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### Title

Drift, Draft, or Drag: How U.S. Supreme Court Justices React to New Members

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## Introduction

We theorize that sitting Supreme Court justices strategically react to new members in order to preserve the institutional credibility of the Court. The theoretical motivation behind our work is straight-forward. Given the small number of justices, one member could easily shift the aggregate ideology of the Court by changing that justice's individual ideological position, for example, by becoming much more liberal or much more conservative. Yet, individual justices rarely change their ideological positions in the short-run and the changes, if made at all, are small. Despite this potential for dramatic policy shifts by sitting justices, the ideological equilibrium in the Supreme Court is rarely distorted from the inside by those sitting justices. That is, the Court normally preserves the status quo, or moves incrementally, and sitting justices rarely make dramatic policy shifts.

Membership change, on the other hand, could have a dramatic effect on the aggregate ideology of the Court if new members have different ideological positions than the retiring or replaced justices (Sunstein 2007). For convenience, we refer to any departed justice as "retiring" even if the justice left the bench for other reasons such as death. Such shifts in the aggregate ideology of the Court, or the mean ideology of individual justices, may in turn have a dramatic effect on the Supreme Court agenda and general deliberation process. If sitting justices have ideological preferences over policy outcomes, then we would expect them to be affected by the membership change. Furthermore, we would expect them to adjust their own policy positions in order to reach a new equilibrium, i.e., reach a state of the world such that no justice would have an incentive to unilaterally change his/her policy position any further. Such equilibrium would persist until further membership changes occurred or some other external shocks, such as war, terrorist acts, and other major events altered policy positions. While not previously applied to the Court, the phenomenon of institutional balancing is not an entirely novel concept (Fiorina 1988; Alesina and Rosenthal 1995). For example, the party of the president is often penalized during the midterm elections in the US (Campbell 1960). Similarly, the 'second-order' elections penalize the ruling party in parliamentary systems (Reif and Schmitt 1980). For our purposes, we expect justices will balance their own preferences against the institutional cost in lost legitimacy whenever a potential change in policy occurs as a result of a new member. To our knowledge, policy balancing in the Supreme Court following membership changes has not previously been considered or shown.

## Revealed Preferences and Strategic Shifts

An assessment of the Supreme Court as a whole often begins with an assessment of the justices as individuals. The attitudinal model, for example, accounts for judicial behavior through the lens of the revealed preferences of justices (Schubert 1974; Rohde and Spaeth 1976; Segal and Spaeth 1993). It operates on the assumption that the personal attitudes of the justices on the Supreme Court will correlate closely with their actual actions. Therefore, their revealed preferences or ideal points are reasonable proxies for their actual or personal preferences. While attitudinal models do not explicitly assert that preferences or attitudes of justices are fixed, the norm for empirical work in this area is an assumption of fixed ideal points. Fixed measures in the literature are derived from newspaper editorials during confirmation (Segal and Cover 1989), party identification (George and Epstein 1992), and measures of socio-economic background (Tate 1981). These fixed measures produce robust results in some litigation areas like civil rights, but are less useful in other areas like federalism (Epstein and Mershon 1996). A related vein of research, the strategic model, suggests that justices pursue their policy preferences within their institutional setting which is configured as an interdependent choice arena (Eskridge 1991; Epstein and Knight 1998). Although the theoretical construct does not assert fixed preferences, empirical testing of the strategic model has also operated under an assumption of fixed preferences (Eskridge 1991; Spiller and Gely 1992; Segal 1997). As Martin and Quinn (2007) point out, the use of fixed preferences has been driven by empirical convenience rather than theoretical necessity.

Recent scholarship has cast serious doubt upon the assumption of fixed preferences. Virtually all justices become either more liberal or more conservative over time (Epstein et al. 1998, 2007; Martin and Quinn 2007; Ruger 2005; Segal et al. 2000; Ulmer 1973, 1979). Some explanations of the impetus for the drift have focused on a “newcomer” effect (Bowen and Scheb 1993; Hagle 1993; Howard 1965). Other explanations look to the larger political environment for answers (Baum 2006; Epstein et al 2001; Ulmer 1979). Arising from an assessment of the causes of drift, emerging scholarship has begun to address the impact of membership change including as set in the environment of a collegial court (Meinke and Scott 2007). As recent evidence suggests, the ideological position of newly appointed justices may be of particular interest and importance given the possible ideological responses to newcomers from other – sitting – justices (Greenburg 2007).

Using the Martin-Quinn ideology scores (Martin and Quinn 2002, 2005), we examine how the policy positions of sitting justices shift in response to policy positions of the newly appointed justices. The Martin-Quinn scores are estimates of how liberal (negative values) or conservative (positive values) the Supreme Court justices are *relative* to each other given their *observed* behavior (Martin and Quinn 2002). We describe this in more detail below. The use of the Martin-Quinn ideology scores also allows us to account for variation in the agenda or docket of the Court because they are measures of the relative ideology of the justices. That is, since the measures assess the ideological placement of the justices in relation to each other, we need not be overly concerned that cases decided one year may not be substantively similar to the cases decided the next year. While perhaps not perfect, this is a parsimonious way to account for changes in the agenda of the Court.

A membership change may affect sitting justices one of three ways and likewise, sitting justices may react to that change in one of three ways. Membership change may affect a sitting justice positively (new member is ideologically closer to the sitting justice), negatively (new

member is ideologically farther), or not affect at all (the new and retiring members are equidistant from the sitting justice). There are three ways a justice may change his or her policy position in response to a new member. First, a justice may move toward that member in policy space. We call this “draft” because the sitting member is carried along behind the movement of the new member. Notice that such behavior *amplifies* the change in the aggregate ideology of the Court caused by the membership change. Alternatively, a sitting justice may move in the opposite direction to counterbalance the impact of the new member. We call this “drag” since the strategic calculus is to reduce the impact of the new justice on the change in the aggregate ideology of the Court. The third possibility would be simply no response if the new member is unlikely to shift the aggregate Court ideology or if sitting justices accept the membership change as is. We call this non-response “drift.” Notice that in the cases of draft and drag each sitting justice faces a social dilemma: how much to amplify, or counterbalance, the ideological change given that other sitting justices face the *same* problem. In our empirical examination of individual justice’s behavior below, we account for this problem of collective action by controlling for the behavior of “other” sitting justices through some of the robustness check specifications.

Our results suggest that membership change in the Supreme Court has a discernable effect on the revealed policy positions of sitting justices. At the aggregate level, the Court seems to move to counter-balance the ideological change brought about by a new justice. One possible implication of the result, which we discuss in greater detail below, is that such counter-balancing behavior may provide greater institutional stability of the Supreme Court. The contrarian movement of drag ensures an institutional rigidity that lessens any new member’s ability to move the aggregated policy position of the Court in any substantial fashion.

At the individual level, however, it is clear that not all justices act to counter-balance the ideology of the new member in the same way. Justices who are more sympathetic to the new member make the smallest counter-balancing moves. In the extreme, such justices may ignore the appointment altogether (“drift”), or even move in the direction of the new member (“draft”). In the majority of cases, however, justices’ ideology scores move against the direction of the membership change (“drag”), including the justices who would benefit from the membership change. In other words, membership change in the conservative direction leads to a greater response from liberal justices while a change in the liberal direction leads to a greater response from the conservative justices.

Statistically, changes in ideological extremism are mostly explained by the changes in individual utility resulting from the membership change (assuming a Euclidian utility function as described below in detail). The further away a new member’s ideology score is from those of the existing members, the greater is the utility loss, and the more strongly the existing members will respond in order to counterbalance the impact of the new member. Those justices who lose most utility as a result of membership change respond by becoming more ideologically extreme, that is, move away from the mean ideological position of other justices.

Looking at the membership change in the Supreme Court through a historical perspective allows us to qualify our results further. Although counter-balancing (“drag”) has been the most prominent response in the Supreme Court overall, drag was mostly a feature of 1938-1948 and 1975-1995 periods. The 1938-1948 period we call a period of “Constrained Liberalism” when the newly appointed justices tended to be more liberal than the retiring ones and when the sitting justices moderated the change by moving in the conservative direction. Conversely, 1975-1995 is the opposite. It is a period of “Constrained Conservatism” with more conservative

appointments and a general moderation by sitting justices in the liberal direction. On the other hand, 1950s and 1960s are mostly characterized by a “liberal drift” while the early 1970s are characterized by “conservative” drift. In the latter two periods, membership change in the Supreme Court had a marginal effect on the ideology positions and policy responses of sitting justices.

### **Counter-Balancing and Supreme Court Incrementalism**

As shown below, the prevalence of drag as a typical response of Supreme Court justices to membership changes (especially during 1938-1948 and 1975-1995) may underlie the institutional stability of the Supreme Court and its tendency towards incremental changes. Rosenberg (1991) suggests the Supreme Court is unwilling or incapable of instilling major social change. Other scholars have determined the Court is responsible for incremental movement in public opinion once it issues modest alterations on public policy (Marshall 1987, 1989; Franklin and Kosaki 1989).

Why do justices tend to counter-balance newcomers’ ideology positions if the latter are significantly different from the ideological positions of retiring justices? Extant literature points to a well documented link between institutional legitimacy and the public reaction to the Court’s rulings is (Gibson 1989, 1991; Tyler and Rasinski 1991; Mondak 1993). For the Court, policy legitimacy and institutional legitimacy are inextricably linked (Mondak 1994). Clearly a concern for institutional legitimacy serves as a constraint on action – and therefore a cause of incrementalism (Flemming and Wood 1997; Wahlbeck 1997). Indeed, both the status quo of the law and the hesitancy to move from the status quo play a critical role in the development of law and in the content of legal opinions (Bonneau et al 2007). The received wisdom is that the Court as a whole moves rather slowly and risks a loss of institutional legitimacy if it moves quickly. This observed incrementalism suggests that justices balance their own preferences against the institutional cost in lost legitimacy whenever a change in policy occurs (Flemming and Wood 1997). An incentive to avoid such costly change may explain counter-balancing behavior, even for those justices who are ideologically closer to new members than to retiring members and who still tend to moderate the ideological shift by moving their own policy position opposite to the direction of this ideology shift.

Our results may explain why conservative appointments to the Supreme Court in recent decades (Period of “Constrained Conservatism”) have not necessarily lead to major shifts toward the conservative social agenda. For example, *Planned Parenthood v. Casey* (505 U.S. 833, 1992) replaced the trimester test with an undue burden standard but still reaffirmed *Roe v. Wade* (410 U.S. 113, 1973). Affirmative action in the form of race-based university admissions survived through *Grutter v. Bollinger* (123 S.Ct. 2325, 2003). Although the Court concluded in *City of Richmond v. J.A. Croson Co* (488 U.S. 469, 1987) that state affirmative action plans are subject to strict scrutiny on review, it held that federal plans are subject to mid-tier review (*Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 1990). Through *Lee v. Weisman* (505 U.S. 577, 1992) the Court extended *Engel v. Vitale* (370 U.S. 421, 1962) and again banned school prayer - at an optional middle school graduation ceremony. The Court struck down a Texas statute that criminalized same sex sexual conduct as unconstitutional in *Lawrence v. Texas* (123 S. Ct. 2472, 2003). In *Kelo v. City of New London* (545 U.S.469, 2005) the Court ruled that the taking of property for economic development does not run counter to the “public use” restriction

of the Fifth Amendment. The attempt by the Bush administration to use military commissions for the prosecution of enemy combatants was thwarted by the Court in *Hamden v. Rumsfeld* (126 S.Ct. 2749, 2006). The cases are illustrative rather than exhaustive.

## Data

To examine how justices' ideal points change in response to membership change in the Supreme Court, we construct a dataset using Martin-Quinn ideology scores, 1938-2004 period (Martin and Quinn 2002, 2005). The dataset is available online in Stata and Excel formats (<http://ms.cc.sunysb.edu/~osmirnov>). A minor disclaimer: throughout the paper we use the terms "justice's ideal preference point", "justice's ideology" and similar syntax in reference to the Martin-Quinn scores. In this respect, it is important to note that the scores are merely estimates derived from the observed behavior (possibly, strategic—*viz.* not sincere). The scores, therefore, may actually represent justices' policy positions and not necessarily their "true" preferences. With that in mind, for the sake of simplicity we use the terms "preferences" and "ideology" interchangeably.

In this paper we focus on the question of how justices react to membership change depending on their ideology as well as the ideology of the new members. At the same time, we notice that in absolute terms justices tend to change their ideological positions more in years when there is a membership change as opposed to years when there is no change (coef. = 0.040; 95% CI: [0.017; 0.063]; see `all_cases.*` Stata or Excel file online). As we mentioned above, justices tend to become more extreme over time (Epstein et al. 2007). It seems, however, that during the times of membership change, the propensity to become more extreme is amplified. Nevertheless, we are most interested in another question: how exactly do justices respond to new members and what factors determine such behavior?

To model the change we use the difference between a justice's ideal point in a year  $t$  and ideal point in year  $t - 1$ , where  $t$  is the year when membership of the Supreme Court changed. Formally, define  $J_t^i$  as the location of the ideal point of justice  $i = 1, 2, \dots, 8$  in the time period  $t$ . Note that maximum  $i = 8$  since there can be at most 8 justices remaining on the Court when there is a membership change. Also, maximum  $i = 7$  when two justices are replaced in a given year. Thus, the *justice's ideal point change* is  $\Delta_J^i = J_t^i - J_{t-1}^i$ , which is our first dependent variable.

The second dependent variable that we analyze is the *change in the relative ideological extremism*. We define  $X_t^i$  as the relative ideological extremism of justice  $i$  in the period  $t$ ,  $X_t^i = |J_t^i - \mu_t|$ , where  $\mu_t$  is the mean ideology in the Supreme Court at time  $t$ . In other words, the relative ideological extremism of a justice is the distance between the justice's ideal point and the ideological mean of the Court. Thus, the change in the ideological extremism is  $\Delta_X^i = X_t^i - X_{t-1}^i$ . Positive values indicate a change in a justice's ideology farther from the Court mean, while negative values imply ideological moderation.

A key explanatory variable that we create is the ideology change between the old and new members of the Court  $C_t = J_t^{A,1} - J_{t-1}^{L,1}$ , where  $J_t^{A,1}$  is the ideal point of a newly appointed justice in the time period  $t$ , and  $J_{t-1}^{L,1}$  is the ideology of a justice who left the Court in the period

$t-1$ . In the case of a two-justice change, which happened 5 times during the period that we cover (1937-2004), the variable is  $C_t = (J_t^{A,1} + J_t^{A,2}) - (J_{t-1}^{L,1} + J_{t-1}^{L,2})$ . Negative  $C_t$  implies a liberal membership change while a positive value means that a more conservative justice was appointed.

A possible criticism of this explanatory variable is that other—existing—members of the Court may update their ideal points in such a way that—from the point of view of justice  $i$ —the ideology of the Court would not change, or change differently from  $C_t$ . In other words, there may be a need to *control* for the reaction (response) of other justices (*not i*) to the membership change. To achieve this goal we create an alternative explanatory variable: the ideological change in the mean of the Supreme Court *keeping justice's i ideology constant*,  $\Delta_{\mu,t} = \mu_t^i - \mu_{t-1}^i$ ,

such that  $\mu_t^i = \left( J_{t-1}^i + \sum_{k=1}^8 J_t^k \right) / 9$ . However, as our analysis below suggests, the two alternative explanatory variables lead to identical results.

Finally, another important explanatory variable is a *change in justice's utility* resulting from the membership change, keeping the ideal point of justice  $i$  constant and equal to  $J_{t-1}^i$ . We define the justice's individual utility as a negative absolute distance between the justice's ideal point and the mean ideology of the Court. At time  $t-1$  the utility is  $U_{t-1}^i = -|J_{t-1}^i - \mu_{t-1}^i|$ , and at time  $t$  the utility is  $U_t^i = -|J_{t-1}^i - \mu_t^i|$ . Again, note that we are using  $J_{t-1}^i$  in the formula to avoid endogenizing the explanatory variable.

## Descriptive Statistics

In the period that we cover, 1937-2004, the membership of the U.S. Supreme Court changed 26 times (1 year is 1 unit of time). In 21 cases only one justice was replaced; in 5 cases two justices were replaced within a year. We are interested in the behavior of the existing justices who stay on the Court (8 in the case of a single replacement; 7 in the case of two replacements). Specifically, we are interested in how justices' ideal points change given the change of membership. Thus, the total number of cases that we analyze is  $N=203$  ( $21 * 8 + 5 * 7$ ).

The average change in the justices' ideal points is -0.02 (95% CI: -0.54, 0.16) with the standard deviation 0.25 suggesting that justices changed their ideologies in both directions more or less equally. The average cumulative difference between the new members and the old members of the Court was 0.55 (95% CI: 0.16, 0.95) suggesting that on average the replacements in the period that we study tended to be more conservative. This is also reflected in the change of the new mean ideology of the Court (keeping ideology of the justice of interest constant), which is 0.045 (95% CI: 0.07, 0.083). The correlation between the new justice's ideology change and the change in the new mean ideology of the Court is, not surprisingly, 0.95. The average change of the estimated *median* justice is not discernable from zero (-0.02; 95% CI: -0.93, 0.97).

*On average*, membership change did not have a positive or negative effect on the utility of the existing justices; the average utility change was 0.03 (95% CI: -0.01, 0.07). Similarly, the

*average* change in the ideological extremism of the existing justices (previously defined as the distance to the Court mean) is indistinguishable from zero, 0.04 (95% CI: -0.02, 0.09).

### **Aggregate Level Analysis**

The first question that we ask is how existing members of the Supreme Court react to the ideology of the new members. In order to answer this question at the *aggregate* level, we can examine dynamics of the mean ideology of the Court when the membership changes (N=26). In particular, we can compare the *actual change* in the mean with a *hypothetical change* in the mean, in which existing members of the Court do *not* change their ideal points (in this case, we use the justices' ideal points from the previous time period).

If the actual ideological change is the same as the hypothetical change, then existing members of the Court *as a whole* are unaffected by the new members. Of course, individual members may still change their ideologies, but the net effect—the mean of the change—will be zero. We call this case “*mere drift*” as a refinement on the term as used by Epstein et al. (2007). That is, the movement by the justice may be the result of a variety of forces such as individual reflection or growth, but it is apparently not a strategic response to a new member. On the other hand, if the actual ideological change is greater than the hypothetical change, then justices on average move in the direction of the new members. This is a case of bandwagoning, which we call “*draft*”. Finally, if the actual change in the Court mean is smaller than the hypothetical change, then justices on average move in the direction which is opposite to the ideology of the new members. This is a case of counter-balancing which we call “*drag*”.

Table 1 (below) shows the 26 cases when the membership of the Supreme Court changed from 1938 to 1994. These cases can be broken down as follows. There are 7 cases of drift: in 4 cases the new members were more liberal than the retiring ones and in 3 they were more conservative. There are 14 cases of drag: 7 cases of “liberal drag” (drag in the liberal direction) and 7 cases of “conservative drag” (drag in the conservative direction). Finally there are 4 cases of draft (all in the liberal direction). One case (1954) is indeterminate since the new justice Harlan had virtually same policy position as the retiring justice Jackson.



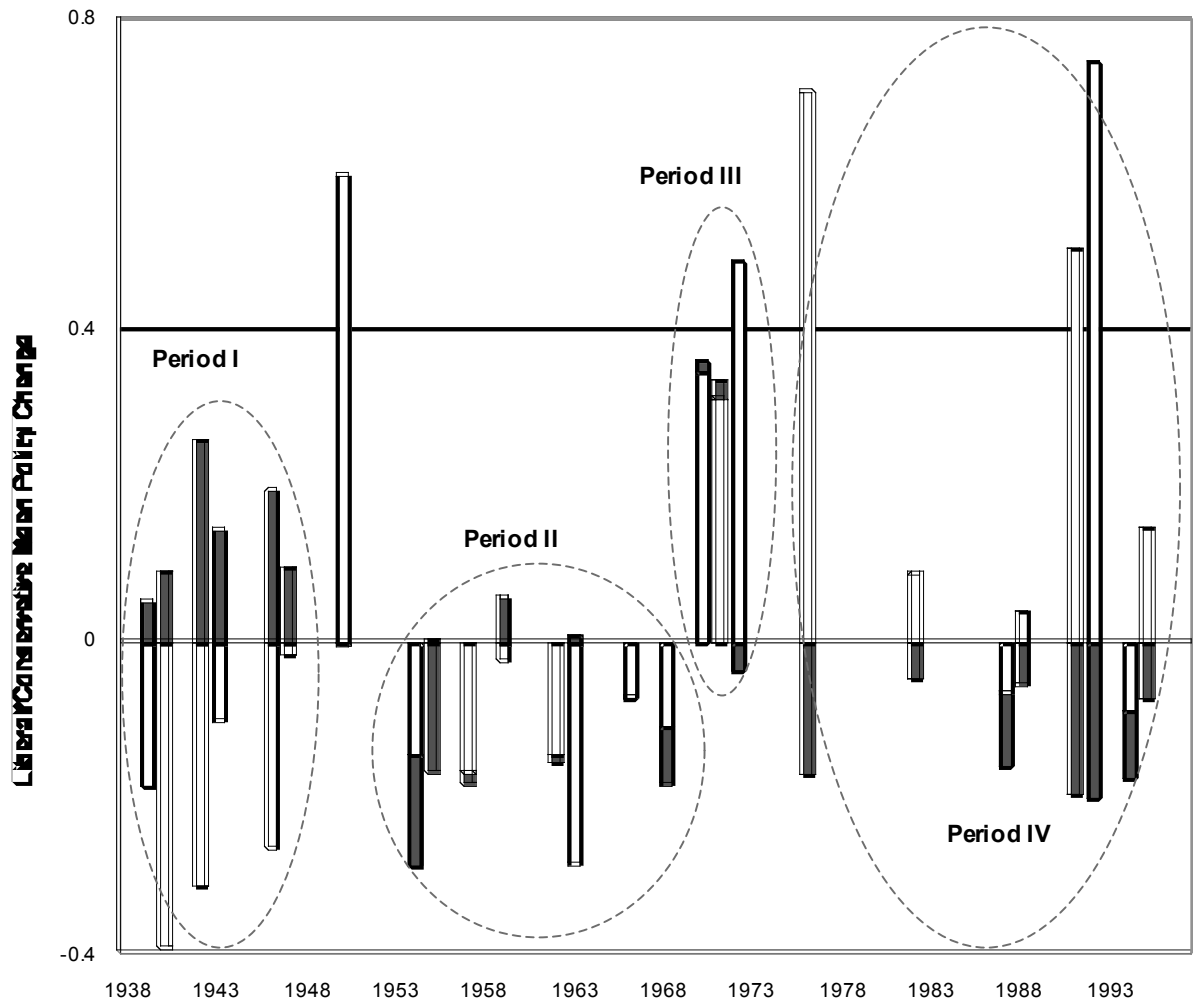
**Table 1. Supreme Court appointments and policy change at the aggregate level.**

| Year | Retiring justice(s) | New justice(s)       | Hypothetical change | Actual change | Case               |
|------|---------------------|----------------------|---------------------|---------------|--------------------|
| 1938 | Cardozo, Brandeis   | Frankfurter, Douglas | -0.185              | -0.133        | Conservative Drag  |
| 1939 | Butler              | Murphy               | -0.394              | -0.302        | Conservative Drag  |
| 1941 | McReynolds, Hughes  | Jackson, Byrnes      | -0.314              | -0.057        | Conservative Drag  |
| 1942 | Byrnes              | Rutledge             | -0.100              | 0.046         | Conservative Drag  |
| 1945 | Roberts             | Burton               | -0.266              | -0.071        | Conservative Drag  |
| 1946 | Stone               | Vinson               | -0.016              | 0.080         | Conservative Drag  |
| 1949 | Rutledge, Murphy    | Clark, Minton        | 0.600               | 0.599         | Conservative Drift |
| 1953 | Vinson              | Warren               | -0.144              | -0.287        | Liberal Draft      |
| 1954 | Jackson             | Harlan               | 0.003               | -0.165        | Indeterminate      |
| 1956 | Reed, Minton        | Brennan, Whittaker   | -0.168              | -0.184        | Liberal Drift      |
| 1958 | Burton              | Stewart              | -0.024              | 0.034         | Conservative Drag  |
| 1961 | Whittaker           | White                | -0.145              | -0.154        | Liberal Drift      |
| 1962 | Frankfurter         | Goldberg             | -0.285              | -0.276        | Liberal Drift      |
| 1965 | Goldberg            | Fortas               | -0.070              | -0.072        | Liberal Drift      |
| 1967 | Clark               | Marshall             | -0.108              | -0.183        | Liberal Draft      |
| 1969 | Warren              | Burger               | 0.346               | 0.360         | Conservative Drift |
| 1970 | Fortas              | Blackmun             | 0.311               | 0.335         | Conservative Drift |
| 1971 | Harlan, Black       | Powell, Rehnquist    | 0.489               | 0.451         | Liberal Drag       |
| 1975 | Douglas             | Stevens              | 0.707               | 0.538         | Liberal Drag       |
| 1981 | Stewart             | O'Connor             | 0.089               | 0.042         | Liberal Drag       |
| 1986 | Burger              | Scalia               | -0.064              | -0.161        | Liberal Draft      |
| 1987 | Powell              | Kennedy              | 0.041               | -0.013        | Liberal Drag       |
| 1990 | Brennan             | Souter               | 0.505               | 0.310         | Liberal Drag       |
| 1991 | Marshall            | Thomas               | 0.745               | 0.543         | Liberal Drag       |
| 1993 | White               | Ginsburg             | -0.089              | -0.175        | Liberal Draft      |
| 1994 | Blackmun            | Breyer               | 0.148               | 0.076         | Liberal Drag       |

Note: Hypothetical change represents the mean of policy positions of all justices (both new and sitting) under the assumption that sitting justices do *not* change their past policy positions. The actual change represents the mean of actual policy positions of all justices. “Liberal / conservative drift” is a case when sitting justices do not respond when the new justices are more liberal / conservative than the retiring ones.

Figure 1 (below) represents the timeline of Supreme Court appointments. The white bars show the policy change brought by the new justices under the assumption that the sitting justices do not change their own policy positions in response to the new justice. The black bars show the actual policy responses of the sitting justices. The size of the bars corresponds to the magnitude of the policy change.

Figure 1. History of the U.S. Supreme Court appointments, 1938 – 1994.



Note: The vertical axis represents mean policy change along the liberal–conservative policy space (negative values indicate change in the liberal direction; positive values indicate change in the conservative direction). The **white bars** represent policy change brought by the new justices under the assumption that sitting justices do *not* change their policy positions (same as “hypothetical change” in Table 1). The **black bars** represent the mean change in the actual policy positions of the *sitting* justices. When the white and black bars point in the same ideological direction, we have a case of *draft* (bandwagoning). When the white and black bars point in a different direction, we have a case of *drag* (counter-balancing). When the black bars are small or non-existent, we have the case of *drift* (no reaction from sitting justices).

Table 1 and Figure 1 suggest that the history of Supreme Court appointments can be divided into four distinct periods with one case being an obvious outlier.

**I. Period 1938-1948. Constrained liberalism.** In this period there were 6 appointments. In each case, new justices were more liberal than the retiring ones. In each case, the sitting justices responded at the aggregate level with a “drag” in the conservative direction.

**1949 outlier case.** In 1949 justices Clark and Minton replaced justices Rutledge and Murphy, leading to a major conservative change (0.600) in the mean policy position of the Supreme Court justices. The sitting justices, however, did not respond to this change.

**II. Period 1950-1968. Unconstrained and amplified liberalism.** In this period, there 8 appointments. In one case (1954), the new justice had the same policy position as the retiring one. In all of the seven other cases, new justices were more liberal than the retiring ones. In four of those (1956, 1961, 1962, 1965), sitting justices simply accepted the greater relative liberalism of new justices. Interestingly, all four cases of the “liberal drift” belong to this period. In one case (1958), we observe a minor conservative drag. Finally, the two remaining cases, 1953 and 1967, are the cases of “liberal draft” when sitting justices responded to more liberal replacements with their own aggregate move to the left.

**III. Period 1969 – 1974. Unconstrained (or mildly constrained) conservatism.** In this period, new justices appointed to the court were much more conservative than the retiring ones. Yet, the court at the aggregate level did not respond in any major way to the appointments. Early 1970s appointments characterized by conservative drift appear to be the opposite of early 1960s appointments characterized by the liberal drift.

**IV. Period 1975 – 1995. Constrained conservatism.** Just as Period III appears to be the opposite of Period II, Period IV appears to be the opposite of Period I. In six cases, the new justices were more conservative than the retiring ones. In the other two cases, the new justices were slightly more liberal. Note that one such “liberal change” was Scalia replacing more conservative Burger. In all eight cases, sitting justices responded to new appointments at the aggregate level by moving their own policy positions to the left.

Thus, Periods I and IV are primarily characterized by the counter-balancing drag. Periods II and III, on the other hand, are primarily characterized by drift, liberal in 1960s and conservative in 1970s.

An obvious question is how big is the drag and drift? The question can be answered in relative terms. How do the new appointments affect the mean policy positions in the court if we keep the policy positions of sitting justices constant? On average, new appointments lead to a 0.244 difference between the old and new mean policy position in the court. In the 14 cases of drag, this difference was decreased by an average of 0.120, or about 49% (0.128 for the conservative drag and 0.111 for the liberal drag). In the four cases of draft (all four – liberal draft), the difference increased by an average of 0.100, or about 41%. These numbers, along with the size of the black bars in Figure 1, suggest that the sitting justices’ response to the policy change brought by new appointments is more than just a statistical significance.

### **Individual Level Analysis**

So far we have studied the effect of new justices on the ideology of the Court at the aggregate level. Now we turn to an examination of the justices’ behaviors at the *individual* level. First we examine how membership change affects the “ideological extremism” of the existing justices. We previously defined this as the absolute distance between the justice’s ideal point and the Court mean. As an aside, using the expected median justice estimate instead of the Court mean, leads to substantively identical results.

**Table 2. Effect of membership change on the ideological extremism of justices.**

| Model                                       | 1.1   | 1.2                | 1.3                | 1.4                 | 1.5                 |
|---|---|--------------------|--------------------|---------------------|---------------------|
| Dep. Variable                               | <i>Change in the Ideological Extremism (distance to the mean)</i> |                    |                    |                     |                     |
| <i>Ideology relative to the Court mean</i>  | -0.046<br>(3.15)**  |                    |                    |                     | -0.022<br>(2.41)*   |
| <i>New members ideology change</i>          |   | -0.033<br>(3.46)** |                    |                     |                     |
| <i>Mean ideology change in the Court***</i> |   |                    | -0.349<br>(3.50)** |                     | -0.037<br>(0.60)    |
| <i>Justice's utility change***</i>          |   |                    |                    | -1.188<br>(19.75)** | -1.162<br>(18.62)** |
| <i>Years in Court</i>                       |   |                    |                    |                     | -0.003<br>(1.32)    |
| Constant                                    | 0.035<br>(1.26)   | 0.054<br>(1.95)    | 0.052<br>(1.86)    | 0.071<br>(4.33)**   | 0.103<br>(3.61)**   |
| Observations                                | 203   | 203                | 203                | 203                 | 203                 |
| R-squared                                   | 0.05  | 0.06               | 0.06               | 0.66                | 0.67                |

Absolute value of t statistics in parentheses  
\* significant at 5%; \*\* significant at 1%; \*\*\*keeping ideology of the justice constant

The most basic Model 1.1 in Table 2 suggests more conservative justices were less likely to become ideologically extreme than liberal justices. Model 1.2 further tells us that greater ideological extremism was observed when the new justices were more liberal. Notice that models 1.1 and 1.2 are, in fact, consistent with each other if liberal justices moved in the liberal direction with a liberal membership change (the case of bandwagoning, or draft). Model 1.3 is an alternative to Model 1.2, in which we examine the behavior of a justice *controlling for the behavior of all other justices* in the Court as reflected in the present Court mean while keeping the ideology of the justice of interest *constant*. The substantive result, however, remains the same.

Models 1.4 and 1.5 appear to explain changes in ideological extremism best. Notice the dramatic increase of the R-squared. Model 1.4 shows that the change in extremism is primarily a function of the justice's utility change. Justices who lose utility because of the membership change are much more likely to become ideologically extreme than justices who gain utility. The effect remains equally strong even when we control for other variables in Model 1.5.

We have shown that changes in the ideological extremism of justices are mostly a function of the change in the justice's utility. Justices who prefer new members of the Court to the old ones tend to move to the Court mean; otherwise, they move away from the Court mean to either conservative or liberal extreme. The results are universally stronger if the statistical model

is run on Periods I and IV data only during the periods of “Constrained Liberalism” and “Constrain Conservatism.”

This brings us to the next question. Ideological extremism is an absolute measure which does not capture ideological direction—whether the justice is conservative or liberal. To examine directional change, we use a new dependent variable: justice ideology change. Positive change implies a more conservative ideology while negative change implies a more liberal ideology.

**Table 3. Effect of membership change on the justices’ ideal points.**

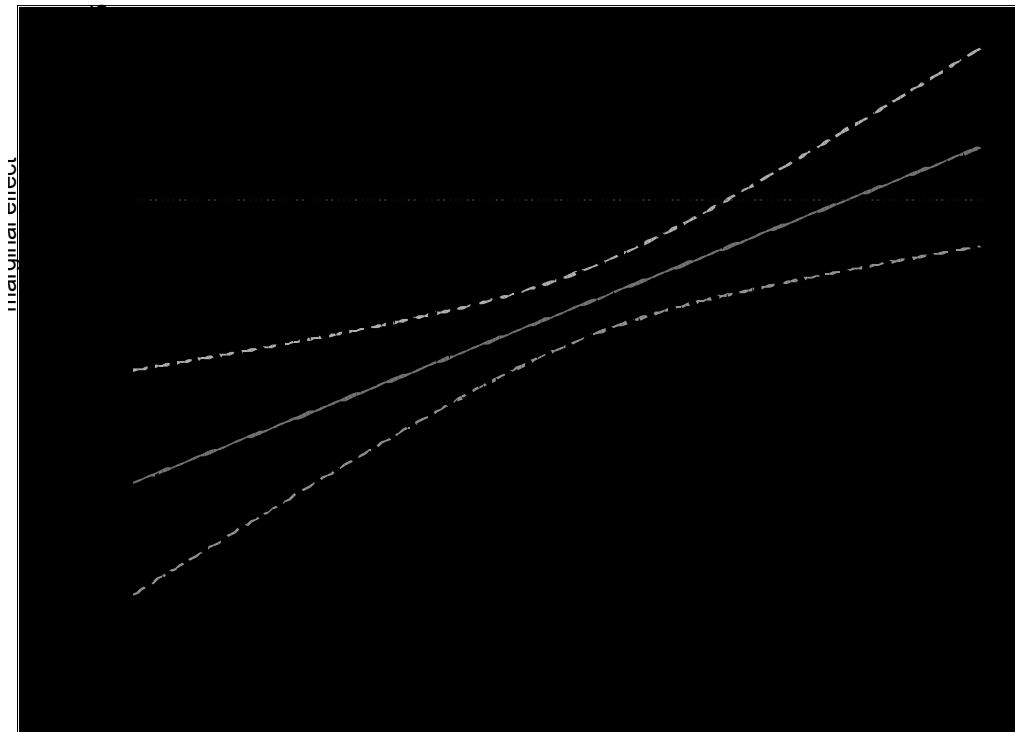
| Model  | 2.1  | 2.2                | 2.3                | 2.4                |
|--|--|--------------------|--------------------|--------------------|
| Dep. variable  | <i>Justice ideal point (Ideology) change (in absolute terms)</i> |                    |                    |                    |
| <i>New members ideology change</i>   | -0.026<br>(4.28)**   |                    | -0.041<br>(6.45)** |                    |
| <i>Mean ideology change in the Court***</i>                                    |  | -0.205<br>(3.23)** |                    | -0.428<br>(5.96)** |
| <i>Justice’s utility change***</i>   |  |                    | -0.149<br>(1.74)   | -0.098<br>(1.17)   |
| <i>Interaction: New members ideology change*Justice’s utility change</i>       |  |                    | 0.059<br>(3.29)**  |                    |
| <i>Interaction: Mean ideology change in the Court*Justice’s utility change</i> |  |                    |                    | 0.493<br>(2.72)**  |
| <i>Estimated median ideology change</i>  |  |                    | 0.229<br>(4.87)**  | 0.284<br>(5.44)**  |
| Constant   | -0.005<br>(0.28)   | -0.010<br>(0.56)   | 0.001<br>(0.04)    | -0.001<br>(0.03)   |
| Observations   | 203  | 203                | 203                | 203                |
| R-squared  | 0.08   | 0.05               | 0.21               | 0.19               |

Absolute value of t statistics in parentheses  
\* significant at 5%; \*\* significant at 1%; \*\*\*keeping ideology of the justice constant

The simple Model 2.1 in Table 3 indicates that justices move in the direction which is opposite to the ideology change brought by the new members of the Court. Controlling for the present behavior of other justices in the Model 2.2 does not change this result. The story, however, is more complex as Models 2.3 and 2.4 show. In these two models, we introduce an *interaction* variable—a product of membership change and utility change. The explanatory variables in Models 2.1 and 2.2 only tell us the direction and size of the change but the models do not tell us whether the justice of interest benefited from the ideological change or suffered a utility loss. Models 2.3 and 2.4 account for the direction, the size, and the utility impact of the change in membership. The interaction variable is positive and significant, which means that justices who lose utility make a much more dramatic counterbalancing move. Once again, the results are stronger if the statistical models are run on Periods I and IV data only which are the periods of drag.

Figure 2 shows the marginal effect of the utility change on the counterbalancing behavior of justices. The figure is created on the basis of the Brambor-Clark-Golder algorithm (Brambor et al 2006). The significance threshold for the marginal effect of the utility change is 0.41 indicating that even justices who gained utility (up to 0.41 units) amplify their counterbalancing behavior. The largest counterbalancing response occurs among the justices who lose the most utility, that is, who are the farthest from the ideological locations of the new members.

**Figure 2. Marginal effect of the utility change on the justice’s ideology change**



Note: The range of the *utility change* variable in the dataset is [-0.604, 0.643].

In other words, membership change in a liberal direction has no obvious effect on extreme liberals, makes moderate liberals slightly more *conservative*, and makes conservatives a

lot more conservative proportional to their conservatism. Conversely, a membership change in a conservative direction has no obvious effect on extreme conservatives, makes moderate conservatives slightly more *liberal*, and makes liberals a lot more liberal proportional to their liberalism. *Ceteris paribus*, such behavior over time has a *stabilizing* effect on the mean Court ideology, but not necessarily on its variance.

## Conclusion

We have shown that membership change in the U.S. Supreme Court has a discernable effect on the revealed ideology of other justices. At the aggregate level, the Court as a whole seems to counter-balance the ideological change brought by the new justices. Counter-balancing appears to be most frequent in the period of “Constrained Liberalism” (1938-1948) and the period of “Constrained Conservatism” (1975-1995). On the other hand, the 1950s, the 1960s, and the early 1970s are associated with other types of policy responses: drift and draft – when justices either ignored or even amplified ideological shifts caused by membership change. The latter is especially true for the liberal membership change in the 1960s.

At the individual level, not all justices act to counter-balance the ideology of the new members in the same manner. The farther a justice is located from the new member, the greater the counterbalancing move. Changes in ideological extremism are explained by the changes in individual utility brought about by the addition of opposite-minded members. Those who lose utility are most likely to become more ideologically extreme. In other words, various degrees of “drag” are more prominent in the Supreme Court than other types of behavior such as drift and draft. This analysis explains the effect of new members on the sitting justices, but also suggests a causal explanation for aggregate incrementalism at the Supreme Court level. This strategic reaction of sitting justices to new members ensures a relatively stable mean ideology for the Court. A stable mean ideology for the Court enhances its institutional credibility because it limits the potential for the Court to lurch toward new policy with each new member. Accordingly, the justices react to new members to preserve institutional credibility. This not only explains the institutional stability of the Court over time, it also serves as a cautionary note to anyone concerned with the political aspects of the Court. The appointment of extremists to the Supreme Court may be counterproductive to actual policy change. Moreover, the importance placed by interest groups on the policy positions of Supreme Court nominees should be tempered. The reality is that the justices seem to move in a strategic manner with an eye towards preserving institutional credibility as well as their own policy preferences.

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