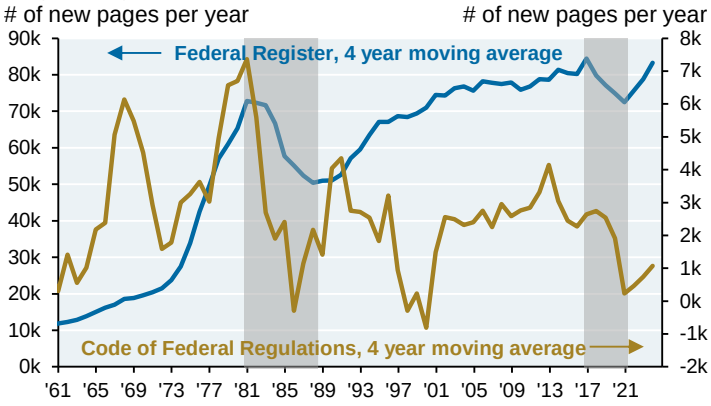
The Supreme Court vs the Regulatory State: on the end of Chevron deference, a revised statute of limitations for challenging government regulations, the Major Questions Doctrine curtailing agency power, the right to a jury trial and a District Court preliminary injunction against Biden's LNG export moratorium

Recent Supreme Court rulings may now usher in the largest pushback on the regulatory state since the Reagan Administration. During Trump's first term, the pace of regulation slowed due to executive orders, guidance documents, regulation freezes and litigation abeyances. Following Biden's election, the pendulum swung back: some approaches used by Trump to slow regulation were used by Biden to reinstate them, and some Trump deregulatory measures were struck down by courts for procedural and statutory violations. But after recent Supreme Court rulings, challenges to the regulatory state may be more durable and more likely to succeed if Trump wins a second term.

The crux of the Supreme Court's recent views on administrative law come from Justice Roberts: government agencies do not necessarily have special competence regarding all rules and regulations they promulgate, and federal courts should not be categorically bound by agency interpretation of ambiguous, vague or under-specified federal statutes. Instead, courts should generally have authority and responsibility to determine the best meaning of federal laws, including when adjudicating challenges to agency regulations. As a result, a wave of litigation may now challenge government regulations, at times before deliberately selected courts/judges, and with limited deference to agency opinions. Recent rulings also make it easier to challenge agency rulings by redefining the statute of limitations for doing so; by establishing new hurdles for agencies that interpret major legislation; and by making regulatory enforcement more burdensome for the government.

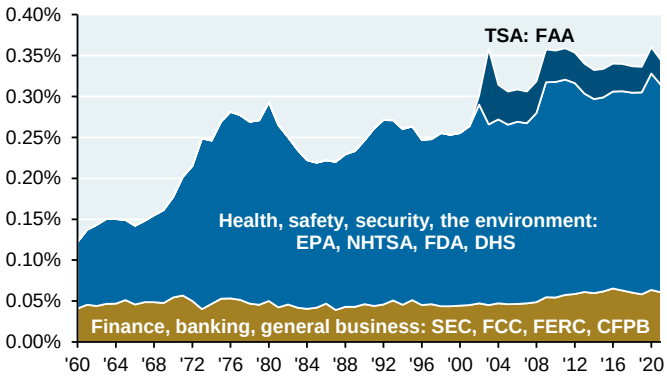
The backdrop to the court's rulings has been a gradual expansion of the regulatory state over the last three decades. The first chart shows the number of pages added each year to the Federal Register and to the Code of Federal Regulations[1]. The Reagan and Trump deregulatory eras are shaded in gray. In addition to these barometers, researchers also track the growth in economically significant rules (Biden leads the pack as shown on the next page), and in Federal Government annual regulatory budget outlays. As shown below, regulatory outlays doubled in real terms since the 1970's. An observation from GW's Regulatory Studies Center: while tight budgets sometimes constrain regulatory spending at federal agencies, the agencies that are partially funded by fees on entities they regulate have often seen greater increases in regulatory outlays and staffing.

Regulatory barometers



Source: George Washington University, Federal Register, JPMAM, 2024

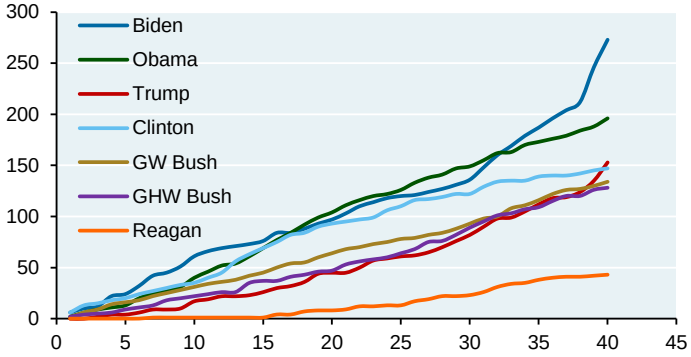
Regulatory agency budget outlays by fiscal year



Source: GWU Regulatory Studies Center, JPMAM, 2024

[1] The **Federal Register** is the daily journal of the federal gov't in which all newly proposed rules are published along with final rules, executive orders and other notices. These regulations might increase or decrease regulatory burdens, making it an imperfect measure. The **Code of Federal Regulations** is the codification of general and permanent rules promulgated by departments and agencies of the federal gov't. The number of pages published annually provides a rough sense of the volume of regulations with which businesses, workers, consumers and other regulated entities must comply

Cumulative # of economically significant rules by month 40 of each presidency



Source: GWU Regulatory Studies Center, May 2024

What happened to Trump's anti-regulatory push in 2020? As of the end of 2019, Trump was on track to match the regulatory pace of both Bush presidencies. However, a spike occurred in the number of economically significant rules from his Administration in 2020. The reason: COVID rules from the Small Business Administration, Health and Human Services, the Department of Homeland Security and the Department of Labor. In the absence of COVID, Trump's final rule count would likely have remained much closer to where it was in January 2020 (month 36 of his presidency).

On the anecdotal front, there are plenty of examples of regulatory overreach. A notable one from 1992: "*A Politician's Dream Is a Businessman's Nightmare*" written by Senator George McGovern, one of the most liberal politicians of the 20th century, after his small business failed due to regulation and red tape. McGovern cited endless exposure to frivolous claims and high legal fees, writing that firsthand experience with difficulties that businesspeople face every day would have made him a better senator and a better presidential contender[2]. Even the New York Times (!!) commented on "regulatory fatigue" in a 2017 piece on New York apple orchards being subject to 5,000 rules, including guidance on angling of ladders and 10,400 words on pesticide spraying[3].

It's tempting to be outraged by these burdens on small and large businesses and the drag on productivity. That is, unless you: live near a toxic train derailment whose impacts spread to 16 states[4]; become severely ill due to forever chemicals (PFAS) in food or water[5]; end up sick after swimming in US rivers, streams, lakes and ponds, half of which are classified as impaired due to farm pollution[6]; or end up dead due to regulatory failures to control pharmaceutical company promotion of opioid use[7]. Regulation is in the eye of the beholder.

In any case, the rest of this note reviews recent Supreme Court cases and implications for the regulatory state[8] and concludes with data on the ideology of Supreme Court justices. In two weeks, we will release a piece on the underperformance of US small cap stocks which we wrote for asset allocators, chief investment officers, portfolio managers and other diversified investors.

Michael Cembalest
JP Morgan Asset Management

[2] McGovern only won one state in 1972 (MA), matching Mondale's dismal performance in 1984 (MN)

[3] "*When Picking Apples on a Farm With 5,000 Rules, Watch Out for the Ladders*", NYT, December 27, 2017

[4] "*Widespread impacts to precipitation of the East Palestine Ohio train accident",* Environmental Research Letters, 2024, National Atmospheric Deposition Program and University of Wisconsin Madison

[5] See "*Bystanders to a Public Health Crisis: The Failures of the US Multi-Agency Regulatory Approach to Food Safety in the Face of Persistent Organic Pollutants*", GW Law, 2024 and "*Forever chemicals called PFAS show up in your food, clothes, and home*", NRDC, April 10, 2024

[6] "*The Clean Water Act at 50: Promises Half Kept at the Half-Century Mark*", Environmental Integrity Project, March 2022; see pages 3-8 for the details on how ~50% of US waterways are too polluted to meet standards for swimming and recreation, aquatic life, fish consumption or drinking water

[7] "*How FDA Failures Contributed to the Opioid Crisis*", AMA Journal of Ethics, August 2020

[8] **Acknowledgements**. Michael Morley is the Sheila M. McDevitt Professor of Law at FSU College of Law. Michael is a specialist on election law, constitutional law and the federal courts, and author of "Election Emergencies" in the forthcoming Oxford Handbook of American Election Law. Michael was instrumental in the preparation of this note, and in preparation of other election related sections that appear in the Eye on the Market

A rundown of recent Supreme Court rulings on regulatory issues

[1] The end of Chevron deference: no more automatic deference to government agencies by courts

The Chevron deference[9] essentially gave priority to government agencies when interpreting vague, ambiguous or underspecified federal statutes. In a typical bill there are a lot of such ambiguities. Some famous examples of Chevron deference used by the Supreme Court to affirm agency rulings:

- Comptroller of the Currency's interpretation of the word "interest" to include late payment fees for loans when ruling on the National Bank Act (*Smiley v Citibank*, 1996)
- Social Security Administration interpretation of the word "disability" to mean a condition that causes death or a condition lasting 12 months or more when ruling on the Social Security Act (*Barnhart v Wilson*, 2002)
- FCC interpretation of the words "telecommunications service" to exclude broadband internet when ruling on the Communications Act of 1934 (*National Cable v Brand X*, 2005)

The Supreme Court has now overturned Chevron deference (*Loper-Bright v Raimondo*, June 2024). Federal courts will generally no longer be required to defer to agency interpretations of laws they administer, including regulations that agencies promulgate. Courts can now decide for themselves whether agencies have adopted the most accurate interpretation of federal law, absent express congressional direction to the contrary. In the majority opinion of Justice Roberts, **agencies "have no special competence in resolving statutory ambiguities while courts do"**. Ouch! If someone said I had no special competence for my job, I would be pretty offended.

Loper-Bright may make it easier for courts, particularly Republican judges and a GOP-dominated Supreme Court, to strike down federal regulations including environmental regulations, SEC and labor regs and restrictions on heavily regulated industries[10]. While *Loper-Bright* emphasized that the Court will not revisit past rulings (on the basis of *stare decisis*), there are thousands of agency rulings that haven't been challenged yet; justices Kagan and Jackson wrote about the risk of a litigation wave on such rulings in their dissents.

Supporters of the Chevron deference hope that a future Congress passes legislation to codify it; in other words, Congress could explicitly grant agencies the power to resolve statutory ambiguities and fill in statutory gaps. *Loper-Bright* recognized that certain laws may already grant such authority to particular agencies. But such delegations of interpretive power to agencies could be challenged by conservative justices based on Article III concerns, and this issue may become the next constitutional bridge to cross (i.e., can courts may be required to follow agency interpretations when legislatively directed to do so).

Where to from here?

- Justice Roberts indicated that courts should now rely on an older standard from 1944 (Skidmore) in which courts view agency decisions as "guidance" and grant them "respectful consideration". From Kagan's dissent: "in one fell swoop, the majority today gives itself exclusive power over every open issue, no matter how expertise-driven or policy-laden, involving the meaning of regulatory law…", adding that "in every sphere of current or future federal regulation, expect courts from now on to play a commanding role"

[9] **Some history on Chevron deference**. The Supreme Court ruling which created Chevron deference stemmed from an appellate court ruling by RBG in 1982 that sided with the Natural Resources Defense Council. The NRDC sued Reagan's EPA over the EPA's interpretation of the word "stationary source" as it related to pollution. Fun fact: the Reagan EPA was run at the time by **Anne Gorsuch, Neil's mother**. Overturning RBG's appellate ruling, the Supreme Court decided in 1984 that agencies should get the benefit of the doubt when interpreting any vagueness or undefined terms in existing legislation; thus, the Chevron deference. Today, the situation is flipped: pro-regulation forces are government agencies and anti-regulatory forces are in the judiciary.

Since 1984, Congress passed thousands of laws under the assumption that agencies implementing them may resolve ambiguities or fill in details a statute does not address based on their own determinations. Many agencies and courts built rule-making and litigation strategies on Chevron deference, for both significant and insignificant regulations. Chevron deference was a frequently invoked concept in American law; the case has been cited in 70 Supreme Court decisions and in 17,000 lower court opinions.

[10] Note that *Loper-Bright* doesn't materially affect the DoJ Antitrust Division or the FTC since they rarely rely on Chevron deference. The FTC non-compete ban may be struck down soon, but under a different rationale

- Even bipartisan legislation may now be harder to pass since Congress will have to add much greater specificity in its bills, rather than leaving such work to agencies (some commentators refer to *Loper-Bright* as a "full employment act" for lawyers and lobbyists). Many bills that Congress intends to put in front of Biden before his term ends could be affected: AI privacy, funding hospitals and community health centers, telehealth/pharmacy benefit manager rules, etc
- Let's use healthcare as an example. The following issues have been handled by agencies for many years, but new interpretive disputes that arise might be resolved by courts instead: routine Medicare reimbursement updates, FDA reviews of emerging medical technologies, CMS policies on nursing home staffing mandates, and home health reimbursement cuts and payments to hospitals with large shares of Medicaid patients[11]
- *Loper-Bright* casts significant doubt on Treasury/IRS ability to propose regulations aimed at "related-party basis adjustment" transactions. An inability to issue sweeping regulations may also impact the current large partnership enforcement initiative, and may lead to renewed challenges to partnership anti-abuse rules[12]
- If Trump wins, the shoe would be on the other foot. For example: anti-development groups may engage in judge shopping and appeals to postpone projects (if time is money, some projects may never be built), and DC Circuit court judges appointed by Biden and Obama may challenge Trump cabinet regulatory rollback decisions. The DC Circuit currently has 7 judges appointed by Democratic Presidents and only 4 appointed by Republican Presidents

[2] Major Questions Doctrine. The Court has begun vigorously enforcing a canon of statutory interpretation called the "Major Questions Doctrine". Its practical meaning: any agency action with "vast economic and political significance" requires clear Congressional authorization. This doctrine has been cited by the Supreme Court four times since 2021 in majority decisions ruling against government overreach:

- *Alabama Association of Realtors v Dep't of Health and Human Services*: Court rules that HHS overstepped its authority in trying to implement an eviction moratorium
- *National Federation of Independent Business v Dept of Labor*: Court rules that OSHA overstepped its authority by implementing wide-reaching vaccine mandate without congressional authorization
- *West Virginia v EPA*: Court held that the EPA overstepped its authority granted by the Clean Air Act when implementing the Clean Power Plan and regulating CO_2 emissions from existing power plants
- *Biden v Nebraska*: Court held that the HEROES Act, which allowed the Secretary of Education to "waive or modify" legal provisions governing student loans due to war or national emergencies, did not empower him to waive $430 billion in student loans by reducing or eliminating most debts when the pandemic ended

[3] The statute of limitations for challenging Federal Regulations now starts at time of injury (not at passage)

In *Corner Post v Federal Reserve Board of Governors* (June 2024), the Court held that the statute of limitations for bringing pre-enforcement challenges to a federal regulation starts at the time a business is adversely affected by the regulation, rather than when the regulation was first adopted. As a result, it will now be possible for companies to challenge regulations that were adopted more than six years ago (and even decades earlier), as long as the plaintiff can prove that its *own* injury from the regulation began within the last six years.

[11] While *Loper-Bright* enhances judicial power to interpret federal statutes in many cases, agencies are still primarily responsible for implementing statutory schemes (i.e., determining prices, reimbursement rates, approving drugs/devices)

[12] "*Court supermajority significantly curtails administrative agency authority in Loper-Bright with momentous impact on federal tax system*", Vinson & Elkins, JD Supra, July 2, 2024

[4] Right to a jury trial rather than by administrative law judges

In *SEC v Jarkesy* (June 2024), the Supreme Court ruled that the 7th amendment right to a jury trial also generally applies to many types of civil fines and penalties levied by federal agencies, including by the SEC under the Dodd Frank Act. The ruling means that in many cases, federal regulators and administrative law judges cannot impose fines without first going to federal court and having a jury trial before lay people. The result: enforcement of federal regulatory measures may become harder, slower and more burdensome.

What about the election?

The deregulatory impulse may be strengthened further if Republicans sweep Congress. GOP control may enable Trump to sign into law "deregulatory" legislation which would be harder for a future administration to reverse. A GOP-controlled Congress could also use the Congressional Review Act (CRA) to reject recently promulgated regulations by the Biden administration and prohibit adoption of substantially similar rules.

Trump had a Republican Congress in 2016, enabling him to achieve deregulation via legislation (e.g., repeal of the Obamacare individual mandate penalty) and the CRA (rejection of 16 Obama-era rules). Until Trump, the CRA had been used only once to overturn a regulation, in 2001. However, the CRA can only be used to revoke regulations passed within the prior 60 legislative days; the Biden administration recently moved to finalize many regulations ahead of that window, including nearly three dozen economically significant regulations in April alone, more major rules than in any other month since 1981.

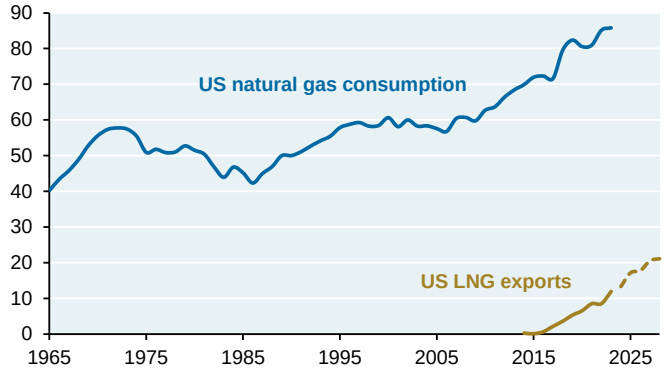
Update: US District Court issues preliminary injunction against Biden LNG export moratorium

The Natural Gas Act requires entities wishing to export LNG to foreign countries to receive an order permitting this from the DOE. In January 2024, the DOE announced it was "pausing determinations" on applications to export LNG to countries that have not entered into free trade agreements with the US, declaring it would rethink the entire approval process for exports to such countries.

Several states sued to challenge DOE's announcement. On July 1, 2024, the US District Court for the Western District of Louisiana issued a preliminary injunction barring DOE from implementing its moratorium. The court held that plaintiff states could immediately sue in federal court rather than waiting for DOE to reject particular applications, citing the negative impact on tax revenues and investment. The court's rationale included lack statutory power to suspend applications, the lack of a public notice-and-comment rulemaking process and intrusion on Congressional power to regulate foreign commerce.

The preliminary injunction can remain in effect until the district court issues a final judgment. The government may appeal the district court's preliminary injunction to a three-judge panel of the US Court of Appeals for the Fifth Circuit[13] and eventually from the Supreme Court. Bottom line: the government's LNG export moratorium just got harder to defend since it will no longer be entitled to the benefit of Chevron deference.

US natural gas consumption vs US LNG exports
Billion cubic feet per day



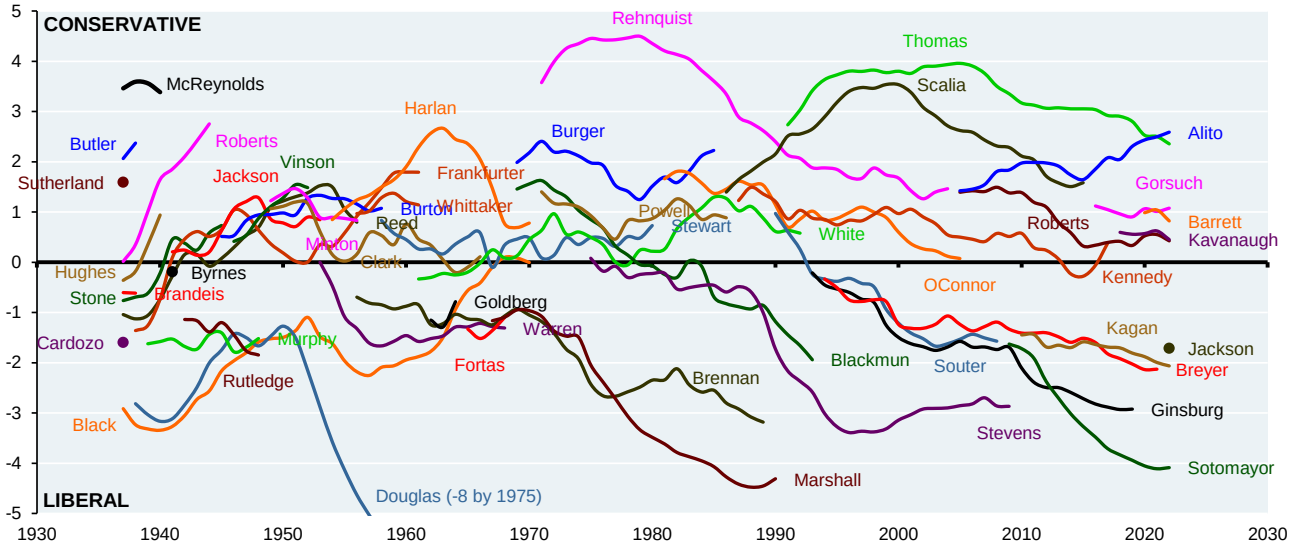
Source: EI Statistical Review, James Stock (Harvard/NBER), JPMAM, 2024

[13] For more on the conservative Fifth Circuit and its impact, see "*The Fifth Circuit won by losing: the court is too radical to win even this Supreme Court's approval, but not too radical to influence it deeply*", The Atlantic, July 7, 2024

Tracking the ideology of Supreme Court justices

There are some interesting approaches used to track the ideology of Supreme Court justices. The first shows Martin-Quinn scores[14], continuously updated to reflect the ideology of each justice since 1937. The underlying numerical model tries to predict how judges will vote based on their prior voting records in each case, and is accurate around 75% of the time. The overlap of justices is critical here, since that's the only way that Hugo Black (1937-1971) and William Rehnquist (1971-2004) could be compared on the same mathematical spectrum: they both served with Potter Stewart (1958-1980), allowing comparisons across time.

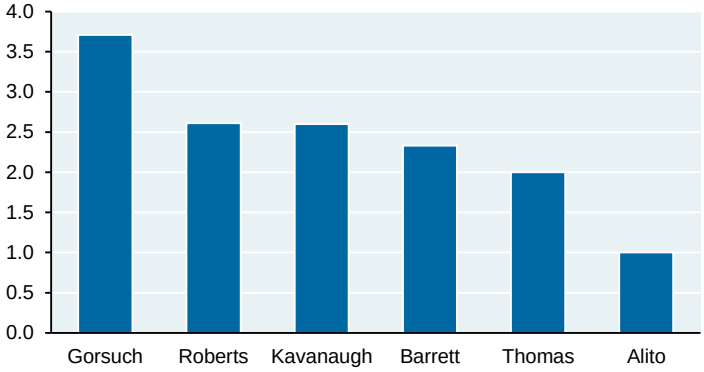
Ideological leanings of Supreme Court justices



Source: Andrew D. Martin and Kevin M. Quinn, "*Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court*"

Another interesting chart appears on the left: **how often do the court's current set conservative justices vote with the liberals on the court[15]?** The results conformed to my prior expectations, but it's interesting to see the empirical data. Alito is at the bottom of the chart, the only conservative justice currently on the court never to have joined all the liberal justices in a 5-4 decision. At the other end of the spectrum, Justice Gorsuch has been a more frequent ally of liberal justices in closely divided cases mainly in two areas: criminal and indigenous law.

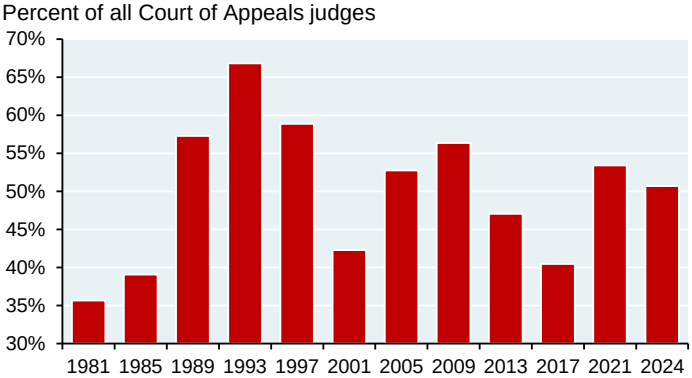
Conservative justice bridging alliance score with liberal justices, Score



Source: Empirical SCOTUS, Adam Feldman (USC), April 2024

US Court of Appeals judges appointed by a Republican President

Percent of all Court of Appeals judges



Source: Bridgewater, 2024

[14] Original paper: **"***Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*", Andrew D. Martin and Kevin M. Quinn, Political Analysis (2002)

[15] "*Charting Justices Decisions Cutting Across Ideological Lines*", Empirical SCOTUS, Feldman (USC), April 2024

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