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DO JUSTICES TIME THEIR RETIREMENTS POLITICALLY?
AN EMPIRICAL ANALYSIS OF THE TIMING AND OUTCOMES
OF SUPREME COURT RETIREMENTS IN THE MODERN ERA

Christine Kexel Chabot*

Abstract

As the rampant speculation preceding Justice Kennedy's retirement made clear, it is difficult to predict when Justices will retire. Justices often defy the conventional wisdom that a Justice is more likely to retire when the president and Senate share the Justice's ideology. For example, Justice Ginsburg chose to remain on the Court rather than retire during President Obama's terms. Her choice is not unusual. Since 1954, a majority of similarly situated Justices refused to retire. In light of this behavior, it is no surprise that existing studies struggle to explain Justices' retirement decisions and disagree on whether political factors predict retirement.

This Article identifies key reasons past studies have found Justices' retirement decisions inexplicable. No studies measure whether Justices actually succeed in obtaining like-minded successors. Nor do past studies consider accurate measures of ideology while controlling for retirements forced by health. This empirical study of modern-era retirements addresses each of these shortcomings. It constructs more accurate measures of ideology by using voting records to pinpoint ideological similarities or differences between Justices, presidents, and Senators who may appoint a successor. It also differentiates between voluntary retirements and involuntary retirements forced by health. Finally, by comparing the votes of a Justice and his or her successor relative to other Justices remaining on the Court, this study offers the first measure of Justices' success in obtaining like-minded replacements.

The analysis reveals that Justices have had limited opportunities to retire to ideologically compatible presidents and Senates, and even then, limited success in obtaining like-minded replacements. Not all Justices had opportunities to time their retirements politically. Health problems forced many Justices to leave at politically inopportune times, and some Justices near the center of the Court were ideologically distant from leaders of both parties by the time they retired. Further, even Justices who retired to ideologically compatible presidents rarely obtained a successor who closely replicated the retiring Justice's voting behavior. Limited

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success in obtaining like-minded replacements explains why Justices flout calls to retire while presidents who share their ideology are in office.

INTRODUCTION

Many scholars believe Supreme Court Justices wait to retire until they face an ideologically compatible president and Senate.¹ Leading studies, however, rely on inaccurate partisan measures of Justices' political incentives to retire.² To illustrate the problem, consider Justice Anthony Kennedy's retirement. At the time he announced his retirement, Kennedy was the oldest Republican appointee on the Court,³ and Republicans controlled the White House and Senate. Kennedy's retirement, however, portended anything but a routine replacement of one Republican appointee by another.

Justice Kennedy's voting record and position at the center of the Court reveal that his retirement offered limited political returns.⁴ Kennedy's voting record shows a significant ideological divide between Kennedy and recent leaders of both the Republican and the Democratic parties.⁵ As a result, it should be no surprise that the Republican-controlled White House and Senate did not appoint a successor who is likely to perpetuate Kennedy's voting record.

To be sure, the precise voting record for Kennedy's successor, Brett Kavanaugh, remains to be seen. Still, Kennedy's final term on the Court revealed significant differences between Kennedy and President Trump's initial appointee,

¹ Leading political scientists note that a Justice "of advanced age enjoying relatively good health may be more prone to retire if the incumbent president is likely to appoint an acceptable replacement." LEE EPSTEIN, THOMAS G. WALKER, NANCY STAUDT, SCOTT A. HENDRICKSON, & JASON M. ROBERTS, *THE U.S. SUPREME COURT JUSTICES DATABASE* 121 (2017) [hereinafter *SUPREME COURT JUSTICES DATABASE*], <http://epstein.wustl.edu/research/justicesdataCodebook.pdf> [<https://perma.cc/SB46-WE6S>]; see also Gary King, *Presidential Appointments to the Supreme Court: Adding Systematic Explanation to Probabilistic Description*, 15 *AM. POL. Q.* 373, 384 (1987) (noting political retirement hypothesis: "whether or not older justices wait to retire until a president of their political party identification or ideological orientation is in the White House"). Conversely, a Justice may block a dissimilar successor by refusing to retire to an ideologically distant president and Senate. Even a Justice "suffering health problems may attempt to postpone retirement" to avoid being replaced by a Justice with different views. *SUPREME COURT JUSTICES DATABASE*, *supra* at 121.

² See ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 186 (2003).

³ Justice Kennedy turned 82 on July 23, 2018. CNN Library, *Anthony Kennedy Fast Facts*, CNN (June 29, 2018, 12:54 PM ET), <https://www.cnn.com/2013/02/22/us/anthony-kennedy-fast-facts/index.html> [<https://perma.cc/ZPM2-WJQY>].

⁴ See *infra* Figure A.

⁵ See *infra* notes 117 and 182.

Neil Gorsuch. In their only full term together as Justices,⁶ Kennedy and Gorsuch fully agreed in just 52 percent of non-unanimous cases.⁷ Kennedy aligned more closely with Chief Justice Roberts, another Republican appointee, and fully agreed with Roberts at the much higher rate of 74 percent of non-unanimous cases.⁸ Kennedy also fully agreed with Republican-appointee Justice Alito at the slightly higher rate of 58 percent.⁹ As these voting records show, there can be a substantial range of differences in voting records of Justices even though they were all appointed by presidents of the same party. This fact, coupled with Kennedy's role as the swing vote on many important issues, helps explain why Kennedy's retirement attracted great controversy.

To be sure, the concern over like-minded successors extends far beyond Justice Kennedy to the Court as a whole. This Article sheds light on Justices' incentives to retire by analyzing recent departures from the Court as well as current Justices (such as Ruth Bader Ginsburg) who have passed over political retirement opportunities occurring late in their tenure. The analysis is the first to incorporate voting records of retiring Justices and their successors into an analysis of the complete political landscape surrounding Justices' retirement decisions.

The study reveals that political timing has not dominated Justices' retirement decisions in the modern era. While Justices averaged significantly more like-minded successors when they retired to ideologically compatible presidents, not all Justices had opportunities to time their retirements politically. Health problems forced many Justices to leave at politically inopportune times, and some Justices near the center of the Court were ideologically distant from leaders of both parties by the time they retired.¹⁰ Limited ability to obtain a like-minded successor also diminished incentives for Justices with extended tenure to retire before health problems force them to leave.¹¹

⁶ Gorsuch, like Kavanaugh, had also clerked for Justice Kennedy earlier in his career. *Neil Gorsuch Fast Facts*, CNN (Aug. 31, 2018, 12:22 PM ET), <https://www.cnn.com/2017/02/03/us/neil-gorsuch-fast-facts/index.html> [<https://perma.cc/HV5Z-GVW>].

⁷ *Stat Pack, October Term 2017, Justice Agreement – Non-Unanimous Cases*, SCOTUSBLOG, (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_agreement-tables_20180629.pdf [<https://perma.cc/TB5W-KT7J>] (compiling percentages of agreement based on non-unanimous cases in which Justices fully agreed for the October 2017 Term).

⁸ *Id.*

⁹ *Id.*

¹⁰ See *infra* Part II.D.2 for a discussion on Justices Stewart, O'Connor, and Kennedy.

¹¹ See *infra* Figure 6 and surrounding discussion of retirement outcomes.

Retirement has been the primary source of vacancies on the Court since 1954,¹² and it is clear that retirement correlates with age.¹³ Still, past research provides only a limited understanding of how political timing relates to Justices' retirement decisions. Some Justices have openly voiced political goals for retirement¹⁴ or regretted retirements to ideologically incompatible presidents.¹⁵ The leading anecdotal account claims that "partisanship currently dominates the departure process."¹⁶ But empirical studies disagree on whether political factors significantly predict retirement,¹⁷ and previous analyses fail to examine incentives shown by

¹² Twenty-three Justices have retired and two have died in office since 1954. SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 118. By 1954, Justices enjoyed the benefit of modern retirement provisions allowing them to retire to senior status at full salary when they reached age 65 with 15 years of service (or age 70 with 10 years of service). See Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 10 (2012) (citing Act of Feb. 10, 1954, Pub. L. No. 294, § 4, 68 Stat. 8, 12–13). Modern retirement decisions do not reflect earlier influences such as lack of pensions or arduous circuit-riding duties. For a careful discussion of the statutory history of retirement options available to federal judges, see Burbank et al., *supra* at 6–12.

¹³ Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*, 47 DEMOGRAPHY 269, 291 (2010) ("Age raises expected annual odds of retirement about 6% per additional year, other things being equal.").

¹⁴ Justice Douglas refused to "resign while there's a breath in my body, until we get a Democratic president." WARD, *supra* note 2, at 186.

¹⁵ After he retired, Earl Warren expressed regrets about leaving the Court: "If I had ever known what was going to happen to this country and this Court, I never would have resigned. They would have had to carry me out of here on a plank!" WARD, *supra* note 2, at 175.

¹⁶ WARD, *supra* note 2, at 228.

¹⁷ For example, some scholars find that Justices are more likely to retire if the president is of the same party as their appointing president. Stolzenberg & Lindgren, *supra* note 13, at 291. Others scholars identify a relationship between retirement and political timing factors other than presidential ideology. See King, *supra* note 1, at 376 ("The specific hypothesis here is that the justices have higher probabilities of retirement in times of political turmoil and realignment."); Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25, 37 tbl.1 (1993) (presenting probability coefficients showing that it is early in a president's second term was significantly related to time of retirement). Still other scholars fail to find significant relationships between retirement and political timing. See generally Saul Brenner, *The Myth that Justices Strategically Retire*, 36 SOC. SCI. J. 431, 434–38 (1999) (failing to find prevalent political timing in Justices' retirements from 1937–1991); Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143, 169–71 tbl.7 (2006) (arguing there is no significant relationship between retirement and White House control by party of appointing president); Christopher J.W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies*, 22 POL. BEHAV. 145, 155 tbl.2 (2000) (finding an insignificant relationship between Justice-president party agreement and retirement). Finally, Bustos and Jacobi argue that existing empirical studies do not adequately account for nuanced political factors influencing Justices' retirement decisions. See Álvaro Bustos & Tonja Jacobi, *A Theory of Justices'*

actual retirement outcomes (e.g., how often Justices succeed in obtaining like-minded successors).

The lack of consensus in existing empirical studies reflects diverse—and often outdated—measures of political timing. Many leading analyses conflate judicial ideology with the party of an appointing president¹⁸ or fail to control for involuntary retirement due to poor health.¹⁹ None of these analyses compare voting records of outgoing Justices to voting records of their successors.

Advances in judicial politics research enable more nuanced analysis of factors related to political timing and retirement outcomes. For starters, recent research demonstrates that Justices' voting records provide a better measure of judicial ideology than party of appointing president.²⁰ Political scientists have recently established refined ideological measures, known as “common space” scores, which at the Supreme Court level are derived from Justices' votes in non-unanimous cases.²¹ These scores can also be compared to scores identifying ideologies of the president and Senate.

Common space scores provide a more accurate picture of political timing for Justices like David Souter, who was a Republican appointee with a liberal voting record. Given his voting record, Souter's retirement to President Obama and a

Retirement, 17 AM. L. & ECON. REV. 529, 532 (2015).

¹⁸ See, e.g., Stolzenberg & Lindgren, *supra* note 13, at 291; Yoon, *supra* note 17, at 169 (evaluating whether Justices are more likely to retire when White House is controlled by the same party as the party of their appointing president); cf. Zorn & Van Winkle, *supra* note 17, at 152 (considering whether “the presidency and/or the Senate are controlled by the same political party as the justice”).

¹⁹ Health is more difficult to code in studies which use dependent variables comprised of decisions to retire or not retire in each year that a Justice is on the bench. Nevertheless, failure to control for retirement forced by health is a critical omission. This omission casts doubt on the two studies which consider more nuanced measures of ideological proximity to the president and find this proximity to be an insignificant predictor of time of retirement. Kjersten Nelson & Eve Ringsmuth, *Departures from the Court: The Political Landscape and Institutional Constraints*, 37 AM. POL. RES. 486, 498 tbl.2 (2009) (listing variables); Terri Peretti & Alan Rozzi, *Modern Departures from the Supreme Court: Party, Pensions, or Power?* 30 QUINNIPIAC L. REV. 131, 148 (2011) (coding “Voluntary departure” to include all retirements as distinguished from decisions to remain on the Court or die in office).

²⁰ Christine Chabot & Benjamin Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1019 tbl.2 (2011) (noting that in non-unanimous cases, just under half of Justices sided with appointees of other parties most of the time); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?* 29 WASH. U. J.L. & POL'Y 133, 209 (2009) (noting that measures of ideology based on judicial votes are “a large improvement over the party-of-appointment proxy measure”).

²¹ The scores incorporate votes (or in the case of a president, stated position on select roll call votes) to rank political actors' positions relative to one another on a scale from -1 to 1. The scores do not incorporate absolute value judgments as to whether votes are conservative or liberal as they are always relative to other actors in the system.

Democrat-controlled Senate was well-timed politically. The timing of Souter's retirement facilitated a successor (Justice Sotomayor) who maintained Souter's overall voting record relative to other Justices on the Court. Voting records can also illustrate differences between appointees of the same party. Voting records for Republican appointees Kennedy and O'Connor place them at the center of the Court and show a significant ideological distance from other Republican appointees such as Thomas, Scalia, and Alito.²²

Further, although in recent decades Justices have almost always left the Court by retiring, just under half of the twenty-three modern retirements have been forced by serious health conditions or other external forces over which a Justice has no control.²³ Consider Justice Douglas. While he voiced a strong interest in maintaining his "liberal" voting record,²⁴ a severe stroke forced him to retire to President Ford, who did not share Douglas's ideology. In this case, health problems prevented Douglas from attaining a politically timed retirement. Other Justices who retire involuntarily may also be precluded from attaining political retirement goals.

Justices who retire voluntarily seem better positioned to time their retirements politically, but political timing has not provided sufficient incentives for many Justices to retire. Justices with extended tenure have often passed up voluntary retirements to ideologically compatible presidents. Justice Ruth Bader Ginsburg, for example, passed up an opportunity to retire after an extended tenure and during the Obama Administration. She is not alone: eight other Justices with extended tenure made similar decisions.²⁵ These Justices were unwilling to give up a powerful and prestigious position, despite the risk that health would force an ill-timed, involuntary retirement later on.²⁶

Finally, the ultimate measure of incentives to time retirements politically is how often Justices succeed in obtaining like-minded successors. Voting records allow one to compare the votes of an outgoing Justice and his or her successor relative to other Justices on remaining on the Court. A Justice who votes as the third most liberal Justice on the Court, for example, would presumably prefer a successor who will continue to vote that way.²⁷ A successor who votes as the second-most

²² See *infra* Figures B and C.

²³ For a list of involuntary retirees, see *infra* Part II.B.2.b. In addition to severe health problems, this study also counts as involuntary Justice Fortas's retirement to avoid imminent impeachment.

²⁴ WARD, *supra* note 2, at 187 (noting that Douglas initially refused to retire despite severe health problems: "Even if I'm only half alive, I can still cast a liberal vote").

²⁵ See *infra* Figure 5 (noting that Justices Black, Frankfurter, Brennan, White, Rehnquist, Stevens, Scalia, and Breyer also passed up politically opportune retirement windows).

²⁶ See *infra* Figure 5 (noting that only 2 of 9 Justices to pass over opportune retirement windows secured voluntary retirements later on).

²⁷ As noted below, common judicial space scores do not include a value judgment as to liberal versus conservative votes. They rank Justices on a spectrum based on their levels of agreement or disagreement in non-unanimous cases. Still, those familiar with the Court

conservative Justice would be far less satisfactory. Analysis of retirement outcomes illustrates diminished political returns associated with political timing and illuminates the dissatisfaction that Justice O'Connor voiced about the voting records of her successor, Justice Alito.²⁸

Consideration of Justices' voting records, voluntary versus involuntary retirements, and succession outcomes all refine earlier understandings of Justices' retirement decisions. This Article develops these points as follows: First, in Part I, it provides background on political timing and summarizes past research addressing Justices' retirement decisions. Second, in Parts II.A through II.B, the Article identifies multiple variables to account for the complete political landscape surrounding Justices' retirement decisions. The Article develops numerical measures to compare how an outgoing Justice and his or her successor voted relative to other Justices remaining on the Court. It also explains how common space ideology measures and other variables derive from Justices' actual voting records and recent insights from judicial politics literature. Further, the Article places political timing in context by controlling for involuntary retirements and by considering how often Justices had and capitalized on politically opportune retirement windows occurring after an extended tenure. Third, in Parts II.C through II.D, the Article develops several political-timing hypotheses and analyzes how explanatory variables relate to the timing of Justices' departures from the Court. It incorporates statistical analysis to compare retirement outcomes for different groups of Justices. Finally, the Article concludes that political timing has not dominated Justices' retirement decisions in the modern era.

Since 1954, thirteen Justices retired voluntarily, ten retired involuntarily, and two died.²⁹ Just over half of the twenty-three retirements were not politically timed. While political timing was more frequent in the subset of voluntary retirement decisions, some Justices near the center of the Court did not face ideologically similar presidents from either party by the time they retired. Further, political timing often failed to induce voluntary retirements for Justices who faced politically opportune retirement windows occurring late in their tenure. Instead, many Justices preferred to stay on the Court and risk a politically inopportune retirement forced by health.

Analysis of retirement outcomes shows that Justices rarely obtained a successor who occupied exactly the same seat on the Court as the outgoing Justice. Instead, outgoing Justices averaged successors who were 2.3 seats away from the outgoing Justice's seat on the Court. Statistical analysis shows that political timing produced a generally favorable result as Justices averaged significantly closer successors (1.58

understand Ginsburg's end of the voting spectrum as relatively "liberal" and Thomas's end of the voting spectrum as relatively "conservative."

²⁸ Since retiring, "O'Connor has been increasingly clear about her disenchantment with the work of her successors, especially . . . Samuel A. Alito, Jr., (who took her seat)." Jeffrey Toobin, *Justice O'Connor Regrets*, NEW YORKER (May 6, 2013), <https://www.newyorker.com/news/daily-comment/justice-oconnor-regrets> [<https://perma.cc/363X-5LWN>].

²⁹ See SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 119.

as opposed to 3.09 seats away) when they retired to an ideologically proximate president.³⁰ However, the analysis does not identify significantly different outcomes for the subset of voluntary retirees with higher rates of political timing: on average, voluntary retirees did not obtain significantly more like-minded successors than Justices who left involuntarily.³¹ In part, this result reflects the fact that some Justices near the center of the Court lacked opportunities to retire to ideologically proximate presidents. Further, even Justices who retired to ideologically proximate presidents experienced a range of outcomes and sometimes ended up with relatively dissimilar successors.

To be sure, political timing may become more apparent as the number of retirees in the modern era grows. It remains to be seen whether future retirements will display more pervasive political timing, or whether a substantial number of Justices will continue to hold on to their seats and risk involuntary retirement at a politically inopportune time. Political timing offers only limited incentives for a Justice who would like a successor to fill his or her exact seat. Retirees have obtained this outcome infrequently in the past. Instead, a Justice who chooses to time her retirement politically should expect only a relatively similar successor or the opportunity to avoid a distant successor. Further, Justices who occupy the center of the Court, like Kennedy, have little reason to expect that they will be replaced by a like-minded successor.

This Article shows that Justices have had limited opportunities to retire to ideologically compatible presidents and Senates, and even then, limited ability to obtain a like-minded successor. Political timing was not an option for Justices who suffered declining health or for some Justices at the center of the Court. Even Justices who retired to ideologically compatible presidents were unlikely to obtain successors occupying their exact seat. This may help explain why a substantial number of Justices chose to risk involuntary retirement rather than seize politically opportune retirement windows as soon as possible. Examination of the complete landscape surrounding modern retirement decisions illuminates the limited incentives offered by political timing. In the modern era, political concerns have played a partial but not dominant role in the timing of Justices' retirements.

I. POLITICALLY TIMED RETIREMENTS

Justices' retirement decisions occupy a fascinating position at the intersection of law and politics. Assertions that Justices' votes reflect their political orientation are commonplace,³² and leading scholars also posit that retirement decisions reflect

³⁰ As noted below, Justices who retire when the Senate median is ideologically proximate do not obtain significantly more like-minded successors than Justices who retire to ideologically distant Senate medians. *See infra* note 194 and accompanying text.

³¹ *See infra* Part II.D.4.b (comparing average succession outcomes for voluntary versus involuntary departures).

³² LEE EPSTEIN, WILLIAM LANDES, & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 102 (2013) (stating that politicians, interest groups, and the general public

Justices' political views.³³ With respect to voting, one rarely—if ever—expects to hear Justices themselves describe their votes in political terms.³⁴ But when it comes to retirement, Justices have been more forthcoming about their political concerns.

Examples abound. Justice Ginsburg has recently explained her refusal to retire in overtly political terms: in a 2014 interview, Justice Ginsburg opined that it would be “misguided” to think “Obama could appoint someone like me” as a successor.³⁵ Over a decade earlier, Justice Rehnquist noted that Justices make retirement decisions based on who controls the White House “in more cases than not.”³⁶ In the 1970s, Justice Douglas expressed concerns about preserving his “liberal” voting record and his desire to retire to a Democratic president.³⁷ Finally, Justice Warren’s and Justice O’Connor’s retirement regrets evince their disappointment in the subsequent political direction of the Court.³⁸

all realize that “Justices are ideological,” and that Justices’ ideology “influences their votes”).

³³ King, *supra* note 1, at 384 (“Since other decisions of the justices are based on political orientations, it is plausible that retirement decisions, when they are voluntary, also depend upon political calculation.”); Yoon, *supra* note 17, at 144 (noting that judges’ ideological leanings “influence how they interpret and decide cases” and produce preferences for a “like-minded successor”).

³⁴ “[M]ost judges would sooner admit to grand larceny than confess a political interest or motivation.” Frank Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 N.W. U. L. REV. 251, 262 (1997) (quoting ROBERT A. CARP & RONALD STIDHAM, *THE JUDICIAL PROCESS IN AMERICA* 301 (1996)). In the aftermath of Robert Bork’s failed nomination, recent nominees have clearly disclaimed any role for personal political preferences. See EPSTEIN ET AL., *supra* note 32, at 101 (describing Roberts’ “neutral umpire” analogy and Alito’s and Sotomayor’s political disclaimers). This expectation also illustrates why the partisan complaints Brett Kavanaugh voiced at his confirmation hearing attracted so much controversy. See Aaron Blake, *Brett Kavanaugh Just Got Remarkably Angry — and Political — for a Supreme Court Nominee*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/politics/2018/09/27/brett-kavanaugh-just-got-remarkably-angry-political-supreme-court-nominee/?utm_term=.071676cc7e15 [<https://perma.cc/D8BB-U5ZZ>] (describing Kavanaugh’s accusation that the Democrats’ investigation into allegations of his sexual misconduct was a “political hit” and “revenge on behalf of the Clintons”).

³⁵ Pema Levy, *Liberal Justice Ruth Bader Ginsburg Explains Why She Won’t Retire*, NEWSWEEK (Sept. 24, 2014), <http://www.newsweek.com/ruth-bader-ginsburg-explains-why-she-wont-retire-272876> [<https://perma.cc/C6J5-2KWS>] (quoting 2014 interview with *Elle* magazine).

³⁶ WARD, *supra* note 2, at 218.

³⁷ See Stolzenberg & Lindgren, *supra* note 13, at 274; Zorn & Van Winkle, *supra* note 17, at 150.

³⁸ Toobin, *supra* note 28 (describing O’Connor’s “disenchantment with the work of her successors”); WARD, *supra* note 2, at 175 (noting that Warren said he “never would have resigned” if he “had ever known what was going to happen to this country and this Court”).

While Justices' expressions of political retirement concerns are not universal,³⁹ they stand in marked contrast to Justices' staunch disavowal of politics when deciding cases. It is no wonder that Artemus Ward's careful and detailed account of Justices' retirement decisions recognizes a prevailing role for partisanship. To be sure, partisanship "played less of a role earlier in the Court's history" when other variables including financial concerns took precedence.⁴⁰ In the modern era, however, Ward asserts that partisanship is "the major element in the departure-decision making of more recent justices."⁴¹ He concludes that "partisanship currently dominates the departure process."⁴²

As the legal realist movement has demonstrated, however, words differ from actions. And the action here—retirement—is a single irreversible decision which costs a Justice far more than a vote in any particular case. As a result, a Justice may express political concerns but prioritize other values in his or her ultimate decision to leave the Court. Justices who retire must permanently give up one of the most powerful and personally rewarding offices in the nation. Recent Justices have also enjoyed a reduced workload and extensive travel and lecturing opportunities. Further, Justices may believe they will be able to time their retirements politically, but may fail to accurately predict impending health problems which will force retirement at an inopportune time.

Indeed, despite the political interests expressed above, none of the Justices quoted managed a politically timed retirement: Ginsburg remains on the bench and risks an ill-timed departure during the Trump administration. Rehnquist died in office and never retired. Douglas's health forced him to retire to a Republican president, and Warren and O'Connor regretted the outcomes of their retirements.⁴³ If political concerns truly dominated Justices' retirement decisions, they would manifest themselves in Justices' behavior and in most cases result in politically timed retirements.

³⁹ See, e.g., WARD, *supra* note 2, at 200 (noting that Powell denied that ideology of his successor influenced his retirement decision).

⁴⁰ WARD, *supra* note 2, at 228.

⁴¹ *Id.*

⁴² *Id.*

⁴³ As noted below, Warren's failed attempt to retire at the end of the Johnson administration ultimately resulted in Warren's retirement to President Nixon. See WARD, *supra* note 2, at 175. By the time Justice O'Connor retired, she was ideologically distant from Republican President George W. Bush, even though O'Connor joined the Court as a Republican appointee. Toobin, *supra* note 28.

Unsurprisingly, several empirical studies address this question: do political factors predict the times Supreme Court Justices retire? These studies disagree over the significance of political timing, and they are difficult to reconcile because they use a diverse range of variables.⁴⁴ Even leading Supreme Court studies which identify significant evidence of political timing associate political effects with different variables.

The only article which finds a significant link between presidential ideology and times of Justices' departures is Ross Stolzenberg and James Lindgren's 2010 study entitled *Retirement and Death in Office of U.S. Supreme Court Justices*.⁴⁵ Stolzenberg and Lindgren examine a comprehensive group of all Justices on the Court from 1789 through 2006, for a large sample of 110 Justices and 1,895 Justice-years in which Justices made the choice to either retire or remain on the Court.⁴⁶ Their logistic regressions evaluate a "politicized departure hypothesis," in which political timing reflects a Justices' loyalty to the party of their appointing presidents.⁴⁷ To control for retirements forced by health problems, the study considers how long a Justice lives after he or she leaves the bench.⁴⁸

Stolzenberg and Lindgren find statistically significant support for the argument that Justices time their retirements politically:

If the incumbent president is of the same party as the president who nominated the justice to the Court, and if the incumbent president is in the first two years of a four-year presidential term, then the justice has odds of resignation that are about 2.6 times higher than when these two conditions are not met.⁴⁹

Along with this heightened resignation rate, the study finds the odds of death are much higher when an opposing party president controls the White House.⁵⁰ Based on these relationships, Stolzenberg and Lindgren "find that political climate effects on retirement are consistent with the politicized departure hypothesis."⁵¹

Other studies that identify significant political timing do not examine the relationship between time of departure and the Justice's ideological proximity to the president. Gary King, for example, finds that turnover on the Court significantly increases during periods of military conflict and electoral change.⁵² He expressly

⁴⁴ Bustos & Jacobi, *supra* note 17, at 532 ("The existing literature has not coalesced on an agreement of which other variables should be included in the analysis . . .").

⁴⁵ Stolzenberg & Lindgren, *supra* note 13.

⁴⁶ *Id.* at 277, 280–81 tbl.3.

⁴⁷ *Id.* at 273 (noting that politicized departure hypothesis reflects "belief that justices tend to be loyal to the party of the president who appointed them . . .").

⁴⁸ *Id.* at 275.

⁴⁹ *Id.* at 291.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² King, *supra* note 1, at 378–79, 382 tbl.1 (reporting results of exponential Poisson

leaves open the question “whether or not older justices wait to retire until a president of their political party identification or ideological orientation is in the White House.”⁵³

Similarly, Timothy Hagle considers relationships between several political variables and the number of retirements from the Supreme Court in a given year.⁵⁴ Hagle considers (and finds significant explanatory power in) the fact that a president is in his second term, as well as the fact that it is early in the president’s term.⁵⁵ However, the study does not include a variable identifying whether the president is ideologically proximate to the retiring Justice.⁵⁶ It is unclear if either of the presidential variables included support a strong theory of political timing. Why would a Justice looking to retire to an ideologically compatible president wait until the second term? Further, retirement in the early years of a president’s term may reflect an institutional desire to shield the Court from election-year politics but not necessarily political timing.

Other studies fail to identify a significant relationship between presidential ideology and when Justices retire.⁵⁷ Saul Brenner disclaims prevalent political timing based on his detailed tabulation of critical variables surrounding Justices’ retirement decisions. His study focuses on the thirty-three Justices that left the Court from 1937 to 1994.⁵⁸ Unlike studies by Stolzenberg and Lindgren and others, Brenner looks beyond party of appointing president to actual voting records. In particular, Brenner considers whether a Justice retired to a president whose party

regression model of U.S. Supreme Court appointments).

⁵³ *Id.* at 384.

⁵⁴ Hagle, *supra* note 17, at 37 tbl.1 (reporting estimation of retirement results of exponential Poisson regression).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Nelson & Ringsmuth, *supra* note 19, at 501 (noting common space calculation of “ideological distance between the president and each justice does not significantly affect the hazard rate” for retirement, even though distance between Justice and Senate median does have a significant effect; considering justice-year decisions to retire or stay from 1947–2004); Peretti & Rozzi, *supra* note 19, at 155–56 (considering retirements from 1953 to 2010 terms and failing to identify significant correlation between time of retirement and ideological proximity to president and Senate using either partisan or common space measures); Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180, 184–85 (1988) (finding insignificant relationship between time of retirement and White House being controlled by party of appointing president, based on analysis of decisions to retire or not to retire in judge years from 1789 through 1980); Yoon, *supra* note 17, at 169–71 tbl.7 (finding an insignificant relationship between retirement and White House being controlled by party of appointing president, based on judge years 1869–2002); Zorn & Van Winkle, *supra* note 17, at 155 tbl.2 (finding an insignificant relationship between Justice-president party agreement and retirement, based on analysis of decisions to retire or not to retire in judge years from 1789 through 1992).

⁵⁸ Brenner, *supra* note 17, at 434–35.

ideology aligned with the Justice's voting record of agreement with a liberal or conservative voting bloc on the Court.⁵⁹ While party of appointing president offered the best available metric of judicial ideology for other studies including a broader group of judges,⁶⁰ Brenner's analysis takes an important step toward a more nuanced understanding of factors influencing political timing.

Voting records such as those considered by Brenner offer far more insight into political timing than party of appointing president. A partisan measure would mean that a Republican appointee like Justice Brennan timed his retirement politically when he retired to Republican president George H. W. Bush. However, Brennan had such a liberal voting record that his appointing president, Dwight Eisenhower, called Justice Brennan one of his greatest "mistakes."⁶¹ As Brenner's study recognizes, Brennan's liberal voting record supports a different and more accurate assessment of the political circumstances of his retirement: Brennan retired to an ideologically distant president and not in a manner consistent with political timing.⁶² The common space measures of ideology used in this Article are updated and enhanced versions of the voting metrics used in Brenner's study, and they add critical nuance to analysis of political timing.⁶³

Further, Brenner's study considers whether a Justice actually retired due to poor health,⁶⁴ a variable that also correlated significantly with retirement in an earlier study by Peeverill Squire.⁶⁵ While a handful of other studies include proxies for a Justice's health,⁶⁶ workload until retirement or longevity after retirement do not fully

⁵⁹ *Id.* at 434 (classifying "justices in the 1937 to 1991 period as 'liberal' or 'conservative' based on their bloc membership during their last term prior to retirement" and classifying Presidents based on political party).

⁶⁰ For example, Stolzenberg and Lindgren and Zorn and Van Winkle consider all Justices throughout history. Stolzenberg & Lindgren, *supra* note 13, at 277, 280 tbl.3; Zorn & Van Winkle, *supra* note 17, at 150. Yoon considers Supreme Court Justices alongside federal district court and court of appeals judges. Yoon, *supra* note 17. These studies had to rely on partisan measures of ideology to accommodate a broader group of judges for whom voting data was either not available or not reflected in common space scores.

⁶¹ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 200 (rev. ed. 1999).

⁶² Brenner, *supra* note 17, at 436 tbl.2.

⁶³ There are only two retirement studies that incorporate common space scores. *See* Nelson & Ringsmuth, *supra* note 19, at 495–96; Peretti & Rozzi, *supra* note 19, at 156. However, neither study accounts for the other key variable of involuntary retirement forced by health. *See infra* note 68.

⁶⁴ Brenner, *supra* note 17, at 435 tbl.1.

⁶⁵ Squire, *supra* note 57, at 185 (showing that physical infirmity is "the single most important variable" explaining the decision to retire).

⁶⁶ Stolzenberg and Lindgren consider longevity after retirement. *See* Stolzenberg & Lindgren, *supra* note 13, at 275. Zorn and Van Winkle find that "low opinion output . . . serves as a proxy for physical infirmity." *See* Zorn & Van Winkle, *supra* note 13, at 151. Studies which measure decisions to retire or not to retire for each Justice year have more

capture a Justice's actual health at the time of retirement. Charles Evans Whittaker, for example, had serious mental health issues that forced him to retire and take disability status eleven years before he died.⁶⁷ Health problems are important to consider because they can force involuntary retirements and override any political timing preferences a Justice might otherwise hold. Studies that do not consider the difference between voluntary and involuntary retirements risk erroneously concluding that presidential ideology has no significant relationship to a Justice's time of departure.⁶⁸ Further, Brenner considers missed opportunities and whether a Justice passed over an opportunity to retire to an ideologically compatible president after age seventy.⁶⁹ The missed-opportunities analysis in this Article updates Brenner's analysis. It incorporates common space measures of ideology and considers Justices' tenure and age as appropriate markers for opportune retirement windows.

Finally, judicial politics research has made important gains in recent years. Researchers have coded voting records for a larger sample of previously unexamined historical Supreme Court cases,⁷⁰ and for more recent cases researchers have developed nuanced measures of Justices' ideology based on their voting records in non-unanimous cases.⁷¹ As explained in more detail below, these nuanced ideological measures plot Justices' ideal points based on their voting records for each term. Ideal points allow one to consider not just general alignment with a "conservative" or "liberal" voting bloc, but also where a Justice stands relative to all other Justices on the Court. A group of leading political scientists has also scaled Justices' ideal points so they can be compared directly to leading nuanced measures of ideology for presidents and members of Congress.⁷²

difficulty coding health problems than studies which measure a Justice's health at the time of retirement. Squire attempted to code for health in a justice-year study by defining physical infirmity as "major physical disability, like a stroke, which renders an individual incapable of even trying to perform his or her task." See Squire, *supra* note 57, at 185–86.

⁶⁷ WARD, *supra* note 2, at 165.

⁶⁸ This variable is omitted in Yoon's general study of federal judges including Supreme Court justices, see Yoon, *supra* note 17, and it is also omitted from two studies incorporating common space measures into an analysis of political timing. Nelson & Ringsmuth, *supra* note 19, at 498 tbl.2 (listing variables); Peretti & Rozzi, *supra* note 19, at 148 (coding "Voluntary departure" to include all retirements as distinguished from decisions to remain on the Court or die in office). All of these studies find an insignificant relationship between time of retirement and the Justice's ideological proximity to the president.

⁶⁹ Brenner, *supra* note 17, at 437–38.

⁷⁰ Chabot & Chabot, *supra* note 20, at 1006–14; THE SUPREME COURT DATABASE: LEGACY DATABASE (Aug. 14, 2017), <http://www.supremecourtdatabase.org/> [<https://perma.cc/7HMJ-RJTA>].

⁷¹ Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999, 10 POL. ANALYSIS 134, 134–36 (2002).

⁷² Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306–11 (2007).

Enhanced measures of political preferences also support a more sophisticated theory of retirement. Consider Justice Ginsburg's refusal to retire because "Obama could [not] appoint someone like me . . ." ⁷³ Ginsburg's desire for a like-minded successor may not be satisfied by retirement to a Democrat-controlled White House or even Democrat-controlled White House *and* Senate. Indeed, even though Justice Stevens retired when Democrats controlled the White House and Senate, his successor, Justice Elena Kagan, was more closely aligned with the center of the Court than Stevens. ⁷⁴ It is also doubtful that Justices at the center of the Court, like Kennedy, will obtain similar successors by retiring to presidents of the same party as their appointing president. A Justice seeking a like-minded successor would likely look beyond party and consider his or her votes relative to other Justices remaining on the Court and relative to the ideologies of the president and Senate. ⁷⁵ Further, if a Justice does not believe his or her health will force him or her to retire during upcoming political cycles, circumstances indicating a relatively close successor may not be enough. He or she may prefer to stay on the Court and cast his or her own votes rather than allowing a successor to cast relatively close votes. ⁷⁶

Precise retirement outcomes have never been measured until now, but they are of critical importance to political timing theory. As an empirical matter, does political timing succeed most of the time, or are appointing presidents themselves disappointed a great deal of the time? ⁷⁷ If the latter possibility is true, then there is little reason for a retiree to expect a well-timed departure to produce a like-minded

⁷³ See *supra* note 35 and accompanying text.

⁷⁴ See *infra* Figure 6 (showing that Kagan's overall voting record in non-unanimous cases placed her three seats to the right of Justice Stevens).

⁷⁵ See Bustos & Jacobi, *supra* note 17, at 557 (predicting "that the retirement decision varies with the extremeness or moderation of the ideology of the retiring justice—both relative to the rest of the Court and relative to the political actors"). Bustos and Jacobi advance an even more sophisticated model pursuant to which Justices calibrate their retirement decisions based on the likely change to the Court's median. *Id.* at 529–30. The desire for a like-minded successor and identical median will often overlap and reflect similar variables, but focus on change to the Court's median limits retirees to a narrower range of ideological goals. This Article focuses on the more general question of Justices' desire for a like-minded successor.

⁷⁶ Bustos and Jacobi advance this argument based on their prediction of how much a particular retirement will shift the median of the Court. *Id.* at 551–52 ("[W]henver justices . . . believe that their forced probability of retirement is practically zero, they will always decide to stay in service . . ."). Whether the Justice wishes to avoid changing the Court's median or avoid changing his or her individual voting pattern, a Justice's best means of minimizing either type of change is to remain on the Court and continuing to cast his or her own votes.

⁷⁷ For competing possibilities, compare Chabot & Chabot, *supra* note 20, at 1019 (noting that, throughout history, presidents have been disappointed just under half of time), with Christine Chabot, *A Long View of the Senate's Influence over Supreme Court Appointments*, 64 HASTINGS L.J. 1229, 1261 fig.2 (2013) (asserting that presidents have enjoyed more success in appointing like-minded Justices since at least the 1970s).

successor. Further, if political timing generally produces the desired result, how close a successor can a retiring Justice expect? These retirement outcomes have never been addressed by previous research, and this Article provides answers by developing new measures of retirement outcomes. The measures are based on Justices' voting records, and they compare how the retiring Justice and his or her successor vote relative to other Justices remaining on the Court.

II. EMPIRICAL ANALYSIS

A. Data

This study evaluates twenty-five departures from the Court occurring since 1954. That year marks the beginning of modern retirement provisions in which Justices enjoyed the option of leaving the Court while continuing to collect a full salary as early as age sixty-five.⁷⁸ Of these departures, twenty-three were retirements and two were deaths.⁷⁹

B. Relevant Variables

1. Dependent Variables

This study examines factors thought to explain Justices' time of departure as well as succession outcomes. The subsections below describe key dependent variables: time of departure and succession outcomes.

⁷⁸ By 1954, Justices had the option of retiring to senior status at full salary when they reached age 65 with 15 years of service or age 70 with 10 years of service. Burbank et al., *supra* note 12, at 10 (citing Act of Feb. 10, 1954, Pub. L. No. 294, § 4, 68 Stat. 8, 12–13). Retirement “on a pension equal to [the Justice’s] salary at the time of retirement” was also available to Justices who had reached age 70 with 10 years of service. Burbank et al., *supra* note 12, at 7–10. In 1984, the law was again amended to reflect the “Rule of 80.” *Id.* at 10. “This provision . . . allows judges to assume senior status or fully retire at or after age sixty-five as long as the combination of their age and years of service total eighty.” *Id.* Retirement decisions in the modern era do not reflect earlier influences such as lack of pensions or arduous circuit-riding duties.

⁷⁹ See SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 121. Technically, Justices could leave the Court by retiring, taking senior status and continuing to serve on a lower federal court, or resigning from office. Burbank et al., *supra* note 12, at 8–9 (noting that federal judges have “four options” including “resignation, retirement, service in senior status, and continued regular active service,” with the option to serve in senior status being extended to Supreme Court Justices in 1937). This study does not distinguish between resignation, retirement, and retirement to senior status, as any one of these options requires a Justice to permanently cede his or her seat on the Court to a successor.

(a) *Time of Departure*

The first variable, time of departure, is the time a Justice permanently relinquishes his or her spot on the Court by retiring or dying.⁸⁰ As noted above, of the Justices leaving the Court since 1954, twenty-three retired and only two died in office.⁸¹ Almost all Justices retire shortly after informing the administration of their intentions to step down. Two exceptions are Chief Justice Warren and Justice O'Connor. Warren remained on the bench after the Johnson administration's unsuccessful attempt to appoint Fortas as his successor.⁸² Warren, therefore, did not retire and permanently give up his seat until President Nixon was in office,⁸³ a move which Warren later regretted.⁸⁴ Justice O'Connor briefly suspended her retirement to accommodate the unexpected vacancy created by Chief Justice Rehnquist's death.⁸⁵ O'Connor did not officially leave the Court until after the Senate confirmed both Rehnquist's and her own successors.⁸⁶ Finally, the official time of Justice Scalia's departure was during the Obama administration, even though a Republican-controlled Senate ultimately refused to consider Obama's nominee pending the presidential election.⁸⁷

(b) *Succession Outcome*

This Article is the first study to analyze actual succession outcomes based on Justices' voting records. It develops numerical measures to compare how an outgoing Justice and his or her successor vote relative to other Justices remaining on the Court. An outcomes analysis allows one to consider all variables related to the politics of retirement: it looks not only to the successor appointed by the president and confirmed by the Senate but also how the new Justice's position on the Court compares to the position of his or her predecessor. The discussion below explains measures of judicial ideology based on Justices' votes. It then incorporates these

⁸⁰ See SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 121.

⁸¹ *Id.*

⁸² WARD, *supra* note 2, at 171–73.

⁸³ *Id.* at 174.

⁸⁴ *Id.* at 175.

⁸⁵ *O'Connor to Remain Crucial Vote in Key Cases*, NBC NEWS (Oct. 27, 2005, 8:48 PM ET), http://www.nbcnews.com/id/9842789/ns/us_news-the_changing_court/t/oconnor-remain-crucial-vote-major-cases/#.WUX17WjyvIU [<https://perma.cc/H9GJ-Z7FQ>] [hereinafter *Crucial Vote*]; see also *Supreme Court Nominations: present–1789*, UNITED STATES SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/4626-M5TY>].

⁸⁶ *Crucial Vote*, *supra* note 85.

⁸⁷ Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NAT'L PUB. RADIO (June 19, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [<https://perma.cc/92G8-DKL5>].

measures into numerical comparisons of voting records of departing Justices and their successors, both of which reflect Justices' positions relative to other Justices on the Court.

In general, Justices' votes in non-unanimous cases provide helpful metrics of similarities and differences in judicial ideology. Voting records add nuance to more general understandings of a Justice's ideology based on party of appointing president.⁸⁸ Justices' votes in non-unanimous cases have provided the basis of analysis in leading studies considering paired voting alignments⁸⁹ or Justices' average relative positions based on votes in all non-unanimous cases for a given term.⁹⁰ This Article incorporates ideological scores derived from a leading measure of judicial ideology, Martin-Quinn scores.⁹¹ Martin-Quinn scores themselves incorporate Justices' votes in non-unanimous cases and employ a sophisticated Bayesian methodology to determine Justices' ideal points.⁹² These ideal points reflect "where the Justices stand relative to one another" based on their voting alignments.⁹³

Prominent political scientists have rescaled Martin-Quinn scores to correspond to "common space" ideological rankings for other relevant political actors including the president and Senators.⁹⁴ These "Common Judicial Space" scores (hereinafter referred to as "common space scores") provide the primary measure of Justices' ideology for this study.⁹⁵ The scores rank Justices from -1 to +1, based on their votes in non-unanimous cases. The example below sets forth the ideological spectrum created by common space scores for 2013 (the most recent year in which these scores are available):

⁸⁸ See *infra* Figures B and C and surrounding text.

⁸⁹ See, e.g., Chabot & Chabot, *supra* note 20, at 1014–21; Chabot, *supra* note 77, at 1247–48.

⁹⁰ See generally Martin & Quinn, *supra* note 71, at 134–36.

⁹¹ *Id.*

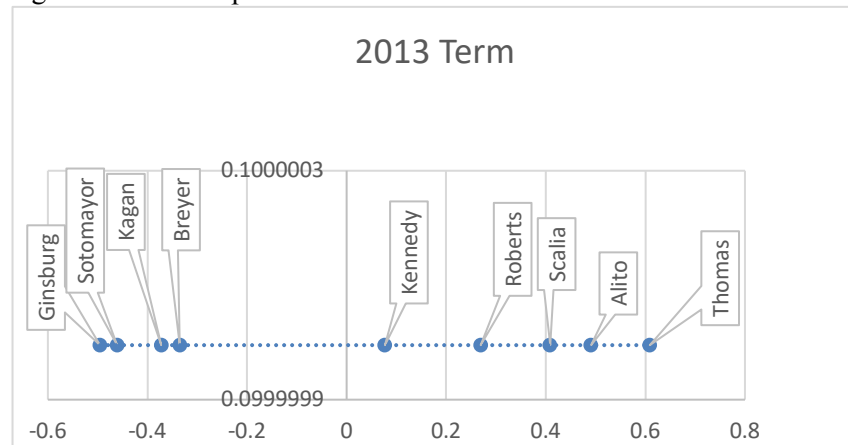
⁹² *Id.*

⁹³ Fischman & Law, *supra* note 20, at 177.

⁹⁴ Epstein et al., *supra* note 72, at 307–11.

⁹⁵ The version of Common Judicial Space scores used in this study is current through 2013. See *id.* at 303.

Fig. A: Common Space Scores for the 2013 Term



The numerical rankings themselves do not ascribe ideological labels, but one might generally refer to the left-most Justices (Ginsburg, Sotomayor) as relatively “liberal” and the right-most Justices (Scalia, Alito, and Thomas) as relatively “conservative.” The ideological measures used in this Article refer to average positions taken in non-unanimous decisions for a given term, and they are always relative to other actors in the political system. The Article does not attempt the difficult feat of assessing how liberal or conservative a particular voting record is in absolute terms.

Further, while common space scores rank Justices numerically, the rankings are ordinal. The Justices’ rankings are relative to other Justices hearing the same body of non-unanimous cases for a given term. They are similar to a student receiving a B in a class graded on a curve. Common space scores do not provide cardinal values which may be compared across terms, just as a B student from one class graded on a curve would not necessarily be a B student in that class the following year.⁹⁶ Common space scores can also account for relative differences in ideology within appointees of a single party. By the time they retired, for example, Republican appointees Sandra Day O’Connor and Potter Stewart had common space scores that were moderate in relation to other Republican appointees on the Court and Republican presidents in power.⁹⁷

Turnover on the Court creates a unique opportunity for comparison over a discrete period. It allows one to compare voting records for retiring Justices and their successors *relative to other Justices remaining on the Court*. If Neil Gorsuch proves to be a like-minded successor for Justice Scalia, for example, then common space scores for Gorsuch’s initial term in office will reflect that Justice Gorsuch votes with

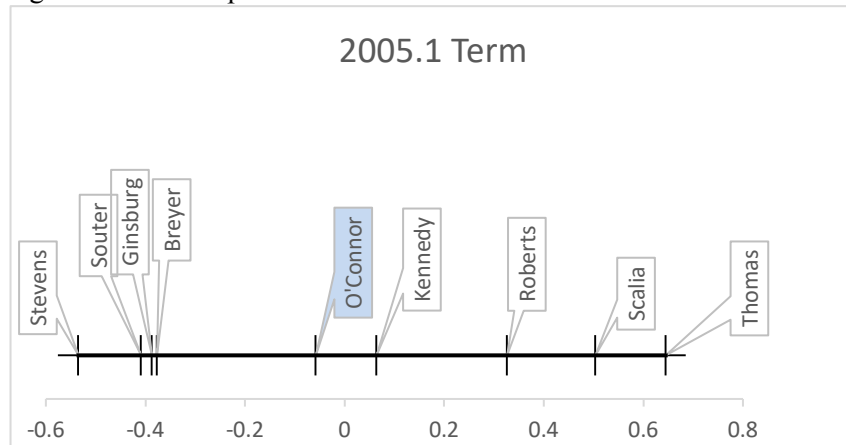
⁹⁶ Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CAL. L. REV. 813, 846 (2010) (providing that Martin Quinn scores reflect ordinal rather than cardinal values).

⁹⁷ Stewart retired to President Reagan, who in turn replaced him with Justice O’Connor. O’Connor later retired to the second President Bush.

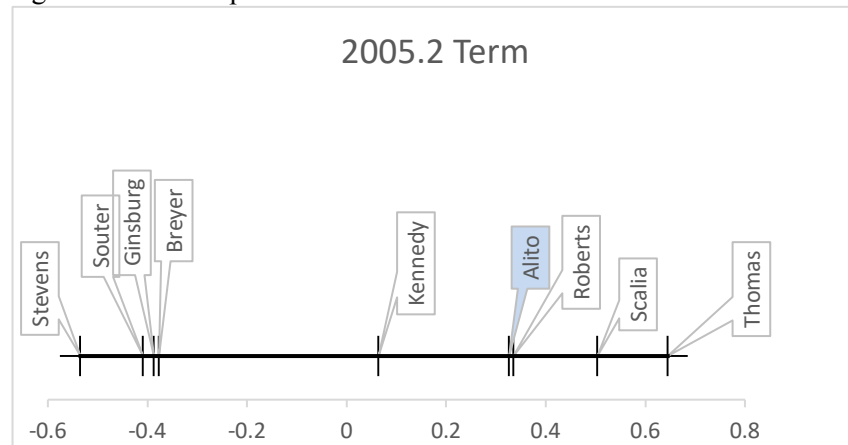
Justices Thomas and Alito far more than he votes with Justices Ginsburg and Sotomayor. If Gorsuch is a true Scalia clone, then he will occupy Justice's Scalia's precise spot relative to other Justices. According to the most recently calculated common space scores (2013 term), Scalia's spot was that of the third most conservative Justice on the Court.

Other retirees may find that their successors occupy a different seat relative to other Justices remaining on the Court. The figures below illustrate relative voting alignments for Justice Sandra Day O'Connor, and her successor, Justice Samuel Alito.

Fig. B: Common Space Scores for the 2005.1 Term⁹⁸



⁹⁸ Since O'Connor remained on the Court for the first part of the 2005 term, common space scores are broken into terms: 2005.1 (court with O'Connor) and 2005.2 (court with Alito).

Fig. C: Common Space Scores for the 2005.2 Term⁹⁹

Thus, an extremely like-minded successor for O'Connor would have occupied her exact seat. An O'Connor clone would have been zero seats away from O'Connor and continued to vote as the middle Justice on the Court. Instead, O'Connor's seat was filled by Justice Alito, who was two seats to her right and close to Chief Justice Roberts. Justice Alito was closer to Scalia and more distant from Breyer than O'Connor. Presumably, this outcome was preferable, however, to a Justice who was four seats away and closer to Justice Thomas or Justice Stevens.

2. Explanatory variables

(a) Ideological Proximity between Retiring Justices and Presidents or Retiring Justices and Senate Medians

(i) Relevant Political Actors

Justices who time their retirements politically will leave the Court when political actors who share the Justices' ideology appoint a successor. Supreme Court Justices are appointed by the President, by and with the "Advice and Consent" of the Senate.¹⁰⁰ The ideology of the president who will appoint a Justice's successor has a clear theoretical link to political timing.¹⁰¹ The importance of the president is also borne out by empirical research. Ideology of appointing president has been a significant predictor of Justices' votes since at least the 1970s.¹⁰² This study also identifies a significant role for appointing presidents: on average, Justices who retire to ideologically proximate presidents obtain significantly more like-minded

⁹⁹ See *supra* note 88 (providing a description of the 2005.2 term).

¹⁰⁰ U.S. CONST. art. II, § 2, cl. 2.

¹⁰¹ See *id.*

¹⁰² Chabot, *supra* note 77, at 1261 fig.2.

successors than Justices who retire to ideologically distant presidents.¹⁰³ The Senate's role is less clear, as it may implicate both ideology of the Justice's successor and institutional concerns for the Court. Theory predicts that an ideologically distant Senate will constrain a president's choice of nominees, and thus a Justice seeking a like-minded successor will also take the Senate's ideology into account.¹⁰⁴ A hostile Senate can also prevent a president at the end of his term from appointing a successor.¹⁰⁵ At the same time, widely publicized and potentially hostile confirmation hearings raise a distinct institutional concern for the Court. An ideologically hostile Senate may be more inclined to launch a messy and politicized confirmation hearing and cast the Court in an undesirable political limelight.¹⁰⁶ Even if a Justice is unconcerned with his or her successor, he or she might avoid an ideologically distant Senate to reduce the risk of this institutional harm.

Further, empirical studies have failed to identify a significant relationship between senatorial ideology and Justices' voting records in recent decades.¹⁰⁷ Conservative presidents who faced liberal Senates sometimes compromised and nominated Justices such as Anthony Kennedy. Other times constrained presidents did not compromise and still managed to appoint conservative Justices such as Clarence Thomas. Likewise, this study does not identify significant correlation between senatorial ideology and desirable retirement outcomes.¹⁰⁸ Thus, while Senatorial ideology should be considered along with the ideology of the president, senatorial ideology offers weaker evidence of political timing on both theoretical and empirical grounds.

(ii) *Common Space Measures of Ideology*

As noted above,¹⁰⁹ the study relies on leading political science measures of judicial ideology known as common space scores. These scores derive from Justices' votes in all non-unanimous cases for a term, and for each term, they rank a Justice's

¹⁰³ See *infra* Part II.D.4.a.

¹⁰⁴ Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1073–77 (1999).

¹⁰⁵ A Republican-controlled Senate flatly refused to consider President Obama's nomination of Merrick Garland to replace Justice Scalia in light of the upcoming presidential election. The Senate also considered but ultimately filibustered President Johnson's nomination of Abe Fortas to replace Earl Warren shortly before the 1968 presidential election. In both of these instances, the Senate's opposition allowed the nomination to be filled by a newly elected president (Trump or Nixon) rather than the president in the outgoing administration.

¹⁰⁶ Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 407 (“[H]otly-contested nominations are much more likely to occur when the president's party does not control the Senate.”).

¹⁰⁷ Chabot, *supra* note 77, at 1262 fig.3.

¹⁰⁸ See *infra* Part II.D.4.a.

¹⁰⁹ See *infra* Part II.B.1.b.

ideological position relative to positions of other Justices, the president, and Senators.¹¹⁰ The relative rankings allow one to evaluate ideological difference or similarity between retiring Justices and political actors who will appoint their successors.

Just as common space scores improve on party affiliation as a metric for judicial ideology,¹¹¹ they also add nuance to measures of ideology of nominating presidents and the Senate. The scores account “for the fact that Presidents and Senators of the same party vary in their ideological intensity.”¹¹² Common space scores rank Senators or presidents from liberal to conservative on a scale of -1 to +1. Scores derive from roll call votes cast by each member of Congress,¹¹³ and facilitate calculation of a Senate median for this study.¹¹⁴ The scores also rank presidents in equivalent terms, based on the positions presidents take on particular congressional roll call votes.¹¹⁵ The first dimension coordinate of the scores used here addresses the role of government in the economy and “typically picks up the liberal/conservative dimension of conflict in American politics.”¹¹⁶

(iii) *Ideological Distance or Proximity*

Common space scores for the president and Senate medians are directly comparable to common space scores for Justices in the last available term before they left the Court. The scores illustrate relative ideological proximity. Common space scores establish a range of a 0.006 to 1.182 difference between Justices and presidents at the time of departure. The median distance between retiring or departing Justice and president is 0.396. This midpoint marks significant ideological difference—it is slightly less than the distance between Justice Kennedy and the

¹¹⁰ This study draws common space scores for Justices from the Lee Epstein research page cited above. *See generally* Epstein et al., *supra* note 72. For common space scores for the President and Senate median, *see* Keith Poole et al., *Common Space Scores Congresses 75–113* (Jan. 6, 2015), <https://legacy.voteview.com/basic.htm> [<https://perma.cc/BT3B-QQ5P>].

¹¹¹ Leading political scientists adopt Poole et al.’s work in this area and “recognize the profound contribution of his measures to the study of American political institutions.” Epstein et al., *supra* note 72, at n.4.

¹¹² Fischman & Law, *supra* note 20, at 174.

¹¹³ Epstein et al., *supra* note 72, at 306.

¹¹⁴ The median reflects the ideological tipping point needed for a nominee to gain a majority of votes in the Senate. If all Senators are ranked from most liberal to most conservative, the “median is the case in the middle of the distribution . . . such that . . . half the senators are to the ideological right of the median and half are to the ideological left.” SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 101. Studies have also considered the now-historical filibuster pivot instead of Senate medians. These studies have not identified a significant role for the filibuster pivot in predicting Justices’ votes or times of retirement. *See* Chabot, *supra* note 77, at 1270 fig.6; Nelson & Ringsmuth, *supra* note 19.

¹¹⁵ Epstein et al., *supra* note 72, at 306.

¹¹⁶ SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 99.

second President Bush in the 2005 term,¹¹⁷ and it is greater than the distance between Justice Kennedy and Justice Scalia for the 2013 term.¹¹⁸ The range of distances between Justices and Senate medians is smaller (0.01 to 0.62), and the median distance at the time of retirement is also smaller, 0.255.¹¹⁹

Departures in which the common space distance between the outgoing Justice and the president is *over* the median distance can therefore be considered departures to ideologically distant presidents. These departures may also be to a relatively distant Senate where the distance between the outgoing Justice and Senate median is greater than the median distance between outgoing Justices and Senate medians. Justice Marshall's retirement presents a strong example of retirement to ideologically distant political actors. When Marshall's health forced him to retire during the first Bush administration, he had a common judicial space score of -0.690, President George H. W. Bush had a common space score of 0.492, and the score for the Senate median was -0.160. Here, differences between common space scores illustrate that Marshall retired to an ideologically distant president and Senate. The president's score was 1.182 away from Marshall's score, and the Senate's score was 0.530 away.

Retirements *under* the median distance between outgoing Justices and presidents (and Senate medians) can also be considered departures to ideologically proximate political actors. When Justice Souter retired to President Obama, for example, Souter's common space score was -0.396, Obama's common space score was -0.294, and the Senate median's common space score was -0.178. Souter was 0.102 away from the president and 0.218 away from the Senate. Because these distances are smaller than median distances between outgoing Justices and the president or Senate median, common space scores show that Souter retired to an ideologically proximate President and Senate.

The terms "ideologically distant" and "ideologically proximate" will be repeated throughout this Article. As used herein, ideological distance or proximity will always reflect the relative difference in common space scores for outgoing Justices and presidents or for outgoing Justices and Senate medians. Departures in which this difference is above the median distance between a Justice and president or Justice and Senate median are departures to "ideologically distant" presidents or Senates. Departures in which the difference is below the median distance between a Justice and president or Senate median are departures to "ideologically proximate" presidents or Senates. Justices who retire to ideologically proximate political actors have timed their retirements politically, whereas Justices who retire to ideologically distant political actors have not timed their retirements politically.¹²⁰

¹¹⁷ In the 2005 Term, Justice Kennedy and the second President Bush were 0.42 apart.

¹¹⁸ In the 2013 Term, Justices Kennedy and Scalia were 0.33 apart.

¹¹⁹ This reflects the fact that median members of the Senate occupy a narrower range of common space scores than presidents.

¹²⁰ The same point holds for the two Justices who died in office rather than retiring.

(b) *Voluntary or Involuntary Departure*

Political factors do not capture reasons driving half of all departures from the Court in the modern era. While twenty-five Justices have left the Court in the modern era, twelve were forced to do so by declining health (and in two cases death) or other factors beyond a Justice's control. The following nine Justices retired because of a severe decline in health that left them unable to continue their work on the Court: Marshall (mental and physical decline);¹²¹ Douglas (stroke);¹²² Brennan (stroke);¹²³ Frankfurter (stroke);¹²⁴ Whittaker (nervous breakdown);¹²⁵ Black (mental and physical decline);¹²⁶ Harlan II (cancer);¹²⁷ Burton (Parkinson's disease);¹²⁸ and Minton (mental and physical decline).¹²⁹ Justice Fortas was also forced to retire when it became clear that ethics charges against him would result in impeachment if he did not resign. Finally, Chief Justice Rehnquist and Justice Scalia departed involuntarily when they died in office.

Thirteen remaining Justices chose to leave the Court before health forced them to retire: Warren, O'Connor, White, Stewart, Powell, Clark, Stevens, Goldberg, Burger, Souter, Blackmun, Reed, and Kennedy.¹³⁰ Some Justices retained the physical ability to continue working but faced difficult personal tradeoffs. Prominent examples include Justice O'Connor's decision to retire after her husband was diagnosed with Alzheimer's disease,¹³¹ and Justice Clark's decision to step down so that his son, Ramsey, could be appointed Attorney General.¹³² These retirements remain voluntary tradeoffs as both Justices O'Connor and Clark were personally healthy enough to continue their work on the Court. They instead prioritized familial interests over personal desire to remain on the Court.

¹²¹ WARD, *supra* note 2, at 205.

¹²² *Id.* at 186–87.

¹²³ *Id.* at 202.

¹²⁴ *Id.* at 166–67.

¹²⁵ *Id.* at 164–65.

¹²⁶ *Id.* at 182.

¹²⁷ *Id.*

¹²⁸ *Id.* at 163.

¹²⁹ *Id.* at 161–62.

¹³⁰ See generally WARD, *supra* note 2. While other studies suggest Reed and Blackmun retired due to health concerns, Ward provides a different account. He notes that Reed logged an additional 18 years on the bench in senior status after he left the Court. *Id.* at 163. He also notes that Blackmun's retirement was not accompanied by any documented health concerns. *Id.* at 208 (“Health concerns did not prompt Blackmun's departure.”).

¹³¹ Sandra Day O'Connor, OYEZ, https://www.oyez.org/justices/sandra_day_oconnor [<https://perma.cc/YQ4N-GFJX>] (“[Justice O'Connor] retired from the bench in 2006 to care for her husband, who was diagnosed with Alzheimer's disease.”).

¹³² WARD, *supra* note 2, at 170.

(c) *Missed Opportunities*

The study also considers Justices' ability to avoid involuntary retirement by stepping down before they face insurmountable health problems. To assess the relationship between involuntary retirement and political timing, it is helpful to understand how often Justices passed over politically opportune retirements occurring after an extended tenure. Leading political scientists predict that a Justice "of advanced age enjoying relatively good health may be more prone to retire if the incumbent president is likely to appoint an acceptable replacement."¹³³ As a result, political timing should induce Justices to retire when they face ideologically proximate presidents or presidents and Senates, so long as they are of an advanced age and sufficient tenure.

This Article analyzes how many Justices passed up politically opportune retirements that occurred after age sixty-five and an extended tenure. The first subsection defines an extended tenure period after which politically motivated Justices might reasonably choose to retire. The second subsection explains that a politically opportune window also requires the ideologically proximate president to be in the first two years of his term in office.

(i) *Extended Tenure*

Justices do not have a fixed retirement norm based on age or length of tenure, and both average tenure and retirement age have increased in recent decades.¹³⁴ The increase may reflect a judicial mindset in which Justices believe they are appointed to "serve for life" and should not step down simply because they have reached an advanced age. Justice Thurgood Marshall is illustrative. He denied rumors that he would step down at the end of the Carter Administration and allow President Carter to appoint Marshall's successor before Ronald Reagan took office.¹³⁵ By the end of Carter's term in 1980, Marshall was seventy-two years old and pension eligible. However, he had served on the Court only twelve years. Marshall's response to a reporter shows that he did not base his retirement decision on advanced age and that he did not consider twelve years a sufficient tenure: "I was appointed for life, and I

¹³³ SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 120.

¹³⁴ Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 770, 775, 782 fig.3 (2005) (noting an increase to 26.1 years in average tenure from 1970–2005, and an increase in to an average retirement age of 78.1 for this same period). Other scholars who question the degree of recent increase still agree that the average tenure has "increased slowly and steadily over the long term." David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791, 794 (2007).

¹³⁵ WARD, *supra* note 2, at 204.

intend to serve out my term!”¹³⁶ Indeed, Marshall remained on the Court for eleven more years and battled serious health problems until he was forced to retire.¹³⁷

Still, one might expect a Justice to accept an extended tenure that is less than his or her entire life, especially if political timing concerns dominate his or her retirement decision. In the context of proposed term limits for Supreme Court Justices, many leading scholars have settled on eighteen years as an ideal length for extended tenure: it is “more than long enough to guarantee judicial independence without producing the pathologies associated with the current system of life tenure.”¹³⁸ Without entering the debate over term limits, the eighteen-year benchmark also seems a reasonable measure for extended tenure in the retirement context. Calabresi and Lindgren argue that eighteen years is consistent with historical average tenures for Supreme Court Justices,¹³⁹ and their proposal is close to the average 20.58-year tenure for retirees examined in this study.

Therefore, as long as a Justice has also met the general retirement age of sixty-five,¹⁴⁰ an eighteen-year tenure offers a fair benchmark for the tenure a Justice must have before one would expect him or her to capitalize on a politically opportune retirement window. As illustrated by Justice Marshall, few Justices seem likely to choose a shorter tenure no matter what the political climate. But sixty-five-year-old-plus Justices who have served at least eighteen years should be willing to take advantage of politically opportune retirement windows if they actually prioritize political timing. If not, Justices must have strong reasons other than politics for retaining their position on the Court.

(ii) *Avoiding Institutional Concerns Over Election-Year Retirements*

When assessing opportune retirement windows, it is also important to consider whether the like-minded president was near the end of his four-year term. Justices

¹³⁶ *Id.* at 204.

¹³⁷ *Id.* at 205–06.

¹³⁸ Calabresi & Lindgren, *supra* note 134, at 775 (arguing for a constitutional amendment to implement term limits); see also Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 802–16 (1986); L.A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 77, 78–79 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); James E. DiTullio & John B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1101–19 (2004).

¹³⁹ Calabresi & Lindgren, *supra* note 134, at 876 (noting that 18-year tenure would “restore the norms . . . that prevailed on the Court between 1789 and 1970”).

¹⁴⁰ Many analyses use advanced age as a marker for appropriate retirement windows. See SUPREME COURT JUSTICES DATABASE, *supra* note 1, at 121 (naming “advanced age” as the primary reason for departure from the Court); Brenner, *supra* note 17, at 437–48 (providing a median age of 70).

have expressed general aversion to retiring during an election year,¹⁴¹ and past studies have also found that Justices are more likely to retire during the first two years of a like-minded president's term in office.¹⁴² As a result, this study requires a political retirement opportunity to occur during the first two years of a term for an ideologically proximate president. Ideological proximity is unlikely to induce voluntary retirement if a president is at the end of a term.

C. Hypotheses

Political timing theories suggest several hypotheses which can be tested empirically based on Justices' retirement decisions in the modern era:

1. A majority of retiring Justices time their departures politically.¹⁴³
2. In the subset of Justices retiring voluntarily, a majority of Justices time their departures politically.
3. Few Justices pass over politically opportune retirement windows occurring after an extended tenure.
4. Analysis of succession outcomes facilitates statistical evaluation of two null hypotheses:
 - a. The average distance between Justices and their successors is the same for Justices who depart to ideologically proximate presidents or Senates as it is for Justices who depart to ideologically distant presidents or Senates.
 - b. The average distance between successors and voluntary retirees is the same as the average distance between successors and Justices who leave involuntarily.

¹⁴¹ WARD, *supra* note 2, at 206 (noting that White, “[l]ike many Justices . . . did not want to depart in a presidential election year to protect the institution from partisan politics”).

¹⁴² Hagle, *supra* note 17, at 37 tbl.1.

¹⁴³ As noted in Part II.B.2.a.iii, above, a politically-timed departure means that the president or president and Senate are ideologically proximate to the retiring Justice at the time of his or her departure from the Court. Presidents are ideologically proximate to a retiring Justice if the distance between their common space scores are under the median distance between retirees and presidents. Senate medians are ideologically proximate to a retiring Justice if the distance between their common space scores are under the median distance between retirees and Senate medians.

*D. Analysis**1. Political Timing in General*

When the twenty-three retirements since 1954 are considered as a whole, the analysis shows that political timing has not dominated Justices' retirements. As noted in Figures 1 and 2, twelve of twenty-three total retirements were to ideologically distant presidents. These Justices retired to presidents in cases where distance between their common space scores marks a significant ideological divide: the ideological difference was greater than the median distance from retiring Justice to president, such that the Justice retired to a president who was about as far away as Justice Kennedy was from President George W. Bush.¹⁴⁴ Examples of Justices retiring to distant presidents underscore this difference: they include Justice Marshall's and Justice Brennan's retirements to President George H. W. Bush and Justice Douglas's retirement to President Ford. Six of the eleven retirements to distant presidents also occurred when the Senate was ideologically distant.¹⁴⁵

To be sure, there were eleven retirements under the median common space distance from Justice to presidents. Examples include Justice Powell's and Justice Burger's retirements to President Reagan and Justice Stevens' and Justice Souter's retirements to President Obama. Six of these retirements were also under the median distance between retiring Justices and the median Senator. These retirements are consistent with a theory of political timing, but they do not occur often enough to dominate retirement decisions as a whole.

¹⁴⁴ See *infra* Appendix A (providing a detailed record of distances between Justices and presidents or median Senators).

¹⁴⁵ The distance from retiree to Senate median was above the median distance between retiring Justices and the Senate median.

Fig. 1: Justices Retiring to Ideologically Distant¹⁴⁶ Presidents

Justice	President at Retirement
Marshall*	Bush I
Douglas*	Ford
Brennan*	Bush I
Frankfurter*	Kennedy
Whittaker*	Kennedy
Warren*	Nixon
Fortas	Nixon
O'Connor	Bush II
White	Clinton
Black	Nixon
Stewart	Reagan
Kennedy	Trump ¹⁴⁷

* Justices who retired to presidents and Senates who were above median distances between retiring Justices and the president as well as the Justice and median Senator.

Fig. 2: Justices Retiring to Ideologically Proximate¹⁴⁸ Presidents

Justice	President at Retirement
Powell	Reagan
Clark [†]	Johnson
Harlan II [†]	Nixon
Stevens	Obama
Goldberg [†]	Johnson
Burger	Reagan
Souter [†]	Obama
Blackmun	Clinton
Burton	Eisenhower
Minton [†]	Eisenhower
Reed [†]	Eisenhower

[†] Justices who retired to median Senators who were below median distances between retiring Justices and median Senators.

¹⁴⁶ “Ideologically Distant” refers to retirements in which the distance between retiree and president was above the median common space distance between retirees and presidents. *See supra* Part II.B.2.a.iii.

¹⁴⁷ Although common space scores for President Trump are not yet available, this analysis counts Trump as ideologically distant from Justice Kennedy, based on distance between Kennedy and Trump’s first appointee, Neil Gorsuch. *See infra* notes 6–8 and accompanying text.

¹⁴⁸ “Ideologically Proximate” refers to retirements in which the distance between retiree and president was below the median common space distance between retirees and presidents. *See supra* Part II.B.2.a.iii.

The results reported in Figures 1 and 2 are inconsistent with the idea of dominant political timing set forth in Hypothesis 1. The analysis shows that Justices retired to ideologically distant presidents just over half of the time, and presidents and Senates who are both far removed from the Justice's ideology 26 percent of the time. These results are also consistent with studies finding lack of a significant relationship between the ideology of the Justice and president at the time of retirement.¹⁴⁹

2. Political Timing for Voluntary Versus Involuntary Retirements

While one might assume retirement gives Justices greater ability to time their departures from the Court, many Justices retire at such advanced ages that health forces them to step down involuntarily. An analysis controlling for retirements forced by health (or other factors beyond a Justice's control) recognizes that some Justices have more control over their time of departure than others. This analysis establishes that political timing was more prevalent in voluntary retirements than in involuntary retirements. Of the twenty-five Justices leaving the Court since 1954, thirteen were voluntary retirements, and twelve were involuntary retirements or deaths.¹⁵⁰ Justices retired to ideologically proximate presidents far more often when they retired voluntarily.

Fig. 3: Voluntary Retirees

Justices Retiring to Ideologically Distant Presidents	Justices Retiring to Ideologically Proximate Presidents
Warren*	Powell
O'Connor	Clark†
White	Stevens
Stewart	Goldberg†
Kennedy	Burger
	Souter†
	Blackmun
	Reed†

* Justices who retired to distant presidents and Senates. These Justices retired to presidents and Senates whose common space scores were farther away from the Justice's scores than the median distances between Justices and each of these political actors.

† Justices who retired to presidents and Senate medians who were both ideologically proximate to the retiring Justice, as the Justices' distance from both actors was below the median distance between a retiring Justice and president or Senate median.

¹⁴⁹ See *supra* notes 57–58 and accompanying text.

¹⁵⁰ See *supra* Part II.B.2.b (explaining voluntary or involuntary departure variable).

Fig. 4: Involuntary Retirees or Death

Justices Departing to Ideologically Distant Presidents	Justices Departing to Ideologically Proximate Presidents
Marshall*	Harlan II†
Douglas*	Rehnquist†
Brennan*	Burton
Frankfurter*	Minton†
Whittaker*	
Scalia	
Fortas	
Black	

* Justices who retired to distant presidents and Senates. These Justices retired to presidents and Senates whose common space scores were farther away from the Justice's scores than the median distances between Justices and each of these political actors.

† Justices who retired to presidents and Senate medians who were both ideologically proximate to the retiring Justice, as the Justices' distance from both actors was below the median distance between a retiring Justice and president or Senate median.

Eight of thirteen (62 percent) voluntary retirements were to ideologically proximate presidents. For these eight Justices, the common space distance between Justice and president was under the median distance from a Justice to a president at the time of retirement. For involuntary departures, only four of twelve (33 percent) were to ideologically proximate Presidents. The rate of politically timed retirement is notably higher for voluntary retirees. The reverse is also true for ill-timed retirements to distant presidents. Voluntary retirees have a much smaller percentage of retirements to ideologically distant presidents than involuntary retirees (38 percent for voluntary retirees versus 67 percent for involuntary retirees).

Consideration of senatorial ideology reveals a similar pattern, especially for Justices avoiding departures to distant Senates. Only one Justice voluntarily retired to an ideologically distant president when the Justice's distance from the Senate was also above the median distance between retiring Justices and median Senators. The five other Justices who retired to distant presidents and Senates all did so involuntarily. Thus, voluntary retirees avoided ideologically distant presidents and Senates at a higher rate than involuntary retirees. The Senate's role was less pronounced in retirements to ideologically close presidents: here, voluntary retirees left to presidents and Senates who were both ideologically proximate to a Justice in four of eight cases, or half of the time. The Senate and president were both ideologically close to involuntary retirees in three of four cases. Voluntary retirees avoided distant Senates and presidents more than they prioritized proximate Senates and presidents.

Political timing comes into better focus when one parses voluntary and involuntary retirements. Justices who retired voluntarily choose political timing more frequently than Justices who left involuntarily. This finding supports a theory of politically timed retirement and Hypothesis 2, which posits that most voluntary retirements will be politically timed.

Reasons for involuntary retirement are, by definition, health or another external event giving the Justice no choice but to retire. As one might expect, involuntary retirements sometimes occur when the president and Justice have extremely different ideologies. This was the case when Justices Douglas and Marshall retired to Presidents Ford and Bush, for example. Douglas fought his retirement and remained on the bench despite a stroke and serious decline in mental capacity.¹⁵¹ Douglas asserted that he could still “cast a liberal vote,” even if “half-alive” and that he would not resign “until we get a Democratic president.”¹⁵² Some Justices do not face Douglas’ dilemma and happen to leave at politically opportune times (for example, Chief Justice Rehnquist passed away while George W. Bush was in office). Still, the predominant outcome is that Justices who left the Court involuntarily ended up retiring to ideologically distant presidents and Senates.

Voluntary retirements, on the other hand, are consistent with political timing in a majority of cases. Eight of thirteen voluntary retirees managed to retire to like-minded presidents who were under the median distance for common space scores between presidents and retirees. These Justices did not openly acknowledge concerns over the president’s ideology,¹⁵³ but their actions are consistent with a preference for political timing. Justices Burger and Powell chose to retire to President Reagan, and Justice Blackmun and Justices Souter and Stevens chose to retire to Presidents Clinton and Obama, respectively. President Johnson actively induced Justices Goldberg and Clark to retire by offering desirable appointments in exchange for retirement,¹⁵⁴ and Justice Reed retired to President Eisenhower.

Justices who voluntarily retired to ideologically distant presidents appeared to do so for a variety of reasons. The five Justices who voluntarily retired to ideologically distant presidents are Chief Justice Warren and Justices White, Stewart, O’Connor, and Kennedy. As described in more detail below, the reasons for these retirements vary. Justice Warren’s retirement may be considered a failed attempt to retire at a politically opportune time; Justice White appears to have prioritized party loyalty over desire for a like-minded successor; and by the end of their careers Justices Stewart, O’Connor, and Kennedy no longer faced ideologically similar presidents to whom they might retire.

Chief Justice Warren began to explore retirement in 1968. Warren feared that his health would decline over the next few years and that Republican Richard Nixon would have the chance to name Warren’s successor after he won the 1968 presidential election.¹⁵⁵ On June 13, 1968, Warren met with Democratic President Johnson “to inform him of his retirement and his wish for a like-minded

¹⁵¹ WARD, *supra* note 2, at 186–87.

¹⁵² *Id.*

¹⁵³ *See, e.g., id.* at 200 (noting that Justice Powell denied that the ideology of his successor influenced his retirement decision).

¹⁵⁴ Justice Goldberg left the Court to become U.N. Ambassador and Clark left so that his son, Ramsey, could be appointed Attorney General. *Id.* at 168–70.

¹⁵⁵ WARD, *supra* note 2, at 171.

successor.”¹⁵⁶ Warren followed the meeting with a letter informing President Johnson of his “intention to retire . . . effective at your pleasure.”¹⁵⁷

After the Senate filibustered Johnson’s nominee, Abe Fortas, Johnson withdrew his nomination of Fortas. Richard Nixon ultimately won the election, and Johnson did not nominate another successor for Warren before Nixon took office.¹⁵⁸ Despite uncertainty as to whether Warren’s retirement letter remained valid under the Nixon administration, Warren honored his original retirement letter and allowed Nixon to nominate his successor. Warren reportedly refused to withdraw the letter because he did not want his departure to be viewed as “purely partisan.”¹⁵⁹ Thus, Johnson’s inability to get Fortas confirmed provided a roadblock. Institutional concern for the appearance of an impartial Court ultimately overrode Warren’s initial desire for a politically timed retirement.

Justice White, on the other hand, was a Democratic appointee whose overall voting record placed him closer to Republican presidents. When he retired, White’s common space score of 0.090 was 0.467 away from President Bill Clinton’s score of -0.377. White’s vote in the hot-button dispute over abortion rights in *Planned Parenthood v. Casey* also marks his distance from Democrats in at least one crucial area. White joined dissenting opinions by Rehnquist and Scalia, who dissented on the ground that “*Roe [v. Wade]* was wrongly decided,” and that it “should be overruled.”¹⁶⁰

Justice White also passed up earlier opportunities to retire to Presidents Reagan and George H. W. Bush, both of whom had common space scores which were relatively close to Justice White’s common space score: White was 0.286 from Reagan at the end of the 1985 term and 0.272 away from Bush at the end of the 1988 term.¹⁶¹ Further, these were optimal retirement windows from an age and tenure perspective. By the time Reagan was in his second term, White was over sixty-five and had served over twenty years on the Court. White did not act like a Justice who cared about timing his retirement in a manner designed to ensure a like-minded successor.

White did, however, demonstrate loyalty to the political party of his appointing president. As a Kennedy appointee, White was reported to have considered retiring to President Carter.¹⁶² Many years later, White reportedly told the *Washington Post* “that since he came in with a Democratic Administration, it would be fitting to retire

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 173.

¹⁵⁹ *Id.* at 174.

¹⁶⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting in part).

¹⁶¹ Both of these opportunities were in the first 2 years of a presidential term and would not raise concerns over an election year retirement.

¹⁶² Calabresi & Lindgren, *supra* note 134, at 806 (citing DENNIS HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF BYRON R. WHITE* 381 (1998)).

under a Democratic Administration.”¹⁶³ Justice White ultimately retired to Democratic president Bill Clinton, even though Clinton’s common space score was far removed from the common space score and ideology evinced by White’s more conservative voting record.

Finally, some Justices may never have an opportunity to retire to an ideologically proximate president. For example, a Justice appointed by one party may have a voting record that is generally moderate or that ultimately turns out to be moderate in relation to other Justices or leaders within a political party. There are several possible reasons why a Justice’s voting record may become moderate in relation to other Justices or party leaders by the time of retirement. Maybe the Court faces a changing set of cases, the Justice’s own ideology drifts,¹⁶⁴ or the ideology of party leaders drifts away from that of the Justice.¹⁶⁵

While scholars may debate the reason for this change, the outcome is clear: some Justices will end up with voting records and common space scores that are not particularly close to *either* party’s president by the time these Justices retire. Here it is possible that a Justice will find party loyalty an appealing albeit second-best option for political timing. This explanation is consistent with the timing, if not the explanations given, for Potter Stewart’s retirement.¹⁶⁶ Stewart was an Eisenhower appointee who retired shortly after the presidency shifted from Jimmy Carter to Ronald Reagan.¹⁶⁷ Stewart’s common space score was relatively far removed from the common space scores of *both* Jimmy Carter and Ronald Reagan.¹⁶⁸ Stewart may have nevertheless preferred to retire to a Republican president.¹⁶⁹

¹⁶³ WARD, *supra* note 2, at 207 (citing Joan Biskupic’s *Washington Post* report).

¹⁶⁴ Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 N.W. U. L. REV. 1483, 1485–86 (2007).

¹⁶⁵ For example, Richard Primus notes that during “the three decades Scalia sat on the Supreme Court, conservative legal thought increasingly deemphasized majoritarianism and deference to elected officials, gradually giving greater weight to regulatory skepticism and the robust construction of certain individual rights.” Richard Primus, *Trump Picks Scalia 2.0*, POLITICO (Jan. 31, 2017) <http://www.politico.com/magazine/story/2017/01/trump-gorsuch-supreme-court-scalia-20-214718> [<https://perma.cc/E5T4-RP5N>]. As a result, one might find “that being Scalia 2.0 in 2017 is different from being Scalia 1.0 in 1986,” and that Gorsuch still counts as a Scalia clone despite possibly divergent views on issues such as *Chevron* deference. *Id.*

¹⁶⁶ WARD, *supra* note 2, at 194 (“[T]hough there is no direct evidence that partisanship motivated [Stewart], he chose to leave during the first term of a new Republican administration, suggesting that partisanship may have played a part.”).

¹⁶⁷ *Id.*

¹⁶⁸ Stewart’s score for his final term was 0.132467985, which was 0.405532015 away from President Reagan’s score of 0.538. Nor was Stewart a Justice whose voting record placed him closer to a Democratic president. During the 1979 term, Stewart’s common space score was 0.083512865, which was 0.585512865 away from President Carter’s score of -0.502. See *infra* Appendix A.

¹⁶⁹ WARD, *supra* note 2, at 194.

The story surrounding the retirement of Stewart's successor, Sandra Day O'Connor, is more complicated. Like Stewart, Justice O'Connor was a Republican appointee who ended her time on the bench with a voting record and common space score that were moderate compared to more recently appointed conservative Justices and President George W. Bush.¹⁷⁰ Unlike Stewart, however, O'Connor did not retire as soon as Republicans took control of the White House or even during Bush's first term.

O'Connor's decision to remain on the bench may have reflected the Justice's desire to distance both herself and the Court from political intrigue surrounding the 2000 election.¹⁷¹ There were rumors that O'Connor wanted Bush to win the election so that she could retire to a Republican president, and O'Connor herself ultimately cast the deciding vote granting Bush the presidency in *Bush v. Gore*.¹⁷² To further complicate matters, O'Connor's husband had a pacemaker implanted in 1999¹⁷³ and continued to experience additional health problems thereafter.

O'Connor ultimately decided to retire in Bush's second term, when her husband was diagnosed with Alzheimer's.¹⁷⁴ Even then, O'Connor prioritized institutional concerns for the Court in the ultimate timing of her departure. Although O'Connor publicly announced her plans to retire in July 2005,¹⁷⁵ Justice Rehnquist died on September 3 of the same year and left an immediate vacancy on the Court. Rather than leave the Court with two vacancies, O'Connor postponed her departure until both Rehnquist's and her position could be filled.¹⁷⁶ The timing of O'Connor's retirement is most consistent with personal concerns and concern for the Court as an institution. She did not have an opportunity to retire to an ideologically proximate president, and her refusal to retire during President Bush's first term seemed designed to refute rather than confirm partisan timing.

Finally, Justice Kennedy's position as a Republican appointee at the center of the Court presents incentives similar to those of Justices Stewart and O'Connor.¹⁷⁷

¹⁷⁰ O'Connor's common space score for her final term was -0.057714645, which was 0.543714645 away from President Bush's common space score of 0.486. *See infra* Appendix A.

¹⁷¹ WARD, *supra* note 2, at 220.

¹⁷² *Id.* (noting at an election night party, "O'Connor was visibly upset when the networks" awarded Florida to Democratic candidate Al Gore, and O'Connor's husband reportedly told some partygoers that the Justice would delay her retirement if Al Gore won the presidency).

¹⁷³ *Id.*

¹⁷⁴ Sandra Day O'Connor, OYEZ, https://www.oyez.org/justices/sandra_day_oconnor [<https://perma.cc/YQ4N-GFJX>] (noting Justice O'Connor "retired from the bench in 2006 to care for her husband, who was diagnosed with Alzheimer's disease").

¹⁷⁵ William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST, (July 1, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html> [<https://perma.cc/55N4-T2E6>].

¹⁷⁶ *Crucial Vote*, *supra* note 85. Thanks to Mark Walsh for pointing out an error in an earlier version of this paper.

¹⁷⁷ In addition, Kennedy's decision to retire from the Court while "continuing to serve

By the time Kennedy retired, it was unlikely that he would ever face an ideologically proximate president during his remaining years on the Court. Kennedy's position at the center of the Court has placed him at a relatively great distance from presidents of both parties in recent years. Kennedy was 0.42 away from George W. Bush in 2005, and he was 0.37 away from Obama during the 2013 term. While common space scores for President Trump are not yet available, initial voting records for Trump's first appointee, Justice Gorsuch, suggest a substantial ideological distance between Kennedy and Trump.¹⁷⁸

Like Justices O'Connor and Stewart, Kennedy's position at the center of the Court limited his political retirement opportunities. In addition to whatever remaining value Kennedy placed on party loyalty,¹⁷⁹ specific overtures from the White House may have induced Justice Kennedy's retirement.¹⁸⁰ Further, the Republicans' recent refusal to consider Merrick Garland's nomination and willingness to tolerate an extended vacancy on the Court may have raised the cost of a potentially ill-timed retirement for Kennedy. Before, a Justice who retired at an inopportune time risked only a somewhat more dissimilar successor than he or she might otherwise have obtained. Now, however, a retirement to an ideologically hostile Senate could also result in an extended vacancy on the Court, as the Senate might postpone consideration of a successor until after an election. At the time of Kennedy's June 2018 retirement, it was widely known that Democrats faced an uphill battle to regain control of the Senate.¹⁸¹ Nevertheless, by retiring before the midterm elections, Kennedy minimized the possibility that the appointment of his successor would be blocked for an extended period. It remains to be seen whether future Justices will find greater incentives to time their retirements around upcoming elections.

Overall, Justices who left voluntarily retired to ideologically similar presidents just under two-thirds of the time, whereas involuntary retirees retired to ideologically similar presidents only one-third of the time. While there are currently small numbers of both voluntary and involuntary retirees, the numbers suggest that voluntary retirements will be most likely to exhibit political timing preferences in

in a senior status" suggests that private health issues did not force Kennedy to retire. See Letter from Justice Anthony Kennedy to President Donald Trump (June 27, 2018), <http://src.bna.com/AgD> [<https://perma.cc/8AGJ-2TET>].

¹⁷⁸ See *supra* notes 6–8 and surrounding text.

¹⁷⁹ Adam Liptak, *Will Anthony Kennedy Retire? What Influences a Justices' Decision*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/us/politics/anthony-kennedy-retirement.html> [<https://perma.cc/F9YQ-4HNQ>] (noting the potential role of party loyalty).

¹⁸⁰ Adam Liptak & Maggie Haberman, *Inside the White House's Quiet Campaign to Create a Supreme Court Opening*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/trump-anthony-kennedy-retirement.html> [<https://perma.cc/43EU-E6X3>].

¹⁸¹ Harry Enten, *This Poll Shows Why It's Difficult for Democrats to Take the Senate*, CNN (June 23, 2018), <https://www.cnn.com/2018/06/23/politics/enten-poll-of-the-week-north-dakota-democrat-senate/index.html> [<https://perma.cc/F6GR-NVLS>].

the future. Future Justices seem likely to avoid missteps like those which led to Warren's botched attempt to retire to a like-minded president in an election year. Other Justices may continue to find that they do not have much in common with current party leaders by the time they retire. The Senate's recent willingness to delay consideration of Justice Scalia's successor and leave an extended vacancy on the Court may also raise the cost of postponing retirement.

3. *Missed Opportunities*

Politically timed retirements could increase if a greater number of Justices retire voluntarily. As noted above, just over half of departures from the Court in the modern era were voluntary. Still, advances in modern medicine might pave the way for more voluntary retirements in the future, allowing Justices the opportunity for both a relatively long tenure and politically timed retirement. On the other hand, retirement from the Court is very costly for a Justice, as he or she must permanently give up what is often an immensely personally rewarding position as well as the most powerful judicial office in the United States.

To date, a substantial number of Justices have had politically opportune retirement windows occurring late in their tenure. A majority of Justices with extended tenures have had and been unwilling to take advantage of these opportunities. These Justices have instead assumed the risk of an ill-timed, involuntary departure in the future. Consider Justice Ginsburg, who is currently eighty-six and has served for over twenty-five years on the Court. By passing up an opportunity to retire to President Obama late in her tenure, Ginsburg has run the risk of an involuntary departure to President Trump. A missed opportunities analysis shows that Ginsburg's action is common among Justices serving a long tenure.

Justices have often been willing to pass up politically opportune retirement windows arising late in their tenure. Since 1954, sixteen Justices have served an extended tenure of at least eighteen years (and been over the general retirement threshold of age sixty-five). They are Justices Black, Frankfurter, Brennan, White, Rehnquist, Stevens, Scalia, Kennedy, Ginsburg, Breyer, Thomas, Marshall, Douglas, O'Connor, Blackmun, and Reed. A majority of Justices in this window passed up opportunities to retire to ideologically compatible presidents. Nine Justices passed up politically opportune retirements after extended tenure, while seven Justices did not.

The Justices who did not pass up politically opportune retirement windows after eighteen years were Justices Thomas, Marshall, Douglas, O'Connor, Blackmun, Reed, and Kennedy. Reed and Blackmun retired as soon as opportune windows arose, and Marshall and Douglas never had ideal opportunities to retire to ideologically proximate Democratic presidents before their health declined. O'Connor and Kennedy were Justices at the center of the Court, and as a result, they never had an opportunity to retire to ideologically proximate Republican or

Democratic presidents after an extended tenure.¹⁸² Finally, Justice Thomas appears to have an opportunity to retire to an ideologically proximate president during the Trump Administration.

A majority of Justices with extended tenure did not face these limitations. Instead, Justices Black, Frankfurter, Brennan, White, Rehnquist, Stevens, Scalia, Breyer, and Ginsburg all passed over politically opportune retirement windows occurring after they had served an extended tenure. Figure 5, below, illustrates these Justices' retirement opportunities:

Fig. 5: Justices Who Passed Up Politically Opportune Retirements

Justice (18 year +)	Ideologically Proximate President	Subsequent Voluntary Retirement
Black*	Kennedy, Johnson	No
Frankfurter*	Eisenhower	No
Brennan	Carter	No
White*	Regan, Bush I	Yes
Rehnquist	Bush I, Bush II	No
Stevens	Clinton	Yes
Scalia	Bush II	No
Ginsburg	Obama	?
Breyer*	Obama	?

* The Senate was also ideologically proximate: Distance from Justice to median Senator was also under the median distance between Justices and median Senators.

Figure 5 outlines retirement opportunities that nine of sixteen Justices with extended tenure passed over. These nine Justices had opportunities to retire to presidents with common space scores closer to the Justice than the median distance between presidents and Justices at retirement. The opportunities also occurred when the presidents were in the first two years of a term, so the politically opportune retirement window was free of any institutional concerns raised by an impending presidential election. Further, four of the nine Justices passed up seemingly perfect conditions, in which the Senate median's ideology was also under the median distance between retiring Justices and Senate medians.

Decisions by a substantial number of Justices to pass over these politically opportune retirement windows suggest that political concerns do not predominate. This evidence is inconsistent with Hypothesis 3, which posited refusal to retire by only a few Justices. Instead, it seems that many Justices strongly prefer to remain on the bench. This allows them to maintain a powerful and often personally rewarding office, perhaps for the remainder of their lives. In many cases, political timing

¹⁸² Although the distance between Kennedy and Obama (0.37) was just under the median distance from Justice to president, Kennedy was not much closer to President Obama than he was to President Bush, who was 0.42 away from Kennedy. Kennedy's position is best interpreted as that of a Justice in the center of the Court who is ideologically distant from presidents of both parties.

interests have not been strong enough to draw Justices away from the Court even though they have already served an extended tenure.

Justices who forgo voluntary retirement during extended tenure are taking the chance that they will be forced to retire in the future. And, as noted above, involuntary retirees obtain political timing at a far lower rate, so the risk also encompasses an involuntary retirement to an ideologically distant president and Senate. Perhaps part of this risk-taking reflects that Justices, like most human beings, find it difficult to come to grips with their own physical and mental decline and mortality.

Still, as noted in Figure 5, Justices who pass over politically opportune retirements run a substantial risk that they will not retire voluntarily in the future. Of the nine Justices who passed over an earlier, politically opportune retirement, only Justices Stevens and White secured voluntary retirement later on. Justice Stevens retired to a relatively ideologically compatible president (Obama) and Justice White prioritized partisanship when he retired to President Clinton. Five Justices who passed over earlier retirement opportunities were ultimately forced to depart involuntarily. Their involuntary departures followed the typical pattern of less frequent political timing. Four of these five Justices left the Court when an ideologically distant president was in power (Scalia, Frankfurter, Brennan, and Black), while Chief Justice Rehnquist happened to die while George W. Bush was president.

Finally, Justice Ginsburg and Breyer both passed up politically opportune retirements and remain on the bench. Ginsburg is eighty-six years old, and Breyer is eighty. Both have general life expectancies which last beyond President Trump's current term in office: Ginsburg has a life expectancy of ninety-two, and Breyer's life expectancy is eighty-seven.¹⁸³ Still, even a long life expectancy does not guarantee that a Justice will be healthy enough to serve for the rest of his or her life. Just under half of retirees in the modern era stepped down due to overriding health issues. The possibility of involuntary retirement forced by poor health is a risk for both Justices Ginsburg and Breyer.

Given a significant number of Justices' unwillingness to capitalize on politically opportune retirement windows, it is difficult to expect the percentage of voluntary retirements to increase in the future. Justices instead seem inclined to remain on the bench until health forces them to leave. This missed opportunities analysis further illustrates the limited role of political timing in Justices' decisions to leave the Court.

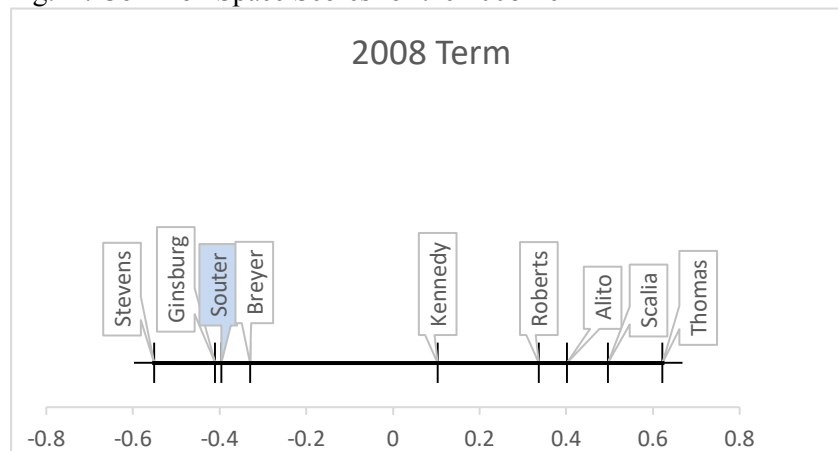
¹⁸³ FELICITIE C. BELL & MICHAEL L. MILLER, SOC. SEC. ADMIN., LIFE TABLES FOR THE UNITED STATES SOCIAL SECURITY AREA 1900–2100, at 59–61 (2005) (providing Calendar Year 2010 life expectancies for an 86-year-old female and 80-year-old male), http://www.ssa.gov/oact/NOTES/pdf_studies/study120.pdf [<https://perma.cc/86KC-5KRG>].

4. Retirement Outcomes

The goal of political timing is for a retiring Justice to obtain a like-minded successor. This Article compares how the outgoing Justice and his or her successor vote relative to other Justices remaining on the Court. Numerical analysis of succession outcomes illustrates how often political timing leads to a like-minded successor, as well as the magnitude of similarity or dissimilarity between a retiring Justice and his or her successor.

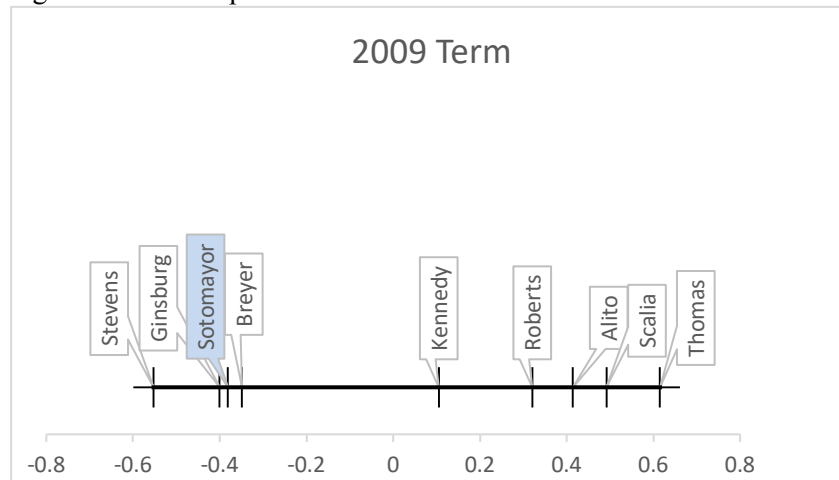
Justices who retire to ideologically proximate presidents sometimes obtain like-minded successors. This was the case for Justice Souter, who left the Court the third-most liberal Justice during the 2008 Term, as noted in Figure D, below.¹⁸⁴ Figure E notes that Souter was replaced by Justice Sotomayor in the 2009 Term. Figure E shows that Justice Sotomayor tracked Souter's overall voting record to the extent that she was also the third-most liberal Justice, relative to other Justices remaining on the Court next Term.

Fig. D: Common Space Scores for the 2008 Term



¹⁸⁴ Again, the common judicial space scores themselves create a spectrum of differences marked by Justices' voting patterns in non-unanimous cases. They do not include a value judgment as to liberal versus conservative votes.

Fig. E: Common Space Scores for the 2009 Term



Other Justices may obtain a dissimilar successor who occupies a different position relative to other Justices on the Court. Justice Marshall, for example, voted as the left-most Justice on the Court (see Figure F, below) when insurmountable health problems forced him to retire to a Republican president and Senate. Marshall's successor, Clarence Thomas, cast votes that placed Thomas eight seats away from Marshall in his first term, as noted in Figure G. Thomas was on the opposite end of the Court's ideological spectrum in relation to other Justices remaining on the Court. Figures F and G show that Marshall was the farthest Justice to the left in the 1990 Term, and Thomas was the farthest Justice to the right in the 1991 Term.

Fig. F: Common Space Scores for the 1990 Term

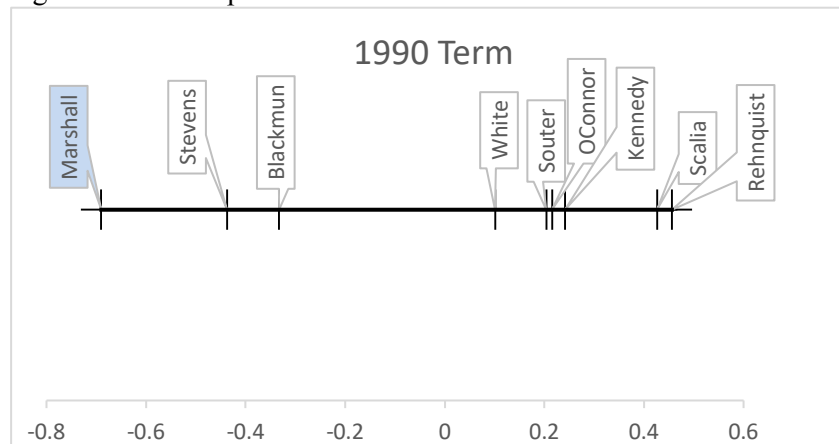
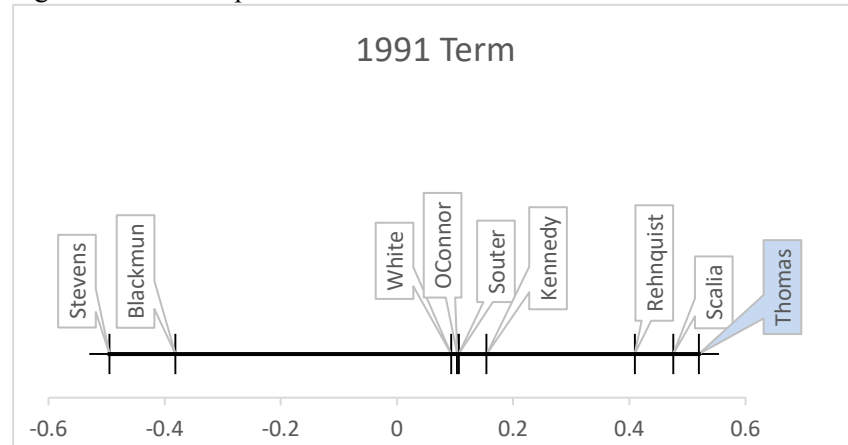


Fig. G: Common Space Scores for the 1991 Term



The distance between the seat occupied by a retiring Justice and his or her successor (zero for Souter and Sotomayor; eight for Marshall and Thomas) is based on voting records relative to the same set of Justices remaining on the Court. This distance offers a helpful metric for comparing overall voting records of Justices and their successors in relationship to other Justices who remain on the Court. The years immediately before and after retirement provide a discrete time frame in which the voting records of retirees and successors can be compared to the same group of other Justices remaining on the Court. Figure 6, below, notes distances between all Justices to leave the Court and their successors. It shows that the distances for Souter-Sotomayor and Marshall-Thomas are extremes, and that most outgoing Justices end up with successors about two seats away from their spot on the Court.

Fig. 6: Distance Between Voting Records of Outgoing Justices and Successors¹⁸⁵

Outgoing Justice	Successor	Ideologically Proximate President	Distance Between Justice and Successor
Marshall	Thomas	No	8
Warren	Burger	No	6
Fortas [†]	Blackmun	No	5
Harlan II [†]	Rehnquist	Yes	4
Stevens	Kagan	Yes	3
Goldberg [†]	Fortas	Yes	3
Brennan	Souter	No	3
Frankfurter	Goldberg	No	3
Blackmun	Breyer	Yes	2
O'Connor [†]	Alito	No	2
Stewart [†]	O'Connor	No	2
Douglas	Stevens	No	2
Black [†]	Powell	No	2
Minton [†]	Brennan	Yes	2
Powell	Kennedy	Yes	1
Burger	Rehnquist	Yes	1
Clark [†]	Marshall	Yes	1
Reed [†]	Whittaker	Yes	1
Whittaker	White	No	1
Burton	Stewart	Yes	1
White [†]	Ginsburg	No	0
Souter [†]	Sotomayor	Yes	0
Rehnquist [†]	Roberts	Yes	0

[†] Justices who retired to ideologically proximate Senate medians.

Figure 6 provides numerical rankings of how like-minded retirees and their successors are. It shows that Justices rarely obtain a successor occupying the exact same seat (zero spaces apart from the original Justice's seat). Justices and successors who occupied the same seat were Souter and Sotomayor (third-most liberal seat), Rehnquist and Roberts (third most conservative seat), and White and Ginsburg (fourth-most liberal seat).¹⁸⁶ Perhaps White and Ginsburg are farther apart considering their voting record on personal liberties issues rather than the gamut of non-unanimous cases.¹⁸⁷ The rarity of successors occupying exactly the same seat

¹⁸⁵ Highlighted rows indicate voluntary retirements.

¹⁸⁶ Again, this distance between White and Ginsburg reflects overall voting records in the entire body of non-unanimous cases before the Court.

¹⁸⁷ White joined the dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, J., dissenting), for example, whereas Ginsburg has a much more liberal voting record with respect to privacy interests.

may explain why Justices are reluctant to retire: a politically timed retirement cannot guarantee a successor who will maintain a retiree's precise voting record relative to other Justices.¹⁸⁸

The average overall distance between retiring Justices and their successors is 2.3 seats. This is close to the two-seat distance between Chief Justice Roberts and Justice Alito in the 2013 term (the most recent set of voting-record based measures available). Figure 6 also lists whether a Justice retired to an ideologically proximate president, notes ideological proximity to Senate medians, and highlights Justices who retired voluntarily. These distinctions facilitate comparison of retirement outcomes for important subgroups of Justices: (1) Justices whose departures are politically timed versus Justices whose departures are not politically timed; and (2) Justices who retire voluntarily versus Justices who leave involuntarily.

(a) T-test Comparing Average Succession Outcomes for Politically Opportune Versus Politically Inopportune Departures

As an initial matter, analysis of succession outcomes addresses how often and to what extent political timing actually succeeds. Although the theory of political timing is premised on success in obtaining a like-minded successor, as an empirical matter it is unclear how often this will happen. A Justice could retire to an ideologically proximate president, only to find that the president fails to appoint a like-minded successor. Over history, Justices have often voted in ways that disappoint their appointing presidents¹⁸⁹ although presidents have improved on this score since the 1970s.¹⁹⁰ This study measures success rates by comparing outcomes for Justices departing to ideologically distant versus proximate presidents. This analysis shows that, on average, Justices who depart to ideologically proximate presidents obtain significantly closer successors than Justices who depart to ideologically distant presidents.

Comparison of average distances between successors and outgoing Justices shows that Justices who depart to ideologically proximate presidents (under the median distance between Justices and presidents) obtain successors who are an average of 1.58 seats away.¹⁹¹ Justices who depart to ideologically distant presidents (over the median distance between Justices and presidents) obtain successors an average of 3.09 seats away. On average, Justices who depart to ideologically distant presidents obtain successors almost twice as far away as Justices who depart to ideologically proximate presidents.

¹⁸⁸ This outcome may mean political timing is not a sufficient draw for many Justices. Bustos and Jacobi posit that Justices interested in preserving the Court's median would always prefer to remain on the Court and continue their precise voting record. *See* Bustos & Jacobi, *supra* note 17, at 551–52. Likewise, Justices who generally desire like-minded replacements may also prefer their own votes to votes of a reasonably close successor.

¹⁸⁹ Chabot & Chabot, *supra* note 20, at 1014–21.

¹⁹⁰ Chabot, *supra* note 77, at 1261.

¹⁹¹ *See infra* Appendix B.

A *t*-test provides statistical analysis of whether averages for these two groups are significantly different from one another.¹⁹² The *t*-test measures not only the difference between average outcomes but also the variance or noise surrounding the average for each group (e.g., a group with three sixes averaging six has much less variance than a group with a three, a six, and a nine averaging six). This analysis identifies a statistically significant difference in average succession outcomes for Justices departing to ideologically proximate versus ideologically distant presidents. The *t*-stat, 1.903, is large enough that the *p*-value (0.038)¹⁹³ denotes statistical significance within the standard 5 percent confidence level. One can confidently reject Null Hypothesis 4.a with respect to presidential ideology: the average distance between departing Justices and successors is *not* the same for Justices who depart to ideologically proximate presidents as it is for Justices who depart to ideologically distant presidents. Instead, Justices who depart to ideologically proximate presidents average significantly more like-minded successors than Justices who depart to ideologically distant presidents.

The same analysis fails to identify a significant role for the Senate. A *t*-test comparing average outcomes for Justices who depart to ideologically proximate versus distant Senate medians fails to identify a significant difference between these groups. The averages are closer together (2.8 for distant Senate medians versus 1.8 for proximate Senate medians),¹⁹⁴ and the smaller *t*-stat, 1.195, has a 12 percent *p*-value¹⁹⁵ which falls outside even the most generous 10 percent confidence level. One cannot reject that average succession outcomes are the same for Justices to depart to distant Senates as they are for Justices who depart to ideologically proximate Senates.¹⁹⁶

¹⁹² *The T-Test*, WEB CTR. FOR SOC. RES. METHODS, https://www.socialresearchmethods.net/kb/stat_t.php [<https://perma.cc/DNV6-WCUC>] (“The *t*-test assesses whether the means of two groups are statistically different from each other.”); See Student, *The Probable Error of a Mean*, 6 BIOMETRIKA 1 (1908). The tests in this Article were run using Excel 2013.

¹⁹³ One-tailed. For complete results see Appendix B. The one-tailed metric is appropriate here because the test is measuring whether distance between retirees and successors will increase with distance between retirees and presidents. The *t*-test assumes unequal variances, because the groups compared do not have the same number of Justices.

¹⁹⁴ The average outcomes for Justices retiring to ideologically proximate versus distant Senate happen to be equal to the average outcomes for Justices retiring voluntarily versus involuntarily. The different variances for each analysis confirm that each average is drawn from a different group of Justices. See Appendix B.

¹⁹⁵ One-tailed.

¹⁹⁶ Nelson and Ringsmuth find that Senatorial ideology significantly predicts time of retirement. See Nelson & Ringsmuth, *supra* note 19. This may reflect Justices’ separate concern in avoiding contested confirmation hearings that damage public perception of the Court. Ideology of the Senate at time of nomination has not significantly predicted Justices’ votes in recent decades, see Chabot, *supra* note 77, at 1262 fig.3, so it is not surprising that retirement to an ideologically proximate Senate also fails to denote a significantly improved retirement outcome.

(b) T-test Comparing Average Succession Outcomes for Voluntary Versus Involuntary Departures

A second strain of analysis compares the results of voluntary versus involuntary departures. As noted above, voluntary retirees had notably higher rates of political timing than Justices who left involuntarily. And voluntary retirees averaged more like-minded successors than Justices who left involuntarily: The average distance between voluntarily retiring Justices and their successors is 1.8 seats, while the average distance between involuntarily departing Justices and their successors is 2.8 seats.¹⁹⁷ For the 2013 term, Justice Roberts was two seats apart from Justices Breyer and Alito, and Roberts was three seats apart from both Justices Thomas and Kagan.

Although Justices who left involuntarily have a greater average distance from successors than voluntary retirees, the gulf is not great and reflects a small sample of recent retirements. A *t*-test comparing average outcomes for voluntary and involuntary departures fails to identify a statistically significant difference between average succession outcomes for these groups.¹⁹⁸ The *t*-Stat, -1.198, is small and yields *p*-values (0.123)¹⁹⁹ that fall outside of even the most generous 10 percent confidence interval. In this small sample of outcomes (twelve voluntary retirements and eleven involuntary departures²⁰⁰), one cannot reject that average succession outcomes are the same for each group. The relative prevalence of political timing in voluntary retirements has not resulted in a significant difference in average retirement outcomes.

* * *

Leaving the Court while an ideologically compatible president is in office is the single factor marking significantly more favorable succession outcomes. If enough Justices voluntarily retire to ideologically proximate presidents, there is reason to think they would average significantly better outcomes than Justices who leave involuntarily. Instead, the similarity between average outcomes for voluntary and involuntary retirements seems to reflect small numbers and instances in which voluntary and involuntary departures do not follow overall trends.

Some Justices who left the Court involuntarily (such as Rehnquist) lucked into a like-minded successor, whereas other Justices (such as White) voluntarily left the bench when an ideologically distant president was in office. Other Justices such as

¹⁹⁷ See Appendix B.

¹⁹⁸ For complete results see Appendix B.

¹⁹⁹ One-tailed.

²⁰⁰ Justice Scalia is not included because vote-based common space scores for the first full term of his successor, Neil Gorsuch, were not available as of the time of this writing. Justice Kennedy is not included because his successor has not yet served a full term on the Court.

Stewart, O'Connor, and Kennedy no longer faced an ideologically close president by the time they were ready to retire. It remains to be seen whether future retirements will reflect more politically predictable patterns.

Leading commentators have opined that Kennedy was the last Justice on the Court whose voting record mixed liberal and conservative votes in recent decades.²⁰¹ If this pattern holds (as it seems likely to with respect to Justice Kavanaugh), Justices who fail to retire to ideologically compatible presidents will now risk more distant successors than they may have obtained in the past. A system that eliminates moderate appointees would make Ginsburg or other liberal Justices more likely to be replaced by successors like Thomas than successors like Souter, and vice versa for conservative Justices who retire to Democratic presidents.

Nevertheless, even Justices who retire to an ideologically proximate president may not find the average outcome (a successor 1.58 seats away) sufficient to meet their desire for a successor who occupies the same seat as the retiring Justice. The upper range of outcomes for these Justices may be most unsatisfactory. Justice Harlan obtained a successor four seats away (Rehnquist) even though he retired to President Nixon, and Justice Stevens obtained a successor three seats away (Kagan) even though he retired to President Obama.

Analysis of outcomes further confirms the limited role played by political timing. While on average political timing produced a significantly more like-minded successor, it rarely resulted in a successor filling the Justice's exact seat. In the past, political timing did not dominate voluntary retirement decisions to the extent that voluntary retirees averaged significantly better succession outcomes. It remains to be seen whether this pattern holds in the future for a more polarized Court.²⁰²

CONCLUSION

In his concurrence in *Planned Parenthood v. Casey*, Justice Blackmun noted that the Court was one vote away from overruling *Roe v. Wade*.²⁰³ Blackmun expressed concern over how his successor would vote on this issue: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice . . . will be made."²⁰⁴

Although Blackmun ultimately managed to retire to President Clinton, it is illuminating to consider Blackmun's outlook from the vantage point of *Planned Parenthood v. Casey*. The decision was issued on June 29, 1992, before Clinton was elected president in the fall of 1992.²⁰⁵ Blackmun's preference for a like-minded successor was coupled with great uncertainty. The uncertainty reflected both

²⁰¹ Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/LA5C-TP8V>].

²⁰² *See id.*

²⁰³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 943 (1992).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 833.

Blackmun's health and the outcome of a future presidential election. This uncertainty has pervaded departures from the Court: health problems or death accounted for just under half of all departures in the modern era. These forced departures limited Justices' ability to time their retirements politically.

While Justices who retired voluntarily seemed to prefer political timing, not all Justices had this option. Justices who ended up near the center of the Court, such as Justices O'Connor, Stewart, and Kennedy found that neither political party offered ideologically proximate presidents by the time they retired. Further, even well-timed retirements offered limited political returns. Although Justices averaged significantly more like-minded replacements when they retired to ideologically proximate presidents, some of these Justices still obtained successors several seats away. Justice Stevens' retirement to Obama and somewhat distant successor in Justice Kagan is a good example.

Limited political retirement opportunities and a range of succession outcomes prevented voluntary retirees from averaging significantly more like-minded successors than those appointed for Justices who left involuntarily. This result suggests that a voluntary, politically timed retirement has less allure than many scholars assume. Indeed, political timing failed to draw Ruth Bader Ginsburg and eight similarly situated Justices with extended tenure away from the Court at the first opportunity. These Justices instead passed over politically opportune retirement windows and risked an involuntary departure forced by health.

Analysis of succession outcomes suggests an additional reason for Justices' refusals to retire. Retiring earlier than necessary will not only force Justices to give up a powerful and rewarding post, but it may also truncate a Justice's legacy on the Court. Even Justices who retired to ideologically compatible presidents rarely managed to obtain successors who occupied the same position relative to other Justices remaining on the Court. A Justice who demands a replacement just "like me" may find a politically timed retirement insufficient to meet this goal.

In sum, this Article shows that Justices' political retirement goals have often turned out to be wishful thinking. Some Justices found that they were relatively far removed from ideologies of party leaders (and potential successors) by the time they retired, and Justices who timed their retirements politically had limited success in obtaining like-minded replacements. Poor health and a strong personal desire to remain on the Court often dominated political concerns in the timing of recent retirements. As a result, political timing has played only a limited role in Justices' retirement decisions in the modern era.

Appendix A: Absolute Differences in Common Space (“CS”) Scores at Time of Departure from Court²⁰⁶

Justice	Justice CS (last avail. term)	POTUS	POTUS CS	Difference JU – POTUS	Senate Median CS	Difference JU – Senate
Marshall	-0.689847946	Bush I	0.492	1.181847946	-0.1595	0.5303479
Douglas	-0.785473526	Ford	0.372	1.157473526	-0.164	0.6214735
Brennan	-0.652549982	Bush I	0.492	1.144549982	-0.125	0.52755
Frankfurter	0.391406178	Kennedy	-0.485	0.876406178	-0.064	0.4554062
Whittaker	0.268522859	Kennedy	-0.485	0.753522859	-0.064	0.3325229
Warren	-0.343943059	Nixon	0.378	0.721943059	-0.0415	0.3024431
Scalia	0.408948958	Obama	-0.294 ⁱ	0.702948958	9999	9999
Fortas	-0.296856195	Nixon	0.378	0.674856195	-0.0415	0.2553562
O’Connor	-0.057714645	Bush II	0.486	0.543714645	0.121	0.1787146
White	0.089567728	Clinton	-0.377	0.466567728	-0.134	0.2235677
Black	-0.03236803	Nixon	0.378	0.41036803	-0.022	0.010368
Stewart	0.132467985	Reagan	0.538	0.405532015	0.016	0.116468
Powell	0.152101785	Reagan	0.538	0.385898215	-0.1125	0.2646018
Clark	-0.02996017	Johnson	-0.326	0.29603983	-0.126	0.0960398
Harlan II	0.109714217	Nixon	0.378	0.268285783	-0.022	0.1317142
Stevens	-0.552633941	Obama	-0.294	0.258633941	-0.178	0.3746339
Rehnquist	0.319624513	Bush II	0.486	0.166375487	0.121	0.1986245
Goldberg	-0.203025952	Johnson	-0.326	0.122974048	-0.161	0.042026
Burger	0.417627245	Reagan	0.538	0.120372755	0.014	0.4036272
Souter	-0.396140665	Obama	-0.294	0.102140665	-0.178	0.2181407
Blackmun	-0.452527523	Clinton	-0.377	0.075527523	-0.134	0.3185275
Burton	0.242854804	Eisenhower	0.176	0.066854804	-0.093	0.3358548
Minton	0.194867775	Eisenhower	0.176	0.018867775	0.0685	0.1263678
Reed	0.182110026	Eisenhower	0.176	0.006110026	0.0685	0.11361

* Highlighted rows indicate voluntary retirements.

ⁱ Obama’s common space score is drawn from the latest available set of common space scores in 2013. Common space scores have not been updated through the time of Scalia’s death in 2016.

²⁰⁶ See *supra* notes 94 and 102 (containing links to common space scores underlying these calculations and descriptions of common space scores for Justices, Presidents, and Senators).

Appendix B: T-test Result Comparing Average Retirement Outcomes

Justices who depart to ideologically distant versus ideologically proximate presidents

t-Test: Two-Sample Assuming Unequal Variances

	Justice-Successor Dist for Ideologically Distant President	Justice-Successor Dist for Ideologically Proximate President
Mean	3.090909	1.583333
Variance	5.490909	1.537879
Observations	11	12
Hypothesized Mean Difference	0	
df	15	
t Stat	1.903404	
P(T<=t) one-tail	0.038178	
t Critical one-tail	1.75305	
P(T<=t) two-tail	0.076356	
t Critical two-tail	2.13145	

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Justices who depart to ideologically distant versus ideologically proximate Senate medians

t-Test: Two-Sample Assuming Unequal Variances

	Justice- Successor Dist for Ideologically Distant Senate Median	Justice- Successor Dist for Ideologically Proximate Senate Median
Mean	2.818182	1.833333
Variance	5.163636	2.515152
Observations	11	12
Hypothesized Mean Difference	0	
df	18	
t Stat	1.195168	
P(T<=t) one-tail	0.123766	
t Critical one-tail	1.734064	
P(T<=t) two-tail	0.247531	
t Critical two-tail	2.100922	

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Justices who retire voluntarily versus Justices who depart involuntarily

t-Test: Two-Sample Assuming Unequal Variances

	Voluntary	Involuntary
Mean	1.833333	2.818182
Variance	2.69697	4.963636
Observations	12	11
Hypothesized Mean Difference	0	
df	18	
t Stat	-1.19784	
P(T<=t) one-tail	0.123257	
t Critical one-tail	1.734064	
P(T<=t) two-tail	0.246514	
t Critical two-tail	2.100922	