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The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices

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When a vacancy occurs on the Supreme Court, the president can attempt to use his power of nomination strategically in order to bring the Court in line with his own policy preferences. However, the president faces two constraints when attempting to do so. First, he may be constrained by the presence of continuing justices and the existing Court median. Second, he may be constrained by the Senate, which must approve his nominee. In this paper we develop and test a theory that examines the conditions under which a president is constrained in his choice of a nominee. Our results show that presidents can, and do, behave strategically with respect to Supreme Court nominations.

1. INTRODUCTION

In recent decades, vacancies on the Supreme Court have appeared approximately every two years. Because the Court plays such a central role in politics and policymaking, presidents place a great deal of importance on filling these vacancies with nominees who will produce a Court that looks more favorably on their agendas. Surprisingly, however, while we have learned a great deal in recent years about Senate voting on Supreme Court nominations, very little systematic analysis has been done on presidents' choices of nominees. Given the involvement of the judiciary in nearly every important area of policymaking and the centrality of the nomination process to an understanding of the checks and balances in our political system, it is imperative to understand the process by which presidents select nominees.

Here we analyze presidential choices of Supreme Court nominees. Our starting point is the observation that the Senate almost always approves Supreme Court nominees. Since the turn of the century, only four nominees have been rejected by the Senate, while fifty-five have been approved—a

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success rate of greater than 93 percent.¹ Given this tremendous rate of success, we believe the important question to examine is how the president decides what kind of nominee he should choose.

Our primary interest is in determining how the political context influences nominations. In particular, we look to see whether the existence of other political institutions, the preferences of those other institutions, and the constitutionally prescribed sequence of the process affect the president's choice. We also explore whether other factors, such as presidential popularity and years remaining in office, affect nominations. Our goal is to determine which of these factors influence the president's choice.

2. THE SUPREME COURT AND THE SEPARATION OF POWERS

The selection of a Supreme Court justice begins with an opening on the Court due to either the death or retirement of a justice. When a vacancy occurs, the president nominates a candidate, and the candidate is confirmed or rejected by a majority vote of the Senate. If the position of chief justice becomes vacant, the president may either nominate both a sitting justice for the position and a new associate justice, or he may nominate a new chief justice from outside the Court.²

Surprisingly, even though the president plays a major role in this process, most recent systematic analyses of Supreme Court nominations have focused mainly on the Senate's confirmation vote.³ We have learned that the Senate vote is more likely to be conflictual when the nominee is less qualified or is ideologically out of step with the Senate (Cameron, Cover, and Segal 1990b). We have also seen that the timing of the nomination (Segal 1987) and the preferences of constituencies and interest groups (Overby et al. 1992; Segal, Cameron, and Cover 1992; Caldeira and Wright 1998) influence the Senate's vote. Additional evidence suggests that the ideology of the departing justice also may matter (Ruckman 1993).

¹The four nominees rejected by the Senate were John J. Parker in 1930, Clement Haynsworth, Jr., in 1969, G. Harrold Carswell in 1970, and Robert H. Bork in 1987. Despite being rejected, these nominees all received a good deal of support when the Senate voted, ranging from Bork's 42 percent to Parker's 49 percent. In addition to these rejections, two other nominees were not confirmed by the Senate: Johnson withdrew his nomination of Abe Fortas for the position of chief justice before voting took place, and the Senate took no action on Johnson's nomination of Homer Thornberry.

²William Rehnquist, for example, was an associate justice when nominated and confirmed for the position of chief justice. His predecessor, Warren Burger, was not on the Court when nominated and confirmed.

³A wealth of descriptive material on how presidents choose from among potential nominees can be found in a number of studies. For recent examples, see Abraham (1991), Maltese (1995), and Silverstein (1994). For systematic evaluations of presidential nominations see Massaro (1978; 1990), Cameron, Cover, and Segal (1990a), Watson and Stookey (1995), and Nemacheck and Wahlbeck (1998).

These studies of the confirmation vote treat the choice of a nominee as exogenous. Put somewhat differently, although many of these studies assume that members of the Senate behave rationally in deciding how to vote, they do not make the same assumption for the president. Instead, the strategic manner in which a president might choose a nominee is ignored. Yet most nominees receive a large majority of votes, which suggests the need for a careful analysis of the *nomination* stage. Lopsided confirmation votes are almost certainly due in part to the careful consideration given by presidents to the choice of nominees, consideration given with an eye toward the confirmation vote.

How might the president behave strategically? Given the Court's key role in setting public policy, the president will want a Court that shares his ideology and thus will nominate someone who will bring the Court closer to his preferences. At the same time, however, the president is constrained by institutional features of the nomination process. First, the Senate has the power to confirm or deny the president's choice, which may force him to take the preferences of the Senate into account when nominating someone for a seat on the Court. Second, depending on the configuration of preferences of continuing justices and his own ideology, the president may not be able to shift the Court so that it completely shares his own preferences. Instead, he may be able to move it only a short distance toward his ideal point.

3. THE NOMINATION GAME

The requirement that the Senate must approve a president's nominee places a certain structure on the nomination game. In the first stage, a vacancy occurs; in the second stage, the president nominates someone to fill that vacancy; and in the third stage, the Senate votes on the president's nominee.⁴ Because the president knows that the Senate will vote on his nominee, when he makes his choice he will take the preferences of the Senate into account. Given the constitutionally prescribed sequence of this game, and relying on the assumption that actors are rational and forward-looking, we can model the nomination game using the equilibrium concept of subgame perfection.⁵

⁴For reasons discussed later in this paper, we omit the Judiciary Committee from our analysis.

⁵Analyses using the same equilibrium concept to examine the president's appointment power include Nokken and Sala (forthcoming), Hammond and Hill (1993), and Snyder and Weingast (1994). Like Snyder and Weingast, we model the appointment process as occurring along a single dimension. Although some recent analyses (most notably, Nokken and Sala forthcoming) indicate that a second dimension might be empirically relevant for Supreme Court confirmation voting, previous studies have demonstrated that a single dimension provides a useful approximation of the more complicated multi-dimensional reality of the appointment process (e.g., Segal, Cameron, and Cover 1992; Cameron, Cover, and Segal 1990b). In addition, single-dimensional analyses are more

If the Senate rejects the nominee, the game ends. In other words, we treat this as a single-period game. Several arguments provide justification for focusing on a single-period game. To begin with, as our analysis demonstrates below, there are a number of interesting and testable implications that derive from a single-period model.⁶ Furthermore, in order eventually to model the nomination process as a multiperiod game, it is useful first to understand the single-period game.

Most importantly, a single-period game is a very plausible representation of the nomination process. For a number of reasons, the president will not want the game to continue. The president's public approval and standing with the Senate may suffer from such a rejection. Thus, there is a loss of *political capital* associated with putting forth a nominee who is rejected. Moreover, the president has to expend this capital in a losing cause, whereas it might otherwise be spent more profitably on other policy issues. In addition, there are *time-related* costs. If his term in office is ending, the president might not get another chance to nominate someone. Alternatively, the Senate might change and become more inhospitable to his preferred nominees (e.g., the president's party often loses Senate seats at the midterm election). Finally, the president will lose time in which he could have a Court that produces outcomes more in line with his preferences. Because of these costs, he has a strong incentive to nominate someone who will be approved.

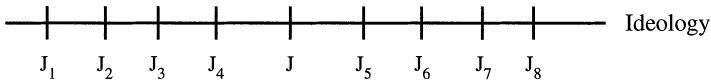
We make the following assumptions in the game. First, all players have perfect and complete information about the preferences of other actors and the sequence of the game. Second, players have Euclidean preferences. Third, the actions of players are driven by their preferences over policy, an assumption we elaborate on below. Fourth, recognizing that the size of the Court has remained at nine members for well over one hundred years, we assume that after a justice retires or dies the Court will have eight members. Fifth, we assume that if the Senate does not approve a nominee, the seat remains open, and the Court functions with eight members. Finally, in the spatial models presented below we also assume, without loss of generality, that the president's ideal point is to the left of the Court median.

The game begins when a seat opens on the Court.⁷ Prior to the creation of the vacancy, the median of the nine-member Court is equal to the position

tractable, theoretically and empirically. We agree with Krehbiel's (1996) assessment that "multidimensional institutional theories are more likely to yield examples than general propositions, and as such it is difficult to discern whether or how the general properties of multidimensional choice within inter-branch institutional settings differ from the unidimensional results" (1996, 34).

⁶A single-period approach also facilitates empirical testing by narrowing the potential equilibrium predictions (Morton 1999). Allowing a game to be repeated often produces multiple equilibria, which could prevent the model from yielding clear and testable implications.

⁷We treat the existence of a vacancy on the Court exogenously. In a more complete model, vacancies could be endogenous, as some openings occur due to strategic considerations (Squire 1988; Hagle 1993).

Figure 1. Supreme Court with a Vacancy

of the fifth justice. Once the vacancy occurs, however, this changes. In Figure 1, each of the eight remaining justices (J_1 through J_8) is located along a scale according to his or her ideology. Because there are now only eight members on the Court, no single justice occupies the median position. Instead, the policy outcome will be a lottery over the interval $[J_4, J_5]$, and we therefore allow the midpoint of this interval, $J = (J_4 + J_5)/2$, to be considered the Court's median after a vacancy occurs.

Once a seat opens, the president has an opportunity to nominate a potential new justice. We assume that the president, whose ideal point we denote by P , is motivated by policy concerns. Thus, he wants to move the median of the Court as close as possible to his own ideal point. In other words, the president wants to minimize the distance between P and J^* , where J^* is defined as the location of the new median if the president's nominee is approved by the Senate.⁸

Consider first what the president would do in the absence of the requirement that the Senate confirm his nominee. In such a case, of course, the president still cannot simply "choose" a new median for the Court. Rather, he is constrained by the presence of eight sitting justices. Because of these continuing justices, the new median will remain in the interval $[J_4, J_5]$, regardless of the ideological position of the nominee. More specifically, if the president chooses a nominee N such that $N < J_4$, then the new median, J^* ,

⁸We do not explicitly model the process through which the Supreme Court reaches decisions; instead, we rely on the median voter on the Court to provide a proxy for its decision-making outcomes. Somewhat surprisingly, very little attention has been paid to the accuracy of using the median voter to represent the Court's policy positions. We believe that the relevance of the median voter to Court decision making deserves further attention, but here use three arguments to support its use. First and most simply, we rely on Black's median voter theorem, which holds that in a voting body whose members can be arrayed along a line with single-peaked preferences, the outcome will be the median voter. Second, although some studies have demonstrated that the chief justice can act strategically in assigning opinions (Maltzman and Wahlbeck 1996), it remains true that both the chief justice and the opinion author must take care to satisfy the median member of the Court, for without the support of that member, they cannot sustain a majority. Thus, changes in the median lead monotonically to changes in the Court's output. Finally, and most impressionistically, close observers recognize the importance of the median member of the Court. When *National Journal* recently published a list of the most important political actors in Washington, Sandra Day O'Connor and Anthony Kennedy—usually at or near the median on the Court—made the list, but Justices Rehnquist and Scalia did not. See "The Washington 100," *National Journal*, June 14, 1997.

will be equal to J_4 . Similarly, if $N > J_5$ then $J^* = J_5$; and if N is located in the interval $[J_4, J_5]$, then $J^* = N$.

We maintain that the president's choice is motivated by the effect the nominee will have on the Court's median. The president will choose a nominee who, if approved, will bring the Court's median closer to his own ideal point. He can do this by choosing a nominee whose ideal point is close to his own (i.e., $N = P$). Thus, what is key from our perspective is that the president can achieve both of these goals—minimizing both $|P - J^*|$ and $|P - N|$ —simultaneously.

Consider Figure 1, keeping in mind that for the moment we are still ignoring the role played by the Senate. If the president is located to the left of J_4 , he will want to move the median to J_4 and can do so by choosing a nominee such that $N = P$. Similarly, if $P > J_5$, any nominee such that $N > J_5$ will move the median to J_5 ; and the president again will choose $N = P$. Finally, when the president is located in the interval $[J_4, J_5]$, choosing a nominee at his own ideal point will cause the new median to be located at his ideal point (i.e., $N = P$ will lead to $J^* = P$).

In other words, regardless of his location relative to the existing Court median, the president can move the median toward his ideal point by choosing $N = P$.⁹ In some cases he is constrained by the presence of the continuing justices, in the sense that he can only move the median a portion of the distance to his own ideal point. But in all cases, by choosing $N = P$ he obtains the best possible new median.

What happens when we introduce the Senate into the model? Obviously, the president now must take into account the preferences of the Senate before deciding on a nominee. His goal will be to choose the nominee who will produce the best new median and *who also will be approved by the Senate*.¹⁰

Whether the Senate constrains the president, however, depends on the configuration of institutional preferences. As the model we develop in the next section demonstrates, there are three distinct *regimes*, and which variables affect the position of the nominee depends on which regime exists. In the first two regimes discussed below, the Senate and president agree on the direction of change for the median (although they may disagree on the amount). In the third regime, they disagree about even the direction of change.

⁹Choosing $N = P$ therefore is a weakly dominant strategy for the president. The president could, of course, choose other values of N . However, by choosing $N = P$ he not only moves the median toward his ideal point, he also increases the likelihood that future medians will be located close to his ideal point.

¹⁰We assume that the Senate also is motivated primarily by policy concerns and is most concerned with how the new nominee will, if confirmed, affect the median on the Court. We base this assumption on the demonstrably strong relationship between senators' policy preferences and their votes on Supreme Court nominees (see, e.g., Cameron, Cover, and Segal 1990b; Ruckman 1993).

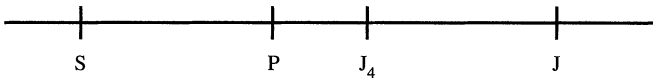
3.1 Regime 1: Unconstrained Presidential Power

First, consider the case where $S < P < J$, as illustrated in Figure 2a. The president knows that if he nominates someone who shares his ideology (i.e., $N = P$) and that person is confirmed, then the new median will be equal to J_4 . In addition, he knows that the Senate prefers any new median J^* such that $J^* < J$. Since a nominee located at P produces $J^* = J_4$, the president knows that the Senate, which prefers J_4 to J , will approve such a nominee. Of course, the Senate might prefer a nominee located closer to S than the one the president is willing to put forward. Since it prefers J_4 to J , however, the Senate's hand is forced: by rejecting the president's nominee, it would decrease its own utility. The president, by virtue of having the first move, can present the Senate with an option that, while not perfect, is one it prefers to the status quo.

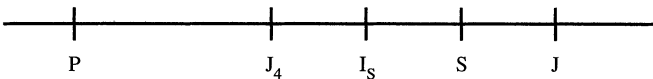
More generally, in this regime the president is *unconstrained* by the Senate; by choosing a nominee at his ideal point he also moves the median closer to the Senate's ideal point. Put somewhat differently, any nominee that the president likes will create a new Court median that falls within the Senate's win set. This holds true whenever $S < P < J$ and also usually when

Figure 2. Presidential Nominating Regimes

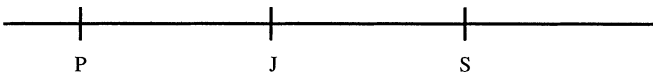
2a: Unconstrained President (Regime 1)



2b: Semi-Constrained President (Regime 2)



2c: Fully Constrained President (Regime 3)



$P < S < J$, with the exception of the condition discussed in the next section.¹¹ In effect, when the president and the Senate are on the same side of the Court median, the president is almost always unconstrained by the Senate position, and N will be a function of P , but it will not be a function of S or J .

3.2 Regime 2: Semi-Constrained President

If the Senate is located closer to the median of the Supreme Court than is the president (i.e., $|J - S| < |J - P|$), the president may not have as much power as he does in Regime 1. More specifically, if $P < S < J$, $S > (J_4 + J)/2$, and $P < 2S - J$, the president will no longer be able to present the Senate with a take-it-or-leave-it offer and be confident that the Senate will take it.¹² To see this, consider Figure 2b. If the president chooses a nominee such that $N = P$, then the new median would be $J^* = J_4$. The Senate, however, prefers J to J^* and therefore would reject the nominee. In fact, the Senate prefers any point to the right of I_S , which is defined as $I_S = 2S - J$ and is the Senate's indifference point with respect to the Court median, to J .

As opposed to Regime 1, where the president is constrained by neither the Senate's ideal point nor the median of the Court, here the president is constrained by a combination of the two. What nominee can the president choose in order to obtain the best possible new median? Working backward, we can see that the Senate will approve any nominee that yields a median that is closer to S than is J . The president then knows that the best he can do is to choose a nominee who will produce a new median at I_S . He can do so by choosing a nominee such that $N = I_S$. Hence, in this regime, the president has to nominate someone whose position is determined by the combination of the ideal points of the Senate and the Court. He is *semi-constrained*; that is, he can choose a nominee who will bring the Court's median closer to his own ideal point, but he cannot do so by choosing $N = P$, and he cannot move the median all the way to J_4 .

3.3 Regime 3: Fully Constrained President

Finally, the president and the Senate might be located on opposite sides of the Court's median, as depicted in Figure 2c. In this regime, the president and the Senate disagree completely about the ideological direction the Court should take. Indeed, any attempt by the president to move the median closer to his ideal point will be rebuffed by the Senate; and the Senate will never

¹¹When $S < P < J$, P is always in the Senate's win set, and the president can always choose $N = P$.

¹²In other words, if the Senate is closer to J than to J^* and the president is farther from S than S is from J , then the president is semi-constrained.

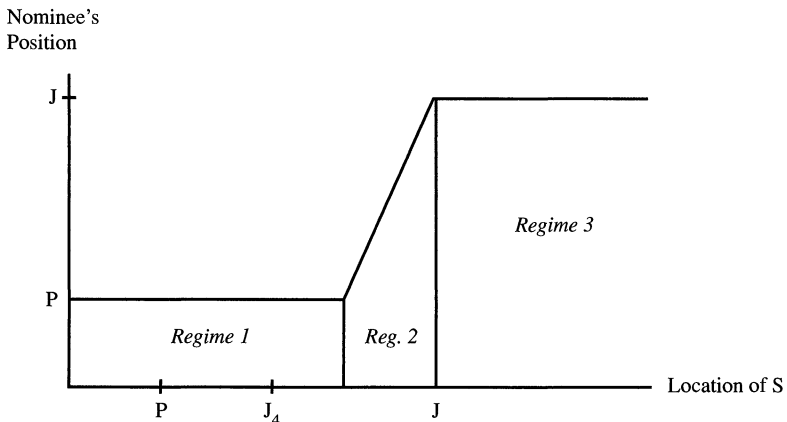
see a presidential nominee who is likely to move the Court's median toward S. There is a standoff, and the only outcome that would please both the president and the Senate would be a nominee located at J. Regardless of whether the distance between J and S is small or large, as long as P and S are on opposite sides of J the president will be *fully constrained* in his ability to move the Court median closer to his ideal point.

Equilibrium Outcomes

The preceding discussion demonstrates that while P, J, and S each are important determinants of the location of N, their importance is a function of the specific configuration of preferences. More explicitly, the model demonstrates that there are three distinct theoretical regimes: one in which N is a function of P, one in which N is a function of I_S (which in turn is a function of S and J), and finally, one in which N is a function of J.

Figure 3 depicts the equilibrium outcomes as a function of the Senate median. Holding P and J constant, we see that when $S < P$, the outcome will be equal to P, regardless of the location of S. Similarly, when $S > J$, the outcome will be J, regardless of the location of S. Only when S is located to the right of $(J_4 + J)/2$ (i.e., the midpoint of the interval $[J_4, J]$) does the location of the Senate median have a direct influence on the outcome. Similar figures could be drawn in which P is allowed to vary while S and J are held constant or where J is allowed to vary while P and S are held constant. In each figure we would see that within one regime the variable of interest would have an effect on the outcome, while in the other two regimes it would not.

Figure 3. Nominee's Ideology as a Function of the Senate's Location



This theoretical finding—that different variables are influential in different regimes—guides our empirical approach. In particular, the theory points to the following specification of the empirical model:

$$N = \beta_0 + \beta_1 * D_1 * P + \beta_2 * D_2 * I_S + \beta_3 * D_3 * J + \epsilon \quad (1)$$

where D_1 , D_2 , and D_3 are dummy variables indicating the nature of the regime.¹³ As the theoretical model and the empirical specification in Equation 1 make clear, the nominee's position is affected by *either* the president's ideology *or* the Senate's indifference point *or* the Court's median. It is not, however, a function of all of these variables at the same time. Whether each variable matters depends on the location of S relative to J and P . In effect, then, this adopts the approach of switching regressions, where different independent variables matter under different conditions.¹⁴

4. MEASURING INFLUENCES ON THE NOMINATION

To examine the choice of Supreme Court nominees, we consider all justices nominated to the Supreme Court between 1949 and 1994 (i.e., from Tom Clark through Stephen Breyer). This sample is relatively small, with only twenty-eight observations, and it is limited in time.¹⁵ However, since these were the only nominees for whom we could obtain data for all the variables, this problem could not be avoided.¹⁶

Our dependent variable, which follows from our theoretical model, is the ideological position of the nominee. To operationalize this variable we use the ideology scores developed for Supreme Court nominees by Segal and Cover (1989). Segal and Cover derived these scores, which are meant to be predictive of a justice's future behavior, from a content analysis of pre-confirmation editorials about the civil liberties and civil rights tendencies of the nominees. Like ADA scores, these predicted scores range from zero to

¹³More formally, $D_1 = 1$ if $S < P < N$ or if $P < S < N$, $S < (J_4 + J)/2$, and $P < I_S$, otherwise $D_1 = 0$; $D_2 = 1$ if $P < S < N$, $S < (J_4 + J)/2$, and $P < I_S$, otherwise $D_2 = 0$; and $D_3 = 1$ if $P < J < S$, otherwise $D_3 = 0$.

¹⁴The switching regimes regression approach is especially valuable when we do not know which regime exists (e.g., Lee and Porter 1984). In our analysis, the location of the various actors spells out which regime exists. See also footnote 29.

¹⁵Another potential problem is that we cannot observe all the people that a president chooses *not* to nominate. Instead, we make the reasonable assumption that the president is allowed to choose from a set of potential justices whose preferences range across the ideological spectrum. For a perceptive analysis that includes people who were considered but not nominated, see Nemacheck and Wahlbeck (1998).

¹⁶The limiting variable is the ideology of elected officials. ADA scores extend back to only 1947, and W-NOMINATE scores for the president extend back to roughly the same time.

one, with zero being the most conservative and one being the most liberal ideology. Table 1 presents the descriptive statistics for this variable and for other variables we discuss below.

To measure the ideology of the Senate, we use the yearly ADA scores of the median member of the Senate. We adjust these scores according to the methodology recently developed by Groseclose, Levitt, and Snyder (1999), which controls for the possibility that the ADA scale shifts and compresses or expands over time.

Measurement of presidential ideology is somewhat less straightforward. One option would be to use a dummy variable to designate a president's partisanship. We prefer to use a more differentiated measure, however, and thus use presidential ADA scores, which are computed by examining each president's positions on the votes ADA uses to calculate scores for members of Congress (Zupan 1992). As with the ADA scores for the Senate, the presidential ideology scores also range from zero to one, with zero being most conservative and one most liberal. And as with the Senate ADA scores, the presidential ADA scores are computed yearly and are adjusted.

While ADA scores and the nominees' ideology scores both can be aligned along the same zero-to-one scale, a potential problem exists. ADA scores are general measures of ideology, computed in order to demonstrate the overall liberal or conservative tendencies of each member of Congress. The nominees' scores, on the other hand, focus on civil liberties and civil rights and thus are more issue-specific than ADA scores. Yet, there are reasons to use them together. First, justices cast far more votes in civil liberties and civil rights cases than in any other policy area. Thus, a good portion of their overall ideology is comprised of these more specific scores. Second, at the congressional level, ADA scores and ACLU scores are highly correlated. Third, both types of scores represent attempts by third parties to locate political actors along a similar zero-to-one, conservative-to-liberal dimension. In the end, we maintain that it remains the best option. The only preconfirmation measures of nominees' ideologies are the civil liberties scores, and ADA scores for the Senate and president are relevant and extend farther back in time than do other issue-specific scores.

To measure the median position of the Court, we look at the median voting score on civil liberties from the Court's previous term. We compute this by looking at the voting scores of the eight continuing members of the Court and using the midpoint of the interval $[J_4, J_5]$ as the median. For example, in 1994 Stephen Breyer was nominated to fill the seat vacated by the retirement of Harry Blackmun. Of the eight justices from the 1993 term who were retaining their seats, Justice O'Connor had the fourth highest voting score and Justice Kennedy the fifth. Since their scores were 36.2 and

Table 1. Descriptive Statistics

Variable	Maximum	Minimum	Mean	Median	Mode	Standard Deviation	Skewness Statistic
Nominee's Ideology Scores	1.00	0.00	0.45	0.45	0.50 ^a	0.33	0.26
President's Ideology	0.89	-0.06	0.35	0.34	0.34 ^a	0.31	0.26
Senate's Indifference Point	0.60	-0.29	0.21	0.21	0.21 ^a	0.24	0.26
Court Median	0.76	0.26	0.52	0.50	0.50	0.12	0.30
President's Ideology in Regime 1	0.85	0.00	0.22	0.11	0.00	0.27	0.96
Senate's Indifference Point in Regime 2	0.59	0.00	0.01	0.00	0.00	0.17	2.74
Court Median in Regime 3	0.65	0.00	0.11	0.00	0.00	0.21	1.59
Presidential Approval	0.79	0.40	0.59	0.62	0.65	0.11	-0.15
Years Remaining in Office	1.00	0.25	0.73	0.75	0.75 ^a	0.22	-0.18
Qualifications of Nominee	1.00	0.11	0.77	0.99	1.00	0.27	-1.11

^aindicates one of multiple modes

N = 28

Note: Scores for the president and the Senate are adjusted ADA scores. These adjusted scores can take on values greater than one or less than zero. We used the full range of values in our analysis, but the results were essentially the same if we bounded these scores at zero and one.

44.7, respectively, the median we use for Breyer's appointment is 40.5, the average of these two scores.¹⁷

5. EMPIRICAL ANALYSIS

Table 2 presents the distribution of nominations by regime type. Of the twenty-eight observations, the majority—eighteen, to be specific—fall into Regime 1. Three nominations (Stevens, Bork, and Kennedy) fall into Regime 2. The remaining seven nominations belong to Regime 3. The existence of nominations in each regime will allow us fully to test our theory, but the small number of observations in the second and third regimes will decrease the likelihood of obtaining statistically significant results.

As our theoretical model indicates, the location of the nominee, N , should be a function of the president's ideal point, the Senate's indifference point, and the existing median on the Court once a vacancy occurs. However, the type of regime determines which of these variables should have an effect on N . In Regime 1 we expect P to have a significant effect; in Regime 2 we expect I_s to have a significant effect; and in Regime 3 we expect J to have a significant effect.

Bivariate analysis provides initial support for our model. In Regime 1, there is a strong relationship between the president's ideology and the nominee's ideology ($r = .60$, $p < .01$). Similarly, in Regime 3, we find a strong relationship between the Court median and the nominee's ideology ($r = .76$, $p < .05$). In Regime 2 we do not find support for our theory ($r = -0.08$); this is unsurprising, given the small number of observations in this regime.

Table 3 presents the results of our switching regressions. Column 1 in this table presents the most basic and straightforward test of our model. All three of the variables have positive coefficients, as the theory predicts. Both the president's ideology in Regime 1 and the Court's median in Regime 3 differ from zero at $p < .01$.¹⁸ Only the Senate's indifference point in Regime 2 fails to reach standard levels of significance, although here and in a range of other specifications its coefficient is in the expected direction. On the whole, the model does a good job of predicting the ideology of nominees to the Court.

Before proceeding to a discussion of alternative hypotheses and specifications, we wish to make two general points about our empirical analysis.

¹⁷In some cases, there were only seven continuing members on the Court when a nominee was chosen. In such cases we use the voting score of the median, or fourth, justice. In other cases, there were seven sitting justices and also one justice who had been confirmed but who had not yet established a voting record on the Court. For these cases we used the voting scores of the continuing justice along with the predicted vote of the newly confirmed justice.

¹⁸All significance levels we report for the theoretical variables of interest are based on one-tailed tests.

Table 2. Nominees Classified by Regime Type

Regime 1: Unconstrained President	Regime 2: Semi-Constrained President	Regime 3: Fully Constrained President
Warren	Stevens	Clark
Brennan	Bork	Minton
Whittaker	Kennedy	Harlan
Stewart		Fortas (associate)
White		Fortas (chief justice)
Goldberg		Souter
Marshall		Thomas
Burger		
Haynsworth		
Carswell		
Blackmun		
Powell		
Rehnquist (associate)		
O'Connor		
Rehnquist (chief justice)		
Scalia		
Ginsburg		
Breyer		

Note: Regime 1 occurs when $S < P < J$; Regime 2 occurs when $P < S < J$, $S > (J_4 + J)/2$, and $P < 2S - J$; and Regime 3 occurs when $P < J < S$. The same regimes occur for the mirror-images of these preference configurations (i.e., $J < P < S$ also is classified as Regime 1).

First, because ADA scores are imperfect proxies for ideology, we reran the regression shown in Column 1 (and others presented in this paper) using several other measures for ideology. Using raw (unadjusted) ADA scores produced results that were essentially the same as—or in some cases, even better than—those produced using real (adjusted) ADA scores. Adjusted W-NOMINATE scores also yielded strong support for our theory. Because no measure of ideology is perfect, scholars are better off using a variety of measures to test a theory. The similarity across different measures in our analysis demonstrates the robustness of our results.¹⁹

Second, the significance of our theoretical variables can be tested in two different ways. Our theory predicts that the coefficients of these variables

¹⁹The NOMINATE scores were rescaled from 0 (conservative) to 1 (liberal) so they would be consistent with our other measures. Using the average of a president's ideology score over the course of his term produced results that were nearly identical to those found in Column 1. Using the presidential ideology scores of Segal, Howard, and Hutz (1996), which are based on expert assessments, yielded similar results.

Table 3. Predicting the Ideology of Supreme Court Nominees

	Column 1	Column 2	Column 3	Column 4
Presidential ADA Scores (in Regime 1 only)	0.83 (0.23)	0.87 (0.25)	0.92 (0.53)	0.83 (0.25)
Senate's Indifference Point (in Regime 2 only)	0.20 (0.32)	0.06 (0.30)	0.62 (0.39)	
Court Median (in Regime 3 only)	1.18 (0.29)	1.42 (0.74)	1.23 (0.61)	0.96 (0.29)
Presidential ADA Scores (in Regimes 2 and 3)		-0.04 (0.42)		
Senate's Indifference Point (in Regimes 1 and 3)		-0.55 (0.30)		
Court Median (in Regimes 1 and 2)		0.18 (0.47)		
Presidential ADA Scores (in all Regimes)			-0.04 (0.42)	
Senate's Indifference Point (in all Regimes)			-0.55 (0.30)	
Court Median (in all Regimes)			0.18 (0.47)	
Constant	0.13 (0.10)	0.11 (0.25)	0.11 (0.25)	0.12 (0.10)
Adjusted R ²	0.41	0.49	0.49	0.31
SEE	0.26	0.24	0.24	0.28
Durbin-Watson	1.49	1.99	1.99	1.21

Numbers in parentheses are standard errors

N = 28

should be positive and significantly different from zero. In other words, our model predicts that these theoretical variables should have a positive effect on the nominee's ideology. However, our theory also predicts that a one-unit change in the relevant independent variables should produce a corresponding one-unit change in the dependent variable. To test this second prediction, the proper null hypothesis is that the coefficient is equal to one; and failure to reject this null constitutes support for our theory. Both predictions are important. We cannot simply test whether the coefficient differs from one, because a coefficient indistinguishable from one also might be indistinguishable from zero (e.g., a coefficient of 1.00 with a standard error of 2.00).

Similarly, we cannot test only whether the coefficient differs significantly from zero, since such a coefficient might be statistically distinguishable from one (e.g., a coefficient of 0.20 and a standard error of 0.04). In the remainder of the paper we will report p-values based on the null hypothesis that the coefficient is equal to zero, but we will also note whether the coefficients differ significantly from one. It is extremely important—and supportive of our theory—to note that in every instance where we find that the coefficients are significantly different from zero, we also find that they are *not* significantly different from one.²⁰

Alternative Hypotheses

While the most basic test of our theoretical model is the one presented in Column 1, our theory also produces additional hypotheses. In particular, the theory not only predicts that the president's ideology should be a significant influence on the nominee's ideology in Regime 1; it also predicts that the president's ideology should *not* be a significant influence on the nominee's ideology in Regimes 2 and 3. Similarly, the Senate should play no role in Regimes 1 and 3, and the Court median should be insignificant in Regimes 1 and 2. In other words, instead of expecting that the variables for the president, Senate, and Court should be significant and positive (and equal to one) in all three regimes, the theory predicts regime-specific effects. The equation to be estimated is thus:

$$N = \beta_0 + \beta_1 * D_1 * P + \beta_2 * D_2 * I_S + \beta_3 * D_3 * J + \beta_4 * (D_2 + D_3) * P + \beta_5 * (D_1 + D_3) * I_S + \beta_6 * (D_1 + D_2) * J + \epsilon \quad (2)$$

where we expect β_1 , β_2 , and β_3 to be significant and β_4 , β_5 , and β_6 to be insignificant.

Column 2 in Table 3 presents the results for the alternative specification (2). Again, the results are supportive of our theory. The president's ideology is significant in Regime 1, but not in Regimes 2 and 3, and the Court median is significant in Regime 3, but not in Regimes 1 and 2. Both variables also are indistinguishable from one. Once again, the Senate's indifference point is not a significant influence on ideology in Regime 2, although it curiously produces a somewhat significant but negative coefficient for Regimes 1 and 3.

While this alternative specification follows directly from our theoretical model, a number of other hypotheses also are plausible. For example, the nominee's position might be a function of the preferences of the president, the Senate's indifference point, and the Court, irrespective of the regime. The expectation for this alternative hypothesis would be that as the ideologi-

²⁰We also find that our constant term is always indistinguishable from zero, which the theory also predicts.

cal scores of any of these actors increase, so would the ideological score of the nominee.

To test this alternative hypothesis we added these three variables to Column 1 of Table 3 (i.e., we removed the parenthetical terms from the last three interactions in Equation 2). The results of this test, shown in Column 3, once again provide support for our model. The president's ideology in Regime 1 and the Court's median in Regime 3 again have coefficients that are in the predicted direction, are significantly different from zero at $p < .05$, and are also indistinguishable from one. Interestingly, the Senate's indifference point in this specification also approaches standard levels of significance ($p < .10$) and is indistinguishable from one, lending an additional measure of support to our theory.

At the same time, little support is given to the alternative hypothesis. None of the noninteracted variables are significant in the predicted direction, and a joint F-test shows that they are jointly insignificant at the .05 level.²¹ These results, like those presented in the other columns, lend support to our theoretical argument and to the robustness of our results.²² As the theory predicts, the president's choice of a nominee appears to be a function of the president's preferences in Regime 1, the Senate's indifference point in Regime 2, and the Court's median in Regime 3.²³

²¹Furthermore, we can reject the hypothesis that these other variables are equal to one. As in the previous column, the variable measuring the Senate's indifference point was weakly significant, albeit with a negative coefficient. This implies that, for example, if $P < I_S < J$, as I_S moves to the right, the president will choose a nominee farther to the *left*. We offer no explanations for this result but simply note that it presents an opportunity for future research.

²²Similarly, we allowed the constant to vary across regimes by omitting the constant from the estimation and instead including D_1 , D_2 , and D_3 . None of these noninteracted regime dummy variables were significant, while the interaction of D_1 with the president's preferences and the interaction of D_3 with the Court's position remained significant at the $p < .05$ level.

²³The text reports two of the alternative hypotheses that we tested: whether the president, Senate, and Court matter across all regimes and whether these three variables matter in regimes in which we expect them *not* to matter. We also examined a variety of other null hypotheses, including one in which the nominee's ideology is regressed on the president and Senate alone, one where it is regressed on the president and the distance between the president and the Senate, one where we include the president alone, and one where we include variables about the president's popularity and time remaining in office and the nominee's qualifications (discussed below with respect to Table 4). We also included the regime-specific theoretical variables in these models. While there were some differences across these specifications, in general the results showed that the regime-specific interaction terms were significant, and the alternative variables were not. The main exception to this occurred when we included the president in all three regimes with the three regime-specific theoretical variables. In this case, due to collinearity, nothing was significant. We discuss collinearity below. We also note that even if these alternative models had not generally produced insignificant results for variables we expect to be insignificant and significant results for variables we expect to be significant, it can be argued that none of these alternatives are well-developed enough to provide specific alternative hypotheses or theoretical interpretations.

While these results support our theory, we wish to introduce a bit of caution in interpreting them. First, standard hypothesis testing is more appropriate for testing whether a particular variable is significant (i.e., when the null hypothesis is that the variable is not different from zero) than for situations where the model holds that a variable should be insignificant. Thus, conventional levels of significance should not be used to determine whether these coefficients are indeed equal to zero, as this might result in a Type II error. One approach that social scientists take to deal with this problem is to use a more stringent test of $p < .50$ for a one-tailed test (e.g., Hall and Grofman 1990). Even according to this much more stringent test, none of the variables we expect to be insignificant turn out to be significant in a positive direction.

A second problem is more serious and has to do with collinearity between the variables. In both Columns 2 and 3, collinearity is a problem.²⁴ Unfortunately, two of the standard ways to fix collinearity are not plausible options—we can neither add more observations nor delete independent variables (Lewis-Beck 1995). Thus, we cannot directly address the problem of collinearity.

The primary effect of multicollinearity, of course, is to increase the size of standard errors. Thus, it provides a bias against finding significant results. We cannot know whether coefficients are indistinguishable from zero because the model is correct or because of multicollinearity and random variation producing spurious results. Therefore, it is even more surprising that our primary theoretical variables—the president in Regime 1 and the Court median in Regime 3—remain significant under a wide range of specifications. In addition, these variables remain significant for alternative measures for each variable, as noted earlier. Moreover, the variables that we do not expect to be significant also turn out to be insignificant under a wide range of specifications and operationalizations.²⁵ Although we cannot ignore the problems

²⁴For example, the bivariate correlations range from .01 to .89. And when we regress Presidential Ideology (in Regimes 2 and 3) on the other independent variables in Column 2, we find a high adjusted R^2 (0.83). Other diagnostic tests were much more encouraging. In Columns 2 and 3 the Durbin-Watson statistic allowed us to reject the possibility of autocorrelation (in Column 1 the statistic is inconclusive). Furthermore, plotting the standardized residuals of Column 1 against its standardized predicted values demonstrates that the analysis was not driven by outliers. To complement this visual inspection of the data, we relied on Cook's distance test, which is a measure of how much the residuals of all cases would change if a particular case were excluded from the calculation of the regression coefficients. A large Cook's D indicates that excluding a case from computation of the regression statistics changes the coefficients substantially. In the case of only one observation—Stephen Breyer—did this test indicate the existence of a potential outlier. Removing Breyer from the dataset actually *improved* our results—it increased the overall fit of the model and made our theoretical variables more significant.

²⁵Comparing the degrees of collinearity our theoretical variables encounter to the degrees of collinearity encountered by the variables representing the alternate hypotheses yields further support

potentially caused by multicollinearity, the stability of our results across a wide range of tests lends additional support to our findings.

In the end, how should the findings be interpreted? We will not be surprised if future theoretical work demonstrates a more important role for the president in other regimes. Because of the collinearity between the presidential variable and the other variables, it is difficult conclusively to reject this possibility. And in the next section we explore a couple ways in which the president might be able to be more influential in Regimes 2 and 3. At this point, however, the evidence suggests that the president is significant in Regime 1, and the Court median is significant in Regime 3, while these variables and the Senate are not significant in other regimes.

Reclassifying Borderline Observations

One finding from the previous columns that has not been consistent with our theory is the lack of significance of the Senate's indifference point in Regime 2. No doubt this is due, at least in part, to the small number of cases in this regime. However, it also calls for a closer examination of the three observations that occur in this regime. And it turns out that in all three cases the observations might justifiably be reclassified as belonging to one of the other regimes.²⁶

First, let us look at the nomination of John Paul Stevens in 1975. At that time, President Ford's adjusted ADA score was 18, the Court's median in the wake of Justice Douglas's retirement was 51.1, and the adjusted ADA score for the Senate median was 50.2. Based on the latter two of these values, the Senate's indifference point was thus 49.3. Because Stevens's predicted vote was fairly conservative (38.0), Senate approval of his nomination would have led to a new median of 49.3. Since the Senate fell in between the existing and the potential new Court medians (i.e., J and J*), we classified this observation as belonging to Regime 2. However, given that the new median and the Senate's indifference point are equal, and given that P is less than both S and J, we could just as well have classified Stevens as belonging to

for our theory. For example, in Column 3 of Table 3 the Regime 1 * Presidential ADA Scores variable suffers from a greater degree of collinearity (an adjusted R^2 of .87 when regressed on the other variables) than any of the nontheoretical variables, yet it is significant. Furthermore, when we use unadjusted ADA scores, collinearity decreases a great deal, yet the results remain the same.

²⁶We hasten to add that we examined *all* observations to determine which, if any, classifications were borderline. Only those classified as belonging to Regime 2 were even remotely borderline—no observations classified as belonging to other regimes were close to the regime borders. Thus, we stress that we are not reclassifying Regime 2 observations in order to provide post hoc explanations for the lack of significance of the Regime 2 variable. Rather, because the theory predicts such sharp cutpoints and because there are only three cases in this regime, we believe it makes sense to examine these cases individually to see how securely they fit into Regime 2.

Regime 1.²⁷ More generally, any time a nomination is this close to the border of two regimes, classification of regime type is uncertain, since the ideology and voting scores should be considered to measure true preferences with some error and since any uncertainty on the part of the political actors could lead to a change in regime classification.

Examination of the Bork and Kennedy nominations similarly shows that these also could be classified differently. In both cases the Senate median is less than, but very close to, the Court median, with $S = 48.2$ and $J = 48.6$, respectively. Since the president's ideal point is much less than either of these other points, we classified these nominations as belonging to Regime 2. However, because the values for S and J are extremely close, both Bork and Kennedy could very plausibly be reclassified as belonging to Regime 3, which calls for the president and Senate to be on opposite sides of the Court median.²⁸

Based on these reclassifications, we re-estimated Equation 1. In Column 4 of Table 3, Stevens is moved into Regime 1 while Bork and Kennedy are placed in Regime 3. The results again show support for our theory. Both the Court median in Regime 3 and the president's ideology in Regime 1 are significantly different from zero and indistinguishable from one.²⁹

Controlling for the President's Bargaining Advantage

Several other factors outside of our model might affect the choice of a nominee. We would not, however, expect these factors, which we can think of as the president's bargaining advantage, to be important under all conditions. Rather, like the theoretically derived independent variables discussed earlier, we expect that if these variables matter, they do so only in certain regimes. We offer these as additional alternatives to our model, alternatives that derive from the descriptive and historical work on nominations.

More specifically, in Regime 1 we would not expect these other factors to matter, whereas we might expect them to matter in Regimes 2 and 3. In Regime 1, the president already can nominate someone who shares his ideology. He cannot use any political capital he might have to move the nominee closer to his own position. In Regimes 2 and 3, however, the president must choose a nominee located some distance from his own most preferred

²⁷Furthermore, since the Court median and the Senate median are separated by only one percentage point, it could also be the case that $J < S$, or at least that actors perceive that $J < S$, in which case this could be classified as belonging to Regime 3.

²⁸In addition, aggregate civil liberties voting scores probably understate the conservative nature of the Rehnquist Court (Baum 1995; Lee, Sandstrum, and Weisert 1996).

²⁹We also performed a switching regimes regression, using LIMDEP, on this equation. This procedure similarly yielded significant results for these variables.

point.³⁰ Several factors might, however, enable him to choose a nominee such that $P < N < I_S$ (in Regime 2) or $P < N < J$ (in Regime 3).³¹

We propose and test three such variables: presidential approval, the president's year in office, and the qualifications of the nominee. Each of these variables was recoded for placement on the interval from zero to one. The approval ratings, which register the percentage of people approving of the president, were acquired for the month of each nomination from the Gallup Opinion Poll.³² Gallup asked the same question in each month for each year in our sample: "Do you approve or disapprove of the way [the current president] is handling his job as president?" The descriptive literature on nominations suggests that the greater a president's popularity, the more likely he is to be able to choose a nominee closer to his own ideal point.

Similarly, the more recently a president has been elected, the more successful he should be in bargaining with the Senate. Consequently we include a variable measuring the percentage of the president's term that remains to be served. This variable takes on the value of 1 in the president's first year in office, 0.75 in the second year, and so on.

Finally, the more qualified a nominee is, the harder it will be for the Senate to reject her or him. Thus, a president will be able to nominate someone who is closer to P if that nominee is highly qualified.³³ These qualification

³⁰Thus we have another example of regime-specific variables. By including the variables discussed below without interacting them with specific regimes, we would be biasing the results toward zero, since we would be mixing a regime where we expect to find no effect (Regime 1) with regimes in which an effect might exist (Regimes 2 and 3). Not surprisingly, when we did include the bargaining variables without regime-specific effects, the results were insignificant.

³¹In effect, while we do not formally model it, these factors, if important, should improve a president's position in a bargaining game with the Senate. Since the president already can nominate someone located at his ideal point when faced with a Regime 1 configuration, he need not bargain, and these factors should not be important in that regime. However, we should note that allowing these variables to matter across all three regimes did not alter the results shown below.

³²Gallup lacked data on Reagan at the time of his nomination of Kennedy in November 1987. As a result, we used his approval rating for the last month they had it available, which was August 1987. Ratings were obtained from *The Gallup Opinion Index*, October–November 1980, Report Number 182 and *The Gallup Poll: Public Opinion*, 1981–1995.

³³All values were rescaled to account for the location of the president. If, for example, $P < J$ in Regime 3, then we would expect an increase in popularity to *decrease* the value of N , whereas if $P > J$, then we would expect an increase in popularity to *increase* the value of N . Because the expected signs differ according to whether P is to the left or to the right of J , D_2 *Approval is inappropriate. The most straightforward way to correct for the directional issue is to multiply this interaction term by the difference between P and the Court (for Regime 3) or P and the Senate's indifference point (for Regime 2). For example, for popularity the measures are D_2 *Approval*($P - I_S$) and D_3 *Approval*($P - J$). This controls for not only direction, but also for the distance between the president's ideal point and the other points. Equivalent changes were made for the other variables. We control for distance as well as direction because we hypothesized that, for example, a very popular president in Regime 3 located far from J could lead to a greater change in the nominee's position

scores were obtained from *The Supreme Court Compendium* (Epstein et al. 1996) and were computed in the same way as the Segal/Cover ideology scores.

The results presented in Table 4 demonstrate little systematic support for these factors.³⁴ It appears that in Regime 3 there is at least some reason to believe that these variables affect the choice of a nominee in the expected manner. High approval ratings, proximity to an election, and a more highly qualified nominee all seem to allow a president in Regime 3 to nominate someone whose predicted vote is on the president's side of the Court's median. However, even in this regime the results are not strong: with one-tailed tests the p-values range from .07 for approval and qualifications to .15 for years remaining in office.

Two final points are important to note here. First, we do not doubt that these factors *sometimes* matter. What we show here is that they are not systematic, regular, and significant influences on the president's choice. Second, the "Years Remaining" variable taps into what might be called the *electoral context*, whereas most of this paper has been devoted to looking at the institutional context. These results, as well as other unreported results, provide little evidence of a significant influence from the electoral context.³⁵

Additional Interpretations

What additional substantive interpretations can be drawn from our results, particularly those found in Columns 1, 2, and 3 of Table 3? First, the model makes it clear that presidents are faced with different constraints at different times. Two of the first three justices that Ronald Reagan nominated were extreme conservatives (William Rehnquist and Antonin Scalia). Yet his final nominee to the bench was the relatively moderate Anthony Kennedy. One difference between these contexts was the regime. For Reagan's first three appointments, he was unconstrained (i.e., Regime 1). His party controlled the Senate, and he was able to choose any nominee he wished, know-

than a very popular president located a very short distance from J. We also tried using a signed dummy variable (e.g., instead of $(P - J)$ we used -1 if $J > P$ and 1 if $P > J$). This produced no substantive differences in the results.

³⁴Because of collinearity and limited degrees of freedom, we have chosen to report these variables separately rather than together. When we include all the variables shown in Table 4 in one equation, the only variables that are significant are presidential ideology in Regime 1 and the Court median in Regime 3.

³⁵We also examined whether the choice of a nominee was affected by a host of other related variables, such as whether it was a president's first term, whether he was running for re-election, whether he was in his last year in office, whether he was in his last two years in office, and whether he was an unelected president (i.e., Johnson and Ford). None of these variables were significant. Nor were variables controlling for the number of previous nominees or appointments.

Table 4. Controlling for Additional Factors in the Nomination of Supreme Court Justices

	Column 1	Column 2	Column 3
<i>Theoretical Variables</i>			
Presidential ADA Scores (in Regime 1)	0.80 (0.23)	0.81 (0.24)	0.78 (0.23)
Senate's Indifference Point (in Regime 2)	0.30 (1.10)	0.74 (4.53)	-0.06 (1.61)
Court Median (in Regime 3)	1.04 (0.30)	1.06 (0.32)	0.95 (0.33)
<i>Additional Factors</i>			
Presidential Approval (in Regime 2)	0.27 (2.23)		
Presidential Approval (in Regime 3)	0.91 (0.59)		
Years Remaining in Office (in Regime 2)		0.10 (8.50)	
Years Remaining in Office (in Regime 3)		0.53 (0.51)	
Nominee's Qualifications (in Regime 2)			-0.25 (1.86)
Nominee's Qualifications (in Regime 3)			1.00 (0.65)
Constant	0.14 (0.10)	0.13 (0.10)	0.15 (0.10)
Adjusted R ²	0.41	0.38	0.41
SEE	0.26	0.26	0.26
Durbin-Watson	1.54	1.51	1.59

Numbers in parentheses are standard errors

N = 28

ing that the Senate would be likely to approve of him or her. However, after the Senate changed hands and was controlled by Democrats after the 1986 election, Reagan was faced with a different situation. Once in Regime 3, he was no longer able to nominate an extreme conservative, but rather was constrained because the Senate's preferred point was on the other side of the Court median.

Bill Clinton, on the other hand, disappointed some Democrats by not choosing justices who were more liberal. And indeed, Stephen Breyer's

prenomination record was perceived to be fairly moderate. On the other hand, Ruth Bader Ginsburg's Segal/Cover score is liberal, and even Breyer's score was far more liberal than all but one of the nominees from the previous twenty-five years. Interestingly, shortly after Breyer was approved, Clinton's party lost control of the Senate. This changed the political context to Regime 3, which would further constrain Clinton's ability to nominate a more liberal jurist.

The model also allows us to speculate on the substantive influence of regimes and of elections. If George Bush had defeated Bill Clinton in the 1992 election, Bush certainly would have chosen nominees who were more conservative than Ginsburg and Breyer. But at the same time, the nomination context instead would have been Regime 3, compelling Bush to choose a moderate nominee rather than a strongly conservative nominee. Speculating even further, if Bush had been in office when the Republicans gained control of the Senate in 1994, we would have switched back to Regime 1, where Bush would have been unconstrained. In this situation a justice like William Rehnquist might have realized that conditions were ripe for a successor who shared his ideology and that it might be a strategically opportune time to retire.

6. DISCUSSION

Presidents view Supreme Court nominations as important policy choices. To help ensure Senate approval of their nominees and to move the policy orientation of the Court closer to their own preferences, they must take into account the preferences of the Senate and the ideology and behavior of continuing members of the Court. Our theoretical model, which is supported by our empirical results, spells out the way in which presidents engage in such strategic behavior.

One potential extension to our analysis would be to incorporate the Senate Judiciary Committee, which holds hearings on each nominee, into the theoretical model. Including this committee would change the president's calculus. No longer could he worry about only the Senate median; he would also have to worry about the committee median.³⁶ However, while the Judiciary Committee undoubtedly plays an important role in the confirmation process, and while the president undoubtedly takes into account the preferences of its members, the committee does *not* act as a gatekeeper. Even if the committee disapproves of a nominee, it still can send that nominee's name to the floor for a vote by the entire Senate.³⁷ For example, neither Clarence

³⁶See Nokken and Sala (Forthcoming) for such a model.

³⁷If the committee approves a nominee, it automatically sends the nomination to the floor. If the committee does not approve the nominee, it can choose whether or not to send the nomination to the floor.

Thomas nor Robert Bork won a majority of the vote within the committee, yet the nominations of both of these men were forwarded to the floor.

Instead of acting as a gatekeeper, the committee's primary role is to make a recommendation that sends a signal to the rest of the Senate. Whether the committee acts as a binding constraint and absolutely needs to be included in this analysis is therefore an open question. On the one hand, the Senate has never approved a nominee who was voted down by the committee, with Thomas's committee vote of 7-7 being the only near exception. On the other hand, the committee does not gatekeep; thus, its function is probably better handled by a model of information transmission.

Second, our paper was motivated by the observation that in this century presidents have been enormously successful in getting their nominees past the Senate. However, it is worth noting that failed nominations were more common in the nineteenth century, as were closely contested votes. Were presidential appointments in general more contentious in the nineteenth century than in this century? Did presidents treat Supreme Court appointments differently? While such questions are beyond the scope of this study, they are certainly worthy of attention. Our analysis represents a building block toward a fuller understanding of presidential appointments, but we acknowledge that future research should attempt to deal with these other sorts of questions.

Third, instead of using the median voter of the Senate, future work might consider using the member of the Senate located at the filibuster pivot. The reason for this, of course, is that the Senate can filibuster on a nomination, a tactic that the president will need to take into account. While the use of a filibuster on a Supreme Court nomination is a rare event, its infrequency does not denote its unimportance.³⁸

Fourth, we believe scholars should proceed cautiously when moving from our model to any predictions about Senate voting. Even leaving aside the possibility that the president has made an error when choosing a nominee (which presidents surely have done), we would not expect all Senate confirmation votes to consist of bare majorities, which this analysis might seem to indicate. Events that happen between the president's nomination and the confirmation vote can influence the Senate's action. In the cases of Fortas and Thomas, for example, information made public subsequent to the nomination but prior to the confirmation vote undoubtedly shifted the votes of some members. In addition, individual senators might be influenced by party leaders, norms, or even something akin to a snowball effect, causing a larger than expected majority to vote for a nominee. Thus, we recognize that the Senate

³⁸The 1968 nomination of Abe Fortas to the position of chief justice was withdrawn after it was filibustered in the Senate. In addition, it is entirely conceivable that Bill Clinton had the filibuster pivot (Krehbiel 1998) in mind when he nominated moderate Stephen Breyer to the bench.

might pay attention to factors other than policy positions when voting on Supreme Court nominees and recognize that incorporating such factors into future models might make for a richer analysis.

While these and other changes might be made to our theoretical model and empirical tests, we believe that our analysis sheds new light on the nominations process. There is a reason most Supreme Court nominees easily pass the Senate: presidents act strategically to choose the best nominee they can, given the constraints that they face.

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