

A Divided Court?

*A study of the United States Supreme Court
and political polarization*

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Tittel

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Anders Røneid Erikstad Oslo., May 2016

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1 Introduction

1.1 Background and motivation

The United States Supreme Court is the highest federal court in the United States, and it has played and continues to play an important role in American political and social life. In my thesis I will try to find out whether the current political climate in the United States is reflected in how the U.S. Supreme Court functions, and whether a deeper ideological division has occurred during John Roberts' tenure as Chief Justice.

My main motivation for writing a thesis about the U.S. Supreme Court is the sheer importance of the Supreme Court in American society throughout history and in the present. The United States is the world's foremost superpower politically and militarily, but also culturally. Given the importance of the Supreme Court in the United States, it is of great interest to look at ideological developments regarding the justices on the court.

The ongoing presidential election campaigns helps to illustrate the diverging ideological views in American society, more than in non-election years. Justice Antonin Scalia's death in February 2016 and President Barack Obama's subsequent nomination to fill the vacancy has become a political issue of interest not only in the United States but also in the rest of the world. There is arguably no other country in the world that pays so much attention to Supreme Court nominations as the United States, and a similar situation in for example Norway would not garner the same media attention.

The current political climate in the United States consists of two major parties, the Republican Party and the Democratic Party, that in recent years have diverged farther and farther from each other. There is little willingness for cooperation between the two parties, and in my thesis I will try to find out whether this ideological division can also be found among the Supreme Court justices.

My thesis question is then: *Has the U.S. Supreme Court become more polarized and politicized in recent years, and especially during the tenure of Chief Justice John Roberts?*

1.2 Method

In order to find an answer to the thesis question I have used several sources. The most important one has been the Supreme Court Database. I have used data from this database in an attempt to identify and discuss major trends in the voting patterns of the Supreme Court justices. I have also used this database in order to find out the developments of the individual justices who have served with John Roberts. I will try to find out the reasons for why this has happened.

1.2.1 About the database

The Supreme Court Database contains information on every U.S. Supreme Court case since 1791, but with more detailed information on cases since 1946. It was created and continues to be maintained by Professor Harold Spaeth of the Michigan State University College of Law. It has been used frequently by social scientists for research purposes and also by journalists¹

The database contains information on the ideological direction of the decision in each case decided since 1946, i.e. whether the case decision is considered *conservative* or *liberal*. It also contains information on each case based on category, for example whether the case is about criminal procedure, economic activity, civil rights and several other categories.

There are multiple criteria for categorizing a decision as either conservative or liberal, which is of great interest in my thesis. The decision direction in each case is of interest because it shows how the Supreme Court has developed over time with regards to decision direction, i.e. *liberal* or *conservative*. It is also interesting to look at whether there is a connection between the case category and the case decision. The different criteria will be elaborated on later in thesis.

1.3 Structure of the thesis

In this introductory chapter I will introduce my primary and secondary sources and I will give arguments as to why I have chosen these particular sources, and why I consider the chosen sources to be of particular importance.

¹ The Supreme Court Database, “The Genesis of the Database”, <http://supremecourtdatabase.org/about.php>, accessed 01.04.2016

Chapter 2 will consist of a discussion of the general partisan polarization that arguably has occurred in the United States in the last 30 years. This chapter is supposed to give the reader an idea of this partisan polarization and will serve as a starting point for further discussion in later chapters.

Chapter 3 will give an introduction to the role of the Supreme Court in society, and will also contain a part on how United States Supreme Court justices are appointed. I will argue that this process has become a source of potential conflict in recent years. In the last decades, it has arguably become more important for presidents to nominate candidates with whom they share political points of view. This change has led to the court becoming more polarized and could lead to potential conflict in the future. Some argue that the liberal justices have become more liberal in recent years, and the conservative justices have become more conservative. In contrast to earlier compositions of the Supreme Court, it seems as though there is less of a middle ground now.

Chapter 4 will contain an analysis of the data found in the Supreme Court Database, with regards to the decision direction, i.e. whether the case decision is considered *liberal* or *conservative*.

In chapter 5 I will look at the ideological developments for each individual justice, also by using data from the Supreme Court Database. While the analysis in chapter 4 is more concentrated on the Roberts Court as a whole, there is more focus on the individual justices in chapter 5.

In chapter 6 I will look at some cases decided by the Supreme Court that have been of special importance politically and socially.

Chapter 7 will contain small discussion on recent developments on the Supreme Court, especially the vacancy after Antonin Scalia's death and the subsequent nomination process for Merrick Garland.

Chapter 8 will contain a conclusion where I will try to come up with answers to the thesis question.

1.4 Sources

I have used several books, journal articles and newspaper articles that I have seen as valuable for my work. One book I found especially valuable were *Justices, Presidents and Senators: A History of the U.S. Supreme Court* by professor Henry J. Abraham. This book gave me a

good overview of the political process of the nomination and confirmation processes for Supreme Court justices. Another piece of work that has contributed to and increased understanding of American politics is the anthology *Issues in American Politics: Polarized Politics in the age of Obama*, edited by professor John Dumbrell. It contains articles on subjects ranging from culture wars, health politics and to economic policy. However, the most interesting article for my thesis concerned itself with the increasing political polarization in Congress.

In addition I have made several figures based on the Martin-Quinn Scores. The Martin-Quinn scores were developed by Andrew D. Martin of the University of Michigan and Kevin M. Quinn of the UC Berkeley School of Law in order to measure “the relative location of U.S Supreme Court justices on an ideological continuum”.² The Martin-Quinn Scores are also based on data from the Supreme Court Database. Further explanation for these scores can be found in later chapters.

The Supreme Court receives much media attention because of its important role in society. The articles of *New York Times*’ Adam Liptak have been especially valuable in order to help me understand why the decisions of the Supreme Court could have wide-ranging social and political consequences. While newspaper articles are not academic sources, there is valuable knowledge to be gained from Liptak’s articles, especially considering his background and merits.

The rest of my sources are named in the bibliography and footnotes.

1.5 A brief definition of important terms

1.5.1 Polarization

Polarization is defined by Merriam-Webster dictionary as a “division into two opposites”.³ This is a basic definition of several political systems. Democracy rests upon differing opinions and political views. However, there is a second part of the definition: “concentration about opposing extremes of groups or interests formerly ranged on a

² Berkeley Law, University of California, “Project description”, <http://mqscores.berkeley.edu/index.php>, accessed 25.04.2016

³ Merriam-Webster Dictionary, “polarization”, <http://www.merriam-webster.com/dictionary/polarization>, accessed 12.05.2016

continuum”.⁴ This second definition is more fruitful for my thesis. It is exactly this gradual divergence within American politics generally, and especially within the voting patterns of the Supreme Court justices that is central to this thesis. In chapter 2 I will look at the general political polarization in the United States since 1980.

1.5.2 Conservatism

The definition of the political concept of conservatism may differ. What a person refers to himself or herself as a conservative does of course vary from person to person. For example, there has been discussions among the current Republican presidential candidate as to who is the “real conservative”.

Conservatism as an ideology is not as clear-cut as for example socialism or communism. Having a conservative opinion in some matters does not mean that one can't have a liberal opinion in others. It is however possible to identify some main characteristics of conservatism. For example, a conservative opinion is as the term implies about conservation, not revolution. In his book *An Introduction to Political Philosophy*, author Jonathan Wolf uses the ideas of political theorist Michael Oakeshott in order to describe some general aspects regarding conservatism: “...our traditions and inherited institutions contain more wisdom than we do – the accumulated wisdom of generation – and that it is both wrong and damaging to reform and rebuild except in the most slow and careful manner.”⁵

A conservative may be interested in maintaining a strong central government, while still having clear limits on the government's power. The government should provide for its citizens basic needs, such as safety and a judicial system. However, there are also other needs that can be provided by the state, but only if others, typically the private sector, cannot do it equally as good.⁶ A skepticism towards a strong central government is especially evident in the United States, where personal freedom is valued highly. Norwegian encyclopedia *Store norske leksikon* mentions a distinction between continental and Anglo-Saxon conservatism.

⁴ Merriam-Webster Dictionary, “polarization”, <http://www.merriam-webster.com/dictionary/polarization>, accessed 12.05.2016

⁵ Wolf, Jonathan, «An Introduction to Political Philosophy», Oxford: Oxford University Press, 2006, page 180

⁶ Langslet, Lars Roar, ”Konservatisme” Store norske leksikon. accessed May 12, 2016, <https://snl.no/konservatisme>.

The latter tradition is more liberal economically and places special importance on personal freedom.⁷

1.5.3 Liberalism

Liberalism as a political ideology places great importance on individual autonomy, and this ideology has played an important part in Western political developments since the 18th century.⁸ In many ways, and especially in an American context, there are many similarities between conservatism and liberalism. Both ideologies do, for example, emphasize the importance of a free market economy. As I will show in this thesis, there are also several differences between a conservative and a liberal. This is especially evident in for example social issues. A typically liberal opinion could be pro-abortion, pro-same sex-marriage and pro-environmentalism, as opposed to a typically conservative opinion which could be pro-life, pro-family and more skepticism towards climate change.

⁷ Langslet, ” Konservatisme”

⁸ Aksel Braanen Sterri, & Ole T. Berg, (2016, 20. januar).” Liberalisme”, Store norske leksikon, accessed May 12, 2016, <https://snl.no/liberalisme>

2 Political polarization in the United States since 1980

The United States has arguably become more politically polarized in the last 30 years, since the election of Ronald Reagan in 1980. His election was instrumental in the rightwards turn of the Republican Party. John E. Owens, professor of United States Government and Politics at the University of Westminster, in his chapter “The onward march of (asymmetric) political polarization in the contemporary Congress” in *Issues in American Politics: Polarized Politics in the age of Obama* argues that, for decades,

class and cultural issues have produced increasingly sharp ideological divisions between Democrats and Republicans, engendering congressional parties that are much more cohesive and ideologically polarized than either of the mid-decades of the mid-twentieth century or anticipated by the U.S. Constitutions framers.⁹

There seems to be a consensus on this matter, and it is arguably safe to say that politics in the United States has become more polarized in recent decades. The important questions here are why this has happened and what kind of consequences this will have on important institutions in the United States, most notably the U.S. Supreme Court.

Owens furthermore elaborates on this issue by arguing that members of Congress increasingly “depend upon central party leaders and coordinated party efforts to tease out...legislative products that distinguish their party from the opposition and will advantage their party in the next set of elections.”¹⁰ This is an important part of the so-called polarization, because in order to attract voters one party has to stand out as different from the other party and appeal to their voter groups with issues that concern them. This aspect of polarization is not entirely negative because it gives the voters clear alternatives and makes them able to distinguish between the two parties.

⁹ John E. Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress” in *Issues in American Politics: Polarized Politics in the age of Obama*, Dumbrell, John, ed., Abingdon: Routledge, 2013. Kindle edition, page 98

¹⁰ John E. Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress” in *Issues in American Politics: Polarized Politics in the age of Obama*, Dumbrell, John, ed., Abingdon: Routledge, 2013. Kindle edition, page 98

Another issue is that polarization has led to the Republican Party turning rightwards, arguably much more than the Democratic Party has turned leftwards. In other words, the Republican Party has in recent decades become more conservative while the Democratic Party has become more liberal, albeit on a much smaller scale. Owens states that congressional Republicans have moved much more sharply to the right than have congressional Democrats to the left.¹¹ In addition, there is a difference between the polarization in the U.S. House of Representatives and the U.S. Senate.

With regards to reasons for this partisan polarization, Owens points to the most common explanation as “changes occurring within the electorate over recent decades.”¹² He lists four major changes within the electorate as being: the negative response of white southern Democrats to African-Americans’ demands for civil rights, a growing economic and social inequality in the U.S., effective partisan redistricting and increased ideological and geographic sorting.

These reasons have led to the two parties and its voters becoming less similar to each other and has led to a more polarized political climate in the U.S. Owens also points to the fact that adherents to each party being very unlikely to approve of a candidate or officeholder of the other party, i.e. Republican voters are very unlikely to approve of Democratic officeholders or candidates and very likely to approve of Republican officeholders or candidates.

Owens mentions rising educational levels among voters, and argues that higher levels of education will make voters better able to make their own opinions among a wider range of issues and thus better able to discern differences between the two parties with regards to these issues. He furthermore argues that “voters’ ideological self-identification has become a much more reliable indication of their liberalism/conservatism and their partisanship”¹³ and that “partisan differences have now become much more significant than gender, age, race or class.”¹⁴ Voters who identify themselves as conservative is more inclined to vote for Republican candidates, while voters who identify themselves as liberal are more inclined to vote for Democratic candidate. This has led the voters to become more rigid in their voting patterns. According to American National Election Survey results, in the period between 1972

¹¹ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 99

¹² Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 101

¹³ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 103

¹⁴ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 103

and 2004, “voter’s partisanship and ideological self-identification became highly correlated over this period at 0,63.”¹⁵ The results also show that within the same time period “liberals voted for Democratic congressional candidates 86 per cent of the time (compared with 75 per cent in 1972) and conservatives voted for Republican candidates 79 per cent of the time.”¹⁶

Owens argues that “the most drastic form of partisan agenda-setting in the house...is that no speaker...will bring any major legislation seen as important by the majority unless he/she is confident that it will pass.”¹⁷ Different party leaders in the house, be it Republicans or Democrats have become more restrictive in their behavior and have used the rules of the house “much more efficiently in line with majority party expectations and policy preferences.”¹⁸ This way each party has enforced more discipline on their own members and also found a way to give the other party fewer opportunities to influence the legislation process. From 1985 until 2011, “the percentage of rules that were restrictive (primarily limiting floor amendments) rose from 21.5 to 86 per cent.”¹⁹ Owens argues that this shift toward more restrictive rules makes decision-making more efficient for the majority party and lessens opportunities for the minority party.²⁰ As a consequence of this the minority party in the house has almost been excluded from what Owens refers to as “the formal amendment process”²¹ the process of legislation. For example, Owens mentions that in periods when the Republican Party has ruled the House of Representatives, “the majority party on a committee has regularly excluded hearing witnesses requested by the minority who might be expected to oppose the majority’s legislative proposals.”²² He argues that the House of Representatives has experienced a greater degree of polarization compared to the Senate. Because of the rules of the Senate, individual senators and the minority party have “greater opportunities to obstruct the majority, the more so the smaller the majority party’s plurality.”²³

¹⁵ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 103

¹⁶ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 103

¹⁷ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 110

¹⁸ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 110

¹⁹ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 110

²⁰ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 111

²¹ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 111

²² Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 111

²³ Owens, “The onward march of (asymmetric) political polarization in the contemporary Congress”, page 111

2.1 Gingrich Republicans

Newt Gingrich was a member of the House of Representatives for the Republican Party for Georgia's 6th district from 1979 until 1999. He served as Speaker of the House from 1995 until 1999, and he was an influential politician within the Republican Party. Owens mentions that between 1978 and 2006, "33 ideologically committed conservative Republicans who had served with Gingrich in the House were elected to the Senate"²⁴ Owens refers to these Republicans as "Gingrich Republicans", and he argues that these Republicans have had a large influence on the polarization of the Senate. The senators had spent much time with Newt Gingrich and Owens argues that they had adopted his "confrontational approach."²⁵ They were more than twice as conservative as their fellow Republican senators, and they represented a new rightward shift for the Republican Party.

Owens uses the working paper "The Gingrich Senators and Party Polarization in the U.S. Senate" by Sean Theriault, associate professor in the Department of Government at the University of Texas, Austin, and David W. Rohde, professor of Political Science and director of the Political Institutions and Public Choice Program at Duke University from 2011 as a source. The authors themselves state in the beginning of the paper that the growing divide between the voting scores of Democrats and Republicans in the Senate can be accounted for almost entirely by the election of a particular breed of senator: Republicans who previously served in the House after 1978.²⁶

According to the authors, Republican senators who were elected to the House of Representatives in or after 1978 can explain the growing political divide between the two parties. According to the authors, the main reason for increased polarization in the Senate is what they refer to as "Gingrich Senators". These are senators that are jointly (1) Republican, (2) former House members, and (3) elected to Congress after 1978.²⁷ However, they make an important distinction. It is a combination of the three characteristics mentioned above that makes the Senate more polarized. It is, for example possible to be both Republican and elected to Congress after 1978 and still not be a contributing factor to an increasingly polarized Senate. The authors themselves refer to Newt Gingrich as the "most important

²⁴ Owens, "The onward march of (asymmetric) political polarization in the contemporary Congress", page 113

²⁵ Owens, "The onward march of (asymmetric) political polarization in the contemporary Congress", page 113

²⁶ Sean M. Theriault and David W. Rohde, "The Gingrich Senators and Party Polarization in the U.S. Senate", *Journal of Politics*, 73(4) (2011), pages: 1011-1024, page 1012

²⁷ Theriault and Rohde, "The Gingrich Senators and Party Polarization in the U.S. Senate", page 1012

House Republican of the last 40 years”²⁸, because of the immense influence he has had on the Republican Party and its elected officials. Gingrich himself was elected to the House of Representatives from Georgia’s 6th district in 1978, and remained a member until his resignation in 1999. During his tenure in the House of Representatives he became more influential and was an important part of the Republican victory in the congressional election in 1994. The Republican Party gained the majority of representatives in the House, which had been controlled by the Democratic Party since 1952. Gingrich was appointed Speaker of the House, a role he had until 1999.

Theriault and Rohde argue that Newt Gingrich’s role in the House is influential with regards to the rightwards, conservative turn for several Republicans. They state that the 100th Congress (1987-1989) marked a shift in the Republican Party. Up until then “Republicans who had served in the House were more moderate than Republicans who did not serve in the House.”²⁹ However, “Beginning in the 100th Congress, however, the Republicans who came to the Senate from the House were more conservative than their non-House counterparts.”³⁰ The 100th Congress coincided with Gingrich’s fifth term in the House of Representatives and him arguably having an increasing influence in the House. The authors assert that “Gingrich’s former colleagues are almost twice as conservative as their fellow Republicans”³¹ and that the “Gingrich Senators have substantially more conservative voting records than those

Senators who entered the Senate at the same time as the Gingrich Senators, but who had not previously served in the House.”³² These findings point to the fact that a large number of Republican senators have become more conservative in their voting, and because of this the Senate has become more polarized in recent years. The authors argue that Newt Gingrich himself has had a large influence on this polarization, because he has managed to influence other Republicans in the House, who later became senators.

The authors also test whether this conservative shift by the Republicans is only a one-party matter or whether the voting patterns of Democrats have changed. They identify two main Democrats, representative Richard Gephardt from Missouri, and representative Jim Wright from Texas. In the same way that they argue Gingrich’s influence on Republicans,

²⁸ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1012

²⁹ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1013

³⁰ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1013

³¹ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1013

³² Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1013

they see Gephardt and Wright as influential Democrats. However, they come to the conclusion that “Gephardt Senators vote similarly to the non-House veterans and House veterans serving before Gephardt’s election who subsequently served in the Senate.”³³ Gephardt Senators have not changed their voting patterns in the same way that Gingrich Senators have, although the authors argue that the so-called Gephardt Senators are a bit more liberal than other Democratic senators.

The authors refer to Newt Gingrich’s influence as the “Gingrich Effect”, and they look at several factors in trying to explain his influence on other Republicans. They come up with four different explanations for the Gingrich Effect, namely that their “conservative ideology may have roots in their constituencies”³⁴, that “electoral influences may also affect senator ideology”³⁵, that “the nature of House service in the era after Gingrich’s first election may independently effect polarization in the Senate”³⁶ and lastly that “the conservative ideology of the Gingrich Senators may be the result of something unique about them as individuals”³⁷. These four explanations are all important in order to understand the Gingrich Effect. In the first explanation, the so-called constituency factor, the authors argue that the Gingrich Senators may come from states where the voters are more conservative than voters in states where non-Gingrich senators have been elected. The authors find that “Gingrich Senators come from states where Republican presidential candidates do on average 4.0 percent better than they do nationwide.”³⁸ It would be logical to argue that a state where a Republican presidential candidate does better on average is also more likely to elect a Republican senator. Non-Gingrich Republican senators, on the other hand, come from states where a Republican presidential candidate on average does slightly less better (1.9 percent) than they do nationwide.

In the same way, when comparing the Gingrich Senators and the Gephardt Senators, the authors find that the Gephardt Senators come from states that “give Democratic presidential candidates 3.5 percent more votes than their nationwide average.”³⁹ Non-Gephardt Senators, on the other hand, “come from states that on average gave Democratic

³³ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1014

³⁴ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1014

³⁵ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1014

³⁶ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1020

³⁷ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1020

³⁸ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1020

³⁹ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1020

presidential candidates 2.2 percent more votes than their nationwide average”⁴⁰ As we have seen, there is less difference between the Gephardt Senators and the non-Gephardt Senators than there is between the Gingrich Senators and the non-Gingrich Senators.

The personal influence of Gingrich himself is not to be disregarded, and the authors referring to the Gingrich Senators as having “been baptized in the partisan waters of Newt Gingrich.”⁴¹ Gingrich founded the Conservative Opportunity Society in 1983. This was an organization where Republicans met and discussed ideas, and it included several young Republicans.

The main point of the article, however, is to point out that the rightwards conservative turn of Republican senators elected to the Senate after serving in the House with Newt Gingrich is perhaps the main reason for the increasing polarization of the Senate in the last 20-25 years. The authors argue that “modern Senate more closely resembles the U.S. House, where partisanship has been more prominent since at least the breakdown of the *conservative coalition* in the 1960s.”⁴² They argue that the rise of the Gingrich Senators is the main reason behind this development and they also argue that this polarization is only likely to increase. The Democrats are not likely to become more closely aligned with the Republicans, and the two parties are more likely to move farther away from each other.

In the following chapters I will try to find out whether this polarization which has occurred in the House of Representatives and in the Senate can be found among the justices of the Supreme Court.

⁴⁰ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1020

⁴¹ Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1023

⁴² Theriault and Rohde, “The Gingrich Senators and Party Polarization in the U.S. Senate”, page 1023

3 The Supreme Court in American society

In the United States Constitution it is stated that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court."⁴³ This basically means that the President has the power to nominate candidates that he finds best fit for the Supreme Court. After the nomination, the nominee goes through hearings in the Senate and is then either confirmed or rejected by a voting process in the Senate.

In this chapter I will look at the mechanics behind the nomination and confirmation of Judges to the U.S. Supreme Court and I will also try to find out if this process has in any way been affected by the partisan polarization that has occurred in the United States in the last 30 years. The chapter will also contain a discussion on the role of the Supreme Court in American society and a comparison between the U.S Supreme Court and Supreme Courts in the U.K and Norway.

In his book *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, professor Henry J. Abraham quotes professor Sheldon Goldman of the University of Massachusetts, Amherst and lists "eight qualities, characteristics or traits that most would agree are associated with the ideal type of a judge."⁴⁴ These traits are as follows:

1. Neutrality as to the Parties in Litigation. 2. Fairmindedness. 3. Being Well Versed in the Law. 4. Ability to Think and Write Logically and Lucidly. 5. Personal Integrity. 6. Good Physical and Mental Health. 7. Judicial Temperament. 8. Ability to Handle Judicial Power Sensibly.

Abraham furthermore goes on to state "what history demonstrates as the ascertainable decisional reasons or motivations for the presidential selections of members of the Supreme Court."⁴⁵ According to Abraham, these are "objective merit...personal friendship...balancing "representation" or "representativeness" on the Court and..."real" political and ideological

⁴³ United States Constitution, art. II, § 2 http://www.archives.gov/exhibits/charters/constitution_transcript.html, accessed 13. January 2015

⁴⁴ Henry J. Abraham, *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, Lanham: Rowman & Littlefield Publishers, 2008, Kindle edition, page 1

⁴⁵ Abraham, *Justices, Presidents and Senators*, page 2

compatibility.”⁴⁶ These reasons or motivations seem to sum up what aspects presidents consider when they are nominating justices for the Supreme Court.

Abraham mentions that there could be several or only one motivation behind each president’s nomination. For example a president can nominate a candidate based on the merit of the candidate, i.e. if a specific candidate has shown to be exceptionally skilled in law. Republican president Herbert Hoover nominated Benjamin Nathan Cardozo as a Supreme Court justice in 1932. Hoover was a Republican and Cardozo was a Democrat, but even so, Hoover appointed Cardozo. This action was considered to be one of Hoover’s greatest acts as president. Hoover crossed party lines and nominated a Democratic candidate to the Supreme Court.

The second motivation Abraham mentions is personal friendship. A president can nominate a candidate based on a good personal relationship with the candidate. Even though the candidate is skilled in law, this motivation can be seen as a personal favor or reward. For example, Abraham mentions Andrew Jackson’s nomination of his good friend Roger Brooke Taney as Chief Justice in 1835, Harry Truman’s nominations of Harold H. Burton, Fred M. Vinson, Tom C. Clark and Sherman Minton and also John F. Kennedy’s nomination of Byron White in 1962. Byron White had been the chair of John F. Kennedy’s campaign in Colorado in the 1960 U.S. presidential election, and had also served in the Kennedy administration.

The third motivation mentioned is representation or representativeness on the court. Abraham argues that this motivation has become more frequent in recent years, and mentions factors such as ”religion, race, gender, age and geography”⁴⁷ which are taken into consideration when looking at potential candidates for the Supreme Court. He lists examples of this, which includes Thurgood Marshall’s nomination by Lyndon Johnson in 1967 and the nomination of Sandra Day O’Connor by Ronald Reagan in 1981.

As the fourth factor considered when nominating judges to the Supreme Court, Abraham mentions ”political and ideological compatibility.”⁴⁸ He states that this factor ”has arguably been *the* controlling factor”⁴⁹ for presidents when considering whom to nominate to the Supreme Court. It is very understandable that presidents look at the political and

⁴⁶ Abraham, *Justices, Presidents and Senators*, page 2

⁴⁷ Abraham, *Justices, Presidents and Senators*, page 2

⁴⁸ Abraham, *Justices, Presidents and Senators*, page 3

⁴⁹ Abraham, *Justices, Presidents and Senators*, page 3

ideological views of a potential candidate, because the U.S. Supreme Court plays an important role in political life in the U.S.

Of course, a president is not able to foresee how a certain nomination for the Supreme Court is going to act and vote. Thorough work is done beforehand in order to ensure that the different parties nominees are going to adhere to a certain conservative or liberal policy. However, a president cannot be sure that a certain nominee is guaranteed to adhere to the same policy if or when he or she is confirmed to the U.S. Supreme Court.⁵⁰ Abraham states that “in approximately 20 percent of Supreme Court appointments presidents have been ideologically disappointed with their nominees’ on-bench voting patterns.”⁵¹ There is no prerequisite for the Justices to follow the policies of the president who nominated them and they are under no obligation to follow certain policies once confirmed to the Supreme Court.

Abraham quotes Justice Felix Frankfurter, who served as an Associate Justice on the U.S. Supreme Court from 1939 until retirement in 1962, who argued that justices should be selected “wholly on the basis of functional fitness”⁵² and that the justices “should be at once philosopher, historian and prophet”⁵³. To Frankfurter, it was not the number of years of judicial experience that made a jurist the best candidate for the Supreme Court, but it was rather that the jurists should be “thinkers, and more particularly, legal philosophers”⁵⁴ in the same way that Oliver Wendell Holmes and Benjamin Cardozo had been.

There are other aspects that are important in choosing a nominee for the Supreme Court. Abraham lists several common characteristics of Supreme Court Justices⁵⁵:

- Native-born
- White
- Male
- Predominantly protestant
- 50 to 55 years of age at the time of appointment
- First born
- Of Anglo-Saxon ethnicity

⁵⁰ Abraham, *Justices, Presidents and Senators*, page 55

⁵¹ Abraham, *Justices, Presidents and Senators*, page 55

⁵² Abraham, *Justices, Presidents and Senators*, page 44

⁵³ Abraham, *Justices, Presidents and Senators*, page 44

⁵⁴ Abraham, *Justices, Presidents and Senators*, page 44

⁵⁵ Abraham, *Justices, Presidents and Senators*, page 49

- Upper-Middle to Upper Class social status
- Bachelor of arts (B.A.) and Bachelor of laws (LL.B) or Juris Doctor (J.D.) degrees
- Service in public office
- From populous states

These are common characteristics regarding Supreme Court justices historically, but Abraham argues that today “a woman’s seat and a black seat are political certainties”⁵⁶ There is also a religious factor regarding the composition of the Supreme Court. Despite it being traditionally filled with predominantly people of Protestant faith, there is a notion that there should be a Jewish seat and a Catholic seat on the Supreme Court.⁵⁷

An important issue in this thesis is whether the decisions of the Justices are primarily motivated by the juridical considerations of each individual Justice or whether the decisions are motivated by political considerations. One cannot disregard the fact that the Justices of the U.S. Supreme Court have personal political opinions, and that these political opinions may or may not influence their positions when deciding cases in the Supreme Court. However, it is almost impossible to find out whether the Justices have let their own political opinions influence their decisions in the Supreme Court, but one cannot consider the Justices as being apolitical persons.

3.1 The appointment process for justices to the U.S. Supreme Court

Justices for the U.S. Supreme Court are nominated by the sitting president and are appointed to the U.S. Supreme Court subject to the approval of the Senate. Prior to being confirmed as Justices of the U.S. Supreme Court the nominees undergo hearings conducted by the Senate Judiciary Committee. In these hearings the nominees are subject to questioning by the members of the committee and they are either confirmed or rejected by the Senate with a simple majority vote.

⁵⁶ Abraham, *Justices, Presidents and Senators*, page 49

⁵⁷ Abraham, *Justices, Presidents and Senators*, page 50

In the paper “Supreme Court Appointment Process: Senate Debate and Confirmation Vote” by Barry J. McMillion, the author argues that because of the special importance of the U.S. Supreme Court “the Senate has tended to be less deferential to the President in his choice of Supreme Court Justices than in his appointment of persons to high executive branch positions.”⁵⁸ U.S Supreme Court Justices are members of the Court for life unless they retire and because of the length of time of their appointments and their important role in society, their appointment process is treated differently by the Senate than other appointment processes, i.e. executive positions. McMillion mentions different criteria used by Senators in order to evaluate the nominees, including professional qualifications, judicial philosophy, political ideology, the Justices’ Constitutional views, the views of interest groups and the criterion of diversity.⁵⁹ The different criteria do of course vary in importance among the Senators and also differ in importance with regards to the different nominees. The average number of days from nomination until Senate vote is 67⁶⁰, and McMillion argues that there is a link between the number of days from nomination until final vote and “the level of opposition a nominee has among Senators not belonging to the President’s party.”⁶¹

3.2 The role of the U.S. Supreme Court in American society

The U.S Supreme Court is the highest court in the United States and the Court concerns itself with “all cases and controversies arising under the Constitution or the laws of the United States.”⁶² The U.S. Supreme Court has the final say on matters regarding the U.S. Constitution and it has the authority to invalidate legislation that, in the Courts opinion, conflicts with the Constitution. This is the so-called power of *judicial review*. This power is one part of the *checks and balances* system between the *legislative*, *executive* and *judicial* branches of government, a system in which all branches of the government has powers to balance each other. The three branches were created as independent of each other, in order to

⁵⁸ Barry J. McMillion, “Supreme Court Appointment Process: Senate Debate and Confirmation Vote”, *Congressional Research Service Report R44234*, <https://www.fas.org/sgp/crs/misc/R44234.pdf>, accessed 28.03.2016

⁵⁹ Barry J. McMillion, “Supreme Court Appointment Process: Senate Debate and Confirmation Vote”

⁶⁰ Barry J. McMillion, “Supreme Court Appointment Process: Senate Debate and Confirmation Vote”

⁶¹ Barry J. McMillion, “Supreme Court Appointment Process: Senate Debate and Confirmation Vote”

⁶² Supreme Court of the United States, “The Court and Constitutional Interpretation”, <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

maintain a *separation of powers*. In the American system the legislative branch is the Congress, the executive branch is the President and the judicial branch is the U.S. Supreme Court.

Because of the U.S. Supreme Court's power in the system of *checks and balances*, it has played and continues to play an important role in American society. The U.S. Supreme Court is responsible for ensuring that legislation proposed by Congress does not conflict with the Constitution and it continues to have "a crucial responsibility in assuring individual rights, as well as in maintaining a "living Constitution" whose broad provisions are continually applied to complicated new situations.⁶³ The part of maintaining a "living Constitution" is very important because the Justices of the U.S. Supreme Court has to interpret the meaning and principles of a Constitution which came into force in 1789 and apply these meanings and principles to cases in the present. As the Constitution itself is written in very general terms, it is up to the Justices to interpret the "deeper meaning" behind the wording. As the Justices of the U.S. Supreme Court are human beings like everyone else it is of course impossible to think that every U.S. Supreme Court Justice ever would share the same interpretation of the Constitution. There are different theories of *judicial interpretation*, and in the history of the U.S. Supreme Court there have been conflicts over the different theories. I will elaborate more on the different theories later in the thesis.

The Founding Fathers were concerned with the U.S. Supreme Court's role in American society, and they stated the importance of *judicial review*. According to Alexander Hamilton, the Constitution represented the will of the people and he argued that the will of the people "would be supreme over the will of a legislature, whose statutes might express only the temporary will of part of the people."⁶⁴ The Constitution would continue to be superior to laws proposed by a legislature, because a legislature would not represent the will of all people but rather a part. James Madison, another important figure behind the Constitution, stressed that the interpretation of the Constitution must be left to independent judges in order to keep it away from political conflict. Madison argued that "if every constitutional question were to be

⁶³ Supreme Court of the United States, "The Court and Constitutional Interpretation", <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

⁶⁴ Supreme Court of the United States, "The Court and Constitutional Interpretation", <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

decided by public political bargaining the Constitution would be reduced to a battleground of competing factions, political passion and partisan spirit.⁶⁵

The role of the U.S. Supreme Court is different from supreme courts in other countries. Charles Evans Hughes, who was Chief Justice of the U.S. Supreme Court from 1930 until 1941, described the U.S Supreme Court as “distinctly American in concept and function”⁶⁶ and French political scientist Alexis de Tocqueville, who was a keen observer of the American political system in the first half of the 19th century, stated that no country had “organized a judicial power in the same manner as the Americans.”⁶⁷, and that “a more imposing judicial power was never constituted by any people.”⁶⁸ The U.S Constitution is the oldest constitution in force and the U.S. Supreme Court has protected and continues to protect it to this day.

3.3 A comparison of the U.S. Supreme Court and Supreme Courts in other countries

When comparing the U.S. Supreme Court to supreme courts in other countries, I choose to look at European countries. For example, the United Kingdom did not establish a supreme court until 2009. The UK Supreme Court was established

to achieve the complete separation of the United Kingdom's senior judges from the upper House of Parliament, emphasising the independence of the then Law Lords (now UKSC Justices) and increasing transparency at the top of the judicial system.⁶⁹

In contrast to the U.S. Supreme Court, the UK Supreme Court does not have the power to overrule legislation passed by the UK Parliament. Rather, the role of the UK Supreme Court is “to interpret the law and develop it where necessary, rather than formulate public policy.”⁷⁰ It is also important to note that the United Kingdom does not have a single

⁶⁵ Supreme Court of the United States, “The Court and Constitutional Interpretation”, <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

⁶⁶ Supreme Court of the United States, “The Court and Constitutional Interpretation”, <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

⁶⁷ Supreme Court of the United States, “The Court and Constitutional Interpretation”, <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

⁶⁸ Supreme Court of the United States, “The Court and Constitutional Interpretation”, <http://www.supremecourt.gov/about/constitutional.aspx>, accessed 28.03.2016

⁶⁹ The Supreme Court, “Frequently Asked Questions“, <https://www.supremecourt.uk/faqs.html#1>, accessed 28.03.2016

⁷⁰ The Supreme Court, “Frequently Asked Questions“, <https://www.supremecourt.uk/faqs.html#1>, accessed 28.03.2016

constitutional document, but rather a series of legislation and Acts of Parliament that makes up a “constitution”.

When comparing the Norwegian system to the American system, there are more similarities between the two than there are between the American and the British systems. For example, Norway has a constitution that states that the Norwegian Supreme Court (Høyesterett) has the final say in matters regarding the law and the Norwegian constitution.⁷¹ The Norwegian constitution also sets the number of members of the Supreme Court, which consists of a chief justice and at least four other justices.⁷² The constitution also states that the courts of Norway are responsible for finding out whether legislation passed and decisions made by the government does not conflict with the Norwegian constitution.

The UK Supreme Court and the Norwegian Supreme Court arguably does not have the same prominent role in society as the U.S Supreme Court has. The U.S. Supreme Court has a more important role politically and socially, contributing with a wide range of decisions from for example civil rights to abortion rights

⁷¹ Grunnloven, §88, *Kongeriket Norges Grunnlov*, §88, LOV-1814-05-17 https://lovdata.no/dokument/NL/lov/1814-05-17#KAPITTEL_4, accessed 30.03.2016

⁷² Grunnloven, §88, accessed 30.03.2016

4 The Supreme Court Database

The Supreme Court Database contains information on every U.S. Supreme Court case since 1791, but with more detailed information on cases since 1946. It was created and continues to be maintained by Professor Harold Spaeth of the Michigan State University College of Law. It has been used frequently by social scientists for research purposes and also by journalists⁷³

In my thesis I will use the database to find out how the different justices on the U.S. Supreme Court voted in different cases and try to find out if there are noticeable voting patterns for the different justices. The database also contains information on the ideological direction of the decision in each case decided since 1946, i.e. whether the case decision is considered *conservative* or *liberal*. It also contains information on each case based on category, for example whether the case is about criminal procedure, economic activity, civil rights and several other categories.

The database lists several criteria for categorizing a decision as either conservative or liberal, which is of great interest in my thesis. The decision direction in each case is of interest because it shows how the Supreme Court has developed over time with regards to decision direction, i.e. *liberal* or *conservative*. It is also interesting to look at whether there is a connection between the case category and the case decision. The criteria of the database for characterizing a decision as either *liberal* or *conservative* are as follows:

In order to determine whether an outcome is liberal (=2) or conservative (=1), the following scheme is employed.

1. In the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys, liberal (2)=

- pro-person accused or convicted of crime, or denied a jury trial
- pro-civil liberties or civil rights claimant, especially those exercising less protected civil rights (e.g., homosexuality)
- pro-child or juvenile
- pro-indigent
- pro-Indian
- pro-affirmative action

⁷³ The Supreme Court Database, "The Genesis of the Database", <http://supremecourtdatabase.org/about.php>, accessed 01.04.2016

- pro-neutrality in establishment clause cases
- pro-female in abortion
- pro-underdog
- anti-slavery
- incorporation of foreign territories
- anti-government in the context of due process, except for takings clause cases where a pro-government, anti-owner vote is considered liberal except in criminal forfeiture cases or those where the taking is pro-business
- violation of due process by exercising jurisdiction over nonresident
- pro-attorney or governmental official in non-liability cases
- pro-accountability and/or anti-corruption in campaign spending
- pro-privacy vis-a-vis the 1st Amendment where the privacy invaded is that of mental incompetents
- pro-disclosure in Freedom of Information Act issues except for employment and student records

conservative (1)=the reverse of above

2. In the context of issues pertaining to unions and economic activity, liberal (2)=

- pro-union except in union antitrust where liberal = pro-competition
- pro-government
- anti-business
- anti-employer
- pro-competition
- pro-injured person
- pro-indigent
- pro-small business vis-a-vis large business
- pro-state/anti-business in state tax cases
- pro-debtor
- pro-bankrupt
- pro-Indian
- pro-environmental protection
- pro-economic underdog
- pro-consumer
- pro-accountability in governmental corruption
- pro-original grantee, purchaser, or occupant in state and territorial land claims
- anti-union member or employee vis-a-vis union
- anti-union in union antitrust
- anti-union in union or closed shop

- pro-trial in arbitration

conservative (1)= reverse of above

3. In the context of issues pertaining to judicial power, liberal (2)=

- pro-exercise of judicial power
- pro-judicial "activism"
- pro-judicial review of administrative action

conservative (1)=reverse of above

4. In the context of issues pertaining to federalism, liberal (2)=

- pro-federal power
- pro-executive power in executive/congressional disputes
- anti-state

conservative (1)=reverse of above

5. In the context of issues pertaining to federal taxation, liberal (2)= pro-United States; conservative (1)= pro-taxpayer

6. In interstate relations and private law issues, unspecifiable (3) for all such cases.

7. In miscellaneous, incorporation of foreign territories and executive authority vis-a-vis congress or the states or judicial authority vis-a-vis state or federal legislative authority = (2); legislative veto = (1).⁷⁴

There is also a third value in addition to a liberal or conservative outcome, and that is referred to as “unspecifiable” and is defined where:

the issue does not lend itself to a liberal or conservative description (e.g., a boundary dispute between two states, real property, wills and estates), or because no convention exists as to which is the liberal side and which is the conservative side (e.g., the legislative veto). This variable will also contain

⁷⁴ The Supreme Court Database, “Online Code Book: Decision Direction”, <http://supremecourtdatabase.org/documentation.php?var=decisionDirection>, accessed 05.04.2016

"unspecifiable" where one state sues another under the original jurisdiction of the Supreme Court and where parties or issue cannot be determined because of a tied vote or lack of information.⁷⁵

The categorization of each decision as either a liberal decision or a conservative decision is of great interest in this thesis and is important because it helpful in deciding whether the U.S. Supreme Court at different times can be seen leaning in a conservative or liberal direction.

The direction of the decision in each case is of course labeled *liberal* or *conservative* after the decision has been made, and the direction of the decision is labeled by someone who is an outsider to the U.S. Supreme Court and has no influence on the decision. Thus, it would seem clear that the Justices of the U.S. Supreme Court do vote on cases in a way that characterizes them as either a liberal or conservative. They do not actively seek to be labeled one way or the other, but they rather vote according to their interpretation of the U.S. Constitution in relation to the judicial aspects of each individual case. Some of the models of judicial interpretation, i.e. textualism or originalism, can be seen as being either *liberal* or *conservative*, but the main point is that the Justices do not actively seek to be either *liberal* or *conservative* but rather they vote in each case according to their judicial interpretation. The way the Justices vote can then be characterized as either *liberal* or *conservative*.

In an article in *The New York Times* from July 2010 Adam Liptak argues that the Supreme Court under Chief Justice John G. Roberts is the "most conservative in decades."⁷⁶ The article was written at the end of Roberts' fifth term as Chief Justice and Liptak remarked that in the five years since Roberts was confirmed as Chief Justice "the court not only moved to the right but also became the most conservative one in living memory"⁷⁷. Among sources used, the Supreme Court Database is mentioned as one source. Liptak states that "scholars who look at overall trends rather than individual decisions say that widely accepted political science data tell an unmistakable story about a notably conservative court."⁷⁸ As the article was written in 2010, there has been large number of cases decided, and many important decisions made, by the U.S. Supreme Court since then. One could argue whether Liptak's

⁷⁵ The Supreme Court Database, "Online Code Book: Decision Direction", <http://supremecourtdatabase.org/documentation.php?var=decisionDirection>, accessed 05.04.2016

⁷⁶ Liptak, Adam. "Court Under Roberts Is Most Conservative In Decades." *New York Times*, July 24, 2010. <http://www.nytimes.com/2010/07/25/us/25roberts.html>, accessed 05.04.2016

⁷⁷ Liptak, "Court Under Roberts Is Most Conservative In Decades."

⁷⁸ Liptak, "Court Under Roberts Is Most Conservative In Decades."

arguments are still valid today, as the Supreme Court has for example guaranteed marriage for same-sex couples in the 2015 landmark case *Obergefell v. Hodges*.

As mentioned above, the Supreme Court Database lists the outcome of every single case decided by the Supreme Court since 1946. Every single case has equal weight in the statistics, and cases considered *landmark cases*, i.e. *Brown v. Board of Education* or *Miranda v Arizona*, are seen as equal to less prominent cases. In total, the Supreme Court has decided on 8662 cases from 1946 until 2014. 4359 of the total case decisions are labeled as *liberal* decisions and 4133 are labeled as *conservative* decisions. 170 are labeled with *no direction*. The number of *liberal* decisions and the number of *conservative* decisions are almost equal and when one looks at the whole period (1946-2014) percentage-wise the percentage of *liberal* decisions is 51% and consequently the percentage of *conservative* decisions is 49%. This means that the Supreme Court has made almost an equal amount of *liberal* and *conservative* decisions in a period of 68 years, albeit with a slightly higher number of *liberal* decisions. However, one must keep in mind that all cases are treated equally in the database. The percentages for *liberal* and *conservative* decisions are almost equal, but some cases may have more political and social impact than other cases.

The Supreme Court all cases

	All cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	8662	4359	4133	170	51	49
1946-04 (ex Roberts)	7865	3989	3716	160	52	48
2005-14 (Roberts all)	797	370	417	10	47	53
2005 (Roberts 1)	26	11	15	0	42	58
2005-08 (Roberts 2)	292	124	164	4	43	57
2009 (Roberts 3)	92	45	46	1	49	51
2010-14 (Roberts 4)	387	190	192	5	50	50
	Numbers					
Term	Issue Frequen	Criminal Proce	Economic Act	Civil Rights	Judicial Powe	First Amendm
1946-14	8607	1949	1678	1405	1186	667
1946-04 (ex Roberts)	7812	1721	1515	1272	1087	626
2005-14 (Roberts all)	795	228	163	133	99	41
2005 (Roberts 1)	26	7	2	3	6	1
2005-08 (Roberts 2)	292	88	58	52	45	14
2009 (Roberts 3)	92	33	20	10	11	5
2010-14 (Roberts 4)	385	100	83	68	37	21
	Per cent					
Term	Issue Frequen	Criminal Proce	Economic Act	Civil Rights	Judicial Powe	First Amendm
1946-14	100	23	19	16	14	8
1946-04 (ex Roberts)	100	22	19	16	14	8
2005-14 (Roberts all)	100	29	21	17	12	5
2005 (Roberts 1)	100	27	8	12	23	4
2005-08 (Roberts 2)	100	30	20	18	15	5
2009 (Roberts 3)	100	36	22	11	12	5
2010-14 (Roberts 4)	100	26	22	18	10	5

Table 1. The Supreme Court – all cases

When one looks at the total numbers *without* the numbers from the Roberts Court, there are a total number of 7865 cases. 3989 of these have decisions labeled as *liberal* and 3716 have decisions labeled as *conservative*. Percentage-wise this means that 52% of the decisions are *liberal* and 48% are *conservative*. This means that there is an increase of one percentage point in the amount of *liberal* decisions and consequently a decrease of one percentage point in the amount of *conservative* decisions. The total percentage of *liberal* decisions in the period is 51% and the percentage of *liberal* decisions without taking into account the Roberts Court decisions is 52%. Consequently, the percentages of *conservative* decisions are 49% and 48%, respectively. This means that the Roberts Court is more *conservative* than earlier Supreme Courts.

When one looks at the numbers and percentages for the Roberts Court isolated, there is an interesting development. Of all the 797 cases decided under Chief Justice John Roberts from 2005-2014, there are 370 cases with *liberal* decisions, 417 cases with *conservative* decisions and 10 cases labeled with *no direction*. The total number of *conservative* decisions is substantially larger than the number of *liberal* decisions. Percentage-wise this amounts to 47% *liberal* decisions and 53% *conservative* decisions. The numbers show that in terms of the total decisions made there has been a *conservative* shift in the Supreme Court under Chief Justice John Roberts, as Adam Liptak argued in the article mentioned above.

There have been changes in the composition of the Supreme Court since John Roberts became Chief Justice in 2005, and when one breaks down the period under the leadership of John Roberts there have been interesting developments. When Roberts became Chief Justice the other Justices of the Supreme Court were, in order of seniority: John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer. I will refer to this specific composition of the Court as *Roberts 1*. Until the retirement of Sandra Day O'Connor in 2006, Roberts 1 decided on 26 cases. Of these 26, 11 had *liberal* outcomes and 15 had *conservative* outcomes. This amounts to percentages of 42 percent *liberal* and 58 percent *conservative*. Although 26 cases is a very low number of cases compared to the total amount of cases decided by the Supreme Court since 1946, there clearly is a higher percentage of *conservative* decisions than *liberal* decisions under Roberts 1.

After O'Connor's retirement in 2006, she was replaced by Justice Samuel Alito, who is considered to be among the more conservative Justices on the Supreme Court.⁷⁹ With this exception, the composition of the Court remained unchanged until 2008. This composition will be referred to as Roberts 2. Of the 292 cases heard by this specific Supreme Court, 124 had a *liberal* outcome, 164 had a *conservative* outcome and 4 had *no direction*. The percentages were 43 percent *liberal* and 57 percent *conservative*. As the total number of cases is significantly higher under Roberts 2 than under Roberts 1, 292 compared to 26, it is arguably true that the Supreme Court during the first three years of John Roberts' tenure as Chief Justice was remarkably more conservative than earlier Supreme Courts. Because the number of cases is much higher during Roberts 2 than Roberts 1, and the percentages of

⁷⁹ Granick, Jennifer Stisa and Christopher John Sprigman. “The Criminal N.S.A.” *New York Times*, June 27, 2013. http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all&_r=2&, accessed 08.04.2016

conservative decisions are approximately the same for each composition of the Supreme Court there is a clear *conservative* incline for the Supreme Court in Roberts' early tenure.

In 2009 David Souter retired and Sonia Sotomayor, who is considered to be on the liberal bloc of the Supreme Court⁸⁰, replaced him. This composition of the court will be referred to as Roberts 3. As one can see from the statistics, there was a significant change with regards to the number of *liberal* and *conservative* decisions in 2009. Of the 92 cases heard, 45 had a *liberal* decision and 46 had a *conservative* decision. There was almost an equal amount of *liberal* and *conservative* decisions and the percentages were 49% *liberal* and 51% *conservative*. These numbers are drastically different than the numbers under Roberts 1 and Roberts 2.

The last change in the composition of the Supreme Court happened in 2010, when the long-serving Justice John Paul Stevens retired and was replaced by Elena Kagan. This composition of the Supreme Court, which continued until the death of Antonin Scalia in 2016, will be referred to as Roberts 4. From 2010 until 2014, the Supreme Court heard 387 cases. 190 of the cases had a *liberal* outcome, 192 had a *conservative* outcome and 5 had *no direction*. 50 percent of the decisions had a *liberal* outcome and 50 percent had a *conservative* outcome. The Supreme Court seemed to follow a trend that started during Roberts 3, where the number of *liberal* decisions increased and the number of *conservative* decisions subsequently decreased.

There are a number of reasons for why the Supreme Court decides on the cases the way they do. For example, it could depend on the different judicial interpretations of each Justice or it could depend on the type of case it decides on. In the following part I will look at the five most common case categories for the Supreme Court, based on the number of cases within each category.

⁸⁰ Liptak, Adam, "In Supreme Court Term, Striking Unity on Major Cases", *New York Times*, June 30, 2012, http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html?_r=1&hpw&pagewanted=all, accessed 08.04.2016

4.1 Criminal procedure

Criminal procedures – all cases

	Criminal Procedure				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	1949	853	1095	1	44	56
1946-04 (ex Roberts)	1721	753	967	1	44	56
2005-14 (Roberts all)	228	100	128	0	44	56
2005 (Roberts 1)	7	2	5	0	29	71
2005-08 (Roberts 2)	88	37	51	0	42	58
2009 (Roberts 3)	33	15	18	0	45	55
2010-14 (Roberts 4)	100	46	54	0	46	54

Table 2. Criminal procedures – all cases

Of the total number of cases heard by the Supreme Court in the period 1946-2015, the type of case heard the most frequently fell under the category “criminal procedure”. The Supreme Court Database defines this category as cases regarding “the rights of persons accused of crime, except for the due process rights of prisoners.”⁸¹ The total number of “criminal procedure” cases for the whole period is 1949, or approximately 23 percent. Under the Roberts Court from 2005-2014, the number of “criminal procedure” cases was 228 or approximately 29 percent. If one breaks down the numbers for each specific composition of the Supreme Court, the percentage of “criminal procedure” cases is 27% (Roberts 1), 30% (Roberts 2), 36 % (Roberts 3) and 26% (Roberts 4). “Criminal procedure” is the most frequent category for the Roberts Court as a whole and also for the separate courts.

If one looks at the outcomes of “criminal procedure” cases, there has been a historical trend towards *conservative* decisions. Of all the 1949 “criminal procedure” cases since 1946, 1095 or 56 % have had a *conservative* decision and 853 or 44% have had a *liberal* decision. The percentages for “criminal procedure” cases for the Roberts Court are exactly the same as the percentages for the whole period from 1946. Breaking it down into the separate compositions of the Roberts Court, the percentages of *conservative* decisions are as follows: 71% (Roberts 1), 58% (Roberts 2), 55% (Roberts 3) and 54 % (Roberts 4). As one can see from these numbers, there is a pattern of *conservative* decisions in cases regarding “criminal procedure”, and the Roberts Court is no different from earlier Supreme Courts in this aspect.

⁸¹ The Supreme Court Database, “Online Code Book: Issue”, <http://supremecourtdatabase.org/documentation.php?var=issue>, accessed 11.04.2016

It is interesting to note that the percentage of cases regarding “criminal procedure” is higher during John Roberts’ tenure as Chief Justice is higher than the whole period altogether, while at the same time the percentage of *conservative* decisions is higher under Roberts than the whole period. In addition, if one looks at the tendency that “criminal procedure” cases tend to have *conservative* outcomes, some part of the explanation for the *conservative* shift under Roberts could be the higher number of “criminal procedure” cases under Roberts. It is not possible to say whether this is the most important explanation is more *conservative* than earlier Supreme Courts. The U.S. Supreme Court is asked to hear a large number of cases every year, and chooses to hear only a small percentage of these cases. Usually, the Supreme Court chooses to hear a case if the “case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value.”⁸² It is thus highly unlikely that the Justices of the Supreme Court will choose which cases to hear based on the likely outcome of each case, in order to tilt the Supreme Court in either a *conservative* or *liberal* direction.

4.2 Economic activity

Economic activity – all cases

Term	Economic Activity				Mean ex no direction	
	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	1678	974	700	4	58	42
1946-04 (ex Roberts)	1515	905	606	4	60	40
2005-14 (Roberts all)	163	69	94	0	42	58
2005 (Roberts 1)	2	0	2	0	0	100
2005-08 (Roberts 2)	58	23	35	0	40	60
2009 (Roberts 3)	20	8	12	0	40	60
2010-14 (Roberts 4)	83	38	45	0	46	54

Table 3. Economic activity – all cases

The second most heard category is “economic activity”. The total number of cases in this category is 1678 or approximately 19 percent. The numbers for the Roberts Court is 163 cases or 21 percent. Breaking it down into the separate compositions, the numbers are: 2 cases or 8 percent (Roberts 1), 58 cases or 20 percent (Roberts 2), 20 cases or 22 percent (Roberts

⁸² Unites States Courts, “Supreme Court Procedures”, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>, accessed 12.04.2016

3) and 83 cases or 22 percent (Roberts 4). Regarding the direction of the cases, it is interesting to note that for the period from 1946-2014, 58 percent of the cases had a *liberal* outcome and 42 percent had a *conservative* outcome. This is almost the exact opposite of the percentages for “criminal procedure” for the whole period. The Supreme Court has leant in a decidedly *liberal* direction when it comes to the category of “economic activity”.

Looking at the total numbers without taking into account the number for the Roberts Court, the percentages are leaning even more in a *liberal* direction, with 60 percent *liberal* and 40 percent *conservative*. And when one looks at the percentages for the Roberts Court only, there is a clear contrast between the Roberts Court and earlier Supreme Courts. The percentages for the Roberts Court are the exact opposite of the percentages for the whole period, with 58 percent *conservative* and 42 percent *liberal*. For the separate courts, the percentages of *conservative* decisions are 100 percent (Roberts 1), 60 percent (Roberts 2), 60 percent (Roberts 3) and 54 percent (Roberts 4). As a whole, the Roberts Court clearly is more *conservative* when it comes to “economic activity” than earlier Supreme Courts.

The percentage of “economic activity” cases for the whole period is 19 and the percentage for the Roberts Court is 21, and so the percentages are quite similar.

4.3 Civil rights

Civil rights all cases

	Civil Rights				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	1405	792	613	0	56	44
1946-04 (ex Roberts)	1272	725	547	0	57	43
2005-14 (Roberts all)	133	67	66	0	50	50
2005 (Roberts 1)	3	0	3	0	0	100
2005-08 (Roberts 2)	52	26	26	0	50	50
2009 (Roberts 3)	10	7	3	0	70	30
2010-14 (Roberts 4)	68	34	34	0	50	50

Table 4. Civil rights – all cases

The third most common category heard is “civil rights” which includes

non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage.⁸³

The total number of “civil rights” cases for the whole period is 1405 or 16 percent. The Roberts Court has heard 133 cases in this category, or a percentage of 17. “Civil rights” cases have historically tended towards having a *liberal* outcome, with 56 percent *liberal* decisions and 44 percent *conservative* decisions for the whole period. For the Roberts Court alone, the percentages are 50 percent *liberal* and 50 *conservative*, so there is a slight trend towards *conservative* decision on the Roberts Court. Roberts 1 heard 3 cases in this category, all with a *conservative* decision. Roberts 2 heard 52 cases with a split of 50-50 *liberal* and *conservative* decisions. Roberts 3 heard 10 cases with 70 percent *liberal* decisions and 30 percent *conservative* decisions. In Roberts 4, the number of cases heard was 68 and the decisions were again split 50-50.

Overall there does not seem to be a heavy trend towards *conservative* decisions for the Roberts Court in this category. Looking at the percentages for this category without the numbers for the Roberts Court, and comparing it the percentages for period as a whole, there is only a change in one percentage point.

4.4 Judicial power

Judicial power all cases

	Judicial Power				Mean ex no direction		
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative	
1946-14	1186	422	763	1	36	64	
1946-04 (ex Roberts)	1087	379	708	0	35	65	
2005-14 (Roberts all)	99	43	55	1	44	56	
2005 (Roberts 1)	6	3	3	0	50	50	
2005-08 (Roberts 2)	45	18	27	0	40	60	
2009 (Roberts 3)	11	7	4	0	64	36	
2010-14 (Roberts 4)	37	15	21	0	41	57	

Table 5. Judicial power – all cases

⁸³ The Supreme Court Database, “Online Code Book: Issue”, <http://supremecourtdatabase.org/documentation.php?var=issue>, accessed 11.04.2016

“Judicial power” is the fourth most common category and this category concerns itself with “the exercise of the judiciary's own power.”⁸⁴ The number of cases falling under this category for the period from 1946-2014 is 1186, or 14 percent of all cases. For the Roberts Court, the number of cases in this category is 99 or 12 percent. Breaking down the numbers into the specific compositions of the court, the numbers are: 6 cases or 23 percent (Roberts 1), 45 cases or 15 percent (Roberts 2), 11 cases or 12 percent (Roberts 3) and 37 cases or 10 percent (Roberts 4).

When looking at the direction of the decisions in this category, there is a decidedly *conservative* trend. For the whole period 64 percent of the cases have had a *conservative* decision, and 36 percent have had a *liberal* outcome. For the Roberts Court only the percentages are 44 percent *liberal* and 56 percent *conservative*. The percentages for the Roberts Court are less decidedly *conservative*, but still they lean in a *conservative* direction. For the different compositions of the Supreme Court, the percentages vary. Under Roberts 1, only 6 cases were heard and the percentages were split 50-50. For Roberts 2, however, there was a larger amount of cases (45) in this category and the percentages were 60 percent *conservative* and 40 percent *liberal*. Of the only 11 cases decided during Roberts 3, the percentages were heavily in favor of the *liberal* side with 64 percent *liberal* and 36 percent *conservative*. Under Roberts 4, 37 cases were decided and 57 had a *conservative* outcome.

As all cases in the Supreme Court Database have the same weight as each other, there is no specific attention paid to important landmark cases. However, it seems that as the number of cases rises the percentages seem to lean in a *conservative* direction. This could of course be explained by the juridical aspects and case-specifics in each case heard in each of the periods. As it is not possible to go through every detail in every case, one cannot say with certainty what causes these shifts in the percentages for each period.

⁸⁴ The Supreme Court Database, “Online Code Book: Issue”, <http://supremecourtdatabase.org/documentation.php?var=issue>, accessed 11.04.2016

4.5 First amendment

First amendment all cases

Term	First Amendment				Mean ex no direction	
	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	667	369	298	0	55	45
1946-04 (ex Roberts)	626	353	273	0	56	44
2005-14 (Roberts all)	41	16	25	0	39	61
2005 (Roberts 1)	1	0	1	0	0	100
2005-08 (Roberts 2)	14	2	12	0	14	86
2009 (Roberts 3)	5	1	4	0	20	80
2010-14 (Roberts 4)	21	13	8	0	62	38

Table 6. First amendment – all cases

The last of the five most common categories is called “first amendment”. The First Amendment to the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁸⁵

Freedom of speech and freedom of religion are two of the most important aspects of the First Amendment. For the whole period, the Supreme Court has decided on 667 cases in this category, with 369 or 55 percent of the cases having a *liberal* direction and 298 or 45 percent having a *conservative* direction. The numbers for the Roberts Court only is 41 cases heard with the percentages being 39 percent *liberal* and 61 percent *conservative*. The percentages for the Roberts Court are strikingly different than the percentages for the period as a whole, and in this case category the Roberts Court is much more conservative than earlier Supreme Courts. For the first three periods under Chief Justice John Roberts, the percentages were heavily in favor of the *conservative* side with percentages of 100 percent (Roberts 1), 86 percent (Roberts 2) and 80 percent (Roberts 3). Although the total number of cases (only 20) in the first three periods in this category is small, the percentages of *conservative* decisions in the first three periods are very high. The percentages for Roberts 4 are quite different than the percentages for the first three periods. Roberts 4 heard 21 cases, and the percentages were 62 percent *liberal* and 38 percent *conservative*. In this period, the Supreme Court heard 21 cases

⁸⁵ U.S. Constitution, amendment I, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html, accessed 14.04.2016

in this category, albeit only accounting for 5 percent of the total number of cases in the period. This is the highest number of cases in a period under Chief Justice John Roberts, and the percentage of *liberal* decisions is much higher than in earlier periods. As mentioned earlier, it is difficult to point to one reason for Roberts 4 being more *liberal* than earlier compositions. Again, it could come down to specific aspects of each case, or perhaps the different compositions of the Supreme Court.

4.6 Case decisions

As there are nine Justices on the Supreme Court, there are only a limited number of ways that the Supreme Court can vote on cases. Cases are decided by a majority vote, i.e. five or more Justices vote together. In cases where there is an absence on the Supreme Court, the decision from the directly lower court is affirmed. In cases where there is a unanimous decision, all of the Justices vote together in a 9-0 decision. The opposite of a unanimous decision is a 5-4 decision, in which a case is decided by the smallest possible margin. The Supreme Court Database has information regarding the voting in each case since 1946. In my thesis, the most interesting voting types is 9-0 decisions and 5-4 decisions, as these types of decisions show where the Supreme Court Justices are in most agreement and most disagreement in each case.

4.7 9-0 decisions

	9-0 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	2499	1416	1026	57	58	42
1946-04 (ex Roberts)	2185	1265	867	53	59	41
2005-14 (Roberts all)	314	151	159	4	49	51
2005 (Roberts 1)	17	7	10	0	41	59
2005-08 (Roberts 2)	99	48	48	3	50	50
2009 (Roberts 3)	38	21	17	0	55	45
2010-14 (Roberts 4)	160	75	84	1	47	53

Table 7. 9-0 decisions

Of all cases heard by the Supreme Court since 1946, 2499 cases or approximately 29 percent have been decided with a 9-0 vote. For the Roberts Court, the corresponding numbers are 314 cases or 39 percent. Percentage-wise the Roberts Court has been more in agreement than

earlier courts. For the specific compositions of the Roberts Court, the 9-0 percentages are 65 percent (17 cases) for Roberts 1, 34 percent (99 cases) for Roberts 2, 41 percent (38 cases) for Roberts 3 and 42 percent (160 cases) for Roberts 4. The percentages for 9-0 decisions is higher for both the Roberts Court as a whole and also for the specific compositions of the Roberts Court compared to earlier Supreme Courts.

Of the 2499 cases that have been decided in a 9-0 manner by the Supreme Court, 1416 have had a *liberal* outcome and 1026 have had a *conservative* outcome. 57 cases have been labelled *no decision*. The 9-0 cases have thus historically trended towards a decidedly *liberal* outcome. For the Roberts Court however, there have been trends towards *conservative* outcomes. Of the 314 cases that have been decided 9-0 by the Roberts Court, the percentages are very even, with 51-49 in favor of *conservative* decisions. Although the percentages are very even for the Roberts Court, they are quite different compared to the percentages for the earlier Supreme Courts. In only one of the compositions of the Roberts Court have the percentage of *liberal* 9-0 decisions been higher than the percentage of 9-0 *conservative* decisions, namely Roberts 4, where the percentages were 55-45 in favor of *liberal* decisions. Not only has the Roberts Court a higher percentage of 9-0 decisions, meaning that the justice are more in agreement, In addition, the percentage of 9-0 *conservative* decisions is higher than previous Supreme Courts. If both the percentage of 9-0 decisions is higher than previously, and the percentage of *conservative* 9-0 decisions is higher than previously, it can be argued that the Roberts Court is more uniformly *conservative* than previous Supreme Courts.

4.8 Criminal procedures 9-0 decisions

Criminal procedures 9-0

	Criminal Procedure					
	9-0 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	462	253	209	0	55	45
1946-04 (ex Roberts)	380	221	159	0	58	42
2005-14 (Roberts all)	82	32	50	0	39	61
2005 (Roberts 1)	6	2	4	0	33	67
2005-08 (Roberts 2)	23	11	12	0	48	52
2009 (Roberts 3)	12	5	7	0	42	58
2010-14 (Roberts 4)	41	14	27	0	34	66

Table 8. Criminal procedures 9-0

For the whole period since 1946, 462 of 1949 “criminal procedure” cases have been decided 9-0, which is a percentage of approximately 24 percent. Of these 462 there have been 253 cases with a *liberal* direction and 209 cases with a *conservative* direction. The percentages are 55-45 in favor of *liberal* decisions. For the Roberts Court, the numbers are strikingly different. 82 cases in this category have been decided in a 9-0 manner, and the percentages are heavily trending towards *conservative* decisions. 61 percent of the cases have had a *conservative* decision, and 39 have had a *liberal* decision. There has not been a single period on the Roberts Court where there have been more *liberal* decisions than *conservative* decisions. As noted earlier, the Roberts Court has the same percentages for *liberal* and *conservative* decisions in this case category as previous Supreme Courts. However, and they have been more uniformly *conservative* in this category, with a higher percentage of 9-0 *conservative* decisions than previous Supreme Courts. Although the total number of 9-0 decisions is lower under Roberts, the percentage is higher and the percentage of *conservative* decisions is also higher.

4.9 Economic activity 9-0 decisions

Economic activity 9-0

	Economic Activity					
	9-0 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	497	309	188	0	62	38
1946-04 (ex Roberts)	426	271	155	0	64	36
2005-14 (Roberts all)	71	38	33	0	54	46
2005 (Roberts 1)	1	0	1	0	0	100
2005-08 (Roberts 2)	21	12	9	0	57	43
2009 (Roberts 3)	8	5	3	0	63	38
2010-14 (Roberts 4)	41	21	20	0	51	49

Table 9. Economic activity 9-0

497 of 1698 cases in this category have been decided with a 9-0 decision from 1946-2014, which amounts to a percentage of approximately 30 percent. For the Roberts Court alone, there have been 71 9-0 decisions in this category from a total of 163 cases, with a percentage of approximately 45 percent. The typical decision direction in 9-0 decisions in this category for the whole period is *liberal* with 62 percent of the decisions being *liberal* and 38 percent being *conservative*. For the Roberts Court, the majority of the decisions are also *liberal*, with 54 percent *liberal* and 46 percent *conservative*. However, the percentage of *conservative* 9-0 decisions is higher under Roberts, and in this respect one could argue that the Roberts Court has been more *conservative* than previous Supreme Courts.

4.10 Civil rights 9-0 decisions

Civil rights 9-0

	Civil Rights 9-0 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	402	272	130	0	68	32
1946-04 (ex Roberts)	355	251	104	0	71	29
2005-14 (Roberts all)	47	21	26	0	45	55
2005 (Roberts 1)	1	0	1	0	0	100
2005-08 (Roberts 2)	16	8	8	0	50	50
2009 (Roberts 3)	7	4	3	0	57	43
2010-14 (Roberts 4)	23	9	14	0	39	61

Table 10. Civil rights 9-0

402 of 1405 cases, or a percentage of approximately 29 percent, in this category have been decided in a 9-0 manner in the period from 1946 to 2014. For the Roberts Court, the number of cases is 47 of 133, or a percentage of approximately 35 percent. With regards to the decision directions, there is a decidedly *liberal* trend for this case category. 68 percent of the decisions have been *liberal* and 32 percent have been *conservative*. For the Roberts Court, the percentages are quite different. For the 47 cases decided 9-0 in this category under Roberts, the percentages are 45 percent *liberal* and 55 percent *conservative*. The change in the percentages is a significant amount. In addition, there is only one specific composition of the Roberts Court, namely Roberts 3, where the percentage of *liberal* decisions is higher than the percentage of *conservative* decisions. In 9-0 decisions in this case category, the Supreme Court under Roberts has been decidedly more *conservative* than earlier Supreme Courts.

4.11 Judicial power 9-0 decisions

Judicial power 9-0

	Judicial Power					
	9-0 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	484	181	302	1	37	63
1946-04 (ex Roberts)	435	157	278	0	36	64
2005-14 (Roberts all)	49	24	24	1	50	50
2005 (Roberts 1)	4	2	2	0	50	50
2005-08 (Roberts 2)	21	8	13	0	38	62
2009 (Roberts 3)	6	4	2	0	67	33
2010-14 (Roberts 4)	18	10	7	0	56	39

Table 11. Judicial power 9-0

For the period from 1946-2014 484 of 1186 cases, or a percentage of approximately 41 percent, have been decided in a 9-0 manner. For the Roberts Court, the number of 9-0 cases in this category is 49 of 99, or approximately 50 percent. Cases in this category that have been decided 9-0 tend to have a *conservative* outcome, with 63 percent of the decisions in the period from 1946-2014 having a *conservative* decisions. For the Roberts Court, the percentages are exactly 50-50. This means that the Roberts Court actually has decided cases in this category in a 9-0 manner, with a higher percentage than earlier Supreme Courts and they have also a higher percentage of *liberal* 9-0 decisions.

4.12 First amendment 9-0 decisions

First amendment 9-0

	First Amendment					
	9-0 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	125	88	37	0	70	30
1946-04 (ex Roberts)	114	85	29	0	75	25
2005-14 (Roberts all)	11	3	8	0	27	73
2005 (Roberts 1)	1	0	1	0	0	100
2005-08 (Roberts 2)	3	0	3	0	0	100
2009 (Roberts 3)	0	0	0	0	0	0
2010-14 (Roberts 4)	7	3	4	0	43	57

Table 12. First amendment 9-0

For the whole period from 1946-2014, 125 of 667 cases in this category have been decided in a 9-0 manner. This amounts to a percentage of approximately 19 percent. For the Roberts Court, the number of cases decided in a 9-0 manner is 11 of 41, or a percentage of approximately 27 percent. Historically there has been a trend toward *liberal* decisions in 9-0 decisions in this category, with 70 percent of the decisions being *liberal* and 30 percent being *conservative*. The Roberts Court, however, has been overwhelmingly *conservative* in 9-0 decisions in this category. Although the number of 9-0 decisions is small, the percentages are 73 percent *conservative* and 27 percent *liberal*. If one looks at the percentage of 9-0 decisions in this category under Roberts and the percentage of *conservative* decisions, the Roberts Court has arguably been both more in agreement and more *conservative* than earlier Supreme Courts.

4.13 5-4 decisions

All cases 5-4

	5-4 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	1295	537	752	6	42	58
1946-04 (ex Roberts)	1128	468	656	4	42	58
2005-14 (Roberts all)	167	69	96	2	42	58
2005 (Roberts 1)	2	1	1	0	50	50
2005-08 (Roberts 2)	68	22	46	0	32	68
2009 (Roberts 3)	16	6	9	1	40	60
2010-14 (Roberts 4)	80	40	40	0	50	50

Table 13. All cases 5-4

At the other end of the scale from 9-0 decisions are 5-4 decisions. 5-4 decisions are decided with the smallest possible margin, and these decisions are where the Justices of the Supreme Court disagree with each other the most. More often than not, the Justices who are considered *liberal* vote together and the Justices who are considered *conservative* vote together. If there are 4 Justices in each of these groups, the deciding vote is the swing vote. In 5-4 cases, the swing vote is crucial to the outcome of the case and as the name implies the swing vote votes with the majority, regardless of whether there is *liberal* majority or a *conservative* majority. Under Roberts, the swing vote is by many considered to be Justice Anthony Kennedy^{86 87}. As with the 9-0 decisions in the five most common categories mentioned above, I will analyze the numbers for 5-4 decisions. Looking at the numbers for 5-4 decisions for the whole period from 1946-2014, the percentage for 5-4 decisions is approximately 15 percent. There seems to be a trend toward *conservative* decisions. 58 percent of the decisions have been *conservative* and 42 have been *liberal*. For the Roberts Court, the percentage of cases being decided 5-4 is approximately 21 percent. The percentages for *liberal* and *conservative* decisions are exactly the same as for the period as a whole, albeit with a smaller number of cases.

⁸⁶ Bravin, Jess, "Court Conservatives Prevail", *Wall Street Journal*, June 28, 2011, <http://www.wsj.com/articles/SB10001424052702303627104576410051761796150>, accessed 16.04.2016

⁸⁷ Liptak, Adam, "Roberts Court Shifts Right, Tipped by Kennedy", *New York Times*, June 30, 2009, <http://www.nytimes.com/2009/07/01/us/01scotus.html?pagewanted=1&r=0>, accessed 16.04.2016

4.14 Criminal procedure 5-4 decisions

Criminal procedures 5-4

	Criminal Procedure 5-4 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	402	163	239	0	41	59
1946-04 (ex Roberts)	344	133	211	0	39	61
2005-14 (Roberts all)	58	30	28	0	52	48
2005 (Roberts 1)	1	0	1	0	0	100
2005-08 (Roberts 2)	26	11	15	0	42	58
2009 (Roberts 3)	5	2	3	0	40	60
2010-14 (Roberts 4)	26	17	9	0	65	35

Table 14. Criminal procedures 5-4

The number of 5-4 cases in the category “criminal procedure” for the period from 1946-2014 is 195 from a total number of 1678 cases. This amounts to a percentage of approximately 12 percent. For the Roberts Court only, the number of 5-4 cases is 18 from a total of 163 or a percentage of 11 percent. The typical decision direction in 5-4 cases in this category is *conservative* with 57 percent of the cases from 1946-2014 decided in a 5-4 manner having a *conservative* outcome. For the Roberts Court the percentage of *conservative* decisions is even higher, with 72 percent of the 5-4 decisions in this category being *conservative*. As is the case with 9-0 decisions, the Roberts Court could be considered more *conservative* than earlier Supreme Courts. The percentage of *conservative* decisions is higher under Roberts, both in 9-0 decisions and 5-4 decisions.

4.15 Economic activity 5-4 decisions

Economic activity 5-4

	Economic Activity					
	5-4 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	195	83	112	0	43	57
1946-04 (ex Roberts)	177	78	99	0	44	56
2005-14 (Roberts all)	18	5	13	0	28	72
2005 (Roberts 1)	0	0	1	0	0	0
2005-08 (Roberts 2)	10	2	7	0	20	70
2009 (Roberts 3)	0	0	0	0	0	0
2010-14 (Roberts 4)	8	3	5	0	38	63

Table 15. Economic activity 5-4

Cases decided in a 5-4 manner in this category do have a trend towards *conservative* decisions. In the period from 1946 to 2014, there were 112 cases of 195 having a *conservative* decision and 83 having a *liberal* decision. This amounts to percentages of 57 percent *conservative* and 43 percent *liberal* for the whole period. For the Roberts Court, the percentages are even more heavily in favor of *conservative* decisions with 72 percent of the decisions being *conservative*. It is important to keep in mind that the number of 5-4 cases in this category under Roberts is only 18, but there seems to be a trend towards *conservative* decisions. Comparing 9-0 decisions in this category to 5-4 decisions for both the period as a whole and under Roberts, there seems to be a *liberal* trend in 9-0 decisions and a *conservative* trend in 5-4 decisions.

4.16 Civil rights 5-4 decisions

Civil rights 5-4

	Civil Rights					
	5-4 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	211	96	115	0	45	55
1946-04 (ex Roberts)	181	82	99	0	45	55
2005-14 (Roberts all)	30	14	16	0	47	53
2005 (Roberts 1)	0	0	1	0	0	0
2005-08 (Roberts 2)	12	3	8	0	25	67
2009 (Roberts 3)	0	0	0	0	0	0
2010-14 (Roberts 4)	18	11	7	0	61	39

Table 16. Civil rights 5-4

Of the 211 cases with a 5-4 decision in this category for the whole period, there have been 115 cases with a *conservative* decision and 96 with a *liberal* decision. This amounts to percentages of 55 percent *conservative* and 45 percent *liberal*. It is interesting to note that cases with a 5-4 decision under Roberts have a higher percentage of *liberal* decisions compared to earlier Supreme Courts. There is still a higher percentage of *conservative* decisions than *liberal* decisions under Roberts, but the percentages are 53 percent *conservative* and 47 percent *liberal*. Cases with 9-0 decisions in this category have historically trended towards *liberal* decisions, and cases with 5-4 decisions have trended towards *conservative* decisions. However, under Roberts both cases with 9-0 decisions and cases with 5-4 decisions have a higher percentage of *conservative* decisions than *liberal* decisions.

4.17 Judicial power 5-4 decisions

Judicial power 5-4

	Judicial Power					
	5-4 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	121	51	70	0	42	58
1946-04 (ex Roberts)	99	43	56	0	43	57
2005-14 (Roberts all)	22	8	14	0	36	64
2005 (Roberts 1)	0	0	0	0	0	0
2005-08 (Roberts 2)	10	4	6	0	40	60
2009 (Roberts 3)	4	3	1	0	0	0
2010-14 (Roberts 4)	8	1	7	0	13	88

Table 17. Judicial power 5-4

121 of a total of 1186 cases in this category have been decided in 5-4 a manner for the whole period from 1946-2016. This amounts to a percentage of approximately 10 percent. The percentage of *liberal* and *conservative* 5-4 decisions for the whole period is 58 percent *conservative* and 42 percent *liberal*. For the Roberts Court, 22 of 99 cases, or a percentage of approximately 22 percent, in this category have been decided in a 5-4 manner. The percentages for the Roberts Court are 36 percent *liberal* and 64 percent *conservative*. As one can see from these numbers, both the percentage of 5-4 decisions and the percentage of *conservative* decisions are higher for the Roberts Court compared to earlier Supreme Courts.

4.18 First amendment 5-4 decisions

First amendment 5-4

	First Amendment					
	5-4 cases				Mean	
Term	Cases	Liberal	Conservative	No direction	Liberal	Conservative
1946-14	158	61	97	0	39	61
1946-04 (ex Roberts)	144	57	87	0	40	60
2005-14 (Roberts all)	14	4	10	0	29	71
2005 (Roberts 1)	0	0	0	0	0	0
2005-08 (Roberts 2)	4	1	3	0	25	75
2009 (Roberts 3)	3	0	3	0	0	0
2010-14 (Roberts 4)	7	3	4	0	43	57

Table 18. First amendment 5-4

For the whole period from 1946-2014, there have been 158 cases decided in a 5-4 manner in this category, from a total of 667. This amounts to a percentage of approximately 24 percent. The cases have trended towards having *conservative* decisions, with 61 percent of the decisions being *conservative* and 31 being *liberal*. For the Roberts Court, there have been 14 from a possible number of 41 cases decided in a 5-4 manner. This amounts to a percentage of approximately 34 percent. The 5-4 cases have, as we have seen, historically trended towards *conservative* decisions. The Roberts Court is arguably even more *conservative* than earlier Supreme Courts. In 5-4 cases in this category, the percentages are 71 percent *conservative* and 29 percent *liberal*. Even though the number of cases decided 5-4 in this category is much smaller under Roberts, the percentage of *conservative* decisions is higher.

4.19 Conclusion

The question asked at the beginning of this chapter was whether the Roberts Court has been more conservative than earlier Supreme Courts. In a *New York Times* article from 2010, Adam Liptak argued that the Roberts Court has become “the most conservative one in living memory.”⁸⁸ By using statistics provided by the Supreme Court Database, I have tried to find out whether Liptak’s argument is valid.

What I have found out from the statistics is that:

⁸⁸ Liptak, Adam, “Court Under Roberts Is Most Conservative in Decades”, *New York Times*, July 24, 2010, <http://www.nytimes.com/2010/07/25/us/25roberts.html>, accessed 18.04.2016

- The percentage of *liberal* and *conservative* decisions for the period from 1946-2014 are 51 percent *liberal* and 49 percent *conservative*
- The percentages of *liberal* and *conservative* decisions for the Roberts Court from 2005-2014 are 47 percent *liberal* and 53 percent *conservative*.
- For Roberts 1 the percentages are 42 percent *liberal* and 58 percent *conservative*.
- For Roberts 2 the percentages are 43 percent *liberal* and 57 percent *conservative*.
- For Roberts 3 the percentages are 49 percent *liberal* and 51 percent *conservative*.
- For Roberts 4 the percentages are 50 percent *liberal* and 50 percent *conservative*.
- For criminal procedure cases for the whole period the percentages are 44 percent *liberal* and 56 percent *conservative*.
- For the Roberts Court, the percentages for criminal procedure cases are 44 percent *liberal* and 56 percent *conservative*.
- For economic activity cases for the whole period the percentages are 58 percent *liberal* and 42 percent *conservative*.
- For the Roberts Court, the percentages for economic activity cases are 42 percent *liberal* and 58 percent *conservative*.
- For civil rights cases for the whole period, the percentages are 56 percent *liberal* and 44 percent *conservative*.
- For the Roberts Court, the percentages for civil rights cases are 50 percent *liberal* and 50 percent *conservative*.
- For judicial power cases for the whole period, the percentages are 36 percent *liberal* and 64 percent *conservative*.
- For the Roberts Court, the percentages for judicial power cases are 44 percent *liberal* and 56 percent *conservative*.
- For first amendment cases for the whole period, the percentages are 55 percent *liberal* and 45 percent *conservative*.
- For the Roberts Court, the percentages for first amendment cases are 39 percent *liberal* and 61 percent *conservative*.

As we can see from the numbers, the Roberts Court has been more *conservative* than earlier Supreme Courts, as the percentage of *conservative* decisions under the Roberts Court is higher than earlier Supreme Courts. However, the percentage of *liberal* decisions under

Roberts has risen over time and under Roberts 4 there is an equal percentage of 50 percent *liberal* and 50 percent *conservative*. For four of the five most common categories, the percentage of *conservative* decisions is higher or equal than under previous Supreme Courts. It is only in the category “judicial power” that the percentage of *conservative* decisions is lower under Roberts compared to earlier Supreme Courts. If the percentage of *conservative* decisions is higher for the Roberts Court as a whole and the percentage of *conservative* decisions is higher for four out of five of the most common categories, one could argue that the Roberts Court has been more *conservative* than earlier Supreme Courts.

With regards to the type of decision, i.e. whether the case is decided in a 9-0 manner or a 5-4 manner the main points are as follows:

- The percentage of cases being decided 9-0 for the whole period is 29 percent.
- The percentages for *conservative* and *liberal* decisions in 9-0 cases for the whole period are 58 percent *liberal* and 42 percent *conservative*.
- For the Roberts Court, the percentage of cases being decided 9-0 is 39 percent.
- The percentages for *conservative* and *liberal* directions in 9-0 cases under Roberts are 49 percent *liberal* and 51 percent *conservative*.
- For criminal procedure cases being decided in 9-0 for the whole period, the percentages are 55 percent *liberal* and 45 percent *conservative*.
- For the Roberts Court, the percentages for criminal procedure 9-0 cases 39 percent *liberal* and 61 percent *conservative*.
- For economic activity cases being decided 9-0 for the whole period, the percentages are 62 percent *liberal* and 38 percent *conservative*.
- For the Roberts Court, the percentages for economic activity 9-0 cases are 54 percent *liberal* and 46 percent *conservative*.
- For civil rights cases being decided 9-0 for the whole period, the percentages are 68 percent *liberal* and 32 percent *conservative*.
- For the Roberts Court, the percentages for civil rights 9-0 cases are 45 percent *liberal* and 55 percent *conservative*.
- For judicial power cases being decided 9-0 for the whole period, the percentages are 37 percent *liberal* and 63 percent *conservative*.
- For the Roberts Court, the percentages for judicial power 9-0 cases are 50 percent *liberal* and 50 percent *conservative*.

- For first amendment cases being decided 9-0 for the whole period, the percentages are 70 percent *liberal* and 30 percent *conservative*.
- For the Roberts Court, the percentages for first amendment 9-0 cases are 27 percent *liberal* and 73 percent *conservative*.

From these numbers, one can tell that the percentage of 9-0 decisions is higher under Roberts than under previous Supreme Courts, with a percentage of 39 percent under Roberts and 29 percent for the period as a whole. A 9-0 decision means that all Justices of the Supreme Court vote together, and one could argue that these cases are cases where they are most in agreement with each other. When looking at the typical direction of the 9-0 decisions, one finds that the percentage of *conservative* decisions is higher under Roberts than under previous Supreme Courts. For the five most common categories, the percentage of *conservative* decisions is higher in all with the exception of judicial power cases. The percentage of 9-0 decisions is higher under Roberts than under previous Supreme Courts and the percentage of *conservative* decisions in 9-0 cases is also higher under Roberts. One could argue that the Roberts Court has been both more in agreement and more *conservative* than previous Supreme Courts

For 5-4 decisions, the main points are:

- The percentage of 5-4 decisions for the period as whole is 15 percent.
- The percentages for *liberal* and *conservative* decisions in 5-4 cases for the period as a whole are 42 percent *liberal* and 58 percent *conservative*.
- The percentage of 5-4 decisions for the Roberts Court is 21 percent.
- The percentages for *liberal* and *conservative* decisions in 5-4 cases for the Roberts Court are 42 percent *liberal* and 58 percent *conservative*.
- For criminal procedure cases being decided 5-4 for the whole period, the percentages are 41 percent *liberal* and 59 percent *conservative*.
- For the Roberts Court, the percentages for criminal procedure 5-4 cases are 52 percent *liberal* and 48 percent *conservative*.
- For economic activity cases being decided 5-4 for the whole period, the percentages are 43 percent *liberal* and 57 percent *conservative*.
- For the Roberts Court, the percentages for economic activity 5-4 cases are 28 percent *liberal* and 72 percent *conservative*.

- For civil rights cases being decided 5-4 for the whole period, the percentages are 45 percent *liberal* and 55 percent *conservative*.
- For the Roberts Court, the percentages for civil rights 5-4 cases are 47 percent *liberal* and 53 percent *conservative*.
- For judicial power cases being decided 5-4 for the whole period, the percentages are 42 percent *liberal* and 58 percent *conservative*.
- For the Roberts Court, the percentages for judicial powers 5-4 cases are 36 percent *liberal* and 64 percent *conservative*.
- For first amendment cases being decided 5-4 for the whole period, the percentages are 39 percent *liberal* and 61 percent *conservative*.
- For the Roberts Court, the percentages for first amendment 5-4 cases are 29 percent *liberal* and 71 percent *conservative*.

As we can see from these numbers, the percentage of 5-4 decisions is higher under Roberts than for the period as a whole. If cases with 5-4 decisions are the cases where the Justices of the Supreme Court most disagree with each other, one could argue that the Roberts Court has been less in agreement. The percentages of *liberal* and *conservative* decisions in 5-4 cases are exactly the same under Roberts as for the period as a whole. For three of the most common categories, the percentage of *conservative* decisions in 5-4 cases is higher under Roberts than previous Supreme Court and in two categories the percentage of *conservative* decisions is smaller.

One could say from looking at the numbers that the Roberts Court is both more in agreement and more in disagreement than previous Supreme Courts. A total of 60 percent of the Supreme Court's decisions under Roberts has been either 9-0 decisions or 5-4 decisions. In cases where the decision has been 9-0, the Roberts Court has been more *conservative* than earlier Supreme Courts, and one could argue that it has been more uniformly *conservative*. For 5-4 decisions, the percentages for *liberal* and *conservative* decisions are exactly the same. In 5-4 decisions, the swing vote is often the deciding vote. As mentioned earlier, the swing vote under Roberts has most often been Justice Anthony Kennedy, and this means that Kennedy has most often sided with the *conservative* bloc on the Supreme Court.

By looking at the statistics, one could argue that the Supreme Court under Roberts has been more conservative than earlier Supreme Courts. These statistics, however, is just one way of finding out the developments of the Supreme Court. It is also of great importance to

look at the developments of each justice under Roberts with regards to his or her voting records. In later chapters, I will analyze developments on the Supreme Court under Roberts and try to find out how the individual justices have developed ideologically over time.

5 The Roberts Court: Ideological developments among the justices

In this chapter I will look the ideological developments for the individual justices and try to find out whether the Supreme Court become more partisan, that is, have the liberal members of the court become more rigidly liberal and have the conservative members become more rigidly conservative?

For example if one looks at how the judges voted in important cases for the Supreme Court in the 2014-2015 term it becomes clear that there is a group of liberal justices and a group of conservative justices that more often than not share the same opinions and votes together.⁸⁹ In a list of 13 key cases listed by Washington Post one sees that justices Breyer, Sotomayor, Kagan and Ginsburg voted together in all of these cases. In eight of these cases, the so-called swing vote of Justice Anthony Kennedy voted with the liberal side and in the other five cases he voted with the conservative side. In eight of the cases the conservative wing of justices Alito, Thomas and Scalia voted together. Chief Justice John G. Roberts voted with the conservative wing in eight of the 13 cases, but also voted with the liberal wings in three cases. The chief justice, in spite of being considered the most senior member of the Supreme Court, does not have the authority to overrule the verdicts of the other justices.

⁸⁹ Barnes, Robert and Park, Katie, "How the Supreme Court voted in 13 key cases", *Washington Post*, June 30, 2015, <http://www.washingtonpost.com/graphics/politics/scotus-key-decisions-2015/>, accessed 21.09.2015

5.1 U.S. Supreme Court justices who have served under Roberts, listed by seniority:

John Paul Stevens

John Paul Stevens was nominated by President Gerald Ford in 1975 and was confirmed by the Senate in a 98-0 vote. Stevens served until his retirement in 2010.

Sandra Day O'Connor

Sandra Day O'Connor was nominated by President Ronald Reagan in 1981 and was confirmed by the Senate in a 99-0 vote. She served until her retirement in 2006

Antonin Scalia

Antonin Scalia was nominated by President Ronald Reagan in 1986 and was confirmed by the Senate in a 98-0 vote. He served until his death in February 2016.

Anthony Kennedy

Anthony Kennedy was nominated by President Ronald Reagan in 1987 and was confirmed by the Senate in a 97-0 vote.

David Souter

David Souter was nominated by President George H.W. Bush in 1991 and was confirmed by the Senate in a 90-9 vote. He served until his retirement in 2009.

Clarence Thomas

Clarence Thomas was nominated by President George H.W. Bush in 1993 and was confirmed by the Senate in a 52-48 vote.

Stephen Breyer

Stephen Breyer was nominated by President Bill Clinton in 1994 and was confirmed by the Senate in an 87-9 vote.

Samuel Alito

Samuel Alito was nominated by President George W. Bush in 2006 and was confirmed by the Senate in a 58-42 vote.

Sonia Sotomayor

Sonia Sotomayor was nominated by President Barack Obama in 2009 and was confirmed by the Senate in a 68-31 vote.

Elena Kagan

Elena Kagan was nominated by President Barack Obama in 2010 and was confirmed by the Senate in a 63-37 vote.

As we can see from the voting records in the confirmation processes for the Supreme Court Justices, there has been an increase in the number of votes opposing the confirmation of Justices. All of the three first Justices mentioned were confirmed virtually unanimously and did not receive any votes opposing them. The confirmation processes for Clarence Thomas and Samuel Alito ended with them being confirmed with small margins. In Clarence Thomas' case, the confirmation hearings were exceptionally intense, much owing to a sexual harassment claim by a former colleague. Adam Liptak of the New York Times stated in a 2014 article that with: "the exception of Justice Clarence Thomas, the five most senior members of the current court were confirmed easily, receiving an average of three negative votes. The four more recent nominees received an average of 33."⁹⁰

The candidates for the Supreme Court are under more intense scrutiny than was usual earlier. Hearings are conducted by the Senate Judiciary Committee, which has been led by Republican Senator Chuck Grassley since 2015.

Liptak also states that among the Justices, "there is no Democratic appointee on the Supreme Court who is more conservative than any Republican appointee."⁹¹ Republican presidents routinely nominate conservative Justices and Democratic presidents nominate liberal Justices. Liptak points out that earlier Republican presidents nominated liberal candidates including Chief Justice Earl Warren, who was nominated by president Dwight Eisenhower in 1953. The last conservative candidate nominated by a Democratic president was Byron White, nominated by president John F. Kennedy in 1962.

⁹⁰ Liptak, Adam, "The Polarized Court", *New York Times*, May 10, 2014, <http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html? r=1>, accessed 20.04.2016

⁹¹ Liptak, "The Polarized Court"

Another important point Liptak makes is the increasing influence of liberal and conservative law organizations. These organizations have an increasing influence on the candidates, and the candidates are mostly chosen from members of these organizations. For example, a Republican president will most likely choose a candidate who has a proven record of conservatism and a Democratic president will most likely choose a candidate who has a proven record of liberal views. The Supreme Court today is now divided along party lines,⁹² and Liptak argues that Justices have “separated into two groups with vanishingly little overlap or interaction.”⁹³

This division among the Justices reflects the current situation in Congress where there is little or no cooperation between the two parties. As the Supreme Court has the power to overturn legislation, it becomes all the more important to ensure that the Supreme Court is tilted in the favor of the president’s party.

5.2 Martin-Quinn scores

This project has been developed by Andrew D. Martin of the University of Michigan and Kevin M. Quinn of the UC Berkeley School of Law in order to measure “the relative location of U.S Supreme Court justices on an ideological continuum”.⁹⁴ The Martin-Quinn scores are estimated from October 1937, and the “measures are estimated using a dynamic item response theory model, allowing judicial ideology to trend smoothly through time.”⁹⁵ As the model used is very complex I will not spend time or place in the thesis describing the theoretical framework behind it. However, I have found the Martin-Quinn scores very useful for finding out the ideological developments for the Supreme Court Justices.

The first figure gives an overview of all the Supreme Court Justices who have served under Chief Justice John Roberts and thus includes Justices Sandra Day O’Connor, David Souter and John Paul Stevens who are all retired. The higher the number is, the more conservative is the Justice. If the number is close to 0, the Justice has an equal amount of *liberal* and *conservative* decisions. The shaded area at the very right in the graph shows the developments after John Roberts became Chief Justice in 2005, but it is also useful to show

⁹² Liptak, “The Polarized Court”

⁹³ Liptak, “The Polarized Court”

⁹⁴ Berkeley Law, University of California, “Project description”, <http://mqscores.berkeley.edu/index.php>, accessed 25.04.2016

⁹⁵ Berkeley Law, University of California, “Project description”

the period before John Roberts because it shows the ideological development of each individual Justice.

The second figure shows the moving average of the individual justices. In contrast to figure 1, this figure is set up so that a lower number means more *conservative* and a higher number means more *liberal*. This figure is interesting every point shows the average of the last 73 cases for the individual justice. The first point shows the average for case 1-73, the second point the average for case 2-74, and so on. This figure gives a clearer indication of how the individual justices have voted over time.

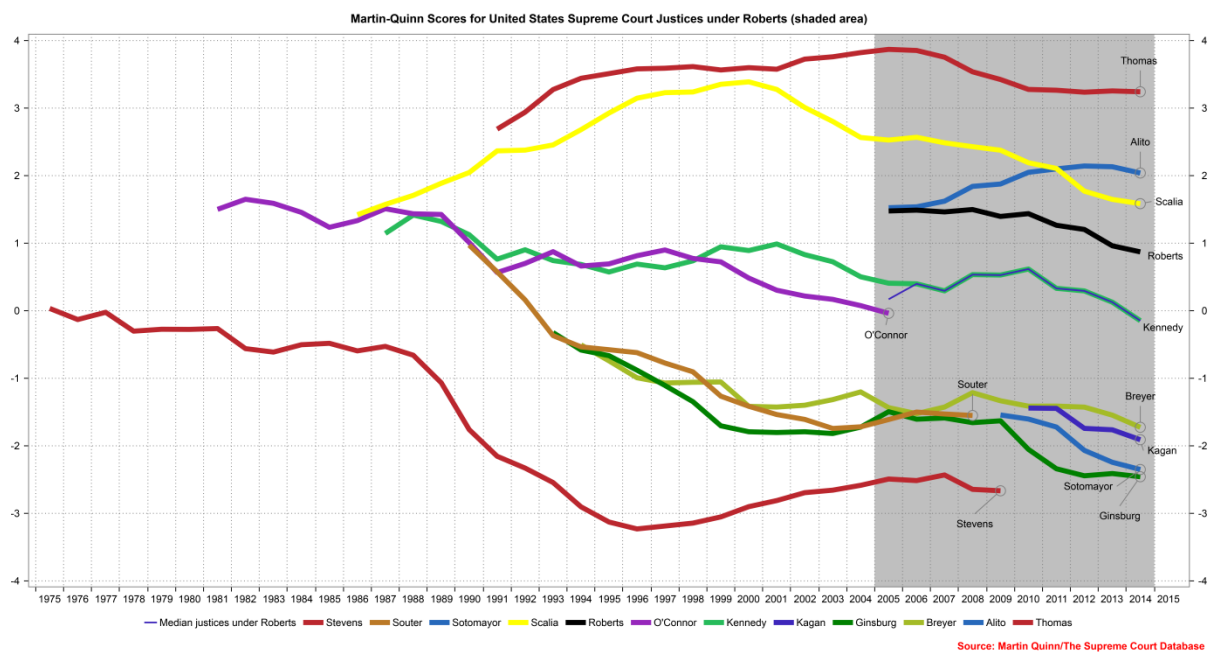


Figure 1. Martin-Quinn Scores for the United States Supreme Court Justices under Roberts

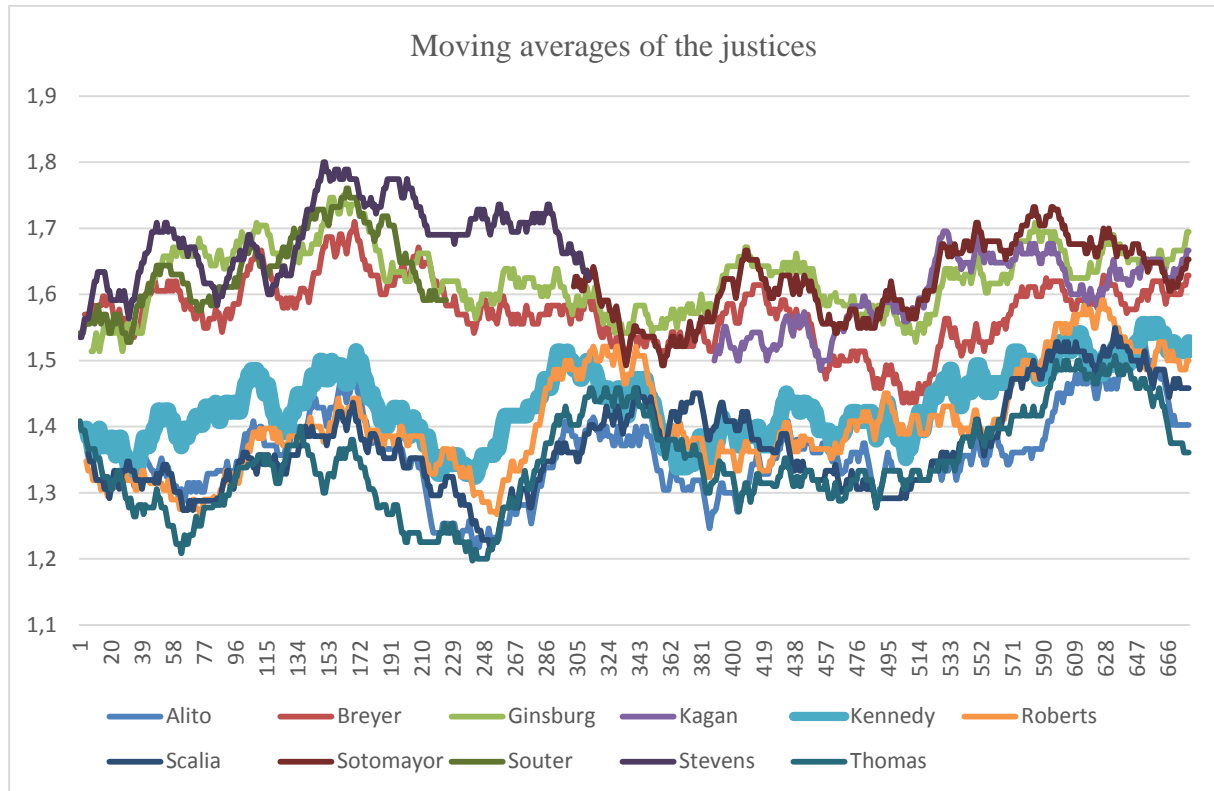


Figure 2. Moving averages of the justices

As we can see from figure 1, the most conservative Justice of all Justices who have served with John Roberts has been Clarence Thomas. He has continually been more *conservative* than any other Justice he has served with on the Supreme Court, although it seems that has become slightly less *conservative* in recent years.

The second most *conservative* Justice of the Justices who have served with John Roberts has traditionally been Antonin Scalia. However, one can see from the graph that he has become less *conservative* over time and has been overtaken by Samuel Alito as the second most *conservative* Justice on the Supreme Court. In contrast to both Clarence Thomas and Antonin Scalia, Samuel Alito has actually become more *conservative* during his tenure on the Supreme Court, and is at the end of the 2014 term the second most *conservative* Justice on the Supreme Court.

Chief Justice John Roberts is currently ranked as the fourth most *conservative* Justice on the Supreme Court. During his tenure as Chief Justice he has become less *conservative*, in the same way that both Clarence Thomas and Antonin Scalia has.

Sandra O'Connor was at the start of her tenure a slight *conservative*, but gradually became more *liberal* and when she retired in 2005 she had gradually become more *liberal*.

Justice Anthony Kennedy has been regarded as the median justice of the Supreme Court under John Roberts, and he has gradually become less *conservative* over time. Kennedy is also regarded as the “swing vote” in several cases, a characterization he has objected against.⁹⁶ The swing vote is especially crucial in 5-4 cases, where the Justices are divided 4-4 and one vote is needed for either side in order to obtain a majority.

The fourth most *liberal* Justice on the Supreme Court is Stephen Breyer, who has become more *liberal* over time. He began his tenure on the Supreme Court being near 0 on the graph, meaning that he was equally *conservative* and *liberal* in his decisions, but has gradually shifted towards a more *liberal* stance.

With the shortest tenure of the Justices serving under Chief Justice John Roberts, Elena Kagan has been the third most *liberal* Justice. She has been a on the *liberal* side during her whole tenure, but as with most of the other Justices she has become more *liberal*.

Sonia Sotomayor is the second most *liberal* Justice currently serving on the Supreme Court, and she has become more *liberal* during her tenure on the Supreme Court.

The most *liberal* Justice currently serving on the Supreme Court is Ruth Bader Ginsburg. Ginsburg started off as a slight *liberal*, just below 0 on the graph and has as most of the other Justices become more *liberal* over time.

Although he retired in 2009, John Paul Stevens' tenure on the Supreme Court is an interesting case. His tenure began in 1975 and at the beginning he was just above 0 on the graph, meaning he was very slightly *conservative*. However, Stevens became very *liberal* over time and ended up as the most *liberal* Justice who has served with John Roberts. No other Justice has since surpassed him, and Stevens is regarded as one of the most *liberal* Justices in the history of the Supreme Court.⁹⁷

⁹⁶ Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*, (New York: Penguin Press, 2007), Kindle edition: Location 2616.

⁹⁷Toobin, Jeffrey. “After Stevens”. *The New Yorker*, March 22, 2010.
<http://www.newyorker.com/magazine/2010/03/22/after-stevens>, accessed 25.04.2016

What we can tell from the graph is that only one of the Justices who have served with John Roberts has become more *conservative*, namely Samuel Alito. However, there seems to be a trend that the justices will become more *liberal* over time, even if there is a difference in the degree of “liberalization” between the individual justices.

5.2.1 The developments of the individual justices

I have also used the Martin-Quinn scores to show the development of the individual justice on the Supreme Court. For the first type of graph, a higher number means that the justice has been more *conservative* and a lower number means that the Justice has been more *liberal*. When the score is close to 0 it means that the justice has almost the same number of *conservative* decisions as *liberal* decisions. The red line shows the average for the individual justice, the blue line shows the mean and the green line shows the average for the median justice under Roberts.

The second type of graph, with just a single line shows the developments of the individual justices, and each point on each graph represents a moving average of the previous 73 cases for each justice. The number 73 is chosen because that is the average number of cases that the Supreme Court decides on in each term. This type of graph is interesting because it shows the changes in the typical decision direction for each justice over time. In contrast to the previous graphs, this graph is set up so that a higher number means that the justice is more *liberal* and a lower number means that the justice is more *conservative*. If the average for the justice is below 1.5 on the graph, the justice can be considered *conservative*, and if the average is above 1.5 the justice can be considered *liberal*. I chose to not include this type of graph for justices O'Connor, Souter and Stevens because of their relatively low number of cases decided under Roberts compared to the current justices.

5.2.2 Samuel Alito

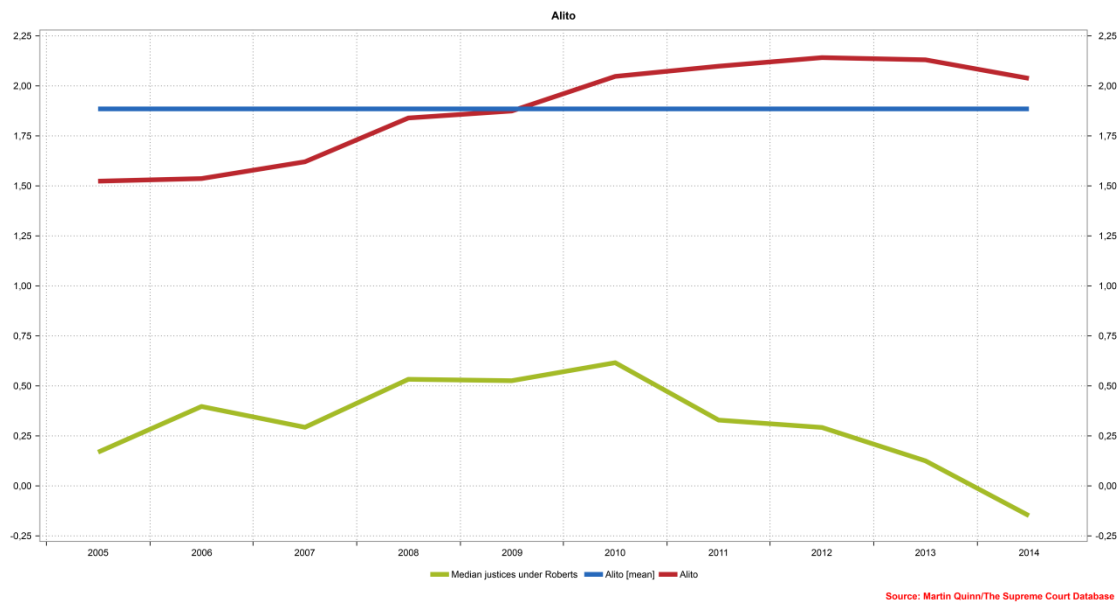


Figure 3. Alito, figure 1

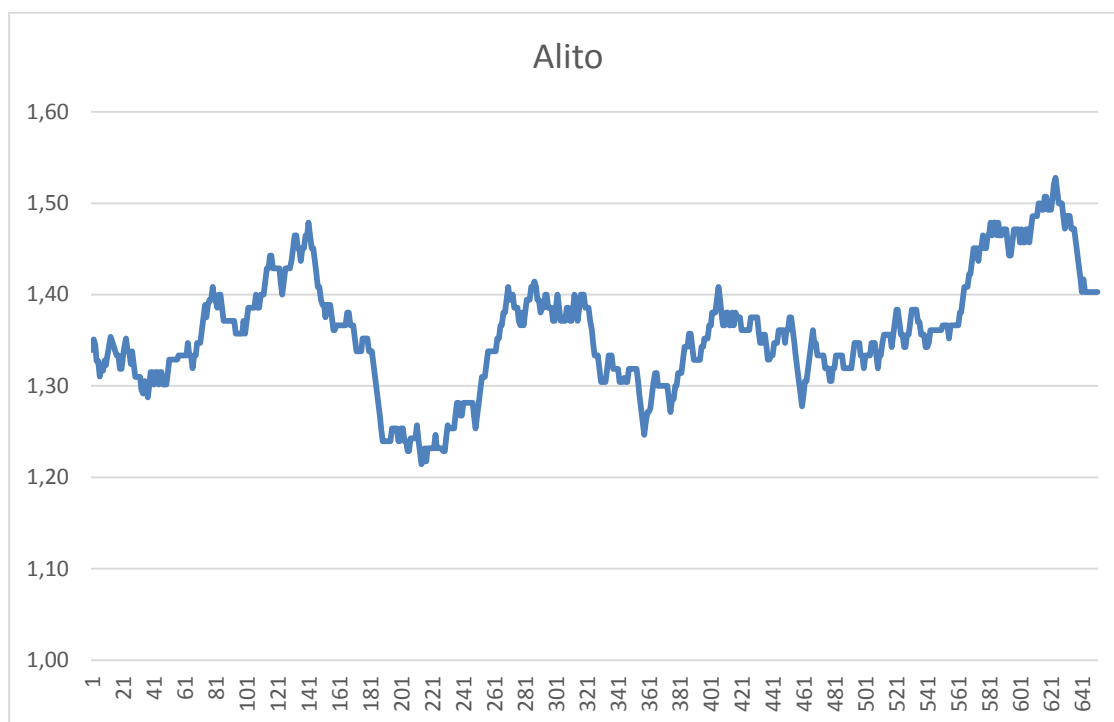


Figure 4. Alito, figure 2

In Samuel Alito's case he has been more *conservative* than the mean Justice on the Supreme Court, and as mentioned above he has also become more *conservative* over time. The median justice has become more *liberal* under Roberts, while Alito has gone in the

opposite direction and he is now more *conservative* than he was when he was appointed to the Supreme Court.

5.2.3 Stephen Breyer

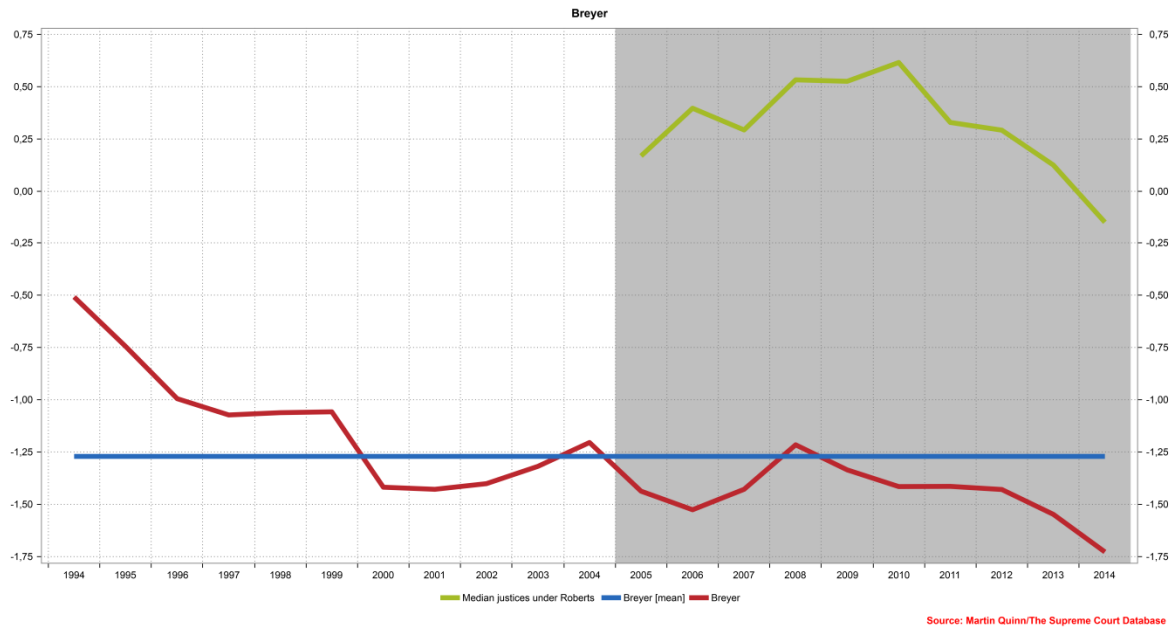


Figure 5. Breyer, figure 1

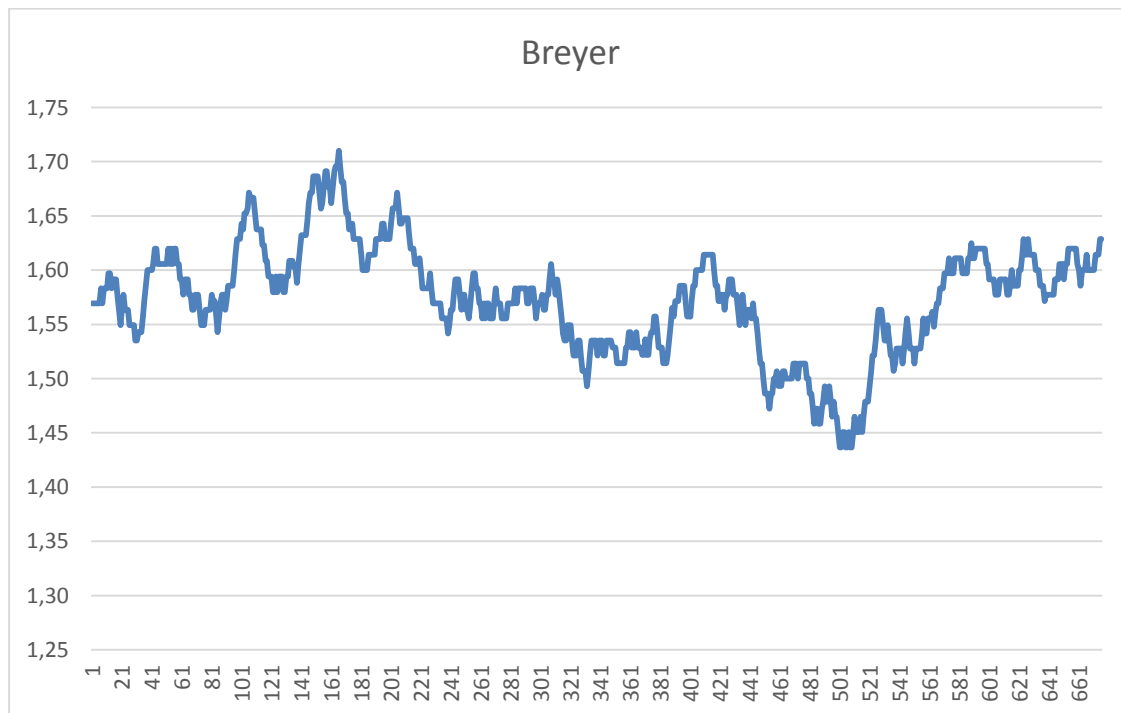


Figure 6. Breyer, figure 2

Stephen Breyer has been on the *liberal* wing of the Supreme Court the whole time he has been a member of the Court and he has consistently been more *liberal* than the median justice. Although he started as being on the *liberal* side, Breyer has become gradually more *liberal* over time as is the case with several of the other justices.

5.2.4 Ruth Bader Ginsburg

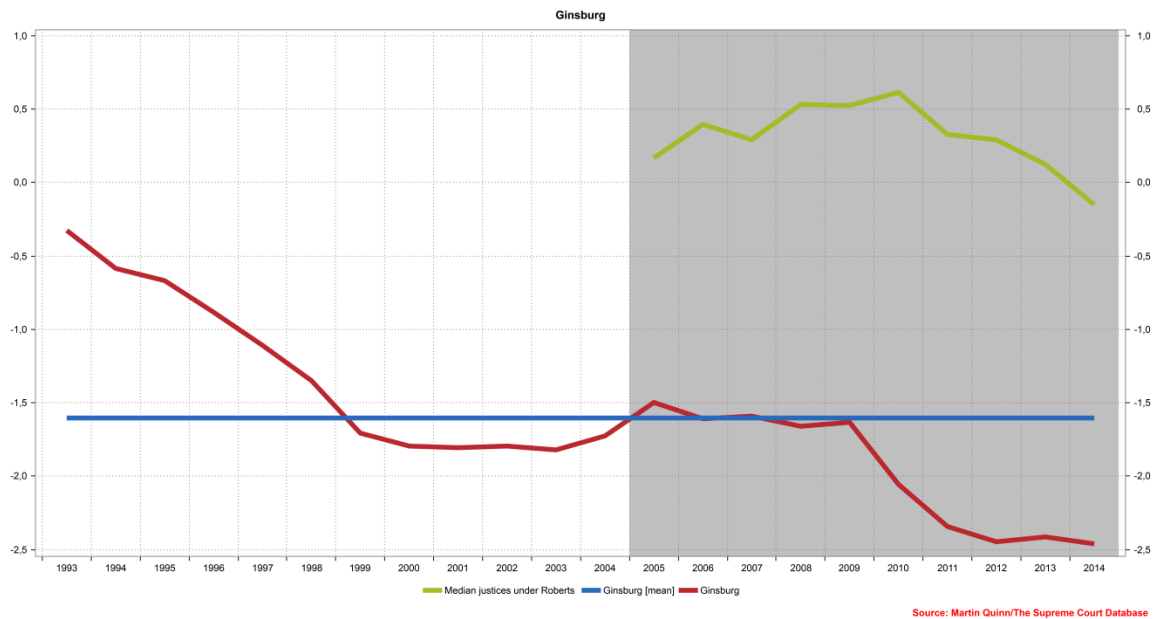


Figure 7. Ginsburg, figure 1

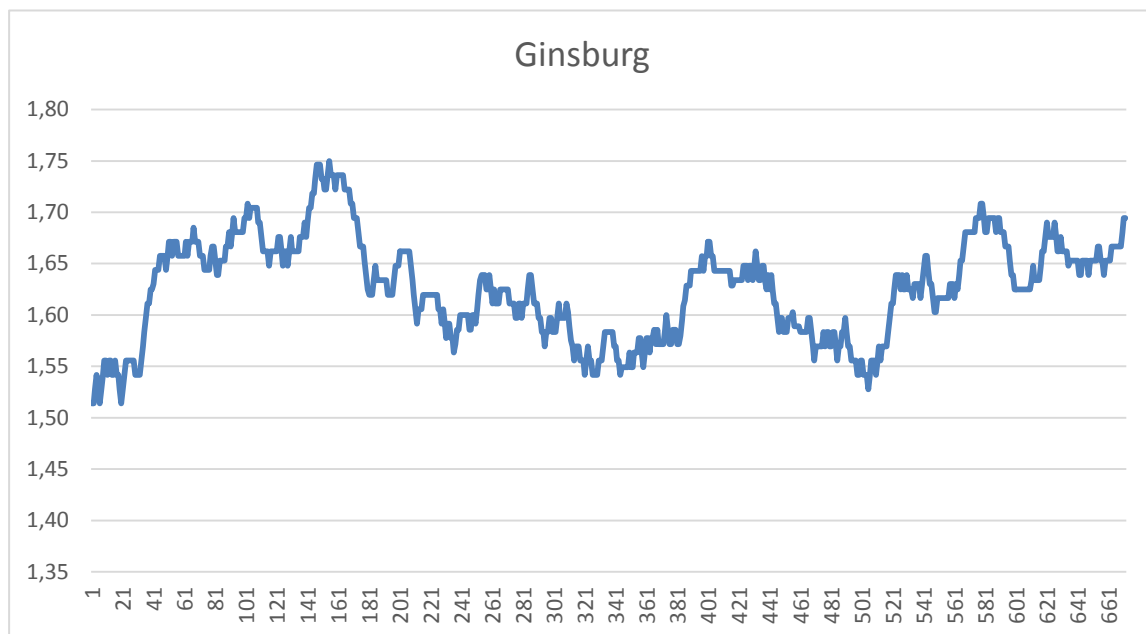


Figure 8. Ginsburg, figure 2

In Ruth Bader Ginsburg's case, she has been on the *liberal* side the whole time she has been a member of the Supreme Court, and she has also been more *liberal* than the median justice. Although she has fluctuated slightly, the graph shows that she was at her most *liberal* at the end of the 2014 term.

5.2.5 Elena Kagan

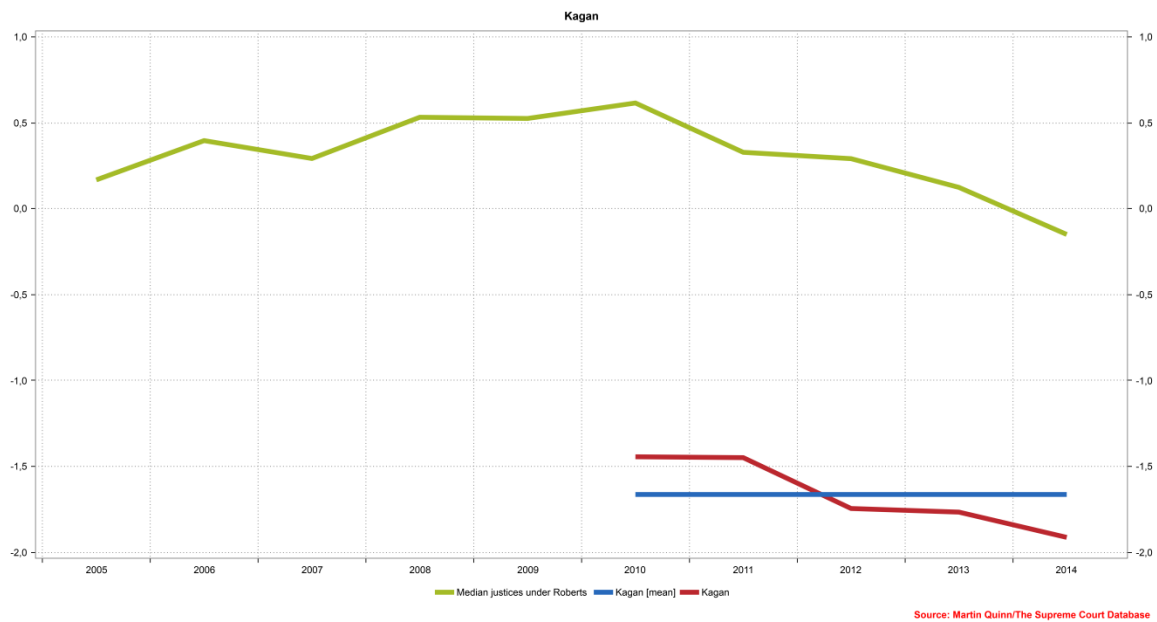


Figure 9. Kagan, figure 1

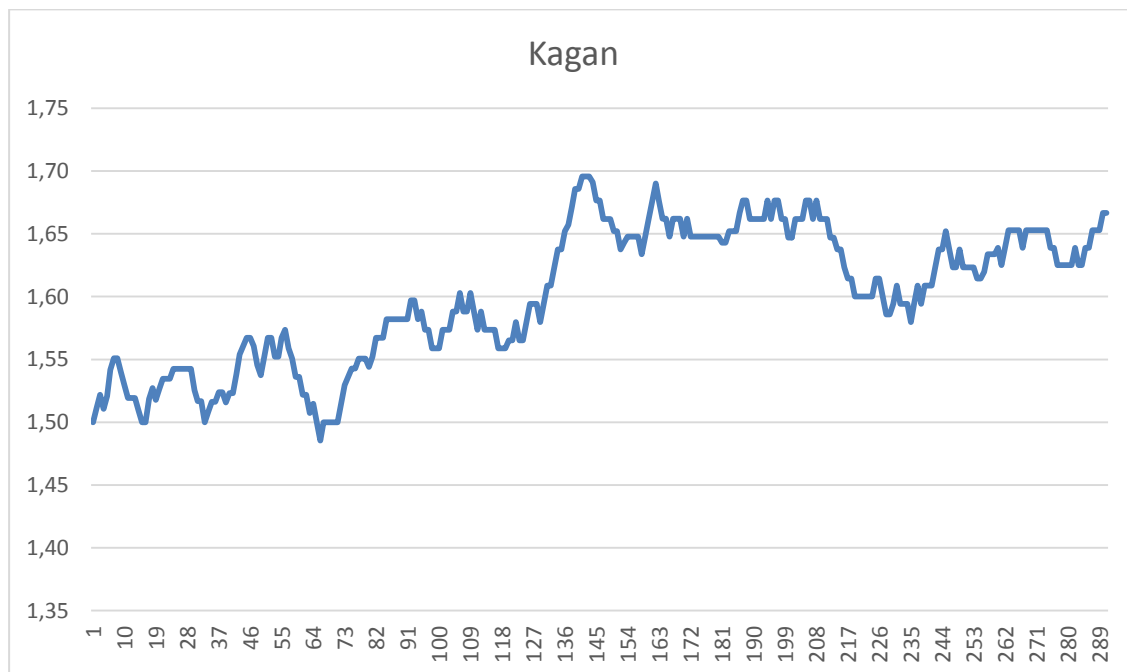


Figure 10. Kagan, figure 2

Elena Kagan has been a *liberal* the whole time she has been a member of the Supreme Court. Kagan has consistently been more *liberal* than the median justice, and she has also become more *liberal* over time.

5.2.6 Anthony Kennedy

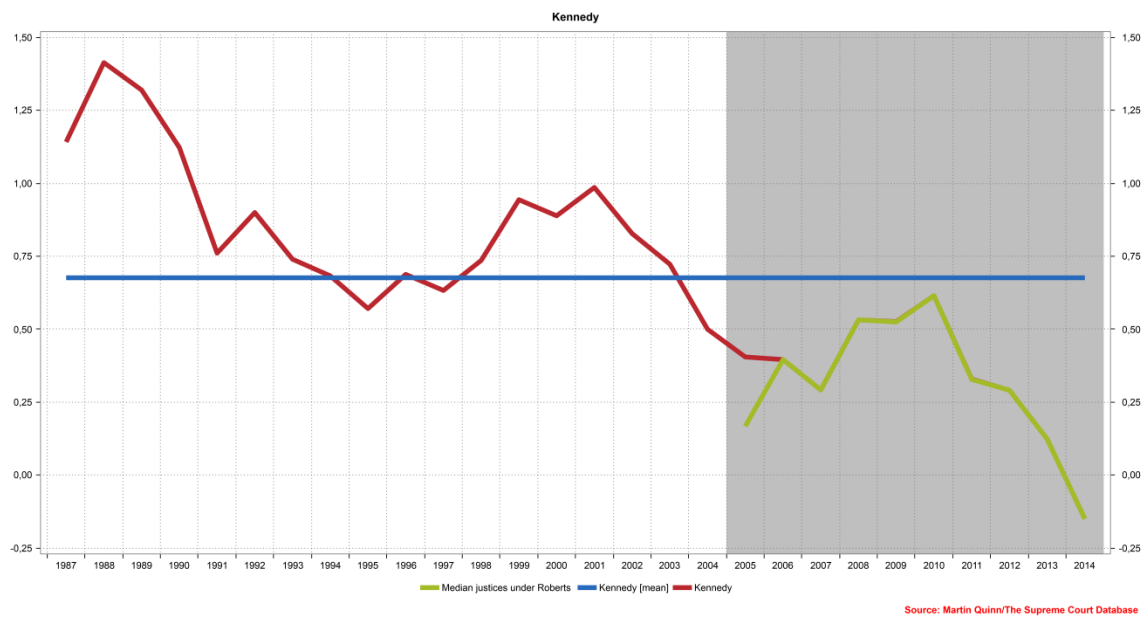


Figure 11. Kennedy, figure 1

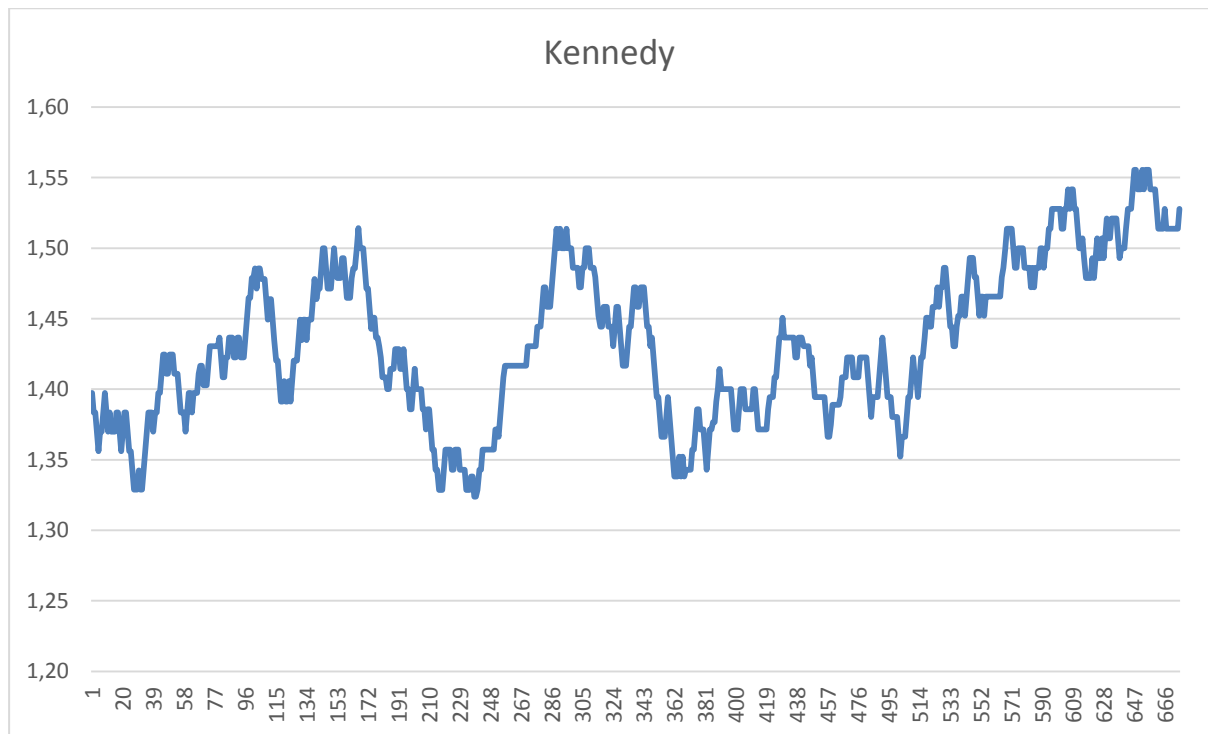


Figure 12. Kennedy, figure 2

Justice Anthony Kennedy's development is of special interest in my thesis, and we can see from the graph that he started off as a consistent *conservative*. For his first 18 years on the Supreme Court, he was always on the *conservative* side. The blue line indicates that his mean is above 0, which means that on average he has been more *conservative* than *liberal*. Kennedy has been regarded as the median justice on the Supreme Court and as we can see from the graph, the red line coincides with the green line. As with the other justices, Kennedy has become more *liberal* over time and at the end of the 2014 he was just below 0, which means that he was a slight *liberal*.

5.2.7 Sandra Day O'Connor



Figure 13. O'Connor

As Sandra Day O'Connor retired in 2006, she served for only a brief time with Chief Justice John Roberts. However, it is interesting to note that she started out as a *conservative* justice but over time she became less *conservative* and more *liberal*, and could be placed at the center of the Supreme Court. O'Connor ended her tenure on the Supreme Court as a slight *liberal*.

5.2.8 John Roberts

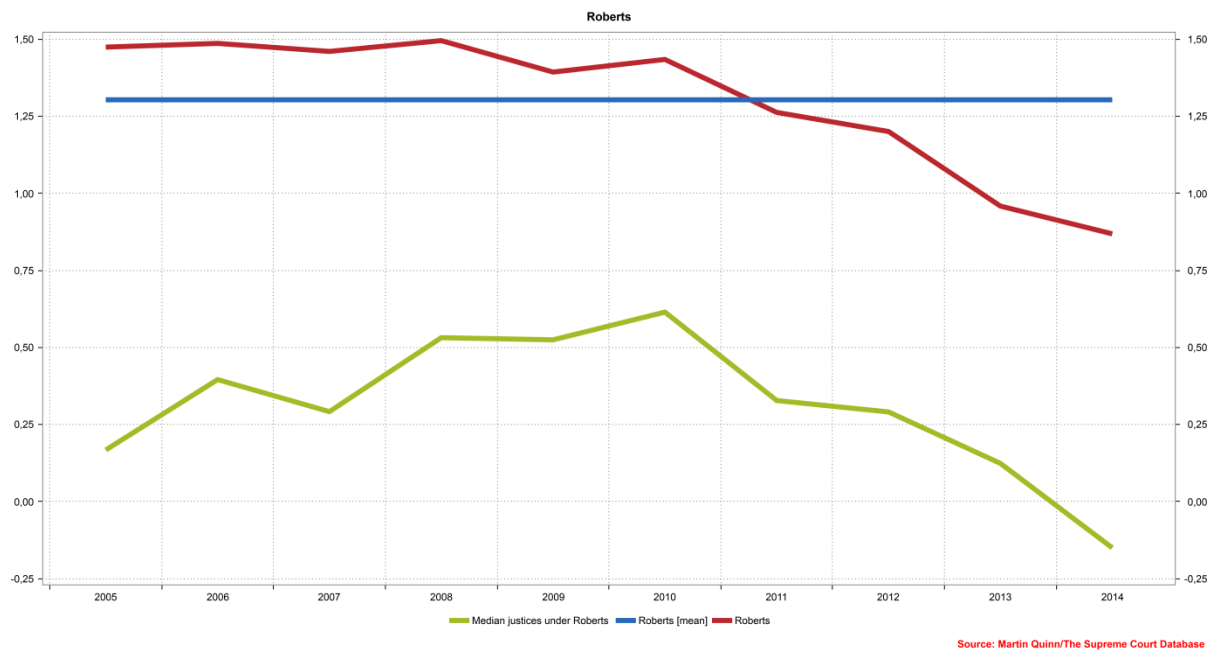


Figure 14. Roberts, figure 1

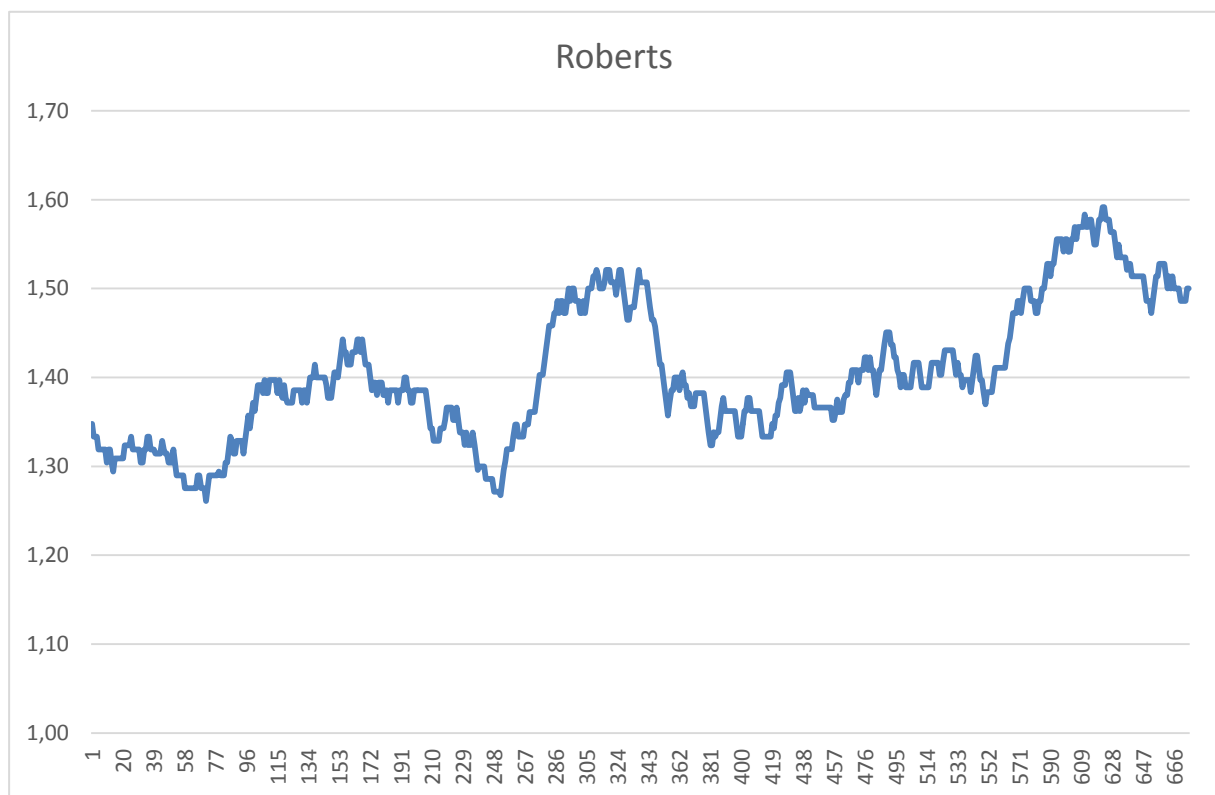


Figure 15. Roberts, figure 2

Chief Justice John Roberts has consistently been on the *conservative* side during his tenure as Chief Justice. Roberts has been more conservative than the median justice, but as the graph shows he has become less *conservative* over time. Figure 2 shows that Roberts is around 1.5 on the graph, which means that he is almost as *liberal* as he is *conservative*.

5.2.9 Antonin Scalia

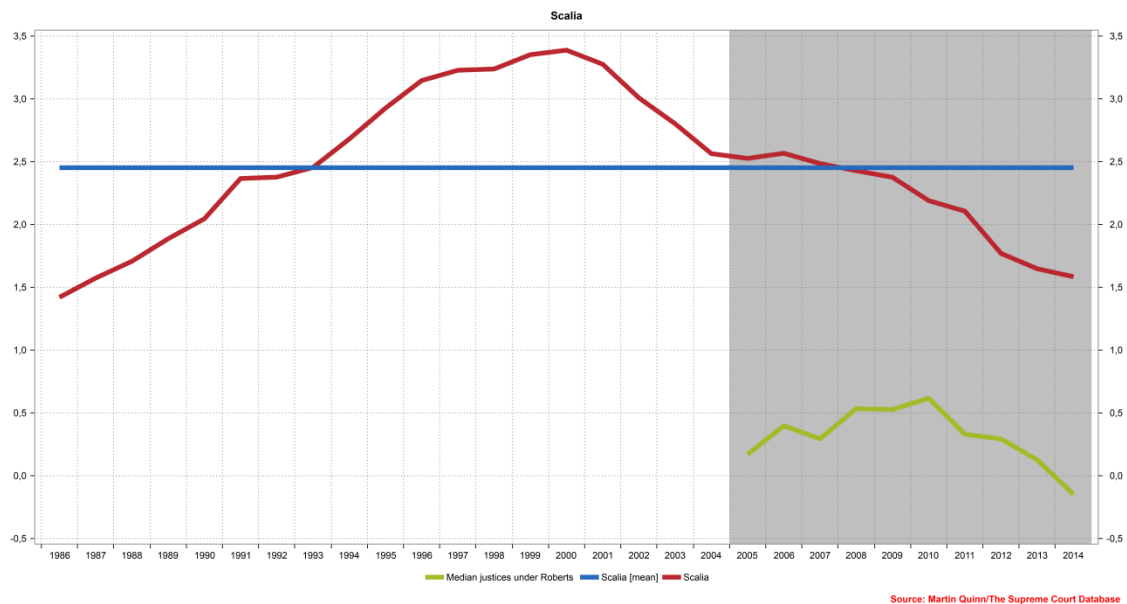


Figure 16. Scalia, figure 1

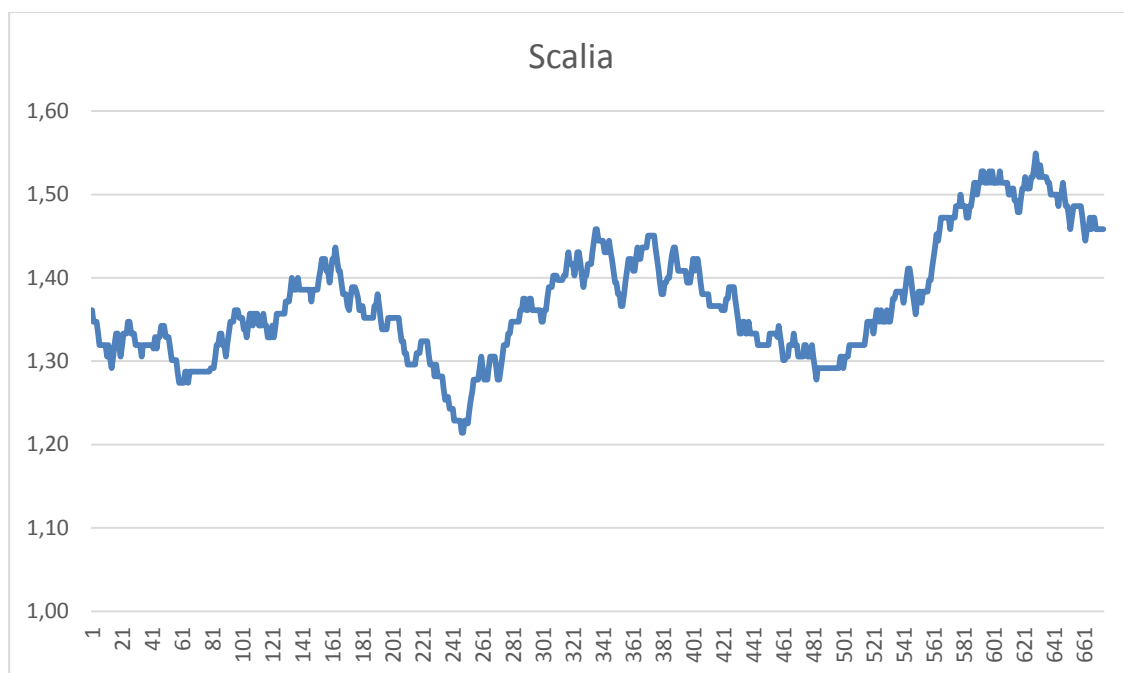


Figure 17. Scalia, figure 2

Antonin Scalia was a on the *conservative* wing for the whole time he was a justice on the Supreme Court. He started out as a moderate *conservative*, and then gradually became more *conservative* reaching a high point around the year 2000. After this he gradually became less *conservative*, but he still was more *conservative* at the end of the 2014 term than he was when he was first appointed in 1986. Scalia was for his whole tenure, more *conservative* than the median justice and he has historically been one of the most *conservative* justices in the history of the Supreme Court.

5.2.10 Sonia Sotomayor

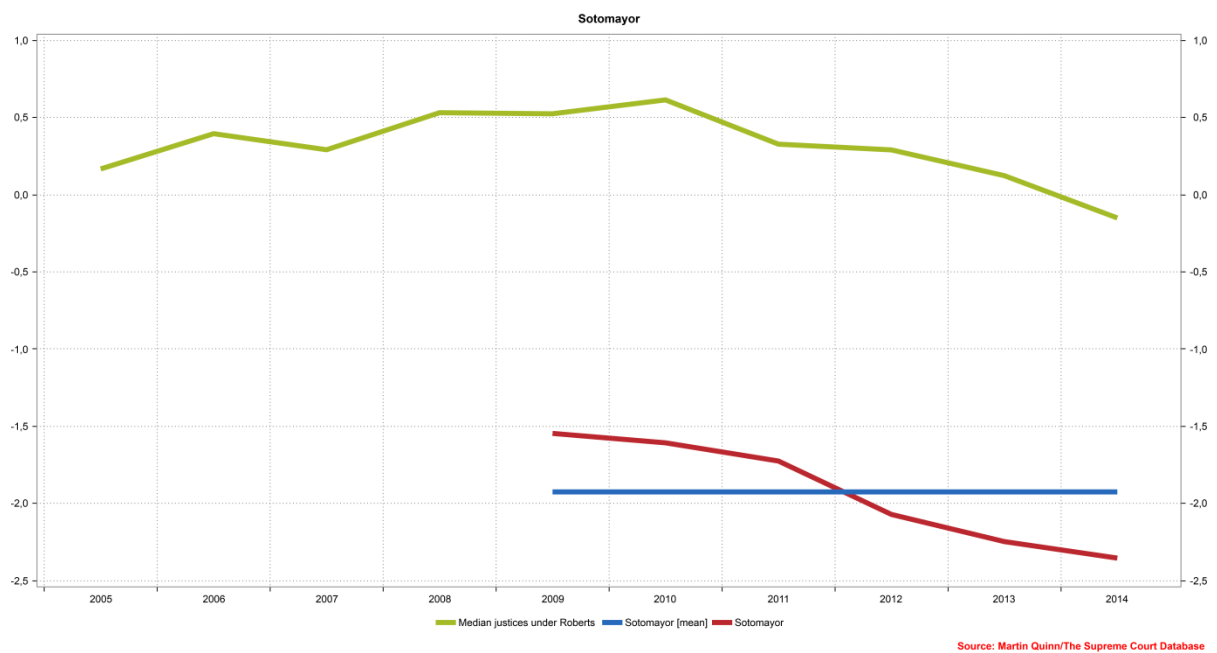


Figure 18. Sotomayor, figure 1

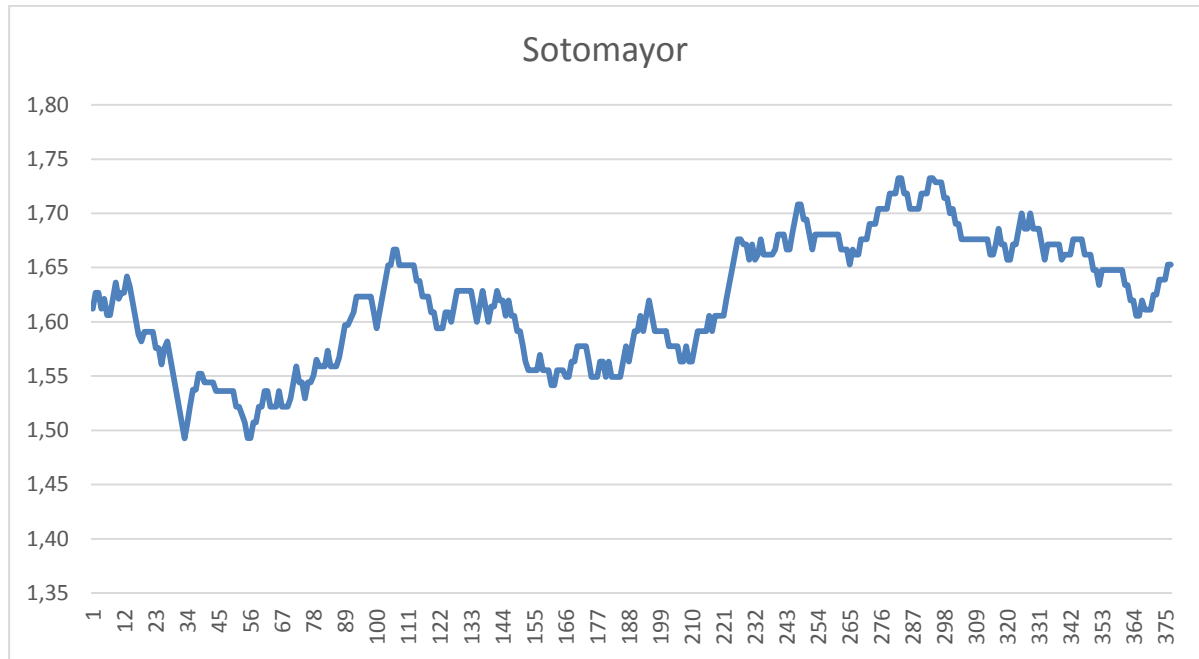
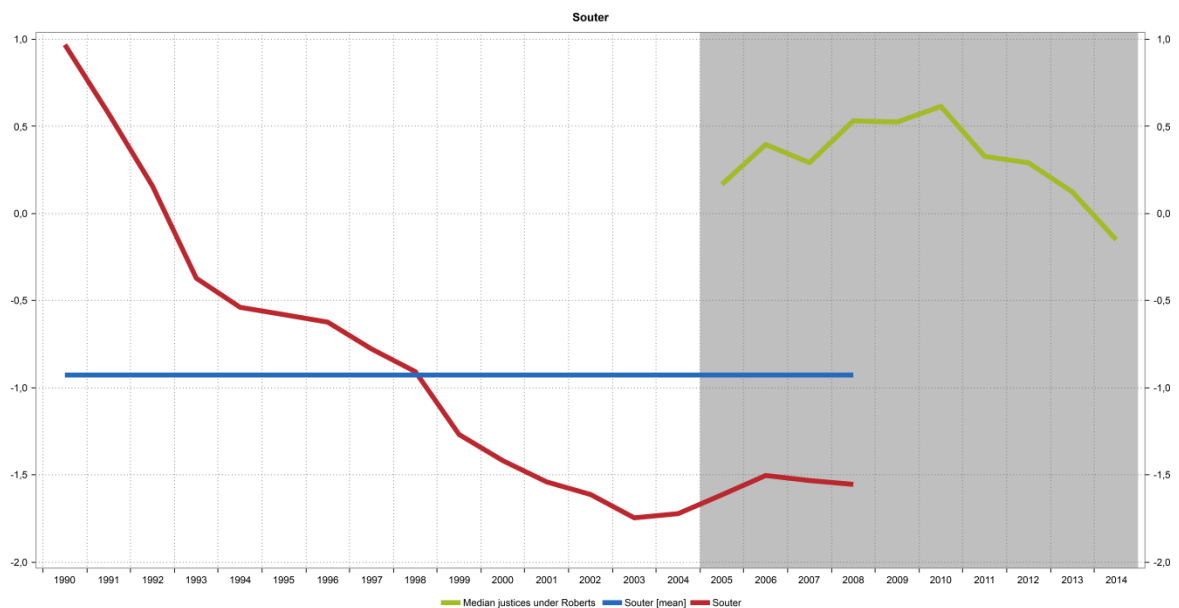


Figure 19. Sotomayor, figure 2

Sonia Sotomayor has been consistently *liberal* and has also been consistently more *liberal* than the median justice. She has also become more *liberal* over time, reflecting the developments of most other justices. This places her firmly on the *liberal* side of the Supreme Court.

5.2.11 David Souter



Source: Martin Quinn/The Supreme Court Database

Figure 20. Souter

Although David Souter only served on the Roberts Court for 4 years, his development is interesting. He started out as a *conservative* justice, and then relatively quickly became less *conservative* and started shifting towards the *liberal* side. If one compares the position of the red line at the start of Souter's tenure, he was more *conservative* than the median justice under Roberts. By the 1993 term, he had shifted towards the *liberal* side and at the end of his tenure he had become more *liberal* than the median justice under Roberts.

5.2.12 John Paul Stevens

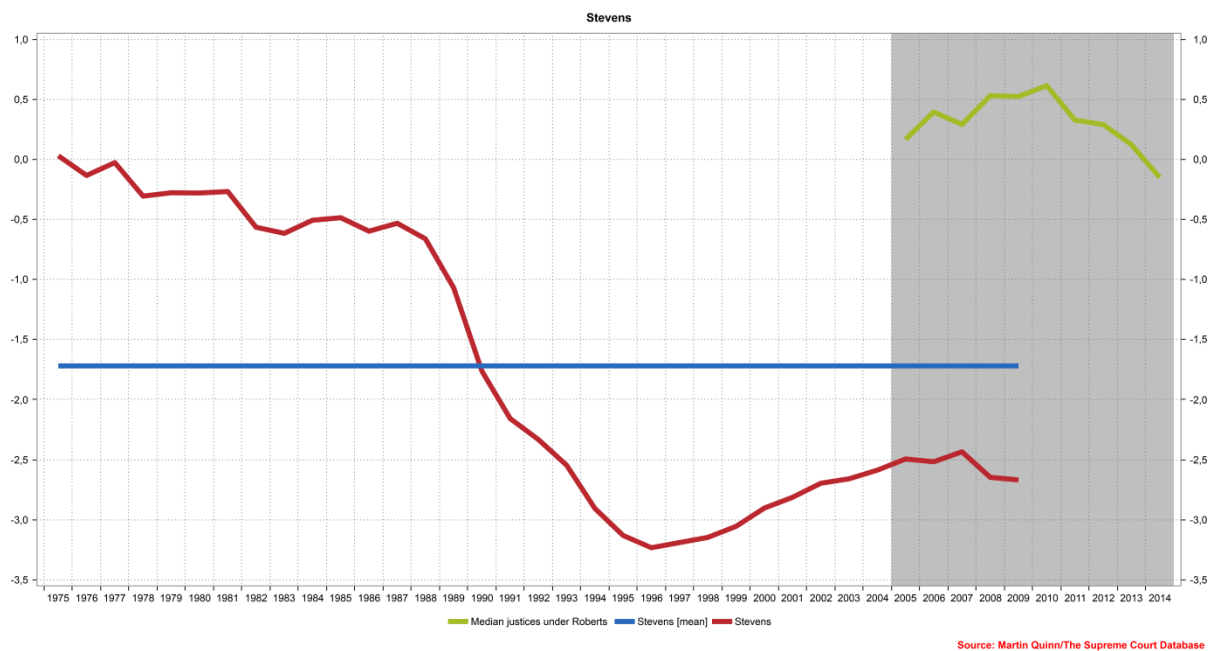


Figure 21. Stevens

John Paul Stevens started out as a very slight *conservative*, but over time he became much more *liberal*. As the graph shows, he was much more *liberal* than the median justice under Roberts and he was consistently on the *liberal* side of the Supreme Court. When he retired in 2010, he was firmly in the *liberal* wing of the Supreme Court.

5.2.13 Clarence Thomas

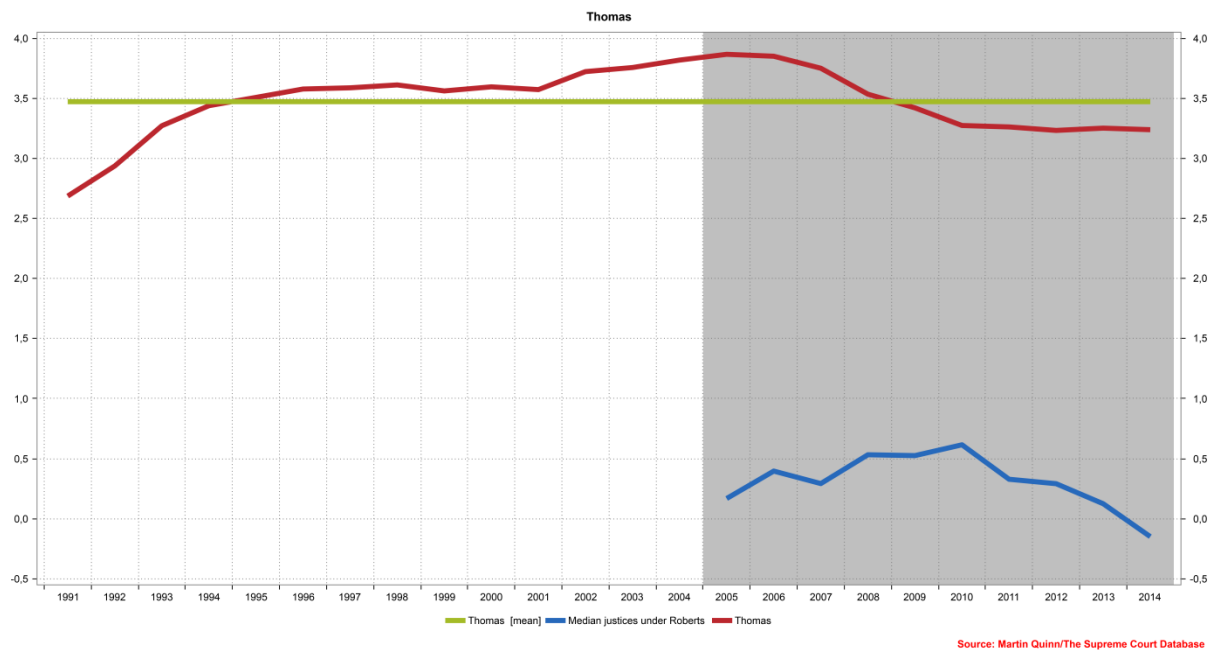


Figure 22. Thomas, figure 1

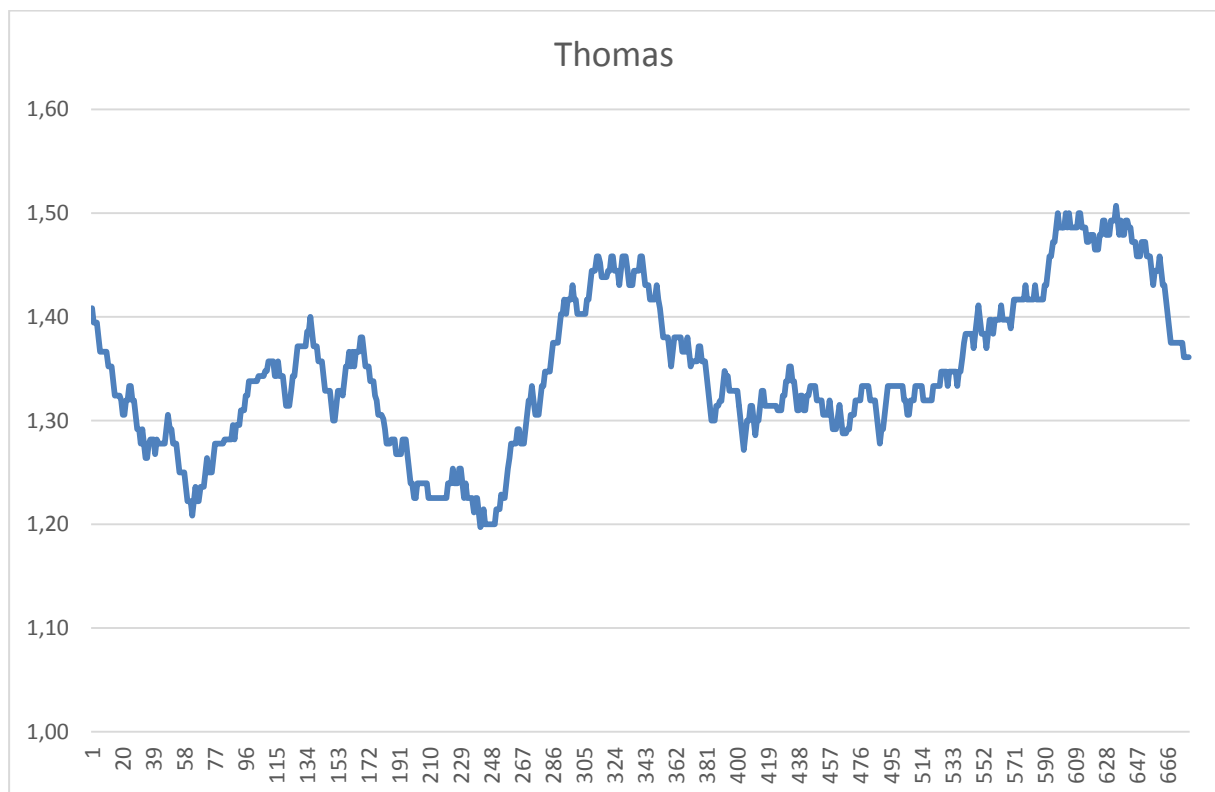


Figure 23. Thomas, figure 2

Clarence Thomas has been a consistent *conservative* during his whole tenure as a Supreme Court justice. He started out on the *conservative* side and gradually became more

conservative, reaching a high point after the 2005 term. Since 2005 he has become less *conservative*, but he has continually been much more *conservative* than the median justice under Roberts.

5.3 Justice agreement

Another important issue is justice agreement, which signifies which justices frequently vote together and which justices are the farthest apart in their voting. It is reasonable to think that the *liberal* justices would vote together and the *conservative* Justices would vote together. The SCOTUSblog is a website with coverage of the Supreme Court and its decisions⁹⁸ and provides statistics for the Supreme Court. The statistical analysis provided by the SCOTUSblog has been helpful in this thesis. After every Supreme Court term, the SCOTUSblog summarizes the work of the Supreme Court and publishes several analyzes and statistics which I have found useful for my thesis. The following graphs and tables are taken from the SCOTUSblog Stat Pack for the October Term 2014.

All Cases										
Justice	Votes	Frequency in Majority		OT13	OT12	OT11	OT10	OT09	OT08	OT07
Breyer	72	66	92%	88%	83%	76%	79%	78%	75%	79%
Sotomayor	74	66	89%	82%	79%	80%	81%	84%	-	-
Kennedy	74	65	88%	92%	91%	93%	94%	91%	92%	86%
Ginsburg	74	64	86%	85%	79%	70%	74%	80%	70%	75%
Kagan	74	63	85%	92%	81%	82%	81%	-	-	-
Roberts	74	59	80%	92%	86%	92%	91%	91%	81%	90%
Alito	74	53	72%	88%	79%	83%	86%	87%	81%	82%
Scalia	74	51	69%	90%	78%	82%	86%	87%	84%	81%
Thomas	74	45	61%	88%	79%	86%	88%	83%	81%	75%

Table 19. Frequency in the majority – all cases

The SCOTUSblog has made charts listing how frequently the individual justice has voted with the majority and which justices most frequently vote together. One can see from the chart that in the 2014 term, the justice who has voted most frequently with the majority in all cases was Stephen Breyer, with a percentage of 92 percent. Stephen Breyer is, as mentioned above, considered to be one of the more *liberal* justices on the Supreme Court. The justice who was second most in the majority was Sonia Sotomayor with 89 percent. In third place is

⁹⁸ SCOTUSblog, Supreme Court of the United States blog, “About Us”, <http://www.scotusblog.com/about/>, accessed 24.04.2016

justice Anthony Kennedy, considered to be the swing justice on the Roberts Court, with 88 percent. The other two justices in the top 5 are Ruth Bader Ginsburg and Elena Kagan, and it is worth noting that 4 of 5 justices most frequently in the majority is considered to be on the *liberal* side, and that all 4 of the justices considered to be *conservative*, namely John Roberts, Samuel Alito, Antonin Scalia and Clarence Thomas, are the ones who are least frequently in the majority. For all the *conservative* justices, the percentages were higher in earlier terms, and one could assume that the Supreme Court has become less *conservative* since all the presumed *conservative* justices are now less frequently in the majorities than they were.

It is also worth considering that the considered swing vote justice, Anthony Kennedy, is for the 2014 term only third most frequently in the majority. One would think that the swing vote justice would be the justice most frequently in the majority, because he or she is the justice most likely to switch sides in order to be in the majority. However, if one looks at the Kennedy's percentages for earlier terms it is clear that he has been most frequently or second most frequently in the majority for all terms. Since Stephen Breyer, who is considered to be more *liberal* than Kennedy, is the justice who is most frequently in the majority one could argue that there has been a *liberal* shift on the Supreme Court.

Divided Cases

Justice	Votes	Frequency in Majority		OT13	OT12	OT11	OT10	OT09	OT08	OT07
Breyer	42	36	86%	64%	67%	57%	60%	58%	62%	68%
Sotomayor	44	36	82%	46%	59%	64%	64%	69%	-	-
Kennedy	44	35	80%	84%	83%	88%	88%	83%	89%	79%
Ginsburg	44	34	77%	56%	60%	45%	50%	63%	55%	65%
Kagan	44	33	75%	75%	63%	67%	67%	-	-	-
Roberts	44	29	66%	76%	73%	86%	83%	83%	72%	73%
Alito	44	23	52%	63%	59%	69%	74%	76%	72%	75%
Scalia	44	21	48%	72%	58%	67%	74%	76%	76%	65%
Thomas	44	15	34%	64%	60%	74%	76%	67%	72%	85%

Table 20. Frequency in the majority - divided cases

In divided cases, it is also the *liberal* justices who are most likely to be in the majority. 4 of the 5 justices who were most frequently in the majority in divided cases were *liberal*, and all 4 of the *conservative* justices were least frequently in the majority. If the justices most frequently in the majority in divided cases are also more likely to *liberal* justices one could argue that majority of the decisions have been *liberal*. The presumed *conservative* justices are

also the justices least frequently in the majority in divided cases, so one could argue that in divided cases the outcome decision is more likely to be *liberal*.

5-4 Cases

Alignment of the Majority

Majority	19	Cases
Kennedy, Ginsburg, Breyer, Sotomayor, Kagan	8	<i>Alabama Black Caucus, Wong, Brumfield, Kingsley, Patel, Inclusive Comm., Obergefell, Arizona Legislature</i>
Roberts, Scalia, Kennedy, Thomas, Alito	5	<i>Din, Ayala, Horne, Michigan, Glossip</i>
Roberts, Ginsburg, Breyer, Alito, Sotomayor	2	<i>Dart Cherokee, Yates</i>
Roberts, Scalia, Thomas, Breyer, Alito	1	<i>Armstrong</i>
Roberts, Kennedy, Alito, Breyer, Sotomayor	1	<i>Wyne</i>
Roberts, Ginsburg, Breyer, Sotomayor, Kagan	1	<i>Williams-Yulee</i>
Thomas, Ginsburg, Breyer, Sotomayor, Kagan	1	<i>Walker</i>

Table 21. 5-4 cases, alignment of the Majority

When looking at the different alignments of the majority in 5-4 cases, i.e. which justices make up the different majorities, the most common alignment consists of justices Breyer, Ginsburg, Kagan, Kennedy and Sotomayor. In 8 of the 19 cases with a 5-4 decision in the 2014 term, these 5 justices made up the majority. In 5 of the 5-4 cases, the majority consisted of justices Alito, Kennedy, Roberts, Scalia and Thomas. Thus, in 13 of 19 cases the majority consisted of either a *liberal* majority or a *conservative* majority. It is also interesting to note that Breyer was in the majority in 14 of the 19 cases, meaning that he although he is considered a *liberal* justice he can also be in agreement with more *conservative* justices in some cases.

Term	Number of 5-4 Opinions	Percentage of Total Opinions	Percentage of 5-4 Split Ideological	Conservative Victory* (Percentage of Ideological)	Conservative Victory (Percentage of All 5-4)	Number of Different Alignments
OT05	11	12%	73%	63%	45%	7
OT06	24	33%	79%	68%	54%	6
OT07	12	17%	67%	50%	33%	6
OT08	23	29%	70%	69%	48%	7
OT09	16	19%	69%	73%	50%	7
OT10	16	20%	88%	71%	63%	4
OT11	15	20%	67%	50%	33%	7
OT12	23	29%	35%	63%	43%	7
OT13	10	14%	60%	67%	40%	7
OT14	19	26%	68%	38%	26%	7
Average	17	22%	67%	61%	44%	7

Table 22. 5-4 cases split ideologically

The percentage of 5-4 cases split ideologically has for the whole Roberts Court been relatively high, with percentages being over 60 percent for all terms except the 2013 term. The percentage of *conservative* victories in 5-4 cases has also been relatively high, with no percentage lower than 50 percent except for the 2014 term. One could argue that the Roberts Court has had a high percentage of 5-4 cases being split ideologically and that most of the 5-4 cases being split ideologically has had a *conservative* outcome. According to the SCOTUSblog a *conservative* victory occurs when the majority consisted of John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas and either Samuel Alito or Sandra Day O'Connor.

However, when looking at the *conservative* victories in a percentage of all 5-4 cases, there are only two terms under Roberts in which there has been a higher percentage of *conservative* victories than *liberal* victories. It seems as though that when the justices are split 5-4 based on ideology, the outcome is likely to be *conservative*, but when a 5-4 case is not split based on other factors than ideology the outcome is more likely to be *liberal*. One must keep in mind, however, that the percentage of 5-4 cases being split ideologically is on average 67 percent for the whole Roberts Court.

Membership in a Five-to-Four Majority

Justice	Cases Decided	Frequency in Majority		OT13	OT12	OT11	OT10	OT09	OT08	OT07
Kennedy	19	14	74%	100%	87%	80%	88%	69%	78%	67%
Breyer	19	14	74%	50%	48%	47%	31%	38%	39%	45%
Sotomayor	19	13	68%	30%	39%	47%	38%	43%	-	-
Ginsburg	19	12	63%	40%	43%	33%	38%	25%	50%	50%
Roberts	19	10	53%	70%	61%	67%	63%	56%	48%	58%
Kagan	19	10	53%	50%	43%	40%	38%	-	-	-
Alito	19	9	47%	60%	57%	60%	63%	63%	52%	50%
Thomas	19	7	37%	50%	65%	67%	75%	69%	65%	67%
Scalia	19	6	32%	50%	60%	60%	69%	69%	70%	58%

Table 23. Membership in a Five-to-Four Majority – Frequency in the Majority

When looking at the different constellations in 5-4 cases, the percentages show that justice Anthony Kennedy has been in the majority most frequently, which is reasonable as he is considered to be the swing vote. In addition the top 4, consists of Stephen Breyer, Sonia Sotomayor and Ruth Bader Ginsburg. The three justices mentioned are all considered *liberal*. Elena Kagan and John Roberts have been in the majority with the same frequency as each other, with 53 percent for both justices. The three justices considered to be the most *conservative*, namely Samuel Alito, Clarence Thomas and Antonin Scalia, are also the

justices who are least frequently in the majority. However, there seems to be a drastic change for the 2014 term. In all previous terms, all the three most *conservative* justices were in the majority with more than 50 percent frequency. It is the same case with the justices who are considered as *liberal*. With the exception of Ruth Bader Ginsburg's 2007 and 2008 terms, no justice considered as *liberal* has been in the majority with more than 50 percent of the time. Considering these findings, one could argue that the early years of the Roberts Court was a *conservative* Supreme Court and that there has been a *liberal* shift. For example, the percentages for the justice with the shortest tenure, Elena Kagan, have gradually risen between every term from 38 percent in the 2010 term to 53 percent in the 2015 term. The percentages for the other *liberal* justices have also risen gradually over the last terms. In addition, the percentages for the three most *conservative* justices have fallen almost every term since the 2010 term when the percentages were at their highest. One can assume that the most *conservative* and the most *liberal* justices are unlikely to vote together in a majority, and so one could argue that the each justice's frequency in the majority is a good indicator of the decision direction of the Supreme Court in split decisions.

	Highest Agreement		Lowest Agreement	
All Cases	1	Ginsburg - Breyer 94.4%	1	Thomas - Sotomayor 50.0%
	2	Breyer - Sotomayor 94.4%	2	Thomas - Breyer 51.4%
	3	Breyer - Kagan 94.4%	3	Thomas - Kagan 54.1%
	4	Ginsburg - Kagan 93.2%	4	Thomas - Ginsburg 55.4%
	5	Ginsburg - Sotomayor 91.9%	5	Alito - Kagan 56.8%
	6	Sotomayor - Kagan 90.5%	6	Scalia - Ginsburg 58.1%
	7	Roberts - Scalia 83.8%	7	Scalia - Sotomayor 58.1%
	8	Kennedy - Sotomayor 82.4%	8	Ginsburg - Alito 58.1%
	9	Roberts - Alito 81.1%	9	Alito - Sotomayor 60.8%
	10	Kennedy - Kagan 81.1%	10	Scalia - Breyer 62.5%
Divided Cases	1	Ginsburg - Breyer 90.5%	1	Thomas - Sotomayor 15.9%
	2	Breyer - Sotomayor 90.5%	2	Thomas - Breyer 16.7%
	3	Breyer - Kagan 90.5%	3	Thomas - Kagan 22.7%
	4	Ginsburg - Kagan 88.6%	4	Thomas - Ginsburg 25.0%
	5	Ginsburg - Sotomayor 86.4%	5	Alito - Kagan 27.3%
	6	Sotomayor - Kagan 84.1%	6	Scalia - Ginsburg 29.5%
	7	Roberts - Scalia 72.7%	7	Scalia - Sotomayor 29.5%
	8	Kennedy - Sotomayor 70.5%	8	Ginsburg - Alito 29.5%
	9	Roberts - Alito 68.2%	9	Alito - Sotomayor 34.1%
	10	Kennedy - Kagan 68.2%	10	Scalia - Breyer 35.7%
5-4 Cases	1	Roberts - Alito 94.7%	1	Scalia - Sotomayor 0.0%
	2	Scalia - Thomas 94.7%	2	Alito - Kagan 0.0%
	3	Ginsburg - Sotomayor 94.7%	3	Roberts - Kagan 5.3%
	4	Breyer - Sotomayor 94.7%	4	Scalia - Ginsburg 5.3%
	5	Ginsburg - Breyer 89.5%	5	Scalia - Breyer 5.3%
	6	Ginsburg - Kagan 89.5%	6	Thomas - Sotomayor 5.3%
	7	Scalia - Alito 84.2%	7	Thomas - Ginsburg 10.5%
	8	Sotomayor - Kagan 84.2%	8	Thomas - Breyer 10.5%
	9	Roberts - Scalia 78.9%	9	Ginsburg - Alito 10.5%
	10	Thomas - Alito 78.9%	10	Roberts - Ginsburg 15.8%

Table 24. List the justice pairs with the highest and the lowest agreement rates

These tables, found in the SCOTUSblog Stat Pack for the October 2014 term, list the justice pairs with the highest and the lowest agreement rates on the Supreme Court. It is interesting to note that of the ten justice pairs with the highest agreement percentages, the first six pairs all consist of justices who are considered to be *liberal*. Only two of the ten pairs consist of two *conservative* justices, while the other two consist of swing vote justice Anthony Kennedy, and either *liberals* Sonia Sotomayor or Elena Kagan.

What is even more interesting is that all ten of the justice pairs with the lowest agreement rates all consist of a *conservative* justice and a *liberal* justice. The justice pair with

the lowest agreement rate in all cases consists of Sonia Sotomayor and Clarence Thomas, the two justices seen as the most *liberal* and the most *conservative*, respectively. In 5-4 cases, all of the ten justice pairs with the highest agreement rate are either two *liberals* or two *conservatives*. In addition, all of the ten justice pairs with the lowest agreement rate consist of one *liberal* justice and one *conservative* justice. These findings seem to indicate that there is a clear division between the *liberal* wing and the *conservative* wing on the Supreme Court. The *conservative* justices and the *liberal* justices do not vote together frequently.

6 Landmark cases during John Roberts' tenure as Chief Justice

This chapter will contain a discussion of two important cases decided on during John Robert's tenure as Chief Justice.

6.1 Obergefell v. Hodges

The case *Obergefell v. Hodges* was argued on the 28th of April 2015, and decided on the 26th of June 2015. This case was a case regarding whether same-sex couples had the same right to marry with regard to the U.S. Constitution, most notably in connection to two specific lines in the Constitution. The first of these two lines is in the 5th Amendment, and states that “nor shall any person...be deprived of life, liberty, or property, without due process of law”⁹⁹, often referred to as the Due Process Clause. The second of the two lines is in the 14th Amendment, and states “that no State shall...deny to any person within its jurisdiction the equal protection of the laws”¹⁰⁰, often referred to as the Equal Protection Clause.

The case was brought to the U.S. Supreme Court after a group of same-sex couples in the states of Michigan, Kentucky, Ohio, and Tennessee had been denied by their respective states “the right to marry or to have marriages lawfully performed in another State given full recognition.”¹⁰¹ The same sex-couples, who were the petitioners in each case, had their cases heard in their respective four states, and all the states ruled in favor of the petitioners.

However, this case was overruled by the United States Court of Appeals for the Sixth Circuit, which is a court that has jurisdiction over the lower district courts in the four states of Michigan, Kentucky, Ohio and Tennessee which were all involved in this specific case.

The case was then brought to the Supreme Court, and decided on the 26th of June 2015. The decision was a 5-4 decision, in which the majority consisted of the judges Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan and Sonia Sotomayor. Chief

⁹⁹ U.S. Constitution, amendment V, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html, (accessed 23. 02.2016)

¹⁰⁰ U.S. Constitution, amendment XIV, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (accessed 23. 02. 2016)

¹⁰¹ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015). www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed 04.03.2016)

Justice John Roberts and judges Samuel Alito, Clarence Thomas and Antonin Scalia all wrote dissenting opinions. All dissenting opinions were joined by at least one other of the dissenting judges.

The majority opinion was written by Justice Anthony Kennedy and their decision was that:

The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.¹⁰²

In accordance with the Fourteenth Amendment which states that no person shall be denied equal protection of the laws, the Supreme Court decided that same sex-marriage should by law have to be considered equal to marriage between two people of different sex. The majority argued that the Fourteenth Amendment and the Due Process Clause protects liberties that “extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.”¹⁰³ In short, the majority argued that same-sex marriage has to be considered equal to marriage between people of different sex in all states.

The arguments of the majority referred to four principles and traditions “which demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”¹⁰⁴

The first of these principles, the majority argued, was that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”¹⁰⁵ Under the Due Process Clause, no person could be deprived of the personal choice of whom they wanted to marry, and no one could be discriminated with regards to their choice on the basis of their sexual orientation.

In the second principle the majority argued that “that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed

¹⁰² Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹⁰³ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹⁰⁴ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹⁰⁵ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

individuals.”¹⁰⁶ In their opinion, the right to marry is a fundamental right to the two persons involved and no one should be denied the right to marry on the basis of their sexual orientation. The choice to marry should be based on the persons involved, and no one should have the authority to deny anyone this choice.

The third principle argues same sex-marriage should be protected because it “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education”¹⁰⁷. In this point the majority argues that children of unmarried couples suffer stigma and experience a more difficult family life. They also argue that the right to marry is not less “meaningful for those who do not or cannot have children”¹⁰⁸ and that the right to marry “cannot be conditioned on the capacity or commitment to procreate.”¹⁰⁹ According to them the right to marry does not depend on having children, and that a married couple without children should be considered equal to a married couple with children.

Principle four places marriage as a “keystone of the Nation’s social order”¹¹⁰, and emphasizes the social importance of marriage. The majority argued that same sex-couples should not be denied access to a central social institution such as marriage. Because of the social importance of marriage, it should not be only for opposite sex-couples.

The majority referred to the Supreme Court cases *Loving v. Virginia* of 1967, which stated that “the Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”¹¹¹, and the case *Eisenstadt v. Baird* of 1972, in which the Supreme Court invalidated a law which prohibited the distribution of contraceptives to unmarried people. Both of these cases had used the Equal Protection Clause of the Fourteenth Amendment as an argument.

In a dissenting opinion, written by Chief Justice John Roberts, Roberts argues that the Supreme Court is not a legislature and that “Under the Constitution, judges have power to say what the law is, not what it should be.”¹¹² The argument here is that Supreme Court itself

¹⁰⁶ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹⁰⁷ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹⁰⁸ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹⁰⁹ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹¹⁰ Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

¹¹¹ *Loving v. Virginia*, 388 U.S. 1 (1967). <https://supreme.justia.com/cases/federal/us/388/1/case.html>, accessed 23. 02. 2016)

¹¹² Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015)

should not make any laws, but that it should rather discuss what the law is. Roberts furthermore states, referring to the majority of the Supreme Court, that “Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”¹¹³ With regards to the debate about same sex-marriage, Roberts argues that it should be up to the people of the United States to decide on the matter, rather than the Supreme Court. He argues that the decision of the majority of the Supreme Court is “an act of will, not legal judgment.”¹¹⁴ This is an interesting statement because, according to Roberts, the five justices of the majority have decided this case based on what they would like to definition of marriage to be and not what it is according to law. Roberts argues that marriage has for a long time been universally defined as between a man and a woman, and not between people of the same sex. John Roberts has often sided with the conservative side of the Supreme Court, and his dissent is joined by Justices Antonin Scalia and Clarence Thomas, who are also often considered to be on the conservative side of the Supreme Court.

6.2 Citizens United v. Federal Election Commission

The case *Citizens United v. Federal Election Commission* was argued on March 24, 2009 and reargued on September 9, 2009. The case concerned itself with a federal law that “prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an “electioneering communication” or for speech that expressly advocates the election or defeat of a candidate.”¹¹⁵

A nonprofit corporation named Citizens United had made a critical documentary about presidential candidate Hillary Clinton, and the case in question concerned itself with whether corporations could spend money on political broadcasts during elections. The Bipartisan Campaign Reform Act (BCRA) of 2003 had prohibited “corporations or labor unions from funding such communication from their general treasuries.”¹¹⁶ However, the Citizens United organization felt that this law was in violation of the First Amendment, especially with regards to free speech.

¹¹³ *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, 576 U. S. ____ (2015)

¹¹⁴ *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, 576 U. S. ____ (2015)

¹¹⁵ *Citizens United v. Federal Election Commission*, 558 U. S. ____ (2010)
www.supremecourt.gov/opinions/09pdf/08-205.pdf, page 9, accessed 02.05.2016

¹¹⁶ Chicago-Kent College of Law at Illinois Tech. “*Citizens United v. Federal Election Commission*.” Oyez.
<https://www.oyez.org/cases/2008/08-205>, accessed 02.05.2016

The case was decided in a 5-4 decision, with the majority being composed of Chief Justice John Roberts and justices Antonin Scalia, Samuel Alito, Anthony Kennedy and Clarence Thomas. In the majority opinion, written by Anthony Kennedy, it was stated that the “Court has recognized that First Amendment protection extends to corporations,”¹¹⁷ and that the government “may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”¹¹⁸ Thus, the Supreme Court cannot distinguish between persons and corporations with regards to political spending. The free speech clause of the First Amendment should not only apply to persons, but also to for example corporations or unions.

This case and its decision were controversial and the decision was criticized by President Barack Obama. Obama stated that the decision “gives the special interests and their lobbyists even more power in Washington - while undermining the influence of average Americans”.¹¹⁹ Because there was now no limit on who could spend money on political broadcasts, President Obama feared that powerful special interest groups would become more powerful compared to ordinary Americans.¹²⁰ This case is an example of the possible social and political impact a Supreme Court decision could have in the United States.

¹¹⁷ Citizens United v. Federal Election Commission, 558 U. S. ____ (2010)

¹¹⁸ Citizens United v. Federal Election Commission, 558 U. S. ____ (2010)

¹¹⁹ CNN, “Obama criticizes campaign finance ruling”, *CNN*, January 21, 2010

<http://politicalticker.blogs.cnn.com/2010/01/21/obama-criticizes-campaign-finance-ruling/>, accessed 02.05.2016

¹²⁰ CNN, “Obama criticizes campaign finance ruling”

7 President Obama's nomination to replace justice Scalia

Since justice Antonin Scalia's death in February 2016, there has been a vacancy on the Supreme Court. There are currently eight members of the Supreme Court, and as the Supreme Court is very much split ideologically it is likely that some cases will end with a 4-4 decision. In cases with 4-4 decisions, the decision of the immediate lower court will stand and the Supreme Court will make no decision in the case. This situation means that the Supreme Court is not able to function as it should, and can be seen as problematic.

The discussion on Scalia's replacement began soon after Scalia's death and has been a controversial issue since. As it is President Obama's last year as president, Republican politicians felt that the choice for a new Supreme Court justice should be left to the next president after the 2016 election. However, President Obama said that he would fulfill his constitutional duties and nominate a successor to Antonin Scalia.¹²¹ The Republicans feared that Obama would choose a candidate who is likely to tilt the Supreme Court in favor of the liberal side, and they would preferably like a new Republican president to fill the vacancy on the Supreme Court. Republican Majority Leader Mitch McConnell stated that "the American people should have a voice in the selection of their next Supreme Court justice"¹²². The chairman of the Senate Judiciary Committee, Republican Chuck Grassley echoed McConnell's statements, arguing that there is a huge political divide and that Obama "has made no bones about his goal to use the courts to circumvent Congress and push through his own agenda."¹²³

On March 16th, President Obama nominated Merrick Garland to fill the vacancy after Antonin Scalia. Republican fears that Obama would nominate a liberal candidate were unfounded. Merrick Garland is seen as a moderate candidate who has drawn praise from both parties.¹²⁴ However, the Republican stance remained the same and they were adamant in their refusal to even hold a hearing for a new candidate until after the 2016 presidential elections.

¹²¹ Landler, Mark and Baker, Peter, "Battle Begins Over Naming Next Justice", *New York Times*, February 13, 2016, <http://www.nytimes.com/2016/02/14/us/politics/battle-begins-over-naming-next-justice.html>, accessed 03.05.2016

¹²² Landler and Baker, "Battle Begins Over Naming Next Justice"

¹²³ Landler and Baker, "Battle Begins Over Naming Next Justice"

¹²⁴ Shear, Michael, D., Hirschfeld, Julie Davis and Gardiner, Harris, "Obama Chooses Merrick Garland for Supreme Court", *New York Times*, March 16, 2016, http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?_r=0, accessed 03.05.2016

Obama argued that the Republican stance was unprecedented and a refusal of the Senate's constitutional duty.¹²⁵

The statements from leading Republican reflect the fact that the Supreme Court has become a political arena. To go as far as even refusing to a hearing for a candidate reflects the current political climate in the United States, where there is little or no willingness for cooperation. President Obama argued that the Senate should fulfill their constitutional duty even if the Republicans did not agree with his choice of a candidate. He made note of the polarized political climate, arguing that "at a time when our politics are so polarized... is precisely the time when we should play it straight".¹²⁶ There has not been any significant change in the Republican stance since the Merrick Garland's nomination, and the Republican-controlled Senate still continues to refuse a hearing for Obama's nominee.

The Republican refusal to vote over a candidate for the Supreme Court arguably stems from their fear that a candidate nominated by President Obama will ensure a liberal majority on the Supreme Court. At a time when American politics is as polarized as it is, the Supreme Court is especially important because of its power to overturn legislation. Each party arguably has an interest in having a majority on the Supreme Court supporting its legislation, and is interested in nominees who seem to share the same political opinions.

It seems as though the political battle over the new Supreme Court justice is of more importance to the politicians of each party, rather than to the Supreme Court itself. Chief Justice John Roberts has stated that the confirmation process does not function the way it should,¹²⁷ and that "the process is being used for something other than ensuring the qualifications of the nominees."¹²⁸ Roberts argues that the candidates should be considered on the basis of their qualifications and not their political opinions. As the confirmation process has become so hostile there might, according to Roberts, become an impression that the justices will be more closely identified with the party of the President who nominated them rather than their actual judicial philosophy and their decisions on the Supreme Court.¹²⁹ The Supreme Court justices are not politicians and if the justices should not be under pressure to

¹²⁵ Shear, Hirschfeld, and Gardiner, "Obama Chooses Merrick Garland for Supreme Court"

¹²⁶ Shear, Hirschfeld, and Gardiner, "Obama Chooses Merrick Garland for Supreme Court"

¹²⁷ Liptak, Adam, "John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy." New York Times, March 21, 2016.

<http://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html>, accessed 04.05.2016

¹²⁸ Liptak, "John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy."

¹²⁹ Liptak, "John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy."

adhere to specific political opinions. In order to maintain the integrity and the specific role of the Supreme Court in society, the justices should not be subject to intense political scrutiny as it could be damaging to the Supreme Court as an institution.

What the Republican stance shows is that there is a huge divide between the Democratic and the Republican parties and this divide shows no sign of diminishing in the near future. What will happen after the presidential election in November is impossible to say. However, as the two parties are both looking to have a majority on the Supreme Court supporting their own views it seems unlikely that any forthcoming Supreme Court candidates will be confirmed unanimously. Even though the Republicans argue that they will not consider Garland's nomination because of the upcoming election, it seems unlikely that they will consider other Democratic candidates more favorably in the near future.

In the current political climate even nominations for justices for the Supreme Court has become an important political issue where there is little or no agreement between the two parties. The number of opposing votes for candidates has on average increased in recent years and it seems unlikely that there will be a candidate for the Supreme Court unanimously confirmed in the future.

8 Conclusion

What I have tried to find out in this thesis is whether the partisanly polarized political climate in the United States today is also reflected in the work of the U.S. Supreme Court. My thesis question was: *Has the U.S. Supreme Court become more polarized and politicized in recent years, and especially during the tenure of Chief Justice John Roberts?* By looking at statistics from the Supreme Court Database I have tried to find out the developments on the Supreme Court over time and especially during the tenure of Chief Justice John Roberts.

What I have found is that the Supreme Court under John Roberts has been more *conservative* than earlier Supreme Courts, and in four out of the five most common case categories heard by the Supreme Court there has been a higher or equal percentage of *conservative* case decisions compared to earlier Supreme Courts. However, the percentage of *conservative* decisions has fallen over time, and the percentage of *liberal* decisions has subsequently risen. The percentages for the period from 2010 to 2014 are split with 50 percent *liberal* decisions and 50 percent *conservative* decisions, and so one could argue that the Supreme Court was more *conservative* in the early years of John Roberts' tenure but has become more equally divided between *conservative* and *liberal*. When comparing the decision direction of the Supreme Court under Roberts to earlier Supreme Courts, there are several remarkable differences between the two.

The Roberts Court has been more uniformly *conservative* than earlier Supreme Courts, because the percentage of 9-0 *conservative* decisions for the Roberts Court is higher than for earlier Supreme Courts. In contrast, 9-0 decisions in the period from 1946-2004 had a tendency towards *liberal* outcomes. In four of the five most common case categories, there is a higher percentage of *conservative* 9-0 decisions for the Roberts Court than for earlier Supreme Courts

In 5-4 decisions, the percentages for *liberal* and *conservative* decisions are exactly the same for the Roberts Court and earlier Supreme Courts. In three of the five most common case categories there are a higher percentage of *conservative* decisions under Roberts, while in two there is a higher percentage of *liberal* decisions.

One could say that when the justices on the Roberts Court are all in agreement, the decision direction tends to be *conservative*, but when the justices are split 5-4 the decision

could be either *liberal* or *conservative*. If the justices on the Supreme Court are split 4-4 ideologically, the deciding vote belongs to the swing vote justice. Under Roberts, the swing vote justice has most often been Justice Anthony Kennedy, and he has trended towards the *liberal* side of the Supreme Court in recent years.

When looking at the ideological developments of the individual justices who have served on the Supreme Court with Chief Justice John Roberts, one finds that all the justices who are considered *liberal* (Breyer, Ginsburg, Kagan and Sotomayor) have become more *liberal* during their tenure on the Supreme Court. Median justice Anthony Kennedy has also become more *liberal* over time, and he is now more *liberal* than he was when he began his tenure on the Supreme Court. All the justices considered *conservative* (Alito, Roberts, Scalia and Thomas) have, except for Alito, become less *conservative* over time and they are now less *conservative* than they were at the beginning of John Roberts tenure as Chief Justice.

A way of finding out whether the Supreme Court in recent years has become more polarized like the Congress is to look at which justices are most frequently in the majority and which justices have the highest and lowest agreement rates. Four of the five justices most frequently in the majority in the 2014 term are *liberal* justices, and all four of the *conservative* justices are the four least frequently in the majority for the same term. However, this has not always been the case. The percentages for frequency in the majority for the *conservative* justices fell drastically from the 2013 term to the 2014 term, while the percentages for the *liberal* justices has risen gradually over the years.

When looking at agreement rates for the justices it is interesting to note that there are no pairings of one *conservative* and one *liberal* justice among the ten with the highest agreement rates for the 2014 term. And all the ten pairings with the lowest agreement rate all consist of one *conservative* and one *liberal* justice.

Not only has the Supreme Court itself become more divided, but the nomination process for justices has become more contentious in recent years. As the Supreme Court is able to overturn legislation, it is in the interest of both parties to nominate justices who share their own political and ideological leanings. The Republican opposition to the nomination of Merrick Garland to the Supreme Court illustrates the unwillingness of the Republicans to do their constitutional duty and cooperate with President Barack Obama. Chief Justice John Roberts has criticized the nomination process, and it seems as though it is the politicians

themselves, and not the Supreme Court justices, who have made the Supreme Court into a political arena.

The Supreme Court plays an important role in American political and social life, and it has issued many landmark decisions that have shaped American society in various ways. It is important to keep in mind that even though the Roberts Court has on average been more *conservative* than earlier Supreme Courts, it has also issued key *liberal* decisions regarding for example same-sex marriage and President Obama's Affordable Care Act. As mentioned earlier, there is no special weight given, in the Supreme Court Database, to cases that may have large social or political impact. A majority of the large number cases decided by the Supreme Court does not have any significant impact and more media attention is perhaps paid to cases that could have significant impact. This could create an impression of a Supreme Court being especially *liberal* or especially *conservative* based on a few special impact cases.

There has been, to a degree, a polarization of the Supreme Court into two opposing factions. The *liberal* justices frequently vote together and the *conservative* justices frequently vote together. Earlier Supreme Courts could consist of *liberal* Republicans and *conservative* Democrats, but in recent years the trend is that the *conservative* Republican Party will nominate *conservative* justices and the more *liberal* Democratic Party will nominate *liberal* justices. This trend is not likely to change in the future.

Bibliography

Databases

Macrobond, <https://macrobond.net/> (login required)

Lovdata: <https://lovdata.no/>

SCOTUSblog statpacks, <http://www.scotusblog.com>

Bhatia, Kedar. *Final Stat Pack for October Term 2014*. SCOTUSblog, June 30, 2015, <http://www.scotusblog.com/2015/06/final-stat-pack-for-october-term-2014/>

Supreme Court Database, <http://supremecourtdatabase.org>

Books

Abraham, Henry J. *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, 2008. Kindle edition.

Dumbrell, John, ed. *Issues in American Politics: Polarized Politics in the age of Obama*. Abingdon: Routledge, 2013. Kindle edition.

Greenburg, Jan Crawford. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin Press, 2007. Kindle edition.

Newspaper

Barnes, Robert and Katie Park, "How the Supreme Court voted in 13 key cases." *The Washington Post*, June 30, 2015.
<http://www.washingtonpost.com/graphics/politics/scotus-key-decisions-2015/>,
accessed 21.09.2015

Bravin, Jess, "Court Conservatives Prevail." *Wall Street Journal*, June 28, 2011.
<http://www.wsj.com/articles/SB10001424052702303627104576410051761796150>,

CNN, "Obama criticizes campaign finance ruling." CNN, January 21, 2010.
<http://politicalticker.blogs.cnn.com/2010/01/21/obama-criticizes-campaign-finance-ruling/>

- Granick, Jennifer Stisa and Christopher John Sprigman. "The Criminal N.S.A." *New York Times*, June 27, 2013. http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all&_r=2&
- Landler, Mark and Peter Davis. "Battle Begins Over Naming Next Justice." *New York Times*, February 13, 2016, <http://www.nytimes.com/2016/02/14/us/politics/battle-begins-over-naming-next-justice.html>
- Liptak, Adam. "The Polarized Court." *New York Times*, May 10, 2014. http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?_r=0
- . "John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy." *New York Times*, March 21, 2016. <http://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html>
- . "In Supreme Court Term, Striking Unity on Major Cases", *New York Times*, June 30, 2012, http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html?_r=1&hpw&pagewanted=all
- . "Roberts Court Shifts Right, Tipped By Kennedy." *New York Times*, June 30, 2009. http://www.nytimes.com/2009/07/01/us/01scotus.html?pagewanted=1&_r=0,
- . "Court Under Roberts Is Most Conservative In Decades." *New York Times*, July 24, 2010. <http://www.nytimes.com/2010/07/25/us/25roberts.html>
- . "In Supreme Court Term, Striking Unity on Major Cases." *New York Times*, June 30, 2012. http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html?_r=1&hpw&pagewanted=all
- Shear, Michael D., Julie Hirschfeld Davis and Gardiner Harris. "Obama Chooses Merrick Garland for Supreme Court", *New York Times*, March 10, 2016. http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?_r=0
- Toobin, Jeffrey. "After Stevens". *The New Yorker*, March 22, 2010. <http://www.newyorker.com/magazine/2010/03/22/after-stevens>

Journals

Theriault, Sean M. and David W. Rohde. "The Gingrich Senators and Party Polarization in the U.S. Senate." *Journal of Politics*, 73(4) (2011), 1011-1024

Judicial documents

Citizens United v. Federal Election Commission, 558 U. S. ____ (2010),

www.supremecourt.gov/opinions/09pdf/08-205.pdf

Chicago-Kent College of Law at Illinois Tech. "Citizens United v. Federal Election Commission." Oyez. <https://www.oyez.org/cases/2008/08-205>

Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U. S. ____ (2015). www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

Loving v. Virginia, 388 U.S. 1 (1967).

<https://supreme.justia.com/cases/federal/us/388/1/case.html>

U.S Constitution, http://www.archives.gov/exhibits/charters/constitution_transcript.html

U.S. Constitution, «Amendments» 1-10:

http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html

U.S. Constitution, «Amendments» 11-27:

http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html

Other websites

Braanen Sterri, Aksel & Ole T. Berg, (2016, 20. januar). "Liberalisme", Store norske leksikon, <https://snl.no/liberalisme>

Martin-Quinn Scores, "Project Description", <http://mqscores.berkeley.edu/index.php>,

The Supreme Court of the UK, <https://www.supremecourt.uk/>

The Supreme Court of the U.S, <http://www.supremecourt.gov>

US Courts, <http://www.uscourts.gov>

Other

McMillion, Barry J. "Supreme Court Appointment Process: Senate Debate and Confirmation Vote", *Congressional Research Service Report R44234*. (October 19, 2015)
<https://www.fas.org/sgp/crs/misc/R4234.pdf>