

Replacing Justice Kennedy*

Lee Epstein, Andrew D. Martin & Kevin Quinn[†]

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

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

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

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

So that our analysis captures current realities on the U.S. Supreme Court, we use the 2017-18 term (provisional) Martin-Quinn scores to characterize the justices’ ideologies, even though the scores for the nominees (outlined below) end in 2017.

Possible Nominees Holding Federal Positions. Donald Trump released three lists of Supreme Court picks.³ Twenty-five names are on the most recent list (November 17, 2017).⁴

*This is an update of two previous studies, [President-Elect Trump and his Possible Justices](#), which was reported in the *New York Times* on February 1, 2017; and [Possible Presidents and their Possible Justices](#), which was reported in the *Times* on September 25, 2016.

[†][Lee Epstein](#) is the Ethan A.H. Shepley Distinguished University Professor at Washington University in St. Louis; [Andrew D. Martin](#) is the Dean of the College of Literature, Science, and the Arts and Professor of Political Science and Statistics at the University of Michigan; [Kevin Quinn](#) is Professor of Political Science at the University of Michigan. We thank the National Science Foundation for supporting our work on the U.S. Supreme Court. Data and documentation for this analysis are at: <http://epstein.wustl.edu/research/ReplacingJusticeKennedy.html>

¹Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, & Chad Westerland, “The Judicial Common Space,” 23 *Journal of Law, Economics, & Organization* 303 (2007).

²At: <http://mqscores.lsa.umich.edu>.

³May 18, 2016; September 23, 2016; November 17, 2017

⁴At: [President Donald J. Trump’s Supreme Court List](#).

The majority (19/25) are sitting federal judges or nominees for federal judgeships, as Table 1 shows. For these judges, we measure their ideology by the tried-and-true approach developed by Giles, et al.⁵

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

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

Name/ Position (Appointing President)	Year/Age & State of Birth	Law School	Clerkships
Amy Coney Barrett 7 th Circuit Judge (Trump)	1972 (46) Louisiana	Notre Dame	Silberman (CoA), Scalia (SCt)
Charles Canady Former MC; current FL SCt Justice	1954 (64) Florida	Yale	None
Steven M. Colloton 8 th Circuit Judge (Bush 2)	1963 (55) Iowa	Yale	Silberman (CoA), Rehnquist (SCt)
Allison Eid 10 th Circuit Judge (Trump)	1965 (53) Washington St.	Chicago	JE Smith (CoA), Thomas (SCt)
Britt Grant Nominee, 11 th Circuit Judge (Trump)	1978 (40) Georgia	Stanford	Kavanaugh (CoA)
Raymond W. Gruender 8 th Circuit Judge (Bush 2)	1963 (55) Missouri	Washington University	None
Thomas M. Hardiman 3 rd Circuit Judge (Bush 2)	1965 (53) Massachusetts	Georgetown	None
Brett M. Kavanaugh D.C. Circuit Judge (Bush 2)	1965 (53) D.C.	Yale	Stapleton (CoA), Kozinski (CoA), Kennedy (SCt)
Raymond M. Kethledge 6 th Circuit Judge (Bush 2)	1966 (52) New Jersey	Michigan	Guy (CoA), Kennedy (SCt)
Joan Larsen 6 th Circuit Judge (Trump)	1968 (50) Iowa	Northwestern	Sentelle (CoA), Scalia (SCt)
Mike Lee U.S. Senator (R-Utah)	1971 (47) Arizona	BYU	Benson (DCt), Alito (CoA), Alito (SCt)
Federico A. Moreno S. Dist. FL Judge (Bush 1)	1952 (66) Venezuela	Miami	None
Kevin C. Newsom 11 th Circuit Judge (Trump)	1972 (46) Alabama	Harvard	O'Scannlain (CoA), Souter (CoA)
William H. Pryor, Jr. 11 th Circuit Judge (Bush 2)	1962 (56) Alabama	Tulane	Wisdom (CoA)
Margaret A. Ryan Armed Forces Judge (Bush 2)	1964 (54) Illinois	Notre Dame	Luttig (CoA), Thomas (SCt)
David Stras 8 th Circuit Judge (Trump)	1974 (44) Kansas	Kansas	Brunetti (CoA), Luttig (CoA), Thomas (SCt)
Diane S. Sykes 7 th Circuit Judge (Bush 2)	1957 (61) Wisconsin	Marquette	Evans (DCt)
Amul R. Thapar 6 th Circuit Judge (Trump)	1969 (49) Michigan	Berkeley	Spiegel (DCt), NR Jones (CoA)
Timothy M. Tymkovich 10 th Circuit Judge (Bush 2)	1956 (62) Colorado	Colorado	Erickson (CO SCt)
Don Willett 5 th Circuit Judge (Trump)	1966 (52) Texas	Duke	JS Williams (CoA)
Patrick R. Wyrick Nominee, W. Dist OK Judge (Trump)	1981 (37) Texas	Oklahoma	Payne (DCt)

Table 1. Federal judges and legislators on the President’s short list. Age (in parentheses) is age at the end of 2018, which may not be the judge’s current age. Source for all but Canady, Grant, Lee, Ryan, and Wyrick is the [Federal Judicial Center’s Biographical Directory of Federal Judges](#). Because Lee and Canady are (were) legislators, Ryan serves on an Article I court, and Wyrick and Grant are nominees, they are not listed in the FJC’s directory. We obtained information from U.S. Senate Judiciary Committee’s questionnaires and various websites, including [Lee’s Senate site](#), [Ballotpedia](#), and [Pace Law](#).

Because Giles, et al. use Lewis, Poole, and Rosenthal’s NOMINATE scores to measure the senators’ and presidents’ ideology, we can place federal judges in the same left-right space as the current justices.⁶ The same holds for Mike Lee, the lone U.S. Senator on Trump’s list, and Charles Canady, a former member of the U.S. House of Representatives (currently a state supreme court justice) (see Table 1). Larsen and Stras, two Trump appointees to a court of appeals present more of a challenge. Both fall into category 3 above and so normally we would use Trump’s ideology score. Because it is not yet available, we substitute Vice President Pence’s score developed when he served in Congress.

Of course, we can’t say with any degree of (un)certainty whether our ideological placements of Canady, Lee, and the federal judges/nominees will predict their behavior on the U.S. Supreme Court; none are justices (yet). What we can say is that the ideological scores produce reasonably accurate predictions for Scalia and the current justices, as Table 2 shows.⁷ For example, based on Breyer’s lower court ideology we would expect him to vote 37.4% of the time in the conservative direction. Breyer’s actual percentage is 40.3%—for an error rate of 2.9 percentage points. For some justices the fit is even better (*e.g.*, Kagan and Kennedy) and for some slightly worse (*e.g.*, Sotomayor and Alito) but, overall, there’s a strong and statistically significant relationship ($p < 0.01$) between the justices’ lower court scores and their voting on the Supreme Court.

Justice	Justice’s Ideology Score	Predicted Percent Conservative	Justice’s Percent Conservative	Error
Alito	0.557	57.9	63.6	5.8
Breyer	-0.413	37.4	40.3	2.9
Ginsburg	-0.504	35.4	36.3	0.9
Gorsuch	0.693	60.8	55.9	-4.9
Kagan	-0.354	38.6	36.9	-1.7
Kennedy	0.506	56.8	54.6	-2.2
Roberts	0.693	60.8	57.3	-3.5
Scalia	0.692	60.7	61.1	0.4
Sotomayor	-0.301	39.7	36.0	-3.7
Thomas	0.557	57.9	63.9	6.1

Table 2. Predictions of the justices’ voting based on their lower court ideology score (for Kagan, Obama’s score). Percent conservative calculated from the [U.S. Supreme Court Database](#), with decisionType=1 or 7 and term ≥ 2005. $R^2=0.89$; RMSE=4.13.

Possible Nominees Serving as State Judges. The remaining four names on Trump’s list are state supreme court justices (see Table 3). Unfortunately, there is no equally tried-and-true method of including these justices in same policy space as Supreme Court justices. To

⁶These scores are at: <https://voteview.com>. Updated scores for the court of appeals judges are at: <http://epstein.wustl.edu/research/JCS.html>. Christina L. Boyd maintains the district judges’ scores at <http://clboyd.net/ideology.html>.

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

avoid excluding them, we rely on the JCS score of the federal judge/justice for whom they clerked. Using this approach we are able to incorporate all but Young who never served as a clerk. (Neither did Canady. But, recall, we measured his ideology with his score as a member of the House of Representatives.)

Name/ State Supreme Court	Year/Age & State of Birth	Law School	Clerkships
Keith R. Blackwell Georgia	1975* (43) Georgia	Georgia	Edmondson (CoA)
Thomas R. Lee Utah	1964 (54) Arizona*	University of Chicago	Wilkinson (CoA), Thomas (SCT)
Edward Mansfield Iowa	1957* (61) Massachusetts	Yale	Higginbotham (CoA)
Robert P. Young Michigan	1951 (67) Iowa	Harvard	None

Table 3. Sitting state supreme court justices on the President’s short list. We exclude Canady because he was a former member of Congress (see Table 1). Age (in parentheses) is age at the end of 2018, which may not be the judge’s current age. * indicates difficult-to-verify information. Sources include state supreme court and the Federalist Society websites and Ballotpedia.

Relying on clerkships to assess the state justices’ ideology is novel, and so we must emphasize that this measurement strategy has not been validated, much less extensively scrutinized. Nonetheless, the results appear plausible, as we’ll see in the next Section. (Note: In the last version of this report, we wrote that the results appear plausible *with the possible exception of Willett*. Because Willett is now a federal court of appeals judge, we are able to use a more time-tested measure of his ideology.)

2 Possible Nominees as Justices

Figure 1 shows where Trump’s candidates would fit on the current Court if they were to become justices.

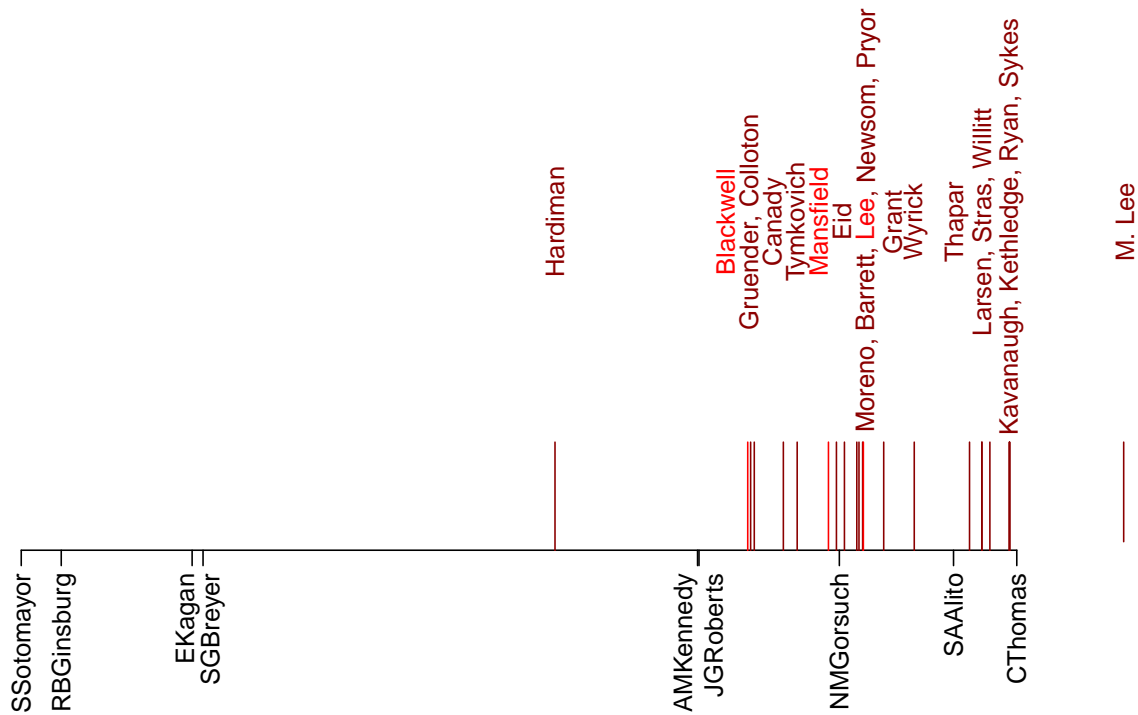


Figure 1: Left-right placement of the 2017-18 term justices and 24 possible nominees to the Court. Candidates holding a federal office are in maroon, as is Canady who served in Congress; state supreme court justices are in red.

All but one of the potential Trump nominees are to the right of (more conservative than) Kennedy, but their ideological range is greater than it is for current Democratic appointees (even excluding the extremes Hardiman and M. Lee).⁸

1. *Moderately Conservative (between Kennedy and Gorsuch).* Only our estimate for Hardiman⁹ falls into a moderate category: Were he to replace Kennedy, he may be sufficiently close to the center to form majority coalitions with the left or right side of the Court—in much the same way that Kennedy and O’Connor did throughout the 1990s and 2000s. But there are 7 judges in the interval between Kennedy and Gorsuch (from Blackwell to Eid) who could be thought of as moderately conservative in that they may be more likely to join Roberts than, say, Alito or Thomas.
2. *Conservative (between Gosuch and Alito).* Another 7 of the short-listed judges fall into this category—roughly the same category (or ideological range) as Gorsuch-Alito (Moreno to Wyrick). The possibility of ideological drift aside (more on drift below), we predict that all 7 will be reliable conservatives voting to limit gay rights, uphold

⁸It is also possible that Young is to the left of Kennedy but our measurement procedures do not allow us to place him on the line in Figure 1.

⁹Under the JCS procedure, Hardiman is located halfway between Senators Santorum and Spector (who was rather far to the left for a Republican).

restrictions on abortion, and invalidate affirmative action programs (as Alito has done throughout his career).¹⁰ More generally if we use Alito as our guide, we would expect these 7 candidates to reach conservative decisions in 64% of all cases and in 74% of non-unanimous decisions. The percentages for Kennedy, by comparison, are 55% and 58%.¹¹ (The differences between Alito and Kennedy are statistically significant at $p < 0.01$.)

3. *Extremely Conservative (to the right of Alito)*. Lee—the most conservative member of the U.S. Senate according to Lewis et al.’s scores—is obviously the most extreme of the potential nominees, to the right of even Thomas. But 8 others, from Thapar to Kavanaugh/Kethledge/Ryan/Sykes would also, we estimate, vote about as conservatively as Thomas. In other words, should any get the nod, Thomas (and Alito) would be less isolated on the extreme right.

3 Ideological Drift

These predictions assume that once on the Court, the second Trump appointee will not be a turncoat (e.g., Warren, Souter) or leftward drifter (e.g., Blackmun, O’Connor, Kennedy). Empirical studies, however, question this assumption. They have found that as many as half of all justices serving since 1937 diverged from their president’s ideology or otherwise drifted to the right or, more typically, to the left.¹²

Why? Epstein, Landes, & Posner tested, and ultimately confirmed, the hypotheses that justices are less likely to drift to the right if they were a federal official (including a judge) working in the District of Columbia at the time of their appointment.¹³ Perhaps the president has better information about potential appointees who are inside the Beltway. Or perhaps newcomers to Washington are more vulnerable to criticism, and more grateful for praise, from (some left-leaning) reporters.¹⁴ As Judge Silberman of the D.C. Circuit put it, “I do not think I fully appreciated until I became a judge . . . how much an impact press coverage can have on judges. [I] understand better today the reason for the evolution of some judges. More often than not it is attributable to their paying close attention to newspaper accounts of their opinions.”¹⁵

¹⁰We base this claim on a cut-point analysis, available on request.

¹¹We used the [Supreme Court Database](#) to calculate these percentages. We base them on the 2005-2017 terms in orally argued cases resulting in a signed opinion of the Court or a judgment.

¹²*E.g.*, Andrew D. Martin & Kevin M. Quinn, “[Assessing Preference Change on the U.S. Supreme Court](#),” 23 *Journal of Law, Economics, & Organization* 365 (2007); Lee Epstein, et al., “[Ideological Drift Among Supreme Court Justices](#),” 101 *Northwestern University Law Review* 1883 (2007); Lee Epstein, Willam M. Landes, & Richard A. Posner, *The Behavior of Federal Judges* (Harvard University Press, 2013) .

¹³Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006), 144; Linda Greenhouse, “Justices Who Change: A Response to Epstein, et al.” 101 *Northwestern University Law Review* 1885 (2007).

¹⁴This is known as the “Greenhouse Effect,” named for the long-serving Supreme Court correspondent for the *New York Times*, Linda Greenhouse. For an analysis, see Baum, note 13. Perhaps the emergence of conservative and libertarian blogs have worked to offset this effect.

¹⁵Quoted in Baum, note 13, 139.

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

As Table 4 shows, only three nominees now working in Washington appear on Trump’s list (Kavanaugh, Lee and Ryan)—even though there are other plausible D.C. candidates (notably former Solicitor General Paul Clement¹⁶). Apparently, the idea is to “send a message that [the Trump administration] is an outside-the-Beltway organization.”¹⁷

¹⁶For possible reasons for their exclusion, see Adam Liptak, “Trump’s Supreme Court List: Ivy League? Out. The Heartland? In.,” *New York Times*, November 14, 2016.

¹⁷John G. Malcolm, a director and fellow at the Heritage Foundation, who suggested some of the names on Trump’s shortlist, quoted in Liptak, note 16.

Name	Washington, D.C. Work Connections
Amy Coney Barrett	None
Keith R. Blackwell	None
Charles Canady	None
Steven M. Colloton	Special Assistant to the Attorney General, Office of Legal Counsel, 1990-91
Allison Eid	None
Britt Grant	None
Raymond W. Gruender	None
Thomas M. Hardiman	None
Brett M. Kavanaugh	Currently works in Washington as a Judge
Raymond M. Kethledge	None
Joan Larsen	Assistant Attorney General, Office of Legal Counsel, 2002-03
Mike Lee	Currently works in Washington as a U.S. Senator (R-Utah)
Thomas R. Lee	Deputy Assistant Attorney General, Civil Division, 2004-05
Edward Mansfield	None
Federico A. Moreno	None
Kevin C. Newsom	None
William H. Pryor, Jr.	None
Margaret A. Ryan	Currently works in Washington as a Judge
David Stras	None
Diane S. Sykes	None
Amul R. Thapar	Assistant U.S. Attorney, District of Columbia, 1999-2000
Timothy M. Tymkovich	None
Don Willett	Special Assistant to the President (George W. Bush), 2001-02 Deputy Assistant Attorney General, Office of Legal Policy, 2002-03
Patrick R. Wyrick	None
Robert P. Young	None

Table 4. Working in Washington, D.C. or work experience in the executive branch in Washington, D.C. Canady worked in Washington when he was a member of Congress but no longer lives there; and he never held a federal executive position in D.C. Between college and law school, Eid worked as an assistant and speechwriter to the U.S. Secretary of Education. Likewise, before law school Britt held various positions in the White House during the George W. Bush administration, and while in law school she worked for a month (January 2006) in the Justice Department’s Office of Legal Policy. For sources, see Tables 1 and 3.

Note, though, that five of the short-listers worked under Republican presidents in the executive branch in Washington, which may mitigate the risk of drift¹⁸—or at least reflect greater dedication to conservative causes.¹⁹ Alito provides an example. He was not living in Washington at the time of his nomination, but he came to the Court with substantial executive branch experience in D.C.: assistant to the Solicitor General and deputy assistant attorney general during the Reagan years. Unlike Kennedy or Souter, neither of whom ever worked in Washington, Alito shows no signs of drift or divergence.

Emerging from this analysis and the existing literature is a straightforward prediction:

¹⁸See Michael C. Dorf, “Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and Others Don’t?,” 1 *Harvard Law & Policy Review* 457 (2007), at 457 (“[A]n especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal [is] experience in the executive branch of the federal government. Those who lack such experience evolve; those who have it do not.”).

¹⁹Dorf, note 18, 458.

Were Trump to reach into the heartland or the South, and select a nominee with little or no connection to Washington, D.C., he might well trade off elitism and insiderism in favor of (possible) short-term electoral benefits, as well as incur the policy costs of ideological divergence or drift.

Appendix. Other Approaches to Locating Judges (and Cases) in Ideological Policy Space

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

For three reasons, we respectfully disagree.

1. Meehl's meta-analysis of more than six decades ago demonstrated that expert judgment is almost always inferior to systematic scientific assessment; it may be even worse than novice evaluations.²⁰ Many follow-up studies have endorsed or confirmed Meehl's conclusions. For a review relevant to law, we recommend Caldeira's commentary on a competition between a statistical model and legal experts over predicting Supreme Court outcomes.²¹ That the model generally outperformed the experts hardly surprised Caldeira. In light of the long line of literature demonstrating that "human judges are not merely worse than optimal regression equations; they are worse than almost any regression equation," Caldeira would have been astonished had the competition come out the other way.
2. As for a close reading of the judges' opinions: We know that federal judges who have a realistic prospect of promotion to the Supreme Court (now all the judges on Trump's short list) alter their judicial behavior in order to improve their chances—in other words, they "audition" for an appointment to the Court.²² We also know that on the U.S. Courts of Appeals there is substantial "dissent aversion" (a reluctance by some judges to dissent publicly even when they disagree with their colleagues' decision), which means that the ideological composition of the judges' circuits (and so the panels on which they serve) will affect their votes.²³ Taken together, these factors suggest that lower court records may be poor, even misleading, predictors of how judges will vote as justices (and Epstein, Landes, & Posner demonstrate as much²⁴).
3. See Table 2. Although we don't know, and can't know yet, whether the predictions will be as accurate for the candidates on Trump's short list as they are for recent justices, the strong fit between the lower court scores and Supreme Court voting is encouraging.

²⁰Paul Meehl, *Clinical versus Statistical Prediction: A Theoretical Analysis and Review of the Evidence* (original copyright, 1954).

²¹Gregory A. Caldeira, "The Supreme Court Forecasting Project: Prediction versus Explanation and Statistical Models versus Expert Judgments," 2 *Perspectives on Politics* 777 (2004).

²²Epstein, Landes, & Posner, *The Behavior of Federal Judges*, note 12, especially Chapter 8.

²³Id., Chapter 6. See also Lee Epstein, William M. Landes & Richard A. Posner, "Why (and When) Judges Dissent," 3 *Journal of Legal Analysis* 101-137 (2011).

²⁴Epstein, Landes, & Posner, *The Behavior of Federal Judges*, 279-281, note 12, 279-281.