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THE INCREASING IMPORTANCE OF IDEOLOGY IN THE NOMINATION AND CONFIRMATION OF SUPREME COURT JUSTICES

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TABLE OF CONTENTS

I. Introduction	609
II. Ideology and Presidents	610
A. Measurement Issues	616
B. Results	619
III. Ideology and Senators	620
A. Measurement Issues	622
B. Results	627
IV. Rational Anticipation in the Appointments Process	631

I. INTRODUCTION

Among the central questions raised in this Article is how the personal beliefs of federal judges and Justices affect the nomination and confirmation processes. If we define “personal beliefs” in strictly ideological terms and if we focus exclusively on Supreme Court Justices,

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then our answer is straightforward enough: personal beliefs affect who the President will nominate and whether the Senate will confirm his choice. A great deal of research demonstrates this point, and the empirical analyses we report throughout this Article—updated to include the appointments of John G. Roberts and Samuel Alito—merely serve to reinforce the point.¹

But this is not the end of the story. While it is true that ideology has always played some role in judicial appointments, its importance seems to be increasing with time. As we show in Part II, the degree to which candidates share the political values of their nominating President is higher now than it was just three decades ago. And as we demonstrate in Part III, although Senators of today—no less than those of yesterday—attend to the nominees' qualifications, ideological compatibility now takes precedence.

Whether this is a positive or negative development is a matter of contention. That it is entirely rational is far less so. As we show in Part IV, when Presidents seek out candidates who share their political values, they are often rewarded with Justices who entrench those values into law—at least in the short term.

II. IDEOLOGY AND PRESIDENTS

When faced with the opportunity to make his first two appointments to the U.S. Supreme Court, President George W. Bush was hardly lacking acceptable candidates. If he wanted to follow in the path of his immediate predecessors and nominate a candidate with federal judicial experience, he could have chosen from among the nearly 270 judges sitting on the U.S. Courts of Appeals.² Had he looked to the states—à la Ronald Reagan with his appointment of Sandra Day O'Connor—the pool would have been even larger: sitting on state high and appellate courts were over 1300 justices and judges.³ The President also could have turned to elected officials with law degrees—as did Eisenhower with his appointment of Earl Warren—thus increasing the number of possible nominees by hundreds, if

1. While the analyses in this Article are fully updated to include the nominations and confirmations of John G. Roberts, Jr., and Samuel A. Alito, Jr., we adapt the methods and other material from our previous work on Supreme Court appointments, including LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE & CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005) and Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006).

2. See U.S. Courts, 2006 Judicial Facts and Figures tbl.1.1, <http://www.uscourts.gov/judicialfactsfigures/2006/Table101.pdf>.

3. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 12–15 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf>.

not thousands. Then, there are attorneys working in private firms. This was the route President Richard Nixon took when he selected Justice Lewis F. Powell to replace Justice Hugo Black.

But no President, neither Bush nor any of his predecessors, considers each and every man and woman occupying these positions. Instead, their advisors create lists of candidates from which to choose⁴—and from these lists, Presidents typically focus on candidates most likely to advance their own political goals.⁵ Sometimes the emphasis on politics has centered on partisan aims, with the idea being that Presidents try to exploit judicial appointments to advance their own interests or their party's electoral interests.⁶ In other cases, politics have been primarily about policy, or the idea that Presidents seek to nominate judges and Justices who share their ideological commitments.⁷

In some cases the two goals—electoral interests and ideology—are difficult to separate. But that is not always true. For instance, take Nixon's nomination of William Rehnquist. It is hard to make the case that with this appointment Nixon had much on his mind other than ideology. Sure, the President was interested in—perhaps obsessed by—making appointments that would enhance his and his party's appeal to Southerners. But the Arizonian-by-way-of-Wisconsin Rehnquist hardly fit the bill. Yes, the President talked about appointing “strict constructionists” to the bench. But, according to an internal memo, this is what Nixon meant: “A judge who is a “strict constructionist” in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs—the latter two groups having been the principal beneficiaries of the Supreme Court's “broad constructionist” reading of the

4. See CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION* 147–55 (2007) (providing names on the short lists of Presidents Herbert Hoover through George W. Bush).

5. In addition to the two objectives mentioned in the text—partisan and policy—Professor Sheldon Goldman discusses personal goals (e.g., rewarding loyal friends). SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* (1997). Several of Harry Truman's appointments fell into this category—see *id.* at 68–76—and some say the same of George W. Bush's nomination of Harriet Miers—that it was an attempt to place a crony on the bench. If this is so, given the reaction to Miers, it may be some time before another President tries to exploit appointments to the Court for this purpose.

6. *Id.* at 134–37.

7. See NEMACHECK, *supra* note 4, at 127 (study suggests that “presidents select the most ideologically compatible candidates when they perceive confirmation constraints to be less restrictive on their choice”).

Constitution.”⁸ How did Nixon know that Rehnquist would fit the definition of a conservative judge? Among other indicators, the fact that it was none other than Rehnquist who wrote the memo.⁹

Quite different were Dwight Eisenhower’s motivations for appointing William J. Brennan. Unless commentators of the day knew something that Eisenhower did not, the President could hardly have believed that Brennan shared his ideology. Virtually all editorials published around the time of Brennan’s nomination identified him as the liberal he was and would remain during his thirty-four-year tenure on the Court.¹⁰ Motivating Eisenhower instead were electoral considerations. Because Brennan was a Catholic and a Democrat, the President believed the appointment would help his chances for reelection.¹¹

At one time in our nation’s history, it seems possible, even likely, that the Eisenhower-type partisan-electoral considerations trumped ideology. Consider the crucial role that geography once played in Supreme Court appointments.¹² Of George Washington’s first six appointments,¹³ two

8. JOHN W. DEAN, *THE REHNQUIST CHOICE* 16 (2001) (quoting Memorandum from Assistant Attorney General William H. Rehnquist to Attorney General John N. Mitchell (May 29, 1969)).

9. At the time he wrote the memo, Rehnquist was an Assistant Attorney General in the Nixon administration.

10. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–60 (1989). The authors analyzed editorials written in four newspapers and found that they deemed Brennan a “liberal.” See also *infra* fig.1.

11. See, e.g., HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 208 (5th ed. 2008) (“[Eisenhower saw] the political wisdom of designating, especially in an election year, a Democrat who also happened to be a Roman Catholic.”); EPSTEIN & SEGAL, *supra* note 1, at 121 (Eisenhower motivated to nominate “the Democrat and Catholic Brennan” as an “electoral consideration[.]”); Arthur Krock, *The Inspiring Background of the New Justice*, N.Y. TIMES, Oct. 2, 1956, at 34 (Eisenhower’s appointment of a Catholic “was obviously good politics”).

12. See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1763 (2003) (“[A] president was not free to choose anyone he wanted to fill a Court vacancy. The nominee had to come from the circuit where the previous justice was assigned; otherwise the circuit would be deprived of someone knowledgeable of its state law.” (footnote omitted)). While this is an overstatement, its thrust is correct in that geography structured presidential choices in ways it no longer does.

13. We refer to his first six successful appointments: John Jay, John Blair, William Cushing, James Iredell, John Rutledge, and James Wilson. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 379 (4th ed. 2007).

hailed from the East,¹⁴ two from the Mid-Atlantic,¹⁵ and two from the South.¹⁶ This was no coincidence. During his presidency, Washington wrote the following: “In the appointments to the great offices of the government, my aim has been to combine geographical situation, and sometimes other considerations.”¹⁷ He echoed the sentiment in 1799 when he claimed, “It would be inexpedient to take two of the Associate Judges from the same state. The practice has been to . . . disseminate them through the United States.”¹⁸

Though the “practice” to which Washington referred originated with him, he was not wrong to deem it as such. Washington’s successor, John Adams, may be best known for his efforts to pack the Court with good Federalists, but he certainly did not ignore geographic considerations. When James Wilson of Pennsylvania died in 1798, the President was determined that his replacement hail from Virginia, “since that state had no member on the bench.”¹⁹

And so it went. In one way or another, at least through much of the nineteenth century, President after President adhered to the norm of

14. John Jay (New York), William Cushing (Massachusetts). Supreme Court of the United States, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Mar. 19, 2008).

15. John Blair (Virginia) and James Wilson (Pennsylvania). *Id.*

16. John Rutledge (South Carolina) and James Iredell (North Carolina). *Id.* Note that here we define the geographic areas in terms of the three circuits established in Judiciary Act of 1789, § 4, 1 Stat. 73, 74–75.

17. William J. Daniels, *The Geographic Factor in Appointments to the United States Supreme Court: 1789–1976*, 31 W. POL. Q. 226, 227 (1978) (quoting 11 THE WRITINGS OF GEORGE WASHINGTON 78 (Jared Sparks ed., 1855)).

18. *Id.* (quoting 34 THE WRITINGS OF GEORGE WASHINGTON 488 (John C. Fitzpatrick ed., 1940)).

19. Daniel S. McHargue, *Appointments to the Supreme Court of the United States: The Factors that Have Affected Appointments: 1789–1932*, at 37 (May 1949) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with UCLA Law School, Hugh and Hazel Darling Law Library). As Adams wrote to his secretary of state, Thomas Pickering, “As Virginia has no judge at present, she is as much entitled as Pennsylvania to attention.” *Id.* Adams first offered the position to John Marshall; when he declined, the President turned to another Virginian, Bushrod Washington. *Id.* at 38. For his next appointment, Adams replaced the North Carolinian, James Iredell, with Alfred Moore, also from North Carolina. *Id.* at 40. Even when the Chief Justice spot opened up after Oliver Ellsworth of Connecticut resigned, the President initially nominated a successor also from the North, John Jay of New York. *Id.* at 41. Only after Jay refused to take the seat did Adams return to Marshall. *Id.* at 42.

geographic diversity that Washington had established. This much is not contested, but why geography played such a dominant role is open to speculation.²⁰ Surely one explanation is that Presidents used geography to appeal to elected officials and voters—that is, to achieve partisan-electoral ends. Taft provides an example when he exploited appointments to appeal to voters in New Jersey, as well as to break up the solid Democratic South.²¹

If this was so, Taft was hardly the last to launch a so-called “Southern Strategy” via appointments to the Court.²² After Taft, Hoover’s failed nomination of John Parker of North Carolina was perceived by Progressives and liberal Democrats as a Republican Southern Strategy²³—though, again, it was Richard Nixon who was most explicit about his intent to make Republican inroads into the region. At a news conference held in 1969, Nixon declared that the Court should be regionally and ideologically balanced, and he made good on this claim by nominating Clement Haynsworth of South Carolina and G. Harrold Carswell of Florida.²⁴ Only

20. A common answer centers on the Judiciary Act of 1802, which states that each circuit “shall consist of the justice of the supreme court residing within the said circuit.” Judiciary Act of 1802, § 4, 2 Stat. 156, 157. “Thus began the tradition of regional representation.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 182 (2002). Professor Richard D. Friedman is even more explicit: “The importance of geography . . . reflected the prevalent conception that each justice represented a particular judicial circuit.” Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 30–31 (1983).

21. Daniel S. McHargue, *President Taft’s Appointments to the Supreme Court*, 12 J. POL. 478, 495 (1950) (noting that the Republican Taft’s elevation of Edward D. White of Louisiana to the Chief Justiceship may have been “an attempt to break the solid hold of the Democratic party upon the South” (quoting CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 565–66 (1943))).

22. Some actually say the practice started with George Washington. When he appointed three Northerners and three Southerners to the Court, he “was the first President to employ a Southern Strategy.” Daniels, *supra* note 17, at 227 (quoting JAMES F. SIMON, *IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON’S AMERICA* 9 (1973)). Indeed, Washington was quite explicit about his nomination of Iredell from North Carolina: “He is of a State . . . of some importance in the Union that has given no character to a federal office.” BARBARA A. PERRY, *A “REPRESENTATIVE” SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS* 4 (1991).

23. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1154 (1988).

24. Daniels, *supra* note 17, at 226.

after the Senate rejected both—and Nixon “clearly laid to rest” any lingering “geographic imperative” with his nomination of a second Minnesotan, Harry Blackmun—was he able to succeed in appointing a Southerner, Lewis Powell of Virginia.²⁵

Since the Nixon years, however, the role of geography has been minimized.²⁶ We could say the same of several other characteristics associated with partisan-electoral considerations, such as religion (think Eisenhower’s appointment of Brennan), or even service to the party or the President. They now seem to take a back seat to just the sort of calculations that led Nixon to appoint Rehnquist, and more recently, Bush to appoint Alito—ideology.²⁷ In both instances, and virtually all in between, Presidents sought out candidates whose judging would reflect their political values.

This is not to say that emphasis on the nominees’ ideology is a recent development—quite the opposite. While virtually every President since Nixon has cared a great deal about packing the Court with Justices who shared his own commitment to a particular ideology, so too did many of their predecessors. Surely, both George Washington and John Adams wanted to appoint judges attached to a Federalist philosophy, and just as clearly, Thomas Jefferson hoped to rid the judiciary of most of them.

Thus, Justices appointed mostly or even exclusively for electoral reasons—the Brennans and the Powells—are the exceptions. The rule now is that Presidents name Justices who share their political ideology. If Presidents could put themselves on the bench, they would; however, they cannot, so they find the closest possible surrogates.

25. Freund, *supra* note 23, at 1156. Nixon’s choice for Chief Justice, Warren Burger, was also from Minnesota.

26. Indeed, today’s Justices may be the least geographically heterogeneous in American history. Of the nine Justices, only two worked outside the Boston-Washington, D.C. corridor at the time of their appointment—Justices Kennedy (California) and Stevens (Illinois). Justice Souter is a close call. When appointed to the Supreme Court, he was serving on the U.S. Court of Appeals for the First Circuit. That circuit is located in Boston, though Souter’s office was in his home state of New Hampshire. Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 19, 2008).

27. See, e.g., JAN CRAWFORD GREENBURG, SUPREME CONFLICT 312–15 (2007).

A. Measurement Issues

To support the claim that Presidents choose Justices who share their political ideology, one must compare the ideology of Presidents and the ideology of their nominees. A close association between the ideologies would indicate that Presidents tend to appoint political allies. An association that strengthens over time would be consistent with the claim of a growing role for personal beliefs in the nomination process.

To make these comparisons, reliable and valid measures of both the Presidents' and their nominees' ideology prior to the time of confirmation is required. Ideally, these measures should travel as far back in time as possible. For the nominees, these criteria do not present significant obstacles. The method used—a tried and true method—was developed back in 1989 by Jeffrey A. Segal and Albert D. Cover. This method relies on newspaper editorials written about the candidate between the time of his or her nomination to the Supreme Court and the Senate's vote.²⁸ To derive their measure, Segal and Cover read each paragraph in the editorial and determined whether the paragraph suggested that the nominee held moderate, conservative, or liberal views over particular issues.²⁹ They then assessed the nominee's ideology by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and then divided by the total number of paragraphs coded liberal, conservative, and moderate.³⁰ The resulting scale of ideology (or policy preferences) ranges from 0 (unanimously conservative) to .5 (moderate) to 1 (unanimously

28. Segal & Cover, *supra* note 10, at 559; see also Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990) (using the scores to explain the Senators' votes on Supreme Court nominees). Segal and Cover examined four newspapers, with two classified as more liberal (the *New York Times* and *Washington Post*) and two as more conservative (the *Chicago Tribune* and *Los Angeles Times*). Segal & Cover, *supra* note 10, at 559.

29. Under the Segal-Cover approach,

[l]iberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.

Segal & Cover, *supra* note 10, at 559.

30. *Id.*

liberal).³¹

Since the development of these “Segal-Cover scores,” Segal and various collaborators have updated them with each passing nomination.³² Consequently, a complete series now exists for all nominees from Hugo L. Black through Samuel Alito, as Figure 1 indicates.

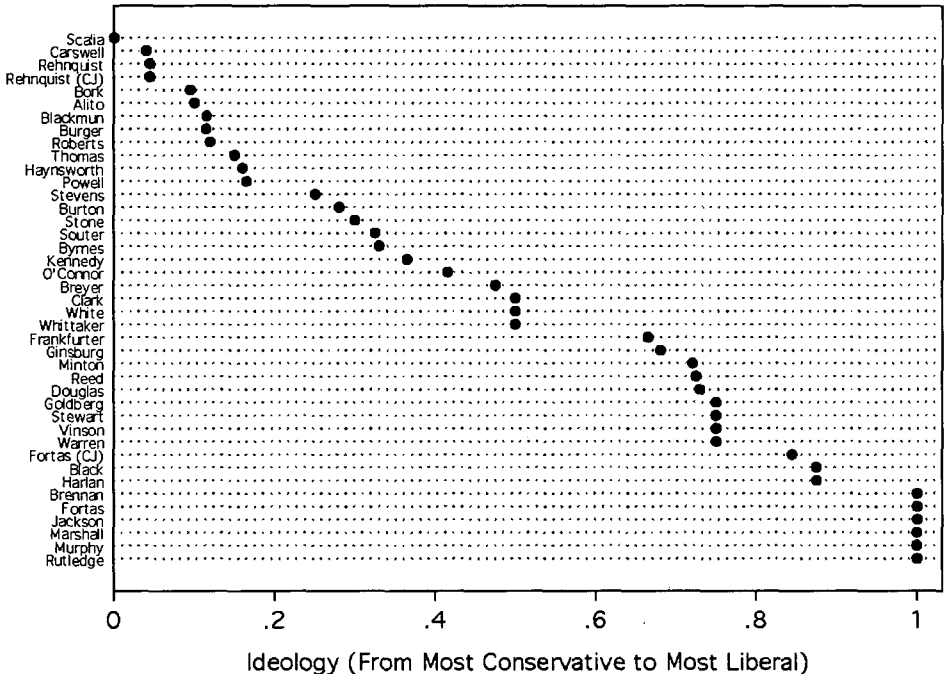


Figure 1: Perceived ideology of Supreme Court nominees, Black (1937) through Alito (2006). More conservative nominees are located toward the top of the figure; less conservative nominees are toward the bottom.³³

Our measure of the President’s ideology is equally as valid and reliable. Developed by Keith Poole, it is based on the President’s positions on bills before Congress, and ranges from a very conservative $-.58$ (Ronald

31. *Id.*

32. *E.g.*, EPSTEIN & SEGAL, *supra* note 1, at 110–11; Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995). For the most recent scores, see Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005, <http://ws.cc.stonybrook.edu/polsci/jsegal/quatable.pdf> (last visited Mar. 19, 2008) [hereinafter Qualification and Ideology Data].

33. The data in this figure come from Segal & Cover, *supra* note 10, at 560. See *supra* note 28–29.

Reagan) to a very liberal .52 (John Kennedy), as Figure 2 shows.³⁴ Unfortunately, as the figure also makes clear, Poole's scores are available only for Presidents serving since Eisenhower.

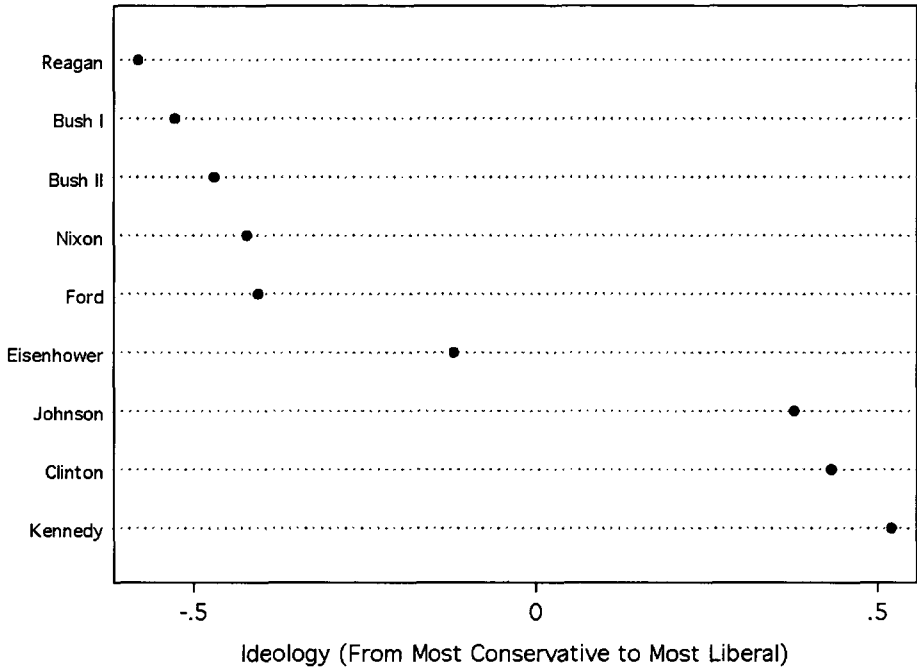


Figure 2: Ideology of Presidents, Eisenhower through George W. Bush. More conservative Presidents are located toward the top of the figure; less conservative Presidents are toward the bottom.³⁵

34. Keith T. Poole, *Voteview: Common Space Data* (Jan. 4, 2007), <http://www.voteview.com/readmeb.htm> (providing numerous file formats with mixed congressional and presidential measures). Note that we reversed the signs to keep Poole's data consistent with the Segal-Cover scores. See Nolan M. McCarty & Keith T. Poole, *Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986*, 11 J. L. ECON. & ORG. 282 (1995). While Presidents do not cast roll call votes in Congress, on most important pieces of legislation, the President announces a "vote intention"—that is, how he would vote on the bill if afforded the opportunity. Since the early 1950s, *Congressional Quarterly* has published these presidential vote intentions. If the President announced his intention to vote in favor of a bill curtailing abortion rights, that would be a conservative "vote"; if he opposed such a bill, a liberal "vote."

35. The data in this figure come from Poole, *supra* note 34.

B. Results

This is indeed unfortunate because it limits the claims we can make about the extent to which ideology figures into the President's decisionmaking. But it does not preclude them altogether, as Figure 3 indicates. There we show the relationship between the Presidents' ideology (based on Poole's measure) and their nominees' ideology (based on the Segal-Cover scores).

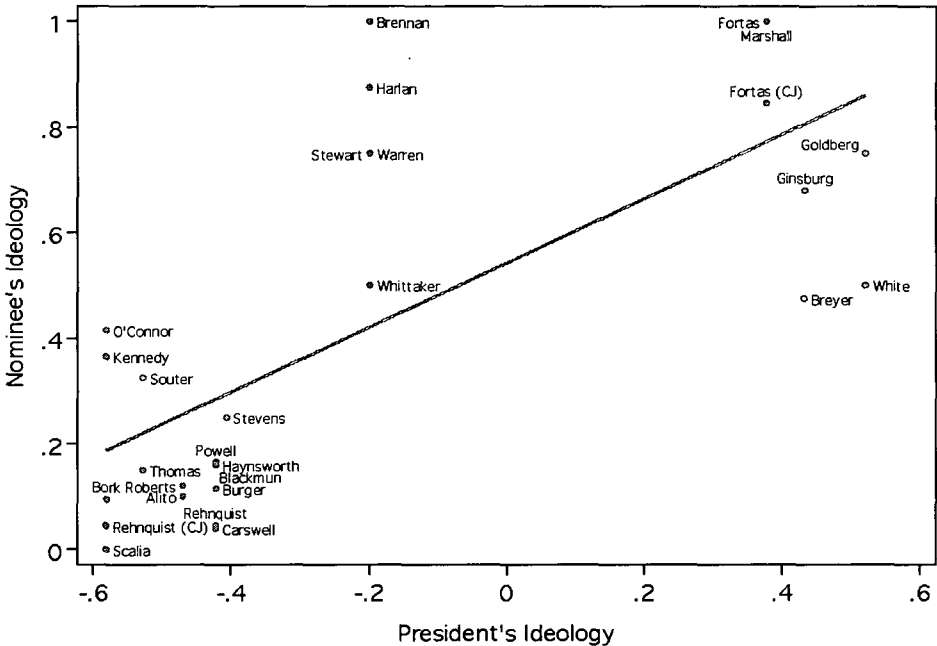


Figure 3: The graph represents the relationship between the ideology of Presidents and the ideology of their nominees, since 1953. Both the vertical and horizontal axes are ordered from most conservative (lower, negative numbers) to most liberal (higher, positive numbers). The superimposed line represents a regression-based prediction of the nominees' ideology based on their nominating President's ideology. The closer a point to the line, the stronger the association between the two. Nominees above the line were more liberal than we would predict based on their President's ideology; nominees below the line were more conservative. The correlation between the Presidents' and their nominees' ideology is .71.³⁶

36. The data on the Presidents' ideology comes from Poole, *supra* note 34.

What do we learn from Figure 3? Overall, the ideology of the Presidents and their nominees is rather closely associated.³⁷ Note that nominations made by the conservative Presidents—Reagan, George H. W. Bush, George W. Bush, Nixon, and Ford—tend to group toward the bottom. Likewise, Justices appointed by the liberals—Johnson, Kennedy, and Clinton—mostly cluster near the top.

That these are the very patterns we would expect if Presidents nominate ideological allies to the Court should come as little surprise. Subject to the constraint of Senate confirmation, Presidents are free to name whoever they want to the Court, and their choice usually turns out to share their political values.

But note a possible second pattern. In moving in time from Eisenhower to George W. Bush, the fit between the President's ideology and his appointees' ideology seems to increase. If ideology were an important consideration for the relatively moderate Eisenhower, his nominees should appear closer to the middle of Figure 3. Justice Whittaker fits the bill, but Justices Harlan and Brennan and, to lesser extents, Justices Stewart and Warren do not. President George W. Bush's two nominees, Chief Justice Roberts and Justice Alito, on the other hand, are located quite near the diagonal regression line, indicating an extremely close fit between the President's ideology and his nominees' ideology. More generally, all but one of the "outliers"—Justices severely incompatible with their President's ideology—were nominated prior to the Nixon years.³⁸

III. IDEOLOGY AND SENATORS

Our emphasis on "possible" and "seems" is no accident. With only nine Presidents and twenty-eight candidates, reaching tentative conclusions is about the best we can do. Even those tentative conclusions may not be especially compelling. Suppose, for example, that we are right and the ideology of Presidents and their nominees has grown closer with time.

The data on the Justices' ideology comes from Segal & Cover, *supra* note 10, at 560; Qualification and Ideology Data, *supra* note 32.

37. The correlation between the two is .71, suggesting a reasonably strong relationship: the more liberal (or conservative) the President, the more liberal (or conservative) the nominee.

38. A regression of the nominees' ideology on presidential ideology turns up six outliers (here, nominees whose predicted ideology yields a residual higher than .25): Stewart (.33), Warren (.33), Breyer (-.33), White (-.36), Harlan (.45), and Brennan (.58). The Nixon nominee Carswell is close at .24.

Such a result could represent an increasing concern with and attention to ideology—as we suspect, but it could also simply reflect better, more accurate information on the part of Presidents and their advisors.

When it comes to Senators, we can do better. Because we can draw on far more data points, as well as a time-tested model of Senate voting on Supreme Court nominees, we are ultimately able to reach more certain conclusions about the increasing role of ideology.

Within the political science literature regarding Senators' votes on Supreme Court nominees, most extant studies, whether in part or in full, rely on the same underlying model: the Cameron, Cover, and Segal account (CCS).³⁹ Briefly, this account operates under the assumption that electorally oriented Senators vote on the basis of their constituents' "principle concerns in nomination politics."⁴⁰ Those concerns primarily center on whether a candidate for the Supreme Court is perceived as (1) meritorious, and (2) sufficiently proximate to the Senator (i.e., her constituents) in ideological space.⁴¹ As Cameron and his colleagues explain it, a Senator's decision on whether to vote nay or yea "is decisively affected by the ideological distance between senators and nominees. Equally important . . . are the qualifications of the nominee."⁴² The Cameron team also confirms the importance of two other factors: (3) whether the President is "strong" and (4) whether the President and Senator are of the same party.⁴³ Both of these factors increase the likelihood of a yea vote.⁴⁴

39. Cameron et al., *supra* note 28. For analyses relying in part or in full on the CCS account, see GEORGE L. WATSON & JOHN L. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 91, 118 (1995); Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Confirmation Process*, 66 J. POL. 663, 668 (2004); Charles R. Shipan & Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 AM. J. POL. SCI. 654, 654–55 (2003). The Cameron team produced its own extension two years later. See Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992). The core distinction between Cameron et al. and Segal et al. is the latter's emphasis on parsing the effects of a Senator's personal ideology and that of his constituents on the Senator's roll call vote.

40. Cameron et al., *supra* note 28, at 528.

41. *Id.*

42. *Id.* at 530.

43. *Id.* at 531.

44. *Id.*

A. Measurement Issues

While Cameron and his colleagues developed their ideas well over a decade ago, they seem entirely in line with contemporary congressional scholarship. That may be why they continue to figure prominently into many (if not most) essays on the confirmation of Justices.⁴⁵ It is also why we have no hesitation about adopting their account here.

More difficult questions come into play, however, in considering how to put the CCS account to the test, and especially how to use it to assess our contention about the increasingly dominant role of ideology.⁴⁶ On the one hand, as we foreshadowed above, data sparseness is not a problem. While highly valid and reliable measures of the President's political values are available only from Eisenhower forward, equally good indicators of the nominees' and Senators' ideology stretch much further back in time—at least to 1937.⁴⁷ Put concretely, for our analysis of the effect of the nominees' ideology on the Senate, we can study 3,809 votes cast by Senators, covering forty-one candidates for the Supreme Court (from Black to Alito).

On the other hand, difficult questions of measurement remain. Keep in mind that to animate the CCS account, we need to measure four variables: (1) whether the nominee is unqualified for office (Lack of Qualifications), (2) the ideological distance between the nominee and Senator (Ideological Distance), (3) whether the President is strong (Strong President), and (4) whether the President and Senator are of the same party (Same Party). The last two are straightforward enough. To assess the President's strength, we borrow from existing work and, for each nominee, simply note whether the President's party controlled the Senate and whether he was in his first three years in office—Presidents meeting both criteria are “strong.”⁴⁸ Likewise, it is not difficult to learn whether the President and any given Senator are of the same political party.

45. E.g., James G. Gimpel & Robin M. Wolpert, *Rationalizing Support and Opposition to Supreme Court Nominations: The Role of Credentials*, 28 *POLITY* 67, 67 (1995); Johnson & Roberts, *supra* note 39, at 668; Shipan & Shannon, *supra* note 39, at 654–55.

46. We adopt some of the material in this section from our previous work on Senate confirmations. See, e.g., EPSTEIN & SEGAL, *supra* note 1, at 108–16.

47. The Segal-Cover editorial scores are available from 1937 onward. See *supra* Figure 1. Poole's estimates of Senators' ideal points, based on their roll call votes, are also available from 1937 forward. See Keith T. Poole, *Voteview: Data Download Front Page*, <http://voteview.ucsd.edu/dwnl.htm> (last visited Mar. 18, 2008).

48. See Cameron et al., *supra* note 28, at 529–30.

Learning whether a candidate was perceived as meritorious, however, seems to present a greater challenge because scholars and policymakers alike disagree over the characteristics that make for a “qualified” nominee. In fact, some observers argue that the whole enterprise of measuring merit is “doomed to failure” because “[q]ualifications’ always have been and always will be defined politically.”⁴⁹ For example, to the conservative Senator Orrin Hatch, a Republican from Utah, Robert Bork was quite qualified for a seat on the Supreme Court; but to the liberal Ted Kennedy, a Democrat from Massachusetts, he was not.

We cannot say we disagree, but devising a measure of merit based on Senators’ (or even scholars’) colored definitions of merit is not our project. Rather, our goal is to tap into the Senators’—or, more precisely, assuming that Senators are oriented toward reelection, their constituents’—perceptions of whether a candidate is qualified. This requires us to locate a measure of qualifications from sources external to and independent of the Senate (and, of course, that is available and observable prior to its vote). In other words, we would not want to use a measure based on either Ted Kennedy’s or Orrin Hatch’s opinion of Robert Bork’s (or any other nominee’s) professional qualifications.

In light of these criteria, we turn to an approach once again developed by Jeffrey A. Segal and Albert D. Cover: a measure of qualifications derived from an analysis of newspaper editorials written from the time of nomination by the President until the vote by the Senate.⁵⁰ As they did for

49. WATSON & STOOKEY, *supra* note 39, at 219.

50. See Cameron et al., *supra* note 28, at 529. An alternative approach would be to use the nominee ratings produced by the American Bar Association’s Standing Committee on the Federal Judiciary. They are (presumably) extrinsic to individual Senators; they are announced prior to the confirmation vote; and they are, according to the ABA, “impartial evaluations of the integrity, professional competence and judicial temperament” that “do[] not consider a nominee’s philosophy or ideology.” American Bar Association, Standing Committee on the Federal Judiciary, <http://www.abanet.org/scfedjud/home.html> (last visited Mar. 19, 2008). As we have explained elsewhere, they also are problematic in any number of ways. See EPSTEIN & SEGAL, *supra* note 1, at 70–75. First, the Committee’s rating system has fluctuated with time, and even within particular periods it has lacked consistency. For example, until 1970 it typically rated a candidate as simply “qualified” or not—but not always. In 1963, the Committee deemed Arthur Goldberg “highly acceptable,” though they thought it inappropriate to proffer “an opinion to the degree of qualification.” ABRAHAM, *supra* note 11, at 27. Another problem for our purposes is the allegations that ABA ratings evince a liberal ideological bias. See, e.g., James Lindgren, *Examining the American Bar Association’s Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 26 (2001). Finally, these ratings do not

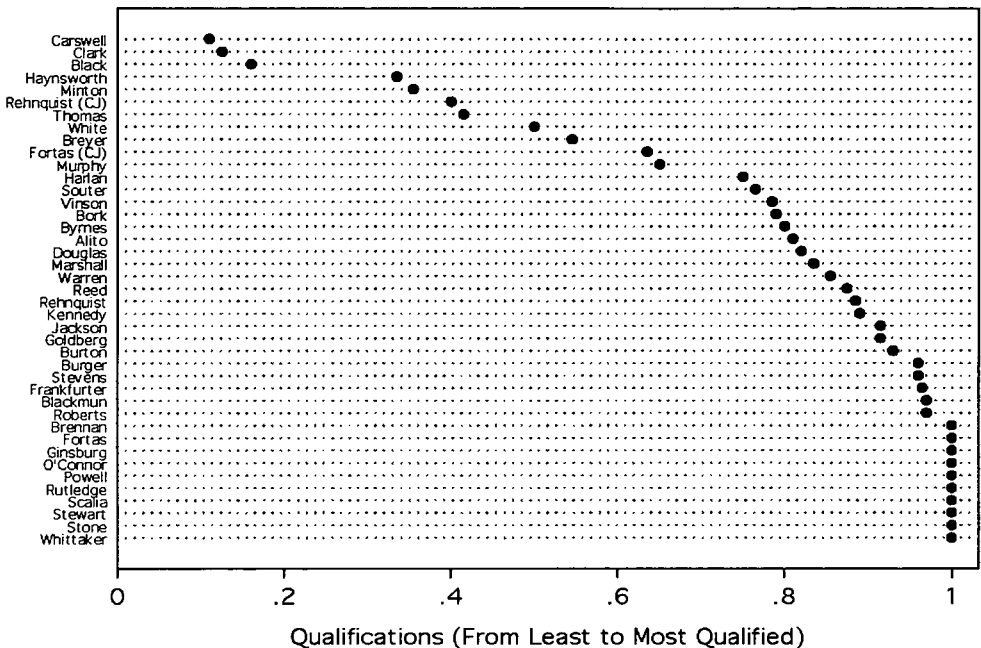
their measure of the nominees' ideology, Segal and Cover identified every editorial in four leading newspapers that offered an opinion on a candidate's qualifications. With the editorials in hand, Segal and Cover evaluated their content on the basis of claims about the nominee's acceptability from a professional standpoint. For example, the following, which appeared in the *New York Times*, would be evaluated as a negative statement about Clarence Thomas's credentials: "Believe him or not, nothing in this bizarre episode enhances Judge Thomas's qualifications, which were slim to start. . . . If Judge Thomas were a brilliant jurist, a Holmes or a Brandeis, the gamble might be justified. But Clarence Thomas offers no such brilliance. . . ." ⁵¹

On the other hand, this sentence, also appearing in the generally liberal *New York Times*, would be counted as a positive claim about Antonin Scalia's and William Rehnquist's qualifications: "Even liberal critics acknowledge the impressive legal credentials of the Supreme Court nominees. Justice Rehnquist was first in his Stanford Law School class; Judge Scalia was a Harvard Law Review editor; both have written scholarly articles and learned, if combative, judicial opinions." ⁵² After analyzing all the editorials, Segal and Cover created a scale of qualifications for each nominee that ranges from + 1 (most qualified) to 0 (least qualified), as seen below in Figure 4.

contain information that comes out after the ABA report but prior to the Senate vote, such as the sexual harassment allegations against Clarence Thomas.

51. Editorial, *Against Clarence Thomas: Even 'Don't Know' Calls for a 'No' Vote*, N.Y. TIMES, Oct. 15, 1991, at A24.

52. Editorial, *Presidential Insults*, N.Y. TIMES, June 25, 1986, at A26.



Qualifications (From Least to Most Qualified)

Figure 4: Perceived qualifications of Supreme Court nominees, Black (1937) through Alito (2006). Less qualified nominees are located toward the top of the figure; more qualified nominees are toward the bottom.⁵³

Since Segal and his colleagues developed these scores, many others have invoked them in their studies of Senate confirmation of Supreme Court Justices.⁵⁴ It is easy to see why. As Figure 4 shows, the Segal-Cover measure generally comports with our existing knowledge of the nominees. Note, for example, that it is G. Harrold Carswell—reckoned “mediocre” even by supporters⁵⁵—who receives the lowest score, while Justices Kennedy, Ginsburg, Scalia and several others—i.e., candidates even would-

53. The data in this figure is from Cameron et al., *supra* note 28, at 530. For updated data, see Qualification and Ideology Data, *supra* note 32.

54. See, e.g., EPSTEIN & SEGAL, *supra* note 1; David W. Rohde & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court*, 69 J. POL. 664 (2007); Charles R. Shipan, *Partisanship, Ideology, and Senate Voting on Supreme Court Nominees*, 5 J. EMPIRICAL L. STUD. 55 (2008).

55. As Senator Roman Lee Hruska (R-Neb.) famously stated in a Senate speech supporting Carswell’s confirmation: “Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises, Cardozos, and Frankfurters, and stuff like that there.” ABRAHAM, *supra* note 11, at 12.

be opponents admitted were qualified to serve—receive the highest.⁵⁶

Finally, we come to the crux of the matter: how to measure the ideological distance between the nominee and the Senator. To be sure, we possess good indicators of each: for Senators, we rely on Keith Poole's Common Space scores, which provide estimates of Senators' ideal points based on their roll call votes.⁵⁷ For nominees, we can rely on the measures discussed earlier: the Segal-Cover newspaper scores as depicted in Figure 1.⁵⁸ What we cannot assume, however, is that these measures are comparable for purposes of computing the ideological distance between Senators and nominees. We must instead rely on the technique of "bridging"—a technique that renders this questionable assumption unnecessary.

In general, bridging provides a method of devising comparable estimates of the preferences of political actors of interest without forcing analysts to make leaps of faith about the comparability of the underlying measures.⁵⁹ All it requires, as its name suggests, is a "bridge," in our case, a mechanism of sorts that would enable us to generate Poole-like Common Space scores for each nominee so that we can directly compare the nominees' and the Senators' ideology.

The bridge we invoke here, as in previous research,⁶⁰ are candidates nominated by Presidents whose party held a majority in the Senate at the time of nomination.⁶¹ Specifically, to each of these nominees we assigned

56. That the qualifications scores square with our impressions of the nominees is not their only virtue—at least three others come to mind. First, the scores are external to the Senate—it is from newspaper editors and not Senators from whom we derived the scores—and available and observable prior to the Senate's vote. Second, to the extent that different scholars examining the same set of editorials reach the same judgment about them, the scores seem reliable. Finally, and perhaps not so stunningly given the range of newspapers consulted, the scores are not biased by the ideology or political party of the nominee; neither liberals nor Democrats receive higher (or lower) ratings based solely on their policy preferences or partisanship.

57. See Poole, *supra* note 34.

58. See Segal & Cover, *supra* note 10, at 560.

59. See generally Michael Bailey & Kelly H. Chang, *Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation*, 17 J. L. ECON. & ORG. 477, 483–84 (2001) (explaining the methodology of the bridging analysis).

60. Epstein et al., *supra* note 1, at 299.

61. The assumption here is transparent and well-supported in the literature: Presidents whose party controls the Senate face relatively fewer constraints in nominating a candidate who reflects their ideological preferences than do Presidents whose party does not control the Senate. See, e.g., Byron J. Moraski & Charles R.

the Common Space score of their appointing Presidents (see Figure 2) with the goal of producing a set of nominees for which we had both Common Space and Segal-Cover scores. Next, for Presidents whose party controlled the Senate, we estimated a simple OLS regression with their Common Space scores as the dependent variable, and the Segal-Cover scores as the only independent variable. This regression, in turn, generated the coefficients necessary for the following linear transformation, which we used to calculate Common Space scores for nominees from their Segal-Cover scores.⁶² In the final step, we applied this transformation to all nominees to derive a full set of Common Space scores and then calculated the (Euclidean) Ideological Distance variable by subtracting a nominee's Common Space score from the Senator's, and squaring the value.

B. Results

With all four measures of our variables in hand, we can now estimate the extent to which ideology and all the other factors explain Senators' decisions to cast yea or nay votes over Supreme Court nominees. We do so using probit, with Table 1 displaying the results: the maximum likelihood estimates of the coefficients for each variable.

Variable	Coefficient	(Std. Err.)
Lack of Qualifications	-2.212*	(0.114)
Ideological Distance	-2.180*	(0.126)
Strong President	0.550*	(0.067)
Same Party	0.728*	(0.079)
Constant	1.858*	(0.081)
N		3809
Log-likelihood		-915.87
$\chi^2_{(4)}$		682.92

Table 1: Senate voting on Supreme Court nominees, Black (1937) through Alito (2006). Cell entries are probit coefficients and robust standard errors (in parentheses). * indicates $p \leq .05$.

Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1092-94 (1999).

62. The regression is as follows: Common Space Score = 0.5186 - 1.014 (Segal-Cover Score).

Notice, first, that each coefficient runs in the right direction; each is statistically significant at $p \leq .05$; and none is trivial in size. In other words, all four factors exert substantial influence on Senators' votes—qualifications not excepted. What our analysis indicates is that when a nominee is perceived as highly unqualified and Ideological Distance is set at its mean,⁶³ the likelihood of a Senator casting a yea vote is only about 0.29.⁶⁴ That probability rises to a near-sure-bet yea vote (0.92) when the nominee is highly qualified.⁶⁵ So, while some may ridicule merit as a minor consideration in Supreme Court confirmation proceedings,⁶⁶ it is clear that Senators (and their constituents) do not.

But this should not be taken to denigrate the role of ideology. Quite the opposite: A candidate's political values, relative to a Senator's, exert an effect on that Senator that is both statistically significant and substantively meaningful. To see this, refer to Figure 5 below, in which we plot the change in the predicted probability of a yea vote across the range of values of Ideological Distance for the least qualified, "on average" qualified, and most qualified nominees; and with both Strong President and Same Party set at 0. Notice that the predicted probability of a Senator voting for a moderately qualified candidate is a highly unlikely 0.06⁶⁷ when the candidate and Senator are ideological extremes; that figure increases to

63. Strong President and Same Party are set at 0.

64. The 95% confidence interval is [0.23, 0.35]. We estimated all predicted probabilities in this paragraph and in those to follow using SPost. See Scott Long & Jeremy Freese, SPost: Postestimation Analysis with Stata, <http://www.indiana.edu/~jlsoc/spost.htm> (last visited Mar. 19, 2008).

65. The 95% confidence interval is [0.90, 0.94].

66. See Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 301 (2004) ("We believe that the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive. We also believe that politics is primarily to blame. The present level of partisan bickering has not only unduly delayed judicial appointments, it has also undermined the public's confidence in the objectivity of those justices that are ultimately selected. Because it is disguised by claims about a particular candidate's 'merit,' however, much of the politicking has escaped the public eye." (footnote omitted)); John Anthony Maltese, *Anatomy of a Confirmation Mess: Recent Trends in the Federal Judicial Selection Process*, JURIST, Apr. 15, 2004, <http://jurist.law.pitt.edu/forum/Symposium-jc/Maltese.php> ("The defeat of Robert Bork's 1987 Supreme Court nomination was the watershed event that unleashed what Stephen Carter has called 'the confirmation mess.' There was no question that Bork was a highly qualified nominee. He was rejected not because of any lack of qualifications, or for any impropriety, but because of his stated judicial philosophy: how he would vote as a judge." (footnote omitted)).

67. The 95% confidence interval is [0.03, 0.09].

0.91⁶⁸ when they are at the closest levels.

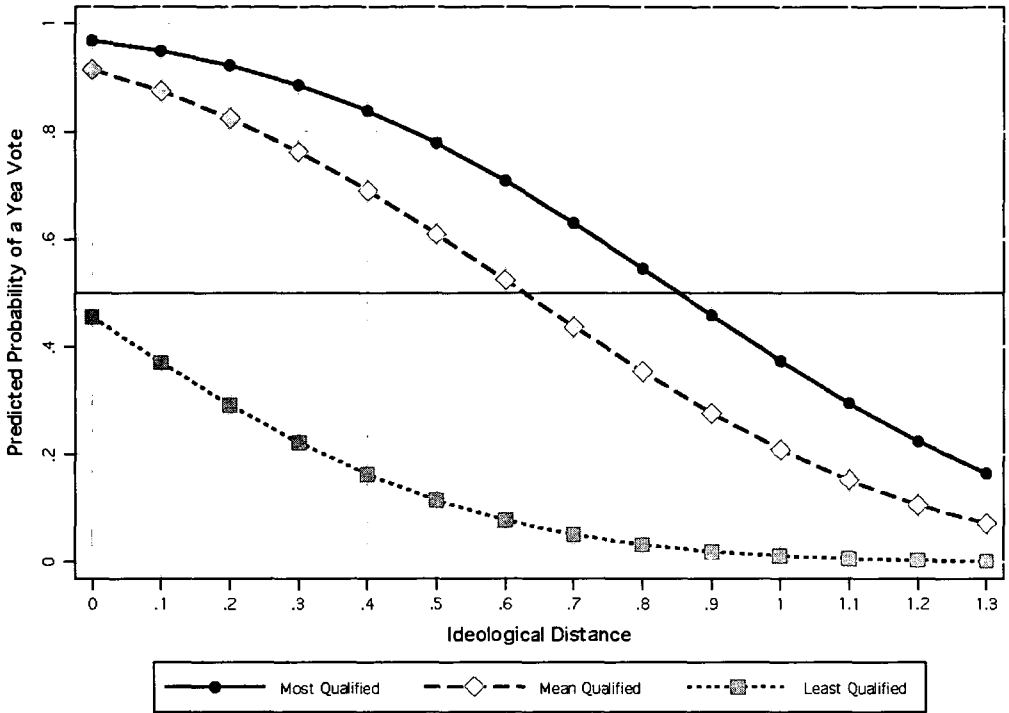


Figure 5: The effect of ideology on Senate voting over Supreme Court nominees, from Black (1937) through Alito (2006). Here, we show the probability of a Senator casting a yea vote when we set Lack of Qualifications at its maximum, mean, and minimum over the range of Ideological Distance (0 indicates no distance and 1.3 indicates maximum distance). Strong President and Same Party are set at 0. We generated this figure using SPost.

What these results tell us is that the ideological distance is critical in Senate voting. This much is well understood. But our contention is more—it is that ideology is playing an increasingly important role.

To explore this claim, we estimated a set of models for each of the twenty-six nominees between Vinson (1946) and Souter (1990). One model that takes into account votes on all nominees before their candidacy (a “before” model) and one that models votes on all nominees subsequent

68. The 95% confidence interval is [0.89, 0.94].

to and including them (a “since” model). Comprising the twenty-six models were the four variables depicted in Table 1.

All twenty-six returned satisfactory results. With only a handful of exceptions,⁶⁹ the estimated coefficients in each were correctly signed and statistically significant at $p \leq .05$ (Ideological Distance always attains statistical significance). Given our specific interest in ideology, however, we reproduce in Figure 6 only the coefficients on Ideological Distance.

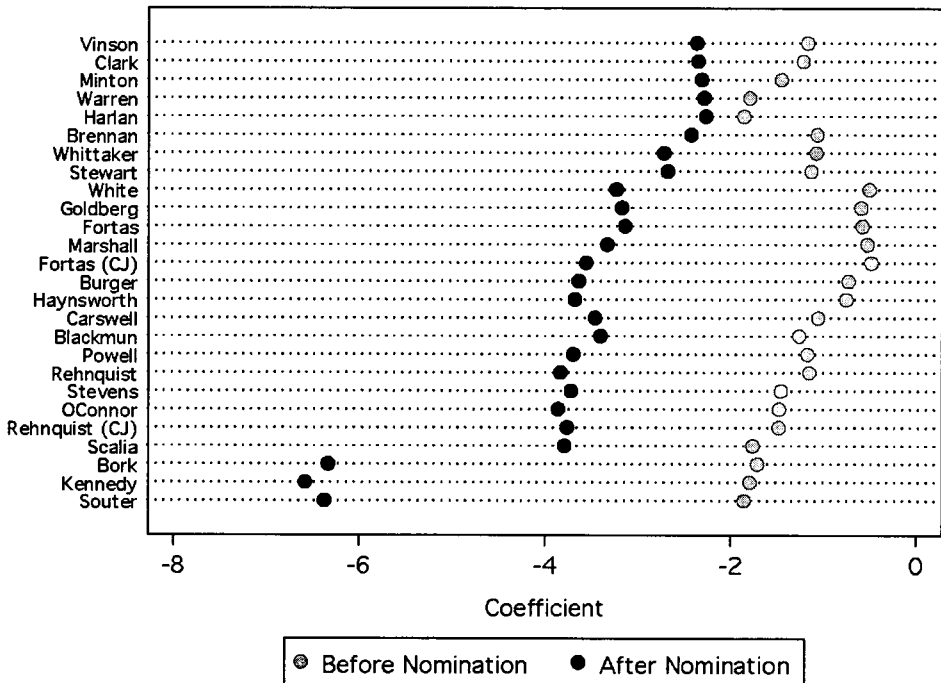


Figure 6: Estimated coefficients for Ideological Distance, before and since each nominee from Vinson (1946) through Souter (1990). The more negative the coefficient, the greater the effect ideology exerts on the votes of Senators. We generated these coefficients by estimating “before” and “since” models for each nominee; the models use the same variables listed in Table 1. So, for example, to obtain Vinson’s “before” coefficient, we

69. The exceptions are Same Party, which is statistically insignificant between White’s and Fortas’s (Chief Justice) nominations, and Strong President, which fails to achieve statistical significance in the “since” Bork and Kennedy models.

estimated a model of Senators' votes (again, using the variables listed in Table 1) for all nominees prior to Vinson. Vinson's "since" estimate is derived from a model of votes over Vinson and all nominees subsequent to him. The depicted coefficients are correctly signed and statistically significant ($p \leq .05$).

The results could not be more telling. To us, it is simply impossible to look at Figure 6 and ignore the increasing importance of ideology over time. Sure, a real break in the data occurs in the late 1980s, after Robert H. Bork's failed 1987 confirmation, with the coefficient skyrocketing from -1.71 (for all nominees prior to Bork) to -6.33 (for all nominees after and including Bork). But that pattern had been building for some time. With nearly each passing nomination since Harlan's, the ideology of the candidates vis-à-vis the Senators has exerted a stronger and stronger effect on the decision to vote yea or nay.

IV. RATIONAL ANTICIPATION IN THE APPOINTMENTS PROCESS

What led Senators to begin to place more emphasis on ideology in the late 1950s and then even more (though no less on qualifications)⁷⁰ during and after Bork's nomination? Robert Bork himself lays the blame—or credit, depending on one's perspective—on the Court and, in particular, its "increasingly political nature . . . , which reached its zenith with the Warren Court"⁷¹

If Bork's explanation is right, it suggests that the emphasis placed by appointers on ideology is entirely rational.⁷² Think about it this way: if

70. See EPSTEIN & SEGAL, *supra* note 1, at 102–06; Epstein et al., *supra* note 1, at 300.

71. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 348 (1990).

72. Bork's response addresses the monotonic increase in the importance of ideology since the late 1950s but not the dramatic jump after his failed nomination. For explanations on why the Bork nomination seemed to usher in a regime change, see RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 98 (2005) (finding the failed Bork appointment "marked a change in the newsworthiness of Supreme Court nominations," with news stories in the *New York Times* increasing by thirty-eight percent pre-Bork and post-Bork periods); Gregory A. Caldeira, *Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests*, 77 KY. L.J. 531, 538 (1989) (noting the domination of "organized interests in federal judicial nominations"); Ayo Ogundele & Linda Camp Keith, *Reexamining the Impact of the Bork Nomination to the Supreme Court*, 52 POL. RES. Q. 403, 415 (1999) (finding that "the Bork hearings marked a

Presidents were unable to entrench their political values on the Court through their Justices, attention to the ideology of nominees would be entirely irrational—they would be better off using appointments to pursue partisan-electoral goals, but that is not the case. Figure 7 highlights that at least for their first decade or so in office, Justices carry their President’s ideological commitments into their decisions, and that trend may be on the rise. There we plot the results of regression analyses comparing the Justices’ ideology (“ideal points”) based on their voting patterns in their first and tenth terms⁷³ with the ideology (or “ideal point”) of their appointing President.⁷⁴ The closer a Justice is to the line, the better his President’s ideology corresponds to the Justice’s first-term (top panel) or tenth-term (bottom panel) ideal point estimate. Justices above the line are more conservative than we would expect based on the ideology of their

statistically and substantively significant change in the criteria applied by the Senate Judiciary Committee” in its questioning of nominees’ constitutional philosophies).

73. We measure the Justices’ ideology via Andrew D. Martin and Kevin Quinn’s term-by-term ideal point estimates. Martin and Quinn derive them by analyzing the votes cast by the Justices via a Bayesian modeling strategy. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 135, 145–50 (2002). For updated Martin and Quinn ideal point estimates, see Martin-Quinn Scores: Measures, <http://mqscores.wustl.edu/measures.php> (last visited Mar. 19, 2008). We also have posted them, along with all other data used in this study, at <http://epstein.law.northwestern.edu/research/ApptIdeology.html>.

74. Ideology of the appointing President is the same we have used throughout: Keith Poole’s Common Space estimates. See Poole, *supra* note 34. To derive Figure 7 we used linear regression. The dependent variable is the Martin-Quinn estimate of Justices in their first and tenth terms. See Martin & Quinn, *supra* note 73, at 145–48. The independent variable is Poole’s estimate of the ideology of their appointment president. See Poole, *supra* note 34. The table below presents the results (standard errors are in parentheses); a visual depiction of this relationship appears in Figure 7.

	First Term	Tenth Term
Intercept	0.393 (0.190)	-0.078 (0.438)
Predicted Ideal Point	2.43 (0.393) <i>n</i> =24 RMSE=.829	2.43 (0.990) <i>n</i> =19 RMSE=1.614

appointing President; Justices below it are more liberal. For Justices on the line, their President's most preferred position perfectly (or nearly so) predicts their own.

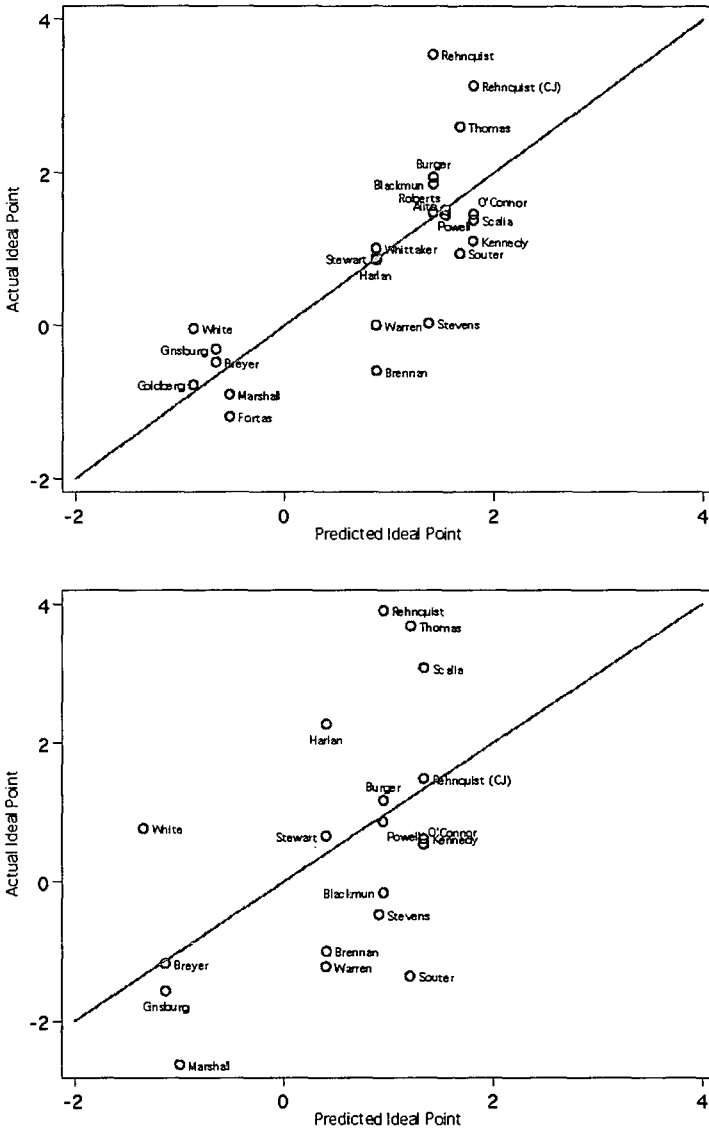


Figure 7: Actual ideology during a Justice's first and tenth terms plotted against predicted ideology (based on the ideology of the appointing President).

The superimposed lines are where $X = Y$.
 The closer a circle is to the line, the better
 the prediction.⁷⁵

Assuming that most Presidents hope to identify nominees as close as possible to their own ideology and make their ultimate selection “after a careful and highly ideological search,”⁷⁶ we would expect them to succeed—and, as Figure 7 shows, they typically do. For example, take George W. Bush’s two nominees, Chief Justice Roberts and Justice Alito. If we were to use Bush’s ideology to predict their voting patterns during their first terms on the Court, we would be nearly right on the money for both.⁷⁷ Also, note that even Justices famous for eventually making significant moves to the right or left tended to reflect their President’s ideology commitments in their first term. Justice Souter provides a case in point. Based on the ideology of Souter’s appointing President, George H.W. Bush, we would have expected a moderately conservative Justice, and that is what we observe in Souter’s initial term.

Ten years after appointment, the picture clouds considerably. Underscoring this point is the bottom panel of Figure 7. Here, we see a substantial decrease in the association between the President’s and his Justice’s ideologies—the correlation between the two drops from .70 to .51⁷⁸—suggesting a problem for administrations that seek to leave lasting imprints on the Court. Once again, Souter is the classic example—a Justice who sharply departed from the values of his appointing President within a decade of service. But, as we can see in Figure 7, there are others, including Blackmun, Harlan, and White.

Note, though, who is not on this list: Justices Breyer and Ginsburg, among several other recent appointees. This brings us to the third and key claim: that contemporary Justices, even more than their predecessors, may be entrenching their President’s views into the law—and may be doing so

75. For more details on how we produced this figure, see *supra* notes 73 & 74.

76. David A. Strauss, Memo to the President (And His Opponents): Ideology Still Counts, 102 NW. U. L. REV. COLLOQUY 49, 53 (2007), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/22/LRColl2007n22Strauss.pdf>.

77. For Alito, the prediction is 1.53; his actual ideal point estimate is 1.45. For Roberts, the prediction is 1.53; the actual value is 1.51.

78. The table *supra* note 74 confirms this visual analysis more formally. Note that the slope estimate is nearly identical in both the first term and tenth term regressions. The RMSE, however, increases from .829 in the first term regression to 1.614 in the tenth term regression.

long after he leaves office.

Of course, there are exceptions.⁷⁹ And, of course, our data is limited in their time horizon. But even this tentative finding seems quite sensible in light of the increasing emphasis on ideology in the Senate and possibly in the White House.

If we are right, then our analysis may bring positive news to the Bush Administration. Predictions of the President's two appointees' voting patterns based on his ideology were not just satisfactory; they were especially accurate. Of the twenty-four Justices in our dataset, for only three others did the President's ideal point estimate yield a better prediction of first-year behavior⁸⁰—again, suggestive of the increasing importance of ideology in the appointments process. Moreover, if Breyer and Ginsburg are any indication, the two successful Bush nominees may carry his legacy well into the coming decades.

Then again, this is sheer speculation on our part based on a limited sample. As Figure 7 indicates, many Justices drift considerably from the ideology of their appointing Presidents, and it is always possible that Alito and Roberts will follow suit. In other words, and despite the best efforts of President Bush and his advisors, the Alito and Roberts of today may not be the Alito and Roberts of tomorrow. More generally, while the evidence tends to show that ideology has become an increasingly important consideration in the appointment of Justices, only with time will we be able to assess the consequences of this shift.

79. The two appointees prior to Breyer and Ginsburg—Souter and Thomas—are examples, though for different reasons. By his tenth term, Souter was a good deal more liberal than George H.W. Bush, and Thomas was a good deal more conservative.

80. Justices Stewart, Harlan, and Powell.

