

**SMALL CHANGES, BIG IMPACT:
HOW SINGULAR MODIFICATIONS SHIFTED THE FEDERAL
GOVERNMENT FROM ITS CONSTITUTIONAL ROLES**

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Abstract

This paper is an examination of “small” changes to each branch of the United States Federal Government that have had major implications on how the government works and its design. Each chapter focuses on a singular change to one branch of government; explores the historical significance; and assesses the potential future implications of those changes if the trends within the chapters continue.

Chapter One examines the changes of post- Seventeenth Amendment split party delegations using the DW-NOMINATE¹ scoring method and senator party support; Chapter Two examines the polarization of the Supreme Court since the New Deal by assessing Supreme Court justices with the Martin-Quinn Scores² and the overall polarization of each Court, and Chapter Three examines the power shift of the first fifteen presidential executive orders and how presidents are changing the way they use the power of the pen using the length of time to issue fifteen executive orders and what types of orders that are issued.

The conclusions that arise from each chapter highlight the trend that small changes to the federal government have long lasting and large implications that are often overlooked or are lumped into larger changes in the federal government. By understanding the small changes, the bigger picture can become clearer.

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¹ Jeffrey B. Lewis et al., "Voteview: Congressional Roll-Call Votes Database", Voteview Database, 2020, <https://voteview.com/>.

² Andrew D. Martin and Kevin M. Quinn, "Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo For The U.S. Supreme Court, 1953-1999", *Political Analysis*, 2002, <https://mqscores.lsa.umich.edu/measures.php>. 10:134-153

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Table of Contents

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Abstract..... | ii |
| Acknowledgements..... | iii |
| List of Tables | vi |
| List of Figures..... | vii |
| Introduction..... | 1 |
| Chapter One: The Seventeenth Amendment and Modern Split Party Delegations: The Habits and Attitudes of Split Party Delegations in a Post Seventeenth Amendment Government..... | 9 |
| Introduction..... | 9 |
| Critical Literature Review..... | 11 |
| Pre- Seventeenth Amendment..... | 12 |
| Post Seventeenth Amendment and State Power Changes..... | 13 |
| Introduction of Electorate Created Split Party Delegation | 15 |
| Attributes of Split Party Senators..... | 16 |
| Responsiveness of Senators Post Seventeenth Amendment | 17 |
| Split Party Delegation Ideology..... | 19 |
| Conclusion | 20 |
| Data..... | 21 |
| Ohio | 23 |
| West Virginia..... | 24 |
| Montana | 25 |
| Analysis | 27 |
| Conclusion | 30 |
| Chapter Two: Polarization of the Supreme Court of the United States. How the Growth in Polarization of the Supreme Court is Leading the Potential For Ideology to Influence Policy at the Judicial Level..... | 32 |
| Introduction..... | 32 |
| Critical Literature Review..... | 35 |
| Political Party Polarization- Landes & Posner Analysis..... | 36 |
| Polarization Due to The United States- Hasen Analysis..... | 37 |
| Polarization From the Court Itself- Clark Analysis | 38 |
| Methodology | 40 |
| Martin Quinn Scoring | 40 |
| Presentation of Results..... | 42 |
| The Stone Court (1941-1946)..... | 42 |

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| The Vinson Court (1946- 1953)..... | 43 |
| The Warren Court (1953-1969) | 45 |
| The Burger Court (1969-1986) | 46 |
| The Rehnquist Court (1986-2005)..... | 47 |
| The Roberts Court (2005-present) | 48 |
| Supreme Court Justices from 1941-2019..... | 49 |
| Caseload of the Courts | 50 |
| Analysis | 51 |
| Impact of Judicial Review | 54 |
| Shifting to Policymaker | 54 |
| Polarization and Policy | 55 |
| Conclusion | 56 |
| Chapter Three: The Increase of Power with Executive Orders. How Modern Presidents Have Changed Executive Orders, Specifically the First Fifteen Executive Orders Issued... 59 | |
| Introduction..... | 59 |
| Critical Literature Review..... | 60 |
| Revoking Executive Orders: Sharece Thrower Analysis..... | 62 |
| Unilateral Orders- Power to Act Alone-Bailey & Rottinghaus Analysis..... | 64 |
| Presidential Environment and Executive Orders- Mayer Analysis..... | 65 |
| Conclusion | 66 |
| Data..... | 67 |
| Why the First fifteen Executive Orders | 67 |
| Types of Executive Orders..... | 68 |
| Time in Office..... | 70 |
| Political Party Division..... | 71 |
| Analysis | 73 |
| Conclusion | 75 |
| Conclusion | 77 |
| Findings | 77 |
| Limitations | 81 |
| Recommendations..... | 81 |
| Final Thoughts | 82 |
| Bibliography | 86 |
| Curriculum Vitae..... | 92 |

List of Tables

| | |
|-------------------------------------------------------------------------------|----|
| Table 1: Political Party Division of Legislative and Executive Branches | 72 |
|-------------------------------------------------------------------------------|----|

List of Figures

| | |
|--------------------------------------------------------------------------|----|
| Figure 1: Portman- Ohio- Republican. Party Support/ Opposition..... | 23 |
| Figure 2: Brown- Ohio- Democrat Party Support/ Opposition..... | 23 |
| Figure 3: Manchin- W. Virginia- Democrat Party Support/ Opposition | 24 |
| Figure 4: Capito- W. Virginia- Republican Party Support/ Opposition..... | 24 |
| Figure 5: Tester- Montana- Democrat. Party Support/ Opposition..... | 25 |
| Figure 6: Daines- Montana- Republican. Party Support/ Opposition | 25 |
| Figure 7: DW-NOMINATE Score..... | 26 |
| Figure 8: Party Support by Senator..... | 29 |
| Figure 9: The Stone Court Median and Deviation | 42 |
| Figure 10: Stone Court Justices Ideology | 42 |
| Figure 11: The Vinson Court Median and Deviation | 43 |
| Figure 12: Vinson Court Justices Ideology..... | 43 |
| Figure 13: The Warren Court Median and Deviation | 45 |
| Figure 14: Warren Court Justices Ideology | 45 |
| Figure 15: The Burger Court Median and Deviation..... | 46 |
| Figure 16: Burger Court Justices Ideology | 46 |
| Figure 17: The Rehnquist Court Median and Deviation..... | 47 |
| Figure 18: Rehnquist Court Justices Ideology | 47 |
| Figure 19: The Roberts Court Median and Deviation..... | 48 |
| Figure 20: Roberts Court Justices Ideology..... | 48 |
| Figure 21: All Justices Ideology | 49 |
| Figure 22: Average Case Count Per Court Per Year | 50 |
| Figure 23: Types of Executive Orders by President | 69 |
| Figure 24: Number of Days in Office | 70 |

Introduction

This thesis is about change and power, not groundbreaking massive structural change often critiqued and used as a measuring stick for change, but more subtle changes to the federal government. These seemingly “small” changes, normalized over time, can have a larger impact than bolder reform efforts focused on the federal government. Examples of such often under-recognized, but significant changes are the adoption of the Seventeenth Amendment, the slow polarization of the Supreme Court, and the use of executive orders as a tool to undo a previous administration’s work. The measure of the magnitude of these fundamental changes is that each was contrary to the fundamental design of the Constitution as the Founders envisioned it and ironically altered conduct done in the name of the Constitution. This thesis is about those “small” changes in power, the ones that have created a different government from what was designed by the Founders of the United States.

Each chapter examines a big-small change in one branch that had ramifications for all three branches. Chapter One focuses on the Seventeenth Amendment which proved a groundbreaking change when it was adopted to root out corruption and to provide more power to the people. This pleased the federal government because it diminished the power of the States within the federal government.

In Chapter Two the subject is on the polarization of the Supreme Court over time and how it has created a potentially unstable situation for the “apolitical”³ branch of the federal government. The decider of disputes and the last word in constitutionality hangs on partisan ideals more every day.

Chapter Three will focus on how executive orders have been part of the fabric of the United States from its inception, but their use of them at the start of a new administration has changed. Executive orders are increasingly used to undo policies and directives of previous administrations, rather than moving forward with the new administrations ideas and directions. These types of changes over time result in large power shifts, and so this thesis examines why and how these changes have occurred and assess what it could mean in the future.

From its inception, changes in the United States government have been the subject of intense study. These changes were in fact part of the design and necessary for the structure of government to adapt to shifting conditions over time. The Founders took great care in establishing a government that was new and different from anything attempted before, creating our “great experiment” in democracy. From the very beginning, some fundamental changes have been made to the Constitution, starting with the Bill of Rights. What makes this paper different from previous studies is that it looks at each branch of government independently and analyzes how a particular change had lasting effects on governance. These changes, though small, have altered the workings of

³ Alexander Hamilton et al., *The Federalist Papers* (repr., New York: Signet Classic, 2014), 464. In *Federalist #78*, Alexander Hamilton notes that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.” This is an important distinction from the other three branches, and the judiciary’s lack of political power is changing over time.

the three branches individually, and ultimately changed the balance of power from the original design of the Constitution.

Individually, these three topics are important, but together they are of greater significance given the broad changes they brought to the government and its working design. Rather than taking these changes at face value and accepting them as part of our government, this thesis takes a closer look into why and how these changes have happened, and more importantly, what they could mean in the future.

Chapter One of this thesis focuses on the Legislative Branch, and the fundamental change of the 17th Amendment and the resulting split party delegations. James Madison defended the original design of indirect election of senators in *Federalist 62*, to keep the States involved with the Federal government⁴ Prior to the 17th Amendment, split party delegations were the result of majority party change over within state legislatures. In each of their respective pieces, John D Buenker, Sean Gailmard, and Jeffery A. Jenkins argued that the passage of the 17th Amendment erased the States check and balance power on the federal government and removed the redundant principle- agent-agent relationship that was no longer working, but at the expense of the expertise of the government from the state legislatures.⁵ ⁶ What each of these authors miss is the resulting power of the direct election of senators to the people and the phenomenon of split party delegations from the people.

⁴ Alexander Hamilton et al., *The Federalist Papers* (repr., New York: Signet Classic, 2014), 375.

⁵ John D. Buenker, "The Urban Political Machine And The Seventeenth Amendment", *The Journal Of American History* 56, no. 2 (1969): 305-322, doi:10.2307/1908126.

⁶ Sean Gailmard and Jeffrey A. Jenkins, "Agency Problems, The 17th Amendment, and Representation In The Senate", *American Journal Of Political Science*, 53, no. 2 (2009), <http://www.jstor.org/stable/25548121>. 324-42

There are arguments that have addressed split party delegations and how they materialize from States, such as William Bernhard and Brian R Sala, and Steven Rogers make competing claims on individual analyses of Senators and their voting in regard to split party delegations, but each of them miss a key component that is addressed in this thesis- the public comments of Senators prior to election and how well they play the politic game to keep their seat when they are the minority party in a very politically polarized environment. The methodology of Chapter One and the approach in researching split party delegations and how minority senators adjust their voting strategies took a multi-faceted approach. Selecting states with split party delegations not resulting from special elections or governor appointments as well as Senators who has been in office for a bit of time. Then, the Senators from each state will examined by their party support and opposition⁷, looking for trends during individual elections. Additionally, considering senators DW-NOMINATE scores, which is a system of analysis to give averages of how liberal or conservative senators are in their voting records in accordance with party alignment.⁸ The final piece to the analysis was looking at public statements from senators, and most commonly each senator noted how they were willing to and often had worked with their counterpart, even if their voting records do not show it. The finding from this chapter highlight the difference in how minority party senators operate during elections and with their counterparts in the Senate, but the research does show that there is no clear explanation as to why or how minority party senators manage to keep their seat in Congress.

⁷ Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/memberanalysis.php>

⁸ Jeffrey B. Lewis et al., "Voteview: Congressional Roll-Call Votes Database", Voteview Database, 2020, <https://voteview.com/>.

Chapter Two of this thesis focuses on the Judicial Branch of the federal government, and the slow polarization of the Supreme Court and the resulting potential for partisan decisions to influence the fabric of the federal government. The Supreme Court was never completely apolitical, but a sixty-vote confirmation majority, and in general more bipartisanship, kept the Supreme Court from leaning too far in polarization. Since the New Deal, this has begun to change. This chapter focuses on all six post New Deal Supreme Courts and looks at how the Supreme Court has slowly but steadily polarized in a time of Adversarial Legalism, and the result is the possibility of further polarization and a foundation for partisan interpretations of laws and policy.

This chapter used data from the Martin-Quinn scoring method, as the method uses multiple aspects of Justices and the overall Court in ideology scoring of Supreme Court Justices.⁹ Additionally, Chapter Two takes data from the Supreme Court Database¹⁰, applies it to the overall Court, and notes the differences in central ideology of each Supreme Court. The most compelling aspect of these scoring methods is when each of the Justices are put together to visually see the change over time of polarization.

Within this research and combining it with the movement of Adversarial Legalism¹¹, it highlights the Supreme Court's power to decide policy for the United States using their interpretation of the law because of Congress's vague legislation. Additionally, the potential for future Supreme Court Justices to be more polarized from

⁹ Andrew D. Martin and Kevin M. Quinn, "Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo For The U.S. Supreme Court, 1953-1999", *Political Analysis*, 2002, <https://mqscores.lsa.umich.edu/measures.php>. 10:134-153

¹⁰ Harold J. Spaeth et al., "The Supreme Court Database", *Supreme Court Database*, Version 2019 Release 01, 2019, <http://Supremecourtdatabase.org>.

¹¹ Robert A Kagan, *Adversarial Legalism*, 2nd ed. (repr., Cambridge, Mass.: Harvard University Press, 2003).

the outset due to the removal of the sixty-vote majority needed for confirmation creates an additional layer of possible movement away from the apolitical arbiter the Judicial Branch was designed to be.

Chapter Three of this thesis is on the Executive Branch, specifically on the use and types of executive orders issued by new presidents. From the country's inception, executive orders have been part of the fabric of governing from the Executive Branch. Chapter Three will focus on modern presidents and their use of their first fifteen, and often most important executive orders. Looking at the history of executive orders, how do presidents use the power of the pen to influence their new administration? Over time presidents have changed their use of the first fifteen executive orders by issuing more executive orders in a shorter time span as well as the types of executive orders issued.

The method to discern this comes from looking at the first fifteen executive orders of presidents Reagan through Biden using the Federal Register¹² and National Archives.¹³ They will be divided into three categories: revokes previous order, amends previous order, and new directive. Additional data from length in time of office and the division of political party in the federal government are also considered. The larger question that will be examined through this data is are presidents changing how they issue executive orders? For example, President Biden has issued over thirty executive orders within a month of his presidency, but President Bush issued just seven in the same timeframe. No

¹² "Executive Orders", Federal Register, 2021, <https://www.federalregister.gov/presidential-documents/executive-orders>.

¹³ "Executive Orders Disposition Tables Index", National Archives, 2021, <https://www.archives.gov/federal-register/executive-orders/disposition>.

president within the research entered the office during a major war conflict, but there are outside factors to look at as well.

Through this research, a trend emerges with how presidents use their first fifteen executive orders. No president goes without revoking a previous president's executive orders, the timeframe in which presidents utilize their power of the pen has decreased, and presidents are using their power to advance their agenda and bypass Congress. The context of this research is important to the changing landscape of the federal government. As presidents use their increasing power; they are given the ability to work with a decrease in checks and balances unless their executive orders are challenged in Court or through Legislation passed by Congress; each of which are becoming more polarized with time.

The research presented in these three chapters reveals trends that, if unchecked, will push the United States into further polarization and a deviation from the writings of the Constitution. President Washington said in his farewell address that the people need to be wary of "cunning, ambitious, and unprincipled men (who) will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion."¹⁴ This thesis explores how subtle drifting away from our Constitution and its principles over time undermines the functioning of the three branches through usurped executive

¹⁴ George Washington, "Farewell Address (1796)", *Teaching American History*, 1796, <https://teachingamericanhistory.org/library/document/farewell-address/>.

power and destructive political polarization. The antidote to this is vigilance of the people and the election of principled leaders.

Chapter One: The Seventeenth Amendment and Modern Split Party Delegations: The Habits and Attitudes of Split Party Delegations in a Post Seventeenth Amendment Government

Introduction

The United States Senate unique. It is the only Constitutional feature of the United States government that has been fundamentally altered in its form of election from its constitutional founding. When the Framers wrote the United States Constitution they did so with care, purpose, and intent; creating a government that was a new and novel idea compared to other countries at the time. Over the course of United States history, parts of the Constitution have changed, but one of the most radical was moving from indirect election of United States Senators to direct election in 1913¹⁵. The Seventeenth Amendment changed not only the mode of election of Senators, but also diminished the power of states within the federal government. Because of the Seventeenth Amendment, Senators have become more identifiable by their party and “brand”¹⁶ rather than their voting record and connections within their state party.

¹⁵ "U.S. Senate: Direct Election Of Senators", Senate.Gov, 2020, https://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm. The Seventeenth Amendment was ratified on April 8, 1913 when Connecticut added their approval for ratification, giving the Amendment the three fourths majority, it needed. The following year (1914), Senate elections were held via popular vote.

¹⁶ The term ‘brand’ is applied as such as how the Senator presents themselves to the general public, constituents, and their personal marketing in campaigns.

Examining the ramifications of the Seventeenth Amendment could be as simple as looking at what the potential makeup of the Senate would be if there was no Seventeenth Amendment (going on the assumption that party-controlled legislatures would select United States Senators of the same party), but it is not that simple. There has been an increase in split-delegation representation within the United States Senate since the Seventeenth Amendment was ratified. There are three main questions that arise from this: how does this happen; why does this happen; and how do these Senators maintain their seats when they represent the minority party in their state?

All three of these questions raise an empirically answerable question- has the Seventeenth Amendment changed the behaviors of moderate Senators in states in which their state legislature is of the opposite party? The research in this paper shows that the Seventeenth Amendment has opened the door for split party delegations creating an environment in which the electorate chooses split delegations for differing reasons, but the minority senator fights harder than their counterpart of the majority party.

This paper examines Senators Tester and Daines of Montana, Senators Brown and Portman of Ohio, and Senators Manchin and Moore Capito of West Virginia. Without the Seventeenth Amendment, would these senators be in office representing the minority party compared to their state legislature majority party? Probably not, but looking at their behavior, public stances, and voting records could shed light on their ways of navigating a seat when their state makeup seems the opposite of themselves. Using multiple sources, we can look at their voting profiles, public stances, and overall brand as a Senator. In doing so, this chapter shows that minority party Senators tend to have moderate

behaviors, while still voting their party line, because their brand is moderate enough that they can behoove the electorate into reelecting them.

Critical Literature Review

When the Framers wrote the United States Constitution, their goal was to create a government the world had never seen. As Alexander Hamilton notes in the *Federalist 1* that it was up to men to decide “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”¹⁷ Because of their drive and intellect, the Framers surpassed creating a new government; they created a government that has been inimitable. While there have been amendments, additions, and alterations to the United States Constitution, the one that had the most immediate effect on the structure of Legislative Branch was the Seventeenth Amendment. Ratified in 1913, the Seventeenth Amendment changed the mode of election of United States Senators from indirect election through state legislatures to direct election by the people of the state they were to represent in Congress. There have been arguments on both sides regarding the impact of the Seventeenth Amendment, but one idea rings true: the Seventeenth Amendment gave the electorate the option to split delegation representation within the United States Senate between political parties in a way that did not exist when state legislatures were appointing Senators.

¹⁷ Alexander Hamilton et al., *The Federalist Papers* (repr., New York: Signet Classic, 2014), 27.

Pre- Seventeenth Amendment

Prior to the ratification of the Seventeenth Amendment, it was state legislatures that chose who was to represent their state in the United States Senate. Elaine Swift notes, “the framers intended the Senate first and foremost to resemble in its form the British House of Lords and intended the senators to serve Lords-like functions that would both incorporate and precede in importance those mentioned above.”¹⁸ Because of this design, state legislatures often proved corrupt when it came to choosing Senators. The United States Senate Archives describe some of the bribery and corruption issues from the 1860s; including “Intimidation and bribery marked some of the states' selection of senators. Nine bribery cases were brought before the Senate between 1866 and 1906. In addition, 45 deadlocks occurred in 20 states between 1891 and 1905, resulting in numerous delays in seating senators.”¹⁹ With the issues of bribery, hostility within state legislatures, the desire for power, and a smaller federal government, the mode of election of United States Senators needed a change, and that change came with the Oregon plan and the eventual ratification of the Seventeenth Amendment.²⁰

James Madison wrote in *Federalist 62*, “It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former and may form a convenient link between the two systems.”²¹ What neither

¹⁸ Elaine K Swift, *The Making Of An American Senate: Reconstitutive Change In Congress, 1787-1841* (repr., Ann Arbor: University of Michigan Press, 2002), 10.

¹⁹ "U.S. Senate: Direct Election Of Senators", *Senate.Gov*, 2020, https://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm.

²⁰ Wendy J Schiller and Charles Haines Stewart, *Electing The Senate* (repr., Princeton University Press, 2014).

²¹ Alexander Hamilton et al., *The Federalist Papers* (repr., New York: Signet Classic, 2014), 375

Madison nor the other framers could predict was the subsequent corruption and need for change to create the Seventeenth Amendment.

As early as the 1870s, there were petitions for an amendment for the direct election of Senators, only to be stalled within the Senate.²² The first successful trial for this was in Oregon using a direct primary method with the Oregon Plan of 1904. This plan stated “that every political party shall nominate all of its candidates for public office under the provisions of this act”²³ only. This forced parties to go through a direct primary for all elected positions, not just for the House of Representatives and Presidency. A direct primary gave the opportunity to the people to decide who they felt should represent them in the Senate and took away the power of the party nominating conventions of selecting nominees.²⁴ With state plans taking shape, it forced the hand of Congress to create an amendment that would create the direct election of Senators.

Post Seventeenth Amendment and State Power Changes

After the ratification of the Seventeenth Amendment, the fundamental makeup of the United States Senate changed. With the electorate in charge of electing Senators, it no longer was about family ties, party loyalty, bribery, or personal connections. It was about the people believing in the person they chose to vote for.

Prior to the Seventeenth Amendment, the principal- agent relationship was a stable and redundant one. The electorate chose their state legislature and in turn the

²² "U.S. Senate: Direct Election Of Senators". *Senate.Gov*, 2020.

https://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm.

²³ James D. Barnett. "Forestalling the Direct Primary in Oregon." *Political Science Quarterly* 27, no. 4 (1912): 648-68. doi:10.2307/2141217.

²⁴ Wendy J Schiller and Charles Haines Stewart, *Electing The Senate* (repr., Princeton University Press, 2014).

legislature chose the United States Senator to represent the State in Washington D.C. Authors Gailmard and Jenkins discuss the indirect hierarchical agency of principle-agent relationship quite well in that the checks and balances do not come from electorate, but by the first agent (the state legislatures).²⁵ With the passage of the Seventeenth Amendment, the States lost their only true method of checks and balances on the Federal government. As Buenker notes, “while the Seventeenth Amendment did create a direct agency relationship, it also eliminated both the informed selection and monitoring of U.S. Senators by relative political experts, state legislatures. Therefore, U.S. Senators may have been held to a *better* post-amendment standard in democratic terms, but not as *tightly* as they were held to their pre-amendment standard.”²⁶ With the States losing their grip within the Federal government, the Senate no longer had the Lord-like status it had attained previously; the upper house of Congress began to function through elections like that of the House of Representatives.

With the ratification of the Seventeenth Amendment, this double check was erased, creating a principle-agent relationship that matched the House of Representatives; the largest difference between the two elections was time, as House of Representative members are reelected every two years, versus every six for Senators. With this gap in time, it provides an opportunity for Senators to moderate their votes more so between elections than House members.

²⁵ Sean Gailmard, and Jeffery A. Jenkins. "Agency Problems, the 17th Amendment, and Representation in the Senate." *American Journal of Political Science* 53, no. 2 (2009): 324-42. <http://www.jstor.org/stable/25548121>.

²⁶ John D. Buenker. "The Urban Political Machine and the Seventeenth Amendment." *The Journal of American History* 56, no. 2 (1969): 305-22. doi:10.2307/1908126.

Introduction of Electorate Created Split Party Delegation

Prior to the ratification of the Seventeenth Amendment, a logical person may think that there were no split party delegations within the United States Senate, but that would be untrue. Some may view split party delegations as a more recent phenomenon, but the number of states that have had split party delegations has been consistent since the founding of the United States. Prior to the Seventeenth Amendment, there were a high number of split party Senate delegations from the two major parties at their prime.²⁷ While split-party delegations have always existed in the United States government, the change is within the amount and types of representation created. With the way elections are designed for the United States Senate, it is very rare to see a radical shift in membership makeup. Add this to the fact that Senators of the same state are rarely up for reelection at the same time gives the opportunity for split delegation to occur from an electorate level, not just a state legislature one.²⁸ Seeing the difference between the two modes of election is imperative when researching the split party delegation. While both versions of split party delegations are important, it is expected that State Legislature majorities would select Senators of their party; it is an anomaly when the electorate chooses a minority party Senator in contrast to their state legislature makeup, as their representative in Congress.

²⁷ Thomas L. Brunell, and Bernard Grofman. "Explaining Divided U.S. Senate Delegations, 1788-1996: A Realignment Approach." *The American Political Science Review* 92, no. 2 (1998): 391-99. doi:10.2307/2585671.

²⁸ Thomas L. Brunell, and Bernard Grofman. "Explaining Divided U.S. Senate Delegations, 1788-1996: A Realignment Approach." *The American Political Science Review* 92, no. 2 (1998): 391-99. doi:10.2307/2585671, 392

Attributes of Split Party Senators

In looking at elections post Seventeenth Amendment ratification, one must look at the outliers, the Senators who are elected creating a split delegation. Modern Senators are people who have financial means, relevant professional background, have advanced degrees, and have connections within their state. As John Sides notes “Politicians also benefit from a reputation or ‘brand’ that citizens recognize and can rely on when voting.”²⁹ A politician’s “brand” can either assist them within an election or destroy them. Sides makes the point that sometimes a brand matters more than a party affiliation; that idea can assist minority party Senate candidates in states where they stand a chance of winning an election. If a candidate brands themselves as a bearer of all people, they stand the chance of beating a challenger who may have a harder line stance, even if they are in the majority party. Stephen K. Medvic, in discussing the elections of Senators as whole notes, “Senators may alter their campaign behavior based on the campaigns and elections of their counterparts.”³⁰ In conjunction with Sides et al, Medvic et al follow the same thought pattern. Candidates base their electability on the candidacy of their counterparts in the Senate. The fair question then is how do Senators of opposite parties win within the same state?

Historically, the United States has varied in political polarization. In the current political climate, polarization is thought widespread through all levels of government. In his work, Carlos Algara notes, “As a byproduct of the pronounced partisan polarization between the congressional parties, the value of the collective partisan brand as a voting

²⁹ John Sides et al., *Campaigns And Elections*, 3rd ed. (repr., W. W. Norton & Company, 2019), 163

³⁰ Stephen K Medvic, Jamie L. Carson, and Carrie P. Eaves, *New Directions In Campaigns And Elections* (repr., New York: Routledge, 2011), 198.

heuristic increases.”³¹ With this thought process, comes the question of how do minority party Senators gain enough favor to obtain their seat from an electorate majority outside of their own party? Scott R. Meinke notes, “in contrast to their legislatively elected predecessors, directly elected senators were much more likely to moderate in their nominate scores as reelection approach(es).”³² With this moderation comes the brand discussed previously. If a Senator can adjust their stances within their voting records, they have the potential to gain enough favor from the majority even if they are on differing sides of the political aisle.

Responsiveness of Senators Post Seventeenth Amendment

The responsiveness of United States Senators is often how they are measured, but in a society with less working across the aisle and more partisanship, this has become a more difficult task. Schiller and Stewart make an excellent point with their data: “One might have expected major changes in the behavior of U.S. senators elected after the Seventeenth Amendment and even transformations in the nature of the Senate itself. But political scientists have come to the conclusion that in fact, while there were some changes, they were relatively minor.”³³ While Schiller and Stewart focus on the overall behavior of the Senate post Seventeenth Amendment, the data they dismiss is the minor

³¹ Carlos Algara, "The Conditioning Role Of Polarization In U.S. Senate Election Outcomes: A Direct-Election Era & Voter-Level Analysis", *Electoral Studies* 59 (2019): 1-16, doi: 10.1016/j.electstud.2019.02.006.

³² Scott R. Meinke. "Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election." *Political Research Quarterly* 61, no. 3 (2008): 445-57. <http://www.jstor.org/stable/20299747>.

³³ Wendy J Schiller and Charles Haines Stewart, *Electing The Senate* (repr., Princeton University Press, 2014), 12.

changes. Those minor changes could be linked to the split party delegation and their different range of electability.

There have been many arguments surrounding the responsiveness of senators to their electorate along with multiple data sets on arguing claims for or against. When looking at hard data, the votes senators make, there is different arguments to be made. According to William Bernhard and Brian R. Sala, "Prior to direct election, senators had little systematic incentive to shift their public ideologies in pursuit of reelection. With direct election, however, we show a systematic bias in favor of late term moderating behavior, particularly for Republican incumbents."³⁴ Using their method of analysis, Bernhard and Sala make the case that Senators do change their responsiveness in favor of reelection. Contrary to this view Steven Rogers' assessment concluded, "by directly linking votes to seats, the Seventeenth Amendment allowed election outcomes to be more responsive to preferences. Even though the institution of direct elections increased the responsiveness of southern elections, there were no evident changes in the levels of electoral responsiveness for non-southern elections. These findings imply that the Seventeenth Amendment is not necessary to create responsive Senate elections."³⁵ With these differing viewpoints, there is some major issues to be noted. Why are they so different, does the data truly make that much of a difference? Most importantly, how does this apply to split delegation representation from the states in the Senate? Some of these questions can be answered by looking at voting records, but more importantly, the issue

³⁴ William Bernhard and Brian R. Sala, "The Remaking Of An American Senate: The 17Th Amendment And Ideological Responsiveness", *The Journal Of Politics* 68, no. 2 (2006): 345-357, doi:10.1111/j.1468-2508.2006.00411.x.

³⁵ Steven Rogers, "The Responsiveness Of Direct And Indirect Elections", *Legislative Studies Quarterly* 37, no. 4 (2012): 509-532, doi:10.1111/j.1939-9162.2012.00060.x.

of minority party senators in split delegations are the anomaly. Looking at those voting records, comments, and brands are a more concrete way to base the claim of responsiveness of the Senator to their constituents along with their electability in a post Seventeenth Amendment Senate.

Split Party Delegation Ideology

There are multiple ways to examine the reasoning behind split Senate delegations, and whether the Seventeenth Amendment has anything to do with it. One item to note is that the split delegations prior to the Seventeenth Amendment were not due to the direct electorate and their voting choices, but rather due to the direct electorate and their state legislature choices. Because of the staggered terms of United States Senators, the state legislature could flip in between election cycles for United States Senators, creating the split delegations. The phenomenon of the direct electorate selecting United States Senators is the direct result of the Seventeenth Amendment. The schools of thought behind the voting choices are many, but the most dominant theories are proximity voting and the balancing theory.³⁶ Between these two theories, the data used in them can create differing results. Fiorina is often cited in the theories, but Christopher P. Donnelly makes a counter argument in his paper, *Balancing Act? Testing a Theory of Split-Party U.S. Senate Delegations*: using a different level of aggregate data creates a differing result when it comes to the balancing theory of Fiorina's. Donnelly notes that based on an individual data set rather than an aggregate, the idea of proximity voting is more likely over Fiorina's balancing theory. Fiorina does note, "balancing arguments should be

³⁶ Alberto Alesina, Morris Fiorina, and Howard Rosenthal, "Why Are There So Many Divided Senate Delegations?", *The National Bureau Of Economic Research*, 1991, <https://www.nber.org/papers/w3663>.

viewed in ‘as if’ terms. In the large, the electorate behaves as if voters were engaging in a fairly sophisticated trading off of party positions.”³⁷ The idea behind balancing theory has merit, but there are multiple factors that cannot be substantiated within it.

In looking at two differing schools of thought of split delegation representation, more questions arise. If it were not for the Seventeenth Amendment, what would our United States Senate look like? Why do voters end up with split party delegations, and most importantly, what are the attributes of Senators who are the minority in their split delegation? Gershtenson added a data set left out by other researchers on this topic, the citizen assessment. This assessment is not all encompassing for many reasons but does give an additional insight not noted in other research. Gershtenson notes, “While responsiveness is an important dimension of representation, perfect responsiveness provides no guarantees that legislators reflect the average preferences of their constituents.”³⁸

Conclusion

Throughout history, there have been split party delegations within the United States Senate. What makes them different now from pre-Seventeenth Amendment split party delegations is that it is the people are choosing the Senators, not the state legislatures. As Abraham Lincoln said, “government of the people, by the people, for the people.”³⁹ Though designed to be an upper house, the United States Senate was not truly

³⁷ Morris P. Fiorina. "An Era of Divided Government." *Political Science Quarterly* 107, no. 3 (1992): 387-410. doi:10.2307/215243

³⁸ Joseph Gershtenson. 2007. “Ideology and Representation in the US Senate: Roll Calls v. Constituent Assessments.” *Journal of Legislative Studies* 13 (4): 558–76. doi:10.1080/13572330701663637.

³⁹ Abraham Lincoln. 1863. "Gettysburg Address - Teaching American History". *Teaching American History*. <https://teachingamericanhistory.org/library/document/gettysburg-address/>.

a chamber of the federal government that was by the people; it was a government body appointed for the people. Since the ratification of the Seventeenth Amendment, the Senate has consistently had split party delegations. What is lacking in research is not necessarily the fact that these happen and why, but more how are minority party Senators different from their majority party counterparts from their state in the Senate. None of this would matter however, without the Seventeenth Amendment. The electorate can be fickle in their choices, but the length of time a Senator is in office grants them the opportunity to mold their brand in a way that promotes them as the best person for the position of Senator in their state, even if their party affiliation does not coincide with the majority of the state they wish to represent.

The arguments for and against the Seventeenth Amendment are both valid and occur at different times since its ratification in 1903. Of the many theories as to why there are split party delegations, the most prominent are the balancing theory, proximity voting, and specific candidate factors.⁴⁰ Looking at specific states, their Senators, and how they consistently retain their positions gives an insight into how and why voters choose past a party affiliation.

Data

The purpose of this data and analysis is to decipher how state minority party Senators in relation to their state legislatures in split party delegations manage to retain their seats in comparison to their majority party counterpart. This study focuses on

⁴⁰ Drew Desilver, "Split Senate Delegations Less Common In Recent Years", *Pew Research Center*, 2017, <https://www.pewresearch.org/fact-tank/2018/01/04/split-u-s-senate-delegations-have-become-less-common-in-recent-years/>.

current Senatorial pairs since, prior to the Seventeenth Amendment, an explanation for the split party delegations could be a switch in state legislature majority during election terms. In the post Seventeenth Amendment Senate, split-party delegations are the result of voter's decisions, not the state legislature.

When compiling data for this analysis, there are many avenues to consider. Other research has been done using NOMINATE scores,⁴¹ Mayhew model,⁴² or RAW scores.⁴³ In doing so they have focused on certain aspects of Senators votes and ideals. Looking strictly at party support/ opposition and DW-NOMINATE⁴⁴ scores, a picture emerges of Senators and their ways of electability in a post Seventeenth Amendment electorate.

Regardless of if the minority senator is from a Republican or Democratic controlled State Legislature state, the constant that remains is Senators alter their voting strategy come their reelection year. Rather than proximity voting or balancing theory, it is a matter of how the Senators work to alter their brand for reelection.

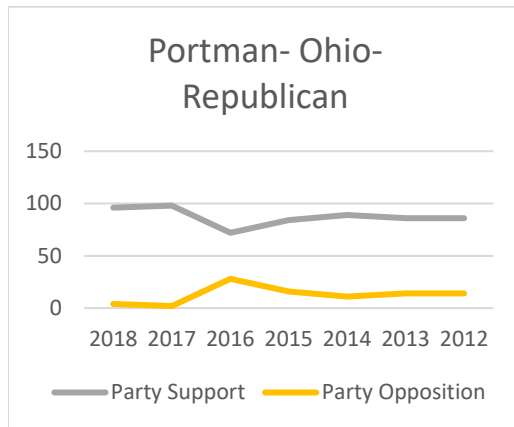
⁴¹ Joseph Gershtenson. 2007. "Ideology and Representation in the US Senate: Roll Calls v. Constituent Assessments." *Journal of Legislative Studies* 13 (4): 558–76. doi:10.1080/13572330701663637.

⁴² Scott R. Meinke. "Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election." *Political Research Quarterly* 61, no. 3 (2008): 445-57. <http://www.jstor.org/stable/20299747>.

⁴³ William Bernhard and Brian R. Sala, "The Remaking Of An American Senate: The 17Th Amendment And Ideological Responsiveness", *The Journal Of Politics* 68, no. 2 (2006): 345-357, doi:10.1111/j.1468-2508.2006.00411.x.

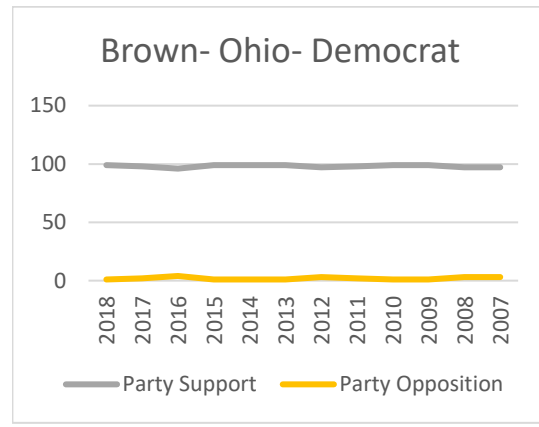
⁴⁴ Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet (2020). *Voteview: Congressional Roll-Call Votes Database*. <https://voteview.com/>

Ohio



45

Figure 1: Portman- Ohio- Republican. Party Support/ Opposition



46

Figure 2: Brown- Ohio- Democrat Party Support/ Opposition

Ohio is a state with a Republican trifecta; both branches of the Legislative and the Executive are under Republican party control, but Senator Sherrod Brown has been a Senator for the state since his election in 2006. What makes Senator Brown unique and electable? Looking at the above charts, he has continued to stay true to his ideals. The standout of Senator Brown is his history in office, as well as his voting record for workers. Senator Brown has consistently fought for worker rights as well as fair trade agreements, notably voting against the North American Free Trade Agreement (NAFTA).⁴⁷

While Senator Brown has held elected office much longer, Senator Portman's party support/opposition record through CQPress creates a picture that majority party senators also change their voting behavior during election cycles. In 2016, Senator

⁴⁵ "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-Portman-Rob>

⁴⁶ "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-Brown-Sherrod>

⁴⁷ Sherrod Brown. (2017). In CQ-Roll Call (Ed.), *Politics in America 2018. The 115th Congress*. Washington, DC: CQ-Roll Call, Inc. Retrieved from <http://library.cqpress.com.proxy1.library.jhu.edu/congress/pi115-Brown-Sherrod>

Portman’s party opposition and support both trended more toward the middle by a significant margin in comparison to Senator Brown, who was not up for reelection. In October of 2016, Senator Portman issued a statement that could explain why his voting record trended to appeal to a wider audience in his reelection saying, “While I continue to respect those who still support Donald Trump, I can no longer support him.”⁴⁸ This reversal of support of the Republican nominee could have ended his reelection campaign, but Senator Portman was able to use his previous voting history and powerful seat in the Senate as a springboard for his reelection.

West Virginia

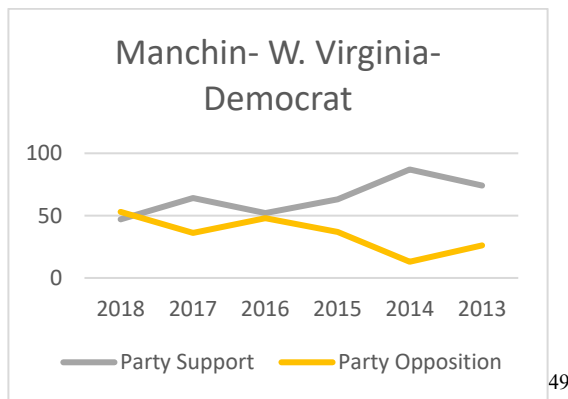


Figure 3: Manchin- W. Virginia- Democrat Party Support/ Opposition ⁴⁹

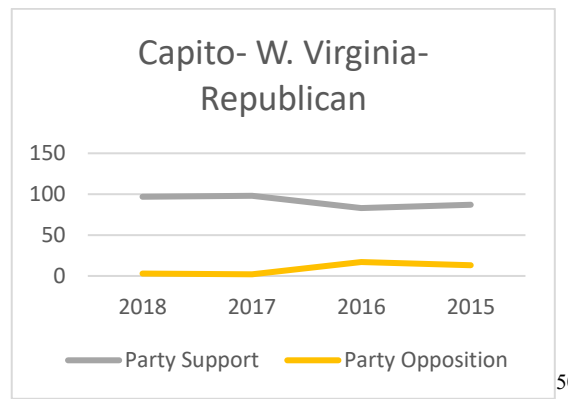


Figure 4: Capito- W. Virginia- Republican Party Support/ Opposition ⁵⁰

West Virginia had a democratically controlled State Legislature from the 1990s through 2014; and Joe Manchin is a previous Governor for the State.⁵¹ With a more

⁴⁸ Rob Portman, "Portman Statement On Presidential Race", *Rob Portman For Senate*, 2016, https://www.robportman.com/portman_statement_on_presidential_race.

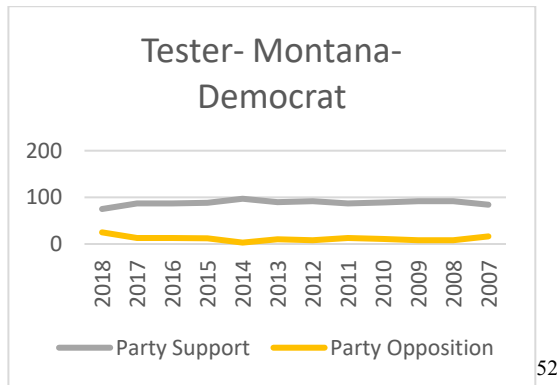
⁴⁹ "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pia115-Manchin-Joe>

⁵⁰ "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/document.php?id=pia115-Capito-Shelley-Moore>

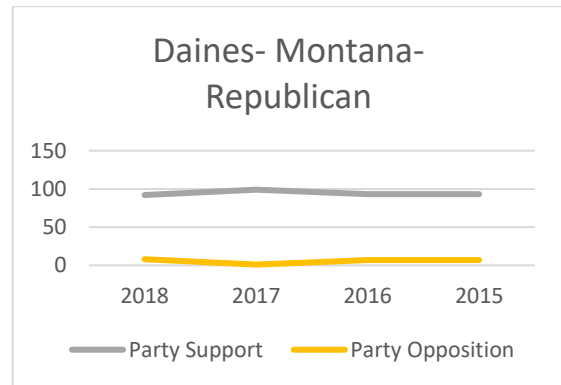
⁵¹ "West Virginia State Legislature - Ballotpedia", *Ballotpedia*, 2020, https://ballotpedia.org/West_Virginia_State_Legislature.

recent trend into conservative ideology, West Virginia flipped in 2014 to a Republican controlled State Legislature, which is when Senator Capito was elected. Senator Manchin has trended toward the middle, but since Donald Trump’s election, he has opposed his party more often than supported in voting. While Senator Manchin identifies as a Democrat, his voting stances have begun to lean more Republican. If the Seventeenth Amendment had not been instituted in 1913, Senator Manchin may have lost his seat in his reelection in 2018.

Montana



52



53

Figure 5: Tester- Montana- Democrat. Party Support/ Opposition

Figure 6: Daines- Montana- Republican. Party Support/ Opposition

The state of Montana has maintained a Republican controlled State Legislature since the 1990s, with two split houses in the mid-2000s as exceptions.⁵⁴ Senator Tester gained acceptance and traction in his state through his personal background, political

⁵² "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pia115-Tester-Jon>.

⁵³ "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pia115-daines-steve>.

⁵⁴ "Montana State Legislature - Ballotpedia", *Ballotpedia*, 2020, https://ballotpedia.org/Montana_State_Legislature.

history, and his effort to work for the people of Montana, not just his political party.⁵⁵ In contrast to Senator Tester, Senator Daines has marginally adjusted his voting record between party support and opposition. Looking at the above graph, Senator Daines trended more with party support in the first year of Donald Trump’s polarizing presidency but is moving slightly back to center the closer he comes to reelection.

The second data set to consider is the DW-NOMINATE scores. While not conclusive, it gives a general overview of how the Senators average their vote. This model of analysis is often referenced, as Poole and Rosenthal created a system that showcases a wide range of politicians.⁵⁶

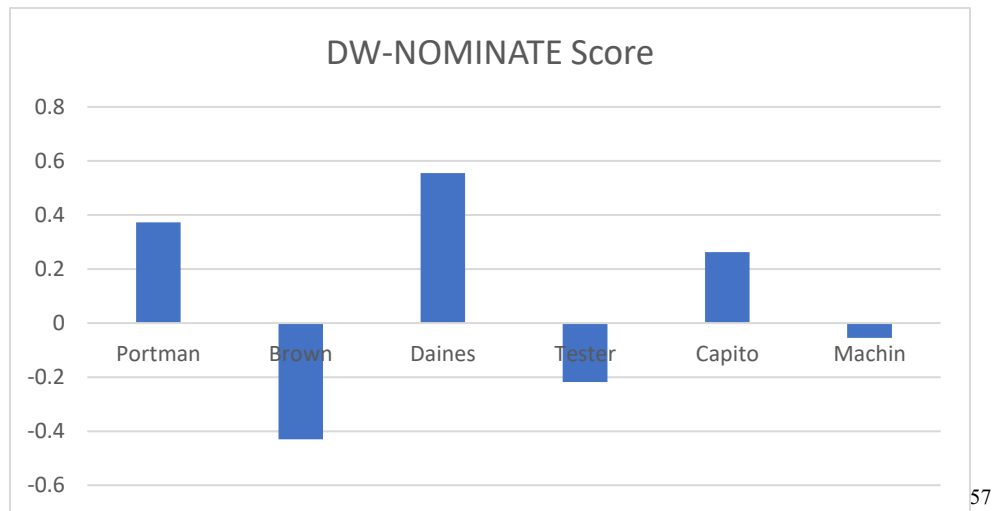


Figure 7: DW-NOMINATE Score

Party ideology plays a significant role in electability of Senators. Of the three data sets, the outlier is that of Ohio Senators Portman and Brown. A Republican trifecta state

⁵⁵ Montana State Legislature - Ballotpedia", *Ballotpedia*, 2020, https://ballotpedia.org/Montana_State_Legislature.

⁵⁶ Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet (2020). *Voteview: Congressional Roll-Call Votes Database*. <https://voteview.com/>

⁵⁷ Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet (2020). *Voteview: Congressional Roll-Call Votes Database*. <https://voteview.com/>

with a Democratic senator leaning further into their party ideology over the Republican senator is an outlier. There could be explanations for this. Brown has been in politics since 1975, always as a Democrat, and always working towards worker's rights.⁵⁸ His name recognition and history are very high in his state, allowing him to use his brand and cherry-picked voting record for reelection. This could play a significant role in his ability to consistently stay with party line ideals and still manage to be reelected each cycle.

Analysis

When examining the data sets in this research, the trends from CQPress stand out. Regardless of state, Senators adjust their voting styles based on more than one factor. Depending on what party is in power in the Executive, majority in the Senate, and a Senator's reelection year all contribute to how Senators vote. As states slowly move to more polarization, the amount of split party delegations is decreasing.⁵⁹

Senator Manchin from West Virginia is the most interesting of these Senators. He not only has the closest to zero DW-NOMINATE score, in his most recent reelection year he crossed party lines more than voted with his chosen party.⁶⁰ ⁶¹ As a Democratic Senator from West Virginia which is a majority Republican state, the logic behind

⁵⁸ Sherrod Brown. (2017). In CQ-Roll Call (Ed.), *Politics in America 2018. The 115th Congress*. Washington, DC: CQ-Roll Call, Inc. Retrieved from <http://library.cqpress.com.proxy1.library.jhu.edu/congress/pia115-Brown-Sherrod>

⁵⁹ Gailmard, Sean, and Jeffery A. Jenkins. "Agency Problems, the 17th Amendment, and Representation in the Senate." *American Journal of Political Science* 53, no. 2 (2009): 324-42. <http://www.jstor.org/stable/25548121>.

⁶⁰ Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet (2020). *Voteview: Congressional Roll-Call Votes Database*. <https://voteview.com/>

⁶¹ "Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id= pia115-Manchin-Joe>

Manchin's movement to the right regardless of party identification is something to be considered.

When examining the trends of party support of the above Senators, each have their own increase and decrease. The below chart of party support of the Senators combined showcase that during Presidential election cycles regardless of if the Senator was up for reelection, their party support adjusted downward. I believe this to be for two main reasons, the first is visibility. Once a Senator is in office, their main goal is to represent their constituents in Washington D.C. During Presidential election cycles, the country tends to pay a bit more attention to the workings of the federal government, as was the case in 2016. With the twenty-four-hour news cycle focused on a highly contested Presidential election, Senators across the board trended toward moderation over extremism because they were more visible to their constituents.

The second reason is self-preservation. Of the Senators examined, Senator Portman was the only Senator up for reelection in 2016. His party support took a 12-point drop from the previous year, which showcases his adjustment of voting not only during a reelection year, but one in which there was also a Presidential election. Senators Brown, Tester, and Manchin were up for reelection in 2018. Of the three, Senator Brown was the only Senator to not adjust his party support, it was kept at 99%. This could be due to Senator Brown's political history, or party conviction. Surprisingly, Senator Manchin has the largest drop in reelection cycles, at 17 points, going so far as the support the Republican party platform more than his own Democratic party.

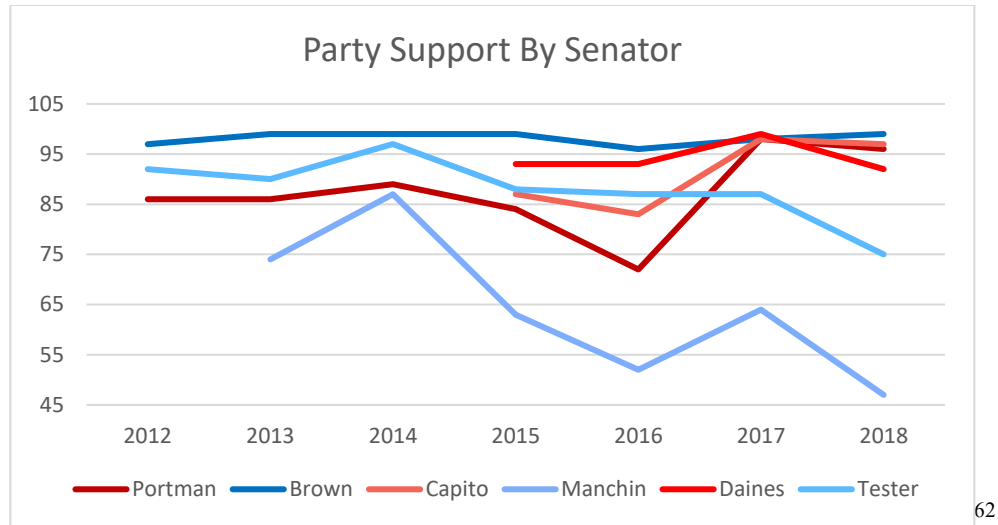


Figure 8: Party Support by Senator

In addition to their voting choices and their support of party platforms, there are other items to consider with each set of Senators within this research. Do they ever agree with each other outside of voting? Senator Portman and Senator Brown of Ohio have chosen on numerous occasions to work with each other for the people they represent, and they have also chosen not to attack the other Senator when one is up for reelection, even if they publicly support their challenger.⁶³ In similar fashion, Senator Tester and Senator

⁶²"Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020, <http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-Brown-Sherrod>

"Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020,

<http://library.cqpress.com.proxy1.library.jhu.edu/congress/document.php?id=pi115-Capito-Shelley-Moore>

"Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020,

<http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-daines-steve>.

"Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020,

<http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-Manchin-Joe>

"Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020,

<http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-Portman-Rob>

"Cqpress Congress Collection", *Library.Cqpress.Com.Proxy1.Library.Jhu.Edu*, 2020,

<http://library.cqpress.com.proxy1.library.jhu.edu/congress/votingscoresresults.php?id=pi115-Tester-Jon>

⁶³ Jack Torry, "Brown, Portman Find Common Ground", *Dayton Daily News*, 2016,

<https://www.daytondailynews.com/news/national-govt--politics/brown-portman-find-common-ground/Md1DjjYXCHgSdzrclcObmI/>.

Daines of Montana have worked together and crossed party lines as well in order to achieve results for their constituents.⁶⁴ When speaking about his new junior Senator; Senator Manchin took the same tone as the previous comparisons. Working for the people of his state, regardless of party, was the most important part of his job. Though Senator Capito would be the junior Senator from West Virginia, it was their job to work together.⁶⁵

Looking at these pairs of Senators, the common thread is they publicly say they will work together, even if they choose not to when it comes to voting. Rather than attacking or undermining their counterpart in the Senate, they have chosen the proverbial high road to maintain decorum with their colleague. In doing so, each of these Senators, regardless of party, are protecting their brand within their state and showing on the surface a willingness to work with other members of the Senate.

Conclusion

Are Senators from split party delegations going to continue to trend toward the majority party in their State Legislature? Was the Seventeenth Amendment anything more than a removal of State input in the Federal government? Does party identification matter over voting record? These questions are something more to explore, but within this research, it is shown that minority party Senators in split delegations either double down on their party platform with a few key votes opposite their party platform, or they

⁶⁴ Martin Kidston, "Tester And Daines: The Art Of Compromise In Washington, D.C., Isn't Dead", *Missoula Current*, 2019, <https://missoulacurrent.com/government/2019/02/tester-daines-compromise/>.

⁶⁵ Amanda Barren, "Senator Manchin Says He And Capito Work Well Together", *WSAZ3*, 2014, <https://www.wsaz.com/home/headlines/Senator--281556281.html>.

succumb to the pressures of their majority party counterparts in order to remain in their position.

Senators do work with one another, produce bipartisan bills, and vote against their party platforms. These cases of Senators highlight their personal voting records, but also highlight their public persona for their electorate. This combination of factors has assisted in making each Senator more marketable. By highlighting their accomplishments and cases when they voted against their party, minority party Senators in split delegations can appeal to voters in ways their majority party counterparts cannot.

While DW-NOMINATE scores, party support rankings, and other models are worthwhile to use in research, it is impossible to create a full picture of whether minority party Senators always change their voting styles when up for reelection. The current political climate plays part in that, as states are moving to more partisan control, but because of the Seventeenth Amendment, the election of Senators is not through a possible gerrymandered process or State Legislature makeup. It is strictly up to the people who vote in the election.

Chapter Two: Polarization of the Supreme Court of the United States. How the Growth in Polarization of the Supreme Court is Leading the Potential For Ideology to Influence Policy at the Judicial Level.

Introduction

The Supreme Court of the United States was not designed to be apolitical. The founders left much of the detail of the Judicial Branch so vague that the parameters of the Judicial branch were laid out in the Judiciary Act of 1789,⁶⁶ only after the first Congress was sworn in and George Washington was elected President. Throughout the *Federalist Papers* and other historical articles, the discussion of the Judicial branch and its impartiality were a large focus. At different points throughout history, the idea of the Supreme Court becoming a third partisan branch of the federal government has not gone undiscussed,⁶⁷ but in today's government of Adversarial Legalism⁶⁸ the question

⁶⁶ Engrossed Judiciary Act, September 24, 1789; First Congress; Enrolled Acts and Resolutions; General Records of the United States Government; Record Group 11; National Archives.

⁶⁷ Michael Nelson. 1988. "The President and the Court: Reinterpreting the Court-Packing Episode of 1937." *Political Science Quarterly (Academy of Political Science)* 103 (2): 267. Doi: 10.2307/2151184.

⁶⁸ Robert A. Kagan. 2001. *Adversarial Legalism*. Cambridge, Mass: Harvard University Press. <http://search.ebscohost.com.proxy1.library.jhu.edu/login.aspx?direct=true&AuthType=ip,shib&db=nlebk&AN=282054&site-chose-live&scope=site>. 9 Definition: adversarial legalism—a method of policymaking and dispute resolution with two salient characteristics. The first is formal legal contestation—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review. The second is litigant activism—a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers.

becomes about the polarization of the Supreme Court. The question this paper addresses is: has the polarization of the Supreme Court created an unstable and potentially dangerous foundation for the interpretation of laws and policy within the United States?

To address this question, this paper looks at three different schools of thought on the polarization of the Supreme Court, construct data from the Martin-Quinn scoring method on judicial ideology,⁶⁹ analyze the results of polarization from the six post New Deal Courts, and discuss how polarization impacts the Supreme Court. Upon looking at the data of how the Supreme Court has moved from center bias to polarization, this chapter showcases that since the New Deal the polarization of the Supreme Court has expanded, providing the groundwork for the Supreme Court to alter policy from Congress based off their power of Judicial review and the Court's interpretation of vague legislative language Congress employs when writing policy.

The United States Supreme Court is the decider of disputes, but it has also become a policymaker in the United States Federal government. Article III of the Constitution reads, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."⁷⁰ The framers of the United States Constitution left the rest of the structure of the courts up to Congress.

⁶⁹ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

⁷⁰ "The Constitution Of The United States: A Transcription", *National Archives*, 2020, <https://www.archives.gov/founding-docs/constitution-transcript>.

Since the founding of the United States, much has changed in the operation and interrelationships of the three branches. The Executive and Legislative branches each have very distinct powers and structures awarded to them in the United States Constitution, along with membership amounts and roles.⁷¹ Article III does not provide the Judicial branch the same specificity in the Constitution, and this has allowed the least political branch of the United States government to slowly turn towards polarization of politics and power of ideology.

Impartiality is a virtue judges do their best to attain, but everyone has personal views, biases, and canons for their ideology. The important factor for judges is how their biases affect their rulings and their interpretation of cases brought before them. The United States Supreme Court is responsible for interpretation of statutes, over time it has become the decider in policy disputes between the Legislative and Executive Branches.⁷²

The Supreme Court has a rich history of tradition and decorum. What makes the Supreme Court different from the other branches of the federal government is its lack of political party affiliation. According to the Supreme Court's website, "To ensure an independent Judiciary and to protect judges from partisan pressures, the Constitution provides that judges serve during 'good Behaviour,' which has generally meant life terms."⁷³ The idea of an independent Judiciary is an important part of the federal government, and as such it is an ideal that should be preserved. With party polarization

⁷¹ The Constitution Of The United States: A Transcription", *National Archives*, 2020, <https://www.archives.gov/founding-docs/constitution-transcript>.

⁷² Mark C Miller and Jeb Barnes, *Making Policy, Making Law* (Washington, D.C.: Georgetown University Press, 2004).

⁷³ "The Court As An Institution - Supreme Court Of The United States", *Supremecourt.Gov*, 2020, <https://www.supremecourt.gov/about/institution.aspx>.

becoming more common within the federal government, that puts the Judiciary at risk of political polarization, specifically because of the nuclear option enacted under the term of Senate Majority Leader Mitch McConnell on April 6, 2017 to confirm Justice Neil Gorsuch to the Supreme Court after his confirmation failed under normal procedure.⁷⁴

Critical Literature Review

The United States Supreme Court has always been political, it is naïve to think otherwise when it is politicians nominating and confirming Justices, but the founders designed the Supreme Court to be the “least dangerous branch.”⁷⁵ The polarization of the Supreme Court has been discussed, not to the same extent as Congress, but scholars and academics have looked to the ideology of Supreme Court Justices for decades. There is an enormous amount of literature on the subject, and the argument is not that the Supreme Court is or is not polarized, but rather how it is polarized. When looking at three distinct schools of thought on the polarization of the Supreme Court: Landes-Posner analysis, the Hasen analysis, and the Clark analysis, the trend that emerges is that while the Supreme Court is generally considered in two camps of conservative and liberal, it is how the Court arrived at that polarization and to what extent that polarization is prevalent. Whether it be political parties, the United States as a whole, or the Court itself- the three analyses discussed agree that the Supreme Court is polarized, but not because of the Justices themselves, rather, a result of outside forces.

⁷⁴ "U.S. Senate: Senate Floor Activity - Thursday, April 6, 2017", *Senate.Gov*, 2017, https://www.senate.gov/legislative/LIS/floor_activity/2017/04_06_2017_Senate_Floor.htm.

⁷⁵ Alexander Hamilton et al., *The Federalist Papers* (repr., New York: Signet Classic, 2014), 464.

Political Party Polarization- Landes & Posner Analysis

In their widely noted study, William M. Landes and Richard A. Posner dissected both the ideological classifications of Justices of the Supreme Court, as well as Justices' fervent move to a more ideological extreme based on their nominating political party⁷⁶. In *Rational Judicial Behavior: A Statistical Study*, Landes and Posner use a combination of methods to dissect the ideology of Supreme Court Justices as well as Appellate Court justices. They examine not only the ideology, but they also include the single majority opinions in their analysis. Landes and Posner devised their own method of classifying Justices using multiple scoring methods derived by others and combining them into a new hypothesis. In their paper, the authors note that the assumption of how Supreme Court Justices vote based off their nominating president is typically accurate and discuss how Justices over time adjust their ideology to the more extreme cases: "this 'ideology drift' is consistent with the correlation between the appointing President's party and a Justice's ideology."⁷⁷ They also find no conformity effect for Justices to go along with the majority opinion if the Justice dissented. This is an important factor- a Supreme Court Justice should not feel compelled to vote with the majority opinion just because the majority opinion is made up of Justices confirmed by the same presidential political party.

Their primary contribution with their work results in the aspect of correcting other databases on incorrect or lacking data as well as their statistical analysis of the ideology

⁷⁶ William M. Landes, Richard A. Posner, Rational Judicial Behavior: A Statistical Study, *Journal of Legal Analysis*, Volume 1, Issue 2, Summer 2009, Pages 775–831, <https://doi.org/10.1093/jla/1.2.775>

⁷⁷ William M. Landes, Richard A. Posner, Rational Judicial Behavior: A Statistical Study, *Journal of Legal Analysis*, Volume 1, Issue 2, Summer 2009, Pages 775–831, <https://doi.org/10.1093/jla/1.2.775>, 59

of Supreme Court Justices. What is missing from Landes and Posners' analysis is the lack of Justice's own ideology, which is central to studying the polarization of the Supreme Court. While outside factors play a role in becoming a Justice on the Supreme Court, once on the Court it is up to the Justice and their ideology.

Polarization Due to The United States- Hasen Analysis

In his article, *Polarization and the Judiciary*, Richard L. Hasen analyzes the polarization of the Supreme Court, arguing the United States' polarization as a whole proves the culprit, rather than the individual ideologies of Supreme Court Justices.⁷⁸ Hasen uses four main ways to highlight how polarization has affected the Supreme Court; judicial selection, decisions Justices make, the country viewing the Supreme Court through a partisan lens based on decisions, and the effect of polarization on the separation of powers.⁷⁹ Looking at the Supreme Court's polarization as a result of outside forces and not the Justices themselves has merit, a Justice cannot become a justice without the nomination of the President and the confirmation of the Senate. As Hasen notes in his work, "all the Court liberals have been appointed by Democratic presidents and all the Court conservatives have been appointed by Republican presidents."⁸⁰ When looking at ideologies, this generally holds true, but not always. There are Justices on the Supreme Court who have shifted their ideologies over time. Most recently, Chief Justice Roberts has begun to swing into the liberal bloc of Justices with his Martin- Quinn ideology score.

⁷⁸ Richard L. Hasen, 2019. Polarization and the judiciary. *Annual Review of Political Science* 22 (1): 261-76, <https://doi.org/10.1146/annurev-polisci-051317-125141>.

⁷⁹ Ibid, 261

⁸⁰ Ibid, 261

Within his work, Hasen references the Martin-Quinn ideology scoring method as a good indicator but raises questions of endogeneity which he does not elaborate on.⁸¹ When analyzing the Supreme Court there are different factors to consider, but for the research within this paper, the Martin-Quinn ideology scores that will be used offer a straightforward and plain model to study, rather than over complicating the potential polarization with outside influence. For Hasen's analysis, the Martin-Quinn ideology scoring method may not apply, because in his view, the polarization of the Supreme Court comes not from the Justices themselves, but a multitude of factors. Overall, Hasen's analysis provides insight into one school of thought on the polarization of the Supreme Court. It does not encompass every idea but does include a wide range of thought processes and reasoning behind the polarization.

Polarization From the Court Itself- Clark Analysis

In his article for *Political Research Quarterly*, Tom S. Clark looked at empirical evidence in the polarization of the Supreme Court and created a basis for understanding the voting blocs of the Supreme Court. Noting that the Supreme Court has not been as studied for ideological preferences as members of Congress have,⁸² Clark looks to previous scholarship of the idea of Supreme Court polarization, specifically referencing McCarty, Poole, and Rosenthal as well as Fiorina. Citing other studies, Clark critiques previous scholarship as it looks for patterns in coalition forming and how predictability regarding votes.⁸³ The goal of the Supreme Court is not for policy preferences, but Clark

⁸¹ Richard L. Hasen, 2019. Polarization and the judiciary. *Annual Review of Political Science* 22 (1): 261-76, <https://doi.org/10.1146/annurev-polisci-051317-125141>. 267

⁸² Tom S. Clark, "Measuring Ideological Polarization On The United States Supreme Court", *Political Research Quarterly* 62, no. 1 (2008): 146-157, doi:10.1177/1065912908314652, 147.

⁸³ Ibid. 147

notes “if policy preferences influence judges’ votes, then one should expect that a more polarized Court will lead to more fractured decisions.”⁸⁴ Clark argues that the method of calculating the distance between the medians of polarization is insufficient for the study of the Supreme Court, arguing that the Supreme Court is too small a sample,⁸⁵ but that is an ill-advised theory. In looking at the median and absolute distance between the ideology scores of Supreme Court Justices, this research will apply the ideology of Justices to polarization across almost a 100-year span of time. When put into a figure, it is apt to see the changes over time as well as the ebbs and flows between differing ideologies.

Clark used the Esteban and Ray model⁸⁶ in his research which works well on polarization but lacks the context of individualism compared to the Martin-Quinn scoring method. Additionally, Clark uses the ideology estimates from two separate scoring methods (Segal- Cover and Judicial Common Space) within his application to make a more robust case that the Court’s polarization and use of heterogeneity are the drivers behind the Courts decisions.⁸⁷ The Judicial Common Space scores are based off Martin-Quinn’s scoring methods and use much of the same data in the analysis as Justice’s scores change over time and with Court decisions made.

Clark’s analysis of the Supreme Court touches on the Warren and Burger Courts but does not offer a comprehensive data analysis of multiple Courts nor individual Justices. Clark notes “ideological polarization on the Supreme Court is an issue that has

⁸⁴ Tom S. Clark, "Measuring Ideological Polarization on the United States Supreme Court." *Political Research Quarterly* 62, no. 1 (2009): 146-57. Accessed November 21, 2020. <http://www.jstor.org/stable/27759852>, 146

⁸⁵ *Ibid*, 147

⁸⁶ *Ibid*, 148

⁸⁷ *Ibid*, 151

intrinsic importance,”⁸⁸ for which he is correct. The macro-analysis he supplies in this research provides a surface level comparison of the Supreme Court over time with additional data on the Warren and Burger Courts. The research supplied within this thesis will rely on the Justice’s own ideological scores, overall Court scores, and the gradual but significant polarization of Justices over time.

Methodology

For this research, the focus will be on the post New Deal Supreme Courts, specifically the Stone Court, Vinson Court, Warren Court, Burger Court, Rehnquist Court, and the Roberts Court. With the Judicial branch taking a more active role in the policy process interpreting legislative language over deciding disputes, the makeup of the Supreme Court plays an important role. As Justices are selected by the President for confirmation in the Senate, it is logical to assume that a President will select a Justice that aligns similarly with their policy interpretation. When a President has a Senate that is also in their party majority, they can choose a more ideologically polarized Justice than if they have a Senate that is of the opposite party in majority.

Martin Quinn Scoring

The baseline data focused within this research is from Andrew D. Martin and Kevin M. Quinn. Martin-Quinn scoring looks at cases, decisions, opinions, and other aspects of the Supreme Court Database to create a comprehensive ideology score of Justices and Courts.⁸⁹ Using this data will assist in the analysis of if methods of

⁸⁸ Tom S. Clark, "Measuring Ideological Polarization on the United States Supreme Court." *Political Research Quarterly* 62, no. 1 (2009): 146-57. Accessed November 21, 2020. <http://www.jstor.org/stable/27759852>. 154

⁸⁹ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153, 121

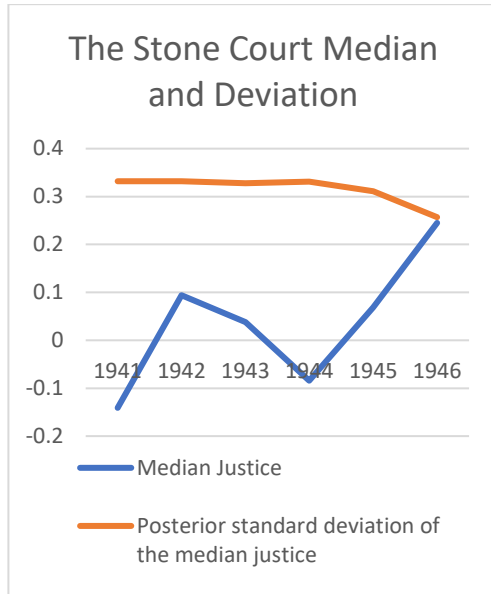
interpretations have a bearing on the ideology of the Court as a whole. Using other research models, they concluded previous works missed key components of the ideology of Supreme Court Justices.⁹⁰ Using their data from The Supreme Court Database,⁹¹ this research will focus on the median ideology of the court per year as well as individual Justices and their ideology score. The figures for each court are independent of each other and note the differences in central ideology. This relates to policymaking, as over time the Supreme Court has moved from deciding the constitutionality of legislation and executive orders to interpreting the meaning behind policy and the intent of the words, thus the Supreme Court is creating policy where Congress has left it vague.

⁹⁰ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153, 121

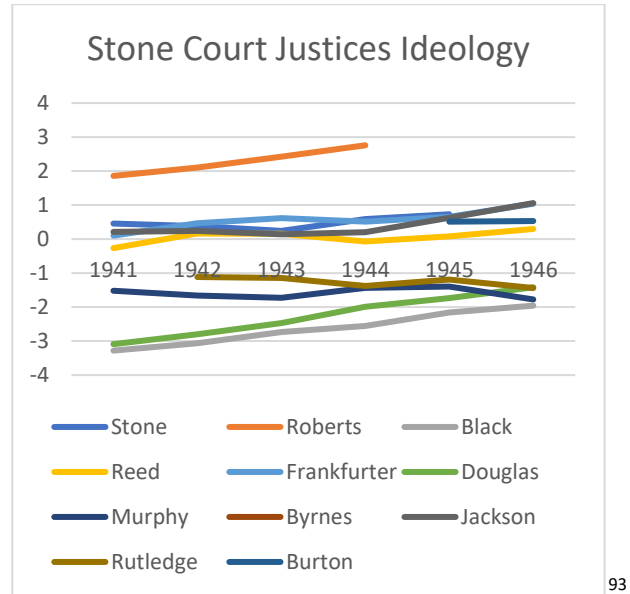
⁹¹ Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2019 Supreme Court Database, Version 2019 Release 01. URL: <http://Supremecourtdatabase.org>

Presentation of Results

The Stone Court (1941-1946)



92



93

Figure 9: The Stone Court Median and Deviation

Figure 10: Stone Court Justices Ideology

In a post New Deal era, the Stone Court had the ability to make changes where other Supreme Courts could not; but the Stone Court was not as proactive as it could have been because of its polarization and lack of a central ideology.⁹⁴ It began with the appointment of Chief Justice Stone, who began his term as Chief Justice in 1941. Using the data from Martin and Quinn, the shift in median ideology in the Stone Court era was a reversal of liberal median to a conservative median, as shown in the figure above. During Chief Justice Stone's tenure, the Court's function shifted. As Melvin Urofsky notes, "The economic issues which had dominated the Court's calendar for nearly a half-century gave

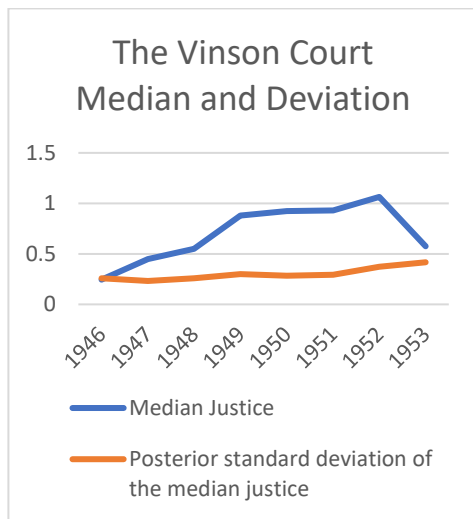
⁹² Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

⁹³ Ibid

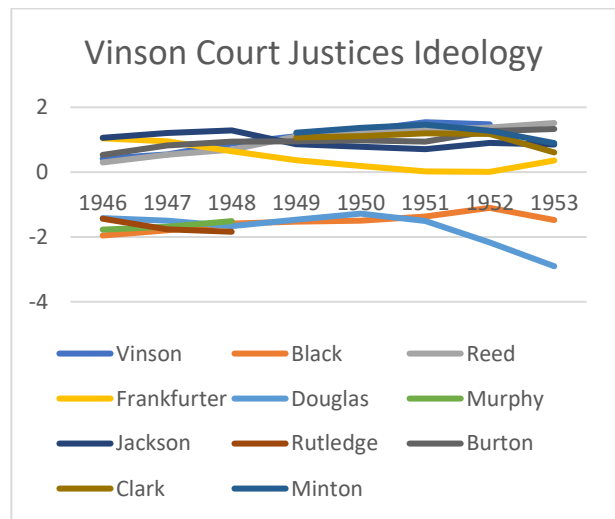
⁹⁴ Melvin I. Urofsky, "Conflict Among The Brethren: Felix Frankfurter, William O. Douglas And The Clash Of Personalities And Philosophies On The United States Supreme Court", *Duke Law Journal* 1988, no. 1 (1988): 71, doi:10.2307/1372546.

way to new questions of civil liberties and the reach of the Bill of Rights, and these cast the jurisprudential debate between judicial restraint and judicial activism in a new light.”⁹⁵ The Stone Court was the true start of the shift of the original design of the Supreme Court to a Court that would create policy with their rulings. President Roosevelt wanted to pack the Court by forcing Justices to retire, but this idea was defeated. President Roosevelt did pack the Supreme Court in a different manner, due to the number of Justices he was able to get confirmed during his presidency. What the data shows from Martin and Quinn is over time the Court’s majority shifted to a conservative viewpoint on cases.

The Vinson Court (1946- 1953)



96



97

Figure 11: The Vinson Court Median and Deviation

Figure 12: Vinson Court Justices Ideology

⁹⁵ Melvin I. Urofsky, "Conflict Among The Brethren: Felix Frankfurter, William O. Douglas And The Clash Of Personalities And Philosophies On The United States Supreme Court", *Duke Law Journal* 1988, no. 1 (1988): 71, doi:10.2307/1372546.

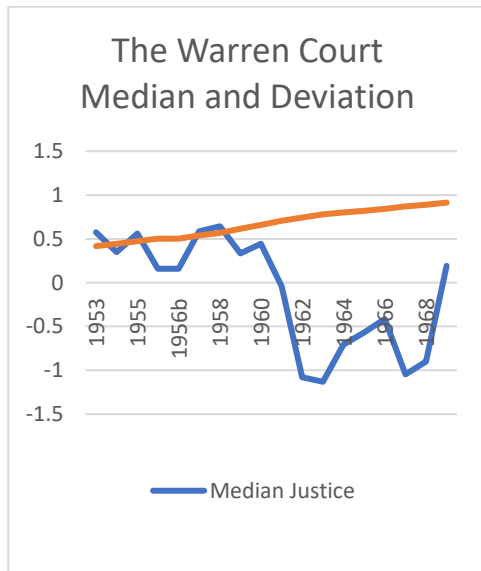
⁹⁶ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

⁹⁷ Ibid.

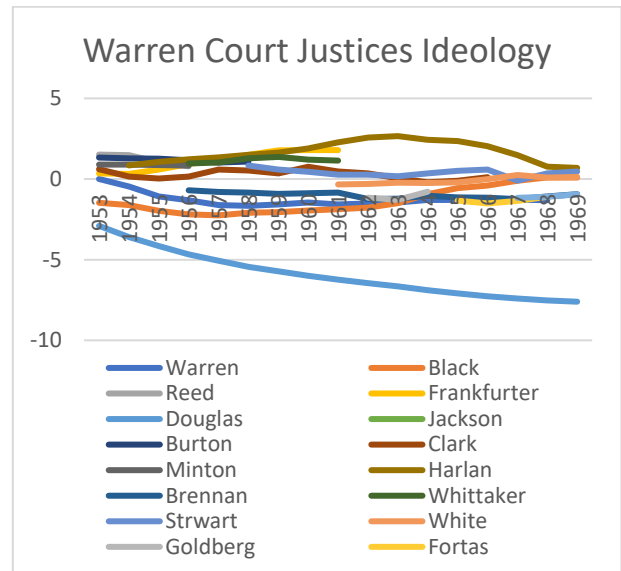
The Vinson Court was a relatively short tenure of a Chief Justice within the research but was one of the largest shifts in ideology. When Chief Justice Vinson was confirmed in 1946, the Court he inherited was coming off World War II and was on the conservative ideology side. The Court itself was divided into two sets of ideologies from the end of World War II through the start of the Cold War; and these ideologies fought over striking down government powers that could result in major consequences during the Cold War. Upon the deaths of two liberal Justices, Murphy and Rutledge, President Truman nominated Clark and Minton, both of which had extensive government, not just judicial experience.⁹⁸ These Justices added to the conservative bloc of the Court, resulting in a major shift in overall Court ideology.

⁹⁸ Russell W. Galloway Jr. "The Vinson Court: Polarization and Conservative Dominance." *Santa Clara Law Review* 22, no. 2 (Mar 22, 1982): 375.

The Warren Court (1953-1969)



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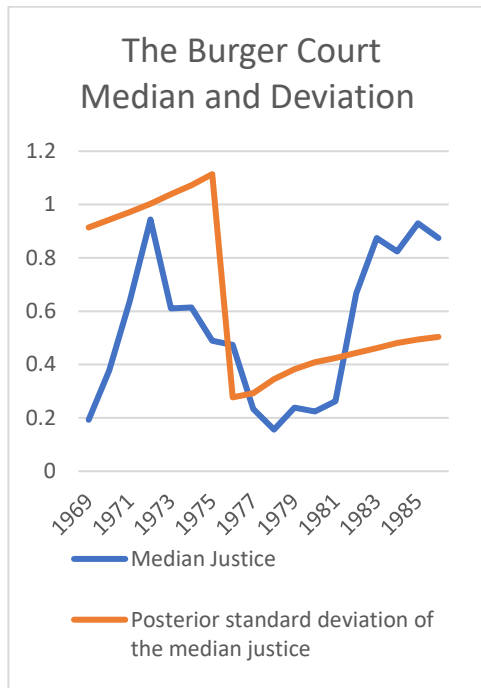
Figure 13: The Warren Court Median and Deviation Figure 14: Warren Court Justices Ideology

In terms of the Warren Court, much of the ideology comes from the outlier of Associate Justice Douglas, who made a sharp trend toward a very liberal ideology in the middle of the Vinson Court which continued to trend more liberal until his death. The Warren Court took place during the Civil Rights Movement, the start of the Vietnam War, and with two back-to-back Democratic presidents, the Court took on a sharp liberal ideology contrasting that of the Vinson Court. In a time when civil liberties were being protested and a new war taking shape, the Warren Court used its judicial review power and liberal ideology to uphold civil liberties that failed in previous Courts.

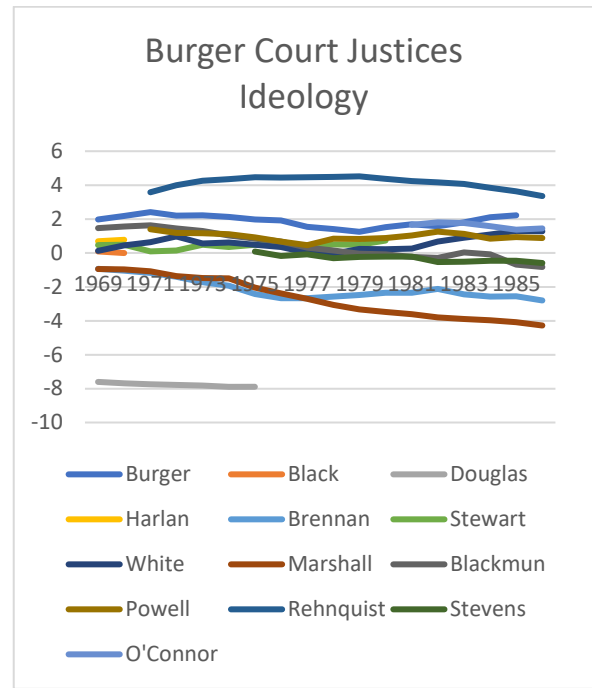
⁹⁹ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

¹⁰⁰ Ibid.

The Burger Court (1969-1986)



101



102

Figure 15: The Burger Court Median and Deviation

Figure 16: Burger Court Justices Ideology

When Chief Justice Burger took over the Supreme Court at the end of 1968, he was chairing a Court that had one of its most liberal terms under Chief Justice Warren. That quickly changed with the election of President Nixon. Galloway notes, “The conservative dominance that has been the hallmark of the Burger era began in the October 1970 Term and remained in full force for at least six consecutive Terms. During this period, the Court's right wing substantially rewrote the law, moving the federal courts and, to some extent, the state courts from a posture of liberal activism to one of conservatism and restraint.”¹⁰³ This idea is reflected in the table above, while the Court

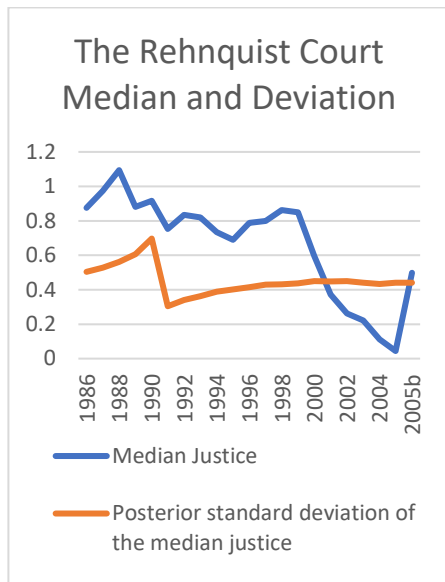
¹⁰¹ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

¹⁰² Ibid.

¹⁰³ Russell W. Galloway Jr., *The Burger Court (1969-1986)*, 27 Santa Clara L. Rev. 31 (1987). Available at: <http://digitalcommons.law.scu.edu/lawreview/vol27/iss1/3>

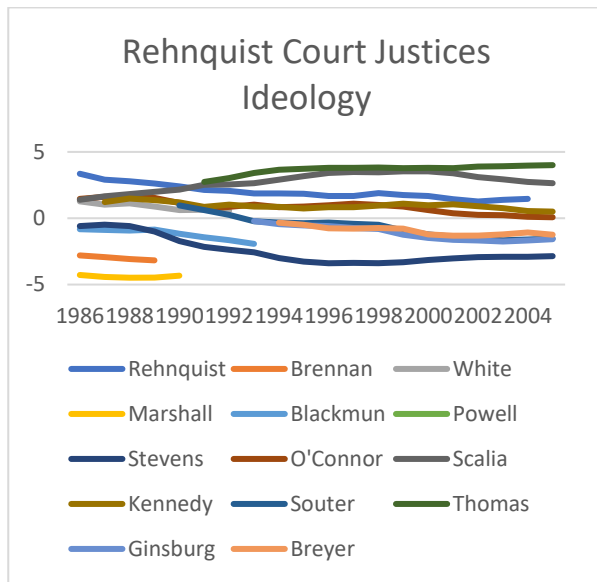
under Chief Justice Burger was consistently conservative, there were dips towards a central ideology when Blackmun shifted more towards the center ideology from the right.¹⁰⁴ With the Burger Court being decidedly conservative, it was up to the centrist Justices to work toward the balance.

The Rehnquist Court (1986-2005)



105

Figure 17: The Rehnquist Court Median and Deviation



106

Figure 18: Rehnquist Court Justices Ideology

Upon his appointment as Chief Justice, William Rehnquist inherited one of the most conservative Supreme Courts since the New Deal. Over time, and with the appointment of Justices such as Ruth Bader Ginsburg and Steven Breyer, the Rehnquist Court shifted to a more central ideology, but still on the conservative scale. Most notable in the table above, the Rehnquist Court highlights the ‘drift’ that can be found in many

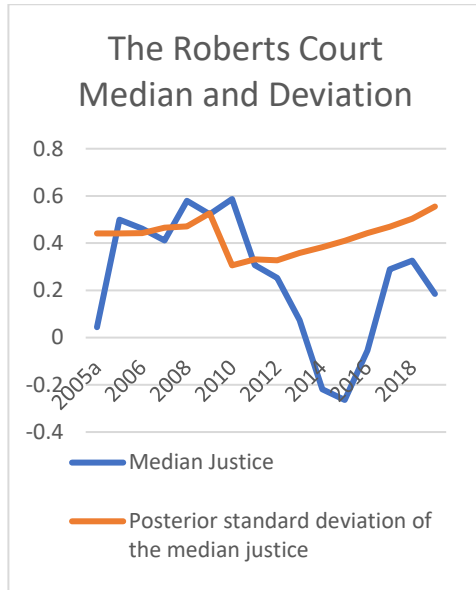
¹⁰⁴ Russell W. Galloway Jr., *The Burger Court (1969-1986)*, 27 *Santa Clara L. Rev.* 31 (1987). Available at: <http://digitalcommons.law.scu.edu/lawreview/vol27/iss1/3>

¹⁰⁵ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

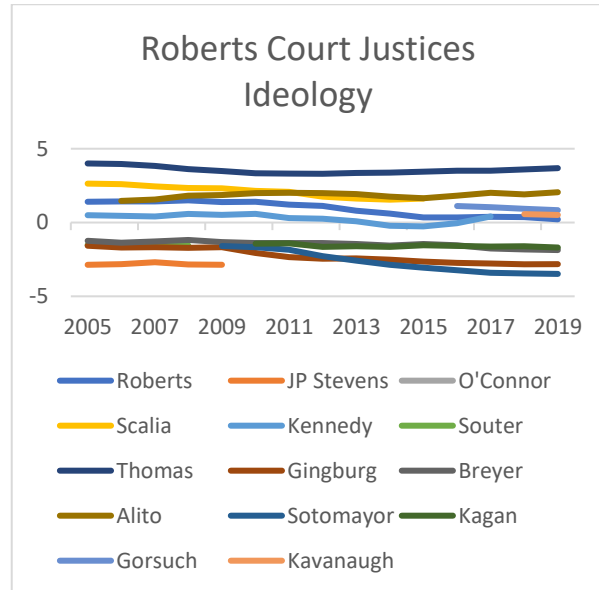
¹⁰⁶ *Ibid*

Courts where the liberal bloc of Justices trend more the liberal polarization, whereas the conservative bloc trends more toward the center.

The Roberts Court (2005-present)



107



108

Figure 19: The Roberts Court Median and Deviation

Figure 20: Roberts Court Justices Ideology

The Roberts Supreme Court is the most current Supreme Court; the members are comprised of nominations from President Ford to President Trump. When Chief Justice Roberts was confirmed to the Supreme Court after a nomination by President George W. Bush, he was placed in the Chief Justice position. President Obama was able to confirm two Justices to the Court, Justice Sotomayor, and Justice Kagan, shifting the Court's median ideology to a liberal view. Had President Obama been able to nominate a third Justice (Merrick Garland), presumably the Court's median ideology would have shifted further to the liberal side, but this nomination was blocked by Senate Majority Leader

¹⁰⁷ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

¹⁰⁸ Ibid

Mitch McConnell.¹⁰⁹ Like previous Supreme Courts, the Roberts' Court determines what cases they will hear, but what makes the Robert's Court different is there are Justices on the Court who were not chosen by a sixty vote Senate approval (Justice Gorsuch and Justice Kavanaugh). Without that threshold, the party politics that could play into future nominations are endless.

Supreme Court Justices from 1941-2019

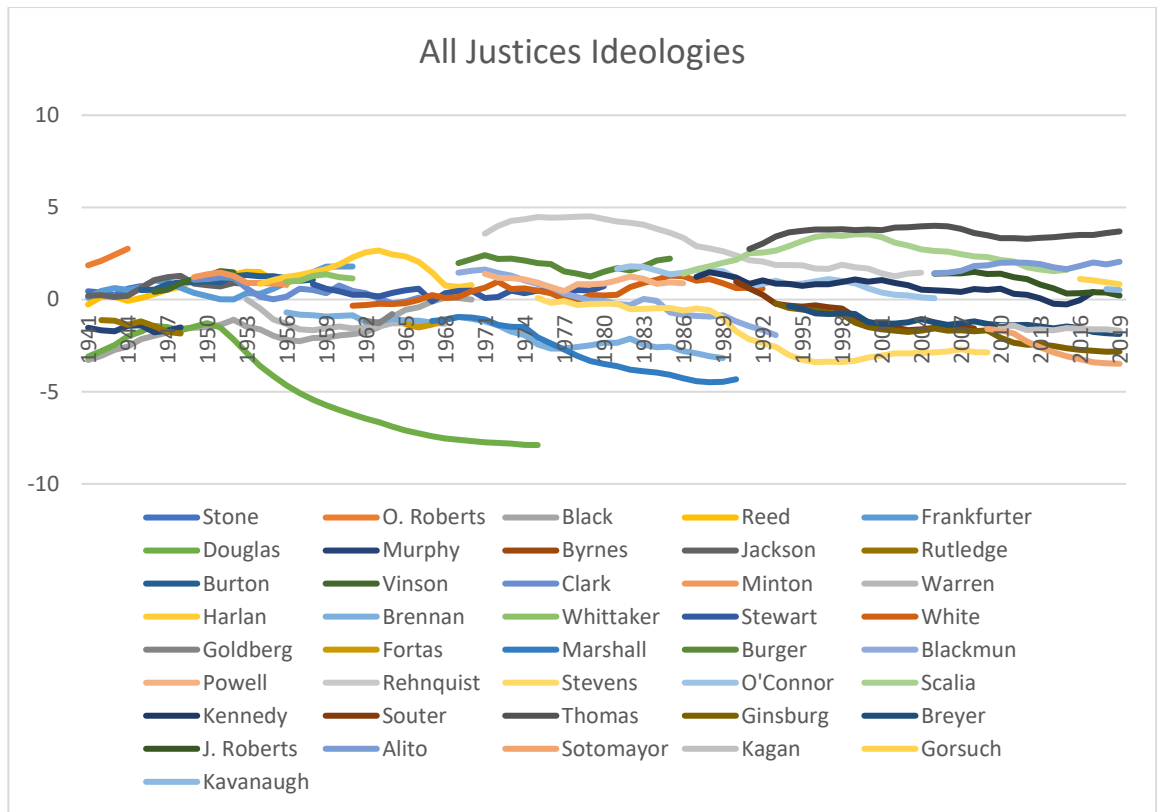


Figure 21: All Justices Ideology

¹⁰⁹ Burgess Everett and David Cohen, "McConnell Throws Down The Gauntlet: No Scalia Replacement Under Obama", *POLITICO*, 2016, <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

¹¹⁰ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

The above chart is a culmination of all the Justices that have served on the Supreme Court since 1941. What is interesting to note about this is the polarization over time of the Martin-Quinn ideology scores of individual Justices. As the chart highlights, there are Justices who are outliers which can skew the data, but overall, the liberal and conservative blocs have begun to drift away from each other and are no longer centralized as they were earlier in the post new deal era. The analysis of this data in the next section will go into more depth as the occurrence of this, but the data from the Martin-Quinn scores highlights the overall drift from the center.

Caseload of the Courts

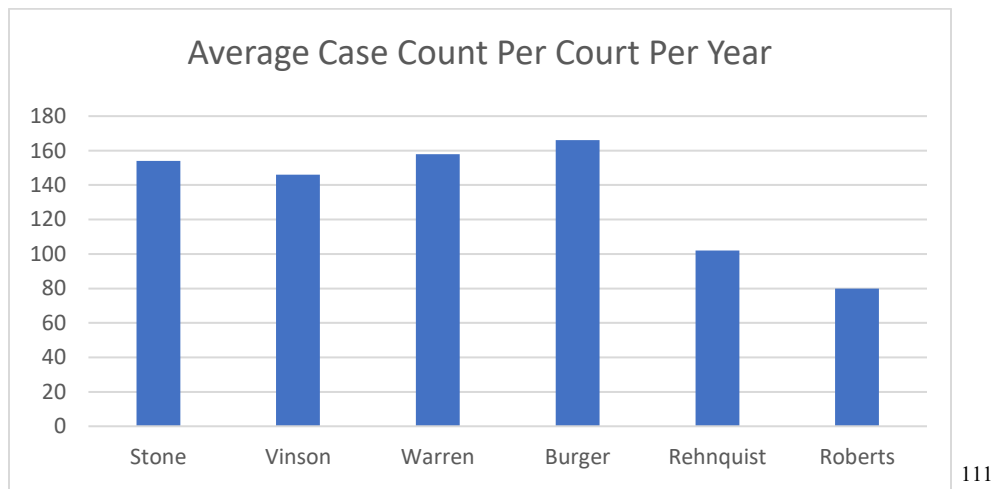


Figure 22: Average Case Count Per Court Per Year

Additional research for this paper concerns the number of cases seen by each Court. Using data from the Supreme Court Database,¹¹² taking the number of cases through Case ID number under each Chief Justice and then averaged the totals per year.

¹¹¹ Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2019 Supreme Court Database, Version 2019 Release 01. URL: <http://Supremecourtdatabase.org>

¹¹² Ibid

The information was not as was suspected, but interesting to note, thus its inclusion within the paper. The US Court website notes that the Supreme Court typically hears 100-150 cases per year.¹¹³ The Rehnquist and Roberts Courts average almost thirty less than the other Courts. There could be a multitude of reasons, the Roberts Court is hearing more complex cases, the Stone, Vinson, and Burger Courts were wartime Supreme Courts, or case load has decreased over time. Case ID's are also used to cover whole cases, there may be different sections of overall cases under one Case ID with multiple rulings associated. While the shortest length of Court tenure is Stone's Court at five years, the Roberts Court having less than half the number of cases compared to the Burger Court which was a much longer tenure and during the Vietnam War is an interesting piece of information.

Caseload is important to the idea of policymaking. If the Roberts Court is hearing more complex cases based on policy rather than simple Constitutionality, the number of cases does not play as significant a role. A larger data sampling and closer examination of the cases brought between these Courts is an opportunity to explore to see the balance of case types and outcomes for a more in-depth analysis. The importance of this data for this research is the sheer number of cases between the Stone to Burger Courts dwarf the number of cases in the Roberts Court on average.

Analysis

The hope and idea the framers of the Constitution had when creating the Judicial branch, was the Supreme Court would be as apolitical as possible, but through research

¹¹³ "About The Supreme Court", *United States Courts*, 2020, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about>.

and study we have seen that is not the case. Not only have Justices become more polarized, but their responsibility has also shifted within the separation of powers as well. With Legislative and Executive branches taking less responsibility regarding policymaking, the Supreme Court has gained more power than it was designed to have.

The Supreme Court's position within the federal government has changed, the weight of the Court's decisions impact more than the parties represented within the case, they can often impact the country as a whole. Mikva and Lane note, "Judges are not automatons. They have policy preferences and form outcome preferences in particular cases. These preferences are sometimes so compelling that a judge may want to impose them as the law in a particular case despite statutory language to the contrary or evidence of statutory meaning to the contrary."¹¹⁴ It is this preference that can become a larger issue when it comes to deciding policy. Mikva and Lane note that the Supreme Court does not usually act when statutory language is clear, but when it is not clear is when the Court must step in.¹¹⁵ Looking at the data of the six Courts in this research, the ideology changes for each, but most drastically within the Roberts Court. That is to be expected with the polarization of political parties in the United States. As elected officials within the Legislative and Executive branches grow more polarized, the logical conclusion is the preferences of the Court will change with nominations, which is in partial agreement of each of the three schools of thought discussed earlier within this paper.

While Rehnquist had the longest term of Chief Justice within this research, he also had the smallest amount of change in ideology within the Court. Unlike the Stone

¹¹⁴ Abner J Mikva and Eric Lane, *An Introduction To Statutory Interpretation And The Legislative Process* (New York (N.Y.): Aspen law & business, 1997), 5

¹¹⁵ *Ibid*, 6

Court, which was primarily made up of Justices nominated by Roosevelt, the other Courts had multiple Presidential appointees. Robert A Kagan makes the point, “the most famous form of judicial policymaking in the United States arises from the courts’ power of judicial review- the authority to hold legislative statutes and executive branch decisions and actions unconstitutional.”¹¹⁶ Judicial review is not new within the federal government, but with a much larger Executive branch and independent agencies working on policy outside of Congress, the judicial review process is as important as ever. When justices have obvious preferences, the judicial review allows those preferences to play a role in a justice’s opinion on the statutory language and actions before them for cases.

Policymaking was not the original intent of the Supreme Court, at least not directly. With the addition of judicial review, the increase in vague legislative language requiring the Court for produce legislative intent, and the decrease in central ideologies of the Court, the power of policymaking has taken a central role. Udi Sommer notes, “In order to make strategic choices in a way that would serve their interests (setting policy closest to their ideal point), the inherent error is built into their strategic calculations. The literature indicates that the justices on the Supreme Court are often able to successfully act in a strategic fashion.”¹¹⁷ With this mindset, a polarized Court can adjust policy through their own lens, because legislative language and intent have given them that ability, along with their freedom to choose their own docket.

¹¹⁶ Robert A. Kagan, Mark C. Miller, and Jeb Barnes. *Making Policy, Making Law*. Washington, D.C.: Georgetown University Press, 2004, 21.

¹¹⁷ Udi Sommer, "How Rational Are Justices On The Supreme Court Of The United States? Doctrinal Considerations During Agenda Setting", *Rationality And Society* 23, no. 4 (2011): 452-477, doi:10.1177/1043463111425014.

Impact of Judicial Review

In one of its earliest cases, the Supreme Court gave itself the power of judicial review. In *Marbury v. Madison*¹¹⁸ the Supreme Court granted itself the ability to strike down laws and statutes from both the Legislative and Executive branches based on the Court's standards. From that decision in 1803, the dangers of political polarization were established within the Supreme Court. With judicial review, Congress and the presidency have become more inclined to nominate and confirm Justices who historically have the same viewpoints they do when creating policy. In their article Shikrishna B. Prakash and John C. Yoo note, "It should come as no surprise that when the Supreme Court has refused to enforce unconstitutional federal legislation, supporters of such legislation have questioned the legitimacy of judicial review."¹¹⁹ Congress and the presidency have the power to change the ideology of the Judicial branch and with the terms of members of the Judiciary are for life, the ability to potentially alter the decision making for generations.

Shifting to Policymaker

The Supreme Court's function is to decide the legality of laws and statutes by using the Constitution for interpretation. The Supreme Court was not intended to function as the policymaker because of vague policy writing from Congress. Udi Sommer notes, "Having neither will nor force, the judiciary department is the least dangerous branch."¹²⁰

¹¹⁸ John Marshall and the Supreme Court of the United States. *U.S. Reports: Marbury v. Madison*, 5 *U.S. 1 Cranch* 137. 1803. Periodical. <https://www.loc.gov/item/usrep005137/>. Through Chief Justice Marshall's decision, the Supreme Court declared a portion of the Judiciary Act of 1789 unconstitutional and making it null and void. This established the basis of judicial review.

¹¹⁹ Saikrishna B. Prakash, and John C. Yoo. "The Origins of Judicial Review." *The University of Chicago Law Review* 70, no. 3 (2003): 887-982. Accessed May 4, 2020. doi:10.2307/1600662.

¹²⁰ Udi Sommer, "How Rational Are Justices On The Supreme Court Of The United States? Doctrinal Considerations During Agenda Setting", *Rationality And Society* 23, no. 4 (2011): 452-477, doi:10.1177/1043463111425014, 453.

Sommers idea that the Supreme Court is the least dangerous branch has merit, but the idea of an independent judiciary is much more difficult in practice when the Supreme Court decides not only on the Constitutionality of a case, but the policy implications as well.

Polarization and Policy

The nomination process of the Supreme Court by design is political, with the President nominating a Justice and the Senate confirming, but historically that does not mean a Justice would be politically polarized. Prior to 2017, the Senate was required to have a sixty-vote majority when confirming a Supreme Court Justice, creating a system where there must be bipartisan support in the confirmation process. After Senate Majority Leader Mitch McConnell used the nuclear option in Supreme Court nominations, requiring only a simple majority to confirm Justice Neil Gorsuch because his confirmation failed under normal procedures,¹²¹ the political ramifications of the nomination process changed the potentials for ideologies on the Court. What makes the Supreme Court different from the other branches of the federal government is its lack of political party affiliation. The idea of an independent Judiciary is an important part of the federal government, and as such it is an ideal that should be preserved. With party polarization becoming more common within the federal government, that puts the Judiciary at risk of the same fate.

¹²¹ "U.S. Senate: Senate Floor Activity - Thursday, April 6, 2017", *Senate.Gov*, 2017, https://www.senate.gov/legislative/LIS/floor_activity/2017/04_06_2017_Senate_Floor.htm.

Conclusion

With polarization happening within the Legislative Branch as well as the Executive, one would hope that the Judicial Branch would retain its status as apolitical. Unfortunately, over time this has gone by the wayside, due in part to party politics within the other federal branches. Because of party polarization, the landscape for policymaking has also been altered. With more “swing” Supreme Court Justices, the ideals of the center could be upheld, but with more polarized Justices, the potential for policymaking to swing in a particular direction and keep hold becomes a much greater possibility. This does not mean that polarization of the Supreme Court diminishes its rulings, nor does it mean that those rulings cannot be overturned. Rulings of the Supreme Court have been overturned, whether because of changes in the Supreme Court ideology, or with new statutes passed by Congress.¹²² Overturning a Supreme Court decision is very difficult, it is not as simple as a different Court choosing to overturn a previous Court’s decision; it is a matter of Constitutionality, new statutes from Congress, or challenges of legislative intent. With the Supreme Court deciding legislative intent through judicial interpretation or judicial review, the question of judicial preference versus the Constitution can play a role. If more polarized Justices are placed on the bench, the ideology of those Justices could play a larger role in Supreme Court challenges to previous rulings or current law, such as *Roe v. Wade*.

The question for this paper was has the polarization of the Supreme Court created an unstable and potentially dangerous foundation for the interpretation of laws and policy

¹²² "SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION", *Govinfo.Gov*, 2020, <https://www.govinfo.gov/content/pkg/GPO-CONAN-2014/pdf/GPO-CONAN-2014-13.pdf>.

within the United States? As this paper demonstrated, since the New Deal, the Supreme Court has become more polarized, creating the groundwork for the Supreme Court to alter policy from Congress based off their power of Judicial review and the Court's interpretation of vague legislative language Congress employs when writing policy. To see how the polarization of the Supreme Court has impacted rulings, more research and analysis needs to be done; specifically examining the voting blocs of Supreme Court rulings to see if the blocs align with the ideology used in the research in this paper. Additionally, another theory to research would be whether the Supreme Court polarization decreases after each installation of new administrations in the executive branch.

What can be learned from the data and analysis from this paper is the theory that the Supreme Court is becoming more polarized is true when looking at Martin-Quinn ideology scores. Going forward, the analysis of Justice's ideology should continue to be studied and examined for an increase in polarization or if the Supreme Court contracts once again. The data and analysis also provided additional insight to the impact judicial ideologies have on the Supreme Court. With the trend of polarization increasing, the potential of a swing Justice's impact will play a larger role in cases where the Court is evenly divided between the ideology extremes.

Presidents can nominate as they wish for a Supreme Court seat, but it is up to the Senate to confirm or deny that person takes a seat on the nation's highest bench. When the President has a Senate in their favor, party polarization is more likely to occur. When the President's political party is the minority in the Senate, they choose a more central minded candidate in hope that will appease the Senate majority party. An instance where

this did not occur because of party polarization is with Merrick Garland. Senate Majority Leader Mitch McConnell blocked Garland's nomination, citing that it was too close to the Presidential election. In doing so, Senate Majority Leader McConnell paved the way for President Donald Trump's nominee, Neil Gorsuch, a more conservative Justice, to join the Supreme Court.

What is noteworthy is the fact that Congress and the Executive designed the Judicial Branch, specifically the Supreme Court and its makeup, only now to have passed their own powers of policy creation to the Supreme Court. This shift in legalism is one that has taken power away from the people who elect the officials in the Executive and Legislative Branches and given the power to appointed people within the Judicial Branch. That power displacement adds to and enhances the adversarial legalism that has become the United States Federal Government.

Chapter Three: The Increase of Power with Executive Orders. How Modern Presidents Have Changed Executive Orders, Specifically the First Fifteen Executive Orders Issued.

Introduction

The Office of the President of the United States is arguably the most powerful position in the world for one person to hold. Over the course of United States history, the position of president has grown, changed, and become stronger than it was designed within the United States Constitution. For the president, nothing is mightier than the pen. Executive orders have been in existence since the founding of the United States, but they have changed. There is no record of executive orders as an explicit constitutional power, but presidential executive orders are regarded as law of the land and treated with the same reverence as legislation passed by Congress and signed into law. As Alexander Hamilton said in *Federalist #70*, “Energy in the executive is a leading character to the definition of good government”¹²³ and to this day, that notion rings true; the energy of the executive changes the way which executive orders are produced. Executive orders are an expedient method to fulfill campaign promises, take swift action in times of crisis, and ways to undo the work of previous administrations.

Not all executive orders are created equal and not all executive orders are constitutional. When a president takes office, they have the power to act swiftly and

¹²³ Alexander Hamilton et al., *The Federalist Papers* (New York: Signet Classic, 2014), 421.

decisively with their pen. Executive orders in general have been studied at length as have the increase in executive orders over time. This paper does not address either one of those aspects of presidential executive orders. The question this paper asks is, have presidents effectively used their first fifteen executive orders, arguably the most powerful, to undo their predecessors work or have they chosen to move their vision of the United States forward with the power of the pen?

To answer this question, this paper will analyze differences of opinion from various scholars on how they view executive orders and their effectiveness; collect data from presidents Reagan through Biden of their first fifteen executive orders respectively; analyze what presidents have done with their early executive power- new directives, revoke predecessors' actions, or amended previous executive orders to fit a new narrative. Then, using this data, this paper will argue that presidents have changed their unilateral power pattern over the course of history, and will conclude with what we can do with this information going forward and how it can change the way presidents work in the future.

Critical Literature Review

An often quoted portion of the presidential powers in the Constitution reads to “faithfully execute”¹²⁴ the laws of the United States, but is that what presidents are doing? The idea of executive orders is not new, nor is the implementation and controversy of executive orders. The questions to be asked are: how have presidential executive orders changed? Are presidents using executive orders to now fulfill campaign

¹²⁴ "The Constitution Of The United States: A Transcription", *National Archives*, 2020, <https://www.archives.gov/founding-docs/constitution-transcript>

promises or is their primary initial goal to undo executive actions by previous presidents? This paper will examine and address modern presidents (Reagan to Biden) and their use of high priority executive action. What did these presidents do with their first fifteen executive orders? Did they fulfill campaign promises and bypass Congress with legislation? Did they undo previous executive actions? Or did these presidents use the power of the pen to direct the government into a new, and in their view, better place for the American people?

Executive orders have a place within the United States government, but they are not as “safe” as legislation. Why do presidents use executive orders to execute policy? Was there a divided Congress when they took office? Was the president the minority party when they took office? What did presidents view as their most important action? Specifically, this chapter examines their first fifteen executive orders. The moment a president takes the oath of office, they can begin signing executive orders. Scholars have studied executive orders in singular and comprehensive fashion but narrowing the focus to the first fifteen executive orders provides a window into the mentality of a president.

While there is a wealth of literature on presidential executive orders, not all literature agrees with how and why presidents use executive orders. Three authors have written extensively on presidents and the power of the pen but come to different conclusions on unilateral presidential action. Each of these authors takes a different approach to their methodology and analysis of presidential executive orders. Sharece Thrower looks at entire presidential terms and the length of time an executive order is in

place before it is revoked by future administrations;¹²⁵ Jeremy D. Bailey and Brandon Rottinghaus look at the types of executive orders presidents issue and whether they cite Congressional Authority, giving presidents a “safer” plane on which to issue their directives;¹²⁶ and Kenneth Mayer takes a numerical approach to analyze the environment around a president and how it influences executive orders.¹²⁷ Each of these methods of research are important to the examination of executive orders, but they are all overarching themes. Looking at the full presidency is important but looking at the initial actions of a president can give a better look into how presidents function with their newfound power.

Revoking Executive Orders: Sharece Thrower Analysis

In her article “To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity,” Sharece Thrower analyzes how long presidential executive orders continue until they are revoked by future administrations. Her argument is that over time, presidential executive orders have moved from long standing directives to quick bolsters to a president’s promises to the people. Her analysis concludes with the thesis that her work “reveals the conditions under which presidents choose to alter executive orders and the qualities that facilitate their durability.”¹²⁸ Her study is crucial to how executive orders are reviewed. She takes a narrow approach into the longevity of

¹²⁵ Sharece Thrower. “To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity.” *American Journal of Political Science (John Wiley & Sons, Inc.)* 61, no. 3 (July 2017): 642-56. DOI: 10.1111/AJPS. 12294

¹²⁶ Jeremy D. Bailey and Brandon Rottinghaus, "Reexamining The Use Of Unilateral Orders", *American Politics Research* 42, no. 3 (2013): 472-502, doi:10.1177/1532673x13509836.

¹²⁷ Kenneth R. Mayer, "Executive Orders and Presidential Power." *The Journal of Politics* 61, no. 2 (1999): 445-66. Accessed March 14, 2021. <http://www.jstor.org/stable/2647511>.

¹²⁸ Sharece Thrower. “To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity.” *American Journal of Political Science (John Wiley & Sons, Inc.)* 61, no. 3 (July 2017): 642-56. DOI: 10.1111/AJPS. 12294

executive orders and the quickness to which they will be overturned by future administrations. What Thrower does not include in her study, which would be helpful, is the timing of the overturning of the executive orders. Thrower examined the average age of an executive order, but further questions to be asked about her research are; did processes change in relation to the executive orders; was there a different conflict from the original executive order; or what has changed within the situation to justify the overturning of an executive order?

The overarching concept of her study is that executive orders are becoming more frequently revoked by future administrations and the strongest argument Thrower makes is “As a result, these orders often have a time limit on the influence they wield.”¹²⁹ Executive orders are treated as law of the land, but they each have an expiration date, one that is up to either the Courts through judicial review, Congress in writing legislation, or a future president revoking or amending the executive order through a new unilateral action. Thrower’s analysis of the duration of executive orders is a compelling case and addition to this research because it highlights the gaps in the research of executive orders past the overuse of them and the polarization of them; it proves through case study statistical analysis that executive orders are not foolproof, and they are on borrowed time. Executive orders are frequently used a political weapon to move forward campaign promises or to undo previous administration’s stances, Thrower provides the groundwork for further study of executive orders and their uses.

¹²⁹ Sharece Thrower. “To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity.” *American Journal of Political Science* (John Wiley & Sons, Inc.) 61, no. 3 (July 2017): 642-56. DOI: 10.1111/AJPS. 12294

Unilateral Orders- Power to Act Alone-Bailey & Rottinghaus Analysis

The authors of the paper *Reexamining the Use of Unilateral Orders: Source of Authority and the Power to Act Alone*, Jeremy D. Bailey and Brandon Rottinghaus, created a database of executive orders and presidential proclamations to test their theory that presidents make choices on whether or not to include the congressional authority they are using to create such an executive order. They note that is it a political calculation and a strategic choice as to why and when presidents cite Congressional Authority.¹³⁰ Citing other researchers, Bailey and Rottinghaus acknowledge that the research on presidential executive orders is constantly evolving, but like this research, sees a deficiency with previous research conducted.

Within their work, the authors note that presidents often cite Congressional Authority, but not consistently. They argue that “Presidents should issue orders based on their own authority only under conditions in which they consider themselves most free.”¹³¹ This thought process is a flawed method as we have seen in modern presidents since the writing of this article in 2013. The data and research are broader in scope in comparison to Thrower’s data as well as the data that will be presented in this paper.

Bailey and Rottinghaus used presidential proclamations in addition to executive orders, which assisted in proving their theory, but diminished the effectiveness of it by including presidential proclamations; they claimed “although proclamations are often ceremonial, presidents frequently issue proclamations treating policy.”¹³² While

¹³⁰ Jeremy D. Bailey and Brandon Rottinghaus, "Reexamining The Use Of Unilateral Orders", *American Politics Research* 42, no. 3 (2013): 472-502, doi:10.1177/1532673x13509836.

¹³¹ Ibid.

¹³² Ibid

proclamations do have value, they are not the same as executive orders, but proclamations serve the theory of Bailey and Rottinghaus- that presidents are increasingly issuing unilateral orders without Congressional authority citations and relying more on their own power.

Much like what will be seen in the data within this paper, Bailey and Rottinghaus used their own judgement on deciding the source of the presidential action in their data, whether it be from a Congressional Authority or another.

Presidential Environment and Executive Orders- Mayer Analysis

In his article *Executive Orders and Presidential Power*, political scientist Kenneth Mayer examines the frequency of executive orders in relation to the political environment in which a president resides.¹³³ Throughout his work, Mayer argues that political scientists and scholars generally do not examine executive orders as closely as other factors of presidencies; he notes “Although the legal literature is extensive, there are limits to what such investigations can tell us about broader patterns of presidential behavior.”¹³⁴ In agreement with this, both Mayer and this research take a different look into executive orders from presidents, but in unique manners.

On face value, the work of Kenneth Mayer provides an in-depth numerical look into executive orders by presidents. His process and viewpoint are that executive orders will vary on a variety of conditions: political party, beginning and end of term effects, and Congressional and public support. His expectation of executive orders “is that

¹³³ Kenneth R. Mayer, "Executive Orders and Presidential Power." *The Journal of Politics* 61, no. 2 (1999): 445-66. Accessed March 14, 2021. <http://www.jstor.org/stable/2647511>.

¹³⁴ Ibid. 446

presidents will tend to issue more when (a) they lack strong support in Congress, and (b) when they experience low levels of popular support”¹³⁵ has strong standing, but his analysis is subjective in nature to a point. Mayer’s strongest point is in his analysis of data that political party weakness in Congress does not produce more executive orders whereas low popularity does. This is counter to his initial hypothesis, but upon reflecting on the data, Mayer notes “Congress is too complex to be fully accounted for by a simple relationship between party differences and institutional collisions.”¹³⁶ This is the crux of his argument that in turn works for the research in this paper. The use of executive orders is a complex system and difficult to discern. When too many variables are considered, the results of the research can become too broad for in-depth analysis.

Conclusion

The common thread through each analysis is that executive orders are more than simple directives. The question that none answered but will be answered within this research is how the first executive orders are changing. Dr. Thrower provided context with her analysis into the length of time before an executive order is revoked; Bailey and Rottinghaus highlight the use of Congressional Authority from presidents to justify executive orders; and Mayer provides an in-depth look at the multifaceted approach presidents take when deciding on the use of executive order power. All of these processes are important and vital to understanding executive orders. They provide background, data, and analysis that is important to further the study of executive orders and their power. While noting the limitations in their studies it creates the groundwork for further

¹³⁵ Kenneth R. Mayer, "Executive Orders and Presidential Power." *The Journal of Politics* 61, no. 2 (1999): 445-66. Accessed March 14, 2021. <http://www.jstor.org/stable/2647511>. 453

¹³⁶ *Ibid.* 461

study in a narrower focus for this paper to see how and why executive orders are changing under modern presidents.

Data

To fully understand the early executive orders of a presidency, the data in this analysis is divided into three main parts: the length of time for a president to sign fifteen executive orders, the types of executive orders signed, and political party division of the executive and legislative branches. These three indicators will provide the groundwork for how executive orders are changing, and what presidents do with their first use of them in office.

Why the First fifteen Executive Orders

In choosing to limit the number of executive orders to examine in this analysis, it will provide a focus on the mindset of presidents shortly after they enter the office of the presidency. To choose timeframe over number of executive orders would diminish the dataset considerably, each president enters the office under difference circumstances and different challenges. By choosing to focus on the first fifteen executive orders over a set timeframe, it creates a level field for interpretation over timelines when there are different issues facing presidents. Other scholars have examined the entirety of executive orders from presidents, or executive orders from a small sampling around a major event. By examining the first fifteen executive orders, the data and analysis provide a clear set of data, timelines for that data, and similar basis for each president.

Types of Executive Orders

The different types of executive orders presidents utilize play a role in how presidents govern from the Oval Office. As Figure 23 highlights, no president has used their first fifteen executive orders in strictly one fashion. What is interesting is the divide of how presidents utilize the power of the pen. The data used in this research is compiled from multiple sources. First is the compilation of the differing types of executive orders presidents issued, using the Federal Register and National Archives. These sources include whether an executive order revokes a previous executive order, amends a previous executive order, or is a new directive.

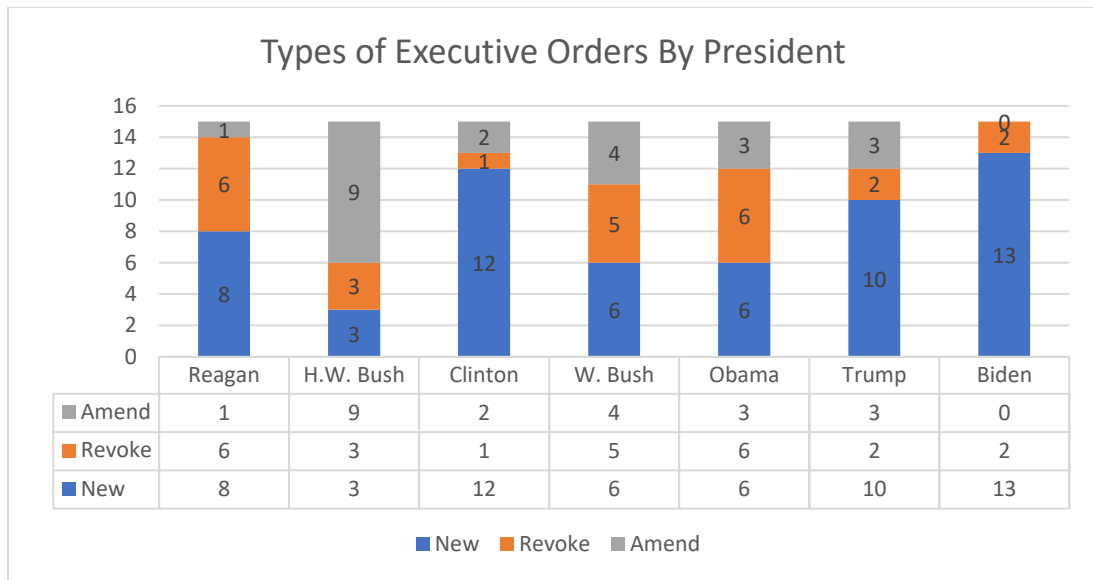


Figure 23: Types of Executive Orders by President

137

The variation of the how presidents use their executive order power is evident in Figure 23. President’s issue executive orders for a variety of reasons, but as this chart shows, the majority of executive orders are new, not to revoke previous president’s actions. President H.W. Bush, President W. Bush, and President Obama are the difference, however. Each president either amended or revoked a previous president’s

¹³⁷ “Executive Orders Disposition Tables Index”, *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1981-reagan.html>

“Executive Orders Disposition Tables Index”, *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1989-bush.html>

“Executive Orders Disposition Tables Index”, *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1993-clinton.html>

“Executive Orders Disposition Tables Index”, *National Archives*, <https://www.archives.gov/federal-register/executive-orders/2001-wbush.html>

“Executive Orders Disposition Tables Index”, *National Archives*, <https://www.archives.gov/federal-register/executive-orders/2009-obama.html>

“Executive Orders.” *Federal Register*, 2021. <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2017>

“Executive Orders”. *Federal Register*, 2021. <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021>

The method of designating which executive order was new, revoke, or amend is based upon the National Archives and the Federal Register’s classification. If an executive order revoked or amended a previous order, it is noted in the works.

executive actions at the start of their time in office. Most notably, President Biden issued more new executive orders than any other president in this analysis.

Time in Office

Looking at the time in which president issue their executive orders is also very important. Using the National Archives, each president was calculated from their first day in office until their 15th executive order was signed.

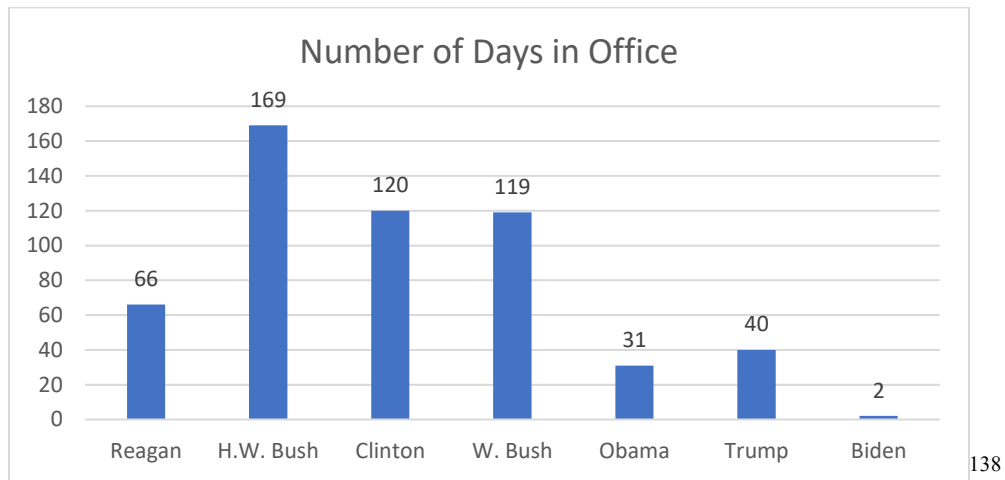


Figure 24: Number of Days in Office

¹³⁸ "Executive Orders Disposition Tables Index", *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1981-reagan.html>

"Executive Orders Disposition Tables Index", *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1989-bush.html>

"Executive Orders Disposition Tables Index", *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1993-clinton.html>

"Executive Orders Disposition Tables Index", *National Archives*, <https://www.archives.gov/federal-register/executive-orders/2001-wbush.html>

"Executive Orders Disposition Tables Index", *National Archives*, <https://www.archives.gov/federal-register/executive-orders/2009-obama.html>

"Executive Orders." *Federal Register*, 2021. <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2017>

"Executive Orders". *Federal Register*, 2021. <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021>

This is an important factor to examine in conjunction with the types of executive orders that a president issues because it provides an insight into presidential workings and highlights the differences in urgency of the use of executive orders. Since the Obama Administration, presidents utilize their executive orders at a much faster rate than previous presidents. In under two months in office, presidents Obama, Trump, and Biden issued fifteen executive orders- but President Biden completed that feat in two days.

Political Party Division

The division of power within the federal government plays an important role in how the Legislative and Executive branches function. As Thomas Jefferson wrote in 1824, “men by their constitutions are naturally divided into two parties.”¹³⁹ In his letter to Henry Lee, Jefferson made the point that political parties are a part of how the government works. Including political parties in this research is an important part of the analysis. When a man enters the Office of the Presidency, his success is in part dependent upon the makeup of Congress. As Kenneth Mayer noted in his research, the makeup of Congress plays a role in the power a president has while executing executive orders.¹⁴⁰ Including this information is important to the discovery of the working of executive orders.

¹³⁹ Thomas Jefferson, "From Thomas Jefferson To Henry Lee, 10 August 1824", *Founders.Archives.Gov*, 1824, <https://founders.archives.gov/documents/Jefferson/98-01-02-4451>.

¹⁴⁰ Kenneth R. Mayer, "Executive Orders and Presidential Power." *The Journal of Politics* 61, no. 2 (1999): 445-66. Accessed March 14, 2021. <http://www.jstor.org/stable/2647511>.

| Political Party Division of Legislative and Executive Branches | | | | |
|-----------------------------------------------------------------------|----------------------------------|------------------------|------------------------------------------|---------------------------|
| President in Office | President Political Party | Senate Majority | House of Representatives Majority | Type of Government |
| Reagan | Republican | Republican | Democrat | Divided |
| H.W. Bush | Republican | Democrat | Democrat | Opposition |
| Clinton | Democrat | Democrat | Democrat | Unified |
| W. Bush | Republican | Democrat | Republican | Divided |
| Obama | Democrat | Democrat | Democrat | Unified |
| Trump | Republican | Republican | Republican | Unified |
| Biden | Democrat | Democrat | Democrat | Unified |

Table 1: Political Party Division of Legislative and Executive Branches

When looking at the above table and the differences between the government divide when a president took office, the number one items to notice is every democratic president entered office with a unified government at their disposal. The question is, why would presidents choose to issue executive orders at a rapid-fire pace, when they have the power of Congress behind them? The first and simplest answer to that question is, were the majorities in Congress enough to defeat a filibuster. In the case of President Biden, the Senate has a 50-50 vote split, and his executive orders were largely new orders designed to counteract the COVID-19 pandemic. When the table of types of government and number of days in office are combined, the trend that emerges is that presidents who have had a unified government at their disposal, typically issue their first fifteen executive orders faster than presidents who enter office with a divided government.

¹⁴¹ "Party Divisions Of The House Of Representatives, 1789 To Present | US House Of Representatives: History, Art & Archives", *History.House.Gov*, 2021, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/>.

"U.S. Senate: Party Division", *Senate.Gov*, 2021, <https://www.senate.gov/history/partydiv.htm>.

Analysis

Examining the data of the previous charts and table create an interesting picture of presidents and their use of the executive order. President Reagan is the outlier, but presidents have consistently been using the power of the pen faster since H.W. Bush. The question that needs to be answered is, have presidents changed how their issue executive orders? When examining the three charts of data, the answer is clear- in recent years, presidents have changed not only the types of executive orders they issue, but more importantly the timeframe in which they do so.

It is interesting to note that apart from President Trump, only Democratic presidents have entered the office with a unified government at their disposal. George H.W. Bush entered the office of the president with an opposition government in front of him, and he took the most time out of all presidents in this research to issue his first fifteen executive orders. At over 160 days,¹⁴² President George H.W. Bush was the most restrained of all the presidents to use the power of the pen.

While the chart breaking down the different types of executive orders the presidents issued does not create a clear-cut image of presidents using the power of the pen initially to revoke previous orders, it does paint the picture that four of the seven presidents studied used more than half of their first executive orders to either amend or revoke previous executive orders. This trend was not the case with Presidents Clinton, Trump, or Biden. Each of these presidents chose to use their executive power to push forward campaign promises and make new changes to the government over revoking the

¹⁴² "“Executive Orders Disposition Tables Index”, *National Archives*, <https://www.archives.gov/federal-register/executive-orders/1989-bush.html>

plans of previous presidents. This does not mean that these presidents did not or will not go on to revoke more executive orders, but rather than starting their term in office undoing previous work, they chose to advance their own.

President George H.W. Bush took the longest to issue fifteen executive orders, but the interesting story is what he did with them. A majority of these executive orders were to amend or revoke the work of previous presidents, only issuing three “new” executive orders.

President Biden stands out among the other presidents in this research; he entered the office of the presidency with a crisis no other modern president has faced. President Biden took swift action within his first two days of office by signing thirteen new executive orders, eight of which were in response to the COVID-19 pandemic. If President Biden had not issued 8 executive orders on the pandemic, he would have taken sixteen days to issue fifteen executive orders.¹⁴³ Though this would have still placed President Biden at the top of the list for speed in issuing executive orders, it would have brought him closer to the trend of other modern presidents in this research. It is important to note the extenuating circumstances in which President Biden entered office, by not doing so, the research in this paper could be construed without context.

Presidents are using other tools in which to push their policy ideas, campaign promises, and agenda forward. A limitation of this research is that it does not include presidential memoranda. Executive orders are given power much like law, but presidential memoranda are being used more frequently as a similar power. As Phillip J.

¹⁴³ "Executive Orders". Federal Register, 2021. <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021>

Cooper notes, “memoranda are different in a number of important respects, beginning with the fact that they are not included in the requirements of the Federal Register Act and are governed by no systematic process for their development and issuance.”¹⁴⁴ This is an important distinction that must be noted, and examined in the future. How many memoranda are issued in the same fifteen days of the presidents and what powers did those memoranda create?

Conclusion

The idea that presidential executive orders are used as a political tool is not new, nor is it a disputed claim. The purpose of this research and analysis was to examine the first fifteen executive orders of a president to see if there is a pattern in how presidents choose to wield their power when they enter the office. As this data showed, presidents use their power in different ways and in different time spans, but they often use executive order power to push their agenda items forward while bypassing Congress.

There is more research and study that needs to be done when examining the early executive orders of a presidency. Data could be used for all presidents to see if there has been a broader trend over time, or if presidents are utilizing their power sooner in their presidency, as President Biden has done most recently.

The initial hypothesis of this paper is that presidents are using their executive order power faster and using it to undo the orders of previous presidents. Overall, this has proved to be true with this data, but with a few noted exceptions. President Biden issued

¹⁴⁴ Phillip J. Cooper. ""The Law": Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games." *Presidential Studies Quarterly* 31, no. 1 (2001): 126-41. <http://www.jstor.org/stable/27552170>.

more “new” executive orders rather than undoing the works of previous presidents, whereas presidents W. Bush and Obama used their power to revoke or amend the work of previous presidents. The highlight of this paper is that every democratic president entered the office with a unified government at their disposal, but republican presidents either faced a divided Congress or an opposition. More research needs to be done to see if the republican presidents succeeded in their executive order power or if they were stopped by the Courts and actions from Congress.

The argument that presidents abuse their power is common, and this paper shows that presidents use their power to “move the needle” in the direction they believe the United States needs to go, whether that be to revoke previous executive orders or bypass Congress to force their agenda into play.

Conclusion

Subtle changes to the federal government have altered the bedrock of governance in the United States. The goal and mission of this thesis was to examine singular “small” changes to each branch of the federal government and analyze how those changes have made a lasting impact from the original design of the Constitution. There are many reasons to the importance of this research, but the most important reason is to look to the future. These changes continue to modify the governance in the United States, but without these changes, the United States federal government would look very different.

Findings

In Chapter One of this thesis, the implications surrounding the Seventeenth Amendment and split party delegations examined the balance of power in the Senate; a balance that changed from pre-Seventeenth Amendment. Without the Seventeenth Amendment it would be the responsibility of state legislatures to select United States Senators, diminishing the power of the people; but with the people choosing U.S. Senators, the power of the states in the federal government has diminished. Other studies have looked to understand the “why” of split party delegations, but this research looked at the delegations themselves. Rather than focus on the “why,” this study focused on the “how.” How do split party delegations keep getting elected? What do minority party senators do to retain the power the people have bestowed upon them?

The research conducted found that minority party senators often change their voting style to keep favor among their constituents. Senator Joe Manchin of West

Virginia is often viewed as a swing vote in the Senate, and the research in Chapter One highlights that he often votes with the Republican party- giving him credence among the heavily Republican state of West Virginia. On the opposite side, Senator Sherrod Brown continuously votes along the Democratic Party line, but uses his relationship with Rob Portman, the Republican Senator from Ohio, as his bedrock of compromise. If the people investigated Senator Brown's voting history over public comments, his constituents may view his actions in a different light.

By using DW-NOMINATE¹⁴⁵ scores as well as party support and opposition of senators, the research conducted highlighted the differences in split party delegations' operations. Split party delegations use multiple tools to gain reelection and to appease their constituents to get reelected. The question asked in Chapter One was whether the Seventeenth Amendment changed the behavior of minority party senators in split party delegations, and as the analysis showed, minority party senators do change their styles in order to retain power and secure reelection. With these findings, the "small" change of the Seventeenth Amendment has had a profound impact on the makeup and working of United States Senators who are from split party delegations. When this is combined with how the Senate uses its power, the workings of minority party senators from split party delegations becomes a major change in the balance of power.

The second chapter of this thesis studied the polarization of the Supreme Court. There has never been an argument that the Supreme Court has 'liberal' and conservative' blocs, but the research conducted for this thesis examined the historical significance of

¹⁴⁵ Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet (2020). *Voteview: Congressional Roll-Call Votes Database*. <https://voteview.com/>

that polarization. As this paper concludes, the Supreme Court has always been polarized, and has consistently over time become more so.

The research in chapter two used the Martin-Quinn¹⁴⁶ scoring method of Supreme Court justices to establish the relationship of political ideology to that of the Supreme Court's makeup. In using the post New Deal courts, the research conducted proved that over time, the Supreme Court has become more polarized. That is more important in this paper is not that the Supreme Court is polarized, but the implications going forward. With the use of the nuclear option¹⁴⁷ to confirm Supreme Court justices, there is now a greater potential for a further increase in polarization of the Supreme Court. Had the sixty vote minimum remained in place, it would generally require bipartisan support in the confirmation process. If the Senate is controlled by the opposite political party from the president in the future, the installation of new Supreme Court justices could be delayed or tabled until a president offers a nominee that appeases the majority.

The third chapter in this thesis studied how presidents are using their early executive order power when taking office, specifically focusing on the first fifteen executive orders and the seven most recent presidents. This was done to give a set baseline of executive orders rather than the time in which they were made. Examining the timeframe in addition to the number of executive orders, as well as the political parties in power within Congress, highlighted the environment presidents entered to complete their agenda.

¹⁴⁶ Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-153

¹⁴⁷ "U.S. Senate: Senate Floor Activity - Thursday, April 6, 2017", *Senate.Gov*, 2017, https://www.senate.gov/legislative/LIS/floor_activity/2017/04_06_2017_Senate_Floor.htm.

The research conducted looked at the types of executive orders presidents issued, whether new, amends previous executive order, or revokes a previous executive order.¹⁴⁸ Additional content examined was the political parties in power for both Congress and the Executive¹⁴⁹ because the context it provided highlighted interesting findings of presidential power. The trend discovered in this research was that Democratic presidents entered office with a unified government, and all Republican presidents but President Trump entered office with either a divided or opposition Congress. With these factors in place, the data concluded that modern presidents are increasingly using their executive order power more urgently, but not that presidents are always undoing the work of previous presidents.

These three chapters are important for historical and future implications for the federal government. Small changes have occurred over time, and those changes have lasting effects on the operations and governance of the United States. Without the Seventeenth Amendment and split party delegations, the states would have retained power in the federal government; with the nuclear option for confirmation of Supreme Court Justices, the polarization of the Supreme Court may be increased; and with the increase in the utilization of executive orders by presidents, the bypassing of Congress can increase and provide further power to the Executive Branch.

¹⁴⁸ "Executive Orders Disposition Tables Index", *National Archives*, <https://www.archives.gov/federal-register/executive-orders/disposition>.

¹⁴⁹ "Party Divisions Of The House Of Representatives, 1789 To Present | US House Of Representatives: History, Art & Archives", *History.House.Gov*, 2021, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/>.

"U.S. Senate: Party Division", *Senate.Gov*, 2021, <https://www.senate.gov/history/partydiv.htm>.

Limitations

Like all research, there are limitations to the work in this thesis as well, but with the questions posed, the limitations are not as expansive as in other research. Each of these chapters poses specific questions and future implications resulting in small changes from the original design of the Constitution. With these changes, there is room for further in-depth study as well as expansion to the questions posed.

Chapter One could have expanded to more split party delegations and over a larger historical period, showing a larger trend or showing different trends from pre- and post-Seventeenth Amendment adoption. Chapter Two could have expanded on the Supreme Courts, focusing on more than just post New Deal Courts to classify if the trend of polarization was more diminished or expanded in previous Courts. Additionally, the research could have examined the “swing” votes of each Supreme Court to see how that the divide of swing votes changed over time. Chapter Three could have expanded from a more historical context and examining all presidents at the start of their terms, as well as a deeper dive into what new actions presidents have taken. It could have had a deeper examination into the reinstating of previous executive orders and how often differing political parties volleyed the reinstatement and revocation of executive orders over time.

Recommendations

Continued study of the branches of government and their changes is something to be considered going forward and is encouraged. This thesis has provided a groundwork for expansion, with some of those ideas in the limitations section. The continuous study of how small changes have impacted the federal government are vitally important to

understanding how the United States government works. If scholars and academics focus solely on the big picture, the small modifications could be led to being regarded as standard procedure.

The study of split party delegations in the Senate could provide a window into the mindset and strategy of minority party senators in heavily dominated majority states. This information could assist other minority parties in states to work in getting senators elected. Regarding the Supreme Court, a more in-depth look into the slow polarization of the Court could be examined looking at earlier Supreme Courts and should continuously be watched for how the Supreme Court acts going forward. In examining the data of the Supreme Court in the future, there could be recommendations made to the use of the filibuster and cloture rules within the Senate. Presidential executive orders are a product of their environment, and worth studying in a manner that will highlight their use and ultimate goal. Looking at more historical records as well as future presidents could either assist in strengthening the argument that presidents are using executive order power to bypass Congress or they are using it to primarily undo the work of their predecessors.

Final Thoughts

The goal of this thesis was to examine how “small” changes to the federal government have lasting implications, and to explore the prospect of future repercussions to the government from such changes. Each branch of the federal government has changed over time, but the question of what those changes mean is something that is not often examined. The implications the “small” changes can have on the United States Federal Government’s structure and balance of power is different from the beginnings of

the nation and is evident as the analysis of this thesis shows, but even without these changes, the federal government would still have evolved to look different from its original inception.

The message that has gotten lost in the workings of the federal government is how the balance of power was defined within the United States Constitution. The Founders were very careful in their language and created a new form of government because they did not want the United States revert to the systems of government from history, or to the English Monarchy. Because of this fear and trepidation, the Founders created a system with checks and balances that were deliberate and intentional in their usage. This thesis has explored how those balances of power have shifted through changes to individual branches. With the direct election of senators, the balance of power shifted toward the people and away from the states; with the polarization of the Supreme Court and the power of judicial review, the balance of power shifted from Legislative and Executive branches towards the Judicial branch; with the changes to executive orders, the balance of power shifted away from the Legislative branch in favor of the Executive branch. Without each of these changes to the federal government, the balance of power would not have shifted in these specific ways.

It needs to be noted that the Founders had no notion that the United States Federal Government would attain the amount of power it currently wields, but the Founders did attempt to create a government that would be able to sustain changes to its power. In *Federalist 48*, James Madison notes that of the three branches, “none of them ought to possess, directly or indirectly, and overruling influence over the others in the administration of their respective powers... The next and most difficult task is to provide

some practical security for each, against the invasion of others. What this security ought to be is the great problem to be solved.”¹⁵⁰ The security of the independence and cohesive work of the three branches of the federal government was a different task when the Constitution was written. The checks and balances of power had clearer lines than the checks and balances of today. It is up to the people, the elected officials, and the rest of the Federal Government to examine the power division and the checks provided to each branch. As this thesis has demonstrated, if an evaluation of the checks and balances of power in a polarized government is not done, the future of the federal government could become imbalanced and create an unstable system of governance that will be difficult to return from.

Each branch has given and taken power from other branches, expanded their own power with new measures, and expanded the role of the federal government that was not the intent of the Founders. The beginning of this thesis noted that “small” changes are not about groundbreaking massive structural change, but normalized changes that have a lasting impact on governance. Each chapter within this thesis analyzed a singular change to each branch of the Federal Government and how those “small” changes have created a different type of governance. If these changes go unchecked, their normalized nature can further divide the United States and encroach on the pillars of the separation of powers.

As Alexander Hamilton stated in *Federalist #51*, “If men were angels, no government would be necessary... In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to

¹⁵⁰ Alexander Hamilton et al., *The Federalist Papers* (New York: Signet Classic, 2014), 305

control the governed; and in the next place oblige it to control itself.”¹⁵¹ As this thesis demonstrates, both the government and the governed have changed, but the difficulty of governing still hangs in the balance.

¹⁵¹ Alexander Hamilton et al., *The Federalist Papers* (New York: Signet Classic, 2014), 319

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Curriculum Vitae

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Winthrop University

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Music Communications

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Mayer Electric, Charlotte, NC

Return Goods Associate and Freight Recovery Specialist

Managed stock and special returns for HUB and Direct Sales. Responsible for restocking cancelled sales, credit orders, and any other returnable items into the warehouse. Created, distributed, and monitored freight reports, open sales orders, training reports, and Branch Transfer Reports. Cash management of counter sales, and customer account payments.

2015-2016

Mayer Electric, Charlotte, NC

Project Manager

Working daily with Outside Account Managers to collect customer information, project plans, and specifications to assist in producing a competitive and accurate proposal. Provide supplier partners and manufacturer representatives with complete information to accurately and completely quote projects and ensure project documents are complete, current, and stored appropriately. Strive to grow and develop customer and supplier relationships. Be the "First Choice" for our customers and suppliers to do business with.

2014-2015

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Return Goods Associate, Receiving Admin.

Managing monthly, quarterly, and annual stock returns for Hub operations. In charge of restocking cancelled sales, credit orders, and any other returnable items into the warehouse. Responsible for receiving packing lists and advising of any discrepancies or damaged items received in shipments, as well as follow-up for resolutions. Also assist with inventory management for the Hub. Covering front receptionist duties when needed, with duties including- answering the phone, paging employees, cash management, reporting, and greeting guests in the front office.

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Drucker & Falk, Rock Hill, SC

Leasing Consultant

Maintained an overall percentage of 98% occupancy and 100% pre-leased, while increasing market values 5 times within 36 months. Managed the monthly newsletter, Resident Insurance Requirements, Demographics, and other programs. Prepared Resident Move In folders, renewal files, and reports for the Property Manager; including Market Survey, Highlights Report, and other Weekly Reports. Assisted in filing monthly evictions, generating purchase orders, work orders, and marketing assignments. Adhered to all policies and procedures, including online courses and development. Responsible for greeting prospects, interacting with residents, and other customer care duties as needed.

2011-2011

Ethel Harris, Inc. Charlotte, NC

Paralegal, Exec. Assistant

Drafted leases, contracts, and estate planning documents. Assisted in maintaining minute books for 100+ businesses and other entities. Assistant to President of the company. Assisted with organizing older files and creating an online excel matrix to store and find data in a more efficient manner. Handled all correspondence for office.

2008-2011

Fatz Café, Rock Hill, SC

Marketing Specialist

Planned, developed, and launched catering business from location; which included creating marketing plan, sales and marketing territories, presentation materials, and in-store catering manual. Within two years- increased sales from 8% to 18% of total store income, making the store the number one location out of 47 nationwide locations.

2006-2008

Cadmus- The Whitehall Group, Charlotte, NC

Account Manager, Assistant to VP of Production

Responsible for the front office. Duties included: greeting visitors, filing and reviewing employee paperwork for Human Resources, and directing all phone calls through the branch. Handled all weekly, monthly, and quarterly reports for the VP of Productions using data from the production floor. Created spreadsheets, graphs, charts, and reports for management. Organized and managed each monthly distribution of printed materials for 1,437 Lowes Home Improvement stores. Dealt directly with Lowes Operations for catalog placement and fulfillment.