonunanimous cases, 1937–2012

the evidence strongly suggests that changes in their voting behavior are mainly due to changes in the mixtures of cases, not shifts in their ideology. Consider the following examples. In the 1946–53 terms, Frankfurter and Jackson, the only moderates on the Court, voted conservatively in 74.7 percent of the cases in 1948 but only 58.4 percent in 1952. In the 1971–80 terms, Blackmun, Powell, Stewart and White were the moderates, yet the percentage of their conservative votes varied from 70.7 percent in 1971 to 45.3 percent in 1977 to 58.9 percent in 1980. In the 1987–92 terms, Blackmun, White and O'Connor were the moderates yet voted conservatively in 64.2 percent of the cases in 1989 but only 39.9 percent in 1991. It seems unlikely that such large changes in voting behavior over a 6–10-year period would result from shifts in the ideology of the justices composing each group rather than from other factors such as changes in the character of the cases decided by the Court, though those changes could be the result of changes in the justices' ideology, since they choose what cases to hear from the thousands of cases they are asked to hear.

terms (eight of the justices became more liberal, and four became more conservative), these changes were gradual and cannot explain the substantial term-to-term changes shown in Figure 1.

We explore these issues by regressing the vote of each justice in each case on a set of dummy variables for each justice. We are particularly interested in the R^2 (or adjusted R^2), which tells us what fraction of the variance in votes can be explained by knowing the identity of the individual justice or his ideological group or both, and $1 - R^2$, which tells us the fraction that can be explained by other factors taken together, such as the nature of the cases, the lower-court decisions in them and the identities of the parties. Estimating separate regressions for conservative, moderate and liberal justices, we find that only 5.0 percent of the variation in votes by conservatives, 2.2 percent by moderates and 1.9 percent by liberals depends on the identity of the individual justice. If we combine all justices into a single regression, the identity-of-the-justice variable explains 19.5 percent of the variation in votes, of which 17.0 percent (87 percent of 19.5 percent) is explained by whether the justice is a conservative, moderate or liberal.

If we assume that moderate justices are at most weakly ideological, that each moderate's ideology is roughly constant over his tenure and that their ideology as a group does not change as the identity of the moderates change over time, we can use their voting behavior as a benchmark to create an adjusted voting index for each justice that by controlling for the influence of nonideological factors (for example, changes in the characteristics of cases) can pinpoint the ideological differences among justices. To understand the approach, imagine two conservative justices who sat on the Court in nonoverlapping periods: Justice A voted conservatively 80 percent of the time in period 1, and Justice B voted conservatively 65 percent of the time in period 2. One might conclude that this shows that A was more conservative than B. But suppose that same group of moderates voted conservatively 70 percent of the time in period 1 but only 50 percent of the time in period 2. This would imply that something, most likely the nonideological characteristics of the cases heard by the Court, had changed significantly between the two periods, which caused the same moderates to vote less conservatively in the second period.⁴ If we adjust A's and B's votes for the voting of the moderates, by setting the moderate index equal to 1 during A's tenure and to .71 during B's tenure,

4. Another possibility is a time trend in ideology that causes moderates to vote more or less conservatively over time even though the case mixture and other nonideological factors remain constant. But the data do not support this claim; Figure 1 reveals no trend in ideology (measured by the fraction of conservative votes in nonunanimous cases) for moderates.

the adjusted fraction of conservative votes for A is still 80 percent (.80/1), but for B it is now 91.5 percent (.65/.71). Thus B is seen to be more conservative than A after adjustment is made for nonideological factors that caused moderates to vote 20 percent more conservatively during A's than B's tenure.⁵

Let us consider the evidence that supports our using the votes of moderates as a benchmark to create an adjusted voting index that allows us to compare the ideologies of justices who served in different time periods. The evidence is as follows.

Trend in Moderates' Voting. Figure 1 shows no significant trend in the voting (fraction of conservative votes) of moderates over the 1937–2005 terms. The absence of a trend implies that changes in the number and composition of the justices that make up the moderate group and even possible ideological changes for a given moderate over his tenure have no significant effects on the voting of moderates taken as a group. We test this hypothesis by estimating a least-squares regression in which the dependent variable is the fraction of conservative votes of moderates each term (the variable along the vertical axis in Figure 1) and the independent variables are a linear time trend and the number of moderate justices in

5. The method of creating an adjusted fraction of conservative votes is as follows. First we calculated the percentage of conservative votes in nonunanimous cases for moderate justices in each term. We set their average value (60.4 percent) equal to 1 and then calculated an index for each term t equal to the percentage of conservative votes for moderates in t divided by 60.4. For example, because moderates voted conservatively 74.4 percent of the time in 1970, our index has a value of 1.23 (74.4/60.4) in 1970, which implies that the case mix and other nonideological factors generated a 23 percent increase in the percentage of conservative votes. We then deflated the percentage of conservative votes by conservative, liberal and moderate justices in 1970 by 23 percent. By repeating this procedure each year, we are able to construct an adjusted index of the percentage of conservative votes that holds constant changes in nonideological factors that influence the justice's vote independent of ideology. We made a further adjustment for the fact that there have been no moderates on the Court since O'Connor left in 2005 (and she voted in only seven nonunanimous cases in that year). Using a sample consisting of all nonunanimous votes of moderate justices from 1937 to 2005, we regressed the direction of the vote (conservative or liberal) on the lower-court outcome (conservative or liberal). Since the Court typically takes cases to reverse the lower-court decision, the regression coefficient on the lower-court variable is negative and highly significant. We used this regression to predict how a hypothetical moderate would have voted in 2005–12 and then adjusted the votes of all justices starting in 2005 for the moderate index, which now covers the 2005–12 terms. Notice finally that in a few instances in Tables 1 and 2 the adjusted fraction of conservative votes for a justice is slightly greater than 1. In those instances, we set the adjusted fraction of conservative votes equal to 1.

each term (which varies from one to four). Neither variable is close to significant, and jointly the two variables are insignificant.⁶

Variation in Moderates' Conservative Votes. Earlier, we provided several examples that showed considerable year-to-year variations in the fraction of conservative votes for the same set of moderate justices (Frankfurter and Jackson in the 1946–53 terms; Blackmun, Powell, Stewart and White in the 1971–80 terms; and Blackmun, White and O'Connor in the 1987–92 terms). Here are a few more examples. White and Stewart were the only two moderates in the 1962–69 terms. Their combined fraction of conservative votes varied from 48.5 percent in 1963 to 63.0 percent in 1966 and back down to 54.5 percent in 1968. White, Blackmun, Powell and O'Connor were the moderates in 1981–86, and their combined conservative votes ranged from 53.7 percent in 1981 to 68.7 in 1983. Or consider O'Connor herself in the 1994–2005 terms when she was the only moderate on the Court. Her conservative votes ranged from 62.2 percent in 1994 to 76.7 percent in 1998 and down to 60.0 percent in 2004. In short, the evidence seems overwhelming that year-to-year variations in the fraction of conservative votes for the same group of moderate justices over periods ranging from 6 to 10 years and for O'Connor over a 12-year period reflect changes in case characteristics, not shifts in ideology for individual justices.

Moderates' Ideological Drift. A related concern that could undermine our benchmark is ideological drift for moderate justices. For example, if moderates become more liberal over time, this would lead to a downward drift in the moderate index and an upward adjustment in the fraction of conservative votes for the more recent justices, which would make the latter group appear more conservative and so make a comparison with earlier justices misleading. It turns out, however, that ideological drift has no effect on our results. We noted earlier (see note 3) that there was significant ideological drift for 12 justices. This group includes four moderates: Blackmun and O'Connor became more liberal, while Frankfurter and White became more conservative, which resulted in no net drift.⁷ Moreover, the absence of a significant trend in the fraction of conservative votes for moderates in Figure 1 shows that there is no net drift.

6. The coefficients and *t*-values (in parentheses) are .0007 (1.23) and .0024 (.23) for the trend and number-of-moderates variables, respectively.

7. Following the approach in Epstein, Landes, and Posner (2013), we tested for drift by estimating a regression in which the dependent variable is a dummy variable that takes the value one if the justice voted conservatively and zero if the justice voted liberally. The independent variable is the term during which the case is decided. A significant negative

Table 1 presents both the adjusted and unadjusted ideology classifications for each justice. Our sample includes 42,492 votes in nonunanimous cases during the 1937–2012 terms.⁸ Table 1 is the same as table 3.2 in our book except that it adds the 2010–12 terms and ranks 43 instead of 44 justices.⁹

The most striking feature of Table 1 is how little our adjustments (designed to eliminate the effect of differences among justices that cannot be ascribed to ideology) alter the ideology findings in our book, with the exception of justices who served during the early years of our sample period. Table 1 shows that the difference between the adjusted and unadjusted fraction of conservative votes is greater than 5 percent for seven justices: McReynolds, Butler, Owen Roberts, Whittaker, Hughes, Brandeis and Stone. Except for Whittaker (who served during the 1956–61 terms), none sat beyond the 1945 term. Notice that our adjustment makes the six justices more conservative than they appear to be from just looking at their unadjusted votes. This is because moderate justices voted less conservatively in the 1937–45 period (50.9 percent) than in the 1946–2005 period (61.7 percent). This implies a 17.5 percent increase $(-(50.9 - 61.7)/61.7)$ in the weight or price of a conservative vote in the earlier period. That in turn increases the adjusted fraction of conservative votes of justices sitting for all or part of the 1937–45 period.¹⁰

For Whittaker we find the opposite, however. During his brief tenure

coefficient implies liberal drift, and a significant positive coefficient implies conservative drift. Restricting the sample to O'Connor's votes, we find a negative and significant coefficient in the 1981–93 period (a coefficient of $-.008$ and a t -value of 2.05 with 986 votes in nonunanimous cases) but an insignificant coefficient in the 1994–2005 terms (a coefficient of $-.006$ and a t -value of .91 with 467 votes in nonunanimous cases). Since O'Connor drifted in the liberal direction, we might have expected a decline in our moderate index starting in the 1994 term because there are no moderates drifting in the opposite direction. This turns out not to be the case because O'Connor's liberal drift took place before 1994.

8. We exclude 2007 votes in subject areas in which we could not classify the outcome as either conservative or liberal (see Epstein, Landes and Posner 2013, chap. 3 app.): 18 votes that cover one case in interstate disputes and one case in which the issue is listed as unclassified.

9. We exclude Cardozo and Sutherland from the rankings in Table 1 because both justices resigned during the 1937 term and cast fewer than 17 votes (16 for Cardozo and 15 for Sutherland) in our covered cases. We now include Elena Kagan in Table 1 because she voted 100 times in our covered cases.

10. The upward adjustments in the fraction of conservative votes were even greater for Butler and McReynolds, who left the bench after the 1938 and 1940 terms, respectively, because the real value of a conservative vote was 45 percent higher during Butler's two terms and 32 percent higher during McReynolds's four terms.

on the Court (1956–61) moderates voted conservatively 70.5 percent of time, compared with 59.4 percent when he was not on the Court. Because the price of a conservative vote fell by about 16 percent $((.594 - .705)/.705)$ during his tenure, our adjustment lowers his conservative vote from 75.8 percent to 64.3 percent.

There is virtually no change in the ideology rankings when we substitute the adjusted for the unadjusted numbers, except that McReynolds and Butler jump from 8 and 18 in the unadjusted rankings to 1 and 2 in the adjusted rankings, while Owen Roberts jumps from 13 to 6 and Whittaker falls from 5 to 15.

Figure 2 illustrates the closeness in rankings between the adjusted fraction of conservative votes on the vertical axis and the unadjusted fraction on the horizontal axis. (The line in Figure 2 has an intercept equal to 0 and slope equal to 1.) Except for the scatter points representing McReynolds, Butler, Owen Roberts and Whittaker, there are no significant changes in rank among the justices even though many of them served in different periods. The rank-order correlation between the adjusted and unadjusted numbers in Figure 2 is .96, and we cannot reject the null hypothesis that the slope in the linear regression equals 1 and the constant equals 0.

Rehnquist is generally believed to have become less conservative after he became chief justice. Table 1 provides support for this hypothesis (though we offer a qualification in Section 3). There is a statistically significant decline of .044 in the adjusted fraction of conservative votes by Rehnquist after he became chief justice. The decline is almost entirely the result of his votes in economic cases.

The overall impact on ideology (equivalently, the fraction of conservative votes) of our adjustments in Table 1 is minor except for the six justices (McReynolds, Butler, Owen Roberts, Hughes, Brandeis and Stone, excluding Byrnes, who was a justice only during the 1941 term) who left the Court between 1938 and 1945 and Whittaker, who was a justice in the 1956–61 terms. The average absolute difference between the adjusted and unadjusted fraction of conservative votes is 17.4 percent for these seven justices but only 1.7 percent for the other 36 justices in our sample.¹¹ And among the latter group, the difference is greater than 4 percent for only three of the justices: Souter and Goldberg (4.0 percent each) and

11. The absolute difference for the 36 justices is 1.7 percent. There are 17 justices for which the difference between the adjusted and unadjusted fraction of conservative votes is negative and 19 for which the difference is positive.

Table 1. Fractions of Conservative Votes in Nonunanimous Cases

Justice	Adjusted			Unadjusted	
	Ideology	Fraction	Rank	Fraction	Rank
McReynolds ^a	C	1.00	1	.727	8
Butler ^a	C	.926	2	.641	16
Rehnquist:	C	.865	3	.850	1
Before chief justice		.885		.894	
After		.841		.798	
Thomas	C	.845	4	.811	2
Scalia	C	.795	5	.764	4
O. Roberts ^a	M	.790	6	.656	13
Burger	C	.763	7	.788	3
Alito	C	.731	8	.751	6
Harlan	C	.722	9	.733	7
O'Connor	M	.714	10	.692	10
Powell	M	.680	11	.695	9
Kennedy	C	.675	12	.646	14
J. Roberts	C	.667	13	.685	11
Minton	C	.645	14	.622	17
Whittaker ^a	M	.643	15	.758	5
Burton	C	.636	16	.658	12
Vinson	C	.604	17	.643	15
White	M	.599	18	.591	20
Jackson	M	.596	19	.604	19
Stewart	M	.593	20	.606	18
Hughes ^a	M	.584	21	.442	27
Reed ^a	C	.567	22	.544	23
Frankfurter	M	.563	23	.581	21
Byrnes	M	.552	24	.509	24
Clark	C	.547	25	.560	22
Brandeis ^a	L	.546	26	.364	28
Stone ^a	L	.528	26	.442	26
Blackmun	M	.474	28	.487	25
Souter	L	.373	29	.333	30
Goldberg	L	.337	30	.296	33
Breyer	L	.325	31	.334	29
Stevens	L	.325	32	.313	31
Fortas	L	.320	33	.298	32
Sotomayor	L	.268	34	.273	34
Ginsburg	L	.266	35	.264	35
Black	L	.264	36	.253	36
Rutledge	L	.256	37	.239	38
Warren	L	.250	38	.247	37
Murphy	L	.245	39	.230	40
Kagan	L	.227	40	.230	39
Brennan	L	.212	41	.218	41

Table 1. *continued*

Justice	Adjusted			Unadjusted	
	Ideology	Fraction	Rank	Fraction	Rank
Douglas	L	.200	42	.194	42
Marshall	L	.166	43	.169	43

Note. Cardozo and Sutherland are excluded from the rankings because they either died (Cardozo) or resigned (Sutherland) during the 1937 term and cast fewer than 17 votes (16 for Cardozo and 15 for Sutherland) in the cases in the sample. Although Byrnes served only one term (1941), he is included because he cast 55 votes. The following justices cast fewer than 150 votes: Brandeis (77 votes), Butler (92 votes) and Kagan (100 votes). The maximum adjusted fraction of conservative votes is set equal to 1. Without the maximum, the fraction would be greater than 1 (=1.01) only for McReynolds. C = conservative; L = liberal; M = moderate.

^a Difference between adjusted and unadjusted fraction of conservative votes > 5%.

Byrnes (4.3 percent). Except for the seven, we find no support for Sunstein's conjecture that changes in the mixture of cases distort the ideology rankings of justices over the past 75 years.

3. DOES IT MATTER THAT CASES ARE WEIGHTED EQUALLY?

We have now to consider Sunstein's second criticism, which is of the implicit assumption in our book (Epstein, Landes, and Posner 2013) that cases are fungible ideologically—all conservative votes are equally significant, all liberal votes equally significant, all moderate votes equally significant. He argues that “to rank judges along an ideological spectrum, we want not merely to count votes (liberal or conservative?) but also to weight them, by examining the particular cases and also the relative extremism of the judges' preferred outcome. It is one thing to vote to strike down a particular affirmative action program; it is quite another to say that all affirmative action programs should be struck down” (Sunstein 2013, p. 56). Suppose that after we have adjusted for differences in case mixture over time, as in Table 1, we find that Justice A voted conservatively in 70 percent and B in 60 percent of the cases. It seems reasonable to conclude that A is more conservative than B, but this may be wrong. Imagine that B votes more conservatively in the cases that really matter to conservatives (such as abortion rights as compared with Securities and Exchange Commission regulation) than A does, so B really is more conservative than A.

We address this problem in two ways. The first compares the fraction

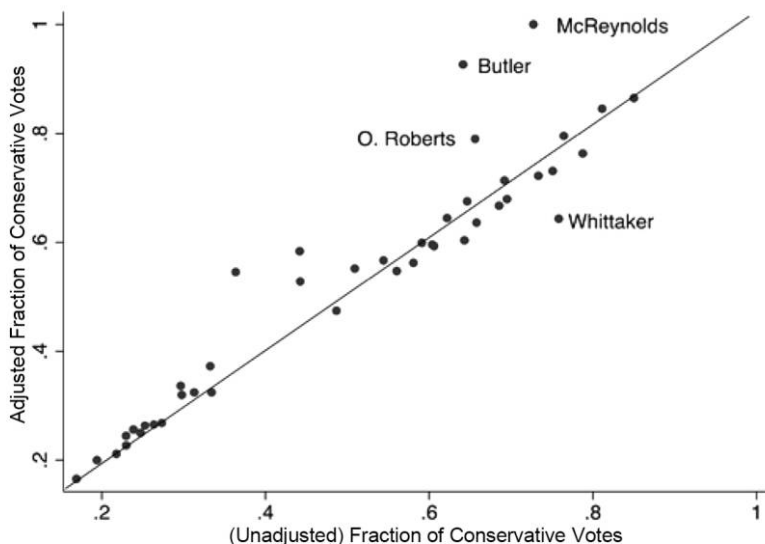


Figure 2. Adjusted and unadjusted fractions of conservative votes

of conservative votes in a subset of cases that are likely to be ideologically more divisive than most Supreme Court decisions—namely, cases in which the votes were 5–4—with the fraction of conservative votes in less closely divided nonunanimous cases. We thus use the amount of disagreement among the justices as a proxy (an imperfect one, considering that *Brown v. Board of Education* was unanimous and *Roe v. Wade* was 7–2) for the significance or controversiality of a case. (See the Appendix for an example.) Second, we examine cases that receive front-page coverage in the *New York Times*. We continue to make the adjustment for case mixture that we made in Section 1 on the basis of a voting index for moderate justices.¹²

Table 2 summarizes the result of our first approach. Notice the steep increase in the fraction of conservative voting in 5–4 cases as we move from liberal to moderate to conservative justices. There are a few exceptions. The moderate O'Connor votes more conservatively than seven of the 13 conservative justices; the conservative Clark is less conservative than every moderate justice but Blackmun; and the liberal Stone voted

12. This adjustment requires that we calculate a separate moderate index for the type of cases (for example, 5–4 decisions, decisions with between one and three dissents, and *New York Times* cases) that we analyze. For example, when we compute ideology rankings for 5–4 decisions, we first compute an index of moderate voting in 5–4 cases and then adjust each justice's votes in 5–4 cases in each year by the moderate index.

Table 2. Adjusted Fractions of Conservative Votes in Nonunanimous Cases with Varying Numbers of Dissents, 1937–2012

Justice	Ideology	Four Dissents	One to Three Dissents	Difference
Rehnquist:	C	1.00	.828	.172**
Before chief justice		1.00	.847	.153**
After		1.00	.804	.196**
Burger	C	.983	.697	.286**
Scalia	C	.889	.796	.093**
J. Roberts	C	.875	.528	.347**
Alito	C	.857	.670	.187**
Thomas	C	.845	.917	-.072*
O'Connor	M	.814	.681	.133**
Kennedy	C	.789	.646	.143**
Minton	C	.789	.662	.127
Powell	M	.784	.647	.137**
Burton	C	.765	.605	.160**
O. Roberts	M	.729	.853	-.124
Vinson	C	.706	.557	.149**
Harlan	C	.702	.792	-.090*
White	M	.694	.577	.117**
Whittaker	M	.692	.642	.050
Reed	C	.684	.527	.157**
Jackson	M	.671	.568	.103*
Byrnes	M	.650	.498	.152
Frankfurter	M	.625	.551	.074*
Stone	L	.583	.504	.079
Stewart	M	.582	.607	-.025
Clark	C	.550	.560	-.010
Blackmun	M	.392	.493	-.101**
Souter	L	.224	.495	-.271**
Stevens	L	.205	.381	-.176**
Breyer	L	.194	.447	-.253**
Murphy	L	.185	.241	-.056
Fortas	L	.178	.306	-.128
Black	L	.168	.290	-.122**
Rutledge	L	.156	.299	-.143**
Goldberg	L	.142	.366	-.224*
Ginsburg	L	.132	.377	-.245**
Kagan	L	.128	.368	-.240**
Douglas	L	.123	.219	-.096**
Sotomayor	L	.119	.397	-.278**
Brennan	L	.084	.266	-.181**
Marshall	L	.073	.184	-.111**
Warren	L	.071	.330	-.259**

Note. The sample contains 33,324 votes in nonunanimous cases in which nine justices voted and 11,061 votes (or 33.2 percent of 33,324 votes) in 5–4 decisions. The fraction of conservative votes is calculated from nonunanimous nine-vote decisions in all terms except for 1945 and 1969; since there were only eight justices on the Court, eight-vote decisions are used for those terms. Brandeis, Butler, Cardozo, Sutherland, McReynolds and Hughes are excluded because they had fewer than 15 votes. C = conservative; M = moderate; L = liberal.

* Significant at the .05 level.

** Significant at the .01 level.

conservatively more than twice as often as Souter and Stevens, who are the next most conservative of the liberal justices. Table 2 also reveals a sharp break in the fraction of conservative voting by justices above and below Blackmun in the conservative index. In 5–4 decisions Blackmun, the least conservative of the moderates, voted conservatively 39 percent of the time, and the justices on either side of him voted conservatively 55 percent and 22 percent of the time, respectively.

Overall, 22 of the 29 conservative and liberal justices in our sample become significantly more ideological (conservatives vote more conservatively and liberals vote more liberally) in 5–4 cases than in cases with fewer dissents: 9 of the 13 conservative justices vote significantly more conservatively in 5–4 cases, and 13 of the 16 liberal justices vote significantly more liberally in 5–4 cases. Thomas, Sherman Minton, Clark and Harlan are the consistently conservative justices as measured by their voting in 5–4 cases compared with less contested cases, although Clark and Harlan are among the most liberal of the conservative justices. Thomas emerges as the most consistently conservative because he votes conservative in a very high fraction of cases independent of the number of dissents in the case (85 percent with four dissents and 92 percent with one to three).

Among liberals, Stone, Frank Murphy and Fortas are the only ones whose ideological voting is the same in the 5–4 majority and cases with between one and three dissents. Unlike other liberals in our sample, Stone voted more conservatively in closely contested cases, although the difference is not statistically significant. Stone is also the most conservative of the liberal justices in closely contested cases and nearly three times more conservative than the next most liberal justice (Souter). Indeed, Stone looks more like a conservative (or moderate) than a liberal justice. He voted conservatively more often than liberals and even more so in closely contested cases.

Of the 10 moderates, five (Jackson, O'Connor, Powell, White and Frankfurter) vote significantly more conservatively and one (Blackmun) votes significantly less conservatively in the 5–4 cases, although the differences are relatively small (the average absolute difference is .10). These changes have no bearing on whether moderates are becoming more or less ideological but instead reflect a change in case mixture that leads moderates to vote more or less conservatively (the only options available). We also find that a significantly higher fraction of moderates than conservatives or liberals (40 percent versus 17 percent) vote the same in

cases with between one and three dissents and 5–4 cases, where their vote in 5–4 cases would be more likely to be decisive rather than strategic. This might be thought implicit in “moderateness.” But it need not be; a moderate justice might feel strongly enough about the outcome of a case to vote strategically, even if his reason for feeling strongly has nothing to do with ideology.

There are several noteworthy changes in rank between 5–4 cases and other cases. Among the current justices, Roberts ranks fourth in conservatism in 5–4 cases but only 22d in cases in which there are fewer than three dissents (though his decision in the Obamacare cases was a notable exception). Thus he is a reliable conservative in the most closely contested cases but moderate when his vote cannot change the outcome. This is consistent with a chief justice’s interest in being on the winning side in most cases; otherwise it looks as if he cannot control his Court. On the liberal side, Sotomayor and Kagan are the fourth and sixth most liberal justices in 5–4 decisions but the 13th and 10th most liberal in other nonunanimous decisions. The mirror image of Roberts, they vote very liberally in 5–4 cases but are among the most conservative liberal justices in cases in which, because there are fewer than four dissenting votes, their votes cannot change the outcome. This makes them look moderate. A moderate image is attractive to many judges, owing to a general dislike of political judges.

Recall that in Table 1 we found that Rehnquist was less conservative (a statistically significant, though small, difference) after he became chief justice. Yet Table 2 reveals that he was equally conservative before and after he became chief justice in both 5–4 cases and cases that appeared on the front page of the *New York Times* (see Table 5). The implication of comparing the different results in the two tables is that he did not moderate his views when a conservative vote mattered to the outcome (5–4 cases and the *Times* sample, which has a disproportionate fraction of 5–4 cases) but moderated his views after he became chief justice in cases that were less controversial or less important. This would be consistent with his successor’s behavior.

Table 3 aggregates the votes of the justices into our three ideology groups. We find that conservatives are 5.4 times and moderates 4.2 times more likely to vote conservatively than liberals are in 5–4 cases. Not surprisingly, the differences are more muted in less contested cases (one to three dissents), in which conservatives vote about twice as conservatively and moderates 1.8 times as conservatively as liberals. We thus observe

Table 3. Adjusted Fractions of Conservative Votes by Ideology, 1937–2012 Terms

	Four Dissents	One to Three Dissents	Difference
All justices	.516	.514	.002
Liberals	.150	.307	-.157**
Moderates	.650	.595	.055**
Conservatives	.849	.712	.137**
Votes	11,061	23,031	

Note. The fraction of conservative votes is calculated from non-unanimous nine-vote decisions in all terms except for 1945 and 1969; since there were only eight justices on the Court, eight-vote decisions are used for those terms.

** Significant at the .01 level.

the statistical phenomenon of regression to the mean as the extremes move closer to the mean in the less contested cases. These findings are similar to those in our book, even though there we do not adjust the votes for differences in case mixture that affect the overall level of conservative voting.

It is worth noting a possible qualification to the hypothesis that ideology plays a bigger role in 5–4 dissents than in less closely divided cases.¹³ Consider a Court of five conservative and four liberal justices (like the current Court) and assume that a justice’s ideological preference does not vary from case to case, so he votes according to his ideology in cases in which ideology dominates nonideological considerations. Hence, in a 5–4 conservative decision (where nonideological factors are relatively unimportant), all five conservative justices will vote conservatively and all four liberals will vote liberally. Now assume a 6–3 conservative decision. Most likely, the five conservatives will vote conservatively, but only three of the four liberals will vote liberally—if all four voted liberally, the decision would be 5–4 rather than 6–3. We observe, therefore, a greater difference between conservatives and liberals in 5–4 than in 6–3 decisions—the difference between conservatives and liberals is 100 percent in the former decisions but only 75 percent ($100 - 25$) in the latter ones. This example suggests that the opportunity to vote one’s ideology (combined with the relative importance of nonideological factors) drives the finding that ideological differences between conservatives and liberals are greater

13. We thank William Hubbard for pointing out this qualification.

Table 4. Fraction of Conservative Votes of Five Conservative and Four Liberal Justices

Vote	Conservative Decision			Liberal Decision		
	C	L	Difference	C	L	Difference
9-0	100	100	0	0	0	0
8-1	100	75	25	20	0	20
7-2	100	50	50	40	0	40
6-3	100	25	75	60	0	60
5-4	100	0	100	80	0	80

Note. C = conservative justice; L = liberal justice.

in the more closely contested cases. Table 4 confirms this for cases in which the difference in the percentage of conservative votes between conservative and liberal justices (assuming that the Court consists of five conservatives and four liberals) is greatest for a 5-4 decision (either a conservative or liberal one) and diminishes as the fraction of dissents declines.

There are two reasons, however, why the opportunity to vote one's ideology cannot account for the sharp increase in ideological voting that we observe in Table 3. First, the calculations in Table 4 depend critically on the ideological makeup of the Court. If the Court consists of seven conservatives and two liberals instead of five conservatives and four liberals, the greatest ideological voting difference between conservatives and liberals occurs in 7-2 conservative decisions (conservatives vote 100 percent and liberals 0 percent for a conservative outcome), not a 5-4 decision (conservatives vote 71 percent and liberals 0 percent conservatively). To take another example, let the Court consist of three liberals, two conservatives and four moderates (which corresponds to the makeup of the Court in the 1972-86 terms) and assume that moderates are equally likely to vote for a conservative or liberal outcome. Then, in decisions that range from 6-3 conservative to 7-2 liberal (and thus includes both 5-4 conservative and 5-4 liberal decisions), both conservatives and liberals have the opportunity to vote their ideology. Conservatives vote 100 percent and liberals vote 0 percent conservatively, and so ideological differences are not magnified in 5-4 decisions. In short, the claim that the opportunity to vote one's ideology can explain that the finding in Table 3 is true only if the Court is made up of five conservatives (or liberals) and four liberals (or conservatives). Since this distribution holds only for the

Roberts Court (which accounts for fewer than 7 percent of the votes in our sample), opportunities alone cannot explain why ideological voting differences are greater in 5–4 cases than in other cases.

The notion that the opportunity to vote one's ideology can account for ideological differences in voting begs the question of why some cases are decided 5–4, 6–3 and so forth. It must be that nonideological factors weigh heavily in some cases. The fact that 5–4 decisions account for 27 percent, 6–3 for 13 percent, 7–2 for 14 percent, 8–1 for 8 percent and 9–0 for 38 percent of cases during John Roberts's terms shows that nonideological factors dominate ideological considerations in a majority of cases.

Our second effort at comparison of more and less significant cases involves 784 nonunanimous cases (and 6,861 votes in those cases) in the 1946–2012 terms in which the *New York Times* published a story about the Court's decision on its front page the day after the decision was issued. We find that the *Times* front page tends, as one expects, to cover the more hotly contested cases—33.4 percent were 5–4 decisions as opposed to 25.1 percent in cases in the 1946–2012 terms not covered in the *Times* sample.

Table 5 presents the rankings of justices on the basis of their votes in the *Times* cases. As with our findings regarding 5–4 cases, we find that conservative justices voted more conservatively, moderates voted about the same and liberal justices voted less conservatively in *Times* cases relative to non-*Times* cases.¹⁴ For example, conservatives voted for the conservative decision 86.9 percent of the time in *Times* cases versus 73.4 percent in non-*Times* cases, moderates voted 58.9 percent versus 62.3 percent for the conservative decision and liberals voted 17.8 percent versus 26.5 percent for the conservative decision.¹⁵ Notice also the sharp drop in the fraction of conservative votes between the least conservative moderate (Blackmun) and the most conservative liberal (Black) in *Times* cases—Blackmun voted conservatively in 43.4 percent of the cases, and Black did so for 28.6 percent. We observe a similar result in 5–4 cases.

14. We do not report the non-*Times* cases in Table 5, although note that ideology calculations in the non-*Times* cases are close to the numbers reported for all nonunanimous cases in Table 1 because *Times* cases account for 18 percent of all cases in the 1946–2012 terms.

15. We also estimated a regression for the 36 justices in which the dependent variable is the difference between the fraction of conservative votes in *Times* and non-*Times* cases and the independent variables are dummy variables denoting whether the justice is a conservative, moderate or liberal. (The excluded variable is the liberal dummy.) The regression coefficients on the conservative and moderate variables are both significant (*t*-ratios of 7.4 and 2.3, respectively) and significantly different from each other.

Table 5. Adjusted Fractions of Conservative Votes in *New York Times* Cases, 1946–2012

Justice	Ideology	Fraction
Minton	C	1.00
Reed	C	1.00
Vinson	C	.969
Rehnquist:	C	.964
Before chief justice		.960
After		.967
Thomas	C	.952
Scalia	C	.922
Burton	C	.891
Alito	C	.839
Burger	C	.834
Harlan	C	.778
Jackson	M	.721
O'Connor	M	.714
Kennedy	C	.708
J. Roberts	C	.706
Clark	C	.692
Powell	M	.665
Whittaker	M	.658
White	M	.598
Frankfurter	M	.561
Stewart	M	.560
Blackmun	M	.434
Black	L	.286
Stevens	L	.267
Souter	L	.266
Warren	L	.217
Fortas	L	.211
Breyer	L	.187
Murphy	L	.153
Brennan	L	.139
Ginsburg	L	.127
Rutledge	L	.126
Goldberg	L	.117
Marshall	L	.097
Douglas	L	.094
Kagan	L	.061
Sotomayor	L	.046

Note. The *New York Times* sample contains 6,961 votes in 784 nonunanimous cases. The adjusted fraction of conservative votes for Minton and Reed exceeds 1 because the “moderate” index for *New York Times* cases was about 35 percent below average during Minton’s and most of Reed’s tenure, which results in an upward shift in Minton’s and Reed’s fraction of conservative votes. C = conservative; M = moderate; L = liberal.

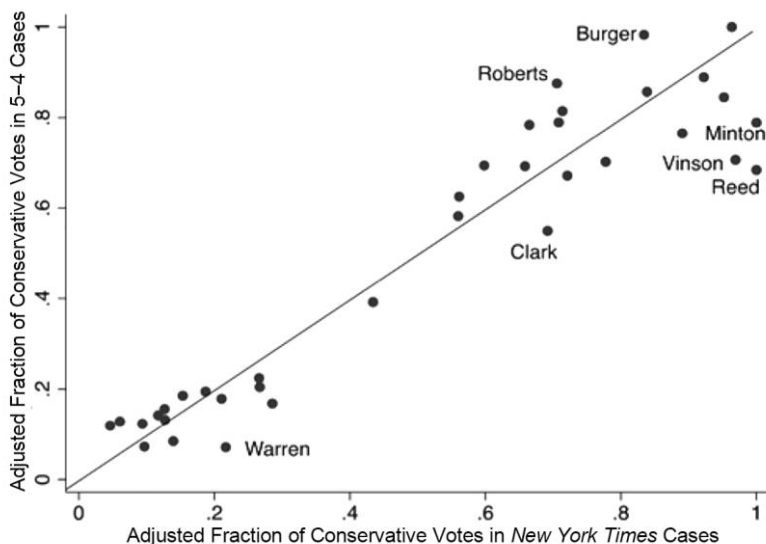


Figure 3. Adjusted fraction of conservative votes in *New York Times* and 5-4 cases

Although the *Times* and 5-4 rankings are highly correlated (rank-order correlation of .88), there are several differences worth noting. As shown in Figure 3, Minton, Fred Vinson and Stanley Forman Reed are the three most conservative justices in the *Times* sample but among the least conservative in 5-4 decisions. Burger and John Roberts go in the opposite direction. They are among the four most conservative in 5-4 cases but the five least conservative in *Times* cases. Clark is the least conservative of conservative justices in both the *Times* and 5-4 cases but votes conservatively about 26 percent more often in *Times* than in 5-4 cases. Warren is the most liberal justice in 5-4 cases but among the four most conservative liberal justices in *Times* cases.

Table 6 presents rank-order correlations that summarize the relations between the different ideological rankings in Tables 1, 2, and 5. Although the overall rankings based on both 5-4 and *Times* decisions are closely related to the ranking in all nonunanimous cases (Table 1), the relation is closer for the 5-4 cases than for the *Times* cases (a rank correlation of .96 versus .85).¹⁶ Some of this difference may be caused by the smaller sample

16. The two correlations are of the 36 justices in the *Times* sample. We noted earlier the correlation between 5-4 and all nonunanimous cases in the full sample of 41 justices (which includes justices who left the bench before the 1946 term).

Table 6. Rank Correlations of Adjusted Fractions of Conservative Votes, 1946-2011 Terms

	All	Four Dissents	One to Three Dissents
Four dissents	.96	1	.90
One to three dissents	.97	.90	1
<i>New York Times</i> cases	.85	.88	.82

Note. Correlations among all, four, and one to three dissents cover 39 justices in the 1937–2012 period. Correlations involving the *New York Times* cases cover 36 justices in the 1946–2012 period.

size for the *Times* cases. For example, Kagan and Sotomayor have 16 and 21 votes, respectively, in the *Times* sample compared with 47 for Kagan and 59 for Sotomayor in the 5–4-cases sample.

In addition to its smaller sample size, the measure strikes us as inferior to the other measures in this paper and in our book because those measures are based directly and exclusively on judicial behavior (the justices' votes, for example), whereas the *Times* measure is bound to be strongly influenced by strictly journalistic considerations, such as the interests and policy preferences of its readership, the interests and policy preferences of its owners and editors, the competition of other stories for first-page coverage and (relatedly) the capacity of the first page. Nevertheless, the significant correlation between the results we derive from that sample and the results from our other two samples provide some support for using *Times* front-page coverage as another proxy for the significance of a Supreme Court decision.

4. CONCLUSION

This paper addresses the two main criticisms made by Sunstein (2013) of the ideological rankings of justices in our book on federal judicial behavior. The first was that ranking justices who sat in different time periods is problematic because the justices faced a different mixture of cases. The second criticism questioned our implicit assumption that all (nonunanimous) cases are fungible for the purpose of calculating a justice's ideology. In response to the first criticism, we created a conservative price index that uses the votes of moderate justices in each term to adjust for changes in case mixture that affect how a justice votes, independent of changes in ideology. We deflated the votes of each justice by this price

index to create an adjusted or real fraction of conservative votes that allows us to compare justices who sat on the Court in different time periods. We responded to Sunstein's second criticism by focusing on the adjusted rankings of justices in the more hotly contested cases and comparing these results to the rankings in all nonunanimous cases. Both adjustments result in only minor changes in the rankings we presented in Epstein, Landes, and Posner (2013), but the changes should be interesting to anyone analyzing the behavior of an individual justice.

APPENDIX: ATTITUDINAL MODEL OF JUDGING

That 5–4 decisions are more ideologically divisive than most Supreme Court decisions is a basic premise of many social science theories of judicial behavior. For example, the widely used attitudinal model assumes that both the facts of cases and the justices' policy preferences can be ordered along a single ideological dimension (see, for example, Schubert 1965; Segal and Spaeth 2002). Figure A1 provides an example. There we show three justices (liberal, moderate and conservative) and three search-and-seizure cases (from extremely protective of individual rights to extremely intrusive).

Under the attitudinal approach, justices vote to uphold all searches to their left. Thus, all three justices will vote to permit the search in the extremely protective case (case 1); even the liberal justice can see that the police followed all the rules. And all three will vote against the search in the extremely intrusive case (case 3); even the conservative justice recognizes that the police disregarded the rules. Cases 1 and 3 are easy cases that create no dissent. Only in the hard case (case 2) does ideological divisiveness occur and lead to a split decision supporting the search (example adapted from Spaeth [1995]).

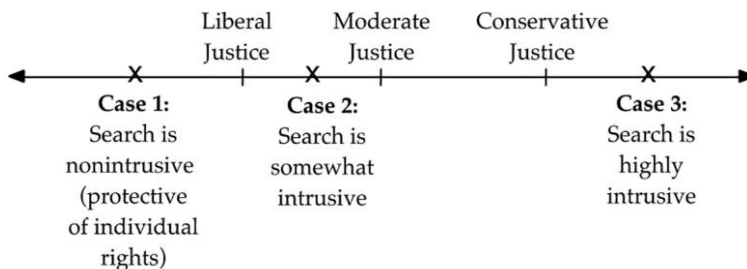


Figure A1. Attitudinal approach

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