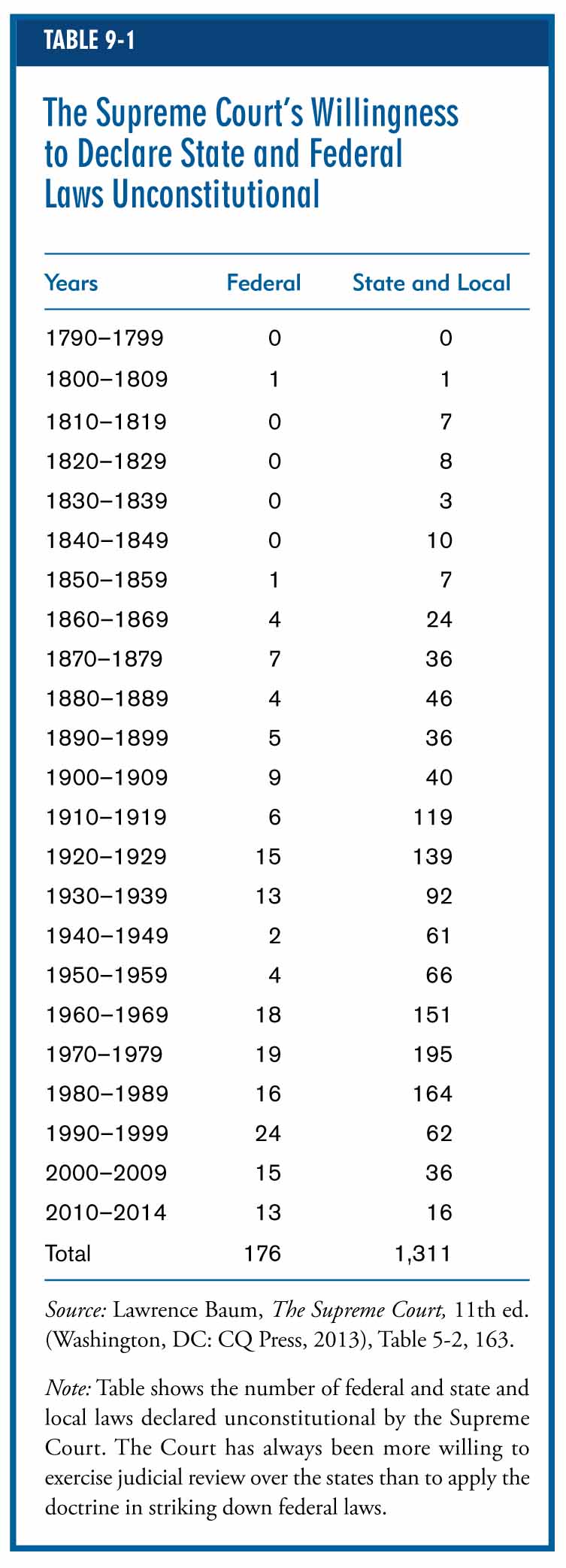
The Logic of American Politics, 7th Edition

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Data Literacy Exercises: Chapter 9

Table 9-1



**Learning objective:** 9.2 Identify characteristics of the three eras of judicial review exercised by the Court.

Discuss the Supreme Court’s place in the separation of powers and the role of principal-agent.

Table 9-1 strongly indicates increased activity in declaring federal and state laws unconstitutional by the U.S. Supreme Court at four important points in our history. The text mentions the rationale for these four periods—the increased mandate given to the court by congress in overseeing the 14th and 15th Amendments, the rise of Progressive regulation of the economy, the Civil Liberties and Rights revolution, and, most recently, the movement to reaffirm states’ rights over federal intrusion.

The number of state laws deemed unconstitutional exceeds the number of federal laws, but part of the reason for that is the simple fact that there are many states. What is interesting is that, for the most part, the number of federal and state laws deemed unconstitutional seems to rise and fall in rough unison, but the balance between state and federal statutes has changed over time, particularly since 1990. The first chart displays the number of Federal and State statutes ruled unconstitutional by the Supreme Court since 1860, the first period of judicial activism. An adjustment has been made to reflect the increase in the number of states from 37 to 50 during this period. The second chart shows overturned federal laws as a proportion of all overturned laws. The horizontal line, set at 15.7%, represents the adjusted mean per decade. What is most interesting is that, even with the increase in state cases involving violations of the Civil and Voting Rights Acts of the mid-1960s, the court has increasingly focused in on national legislation since the 1990s, demonstrating the modern courts movement to a more states’ rights philosophy. In the present decade, the number of federal cases ruled unconstitutional represents nearly half of all such cases. Most of this is due to the decrease in number of state laws thus ruled, not so much an increase on the federal side.

**Questions to Consider:**

1. The number of state statutes ruled unconstitutional by the U.S. Supreme Court has, with minor exception, always exceeded the number of unconstitutionally rules federal statutes.

\*a. True

b. False

@ Feedback: If we don’t count the first two decades listed, state laws have always been the lion’s share of overruled laws. This has been most evident during two periods of activism, 1910-1939 and 1960-1989. Of course, states collectively produce more laws than a single national congress.

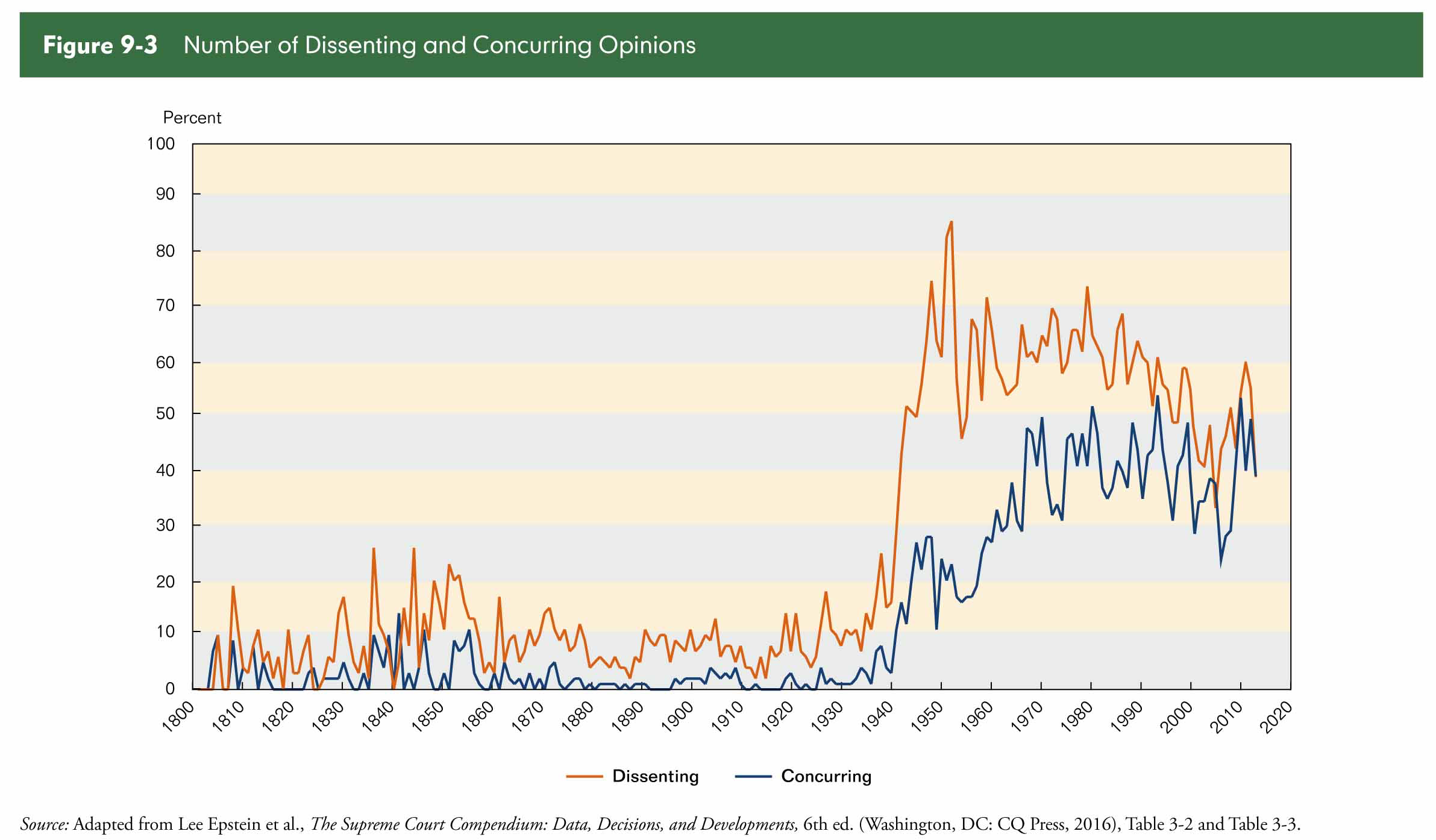
2. Through most periods of judicial activism, the number of state laws deemed unconstitutional has increased at a faster rate than federal laws.

a. True

\*b. False

@ Feedback: Starting with the 1990s, the number of state laws in this category has decreased from the number from the period 1960-1989. The corresponding number of federal laws in those two time periods hasn’t changed much. This is indicative of the recent court’s movement to a states’ rights position.

Figure 9-3



**Learning objective:** 9.4 Relate the judicial decision-making process.

The number of dissenting opinions has almost always exceeded the number of concurring opinions in any given Supreme Court term. Obviously, a majority decision can be signed on to by any other member of the court, thus making a concurring opinion unnecessary. Dissenters from that majority, however, need to specify the reasons for their dissent. What has been most interesting is that, since the 1930s, the number of both have dramatically increased. Part of this, as mentioned in the text, is due to the controversial nature of those decisions—civil rights, free speech, campaign finances, etc. Part is also due to the increasingly divided nature of the court, with many recent decisions being decided by 5-4 majorities. In one case, *McConnell v FEC* (2003), eight separate majority, concurring and dissenting opinions were filed. In several cases, majority and dissenting opinions have taken up more than 200 pages each. Often, the combination of concurring and dissenting opinions makes it difficult to determine which precedent the court has actually made. What makes this all the more interesting is that, in recent decades, the overall number of cases heard by the Supreme Court has declined fairly dramatically. Justices seem to have more to say about less.

Source: Lee Epstein et al. *The Supreme Court Compendium: Data, Decisions and Developments*, 6th ed. Table 3-5 (CQ Press, 2016).

Questions to Consider:

1. Which decade witnessed the greatest increase in dissenting opinions?

a. the 1850s

b. the 1930s

\*c. the 1940s

d. the 1990s

@ Feedback: The Constitutional debates over New Deal legislation and the beginning of Civil Rights cases started to polarize the court between its old guard and the justices appointed by Franklin Roosevelt.

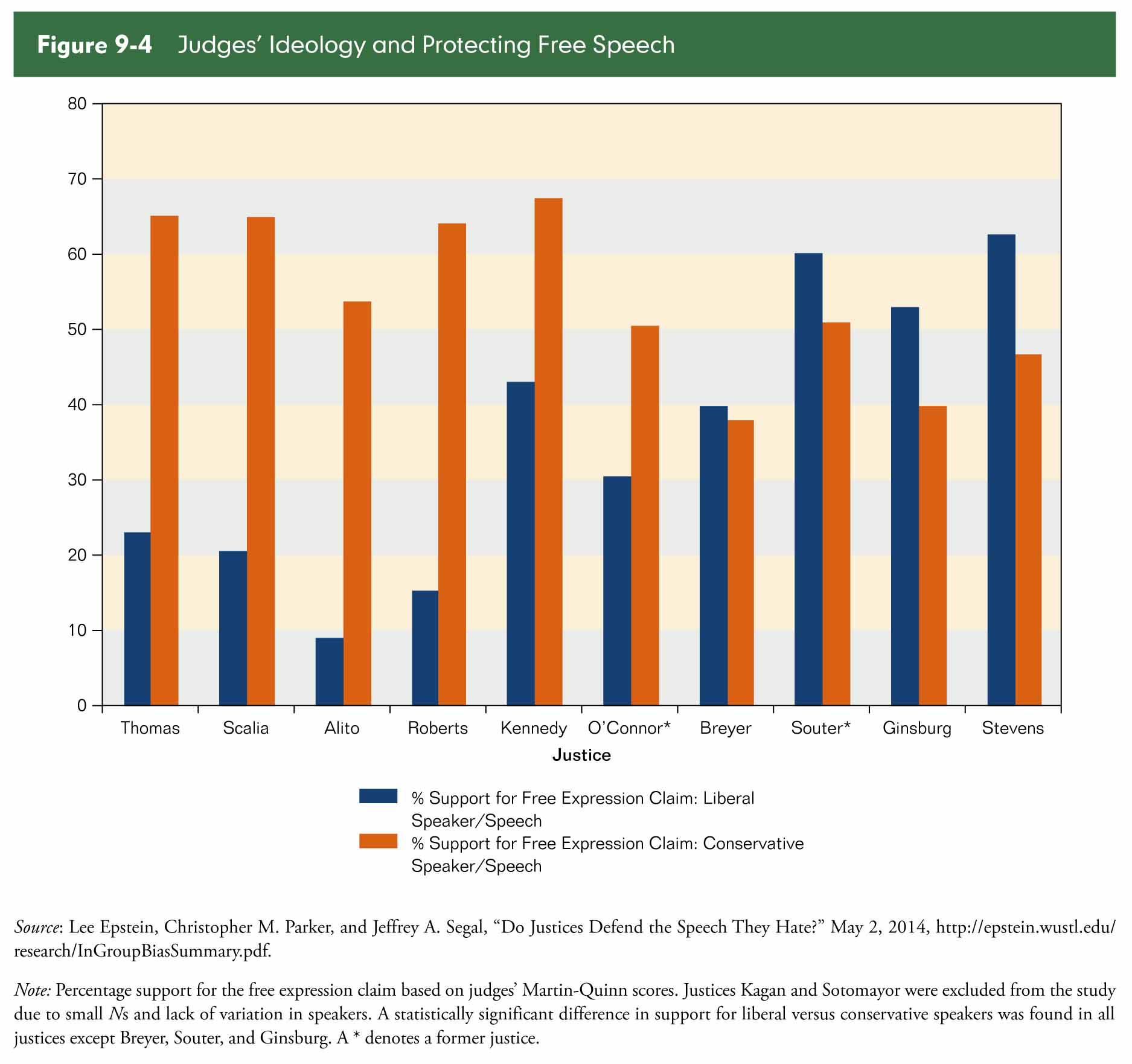
2. By the 21st century, the number of concurring opinions had risen to roughly the number of concurring opinions.

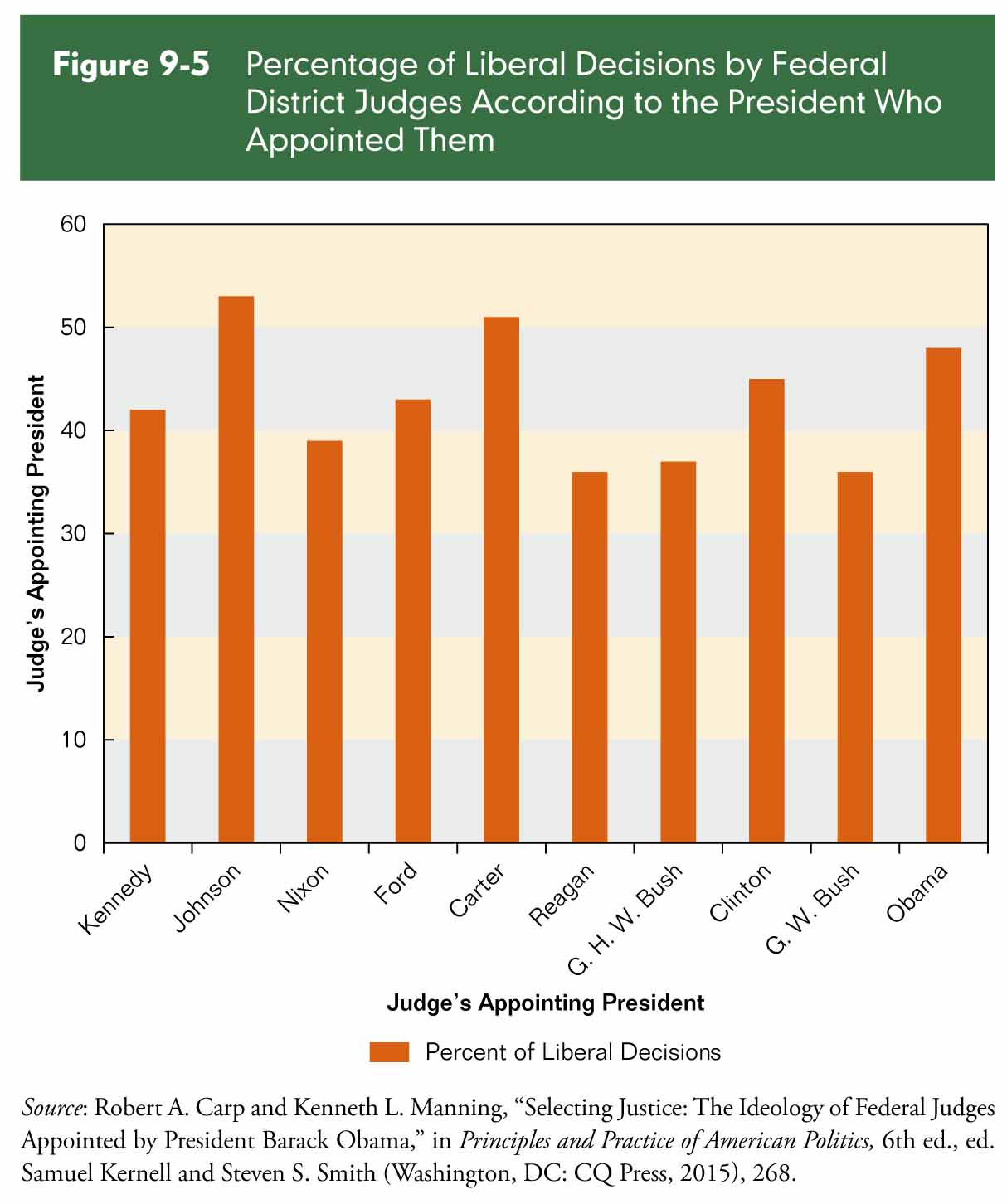
\*a. True

b. False

@ Feedback: The number of dissenting opinions had dropped since its record high in the 1940s, while concurring opinions had risen. Again, all this despite the fact that the Supreme Court was hearing fewer cases.

Figures 9-4 and 9-5





**Learning objective:** 9.4 Relate the judicial decision-making process.

Although we would care to think that president’s own ideological leanings should not influence his choice for nomination to the Supreme Court and that, in turn, the justices selected would not bring their own ideological positions to bear on their decision-making thought, the evidence suggests otherwise. As noted in a previous chapter, exceptions, especially Chief Justice Earl Warren, do exist. In recent decades, Associate Justices Souter and Stevens have anchored the liberal wing of the court during their tenure. They were both appointed by Republican Presidents (Ford and George H.W. Bush) but both were considered rather moderate by current standards. The ideological perspectives of both presidents and justices are captured especially well in examining support for free expression. The blue and orange columns are not additive. The data from which the bar graph is derived measures the percentage of times a justice supported a case that advanced liberal expression and, separately, the percentage of times they supported a case that advanced conservative expression. That is not the same as a measure of the percentage of times they supported either side as a total of all of the cases in which they supported an expression claim. That would be partially a function of how many cases advanced liberal or conservative expression. That type of measure is incorporated in Figure 9-5, listing the percentage of liberal decisions on all cases for all judges appointed by different presidents.

The following chart lists the 27 most recently serving justices (Justices Kagan and Sotomayor had not served long enough to have made enough decisions). They are ranked by the difference between the percentages of cases in which they voted to support a liberal free expression claim and the percentage supporting a conservative claim. A negative number indicates greater support for conservative expression, a positive number liberal expression. A number close to 0% indicates ideological neutrality. Overall, justices may support free expression roughly equally, but whether that expression advances liberal or conservative views does differentiate them pretty much as expected. Of course, the implication is that a president’s party and his ideological position are closely matched. For 19 justices, their ideological position matches their nominating president’s party; for 8 it does not. Eleven of the thirteen conservative justices were appointed by Republicans, eight of the fourteen liberal justices by Democrats. I would guess that, in time, Obama appointees Kagan and Sotomayor will follow the pattern. It is interesting to note that 7 of the 8 justices chosen by Presidents Reagan and both Bush presidents rank as the most conservative, matching what we know about recent party polarization.

|  |  |  |
| --- | --- | --- |
| Justice\* | President | Lib-Cons |
| **Roberts** | **G.W. Bush** | **-48.9** |
| **Alito** | **G.W. Bush** | **-44.8** |
| **Scalia** | **Reagan** | **-44.5** |
| **Thomas** | **G.H.W. Bush** | **-42.3** |
| **Kennedy** | **Reagan** | **-24.5** |
| **O'Connor** | **Reagan** | **-20.1** |
| Rehnquist | Reagan | -16.0 |
| Clark | Truman | -14.7 |
| Blackmun | Nixon | -14.7 |
| Burger | Nixon | -13.5 |
| White | Kennedy | -11.6 |
| Harlan | Eisenhower | -8.0 |
| Powell | Nixon | -0.6 |
| **Breyer** | **Clinton** | **1.9** |
| Whittaker | Eisenhower | 2.9 |
| Stewart | Eisenhower | 8.1 |
| **Souter** | **G.H.W. Bush** | **9.2** |
| **Ginsburg** | **Clinton** | **13.2** |
| **Stevens** | **Ford** | **15.9** |
| Brennan | Eisenhower | 16.0 |
| Marshall | Johnson | 20.1 |
| Black | Roosevelt | 23.3 |
| Frankfurter | Roosevelt | 23.6 |
| Douglas | Roosevelt | 34.0 |
| Warren | Eisenhower | 40.9 |
| Burton | Truman | 41.9 |
| Fortas | Johnson | 45.7 |

\*Justices listed in bold match the ones found in Figure 9-4.

Source: Lee Epstein, Christopher M. Parker, and Jeffrey A. Segal, “Do Justices Defend the Speech They Hate?” May 2, 2014, <http://epstein.wustl.edu/research/InGroupBiasSummary.pdf> and <http://www.supremecourt.gov/about/members_text.aspx> for presidential appointments.

**Questions to Consider:**

1. According to Figure 9-4, the last ten justices who served before 2009 were more likely to lean liberal in their votes in support of free speech than conservative.

a. True

\*b. False

@ Feedback: Six of the ten supported conservative free expression claims proportionately more often than liberal claims. All six were appointed by Republican presidents, as were two of the liberal leaning ones.

2. Of the ten justices listed in Figure 9-4, the liberal leaning ones exhibited greater differentiation in support of liberal versus conservative claims than did the conservative leaning justices.

a. True

\*b. False

@ Feedback: The differentiation, measured by the difference between conservative (orange) and liberal (blue) decisions is obviously greater on the conservative side of the spectrum.

3. Looking at Figure 9-5, which of the following is not true.

a. Justices appointed by President Ford were more liberal overall than justices appointed by other Republican presidents.

\*b. Justices appointed by President Ford were more conservative overall than justices appointed by all Democratic presidents.

c. Justices appointed by President Johnson were the most liberal in their decision-making

d. Only justices appointed by Presidents Johnson and Carter decided in a liberal direction more than 50% of the time.