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An Analysis of Natural Courts: How vacancies and replacements on the Supreme Court best determine the ideological shifts of the Court and what effect longevity has on ideology.

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by

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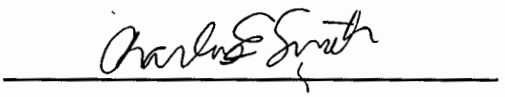

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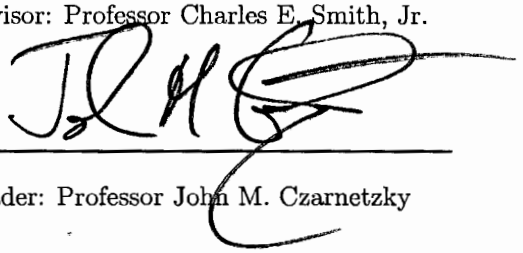

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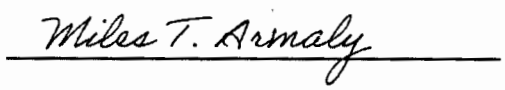

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Abstract

This thesis seeks to explore natural courts and ideology among members of the Supreme Court. Most studies of the Supreme Court allocate focus to the chief justice such that the justice and his ideology determines whether the Court will be described as liberal or conservative for the chief's tenure. However, this thesis questions this model of distinction for the highest court in the land. An analysis of natural courts from Marshall through Roberts specifically targets the highest and lowest ideological shifts between natural courts to understand how vacancies and replacements manipulate the ideology of the Court. In addition to the changes in justices on the Court, this thesis investigates how the length of a natural court affects voting behavior. The analysis of these two factors leads the author to conclude that the current model of labeling a given court is insufficient in capturing the ideology. While a change in the chief justice may shift the ideology of the Court one way or the other, such evidence only further substantiates the claim that it is the most junior justice who determines the ideological shift of the Court.

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1 Introduction

This thesis seeks to explore natural courts and ideology among members of the Supreme Court. Most studies of the Supreme Court allocate focus to the chief justice such that the justice and his ideology determines whether the Court will be described as liberal or conservative for the chief's tenure. However, this thesis questions this model of distinction for the highest court in the land. An analysis of natural courts from Marshall through Roberts specifically targets the highest and lowest ideological shifts between natural courts to understand how vacancies and replacements manipulate the ideology of the Court. In addition to the changes in justices on the Court, this thesis investigates how the length of a natural court affects voting behavior. The analysis of these two factors leads the author to conclude that the current model of labeling a given court is insufficient in capturing the ideology. While a change in the chief justice may shift the ideology of the Court one way or the other, such evidence only further substantiates the claim that it is the most junior justice who determines the ideological shift of the Court.

Two questions were posed in this thesis, allowing for the exploration of the Supreme Court Database. The first inquiry asks the following: do departing and replacement justices contribute more radically to the ideological shifts of the Court than does the serving chief justice? Given the changing nature of the Supreme Court, albeit less dramatic than changes from the two more democratically elected branches of government, as new associate justices fill vacancies on the bench, it would stand to reason that there may be more to learn about the ideology of the Court from the most junior justice than can be learned by its chief.From brief observation of recent natural courts, it would seem that replacement justices do more to sway the ideology of the Court than do chief justices. Since the election of President Trump, three conservative justices, Neil Gorsuch, Brett

Kavanaugh, and Amy Coney Barrett[1] have taken their seats on the highest court in the land. In a short tenure, both have proved to vote right of center in some distinguishing cases (Thomson-DeVeaux 2019). With the death of Justice Ruth Bader Ginsburg and subsequent vacancy of her seat, the Court has many opportunities to shift even further to the right if the president and senate can nominate and confirm a justice before Republicans lose either the White House or a Senate majority.

Sparking interest in this topic was the former Justice John Paul Stevens. In his book *Five Chiefs* he writes that he believes there may be some merit to the claim: there is more "trouble" done to the Court by a replacement justice than the presiding chief justice (2011). Having served more than twenty years on the Supreme Court, Justice Stevens saw justice after justice replaced and, subsequently, felt the shocks of junior justices who made their presence known on the court. Ultimately, this led him to conclude that replacement justices indeed have an unstudied magnitude on the Court that a chief justice simply cannot always muster. Perhaps a chief with moderate views can sway the ideology of the Court from case to case, but even then that tenure is cut short by an ambitious junior justices who reflect a different ideology from their predecessor. Two chapters of this thesis are dedicated to the exploration of the validity of Justice Steven's observation.

The second question lies with the longevity of natural courts: how does the length of a natural court's tenure effect its ideological score? Most notable of chief justices who rallied the Court together for opinion writing was Chief Justice Marshall. Desiring unanimity of decision making over schismatic dissents from opposing members, the chief rallied his bench to strength a fading branch of government. Today, many political scientists acknowledge the impact Chief Justice Marshall had on his subordinates. Such a strategy played well for the Court and granted them the place as the third branch of government as exercised today. Perhaps later justices realized this model, recreating it model for future success in a court legitimized by unanimity. If this was true for John Marshall and his court, do similar examples exist that would suggest the longevity of

[1]At the time this thesis was written, no data was available for the newest justice on the Court. The data from the Supreme Court Database spans from 1791 to a few decisions which include Justice Kavanuagh.

a natural court brings ideology together? Conversely, the practice could have quite the opposite effect of driving justices further into their ideological camps, deeper into their long-held beliefs. Such a claim states explicitly the goal of the final analysis chapter of this thesis.

The results of these analyses were clear: the most junior justice has the greatest affect on the ideological direction of the Court. When a justice departs from the bench, if his or her replacement is of similar ideology, the shift of the ideology of the Court is negligible. If the replacement justice is ideologically dissimilar to his or her predecessor, the ideological shift of the Court is much more dramatic. Similarly, when a natural court retains its members for a long period of time, the shift to the Court is much less drastic. And, members of the Court begin to vote together, making the Court balanced one way or the other. In chapters four, five, and six, these results will be further analyzed and the ideology of specific justices sitting on the Court during shifts or long natural courts will be discussed.

2 Literature Review

Before exploring the research questions as outlined in the introduction, it is important to note the growing field of academic literature on the Supreme Court. Much literature has explored the Supreme Court, specifically the decision making of justices and how the ideology of a justice affects his or her own decision making. However, lacking in almost all the literature is an analysis of all justices from Marshall to the seventh natural court of Chief Justice John Roberts. Nonetheless, the current academic research pertaining to the ideological shifts of the Court and natural courts is detailed as follows.

Two scholars quintessential to study of the Supreme Court are Jeffrey A. Segal and Albert D. Cover. In 1989, they developed a process for scoring the ideology of justices based on newspaper editorials (Segal and Cover 1989). The resulting score has been dubbed the Segal-Cover score. From Chief Justice Earl Warren to Justice Anthony Kennedy, editorials relating to their ideology from presidential nomination until the confirmation process

were analyzed for some hint at the judicial philosophy of the upcoming justice. As an independent source, the editorials gave a full view of the justice without a single decision being made at the Supreme Court (Segal and Cover 1989). The model produced scores that showed a high correlation between the ideology of the justice before confirmation and his or her votes in civil liberties cases once on the Court. However, this method does not account for the shift in ideology over the course of a justice‘s tenure as it relates to a long-serving natural court. Additionally, the scope of this study was limited to justices from Warren to Kennedy. The Supreme Court Database includes data on justice voting from the beginning of the Court through the 2019 term. Such a sample allows for greater analysis and more definable trends in justice ideology.

Another inquiry of the Supreme Court by David Cottrell, Charles R. Shipan, and Richard J. Anderson seeks to understand the connection between presidential nominations and change to the Supreme Court (2019). Here, the model showed how presidential appointments pull the ideological direction of the Court, either toward the president‘s ideology or away from it. The researchers developed a model to show when a presidential nominee to the Supreme Court would draw the Court closer to the “ideal point” of the president, influencing the Court long after the president‘s tenure had ended (Cottrell, Shipan, and Anderson 2019). In addition to determining the scope of influence the president has in shifting the ideology of the Court, the test also found what constraints other institutions placed on this process, namely Senate confirmation voting. The model accurately predicted the ideological shift of the Court given that the Senate and the president were on the same side ideologically and the departing justice was on the opposite side of the ideological scale. Thus, when these two conditions are met, the nominated justice will bring the median of the Court closer to the ideal point of the president (2019). Such a test indirectly shows how departing and replacement justices affect the ideological shifts of the Court, but with further explanation. While this model certainly adds substantially to the knowledge on presidential power and how the ideology of the Court changes over time, it fails to test factors beyond the president and Senate that could further explain shifts in the Court‘s median point.

Further study of the Supreme Court is derived from Christopher P. Banks' writing on Supreme Court precedent among natural courts. A main contention of the research suggests that constitutional flux, the idea that the practice of *stare decisis* ebbs and flows depending on the majority of the Court, can account for large ideological shifts from one natural court to the next (Banks 1992). The flux is further analyzed as a product of democratic forces outside of the Supreme Court, the president and Senate, that nominate and confirm justices to the bench. Taken with the work of Cottrell, Shipan, and Anderson, this conclusion stands to reason. And while the Court has a discretionary docket, that discretion can only be sustained by the actors on the Court. If the president fails to nominate and the Senate fails to confirm a justice of a certain ideological position, the Court will not see that representation on the Court in some capacity. So the president and Senate have political control over the Court as it determines the ideological makeup. Maybe the closest research to the inquiry faced in this thesis, Contrell, Shipman, and Anderson's model surely offers a reasonable explanation as to why natural courts shift; however, its scope is limited from Marshall's first natural court to Rehnquist's tenure through 1991. Such a model also neglects significant insight into departing and replacement justice. The research seemingly limits the shifts to an understanding of the Court of a chief justice, where the shifting ideology of the Court is examined across the chief's tenure rather than attributing the change to a particularly dynamic new member of the Court.

The research from previous studies serves to illustrate the lack of literature pertaining to the ideological shifts that occur because of a vacancy on the Supreme Court as opposed to the sitting chief justice. Banks is one of a few researchers to note the significant changes in ideology between natural courts, as Cottrell, Shipan, and Anderson take an executive perspective to understanding these shifts. And while Segal and Cover note the ideological scores of justices, this offers little to the study of shifts in the Court relative to vacancies and replacements. Surely, the results found in this research confirm previous research. What is added is an understanding of how specific justices through departure and replacement make for a better categorization of the Court than the chief justice.

Furthermore, the longevity of a natural court is scarcely discussed in existing scholarly literature. So, the questions posed in this thesis will add to the research on the Supreme Court and provide yet another variable to discuss in analysis of the highest court in the land.

3 Method

Fundamental to this study is the use of the Supreme Court Database, which cumulates judicial information from 1791 until 2019. The Supreme Court Database serves as a comprehensive set of information about cases argued, outcomes, opinion writing, and decision voting. With every case since the beginning of the Court, the database allows for rigorous testing based on different variables. The purpose of this thesis is to explore how the most junior associate justice of the Supreme Court alters the ideology of the proceeding natural court. To allow for a clear picture of how this is accomplished, the variable decisionDirection as it pertains to the Chief Justice and natural court was analyzed and manipulated. This variable is the most intriguing and helpful variable for this discussion because it marks conservative and liberal votes based on the majority opinion written by the Court. For a conservative decision, 1 is assigned to decisionDirection. For a liberal decision, 2 is assigned to decisionDirection. Now understanding the nature of the variables researched, the process of developing the first working data set for analysis of the Court's ideology can be established.

Several variables were created in the process of developing the research for this thesis. The variables, how they were created, and how they affect the conclusions of the thesis follow. One, the mean decision direction for each natural court was determined, excluding all missing and non-ideological decisions. Two, affirmances of lower court decisions were removed from the mean decision to create a second mean decision direction variable. Without the affirmances, the data more thoroughly reflected ideological stances of the Court since to affirm of a lower court ruling does not change existing constitutional law as evidenced by the significantly disparate difference in the mean decision direction

variances[2]. Three, the ideological score of the natural court was processed. This consisted of finding the mean of the decision direction variable found in process two for both the data set with affirmances counted and with affirmances dropped. Four, the absolute value of the difference between the ideology (found in step three) and the decision direction (found in step two) was then calculated. This allows for each natural court to be compared with one another. By comparing the absolute value of the mean decision direction and the ideology, the data set ordered ideology of each natural court from greatest to least. Such ordering allowed for a thorough analysis of what creates ideological shifts from one natural court to the next. Five, the final process completed was to determine the direction of the shift. For each absolute value of ideological shift, the true difference was taken. A negative ideological value promoted a more conservative court and a positive ideological value a more liberal court. Such directional shifts were labeled "Conservative" for conservative shifts and "Liberal" for liberal shifts.

The manipulation of the decision direction into quantifiable ideological scores and shifts created a model to understand how the ideological score of natural courts shifted over time and between justices. It should be noted that these shifts are proportional changes in the "liberalism" or "conservatism" of the Court. While the data gives an idea of a direction of shift and ideology of the junior justice and natural court, it more clearly represents the number of changes in liberal and conservative outcomes, not how liberal or conservative a justice is or was compared to his or her predecessor. The findings from these analyses are intriguing in comparison to current understandings of the Supreme Court. Two tests followed from the new data set. First, do junior associate justices recently appointed to the Court shift the ideology of the previous Court? To complete this analysis, the ideology of the outgoing and incoming justices were compared. The eight highest scoring ideological shifts and the five lowest served as the source for analysis. These Courts should show that the more ideologically different the justice is, the greater the shift in the Court's decisions. And such shifts should not depend on the current Chief Justice. Rather, the most junior justices, whether the chief justice or an associate justice,

[2]This idea is credited to Dr. Charles E. Smith at the University of Mississippi.

could have an equally, if not more, powerful effect on the natural court for which he or she is appointed and confirmed. The results for this inquiry are discussed in the fourth and fifth chapters of this thesis.

The second test that followed this data set was this: does the longevity of the natural court account for smaller ideological shifts in the natural court than shorter natural courts? To conduct this inquiry, the same method of manipulating the data was used as with constructing the decision direction data. But this time, the term years were included to note how many years a natural court persisted. Once the data set was built, a simple count of the number of years per natural court was conducted, producing the number of years a natural court persisted. Again, the shift in ideology was taken into account, comparing the absolute value to the length of the natural court. Then, the difference between ideology and decision direction was matched to its corresponding absolute value to denote in which direction the court shifted. Those shifts that were negative were labeled as "Conservative" and those that were positive "Liberal." Because the amount of shift is more important than the direction of the shift for the research of this questions, the labels only serve to help understand what voices on the Court had the most influence, that is did the conservative or liberal bloc bring the natural court toward its ideology. The data was ranked from highest to lowest absolute difference in ideological shift and also longest to shortest natural court. While less conclusive than the ideological shifts between natural courts, the data still has a story to tell about the role of time on ideological shifts for a natural court. The results of this inquiry is determined in the sixth chapter.

4 The Five Lowest

As a baseline of understanding the model created in this inquiry, the five lowest ideological score shifts of natural courts will now be examined. Those associate justices which were replaced gives a litmus test in marking the viability of the hypothesis that it is the most junior justice, where junior refers to the length of time the justice has served on the Court, who determines the ideology of the Court rather than the chief justice. In fact,

included among this data set was the replacement of a chief justice (Taft replacing White). As such, a study of these five scores and associated twelve justices proceeds, noting the ideology of the outgoing and incoming associate justices, the president nominating each justice, the natural court in which the shift took place, and the presiding chief justice.

4.1 Sherman Minton and William J. Brennan, Jr.

The lowest absolute difference of ideology score was with Chief Justice Warren's fifth natural court at a mere 0.00047[3], a value statistically insignificant and marking an undetectable shift. Here, two justices were replaced, Justice William J. Brennan replacing Justice Sherman Minton and Justice Charles Evans Whittaker replacing Justice Forman Reed. Both incoming justices were appointed by President Dwight D. Eisenhower which one could assume meant that the two justices held similar ideologies. While this is not the case and the justices followed contrasting ideologies in voting and decision making, the change on the Court was minuscule. The balance of the Court was maintained because the two joining justices, Minton and Reed, were of differing judicial ideologies replacing predecessors of contrasting judicial ideologies.

To begin, the Minton and Brennan replacement will be examined. Associate Justice Sherman Minton was a Truman appointee serving seven years on the Court. Much of the literature pertaining to Justice Minton largely explores his effectiveness as a justice, some placing him in the category of "worst" justices. However, Linda Gugin develops an argument in favor of Minton's judicial style and compares him to Justices Frankfurter and Harlan. Minton like his colleagues practiced judicial restraint in voting and decision making. He most inclined to intervene in areas relating to civil rights, voting to protect minority rights and overturning legislation that quelled those rights (Gugin 2009).

Also revealing of Justice Minton's tenure was his previous seat in the U.S. Senate. Prior to serving on the Court, Minton was an active participant in the upper house of Congress when Franklin Roosevelt was president. According to Gugin, Minton was partic-

[3]All values for both the ideological shifts and shifts of the natural court are based on a -1 to 1 scale, where a negative number represented a conservative shift of the Court and a positive number represented a liberal shift.

ularly frustrated with the Supreme Court in overturning legislation from Roosevelt's New Deal (2009). His reasoning for frustration was rooted in the idea that the Court should respect the laws created by the legislature, only intervening when egregious overreach into individual rights took place at the hand of the government. In fact, he believed the legislature to be more powerful because it was subjected to democracy unlike the monolithic Court whose members served without the pressure of public opinion. So passionately did Justice Minton hold fast to judicial restraint that as a senator he sponsored legislation that would require a seven-person majority to pronounce the unconstitutionality of a legislative piece. Those actions of Minton before his tenure as an associate justice and his decision making on the Court aligned him with a more liberal ideology as defined by the Supreme Court Database.

His replacement, William J. Brennan, Jr., could similarly be marked as holding liberal ideology. One of the most recognizably progressive justices of the Court, Justice Brennan grounded his ideology in affirmative action. Writing the opinion in Cooper v. Aaron two years after his appointment to the Supreme Court, Brennan proved his progressive stance and brought desegregation into the south.

Later in his tenure on the Court, Justice Brennan was noted for his attitude towards rights of expression. Contrasted to Justice Antonin Scalia by Richard Brisbin, Jr., the polarized figures demarked staunchly different views to judicial interpretation (1993). Brennan relied on less abstract legal reasoning and more on instrumentation of the law. The mere fact that Scalia and Brennan were opposed ideologically exhibits the nature of Brennan as a progressive on the Court.

Considering the ideology of Minton and Brennan sheds light on the validity of the inquiry, if not as just one example of its success. Each justice was committed to progressive values while on the Court, voting liberally and penning opinions which reflected the same philosophy. While the decision making of both justices resulted in liberal outcomes, their means of coming to such conclusions were opposed. This might explain the slight shift towards a liberal ideology, although statistically insignificant. The second pair to be studied under this natural court are Justices Reed and Whittaker.

4.2 Stanley Forman Reed and Charles Evans Whittaker

Also taking the Court during Warren's fifth natural court was Justice Charles Evans Whittaker replacing Justice Stanley Forman Reed. The predecessor, Reed, was the final Franklin D. Roosevelt appointment to leave the bench. While often overlooked as a mediocre judge in comparison with his colleagues, which included Blackmun, Frankfurter, and Warren, his tenure was markedly similar to other civil rights activists on the bench serving at the same time. Before his appointment, he served as the Solicitor General and spent almost three years defending the New Deal before the members of the highest court (Pricket 1981). His dutiful work before the Supreme Court would eventually earn him a spot as a legal mind the president could trust for protecting the power of the executive.

Once on the Court, Justice Reed maintained his ideology of an "organic Constitution" that would govern his opinion writing (Pricket 1981). In a case regarding Jehovah's Witnesses and distributing pamphlets door to door, he noted that localities could limit one's First Amendment right to free speech considering the "changing conditions" of modern times which had become a nuisance for urban citizens (Pricket 1981). The city ordinance ensured privacy of city-dwellers who were growing in population thanks to modern advances. This and other rulings served to shape how future courts viewed privacy laws and the scope of the First Amendment.

The movement of an organic Constitution seemed to stop for Justice Reed when it came to Plessy v. Ferguson. While he did submit to unanimity, he was the last of the dissenters to sign onto the opinion, knowing that such a case would impact Southern states gravely. The case in his eyes was decided for the benefit of the Court rather than the advancements of civil rights. Whether this tarnishes his reputation as a liberal-leaning justice is irrelevant when considering the precedent set by his signing onto such a monumental case. He decidedly placed his foot in the camp of the liberal bloc. More notably, he proved his desire to maintain the institution that is the Supreme Court, which may be a better indicator of his voting pattern rather than a certain ideology. Considering he took this approach in decisions after Plessy v. Ferguson (i.e. Railroad Co. v. Tompkins), this reasoning serves its purpose as the most prominent basis for

Justice Reed's voting behavior. Nevertheless, it placed him in the liberal bloc and gave a seat to preserve to Charles Evans Whittaker.

Eisenhower's second appointment for replacement of this natural court, took staunchly liberal stances in civil rights cases. Before his tenure on the Court, Whittaker as a judge on the federal circuit had ruled to desegregate and uphold such cases as Brown v. Board of Education (Berman 1959). His liberal streak continued on the Supreme Court in cases about the swiftness of desegregating schools and enforcing the new constitutional law that had been established in courts prior to his time on the Court.

Justice Whittaker was also known for his avid dismissal of constitutional claims in cases dealing with suspected Communist Party members (Berman 1959). In a lower court ruling, Whittaker states that a university board had an obligation to dismiss faculty members belonging to "a found and declared conspiracy by a godless group to overthrow our government by force" (Berman 1959). His strong remarks on the subject were supported during his committee and confirmation hearings; however, they did not go unnoticed by left wing members of the Senate who questioned the constitutionality in limiting academic freedom. This decision gives him a marked conservative edge in ideology. Once on the Court, Whittaker seems to have softened on the point of communism when it came to immigration cases. In a case regarding the status of deportation for an illegal immigrant after he had been a member of the Communist Party, Whittaker came to the conclusion that his subsequent departure from that ideology would warrant him worthy of lawful status in the country and not subject to deportation.

This first look at replacement justices serves to confirm the hypothesis that newly appointed justices give more indication as to the ideology of the Court than a chief justice. Where the chief justice could be serving across the tenure of many justices, the most junior justice can shift or maintain the ideology of the seat he or she is replacing. So minute was the shift in this circumstance, the ideology shift was 0.00047, that it is statistically insignificant. Justices Brennan and Whittaker shared much in common with their predecessors, maintaining the power of the liberal bloc on the Court.

All told, both of Eisenhower's replacement justices did little to shift the ideology of the

Court to which they were appointed. Both Justices Brennan and Whittaker maintained the liberal bloc of the Court that Justices Minton and Reed had established during their tenures. Unique to this round of replacement justices is that it came in a pair. It was not common for a group of justices to be appointed to a new natural court, especially maintaining the ideology of the Court. The remaining pairs worth noting in this research do not appear until the five highest ideological shifts are examined.

4.3 Stephen Johnson Field and Joseph McKenna

The second lowest ideological shift of the Court occurred in 1897 when Justice Joseph McKenna replaced Justice Stephen Johnson Field on Chief Justice Fuller's eighth natural court. From the vacancy and replacement, a small shift towards the liberal bloc occurred, that of only 0.00649. The replacement of Justice Field surely did little to fixate the ideology of the Court farther in either a liberal or conservative direction as the discussion that follows will show. Justice Field was the longest serving appointee of President Abraham Lincoln, and, until Justice William Douglas, was the longest serving member of the Supreme Court (Zuckert 2011). A Democrat from the new state of California, Field was antislavery and for the North in the War between the States. Zuckert notes that Field held a unique judicial philosophy coined as Lochnerism after the case *Lochner v. New York* (2011). Such a philosophy relies on the economic principle of laissez-faire, favoring rulings that adhered to the natural law and natural rights while holding to social Darwinism. Thus was created a judicial liberalism which regarded capitalism in a favorable light.

Furthermore, the judicial philosophy of Field held to the belief that special interests were not taken up by government backing, leaving the citizenry free to participate in society, and also government involvement in promoting common goods (Zuckert 2011). Zuckert asserts that Justice Field was the architect of judicial liberalism and that the justice was consistent in his decision making because of such a philosophy. One area of constitutional law that this doctrine shines through is in regards to the Fourteenth Amendment. In *Butcher's Union v. Crescent City*, Justice Field makes clear his philos-

ophy:

> [States] can now, as then, legislate to promote health, good order and peace, to develop their resources, enlarge their industries, and advance their property. It [the Fourteenth Amendment] only inhibits discriminating and partial enactments, favoring some to the impairment of the rights of others.The principal, if not the sole, purpose of its prohibitions is to prevent any arbitrary invasion by state authority of the rights of person and property, and to secure to everyone the right to pursue his happiness unrestrained, except by just, equal, and impartial laws.

Here, Justice Field writes that states in their special interests should not have the right to infringe on the rights of individuals when life, liberty, and the pursuit of happiness are threatened.

One of the most famous dissents by the jurist proves Field's judicial philosophy: his dissent in the *Slaughterhouse Cases*. This opinion noted that a monopoly infringes on the rights of the individual in such a way that natural rights as laid out in the Declaration of Independence are hindered. Thus, natural rights take precedent over the rights of a company, or the state of Louisiana in granting monopoly rights to the slaughterhouse as this case deals with. While the cases marking Justice Field's judicial philosophy largely deal with economic ideas, their effects had major implications on the lives of the individual when it comes to Fourteenth Amendment rights. Field's judicial liberalism set him on the left of the Court, making his predecessor's ideology of little shift once the vacancy was filled.

Justice Joseph McKenna, nominated by President William McKinley, proved to take maintain the liberal judicial philosophy of that of his predecessor. Little is documented about the former justice; however, his political and judicial career before rising to the highest court in the land offers some insight as to the ideology of the justice.

Like his predecessor, Justice McKenna hailed from the state of California after his parents moved there from Philadelphia, PA (1897). Of the Roman Catholic faith, McKenna carried his strong moral standings into his legal profession and eventually into the opinion

writing process (1897). Before being appointed to the Supreme Court, Joseph McKenna served on the state legislature and in Congress. He was a Republican which shows the similarities on a fundamental level to his predecessor who was antislavery and pro-North in the Civil War.

When a vacancy occurred on the federal circuit in California, then-President Harrison appointed him to the position (1897). His opinions while judge were largely related to questions on international law, such as controversies on the treatment of Chinese immigrants (1897). Subsequently, with McKinley winning his bid for president, he assigned McKenna to be the Attorney General of the United States. The friendship garnered between the two while they both served in Congress led to the appointment as the Attorney General and kept McKenna close in the event of Supreme Court vacancy. His experience in all three branches of government made for his nomination to the Court by President McKinley. As shown by the small amount of information known about the jurist, his decision making varied nominally from his predecessor and allowed the ideology of the Court to remain rather congruent to the preceding natural court.

4.4 Edward Douglass White and William Howard Taft

The next lowest absolute shift in the Court comes from the replacement of one chief justice for another. While this example may seem to prove that the chief justice does indeed have ideological control over the Court in his ability to shift or maintain ideological norms does quite the opposite. In fact, Chief Justices Edward Douglass White and William Howard Taft show that the vacancy and replacement model of understanding ideological shifts of the Court holds true. When a justice having a similar ideological score of his predecessor takes to the bench, the shift of the Court will be nominal. The shift from Chief Justice White to Chief Justice Taft is a measly -0.00713. A conservative trend of such small caliber notes that Chief Justice Taft did not vary greatly with his predecessor Chief Justice White. To explore this argument further, Chief Justice White and his ideology will be examined.

Chief Justice Edward Douglass White was the ninth chief justice to the Supreme

Court, nominated to the Court by President Grover Cleveland and, ironically enough, elevated to chief justice by then-President Taft, was a Southern Democrat who fought for the Confederacy in the Civil War (Forman 1970). His later political involvement included the state Senate for Louisiana, the Supreme Court of Louisiana, and a stint in the United States Senate after taking time to further pursue his legal degree. From the Senate, he was appointed to the Supreme Court 1894, replacing Chief Justice Fuller in 1910. His history as a Southern Democrat would seem to point him as a conservative decision maker. The opposite is true.

In a dissent for the case *Pollock v. Farmer's Loan and Trust Company*, Chief Justice White made his opinion on civil liberties known (1895):

> Teach the lesson that settled principles may be overthrown at any tine, and confusion and turmoil must ultimately result.... The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

Another principle for which he argues against in this dissent is that of *stare decisis*. Whenever constitutional law detracts from the progress of society, Chief Justice White would argue that such constitutional law should be reevaluated and replaced (Forman 1970).

The replacement for Chief Justice White was the man who elevated him to chief on the Court, William Howard Taft. Taft's assent to chief justice was just one of the many roles he served in the United States government. Before his tenure on the Court, Taft was appointed to the Federal circuit in 1891 and served under President Theodore Roosevelt as the Secretary of War. He became the twenty-seventh president of the United States in 1909 serving only one term. In 1921, President Harding nominated him to the bench,

culminating his many accomplishments and ending where he had always wanted to serve: the Supreme Court (Freidel and Sidey 2006).

Given his detailed history as a Republican politician, it serves to reason that Taft would significantly alter the ideological position of the Court. However, like his predecessor, he was all too eager to overturn those previous decisions when constitutional law should be changed or reverted. His judicial perspective lied closely to upholding federalism (Post 1992). By many judicial scholars and members of the Court, he was described as "a rock-ribbed conservative", ruling in favor of conservative ideology (Post 1992). But the characterization falls flat when observed through the eyes of federalism, as Post notes (1992). In *Lambert v. Yellowley*, Taft signed onto the opinion of Justice Brandeis which argued that Congress has directive over a doctor prescribing spirits for medical remedy, precisely because the Eighteenth Amendment prohibited the sell of alcohol (1926). This case served as a counterexample to the side of the Court he normally joined, noting that national power is a necessity to the strength of legislative authority.

Furthermore, Chief Justice Taft often subscribed to the liberal philosophy of Chief Justice John Marshall saying of his idol that he was "the greatest Judge that America or the World has produced" (Post 1992). Thus, national sovereignty was a hallmark of Chief Justice Taft's rulings, making him more liberal than what is initially prescribed to him. His turn toward legislative authority and nationalized power is bolstered in both *Railroad Commission of Wisconsin v. Chicago, Burlington, & Quincy RR. Co.* and *Stafford v. Wallace*. These two cases upheld Congressional authority over federal regulation of commerce. So, as these two justices initially seem at odds in their judicial philosophies, their exercise prove to make Taft statistically insignificantly more conservative to White.

4.5 Robert Trimble and John McLean

The three cases of ideological shifts thus far have dealt with more modern justices. This pair, Justice Robert Trimble departing and Justice John McLean replacing, harken back to the beginnings of the Court, the eighth natural court under Chief Justice John Marshall. Trimble's vacancy was filled in 1827, causing the Court to shift 0.00802 of an

ideological point. A slight move toward the liberal bloc of the Court, although essentially imperceptible based on decision making and voting patterns, will be discussed.

Justice Robert Trimble was nominated to the bench by President John Quincy Adams. Heralding from Kentucky, back when the state was still in it's infancy and life there was primitive, his family was deeply pious (Schneider 1947). Once an established lawyer in Kentucky, Trimble was elected to the House of Representatives in 1802 (Schneider 1947). Little is known of his service there except that he served only one term in Congress, choosing to return home where he could make a living enough to support his family (Schneider 1947). A few years later, he was appointed to the Supreme Court of Kentucky. There, he authored sixty-three opinions, half of all decisions made by the Court. Until being appointed to the Supreme Court of the United States, he returned home and declined several high positions, such as Kentucky Supreme Court chief justice and U.S. Senator because they did not pay enough to support his family. While he served on the Federal Court, he voiced his disdain for federal supremacy, arguing instead for a strong national government (Schneider 1947). He insisted that federal law had supremacy over state law, a contentious belief as America was becoming a nation. Dying just three years after assuming his position on the Supreme Court, Justice Trimble issued one opinion *Ogden v. Saunders* and often deferred to Chief Justice John Marshall as their ideologies were relatively similar (Currie 1983).

The life of Justice Trimble is little known; however, his firm stance for a strong national government to which the states submitted made his ideology clearly to the left. His predecessor, Justice John McLean, was nominated to the Court by President Andrew Jackson. Much like Justice Trimble, McLean had a long record of public service to his country and his home state of Ohio. Such service included United States Congressman, judge on the Supreme Court of Ohio, Land Commissioner of the United States, and Postmaster General of the United States (Brickner 2011). Throughout his many years of service, McLean was regarded highly among leaders and colleagues (Brickner 2011).

One of his most famous dissents was that in *Dred Scott* case joined in dissent only by Justice Curtis (1857). The invariable conclusion of his opinion sets him apart as a

civil rights actor during a divisive time in American history. Some note that this case ultimately led to the Civil War. If this is true, Justice McLean's dissent was surely a rallying point for antislavery activists. Especially given the norms of the time, Justice McLean was a progressive in his own right (Brickner 2011).

Although these justices are seldom discussed in history, they were both progressive minds on the Court. Each led the charge on controversial opinions given the circumstances of the world they were living in. For this reason, it is understandable that Justice Trimble was replaced by an equally liberal mind in Justice McLean, despite the fact that their liberal ideology were earned for different reasons.

4.6 Harry A. Blackmun and Stephen G. Breyer

Moving several decades forward to Rehnquist's seventh natural court, and the final discussion of the five lowest ideological shifts in the Court, the vacancy to be filled was left by Justice Harry A. Blackmun by Justice Stephen G. Breyer. Once Justice Breyer assumed the seat Justice Blackmun had occupied, the ideology of the Court shifted 0.00814 to the right understandably so. Although Breyer is a liberal justice in his own right, Blackmun held several progressive stances on a miriad of issues, often pioneering decisions on the Court. Nonetheless, the seat Justice Breyer filled was liberal, and his dedication to liberal ideology helped the Court retain its position relative to the median ideological score.

A champion for civil rights for women and racial minorities, Justice Blackmun has made a name for himself as a progressive jurist and staunch member of the liberal bloc of the Court. As a history major in college, Justice Blackmun realized the importance of understanding systemic racism of the past and how it reared its ugly head in the present (Hair 1979). Those evils of oppression done in the past must be rectified, and the Supreme Court, in his eyes, had every reason to bring justice to unjust situations. One example of his commitment to bringing change to oppressed groups in relation to women's rights is found in his dissent in *Beal v. Doe*. Here, the Court denied Medicaid funding for therapeutic abortions, a decision Justice Blackmun strongly disagreed with. His dissent was markedly biting:

> For the individual woman concerned, indigent and financially helpless . . . the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake" (1977).

The message from this opinion was clear: women should have access to abortions and the government should aid those poverty stricken and in need of assistance. He continued his fight for the minorities as it related to oppressed individuals in the community. Those at an economic disadvantaged were always favored by the jurist. And unsurprisingly, the justice had much to say on racial discrimination.

A prime example of his desire to see civil rights as it relates to race protected by the highest court in the land comes from his dissent in *Regents of the University of California v. Bakke* which states that "in order to get beyond racism, we must first take account of race" (1978). Justice Blackmun desired the Court take a comprehensive look at the individuals involved in the case so as to ensure that minority interests were advocated for and protected at such a high level as the Supreme Court. In fact, the jurist encouraged his colleagues to look at a situation through the eyes of the victim (Hair 1979).

Noting only a few of the many achievements of Justice Blackmun, his replacement, Justice Breyer, retained much of the progressive ideology of his predecessor. Justice Breyer's judicial theory is characterized by Cass R. Sunstein as "active liberty", that is a theory which pursues democratic goals (2006). Before his tenure on the Court, Justice Breyer was a Harvard Law professor specializing in administrative law. The fact that he had little experience with constitutional law was quickly dispelled by his reactionary attitude to colleagues of the Court such as Justice Antonin Scalia and his adherence to original textualism (Sunstein 2006).

In 2006, Justice Breyer was the most democratic member of the Rehnquist Court, upholding the most acts of Congress and making decisions that favored the actions of the executive branch (Sunstein). To such a degree, Justice Breyer seems committed to self-governance and submitted to legislative authority in siding with Congress on several of the acts that came before the judiciary. One finds in the theory of active liberty

an adherence to the right of the exercise of sovereign power. As Breyer perceived it, the nature of the country was democratic that required government and individual alike to act in the preservation of certain rights espoused by the founding documents. The Rehnquist Court, he viewed, had pushed back the freedom and liberty established in the Warren Court to such an extent that was not warranted by the Constitution (Sunstein 2006).

Of principal connection to ensuring the rights of citizens, specifically those most vulnerable to having their rights taken away, was affirmative action. Education is of utmost importance to advancing a free society in Justice Breyer's judicial philosophy. He wrote in *Grutter v. Bollinger* that "some form of affirmative action" is "necessary to maintain a well-functioning participatory democracy" (2003). Justice Breyer through this dissent is showing that he sides with Justice Blackmun in issues of race: what the government can do to protect the oppressed and underrepresented populations of society should be done.

When it comes to federalism, Justice Breyer strongly opposed the Rehnquist Court as it scaled back federal power in favor of states rights. One example of redistributing power back to the states and limiting the power of Congress comes in the Court's decision to strike down the Violence Against Women Act, stating that it does not fall under the per view of the Commerce Clause (Sunstein 2006). Here, Justice Breyer, from a pragmatic stance, argues that Congress needs certain powers in order to preserve national initiatives. Those public goods that serve the need of citizens should be uphold by the Court as Congress legislates.

Undoubtedly taking on cases differing from those faced by Justice Blackmun, nonetheless, Justice Breyer persisted in liberal rulings. The decision making of both justices serves to maintain a liberal standard, with Breyer negligibly pushing the Court to the right. This could be due in part to the nature of the cases each justice faced, with Justice Blackmun caught entrenched in civil rights battles that laid the groundwork for future decisions by Justice Breyer. Either way, liberal ideology was maintained and a shift of small magnitudes had no power in moving the Court one direction or the other.

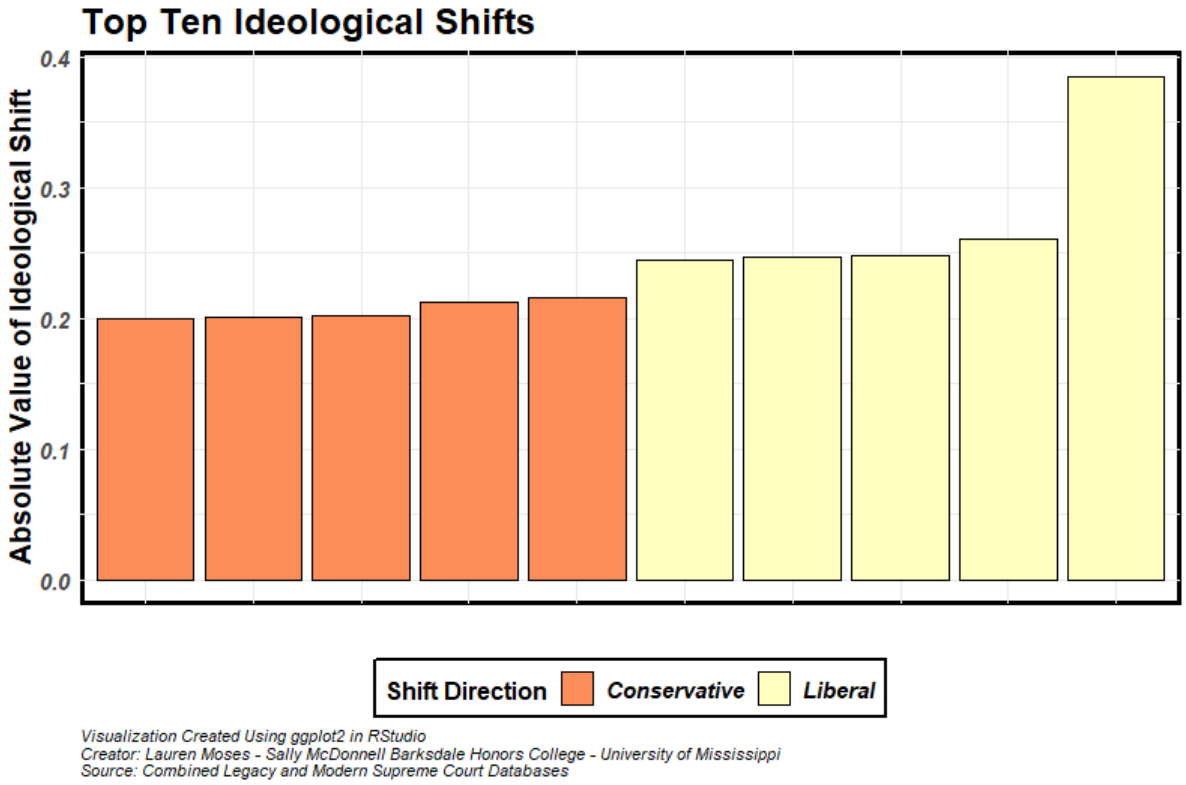
5 The Eight Highest

Perhaps the most telling of the data points are the eight highest ideological score shifts of the natural court. The same variables will be examined in this chapter as the one before. However, those justices who shifted the ideology of the Court most significantly for the tenure of their first natural court are listed. Among this group are four chief justices of which two were outgoing and two incoming. While this may seem to disprove the hypothesis that courts are better marked by incoming justices than chief justices, the overwhelming number of associate justices who served to shift the ideology of the Court would suggest otherwise. As we will see, this phenomenon only bolsters the claim in showing that with a short tenure, the incoming chief justices have had little time to curry the Court towards their ideology. What is more telling of ideological behavior is the vacancy and replacement model as new associate justices and chief justices move the ideological score of the Court on which he serves.

A visualization of the ideological shift in these most drastically-changing courts is found in Figure 1. Through the figure, one can see the intriguing divide between the liberal shifts and conservative shifts. The five greatest ideological shifts brought the Court closer to a liberal majority; the next five had the opposite ideological affect. While the causes for this phenomenon may be extensive (i.e. the practice of judicial restraint was usually more common among the conservative bloc than the liberal bloc), it does note that no ideology was inherent in the Supreme Court.

Furthermore, the data suggests that there is in fact a strong correlation between the ideological shift incurred by a replacement to the bench and the subsequent ideological score of the new natural court. The most junior justice of the Court plays a significant role in affecting the ideology of the bench without the chief justice's influence as leader of the Court. Justices are independent of other influences and seem to stick to their own judicial philosophy. In order to verify this hypothesis, the twenty-two justices whose departure and replacement moved the Court most substantially are discussed as follows.

Figure 1: Ideological Shifts among Replacement Justices



5.1 Fred Moore Vinson and Earl Warren

The most significant shift occurred in the Court when Chief Justice Fred Moore Vinson was replaced by Chief Justice Earl Warren. An ideological shift of 0.38504 was produced by the vacancy and subsequent filling which caused the Court to become noticeably more liberal. In fact, all five of the five highest shifts of the Court pushed the Court to the left ideologically. In the shift of 1953, a Republican president, Dwight D. Eisenhower, seems to work against his party lines in nominating Warren to the Court. The first natural court of Chief Justice Warren surely turned the tides towards a liberal-leaning agenda.

To understand the significance of the shift from Chief Justice Vinson to Chief Justice Warren, one must first understand who Vinson was. Warren was a loyal civil servant, serving the country before his tenure on the Court as a Congressman, lower court judge, Cabinet member, and as head of the Offices of Economic Stabilization and War Mobilization and Reconversion during World War II (Frank 1954). His tenure on the Court, however, lacked much luster. Chief Justice Vinson often gave opinion assignments to

other members of the Court, writing only a small amount given the seniority that the chief justice enjoys in assigning opinion writing. Rather, Chief Justice Vinson spoke through his vote. In civil rights cases, the work of John Frank finds that the Chief Justice voted against the claimant right (1954). When the individual was arguing against the needs of the government, Vinson would rule in favor of the government. This casted him solidly in the conservative bloc of the Court along with colleagues Justices Jackson, Reed, Burton, Clark, and Minton (Frank 1954).

Of the few opinions he did write, they focused on race relations and freedom of speech as they pertain to civil rights. These two areas of law give a rather complete picture of the chief's ideological standings and judicial philosophy. Two cases of importance arose under the umbrella of race relations in which Chief Justice Vinson exercised his voice in issuing the opinion of the Court. The first case, *Shelley v. Kraemer*, dealt with racial restrictive covenants and their ability to be enforced (1948). The second was *Sweatt v. Pain* that dealt with segregation at the University of Texas law school (1950). In each of these cases, Vinson undermined segregation and moved constitutional law further toward separate and unequal. His opinions in this matter were liberal in nature, but not nearly as sweeping as his predecessors' rulings. The Chief Justice, rather, made distinctions from previous rulings of the Court to make for a slow and steady change.

On the topic of free speech, Chief Justice Vinson authored two significant opinions, one for *American Communications Association v. Douds* the other for *Dennis v. United States* (1950, 1951). Both of these cases spoke to the First Amendment rights of avowed Communists. *Douds* upheld the Taft-Hartley Act which required union members to participate in an anti-Communism pledge. Leaving some lose ends as to how future cases should be decided by this standard, *Dennis* detailed more clearly how future Courts would decided cases on Communism as it pertained to the imprisonment of Communist leaders (Frank 1954). The result of these two cases was scaling back free speech to protect the country from Communism and its leaders. Given this strong conservative stance on free speech and only mildly liberal approach to race relations, it stands to reason that Chief Justice Vinson was a member of the conservative bloc in his opinions and in his

voting.

The vacancy left by Chief Justice Vinson was soon filled by Earl Warren, the former Governor of California, nominated by President Eisenhower to the position. One would think that a Republican president would nominate a conservative justice to the bench to uphold his ideals. However, Chief Justice Warren strayed far from the ideas of his predecessor and the man who nominated him. When asked what his worst decision as president was, Eisenhower said it was nominating Warren to the bench (Schwartz 1997). Thus dubbed a staunch liberal of the Court, the record of Chief Justice Warren speaks for itself.

A landmark case coming from Chief Justice Warren's tenure was getting his entire court to vote unanimously in *Brown v. Board of Education* that reversed the separate but equal doctrine (1954). This case effectively turned the tide for civil rights in America, enforcing the law of the land and ending school segregation (Schwartz 1997). Interestingly enough, the case had come before Vinson's court first, but was decided after Vinson's death. The tides of history had been changed as Warren's predecessor who have voted in favor of constitutionally supported segregation (Schwartz 1997). Not only would the Chief have voted against civil rights, but a fractured court would have prevailed, deadening the impact the case would have had if Vinson's side had gained the majority. Nonetheless, Chief Warren and his unanimous decision persisted. From this case alone, it is clear that the chief justices were diametrically opposed in ideology. Yet, more examples of the ideology shift caused by Chief Justice Warren's presence on the Court persist.

Another mark of liberal leaning was Chief Justice Warren's rulings in criminal rights cases. The Chief was instrumental in bringing this case up to the Court to be heard, going so far as to instruct his law clerks to seek out a right to counsel case (Schwartz 1997). Two formative cases were brought to Chief Justice Warren's Court that altered the direction of criminal rights for years to come. Of great importance was his opinion written for *Miranda v. Arizona* (1966). Here, Chief Justice Warren insisted that criminals be made aware of their legal rights at the time of arrest, knowing that a serious criminal activity required some representation (he had formally worked as a district attorney)

(Schwartz 1997). Before deciding this case *Gideon v. Wainwright* had made its way up to the highest court, and Chief Justice Warren was all too eager to hear the case (1963). Setting a precedent for the *Miranda* opinion, this case guaranteed a right to counsel for those accused of criminal activity as protected under the Sixth Amendment.

When Chief Justice Vinson took conservative stances to civil rights cases, the basis for most of the decision making in this model, Chief Justice Warren took the opposite stance. So distinctly did the chief justices see issues, that *Brown v. Board of Education* could have had a much different outcome, and, consequently, the separate but equal doctrine. Clearly, Chief Justice Vinson and Chief Justice Warren were seemingly polar opposite jurists, leading to a dramatic shift in the ideology of the Supreme Court once Vinson departed and Warren was nominated and confirmed. There exists no better example of a justice altering the trajectory of the Court than that which exists between Vinson and Warren. What follows are examples of justices who shifted the ideology of the Court, but not as significantly as Warren did in his first natural court.

5.2 Lewis F. Powell, Jr. and Anthony M. Kennedy

The second largest shift in the Court came when Justice Anthony M. Kennedy replaced Justice Lewis F. Powell on the bench. A 0.26037 shift occurred on Chief Justice Rehnquist's second natural court as Justice Kennedy filled Powell's vacant seat. Like the example of Vinson and Warren, the nominating presidents would suggest that Powell and Kennedy would have similar ideologies. But as the ideological shift score shows, Justice Kennedy pulled the Court farther to the left, one could only assume to the dismay of President Reagan who nominated him.

Justices Lewis Powell, nominated to the Court by President Nixon, was noted by one scholar as a "pragmatic relativist" which made him a swing vote in many cases before the Court (Klafter 1998). Before his tenure on the Court, he served on Virginia's State Board of Education, working to desegregate schools slowly in his state in direct response to the *Brown* ruling. In the rights of the criminally accused, he lamented as American Bar Association president that the rights of criminals was becoming excessive, yet helped

to create the Office of Economic Opportunity Legal Services Program for funds to provide legal assistance to the poor (Klafter 1998). This non-conforming ideology makes clear why some would mark him as a pragmatist and earned him the spot as a swing justice.

Once on the Court, not much changed in his ideology. Reluctant at first to join the Court, President Nixon finally nominated Powell in October of 1971 and was confirmed within two months (Klafter 1998). A considerable opinion regarding the Fourth Amendment was given to Powell early in his tenure: *United States v. United States District Court* (1972). The statements by the jurist in his opinion clarified unreasonable searches, fair trials, and cruel and unusual punishment as defined in the Fourth Amendment. When the police wiretapped without a search warrant three people suspected of conspiracy against the government, the question of the executive's authority in domestic security was raised to the Court. Justice Powell argued that "[slecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent" (1972). Even in cases involving conspiracy against the government, officials needed to obtain proper warrants before conducting surveillance. Here, Justice Powell stood for the protection of citizens against the government, expanding rights of the accused as detailed in the Fourth Amendment and making his vote with the liberal bloc. Similarly, Justice Powell was the swing vote in *Almeida-Sanchez v. United States*, a case holding that warrantless search of an automobile without probable cause denies citizens their Fourth Amendment rights (1973). It was not until *Oliver v. United States* that Powell ruled against the criminally accused, upholding the open fields doctrine (1984).

On the topic of race, one of Justice Powell's greatest opinions was in *Regents of the University of California v. Bakke* (1987). In his opinion, he split the finding for affirmative action policy where four justices voted that it had violated the Civil Rights Act of 1964 and four voted that the policy was constitutional. Truly, the swing justice earned his name, but toed the line on this case arguing that racial quotas did in fact violate the Equal Protection Clause, but that the university had a right to make race an admission

criteria. Bakke, the petitioner, was admitted into the school and the University of California could maintain their affirmative action policy. There is no set ideological principle here since Justice Powell joined both sides of the Court. However, in remembering his actions with desegregating schools in Virginia, it seems that he sympathised with the liberal bloc of the Court while acknowledging a slow process needed to occur to ensure every citizen's concerns were met.

Replacing Justice Powell after his long tenure on the Court was Justice Anthony Kennedy, lauded by the president who nominated him as "a true conservative" (Jelliff 2013). Heralding from California, the justice served with Ronald Reagan while he was governor of California, a connection that landed him on the United States Court of Appeals for the Ninth Circuit and later, as a justice on the Supreme Court (Jelliff 2013). While serving on the Court of Appeals, he had earned a spot as a staunch conservative judge. However, as Anne Jelliff discusses in her analysis of Justice Kennedy, his judicial philosophy is better described as "a moral reading of the Constitution" (2013). Under this pretense, the votes of the swing justice come into clearer view, although his ideological stance on the Court sat most usually in the liberal bloc. Because he voted liberally more often, the Court experienced a significant shift upon his rise to the bench. A thorough analysis of his voting and opinions while there is required to understand the difference between this swing justice and his predecessor.

Justice Kennedy believed in a dichotomy between Constitutional power and a higher moral authority that must be subjected to. Reading the Constitution from a textualist or originalist standpoint does not allow for the righting of wrongs done to vulnerable communities. He states, "whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts" are the primary elements of consideration for a justice (Jelliff 2013). This principle follows closely with the teachings of the Catholic Church, according to Jelliff's analysis, and informed many of Justice Kennedy's decisions.

In cases concerning religious liberty, Justice Kennedy voted in favor of allowing religious groups to express their beliefs on government property, and that the government

should support the expression of religion. However, he also noted that coercion should be avoided by the government, instead promoting religion broadly and taking into consideration the irreligious. His opinion for the case *Board of Education of Westside Community Schools v. Mergens* embodies succinctly the Justice's judicial philosophy in such cases (1990). In the opinion he states that offering equal access to school facilities after hours to groups of religious standing would not establish religion in such a manner that violates the Establishment Clause of the First Amendment. Justice Kennedy argues that a governmental response in this way would maintain neutrality of the public sphere and protect the religious freedoms of citizens, one of the utmost priorities of the government.

While these examples could place him in the conservative bloc, there were several instances where Justice Kennedy invariably voted with the liberal bloc. Take for example *Obergefell v. Hodges* where Justice Kennedy authored the majority opinion in which he promoted LGBTQ rights and marriage equality. Years before, Justice Kennedy had earned his reputation as a gay and lesbian rights advocate in *Windsor v. United States* and *Lawrence v. Texas*. Kennedy was at the forefront of the gay rights crusade, decriminalizing sodomy and speaking for the Court through these three monumental decisions.

Beyond gay rights, Justice Kennedy advocated for equal protection among other marginalized groups. In the case *Texas Department of Housing v. Inclusive Communities Project, Inc.*, Kennedy wrote the majority opinion siding with the liberal bloc. This case focused on racial equality and struck down a Texas law that proved the disparate income theory. Texas tax credits had placed low income housing in center-city areas rather than spreading housing across the city and surrounding suburbs. Justice Kennedy argued that this effectively caused greater racial segregation as low income housing was built in established black neighborhoods and kept out of white neighborhoods. Clearly, Justice Kennedy was more sensitive to social justice issues and establishing rights for marginalized communities, creating a large disparity in ideological score between his predecessor Justice Powell and himself.

5.3 Horace Gray and Oliver Wendell Holmes

The next largest ideological shift of the Court occurred during the ninth natural court of Chief Justice Fuller. In this year, Justices Horace Gray and George Shiras, Jr. were replaced by Justices Oliver Wendell Holmes and William Rufus Day, respectively. The replacement caused a 0.24805 liberal shift of the Court. Once again, the nominating president for the replacement justices was a Republican, which could have made the the replacement against the ideological interest of the commander in chief. But given Theodore Roosevelt's progressive agenda, the justices accomplished his prerogative. Of lasting affect was Justice Holmes whose tenure on the Court brought about great legal change.

The first pair, Justice Horace Gray and Justice Oliver Wendell Holmes, contributed most significantly to the shift of ideology. Justice Gray has been characterized as an avid state's rights enthusiast in his judicial philosophy (Davis 1955). Appointed to the Court by President Arthur in 1881, Gray served for twenty-one years. Following his tenure at Harvard Law School, Justice Gray was a Reporter for the state of Massachusetts Supreme Court and carried on his own private practice (Davis 1955). His service to the state court made him a viable candidate to serve on the court where he developed his judicial philosophy. Justice Gray became a Republican shortly before the Civil War, yet preserved his conservative spirit in political matters (Davis 1955).

Once on the Supreme Court, Justice Gray was found to adhere strongly to his conservative values. At this time of the Court, many cases dealt with state's rights and sovereignty. In a string of cases on the matter, Justice Gray stood firmly to his strict interpretation of the Constitution and relegating power to Congress. Two cases *Julliard v. Greenman* (1884) and *United States v. Lee* (1882) best summarize his philosophy as a nationalist. Through his dissent in *Lee*, Gray stated that the claim to Robert E. Lee's estate fought for between Lee's family and the United States was better suited to be rectified in the legislative or executive rather than the judiciary. In the majority opinion for *Julliard*, Justice Gray again ceded power from the Court to the legislature. He notes, "If, upon a just and fair interpretation of the whole constitution, a particular

power of authority appears to be vested in congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected" (1884). The judiciary must fall to Congressional authority, especially following the many cases that arose from legislation passed during the Civil War. It was inappropriate, according to Gray, for the Supreme Court to take any power from the executive and legislative branches. Such examples point to the conservative tendencies he had on the Court.

His predecessor, Justice Oliver Wendell Holmes, took quite the opposite approach to the bench. An appointee of President Theodore Roosevelt, this justice was notably progressive. According to Ellis Washington, Justice Holmes was one of the greatest progressives on the bench, altering the course of the Supreme Court for generations (2017). The judicial philosophy of Holmes is further characterized as follows:

> During his tenure on the Supreme Court, Holmes systematically reinforced policies for government control of economic regulation, and he supported an expansive, new interpretation of freedom of speech under the First Amendment. These judicial views, in addition to his idiosyncratic temperament and writing bravura, endeared him to supporters of progressive politics and socialist jurisprudence, notwithstanding Holmes' profound skepticism of and disagreement with progressive politics. His evolution-atheism and progressive jurisprudence defined the Progressive Age while transforming American jurisprudence. His views influenced much of American legal thinking covering the first half of the twentieth century. Furthermore, The Journal of Legal Studies acknowledges Holmes as one of the three most cited American legal scholars of the twentieth century (Washington 2017).

Given the enduring nature of Holmes' judicial philosophy, it is no wonder that the justice had the most influence on the ideological shift during this natural court.

Specific examples of Justice Holmes' philosophy are evident in cases decided on more traditional cases on government regulation as well as social issues. In the *Lochner* dissent, Justice Holmes created the modern understanding of federalism, putting an end to "eco-

nomic and social experimentation by the states" (Washington 2017). As it relates to free speech, the justice also deviated from historical understanding of the First Amendment and formed new tests to "check" the powers allotted to individuals. The opinions for the cases *Schenk*, *Abrams*, and *Gitlow* created the "clear and present danger" test and the "marketplace of ideas" concept to expand speech allowed through the amendment of the Constitution. Just in these few examples is it clear that Holmes had a liberal judicial philosophy and exercised it freely while on the bench.

5.4 George Shiras, Jr. and William Rufus Day

Still affecting the ideological shift of the ninth natural court under Fuller was the replacement of Justice George Shiras, Jr. with Justice William Rufus Day. Justice Shiras was appointed to the Court by President Harrison and served for eleven years on the Court (Frank 1941). Hailing from Pittsburgh, Pennsylvania, George Shiras, Jr., was a man of integrity. Before taking his seat on the Supreme Court, Shiras worked as an attorney in Pennsylvania, turning down opportunities from many to become a United States Senator, citing as the basis for his refusal, saying "he would not become a pawn in local Republican politics" (Hudspeth 2003). As scholar J.P. Frank notes, Justice Shiras had little influence on the Court except for his dealings with income tax litigation. Nevertheless, he did have some influence on economic regulation, making him a conservative justice.

Scholar Harvey Hudspeth denotes the problem of the vacillating justice in the income tax case of 1895 *Pollock v. Farmers Loan & Trust Co.* (2003). In this case, the Court was posed with a question of constitutionality for an income tax levied during peace time. Justice Howell Jackson, at the time suffering from tuberculosis, was unable to hear the case the first time. The Court was tied four to four. The justice recovered temporarily, hearing the case and voting to uphold the tax. But, the case was voted against five to four, meaning one justice had switched from supporting the tax to calling for its demise. According to Hudspeth, the culprit was Justice Shiras (2003). Newspapers following the Supreme Court decisions reported Justice Shiras as the swing justice responsible for the demise of the federal income tax.

The majority opinion in *Pollock* argued that

> So far as it falls on the income of real estate and of personal property; being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all these sections, constituting one entire scheme of taxation, are necessarily invalid (1895).

Whether or not Justice Shiras had been the "vacillating justice" as Hudspeth describes is unclear. But what is clear is that the majority, which Justice Shiras had signed onto, had taken a stance to roll back federal power and return some authority to the states. This solidifies Justice Shiras' conservative leaning despite his small voice on the Court.

Replacing Justice George Shiras, Jr., was another President Theodore Roosevelt appointee, Justice William Rufus Day. Unique to Justice Day as his reluctance to dissent, often wishing to be in the majority opinion (Bair 2015). The scholar Bair attributes this attitude as indicative of his sometimes erratic behavior, although the justice did seem to find his camp in the liberal bloc of the Court. Not nearly as progressive as Justice Holmes, Justice Day still found a name for himself as a liberal-leaning justice.

There were several opinions which Justice Day signed onto solidify the analysis that he was a liberal justice, turning the seat Justice Shiras had left him. One such majority was *Lochner v. New York* by which the Supreme Court struck down a New York state statute that regulated maximum hours for bankers. Another case, *Coppage v. Kansas*, Justice Day wrote a dissent separate from the extreme progressive, Justice Holmes, arguing that the right of contract "is not absolute and unyielding" (Bair 2015). Yet another example of Day's ideas on federalism is found in *Hammer v. Dagenhart* where he wrote the majority opinion to strike down federal labor legislation. He believed that Congress had overstepped its commerce clause powers and could not federally mandate working conditions across states. From these examples, it is clear that Justice Day was a decided swing vote, although he most regularly sided with the liberal bloc of the Court. The fact that few scholars have analyzed his tenure on the Court serves to show that Justice Holmes was the greatest contributor to the liberal swing of this natural court. While

Justice Day would sometimes vote in tandem with the justice appointed to the bench within the same year as him, he was not a guaranteed vote. His judicial philosophy regarding federalism and federal power most clearly demonstrates this reality.

5.5 William Howard Taft and Charles Evans Hughes

Again, another pair appointed and confirmed to the Court in tandem proves to be a significant liberal shift of the Court, resulting in a 0.24689 point change. The justices leaving the Court were Chief Justice William Howard Taft and Justice Edward Terry Sanford replaced by Chief Justice Charles Evans Hughes and Justice Owen Josephus Roberts, respectively. Interestingly enough, a new chief justice to the Supreme Court made this ideological shift present in the first natural court under Chief Justice Hughes. Given the gravity of the seat shift between Chief Justices Taft and Hughes, the majority of attention will focus in the next two sections will focus on them.

First explored is the difference in judicial philosophy between Chief Justices Taft and Hughes. In the "Five Lowest" chapter of this thesis, section four, the tenure and philosophy of Chief Justice Taft was explored as he replaced Chief Justice Edward Douglass White. For further information on the conservative chief, that section can be reviewed.

Proceeding Taft was Chief Justice Hughes, an appointee of President Hoover. Taking the bench in February of 1930, Chief Justice Hughes was met with a mounting economic crisis as the United States faced the Great Depression. Unlike Taft, Hughes was much further disposed to liberalism, especially given the circumstance of the country and the massive amount of legislation created through the New Deal (Hendel 1957). As a biographer of Hughes' life and judicial philosophy states

> One of the most striking characteristics of Hughes' work on the bench was his high degree of objectivity .... He was an openminded [*sic*] judge .... In a large measure Hughes succeeded in freeing his judicial reasoning from any social or economic pattern .... The human mind does not operate independently of its experience. But Hughes' basic intellectual loyalty was to the idea of justice itself.... For him justice was not a means to an end; it was the end.

Chief Justice Hughes was revered by many for his intellectual integrity while serving on the highest court, making it difficult to pin-down the chief. However, Hendel notes that Chief Justice Hughes often took liberal stances in civil rights and liberties cases, making him pointedly different from his predecessor.

Before coming to the Court, Hughes had served in a myriad of public offices including running for president with the Republican Party against Wilson in 1916 and Secretary of State for four years (Hendel 1957). As the Governor of New York and work as an Associate Justice to the Supreme Court from 1910 to 1916, Chief Justice Hughes earned his reputation as a liberal.

A notable insight to his social leanings as a liberal were his decisions affecting Communists. Chief Justice Hughes argued that the protections of the First Amendment guarded Communist sympathizers to speak freely, assembly peaceably, and exercise their freedoms. Institutions were not to take away anyone's claim to these rights (Hendel 1957). In regards to civil rights, Chief Justice Hughes wrote a majority opinion stating that black individuals had equal protection under the law to receive legal education and furnished facilities comparable to their white counterparts (Hendel 1957). Furthermore, he joined the majority to strike down a law in Oklahoma which barred blacks the right to vote. Unlike Chief Justice Taft, Hughes took many opportunities to join the liberal bloc of the Court, shifting the ideological score of the seat to reflect his judicial philosophy.

5.6 Edward Terry Sanford and Owen Josephus Roberts

Also coming to replace a justice on the Court during the fist natural court under Hughes was Owen Josephus Roberts taking the seat of Justice Edward Terry Sanford. Justice Sanford hailed from Knoxville, Tennessee, born into the South at the end of the Civil War. His parents had migrated from Connecticut before his birth which made Sanford a northern sympathizer. Leader of the Republican party in Tennessee, Sanford was involved in public service before being elevated to the Supreme Court.

President Harding was responsible for appointing then-Judge Sanford to the Court where he wrote opinions dealing with technical and procedural matters rather than cases

of high profile. His most famous opinion was in *Okanogan Indians v. United States* where he upheld the right of the president to use a pocket veto (Scheb 2016).

While his specialty often laid within mundane cases, Justice Sanford also contributed substantially to First Amendment cases. He wrote the majority opinion for the Court in *Gitlow v. New York*, *Whitney v. California*, and *Fiske v. Kansas*. The first two cases dealt with Communist individuals. Citing the Fourteenth Amendment, Justice Sanford effectively incorporated more the freedom of speech and of the press to the states. The third case *Whitney* dealt with Industrial Workers of the World and membership into the group. A portion of Sanford's opinion for the case is as follows:

> the Syndicalism Act has been applied in this case to sustain the conviction of the defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied, the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant (1927).

Here, Justice Sanford protected nonviolent speech without outright striking down laws that had previously criminalized some speech, especially that relating to communism. Justice Sanford was a markedly liberal-leaning justice, making his small contribution to the Court.

Justice Sanford was replaced by Justice Owen Josephus Roberts whose tenure on the Court was marked by the infamous switch in time that saved nine. Justice Roberts had grown up in Philadelphia and stayed there through most of his professional career, working in the district attorney's office (Solomon 2009). When Roberts eventually joined the Supreme Court, his presence was flew in the face of the rather balanced Court made up of four unbending conservatives and four reliable liberals. Like his predecessor, Justice Roberts was often hinged on the nuts and bolts of a case. For instance, his first majority opinion for the Court "hinged on the meaning of 'of'" (Solomon 2009). This Hoover appointee did not take a major role in the Supreme Court until *Nebbia v. New York*

(1934).

In this case, Justice Roberts wrote the majority opinion of the Court, taking a mighty blow to the four conservatives. He argued that property rights and contract rights were not absolute. Rather, the liberal stated, "government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest" (1934). But his liberal streak did not last. Until 1937, Justice Roberts sided with the conservatives of the Court who struck down much of the legislation of the New Deal. Then, in *West Coast Hotel Co. v. Parrish*, the Court had changed to ruling in favor of government regulation, all thanks to Roberts' switch to the liberal bloc. His liberalism continued throughout the remainder of his tenure, thus adding to the liberal shift of the first natural court under Chief Justice Hughes, although not as greatly as his chief.

5.7 John McLean and Noah Haynes Swayne

The fifth highest shift and final liberal shift of the Court within the ten highest ideological shifts occurred in the twelfth natural court under Taney. Justice John McLean was replaced by Noah Haynes Swayne, resulting in a 0.24457 point shift of the Court. The life and judicial tenure of Justice McLean has been detailed in section five of the previous chapter, so the tenure of Justice Swayne will be the focus here.

Justice McLean as discussed previously was a quite progressive on the Court. But Justice Swayne in the era of Reconstruction, had turned the seat to become even more liberal. Appointed to the bench by President Lincoln, Justice Swayne had proved his dedication and service to expanding civil rights to marginalized individuals while riding circuit. In *U.S. v. Rhodes*, Justice Swayne upheld the Civil Rights Act, protecting the rights of all citizens within the country (Kato 2015). Although the Supreme Court was more hesitant to tie the federal government to this standard, Justice Swayne proved his liberalism in other avenues of civil rights.

The case *ex parte Milligan* allowed Justice Swayne to show his support for part of

the Reconstruction efforts. It is true that the use of military trials during the Civil War were struck down by the Court; nevertheless, Justice Swayne joined a concurrence by the Court stating that Congress indeed had greater power in times of public danger:

> We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but the fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators (1866).

The practice of emergency powers was enlarged by the Court to the benefit of Congress all in the name of ending racial violence. And again, the judicial philosophy of Swayne is detailed in the *Slaughter-House Cases*. The majority upheld the Louisiana statute that increased government regulation and would eventually be used in reading the due process clause (Kato 2015). Justice Swayne had essentially turned an already progressive seat into a guaranteed victory for the liberal bloc of the Court. Thus concludes the liberal shifts of the Court.

5.8 Nathan Clifford and Horace Gray

The remainder of the ideological shifts of the Court center around conservative changes. The next two sections follow the movement during the fourth natural court under Chief Justice Waite. Two appointees by President Arthur incurred a -0.21538 point shift in the Court.

The first pair, Justice Nathan Clifford replaced by Justice Horace Gray, offer little understanding in just how the Court was shifted. Justice Clifford was born in New Hampshire, coming from almost nothing. He did not attend college, but studied on his

own in accordance with the curriculum of Dartmouth College, eventually entering into the tutelage of a prominent lawyer nearby (Chandler 1925). He entered into political life running as a Democrat and earned his first place in the Maine Legislature (Chandler 1925). As U.S. Attorney General, Clifford became acquainted with the Supreme Court and, in 1858, was appointed to the Court by President Buchanan. Given his measly beginnings, it is a testament to his work ethic and drive that he was able to rise to the Supreme Court as an associate justice.

Justice Clifford was privy to the Court for twenty-three years during some of the most trying times. As the scholar Chandler assesses of Clifford's judicial philosophy, the man was a northern who adhered to Jeffersonian principles.

> An analysis of these decisions shows the influence of Judge Clifford with his associates whose party affiliations were different from his. The majority opinions maintained a wise balance between national and state sovereignty, and witness his judicial strength and his sympathy with southern political principles (1925).

The justice was conservative in his philosophy, determined to preserve certain principles of Jeffersonian politics.

As noted earlier in section three of this chapter, Justice Horace Gray was a staunch conservative, upholding state's rights and arguing for less federal involvement. Additionally, he took on a view of the judiciary that called for submission to legislative and executive power. The invariable conservatism of both justices suggest that only through a furtherance of conservative principles by Justice Gray could the replacement have shifted the Court even further to the right.

5.9 Ward Hunt and Samuel Blatchford

The subsequent pair of justices from the shift causing the fourth natural court of Waite was Justice Ward Hunt replaced by Justice Samuel Blatchford. Justice Hunt was appointed to the Supreme Court by President Grant. Born in Utica, New York, he studied

law at Union College, afterwards working for a local judge with who he started a successful partnership (Ward). Like many other justices, Ward Hunt became active in politics where he served in the New York State Assembly and as major of Utica. During this time, Justice Ward ran as a Jacksonian Democrat; however, the antislavery Free Soil ticket eventually gained his support and he departed from his party's social teaching. Later, Justice Ward would be instrumental in founding the Republican Party in New York (Ward). Little is known of the justices tenure on the Supreme Court mainly due to the lack of work assigned to him. After serving only six years, the justice suffered a stroke and his duties were further minimized. Ironically it took a passage of law by Congress to lower the requirements to receive a pension for Justice Ward to be persuaded to step down and relinquish his seat to the next judicial mind.

Justice Ward's replacement was Justice Samuel Blatchford. Still few things are known about Justice Blatchford, be it only fitting that an unassuming and largely unknown justice be succeeded by and equally unknown jurist. He too heralded from New York, coming from a family of great wealth, although he seldom made that fact public. Before rising to the Supreme Court, he worked for the governor of New York and as a counselor of the state supreme court (Justice Blatchford 1893). The writer of a newspaper article summarizing the life of the associate justice states that Justice Blatchford was deeply committed to upholding his office and duty to the Constitution, even denying a request by the government to remove a libel case to Washington (Justice Blatchford 1893). While it is unclear how these two pairs of justices differed significantly, it can be presumed from the great conservative name Justice Gray made for himself on the Court that he contributed most to the ideological shift.

5.10 Robert Houghwout Jackson and John Marshall Harlan II

The seventh highest ideological shift of the Court came from Justice John Marshall Harlan II replacing Justice Robert Houghwout Jackson on the bench. This caused a -0.21267 point conservative shift of the Court during the second natural court under Chief Justice Warren. A more modern example of justices causing great shift in the Court moves

away from the Civil War Era and Reconstruction to a time of mounting cases defining civil rights and liberties. It is interesting that the greatest conservative shifts of the Court centered around changing attitudes about federal government involvement, most commonly in the arena of civil rights.

Justice Robert Houghwout Jackson was a man of great style and grandeur (Jaffe 1955). His philosophy was marked by scorn for judicial caution and a flamboyant attitude that made his presence to his colleagues on the bench. Most notably and informative of Justice Jackson's attitude toward the law was his understanding of federalism. Despising partisan politics, the justice strove to elevate the status of the judiciary, going so far as to write a book entitled *The Struggle for Judicial Supremacy* while serving as the Attorney General (Jaffe 1955). This accomplishment invariably sets the stage for his passion for the expansion of the judiciary and federal power over the states.

A supporter of the New Deal and President Franklin D. Roosevelt appointee, Justice Jackson made his first move of declaring his ideas concerning federalism in the case *Duckworth v. Arkansas*. In a concurring opinion, Justice Jackson notes that the Court had neglected to hold Congress accountable to the responsibility it had through the Constitution.

> Because the Court elected in this almost ostentatious manner to insist on the routine character of its judgment, Jackson chose to treat it as a gratuitous distortion of the commerce clause. Why, he asks in his concurring opinion, does the Court spurn the use of the twenty-first amendment, specifically devised to deal with the liquor traffic?... He then indicates that the Court has the prime responsibility of maintaining the freedom of that national economy which was the principal object of the Constitution (Jaffe 1955).

It was the duty of the Court and the prerogative of Congress to allow for free commercial movement. Justice Jackson notes that the majority opinion allows states and localities to manipulate commerce in a way that violates the duties of the state. Further cases hold similar sentiment in judicial philosophy for which Justice Jackson argued. Another example was *State Tax Comm'n v. Aldrich* in which Justice Jackson stated that the

chaos created through certain federalism teachings only limits the duties of Congress. Thus, Justice Jackson was a loud advocate for greater nationalization and Congressional grabs for the power that rightfully belonged to them.

In the place of this liberal federalist calling for greater federal power rose Justice John Marshall Harlan II. He was known as a great dissenter with intelligence and principle, usually writing opinions counter to the majority (Dorsen 1991). An appointee by President Eisenhower, Justice Harlan proved himself as a true conservative on the Court, unlike the chief and Eisenhower appointee Earl Warren.

Justice Harlan opposed "egalitarian rulings of many kinds", being especially weary of equality doctrines ill established by the Court (Dorsen 1991). Indicative of his opinion of the Court's power encroachment were his dissents in *Baker v. Carr* and *Reynolds v. Sims*. Both cases dealt with reapportionment and manipulated some state's rights in the name of equality. While serving on the Court, Justice Harlan also witnessed a massive reform of criminal procedure. He dissented vigorously from the exclusionary rule to illegally seized evidence, "Miranda" rules, and requirement of trial by jury (Dorsen 1991). The idea of incorporation of the Bill of Rights to the states was equally opposed by the justice who believed "that a 'healthy federalism' was inconsistent with the assertion of national judicial authority" (Dorsen 1991). In essence, most of the civil rights cases coming from the Warren Court lacked any support from the conservative justice.

Justice Harlan's objections to these cases and more came from his understanding of federalism as explained in the Constitution. Additionally, he understood Congress as having final authority in government. To him, this meant that Congress had the right to impair civil liberties, making his opinion known in cases concerning citizenship. Compared to his predecessor, Justice Harlan was strictly conservative, particularly with respect to issues of federalism. Here marked a massive conservative swing in the Court from two justices opposed on almost every judicial philosophy regarding federalism.

5.11 Joseph P. Bradley and George Shiras, Jr.

The final ideological shift of the Court examined in this thesis is the replacement of Justices Joseph P. Bradley and Lucius Quintus C. Lamar with Justices George Shiras, Jr., and Howell Edmund Jackson, respectively. Like so many of the previous shifts of the Court, the fourth natural court under Chief Justice Fuller was subject to two replacements. While those who replaced sitting justices were of little significance in the tenure of the Court, nevertheless, their influence on economic regulation created a conservative shift in the Court of a magnitude of 0.20145 points.

To begin, the pair of Justices Bradley and Shiras will be examined. Justice Joseph P. Bradley was born in New York and raised in the mountains upstate. The justice practiced law in Newark and was appointed to the Supreme Court by Grant following the end of the Civil War where he served for over twenty years. He was a strong nationalist and best remembered for the role he played in the future of race relations in the U.S. (Champagne 1985). The justice's love for learning and attention to detail made him a fantastic jurist (Champagne 1985).

In further regards to his judicial philosophy, the justice is known for his opinion in *Civil Rights Cases* which struck down the Civil Rights Act of 1875 as unconstitutional. His opinion is summarized as follows:

> He determined in the Civil Rights Cases that discrimination based on race, such as refusal of inn service, was not a badge of slavery. He also determined that such discrimination was a function of private rather than state action. As a result, Bradley could not find the authority for the law in the 13th or 14th amendments (Champagne 1985).

Justice Bradley's opinion drew criticism from his colleagues who believed the ruling was too narrow. In *Bradwell v. State* the justice ruled against civil rights, stating that women could be refused admission to the bar based on sex. While this case may seem to place the justice rather far to the right, given the period in which he was ruling, this opinion is not out of the ordinary. Nevertheless, Justice Bradley was subject to a rigid form of thinking.

The tenure of Justice George Shiras, Jr. has already been detailed in length in the fourth section of "The Eight Highest." Any refresher as to the nature of the justice's judicial philosophy can be found there. Given his conservative tendencies in spite of his predecessor's somewhat judicial philosophy, it is no wonder that the Court experienced a conservative shift with the appointment of Justice Shiras to the bench.

5.12 Lucius Quintus C. Lamar and Howell Edmund Jackson

The second pair of outgoing and incoming justices to the Supreme Court during the fourth natural court under Chief Justice Fuller was Justice Lucius Quintus Cincinnatus Lamar and Justice Howell Edmund Jackson. The conservative shift of the Court given these two pairs of justices is of significance here given Justice Lamar's background and tenure on the Court. Appointed by Democratic President Cleveland twenty years following the Civil War, Justice Lamar had served as a Confederate officer during the war much to the chagrin of Senate Republicans (Frank 1941). The confirmation of this Mississippi Congressman was met with great animosity and sitting senators took many forms of attacks of his character to stop his rise to the Court. He succeeded in confirmation with two Republicans voting for his confirmation, and thus began his time in service on the Supreme Court.

While there, this secessionist helped to push the Court to the separate but equal doctrine (2005). A staunch believer in states rights, Justice Lamar advocated for conservative values and influenced the Court to adopt conservative stances to the law. This was most prominent in cases dealing with racial segregation. In *Louisville, New Orleans and Texas Railway Company v. Mississippi*, the justice voted with the majority that "Congress had no right to interfere with the racial segregation of public transportation for instrastate rail travel in Mississippi" (2005). Essentially, the justice ruled that the rights of the states outweighed the rights of the individual and due process should not be forceably incorporated at the state level. Justice Lucius Q. C. Lamar died and was replaced before the infamous *Plessy v. Ferguson*, but it is no secret that *Louisville* served as significant precedent for the separate but equal doctrine. The Southern Democrat had

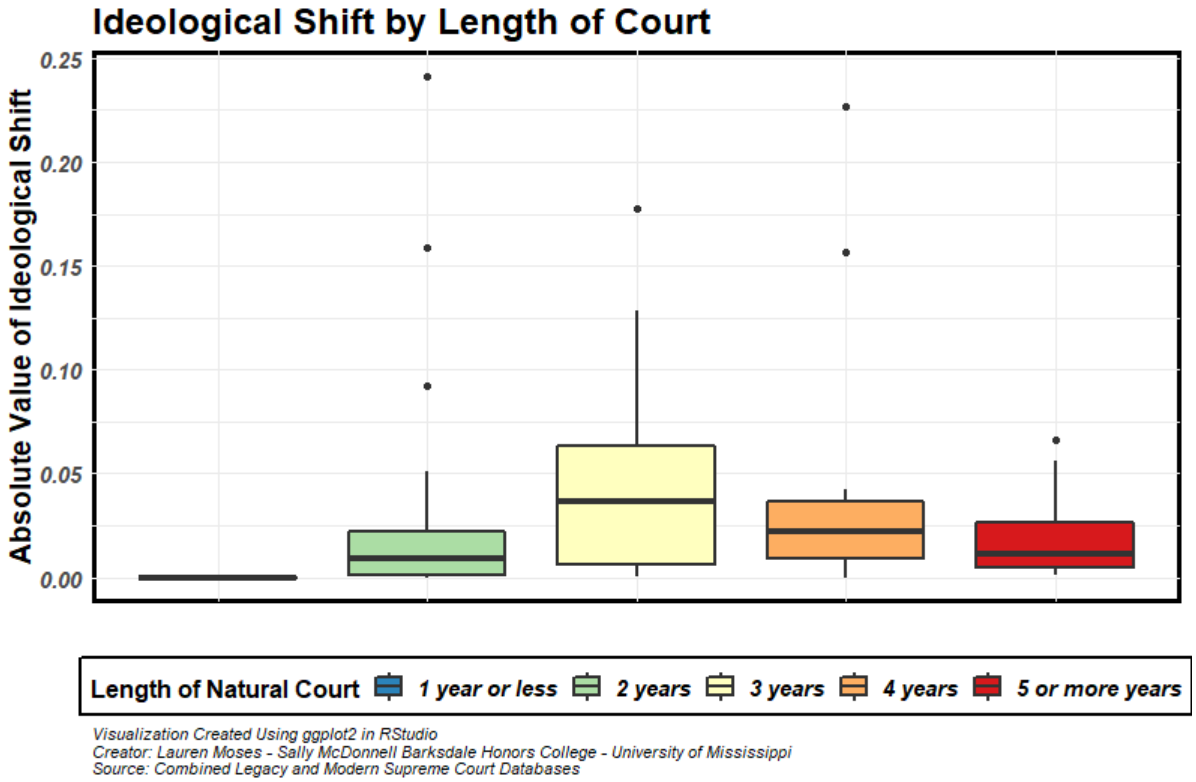
influenced the Court towards traditionally conservative ideological standings as he ruled in favor of limiting the scope of the federal government even at the expense of limiting the rights of individuals.

The successor to Justice Lamar, Justice Edmund Howell Jackson, was a man of little renown on the Court. According to J.P. Frank, his measly service of two years on the Court left little impact (1941). While serving, he limited the scope of his influence to cases on income tax litigation. The justice's lack of impact on the Court meant that little was done to affect the change instituted by Justice Lamar as he had served.

One scholar, Harvey Gresham Hudspeth, notes the life and career of Justice Howell Jackson as the first Tennessean to reside on the Court (1999). A Southern Democrat, his nomination to the bench by President Harrison was a strategic move to quell the Southern Democratic senators ready to quash any Republican nominees to the Court. Former colleagues of the justice, Justice Brown of the Sixth Circuit Court and Republican Senator George Hoar advocated for the quick confirmation of the nominee before Harrison left office (Hudspeth 1999). Then-Judge Jackson was of a beneficial choice to Republicans as well because he expanded the Civil Rights Act of 1870 in the case *United States v. Patrick* (Hudspeth 1999).

Once on the Court, the sickly Tennessean had almost no cases of significance. Some have glossed over his tenure on the Court as one historian, C. Vann Woodward, marked Justice Lamar's replacement as Justice Edward D. White (Hudspeth 1999). One Supreme Court case, *Lascalles v. Georgia*, proved to show that the ruling Jackson had made in *Patrick* was not an accident. He reaffirmed his prior decision and called for a reduction in states rights as territories without the power of a nation. Dying only a year before *Plessy*, his final appeal to the Court is unknown, although one would suspect he would have ruled with the majority (Hudspeth 1999). The greater liberality socially of the justice proceeding Justice Lamar might seem to have outweighed the work of Lamar. The more liberal ideological stance of the justice also came from his dissent in the 1895 case *Pollock v. Farmers' Trust & Loan Co.* where he believed the Court should have upheld a federal income tax (Johnson 2007). Although Justice Jackson never had the

Figure 2: Ideological Shifts across Natural Courts



opportunity while on the Court to show his influence as an anti-Anti-Trust justice, his legacy on the lower court gave rise to decisions found by the Supreme Court to limit the Sherman Act and dispense with some of the regulations established by the legislation (Hudspeth 2002). However, Justice Jackson's short tenure proved to affect the Court minimally, except in his conservative understanding of the Sherman Act and economic regulation, leaving in tact much of Justice Lamar's influence on the bench.

6 Longevity of Natural Court and Ideological Shift

The final source of inquiry lied within the longevity of the natural court. Examining the length of the Court's tenure and the ideology of the Courts immediately preceding and proceeding brought to attention the arc of a natural court. Specifically determined is the direction of ideological change and an exploration of a few of the longest natural courts.

The Figure 2 outlines how the ideological shifts from one natural court to the next spread in respect to the length of the Court. Given the normal distribution of the figure

as the length of the natural increases, one can presume that the longevity of a natural court does indeed affect the ideological shifts. The longer a natural court persists, it will gravitate toward a median ideology. Those natural courts that persist for two years or less would suggest that not enough cases are decided within that time period for ideological shifts to define the Court. Within the two year period lie multiple outliers; yet, the median remains below the three year median.

At the three year mark, the ideological shifts of the Court are significant. Unlike natural courts of longer periods, the natural courts lasting three years shift dramatically as justices are unable to reach a more stable median from one year to the next. Next, in the four year marker, the data trends downward again. It seems that the length of the Court becomes a factor in how great the ideological shift is during the natural court. The downward trend of the median ideological shift trends downward again in the five or more years courts, indicative again of a stabilizing natural court.

Before continuing with a discussion of a few of these natural courts and their personnel makeup, it is worth noting the break through in understanding of the Court this data collection has achieved. Speculation about natural courts and longevity had circulated in previous study by political scientists, but these projections were often limited to Marshall's famous fourth natural court which lasted an unprecedented twelve years. It has been understood that the long-serving chief justice was able to corral the Court into making unanimous decisions and writing but one opinion for each case (Hobson 2006). While this may explain the lack of ideological shift in Marshall's fourth natural court, it does not account for those chief justices who also enjoyed low ideological shift during long natural courts.

Rather, a more appropriate understanding of the longevity of natural courts is to expand upon the conclusions drawn in the fourth and fifth chapters of this thesis. When a natural court persists for several years, the low ideological shift can be attributed to the fact that there were no new appointments to the bench. Logically, this makes sense as it was shown in the preceding chapters how reactive the ideological score of the Court is to replacement justices. Those replacement justices who differ greatly in judicial philosophy

from their predecessors will incur a great ideological shift in the Court from one natural court to the next. The opposite is true when a justice is similar in judicial philosophy to his or her predecessor. And the findings in this chapter of research bolster the argument made in previous chapters: that the better grasp on categorizing courts comes from the most influential justice or justices rather than the chief justice.

In order to explore this finding, three of the longest natural courts which fall within the five or more year category are further discussed in the proceeding sections. These three courts include Chief Justice Marshall's fourth natural court, Chief Justice Rehnquist's seventh natural court, and Chief Justice Waite's sixth natural court. All three of these courts lasted eight years or more. For reference, the greatest ideological shift in a given natural court was 0.24138 for Chief Justice Waite's seventh natural court lasting only two years, and the smallest was essentially zero, usually scoring for natural courts lasting one year or less.

Marshall's fourth natural court experienced a net -0.00545 ideological shift during its twelve year tenure. At the time, the Court was composed of only six justices and a majority of Federalists (Hobson 2006). Given the determination by Chief Justice John Marshall to rally together his Court and offer unanimous opinions, such a small ideological shift is expected. During this time period, the chief was greeted by devoted colleagues who were energized by decisions like *Marbury v. Madison* that had solidified the trajectory of the Court. The slight shifts in the ideological score can be explained by the temperamental associate justice William Johnson of South Carolina (Hobson 2006). Without a coalition, however, he had little power on the Court.

Some cases of note during this time were *Martin v. Hunter's Lessee* and *Trustees of Dartmouth College v. Woodward*. *Martin* expanded the appellate jurisdiction of the Supreme Court and *Dartmouth* invalidated state law in an effort to honor a contract between the state of New Hampshire and Dartmouth College.

While much emphasis has been given to the study of Chief Justice John Marshall's natural courts, research is lacking in the study of other chiefs. The remaining natural courts of interest, Chief Justice Rehnquist's seventh natural court and Chief Justice

Waite's sixth natural court, serve in expanding the evidence found through the data set of the longevity of natural courts. With William H. Rehnquist's court, a mere 0.00149 ideological shift took place over an eleven year period. The conservative chief often deferred to the elected branches of government, creating a marked shift from the Warren Court that had prevailed before (Giuffra 2006). Although not as focused on creating a unified court, that had little bearings on the ideological shift as justices voted largely independently and according to their judicial philosophy.

The sixth natural court under Chief Justice Morrison Waite had an ideological shift of 0.05618 points and lasted 8 years. While much greater than both Chief Justices Marshall and Rehnquist, the value still ranks significantly lower than the outlier of Chief Justice John Roberts' fourth natural court (the ideological shift was -0.07175) which lasted for seven years, as well as natural courts lasting between two and four years. Again, one follows the direction of the Chief Justice in understanding what influence time had on stabilizing the ideological score of the natural court. According to the scholar D. Stephenson, Jr., the Waite Era was not indicative of a "political or judicial chieftain" (1973). Perhaps the distinction in score between Waite's court and Marshall's and Rehnquist's courts is that the chief had a less commanding and all together a less impressive jurist (Stephenson 1973). Nonetheless, the hypothesis that personnel change on the Court has more influence on ideological direction than the chief justice should not be abandoned.

When exploring the ideological scores of the next five longest, the hypothesis becomes even clearer. Chief Justice John Roberts' fourth natural court lasted seven years and shifted -0.07175 points. The first natural court of Chief Justice Chase lasted six years and incurred an ideological shift one-tenth of Roberts' court: 0.007175. Fuller's eighth and tenth natural courts both lasted six years and shifted -0.03223 and 0.06932 points, respectively. And Chief Justice Taft's fifth natural court lasted six years with a -0.00891 shift. Subsequent courts that lasted only six years managed to shift at an even less significant amount. Therefore, it is reasonable to relate a long natural court to the ideological shift of the Court. The longer the natural court persists, the less average

ideological shift will be incurred.

7 Concluding Remarks

The hypothesis this thesis sought to defend was thoroughly bolstered. Despite common practice by Supreme Court scholars, the data found through this investigation point to a different method of classifying the Court: that is, by the most influential justice on the bench. What is more, the research from this study discovered information not yet applied in the field of Supreme Court scholarship. In understanding natural court longevity, observers are better able to make decisions on depoliticizing the Court and making decision-making estimates once a natural court has been established.

As it relates to the greater body of political science research, these findings marry well with the literature cited at the beginning of this thesis. The Segal-Cover score proves the expected ideological shifts of the Court when a new justice is appointed and confirmed. The work of Cottrell, Shipan, and Anderson notes one reason as to why the replacement justice can swing the ideology of the bench so significantly. Banks and his research expounds upon the research of Cottrell, Shipan, and Anderson as yet another explanation for the ideological shifts from one justice to the next. Taken together, they can show that the Court is largely influenced by outside forces when justices are being placed to serve on the bench; however, once serving, a justice will not stray far from his or her ideological philosophy as evidenced by the model detailing the longevity of the natural court.

From this thesis, several avenues of further research remain. How can those tasked with replacing justices practice better decision making to ensure their desired outcome? Which justices had the greatest influences on the Court and how can their influence be reflected in court categorization? What other impacts does a long natural court have on public trust of the Court? A combined Supreme Court database will surely allow for greater study in the field of judicial research as well as how academics and the public understand the Court.

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