

A Theory of Supreme Court Nominations

Peter H. Lemieux

and

Charles H. Stewart, III

**Department of Political Science
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139**

January, 1991

A Theory of Supreme Court Nominations

Peter H. Lemieux

and

Charles H. Stewart, III

Department of Political Science
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Abstract

This paper proposes a positive theory of the process by which the nominees to the Supreme Court are appointed by the president and confirmed or rejected by the Senate. While some nominations do occasionally develop into major political controversies, most nominations produce little uproar. Historically four out of five appointments have been confirmed by the Senate, with a confirmation rate of sixty percent even when the two branches have been controlled by opposing parties. Many commentators have attributed this high confirmation rate to "senatorial deference" to the prerogatives of the executive. However we show that the constitutional structure within which the nomination "game" is played out should usually result in the appointment of a nominee that the Senate will accept, even if both the president and key senators pursue their potentially conflicting ambitions to control the future policy direction of the Court. In other words, we argue that the high rate of confirmation may reflect presidential "deference" to the Senate just as much as the reverse. We also demonstrate that, in most cases, the appointment of any single justice will have only a marginal influence over policies in the near term thus limiting the extent to which the other branches might determine the Court's rulings. We conclude the paper by suggesting directions for future research based on relaxing some of the assumptions on which our model is based.

A Theory of Supreme Court Nominations

Peter H. Lemieux

and

Charles H. Stewart, III*

Department of Political Science
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

From time to time nominations to the United States Supreme Court erupt into major political controversies. Disputes over the proper roles of the Presidency and the Senate in the nomination process have become especially acrimonious since Lyndon Johnson failed to secure the promotion of Abe Fortas to Chief Justice in 1968. A year later Richard Nixon made two unsuccessful attempts to fill a vacancy with the nominations of Clement Haynsworth and G. Harrold Carswell. A period of calm under presidents Gerald Ford and Jimmy Carter ended abruptly with Ronald Reagan's nomination of Robert Bork in 1987, arguably the most contentious nomination of the twentieth century. In commenting on these disputes scholars and jurists have argued over the degree of latitude the president should have in naming new members to the Court, and the degree of discretion granted the Senate in its constitutional role of "advice and consent." In this paper we propose a positive theory of the confirmation process that offers some insight into these philosophical issues.

One view among Court scholars grants the president preeminent power to appoint Supreme Court justices. This power derives primarily from the unique electoral position of the president: He is selected from a national electorate and thus enjoys a national mandate. Senators, in contrast, represent disparate, local interests and thus have no national constituency. From this perspective the Senate's role is limited to ensuring that the president appoints justices with certain minimal qualifications, mostly professional in nature, but the Senate is not empowered to contest the political or juridical views of the nominee. Opponents of the theory of presidential preeminence argue that a majority of the Senate can also be viewed as constituting a "national" constituency and thus deserves equal weight in the nomination process.¹

*An earlier version of this paper was delivered at the National Bureau of Economic Research Conference on Political Economy, Cambridge, Massachusetts, December 7-8, 1990. The authors appear alphabetically.

¹A variety of perspectives on the nomination process can be found in the collection of articles entitled "Essays on the Supreme Court Appointment Process," in the *Harvard Law Review* (1988).

Supporters of the concept of presidential dominance often point to the historical record concerning nominations as evidence for their perspective. The Senate has rarely rejected presidential nominations to the Supreme Court, even when the presidency and the Senate have been controlled by opposing political parties. Overall, 81 percent, or 112 of the 138 nominations made to fill a vacancy on the Court have been successful, including 25 of the 42 nominations (60 percent) made when the Senate was not controlled the president's party.² If most senators in most periods of American history have been willing to ratify even the nominees of presidents with whom they otherwise vehemently disagreed, this fact lends credence to the argument that not only *ought* the president be preeminent in nomination politics, senators act as if they believe he *is* preeminent in making nominations.

Yet it is difficult to interpret this historic tendency of the Senate to confirm nominees because we have no strong theoretical expectations about whether nominees should usually be confirmed or rejected. Historical studies by judicial scholars (Warren, 1923; Cole, 1934; Danelski, 1964; Scigliano, 1971; Harris, 1973; Blaustein and Mersky, 1978; Schmidhauser, 1979; Friedman, 1983; Abraham, 1985) typically stress the idiosyncratic conditions surrounding each nomination and attempt to explain its success or failure as the conjunction of a unique set of actors and events. Recent statistical studies have advanced us from wholly idiosyncratic explanations of nomination failure and success (see Segal, 1987; Lemieux and Stewart, 1990; Ruckman, 1989). Still, even these more methodologically systematic studies take their cues from the historical studies, rather than striking out along new theoretical paths.

We seek to fill this theoretical void by proposing a theory of the confirmation process. To address this problem, we adopt the position increasingly taken by public choice scholars who study the role of Congress in overseeing administrative agencies: Regardless of how various schools of legal interpretation judge normative claims about senatorial activism and presidential discretion, the text of the Constitution imposes an institutional structure of vetoes that gives each branch of the federal government a mechanism for blocking the actions of the others. We then assume that ambitious politicians will use all the tools made available by the Constitution to further their ends.

²This total of 138 nominations excludes promotions of a sitting justice to become Chief Justice and two unusual cases: William Paterson's (1793) first nomination was quickly withdrawn and then resubmitted and approved after a decision on the constitutional legitimacy of nominating a sitting senator, while Homer Thornberry's (1968) nomination was never considered being contingent on the (unsuccessful) promotion of Abe Fortas to Chief Justice. Throughout this paper we concern ourselves only with nominations to fill a seat on the Court. Thus the promotion of a sitting justice to Chief involves very different political calculations than those we analyze here. We also limit our universe to *original replacement* nominations and thus further exclude the six initial appointments made by Washington in 1789, as well as the twenty-two second and third attempts. We are then left with a total of 112 first appointments as the universe for analysis.

Implicit in the Constitution is a game that sets institutional actors against one another in the pursuit of political power — "ambition counteracting ambition" (Federalist 51). The basic parameters of the game are set, *but no others*. A majority of the Senate *must* agree to a presidential nominee, creating a potential "senatorial veto" over presidential appointments. Even if the Founders wished the president to be preeminent in the nomination process (and there is little evidence they did), the Constitution provided no mechanism to secure such preeminence. New justices must be jointly chosen by the president and Senate, if only implicitly. However, as we shall see later, the Constitutional prerogative granting the president the power to propose a new justice to the Senate does give the president additional "leverage" in the nomination process.

At the same time that this senatorial veto induces cooperation between the president and the Senate, another constitutional provision constrains the ability of these two branches to guide the future of the Court: The Supreme Court is a collective body whose members enjoy life tenure. As a result, the replacement of a single justice by another can typically change only marginally the character of future Court decisions. This fact helps to limit the intensity of debate over nominees even in situations where the Senate and the president may have sharply differing preferences for future Court decisions.

The theory we propose in this paper builds on these constitutional "rules of the game" to develop a model of the dynamics of the confirmation process. The model will illustrate both the process by which the president identifies a nominee and whether or not the Senate will vote to confirm the appointment. We focus on understanding how changes in the preferences of justices, senators, and the president alter the range of nominees acceptable to both the president and the Senate. We will further demonstrate how the constitutional feature that grants the president the power to select the nominee gives the executive an important advantage in guiding the Court's decisions, within the limited degree of control that either institution exerts over the Court.

An important substantive conclusion of what follows concerns the issue of senatorial "deference" to presidential wishes. Our model will show that a rational president will usually have to take the preferences of the Senate into account when choosing a nominee. While the president's right to make the nomination grants him great latitude in the process, the Senate can insure that the president does not move the Court too far in one step by rejecting the nominee. We will nevertheless show that a nominee acceptable to both branches can, at least in principle, always be found, which gives meaning to the historically high success rate of nominations. We stress, however, that this high rate of concurrence may reflect "presidential deference" to the Senate in the choice of a nominee as much as it does "senatorial deference" to the president in the process of confirmation.

A goal of this paper is to bridge two literatures in the study of American politics — judicial studies, which has been the nearly exclusive forum of research on nomination

politics, and legislative studies, which has increasingly drawn on the analytical tools of organizational economics to explain both legislative behavior and the relationship of Congress to the rest of society. In keeping with the spirit of that analytic tradition, we present an admittedly stylized view of the world. At times we discard verisimilitude to purchase analytical rigor. On the other hand, in keeping with the empirical tradition in nomination studies, we limit our use of the jargon of formal theory and pay close attention to the substantive interpretations of our findings. While we may run the risk of alienating both audiences, we believe the rewards will be great if two groups of scholars who have rarely interacted can begin an intellectual debate about an important aspect of American politics.

A Theory of Nomination Politics

Our model focuses on the essential features of the process by which the president and the Senate attempt to influence Court decisions. It is a *full information* model of the nomination process, thus putting on hold some interesting, yet complex, substantive and modelling issues.³ Real life is admittedly more complex than the model we explore, and factors enter into decision-making of which we do not take account. For instance, we ignore the role of "judicial competence," which helps to define the nominee pool and may influence senatorial decisions (Cameron, Cover, and Segal, 1990). Instead we assume that the president can choose among a number of possible nominees with acceptable professional credentials, but somewhat differing policy perspectives. We also ignore the special circumstances that attend the promotion of a sitting member of the Court to Chief Justice and consider only nominations to fill a Court vacancy. We also limit our attention to a president's first attempt to fill a vacancy, leaving for future study the more complex situation of multiple appointments. In sum, we aim to formalize the constitutional mechanisms involved in the most common type of contest between the president and the Senate, a first effort to appoint a new justice to fill a Court vacancy.

We make one important assumption about the motivations of both the president and members of the Senate, namely that they all view Supreme Court appointments as a means of influencing future policy decisions by the Court. While electoral motivations are most often cited as the source of legislators' behaviors (e.g., Mayhew, 1974), we believe electoral politics plays a relatively unimportant role in the process of

³While we shall present a *full information* model of the appointment process, our concluding section will offer a brief discussion of the insights that might be gained by assuming that presidents and senators possess only *incomplete information* about the preferences of relevant actors, particularly nominees. While some might wish us to begin with the incomplete information model, we concentrate here on complete information for two major reasons. First, and more important, the incomplete information models we are currently developing all build on the assumptions, findings, and notation we use here; it is important that the relatively simple, intuitive world of complete information be fully understood before moving on to more complex issues. Second, because we are interested in laying out a research agenda for the wider community interested in these problems, we believe the complete information world provides the clearest framework for understanding where future efforts would be most profitable.

confirming nominees to the Supreme Court.⁴ The business of the Court is arcane, conducted among a small group of elite professionals, and employs a language and terms of art that are inaccessible to most voters. Although electoral implications are sometimes attributed to confirmation votes, most recently in the case of Southern Democrats opposing Bork to retain the support of newly-enfranchised black voters, most confirmation battles will have only minor effects at the polls.

A more persuasive case can be made for the influence of interest groups in the confirmation process (Caldeira and Wright, 1990). However, interest group efforts to persuade the president, and more especially senators, of the virtues of particular nominees can be easily incorporated into our model as changes in the preferences of the actors involved. Indeed we will show that presidents can often name someone to the Court holding positions more extreme than his own that the Senate will nevertheless confirm. In such cases we might expect the president to choose a nominee that satisfies the wishes of influential groups even if her political views do not coincide with his own. Finally since most interest groups' efforts for or against a specific nominee are generally policy-oriented, they are in keeping with our basic motivational assumption.

A model of Court decision-making

In order to understand how the president and Senate jockey to control the Court, we first need a model of Court decision-making, since this process is the policy target that the two elected branches attempt to influence through nominations. We base our theory of Supreme Court decision-making on a spatial model of policy choice common to both legislative and electoral studies, though less common in studies of the judiciary.⁵ In handing down rulings and writing opinions, Court majorities choose a point, x , in a multidimensional policy space, \mathbb{R}^m , that defines the Court's interpretation of "the law." The further any position represented in a case deviates from x , the more likely the Court will decide against the parties arguing that case.⁶

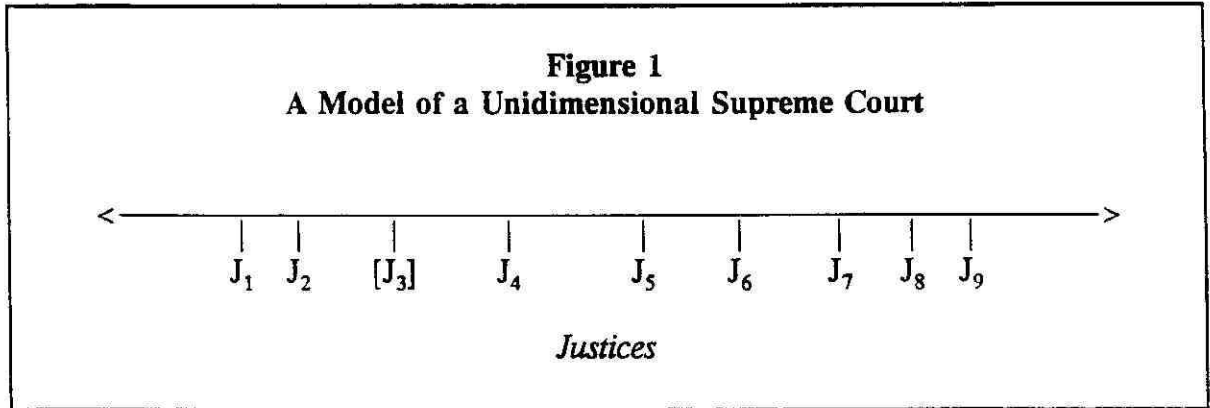
To simplify matters significantly, we begin by confining ourselves to a unidimensional policy space (i.e., $m = 1$). (In the concluding discussion we sketch out an argument for the effects of extending the model to more than one dimension and conclude that

⁴For a contrary argument see Cameron, Cover, and Segal (1990).

⁵These types of models have become increasingly popular in the "law and economics" literature. See, for instance, Ladha (1990), Spiller (1990), and Spiller and Gely (1989). Rohde and Spaeth (1976) and Teger (1977) provide rare instances of the explicit incorporation of microeconomic analysis into the study of judicial nominations.

⁶Thus, any actual Court ruling will actually involve two type of decisions: (1) the location of x , and (2) whether to rule for the appellant or the appellee. The second decision determines who wins the case in a narrow sense, while the first sets down the rule of law that determines the second. Rational actors in the polity also assume that the Court will retain x in the future (until the Court changes), so behavior will be changed by changes in x . We assume that, on average, presidents and senators care more about the location of x than the particular winners of particular cases, and it is thus where we focus here.

Figure 1
A Model of a Unidimensional Supreme Court



the thrust of the analysis remains unchanged.) There is a set of nine justices $\{J_i, i = 1, \dots, 9\}$ that defines the Court. Each justice has a well-defined utility function over every point in \mathbb{R}^m , $U_i(x)$, with an ideal point indicating the location at which J_i 's utility is maximized. We designate a generic ideal point by x_i .

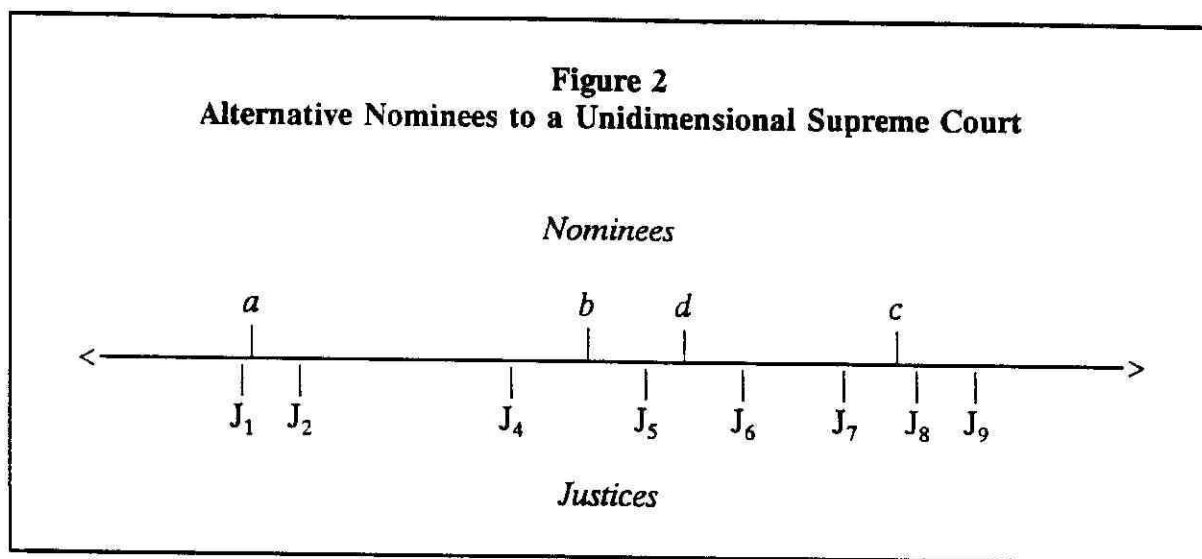
For simplicity we assume quadratic preferences, but any symmetric, strictly concave preference function will do for the following analysis. Thus, for any justice, $U_i(x) = v_i - a_i(x - x_i)^2$, where v_i represents the maximum utility an individual could receive from the Court's decisions, and a_i scales the loss in utility assigned to deviations from x_i . In order to focus on the logic of the model we assume every actor's utility function is identical and normalized with $v_i = 0$ and $a_i = 1$.

The core of the Court decision-making model is rooted in a basic finding of social choice theory: In a pure majority rule setting with only one dimension, an odd number of committee members, and "single-peaked preferences," the equilibrium social choice of the committee is the position held by the median voter (Black, 1958). The social choice will change *only* if the preference of the median voter changes. The precise preferences of the individuals to the right and left of the median voter are thus immaterial to the character of the decision.

We now examine what happens to Court decisions when a vacancy is created. Imagine that we have an original (pre-vacancy) Court with nine members, arrayed as illustrated in Figure 1 above with $J_1 < J_2 < \dots < J_9$. The justice identified as J_5 is the median (J_m), and his position thus determines the boundaries of constitutional interpretation.

Now let an arbitrary justice be designated the vacancy, say J_3 . Her departure immediately complicates the analysis since the Court no longer has an odd number of members. Thus the equilibrium decision can no longer be identified with the ideal point of any single justice but becomes instead an interval defined by the ideal points of two adjacent justices (Enelow and Hinich, 1984: 12). In this particular example, a vacancy created by J_3 's departure shifts the median to the closed interval $[J_5, J_6]$. Without specifying anything about the Court's agenda process, we cannot predict

Figure 2
Alternative Nominees to a Unidimensional Supreme Court



precisely where in $[J_5, J_6]$ this new equilibrium will be. For the moment assume that J_5 and J_6 either "split the difference" or alternate in being the deciding justice in handing down 5-3 decisions.⁷ In either case the midpoint between J_5 and J_6 , or their average value, becomes the new equilibrium of the eight-member court.

This line of argument holds whenever *any* justice to the left of J_5 leaves the Court. Similarly, if *any* justice to the right of J_5 departs, the temporary status quo shifts from J_5 to the interval $[J_4, J_5]$. Finally, if J_5 himself leaves, the eight-member court equilibrium is defined by the interval $[J_4, J_6]$. Thus, in substantive terms, a vacancy created on the "left" of the Court temporarily shifts its decisions to the "right" in the policy space, and vice versa. A vacancy created by the departure of the Court's median may shift decisions in the short term in either direction, depending on how symmetrically J_4 and J_6 were located in comparison to J_5 .

Limitations to changing the decisions of the Court by replacing a single justice become readily apparent in this simple unidimensional example. If any justice to the left of J_5 leaves the Court, then the decisions of the new nine-member Court created by the replacement must lie within the interval that now defines the status quo of the short-handed Court, $[J_5, J_6]$. For instance, if J_3 leaves and creates a vacancy, a replacement located at a in Figure 2 would simply restore J_5 to the Court's median, as would a nominee located at b . A nominee at c would shift the Court's equilibrium to J_6 . Finally, only a nominee such as d , located between J_5 and J_6 would actually become the new median, but again the change would be confined to the interval $[J_5, J_6]$.

⁷The analysis to follow also holds if we assume that decisions are uniformly distributed over the $[J_5, J_6]$ interval.

The relationship between the justice who creates the vacancy and the location of the new median can be summarized as follows:

<i>Vacancy</i>	<i>Replacement (J_r)</i>	<i>New median</i>
J_1, \dots, J_4	$J_r \leq J_5$ $J_5 < J_r < J_6$ $J_r \geq J_6$	J_5 J_r J_6
J_5	$J_r \leq J_4$ $J_4 < J_r < J_6$ $J_r \geq J_6$	J_4 J_r J_6
J_6, \dots, J_9	$J_r \leq J_4$ $J_4 < J_r < J_5$ $J_r \geq J_5$	J_4 J_r J_5

In summary, then, the preferences of the incumbent justices severely constrain the ability of the president and Senate to guide the future of the Court by replacing only one justice.⁸

This discussion allows us to simplify our consideration and explication of the model as we move on to later stages. From the viewpoint of an outsider trying to influence the Court in the short term, all we need to know is the location of the middle three justices — J_4 , J_5 , and J_6 — and where the vacancy is located in relation to J_5 — to J_5 's right, to the left, or J_5 himself. Thus our discussion to follow will be confined to locating these three justices in the policy space. Two of these justices will define the median interval, and we will designate the generic locations of the left- and right-hand anchors to the interval as J_l and J_r , respectively.

Identification of Court nominees

The argument in the previous section alerts us to the limitation that presidents encounter in trying to move the Court into line with their own preferences: no nominee will move the Court outside the $[J_l, J_r]$ interval. However, we will now show that within the model there is always a nominee who would create a new nine-member Court that is preferred by *both* the president and a majority of the Senate to the Court with only eight members and who thus should be confirmed. Moreover, the

⁸An obvious objection to this analysis is the contention that presidents and senators appoint justices to the Court thinking ahead to future nominations. Thus, while any particular nomination might not move the Court very much, a president can string together a series of nominations to move the Court a lot (see Tribe 1985, xvii). This is certainly true. Court vacancies have occurred, on average, about every other year since the nation's founding. Therefore, every president has a reasonable chance to make more than one nomination to the Court in each presidential term. Still, our general point holds: moving the Court requires tremendous patience from impatient politicians. There is no *guarantee* that a president will even get to make *one* nomination (as Jimmy Carter discovered), nor is there a guarantee that the "right" justices will resign or die to create the types of vacancies necessary to change the Court's course (as Ronald Reagan discovered).

new median justice on the nine-member Court will usually be closer to the president in policy terms than the midpoint of the median interval, the equilibrium result under the eight-member Court. Of course, whenever the President and Senate occupy locations on either side of the median interval, any gain for the president must translate into a loss for the Senate, even though a Senate majority prefers the new Court to the eight-member deadlocked situation.

The constitution allows the president to choose the nominee presented for senatorial confirmation. Therefore, we know that any nominee who is confirmed must be preferred by both the president and a Senate majority to the current eight-member Court, otherwise the president would make no nomination⁹ or the Senate would reject the nominee.

To determine the spatial location of nominees, we need to examine the characteristics of five sets in the issue space:

- (1) the *president's preferred-to set*, $P_P(x_m)$, the set of all points where the president would strictly prefer the median of the Court to be located compared to the result that obtains under the eight-member Court, the midpoint between J_l and J_r , designated x_m in the analysis to follow;
- (2) the *president's nominee set*, $N_P(x_m)$, the set of all points where the president could locate a nominee and create a Court he strictly prefers compared to the eight-member Court;
- (3) the *Senate's preferred-to set*, $P_S(x_m)$, the set of all points where a Senate majority would strictly prefer the median of the Court to be located compared to the results that obtain under the eight-member Court;
- (4) the *Senate's nominee set*, $N_S(x_m)$, the set of all points where the president could locate a nominee and create a Court that a majority of the Senate strictly prefers compared to the eight-member Court; and,
- (5) the *candidate set*, $C(x_m)$, the intersection of the two nominee sets. Substantively, it consists of all points where the president could locate a nominee and create a Court that is strictly preferred *jointly* by the president and a Senate majority over the eight-member Court. Formally, $C(x_m) = N_P(x_m) \cap N_S(x_m)$.

To understand how the president's preferred-to and nominee sets [$P_P(x_m)$ and $N_P(x_m)$] are constructed, we begin by examining how the president evaluates the eight-member Court. Recall that with eight members, the Court's decisions are no longer dominated by a single median justice, but rather by two justices, who together define

⁹There is no requirement that a president forward a nomination to the Senate when a vacancy occurs on the Court. As we will see below, however, the president will always want to forward a nomination.

a *median interval*. Because we assume no special agenda power for either justice, we assume that decisions *on average* fall at the midpoint between these two justices for the duration of the eight-member Court. Call this point $x_m = (J_l + J_r)/2$. Because the president has a strictly concave utility function, it is well-known that the president would prefer a nine-member Court with x_m as its median over an eight-member Court where x_m is the average decision. A proof appears in the Appendix.

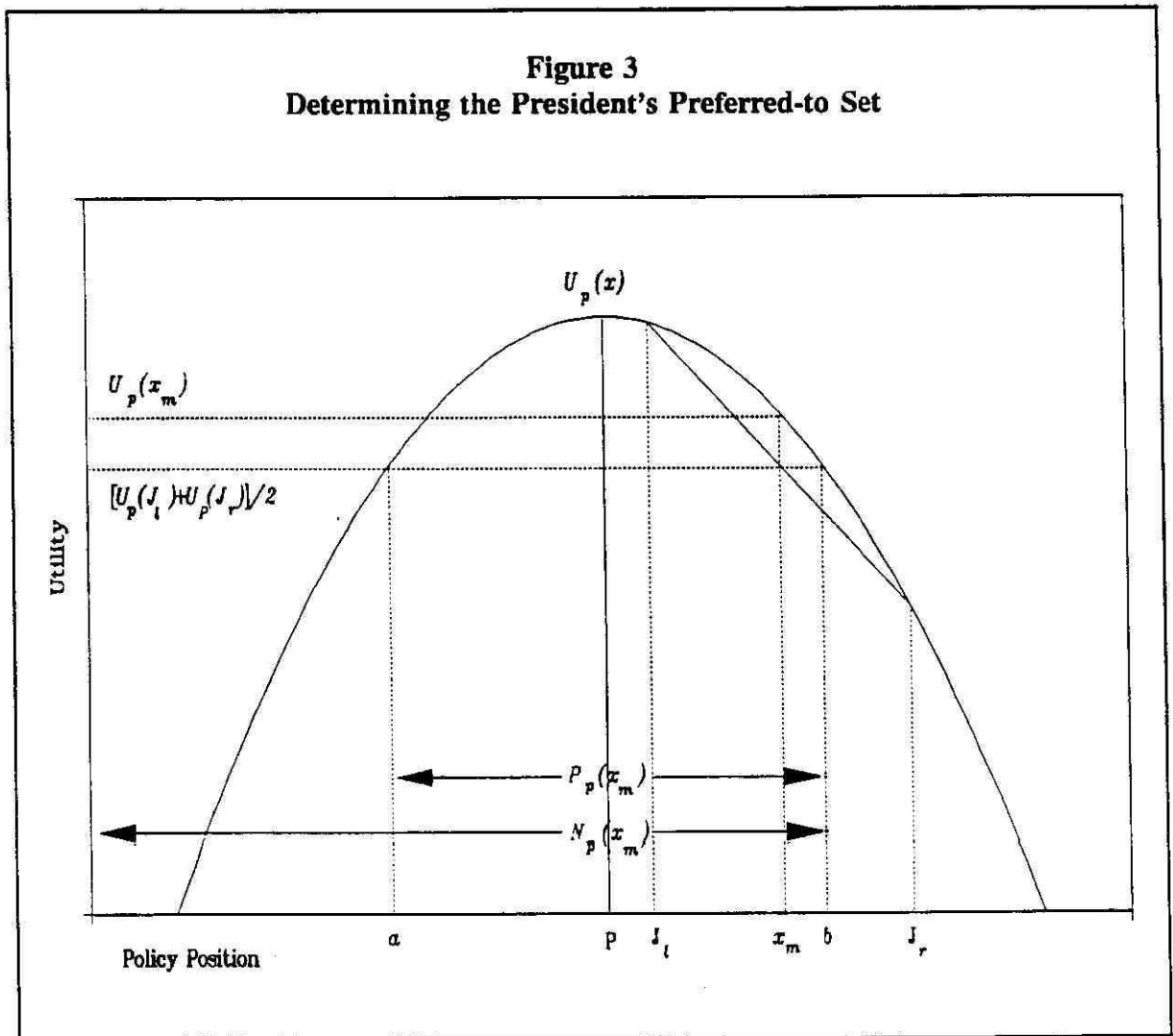


Figure 3 illustrates the proof. With a vacancy the median interval is defined by the two justices, J_l and J_r . The president's ideal point along the single dimension is indicated by P , and his quadratic utility curve is indicated by $U_p(x)$. Two horizontal lines are drawn: The upper line indicates the utility the president receives from a median justice located at the midpoint, x_m , and the line below it denotes the average level of utility the president receives if J_l and J_r alternate in deciding cases, $\frac{1}{2}[U_p(J_l) + U_p(J_r)]$. The president clearly prefers the certain outcome of a new median justice at x_m to the lottery over the median interval.

We now define the president's preferred-to set, $P_p(x_m)$. Formally:

$$P_p(x_m) = \{x \mid U_p(x) > \frac{1}{2}[U_p(J_l) + U_p(J_r)]\}.$$

In Figure 3 $P_p(x_m)$ consists of all points in the interval (a, b) since these yield a higher utility than the lottery outcome. The Appendix shows that $P_p(x_m)$ is a function of the ideal points of the president and the justices defining the median interval.

Notice also how the location of the median justices in Figure 3 limits the president's ability to influence decisions by the nine-member Court that his nominee would create. *Any* successful nomination to the left of, or equal to, J_l makes J_l the new median. This restriction on the president's ability to shift the location of the new median justice ironically expands the president's latitude in choosing a nominee. While the president's preferred-to set is bounded by the distribution of preferences across the members of the eight-member Court, *in this instance the set of all acceptable nominees is unbounded*. The nominee set in Figure 3 includes all points to the left of point b . We formally define this set, $N_p(x_m)$, as:

$$\{N \mid U_p(J_m|N) > \frac{1}{2}[U_p(J_l) + U_p(J_r)]\},$$

where $(J_m|N)$ is the location of the new median justice, J_m , given the location of the nominee, N . In particular:

$$(J_m|N) = \begin{array}{ll} J_l & \text{if } N < J_l \\ N & \text{if } J_l \leq N \leq J_r \\ J_r & \text{if } N > J_r \end{array}$$

Also from the argument in the previous paragraph we know that $P_p(x_m) \subset N_p(x_m)$.

While the nominee set may be unbounded, it is not necessarily so. In general, the nominee set is bounded if $J_l \leq P \leq J_r$ and unbounded otherwise. Whenever the president's position is located within the median interval, a nominee holding the same preferences as the president will, if confirmed, become the new median justice. Otherwise, the president can appoint anyone on "his side" of the median interval and get the same decisions that would have resulted from appointing another justice at precisely the same position as the justice on the end of the president's side of the median interval.

Identifying the Senate's preferred-to and nominee sets is done analogously to the president's. The one minor complication is specifying how to account for the difference between the president, a unitary actor, and the Senate, a collective actor. Because we are confined to a single dimension, we can array all members of the Senate $\{S_i, i=1, 2, \dots, n\}$ along the dimension such that $S_1 < S_2 < \dots < S_n$. For the sake of simplicity we make the counterfactual assumption that the number of

members of the Senate is odd.¹⁰ Given the assumption of unidimensionality, a nominee will be confirmed if and only if he or she satisfies the median senator, S_m . Thus we can ignore the locations of the other senators and concentrate on the preferences of this pivotal senator. For the sake of expositional convenience, we use terms like "the Senate" and "a majority of the Senate" as synonyms for the median senator.

The Senate's preferred-to and nominee sets are similar to the president's:

$$P_S(x_m) = \{x \mid U_S(x) > \frac{1}{2}[U_S(J_l) + U_S(J_r)]\}$$

$$N_S(x_m) = \{N \mid U_S(J_m|N) > \frac{1}{2}[U_S(J_l) + U_S(J_r)]\}.$$

We are left with defining the candidate set, the set of all nominees whose appointment would produce a Court whose median is simultaneously preferred by both the president and the Senate, compared to the eight-member Court. Formally, $C(x_m) = N_P(x_m) \cap N_S(x_m)$.

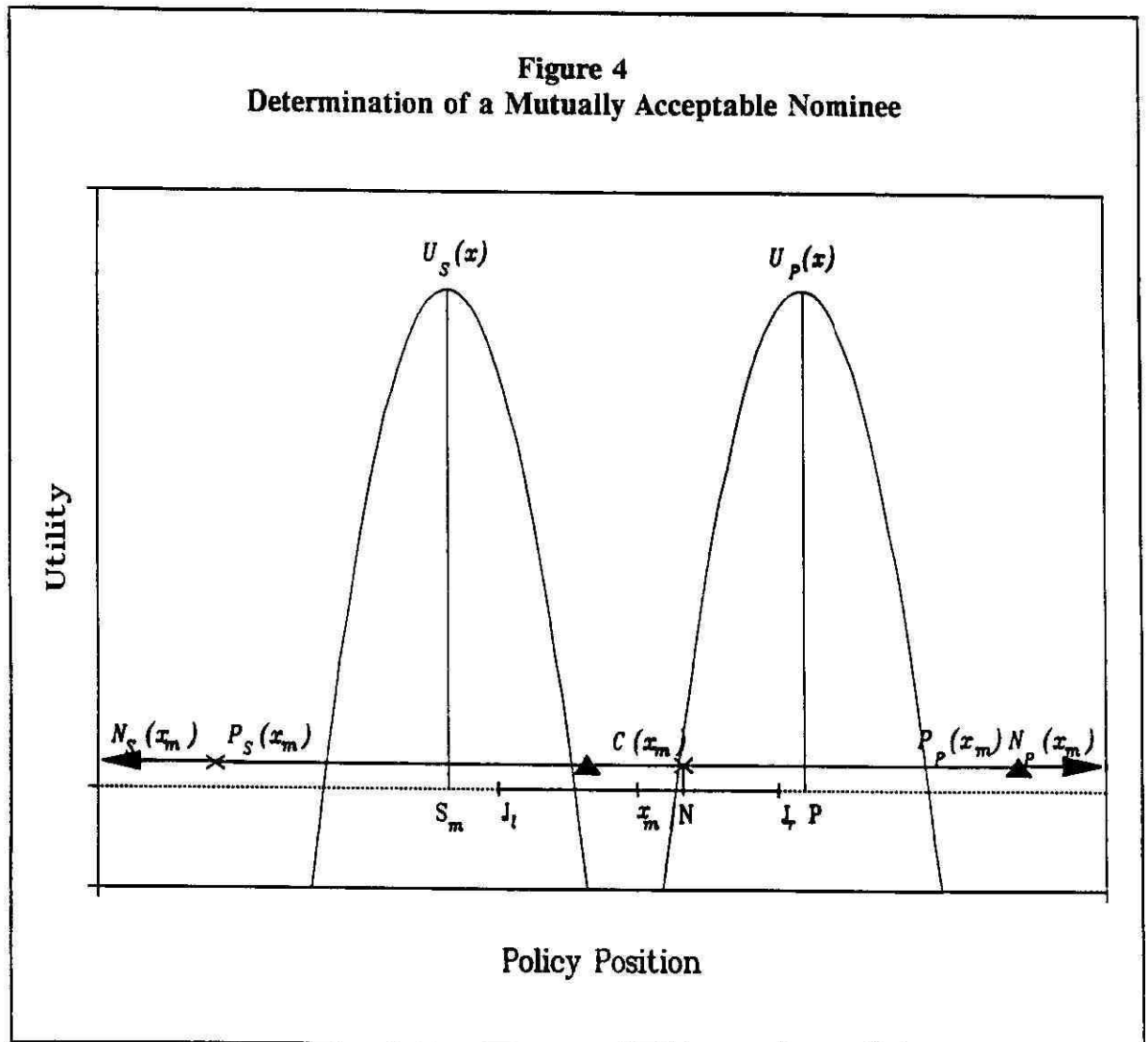
In the Appendix we prove that the president can always find a nominee whose confirmation would simultaneously result in both (1) a Court the president finds at least as attractive as the eight-member Court lottery, and (2) a Court toward which the median senator is indifferent, compared to the lottery. Thus, formally, $N_P(x_m) \cap N_S(x_m) \neq \emptyset$.

To see why there must always be at least one nominee on whom both branches would concur, we begin with the situation where all the actors are risk neutral. Since the eight-member Court yields the midpoint of the median interval as its equilibrium decision, *at the very least*, both the president and the median senator would be indifferent between the appointment of a new justice at the midpoint and the status quo. Such an appointment would yield a Court that produces the same decisions as the eight-member Court did on average, but it would produce these decisions *all the time*. Under the assumption of risk neutrality, a nominee at the midpoint would be the only candidate on whom both the president and Senate could reach agreement.

However once we assume that the actors are risk averse, this midpoint result represents the minimal amount of concurrence in our model. Most of the time, in fact, the range of nominees acceptable to both branches is much larger than one positioned simply at the midpoint between J_l and J_r . As Figure 3 shows, both the president and median senator prefer any of wide range of nominees who would create a stable, nine-member Court when compared to decisions generated by a lottery over the median interval.

¹⁰Alternatively, we could define the median senator as the 51st senator, counting from the most extreme senator located at the end of the president's "side" of the policy space, or simply include the vice president's tie-breaking vote.

Figure 4
Determination of a Mutually Acceptable Nominee



To illustrate this result, we conclude this section by working through the example shown in Figure 4. The median senator, S_m , is located just to left of J_t on one side of the median interval, with the president located to the right of J_r on the other side of the interval. This situation represents the greatest degree of conflict between the branches since the Senate and the president would prefer to locate the new median justice at opposite ends of the interval. The lines bounded by, respectively, crosses and triangles indicate the senator's and president's preferred-to sets. Notice how the risk aversion inherent in their concave utility functions results in both actors being willing to accept a fairly wide range of new Court medians compared to the lottery over J_t and J_r . The nominee sets are indicated by the arrows pointing in opposite directions on both ends of the x -axis. In the senator's case the nominee set continues infinitely from the left-end of his preferred-to set since any nominee to the left of J_t would make her the new median justice. Analogously, the president's nominee set extends infinitely from the right-most point of his preferred-to set.

With only eight justices, announced decisions alternate between J_l and J_r , with the average located at the midpoint between them, x_m . The candidate set, $C(x_m)$, includes all points common to the president's and senator's nominee sets; in this case it is the interval defined by the left-most end of the president's, and right-most end of the senator's, preferred-to sets. A utility-maximizing president would thus propose a nominee located at the end of $C(x_m)$ nearest to him, the point marked N in the figure, and the Senate would concur. The president has thus been able to exploit the risk aversion of the senators and shift the median of the Court somewhat away from x_m and toward his own position. However, the constitutional process of advice and consent empowers the Senate to restrain the president from moving the Court as far as J_r , which would be the best he could do if he did not have to take the Senate's preferences into account.

This example portrays the greatest degree of conflict between the branches. Any other scenario can be shown to result in policy shifts on the Court that are less favorable toward the president. Overall, as compared to the old nine-member Court, the Senate can be shown to lose the most in policy terms when a justice on the "Senate's side" of the old median leaves, to lose less when the median herself leaves, and lose the least when a justice on the "president's side" of the old median retires.

Implications of the Model

We have now explored some features of a simple, full information model of the nomination process. We assume that presidents and senators behave as fully informed, rational, utility-maximizing agents determined to control, to the degree possible, the policies the Court enunciates. The nomination process itself lies embedded within an institutional structure determined by the constitutional provisions of life tenure and of collective decision-making on the Court. If the cases that come before the Court can be arrayed along a single dimension, we can draw two conclusions. First, the constitutional rules limit the president's ability to shift the Court's balance of power. With only a single appointment presidents can *at most* replace the former dominant justice with one of those holding the two adjacent positions. Second, even this fairly limited power can be further held in check by the distribution of opinion in the Senate. For some vacancies only a nominee representing a true compromise between the policy positions of the president and a majority of the Senate will be confirmed. We treat these topics in reverse order.

The president proposes, the Senate disposes

If our model is correct, the President and a majority of the Senate should always find a nominee on which they can concur. Some observers may want to judge the accuracy of our approach solely on this prediction which, depending on one's criteria, may or may not be met. In a literal sense, of course, the prediction fails. Yet this may be a case of deciding between a glass that is eighty-five percent full and one that is only fifteen percent empty. Since the original six appointments by Washington in 1790, there have been 110 vacancies to fill on the Supreme Court. Presidents have failed to see their first nominee confirmed only seventeen times, or fifteen percent.

Moreover, fully seventy percent of first nominations by presidents facing an opposition Senate have been confirmed. We view these high confirmation rates as broadly supporting the hypothesis that even rational, utility-maximizing politicians should be able to find a mutually acceptable new justice.

Yet we cannot entirely ignore the fact that presidents and Senates do occasionally fail to reach agreement. Empirical studies of the confirmation process indicate that such failures can, to a limited extent, be explained systematically (Segal, 1987; Lemieux and Stewart, 1990). In general, rejections more often occur when the opposition party controls the Senate, when the president's authority is undermined by a defeat at the polls or by having succeeded to the position from the vice presidency, and when the nominee is substantially younger than the typical justice on the Court. Rejections are also more frequent when approximately equal numbers of Democratic and non-Democratic (Federalist, Whig, or Republican) justices serve on the Court. This finding accords with our notion of the dominance of the median justice, since replacements to an unbalanced Court will shift future policy outcome much less than appointments to a Court divided into opposing camps. Nevertheless most of these empirical studies can usually account for no more than half of all failed nominations. We might thus conclude that failures to confirm largely result from idiosyncratic features of specific nominations and do not constitute a serious refutation of our model.

While the historical evidence largely concurs with our model's prediction of mutual accommodation, our theory also illustrates why such accommodation need not arise from "deference" by the Senate to the constitutional privileges of the Executive. Depending upon where the president and the median senator stand in relation to the justices who define the median interval, the president may have to nominate someone whose views are more moderate than his own. Consider, first, situations where both the president and the median senator stand to the left of the median interval. In this event the president and senator *both* prefer to make J_i the new median. We would thus expect the Senate to confirm nearly any nominee the president submits. In contrast, the situation illustrated above in Figure 4, where the president and Senate bracket the interval, pits the president's desire to make J_i the new median against the Senate's wish to place J_i in that role. Here the president's choices are more limited. He must put forth a compromise selection lying within the median interval who will then become the new median justice. The four remaining possible orderings of the actors produce intermediate results. To see how the outcome of the nomination process is influenced by different orderings of the actors we have conducted a computer simulation.

We focus our analysis on three criteria, the size of the candidate set, the identity of the new median, and the president's ability to nominate a justice located at his own ideal point (in other words, to "nominate himself"). We generated ideal points for the president, median senator, and the two justices who define the median interval using random drawings from the unit normal distribution. An actor located at zero is thus in the center of the policy space, while someone at positive one stands a full

standard deviation to the right of center. We then determined the president's and senator's preferred-to sets and the resulting candidate set assuming identical quadratic utility functions of the form described on page 6. Finally we designated as the nominee that point in the candidate set closest to the president's own position, which in many cases is the president's own ideal point.

Table 1
Results of Simulated Nominations

Ordering*	Statistics on the Candidate Set (Standard deviation units)				New Median	Proportion President is Nominee
	Mean	Std Dev	Minimum	Maximum		
L-R-S-P	2.116	1.207	0.046	6.875	Endpoint	0.647
S-P-L-R	2.077	1.171	0.064	7.361	Endpoint	1.000
L-S-P-R	1.733	0.854	0.101	4.733	Nominee	0.877
L-S-R-P	1.006	0.760	0.020	4.871	Either	0.184
S-L-P-R	1.000	0.758	0.011	5.795	Nominee	0.673
S-L-R-P	0.136	0.160	0.000	1.000	Nominee	0.000

*This column indicates the relative position of the President, Senator, and the Left and Right justice defining the median interval. Both the ordering presented and its mirror image are included in each row; for instance, the first row includes results for both the ordering L-R-S-P and the ordering P-S-L-R.

We ran the simulation 10,000 times; summary results appear in Table 1. The entries in the table are sorted according to the mean width of the candidate set. While some orderings yield fairly wide candidate sets, others result in sets whose widths become vanishingly small. Looking down the column of means indicates that the six possible orderings of the actors can be grouped into four types:

Both the president and the median senator hold positions to the left or right of the median interval on the Court (rows one and two of the table). In this situation the president has the least difficulty in finding a nominee acceptable to the Senate because the average size of the candidate set reaches its maximum. However, if the median senator holds a more extreme viewpoint than the president (cases in the second row), the president can always secure the nomination of a candidate whose views coincide exactly with his own. When the president holds the more extreme position, he will sometimes have to present a less extreme nominee to guarantee confirmation. In these situations, the new median is always the justice at the endpoint of the median interval nearer the president and Senate.

Both the president and median senator hold positions that lie within the median interval on the Court (row three). Here the median interval is on average somewhat smaller than in the first situation. The closeness of the senator's and president's stands compared to those of the justices makes it possible for the president to nominate someone at his own location in the vast majority of cases. In this case the nominee will become the new median justice.

Either the president or the median senator, but not both, hold positions that lie within the median interval (rows four and five). Here the range of mutually acceptable nominees is much smaller than in the previous two situations since the president and Senate differ on their preferred new median justices. When the president's position lies outside the interval (row four), he prefers to see the endpoint justice nearer him become the new median, while the senator prefers a new median lying between her own position and that of the (same) endpoint justice. Depending on the relative distances among the four actors, the Senate may be able to keep the president from moving the new median all the way to the endpoint. In other instances the median senator will happily vote for a nominee who will make the endpoint justice the new median on the Court, even voting for a nominee at the president's own location about a fifth of the time. In row five the president's position lies within the median interval, so he can always secure confirmation for someone between himself and the endpoint justice nearer the senator who will become the new median. Often the distance between the president and senator in these cases will be small enough that he can nominate someone holding views identical to his own.

The president and the median senator hold diametrically opposed positions on opposite sides of the Court's median interval (row six). This is the situation diagrammed in Figure 4. Here the nominee must lie within the median interval and thus becomes the new Court median. As a result the average width of the candidate set is dramatically smaller than in the previous situations, and the president can never put forth someone holding his own views.¹¹

Overall, then, with the exception of situations where the president lies between the median senator and the median interval, the distribution of preferences in the Senate can require the President to offer up a candidate who reflects a true compromise between their positions. Of the ten thousand simulated nomination scenarios presented in Figure 4, the president could "nominate himself" only 56 percent of the time. Otherwise the Senate's veto power constrained the president's discretion over the choice of a nominee. In these situations the president must "defer" to the wishes of the Senate, rather than the reverse.¹²

¹¹While the table indicates that the minimum size of the candidate set in this situation is zero, we know from the proof in the Appendix that the candidate set must always be non-empty. In fact the smallest candidate set generated in this case was 0.0000008, which rounds to zero in the table.

¹²Our simulation generated about equal numbers for each of the six types of possible orderings among the four actors so that the statistical results in the rows of Table 1 are each based on somewhat

The model also makes it clear that the policy stand of the nominee is endogenous to the nomination process. Historical and quantitative empirical research on nomination politics typically portrays a nominee's policy views, and other characteristics, as a "given" that simply reflects the president's own preferences and criteria. If our viewpoint is correct, presidents choose nominees *in anticipation of* the Senate's views as much as in correspondence with their own beliefs, a perspective corroborated by a recent account of the decision by the Bush administration to nominate David Souter. When asked by a representative of a conservative lobby group why Bush had not nominated the conservative Edith Jones instead of the more moderate Souter, presidential Chief of Staff John Sununu replied that, "...it was a political judgment call on which one we'd be more likely to get through." (*Harper's*, 1990)

This discussion of the power the Senate exerts over the identification of nominees should not entirely overshadow the advantages the president does enjoy through advice and consent. Within the model his leverage comes from his power to propose the nominee, which allows him to take advantage of senators' risk aversion. As the Appendix points out, a corollary of the proof of the nonemptiness of the candidate set is that the president can always choose a nominee who makes the Court's new median closer to his own position than the midpoint of the median interval, the equilibrium outcome if the actors are risk neutral. If the process were reversed, with the Senate presenting a nominee to the president for his veto or approval, then the Senate could exploit the president's risk aversion. Risk aversion thus explains why senators would support a nominee whose appointment nevertheless moves the Court's median in the president's direction.

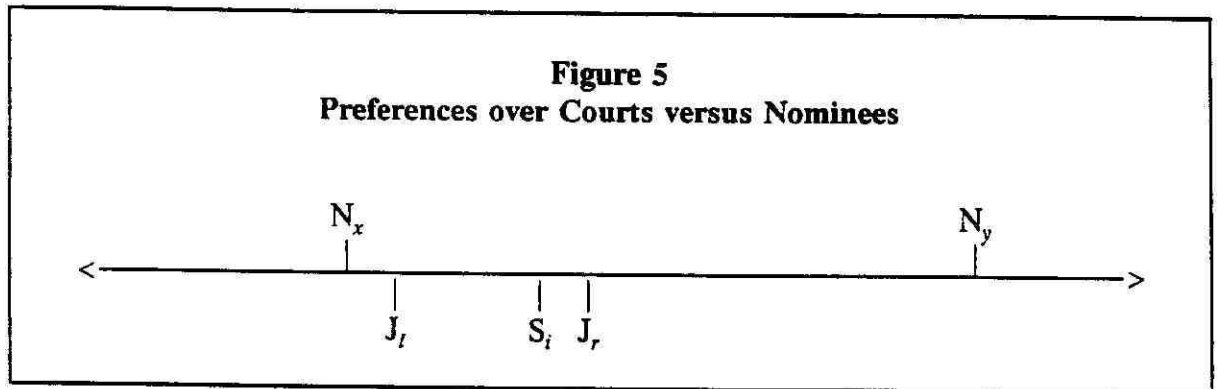
The Court and the importance of nominees

Our analysis points out the important role played in the confirmation process by the structure of preferences among the justices already on the Court. While nearly all quantitative studies of Supreme Court nominations have focused on the characteristics and beliefs of nominees, what is far more important from a strict policy perspective is how the appointment of that nominee will, or will not, shift the identity of the median justice.

Analyses of roll call votes taken on the confirmation of nominees usually presume that senators are less likely to vote for *nominees* further away from their own ideological locations (e.g., Cameron, Cover, and Segal, 1990; Felice and Weisberg, 1988-89). Our perspective indicates that a senator will be less likely to support a nomination that moves the new *Court* further away from the senator. Most of the time these

over 1,600 observations. We hasten to add, however, that the historical distribution of Court vacancies is nowhere near so even. Most nominations are made to Courts with substantial imbalances of policy opinions. For example, using partisanship as a rough measure of policy position, the difference in representation between the majority and minority parties on the Court at the time of a vacancy has averaged 3.9 justices, or a Court with a 6-2 majority after the vacancy. (See Lemieux and Stewart, 1988, for details on the partisanship measure.)

two decision rules will result in identical behavior, but not always. For instance, consider the following diagram:



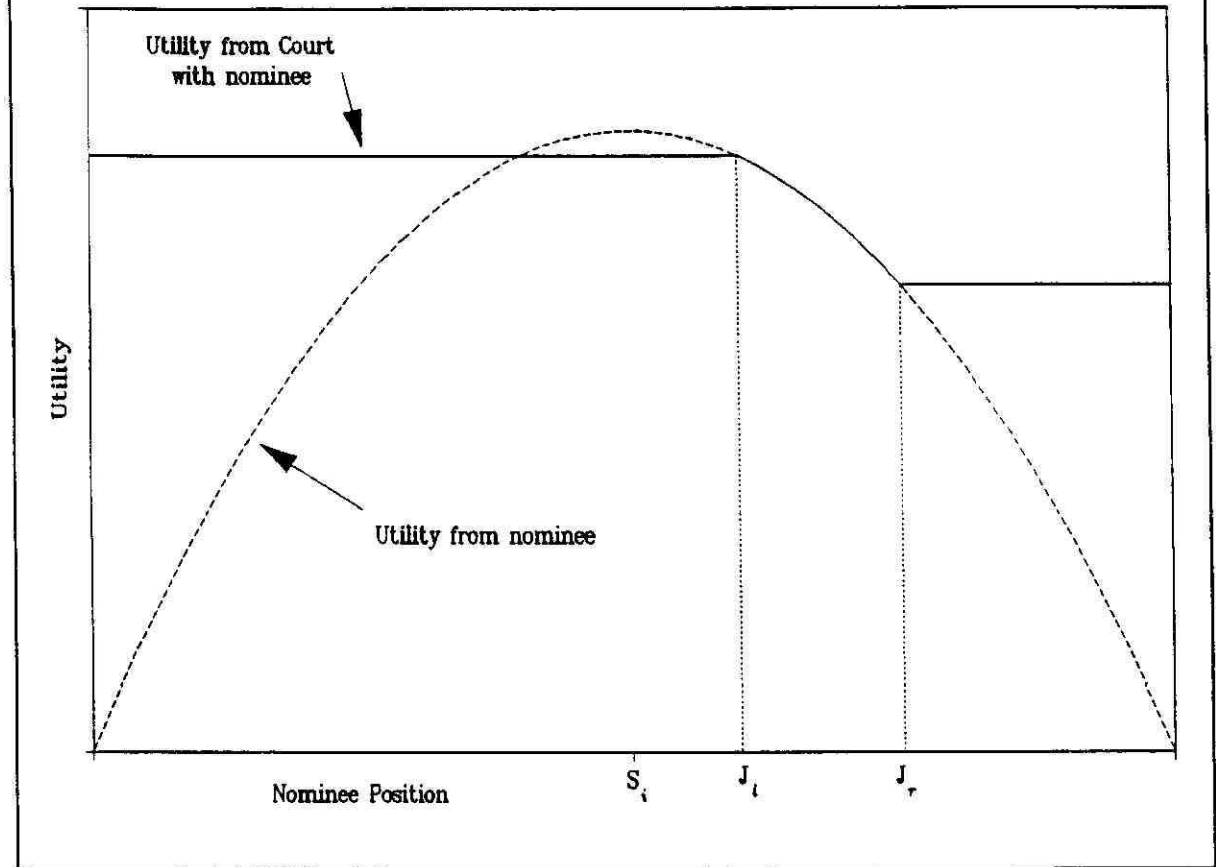
which sketches out the ideological location of a senator (S_i), the location of the middle two justices on an eight-member Court (J_l and J_r), and the location of two hypothetical nominees (N_x and N_y). Note that while N_x is closer to S_i than N_y , S_i might rather see N_y confirmed because this would make J_r the median justice instead of J_l .

That the utility derived from a nominee *judged alone* is different from the utility derived from a nominee *judged in the context of the Court on which he will serve* is also illustrated in Figure 6. Here, we have graphed the policy position of a senator (S_i) and the two relevant justices currently on the Court (J_l and J_r). We have also graphed two utility curves. The first, depicted with a dashed line, is the utility function the senator would associate with a particular nominee located at various positions in the policy space, if that nominee determined the Court's decisions. The second, depicted with a solid line, is the utility function the senator would associate with the decisions handed down by the Court on which that nominee serves. Notice that the two utility functions coincide in the $[J_l, J_r]$ interval, but that the "Court curve" and the "nominee curve" differ everywhere else.

Thus while a senator's evaluation of the nominee's position will generally be correlated with his evaluation of the new Court if the nominee is confirmed, the correlation will not be perfect and need not always be positive. However if, as seems likely, the correlation across nominations is typically positive, empirical estimates of the influence of nominees' ideological positions on confirmation voting will suffer from specification bias and overstate the relationship between the nominee's position and the probability of confirmation.¹³

¹³We have no way of knowing just how high is this correlation is. To get a handle on the question, we ran a Monte Carlo simulation in which the ideological locations of 100 "senators" were randomly drawn on the $[0,1]$ interval, along with two "median justices" and a "nominee." We ran 70 iterations of this simulation; therefore we had 7,000 separate observations. We gave all the "senators" identical, simple Euclidean preferences, and then calculated the utility each received from the position of the "nominee" along with the utility each received from the position of the "court" that was determined by

Figure 6
Utility Functions for Courts versus Nominees



This distinction between the utility derived from a particular nominee and that derived from the resulting Court will be examined in more detail below. In general, we would argue that voting based on nominee characteristics rather than on Court characteristics may be substantively rooted in Mayhew's (1974) notion of "position-taking" behavior (see also Cameron, Cover, and Segal, 1990). The symbolic character of some nominees may make it rational for a senator to ignore that nominee's prospective impact on the Court and to concentrate instead on the nominee's symbolic value to voters.

the nominee. We then allowed each senator to "vote" on confirmation, with a yes vote coming if the senator preferred the nominee to the lottery over the median interval. The Pearson correlation between the two utilities over the 7,000 observations was 0.50. Because the preferences of senators, presidents, and Courts are not randomly generated in the real world, we believe the true correlation is actually higher, and that this estimate represents a lower bound. The larger the correlation, of course, the larger the bias that will be induced in econometric studies by the omission of a "Court" term.

We have no doubt that such behavior exists. Senators probably do have preferences across both courts *and* justices, and information about the position of nominees may be easier to judge than conjectures about how the whole Court will be changed by the nominee's presence. Yet there is also evidence from contemporary Court politics to suggest that senatorial constituents (especially politically aware constituents and interest groups) can differentiate between "pivotal" and "peripheral" justices on the Court and respond accordingly.¹⁴ Our point is simply that, if senators consider the configuration of preferences on the Court at all, empirical analyses of confirmation decisions that omit prospective Court decisions as an predictor will overstate the importance that individual nominee characteristics play in the confirmation calculus of senators.

One other implication of the disjuncture between the policy stands of nominees and the future policy announcements of the Court is that rational senators and presidents may use the confirmation process to achieve other, non-policy-oriented ends. Both the historical literature on judicial nominations (e.g., Abraham, 1985) and studies of nominations to independent regulatory agencies (Moe, 1985) offer examples of this approach.¹⁵ Since most nominations will not change Court decisions very much in the short term, both the president and senators may be willing to accept an "imperfect" nominee (in policy terms) in exchange for other political benefits.

Extensions of the Model: An Agenda for Future Research

As with all formal models of the kind we employ in this paper, the results depend directly on the assumptions, making it important to understand how plausible changes in those assumptions might alter the conclusions. We make three assumptions that deserve special scrutiny and suggest future work: (1) that presidents and senators care only about policy, (2) that they only care about policy in the short-run, and (3) that they have complete information about each others' positions and about the positions of justices and nominees. We briefly discuss each here in turn.

In our model, senators and presidents care only about the Court's rulings as determined by the policy stance of the median justice or the justices defining the median interval. This presumption follows recent analyses of the nomination of executive agency personnel (Calvert, McCubbins, and Weingast, 1989). Since the appointment of any particular nominee has only a small impact on the Court's decisions, presidents

¹⁴The ability of a broad public to discern the pivotal justice has been recently illustrated by the attempt of state legislators in Idaho to craft a bill to regulate abortion matching the announced preferences of the current justice who is viewed as being pivotal on that issue, Sandra Day O'Connor (*New York Times*, 10 March 1990, p. 8).

¹⁵A well-known example in the case of the Court is Eisenhower's supposed decision to nominate William Brennan to the Court despite his being a Democrat. The usual explanation for Eisenhower's choice (Abraham 1985: 262-3) is that he wished to solidify his position among Catholic Democrats as part of his 1956 reelection campaign.

have wide latitude in their choices, and pivotal senators have few reasons to vote to reject.

Yet in the real political world nominees may represent more than simply the opportunity to nudge the Court's decisions one way or the other. Presidents, when they announce and support their nominees, and those nominees themselves in their public appearances, articulate their vision of justice, civil rights and liberties, the role of the Court in the American polity, and many other values. These public pronouncements may transform nominees into symbols of a political vision. When nominees become symbols, senators may have incentives to take a stand on the nomination based purely on the values the nominee represents, what Mayhew (1974) calls "position-taking." Because the symbolism of nominees is often easier for journalists, the public, and even some senators to grasp than the prospective impact of nominees on Court decisions, senators may ignore the short-term impact the nominee would have on the Court and focus instead on the symbolic stimulus the nominee presents.

Nevertheless most nominees are not elevated into ideological symbols over whom protracted debate takes place. For most nominations historically, less than month elapsed between the time the nomination was submitted to the Senate and the day the confirmation vote took place.¹⁶ The speed with which most nominees are considered indicates that senators and key interest groups usually find it prohibitively costly to transform the decision over each vacancy into a symbolic clash of competing values. We suspect that, consistent with our model, nominees become symbols most often when they are regarded as pivotal to the Court's near future, that is, when their appointment will shift the median justice a substantial distance. Senators may choose to treat nominees symbolically as a way of explaining their Washington behavior to their constituents even when the senator is actually evaluating how the prospective nominee might change the Court (Fenno, 1978; Denzau, *et. al*, 1985).

A second key assumption of the model is that senators and presidents only care about the decisions made by the next nine-person Court, a distinctly short-run perspective. Yet politicians are naturally aware of how Court doctrine has changed substantially over time as a result of gradual turnover in personnel.¹⁷ Since our model shows how the president can move the Court in his direction with each appointment, *in the long run* if neither the president nor the Senate changed identities, the president would ultimately be able to staff the Court in a manner that exactly matches his own preferences. Even if the president can only fill another vacancy or two before he

¹⁶For the 112 nominations submitted before the introduction of reviews by the American Bar Association in 1956, 62 percent of them were voted on in less than 14 days. The introduction of ABA reviews has added on average about two weeks to the nomination process. Nevertheless nine of those twenty nominations have required only 33 or fewer days to consider.

¹⁷For example, in the *Harper's* article cited earlier concerning the Souter nomination, Chief of Staff Sununu reassures his confidant that the more conservative Edith Jones will likely be the next nominee if another vacancy arises on the Court during George Bush's tenure in office.

must leave office, he may nevertheless have the opportunity to move the Court substantially away from its prior equilibrium. If the Senate significantly disagrees with the president over Court policy, can it limit the process by which a number of individual replacements add up to a sizeable alteration in the Court's decisions?

The answer to this question lies in an understanding of how senators and presidents value future policy or political payoffs, which lies beyond the scope of this paper. In general, the more that senators discount the future, the more accurate the short-term analysis presented here will be. However senators may also attempt to estimate which seats on the Court may come vacant before the end of the president's term. Such far-sighted thinking may lead them to oppose an otherwise acceptable current nominee if that appointment may improve the president's chances of shifting the Court substantially further by filling a future vacancy. We unfortunately have little evidence on whether senators typically engage in such future-oriented thinking. The Founders certainly hoped they would weigh future events in their current deliberations, but the electoral frenzy in which even members of the Senate now find themselves casts doubt on whether they have long time horizons (Stewart, 1991). We simply note here that the relevance of our model depends in part on separate research into senatorial time preferences.¹⁸

Finally, we have assumed that senators and presidents possess perfect information about each other's preferences, the preferences of nominees, and the preferences of incumbent justices. Given the high degree of scrutiny of the positions taken by presidents, senators, and, perhaps to a lesser degree, justices, we believe perfect information to be a reasonable postulate for first- and even *n*th-generation theories about nomination politics. We note in passing, however, that presidential errors in estimating the distribution of Senate preferences could explain some of the cases where nominations have failed (Lemieux and Stewart, 1989).

Certainty about *nominees*, however, is much more suspect. As Dwight Eisenhower discovered to his dismay with the nominations of Earl Warren and William Brennan, a president's current perception of a nominee may prove a poor predictor of future behavior on the Court. Moreover, even fully-informed presidents may be tempted to misrepresent their nominees to the Senate, hoping to dissemble their way to a more congenial Court. We examine both these issues here.

Uncertainty about potential nominees may both inspire presidents to hedge their bets when making nominations and cause senators to demand some policy concessions when voting on confirmation. If the president has the same degree of uncertainty about the positions of all potential nominees, then the analysis of the original model

¹⁸This question has special pertinence to contemporary nomination politics, since the Republican Party may have a "lock" on the presidency for the foreseeable future while the Democratic Party could conceivably control the Senate for most (or all) of that same future. We suggest here that the more myopic are Democratic senators, the more likely the Court will be entirely composed of conservatives.

still holds with a slight modification: The president is always better off nominating someone whose most likely preferences are located *on average* "near" the president's optimal point in the candidate set. However in this instance the president must choose someone nearer the median senator than he would in the perfect information setting because the senator is also uncertain about the nominee's true position. As uncertainty grows, the Senate can demand a higher "risk premium" to insure that the nominee's true position does not lie outside the candidate set.

If, however, the president's level of uncertainty varies across alternative nominees, it complicates our predictions about the dynamics of nomination politics. Now presidents may actually prefer a more distant nominee whose position is relatively well known over a nominee whose expected position appears closer to the president's own, but about whom there is a high degree of uncertainty. Such an occurrence may be another way that nominees may actually be closer to the Senate's median than we predicted originally.

While we have thus far characterized uncertainty as a problem facing presidents and senators in their decision-making, limited information about the nominee may also be a strategic *asset* that presidents can employ to help secure confirmation. Presidents (and their nominees) may have incentives to misrepresent the nominee's position to the Senate, portraying the candidate as more moderate than he or she actually is. In such cases the nominee's policy stance can be envisioned as a skewed probability distribution with the tail pointing toward the center of the policy dimension. Elsewhere we have shown that a president can attract the votes of moderate senators who might otherwise oppose the nomination by increasing the variance of such a skewed probability distribution (Lemieux and Stewart, 1989). As the variance increases, the longer tail of the distribution moves toward the center faster than does the tail pointing in the more extreme direction. On average the nominee now appears more moderate, and some otherwise hesitant senators will cast their vote for confirmation. This model of uncertainty suggests that presidents have an incentive to depict their nominees as somewhat more moderate than they truly are.

Presidential incentives to dissemble about nominees create senatorial incentives to gather independent information about those nominees before voting. Knowing that senators are monitoring presidential statements about nominees may, in turn, dissuade the president from dissembling. Understanding equilibrium levels of monitoring and lying about nominee preferences is a project on which we are currently working. At this point we can say that allowing the president and the Senate to be asymmetrically informed about the true preferences of the nominee not only helps us predict the level of oversight (e.g., the thoroughness of hearings), but also gives rise to the prediction that some nominations will be rejected. Rejections occur when the president misrepresents the true position of the nominee, and the Senate investigates sufficiently to discover the misrepresentation. Since investigation is costly, the Senate will not always investigate, so the president can sometimes succeed in nominating someone whose true policy views would not otherwise be acceptable to a majority of the Senate. However, the president's fear of possible

senatorial investigations can restrain him from routinely misrepresenting the nominee's views.¹⁹

One other assumption of our model that may raise concerns is that of a unidimensional policy space. We adopted this assumption in order to avoid the various "chaos" results that attend multidimensional voting models: With pure majority rule and more than one issue dimension, any policy can theoretically emerge as the social choice (McKelvey, 1976; Schofield, 1978). With a single dimension and simple majority rule, the median member of the committee (legislature, court, club, etc.) always defines the social choice. We have conducted some preliminary investigations of the implications of a multidimensional model for the results we present here. In general we find that our fundamental results remain valid: Presidents and senators are still severely constrained in the nomination process by the configuration of preferences of the incumbent justices. We sketch out here two ways in which this argument could proceed.

First, it is possible that even if the Court considers cases that may be arrayed along more than one dimension, the norm that a case address only one substantive issue means that most cases can only alter Court doctrine along one dimension at a time. This argument permits us to appeal to Shepsle and Weingast's (1981) notion of "structure-induced equilibrium," which they used to bring order to legislative proceedings. By this assumption, if bargaining over decisions is confined to the single dimension affected in the current case, then the Court has a well-defined equilibrium point in the policy space: the equilibrium in each dimension is simply the median justice in that dimension, while the overall equilibrium is composed of the n-tuple of medians along each of the dimensions.

Using this assumption, a vacancy on the Court creates as the new equilibrium a multi-dimensional space analogous to the "median interval" analyzed here. For instance, in a two-dimensional policy space, the eight-member equilibrium is a "median rectangle" whose dimensions are determined by the locations of the two pairs of justices defining the median intervals along the x- and y-axes. Even in this multidimensional world, however, the eight-member Court announces moderate, yet uncertain decisions. Moreover the ability of the president to change the decisions of the Court by filling one vacancy is still constrained by the preferences of the justices who define this "median rectangle."

¹⁹The argument in this paragraph is based on the analysis of a non-cooperative game between the president and the median senator. In the game, the president may "compromise" with the Senate (i.e., make a nomination acceptable to the senator) or "lie" (i.e., misrepresent a truly unacceptable nominee as acceptable). The Senate may then choose to "investigate" or "accept" the president's nominee. If the Senate investigates, it discovers the true type of nomination the president made and acts to reject or confirm based on the discovery. There is no pure-strategy (Nash) equilibrium to this game, but there are mixed strategies that help us predict the probabilities of presidential compromise and senatorial investigation. These strategies help us calculate the probability of rejection, which is $\text{Prob}(\text{Lie}) \times \text{Prob}(\text{Investigate})$.

This assumption of separable dimensions in a multidimensional space may still seem unreasonably strict. If so, then there are still two bodies of literature to which we might appeal to add the appropriate structure needed to bring order to the analysis. First, we might appeal to the body of research into multidimensional voting situations which concludes that *on average* the social choice of pure majority rule institutions is still centrist. Such findings include models that allow for the probabilistic consideration of alternatives (Ferejohn, Fiorina, and Packel, 1980), the concept of the "uncovered set" (Miller, 1980), and the "finagle point" (Wuffle, Feld, Owen, and Grofman, 1989). All of this research indicates that, on average, changing the location of a single member of a social choice institution usually shifts the region of likely outcomes only slightly.

A second, relevant body of research assumes justices announce decisions only if they know they will not be overturned by Congress (Spiller and Gely, 1989; Spiller, 1990). This latter body of research does not predict *centrist* decisions so much as suggest that courts will choose policies that accommodate the preferences of legislators and presidents as well, so that policy equilibria are unlikely to change radically in the short term. Thus, regardless of how one approaches the multidimensional case, our basic conclusion is likely to remain unchanged: Individual nominees will rarely shift the typical decisions of the Court in a dramatic fashion. We leave for future research the nature of the candidate set of nominees in a multidimensional world.

Finally, Court scholars may wonder about the absence of "precedent" in our model of Court decision-making. In our theory all decisions are made *de novo*, with the result depending solely on the current structure of preferences on the Court. In reality Court decisions make reference to precedents and attempt to show how the current decision conforms with the historic line of argument in similar cases.²⁰ One method of modelling the role of precedent might be to assume that policy is determined by a weighted average of the views of the current median justice and the previous median. This approach yields two results. First, Court policies in this model are altered even less by a new appointment than in the basic model presented earlier. Thus the power of the president and Senate to direct future Court policy is further constrained by the operation of precedent. However, the constraint of precedent on policy actually enables the president to appoint a more extreme nominee if he wishes than he could if precedent did not matter.²¹

²⁰It seems to us an open question whether or not precedent plays a major role in constraining the decisions of the current Court. Cases like *Brown v. Board of Education* or *Roe v. Wade* suggest that the Court is quite willing either to turn its back on former precedent or create new law to address new policy issues.

²¹Let the policy of the Court be determined by a mixture of precedent, which in our model is the opinion of the former median justice, J_m' , and the views of the new median, J_m , as follows:

$$\alpha J_m' + (1-\alpha)J_m$$

Conclusion

With the continuing importance of the Supreme Court in contemporary American politics, we need to understand more about how membership on the Court is determined. In recent years the political science literature has recognized the importance of this issue by, in part, trying to uncover the systematic processes that determine whether Court nominees are actually confirmed by the Senate. Recent efforts along these lines, conducted almost totally by students of judicial politics, have produced solid evidence about why some nominees are confirmed while others are rejected. An abundance of evidence has shown that support expressed by senators for nominees is in part fundamentally no different than the support senators express for policy initiatives: It is strongly determined by partisan and ideological politics.

Given that the politics of Supreme Court nominations share many commonalities with American politics at large, the next step is to look more closely at the nuances of the relationship between the president and Senate majorities when justices are chosen. We believe these analyses will be aided by the theoretical advances that students of legislatures have recently made in understanding the relationship between Congress and the executive branch in policy implementation. This paper is meant to be a first offering in such an enterprise.

Of course, the Court and the executive branch are different, so the application of the new economics of organizations will look different when applied to the Senate-president-Supreme Court nexus. But such an application promises to bear abundant fruit, as it also brings together two related disciplines — legislative and judicial studies — that have long been divided.

with $0 \leq \alpha \leq 1$. Suppose that the president and Senate occupy positions on opposite sides of the median interval as depicted in Figure 4 so that the nominee will become the new median. Then a "policy-equivalent" nominee can be located at $(J_m - \alpha J_m') / (1 - \alpha)$ to yield J_m as the Court's policy. As the weight attached to precedent, α , increases, the nominee can be located further away from J_m . Notice that if only precedent determined the outcome of decisions ($\alpha = 1$), the nominee could be located anywhere in the space.

Technical Appendix

Proof of the statement that the president (and median senator) derive a utility gain from a median justice located at the midpoint of the median interval compared to the lottery over the interval.

Formally, call the position of the left-hand justice in the median interval L , the position of the right-hand justice R , and that of the president P . We now want to compare the utility the president assigns to the midpoint between L and R to the average of the utilities he receives from each of them. Given our assumptions on page 6 concerning the nature of each actor's quadratic utility function, the value the president assigns to a policy option is $U_P(x) = -(P - x)^2$. We then compute the following values:

Utility from the midpoint:

$$\begin{aligned} U_P\left(\frac{L+R}{2}\right) &= -\left(P - \frac{L+R}{2}\right)^2 \\ &= -P^2 - \frac{L^2+R^2}{4} + PL + PR - \frac{LR}{2} \end{aligned} \tag{A1}$$

Average of the utilities from each justice:

$$\begin{aligned} \frac{1}{2}[U_P(L) + U_P(R)] &= -\frac{1}{2}[(P-L)^2 + (P-R)^2] \\ &= -P^2 - \frac{L^2+R^2}{2} + PL + PR \end{aligned} \tag{A2}$$

We now want to find the conditions under which:

$$\frac{1}{2}[U_P(L) + U_P(R)] < U_P\left(\frac{L+R}{2}\right) \tag{A3}$$

Manipulation of the expressions above yields the requirement that $(L - R)^2 > 0$, which is always true whenever $L \neq R$.

Proof of the statement that the candidate set is always nonempty.

Again let P , L , and R represent the positions of the president and the left and right justice defining the median interval, and let S be the location of the median senator. Assume as well that the senator's position lies to the left of the president's so that $S < P$. We now want to show that $C(x_m) \neq \emptyset$. We will do this by demonstrating that, given our assumptions, $\max P_S(x_m) > x_m$, the midpoint between the justices, while $\min P_P(x_m) < x_m$. (See Figure 4 for an example with these assumptions.)

The proof is as follows. We construct the preferred-to sets by determining the minimum and maximum values of x that yield the identical utility each actor would receive from the lottery over L and R . We then show that the maximum value of the senator's preferred-to set exceeds x_m while the minimum value of the president's preferred-to set falls below the midpoint, whenever $L \neq R$. (If the justices hold identical positions, the candidate set includes only that point.)

From the previous proof, the utility from the lottery outcome for each actor is:

$$\begin{aligned} \text{Senator:} & \quad -S^2 + SL + SR - (L^2 + R^2)/2 \\ \text{President:} & \quad -P^2 + PL + PR - (L^2 + R^2)/2. \end{aligned}$$

We now use the quadratic formula to find those points x whose utility equals that of the lottery outcome (called a and b in Figure 3 in the text). For the senator this yields:

$$\begin{aligned} U_S(x) &= -(S-x)^2 = -S^2 + SL + SR - \frac{L^2 + R^2}{2} \\ -S^2 + 2Sx - x^2 &= -S^2 + SL + SR - \frac{L^2 + R^2}{2} \\ 0 &= x^2 - 2Sx + \left(SL + SR - \frac{L^2 + R^2}{2} \right) \end{aligned} \tag{A4}$$

Applying the quadratic formula:

$$x = \frac{2S \pm \sqrt{4S^2 - 4\left(SL + SR - \frac{L^2 + R^2}{2} \right)}}{2} \tag{A5}$$

so that:

$$\max P_S(x_m) = S + \left| \sqrt{S^2 - SL - SR + \frac{L^2 + R^2}{2}} \right|, \tag{A6}$$

since the positive square root will yield the maximum value. Analogously for the president we find the minimum x -value in his preferred-to set to be:

$$\min P_P(x_m) = P - \sqrt{P^2 - PL - PR + \frac{L^2 + R^2}{2}} \quad (\text{A7})$$

selecting the negative square root to generate the minimum value.

We now want to show that $\max P_S(x_m) > x_m = (L+R)/2$, while $\min P_P(x_m) < x_m$. Beginning with the senator we have:

$$\begin{aligned} \max P_S(x_m) &= S + \sqrt{S^2 - SL - SR + \frac{L^2 + R^2}{2}} > \frac{L+R}{2} = x_m \\ &\sqrt{S^2 - SL - SR + \frac{L^2 + R^2}{2}} > \frac{L+R}{2} - S \\ &S^2 - SL - SR + \frac{L^2 + R^2}{2} > \frac{L^2 + R^2 + 2LR}{4} + S^2 - SL - SR \\ &2L^2 + 2R^2 > L^2 + R^2 + 2LR \\ &(L - R)^2 > 0 \end{aligned} \quad (\text{A8})$$

which is true whenever $L \neq R$. Proceeding in a parallel fashion for the president yields the identical constraint.

We have thus shown that the candidate set is always nonempty, for, if the two justices that define the median interval hold different positions, the candidate set includes the midpoint between the justices but also includes points on both sides of the midpoint. If the two justices hold identical positions, that position will be the sole member of the candidate set.

Note also the corollary that, since the maximum value of the senator's preferred-to set exceeds the midpoint of the median interval, it must lie closer to the president's position than does the midpoint (assuming, as we have, that $P > S$). A utility-maximizing president would therefore propose a nominee holding this position. This observation demonstrates that the constitutional provision of presidential nomination and senatorial confirmation permits the president to move the median of the Court in his own direction away from the midpoint, the status quo under the eight-member Court. (However, this nominee need *not* be closer to the president than the median justice of the former *nine-member* Court, since that justice could have occupied a position between the new median justice and the endpoint justice nearest the president's position.)

References

- Abraham, Henry J. 1985. *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2nd ed. New York: Oxford University Press.
- Black, Duncan. 1958. *The Theory of Committees and Elections*. Cambridge: Cambridge University Press.
- Blaustein, Albert P. and Roy M. Mersky. 1978. *The First One Hundred Justices*. Hamden, Conn.: Anchor Books.
- Caldeira, Gregory A. and John R. Wright. 1990. "Organized Interests before the Senate: The Politics of Federal Judicial Nominations in the 1980's." Prepared for delivery at the Annual Meetings of the American Political Science Association, San Francisco, California.
- Calvert, Randall L., Mathew D. McCubbins, and Barry R. Weingast. 1989. "A Theory of Political Control and Agency Discretion." *American Journal of Political Science*, 33:588-611.
- 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.
- Cole, Kenneth C. 1934. "The Role of the Senate in Confirmation of Judicial Nominations." *American Political Science Review*, 28:875-94.
- Danelski, David J. 1946. *A Supreme Court Justice Is Appointed*. New York: Random House.
- Denzau, Arthur, William Riker, and Kenneth Shepsle. 1985. "Farquahrson and Fenno: Sophisticated Voting and Home Style." *American Political Science Review*. 79:1117-34.
- Enelow, James and Melvin Hinich. 1984. *The Spatial Theory of Voting: An Introduction*. Cambridge: Cambridge University Press.
- Felice, John D., and Herbert F Weisberg. 1988-89. "The Changing Importance of Ideology, Party and Region in Confirmation of Supreme Court Nominees, 1953-1988." *Kentucky Law Journal*. 77:509-31.
- Fenno, Richard F., Jr. 1978. *Home Style: Congressmen in Their Constituencies*. Boston: Little, Brown.

- Ferejohn, John A., Morris P. Fiorina, and Edward W. Packel. 1980. "Nonequilibrium Solutions for Legislative Systems." *Behavioral Science*, 25:140-8.
- Friedman, Richard D. 1983. "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond." *Cardozo Law Review*, 5:1-95.
- Harris, Joseph P. 1953. *The Advice and Consent of the Senate*. Berkeley: University of California Press.
- Harvard Law Review*. 1988. 101:1146-1229.
- Ladha, Krishna K. 1990. "The Pivotal Role of the Judiciary in the Deregulation Battle between the Executive and Legislature." Paper presented at the Conference on Political Economy, National Bureau of Economic Research, Cambridge, Massachusetts.
- Lemieux, Peter H. and Charles Stewart III. 1990. "Senate Confirmation of Supreme Court Nominations from Washington to Reagan." *Hoover Institution Working Paper* P-90-3.
- _____. 1989. "Modelling the Process of Supreme Court Confirmations: Positive Theories and Empirical Realities." Paper presented at the Annual Meetings of the American Political Science Association, Atlanta, Georgia.
- McKelvey, Richard D. 1976. "Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control." *Journal of Economic Theory*, 12:472-82.
- Mayhew, David. 1974. *Congress: The Electoral Connection*. New Haven, Conn.: Yale University Press.
- Miller, Nicholas R. 1980. "A New Solution Set for Tournaments and Majority Voting." *American Journal of Political Science*, 24:68-96.
- Moe, Terry M. 1985. "Control and Feedback in Economic Regulation: The Case of the NLRB." *American Political Science Review*, 79:1094-1116.
- Rohde, David and Harold Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: Freeman.
- Ruckman, Peter S., Jr. 1989. "The Confirmation of Supreme Court Justices: Gauging the Effects of Overlooked Variables in a Dynamic Process." Paper presented at the annual meeting of the Law and Society Association, Madison, Wisconsin.

- Schmidhauser, John R. 1979. *Judges and Justices*. Boston: Little, Brown.
- Schofield, Norman J. 1978. "Instability of Simple Dynamic Games." *The Review of Economic Studies*, 45:575-94.
- Scigliano, Robert. 1971. *The Supreme Court and the Presidency*. New York: Free Press.
- Segal, Jeffrey A. 1987. "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics." *Journal of Politics* 49:998-1015.
- Shepsle, Kenneth A. and Barry R. Weingast. 1981. "Structure-induced Equilibrium and Legislative Choice." *Public Choice*, 37:503-15.
- Spiller, Pablo T. 1990. "Governmental Institutions and Regulatory Policy: A Rational Choice Analysis of Telecommunications Deregulation." Paper presented at the Conference on Political Economy, National Bureau of Economic Research, Cambridge, Massachusetts, Dec. 7-8, 1990.
- Spiller, Pablo T. and Rafael Gely. 1989. "Congressional Control or Judicial Independence: The Determinants of Supreme Court labor Relations Decisions, 1949-1987." University of Illinois, mimeo.
- Stewart, Charles III. 1991 (forthcoming). "Responsiveness in the Upper Chamber: The Constitution and the Institutional Development of the U.S. Senate." In *The Constitution and the American Political Process*, ed. Peter Nardulli. Urbana: University of Illinois Press.
- Teger, Stuart. 1977. "Presidential Strategy for the Appointment of Supreme Court Justices." *Public Choice*, 31(Fall):1-22.
- Tribe, Lawrence H. 1985. *God Save This Honorable Court*. New York: Random House.
- Warren, Charles. 1923. *The Supreme Court in United States History*. Boston: Little, Brown.
- Wuffle, A., Scott L. Feld, Guillermo Owen, and Bernard Grofman. 1989. "Finagle's Law and the Finagle Point: A New Solution Concept for Two-Candidate Competition in Spatial Voting Games without a Core." *American Journal of Political Science*, 33:348-75.

