The Departing Justice and US Supreme Court Nominations:

Direct and Indirect Influences on the Next Natural Court

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Previous empirical research on US Supreme Court nominations has largely overlooked the influence of the departing justice. But the theory of reference dependence suggests that the departing justice may serve as a reference point for persons considering a nomination to the Court. Analysis of Supreme Court nominations between 1953 and 2006 provided evidence for the theory. Senators were substantially more likely to oppose a nomination the more the nomination had the potential to move the ideological ideal point of the vacant seat from the senator. The Senate Judiciary Committee chair was also more likely to delay confirmation hearings the more unfavorable a seat change was to him. However, presidents did not appear to constrain their nominations based on the ideology of the departing justice, and justices did not appear to systematically retire from the bench for political reasons, indicating that the influence of the departing justice is not always present or strong in each stage of the appointment process.

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PREFACE

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1.0 INTRODUCTION

In 1967, Thurgood Marshall joined five fellow Democrats and a liberal Republican Chief Justice on the US Supreme Court. Marshall penned liberal majority opinions that expanded the First Amendment to cover possession of obscene materials (*Stanley* v. *Georgia*, 1969), forced states to reconsider their capital punishment procedures (*Furman* v. *Georgia*, 1972), and required prisons to assist inmates in preparing and filing legal papers through access to law libraries or other means (*Bounds* v. *Smith*, 1977).

But over the next decade, a succession of retirements during Republican administrations shifted the Court in the conservative direction. After William Brennan left in 1990, Marshall's lone Democratic colleague was JFK appointee Byron White, who had been one of two justices in the *Roe* v. *Wade* (1973) minority and who had dissented in *Miranda* v. *Arizona* (1966).

Marshall claimed that it was a "double barreled lie" (Lewis 1991) that he was leaving the Court in "mounting anger and discouragement as he watched the ascendancy of a conservative-dominated bench" (Rosenthal 1991). The 82-year-old asserted that his decision to retire had been made in consultation with a doctor, but when pressed for a specific medical reason Marshall stated only that he was "getting old and falling apart" (Lewis 1991), a claim that was somewhat corroborated by his mistaken preliminary vote in favor of a capital sentence in *Lankford* v. *Idaho* (1991) and his confusion about long-standing Court opinion assignment rules (Ward 2003: 205).

Marshall's 1991 retirement was clearly not for political reasons: it was announced under an opposite party president with approval ratings higher than 70 percent, and became effective fewer than 13 months before the next presidential election. But President George H.W. Bush was not completely unconstrained in his choice to replace Marshall, given that the Senate was under Democratic control and that the retirement had left the Court without any African American members. Moreover, less than five years had passed since the Democratic Senate rejected the nomination of conservative Robert Bork, a "watershed" event (Resnick 2001) that "clearly established a firm precedent for ideological inquiries and for the rejection of judicial nominees, at least in some instances, on purely ideological grounds" (Viera and Gross 1998: 247).

President Bush's previous nominee, David Souter, had been characterized as "stealth" by Senator Howell Heflin at Judiciary Committee hearings, with little track record in terms of political views, and was confirmed rather easily, 90 to 9. But Bush's nominee to replace Marshall – Clarence Thomas – had a clear conservative ideology that clashed with both the median senator and the departing justice. Less than two years prior, Thomas, the former head of the Equal Employment Opportunity Commission, had been confirmed as a federal appeals judge by voice vote, with only two senators registering opposition (Dewar 1990). But in July 1991, Thomas stood alongside the president in Kennebunkport, Maine, as a Supreme Court appointee who would face one of the most contentious nomination battles in American history.

Thomas initially stated that he "looked forward to the confirmation process" (Greenburg 2007b), but later remembered his hearings to be a "high-tech lynching" (Marlantes 2007), as accusations surfaced that he had sexually harassed an EEOC employee and had a penchant for pornography. Thomas would also later claim that "[Senate Judiciary Chairman Joe] Biden's

smooth, insincere promises that he would treat me fairly were nothing but talk" (Thomas 2007: 236).

The president's short list for Marshall's replacement reportedly contained the names of Thomas and multiple Hispanics, whites, and women (Wines 1991). Bush would have preferred to nominate Thomas to replace a white justice, and he worried that the "optics" of a Thomas-for-Marshall swap would be interpreted as deference to a racial quota (Greenburg 2007a), but the second nomination of an African American to the Supreme Court was nonetheless opposed by the Congressional Black Caucus and the National Association for the Advancement of Colored People.

On October 15, 1991, the Senate voted to confirm 43-year-old Thomas as the 165th United States Supreme Court justice by a 52 to 48 vote. Like Thurgood Marshall before him, who had promised that his would be a "lifetime appointment" (Goldman and Gallen 1992: 159), Thomas anticipated a long tenure on the Court: "I'm going to be here for 40 years. For those who don't like it, get over it" (Biskupic 1994).

Previous research on the Supreme Court has suggested that departing justices retire strategically to influence the future of the Court. This political retirement theory proposes that justices prolong their tenure on the Court, sometimes past their prime or even their usefulness, to delay retirement until the election of a president with a similar ideology or before the election of a president with conflicting policy preferences. But studies have been mixed on the presence of

systematic evidence for such political retirements (see Peretti and Rozzi 2008: 28, for a review), and the departure of Thurgood Marshall represents an unambiguous counter-example.

But the influence of the departing justice on the next natural Court may be broader than simply providing the president with an opportunity to nominate a like-minded replacement. Political retirement is a purposeful act, but the Thomas episode suggests another avenue by which a departing justice can indirectly affect the process of selecting and confirming a successor: by providing a contrast with the nominee that some institutional players will perceive as a gain and others will interpret as a loss. The theory of the departing justice implies that Clarence Thomas may have benefitted from the fact that he was chosen to replace an extreme ideologue, because – as conservative as Thomas was – he still fell closer to the median senator than did Thurgood Marshall, the justice he was replacing. Therefore, for most senators – and for the median senator in particular – Thomas presented a closer approximation of their ideology than the justice who had just retired; that proxy may have been *imperfect* for most senators, but it nonetheless represented an improvement.

This suggests what may appear to be a counterintuitive recommendation, namely that – all else equal – nominations of extreme conservatives will be better received when the departing justice is an extreme liberal than when the departing justice is a moderate liberal. The conventional wisdom for presidents attempting to "move the median" (Krehbiel 2007) may be to lessen the distance between the nominee and the departing justice and thus to delay appointing an ideologue until a moderate retires. But this logic neglects the fact that such a replacement would be perceived as a loss by most senators, including the median senator. However, if a conservative ideologue is tapped to replace a liberal ideologue, then the perceived loss for many senators will be lessened.

More generally, presidents and senators may view a nomination through the prism of the previous Court – with the departing justice as the reference point – which may explain variation in the president's choice of a replacement, delay in processing the nomination by the Senate Judiciary Committee and the Senate Majority Leader, and the decision of a senator to support or oppose the nomination.

1.1 THE IMPORTANCE OF THE QUESTION

The US Supreme Court is a powerful political institution with the ability to strike down actions of the other branches of government (e.g., the Civil Rights Cases, 1883), to reverse decisions of lower federal (e.g., *Parents Involved* v. *Seattle School District No. 1*, 2007) and state courts (e.g., *Michigan Department of State Police* v. *Sitz*, 1990), and to provide the decisive interpretation of federal statutes and the Constitution (e.g., *Marbury* v. *Madison*, 1803; *Cooper* v. *Aaron*, 1958). The Court has used its authority to order the desegregation of public schools (*Brown* v. *Board of Education*, 1954), to grant women the right to an abortion (*Roe* v. *Wade*, 1973), and to invalidate laws imposing a minimum wage (*Adkins* v. *Children's Hospital*, 1923) or prohibiting child labor (*Hammer* v. *Dagenhart*, 1918). The Court has often been vigilant in defending civil liberties, evidenced by its willingness to issue rulings protecting the rights of Nazis (*National Socialist Party v. Village of Skokie*, 1977), animal sacrificers (*Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 1993), and child pornographers (*Ashcroft* v. *Free Speech Coalition*, 2002).

Congress can override Supreme Court interpretations of statutes simply by passing new legislation (e.g., the Jencks Act). However, King (2007) found that the Court is more likely to

strategically base its interpretations on constitutional grounds, and not statutes, when there is a high probability of Congress attempting to overrule the Court.

This is likely because the lone formal check on a Supreme Court exercise of judicial review when the Court bases its decision on the Constitution is the adoption of a constitutional amendment, a long and difficult process that has occurred only four times in American history. The Eleventh Amendment, ratified after 340 days, barred suits against a state by citizens of another state or a foreign country, overruling the Court in *Chisholm* v. *Georgia* (1793); the Sixteenth Amendment, ratified after 1,302 days, permitted the federal government to implement an income tax, after the Court held such a tax unconstitutional in *Pollock* v. *Farmers' Loan and Trust Co.* (1895); and the 26th Amendment, ratified after 100 days, overruled *Oregon* v. *Mitchell* (1970) to extend the franchise to eighteen-year-olds.

The most consequential of the four, though, was the Fourteenth Amendment, ratified after 757 days, which overruled the Court's *Dred Scott* v. *Sandford* (1857) decision that denied civil rights to blacks. However, in the Slaughterhouse Cases (1873) and in *United States* v. *Cruikshank* (1875), the Court "effectively nullified" (Lawrence 2007: 4) the centerpiece of the amendment – the privileges or immunities clause – by holding that it did not incorporate the Bill of Rights to the states, as its primary framer, John Bingham of Ohio, had intended, and as the ratifiers in Congress and the states had interpreted the amendment's purpose (Lawrence 2007: 18-27). Therefore, the Fourteenth Amendment – carefully constructed in the wake of the Civil War and ratified by the necessary 28 states, after nine states had explicitly rejected it and two had rescinded ratification – had its central provision negated by five Supreme Court justices.

Empirical scholarship on the Court suggests that such judicial decisions are not controlled by legal norms like precedent (Segal and Spaeth 1996) but are instead largely influenced by the

justices' policy preferences (Segal and Cover 1989; Segal and Spaeth 2002), with personal attitudes playing an even larger role in highly salient cases (Unah and Hancock 2006). As Segal and Spaeth (1993: 65) note, "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."

Perceived departures from the Constitution based on such suspected political motivations have led to allegations that the liberal (Levin 2005) and conservative (Dionne 2001) justices practice judicial activism. The Court has developed entire areas of constitutional law, like the right to privacy (*Griswold* v. *Connecticut*, 1965), and prophylactic restrictions, like the exclusionary rule (*Mapp* v. *Ohio*, 1961), that lack an explicit textual basis in the Constitution, and the justices have invented doctrines like substantive due process that some of their brethren call "a contradiction in terms" (Scalia 2005). The Court has received criticism from its own justices that its landmark abortion rulings were "an improvident and extravagant exercise of the power of judicial review" (dissent of Byron White in *Doe* v. *Bolton*, 1973) and that *Roe* v. *Wade* (1973) was a "heavy-handed judicial intervention [that] was difficult to justify" (Ginsburg 1985). Such dubious decision making is not absent from conservative justices: Antonin Scalia's majority opinion in *District of Columbia* v. *Heller* (2008) – "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court" (Sunstein 2008: 246) – could easily be read as "an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other" (Wilkinson 2009: 256).

Court decisions have also exhibited some questionable constitutional readings that betray the political preferences of their authors: for example, Earl Warren was unable strike down segregation in District of Columbia schools on Fourteenth Amendment grounds, as the Court did in *Brown* v. *Board of Education* (1954) for schools in the several states, because the Equal

Protection clause applies only to the states; however, the Chief Justice nonetheless papered over this "embarrassing textual gap" (Lessig 1995: 409-410) in *Bolling* v. *Sharpe* (1954) with a theory that has come to be known as reverse incorporation (Primus 2004). But, again, transparently ideological opinions are not the exclusive province of liberal Courts: the per curiam *Bush* v. *Gore* (2000) decision was derided as "the single most corrupt decision in Supreme Court history, because it is the only one…where the majority justices decided as they did because of the personal identity and political affiliation of the litigants" (Dershowitz 2001: 174). And extra-constitutional actions by the Court can also transcend ideological divisions, like in 1974 after William Douglas became infirm: over the objections of Byron White, who noted the Court's actions were nowhere sanctioned by the Constitution, seven justices decided to disregard Douglas' vote in 4-4 cases (Lazarus 1998) and to assign majority opinions without his input in cases in which the decision fell to him (Ward 2003: 187-188).

Even decisions about whether to rule on the merits of a case are colored by judicial preferences. The justices' caseload is almost entirely discretionary, and voting to grant or deny cert – i.e., to take or not take a case – is influenced by ideology (Perry 1991). The Court is free to sidestep controversial issues by defining them as non-justiciable on the basis of standing, mootness, or their nature as political questions that another branch of government should decide. For example, *Elk Grove Unified School District* v. *Newdow* (2004), a pledge of allegiance case, was dismissed because the plaintiff was a non-custodial parent and therefore, in the majority's view, lacked standing. Conservatives were short handed for the case, since Scalia had recused himself, and, as Clarence Thomas noted in his concurrence, "as a matter of our precedent, the Pledge policy is unconstitutional." Faced with the choice between a backlash from removing

"under God" from the pledge and a backlash for reversing course on its Establishment Clause jurisprudence, the Court elected to punt.

This lack of judicial restraint and constraint, coupled with the shelter of tenure during good behavior, grants justices wide latitude in decision making. Therefore, the most direct way to change the direction of the Court's jurisprudence is to change the identity of its members. Political actors understand the critical nature of Court vacancies, and the resignation of Sandra Day O'Connor provided an example of the importance of what William Brennan termed "the Rule of Five," namely that: "You can do anything you want at the Supreme Court with five votes" (Garbus 2003: 283).

Partisan advocates painted O'Connor's retirement in stark terms: "the most important resignation and nomination…in our lifetime and probably more than that."[1] Language became even graver after a conservative federal appellate judge was nominated as her replacement: confirmation of Samuel Alito "can tip the balance on the Supreme Court radically away from constitutional checks and balances and the protection of Americans' fundamental rights"[2] and "threatens the very existence of core legal rights that Americans, especially women, have relied on for decades."[3] Subsequent decisions suggested that disquiet about O'Connor's replacement may have been warranted: Alito drafted the majority opinion in a 5-4 decision rejecting a gender pay discrimination claim (*Ledbetter* v. *Goodyear*, 2007) and provided the fifth vote in favor of a federal partial birth ban (*Gonzales* v. *Carhart*, 2007), contrasting the previous 5-4 ruling joined by O'Connor that struck down a similar Nebraska prohibition (*Stenberg* v. *Carhart*, 2000).

[1] Jay Sekulow of the American Center for Law and Justice, quoted in Baker (2005).
[2] Senator Patrick Leahy (2006).
[3] Marcia D. Greenberger (National Women's Law Center 2005).

Therefore, the importance of each vote on the nine-member Court makes Supreme Court appointments consequential events whose outcome may influence US policy for decades.

1.2 SUPREME COURT APPOINTMENTS

The three branches of American government intersect regularly only for Supreme Court appointments. The Constitution sketches minimal guidelines for the process, investing the president with the power to appoint Supreme Court judges "by and with the Advice and Consent of the Senate" (Article II, Section 2). But despite this lack of detail, a highly institutionalized appointment procedure has developed.

The first, less institutionalized phase is the nomination, in which the president selects a candidate and submits the nomination to the Senate. The president is constitutionally unconstrained in constructing a list of names and in the ultimate choice of a nominee, although past presidents have sought advice from senators, representatives, administration officials, justices, interest groups, and organizations like the American Bar Association (Rutkus 2005: 8-9, 12). Short lists are often made public, or at least salient characteristics of potential nominees are leaked.

The background of short list candidates is probed by the Federal Bureau of Investigation, which handles personal finances, and by administration and Justice Department officials, who review public records (Rutkus 2005: 12). Nominees must also prepare and submit responses to an extensive Senate Judiciary Committee questionnaire; the completed questionnaire for recent nominee Sonia Sotomayor totaled 173 pages, and she still received criticism for failing to cite a 1981 memo opposing capital punishment that she had signed (Bendavid 2009).

In the second phase, the Senate considers the nomination. The Judiciary Committee has served as a filter since 1868, handling all but a handful of nominees, with hearings held intermittently before the practice became standard in 1955 (Rutkus 2005: 17, 19). Hearings provide a formal opportunity for senators to question candidates, and in recent decades questions about the nominees' prior judicial decisions have grown both in number and in negative tone (Williams and Baum 2006). Preparation time for the hearings has also expanded, from an average of one week for nominations between 1938 and 1954, to an average of 44 days for nominations between 1981 and 2006. Recent nominations have also seen the advent of television coverage, from the 1981 O'Connor appointment forward, as well as the institutionalization of interest groups presenting testimony or petitioning the public to pressure their senators to support or oppose a nomination.

Once hearings have completed, the Judiciary Committee reports the nomination to the full Senate with a recommendation that is favorable or unfavorable, or with no recommendation at all. The nomination is then placed on the Executive Calendar, and floor debate is scheduled. Finally, senators indicate their preferences on the nomination in a roll call or voice vote, or the nomination is derailed with a filibuster, a rare occurrence that has resulted in only one withdrawal of a nomination (the 1968 chief justice nomination of Abe Fortas).

1.3 THE THEORY OF THE DEPARTING JUSTICE

Research has tended to treat Supreme Court appointments in a vacuum, whether analyzing confirmation voting of the Senate (Segal 1987) or individual senators (Epstein et al. 2006), presidential statements in favor of a nominee (Johnson and Roberts 2004), public support for a

nomination (Caldeira and Smith 1996), or interest group mobilization for or against an appointment (Caldeira and Wright 1998). A handful of articles have accounted for the departing justice (Ruckman 1993; Krehbiel 2007) or the median ideology of the interim eight-member Court (Lemieux and Stewart 1990, 1991; Moraski and Shipan 1999; Nokken and Sala 2000), but these studies have only concerned the potential impact of an appointment on the Court median.

The theory of the departing justice considers more than the median, though, proposing that the context of the current nomination includes the member being replaced. The two appointments of President George W. Bush provide anecdotal evidence that the departing justice influences senator opposition to Supreme Court nominations.

The resignation of Sandra Day O'Connor and death of William H. Rehnquist in the summer of 2005 created a rare double vacancy on the Supreme Court. Nominees John Roberts and Samuel Alito faced an identical institutional context: both were nominated and confirmed in the 109th Congress, Republicans controlled the Senate with 55 members, and presidential approval was 45 percent for the Gallup poll immediately prior to the Roberts confirmation vote and 43 percent for the Gallup poll immediately prior to the Alito confirmation vote. The two nominees also had similar qualifications and ideology: Roberts' Segal-Cover perceived qualifications score was 0.970 (where 0 is the lowest score and 1 is the highest), and his Segal-Cover perceived ideology score was 0.120 (where 0 is the most conservative score and 1 is the most liberal); respective scores for Alito were 0.810 and 0.100. But liberal interest groups spent three times as much to defeat Alito's nomination,[4] the Senate Judiciary Committee took nearly

[4] Liberal interest groups spent $454,456 for television advertising against the Roberts nomination, and $1,365,857 against the Alito nomination (Brennan Center at the New York University School of Law 2006).

three weeks longer to send Alito's nomination to the floor,[5] senators threatened to filibuster the Alito nomination, and twenty more senators ultimately voted against Alito's confirmation, with Alito only garnering a 58-42 vote that placed his nomination in danger of being defeated by a filibuster proposed by Massachusetts senators John Kerry and Edward Kennedy.

Considerations of the departing justice may explain the varying levels of support afforded the Roberts and Alito nominations. Roberts was perceived to be an ideological clone of the conservative justice he was scheduled to replace,[6] so moderate or liberal senators could support his confirmation by rationalizing that the Court would be no worse for them than before. But no such justification was possible for the replacement of moderate O'Connor with conservative Alito,[7] providing anecdotal evidence that the increased resistance to the Alito nomination may have been driven by the attempted replacement of "the pivotal middle justice on a divided court" (Dinh 2005).

This dissertation investigates the extent to which such variation in opposition can be attributed to the departing justice acting as a reference point in evaluating a nomination in the four main arenas of Supreme Court replacements: the president's choice of a nominee, the Senate's speed in processing the nomination, senator opposition to the nomination at a confirmation roll call vote, and a justice's decision to retire.

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[5] The Roberts nomination was referred to the Judiciary Committee on July 29, 2005, which favorably reported the nomination 55 days later on September 22, 2005, while 75 days were necessary for the Alito nomination (November 10, 2005, to January 24, 2006). The July 29 date for Roberts' nomination is for his associate justice nomination and not his subsequent chief justice nomination on September 6, 2005.

[6] e.g., "Judge Roberts is viewed as a sort of political clone of Chief Justice Rehnquist" (Waldmeir 2005).

[7] e.g., "The Roberts-for-Rehnquist nomination would not affect the court's balance, but Bush could force an ideological shift to the right when he replaces O'Connor" (Associated Press 2005).

1.4 OVERVIEW OF THE DISSERTATION

The dissertation is structured as follows. Literatures on Supreme Court nominations and reference dependence are reviewed, providing a foundation for the departing justice theory, from which hypotheses are drawn in three areas: senator opposition to a nomination, delay of a nomination in the Senate, and presidential selection of a nominee (Chapter 2). Research designs to test hypotheses in each of the areas are then described (Chapter 3), and subsequent chapters report results for the analyses of senator opposition to Supreme Court nominations (Chapter 4), the timing of Senate confirmation benchmarks (Chapter 5), and presidential choice of nominee ideology (Chapter 6). A final analysis is described and reported on political retirements from the Court (Chapter 7), followed by a summary of findings, unanswered questions, and suggestions for future research (Chapter 8).

2.0 THE DEPARTING JUSTICE

This chapter reviews previous research on Supreme Court nominations, discusses the theory of reference dependence from the marketing and psychological literature, applies the reference dependence theory to construct the departing justice theory, and then derives hypotheses to test the theory in three areas: senator opposition to a nomination, delay of a nomination in the Senate, and presidential selection of a nominee.

2.1 PREVIOUS RESEARCH ON CONFIRMATION VOTING

Much previous empirical research on senator confirmation voting has conceptualized nominations as simple additions of a new justice, without reference to other members of the Court or to the departing justice. Cameron, Cover, and Segal (1990; hereafter CCS) introduced what has become the standard confirmation voting model, which formed the core of updates in Epstein et al. (2006) and Shipan (2008). The CCS model explained confirmation voting with five variables:

1. nominee qualifications,
2. partisanship, operationalized as a senator belonging to a different political party than the nominating president,

3. presidential strength, with strong presidents not being in the fourth year of their term and belonging to the political party that controls the Senate,
4. the squared distance between the ideal point of the senator and the ideal point of the nominee, and
5. an interaction term between qualifications and ideological distance.

None of these variables concern the departing or continuing justices, but other research has addressed the possibility that the balance of the Court has some bearing on the confirmation process. Lemieux and Stewart (1990) found the Senate less likely to confirm a nomination with the potential to alter the Court median, and Lemieux and Stewart (1991) developed a similar theory at the individual level, claiming that senators would be less likely to approve a nomination that would move the Court median further from their ideal point.

Ruckman (1993) proposed that senators attend to "critical nominations" involving a partisan replacement on the Court that would lead to a one-member partisan split, would change control from one party to the other, or would create a partisan deadlock. But the critical nomination operationalization of ideology is overly broad and can be improved with better measures.

The first improvement is methodological, replacing partisanship with more precise and dynamic ideological measures that have become available since the early 1990s. Party identification is a fuzzy gauge that essentially dichotomizes ideology, and, in any event, Supreme Court justices' political preferences drift (Segal, Timpone, and Howard 2000; Epstein et al. 2007b), sometimes to such an extent that their partisan labels become misleading; after all, Republicans wrote the majority opinion in *Roe* v. *Wade* (1973) and voted to strike down school-sponsored prayer (*Engel* v. *Vitale*, 1962).

Epstein et al. (2007b: 1520) found that the ideological preferences of only four of 26 confirmed nominees since 1937 remained stable; in fact, according to Martin-Quinn scores (Martin and Quinn 2002a), two of the four most liberal justices in each term between 1994 and 2006 have been Republicans. Building a critical nominations measure on partisanship alone may therefore lead to incorrect estimates about the timing of a credible threat to change the ideology of the Court median; the recent confirmation of Samuel Alito to a Court with only two Democratic members demonstrated that – even in the absence of a partisan replacement – a nomination can significantly alter the Court median, or at least set the stage for a major shift.

Therefore, the second innovation to the critical nominations literature is to consider nominations more broadly than threats to change the Court median. The median has occupied a central role in judicial politics research (Martin, Quinn, and Epstein 2005: 1276-1278), but evidence from the psychological and marketing literatures suggests that senators may also be influenced by considerations about potential changes to the ideology of the seat being vacated by the departing justice.

2.2 REFERENCE DEPENDENCE

Research has found that variance in responses to identical stimuli can be attributed to orthogonal, often temporal, considerations that are referred to as reference points (Fiegenbaum and Thomas 1988), anchors (Tversky and Kahneman 1974), or adaptation levels (Helson 1964), depending on the study and the particular nuance of the effect. Experimenters have observed that rural residents judged a city as noisier and more polluted than did persons from urban areas (Wohlwill 1974), that male college students rated a target woman in a photograph as less physically

attractive while watching an episode of “Charlie’s Angels” than while otherwise occupied (Kenrick and Gutierres 1980), and that persons described a landscape as more exciting after they were exposed to a gloomy scene than after they had viewed a control photograph (Russell and Lanius 1984).

Social attitudes can be affected by reference phenomena, as well. Eibach and Ehrlinger (2006) found that differences in ratings of racial progress were a function of reference points: African Americans compared contemporary race relations with an ideal situation, while white Americans compared race relations to the past. Strack, Schwarz, and Gschneidinger (1985) observed that persons judged their current life satisfaction to be at higher levels after they were prompted to remember negative events than after they were asked to recollect positive events. Cowan et al. (2002) uncovered a similar effect with regard to hate speech, conceived as a clash between values of free speech and equality, reporting that asking respondents to brainstorm disadvantages of restricting one of those values (e.g., “Please list some of the costs of censoring speech”) influenced respondents to tip the balance in favor of that value.

Reference dependence has also been extensively applied in marketing research as a reference price (Erickson and Johansson 1985), in which consumer choice is influenced by an anchor; studies have found consumer attitudes to be influenced by anchors, operationalized as the advertised “regular” price of the brand (Biswas and Blair 1991), previous prices of the brand (Briesch et al. 1997), or the price of the most recently purchased brand (Hardie, Johnson, and Fader 1993). The marketing literature is unsettled on which of these prices serves as the primary reference point for consumers, but the departing justice is the most obvious anchor for Supreme Court nominations.

2.3 REFERENCE DEPENDENCE ON THE DEPARTING JUSTICE

The ideological relationship between the departing justice and the nominee is salient in the media (e.g., "Alito Leans Right, Where O'Connor Swung Left," Lane 2005) and among senators. At confirmation hearings, Senator Herb Kohl grilled nominee Alito about his relationship to the departing justice, asking "How will you be different from her, Judge Alito?...And how are you like or not like Justice O'Connor as a judge?...Do you see yourself as a justice, if you're confirmed, who in many ways will fill the same role as Justice O'Connor has filled?"

If such considerations are as present in confirmation voting as they are in the prelude to the roll call vote, then a senator's attitude toward a nominee should be influenced by the senator's attitude toward the departing justice. Such reference dependence suggests that senators perceive the movement of a seat from the departing justice to the nominee: if this movement is toward the senator, the nomination is considered a gain; but if the movement is away from the senator, the nomination is considered a loss. Therefore, all else equal, liberal senators should be happier with a moderate replacing a conservative than with a moderate replacing a liberal, conservative senators should be happier with a moderate replacing a liberal than with a moderate replacing a conservative, and moderate senators should be happier with a moderate replacing an ideologue than with a moderate replacing a moderate.

This reference dependence on the departing justice can be presented formally. Consider Figure 2.1, with nominee N and senators S_1 and S_2 of the same political party, ordered on an ideological continuum, where N's confirmation would produce no change in the Court median:

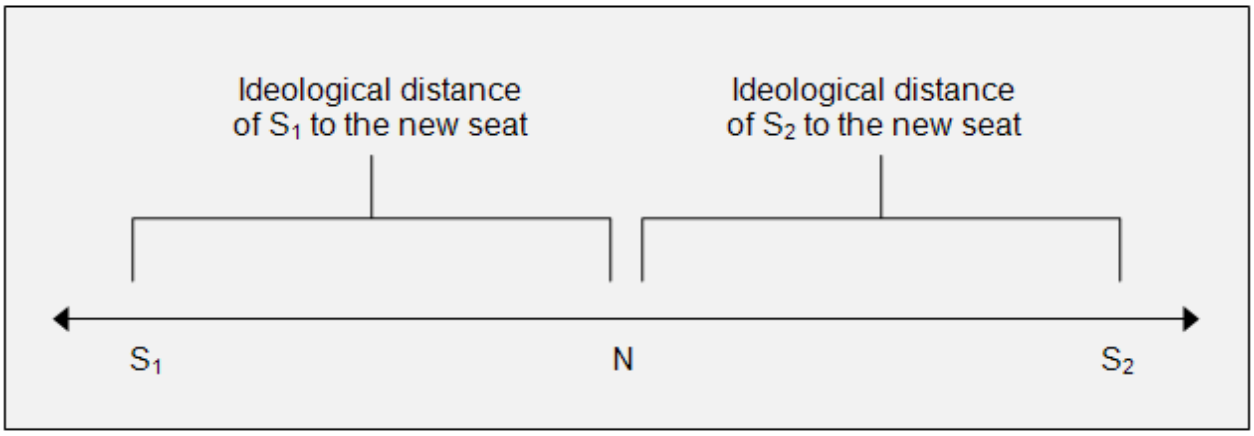

Figure 2.1. Senator ideological considerations without the departing justice

Extant empirical models (e.g., Cameron, Cover, and Segal 1990; Epstein et al. 2006) that only incorporate ideology directly through the ideological distance between a senator and the nominee or indirectly through political party membership would predict equal support from S_1 and S_2, since both senators belong to the same party and lie the same distance from the nominee. But consider Figure 2.2, which incorporates departing justice J_D, who serves as a reference point for judging the ideological impact of the nomination:

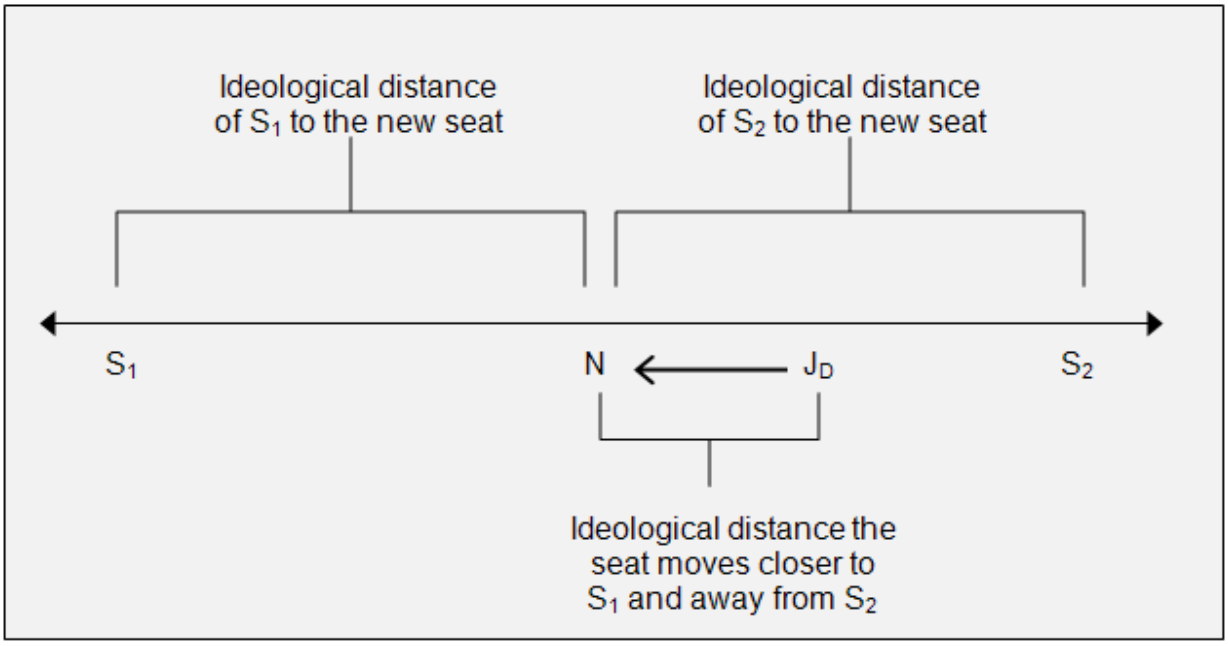

Figure 2.2. Senator ideological considerations with the departing justice

Both senators still equally approve of N in partisan and in absolute ideological terms, but the nomination has the potential of moving the ideology of the open seat closer to S_1 and away from S_2, suggesting that S_1 would be more likely than S_2 to vote for the nominee.

The above example is fashioned in terms of senators who advise and consent to a nomination, but it can be generalized to other institutional actors, such as the president, and to outside influences, like interest groups and members of the public. Therefore, empirical research into Supreme Court nominations may have overlooked an important dynamic.

2.4 HYPOTHESES DERIVED FROM THE THEORY

The departing justice theory was tested on a number of phenomena related to Supreme Court appointments. The following sections derive hypotheses in the areas of confirmation voting, confirmation delay, and presidential choice of nominee.

2.4.1 Senator confirmation voting

The outline of the theory above was placed in terms of the influence of the departing justice on senators' confirmation roll call voting. The first hypothesis is expressed in these terms:

> H_1. Senators are more likely to oppose a nomination the greater the potential the nomination has to move the ideology of the vacant seat away from their ideal point.

2.4.2 Confirmation delay

Most Supreme Court appointments are confirmed, but not all are confirmed quickly: between 1938 and 2006, the Senate rejected only four of the forty nominations on which it conducted a final confirmation or cloture vote, but the length of time between Senate receipt of a nomination and its final vote ranged from the same day (James Byrnes in 1941) to more than four months (127 days for John Harlan in 1954), with a median duration of about one month (30.5 days).

Recent studies of confirmation delay have analyzed executive branch appointments in general (McCarty and Razaghian 1999) or focused on nominations to particular independent regulatory agencies (Nixon 2001; Nixon and Bentley 2006) or to the lower federal courts (Martinek, Kemper, and Van Winkle 2002); few, though, have dealt with Supreme Court nominations. Shipan and Shannon (2003) provided an initial foray, replicating results from the lower courts literature for factors like divided government (Bell 2002) and time remaining in a congressional session (Binder and Maltzman 2002), and identifying several factors relatively unique to the Supreme Court, such as chief justice nominations.

Senators have two fundamental motives for delaying confirmation votes on Supreme Court justices. A sincere reason is that a longer process permits senators and their agents to collect more information and to more thoroughly vet candidates. But senators also have a strategic reason to delay nominations of which they disapprove, since a longer process typically keeps the nominee from participating in Supreme Court conferences, voting on cases, and writing opinions,[8] and also increases the likelihood that a nomination will fail from a gaffe or an

[8] The two major exceptions to this are recess appointments and cases that a shorthanded Court decides to rehear.

embarrassing personal discovery.[9] Shipan and Shannon (2003) provided evidence that ideology may influence the timing of confirmation benchmarks, with delay increasing for critical nominations defined by the Ruckman (1993) criteria.

Another innovation to the confirmation delay literature would be to introduce separate confirmation stages: previous scholarship has tended to treat judicial confirmation as a single process, but the process contains at least three distinct parts: preparation for Senate Judiciary Committee hearings, the time from the committee hearings to the final committee report, and the time between the final committee report and the chamber roll call vote. All three phases are positively correlated, but not at particularly high levels, suggesting something to be gained from separate models.[10]

The length of the first two stages is largely controlled by the chair of the Judiciary Committee, who usually sets the dates for the headings and for the committee vote, and who determines the number of rounds a nominee may receive at the hearings (Rutkus 2005); the first two phases, under the control of the Judiciary Committee chair, are therefore collapsed into one stage. The length of the third phase is essentially determined by the Senate Majority Leader, who schedules the consideration of the nominee and may place a time limit on debate, typically through a unanimous consent request (Rutkus 2005). Therefore, modeling separate components of the judicial confirmation process, and paying particular attention to the key procedural player in each stage, suggests the following hypotheses:

---

[9] The duration of the confirmation process is strongly and positively correlated with the percentage of roll call votes against the nomination ($r = 0.67$, $p < 0.001$). Causality, of course, may be reciprocal or reversed.

[10] For the 37 nominations between 1938 and 2006 for which committee hearings were held, the time spent preparing for the Judiciary Committee hearings correlated at 0.06 with the temporal length of the hearings themselves and at 0.15 with the time between the final committee report and the roll call vote; the temporal length of the hearings correlated at 0.23 with the time between the final committee report and the roll call vote.

H_{2a}. Delay in the scheduling and completion of hearings on a nomination increases the greater the potential a nomination has to move the ideology of the vacant seat away from the chair of the Judiciary Committee.

H_{2b}. Delay in the scheduling and holding of a floor roll call vote on a nomination increases the greater the potential a nomination has to move the ideology of the vacant seat away from the Senate Majority Leader.

The lengths of these two stages are expected to be governed by different factors. Strategic factors like ideological distance should be more influential in the Judiciary Committee phase because the Judiciary Committee chair has ready justifications for delaying a nomination, like the need to conduct background checks or to assess a candidate's record or to permit extra rounds of questioning at a hearing or to invite additional witnesses. These factors are absent in the roll call phase, given that the information-gathering and interview phases have been completed, so the Senate Majority Leader has less cover for postponing a vote and therefore less ability to delay a nomination for strategic reasons.

In addition, fewer explanatory variables should reach statistical significance in the roll call phase relative to the Judiciary Committee phase simply for statistical reasons: the length of the roll call phase is much more brief than the Judiciary Committee phase, so the lower amount of variation in the length of the second phase relative to the first should make it more difficult to identify statistically significant relationships between explanatory variables and the length of delay.

2.4.3 Presidential appointments

Because non-recess appointments to the Court must secure Senate approval, strategic presidents should at least consider the preferences of those who handle and vote on the nominations; this may, in some circumstances, require presidents to restrict their choices to those nominees who can be confirmed. Consider the following senator statements:

> America is a better and freer Nation than Robert Bork thinks. Yet, in the current delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be.
>
> − Senator Edward Kennedy[11]

> If [John Roberts] is a Rehnquist, that would not be cause for exultation; nor would it be cause for alarm. The Court's balance will not be altered. But there is a reasonable danger that he will be like Justice Thomas, the most radical Justice on the Supreme Court...Because if he is a Justice Thomas, he could turn back the clock decades for all Americans. The Court's balance may be tipped radically in one direction and stay that way for too long.
>
> − Senator Chuck Schumer[12]

Political science models of presidential constraint in terms of Supreme Court nominations have tended to focus on the pivotal senator's reaction to the potential impact of the nomination on the Court median (Moraski and Shipan 1999; Johnson and Roberts 2005; Rohde and Shepsle 2007). References to "tipping" in the above statements of Edward Kennedy and Chuck Schumer appear to reflect this concern, but the nominations under discussion had little potential to alter the location of the Court median: John Roberts was considered an ideological clone of his predecessor (e.g., Waldmeir 2005), and, for the Robert Bork nomination, there was little

[11] July 1, 1987, Senate floor remarks from the Congressional Record, p. 18519.
[12] September 28, 2005, Senate remarks from the Congressional Record, p. S10540.

difference in the voting records of retiring median justice Lewis Powell and potential new median Byron White.[13]

The Kennedy and Schumer statements are more consistent with a conception of balance in terms of the Court mean. This interpretation reflects results from confirmation voting research, which has found that senators are more likely to oppose a Supreme Court nomination the further the ideological ideal point of the nominee is from the ideological ideal point of the senator (Cameron, Cover, and Segal 1990; Epstein et al. 2006; Shipan 2008), even controlling for the potential impact of the nomination on the ideology of the Court median (see results presented in Chapter 4). Models of presidential selection of Supreme Court nominees may therefore benefit from incorporating senator consideration of potential changes to the Court mean.

Models of presidential constraint that are presented below presume that presidents, senators, justices, and nominees are motivated by single-peaked symmetric policy preferences that are known to all other actors and that can be represented on a unidimensional liberal-conservative continuum (cf. Rohde and Shepsle 2007); ideology is presumed to be the sole motivation of presidents, justices, and nominees, but some models permit senators to be influenced by considerations of partisanship.

The first model presumes that presidential choice of nominee ideology is constrained by the potential impact of the nomination on the distance between the pivotal senator and the seat being vacated by the departing justice, such that the pivotal senator will oppose an attempt to move the ideology of the seat away from his or her ideal point. Subsequent models presume alternate considerations that may constrain the president.

---

[13] The 1987 Bailey estimated ideal points for Powell and White were 0.32 and 0.38, respectively, compared to -1.78 for Thurgood Marshall and 1.17 for William Rehnquist.

2.4.3.1 Departing justice constraint

Congleton (2002) notes an important, but often overlooked nuance of median theorems, namely, that claiming that decisions are *acceptable* to the median is not equivalent to claiming that decisions will *coincide* with the median's preferences. Non-median members of deliberative bodies can influence outcomes (Caplin and Nalebuff 1991; Ma and Weiss 1993; Chappell, McGregor, and Vermilyea 2004), and non-median members are especially important on the Supreme Court because a single justice may act as a "catalyst" beyond the simple vote in a case by altering the basis of a decision or by articulating a broader interpretation of the Constitution (Tribe 1985, 35-36).

Majority opinions are the primary vehicle by which justices influence policy (Segal and Spaeth 2002: 357), and non-median justices wield some control over the ideological content of the majority opinions they write (Lax and Cameron 2005; Bonneau et al. 2007; Carrubba et al. 2007). More ideologically extreme justices should therefore be expected to produce more ideologically extreme majority opinions than would be the case if the majority opinion were written by the median justice.

Non-median justices with opinion assignment authority possess a particularly strong potential influence over Court decisions. In *Dickerson* v. *United States* (2000), for example, Chief Justice Rehnquist, a longtime critic of the *Miranda* decision, joined the coalition to uphold *Miranda*, assigned himself the majority opinion, and crafted an opinion that kept *Miranda* but also retained every exception to *Miranda* that had accumulated over the years. Katz (2006) speculated that, because only two other justices supported repeal of *Miranda*, Rehnquist's vote was a maneuver to keep opinion assignment control from the next most senior justice, John Paul

Stevens, who had a history of opposing *Miranda* exceptions and may have written a majority opinion that fell even further from Rehnquist's policy preference than the one that became law.

The collegial nature of the Court also contributes to the importance of each member. Justices try – and can – influence one another (Woodward and Armstrong 1979; Greenhouse 2005; Meinke and Scott 2007); for example, in a case discussed in his initial conference, Clarence Thomas's dissent convinced three other justices to change their vote (Greenburg 2007a). But the influence of a new justice can be more subtle, emboldening other members to craft more ideologically extreme opinions, as Sandra Day O'Connor's replacement of Potter Stewart appeared to have done with the Court's conservative wing (Cameron, Park, and Beim 2008-2009: 1868).

Byron White observed that, "Every time a new justice comes to the Supreme Court, it's a different court" (Greenhouse 2007). Presidents may therefore expect the pivotal senator to oppose an attempt to move the vacated seat away from his or her ideal point. If presidents constrain their Supreme Court nominations because of this consideration, then a nominee is expected to be as close to the presidential ideal point as possible while falling within the pivotal senator's departing justice winset.

Figure 2.3 depicts the ideal points of the departing justice and the pivotal senator. The large circle represents the pivotal senator's departing justice winset, i.e., the area within which a new justice will be closer than the departing justice to the pivotal senator.

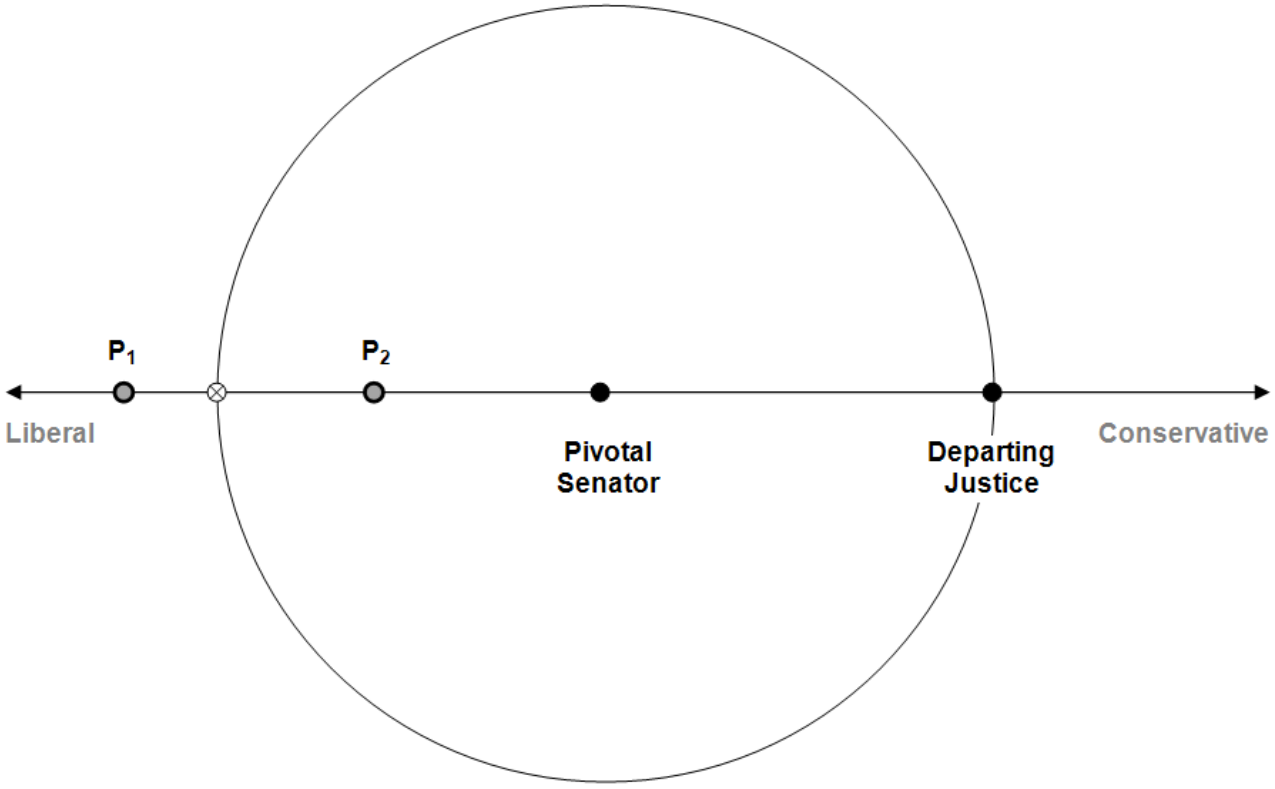

Figure 2.3. Departing justice constraint

Note: Figure depicts the ideal points of the departing justice and the pivotal senator. The large circle represents the pivotal senator's Court departing justice winset, i.e., the area within which a new justice will be closer than the departing justice to the pivotal senator. P_1 and P_2 represent possible locations of the presidential ideal point.

If P_1 is the presidential ideal point, a nomination at P_1 would be opposed by the pivotal senator because the pivotal senator lies further from P_1 than from the departing justice; in this case, the president is expected to nominate someone at the ⊗ symbol, the edge of the pivotal senator's departing justice winset closest to the presidential ideal point. But if P_2 is the presidential ideal point, then the president is expected to nominate at P_2 because the pivotal senator lies closer to P_2 than to the departing justice.

2.4.3.2 Court mean constraint

Pivotal senators may also object to nominations that move the mean ideology of the Court away from their ideal point. The pivotal senator lies a particular distance from each Supreme Court justice, and may oppose any attempt to move one of those justices in an unfavorable direction through a nominee-for-departing-justice replacement.

2.4.3.3 Court median constraint

The median justice exerts a great deal of influence over the vote on the merits of a case (Carrubba et al. 2007), so presidents may expect the pivotal senator to oppose a nomination with the potential to move the Court median further away from the pivotal senator's ideal point relative to the prior Court median. If presidents constrain their Supreme Court nominations because of this consideration, then a nominee will be as close to the presidential ideal point as possible while falling within the pivotal senator's Court median winset, where the edges of the winset denote a nomination in which the Court median falls as close to the median senator after the nomination is approved as the median senator fell from the median of the prior nine-member Court.[14]

[14] Several models of the presidential appointment process include considerations of the median of the eight-member Court after a vacancy (Moraski and Shipan 1999; Nokken and Sala 2000; Rohde and Shepsle 2007). But the median justice of the nine-member Court prior to a vacancy may be a more plausible conceptualization. Eight-member policy-making Courts have been relatively rare in recent decades. Most recent vacancies have resulted from retirement or resignation, and these retirements have often not disrupted Court business because they tend to occur during the Court's summer recess: ten of the twelve confirmation votes since Potter Stewart's 1981 retirement have occurred in July, August, September, or October, resulting in little or no disruption to the Court's business, which begins the first Monday of October and ends in late June or early July. The most recent extended eight-member Court occurred when President Ronald Reagan attempted to replace Lewis Powell in the 1987 term, after the rejection of Robert Bork, the withdrawal of Douglas Ginsburg, and eventual confirmation of Anthony Kennedy. Senators therefore do not have occasion to observe an eight-member Court, so it is likely that their reference point when evaluating a nomination is the nine-member Court prior to the vacancy; and even in an extended period of an interim eight-member Court, it is unclear how much influence an intangible midpoint between two middle justices would have on senator conceptions of the Court, relative to a flesh-and-blood median justice who had likely enjoyed a high profile as a swing justice and most likely is continuing to serve on the Court as the nomination is processed.

2.4.3.4 No constraint

Presidential deference to senator ideology may be ill-advised, given that four of the five Supreme Court nominations rejected since 1895 have been derailed for non-ideological reasons: racially insensitive remarks (John J. Parker in 1930), acceptance of private stipends (Abe Fortas in 1968), conflict-of-interest allegations (Clement Haynsworth in 1969), or a lack of credentials (G. Harrold Carswell in 1970). Even Robert Bork may have been confirmed had his opponents not been able to marshal public opinion against his nomination (Kastellec, Lax, and Phillips 2008: 27-28).

Offering ideological concessions is even more imprudent if the Senate is more likely to confirm a subsequent nomination for fear of receiving blame for obstructing a president's proposal (Johnson and Roberts 2005). To test if senators defer to the president after a rejected nomination, the main confirmation voting models of Epstein et al. (2006) and the main confirmation model that appears in Chapter 4 of this dissertation were re-estimated with a dichotomous variable for nominations on which the Senate conducted a roll call vote after a Senate-rejected Supreme Court nomination; this variable was coded 1 for the nominations of Warren Burger, G. Harrold Carswell, Harry Blackmun, and Anthony Kennedy, i.e., the nominations that followed Senate rejections of Abe Fortas, Clement Haynsworth, G. Harrold Carswell, and Robert Bork. The dependent variable is roll call confirmation vote, coded 1 for yea and 0 for nay.[15]

[15] Lee Epstein provided an updated dataset (Bork3.dta) for Epstein et al. (2006) on her website, which was retrieved on September 21, 2008, from http://epstein.law.northwestern.edu/research/Bork.html. The updated dataset differed from the original Epstein et al. (2006) dataset by including the Alito nomination, using Common Space scores from the 109th Congress, and correcting the Segal-Cover perceived ideology score for Clarence Thomas. The estimation presented in Table 2.1 differed from the Epstein et al. (2006) estimation by clustering standard errors by nomination (cf. Shipan 2008).

Results for the re-estimation of Epstein et al. (2006) are presented in Table 2.1. The coefficient for the post-rejection nomination variable was statistically significant and positive, indicating that senators were more likely to vote in favor of confirmation after a rejected nomination, holding other model variables constant. Predicted probabilities calculated with Clarify (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001) indicated that a rejection can substantially reduce senator opposition: for different party senators and a weak president, with all other variables at their mean, the predicted probability of a yea vote after a successful confirmation vote was 76 ± 13 percent, but rose to 95 ± 4 percent after a rejected nomination.

Table 2.1. Senator voting on Supreme Court nominations (1937-2006)

	Model 1	Model 2
	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Ideological distance	**-2.18 (0.41)**	**-2.31 (0.42)**
Lack of qualifications	**-2.21 (0.37)**	**-2.44 (0.37)**
Same party	**0.73 (0.22)**	**0.76 (0.23)**
Strong president	**0.55 (0.28)**	**0.74 (0.30)**
Nomination after a rejection	---	**1.03 (0.30)**
Constant	**1.86 (0.29)**	**1.79 (0.30)**
Number of observations	3809	3809
Number of clusters	41	41
Pseudo R^2	0.37	0.39
Percent correctly predicted	91	91
Percent modal category	87	87
Percent reduction of error	28	28

Note: Dependent variable is dichotomous senator roll call voting on Supreme Court nominees between 1937 and 2006, with 1 coded as a vote in favor of confirmation or cloture. Models were estimated with probit, with robust standard errors clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Percent reduction of error statistics were derived from the precalc utility designed by Frederick J. Boehmke (**http://myweb.uiowa.edu/fboehmke/methods.html**).

Table 2.2 presents results from the re-estimation of the Chapter 4 model that included senator considerations of potential mean and median changes. The dependent variable was coded 1 for senator opposition to a Supreme Court nomination, and 0 for senator support.

Table 2.2. Senator opposition to Supreme Court nominations (1968-2006)

	Model 3	Model 4
	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	**0.43 (0.14)**
Unfavorable median change	-0.40 (0.43)	0.28 (0.64)
Increased ideological distance	**0.97 (0.22)**	**0.97 (0.21)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.84 (0.61)**
Presidential disapproval	**3.70 (1.67)**	3.01 (1.62)
Different party	**1.14 (0.16)**	**1.16 (0.15)**
Nomination after a rejection	---	**-1.07 (0.34)**
Constant	**-1.77 (0.85)**	-1.29 (0.81)
Number of observations	1883	1883
Number of clusters	19	19
Pseudo R^2	0.54	0.57
Percent correctly predicted	0.89	0.90
Percent modal category	0.78	0.78
Percent reduction of error	0.52	0.56

Note: Dependent variable is senator opposition to a Supreme Court nomination over the seventeen Supreme Court nominations between the 1968 Fortas chief justice nomination and the 2006 Alito associate justice nomination, with 1 coded as opposition and 0 as support. Models were estimated with probit, with robust standard errors clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Percent reduction of error statistics were derived from the precalc utility designed by Frederick J. Boehmke (http://myweb.uiowa.edu/fboehmke/methods.html). In Model 4, fifteen failures and zero successes were completely determined.

As in the Epstein et al. (2006) model, evidence suggests that senators have treated post-rejection nominations differently than regular nominations. The predicted probability of opposition from an opposite party senator with all other model variables set at their mean was 13 ± 7 percent for a nomination after a successful appointment, but fell to 2 ± 1 percent after a rejection.

Presidents have reasons to hope that the Supreme Court appointments game does not continue beyond a single period, like a loss of political capital and time costs in getting a nominee to the Court (Moraski and Shipan 1999). Above results, though, suggest a level of Senate deference that should embolden presidents to select a nominee at the presidential ideal point. Models of constraint, after all, presume that the pivotal senator would oppose a nomination that represented only a trivial ideological loss, but senators may save their objection for those nominations that represent a substantial loss, or senators may condition their opposition on factors other than ideology. Predictions are more fuzzy under such assumptions, with a nominee expected anywhere between the presidential ideal point and the indifference point of the pivotal senator, but a few permutations can be proposed and tested.

2.4.3.5 Conditional deference: partisanship

Partisanship moderates the impact of ideology on senator voting on Supreme Court nominations, substantially influencing senators of a different party than the president, but not same-party senators (Shipan 2008). Presidents may therefore expect same party senators to defer to nominations, but feel constrained by opposite party senators. In this case, presidents are expected to nominate at the presidential ideal point if the pivotal senator belongs to the president's party, and to nominate on or within the pivotal senator's departing justice, Court mean, or Court median winset if the pivotal senator belongs to an opposition party.

2.4.3.6 Conditional deference: partisanship and nominee extremism

Moderate Democratic Senator Howell Heflin voted to confirm four of Ronald Reagan's five Supreme Court appointments that received a floor vote, opposing only the 1987 Robert Bork nomination. Heflin fell to the liberal side of retiring median justice Lewis Powell and closer to Powell than he did to conservative nominee Robert Bork,[16] so the Bork appointment had the potential to move the Court mean and Court median away from Heflin. But the senator still expressed some ambivalence about the nomination:

> I am in a state of quandary as to whether this nominee would be a conservative justice who would safeguard the living Constitution and prevent judicial activism or whether, on the other hand, he would be an extremist who would use his position on the Court to advance a far-right, radical, judicial agenda (quoted in Viera and Gross 1998: 168).

Announcing his opposition, Heflin stated, "when in doubt, don't" (Massaro 1990: 188). If Heflin's ambivalence about his confirmation vote on the Bork nomination reflects the thought of senators, or at least of moderate opposition party senators, then a president may simply refrain from nominating an ideologically extreme candidate when the pivotal senator belongs to an opposition party. In this case, presidents are expected to nominate at the presidential ideal point when the pivotal senator belongs to the president's party; but when the pivotal senator is a member of an opposition party, the expected location of the nomination is as close to the presidential ideal point as possible without falling outside the mainstream of the Court.

[16] Bailey ideal points for Senator Heflin and Justice Powell in 1987 were 0.28 and 0.32, respectively, representing a moderate ideology; William Rehnquist's ideal point was 1.17 as a point of comparison (Bailey and Maltzman 2009). Bork received a conservative Segal-Cover nominee perceived ideology score of 0.095, where 0 is the most conservative score and 1 is the most liberal score.

2.4.3.7 Review of possible constraints

Summarizing the present section, Table 2.3 presents expected ideal points of a Supreme Court nominee based on the discussed constraints and the possibly of no constraint.

Table 2.3. Predicted locations of nominee ideology for various constraints

Model	Location of nominee ideology
Departing justice	As close to P as possible while falling on or within the departing justice winset of the pivotal senator
Court mean	As close to P as possible while falling on or within the Court mean winset of the pivotal senator
Court median	As close to P as possible while falling on or within the Court median winset of the pivotal senator
No constraint	P
Partisanship & Departing justice	If the pivotal senator is of the same party as the president: P
	If the pivotal senator is of a different party than the president: as close to P as possible while falling on or within the departing justice winset of the pivotal senator
Partisanship & Court mean	If the pivotal senator is of the same party as the president: P
	If the pivotal senator is of a different party than the president: as close to P as possible while falling on or within the Court mean winset of the pivotal senator
Partisanship & Court median	If the pivotal senator is of the same party as the president: P
	If the pivotal senator is of a different party than the president: as close to P as possible while falling on or within the Court median winset of the pivotal senator
Partisanship & Nominee extremism	If the pivotal senator is of the same party as the president: P
	If the pivotal senator is of a different party than the president: as close to P as possible while falling at or within one standard deviation of the Court's mean ideology

Note: P refers to the presidential ideal point.

2.5 CONCLUSION

This chapter reviewed previous studies of Supreme Court nominations, noting that little research has included the departing justice in models of the confirmation process. But psychological and

marketing research suggests that the departing justice may be an influence if senators and other actors use the departing justice as a reference point with which to judge the nominee. Formal models and anecdotal evidence were offered to illustrate the plausibility of this idea. To provide a systematic test of the departing justice theory, several hypotheses were derived, in domains ranging from senator voting to confirmation delay to presidential selection of a nominee. The next chapter describes the research designs used test each of these hypotheses.

3.0 RESEARCH DESIGN

This chapter presents the research designs for testing the hypotheses proposed in the previous chapter. This section describes the metric employed in the analyses, and subsequent sections concern the measures and models for individual-level senator roll call voting on nominations, the length of time the Senate considers a nomination, and presidential choices for nominee ideology.

Selection of a metric for ideology presents a concern for testing the hypotheses. Previous research has assumed a bridging mechanism between some combination of Segal-Cover nominee scores (Moraski and Shipan 1999; Johnson and Roberts 2005; Epstein et al. 2006), Americans for Democratic Action (ADA) scores (Cameron, Cover, and Segal; Moraski and Shipan 1999), DW-Nominate scores (Johnson and Roberts 2005), and Judicial Common Space scores (Epstein et al. 2006; Shipan 2008).

One method has been to assume equivalence between senator and nominee metrics, for example, between ADA presidential scores and Segal-Cover nominee scores (Moraski and Shipan 1999) or between DW-Nominate and Segal-Cover scores (Johnson and Roberts 2005). However, ADA scores are culled from only twenty "key" votes, so they suffer more than other measures from selection problems, missing votes, and strategic positioning. In fact, since these twenty identified votes are on highly salient and politically charged issues, ADA scores may exacerbate partisan differences; in 2008, for example, only nine senators fell within the moderate 33-to-67 percent range: some of these senators had reputations as moderates, such as Mary

Landrieu, Gordon Smith, and Arlen Specter, but others, such as Ted Kennedy, Elizabeth Dole, and Robert Byrd, did not.

DW-Nominate scores reflect a larger sample of votes than ADA scores, but the assumption that the Nominate metric is the same as the Segal-Cover metric means that no senator has or will ever fall to the right of Antonin Scalia (who earned a 0.00 Segal-Cover nominee score, but voted to permit flag-burning in *Texas* v. *Johnson*, 1989) and no senator has or will ever fall to the left of Robert Jackson (who earned a 1.00 Segal-Cover score, but voted to uphold a so-called heckler's veto in dissenting from *Terminiello* v. *Chicago*, 1949).

Segal-Cover scores are imperfect proxies for justice ideology, as well, because they are time-invariant, so that Harry Blackmun is always treated as a conservative, despite his "near complete flip, from one of the Court's most conservative members to among its most consistent civil libertarians" (Epstein et al. 2007b: 1494). Moreover, Segal-Cover scores should only be employed in their intended issue area of civil liberties and not in other issue areas or across time (Epstein and Mershon 1996).

Judicial Common Space scores (Epstein et al. 2007a) provide an attractive alternative, because they are dynamic and available in annual increments (and therefore able to reflect ideological drift) and because they place senators, presidents, and justices on the same metric. Common Space scores are problematic for this analysis, though, since their bridging mechanism assumes a relationship between presidents and justices based on the logic of Moraski and Shipan (1999), namely, that unconstrained presidents select a nominee at the presidential ideal point (2007a: 309). This mechanism bridges the presidential score on the Common Space metric and the nominee score on the Martin-Quinn metric (operationalized as the first available score for a justice), but this poses a theoretical problem for the hypotheses that test for an ideological

relationship between presidents and their nominees, since a particular relationship was assumed in the creation of the bridged ideological scores.

Another problem may be even more critical: Johnson and Roberts (2005) suggested that *most* presidents are constrained, given the location of the Senate filibuster pivot, who wields control over a cloture vote, so the Common Space bridging assumption fails to hold in most cases. Further, the bridging assumption has little face validity on two fronts: first, assuming that all of an unconstrained president's nominees have the same ideology (O'Connor and Scalia, for example, or Powell and Rehnquist), and, second, assuming that Republican Dwight D. Eisenhower's unconstrained nominations of liberals Earl Warren and William Brennan mirror the ideology of the appointing president, especially given Eisenhower's regret about the Warren nomination (Eisler 1997) and his de-emphasis on nominee ideology, as described in his memoir (Eisenhower 1963: 226-230).

Therefore, to avoid Common Space scores and the attendant bridging assumptions about the ideological relationship of a president to his nominees, all ideological measures were drawn from estimated ideal point data from Bailey and Maltzman (2009). Bailey estimated ideal points do not assume a direct relationship between institutional actors; their construction instead uses statements and behavior on cases and issues for which information was available on the preferences of multiple institutional actors, like a solicitor general brief in a case decided by the Supreme Court, or Congressional Record statements by senators on Court decisions.

Bailey estimated ideal point scores are available for presidents from 1950 to 2008, for senators from 1951 to 2008, and for Supreme Court justices from 1950 to 2008.[17] Scores were

[17] Bailey estimated ideal points were retrieved from personal correspondence with Michael Bailey (September 28, 2009). For the confirmation voting chapter, senator scores were drawn from the year in which the confirmation or cloture vote occurred; however, scores were not available for a few senators in those years if a senator only served a

not available for Supreme Court nominees, so nominee ideology was instead proxied as the first available Bailey estimated ideal point for a justice, which only required the assumption that senators have information about the potential voting behavior of a nominee, at least in the justice's first year on the Court.[18] Supreme Court nominations are often treated as a game with perfect information (Moraski and Shipan 1999: 1072; Johnson and Roberts 2005: 45; Rohde and Shepsle 2007: 668), and there is evidence that this particular perfect information assumption about nominee ideology is not heroic: "Presidents hoping to create lasting legacies in the form of Justices who share their ideologies can be reasonably certain that their appointees will behave in line with expectations – at least during the Justices' first terms in office" (Epstein et al. 2007b: 1486).

Although first-year justice scores for confirmed nominees highly correlate with Segal-Cover scores, these first-year scores are not available to senators at the time of the confirmation vote. Segal-Cover perceived nominee ideology scores, though, are based on newspaper editorials to which senators have access at the time of the confirmation vote, so some analyses were conducted using these scores. To bridge Segal-Cover and Bailey scores, Segal-Cover nominee

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small portion of a year, so alternate scores were employed for these observations: the 1969 Goodell senator score was used for the 1968 Fortas chief justice cloture vote, the 1968 Dirksen senator score was used for the 1969 Burger confirmation vote, the 1986 Broyhill representative score was used for the 1986 Rehnquist and Scalia confirmation votes, the 1991 Akaka senator score was used for the 1990 Souter confirmation vote, and the 2005 Corzine senator score was used for the 2006 Alito confirmation vote. Senate median scores were drawn from a separate document of medians from Bailey and Maltzman (2009).

[18] Two nominees (Abe Fortas and William Rehnquist) were serving on the Court at the time of their nomination to the chief justiceship; Bailey estimated ideal points from the justice arrays described later were used for these nominees. Other nominees (Homer Thornberry, G. Harrold Carswell, Clement Haynsworth, Robert Bork, Douglas Ginsberg, and Harriet Miers) were not confirmed and therefore did not serve on the Court, which necessitated imputation of their Bailey estimated ideal point. Segal-Cover nominee perceived ideology scores and first year Bailey estimated ideal points for the 23 nominees between 1951 and 2006 who were not already serving on the Court (Earl Warren to Samuel Alito) were used to create a bridging equation to place these three rejected nominees on the Bailey metric. First-year justice Bailey estimated ideal points and Segal-Cover nominee perceived ideology scores correlated at -0.84 ($p \leq 0.01$). Segal-Cover nominee perceived ideology scores were drawn from "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005," retrieved on September 8, 2008, from Jeffrey Segal's website (http://www.sunysb.edu/polsci/jsegal/qualtable.pdf).

scores were regressed against first-year Bailey estimated ideal points for confirmed nominees to place the Segal-Cover values on the Bailey metric. Scores based on first-year Bailey estimated ideal point and on Segal-Cover bridges are presented in Table 3.1:

Table 3.1. Nominee estimated ideal points

Nominee	Segal-Cover Ideal Point	First-Year Bailey Estimated Ideal Point	Bridged Segal-Cover Bailey Estimated Ideal Point
Earl Warren	0.750	-1.00	-0.68
John Harlan II	0.875	-0.19	-0.95
William Brennan	1.000	-0.94	-1.21
Charles Whittaker	0.500	0.28	-0.15
Potter Stewart	0.750	0.17	-0.68
Byron White	0.500	-0.42	-0.15
Arthur Goldberg	0.750	-1.69	-0.68
Abe Fortas (AJ)	1.000	-1.61	-1.21
Thurgood Marshall	1.000	-1.43	-1.21
Abe Fortas (CJ)	0.845	.	-0.88
Homer Thornberry	1.000	.	-1.21
Warren Burger	0.115	0.66	0.67
Clement Haynsworth	0.160	.	0.58
Harrold Carswell	0.040	.	0.83
Harry Blackmun	0.115	0.58	0.67
Lewis Powell	0.165	0.29	0.56
William Rehnquist (AJ)	0.045	1.15	0.82
John Paul Stevens	0.250	-0.38	0.38
Sandra Day O'Connor	0.415	0.68	0.03
William Rehnquist (CJ)	0.045	.	0.82
Antonin Scalia	0.000	0.59	0.92
Robert Bork	0.095	.	0.71
Douglas Ginsberg	0.125	.	0.65
Anthony Kennedy	0.365	0.40	0.14
David Souter	0.325	-0.01	0.22
Clarence Thomas	0.160	1.10	0.58
Ruth Bader Ginsburg	0.680	-0.57	-0.53
Stephen Breyer	0.475	-0.48	-0.10
John Roberts (AJ)	0.120	.	0.66
John Roberts (CJ)	0.120	0.79	0.66
Harriet Miers	0.270	.	0.34
Samuel Alito	0.100	0.84	0.70

3.1 INDIVIDUAL-LEVEL SENATOR OPPOSITION

Data were drawn from the nineteen Supreme Court nominations for which the Senate advised and consented – or rejected – between 1968 (Abe Fortas) and 2006 (Samuel Alito). Ideological measures used in the analysis ranged from 1951 to 2008, but the initial observation was the failed cloture vote on Abe Fortas' chief justice nomination, "the first sign that the constellation of political forces in the process of selecting and confirming Supreme Court [justices] was undergoing realignment" (Silverstein 1994: 163). Unlike the other analyses, restricting the analysis to the 1968-2006 time frame will not introduce problems associated with a small sample size.

The 1968 Fortas vote appeared to mark a discontinuity in the level of senator opposition to Supreme Court nominations. The Warren Court had recently expanded the scope of judicial power (e.g., *Baker* v. *Carr*, 1962; *Griswold* v. *Connecticut*, 1965; *Miranda* v. *Arizona*, 1966), and senators became less deferential in the advice and consent process: the Senate rejected only one of 45 Supreme Court nominations between 1895 and the Fortas chief justice nomination, with no filibuster attempts, a mean of 5 opposition votes, and 69 percent of nominations receiving a voice vote, including Fortas himself in 1965; however, after the failed cloture on the 1968 Fortas nomination, three of the next nineteen nominations were rejected, with three filibuster attempts, a mean of 22 opposition votes, and no voice votes.

The traditional measure of senator preferences regarding a nomination has been the recorded roll call vote (Cameron, Cover, and Segal 1990; Overby et al. 1992; Epstein et al 2006). However, inspection of the Congressional Record, Judiciary Committee hearings, and newspaper reports revealed the preferences of a substantial number of senators who did not cast a roll call vote. Senators Claiborne Pell and David Durenberger, for example, were not present at the 1994

Stephen Breyer confirmation vote, but each made statements in the Congressional Record supporting the nomination (pp. 18571-18572). Therefore, the dependent variable was coded 1 for senators who voted against a nomination at a roll call or whose opposition to a nomination could be culled from the aforementioned documents, and coded 0 for senators who voted for a nomination at a roll call or whose support for a nomination could be culled from the aforementioned documents.[19] For the 1968 to 2006 period, the roll call measure contained 1,823 observations over 320 senators, with 403 instances of senator opposition. The new measure produced 61 additional observations: 1,884 preferences over 323 senators, with 410 instances of senator opposition and one instance of a senator voting present (J. William Fulbright for the 1969 Burger confirmation vote, coded as an absence). Figure 3.1 depicts the two measures of senator opposition.

[19] See Appendix A for more details about the determination of senator preferences.

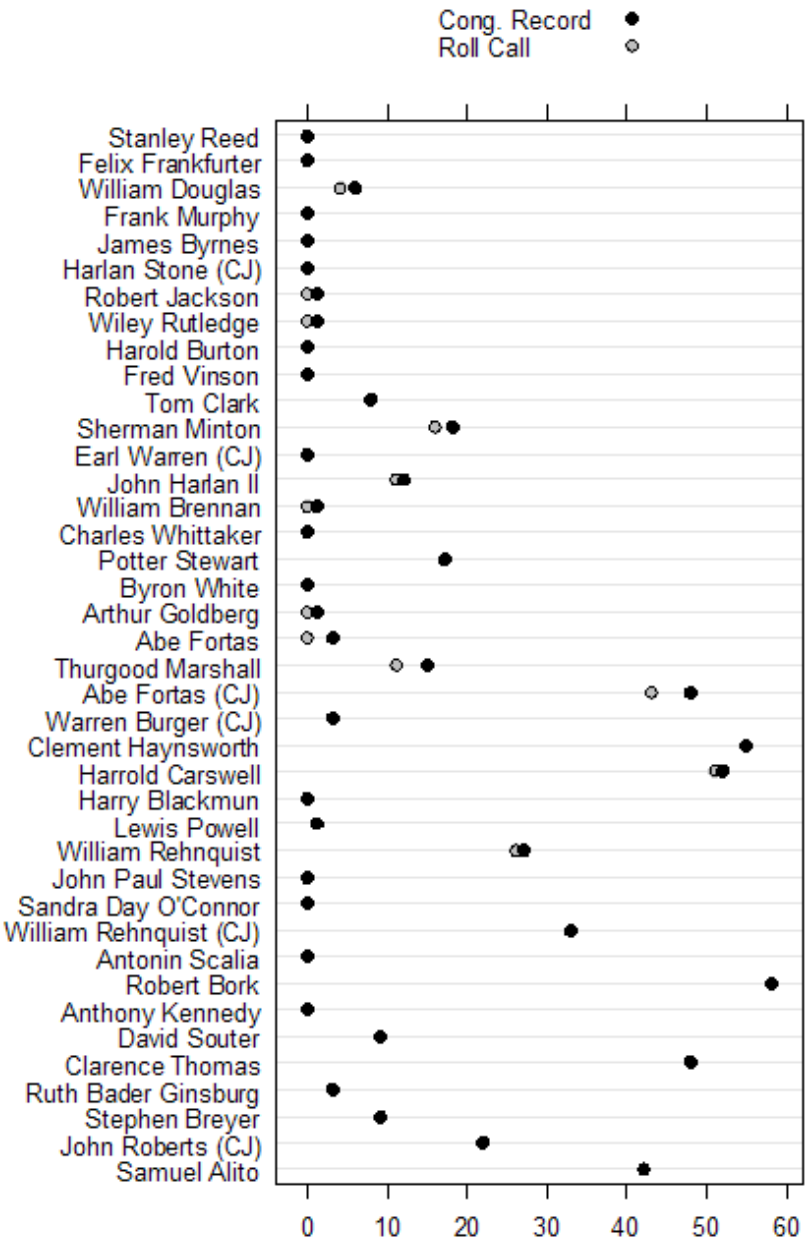

Figure 3.1. Senator opposition to Supreme Court nominations

Note: Figure displays the number of senators who opposed a nomination using the Congressional Record measure and the roll call vote measure. Differences between the measures reflect a situation in which a senator spoke out against a nomination that was confirmed by a voice vote, or a situation in which present senators indicated the preferences of one or more absent senators.

Models were estimated with probit due to the dichotomous nature of the dependent variable, with robust standard errors clustered by nomination, since multiple senator preferences regarding the same nomination are not independent (see Shipan 2008: 62-63). The substantive effect of the independent variables was calculated with predicted probabilities generated by Clarify (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001). Each independent variable was coded with higher values predicted to correlate with senator opposition, and therefore all coefficients were expected to be positive. Tables in subsequent chapters provide indications of statistical significance at the 0.05 level for a one-tailed test, because hypotheses were directional.

For each nomination, justices were arrayed by Bailey estimated ideal point scores for the year prior to the vacancy.[20] The score for the prior Court median was then identified. The score for the departing justice was then replaced with the score for the nominee, the justices were re-ordered, and the score for the potential Court median was identified. Three ideological measures were calculated with the following equations, with each term expressed as a Bailey estimated ideal point:

- Seat Change = | Nominee – Senator | – | Departing Justice – Senator |
- Median Change = | Potential Median – Senator | – | Prior Median – Senator |
- Ideological Distance = | Nominee – Senator |

The 1968 Fortas and 1986 Rehnquist chief justice nominations were anomalies, in the sense that both involved associate justices nominated to replace a departing chief justice. Confirmation of each would have produced a temporary eight-member Court until a subsequent

[20] For years with more than one nomination, the Bailey estimated ideal point of any confirmed nominee was placed into the justice array for subsequent nominations that year. Also, the first available score for Harry Blackmun was from 1971, so this score was used in the arrays for the Powell and Rehnquist associate justice nominations.

confirmation. Under one conception, the potential Court median would be the midpoint between the middle two justices on the interim court. However, both nominations were coupled with associate justice nominations (of Homer Thornberry and Antonin Scalia, respectively) with a clear ideological impact: senators perceived Thornberry as a liberal (Massaro 1990: 45), and Scalia received the most conservative Segal-Cover perceived nominee score possible. Therefore, senators had enough information to imagine a future nine-member Court.

Consider the 1986 Rehnquist nomination: senators would likely not have thought that Rehnquist's elevation to chief justice would have induced a median change, given that the nomination concerned Rehnquist's promotion and not his addition to the Court, and given that Burger and Rehnquist were both conservatives and that a conservative was nominated to fill Rehnquist's associate justice spot. Primary models presumed that senators did not perceive that the Fortas and Rehnquist attempted elevations to chief justice would have threatened a median change. Alternate models, though, were estimated under the eight-member interim Court assumption.

The key theoretical variable is seat change, but controls for median change (Lemieux and Stewart 1991) and ideological distance (Cameron, Cover, and Segal 1990) were necessary to isolate the influence of senator considerations about the departing justice relative to the nominee. These three variables are conceptually related, but their inclusion in the models did not cause multicollinearity: pairwise correlations indicated that no couple exceeded the "potentially harmful" 0.80 level (Griffiths, Hill, and Judge 1993: 435), the largest variance inflation factor in any reported model was well below the value of 10 considered indicative of multicollinearity

(Chatterjee, Hadi, and Price 2000: 240; Hamilton 1992: 134), and the largest condition index was well below the value of 30 indicating strong collinearity (Kennedy 2003: 213).[21]

Models contained controls for factors the literature has identified as influencing senator voting on Supreme Court appointments: nominee qualifications (Epstein et al. 2006), presidential approval (Segal, Cameron, and Cover 1992), and partisanship (Shipan 2008). Lack of nominee qualifications was operationalized as the additive inverse of nominee qualifications scores drawn from Segal and Cover (1989) as updated in Epstein and Segal (2005);[22] a lack of presidential approval was measured as the percentage of respondents disapproving of the president's job performance, drawn from the Gallup poll conducted nearest and prior to the Senate confirmation or cloture vote on a nomination;[23] and partisanship was coded 1 when the senator and president belonged to different political parties, and 0 otherwise.

3.1.1 Robustness check 1: Additional controls

Several additional controls were included in alternate specifications to assess the robustness of findings and to adjust for more idiosyncratic elements of nominations. Chief justice nominations were coded 1 in a dichotomous control. A party polarization measure (McCarty, Poole, and Rosenthal 2006) was coded as the absolute value of the distance between the Senate Democratic

[21] The highest pairwise correlation was between seat change and median change (0.58), the largest VIF in any reported model was 2.8, and the largest condition index in any reported model was 12.
[22] Segal-Cover nominee perceived qualifications scores were drawn from "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005," retrieved on September 8, 2008, from Jeffrey Segal's website (http://www.sunysb.edu/polsci/jsegal/qualtable.pdf).
[23] Gallup presidential disapproval data were collected from the Roper Center (http://www.ropercenter.uconn.edu/). Values were drawn from the poll conducted immediately prior to the Senate confirmation or cloture vote, unless the vote and the final date of the poll coincided; in that case, values were drawn from the poll that began before the date of the Senate vote and ended on the date of the Senate vote.

mean and Senate Republican mean for the Congress that voted on the nomination.[24] And a temporal control was coded as the numbered Congress in which the confirmation or cloture roll call was conducted.

The chief justice is the "first among equals" with greater authority than the other justices, like the power of opinion assignment when voting in the majority; therefore, inclusion of a chief justice control accounts for the possibility that senators are more likely to oppose a chief justice nomination, all else equal. Partisanship of a senator has been identified as an important influence on senator confirmation voting (Shipan 2008); the party polarization control accounts for the possibility that, all else equal, senator opposition to Supreme Court nominations increases in periods of increased polarization. The temporal control addresses the possibility that senators have become more likely to oppose a nomination over the years, all else equal.

Some studies have used interest group activity as an explanatory variable for senator confirmation voting (e.g., Caldeira and Wright 1998), but several factors caution against the inclusion of a pressure group measure. The most important consideration may be causal directionality, since interest group activity may be influenced by some independent variables in the model, like nominee qualifications and ideology, as much as it influences the senator opposition dependent variable. One possible workaround would be to estimate a stage model in which the already-discussed independent variables cause both interest group activity and senator opposition to a nomination; however, two further problems suggest that such a model may be difficult to properly estimate. The first problem is theoretical, regarding the proper conception of interest group activity, with possibilities that include interest group opposition, interest group support subtracted from interest group opposition, or total interest group activity.

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[24] Polarization data were retrieved May 21, 2009, from: http://polarizedamerica.com/.

But once a decision about conceptualization is made, an additional problem is the construction of a measure with sufficient data. Information about the total funds interest groups have allocated to fight or support a given nomination would be difficult, if not impossible, to determine for any reasonable number of nominations. Caldeira and Wright (1998) considered lobbying done at the individual senator level, which required surveys of senators that reduced the number of observations to those associated with only three nominations.

Epstein et al. (2007c) provided a listing of the number of interest groups testifying at Judiciary Committee hearings in favor of and in opposition to confirmation since the nomination of Earl Warren, but those numbers are imperfect proxies of interest group mobilization: first, the numbers conceal the variation in interest group strength of a small lobby and a large lobby, both of which are equally weighted in the measures; second, the numbers do not reflect interest groups that would have provided testimony but were not invited to appear before the committee; and third, the number of interest groups has exploded recently,[25] even though the increase in senator opposition has not been commensurate: the correlation was 0.43 between interest group activity against a nomination and senator opposition for the first fourteen dataset nominations with available interest group data, but, for the latter fourteen dataset nominations with available interest group data, the correlation was 0.27.

[25] Testimony was provided by an average of four interest groups over the first fourteen dataset nominations with available data, four of which received no interest groups testimony. For the latter fourteen dataset nominations with available data, the average was 28 interest groups.

3.1.2 Robustness check 2: Roll call votes

The dependent variables used in the baseline model reflect senator opposition as noted in the Congressional Record and other sources, so to determine any substantive difference between use of the new measure and use of the traditional roll call measure, a separate model was estimated with the roll call vote as the dependent variable.

3.1.3 Robustness check 3: Alternate median specifications

For the anomalous 1968 Fortas and 1986 Rehnquist chief justice nominations discussed earlier, that concerned only a promotion to chief justice and not an addition to the Court, the potential Court median was considered to be equivalent to the prior Court median. A robustness check was conducted with the potential median equal to the median of the eight-member interim Court.

3.1.4 Robustness check 4: No cloture votes

Cloture votes may reflect only opposition to a filibuster and not necessarily carry information about the senator's preference over a nomination.[26] Therefore, a model was estimated omitting the Fortas chief justice observation, the only dataset observation based on a cloture vote.

[26] As an example, 72 senators voted to end debate on the Alito nomination, but only 58 senators voted to confirm.

3.1.5 Robustness check 5: Alternate specification for median change

A relatively small amount of median change accompanied potential Supreme Court replacements (see summary statistics in Appendix B), and the value of the variable was zero for the eight nominations for which there was no threat to change the median ideology of the Court. This may cause higher standard errors than necessary, which may influence inferences about statistical significance. The median change variable was recoded so that +1 indicated median movement away from the senator, -1 indicated potential median movement toward the senator, and 0 indicated no potential median change. The resulting variable had a more even distribution: for senators whose preferences about a nomination were available, 572 observations were coded +1; 519 observations were coded -1; and 792 observations were coded 0.

3.1.6 Robustness check 6: Constituency concerns

Constituency concerns provide a measurement problem, since state-level public opinion data is unavailable for most dataset nominations. Berry et al. (1998) developed state citizen ideology scores that date to 1960, but their measure is a poor proxy for constituency concerns because the measure is based on election returns, which reflect concerns like incumbency that cloud the measure. Erikson, Wright, and McIver (1993, 2006) constructed measures from state-level public opinion data for particular issues and poll questions from 1976 to 2003, and Kastellec, Lax, and Phillips (2008) reported state-level public opinion data for nine nominees (O'Connor, Rehnquist, Bork, Thomas, Souter, Ginsburg, Breyer, Roberts, and Alito).

Neither of these is a perfect proxy, but the Kastellec, Lax, and Phillips (2008) measure appears to be the best option because it directly measures support for nominees. Use of any other

measure, like one in which states were assigned a liberal-conservative score, poses problems for moderate nominees because – while it is a safe assumption that senators from conservative states would be pressured to oppose liberal nominees, and that senators from liberal states would be pressured to oppose conservative nominees – there was no clear assumption for how senators from any of these states would be expected to approach a moderate nominee like Lewis Powell.

3.1.7 Robustness check 7: Clustering standard errors

Statistical significance is determined by calculating the ratio of an estimated coefficient to its standard error. Standard error calculations presume that observations are independent. Including non-independent observations introduces error into the calculation, usually biasing estimates downward, because, among other things, the effective sample size is inflated. Clustering standard errors by non-independent observations is a method to address this problem.

Observations of senator opposition to Supreme Court nominations are not independent on two dimensions: multiple senators consider the same nomination, and individual senators often consider multiple nominations. On the one hand, clustering standard errors by nomination can address the idiosyncrasies of a nomination not captured in the models, such as the personality of the nominee or a seemingly-unrelated national event. But clustering by senator also has an advantage, because it can help account for idiosyncrasies of the senator, like a relatively strong reluctance to oppose a nomination.

Clustering standard errors by nomination provides a more conservative test of hypotheses because standard errors clustered by nomination should be more inflated than standard errors clustered by senator, given the relatively few nominations compared to the large number of senators who have had the opportunity to consider multiple nominations. Main models for

senator opposition therefore cluster standard errors by nomination, but a robustness check was conducted with standard errors clustered by senator.

3.1.8 Robustness check 8: Alternate models of loss aversion

Kahneman and Tversky (1979: 279) noted that "[a] salient characteristic of attitudes to changes in welfare is that losses loom larger than gains".[27] Along these lines, the influence of seat change may be different for senators facing unfavorable seat changes compared to those facing favorable seat changes, as depicted in Figure 3.2.

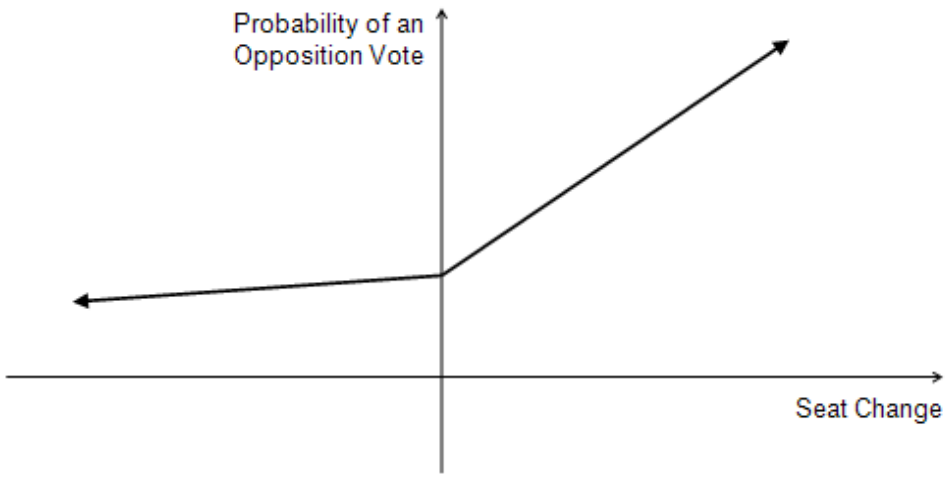

Figure 3.2. Linear loss aversion

Note: Figure displays the probability of a senator vote at various levels of seat change. In this case, negative seat changes (i.e., those favorable to the senator) are not as influential as positive seat changes (i.e., those unfavorable to the senator).

[27] A concept related to loss aversion is risk aversion, defined as a preference for x instead of a risk with an expected value of x (Kahneman and Tversky 1979, 264). This does not have an exact analogue in confirmation voting, since senators are not given a choice, for example, between this nominee who is certain to be a moderate, and that nominee who has a fifty percent change of being a liberal and a fifty percent chance of being a conservative.

The methodological technique used to address this phenomenon was to construct a dichotomous variable, coded 1 if the nomination would move the seat away from the senator and 0 if the nomination would move the seat toward the senator or if there were no potential seat change, and then to interact this variable with a measure of the absolute value of the ideological distance that the seat would change relative to the senator.

3.1.9 Robustness check 9: Curvilinear models of loss aversion

Senators' preference functions for ideological distance may also be nonlinear, in terms of loss aversion. Senators may be more (Figure 3.3) or less (Figure 3.3) sensitive to extreme changes. To address these possibilities, ideological distance measures in the loss aversion model were replaced, first with squared measures and then with square-root measures. These measures were then interacted with the dichotomous median change variable.

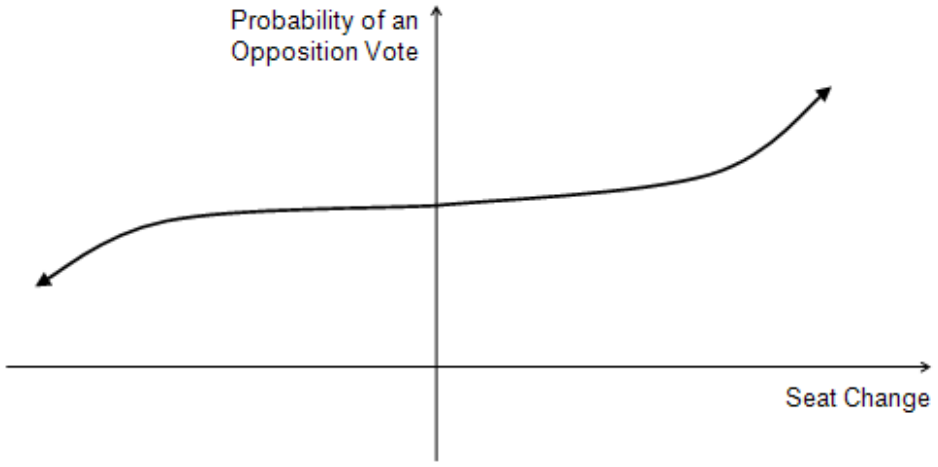

Figure 3.3. Curvilinear loss aversion, type 1

Note: Figure displays the probability of a senator vote at various levels of seat change. In this case, incremental seat changes further from the senator (in either a positive or negative direction) are more influential relative to equivalent incremental seat changes closer to the senator.

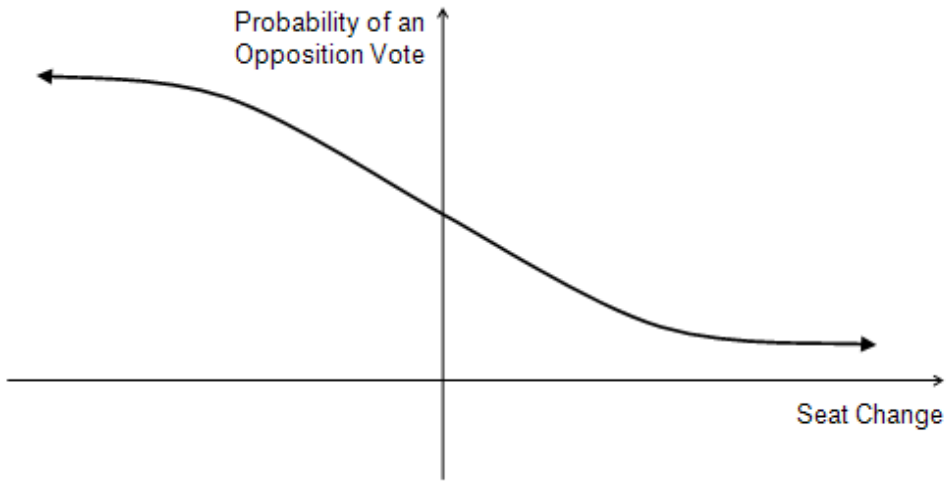

Figure 3.4. Curvilinear loss aversion, type 2

Note: Figure displays the probability of a senator vote at various levels of seat change. In this case, incremental seat changes further from the senator (in either a positive or negative direction) are less influential relative to equivalent incremental seat changes closer to the senator.

3.1.10 Robustness check 10: Nominee qualifications × seat change interaction

The influence of seat changes may be conditioned on nominee qualifications, so an additional model was estimated with an interaction between the lack of nominee qualifications variable and the unfavorable seat change variable.

3.1.11 Robustness check 11: Seat change directionality

Senators may perceive a seat change differently based on nominee ideology, where, for instance, an unfavorable 0.5-unit seat change toward the prior Court median has a different influence than a 0.5-unit seat change away from the prior Court median. A dichotomous variable was coded

with 1 indicating a nomination in which the nominee fell closer to the prior Court median than the senator did, and 0 otherwise.

3.1.12 Robustness check 12: Segal-Cover nominee ideology scores

Although first-year justice scores for confirmed nominees are highly correlated with Segal-Cover scores, these first-year scores are not available to senators at the time of the confirmation vote. Segal-Cover perceived nominee ideology scores, though, are based on information for which senators have access at the time of the confirmation vote, so the analysis was conducted using these scores. Segal-Cover nominee scores were regressed against first-year Bailey estimated ideal points for confirmed nominees to place the Segal-Cover values on the Bailey metric. Then the Bailey arrays were recalculated, as were the three ideological variables, and the main model was re-estimated.

3.1.13 Robustness check 13: Including pre-Fortas 1968 observations

The increased emphasis on ideology makes nominations starting in the 1960s, especially with the failed chief justice nomination of Abe Fortas, an attractive starting point, given the increased emphasis placed on ideology in recent times (Silverstein 1994). But to test if senator opposition has increased in the Fortas era, a model was estimated for nomination between Earl Warren in

1954 and Abe Fortas in 1968, with a combined model estimated for all nominations between Earl Warren in 1954 and Samuel Alito in 2006.[28]

3.1.14 Robustness check 14: Grouped by partisanship

Shipan (2008) estimated models disaggregated by partisanship. Results indicated that ideology was much more influential on opposite-party senators than senators who belonged to the same political party as the president. To check if a similar phenomenon occurs with considerations of the departing justice, the baseline model was estimated separately on same-party and different party senators.

3.1.15 Robustness check 15: Multiple presidential nominations

Senators may be more likely to oppose a president's nomination after the president has received multiple opportunities to appoint justices to the Supreme Court. To test this claim, a model was estimated in which a sequence of dichotomous variables were included indicating the number of previous successful nominations the president has made.[29]

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[28] Bailey estimated ideal points for Daniel (TX) in 1954, Griswold (NE) in 1954, Upton (NH) in 1954, Barkley (KY) in 1954, Blakley (TX) in 1957, and Buttum (SD) in 1962 were not available. These observations were deleted from the analysis. The 1963 senator score was used for Jordan (ID) in 1962.

[29] Coding for this variable was as follows. First nominations: Eisenhower (Earl Warren), Kennedy (Byron White), Johnson (Abe Fortas), Nixon (Warren Burger), Ford (John Paul Stevens), Reagan (Sandra Day O'Connor), HW Bush (David Souter), Clinton (Ruth Bader Ginsburg), and W Bush (John Roberts). Second nominations: Eisenhower (John Harlan II), Kennedy (Arthur Goldberg), Johnson (Thurgood Marshall), Nixon (Clement Haynsworth, Harrold Carswell, and Harry Blackmun), Reagan (CJ William Rehnquist and Antonin Scalia), HW Bush (Clarence Thomas), Clinton (Stephen Breyer), and W Bush (Samuel Alito). Third nomination: Eisenhower (William Brennan), Johnson (CJ Abe Fortas), Nixon (Lewis Powell), Reagan (Robert Bork and Anthony Kennedy). Fourth nomination: Eisenhower (Charles Whittaker) and Nixon (William Rehnquist). Fifth nomination: Eisenhower (Potter Stewart). Note that the 1986 nominations of Antonin Scalia and William Rehnquist were considered to be a single nomination for the purpose of constructing this variable because their confirmation vote occurred on the same day. The 1971

3.1.16 Robustness check 16: Alternate reference point

The Court median may also be a salient feature of Supreme Court nominations that senators may compare to the nominee. Therefore, a model was estimated in which the median justice of the previous nine-member Court was considered the reference point for senators in relation to the nominee.

3.2 CONFIRMATION DELAY

The confirmation delay hypotheses were tested on the 28 nominations from 1953 to 2006, excluding those not reported by the Senate Judiciary Committee (Homer Thornberry in 1968, and Harriet Miers in 2005) and nominations not officially submitted to the Senate (Douglas Ginsberg in 1987, and the associate justice nomination of John Roberts in 2005), but including the failed 1968 cloture vote on the elevation of associate justice Abe Fortas to chief justice. The failed cloture vote on the Fortas chief justice nomination was considered the final Senate action. Even though failed cloture is not the same end event as the other nominations (i.e., a final roll call vote), it is plausible to assume that a roll call vote on the Fortas nomination would have occurred on or near the date of the failed cloture, given that the three other Supreme Court nomination cloture votes were followed by a roll call vote on the same day. Moreover, the decision to code the Fortas cloture vote as the end event is also methodologically justified, since

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nominations of Rehnquist and Lewis Powell were announced on the same day, but the confirmation vote for Rehnquist occurred four days after the vote for Powell, and so was considered to be a subsequent nomination.

there was presumably no risk of a roll call confirmation vote on the Fortas nomination after the failed cloture.

3.2.1 Dependent variables

The two dependent variables for confirmation delay were measured as follows: *Judiciary Committee* extended from Senate receipt of a nomination[30] to the committee's reporting of the nomination to the Senate, and *Roll Call* extended from the final committee report to the final Senate action on a nomination, whether a vote to confirm, a vote to reject, or a failed cloture. Figure 3.5 depicts the length of each of these phases, across nominations.

[30] Dates for confirmation benchmarks were drawn from Rutkus and Bearden (2006). An alternate approach of starting the analysis with the presidential announcement of the nomination (with dates drawn from Garrett and Rutkus 2005) was less justified because the Senate cannot be considered to delay a nomination before it has been officially received. Moreover, there was a relatively high variation in the time between a presidential announcement of a nomination and its receipt in the Senate; half of nominations in the dataset were received on the same day as the announcement, but eight took a week or longer, including the nominations of Anthony Kennedy (19 days) and Sandra Day O'Connor (43 days). John Harlan II and John Roberts were both nominated twice. Harlan's original nomination was received with less than a month remaining in the 83d Congress, which did not hold hearings on the nomination; Harlan was then re-nominated at the start of the 84th Congress. Roberts' nomination was withdrawn after the death of Rehnquist, and Roberts was re-nominated to the chief justiceship on the same date. The earlier date for the Harlan and Roberts nominations was used, since the Senate had the interim time available to gather information about the nominees.

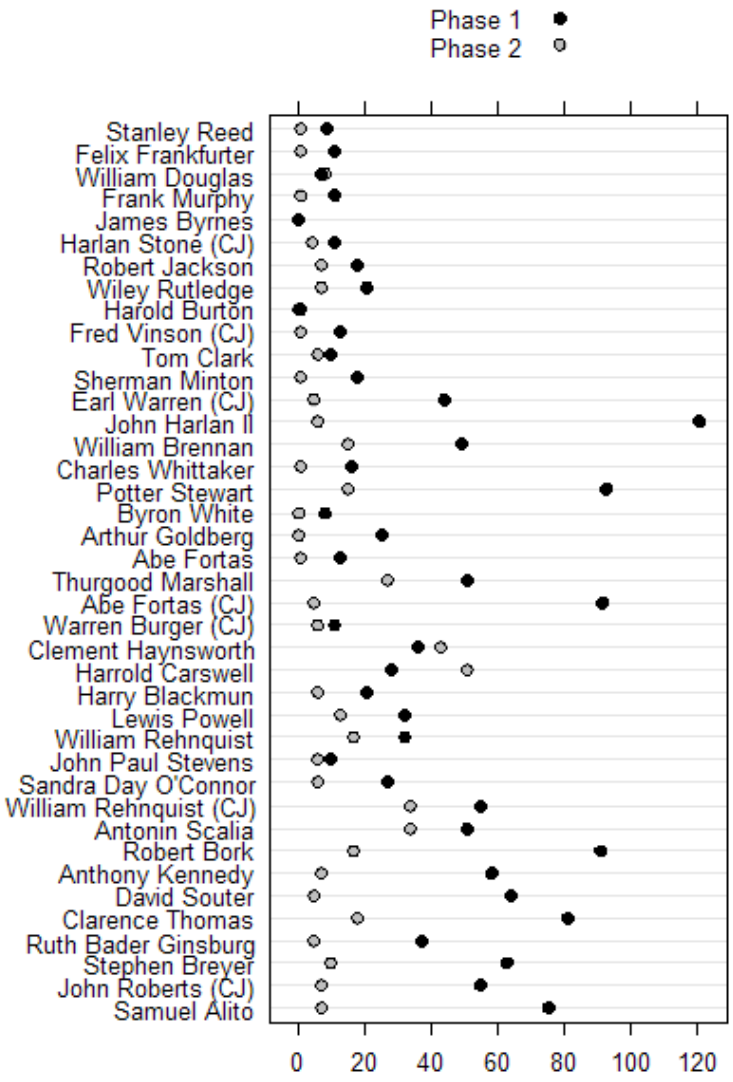

Figure 3.5. Duration of confirmation phases

Note: Figure displays the number of days between Senate receipt of a US Supreme Court nomination and the Judiciary Committee report (phase 1), and the number of days between the Judiciary Committee report and the final roll call vote on the nomination. Days that the Senate was in recess were not excluded.

3.2.2 Estimation technique

The Cox proportional hazards model was employed to estimate durations, which is preferable to alternate parametric models because the Cox model does not require an assumption about the distribution of the baseline hazard (Box-Steffensmeier and Jones 1997). All models included

robust standard errors. Hypotheses were directional, so statistical significance tests were performed at the 0.05 level with a one-tailed test.

The Cox proportional hazards model assumes that the effect of any variable on the risk of failure is constant over time. Schoenfeld residuals were analyzed to test if the assumption of proportionality holds for model variables, and a simple correction for any violation included an interaction with time for each offending covariate (Blossfeld, Golsch, and Rohwer 2007: 237).

If the start and end dates of a particular phase for a particular nominee occurred on the same date, the end date was increased by one day to ensure that the nomination was not dropped from the analysis (following Binder and Maltzman 2002 and Shipan and Shannon 2003); this occurred for the 1962 White and 1962 Goldberg nominations, both of which had a Judiciary Committee report and Senate roll call vote on the same date.

3.2.3 Recess days

Previous research (e.g., McCarty and Razaghian 1999; Bell 2002; Shipan and Shannon 2003) has not removed dates in which the Senate was in recess from the count of days, which may introduce error into the modeling. The nomination of John Harlan, for example, was received in the Senate less than a month before the end of the 83d Congress, and languished for more than a month during a Thanksgiving recess and the interregnum between the 83d and 84th Congress. The 1987 Kennedy nomination sat during the period between the first and second session of the 100th Congress, and the Scalia and Rehnquist nominations were stalled while the Senate recessed from mid-August to early September 1986. Table 3.2 lists the nominations that sat during Senate recesses and the number of days that the nominations were delayed in this fashion.

Table 3.2. Days the nomination sat while the Senate was in recess

	Judiciary Committee Phase	Roll Call Phase
John Harlan II	45	--
Potter Stewart	13	--
Thurgood Marshall	12	--
Abe Fortas (CJ)	47	--
Harrold Carswell	7	6
Lewis Powell	5	6
William Rehnquist	5	6
Sandra Day O'Connor	22	--
William Rehnquist (CJ)	12	25
Antonin Scalia	12	25
Robert Bork	35	--
Anthony Kennedy	35	--
David Souter	38	--
Clarence Thomas	41	--
Ruth Bader Ginsburg	13	--
Stephen Breyer	44	--

The advantage of including recess days is that those days represent genuine delay by the Senate in processing a nomination, and this delay may be a factor that influences senator action on a nomination. Senators and Senate staffers, for example, may use recess days to prepare for hearings or to meet with the president to discuss their confirmation vote. Senators may also use recess days to strategically delay the confirmation process. For these reasons, recess days should be included in the model.

But inclusion of recess days has a major disadvantage: there is no risk of Senate action on a recess day. The Judiciary Committee could be ready to start hearings, or the Senate Majority Leader could be prepared to schedule a roll call vote, but a Senate recess would preclude these actions. Inclusion of recess days would therefore artificially inflate the number of days that the Senate needed to act.

The chosen methodology was to subtract recess days from the time periods to remove any time that Senate action was suspended and for which there is no risk of action. Days in which the Senate was in recess were removed from the baseline analysis, but were included in an alternate specification.[31]

3.2.4 Independent variables

Bailey estimated ideal points were used to proxy ideology. Seat change and median change measures for the key senators (i.e., the Judiciary Committee chair and the Majority Leader)[32] were calculated with the following formulas, with higher values coded as more unfavorable changes:

- Seat Change = | Key Senator – Nominee | – | Key Senator – Departing Justice |
- Median Change = | Key Senator – Potential Court median | – | Key Senator – Former Court median |

Absolute ideological measures were calculated, for the absolute value of the difference between the key senator and the nominee and also for the absolute value of the difference between nominee and prior Court median ideology. Diagnostic tests were conducted to check for multicollinearity between the ideological variables.

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[31] Methodologically, the number of dates the Senate was in recess during the hearings phase was added to date the Senate received the nomination, and the number of dates the Senate was in recess during the roll call phase was subtracted from the date the Senate voted on the nomination. Recess dates were drawn from the US Senate website document, "Dates of Sessions of the Congress, present-1789," retrieved June 26, 2009, from: http://senate.gov/reference/Sessions/sessionDates.htm.

[32] The identity of the Judiciary Committee chair for each nomination was drawn from Nelson and Bensen (1993) and Canon, Nelson, and Stewart (2002). The identity of the Senate Majority Leader for each nomination was drawn from the Senate webpage, "Majority and Minority Leaders and Party Whips," retrieved October 22, 2008, at: http://www.senate.gov/artandhistory/history/common/briefing/Majority_Minority_Leaders.htm.

Other model variables included a lack of nominee qualifications, presidential disapproval, the presence of divided government, and the Congress in which the confirmation or cloture roll call was conducted. In addition, the length of the first phase was included as a control in the second phase, to control for any dependency between phase lengths.

Models did not include several controls that often appear in analyses of confirmation delay. Critical nominations (Ruckman 1993) were omitted, since this measure was indirectly incorporated in the ideological variables. Also, the main models did not include a count of days remaining in a session or a dichotomous variable indicating a nomination submitted late in a session, since the Senate should not be expected to expedite the confirmation process to shoehorn in a nomination given the importance of the Supreme Court. End of session dates are determined by the Congress itself and can easily be extended, but, more importantly, the Senate can carry over a nomination to the next session by unanimous consent, which happened recently for the Anthony Kennedy nomination in November 1987 and the Samuel Alito nomination in November 2005. The end of a Congress may be a more justified expediting factor,[33] but the sole nomination made with fewer than 30 days remaining in a Congress (that of John Harlan II in November 1954) lapsed without even a hearing, and the president resubmitted the nomination at the beginning of the next Congress.[34]

Also excluded was a control for nominations made by presidents in the final year of their term or for nominations made by lame duck presidents. Theoretically, the Senate may speed up a

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[33] The end of Congress date may influence the speed at which the Senate considers a nomination, but that influence may be quite complicated. Presumably, the influence is a non-linear function that has a negligible value until late in a Congress (perhaps around 60 days remaining) at which point a nomination would be slightly expedited so that it can be voted on before adjournment; however, at some point (perhaps around 25 days remaining), senators would be pessimistic about finishing the nomination before the end of Congress and therefore not proceed on it at all (so that the closeness of a nomination to the end of a Congress would actually elongate the process).

[34] The recess appointments of William Brennan and Potter Stewart were additional anomalies, with the recess appointment made in the Congress before the nomination was officially submitted to the Senate.

process to ensure that a nomination receives a roll call vote before the president leaves office and the nomination lapses, or, conversely, an oppositional Senate might use delay to derail a lame duck or last-year-of-term nomination; however, the only dataset observation that falls into either of these categories is Lyndon Johnson's nomination of Abe Fortas in June 1968, which occurred so early in the final year of a presidency that any attempt to postpone a roll call vote on the nomination would have shattered all-time records for Supreme Court confirmation delay.

3.2.5 Robustness check 1: Weibull specification

A Weibull model was estimated as a robustness check, since the Cox model may suffer from bias if more than five percent of observations have the same duration, and parameter estimates can be less precise with small sample sizes (Yamaguchi 1991).

3.2.6 Robustness check 2: Additional controls

Some additional controls were included in alternate model specifications to assess the robustness of findings and to adjust for more idiosyncratic elements of nominations: the quarter of the presidential term in which the nomination was announced (coded as *y* modulo 4, where *y* is the year that the Senate received the nomination),[35] recess appointments (a dichotomous variable coded 1 for a nominee currently serving on the Supreme Court under a recess appointment), and nominations made during the period of the Court's summer recess, which typically extends from early June to the first Monday in October (coded 1 for a nomination in June, July, August, or

[35] The modulo function returns the remainder from a division operation, so, for example, 2009 modulo 4 would return a value of 1, indicating the first year of a presidential term, in this case, the inaugural year of the Obama administration.

September). The recess and summer variables accounted for the possibility that the urgency of completing the confirmation process is lessened when justices are already serving on the Court or while the Court is out of session.

3.2.7 Robustness check 3: Overlapping nominations

An alternate specification controlled for overlapping nominations, with a dichotomous variable coded 1 for both nominations if the Senate received a nomination while it was still considering another nomination. The alternate model also included robust standard errors clustered by overlapping nomination to avoid the assumption that simultaneous nominations were independent observations.

3.2.8 Robustness check 4: Recess days

A robustness check was conducted with recess days included in the total count for the dependent variables.

3.3 PRESIDENTIAL SELECTION OF A NOMINEE

The six models of presidential constraint predict various locations for the ideal point of a Supreme Court nominee. Determination of these predicted ideal points required the use of ideal point estimates for presidents, senators, justices, and nominees. Estimated ideological ideal points for presidents, senators, and justices were drawn from Bailey and Maltzman (2009).

Bailey estimated ideal points were available for presidents from 1950 to 2008, for senators from 1951 to 2008, and for justices from 1950 to 2008.[36] The dataset therefore included all Supreme Court appointments from Earl Warren in 1953 to Samuel Alito in 2006, including nominations announced by the president but not officially submitted to the Senate (Douglas Ginsberg in 1987, the associate justice nomination of John Roberts in 2005, and Harriet Miers in 2005) and those received in the Senate but not reported by the Senate Judiciary Committee (Homer Thornberry in 1968).

3.3.1 Dependent variable

Models predict the dependent variable of nominee ideology. Bailey estimated ideal points were not available for Supreme Court nominees, so nominee ideology was proxied as the first available Bailey estimated ideal point for a justice, which required only the assumption that senators have information about the potential voting behavior of a nominee in the justice's first year on the Court.[37] Table 3.3 lists presidential and nominee ideal points.

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[36] Bailey estimated ideal points were retrieved from personal correspondence with Michael Bailey (September 28, 2009). President and Senate median scores were drawn from the year in which the confirmation or cloture vote occurred, and justice arrays were constructed based on ideal points drawn from the year prior to the appointment, except for Anthony Kennedy, nominated at the end of November, and for Samuel Alito, nominated in November.

[37] Two nominees (Abe Fortas and William Rehnquist) were serving on the Court at the time of their nomination to the chief justiceship; Bailey estimated ideal points from the justice arrays described later were used for these nominees. Other nominees (Homer Thornberry, G. Harrold Carswell, Clement Haynsworth, Robert Bork, Douglas Ginsberg, and Harriet Miers) were not confirmed and therefore did not serve on the Court, which necessitated imputation of their Bailey score. Segal-Cover nominee perceived ideology scores and first year Bailey estimated ideal points for the 23 nominees between 1951 and 2006 who were not already serving on the Court (Earl Warren to Samuel Alito) were used to create a bridging equation to place these three rejected nominees on the Bailey metric. First year justice Bailey estimated ideal points and Segal-Cover nominee perceived ideology scores correlated at -0.84 ($p \leq 0.01$). Segal-Cover nominee perceived ideology scores were drawn from "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005," retrieved on September 8, 2008, from Jeffrey Segal's website (http://www.sunysb.edu/polsci/jsegal/qualtable.pdf), with scores for Homer Thornberry and Douglas Ginsberg drawn from Cameron and Park (2009).

Table 3.3. President and nominee ideal points

Nominee	P	N		Nominee	P	N
Warren (CJ)	-0.05	-1.00		Rehnquist (AJ)	0.83	1.15
Harlan II	-0.05	-0.19		Stevens	0.78	-0.38
Brennan	-0.05	-0.94		O'Connor	1.15	0.68
Whittaker	-0.05	0.28		Rehnquist (CJ)	1.15	1.21
Stewart	-0.05	0.17		Scalia	1.15	0.59
White	-1.37	-0.42		Bork	1.15	0.71
Goldberg	-1.37	-1.69		Ginsberg	1.15	0.65
Fortas (AJ)	-1.05	-1.61		Kennedy	1.15	0.40
Marshall	-1.05	-1.43		Souter	1.11	-0.01
Fortas (CJ)	-1.05	-1.61		Thomas	1.11	1.10
Thornberry	-1.05	-1.21		Ginsburg	-0.88	-0.57
Burger (CJ)	0.83	0.66		Breyer	-0.88	-0.48
Haynsworth	0.83	0.58		Roberts (AJ)	1.11	0.79
Carswell	0.83	0.83		Roberts (CJ)	1.11	0.79
Blackmun	0.83	0.58		Miers	1.11	0.34
Powell	0.83	0.29		Alito	1.11	0.84

3.3.2 Pivotal senator

Modeling political phenomena often requires simplifying assumptions to reduce processes to their core elements. Presidents issue a great deal of nominations to federal offices; most are confirmed without controversy, but those that fail are usually derailed before the final roll call vote (Krutz, Fleisher, and Bond 1998). Supreme Court nominations are of such high stakes, though, that presidents can be confident that, in all but the most extraordinary circumstances, their nominations will not fail before a floor vote (see Moraski and Shipan 1999: 1092-3 for a discussion of the Judiciary Committee not serving as a gatekeeper that may derail a nomination).[38]

[38] No modern Supreme Court nomination has been defeated in the Judiciary Committee.

A nomination can also be defeated through a filibuster, but only one Supreme Court nomination has ever been withdrawn after a failed cloture vote (the 1968 chief justice nomination of associate justice Abe Fortas), and in only three other cases have cloture votes been attempted to close debate on a nomination. The distribution of roll call votes in these three cases indicated that some senators who opposed the nomination were unwilling to support a filibuster to defeat the nomination: in 1986, the Senate voted 68 to 31 to end debate on the Rehnquist chief justice nomination, and that same day confirmed the nomination, 65 to 33; in 2006, 72 senators voted to end debate on the Alito nomination, but only 58 senators voted to confirm; and in 1971, the Senate confirmed the Rehnquist associate justice nomination 68 to 26 even though earlier that day cloture failed 54 to 42.

Models presented below therefore presume that the only method of Senate rejection is through a roll call vote by the full Senate, so the median senator was considered the pivotal member of the Senate.

3.3.3 Departing justice constraint

To determine the predicted nominee ideal point of presidents operating under the departing justice constraint, departing justice winsets were calculated as follows, where values are expressed as Bailey estimated ideal points:

- Departing justice winset = {median senator – | median senator – departing justice |, median senator + | median senator – departing justice |}

The next step was to determine if the location of the nominee fell on or within the median senator's departing justice winset. If so, then the president was predicted to nominate at the presidential ideal point; but if the nominee fell outside the median senator's departing justice

winset, then the president was predicted to nominate at the edge of the departing justice winset closest to the presidential ideal point.

Table 3.4 presents ideal points and edges of the departing justice winset. Gray rows indicate presidents operating under the departing justice constraint, and clear rows indicate unconstrained presidents. Horizontal lines divide nominations by appointing president. P, S, and D respectively refer to ideal points of the president, Senate median, and the departing justice. Predicted N refers to the predicted nominee ideal point.

Table 3.4. Predicted N: Departing justice consideration

Nominee	Departing Justice	P	S	D	Dep. Just. Winset		Predicted N
Warren (CJ)	Vinson	-0.05	0.69	0.65	0.65	0.73	0.65
Harlan II	Jackson	-0.05	0.66	0.29	0.29	1.03	0.29
Brennan	Minton	-0.05	0.46	0.74	0.18	0.74	0.18
Whittaker	Reed	-0.05	0.38	0.80	-0.04	0.8	-0.04
Stewart	Burton	-0.05	0.32	0.52	0.12	0.52	0.12
White	Whittaker	-1.37	-0.01	0.28	-0.30	0.28	-0.30
Goldberg	Frankfurter	-1.37	-0.01	0.49	-0.51	0.49	-0.51
Fortas (AJ)	Goldberg	-1.05	-0.33	-1.69	-1.69	1.03	-1.05
Marshall	Clark	-1.05	-0.35	0.06	-0.76	0.06	-0.76
Fortas (CJ)	Warren	-1.05	-0.38	-1.35	-1.35	0.59	-1.05
Thornberry	Fortas	-1.05	-0.38	-1.61	-1.61	0.85	-1.05
Burger (CJ)	Warren	0.83	-0.47	-1.37	-1.37	0.43	0.43
Haynsworth	Fortas	0.83	-0.47	-1.61	-1.61	0.67	0.67
Carswell	Fortas	0.83	-0.55	-1.61	-1.61	0.51	0.51
Blackmun	Fortas	0.83	-0.55	-1.61	-1.61	0.51	0.51
Powell	Black	0.83	-0.57	-0.26	-0.88	-0.26	-0.26
Rehnquist (AJ)	Harlan	0.83	-0.57	0.00	-1.14	0.00	0.00
Stevens	Douglas	0.78	-0.53	-1.88	-1.88	0.82	0.78
O'Connor	Stewart	1.15	0.10	0.13	0.07	0.13	0.13
Rehnquist (CJ)	Burger	1.15	-0.10	0.76	-0.96	0.76	0.76
Scalia	Rehnquist	1.15	-0.10	1.21	-1.41	1.21	1.15
Bork	Powell	1.15	-0.21	0.32	-0.74	0.32	0.32
Ginsberg	Powell	1.15	-0.21	0.32	-0.74	0.32	0.32
Kennedy	Powell	1.15	-0.21	0.32	-0.74	0.32	0.32
Souter	Brennan	1.11	-0.27	-1.75	-1.75	1.21	1.11
Thomas	Marshall	1.11	-0.41	-2.01	-2.01	1.19	1.11
Ginsburg	White	-0.88	-0.44	0.51	-1.39	0.51	-0.88
Breyer	Blackmun	-0.88	-0.44	-1.21	-1.21	0.33	-0.88
Roberts (AJ)	O'Connor	1.11	0.32	0.21	0.21	0.43	0.43
Roberts (CJ)	Rehnquist	1.11	0.32	0.96	-0.32	0.96	0.96
Miers	O'Connor	1.11	0.32	0.21	0.21	0.43	0.43
Alito	O'Connor	1.11	0.32	0.18	0.18	0.46	0.46

For example, values indicate that President Dwight Eisenhower was constrained by departing justice considerations for his first nomination, which became that of Earl Warren. The Senate median fell relatively close to the departing justice (0.04 units), so the departing justice winset was small, ranging from 0.65 to 0.73. If Eisenhower nominated someone at his ideal point

of -0.05, the nominee would fall much further than the departing justice from the Senate median, and the median senator would be expected to oppose the nomination. Eisenhower was therefore predicted to nominate someone with an ideal point of 0.65, the edge of the departing justice winset closest to his ideal point.

Presidents were constrained from nominating at their ideal point due to the departing justice winset for 23 of the 32 dataset appointments (72 percent), including three of the four nominations that the Senate rejected (Carswell, Haynsworth, and Bork, but not Fortas). Constraint closely tracked presidential administration: presidents were always or never constrained along the departing justice dimension for each of their Supreme Court appointments, except for Lyndon Johnson's replacement of Tom Clark and Ronald Reagan's replacement of William Rehnquist as associate justice.

3.3.4 Court mean constraint

The Court mean constraint was calculated as follows. First, the distance between the ideal point of the median senator and each member of the prior nine-member Court was calculated and averaged. Then the distance between the ideal point of the median senator and each member of the prior nine-member Court – but with the departing justice replaced with the president – was calculated and averaged. If the average distance was smaller with the president as a member of the Court than with the departing justice as a member of the Court, then the president was considered to be unconstrained and was predicted to nominate at the presidential ideal point. If the average distance was larger with the president as a member of the Court than with the departing justice as a member of the Court, then the president was predicted to nominate someone with an ideal point that was as close to the presidential ideal point as possible without

moving the mean Court ideology from the median senator. Table 3.5 lists the values of predicted nominee ideal points under this constraint. Note that the predictions in each case, although not necessary, nonetheless fall at the same location as the predicted ideal points in the departing justice constraint.

Table 3.5. Predicted N: Court mean consideration

Nominee	Departing Justice	P	D	Prior Mean Dist	Unconstrained Mean Dist	Predicted N
Warren (CJ)	Vinson	-0.05	0.65	0.800	0.878	0.65
Harlan II	Jackson	-0.05	0.29	0.966	1.003	0.29
Brennan	Minton	-0.05	0.74	0.884	0.910	0.18
Whittaker	Reed	-0.05	0.80	0.982	0.983	-0.04
Stewart	Burton	-0.05	0.52	0.883	1.049	0.12
White	Whittaker	-1.37	0.28	0.877	0.996	-0.30
Goldberg	Frankfurter	-1.37	0.49	0.890	0.950	-0.51
Fortas (AJ)	Goldberg	-1.05	-1.69	0.859	0.788	-1.05
Marshall	Clark	-1.05	0.06	0.791	0.823	-0.76
Fortas (CJ)	Warren	-1.05	-1.35	0.757	0.629	-1.05
Thornberry	Fortas	-1.05	-1.61	0.757	0.694	-1.05
Burger (CJ)	Warren	0.83	-1.37	0.780	0.824	0.43
Haynsworth	Fortas	0.83	-1.61	0.806	0.823	0.67
Carswell	Fortas	0.83	-1.61	0.787	0.822	0.51
Blackmun	Fortas	0.83	-1.61	0.787	0.822	0.51
Powell	Black	0.83	-0.26	0.808	0.929	-0.26
Rehnquist (AJ)	Harlan	0.83	0.00	0.869	0.961	0.00
Stevens	Douglas	0.78	-1.88	0.987	0.982	0.78
O'Connor	Stewart	1.15	0.13	0.686	0.799	0.13
Rehnquist (CJ)	Burger	1.15	0.76	0.853	0.762	0.76
Scalia	Rehnquist	1.15	1.21	0.769	0.762	1.15
Bork	Powell	1.15	0.32	0.884	0.977	0.32
Ginsberg	Powell	1.15	0.32	0.884	0.967	0.32
Kennedy	Powell	1.15	0.32	0.892	0.984	0.32
Souter	Brennan	1.11	-1.75	0.978	0.967	1.11
Thomas	Marshall	1.11	-2.01	1.034	1.026	1.11
Ginsburg	White	-0.88	0.51	0.962	0.906	-0.88
Breyer	Blackmun	-0.88	-1.21	0.969	0.932	-0.88
Roberts (AJ)	O'Connor	1.11	0.21	0.803	0.879	0.43
Roberts (CJ)	Rehnquist	1.11	0.96	0.803	0.820	0.96
Miers	O'Connor	1.11	0.21	0.784	0.860	0.43
Alito	O'Connor	1.11	0.18	0.786	0.858	0.46

3.3.5 Court median constraint

To determine if presidents constrain their nominations because of Court median considerations, the distance between the ideal points of the Senate median and the median justice of the prior nine-member Court was calculated. Then the distance between the ideal points of the Senate median and the median justice of the new nine-member Court – presuming that the president nominated as the presidential ideal point – was calculated. If this second distance was less than the first distance, then the president was predicted to nominate at the presidential ideal point. If not, then the president was predicted to nominate at the location closest to the presidential ideal point as possible without increasing the Senate-median-to-Court-median distance. Table 3.6 lists the predicted nominee ideal points based on the Court median constraint.

Table 3.6. Predicted N: Court median consideration

Nominee	Departing Justice	P	Predicted N
Warren (CJ)	Vinson	-0.05	0.39
Harlan II	Jackson	-0.05	0.29
Brennan	Minton	-0.05	-0.01
Whittaker	Reed	-0.05	-0.05
Stewart	Burton	-0.05	0.04
White	Whittaker	-1.37	-0.05
Goldberg	Frankfurter	-1.37	-0.42
Fortas (AJ)	Goldberg	-1.05	-1.05
Marshall	Clark	-1.05	-0.97
Fortas (CJ)	Warren	-1.05	-1.05
Thornberry	Fortas	-1.05	-1.05
Burger (CJ)	Warren	0.83	0.83
Haynsworth	Fortas	0.83	-0.30
Carswell	Fortas	0.83	-0.46
Blackmun	Fortas	0.83	-0.46
Powell	Black	0.83	-0.26
Rehnquist (AJ)	Harlan	0.83	0.83
Stevens	Douglas	0.78	0.03
O'Connor	Stewart	1.15	0.13
Rehnquist (CJ)	Burger	1.15	1.15
Scalia	Rehnquist	1.15	1.15
Bork	Powell	1.15	0.32
Ginsberg	Powell	1.15	0.32
Kennedy	Powell	1.15	0.32
Souter	Brennan	1.11	0.41
Thomas	Marshall	1.11	0.40
Ginsburg	White	-0.88	-0.88
Breyer	Blackmun	-0.88	-0.88
Roberts (AJ)	O'Connor	1.11	1.11
Roberts (CJ)	Rehnquist	1.11	1.11
Miers	O'Connor	1.11	1.11
Alito	O'Connor	1.11	1.11

3.3.6 No constraint

Tables 3.4 to 3.6 on the previous pages contain presidential ideal points, which were used as predictions of nominee ideology for the scenario in which the president does not constrain nominations because of ideological considerations.

3.3.7 Conditional deference: partisanship

The first step in calculating predicted nominee ideal points for models in which presidents offer conditional deference based on partisanship was to determine if the nomination was announced when the Senate was controlled by an opposition party. If the nomination was announced when the president's party controlled the Senate, then the predicted nominee ideal point was at the presidential ideal point; but if the nomination was announced when an opposition party controlled the Senate, then the predicted nominee ideal points were the predicted nominee ideal points based on Court median considerations and Court mean considerations. Table 3.7 presents these predicted nominee ideal points.

Table 3.7. Predicted N: Partisanship constraints

Nominee	Departing Justice	Divided Government	Predicted N	
			Partisanship & Court Mean	Partisanship & Court Median
Warren (CJ)	Vinson	1	0.65	0.39
Harlan II	Jackson	0	-0.05	-0.05
Brennan	Minton	1	0.18	-0.01
Whittaker	Reed	1	-0.04	-0.05
Stewart	Burton	1	0.12	0.04
White	Whittaker	0	-1.37	-1.37
Goldberg	Frankfurter	0	-1.37	-1.37
Fortas (AJ)	Goldberg	0	-1.05	-1.05
Marshall	Clark	0	-1.05	-1.05
Fortas (CJ)	Warren	0	-1.05	-1.05
Thornberry	Fortas	0	-1.05	-1.05
Burger (CJ)	Warren	1	0.43	0.83
Haynsworth	Fortas	1	0.67	-0.30
Carswell	Fortas	1	0.51	-0.46
Blackmun	Fortas	1	0.51	-0.46
Powell	Black	1	-0.26	-0.26
Rehnquist (AJ)	Harlan	1	0.00	0.83
Stevens	Douglas	1	0.78	0.03
O'Connor	Stewart	0	1.15	1.15
Rehnquist (CJ)	Burger	0	1.15	1.15
Scalia	Rehnquist	0	1.15	1.15
Bork	Powell	1	0.32	0.32
Ginsberg	Powell	1	0.32	0.32
Kennedy	Powell	1	0.32	0.32
Souter	Brennan	1	1.11	0.41
Thomas	Marshall	1	1.11	0.40
Ginsburg	White	0	-0.88	-0.88
Breyer	Blackmun	0	-0.88	-0.88
Roberts (AJ)	O'Connor	0	1.11	1.11
Roberts (CJ)	Rehnquist	0	1.11	1.11
Miers	O'Connor	0	1.11	1.11
Alito	O'Connor	0	1.11	1.11

3.3.8 Conditional deference: partisanship and nominee extremism

Table 3.8 presents values used to determine predicted nominee ideal points for the partisanship and nominee extremism model, listing the mean and standard deviation (*std*) of the estimated ideal points of the prior nine-member Court, the leftmost and rightmost edge of the extreme ranges (defined as one standard deviation from the mean), the presence of divided government, and the predicted nominee ideal point, which was restricted to fall on or within one standard deviation of the Court's mean ideology.[39]

[39] If the nominee extremism range was defined as two standard deviations from the mean, the only constrained observation would be the Nixon nomination to replace Earl Warren.

Table 3.8. Predicted N: Nominee extremism

Nominee	Departing Justice	Mean	Std	Left	Right	P	Divided Gov't.	Predicted N
Warren (CJ)	Vinson	-0.07	0.99	-1.07	0.92	-0.05	1	-0.05
Harlan II	Jackson	-0.26	1.02	-1.28	0.76	-0.05	0	-0.05
Brennan	Minton	-0.28	1.05	-1.33	0.77	-0.05	1	-0.05
Whittaker	Reed	-0.46	1.00	-1.46	0.53	-0.05	1	-0.05
Stewart	Burton	-0.49	1.00	-1.49	0.52	-0.05	1	-0.05
White	Whittaker	-0.50	1.04	-1.54	0.54	-1.37	0	-1.37
Goldberg	Frankfurter	-0.58	1.00	-1.58	0.42	-1.37	0	-1.37
Fortas (AJ)	Goldberg	-0.84	0.94	-1.78	0.10	-1.05	0	-1.05
Marshall	Clark	-0.83	0.88	-1.72	0.05	-1.05	0	-1.05
Fortas (CJ)	Warren	-0.84	0.86	-1.69	0.02	-1.05	0	-1.05
Thornberry	Fortas	-0.84	0.86	-1.69	0.02	-1.05	0	-1.05
Burger (CJ)	Warren	-0.98	0.81	-1.79	-0.17	0.83	1	-0.17
Haynsworth	Fortas	-0.76	0.96	-1.71	0.20	0.83	1	0.20
Carswell	Fortas	-0.75	0.94	-1.69	0.20	0.83	1	0.20
Blackmun	Fortas	-0.75	0.94	-1.69	0.20	0.83	1	0.20
Powell	Black	-0.49	0.96	-1.45	0.47	0.83	1	0.47
Rehnquist (AJ)	Harlan	-0.43	0.99	-1.42	0.57	0.83	1	0.57
Stevens	Douglas	-0.25	1.09	-1.34	0.84	0.78	1	0.78
O'Connor	Stewart	-0.09	0.95	-1.03	0.86	1.15	0	1.15
Rehnquist (CJ)	Burger	-0.14	1.02	-1.17	0.88	1.15	0	1.15
Scalia	Rehnquist	-0.26	1.03	-1.29	0.78	1.15	0	1.15
Bork	Powell	-0.17	1.04	-1.21	0.87	1.15	1	0.87
Ginsberg	Powell	-0.17	1.04	-1.21	0.87	1.15	1	0.87
Kennedy	Powell	-0.22	1.04	-1.26	0.82	1.15	1	0.82
Souter	Brennan	-0.26	1.12	-1.38	0.86	1.11	1	0.86
Thomas	Marshall	-0.28	1.16	-1.44	0.88	1.11	1	0.88
Ginsburg	White	0.23	0.84	-0.61	1.07	-0.88	0	-0.88
Breyer	Blackmun	0.21	0.88	-0.67	1.08	-0.88	0	-0.88
Roberts (AJ)	O'Connor	0.02	0.93	-0.91	0.94	1.11	0	1.11
Roberts (CJ)	Rehnquist	0.02	0.93	-0.91	0.94	1.11	0	1.11
Miers	O'Connor	0.00	0.91	-0.91	0.90	1.11	0	1.11
Alito	O'Connor	-0.01	0.90	-0.91	0.89	1.11	0	1.11

3.3.9 Estimation technique

The dependent variable of nominee ideal point was estimated with ordinary least squares regression. Presidents often issued multiple appointments, so observations were clustered by

president. The six non-nested models were compared with each other in terms of Bayesian Information Criteria (BIC), following Primo, Binder, and Maltzman (2008).

3.4 CONCLUSION

Previous chapters outlined the theory of reference dependence and applied the theory to Supreme Court nominations, deriving testable hypotheses in three areas: senator confirmation voting, Senate confirmation delay in processing a nomination, and presidential selection of a nominee. This chapter described the research design for testing these hypotheses, including several robustness checks. The next three chapters present the results from the analysis.

4.0 EMPIRICAL RESULTS, SENATOR OPPOSITION

The theory of the departing justice indicates that the justice who has left the Court provides a reference point for persons judging a nomination. Applying this theory to confirmation voting results in the hypothesis that senators are more likely to oppose a nomination the greater the potential the nomination has to move the ideology of the vacant seat away from their ideal point. This hypothesis was tested on the nineteen Supreme Court nominations for which the Senate advised and consented – or rejected – between 1968 (Abe Fortas) and 2006 (Samuel Alito). Results from the analysis are presented in this chapter.

4.1 RESULTS

Inspection of the raw data provided some preliminary support for the seat change hypothesis. The mean value of the seat change variable for senators opposing a nomination was 0.69, indicating a move away from the senator, while the mean value of seat change for senators supporting a nomination was -0.32, indicating a move toward the senator. To give some perspective on the Bailey metric, the minimum observed dataset value was -2.16 (Michigan senator Philip Hart), and the maximum observed value was 2.44 (Alabama senator Joseph Lister Hill). The mean senator Bailey estimated ideal point for the 1,900 observations of senators

serving at the time of a confirmation or cloture roll call was -0.15, with a standard deviation of 1.10.

Figure 4.1 presents correlational data in support of the seat change hypothesis, depicting the number of senators opposing a nomination for two levels of seat change: gray dots denote senators closer to the nominee than to the departing justice (indicating a favorable seat change), and black dots denote senators closer to the departing justice than to the nominee (indicating an unfavorable seat change). Senators facing unfavorable seat changes accounted for 86 percent of instances of senator opposition (352 of 410).

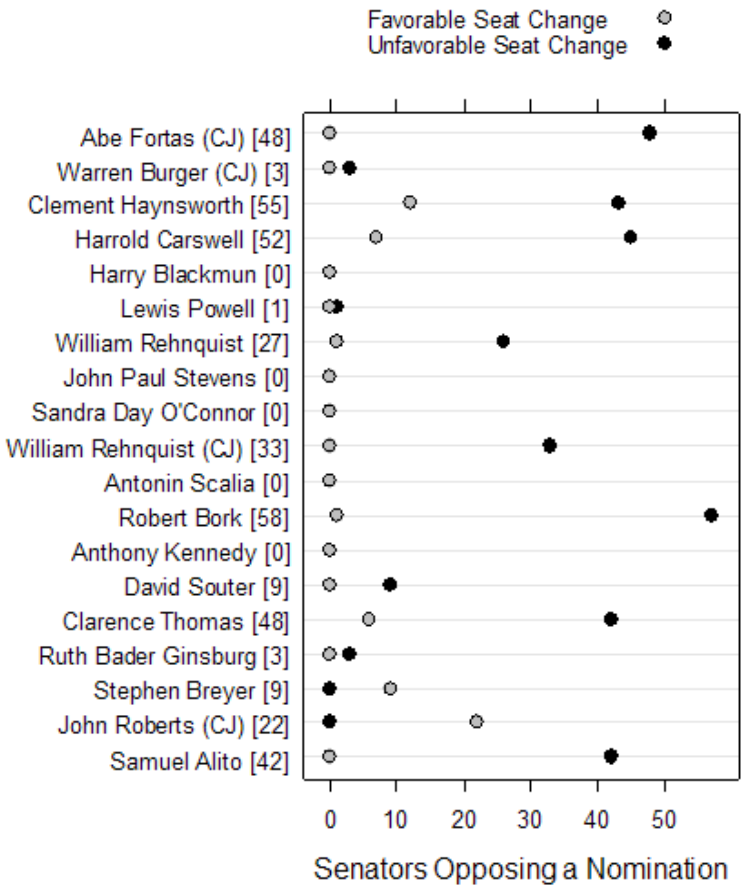

Figure 4.1. Seat changes and senator opposition

Note: Figure displays the number of senators opposing a nomination. Gray dots indicate senators closer to the nominee than to the departing justice, and black dots indicate senators closer to the departing justice than to the nominee. Numbers in square brackets denote the total number of senators opposing the nomination. CJ = chief justice nomination.

Additional evidence in favor of the seat change hypothesis is provided by regressions controlling for other factors. Table 4.1 presents coefficients and standard errors from a probit regression predicting senator opposition to Supreme Court nominations.

Table 4.1. Senator opposition to US Supreme Court nominations (1968-2006)

	Baseline
	Model 4.0
	All Nominations
	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**
Unfavorable median change	-0.40 (0.43)
Increased ideological distance	**0.97 (0.22)**
Lack of nominee qualifications	**3.69 (0.57)**
Presidential disapproval	**3.70 (1.67)**
Different party	**1.14 (0.16)**
Constant	**-1.77 (0.85)**
Number of observations	1883
Number of clusters	19
Pseudo R^2	0.54
Percent correctly predicted	0.89
Percent modal category	0.78
Percent reduction of error	0.52

Note: Dependent variable is senator opposition to a Supreme Court nomination over the seventeen Supreme Court nominations between the 1968 Fortas chief justice nomination and the 2006 Alito associate justice nomination. Models were estimated with probit, with robust standard errors clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Percent reduction of error statistics were derived from the *precalc* utility designed by Frederick J. Boehmke (**http://myweb.uiowa.edu/fboehmke/methods.html**).

Results replicated previous findings, with increased ideological distance, a lack of nominee qualifications, a lack of presidential approval, and partisan differences associating with an increased probability of senator opposition (see, for example, Segal, Cameron, and Cover 1992; Epstein et al. 2006; Shipan 2008). The model also provides evidence that senator

preferences are influenced by the contrast between the nominee and the departing justice, such that potential movement of the seat away from a senator correlates with an increased likelihood of opposition to a nomination.

More specifically, the predicted probability of senator opposition to a nomination was 6 percent, with all model variables set to their mean.[40] For a one standard deviation increase in ideological distance, the predicted probability fell to 1.5 percent, and for a one standard deviation decrease in ideological distance, predicted probability rose to 21 percent. Standard deviation changes for the lack of nominee qualifications variable ranged from 1 percent to 28 percent, 3 percent to 13 percent for presidential disapproval variable, and 2 percent to 16 percent for the partisanship variable.

Figure 4.2 presents the substantive effect of seat changes on senator preferences. For senators of the same party as the president, the point estimate for the predicted probability of senator opposition rose from 0 percent when seat change was set to a value one standard deviation below its observed mean for same party senators to 4 percent when seat change was set to a value one standard deviation above its observed mean for same party senators. For senators of a different party than the president, the corresponding predicted probabilities were 8 percent and 37 percent, indicating that seat changes can be substantial influences on senator preferences regarding a Supreme Court nomination.

[40] Unless otherwise indicated, predicted probabilities in this chapter were calculated with all variables at their mean.

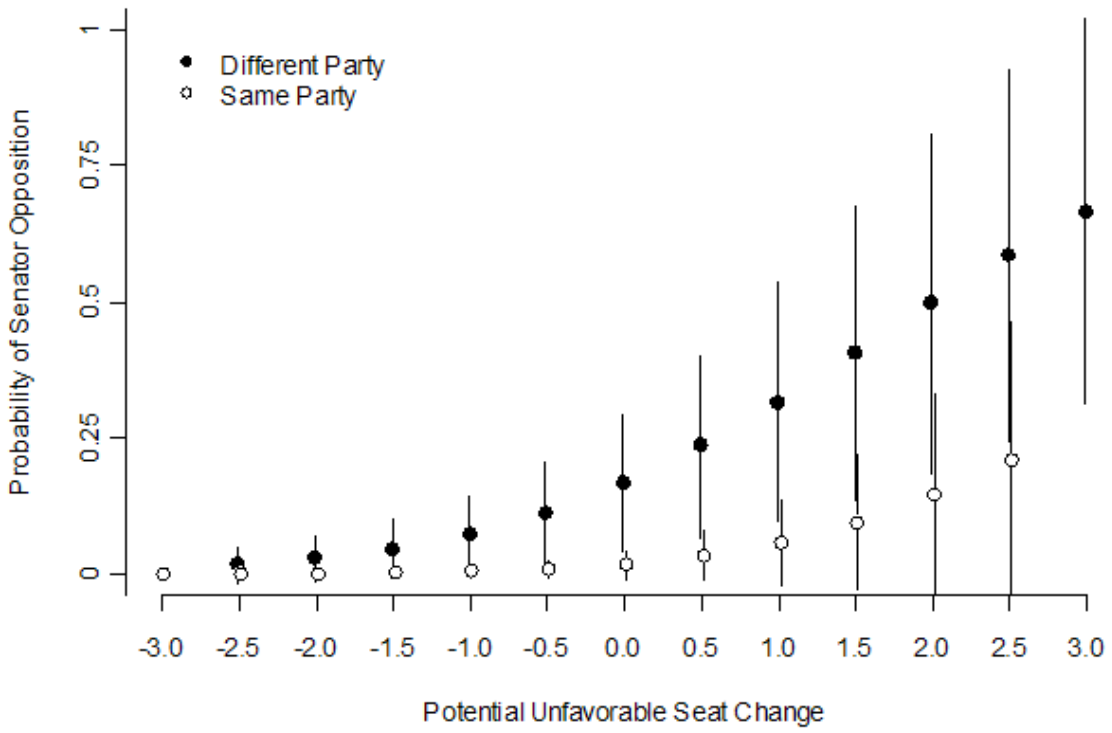

Figure 4.2. The influence of seat change, by partisanship

Note: Figure depicts the predicted probability that a senator opposes a nomination at various levels of observed seat change, with all other model variables at their mean. Dots denote point estimates, and vertical bars indicate 95 percent confidence intervals. Black dots indicate senators of a different party than the president, and white dots indicate senators of the same party as the president. The means and standard deviations of the seat change variable were 0.17 and 1.08 for different party senators, and -0.37 and 1.04 for same party senators. Predicted probabilities were generated with Clarify (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001).

The influence of seat changes rivaled that of ideological distance and nominee qualifications. The respective predicted probabilities for ideological distance were 0 percent to 4 percent (same party senators, with ideological distance set one standard deviation below and above its observed mean for same party senators) and 9 percent to 49 percent (different party senators, with ideological distance set one standard deviation below and above its observed mean for different party senators). For a lack of nominee qualifications, the corresponding predicted probabilities were 0 percent to 12 percent (same party senators) and 3 percent to 50 percent (different party senators).

Several robustness checks for Model 1 were conducted and reported in Table 4.2. Model 4.1 included a temporal control for the Congress in which the confirmation or cloture roll call occurred, a control for chief justice nominations, and a control for party polarization, but when added separately to the main model, the chief justice, party polarization, and Congress variables failed to reach statistical significant (p=0.90, 0.22, and 0.30, respectively).

Model 4.2 predicted the recorded roll call vote, coded 1 for a vote against cloture or confirmation, and 0 for a vote in favor of cloture or confirmation. Results were essentially the same as those from the baseline model in terms of statistical and substantive significance.

For Model 4.3, potential median change values for the Fortas and Rehnquist chief justice nominations were based on the interim eight-member Court, and, for Model 4.4, the Fortas cloture vote was excluded because a vote to end debate may reflect only opposition to the use of a filibuster to block the appointment and not necessarily carry any information regarding preferences about the nomination itself. Again, no inferences drawn from these models were different than inferences drawn from the baseline model.

Table 4.2. Robustness checks 1 to 4 for senator opposition

	Baseline	Check 1	Check 2	Check 3	Check 4
	Model 4.0	Model 4.1	Model 4.2	Model 4.3	Model 4.4
	Senator Opposition	Additional Controls	Roll Calls	Alternate Median	No Cloture Votes
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	**0.54 (0.13)**	**0.47 (0.15)**	**0.47 (0.15)**	**0.50 (0.16)**
Unfavorable median change	-0.40 (0.43)	-0.69 (0.48)	-0.31 (0.45)	-0.19 (0.51)	-0.34 (0.40)
Increased ideological distance	**0.97 (0.22)**	**0.97 (0.19)**	**1.00 (0.25)**	**0.95 (0.23)**	**0.90 (0.27)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.63 (0.53)**	**3.64 (0.57)**	**3.66 (0.58)**	**3.62 (0.58)**
Presidential disapproval	**3.70 (1.67)**	2.47 (2.27)	**3.53 (1.68)**	**3.70 (1.69)**	**3.49 (1.96)**
Different party	**1.14 (0.16)**	**1.11 (0.14)**	**1.13 (0.16)**	**1.14 (0.16)**	**1.18 (0.17)**
Chief justice	---	-0.20 (0.34)	---	---	---
Party polarization	---	5.70 (9.56)	---	---	---
Congress	---	-0.07 (0.16)	---	---	---
Constant	**-1.77 (0.85)**	2.43 (10.73)	**-1.78 (0.86)**	**-1.77 (0.86)**	**-1.69 (0.88)**
Number of observations	1883	1883	1883	1883	1787
Number of clusters	19	19	19	19	18
Pseudo R^2	0.54	0.55	0.55	0.54	0.53

Note: Dependent variable for Model 4.2 is the recorded roll call vote. For all other models, the dependent variable is senator opposition to a nomination. Models were estimated with probit, and robust standard errors were clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Model 4.1 included a control for the Congress in which the roll call occurred. Model 4.3 used eight-member interim Court values to calculate the potential median change for the Fortas and Rehnquist chief justice nominations. Model 4.4 excluded the Fortas cloture vote. Eleven failures and 0 successes were completely determined in Model 4.1.

Model 4.5, presented in Table 4.3, was estimated with the alternate median change control, with median change coded +1, 0, or -1, but results were essentially as in the baseline model for the other variables, although the unfavorable median change variable, while not significant, was signed as expected.

Table 4.3 contains another robustness check, Model 4.6a, with a model that includes a control for state level public opinion about a nomination. State-level public opinion was statistically significant and in the expected direction, consistent with results from Kastellec, Lax, and Phillips (2008) and with the implications of Overby et al. (1992).

One methodological problem, though, was that the limited number of observations for which public opinion data was available reduced the number of observations by more than half. The coefficient for seat change in this model was not statistically significant, but that may only indicate that seat change serves as an indirect influence through state level public opinion; note also that a lack of nominee qualifications loses statistical significance in the presence of the state public opinion control.

Model 4.6b was therefore estimated on the observations restricted to those for which state public opinion data was available, suggesting that the loss of statistical significance for the seat change variable was due to the elimination of more than half of the observations and not necessarily the presence of state level public opinion as a control.

Table 4.3. Robustness checks 5 and 6 for senator opposition

	Baseline	Check 5	Check 6	
	Model 4.0	Model 4.5	Model 4.6a	Model 4.6b
	Senator Opposition	Alternate Median	Constituency Concerns	
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	**0.36 (0.16)**	-0.09 (0.28)	0.37 (0.30)
Unfavorable median change	-0.40 (0.43)	0.21 (0.30)	6.68 (3.42)	1.64 (4.08)
Increased ideological distance	**0.97 (0.22)**	**0.96 (0.22)**	**1.21 (0.25)**	**1.02 (0.35)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.70 (0.56)**	1.28 (0.96)	**2.35 (1.26)**
Presidential disapproval	**3.70 (1.67)**	**3.61 (1.67)**	0.68 (1.77)	2.83 (2.68)
Different party	**1.14 (0.16)**	**1.07 (0.16)**	**2.28 (0.20)**	**1.34 (0.19)**
State public opinion against a nomination	---	---	**0.10 (0.01)**	---
Constant	**-1.77 (0.85)**	**-1.74 (0.85)**	**3.10 (1.31)**	**-2.55 (0.75)**
Number of observations	1883	1883	900	900
Number of clusters	19	19	9	9
Pseudo R^2	0.54	0.55	0.69	0.52

Note: Dependent variable for all models is senator opposition to a nomination. Models were estimated with probit, and robust standard errors were clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Model 4.5 used a trichotomous median change variable (-1 for potential median movement toward the senator, +1 for movement away, and 0 for no change). Model 4.6a contained a control for state-level public opinion on a nomination; in Model 4.6a, 47 failures and zero successes were completely determined. Model 4.6b re-estimates Model 4.6a on the observations restricted to those for which state public opinion data is available.

Table 4.4 contains two more robustness checks, the first (Model 4.7) with standard errors clustered by senator instead of by nomination, since multiple votes by the same senator are not independent events. Standard errors tended to be smaller when clustering nominations by

senator, likely because there were more senator clusters and so the number of effective observations was higher than when clustering by nomination. No inferences changes for any of the variables, though.

Table 4.4. Robustness checks 7 and 8 for senator opposition

	Baseline	Check 7	Check 8
	Model 4.0	Model 4.7	Model 4.8
	Senator Opposition	Cluster by Senator	Loss Aversion 1
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Seat change dummy	---	---	0.05 (0.49)
Seat change distance	---	---	**-0.85 (0.21)**
Seat change distance x Seat change dummy	---	---	**0.95 (0.41)**
Unfavorable seat change	**0.49 (0.14)**	**0.49 (0.07)**	---
Unfavorable median change	-0.40 (0.43)	-0.40 (0.44)	-0.41 (0.55)
Increased ideological distance	**0.97 (0.22)**	**0.97 (0.08)**	**1.00 (0.20)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.69 (0.22)**	**3.75 (0.57)**
Presidential disapproval	**3.70 (1.67)**	**3.70 (0.48)**	**2.97 (1.77)**
Different party	**1.14 (0.16)**	**1.14 (0.13)**	**1.19 (0.18)**
Constant	**-1.77 (0.85)**	**-1.77 (0.23)**	-1.30 (0.99)
Number of observations	1883	1883	1883
Number of clusters	19	320	19
Pseudo R^2	0.54	0.55	0.55

Note: Dependent variable is senator opposition to a nomination. Model 4.7 was estimated with robust standard errors clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). For Model 4.8, seat change distance is the absolute value of the potential seat change, and the seat change dummy is coded 1 if the seat change is unfavorable and 0 if favorable or there is no seat change.

Model 4.8 of Table 4.4 investigates if potential seat change losses are as influential as potential seat change gains. The first three variables involve an interaction term, so the interpretation is not straightforward. The seat change distance is a component of the interaction term, so it must be interpreted in light of the other component of seat change dummy. The non-statistically significant coefficient on the seat change dummy indicates that there is no evidence that the probability of senator opposition is different when there is a potential positive seat change compared to when there is a potential negative seat change. The negative and statistically significant coefficient on seat change distance indicates that greater seat change distance correlates with a decrease in senator opposition when the value of the seat change dummy is zero (i.e., when the potential seat change is favorable or zero). The interaction term is statistically significant, which indicates that the slope of seat change distance is statistically different for favorable and unfavorable seat changes; a lincom for seat change distance plus the interaction terms returns a coefficient of 0.10 that is not statistically significant (p=0.77), which suggests that the influence of seat change distance when there is an unfavorable seat change is not statistically different than zero.

Table 4.5 contains two additional robustness checks, including a squared seat distance term (Model 4.9a) and a square root seat distance term (Model 4.9b). The seat change dummy in both models is not statistically significant, providing no evidence that a difference in favorable vs. unfavorable seat changes influences senator opposition when seat change distance is zero. Squared and the square root of seat change distance coefficients are negative and statistically significant in both models, indicating that senator opposition is less likely when the value of the variables increase when the seat change dummy is zero (i.e., when seat change is favorable); the positive and statistically significant coefficients on interaction terms indicates a difference in the

slope of the seat change distance variable between favorable and unfavorable seat changes. A series of lincom calculations indicates that the slope of the seat change distance variable is not statistically significant in either model (p=0.82 for Model 4.9a; p=0.66 for Model 4.9b) for unfavorable seat changes.

Table 4.5. Robustness check 9 for senator opposition

	Baseline	Check 9	
	Model 4.0	Model 4.9a	Model 4.9b
	Senator Opposition	Loss Aversion 2	
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Seat change dummy	---	0.40 (0.42)	-0.73 (0.68)
Seat change distance^2	---	**-0.30 (0.09)**	---
Seat change distance^2 x Seat change dummy	---	**0.33 (0.17)**	---
Square root of seat change distance	---	---	**-1.66 (0.41)**
Square root of seat change distance x Seat change dummy	---	---	**1.93 (0.73)**
Unfavorable seat change	**0.49 (0.14)**	---	---
Unfavorable median change	-0.40 (0.43)	-0.31 (0.51)	-0.44 (0.55)
Increased ideological distance	**0.97 (0.22)**	**1.02 (0.21)**	**0.98 (0.20)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.68 (0.57)**	**3.79 (0.56)**
Presidential disapproval	**3.70 (1.67)**	**2.98 (1.77)**	**3.04 (1.75)**
Different party	**1.14 (0.16)**	**1.18 (0.17)**	**1.20 (0.19)**
Constant	**-1.77 (0.85)**	**-1.68 (0.99)**	-0.64 (1.03)
Number of observations	1883	1883	1883
Number of clusters	19	19	19
Pseudo R^2	0.54	0.55	0.55

Note: Dependent variable is senator opposition to a nomination. The model was estimated with probit, and robust standard errors were clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Seat change dummy is coded 1 if the seat change is unfavorable, and 0 if favorable or there is no seat change.

Table 4.6 contains three additional robustness checks Model 4.10 contains an interaction between lack of nominee qualifications and unfavorable seat change. Unfavorable seat change is statistically significant and positive, which means that senators are more likely to oppose a nomination the more unfavorable a seat change when the nominee has no lack of qualifications. Lack of nominee qualifications is also statistically significant and positive, which means that that senators are more likely to oppose a nomination the more the nominee lacks qualifications, when the value of seat change is zero. And the interaction term is statistically significant and positive, indicating that unfavorable seat changes are more influential the more a nominee lacks qualifications.

Table 4.6. Robustness checks 10 to 12 for senator opposition

	Baseline	Check 10	Check 11	Check 12
	Model 4.0	Model 4.10	Model 4.11	Model 4.12
	All Nominations	Interaction	Directionality	Segal-Cover Nominee Scores
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	**0.90 (0.21)**	**0.53 (0.18)**	0.27 (0.17)
Unfavorable median change	-0.40 (0.43)	-0.57 (0.56)	-0.59 (0.48)	0.04 (0.65)
Increased ideological distance	**0.97 (0.22)**	**0.96 (0.21)**	**0.98 (0.21)**	**1.04 (0.22)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.57 (0.56)**	**3.77 (0.66)**	**3.87 (0.71)**
Lack of nominee qualifications × Unfavorable seat change	---	**0.69 (0.26)**	---	---
Moderating nominations	---	---	-0.58 (0.42)	---
Presidential disapproval	**3.70 (1.67)**	**3.40 (1.66)**	**4.68 (1.78)**	**4.17 (1.71)**
Different party	**1.14 (0.16)**	**1.20 (0.17)**	**1.19 (0.18)**	**1.20 (0.19)**
Constant	**-1.77 (0.85)**	**-1.69 (0.86)**	**-1.90 (0.88)**	**-1.80 (0.76)**
Number of observations	1883	1883	1883	1883
Number of clusters	19	19	19	19
Pseudo R^2	0.54	0.55	0.56	0.50
Percent correctly predicted	0.89	0.90	0.90	0.89
Percent modal category	0.78	0.78	0.78	0.78
Percent reduction of error	0.52	0.56	0.55	0.48

Note: Dependent variable is senator opposition to a Supreme Court nomination over the seventeen Supreme Court nominations between the 1968 Fortas chief justice nomination and the 2006 Alito associate justice nomination. Ideological variables for Model 4.12 were based on bridged Segal-Cover nominee qualification scores. Models were estimated with probit, with robust standard errors clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Percent reduction of error statistics were derived from the precalc utility designed by Frederick J. Boehmke (http://myweb.uiowa.edu/fboehmke/methods.html).

Figure 4.3 displays the interaction of nominee qualifications and seat change, illustrating that seat change matters little when the nominee is highly qualified (with predicted probabilities of senator opposition ranging from 0.6 percent to 6 percent), but is a substantial influence when the nominee is only moderately qualified (with predicted probabilities ranging from 2 percent to 84 percent). This result suggests that presidents can shield their nominations from opposition due to unfavorable seat changes by selecting a highly qualified nominee.

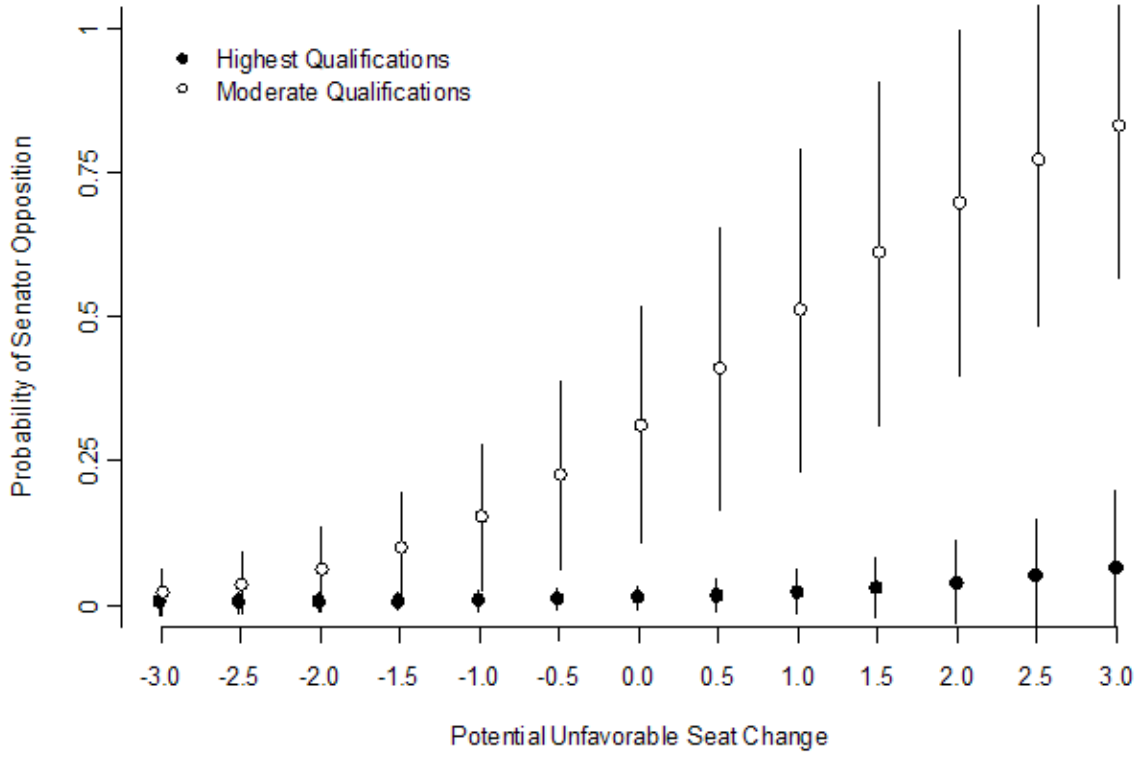

Figure 4.3. The influence of seat change, interacted with qualifications

Note: Figure depicts the predicted probability that a senator opposes a nomination at various levels of observed seat change, with all other model variables at their mean, for two levels of nominee qualifications: impeccable qualifications (Segal-Cover perceived qualifications score of 1.00), and moderate qualifications (Segal-Cover perceived qualifications score of 0.500). Predicted probabilities were generated with Clarify (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001).

Model 4.11 of Table 4.6 contains a dichotomous "moderating" control, coded 1 for those nominations in which the nominee fell closer to the prior Court median than the senator did, and 0 otherwise. The moderating variable did not reach statistical significance (p=0.172), providing no evidence that senator opposition is influenced by whether or not the nomination has the potential to make the mean ideology of the Court more moderate. And when an interaction between the moderating variable and seat change was included, neither variable reached statistical significance, although the seat change main effect retained its statistical significance (p=0.04).

Model 4.12 employed bridged Segal-Cover perceived nominee ideology scores instead of first-year Bailey estimated ideal points as proxies for nominee ideology. The only changes with regard to model variable values were to the ideology of the nominee in each case, and to the ideology of the potential Court median in three cases (Stevens, O'Connor, and Kennedy). The ideological variables highly correlated across the Segal-Cover and first-year Bailey measures: 0.95 (seat change), 0.89 (median change), and 0.90 (ideological distance).

The seat change variable Model 4.12 lost its statistical significance, with a t-value of 1.57 (p=0.12), although the other model variables that reached statistical significance in the main model retained their statistical significance and the same sign of directionality. This indicates that the seat change variable is not robust to every model specification in terms of statistical significance. But even with a lack of statistical significance at the 0.05 level with a one-tailed test, the seat change variable did have some influence. The predicted probability of senator opposition with all variables set at their mean was 7 percent. This value rose to 12 percent and fell to 4 percent with a one-standard deviation change in the seat change variable, and rose to 24

percent and fell to 2 percent when the seat change variable was set at its lowest and highest value.

Table 4.7 contains four additional models with two concerns. The first, Model 4.13a and Model 4.13b, were estimated on Supreme Court nominations from different time periods. Model 4.13a was estimated on pre-Fortas nominations between 1954 and 1967. Results indicate that seat change was not a statistically significant influence on those observations; lack of nominee qualifications did not reach statistical significance, either, which may warrant further analysis. Model 4.13b was estimated on all Supreme Court nominations between 1954 and 2006. Seat change was statistically and substantively significant, with an increase in the seat change variable from its highest to lowest value corresponding to an increase in the predicted probability of senator opposition from 0 percent to 30 percent.

Model 4.14a was estimated on different party senators, and Model 4.14b was estimated on senators with the same political party as the president. A one-standard deviation change for seat change in the different party senator model corresponded to a change in predicted probability of senator opposition from 7 percent to 45 percent; a one-standard deviation change in ideological distance for different party senators corresponded to a 7 percent to 40 percent change. But the corresponding changes for same party senators were not equivalent. A one-standard deviation change for seat change in the same party senator model corresponded to a change in predicted probability of senator opposition from 1 percent to 3 percent; a one-standard deviation change in ideological distance for same party senators corresponded to a 0 percent to 14 percent change. Results were roughly consistent with those from Shipan (2008), with ideological distance having a stronger influence on different party senators than same party

senators; results for seat change were analogous, as well, with seat changes having more of an influence on different party senators than same party senators.[41]

Table 4.7. Robustness checks 13 and 14 for senator opposition

		Check 13		Check 14	
	Model 4.0	Model 4.13a	Model 4.13b	Model 4.14a	Model 4.14b
	Senator Opposition	Pre-1968	1954-2006	Different Party Senators	Same Party Senators
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	-0.35 (0.32)	**0.43 (0.15)**	**0.66 (0.23)**	0.23 (0.14)
Unfavorable median change	-0.40 (0.43)	-0.13 (0.99)	**-1.21 (0.65)**	-0.18 (0.61)	-0.78 (0.51)
Increased ideological distance	**0.97 (0.22)**	**0.85 (0.25)**	**0.85 (0.17)**	**0.93 (0.30)**	**1.07 (0.15)**
Lack of nominee qualifications	**3.69 (0.57)**	1.28 (1.61)	**3.52 (0.55)**	**4.34 (0.68)**	**2.75 (0.52)**
Presidential disapproval	**3.70 (1.67)**	**4.08 (0.99)**	**4.18 (1.17)**	**4.98 (1.56)**	1.33 (2.16)
Different party	**1.14 (0.16)**	0.71 (0.48)	**1.10 (0.16)**	---	---
Constant	**-1.77 (0.85)**	**-3.32 (1.58)**	**-1.85 (0.72)**	-0.65 (0.75)	-1.52 (1.00)
Number of observations	1883	864	2747	960	923
Number of clusters	19	9	28	19	19
Pseudo R^2	0.54	0.32	0.51	0.48	0.52

Note: Dependent variable is senator opposition to a nomination. The model was estimated with probit, and robust standard errors were clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Model 4.13a is restricted to pre-Fortas nominations, and Model 4.13b includes all nominations between 1954 and 2006. Model 4.14a is the baseline model restricted to different party senators, and Model 4.14b is the baseline model restricted to same party senators.

[41] Note that values for seat change were one standard deviation changes measured on all observations, not on same-party or different-party senators.

Model 4.15a of Table 4.8 presents estimation results for a model that includes dummy variables for the number of previous successful nominations the president has made. The model included all observations from 1954 to 2008, so the left-hand column of Table 4.8 presents results for the baseline of that estimation. The first nomination made by a president is the omitted category. Results indicate that the seat change variable retains its statistical significance, but only one of the nomination-number variables is statistically different than the omitted category: the fifth nomination by a president. But that variable only represents one nomination, that of Potter Stewart by Dwight Eisenhower, so that finding may be infected with the idiosyncrasies of that nomination.[42] The general lack of statistical significance suggests that senators may not be more likely to oppose subsequent nominations made by a president simply because the president has already issued previous nominations.

[42] An unreported model omitted the second category of the second nomination made by a president, but only the fifth nomination variable was statistically different than zero.

Table 4.8. Robustness check 15 for senator opposition

	Model 4.13b	Check 15
		Model 4.15
	Senator Opposition	Presidential Nominations
	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.43 (0.15)**	**0.46 (0.18)**
Unfavorable median change	**-1.21 (0.65)**	-0.83 (0.65)
Increased ideological distance	**0.85 (0.17)**	**0.88 (0.18)**
Lack of nominee qualifications	**3.52 (0.55)**	**4.35 (0.67)**
Presidential disapproval	**4.18 (1.17)**	**4.55 (1.36)**
Different party	**1.10 (0.16)**	**1.14 (0.19)**
Second nomination by a president	---	-0.09 (0.46)
Third nomination by a president	---	0.58 (0.57)
Fourth nomination by a president	---	0.48 (0.33)
Fifth nomination by a president	---	**1.87 (0.31)**
Constant	**-1.85 (0.72)**	**-1.70 (0.89)**
Number of observations	2747	2747
Number of clusters	28	28
Pseudo R^2	0.51	0.54

Note: Dependent variable is senator opposition to a nomination. The model was estimated with probit, and robust standard errors were clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Model 4.15 contains dummy variables for the number of previous successful nominations made by the president, with the first nomination of the president serving as the omitted category.

Model 4.16 of Table 4.9 contains results from the baseline model re-estimated with a control for an alternate reference point: the median justice of the prior nine-member Court. The variable did not reach statistical significance, indicating that the ideological relationship between the senator, nominee, and prior Court median has not generally been an influence on senator opposition to a nomination.[43]

[43] The Prior Court median reference point variable is not statistically significant even if the seat change variable is omitted from the model (p=0.207).

Table 4.9. Robustness check 16 for senator opposition

	Baseline	Check 16
	Model 4.0	Model 4.16
	Senator Opposition	Alternate Reference Point
	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	**0.46 (0.14)**
Prior Court median as reference point	---	0.14 (0.18)
Unfavorable median change	-0.40 (0.43)	-0.62 (0.55)
Increased ideological distance	**0.97 (0.22)**	**0.92 (0.24)**
Lack of nominee qualifications	**3.69 (0.57)**	**3.64 (0.56)**
Presidential disapproval	**3.70 (1.67)**	**3.68 (1.67)**
Different party	**1.14 (0.16)**	**1.13 (0.17)**
Constant	**-1.77 (0.85)**	**-1.77 (0.85)**
Number of observations	1883	1883
Number of clusters	19	19
Pseudo R^2	0.54	0.55

Note: Dependent variable is senator opposition to a nomination. The model was estimated with probit, and robust standard errors were clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Model 4.16 included a control for an alternate reference point, the median justice on the prior nine-member Court.

One anomaly in the findings for senator opposition to Supreme Court nominations is the relatively consistent negative sign on the median change variable. The coefficient for median change rarely reached statistical significance, but it did in Model 4.13b, when the model was estimated on all Supreme Court nominations from 1954 to 2006. The negative sign indicates that an increase in the unfavorableness of a nomination (in terms of distance between the senator and nominee relative to the distance between the senator and departing justice) corresponds to a *decrease* in senator opposition. For Model 4.13b, this decrease was not unsubstantial: a one-standard deviation increase and decrease in the median change variable corresponded to predicted probabilities of 2 percent and 7 percent, and a change from highest and lowest values corresponded to predicted probabilities of 0 percent and 23 percent. This finding warrants further investigation. But see Model 4.M3 of Table 4.8 for a possible explanation.

4.2 THE MODERATING INFLUENCE OF MEDIAN CONCERNS

One objection to the theory of the departing justice may be that the focus of an appointment should be – and is – on the potential impact to the Court median. The question then becomes whether the nominee-for-departing-justice switch is more or less salient than the potential-Court-median-for-prior-Court-median switch. Several things suggest that the former change may be more salient. Seat changes are typically much larger than median changes, and the identity of the departing justice and nominee are clear, while there may be some disagreement over the exact location of the Court median, which may depend on the issue area of the legal question that the Court considers (Rohde and Spaeth 1976, but see Martin and Quinn 2002b:12 ff). Moreover,

headlines focus on the replacement ("O'Connor, Alito Differ in Style, Views," Holland 2006), and senators explicitly contrast the nominee with the departing justice:

> I look at the seat Judge Alito has been nominated to replace. It is a seat of moderation. Justice O'Connor represented mainstream America. She understood as a Justice for the highest court in the land, her decisions impacted real people and their lives. Her decisions were not made in the abstract. Judge Alito has stated he looks at the facts of each case, yet time and time again his decisions show support for big business, for the executive branch, but not so much for everyday Americans (Senator Barbara Mikulski, 2006).

Seat changes and median changes both reflect senator perceptions about the potential of a nomination to alter the Court relative to the previous nine-member array of justices, and these influences may moderate one another. This moderation may be a function of relative size and impact of the two considerations.

For example, seat changes may be less influential for nominations with the potential to alter the median justice; this may have occurred with Alito's replacement of O'Connor, if senators' focus fell on the movement of the Court median rightward to Anthony Kennedy, whose record on campaign finance, affirmative action, and abortion restrictions were markedly more conservative than those of O'Connor (Cohen 2006). However, a seat change may also dilute an emphasis on median change, which would have been the case if, for instance, the most salient feature of the Thomas nomination had been the nominee's distance from departing justice Thurgood Marshall (a Bailey estimated ideal point difference of 3.11), rather than the potential movement of the median from O'Connor to Kennedy (a Bailey estimated ideal point difference of 0.04).

Table 4.10 presents results from a probit regression on nominations lacking a potential median change (Model 4.M1) and a probit regression on nominations with the potential to alter

the Court median (Model 4.M2).[44] Comparison of Model 4.M1 to Model 4.M2 suggests that seat changes are more influential when coupled with potential median changes: predicted probabilities for opposition from an opposite party senator ranged from 5 percent to 26 percent in Model 4.M1 (one standard deviation below and above the mean seat change for opposite party senators), but ranged from 6 percent to 60 percent in Model 4.M2 under the same conditions.[45]

[44] Correlation between median change and seat change is 0.62 ($p<0.01$, $n=2776$) for all observations, and 0.58 for observations including and after the Fortas chief justice nomination ($p<0.01$, $n=1900$).

[45] Note, though, that potential seat changes are typically smaller for nominations that pose no threat to change the median, since the departing justice and nominee necessarily lay on the same side of the Court median. Therefore, to provide a more even comparison, the mean and standard deviation of the seat change variable for opposite party senators were based on all observations.

Table 4.10. Median changes and senator opposition

	Model 4.0	Model 4.M1	Model 4.M2	Model 4.M3
	All Nominations	No Potential Median Change	Potential Median Change	All Nominations
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change	**0.49 (0.14)**	**0.49 (0.21)**	**0.89 (0.24)**	---
Unfavorable median change	-0.40 (0.43)	---	-0.66 (0.95)	**1.24 (0.50)**
Increased ideological distance	**0.97 (0.22)**	**1.42 (0.23)**	0.33 (0.27)	**1.14 (0.20)**
Lack of nominee qualifications	**3.69 (0.57)**	**2.48 (0.71)**	**4.85 (1.05)**	**3.25 (0.61)**
Presidential disapproval	**3.70 (1.67)**	**3.71 (2.08)**	**5.55 (2.27)**	**3.30 (1.72)**
Different party	**1.14 (0.16)**	**1.42 (0.24)**	**1.14 (0.21)**	**1.01 (0.17)**
Constant	**-1.77 (0.85)**	**-3.83 (0.93)**	-0.66 (1.15)	**-2.03 (0.74)**
Number of observations	1883	792	1091	1883
Number of clusters	19	8	11	19
Pseudo R^2	0.54	0.58	0.59	0.52
Percent correctly predicted	0.89	0.91	0.91	0.89
Percent modal category	0.78	0.81	0.76	0.78
Percent reduction of error	0.52	0.53	0.61	0.52

Note: Dependent variable is senator opposition to a Supreme Court nomination over the seventeen Supreme Court nominations between the 1968 Fortas chief justice nomination and the 2006 Alito associate justice nomination. Models were estimated with probit, with robust standard errors clustered by nomination. Bold type indicates $p \leq 0.05$ (one-tailed test). Percent reduction of error statistics were derived from the precalc utility designed by Frederick J. Boehmke (http://myweb.uiowa.edu/fboehmke/methods.html).

Figure 4.4 depicts the moderating effect of median change on seat change, illustrating the increased influence of seat change considerations for nominations that threaten to alter the Court median.

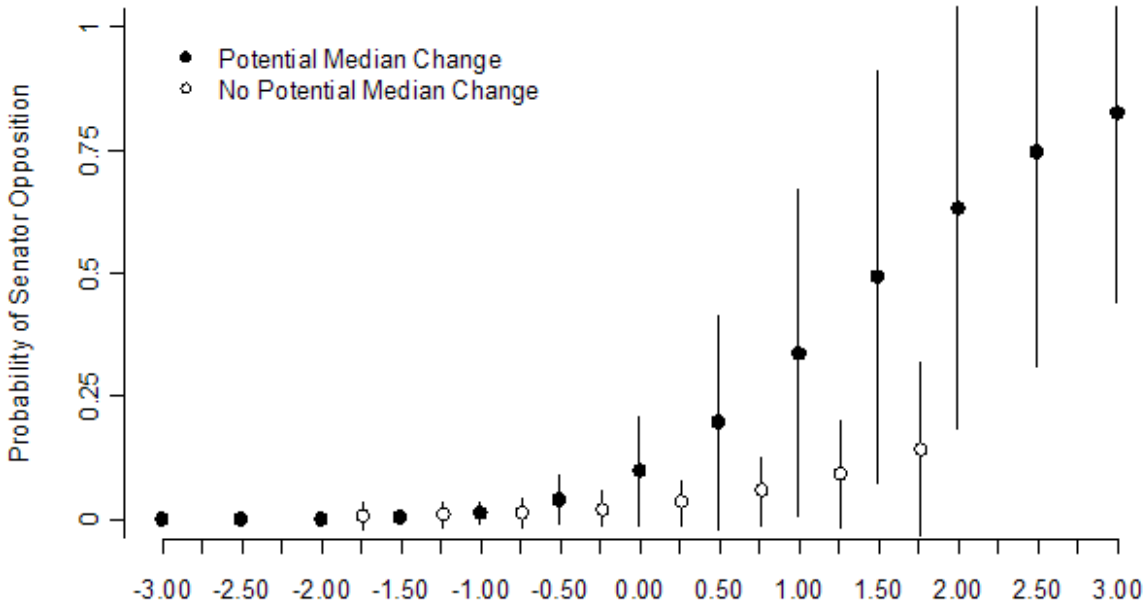

Figure 4.4. Seat change moderated by potential median change

Note: Figure depicts the predicted probability that a senator opposes a nomination at various levels of observed seat change, with all model variables at their mean. Dots denote point estimates, and vertical bars indicate 95 percent confidence intervals. Black dots indicate nominations with a potential median change, and white dots indicate nominations with no potential median change. The means and standard deviations of the seat change variable were -0.08 and 1.26 for nominations with the potential for median change, and -0.12 and 0.82 for nominations lacking the potential for median change. Predicted probabilities were generated with Clarify (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001).

Model 4.M3 of Table 4.10 tested for median effects in an estimation removing the seat change variable. Results indicated that unfavorable median changes associated with an increased likelihood of senator opposition: the predicted probability of opposition from an opposite party senator increased from 13 percent with median change set one deviation below its mean for an opposite party senator to 25 percent with median change set one deviation above its mean for an

opposite party senator. The positive and statistically significant coefficient on median change when seat change considerations are omitted from the model suggests that the negative sign on median change in most models may be a statistical artifact of some kind, since unfavorable median changes associate in the expected direction when seat change is absent from the model.

Compare Model 4.M3 to Model 4.0. Note that, when the baseline model contained a seat change measure, median change had almost no effect: respective predicted probabilities for opposition from an opposite party senator decreased marginally from 18 percent to 14 percent. The larger effect of median change when seat change is omitted therefore suggests that seat change considerations may supersede median change considerations.

This presumed priority of seat changes may be a function of relative size if seat changes are more salient because they are larger; in terms of Bailey estimated ideal points, the mean difference between nominee and departing justice ideology was ten times greater than the mean difference between potential and prior median justices (1.15 compared to 0.11). Figure 4.5 displays the relative sizes of seat and median changes; seat changes were measured as the absolute value of the distance between the Bailey estimated ideal point for the nominee and the departing justice, and median changes were measured as the absolute value of the distance between the Bailey estimated ideal point for the prior median justice and the potential median justice.

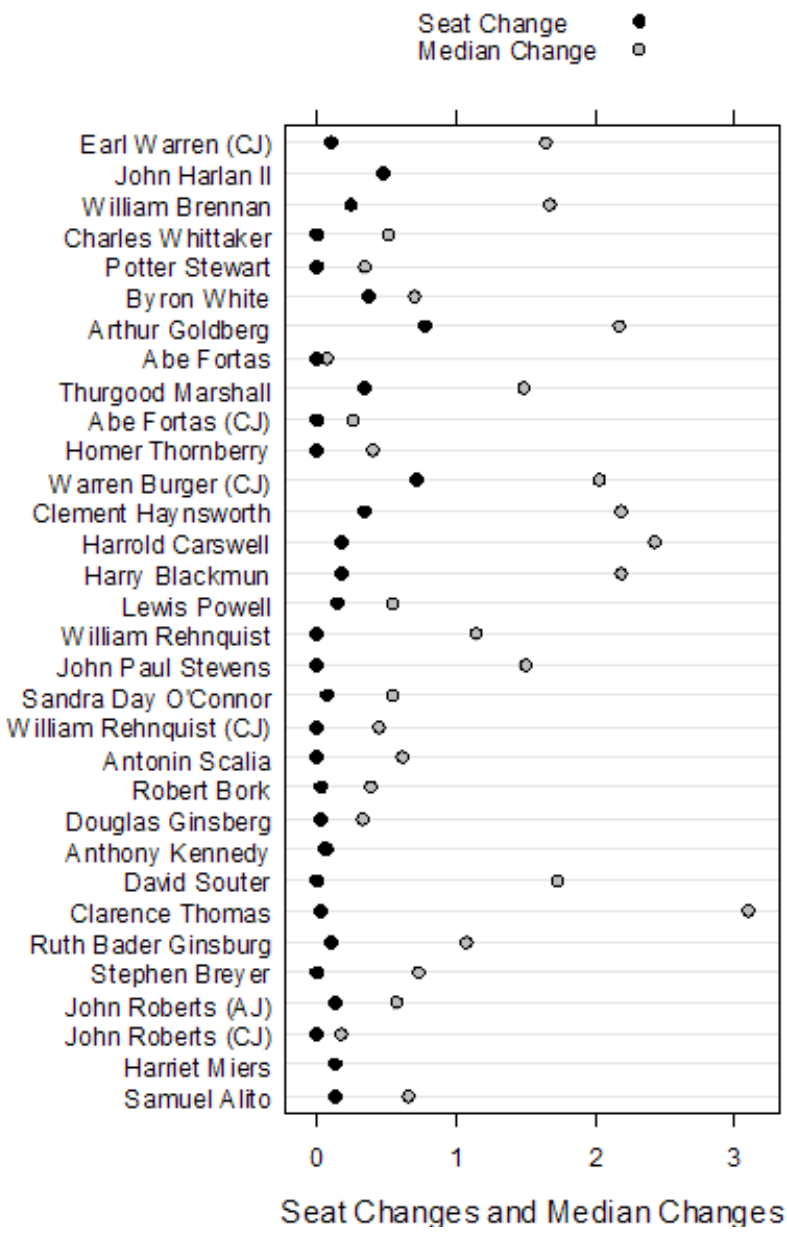

Figure 4.5. Values for the seat change and median change measures

Note: Figure relative sizes of seat and median changes; seat changes were measured as the absolute value of the distance between the Bailey estimated ideal point for the nominee and the departing justice, and median changes were measured as the absolute value of the distance between the Bailey estimated ideal point for the prior median justice and the potential median justice.

Seat changes may also figure more prominently if senators accept a median change as a given. When liberal justice Thurgood Marshall retired under a Republican administration, liberal senators may have resigned themselves to the expectation that George H.W. Bush would

nominate someone to the right of the Court median, and therefore concentrated on the fact that Thomas was perceived to be such a conservative pick. Presumably some senators who objected to Thomas would have supported a more moderate nominee to the conservative side of the Court median.

And seat changes may be more influential because of cognitive accessibility. In other words, the departing justice who anchors the seat change consideration is someone who has likely been receiving praise and/or criticism in the press as they plan to retire, which would make the departing justice – and the consequent seat change – a much more salient consideration than the potential median change. This is also true considering the other half of the comparison: the nominee in the seat change consideration is by far the most visible actor in the appointment, especially compared to the potential Court median.

4.3 THE THOMAS NOMINATION REVISITED

The logic of the seat change phenomenon suggests that Clarence Thomas benefitted from the fact that he was chosen to replace an extreme ideologue, because – as conservative as Thomas was – he still fell slightly closer to the median senator than did the justice he was replacing and,

therefore, for most senators,[46] Thomas presented a closer approximation of their ideology than the justice who had just retired.[47]

A counterfactual analysis was used to test this assertion. First, predicted probabilities were estimated for each senator serving at the time of the Thomas nomination, based on Model 1 values that were constant for the nomination (lack of qualifications and presidential disapproval) and that varied by senator (seat change, median change, ideological distance, and different party). Senators were counted as opposing the nomination if the point estimate for their predicted probability of senator opposition fell above fifty percent. Opposition was predicted from 49 senators, a figure close to the observed tally of 48 senators who voted against the Thomas nomination.

Next, a counterfactual was estimated, replacing the ideology of retiring justice Thurgood Marshall (Bailey estimated ideal point of -2.01) with the ideology of prior median justice Sandra Day O'Connor (score of 0.40). Ideological distance, median change, and all other model variables remained the same as in the estimation using observed values from the Thomas nomination, and the only consequence of the manipulation was to make Thomas appear less ideologically attractive than the retiring justice to the majority of senators, with an unfavorable seat change for 68 senators, compared to 49 in the observed nomination. The mean value of unfavorable seat change rose from -0.37 in the observed confirmation to 0.37 in the counterfactual confirmation, and estimations with this moderate 0.40 departing justice

[46] Johnson and Roberts (2005: 32) observed that the filibuster pivot – and not the median senator – should serve as the constraint on presidential selection of a nominee. The median was referenced in this section since all but one dataset observation concerned a confirmation vote (requiring a majority) and not a cloture vote (requiring a supermajority).

[47] Marshall's 1991 Bailey estimated ideal point was -2.01, Thomas' first year score (from 1992) was 1.10, and the median senator score in 1991 was -0.41. Therefore, Thomas fell 1.51 units from the median senator, while Marshall fell 1.60 units from the median senator.

ideological score predicted opposition from 57 senators, representing a change in vote for eight senators, and – more importantly – a change in outcome from confirmation to rejection.

Figure 4.6 depicts the point estimate and 95 percent confidence interval for the predicted probability that each senator serving at the time of the 1991 Thomas confirmation vote would oppose the nomination. The left graph is based on Model 4.0 variables set to observed values for the Thomas nomination, and the right graph is based on Model 4.0 variables with the more moderate departing justice. For the observed Thomas nomination, senators closer to Marshall's liberal ideology had a large perceived loss (a conservative replacing a fellow liberal), and senators closer to Thomas' conservative ideology had a large perceived gain (a fellow conservative replacing a liberal). Preferences for many senators would therefore be relatively easy to predict, and for the observed Thomas nomination, 32 senators had a predicted probability of opposition less than one percent. But for the counterfactual depicted in the right graph, with a moderate retiring justice, no senator had a predicted probability of opposition less than one percent because conservatives – who had a low probability of voting against Thomas when he was nominated to replace Marshall – now had a higher probability of opposition because their perceived gain (a conservative in place of a moderate) was smaller; similarly, liberals in the counterfactual were less likely to oppose Thomas compared to the observed nomination because their perceived loss was lessened.

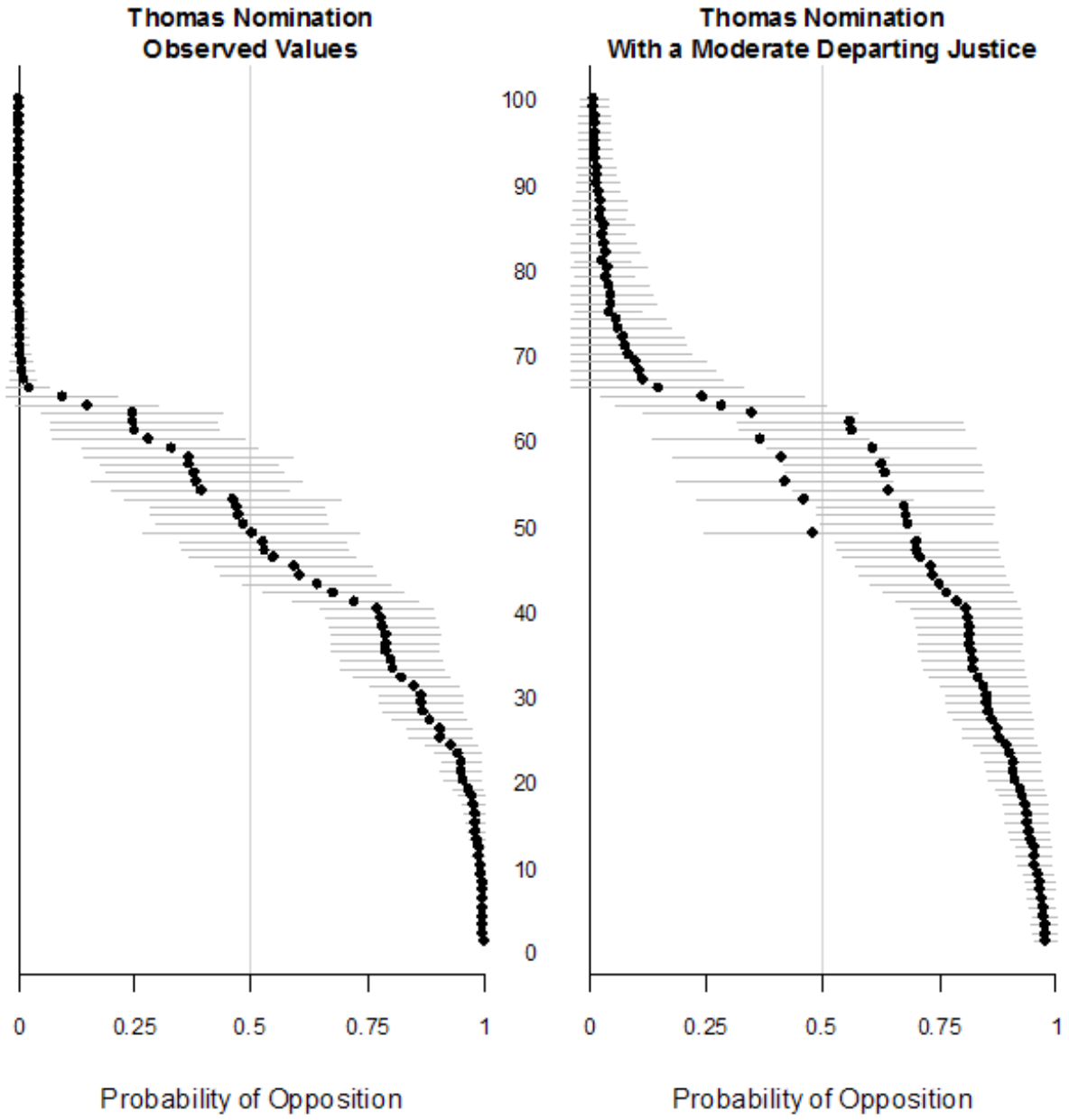

Figure 4.6. 1991 Clarence Thomas nomination counterfactual

Note: Dots denote point estimates and horizontal bars indicate 95 percent confidence intervals for the predicted probability that each senator serving at the time of the 1991 Thomas confirmation vote would oppose the nomination. The left graph is based on Model 4.0 variables set to observed values for the Thomas nomination. The right graph is based on Model 4.0 variables with a more moderate departing justice than Thurgood Marshall (Bailey estimated ideal point of 0.40, compared to -2.01 for Marshall). Senators were ordered by left graph point estimates. Senators were ordered by left graph point estimates. Vertical numbers from 0 to 100 reference individual senators. Predicted probabilities were generated with Clarify (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001).

This counterfactual analysis suggests what may be a counterintuitive recommendation, namely that – all else equal – nominations of extreme conservatives will be better received when the departing justice is an extreme liberal than when the departing justice is a moderate liberal. The conventional wisdom for presidents may be to lessen the distance between nominee and departing justice and thus to delay appointing an ideologue until a moderate retires. But this logic neglects that fact that such a replacement would be perceived as a loss by most senators, relative to the scenario in which a conservative ideologue is tapped to replace a liberal ideologue, about which the median senator would be more ambivalent.[48]

According to this line of thought, the nomination of conservative Robert Bork may have been successful if Bork (bridged Bailey estimated ideal point of 0.71) had been nominated to replace a liberal like Thurgood Marshall (1986 Bailey estimated ideal point of -1.73) instead of moderate Lewis Powell (1986 Bailey estimated ideal point of 0.32) because the ideology of the vacant seat would have moved closer to the median senator (Bailey estimated ideal point of -0.20) in the Bork-for-Marshall exchange instead of away from the median senator, as occurred in the observed Bork-for-Powell swap. Predicted probabilities based on Model 4.0 values for the Bork nomination estimated that 55 senators would oppose the nomination, close to the observed tally of 58 senators, but in a counterfactual replacing the ideology of departing justice Powell with the ideology of Marshall, only 42 senators were predicted to oppose the nomination.

[48] The recommendation, of course, is also applicable to presidents intending to nominate an extreme liberal.

4.4 SUMMARY OF FINDINGS

Evidence presented in this chapter reveals that senator opposition to Supreme Court nominees is influenced by the ideology of the departing justice. Senators over the past few decades have, in general, been more likely to oppose nominations that would reflect a loss for them in terms of the ideology of the vacant seat, independent of considerations of potential median changes, ideological distance, partisanship, and nominee qualifications.

Predicted probability calculations suggested that these seat change considerations can be quite substantial concerns for senators that may result in a change from a yea to a nay vote, or vice versa, simply on the basis of the ideology of the departing justice. The analysis also provided evidence that the influence of seat changes is substantial, suggesting that nominations receiving a close roll call vote, like that of Clarence Thomas, may have had a different outcome if senators were faced with different seat change considerations.

5.0 EMPIRICAL RESULTS, CONFIRMATION DELAY

The theory of the departing justice indicates that the justice who has left the Court provides a reference point for persons judging a nomination. Applying this theory to confirmation delay results in the hypothesis that senators are more likely to oppose a nomination the greater the potential the nomination has to move the ideology of the vacant seat away from their ideal point; in particular, confirmation delay should be related to the interests of the key senators in the confirmation process: the chair of the Senate Judiciary Committee for delay in scheduling and completion of hearings on a nomination, and the Senate Majority Leader for delay in the scheduling and holding of a floor roll call vote on a nomination.

These hypotheses were tested on the 28 nominations from 1953 to 2006, excluding those not reported by the Senate Judiciary Committee (Homer Thornberry in 1968, and Harriet Miers in 2005) and nominations not officially submitted to the Senate (Douglas Ginsberg in 1987, and the associate justice nomination of John Roberts, 2005), but including the failed 1968 cloture vote on the elevation of associate justice Abe Fortas to chief justice.

5.1 JUDICIARY COMMITTEE DELAY RESULTS

Table 5.1 presents results from the baseline model of delay for the Judiciary Committee phase.

Table 5.1. Judiciary Committee delay for US Supreme Court nominations (1950-2008)

	Baseline	
	Model 5.0	
	Coefficient (Std. Err.)	Hazard Ratio
Unfavorable seat change for the Judiciary Committee Chair	**-1.15 (0.31)**	**0.32**
Unfavorable median change for the Judiciary Committee Chair	2.07 (1.33)	7.9
Increased ideological distance from the Judiciary Committee Chair	**0.46 (0.19)**	**1.6**
Ideological extremism of the nominee	0.20 (0.65)	1.2
Lack of nominee qualifications	**-1.44 (0.74)**	**0.24**
Presidential disapproval	**-6.35 (2.02)**	**0.0017**
Divided government	**-0.91 (0.43)**	**0.40**
Congress number	**0.06 (0.03)**	**1.06**
Number of observations	28	
Log pseudolikelihood	-60.2	

Note: Dependent variable is length of time between Senate receipt of a nomination and the final report by the Judiciary Committee, with Senate recess days not counted. The model was estimated with a Cox proportional hazards model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

In interpreting Cox model coefficients, a negative sign on a statistically significant coefficient indicates that an increase in the value of the variable correlates with a decreased risk of the event, in this case, a decreased risk that the Judiciary Committee will report the nomination to the full Senate. Therefore, as expected, an unfavorable potential seat change for the Judiciary Committee Chair associated with a decreased risk of reporting the nomination, i.e., an increased length of the time between Senate receipt of the nomination and the Judiciary Committee's report. The -1.15 coefficient corresponds to a hazard ratio of 0.32 (i.e., -1.15 exponentiated), so the hazard rate of a final report by the Judiciary Committee decreases by 68 percent for a one-unit increase in the size of an unfavorable seat change.

Increased Judiciary Committee delay also correlated with a lack of nominee qualifications, presidential disapproval, and divided government, while an increased risk associated with an increased ideological distance of the nominee from the Judiciary Committee Chair and with the Congress number.[49]

A test of the proportional hazards assumption based on Schoenfeld residuals revealed that the proportional hazards assumption may have been violated by three variables: unfavorable seat change for the Judiciary Committee Chair, unfavorable median change for the Judiciary Committee Chair, and ideological extremism of the nominee. Results are reported in Table 5.2.

Table 5.2. Test of the proportional hazards assumption

	Rho	**Chi^2**	**Prob < Chi^2**
Unfavorable seat change for the Judiciary Committee Chair	**0.30**	**3.66**	**0.06**
Unfavorable median change for the Judiciary Committee Chair	**-0.26**	**3.96**	**0.05**
Increased ideological distance from the Judiciary Committee Chair	0.06	0.07	0.79
Ideological extremism of the nominee	**0.32**	**7.01**	**0.01**
Lack of nominee qualifications	0.23	1.22	0.27
Presidential disapproval	0.03	0.02	0.88
Divided government	-0.23	1.97	0.16
Congress number	0.16	0.60	0.44
Global Test		8.63	0.37

The Cox model was re-estimated to account for the possibility that those three covariates had time-dependent coefficients, by interacting the three covariates with time.[50] Results presented in Model 5.0a of Table 5.3 do not indicate that the effect of the seat change variable

[49] Median change did not reach statistical significance in the baseline model, but did when observations were clustered by the five Judiciary Committee Chairs. Only ideological extremism failed to reach statistical significance when the baseline model observations were clustered by Judiciary Committee Chair.

[50] Time-varying covariates are variables whose values may change over time, such as presidential disapproval ratings. Time-dependent coefficients, on the other hand, are associated with variables whose values do not change over time, but whose influence may wax or wane on an observation during the time from entry to exit (Golub 2008: 532).

was a function of time, because the interaction of seat change and time is not statistically significant.

Table 5.3. Judiciary Committee delay with time-dependent coefficients

	Model 5.0	Model 5.0a
	Baseline	Time-Dependent Coefficients
	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change for the Judiciary Committee Chair	**-1.15 (0.31)**	-1.70 (1.07)
Unfavorable median change for the Judiciary Committee Chair	2.07 (1.33)	3.05 (5.35)
Increased ideological distance from the Judiciary Committee Chair	**0.46 (0.19)**	**0.52 (0.25)**
Ideological extremism of the nominee	0.20 (0.65)	-2.70 (2.88)
Lack of nominee qualifications	**-1.44 (0.74)**	-1.59 (1.11)
Presidential disapproval	**-6.35 (2.02)**	**-6.95 (2.40)**
Divided government	**-0.91 (0.43)**	**-0.81 (0.43)**
Congress number	**0.06 (0.03)**	0.07 (0.05)
Time × Unfavorable seat change for the Judiciary Committee Chair	---	0.02 (0.02)
Time × Unfavorable median change for the Judiciary Committee Chair	---	-0.02 (0.08)
Time × Ideological extremism of the nominee	---	**0.11 (0.06)**
Number of observations	28	28
Log pseudolikelihood	-60.2	-56.8

Note: Dependent variable is length of time between Senate receipt of a nomination and the final report by the Judiciary Committee, with Senate recess days not counted. The model was estimated with a Cox proportional hazards model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

Table 5.4 contains further robustness checks: Model 5.1 was estimated with a Weibull model, and Model 5.2 included additional control for presidential quarter, summer nomination, and recess nomination. Estimates were relatively similar between the main proportional hazards model and the Weibull specification, but several differences between the main model and the model with additional controls manifested: median change reached statistical significance, and coefficients nearly doubled for nominee qualifications, presidential disapproval, divided government, and Congress number. Estimates in Model 5.2, though, should be interpreted with caution, since eleven independent variables were used to explain variation in 28 observations.

Table 5.4. Robustness checks 1 and 2 for Judiciary Committee delay

	Baseline	Check 1	Check 2
	Model 5.0	Model 5.1	Model 5.2
	Baseline	Weibull	Additional Controls
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change for the Judiciary Committee Chair	**-1.15 (0.31)**	**-1.21 (0.37)**	**-1.43 (0.43)**
Unfavorable median change for the Judiciary Committee Chair	2.07 (1.33)	2.17 (1.63)	**2.76 (1.51)**
Increased ideological distance from the Judiciary Committee Chair	**0.46 (0.19)**	**0.47 (0.27)**	**0.64 (0.33)**
Ideological extremism of the nominee	0.20 (0.65)	0.15 (0.61)	-0.18 (0.67)
Lack of nominee qualifications	**-1.44 (0.74)**	**-1.78 (0.97)**	**-2.95 (1.04)**
Presidential disapproval	**-6.35 (2.02)**	**-7.19 (2.98)**	**-12.93 (3.92)**
Divided government	**-0.91 (0.43)**	-0.91 (0.60)	**-1.60 (0.82)**
Congress number	**0.06 (0.03)**	0.06 (0.05)	**0.11 (0.06)**
Presidential quarter	---	---	**-0.72 (0.40)**
Summer nomination	---	---	**-1.49 (0.77)**
Recess nomination	---	---	**-3.23 (1.18)**
Constant	---	**-12.29 (4.65)**	---
Number of observations	28	28	28
Log pseudolikelihood	-60.2	-18.8	-53.6

Note: Dependent variable is length of time between Senate receipt of a nomination and the final report by the Judiciary Committee, with Senate recess days not counted. Models 5.0 and 5.2 were estimated with a Cox proportional hazards model, with robust standard errors, and Model 5.1 was estimated with a Weibull model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

Table 5.5 contains additional robustness checks. Model 5.3 was estimated with a control for overlapping nominations and with standard errors clustered by overlapping nominations, and Model 5.4 was estimated without removal of recess days. Overlapping nominations had a negligible effect on estimates of coefficient values and levels of statistical significance, but the elimination of recess days produced several major differences with the baseline model: the coefficient for seat change increased from -1.15 to -2.08 (with a corresponding change in hazard rate of 32 percent to 12 percent), median change and ideological extremism became statistically significant, and coefficient estimates for nominee qualifications and presidential disapproval nearly doubled.

These results suggest that the decision to include or ignore recess days can have a substantial effect on estimates, but the results themselves provide no guidance for the decision about whether to include recess days in a model. In any specification, though, seat change remains a statistically significant and substantial influence on the length of time that the Judiciary Committee handles a nomination, with increased unfavorable seat change associating with an extended length for the Judiciary Committee phase of the confirmation process.

Table 5.5. Robustness checks 3 and 4 for Judiciary Committee delay

	Baseline	Check 3	Check 4
	Model 5.0	Model 5.3	Model 5.4
	Baseline	Overlapping Nominations	No Recess Days
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change for the Judiciary Committee Chair	**-1.15 (0.31)**	**-1.17 (0.31)**	**-2.08 (0.51)**
Unfavorable median change for the Judiciary Committee Chair	2.07 (1.33)	2.06 (1.31)	**5.31 (1.76)**
Increased ideological distance from the Judiciary Committee Chair	**0.46 (0.19)**	**0.49 (0.22)**	**0.63 (0.31)**
Ideological extremism of the nominee	0.20 (0.65)	0.21 (0.67)	**1.20 (0.67)**
Lack of nominee qualifications	**-1.44 (0.74)**	**-1.43 (0.74)**	**-3.98 (1.17)**
Presidential disapproval	**-6.35 (2.02)**	**-6.18 (2.12)**	**-11.08 (3.28)**
Divided government	**-0.91 (0.43)**	**-0.90 (0.44)**	**-1.27 (0.62)**
Congress number	**0.06 (0.03)**	**0.06 (0.03)**	**0.08 (0.05)**
Overlapping nominations	---	0.15 (0.40)	---
Number of observations	28	28	28
Log pseudolikelihood	-60.2	-60.2	-50.9

Note: Dependent variable is length of time between Senate receipt of a nomination and the final report by the Judiciary Committee, with Senate recess days not counted (Models 5 and 5.3) and with Senate recess days counted (Model 5.4). Models were estimated with a Cox proportional hazards model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

5.2 ROLL CALL DELAY RESULTS

This section tests for the influence of seat change on the second phase of the confirmation process that is overseen by the Senate Majority Leader. Table 5.6 contains results from Model 5.5, which provided no evidence that unfavorable seat change associates with the length of the

second phase. In fact, the only model variables that correlated with the length of the second phase were lack of nominee qualifications and the length of the first phase, both of which predicted increased delay. No variable reached statistical significance when the length of the first phase was removed from the model, so the lack of statistical significance was not because of the inclusion of that variable (pairwise correlation between the two lengths is only 0.30, n=29, p=0.06). Exponentiation of the seat change coefficient indicates that the hazard ratio for that variable is 0.76, which means that the likelihood of a floor vote decreases by 76 percent for each one-unit increase in unfavorable seat change.

Table 5.6. Roll call delay for US Supreme Court nominations (1954-2008)

	Baseline Model 5.5 Coefficient (Std. Err.)
Unfavorable seat change for the Senate Majority Leader	-0.28 (0.43)
Unfavorable median change for the Senate Majority Leader	0.51 (1.18)
Increased ideological distance from the Senate Majority Leader	0.12 (0.54)
Ideological extremism of the nominee	0.07 (0.60)
Lack of nominee qualifications	**-3.20 (1.16)**
Presidential disapproval	-3.24 (2.46)
Divided government	-0.25 (0.42)
Congress number	0.04 (0.04)
Length of Judiciary Committee phase	**-0.02 (0.01)**
Number of observations	28
Log pseudolikelihood	-62.1

Note: Dependent variable is length of time between the final report by the Judiciary Committee and the Senate roll call confirmation vote (or cloture vote for Abe Fortas' 1968 nomination), with Senate recess days not counted. Models were estimated with a Cox proportional hazards model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

A test of the proportional hazards assumption based on Schoenfeld residuals provided no evidence that the proportional hazards assumption was violated by any variables. Results are reported in Table 5.7.

Table 5.7. Test of the proportional hazards assumption

	Rho	**Chi^2**	**Prob < Chi^2**
Unfavorable seat change for the Senate Majority Leader	0.01	0.01	0.94
Unfavorable median change for the Senate Majority Leader	-0.19	1.81	0.18
Increased ideological distance from the Senate Majority Leader	0.11	0.46	0.50
Ideological extremism of the nominee	-0.05	0.11	0.74
Lack of nominee qualifications	-0.20	1.91	0.17
Presidential disapproval	0.17	0.69	0.41
Divided government	0.06	0.07	0.79
Congress number	0.09	0.26	0.61
Length of Judiciary Committee phase	0.05	0.10	0.75
Global test		5.11	0.83

These results suggest that the length of the second phase of the confirmation process that is largely under the direction of the Senate Majority Leader is mostly immune from strategic delay. This lack of statistical significance may have been caused by the relatively small range of observations for the second phase of the confirmation process (median and range of six days and 45 days, respectively, compared to a median and range of 28 days and 120 days for the first phase); the relatively truncated length of the second phase would increase standard errors for the estimates and decrease the chance that coefficient estimates were statistically significant.

However, the lack of statistical significance may also have resulted because the second phase of the confirmation process is less susceptible to strategic influences, for several reasons. Delay may be more justifiable in the first phase when investigators are working behind the scenes to comb through and summarize the body of work attributed to the nominee, compared to

the second phase, when little or no investigation is necessary. Moreover, once the Judiciary Committee reports a nomination, it is no longer the prerogative of a committee but is the concern of the entire Senate, so the Senate Majority Leader may be less able to influence the length of the process than the Judiciary Committee Chair, who must deal with only a few committee members. Or it may be the case that, at least for the observed nominations, the Senate Majority Leader had less desire to delay a nomination based on most of the considerations reflected in the model.[51]

Robustness checks in Table 5.8 (Models 5.6 and 5.7) and in Table 5.9 (Models 5.8 and 5.9) do not provide any evidence that unfavorable seat change associates with the length of the second phase, although there is evidence that the length of the second phase associates with presidential quarter and with overlapping nominations. The 0.87 coefficient for presidential quarter corresponds to an exponentiated hazard ratio of 2.38, indicating that a one-unit increase in presidential quarter corresponds to a more than doubled hazard, such that nominations are processed quicker the later in a presidential term that they occur. The coefficient for overlapping nominations, however, is negative (-0.57), indicating that overlapping nominations take longer to process than stand-alone nominations.

[51] No variable that did not reach statistical significance in the baseline model reached statistical significance when observations were clustered by the eight Senate Majority Leaders.

Table 5.8. Robustness checks 1 and 2 for roll call delay

	Baseline	Check 1	Check 2
	Model 5.5	Model 5.6	Model 5.7
	Baseline	Weibull	Additional Controls
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change for the Senate Majority Leader	-0.28 (0.43)	-0.16 (0.51)	0.25 (0.54)
Unfavorable median change for the Senate Majority Leader	0.51 (1.18)	0.71 (2.07)	1.11 (1.60)
Increased ideological distance from the Senate Majority Leader	0.12 (0.54)	0.03 (0.77)	0.61 (0.70)
Ideological extremism of the nominee	0.07 (0.60)	-0.04 (1.09)	-0.81 (0.62)
Lack of nominee qualifications	**-3.20 (1.16)**	**-3.61 (1.21)**	**-4.86 (2.18)**
Presidential disapproval	-3.24 (2.46)	-4.05 (3.24)	-2.93 (3.73)
Divided government	-0.25 (0.42)	-0.15 (0.54)	-0.64 (0.70)
Congress number	0.04 (0.04)	0.06 (0.06)	0.02 (0.07)
Length of Judiciary Committee phase	**-0.02 (0.01)**	**-0.02 (0.01)**	-0.01 (0.01)
Presidential quarter	--	--	**0.87 (0.51)**
Summer nomination	--	--	-1.14 (0.82)
Recess nomination	--	--	-0.95 (0.89)
Constant	--	-6.47 (6.69)	--
Number of observations	28	28	28
Log pseudolikelihood	-62.1	-29.7	-58.9

Note: Dependent variable is length of time between the final report by the Judiciary Committee and the Senate roll call confirmation vote (or cloture vote for Abe Fortas' 1968 nomination), with Senate recess days not counted. Models 5.5 and 5.7 were estimated with a Cox proportional hazards model, with robust standard errors, and Model 5.6 was estimated with a Weibull model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

Table 5.9. Robustness checks 3 and 4 for roll call delay

	Baseline	Check 3	Check 4
	Model 5.5	Model 5.8	Model 5.9
	Baseline	Overlapping Nominations	No Recess Days
	Coefficient (Std. Err.)	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Unfavorable seat change for the Senate Majority Leader	-0.28 (0.43)	-0.24 (0.50)	-0.14 (0.43)
Unfavorable median change for the Senate Majority Leader	0.51 (1.18)	0.88 (0.96)	0.10 (1.26)
Increased ideological distance from the Senate Majority Leader	0.12 (0.54)	0.07 (0.64)	0.39 (0.50)
Ideological extremism of the nominee	0.07 (0.60)	0.15 (0.57)	-0.08 (0.67)
Lack of nominee qualifications	**-3.20 (1.16)**	**-3.70 (1.30)**	**-2.58 (1.02)**
Presidential disapproval	-3.24 (2.46)	-4.25 (2.34)	-0.43 (2.66)
Divided government	-0.25 (0.42)	-0.20 (0.40)	-0.21 (0.38)
Congress number	0.04 (0.04)	0.05 (0.04)	-0.01 (0.05)
Length of Judiciary Committee phase	**-0.02 (0.01)**	**-0.02 (0.01)**	-0.01 (0.01)
Overlapping nomination	---	**-0.57 (0.33)**	---
Number of observations	28	28	28
Log pseudolikelihood	-62.1	-61.6	-64.2

Note: Dependent variable is length of time between the final report by the Judiciary Committee and the Senate roll call confirmation vote (or cloture vote for Abe Fortas' 1968 nomination), with Senate recess days not counted (Models 5.5 and 5.8) and with Senate recess days counted (Model 5.9). Models were estimated with a Cox proportional hazards model, with robust standard errors. Bold type indicates $p \leq 0.05$ (one-tailed test).

5.3 SUMMARY OF FINDINGS

Results presented in this chapter did not provide evidence that unfavorable seat changes influenced the time that the Senate Majority Leader took to process the nomination between the Judiciary Committee report of the nomination and the final roll call vote. One possible

explanation for this latter finding is that the Senate Majority Leader has less discretion in delaying a nomination once it has been reported by the Senate.

However, results indicated that an unfavorable seat change for the Judiciary Committee Chair correlates with an increased delay by the committee in processing the nomination, providing additional evidence that models of Supreme Court nominations may benefit from inclusion of the departing justice. In the baseline model, the hazard of a final report by the Judiciary Committee decreased by 32 percent for a one-unit increase in the size of an unfavorable seat change, indicating that the Judiciary Committee chair may be delaying the confirmation process when the nomination is unfavorable in terms of seat change.

6.0 EMPIRICAL RESULTS, PRESIDENTIAL APPOINTMENT

Results so far have indicated that the departing justice serves as an important consideration for senators considering a Supreme Court nomination. Senators were much more likely to oppose a nomination the more unfavorable a seat change was, and – in particular – the Judiciary Committee chair has been much more likely to delay the processing of a nomination because of unfavorable seat changes. Given the influence of the departing justice on senator considerations of a nomination – and given that the Senate has veto power over nominations – presidents may constrain their selection of a nominee because of considerations of senator preferences. To test if this was the case, Supreme Court appointments from Earl Warren in 1953 to Samuel Alito in 2006 were analyzed, including nominations announced by the president but not officially submitted to the Senate (Douglas Ginsberg in 1987, the associate justice nomination of John Roberts in 2005, and Harriet Miers in 2005) and those received in the Senate but not reported by the Senate Judiciary Committee (Homer Thornberry in 1968).

6.1 RESULTS

Table 6.1 presents several estimates of model fit between nominee ideal point and predicted nominee ideal point derived from models described in the previous section. Models are ordered by the Bayesian Information Criteria (BIC) scores presented in the final column. The BIC

compares the fit of nonnested models, with lower BIC scores indicating preferred models and a BIC difference greater than 10 providing strong evidence in favor of one model over another (Freese and Long 2006: 110-112).[52]

According to this criterion, there is strong evidence that none of the constraint models outperforms the no constraint model in terms of fit. In fact, arraying models by BIC score appears to suggest that fit decreases as more restrictive constraints are assumed for the president: for example, the three models that eliminate Senate constraint under unified government outperform those in which the president was assumed to consider the Senate median regardless of partisanship. Other information presented in Table 6.1 corroborates BIC scores, with the BIC ordering of model fit consistent with ordering by Akaike information criterion (AIC) scores and by pairwise correlation.

[52] Note that the departing justice constrain returned the same predicted nominee locations as the Court mean constraint, so only one of those models is presented.

Table 6.1. Comparison of models predicting nominee ideal points

Model	Number of Constrained Appointments	Pairwise Correlation with Nominee Ideal Point	OLS Results		AIC score	BIC score
			Constant (Std. Error)	Coefficient (Std. Error)		
No constraint	0	**0.87**	**-0.23 (0.10)**	**0.83 (0.11)**	41.5	44.4
Partisanship & Nominee extremism	11	**0.81**	-0.11 (0.15)	**0.84 (0.12)**	51.6	54.5
Partisanship & Court mean	13	**0.75**	-0.11 (0.17)	**0.78 (0.14)**	59.0	61.9
Partisanship & Court median	14	**0.75**	-0.00 (0.18)	**0.80 (0.16)**	59.5	62.4
Court median	18	**0.71**	-0.05 (0.21)	**0.87 (0.21)**	63.8	66.8
Court mean	23	**0.70**	-0.11 (0.18)	**0.93 (0.21)**	64.4	67.3

Note: Number of observations for each model is 32. Bold font indicates values statistically significant at the 0.05 level (one-tailed test).

This result is somewhat inconsistent with previous research that has found that the president is, to some degree, ideologically constrained when making Supreme Court nominations (Moraski and Shipan 1999; Johnson and Roberts 2005). But the tests of the models of constraint from those publications may be imperfect. Tests of the Moraski and Shipan model presumed equivalence between ADA scores for presidents and senators, Segal-Cover nominee scores for nominees, and percent liberal voting scores on civil liberties cases for sitting justices; Bailey and Chang (2001) demonstrated this assumption was problematic when the model was re-estimated with ideal points derived from bridging observations such as presidential statements on Supreme Court decisions. Johnson and Roberts (2005) employed DW-Nominate scores and Segal-Cover scores and assumed equivalence, as well, which was problematic for a similar reason.

The lack of strong evidence that the president has not systematically constrained his nominations to the Supreme Court along an ideological dimension may be due to several factors. One is that the results reflect the true state of the world in which presidents do not systematically defer to the interests of pivotal senators, same party or otherwise. Another reason may be that the models tested overlook another, more accurate model of presidential constraint, or that the estimated ideal points and their underlying assumptions are incorrect. Or it may be that the model includes too many nominations, especially older ones made by presidents such as Eisenhower in times like the 1950s when "not very much was happening politically" (Nie and Anderson 1974: 579).

Figure 6.1 depicts values from two models (no constraint and Court mean constraint) against nominee ideal points. Early dataset nominations appear to be less constrained than later nominations. Nominations made by Eisenhower (Warren to Stewart) and John Kennedy (White and Goldberg) are somewhat haphazard, sometimes to the left and sometimes to the right, and Lyndon Johnson's nominations (Fortas to Thornberry) are consistently to the liberal side. But nearly all Supreme Court nominees after the Fortas / Thornberry couple have been more moderate than their appointing president, suggesting that modern presidents may have felt more constrained by ideological considerations.

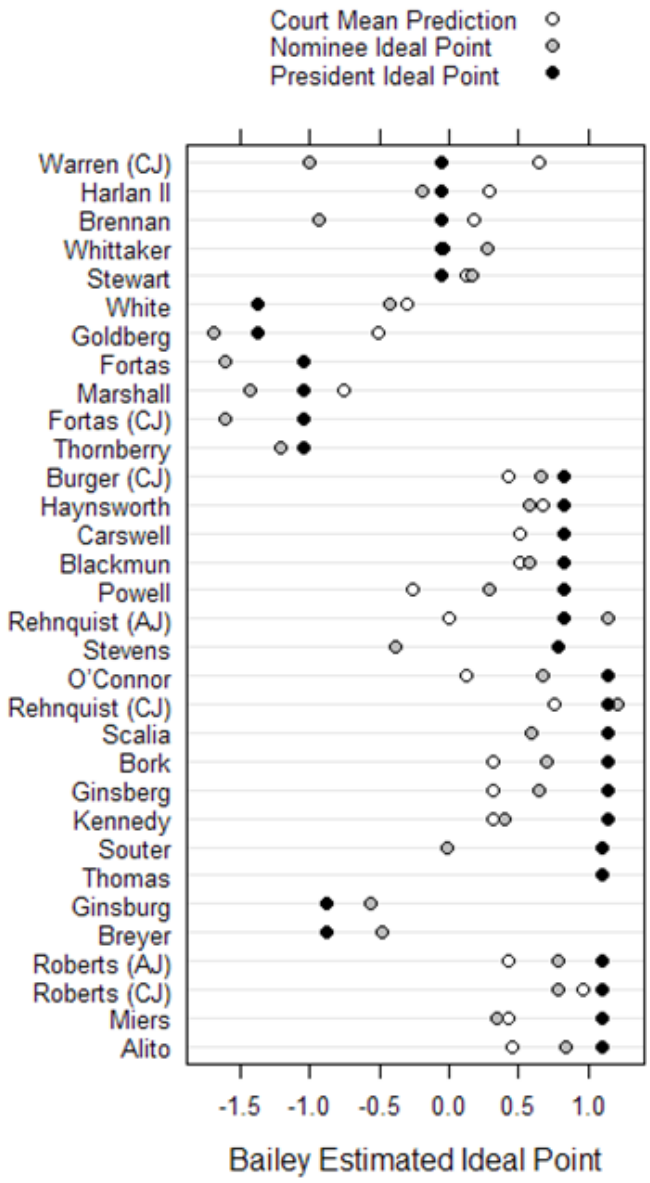

Figure 6.1 Bailey estimated ideal points, three constraints

Note: Figure depicts ideal point for nominees, presidents, and predicted nominee location based on Senate median Court mean considerations. For instances in which no white circle is visible, the white and gray circles coincide. For instances in which no white or gray circles appear, all three circles coincide.

6.1.1 Re-analysis with more modern nominations

To test if presidents have been more constrained in more recent nominations, models were re-estimated omitting the eleven dataset nominations issued before the election of Richard Nixon, with results presented in Table 6.2. The no constraint model still has the lowest BIC score, but the difference between the lowest and highest BIC score is within 10 units. The BIC evidence in favor of the no constraint model over the partisanship and Court median model is merely positive (BIC difference in the 2 to 6 range), although the evidence in favor of no constraint over the Court mean model is still strong (BIC difference in the 6 to 10 range).

Table 6.2. Comparison of models predicting nominee ideal points, post-LBJ nominations

Model	Pairwise Correlation with Nominee Ideal Point	AIC score	BIC score
No constraint	**0.70**	19.1	21.1
Partisanship & Court median	**0.61**	24.0	26.1
Court median	**0.60**	24.3	26.4
Partisanship & nominee extremism	**0.57**	25.2	27.3
Partisanship & Court mean	**0.55**	26.2	28.3
Court mean	**0.49**	27.9	30.0

Note: Number of observations for each model is 21. Bold font indicates values statistically significant at the 0.05 level (one-tailed test).

Results from the more recent nominations, when compared to results from the model containing all nominations between 1953 and 2006, suggests that recent presidents may have been constraining their nominations in ideological terms more than before. But the no constraint

model still performs the best in terms of model fit, indicating that presidential constraint in this area has not been a systematic feature of Supreme Court nominations.

6.2 SUMMARY OF FINDINGS

Few regularly-occurring events in American politics are as momentous as a Supreme Court appointment. The president is invested with the right to propose nominees to the Court, but – save for recess appointments – the nomination must be processed and approved by a majority of senators. Analysis of 32 presidential nominations to the Court between 1953 and 2006 failed to produce evidence, though, that the president systematically defers to the Senate in terms of nominee ideology.

This finding is consistent with the idea that presidential nominations are issued with the presumption of success (Krutz, Fleisher, and Bond 1998: 871) and with the observation that "[s]ince the administration of William McKinley, the Senate has tended to defer to the President's choices, serving in most cases as a political rubber stamp for his nominations" (Tullis 1996-1997: 1331). Model constraints presumed that senators vote purely on ideological or partisan grounds, but senators consider other factors like nominee qualifications (Epstein et al. 2006) and presidential approval (Johnson and Roberts 2004). Presidents can also force a nomination onto a multidimensional playing field by nominating a woman or a minority, which may reduce or eliminate ideological constraint (Overby et al. 1992; Johnson and Roberts 2005). And even if the appointments game were played strictly according to ideology, presidents may be reluctant to accommodate senators given ambiguity about exact ideal points of the nominee

(Szmer and Songer 2005), the justices, and the pivotal senator, not to mention uncertainty about the identity of the pivotal senator.

One implication of these results is that Supreme Court justices like-minded with the president should not heavily weigh their decision to retire on the relative location of the Senate median or the departing justice, since presidents may select a nominee at the presidential ideal point without offering much, if any, in terms of ideological concessions to the Senate. But the evidence for a lack of constraint on the president should make non-like-minded justices apprehensive about departing the Court when the president is ideologically distant, no matter the ideological composition of the Senate.

A major caveat to these results is that things may be changing. Recent Supreme Court nominations battles have become more intense and nominees have been receiving more opposition votes from senators. Evidence suggested that presidential appointments have become more restrained – if not constrained – since the nomination of Abe Fortas (cf. Silverstein 1991). Presidents may therefore have begun to be more concerned with the relative ideological position of justices and senators, and – if the Senate begins to exert additional opposition – may begin to consider other veto points like the filibuster pivot and members of the Judiciary Committee.

7.0 CODA: POLITICAL RETIREMENT

Previous chapters presented theory and evidence that the memory of the departing justice affects the confirmation dynamics of the subsequent nomination. The political science literature, though, has focused on the departing justice's *intentional* attempt to influence the ideology of his or her successor through a political retirement, with mixed results: Peretti and Rozzi (2009: 28) cited eleven studies of this alleged phenomenon, five of which found evidence of political retirement, and six that did not. Such disagreement in the literature invites further investigation, and this chapter provides another exploration into the possibility that US Supreme Court justices voluntarily leave the bench for political reasons.

7.1 POLITICAL CONSIDERATIONS IN LEAVING THE BENCH

Empirical studies have indicated that Supreme Court justices' votes in cases are motivated by political considerations (Segal and Spaeth 1996, 2002). The theory of political retirement suggests that justices' concern for policy also influences their decision to leave Court, such that justices delay retirement when their expected replacement is ideologically distant, and hasten retirement when their expected replacement is ideologically congruent. Justices have displayed an ability to behave strategically (Caldeira, Wright, and Zorn 1999; Katz 2006), and political retirement would be another manifestation of this aptitude. If justices strategically retire, then

justices should be more likely to retire during politically opportune times than to retire during politically inopportune times.

7.2 RESEARCH DESIGN

The abundance of studies about political retirement and its relatively straightforward research question make theory construction less important for new investigations than research design, in particular, the fundamental concern of operationalizing politically opportune conditions for a political retirement.

7.2.1 Identifying a political retirement

Some studies have employed a dichotomous partisanship variable, considering a politically opportune time to be when the political party of the justice controls the presidency (Squire 1988) or the presidency and/or the Senate (Zorn and Van Winkle 2000). But partisanship, especially in recent decades, has been an unreliable proxy for Supreme Court ideology, with Republicans Earl Warren, Harry Blackmun, David Souter, and John Paul Stevens developing liberal voting records and Democrat Byron White becoming more conservative; a partisanship variable, for example, indicates that Blackmun's departure during a Democratic administration was inconsistent with political motivations, even though President Bill Clinton's dedication to abortion rights made Blackmun comfortable leaving the bench (Yarbrough 2008: 318) and even though Blackmun had performed a "near complete flip, from one of the Court's most conservative members to among its most consistent civil libertarians" (Epstein et al. 2007b: 1494).

Other research has proxied political considerations with continuous ideological variables for the distance between the ideal points of a justice and the president (Beckstrom 2004; Nelson and Ringsmuth 2009), the distance between the ideal points of a justice and the Senate median (Nelson and Ringsmuth 2009), or the distance between the ideal points of a justice and the expected location of a successor based on the Moraski and Shipan (1999) model of the appointments game (Perry and Zorn 2008). But these measures may also be imperfect because they omit an ideological reference point.

Consider Figure 7.1, with president P and a five-member Court comprised of justices J_1 to J_5. The Beckstrom (2004) and Nelson and Ringsmuth (2009) measure of the ideological relationship between a justice and the president would indicate that J_1 and J_4 are equally likely to retire for political reasons under P, since the ideal points of J_1 and J_4 are equidistant from the ideal point of P. But political retirement considerations should also account for the ideology of the presumed challenger in the next presidential election, or, if considerations are retrospective, the ideology of the losing candidate in the previous presidential election. The ideal point of J_1 is much closer to the ideal point of P than to the ideal point of presumed challenger C, so J_1's retirement under the current administration would be consistent with political considerations; on the other hand, the ideal point of J_4 is closer to the ideal point of C than to the ideal point of P, so J_4's retirement under the current administration would not be consistent with political considerations.

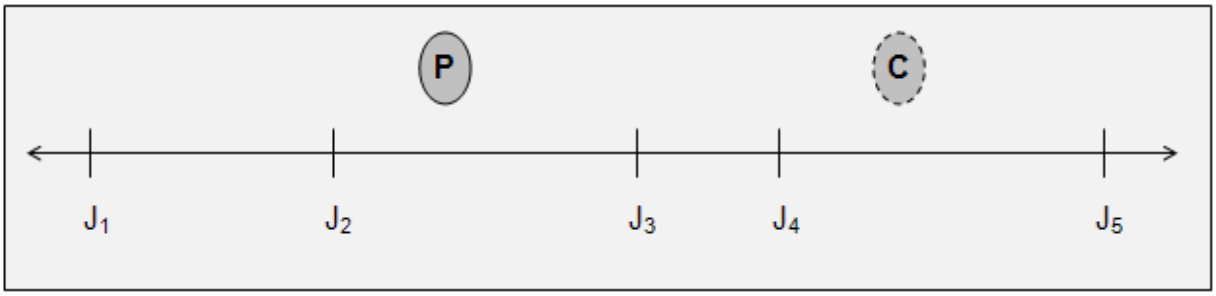

Figure 7.1. Political retirement array

An opportunity for political retirement was therefore operationalized with a dichotomous variable coded 1 if the ideal point of the justice fell closer to the ideal point of the current president than to the ideal point of the presumed challenger in the next presidential election, coded 1 if the ideal point of the justice fell equidistant between the ideal points of the current president and the presumed challenger, and coded 0 if the ideal point of the justice fell closer to the ideal point of the presumed challenger than to the ideal point of the current president.[53]

Political ideology was proxied with Bailey estimated ideal point estimates, with values for justices and presidents available from 1950 to 2008 (Bailey and Maltzman 2009).[54] Estimating ideal points for presumed challengers presented a more difficult operationalization because justices are typically not aware of the identity of the challenger until the year of the presidential election. However, justices' expectations may be retrospective if they anticipate the

[53] This measure presumes that justices expect a president to select a nominee at the presidential ideal point. Some evidence suggests that presidential nominations are sometimes restricted based on the composition of the Senate and the Court (Moraski and Shipan, 1999), but other research indicates that presidents often have the ability to overcome such institutional constraints to ensure the confirmation of their preferred nominee (Johnson and Roberts, 2005). Certain presidents in certain circumstances may temper their choice of nominee ideology due to institutional constraints, but it may nonetheless be reasonable to expect justices to base their retirement decision on the relative ideal points of the president and presumed challenger, and not on a complex calculation that incorporates the ideological arrangement of actors across three branches of government.

[54] Bailey estimates were not available for some justice-year observations: Harold Burton in 1958 (1957 score used); Fred Vinson in 1953 (1952 score used); Sherman Minton in 1956 (1955 score used); Byron White in 1962 (1963 score used); and Abe Fortas in 1969 (1968 score used). Observed Bailey estimated ideal point estimates ranged from -2.27 (William Douglas in 1967 and 1968) to 1.28 (Clarence Thomas in 2008).

challenger in the next election to be ideologically comparable to the previous challenger, similar to the way that some voters appear to base their electoral choice on retrospective evaluations of the economy (Lanoue 1994); therefore, estimates for the ideal point of the presumed challenger in the next presidential election were proxied as the ideal point of the losing candidate in the previous election.

Bailey estimates for several losing presidential candidates were available from their tenures as a representative, senator, or president,[55] but three losing candidates – governors Thomas Dewey, Adlai Stevenson, and Michael Dukakis – did not serve in the federal government, and therefore estimates were not available. Ideal points for these three candidates were proxied by the median Bailey estimate of same-party representatives serving in their respective states (New York, Illinois, and Massachusetts) during the year of their electoral loss (1952 for Stevenson, and 1988 for Dukakis; 1951 for Dewey, since no representative estimates were available before that year).[56] These makeshift estimates possessed some face validity, with liberal estimates for Democrats Stevenson and Dukakis, and a moderate conservative estimate for liberal Republican Dewey.[57]

Table 7.1 lists the presidents who served a majority of each year from 1950 to 2008 and their challenger in the immediately previous election, with Bailey estimated ideal point estimates for each.

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[55] Presidential ideal point estimates were used for Gerald Ford, Jimmy Carter, and George H.W. Bush. George McGovern and John Kerry served as senators during and after their presidential run, so the estimate for each was the senator estimate for the year prior to their presidential nomination. Richard Nixon's last available senator estimate, from 1952, was used for 1961 to 1964; Barry Goldwater's last available senator estimate before his presidential nomination, from 1964, was used for 1965 to 1968; Hubert Humphrey's last available senator estimate before his presidential nomination, from 1964, was used for 1969 to 1972; Walter Mondale's last available senator estimate, from 1976, was used for 1985 to 1988; Bob Dole's last available senator estimate, from 1996, was used for 1997 to 2000; and Al Gore's last available senator estimate, from 1992, was used for 2001 to 2004.

[56] The Bailey estimate for New York Republican Representative Robert Tripp Ross was from the 1952 term.

[57] Ideal point estimates for Stevenson and Dukakis were -1.37 and -0.76, respectively, and the estimate for Dewey was 0.43. As a reference, Bailey estimates were -1.05 for Lyndon Johnson and 1.15 for Ronald Reagan.

Table 7.1. Presidents and challenger estimated ideal points

Year	President	Bailey Score	Challenger	Bailey Score	Year	President	Bailey Score	Challenger	Bailey Score
1950	Truman	-1.68	Dewey	0.46	1981	Reagan	1.15	Carter	-0.97
1951	Truman	-1.68	Dewey	0.46	1982	Reagan	1.15	Carter	-0.97
1952	Truman	-1.68	Dewey	0.46	1983	Reagan	1.15	Carter	-0.97
1953	Eisenhower	-0.05	Stevenson	-1.37	1984	Reagan	1.15	Carter	-0.97
1954	Eisenhower	-0.05	Stevenson	-1.37	1985	Reagan	1.15	Mondale	-1.83
1955	Eisenhower	-0.05	Stevenson	-1.37	1986	Reagan	1.15	Mondale	-1.83
1956	Eisenhower	-0.05	Stevenson	-1.37	1987	Reagan	1.15	Mondale	-1.83
1957	Eisenhower	-0.05	Stevenson	-1.37	1988	Reagan	1.15	Mondale	-1.83
1958	Eisenhower	-0.05	Stevenson	-1.37	1989	HW Bush	1.11	Dukakis	-0.76
1959	Eisenhower	-0.05	Stevenson	-1.37	1990	HW Bush	1.11	Dukakis	-0.76
1960	Eisenhower	-0.05	Stevenson	-1.37	1991	HW Bush	1.11	Dukakis	-0.76
1961	Kennedy	-1.37	Nixon	0.95	1992	HW Bush	1.11	Dukakis	-0.76
1962	Kennedy	-1.37	Nixon	0.95	1993	Clinton	-0.88	HW Bush	1.11
1963	Kennedy	-1.37	Nixon	0.95	1994	Clinton	-0.88	HW Bush	1.11
1964	Johnson	-1.05	Nixon	0.95	1995	Clinton	-0.88	HW Bush	1.11
1965	Johnson	-1.05	Goldwater	1.14	1996	Clinton	-0.88	HW Bush	1.11
1966	Johnson	-1.05	Goldwater	1.14	1997	Clinton	-0.88	Dole	1.24
1967	Johnson	-1.05	Goldwater	1.14	1998	Clinton	-0.88	Dole	1.24
1968	Johnson	-1.05	Goldwater	1.14	1999	Clinton	-0.88	Dole	1.24
1969	Nixon	0.83	Humphrey	-1.58	2000	Clinton	-0.88	Dole	1.24
1970	Nixon	0.83	Humphrey	-1.58	2001	W Bush	1.11	Gore	-1.17
1971	Nixon	0.83	Humphrey	-1.58	2002	W Bush	1.11	Gore	-1.17
1972	Nixon	0.83	Humphrey	-1.58	2003	W Bush	1.11	Gore	-1.17
1973	Nixon	0.83	McGovern	-1.33	2004	W Bush	1.11	Gore	-1.17
1974	Nixon	0.83	McGovern	-1.33	2005	W Bush	1.11	Kerry	-1.44
1975	Ford	0.78	McGovern	-1.33	2006	W Bush	1.11	Kerry	-1.44
1976	Ford	0.78	McGovern	-1.33	2007	W Bush	1.11	Kerry	-1.44
1977	Carter	-0.97	Ford	0.78	2008	W Bush	1.11	Kerry	-1.44
1978	Carter	-0.97	Ford	0.78					
1979	Carter	-0.97	Ford	0.78					
1980	Carter	-0.97	Ford	0.78					

7.2.2 Statistical approach

A Cox proportional hazards model was estimated to determine the relative weight, if any, that an opportunity for political retirement had on the decision to leave the Court, controlling for other relevant factors. Cox models permit observations to be clustered by justice and are preferable to

parametric event history models because they do not require an assumption about the distribution of the baseline hazard (Box-Steffensmeier and Jones 1997: 1432).

The unit of observation was a justice-year, and the dichotomous dependent variable was coded 1 for retirement from the Court and 0 for a death or continuation in office. A justice's first opportunity to retire was considered to occur during the summer recess after their tenure on the Court began. The data contain nine left-censored observations (the justices serving at the 1950 start point), and 12 right-censored observations (the nine justices serving at the 2008 end point, and the three justices who died while members of the Court).

Control variables included age, pension eligibility, job satisfaction, and presidential term. Age was a continuous variable coded as the square of the justice's age because the risk of retirement due to a one-unit increase in age should be higher as a justice grows older. Pension eligibility was a dichotomous variable coded 1 for justices who qualified for a federal pension based on the provisions of US Code 28.I.17.§371,[58] and the measure of job satisfaction was coded as the percent of formally-decided cases in which the justice voted in the minority.[59] The age and dissent rate variables were normalized to range from 0 to 1.

Presidential term was a series of dichotomous variables for the first, second, and fourth years of a presidential term, with the third year serving as the omitted class; retirements were expected to occur less frequently in the fourth year of a term when the president is either a lame duck or running for re-election, and to occur more frequently during the first year of a term,

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[58] Starting March 1, 1937, justices could retire in senior status instead of resigning if they had at least seventy years of age and ten years of federal judicial service. This provision was expanded on February 10, 1954, to include justices with 65 years of age and fifteen years of federal judicial service, and the Rule of Eighty was implemented on July 10, 1984, in which justices could receive their salary for life if they had attained 65 years of age and any combination of 80 years of age or federal service.

[59] Data were drawn from The Supreme Court database (http://scdb.wustl.edu/data.php), 2009 Release 2, Cases Organized by Supreme Court Citation (analu of zero), retrieved October 1, 2009. Observations for minority voting rates begin in 1953.

when a president traditionally experiences a honeymoon period and is more likely to have a like-minded nominee confirmed by the Senate; the first year of a term should also coincide with the retirement of those justices who tarried until a change of administration.[60]

7.3 RESULTS

Table 7.2 lists justices and the years in which retirement would and would not have been consistent with political considerations. Many observations reflected partisanship considerations, for example, with Republicans Anthony Kennedy, Clarence Thomas, and Antonin Scalia having an opportunity to politically retire under Republican presidents but not during Democratic administrations. The measure also appeared to identify observations for which partisanship is deceptive, like liberal Republicans John Paul Stevens and David Souter, who had an opportunity to politically retire under Democratic presidents but not during Republican administrations. Cases of ideological drift were also captured, with Harry Blackmun having an opportunity to politically retire during Republican administrations early in his career (1971-1976) but not later in his tenure (1980-1992).An opportunity for political retirement was present in 56 percent of justice-year observations (295 of 531), compared to the 65 percent of observed retirements (13 of 20) that occurred during those opportunities. Observed retirements were therefore slightly more likely to have been consistent with political considerations than would have been expected in a

[60] No pairwise correlation between any independent variables exceeded the "potentially harmful" 0.80 level (Griffiths, Hill, and Judge, 1993:435), and values for variance inflation factors and condition indexes did not exceed levels respectively recommended in Hamilton (1992:134) and Kennedy (2003:213), indicating that multicollinearity did not pose a problem.

random draw, although a t-test indicated that the 4.4 percent risk of a political retirement was not statistically different (t=0.88) than the 3.0 percent risk of a non-political retirement.

Table 7.2. Political retirement from the US Supreme Court (1950-2008)

Departing Justice	Opportunity for a Political Retirement	No Opportunity for a Political Retirement
Vinson	1953 (d)	1950-1952
Jackson	1953-1954 (d)	1950-1952
Minton	1953-1956*	1950-1952
Reed	1953-1957*	1950-1952
Burton	1953-1958*	1950-1952
Whittaker	1957-1960	1961-1962*
Frankfurter	1950-1960	1961-1962*
Goldberg	1963-1965*	
Clark	1953-1960, 1967*	1950-1952, 1961-1966
Warren	1961-1968*	1954-1960
Fortas	1966-1968	1969*
Black	1950-1952, 1961-1968, 1970-1971*	1953-1960, 1969
Harlan II	1955-1960, 1969-1971*	1961-1968
Douglas	1950-1952, 1961-1968	1953-1960, 1969-1975*
Stewart	1959-1960, 1964-1976, 1981*	1961-1963, 1977-1980
Burger	1970-1976, 1981-1986*	1977-1980
Rehnquist	1972-1976, 1981-1992, 2001-2005 (d)	1977-1980, 1993-2000
Powell	1972-1976, 1981-1987*	1977-1980
Brennan	1961-1968, 1977-1980	1957-1960, 1969-1976, 1981-1990*
Marshall	1968, 1977-1980	1969-1976, 1981-1991*
White	1962-1976, 1981-1992	1977-1980, 1993*
Blackmun	1971-1976, 1993-1994*	1977-1992
O'Connor	1982-1992, 2001-2005*	1993-2000
Stevens	1977-1980, 1993-2000	1976, 1981-1992, 2001-2008
Scalia	1987-1992, 2001-2008	1993-2000
Kennedy	1988-1992, 2001-2008	1993-2000
Souter	1993-2000	1991-1992, 2001-2008
Thomas	1992, 2001-2008	1993-2000
Ginsburg	1994-2000	2001-2008
Breyer	1995-2000	2001-2008
Roberts	2006-2008	
Alito	2006-2008	

Note: An asterisk (*) indicates the year that the justice announced retirement, and a (d) indicates the year that the justice died as a member of the Court.

Table 7.3 presents results from the Cox model predicting retirement from the Court.[61] Cox model coefficients greater than zero reflect a variable for which an increase in the value of the covariate correlates with an increase in the hazard, and coefficients less than zero reflect a variable for which an increase in the value of the covariate correlates with a decrease in the hazard. Therefore, the positive coefficient for the age variable indicates that the risk of retirement increases as a justice grows older which is consistent with previous research (Nelson and Ringsmuth 2009; but see Squire 1988), and the positive coefficient for the pension eligibility variable indicates that the risk of retirement increases as a justice grows older, which is also consistent with previous research (Squire 1998; but see Nelson and Ringsmuth 2009).

The negative coefficient for dissent rate indicates that the risk of retirement decreases for justices who issue more dissenting votes (cf. Squire 1988; Nelson and Ringsmuth 2009),[62] and the positive coefficient for the first year of a presidential term indicates that the risk of retirement is higher during the first year of a term relative to the third year. Variables for political opportunity and for the second and third years of a term did not reach statistical significance, so the data do not provide evidence that these factors influence the risk of retirement from the Court.[63]

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[61] A diagnostic test based on Schoenfeld residuals indicated that the proportional hazards assumption was not violated by any covariate or by the model as a whole. Plots of martingale residuals against omitted covariates produced close-to-linear scatterplots, suggesting that independent variable transformations were not necessary; this was corroborated by a multivariable fractional polynomial model that only linearly transformed the continuous age-squared and minority voting rate variables, which produced no change in estimates of model coefficients or levels of statistical significance.

[62] Dissent rate highly correlated with ideological extremism, measured as the distance between the ideal point of the justice and the Court median (0.71, $p<0.01$). The statistical significance of each variable remained the same when dissent rate was replaced with ideological extremism.

[63] A continuous variable representing the opportunity for political retirement – coded as the distance that the ideal point of the justice fell closer to the ideal point of the current president than to the ideal point of the presumed challenger – also failed to reach statistical significance when replacing the dichotomous opportunity variable (coefficient of -0.10, p-value of 0.34).

Table 7.3. Cox model of political retirement from the US Supreme Court (1953-2008)

	Coefficient (Std. Err.)	Hazard Ratio
Opportunity for political retirement	0.13 (0.42)	1.14
Age^2	**3.55 (1.30)**	**34.97**
Pension eligibility	**1.94 (0.88)**	**6.93**
Job satisfaction (Dissent rate)	**-1.87 (0.98)**	**0.15**
Presidential term, first year	**1.88 (0.68)**	**6.52**
Presidential term, second year	0.03 (0.47)	1.03
Presidential term, fourth year	-0.21 (0.57)	0.81
Number of observations	495	
Number of clusters	31	
Number of retirements	20	
Pseudo R^2	0.37	

Note: Dependent variable is retirement from the US Supreme Court, and the estimation technique was a Cox proportional hazards model, with robust standard errors clustered by justice. Bold type indicates $p \leq 0.05$ (one-tailed test). Continuous variables for age and dissent rate were normalized so that observed values range from 0 to 1. Dissent rates were not available for years before 1953, so the number of observations has been reduced from 531.

Hazard ratios in the second numeric column of Table 7.3 provide a measure of the increase in the risk of retirement at higher levels of a covariate. All other model variables held constant, the risk of retirement for a justice who has reached pension eligibility is nearly seven times the risk for a justice who has not reached pension eligibility, and the risk of retirement during the first year of a presidential term is approximately 6.5 times the risk of retirement in the third year of a term. Hazard ratios for normalized continuous variables for age-squared and dissent rate indicate the risk of retirement for justices scoring 1 on the variable relative to the risk for justices scoring 0 on the variable; therefore, the risk of retirement for the oldest observed

justice is estimated to be 35 times the risk for the youngest observed justice, and the risk of retirement for the justice with the highest observed dissent rate is predicted to be 0.15 times the risk for the justice with the lowest observed dissent rate.

A test of the proportional hazards assumption based on Schoenfeld residuals provided no evidence that the proportional hazards assumption was violated by any variable. Results are reported in Table 7.4.

Table 7.4. Test of the proportional hazards assumption

	Rho	**Chi^2**	**Prob < Chi^2**
Opportunity for political retirement	0.00	0.00	0.99
Age^2	0.27	1.04	0.31
Pension eligibility	-0.04	0.06	0.81
Job satisfaction (Dissent rate)	0.12	0.15	0.70
Presidential term, first year	-0.06	0.01	0.93
Presidential term, second year	-0.11	0.00	0.95
Presidential term, fourth year	-0.13	0.01	0.91
Global Test		1.58	0.98

7.4 CONCLUSION

Anecdotal evidence may be marshaled to support the claim that some justices strategically retire during politically opportune times, but empirical results presented in this article failed to demonstrate that political retirement is a tactic systematically employed by Supreme Court justices. However, only a handful of retirements fell into the time frame of the analysis, which increased the influence of idiosyncratic observations.

For example, two non-political retirements, those of liberals William Brennan (1990) and Thurgood Marshall (1991), respectively occurred in the tenth and eleventh year of an unbroken

string of Republican administrations at a time when the sitting president held relatively high approval ratings, making the prospect of a Democratic presidential victory in the next election somewhat remote. The retirement of these two justices, while not consistent with political considerations, may therefore be explained by a relative lack of opportunity, since these justices had not been given an occasion to retire under a like-minded president for more than a decade and were facing the prospect of at least another five years of Republican administrations.

The non-finding of political retirement provides support for the assumption that models of presidential appointments may presume that vacancies are exogenous events. But, even though this analysis produced no systematic evidence of political retirement, future models of presidential appointments may gain theoretical or empirical leverage by incorporating a retirement as an endogenous part of the appointment process.

A lack of political retirements may be expected if justices value their role on the Court more than they value granting the president the opportunity to replace them with an ideologically-proximate successor, especially given the possibility that they can achieve the latter goal without artificially shortening their tenure (Brenner 1999: 438). After all, even a like-minded successor cannot perfectly represent a justice, so in a sense every retirement is a loss for the justice, not only in policy but in power; therefore, justices who continue on the Court may have made a strategic calculation that is more personal than political.

8.0 CONCLUSIONS

This chapter reviews results from the empirical analyses and discusses several implications of the findings, and then concludes with unanswered questions and suggestions for future research.

8.1 RESULTS AND IMPLICATIONS

This dissertation provided evidence that US Supreme Court justices do not behave in line with expectations derived from the political retirement hypothesis. The retirement decision for some justices, like Harry Blackmun and David Souter, suggests a delay during periods when the president is ideologically dissimilar and a retirement once a like-minded president assumes office. However, systematic evidence for such behavior was absent from the analysis presented in this dissertation, indicating that the justices, by and large, do not purposefully act to influence the ideological composition of the Court that they leave behind.

However, the dissertation provided evidence that justices may nonetheless indirectly and perhaps unintentionally impact the next natural Court. The major contribution of this dissertation was the development and test of the hypothesis that senators considering US Supreme Court nominations are influenced by the contrast between the nominee and the departing justice. The theory of reference dependence found in the marketing and psychological literature was applied to senators considering Supreme Court nominations, with the consequent hypothesis that

senators would be more likely to oppose nominations with the potential to move the ideology of the vacant seat from their ideal point. The expectation was that senators ideologically closer to the departing justice than to the nominee would perceive the nomination as a potential loss, while senators closer to the nominee than to the departing justice would consider the nomination a gain. Empirical results provided at best marginal evidence that key senators in the confirmation process delay a nomination that would move the vacant seat away from their ideal point, but very strong and robust evidence was provided that that senators are indeed more likely to oppose a nomination – in terms of roll call confirmation voting and stated preferences – the greater the threatened loss in terms of seat change. This research has several implications for politicians and for the political science literature.

First, Supreme Court vacancies are not interchangeable. Formal models of appointments often describe an eight-member interim Court (e.g., Moraski and Shipan 1999; Johnson and Roberts 2005), indicating that consideration of the departing justice is orthogonal to presidential selection of a nominee. However, evidence that senator confirmation voting is influenced by the ideological relationship of the nominee to the departing justice suggests that presidents may – or at least, should – incorporate the departing justice into their decision calculus.

Observers expected Barack Obama to have the opportunity to fill at least one seat vacated by a liberal justice, with Ruth Bader Ginsburg, David Souter, and John Paul Stevens cited as the most likely to leave (Greenburg 2008; Johnson 2009). Sonia Sotomayor's appointment to replace any of these three would not have affected the median justice, but may have altered the roll call tally and the risk of a filibuster attempt, depending on which justice left the Court. Presuming that Ginsburg is more liberal than Souter and Sotomayor, Sotomayor may have received more support if she were nominated to replace Ginsburg than for her nomination to replace Souter:

liberal senators may have been relatively less supportive of a Ginsburg-Sotomayor swap, since the seat would have moved away from their ideal point, but their probability of opposing Sotomayor would have been negligible given other factors predicting support, like partisanship and ideological proximity to the nominee; on the other hand, conservatives would have been slightly more pleased with a Ginsburg-Sotomayor exchange that would move the seat toward their ideal point, and their opposition may have been diluted by this consideration and may have resulted in an approval vote from one or more of the more moderate Republicans who opposed Sotomayor's confirmation.

A second implication is for confirmation studies. Many other judiciaries and independent regulatory agencies are multi-member institutions that produce policy through a deliberative process with a membership determined by an executive appointment and a legislative advice and consent. Evaluations of nominations to collegial bodies like these may also be influenced by departing members, with the impact presumably a function of the organization's membership size, jurisdiction, and decision-making process.

A third implication is for the appointments literature. Research has employed the eight-member interim Court as a status quo in models of how senators (Lemieux and Stewart 1991) and the Senate (Lemieux and Stewart 1990) consider Supreme Court nominations. Moraski and Shipan (1999) provided evidence that presidential choices of nominee are influenced by the eight-member interim Court, finding that the ideology of a nominee was related to the median of the eight member Court when the president and the Senate median fell on opposite sides of the Court median.

But while the eight-member interim Court is traditionally considered the status quo in the literature on Supreme Court appointments (see also Johnson and Roberts 2005 and Rohde and

Shepsle 2007), this conceptualization leads to non-intuitive results. Consider the nine-member Court in Figure 8.1, where the shaded circle with an M denotes the location of the Court median:

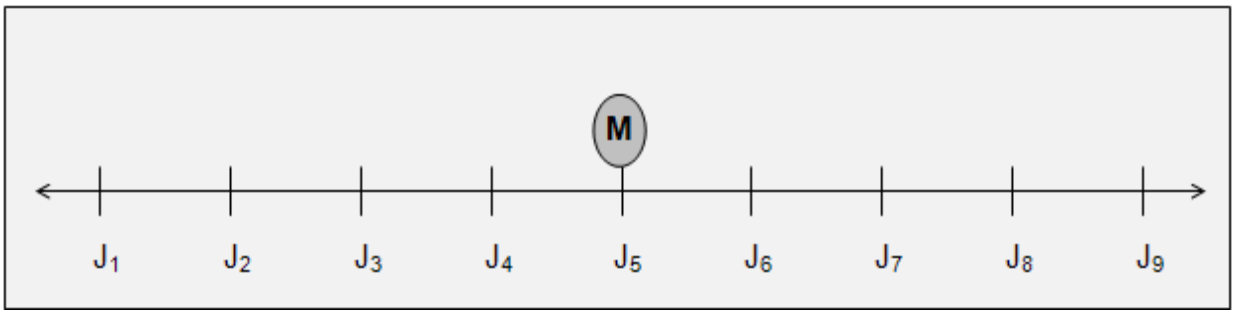

Figure 8.1. Court median before departure of J_9

Suppose that the most conservative justice J_9 departs from the Court; under the eight-member interim Court conceptualization, the Court median would shift leftward, to the midpoint of the J_4 to J_5 range, as shown in Figure 8.2:

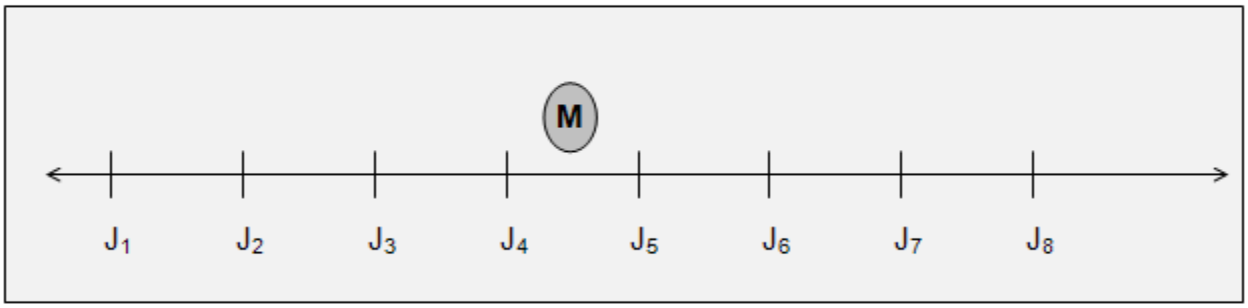

Figure 8.2. Court median after departure of J_9

Now suppose that conservative justice J_9 is replaced by moderate J_{new}. Figure 8.3 displays the consequent rightward movement of the median:

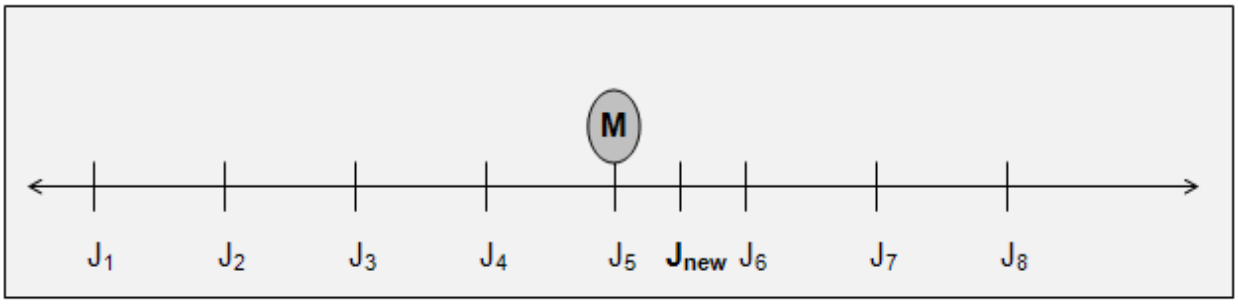

Figure 8.3. Court median after confirmation of J_{new}

Note the logic inherent in the eight-member interim Court conceptualization when applied to the confirmation process as a whole: the Court median shifted twice, even though the ideology and identity of the median justice did not change. Moreover, the addition of moderate J_{new} generated a *conservative* shift in the Court median, even though the Court as a whole is more liberal than it was before the vacancy. Contrast this with the nine-member conceptualization that retains the departing justice: replacement of conservative J_9 with moderate J_{new} would result in a leftward shift of the seat and would result in no change to either the identity or ideology of the median justice.

The nine-member operationalization is more plausible both conceptually and operationally. Actual eight-member Courts have been relatively rare in recent decades, since nearly all postwar vacancies have been retirements or resignations (William Rehnquist was the only sitting justice to die between 1955 and 2007) and have tended to occur during the Court's summer recess: ten of the twelve confirmation votes since Potter Stewart's 1981 retirement have occurred in July, August, September, or October, resulting in little or no disruption to the Court's business, which begins the first Monday of October and ends in late June or early July. The last extended eight-member Court occurred as President Ronald Reagan attempted to replace Lewis Powell in the 1987 term, after the rejection of Robert Bork, the withdrawal of Douglas Ginsburg,

and eventual confirmation of Anthony Kennedy. Moreover, some justices have retired pending the confirmation of their successor, as O'Connor did in her July 1 letter to President George W. Bush, noting that her resignation was "effective upon the nomination and confirmation of my successor" (O'Connor 2005). But, even in an extended period of an interim Court, it is unclear how much influence an intangible midpoint between two center justices would have, relative to a flesh-and-blood justice who had, in most cases, served on the Court for decades.[64]

A final implication is for political science research. The fields of political psychology and political institutions have traditionally been separated in the political science discipline, with psychological theories being tested primarily on members of the mass public. However, the research presented above provided evidence of the value of incorporating psychological theories into investigations of the behavior of institutional actors, suggesting that similar psychological forces govern the behavior and preferences of the public and of political elites.

But, while the analysis presented in this dissertation continued the research agenda of explaining the Supreme Court nomination and confirmation processes, it, of course, does not represent the final word. Several unanswered questions remain for future research to address.

8.2 UNANSWERED QUESTIONS

Incorporating constituency concerns is an important task for studies of confirmation voting, but faces several hurdles. The first is obtaining quality measures of state-level public opinion about

[64] Cognitive accessibility would make the prior nine-member Court a more likely reference point, because envisioning the prior nine-member Court and the real prior median justice is much easier for senators –not to mention the mass public that tries to influence senators – than envisioning an eight-member Court and an abstract median located between two real justices.

Supreme Court nominations. Kastellec, Lax, and Phillips (2008) provided such data for nine recent nominations, seven of which overlap with the 1968 to 2006 time period of the above analysis. However, restriction to nine nominations presents the problem of small sample size, with data for only five nominations (O'Connor, Bork, Thomas, Ginsburg, and Alito) that had the potential for a median change. The second hurdle is isolating the influence of constituency concerns. Public opinion about a nomination is presumably governed by the same factors that influence senatorial preferences in the absence of constituency concerns, like partisanship, nominee qualifications, and ideological considerations; therefore, insertion of state-level public opinion into a model would not be able to determine the indirect influence of model variables through constituency concerns. Isolating the direct influence of model variables from their indirect influence through state-level public opinion is a problem that unfortunately lies beyond the scope of this present analysis, but presents a challenge for future research on senator opposition to Supreme Court nominations. One avenue for future research is to incorporate state-level public opinion in such a manner that it is possible to isolate the influence of constituency concerns from key variables like nominee qualifications and ideology.

8.3 SUGGESTIONS FOR FUTURE RESEARCH

Another line of research is to revisit the reference dependence theory replacing ideology with other nominee characteristics, like gender or race (cf. Ruckman 1993), once more women and minorities have been nominated to the Court and statistical analysis becomes feasible. Research could address whether a man-for-man swap is considered as attractive as a man-for-woman exchange or a woman-for-man replacement, in particular, testing whether some of the

opposition to the nomination of Samuel Alito compared to that of John Roberts was fed by the fact that Alito's confirmation halved female representation on the Court.

The passage of time should also provide an opportunity to revisit political retirement. The first five retirements in the 1950-to-2008 time period of analysis were inconsistent with political retirement, but 10 of the 14 subsequent retirements were consistent, as were 11 of 15 if the 2009 retirement of David Souter is considered. Future research could test if political retirement has become more common after the Court began a more ambitious agenda in the 1960s.

Accumulation of additional observations could also help resolve the question of whether the influence of considerations of the ideology departing justice is consistent with rational choice theory. Extant empirical and theoretical research views Supreme Court appointments through the prism of rational choice, with decisions fully determined by a utility function derived from preferences over viable options. Rational actors rank the choices available to them, and select the alternative that provides the most benefit for the least cost.

Senators, for example, prefer justices who share their ideology, so confirmation votes are influenced by the ideological distance between the senator and a nominee (Epstein et al. 2006) and by the potential impact a nomination would have on the ideology of the Court median (Lemieux and Stewart 1990). Legislators prefer a skilled judiciary, so unqualified nominees have a more difficult time receiving confirmation (Cameron, Cover, and Segal 1990). Senators prefer to strengthen their political party, and are faced with an electoral disincentive for voting against nominations made by popular presidents, so legislators are more likely to vote to confirm an appointment made by a president of the same party (Shipan 2008) or by a president with high approval ratings (Johnson and Roberts 2004). Senators also possess an "electoral connection" to their constituents (Mayhew 1974), so confirmation voting has been found to be influenced by

interest group lobbying (Caldeira and Wright 1998), reelection concerns (Overby et al. 1992), and public opinion (Kastellec, Lax, and Phillips 2008).

However, the influence of the seat change variable in explaining senator confirmation voting can be interpreted in at least two ways. From one perspective, senators voting against a nomination that would move the ideology of the vacated seat further from their ideal point is rational behavior if the senator perceives that the departing justice will remain on the Court until a successor is confirmed. But senators considering the departing justice would be behaving irrationally if they do not perceive that the departing justice will remain on the Court until a successor is confirmed. For many dataset observations, it was at least plausible for senators to think that a departing justice may tarry on the Court for a while longer, but for others – like the death of William Rehnquist – it was not. Future research therefore could compare the influence of the departing justice when there is no or little possibility of continuation on the Court with situations in which a justice retires conditional on the confirmation of a successor.

APPENDIX A

This Appendix contains the list of sources used for construction of the senator opposition dependent variable that was used in the individual-level and aggregate-level analysis.

Earl Warren (3/1/1954, Chief Justice)

The Congressional Record indicated that the nomination was approved by voice vote (p. 2381).

- In the Record, Knowland (p. 2047, 2380) and Kuchel (p. 2380) spoke in favor of the nomination. Long stated that he expected to vote for the nomination (p. 2046). Johnson of Colorado stated that he was a supporter of the Chief Justice (p. 2046). Welker (apparently referring to himself as "the Senator from Idaho") stated that he enjoys a "warm and close friendship with the nominee" (p. 2046). Morse spoke in favor (p. 2046). Hendrickson called the nominee "distinguished" (p. 2046).
- A search of LexisNexis Congressional Publications revealed four Judiciary Committee hearing documents. The first document (HRG-1954-SJS-0094, Feb. 2, 1954, 76 pp.) contained letters from the chair to the committee members regarding the Warren nomination indicating that a non-response would be interpreted as no objection. Documents were included from Knowland (p. 67) and Kuchel (p. 68), both of whom approved. In the second document (HRG-1954-SJS-0092, Feb. 19, 1954, 40 pp.), Knowland provided testimony in support (p. 67), Smithey read a letter from Hendrickson

in favor (p. 68-71), Welker thanked Hendrickson for the letter (p. 72), and Smithey read a letter from O'Conor in favor (p. 72-73). The third document (HRG-1954-SJS-0091, Feb. 20, 1954, 28 pp.) contained no testimony from any senators. The fourth document (HRG-1954-SJS-0089, Feb. 24, 1954, 132 pp.) contained a roll call to report the nomination favorably (p. 143-154): Butler, Dirksen, Hendrickson (twice), Kefauver, McCarran, McClellan, Watkins, Welker, Wiley voted in favor. Eastland and Johnston voted in opposition. Langer voted in favor but "with a lot of reservations", which Kilgore concurred with, but then Kilgore changed his vote to opposition. Kilgore noted that his opposition was based on the "press pressure methods of trying to get a decision out of this committee" (p. 147) and that he "still think[s] Earl Warren is an excellent Chief Justice" (p. 147) and that he would vote in favor of the confirmation of Earl Warren if that were the only issue (p. 153). The document noted that Jenner favored the nomination but did not speak (he may be the second Hendrickson listed). The official Judiciary Committee report was favorable, 12-3.

- The idiosyncratic nature of opposition to the Warren nomination in the Judiciary Committee vote cautioned against imputing preferences to senators.

<u>John Harlan II (3/16/1955)</u>

The recorded roll call vote was 71 in favor and 11 opposed (82 total, 14 missing).

- The Congressional Record or the roll call (p. 3011, 3036) indicated that Scott withheld his opposition vote in a pair with Morse (OR), who would have voted in favor. The Record also indicated that Kennedy (MA), McNamara (MI), Saltonstall (MA), Smith (NJ), and Symington (MO) would have voted in favor. The Record indicated only that

Bridges (NH), Carlson (KS), George (GA), Murray (MT), Schoeppel (KS), Sparkman (AL), and Young (ND) were absent.

- A search of the Congressional Record index for remarks in the Senate on the nomination revealed no preferences of uncoded senators (p. 2829ff, 3012ff, 3022ff, 3034ff).
- A search of LexisNexis Congressional Publications revealed four Judiciary Committee hearing documents. The first document (HRG-1954-SJS-0182, Feb. 4, 1954, 4 pp.) indicated only that blue slip senators Lehman and Irving had no objection. The second document (HRG-1954-SJS-0140, Nov. 19, 1954, 55 pp.) contained no information about uncoded senator preferences. The third document returned was a copy of the second document. The fourth document (HRG-1955-SJS-0001, Feb. 24, 25, 1955, 232 pp.) and fifth document (HRG-1955-SJS-0127, Feb. 23, 1955, 9 pp.) contained no information about uncoded senator preferences. None of the uncoded senators were on the Judiciary Committee.
- The unofficial sense of the Senate, therefore, was 77 in favor and 12 opposed, with 7 uncoded (Bridges, Carlson, George, Murray, Schoeppel, Sparkman, and Young).

<u>William Brennan (3/19/1957)</u>

The Congressional Record indicated that the nomination was approved by voice vote (p. 3946).

- In the Record, Smith (NJ) and Case (NJ) spoke in favor (p. 3936). McCarthy spoke against the nomination (p. 3937). Dirksen spoke in defense of Brennan (p. 3945-3946). Morse noted that every senator on his side of the aisle was prepared to vote for Brennan's nomination (p. 3946). Knowland spoke in favor (p. 3633).

- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1957-SJS-0039, Feb. 26, 27, 1957, 44 pp.). Smith (NJ) and Case (NJ) spoke in favor, and Joseph McCarthy (WI) spoke against. The nomination was reported favorably from committee without an indication of a vote tally (Rutkus and Bearden 2006).

Charles Whittaker (3/19/1957)

The Congressional Record indicated that the nomination was approved by voice vote (p. 3946).

- In the Record, Hennings spoke in favor of the nomination (p. 3929, 3946), and noted that Whittaker's nomination was approved unanimously by the ten present members of the Judiciary Committee out of the 15 total members (p. 3946). Carlson and Symington spoke in favor (p. 2909). Stennis spoke in favor (p. 3108).
- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1957-SJS-0038, Mar. 18, 1957, 38 pp.). Hennings and Symington spoke in favor. The nomination was reported favorably from committee without an indication of a vote tally (Rutkus and Bearden 2006).

Potter Stewart (5/5/1959)

The recorded roll call vote was 70 in favor and 17 opposed (87 total, 13 missing).

- The Congressional Record for the roll call (p. 7472) indicated that Allott (CO), Capehart (IN), Clark (PA), Curtis (NE), Javits (NY), Moss (UT), Murray (MT), Randolph (WV), Symington (MO), and Wiley (WI) would vote in favor, but only that Hickenlooper (IA) was absent.

- A search of the Congressional Record index for remarks, statements, or letters from Hickenlooper on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed two Judiciary Committee hearing documents. Hickenlooper did not testify or appear at the first (HRG-1959-SJS-0087, Apr. 9, 1959, 73 pp.) or the second (HRG-1959-SJS-0088, Apr. 14, 1959, 81 pp.). The Judiciary Committee favorably reported the nomination with three dissents, but Hickenlooper did not serve on the committee.
- The unofficial sense of the Senate, therefore, was 80 in favor and 17 opposed, with 1 uncoded (Hickenlooper).

Byron White (4/11/1962)

The Congressional Record indicated that the nomination was approved by voice vote (p. 6332).

- Carroll spoke favorably of the nomination, but noted that one or two Judiciary Committee members were absent at the Committee hearing earlier in the day (p. 6331). Kefauver and Russell spoke in favor (p. 6331). Mansfield offered congratulations after the voice vote (p. 6332).
- The nomination was reported favorably from committee without an indication of a vote tally (Rutkus and Bearden 2006).
- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1962-SJS-0001, Apr. 11, 1962, 30 pp.), noting that Allott and Carroll approved the nomination by blue slip.

Arthur Goldberg (9/25/1962)

The Congressional Record indicated that the nomination was approved by voice vote (p. 20667).

- Allott, Carroll, Cooper, Dirksen, Douglas, Humphrey, Javits, Kuchel, Mansfield, and Pell spoke in favor of the nomination (p. 20665, 20667). Douglas noted that he thought the Judiciary Committee report was unanimous (p. 20665). Thurmond opposed the nomination (p. 20665). Dodd, Morse, Prouty, Randolph, and Yarborough spoke in favor (p. 20666).
- The nomination was reported favorably from committee without an indication of a vote tally (Rutkus and Bearden 2006).
- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1962-SJS-0018, Sept. 11, 13, 1962, 108 pp.). Douglas testified in favor (p. 3). Dirkson and Douglas (p. 1) approved the nomination. Carroll (p. 69) and Pell (p. 15) endorsed the nomination. Long (p. 69) would vote in favor of the nomination. Keating favored the nomination (p. 71) as did Fong (p. 71).

Abe Fortas (8/11/1965)

The Congressional Record indicated that the nomination was approved by voice vote (p. 20048, 20054-20055, 20068, 20072-20073, 20079).

- Symington noted that the committee approved without a dissenting vote, and announced support for the nomination (p. 20054). Javits spoke favorably (p. 20068). Mansfield spoke in favor and noted that the Judiciary Committee report was unanimous (p. 20073). Williams of Delaware (p. 20072), Curtis (p. 20072), and Thurmond (20054-20055) opposed. Mansfield, Bass, and Tydings spoke in favor (p. 20079).

- The nomination was reported favorably from committee without an indication of a vote tally (Rutkus and Bearden 2006).
- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1965-SJS-0040, Aug. 5, 1965, 62 pp.), indicating that Gore (TN), Bass (TN), and Dodd (CT) testified in favor.

Thurgood Marshall (8/30/1967)

The recorded roll call vote was 69 in favor and 11 opposed (80 total, 20 missing).

- The Congressional Record for the roll call (p. 24656) indicated that present Mansfield withheld his vote in favor because of a pair with absent Stennis (MI), who would have voted against. The Record also indicated that Bible (NV), Gruening (AL), Harris (OK), Hartke (IN), McCarthy (MN), McGovern (SD), Metcalf (MT), Montoya (NM), Murphy (CA), Muskie (ME), and Nelson (WI) and would have voted in favor, while McClellan (AR), Russell (GA), and Smathers (FL) would have voted against. The Record only indicated that Byrd (VA), Fannin (AZ), Hickelooper (IA), and Jordan (NC) were absent.
- A search of the Congressional Record index for remarks, statements, or letters from Byrd of Virginia, Fannin, Hickenlooper, and Jordan on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1967-SJS-0014, July 13, 14, 18, 19, 24, 1967, 202 pp.). None of the four uncoded senators were on the Judiciary Committee or presented testimony.
- The unofficial sense of the Senate, therefore, was 81 in favor and 15 opposed, with 4 uncoded (Byrd of Virginia, Fannin, Hickenlooper, and Jordan).

Abe Fortas (10/1/1968, Chief Justice cloture vote)

The recorded roll call vote was 45 in favor and 43 opposed (88 total, 12 missing).

- The Congressional Record for the roll call (p. 28933) indicated that present Gruening withheld his vote against in a pair with absent Church (ID) and Morse (OR), both of whom would have voted in favor. The Record also indicated that senators Aiken (VT), Bible (NV), Ellender (LA), and Smith (ME) would have voted against. The Record indicated only that Bartlett (AK), Long (MO), McGovern (SD), Morton (KY), and Smathers (FL) were absent.
- A search of the Congressional Record index for remarks, statements, or letters from Bartlett, Edward V. Long, McGovern, and Morton on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed eight Judiciary Committee hearing documents. The first (HRG-1968-SJS-0070, June 27, 1968, 92 pp.), the second (HRG-1968-SJS-0017, July 11, 12, 16-20, 22, 23, 1968, 1292 pp.), the third (HRG-1968-SJS-0064, July 24, 1968, 63 pp.), the fourth (HRG-1968-SJS-0023, Sept. 13, 16, 1968, 124 pp.), the fifth (HRG-1968-SJS-0071, Sept. 10, 1968, 111 pp.), the sixth (HRG-1968-SJS-0065, Sept. 11, 1968, 30 pp.), and the seventh (ID: HRG-1968-SJS-0085, Sept. 13, 1968, 11 pp.) contained no information on the preferences of the uncoded senators. In the eighth document (HRG-1968-SJS-0084, Sept. 17, 1968, 24 pp.), Smathers moved that the Fortas nomination be approved and he voted in favor (p. 14), but Long was absent from the meeting (p. 14). Long and Smathers were the only two uncoded senators on the Judiciary Committee.
- The unofficial sense of the Senate, therefore, was 48 in favor and 48 opposed, with 4 uncoded (Bartlett, Edward Long, McGovern, and Morton).

Warren Burger (6/9/1969, Chief Justice)

The recorded roll call vote was 74 in favor and 3 opposed (77 total, 23 missing).

- The Congressional Record for the roll call (p. 15195) indicated that Fulbright voted present "in view of the circumstances", and that senators Church (ID), Cook (KY), Cranston (CA), Fong (HI), Goldwater (AZ), Gravel (AL), Hollings (SC), Hughes (IA), Javits (NY), Mansfield (MT), McIntyre (NH), Moss (UT), Murphy (CA), Pastore (RI), Pell (RI), Percy (IL), Prouty (VT), and Ribicoff (CT) would have voted in favor. The Record only indicated that Gore (TN), Hart (MI), Inouye (HI), and Metcalf (MT) were absent.
- A search of the Congressional Record index for remarks, statements, or letters from Gore, Hart, Inouye, and Metcalf on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed two Judiciary Committee hearing documents. In the first (HRG-1969-SJS-0136, June 3, 1969, 2 pp.) the Burger nomination was reported favorably to the full Senate by a unanimous voice vote, but Judiciary Committee Hart was not in attendance at that meeting. The second (HRG-1969-SJS-0039, June 3, 1969, 120 pp.) contained no information on the preferences of uncoded senators. Gore, Metcalf, and Inouye were not members of the committee and did not present testimony.
- The unofficial sense of the Senate, therefore, was 92 in favor and 3 opposed, with 1 present and 4 uncoded (Gore, Hart, Inouye, and Metcalf).

Clement Haynsworth (11/21/1969)

The recorded roll call vote was 45 in favor and 55 opposed (100 total, 0 missing).

Harrold Carswell (4/8/1970)

The recorded roll call vote was 45 in favor and 51 opposed (96 total, 4 missing).

- The Congressional Record for the roll call (p. 10769) indicated that Bennett (UT) and Mundt (SD) would have voted in favor, and that Pell (RI) would have voted against. The Record only indicated that Anderson (NM) was absent.
- A search of the Congressional Record index for remarks, statements, or letters from Anderson on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed two Judiciary Committee hearings. Neither the first (HRG-1970-SJS-0062, Jan. 27-29, Feb. 2, 3, 1970, 470 pp.) nor the second (HRG-1970-SJS-0121, Feb. 3, 1970, 69 pp.) contained information on Anderson's preferences. The Judiciary Committee reported the nomination with four dissenting votes of unknown origin (Rutkus and Bearden 2006), but Anderson was not on the Judiciary Committee and did not present testimony.
- The unofficial sense of the Senate, therefore, was 47 in favor and 52 opposed, with 1 uncoded (Anderson).

Harry Blackmun (5/12/1970)

The recorded roll call vote was 94 in favor and 0 opposed (94 total, 6 missing).

- The Congressional Record for the roll call (p. 15117) indicated that Bayh (IN), Goldwater (AZ), Gore (TN), Mundt (SD), Russell (GA), and Tower (TX) would have voted in favor.
- The unofficial sense of the Senate, therefore, was 100 in favor and 0 opposed.

Lewis Powell (12/6/1971)

The recorded roll call vote was 89 in favor and 1 opposed (90 total, 10 missing).

- The Congressional Record for the roll call (p. 44857) indicated that Bennett (UT), Dominick (CO), Gambrell (GA), Humphrey (MN), Miller (IA), Moss (UT), and Percy (IL) would have voted in favor. The Record indicated only that Inouye (HI), Mundt (SD), and Stafford (VT) were absent.
- A search of the Congressional Record index for remarks, statements, or letters from Inouye, Mundt, and Stafford on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1971-SJS-0061, Nov. 3, 4, 8-10, 1971, 496 pp.). There were no dissents were from the Judiciary Committee, and Inouye, Mundt, and Stafford were not on the Judiciary Committee and did not present testimony.
- The unofficial sense of the Senate, therefore, was 96 in favor and 1 opposed, with 3 uncoded (Inouye, Mundt, and Stafford).

William Rehnquist (12/10/1971)

The recorded roll call vote was 68 in favor and 26 opposed (94 total, 6 missing).

- The Congressional Record for the roll call (p. 46197) indicated that present Mansfield would have voted against, but had a pair with absent Percy (IL), who would have voted in favor. The Record also noted that absent Smith (ME) would have voted in favor, but only that Anderson (NM), Bennett (UT), and Mundt (SD) were absent.
- A search of the Congressional Record index for remarks, statements, or letters from Anderson, Bennett, and Mundt on the nomination revealed no entries for Anderson and

Mundt, but returned an entry (p. 46173) in which Fannin entered into the Record a statement by Bennett in favor of the nomination.

- A search of LexisNexis Congressional Publications revealed only a Judiciary Committee hearing (HRG-1971-SJS-0061, Nov. 3, 4, 8-10, 1971, 496 pp.). The Judiciary Committee voted 12-4 in favor of the nomination (Rutkus and Bearden 2006), with the four dissents from Bayh (IN), Hart (MI), Kennedy (MA), and Tunney (CA). Anderson and Mundt were not on the Judiciary Committee and did not present testimony.
- The unofficial sense of the Senate, therefore, was 72 in favor and 27 opposed, with 2 uncoded (Anderson and Mundt).

John Paul Stevens (12/17/1975)

The recorded roll call vote was 98 in favor and 0 opposed (98 total, 2 missing).

- The Congressional Record for the roll call (p. 41128) indicated only that Allen (AL) and Bayh (IN) were absent. Bayh supported the nomination elsewhere in the Record (p. 39883).
- A search of the Congressional Record index for remarks, statements, or letters from Allen on the nomination revealed no entries.
- A search of LexisNexis Congressional Publications revealed two Judiciary Committee hearings (HRG-1975-SJS-0013, Dec. 8-10, 1975, 232 pp.) and (HRG-1975-SJS-0085, Dec. 11, 1975, 6 pp.). There were no dissents from the Judiciary Committee's favorable report (Rutkus and Bearden 2006), and Allen did not serve on the committee or present testimony.

- The unofficial sense of the Senate, therefore, was 99 in favor and 0 opposed, with 1 uncoded (James Browning Allen of Alabama).

Sandra Day O'Connor (9/21/1981)

The recorded roll call vote was 99 in favor and 0 opposed (99 total, 1 missing).

- The Congressional Record (p. 21375) for the roll call indicated that Baucus (MT) would have voted in favor.
- The unofficial sense of the Senate, therefore, was 100 in favor and 0 opposed.

William Rehnquist (9/17/1986, Chief Justice)

The recorded roll call vote was 65 in favor and 33 opposed (98 total, 2 missing).

- The Congressional Record for the roll call (p. 23803) indicated that Garn would have voted in favor, but only that Goldwater was absent.
- However, at the Judiciary Committee hearings, Goldwater made an opening statement in favor of Rehnquist's elevation to the chief justiceship (p. 8).
- The unofficial sense of the Senate, therefore, was 67 in favor and 33 opposed.

Antonin Scalia (9/17/1986)

The recorded roll call vote was 98 in favor and 0 opposed (98 total, 2 missing).

- The Congressional Record for the roll call (p. 23813) contained a misprint:

  > Mr. Simpson: I announce that the Senator from Utah [Mr. Garn] and the Senator from Arizona [Mr. Goldwater] are necessarily absent. I further announce that, if present and voting, the Senator from Utah [Mr. Garn] would each vote "yea."

- Goldwater was not coded as supporting Scalia on the basis of this Record entry (with an ambiguous "each") because, in the Record entry for the Rehnquist nomination on the same day, Simpson only indicated the preference of absent Garn.
- A search of the Congressional Record index for remarks, statements, or letters from Goldwater on the nomination revealed no entries. A Lexis-Nexis search of the Daily Congressional Record & Rules restricted by speaker on the floor to Goldwater and to the search term "Scalia" revealed two documents (132 Cong Rec S 12629, 132 Cong Rec S 12378), neither of which provided information about Goldwater's preference for the Scalia nomination.
- Goldwater was not on the Judiciary Committee and did not present testimony.
- The unofficial sense of the Senate, therefore, was 99 in favor and 0 opposed, with 1 uncoded (Goldwater).

Robert Bork (10/23/1987)

The recorded roll call vote was 42 in favor and 58 opposed (100 total, 0 missing).

Anthony Kennedy (2/3/1988)

The recorded roll call vote was 97 in favor and 0 opposed (100 total, 3 missing).

- The Congressional Record for the roll call (p. 739) indicated that Biden (DE) and Gore (TN) would have voted in favor, but only that Simon (IL) was absent.
- However, Simon did provide testimony to the Judiciary Committee that was favorable to Anthony Kennedy, although it stopped short of an endorsement:

> I cannot agree with all of Judge Kennedy's opinions. In a few cases -- such as his expansive discussion of substantive due process in the case of Beller v.

> Middendorf -- he has seemed to stray somewhat from the principle of judicial restraint which he usually follows. But even in that case he reached the correct result, as later confirmed by the Supreme Court's decision in Bowers v. Hardwick. On the whole, his judicial record is exemplary and sound. Any attempt to suggest that Judge Kennedy is not within the so-called "mainstream" is implausible. Even those of his opinions which hay be criticized by hostile witnesses -- such as his comparable worth opinion and his decision upholding the Navy's right to discharge homosexuals in the Beller case -- are consistent with results reached by numerous other federal appeals courts. The test for me, though, is not whether he is within some selective notion of the "mainstream"; it is whether he is faithful to the constitution and the limits of the judicial role. From what I've seen and read so far, Judge Kennedy should pass that more important test. I hope his testimony and his answers to my colleagues' questions will reenforce [sic] that belief.

- The quote was considered favorable enough to warrant coding Simon in favor of the nomination.
- The unofficial sense of the Senate, therefore, was 100 in favor and 0 opposed.

David Souter (10/2/1990)

The recorded roll call vote was 90 in favor and 9 opposed (99 total, 1 missing).

- The Congressional Record (26996-26997) for the roll call only indicated that Wilson (CA) was absent.
- Wilson was not on the Judiciary Committee at the time and did not testify at the committee hearings.
- However, according to the New York Times, "Senator Pete Wilson, Republican of California, did not vote [on the Souter nomination]. Mr. Wilson was in California campaigning for governor today, but he has endorsed the nomination."[65]
- The unofficial sense of the Senate, therefore, was 91 in favor and 9 opposed.

[65] Source: Richard L. Berke. 1990. "Senate Confirms Souter, 90 to 9, As Supreme Court's 105th Justice." *The New York Times.* October 3.

Clarence Thomas (10/15/1991)

The recorded roll call vote was 52 in favor and 48 opposed (100 total, 0 missing).

Ruth Bader Ginsburg (8/3/1993)

The recorded roll call vote was 96 in favor and 3 opposed (99 total, 1 missing).

- The Congressional Record (p. 18414) indicated that Riegle (MI) would have voted in favor.
- The unofficial sense of the Senate, therefore, was 97 in favor and 3 opposed.

Stephen Breyer (7/29/1994)

The recorded roll call vote was 87 in favor and 9 opposed (96 total, 4 missing).

- The Congressional Record for the roll call (p. 18704) indicated that Graham (FL) and Wallop (WY) would have voted in favor, but contained no information on the preferences of Durenberger (MN) or Pell (RI). However, the Record elsewhere contained a statement by Durenberger in favor of the nomination (p. 18571) and a statement by Pell in favor of the nomination (p. 18572).
- The unofficial sense of the Senate, therefore, was 91 in favor and 9 opposed.

John Roberts (9/29/2005, Chief Justice)

The recorded roll call vote was 78 in favor and 22 opposed (100 total, 0 missing).

Samuel Alito (1/31/2006)

The recorded roll call vote was 58 in favor and 42 opposed (100 total, 0 missing).

APPENDIX B

Variable	Mean	Deviation	Min	Max
Senator opposition	0.22	0.41	0	1
Unfavorable seat change	-0.09	1.09	-3.11	2.89
Unfavorable median change	-0.01	0.18	-0.72	0.72
Increased ideological distance	1.16	0.79	0	4.05
Lack of nominee qualifications	-0.76	0.27	-1.00	-0.11
Presidential disapproval	0.36	0.11	0.15	0.54
Different party	0.51	0.50	0	1

Note: Data were drawn from the nineteen Supreme Court nominations between the 1968 Fortas chief justice nomination and the 2006 Alito associate justice nomination. Senator opposition values were based on the 1883 observations for which senator preferences were obtained; all other values were based on the 1900 observations for senators serving at the time of the confirmation or cloture roll call vote.

CASES CITED

Adkins v. Children's Hospital, 261 US 525 (1923)

Ashcroft v. Free Speech Coalition, 535 US 234 (2002)

Baker v. Carr, 369 US 186 (1962)

Bolling v. Sharpe, 347 US 497 (1954)

Bounds v. Smith, 430 US 817 (1977)

Brown v. Board of Education (I) 347 US 483 (1954)

Bush v. Gore, 531 US 98 (2000)

Chisholm v. Georgia, 2 US 419 (1793)

Church of the Lukumi Babalu Aye v. Hialeah, 508 US 520 (1993)

Cooper v. Aaron, 358 US 1 (1958)

Dickerson v. United States, 530 US 428 (2000)

District of Columbia v. Heller, 554 US ___ (2008)

Doe v. Bolton, 410 US 179 (1973)

Dred Scott v. Sandford, 60 US 393 (1857)

Elk Grove Unified School District v. Newdow, 542 US 1 (2004)

Engel v. Vitale, 370 US 421 (1962)

Furman v. Georgia, 408 US 238 (1972)

Gonzales v. Carhart, 550 US ___ (2007)

Griswold v. Connecticut, 381 US 479 (1965)

Hammer v. Dagenhart, 247 US 251 (1918)

Lankford v. Idaho, 500 U.S. 110 (1991)

Ledbetter v. Goodyear Tire and Rubber Company, 550 US ___ (2007)

Mapp v. Ohio, 367 US 643 (1961)

Marbury v. Madison, 5 US 137 (1803)

Michigan Department of State Police v. Sitz, 496 US 444 (1990)

Miranda v. Arizona, 384 US 436 (1966)

National Socialist Party v. Village of Skokie, 434 US 1327 (1977)

Oregon v. Mitchell, 400 US 112 (1970)

Parents Involved v. Seattle School District No. 1, ___ US ___ (2007)

Pollock v. Farmers' Loan & Trust Co., 157 US 429 (1895)

Roe v. Wade, 410 US 113 (1973)

Stanley v. Georgia, 394 US 557 (1969)

Stenberg v. Carhart, 530 US 914 (2000)

Terminiello v. Chicago, 337 US 1 (1949)

Texas v. Johnson, 491 US 397 (1989)

The Civil Rights Cases, 109 US 3 (1883)

The Slaughterhouse Cases, 83 US 36 (1873)

United States v. Cruikshank, 92 US 542 (1875)

BIBLIOGRAPHY

Associated Press. 2005. “Senators Set for Fight over John Roberts’ Nomination to Supreme Court”. September 6.

Bailey, Michael A., and Kelly H. Change. 2001. “Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation.” *Journal of Law, Economics, & Organization* 17: 477-506.

Bailey, Michael A., and Forrest Maltzman. 2009. *The Constrained Court*. Manuscript.

Baker, Peter. 2005. “Supreme Court Justice O’Connor Resigns.” *Washington Post*. Page A01, July 2.

Beckstrom, Darryn Cathryn. 2004. “Deciding When to Step Down: Revisiting Political retirements on the U.S. Supreme Court, 1954-1994.” Prepared for delivery at the 2004 Annual Meeting of the American Political Science Association, September 2-5.

Bell, Lauren Cohen. 2002. “Senatorial Discourtesy: The Senate’s Use of Delay to Shape the Federal Judiciary.” *Political Research Quarterly* 55: 589-607.

Bendavid, Naftali. 2009. “Sotomayor Faulted Over Missing Memo.” *The Wall Street Journal*, June 6.

Berry, William D., Evan J. Ringquist, Richard C. Fording, and Russell L. Hanson. 1998. “Measuring Citizen and Government Ideology in American States.” *American Journal of Political Science* 42: 327-348.

Binder, Sarah, and Forrest Maltzman. 2002. “Senatorial Delay in Confirming Federal Judges, 1947-1998.” *American Journal of Political Science* 46: 190-199.

Biskupic, Joan. 1994. “Thomas Says, ‘I Am Not an Uncle Tom’ – Supreme Court: The Justice Holds Rare Meeting with an Invited Group of African Americans. He Reportedly Tells Foes to ‘Get over It’.” *The Los Angeles Times*, October 28.

Biswas, Abhijit, and Edward A. Blair. 1991. “Contextual Effects of Reference Prices in Retail Advertisements.” Journal of Marketing 55: 1-12.

Blossfeld, Hans-Peter, Katrin Golsch, and Götz Rohwer. 2007. *Techniques of Event History Modeling using Stata: New Approaches to Causal Analysis*. Mahwah, NJ: Erlbaum.

Bonneau, Chris W., Thomas H. Hammond, Forrest Maltzman, and Paul J. Wahlbeck. 2007. "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51: 890-905.

Box-Steffensmeier, Janet M., and Brad Jones. 1997. "Time is of the Essence: Event History Models in Political Science." *American Journal of Political Science* 41: 1414-1461.

Breisch, Richard, Lakshman Krishnamurthy, Tridib Mazumdar, and S. P. Raj. 1997. "A Comparative Analysis of Alternative Reference Price Models." *Journal of Consumer Research* 24: 202-214.

Brennan Center at the New York University School of Law. 2006. "Three Nominations Reveal Contrasting Influence of Interest Groups in High Court Nomination." January 31. Press release.

Brenner, Saul. 1999. "The Myth That Justices Strategically Retire." *The Social Science Journal* 36: 431-439.

Caldeira, Gregory A., and Charles E. Smith, Jr. 1996. "Campaigning for the Supreme Court: The Dynamics of Public Opinion on the Thomas Nomination." *Journal of Politics* 58: 655-681.

Caldeira, Gregory A., and John R. Wright. 1998. "Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate." *American Journal of Political Science* 42: 499-523.

Caldeira, Gregory A., John R. Wright, and Christopher J.W. Zorn. 1999. "Sophisticated Voting and Gate-keeping in the Supreme Court." *Journal of Law, Economics, and Organization* 15: 549-572.

Cameron, Charles M., Albert D. Cover, and Jeffrey A. Segal. 1990. "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model." *American Political Science Review* 84: 525-534.

Cameron, Charles M., and Jee-Kwang Park. 2009. "How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006." Working Paper. Retrieved June 26, 2009, from: http://www.princeton.edu/~ccameron/HowWillTheyVote.pdf.

Cameron, Charles M., Jee-Kwang Park, and Deborah Beim. 2008-2009. "Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice." *Minnesota Law Review* 93: 1820-1870.

Canon, David T., Garrison Nelson, and Charles Stewart III. 2002. *Committees in the U.S. Congress, 1789-1946*.Washington DC: CQ Press.

Caplin, Andrew, and Barry Nalebuff. 1991. “Aggregation and Social Choice: A Mean Voter Theorem.” *Econometrica* 59: 1-23.

Carrubba, Cliff, Barry Friedman, Andrew D. Martin, and Georg Vanberg. 2007. “Does the Median Justice Control the Content of Supreme Court Opinions?” Presented Second Annual Conference on Empirical Legal Studies, New York, November 10.

Chappell, Jr., Henry W., Rob Roy McGregor, and Todd Vermilyea. 2004. “Majority Rule, Consensus Building, and the Power of the Chairman: Arthur Burns and the FOMC.” *Journal of Money, Credit, and Banking* 36: 407-422.

Chatterjee, Samprit, Ali S. Hadi, and Bertram Price. 2000. *Regression Analysis by Example*. Third Edition. New York: John Wiley & Sons.

Cohen, Adam. 2006. “Editorial Observer; Anthony Kennedy Is Ready for His Close-Up.” *The New York Times*, April 3.

Congleton, Roger D. 2002. “The Median-Voter Model.” Contribution prepared for *The Encyclopedia of Public Choice*. Retrieved June 26, 2009, from: http://rdc1.net/forthcoming/medianvt.pdf.

Cowan, Gloria, Miriam Resendez, Elizabeth Marshall, and Ryan Quist. 2002. “Hate Speech and Constitutional Protection: Priming Values of Equality and Freedom.” *Journal of Social Issues* 58: 247-263.

Dershowitz, Alan M. 2001. *Supreme Injustice: How the High Court Hijacked Election 2000*. New York: Oxford University Press.

Dewar, Helen. 1990. “Thomas Confirmed by Senate; Two Fault Nominee for Appeals Court.” *The Washington Post*, March 7.

Dinh, Viet. 2005. “Justice O’Connor's Indelible Stamp.” *The Washington Post*, July 3.

Dionne, Jr., E.J. 2001. “Judicial Activism Rears it’s [sic] Head Again.” Retrieved June 17, 2009, from the Brookings website: http://www.brookings.edu/opinions/2001/0223governance_jr.aspx.

Downs, Anthony. 1957. *An Economic Theory of Democracy*. New York: Harper Collins.

Eibach, Richard P., and Joyce Ehrlinger. 2006. “‘Keep Your Eyes on the Prize’: Reference Points and Group Differences in Assessing Progress towards Equality.” *Personality and Social Psychology Bulletin* 32: 66-77.

Eisenhower, Dwight D. 1963. *The White House Years: Mandate for Change, 1953-1956*. Doubleday and Co: New York.

Eisler, Kim. 1997. “Eisenhower’s ‘Mistakes’.” Letter to the Editor. *The New York Times*. July 28.

Epstein, Lee, René Lindstädt, Jeffrey A. Segal, and Chad Westerland. 2006. "The Changing Dynamics of Senate Voting on Supreme Court Nominees." *Journal of Politics* 68: 296-307.

Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2007a. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23: 303-325.

Epstein, Lee, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal. 2007b. "Ideological Drift among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review* 101: 1483-1542.

Epstein, Lee, and Carol Mershon. 1996. "Measuring Political Preferences." *American Journal of Political Science* 40: 261-294.

Epstein, Lee, and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.

Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 2007c. The Supreme Court Compendium: Data, Decisions and Developments. Fourth edition. Washington: Congressional Quarterly Press.

Erickson, Gary M., and Johny K. Johansson. 1985. "The Role of Price in Multi-Attribute Product Evaluations." *Journal of Consumer Research* 12: 195-199.

Erikson, Robert S., Gerald C. Wright and John P. McIver. 1993. *Statehouse Democracy: Public Opinion and Policy in the American States*. New York: Cambridge.

Erikson, Robert S., Gerald C. Wright and John P. McIver. 2006. Public Opinion in the States: A Quarter Century of Change and Stability. In *Public Opinion in State Politics*, ed. Jeffrey E. Cohen. Stanford: Stanford University Press, pp. 229–253.

Fiegenbaum, Avi, and Howard Thomas. 1988. "Attitudes towards Risk and the Risk-Return Paradox: Prospect Theory Explanations." *Academy of Management Journal* 31: 85-106.

Garbus, Martin. 2003. *Courting Disaster: The Supreme Court and the Unmaking of American Law*. New York: Times Books.

Garrett, R. Sam, and Denis Steven Rutkus. 2005. "Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2005." CRS Report for Congress. Congressional Research Service: The Library of Congress.

Ginsburg, Ruth Bader. 1985. "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade." *North Carolina Law Review* 63: 375-386.

Goldman, Roger, and David Gallen. 1992. *Thurgood Marshall: Justice for All*. New York: Carroll & Graf.

Golub, Jonathan. 2008. “Survival Analysis.” In *The Oxford Handbook of Political Methodology*, ed. Janet M. Box-Steffensmeier, Henry E. Brady, and David Collier. Oxford: Oxford University Press. pp. 530-546.

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

Greenburg, Jan Crawford. 2007b. “Clarence Thomas: A Silent Justice Speaks Out.” ABC News website. Retrieved June 26, 2009, from: http://abcnews.go.com/TheLaw/story?id=3668863&page=1.

Greenburg, Jan Crawford. 2008. “Legacy of a Supreme Court Nomination.” ABC News, November 4. Retrieved September 30, 2009, from http://abcnews.go.com/m/screen?id=6127964&pid=77.

Greenhouse, Linda. 2005. *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey*. New York: Times Books, H. Holt and Co.

Greenhouse, Linda. 2007. “Change and Continuity on the Supreme Court.” *Washington University Journal of Law & Policy* 25:39-59.

Griffiths, William E., R. Carter Hill, and George G. Judge. 1993. *Learning and Practicing Econometrics*. New York: Wiley and Sons.

Hamilton, Lawrence D. 1992. *Regression with Graphics: A Second Course in Applied Statistics*. Belmont, CA: Duxbury Press.

Hardie, Bruce G.S., Eric J. Johnson and Peter S. Fader. 1993. “Modeling Loss Aversion and Reference Dependence Effects on Brand Choice.” *Marketing Science* 12: 378-394.

Helson, Henry. 1964. *Adaptation-Level Theory*. New York: Harper, Row.

Holland, Gina. 2006. “O’Connor, Alito Differ in Style, Views.” The Associated Press. January 6.

Johnson, Carrie. 2009. “Ginsburg’s Illness Puts Focus on Choices Ahead for Obama.” *The Washington Post*, February 7. Retrieved September 30, 2009, from: http://www.washingtonpost.com/wp-dyn/content/article/2009/02/06/AR2009020603726_pf.html.

Johnson, Timothy R., and Jason M. Roberts. 2004. “Presidential Capital and the Supreme Court Confirmation Process.” *The Journal of Politics* 66: 663-683.

Johnson, Timothy R., and Jason M. Roberts. 2005. “Pivotal Politics, Presidential Capital, and Supreme Court Nominations.” Congress and the Presidency 32: 31-48.

Kahneman, Daniel, and Amos Tversky. 1979. “Prospect Theory: An Analysis of Decision under Risk.” *Econometrica* 47: 263-292.

Kastellec, Jonathan, Jeffrey Lax, and Justin Phillips. 2008. "Public Opinion and Senate Confirmation of Supreme Court Nominees." Paper presented at the annual meeting of the American Political Science Association, Hynes Convention Center, Boston, MA, August 28.

Katz, Daniel Martin. 2006. "Institutional Rules, Strategic Behavior and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on *Dickerson* v. *United States*." *Journal of Law and Politics* 22: 303-339.

Kennedy, Peter. 2003. *A Guide to Econometrics*. Fifth Edition. Cambridge, MA: The MIT Press.

Kenrick, Douglas T., and Sara E. Gutierres. 1980. "Contrast Effects and Judgments of Physical Attractiveness: When Beauty Becomes a Social Problem." *Journal of Personality and Social Psychology* 38: 131-140.

King, Chad M. 2007. "Strategic Selection of Legal Instruments on the U.S. Supreme Court." *American Politics Research* 35: 621-642.

King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44: 341-355.

Krehbiel, Keith. 2007. "Supreme Court Appointments as a Move-The-Median Game." *American Journal of Political Science* 51: 231-240.

Krutz, Glen S., Richard Fleisher, and Jon R. Bond. 1998. "From Abe Fortas to Zöe Baird: Why Some Presidential Nominations Fail in the Senate." *American Political Science Review* 92: 871-881.

Lane, Charles. 2005. "Alito Leans Right, Where O'Connor Swung Left." *The Washington Post*. November 1.

Lanoue, David J. 1994. "Retrospective and Prospective Voting in Presidential-Year Elections." *Political Research Quarterly* 47: 193-205.

Lawrence, Michael Anthony. 2007. "Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses." *Missouri Law Review* 72: 1-72.

Lax, Jeffrey, and Charles M. Cameron. 2005. "Beyond the Median Voter: Bargaining and Law in the Supreme Court." Paper presented at the annual meeting of the Midwest Political Science Association. Palmer House Hilton, Chicago, IL, April 7.

Lazarus, Edward. 1998. *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. New York: Times Books.

Leahy, Patrick. 2006. "Statement of on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States." January 30. Retrieved September 29, 2008, from: http://leahy.senate.gov/press/200601/013006b.html.

Lemieux, Peter H., and Charles H. Stewart III. 1990. “Senate Confirmation of Supreme Court Nominations from Washington to Reagan.” Hoover Institution Working Paper Series, Domestic Studies Program. Stanford, CA.

Lemieux, Peter H., and Charles H. Stewart III. 1991. “A Theory of Supreme Court Nominations.” Unpublished manuscript.

Lessig, Lawrence. 1995. “Understanding Changed Readings: Fidelity and Theory.” *Stanford Law Review* 47: 395-472.

Levin, Mark R. 2005. *Men in Black: How the Supreme Court is Destroying America*. Washington DC: Regnery Publishing Inc.

Lewis, Neil A. 1991. “Marshall Urges Bush to Pick ‘the Best’.” *The New York Times*, June 29.

Long, J. Scott, and Jeremy Freese. 2006. *Regression Models for Categorical Dependent Variables Using Stata*. Second Edition. College Station, TX: Stata Press.

Ma, Barry K., and Jeffrey H. Weiss. 1993. “On Some Generalizations of a Mean Voter Theorem.” *Economics Letters* 42: 185-188.

Marlantes, Liz. 2007. “Justice Thomas Breaks Silence on Bitter Confirmation Hearings.” ABC News website. Retrieved June 26, 2009, from: http://abcnews.go.com/TheLaw/story?id=3668532&page=1.

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

Martin, Andrew D., and Kevin M. Quinn. 2002b. “Patterns of Supreme Court Decision-Making, 1937-2000.” Working Paper no. 26, Center for Statistics and the Social Sciences. Retrieved December 29, 2009, from: http://www.csss.washington.edu/Papers/wp26.pdf.

Martin, Andrew D., Kevin M. Quinn, and Lee Epstein. 2005. “The Median Justice on the U.S. Supreme Court.” *North Carolina Law Review* 83: 1275-1320.

Martinek, Wendy L., Mark Kemper, and Steven R. Van Winkle. 2002. “To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998.” *Journal of Politics* 64: 337-361.

Massaro, John. 1990. *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations*. Albany: State University of New York Press.

Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven: Yale University.

McCarty, Nolan, Keith Poole, and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches*. Cambridge: MIT Press.

McCarty, Nolan, and Rose Razaghian. 1999. "Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996." *American Journal of Political Science* 43: 1122-1143.

Meinke, Scott R., and Kevin M. Scott. 2007. "Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices." *Law & Society Review* 41: 909-938.

Mikulski, Barbara A. 2006. "Mikulski to Oppose Alito Confirmation." Press release. January 26. Retrieved June 26, 2009, from: http://mikulski.senate.gov/record.cfm?id=250756.

Moraski, Bryon J., and Charles R. Shipan. 1999. "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices." *American Journal of Political Science* 43: 1069-1095.

National Women's Law Center. 2005. "Judge Alito's Record Highly Troubling on Women's Rights." News release. October 31. Retrieved September 29, 2008, from: http://www.nwlc.org/details.cfm?id=2479&section=newsroom.

Nelson, Garrison, and Clark H. Bensen. 1993. *Committees in the U.S. Congress, 1947-1992*. Washington DC: Congressional Quarterly.

Nelson, Kjersten R., and Eve M. Ringsmuth. 2009. "Departures from the Court: The Political Landscape and Institutional Constraints." *American Politics Research* 37: 486-507.

Nie, Norman H., and Kristi Andersen. 1974. "Mass Belief Systems Revisited: Political Change and Attitude Structure." *Journal of Politics* 36: 540-591.

Nixon, David C. 2001. "Appointment Delay for Vacancies on the Federal Communications Commission." *Public Administration Review* 61: 483-492.

Nixon, David C., and Roisin M. Bentley. 2006. "Appointment Delay and the Policy Environment of the National Transportation Safety Board." *Administration & Society* 37: 679-694.

Nokken, Timothy P., and Brian R. Sala. 2000. "Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies." *Journal of Theoretical Politics* 12: 91-112.

O'Connor, Sandra Day. 2005. "Letter of Resignation." July 1. Retrieved on March 4, 2009, from: http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf.

Overby, L. Marvin, Beth M. Henschen, Michael H. Walsh, and Julie Strauss. 1992. "Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas." *American Political Science Review* 86: 997-1003.

Peretti, Terri, and Alan Rozzi. 2008. "Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?" Retrieved June 16, 2009, from the SSRN website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307845.

Perry, H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University Press.

Perry, Jessica, and Christopher Zorn. 2008. "The Politics of Judicial Departures in the U.S. Federal Courts." Version 2.2. Retrieved July 5, 2009, from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120773.

Primo, David M., Sarah A. Binder, and Forrest Maltzman. 2008. "Who Consents? Competing Pivots in Federal Judicial Selection." *American Journal of Political Science* 52: 471-489.

Primus, Richard A. 2004. "Bolling Alone." *Columbia Law Review* 104: 975-1041.

Resnik, Judith. 2001. Testimony to the United States Senate Committee on the Judiciary's Subcommittee on the Courts in the Hearings on the Senate's Role in the Confirmation Process. September 4.

Rohde, David W., and Kenneth A. Shepsle. 2007. "Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court." *Journal of Politics* 69: 664-677.

Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: W. H. Freeman.

Rosenthal, Andrew. 1991. "Marshall Retires from High Court; Blow to Liberals." *The New York Times*, June 28.

Ruckman Jr., P.S. 1993. "The Supreme Court, Critical Nominations, and the Senate Confirmation Process." *Journal of Politics* 55: 793-805.

Russell, James A., and U.F. Lanius. 1984. "Adaptation Level and the Affective Appraisal of Environments." *Journal of Environmental Psychology* 4: 119-135.

Rutkus, Denis Steven. 2005. "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate." CRS Report for Congress. Congressional Research Service: The Library of Congress.

Rutkus, Denis Steven, and Maureen Bearden. 2006. "Supreme Court Nominations, 1789 - 2005: Actions by the Senate, the Judiciary Committee, and the President." CRS Report for Congress. Congressional Research Service: The Library of Congress.

Scalia, Antonin. 2005. "Constitutional Interpretation the Old Fashioned Way." Speech at the Woodrow Wilson International Center for Scholars in Washington, D.C., March 14. Retrieved June 26, 2009, from the Center for Individual Freedom website: http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm.

Segal, Jeffrey A. 1987. "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics." *Journal of Politics* 49: 998-1015.

Segal, Jeffrey A., Charles M. Cameron, and Albert D. Cover. 1992. "A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations." *American Journal of Political Science* 36: 96-121.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557-565.

Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.

Segal, Jeffrey A., and Harold J. Spaeth. 1996. "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices." *American Journal of Political Science* 40: 971-1003.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.

Segal, Jeffrey A., Richard Timpone, and Robert Howard. 2000. "Buyer Beware: Presidential Success through Supreme Court Appointments." *Political Research Quarterly* 53: 557-573.

Shipan, Charles R. 2008. "Partisanship, Ideology, and Senate Voting on Supreme Court Nominees." *Journal of Empirical Legal Studies* 5: 55-76.

Shipan, Charles R., and Megan Shannon. 2003. "Delaying Justice(s): A Duration Model of Supreme Court Confirmations." *American Journal of Political Science* 47: 654-668.

Silverstein, Mark. 1994. *Judicious Choices: The New Politics of Supreme Court Confirmations*. New York: Norton.

Szmer, John, and Donald R. Songer. 2005. "The Effects of Information on the Accuracy of Presidential Assessments of Supreme Court Nominee Preferences." *Political Research Quarterly* 58: 151-160.

Squire, Peverill. 1988. "Politics and Personal Factors in Retirement from the U.S. Supreme Court." *Political Behavior* 10: 180-190.

Strack, Fritz, Norbert Schwarz, and Elisabeth Gschneidinger. 1985. "Happiness and Reminiscing: The Role of Time Perspective, Affect, and Mode of Thinking." *Journal of Personality and Social Psychology* 47: 1460-1469.

Sunstein, Cass R. 2008. "Comment: Second Amendment Minimalism: *Heller* as *Griswold*." *Harvard Law Review* 122: 246-274.

Thomas, Clarence. 2007. *My Grandfather's Son: A Memoir*. New York: HarperCollins Publishers.

Tomz, Michael, Jason Wittenberg, and Gary King. 2001. CLARIFY: Software for Interpreting and Presenting Statistical Results. Version 2.0 Cambridge, MA: Harvard University, June 1. http://gking.harvard.edu.

Tribe, Laurence H. 1985. *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*. New York: Random House.

Tullis, Jeffrey K. 1996-1997. "Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court." *Case Western Reserve Law Review* 47: 1331-1357.

Tversky, Amos, and Daniel Kahneman. 1974. "Judgment under Uncertainty: Heuristics and Biases." *Science* 185 1124-1131.

Unah, Isaac, and Ange-Marie Hancock. 2006. "U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model." *Law & Policy* 28: 295-320.

Vieira, Norman, and Leonard Gross. 1998. *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations*. Carbondale, IL: Southern Illinois University Press.

Waldmeir, Patti. 2005. "Senate Committee Begins Hearings on Judge Roberts." *Financial Times*. September 11.

Ward, Artemis. 2003. *Deciding to Leave: The Politics of Retirement from the United States Supreme Court*. Albany: State University of New York Press.

Wilkinson III, J. Harvie. 2009. "Of Guns, Abortions, and the Unraveling Rule of Law." Virginia Law Review 95: 253-323.

Williams, Margaret, and Lawrence Baum. 2006. "Supreme Court Nominees before the Senate Judiciary Committee." *Judicature* 90: 73-80.

Wines, Michael. 1991. "Bush Says List for Marshall Successor Is Short." *The New York Times*, June 29.

Wohlwill, Joachim F. 1974. "Human Adaptation to Levels of Environmental Stimulation." *Human Ecology* 2: 127-147.

Woodward, Bob, and Scott Armstrong. 1979. *The Brethren: Inside the Supreme Court*. New York: Simon and Schuster.

Yamaguchi, Kazuo. 1991. *Event History Analysis*. Newbury Park, CA: Sage Publications.

Yarbrough, Tinsley E. 2008. *Harry A. Blackmun: The Outsider Justice*. Oxford: Oxford University Press.

Zorn, Christopher, and Steven R. Van Winkle. 2000. "A Competing Risks Model of U.S. Supreme Court Vacancies, 1789-1992." *Political Behavior* 22: 145-166.