

Presidential Selection of Supreme Court Nominees: The Characteristics Approach

Charles M. Cameron & Lauren Mattioli*

Princeton University

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Abstract

We propose a new theory of presidential selection of Supreme Court nominees, the “characteristics approach.” The theory envisions Supreme Court nominees as bundles of characteristics: nominee ideology, policy reliability, ascriptive attributes (such as race and gender), and tactical political opportunities. These characteristics are valued by presidents but can only be obtained at cost. We formalize the theory and derive explicit presidential demand functions for nominee ideology, policy reliability, and ascription. Using newly collected data, we estimate empirical presidential demand functions for nominee characteristics. We use the theory and empirical estimates to reconsider the history of presidential choices of Supreme Court nominees, including typical and atypical cases.

I. Introduction

Why do presidents choose one person rather than another as the nominee for a vacant seat on the U.S. Supreme Court?

This question is deeply intractable as social science, for two reasons. First, it is impossible to identify the universe of possible nominees available to any given president: the set of possible nominees is extremely large and quite ill-defined. Second, a given president's selection of Person A versus Person B can be extraordinarily idiosyncratic.

In retrospect, of course, one can always tell a story "explaining" the President's specific choice – why Franklin Roosevelt chose Wiley Rutledge over Learned Hand (say), or why Lyndon Johnson favored Abe Fortas over Henry Friendly. For example, here is William O. Douglas (who knew all the participants well) explaining to Princeton political scientist Walter Murphy why Harry Truman selected Sherman "Shay" Minton as a nominee:

Shay Minton knew Truman. Shay Minton had been in the Senate. He was a member of the Truman Committee in the Senate and he was a member of the Truman Subcommittee. And that Subcommittee was composed of Truman, Minton and Harold Burton. There may have been others also. But those three were the chief members and they went around the country investigating war efforts, manufacturers, and so on. . . . Truman and Minton became very, very close friends. Sherman Minton in those days had his full health. He was very vigorous, active. He liked to take a drink. He enjoyed smoking-room stories. It was conventional for, sort of a standing joke, for Minton once they got their bags at the airport on coming to a new town, to turn to Truman and say, "Harry, shall we go to the hotel and check our bags or go straight to the whorehouse?" This was rough and tumble warmhearted, wonderful Shay Minton, who had a very keen bawdy sense of humor, greatly loved by everybody who knew him, one of my very, very close friends for many, many years. And when there was a vacancy

on the Court, Shay Minton, who was then on the Court of Appeals in the Second Circuit, got on a train or a plane, came to Washington, walked into the White House and said, “Harry, I want that job on the Supreme Court.” And Harry said, “Okay, I’ll give it to you.” It’s just as simple as that. – (Murphy interview of Douglas)

Or consider Richard Nixon’s choice of nominees, nominees who created what Kevin McMahon has called “Nixon’s Court” (McMahon 2011). McMahon’s careful parsing of the archival evidence brought this reaction – perhaps typical – from law professor Eric Posner:

What strikes the reader hardest is how casually Nixon made his choices. Many of them were not seriously vetted before they were nominated, or their names were disclosed publicly and they were shot down. With perhaps the exception of Burger, Nixon knew little about the ideological positions of his nominees and did not seem to care so long as they came across as conservative to the public One can only conclude that appointing a Supreme Court justice was of little interest to Nixon – seen only as an opportunity to make a modest political gain, akin to a small town mayor’s appointment of the local water board.” (Posner 2012)

In short, Truman’s behavior in Douglas’s “simple” story and Nixon’s “casual” choices raise a decidedly complex and demanding question: Given the seemingly haphazard and short-term tactical nature of many nominees – candidates who may come roaring out of "left field" – is it possible to find much systematic in presidential selection of Supreme Court nominees?

We believe the answer is “yes.” To do so, we propose turning from the problematic question “Why Person A?” to the potentially more tractable one, “Why a person *like* Person A?” In other words, we move from dependent variables with *proper names* (like Minton or Carswell) to dependent variables describing *nominee characteristics*: perceived ideology,

policy reliability, and ascriptive attributes such as race and gender. We devise a theory of presidential demand for nominee attributes, including demand for non-policy nominees who bring a short-term tactical advantage. We formalize this theory, the “characteristics approach,” and derive presidential demand functions for nominee characteristics. The theory emphasizes (on one hand) the political returns to presidents from a nominee’s characteristics, and (on the other) the “cost” of finding and placing on the Court individuals with desirable characteristics.

We then turn to data on 50 Supreme Court nominees, made by 13 presidents from Herbert Hoover to Barack Obama. The characteristics approach requires many measures new to the study of nominations; accordingly much of the data is newly collected and used to derive novel measures. The data reveal some striking and perhaps under-appreciated regularities in nominee characteristics, presidential interest in the Supreme Court, and the political environment surrounding nominee selection. We use the data to estimate empirical demand functions for nominee characteristics, particularly ideological proximity to the President, policy reliability, and ascriptive features. In other words, we estimate empirical functions to predict the characteristics of selected Supreme Court nominees. Finally, we use the estimated demand functions and data to interpret 80 years of presidential choices about Supreme Court nominees.

The paper is organized in the following way. First we conclude this Introduction with a very brief literature review. Section II lays out the model and derives presidential demand functions for nominee characteristics. Section III marshals the data and describes the many novel variables required by the theory. Section IV empirically estimates presidential demand functions for nominee characteristics. Section V uses the data and the estimated functions to reconsider the history of presidents’ choices, including cases that seem (in light of the theory) expected and quite unexpected. Section VI concludes. Three appendices provide supplementary material: Appendix A collects the proofs of the formal propositions, Appendix B examines the vote-cost of nominee ideology; Appendix C considers in more detail the

expected policy value of nominees to the selecting president.

Literature Review.—The literature on Supreme Court nominations is very large, but the literature on presidential selection of nominees is surprisingly small. Of course, various historical or popular studies provide detailed accounts of some specific presidential nominee choices (Danelski 1964, Dean 2002, Greenburg 2007 *inter alia*). Yalof 1999 scours the presidential libraries to describe the vetting operations and selection procedures of seven presidents. Nemacheck 2007, in an innovative analysis, uses the archives to reconstruct the nominee “short lists” for 48 nominations. She then examines variables that predict why one individual versus another was selected off the short list. However, the short list data present the same issue as the actual nominee data – that is, why were these specific individuals selected for the short list rather than others?¹ Without fully specifying the universe of possible nominees, the selection problem seems intractable. The characteristics approach offers a way to circumvent this difficulty.

As a formal theory, the characteristics approach to Supreme Court nominations has roots in classic papers by Gorman 1980 (orig. 1956), Becker 1965, and Lancaster 1966 as well as the neoclassical theory of the firm. However, we know of no other application of these ideas in Political Science.

II. The Characteristics Theory of Nominee Selection

Our point of departure is the following observation: a Supreme Court nominee is a bundle of characteristics and it is these characteristics presidents value rather than the nominee *per se*. For example, one characteristic is the policy positions the nominee is likely to advocate on the Court. Another is the salient ascriptive characteristics she possesses, such as gender, race, or ethnicity. Yet another is the tactical political uses afforded by a nominee – for example, would her appointment pay a political debt, increase the chance of carrying a key state in the next election, or open up a Senate seat that can be filled by a co-partisan?

We start with this “characteristics” view of nominees, but then go a considerable step

further: we imagine a president assembling a nominee by “purchasing” nominee characteristics; and then “selling” or consuming those characteristics for political gain. This framework allows us to derive presidential demand functions for nominee characteristics. It also allows us to derive the supply of expected effective policy from nominees. And, it allows an explicit statement of the conditions that lead to the selection of a policy nominee and those that lead to the selection of a patronage or tactical political nominee. The theory’s predictions can readily be taken to data.

The characteristics theory of nominee selection is novel and may at first seem somewhat outlandish. However, the following metaphor may be helpful. In essence, we imagine the President acting like a home builder, who builds a single house for sale. The house has attributes, such as its square footage, number of bed rooms, whether it has a swimming pool and so on. Thus, the house is a bundle of attributes, or an assemblage of characteristics. In turn, each characteristic has an implicit value on the market; these implicit values are often called a characteristic’s “shadow price.” The market value of the house is just the summation of its attributes times their shadow prices. In turn, the shadow prices, along with the costs of materials for building the attributes (the factor input prices), determine the builder’s demand for the materials used to build attributes – in other words, how much of those materials he buys. In addition, the shadow prices and the costs of the building materials determine the builder’s supply of bed rooms, swimming pools, and so on. Increases in the market value of an attribute, and decreases in its construction cost, bring increased demand by the builder for input materials, and increased supply of attributes.

We apply exactly this logic to presidential selection of nominees and their attributes. So, each characteristic of a nominee has a value to the President (a shadow price), and each attribute has a political or effort-cost (a factor input price). The President’s demand for the attributes indicates what and how much he “buys” given the factor input and shadow prices.

Two assumptions are important for the characteristics theory of nominee selection. First, we implicitly assume that any given assemblage or package of nominee characteristics

is technically feasible, albeit costly or difficult to procure. So, for example, we do not see highly experienced, conservative, African-American, female Supreme Court nominees – but not because no such person exists. Rather, we see no such nominee because the input price of some of the characteristics is so high that a Republican President finds the nominee uneconomical to assemble. Of course, “doesn’t exist” and “prohibitively expensive” can be seen as largely semantic differences.

Second, an empirical implementation of the characteristics theory depends on finding reasonable proxies for the political return on or value of nominee attributes (the shadow prices of attributes in the housing example) and proxies for the attributes’ costliness (the factor input prices in the housing example). Absent such proxies, the theory is an empty formalism. We believe natural and measurable proxies exist, as we indicate below. Consequently, the theory affords a new, systematic, and rigorous way for thinking about presidential selection of nominees, a perspective that leads naturally to a dialogue with data.

A. The Model

In the model, presidents can produce two different kinds of nominees, policy nominees and non-policy ones. Policy nominees are characterized by 1) a mean policy propensity or ideology n , 2) a policy reliability r (a non-negative scalar), and 3) ascriptive characteristics t . The latter can be thought of either as an indicator variable, or as an index. Together, nominee ideology n and policy reliability r create a “policy score” z for a nominee, which we define shortly. For simplicity and clarity, we assume non-policy nominees – that is, tactical or patronage nominees – have no policy or ascriptive value whatever but simply bring a utility value \bar{u} . We further assume non-policy nominees are costless to produce, so their net value is simply \bar{u} . In essence, non-policy nominees are always readily available to a President and are easy to place on the Court, if he wishes to do so.

Political Returns from Characteristics.—We first define a nominee’s “policy score” for the President.² Let the ideal policy of the President be p , a point on the real line

(shortly, we assume this is the President’s NOMINATE score). Let the policy x likely to be produced by a nominee be a random variable with mean n and variance v .³ (Nominee ideology n is again a point on the real line, which we will associate shortly with a nominee’s NOMINATE-scaled perceptions [NSP] score (Cameron and Park 2009)). Then the policy score of a nominee for a President is:

$$z(n, v; p, a) = a - \int_x (p - x)^2 dx = a - (p - n)^2 - v$$

(We employ the mean-variance decomposition of the expectation of a quadratic utility function.) We further suppose there is a maximum possible variance \bar{v} and $v = \frac{\bar{v}}{1+r}$. In words, policy reliability shrinks a nominee’s policy variance. A nominee’s policy score is then:

$$(1) \quad z(n, r; p, a, \bar{v}) = a - (p - n)^2 - \frac{\bar{v}}{1+r}$$

The variable a is simply a scaling parameter so that the worst possible nominee has a policy score of zero, while the best possible nominee has a score of $a > 0$. For example, if p and n are bounded by -1 and 1 and $\bar{v} = 1$ then $a = 5$.

A nominee’s policy score indicates the expected variance-weighted policy associated with the nominee, as evaluated by the nominating President. It is the expected effective policy position that the nominee will advocate as justice, as seen by the nominating President. Note that Equation 1 displays declining marginal increases in policy score with ideological proximity to the President.⁴

We assume the President values each unit of policy score z , specifically he gains $\pi_z > 0$ per unit of z . This value reflects the importance of Supreme Court policy-making to the President. The value of π_z ranges from very large to virtually zero, depending on the importance of the Court to the President and his partisan coalition. For example, Gillman 2002 and Bense 2000 show the Court was very important for Republican presidents in the late 19th and early 20th centuries, because a central goal of the Republican Party

was building continent-wide markets using the federal judiciary. Consequently, we would expect π_z to be high for these presidents. But π_z may be low for other presidents. For example, if the President's goals are re-building a war-torn Europe, constructing international organizations to sustain a global free-trade regime, containing communism, and boosting domestic infrastructure via the interstate highway system, π_z will be low since the Supreme Court is largely irrelevant for such an agenda. We return to this point below.

Relevant ascriptive characteristics of nominees, we assume, bring value to the President, but at a declining rate. For tractability and specificity we assume a return of $\pi_t\sqrt{t}$. Obviously, the value of a unit of ascription, π_t , varies over time and reflects social movements and the influence of voting blocs within partisan coalitions.

Combining, we write the political value or political return to the President of a policy nominee as

$$\pi_z z(n, r) + \pi_t \sqrt{t}$$

Cost of Characteristics.—In the characteristics framework, nominee attributes like ideology, policy reliability, and ascriptive features must be “purchased” by the President at some effort-cost or political cost.

Political cost of ideological proximity. The political cost of placing a nominee on the Court can range from minimal – when a nominee engenders no resistance and yields a near-unanimous affirmative vote in the Senate – to very heavy, when interest groups mobilize against the nominee and the President must wage an intense political campaign that nonetheless may fail. Cameron et al 2013, for instance, examines nominations from 1930 to 2010. They find that nominations have become more contentious over time, and use statistical analyses and simulations to conclude that "the more-than-doubling in contentiousness of Senate voting on Supreme Court nominations was driven primarily by the combination of more extreme nominees and an increasingly polarized Senate. Interest group activity also contributed, but to a lesser extent."

Following this line of research, we employ "expected nay votes" as a proxy for the

political cost of a nominee's ideology. Consider the ideological space stretching from the ideal point of most extreme member of the opposition party (o) to that of President, $[o, p]$. Then $|o - n|$ measures the ideological distance of the nominee from that extreme opponent, in the direction of the President. Let w_n denote the per-unit nay votes engendered by placing the nominee away from the opposition and toward the President. Shortly we will be explicit about the factors that affect this marginal cost, but an important one is the presence of interest groups who may mobilize against the nominee and polarize voting. Then the president's political expenditure on nominee ideology has the form $w_n |o - n|$. So, the political cost of placing a nominee on the Court is low if the President capitulates to the opposition by nominating someone who is ideologically close to them, or if w_n is small, e.g., if interest group mobilization is unlikely.

Cost of policy reliability. We take the per-unit cost of reliability w_r to reflect the search and vetting costs for individuals with extensive relevant legal policy-making experience, so the nominee is a known quantity. For example, a highly reliable person may have been mentored by a well-known legal academic; been a member of a self-selected ideological cadre like the Federalist Society; served as a law professor and written law review articles; held an executive branch legal policy-making position in which she wrote confidential legal memoranda on important policy topics; and then held a federal appellate court judgeship in which she penned judicial opinions. A person showing unswerving ideological fidelity in all these positions over many years, in public and private, and in multiple legal roles, will have high policy reliability. Conversely, a nominee whose only experience is holding elected office, working in political campaigns, serving in non-legal political positions, or performing legal work in the private sector will have low policy reliability. One might imagine the cost of reliability as reflecting the availability of highly reliable people of the favored political party. The cost of reliability is then $w_r r$.

Cost of ascriptive features. We assume the per-unit cost of ascriptive features w_t is well-proxied by the availability of individuals in the federal judiciary who have the relevant

characteristics, e.g., the percentage of female members of the federal appellate courts. If the ascriptive characteristic is rare among members of the federal judiciary, it is "costly"; if it is abundant among federal judges, it is "cheap." The cost of nominee ascription is $w_t t$.

Utility.—We now define the President's utility for a policy nominee:

$$u(n, t, r; \pi_z, \pi_t, w_n, w_r, w_t,) = \pi_z z(n, r) + \pi_t \sqrt{t} - w_n |o - n| - w_r r - w_t t$$

or, using Equation 1

$$u(n, t, r; \pi_z, \pi_t, w_n, w_r, w_t,) = \pi_z \left(a - (p - n)^2 - \frac{\bar{v}}{1+r} \right) + \pi_t \sqrt{t} - w_n |o - n| - w_r r - w_t t$$

The President's over-all utility function for nominees is:

$$(2) \quad u(n, t, r; \pi_z, \pi_t, w_n, w_r, w_t,) = \begin{cases} \pi_z \left(a - (p - n)^2 - \frac{\bar{v}}{1+r} \right) + \pi_t \sqrt{t} - w_n |o - n| - w_r r - w_t t & \text{if nominee is a policy nominee} \\ \bar{u} & \text{if nominee is not a policy nominee} \end{cases}$$

The task of the President is, first, to choose between selecting a policy nominee or a non-policy nominee in order to maximize Equation 2; then, if he chooses the former, to select the utility maximizing nominee given the returns on expected policy and ascriptive characteristics and the effective prices of the attributes.

B. Presidential Demand for Nominee Characteristics

Given the model, deriving Presidential demands for nominee characteristics is straightforward. The following three propositions indicate Presidential demands for nominee ideology, nominee policy reliability, and nominee ascriptive characteristics.

Proposition 1. (*Presidential Demand for Nominee Ideology*). *The President's demand for*

Nominee Ideology is:

$$(3) \quad n^*(\pi_z, w_n, p, o) = \begin{cases} p + \frac{1}{2} \frac{w_n}{\pi_z} I & \text{if } w_n < 2\pi_z(p - o) \\ o & \text{otherwise} \end{cases}$$

$$\text{where } I = \begin{cases} -1 & \text{if } p > 0 \text{ (conservative president)} \\ 1 & \text{if } p < 0 \text{ (liberal president)} \end{cases}$$

Proof. See Appendix.

The proposition indicates that the President nominates someone of his own ideology absent any opposition, but compromises as the marginal cost of ideological proximity increases, e.g., if the expected number of nay votes in response to ideological proximity increases. However, increased Presidential concern for Supreme Court policy “stiffens the President’s spine” – it reduces the tendency to compromise in the face of political opposition. Thus, the ideology of the nominee reflects a kind of tug-of-war between the President’s desire to effect Supreme Court policy and the intensity of opposing forces as reflected in the marginal cost of ideological proximity.

An implication of the Proposition is that the scaling parameter $a \geq (p - o)^2 + \bar{v}$ as this assures positive policy scores.

Proposition 2. (*Presidential Demand for Policy Reliability*). *The President’s demand for policy reliability is:*

$$(4) \quad r^*(\pi_z, w_r, \bar{v}) = \begin{cases} \sqrt{\frac{\pi_z \bar{v}}{w_r}} - 1 & \text{if } w_r \leq \pi_z \bar{v} \\ 0 & \text{otherwise} \end{cases}$$

Proof. See Appendix.

Proposition 2 indicates that the demand for policy reliability increases as the President is more concerned about Supreme Court policy, and falls the more difficult it is to acquire a

reliable nominee.

Proposition 3. (*Presidential Demand for Ascriptive Characteristics*). *The President's demand for ascriptive characteristics is:*

$$(5) \quad t^*(\pi_t, w_t) = \left(\frac{\pi_t}{2w_t} \right)^2$$

Proof. See Appendix.

Proposition 3 indicates that the President's demand for ascriptive characteristics increases in the political return from nominees with those characteristics, and falls in the rarity of potential nominees with the ascriptive characteristic— that is, the difficulty of finding such a nominee. Equation 5 might suggest that the value of ascriptive characteristics is always positive, but if the political return on such nominees is effectively zero the President will not demand such characteristics.

The President faces a choice between selecting a policy nominee and selecting a tactical or patronage appointee, a non-policy nominee. We assume a non-policy nominee is easy to find, engenders virtually no political opposition in the Senate, and promises no effective policy output. Hence, such a nominee yields the President a simple political return $\bar{u} > 0$. The choice between nominating a policy nominee and a non-policy one hinges on the utility difference between the optimal policy nominee and \bar{u} , that is between $u(z^*, t^*)$ and \bar{u} .

The following Proposition indicates the logic of the choice.

Proposition 4. (*Choice of policy vs non-policy nominees*). *There exists a unique value of π_z , $\hat{\pi}_z$, above which the President selects a policy nominee and below which he selects a non-policy nominee. The value of $\hat{\pi}_z$ falls as the marginal cost of nominee ideological proximity rises.*

Proof. See Appendix.

Proposition 4 has implications for what one is likely to observe in data on nominee selection. First, Equation 3 indicates that presidents who are less interested in Supreme Court policy are willing to offer relatively distant nominees in order to avoid paying the steep political costs of placing a more proximal nominee on the Court. Proposition 4 indicates that presidents who are very uninterested in Supreme Court policy may opt for a patronage or tactical appointment. In practice, these nominees may well be quite distant from the President ideologically – this reduces the political cost of appointing them. In either case, distant nominees are apt to be associated with presidents who are relatively unconcerned about Supreme Court policy.

III. Data and Measures

The characteristics approach to presidential selection of Supreme Court nominees utilizes some measures that are quite familiar (at least conceptually), such as the ideological proximity of the nominee to the President. But the theory emphasizes many other variables that are novel and that have never been calculated, much less employed in statistical analyses of nominations. Novel measures include nominee policy reliability, the nominee’s policy score, presidential interest in Supreme Court policy, the political cost of nominee ideological proximity to the President, the ascriptive score of nominees, the political return to the President from a nominee’s ascriptive features, the cost of finding reliable nominees, and the difficulty of procuring nominees with a favorable ascriptive score. In this section, we discuss how we construct these measures and present brief highlights about them.

A. Nominee Ideology and Proximity to the President

We require a consistent measure of nominee ideology, particularly one that allows the calculation of a proximity measure to the President. Fortunately, Jeffrey Segal and his coauthors have put considerable effort into measuring how contemporary observers perceived the ideology of Supreme Court nominees, as reflected in newspaper editorials (Segal and Cover 1989,

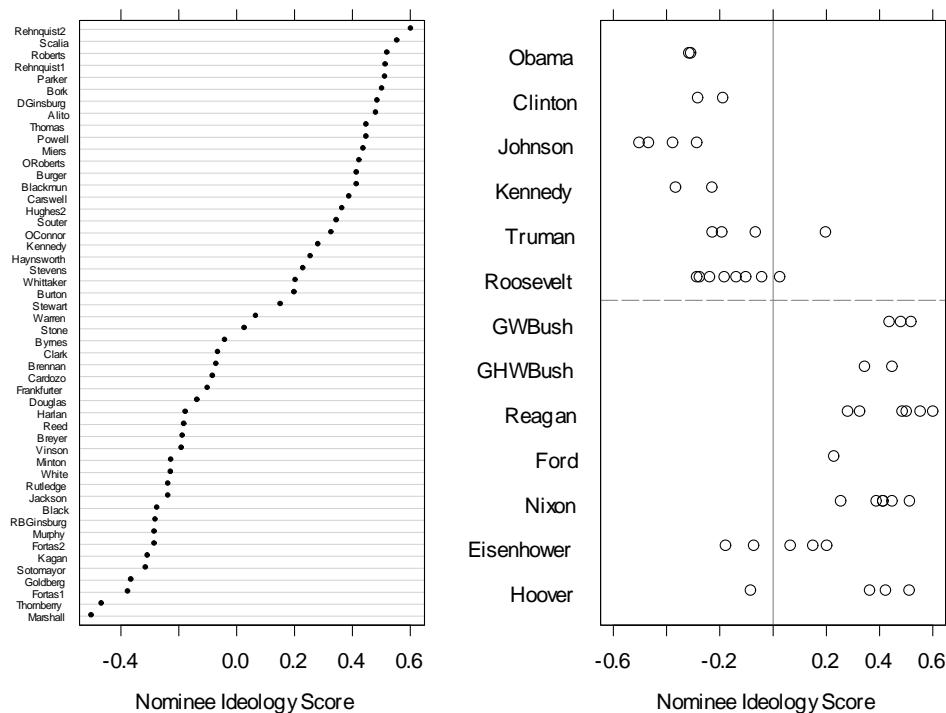


Figure 1: Nominee Ideology, 1930-2010. The left-hand panel shows the NOMINATE-Scaled Perception (NSP) Score for each nominee. The right-hand panel groups the nominees by president (Democrats in the top half of the panel, Republican in the bottom half). Nominees perceived by contemporary observers as liberal have scores less than 0; nominees perceived by contemporary observers as conservative have scores greater than 0. In the right-hand panel, five nominees lie on the "wrong" side of the zero reference line.

Epstein et al). We have calculated similar scores for the four Hoover nominees, so newspaper perception scores are available for all 50 nominees from 1930 to 2010.

Cameron and Park 2009 suggest a statistical procedure for projecting the newspaper perception scores into the NOMINATE space widely used to measure the ideologies of congressmen and presidents.⁵ The resulting NOMINATE-Scaled Perceptions (NSP) Scores display high face plausibility. In addition, Cameron et al 2013 show that the NSP scores are powerful predictors of senators' roll-call votes on nominees. Cameron and Park 2009 show that the NSP scores are also very good predictors of the justices' subsequent dispositional voting on the Court, one, five, and ten years in the future, particularly for justices nomi-

nated after about 1980. Nonetheless, some caveats are in order. For example, one should be cautious about over-interpreting comparisons of scores from nominees who are far apart in time, e.g., Parker (1930) and Bork (1987) who have similar scores. Though their contemporaries perceived both as extremely conservative, what this meant in the early 1930s was not quite the same as it did more than half a century later. Figure 1 displays NSP Scores for all nominees between 1930 and 2010. (the scores are placed in the NOMINATE Senate space). The left-hand panel displays each nominee's score; the right-hand panel clusters the nominations by presidents, with Democrats in the top half of the panel and Republicans in the bottom. Perceived nominee ideology has varied widely, from the highly liberal Thurgood Marshall to the highly conservative William Rehnquist. The nominees of Democrats tend to be liberal and those of Republicans conservative but in several cases but there are prominent exceptions. In addition, some presidents who made multiple nominations picked nominees whose perceived ideology varied considerably.

NOMINATE scores for Presidents are available from Hoover to Obama.⁶ Because NSP Scores are scaled into the NOMINATE space, one can compute ideological distances between each nominee and the President who nominated the individual. Figure 2 displays distances between Presidents and their nominees. The left-hand panel shows the simple distance between the two in NOMINATE space. With some regularity, Republican presidents nominated individuals who are scored as more conservative than the President (e.g., Parker and Hoover); in a few case, Democratic presidents nominated individuals who are scored as more liberal than the President (e.g., Black and FDR). These nominees can be viewed as actually likely to be quite close to the president and certainly not entailing policy concessions to the opposition in the Senate. The right-hand panel displays "clipped" absolute distances in which nominees who were more extreme than the nominating president are given a zero distance from the President.

Several nominees stand out as distant from the nominating president in the direction of the opposite party: Harold Burton (nominated by Truman), Benjamin Cardozo (nominated

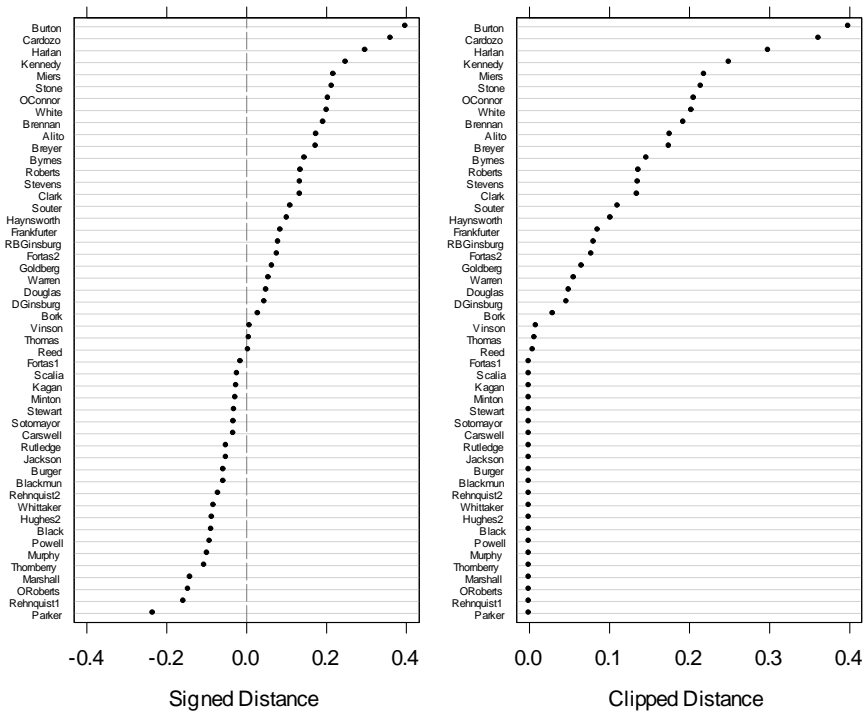


Figure 2: The Ideological Distance Between Presidents and Their Supreme Court Nominees, 1930-2010. The left-hand panel shows the simple signed distance in NOMINATE space between the President and the nominee (negative numbers indicate a nominee either more liberal than a Democratic president or more conservative than a Republican president). The right-hand panel shows clipped distance, so nominees more extreme than the President are assigned zero distance from the President.

by Hoover), and John Marshal Harlan (nominated by Eisenhower). Some nominees that one might have expected to leap out, such as William Brennan, are relatively distant from the nominating President but not freakishly so.

B. The Cost of Ideological Proximity

In the expression $w_n|n - o|$ we require a measure of w_n , the marginal increase in political cost as the nominee's ideology diverges from that of the opposition party in the Senate. As a measure for this political cost, we focus on the *expected percentage of nay votes* in the Senate. We estimate an expected nay vote function from historical data, leveraging findings in the literature of confirmation voting in the Senate (see inter alia Cameron et al 2013).

The confirmation literature suggests that, in addition to the ideological position of the nominee, plausible factors affecting the number of nay votes include the size of the opposition party, the degree of ideological polarization in the Senate, whether the appointment could move the median on the Court, and the number of groups who might mobilize against a nominee. The latter is important because absent group mobilization, most nominees during the 80 years we studied did not engender significant – or virtually any – opposition in the Senate.

Most of these variables are straightforward. However, to measure the number of groups who might mobilize against a nominee, we utilize an order statistic, the maximum number of groups who have ever mobilized against a nominee of that party.⁷ The logic is straightforward: if groups have mobilized in the past, they may do so again. This measure is shown over time for Democratic and Republican presidents in Figure 3. As indicated in the left-hand panel, only recently has there been an increase in the number of groups potentially threatening Democratic nominees. But, the number of groups potentially threatening Republican nominees has changed considerably over time. It increased somewhat in the early 1970s (as revealed by the Haynsworth and Carswell nominations) but it took a dramatic leap upward in the early 1980s (as revealed by the Bork nomination). This dramatic jump reflected the

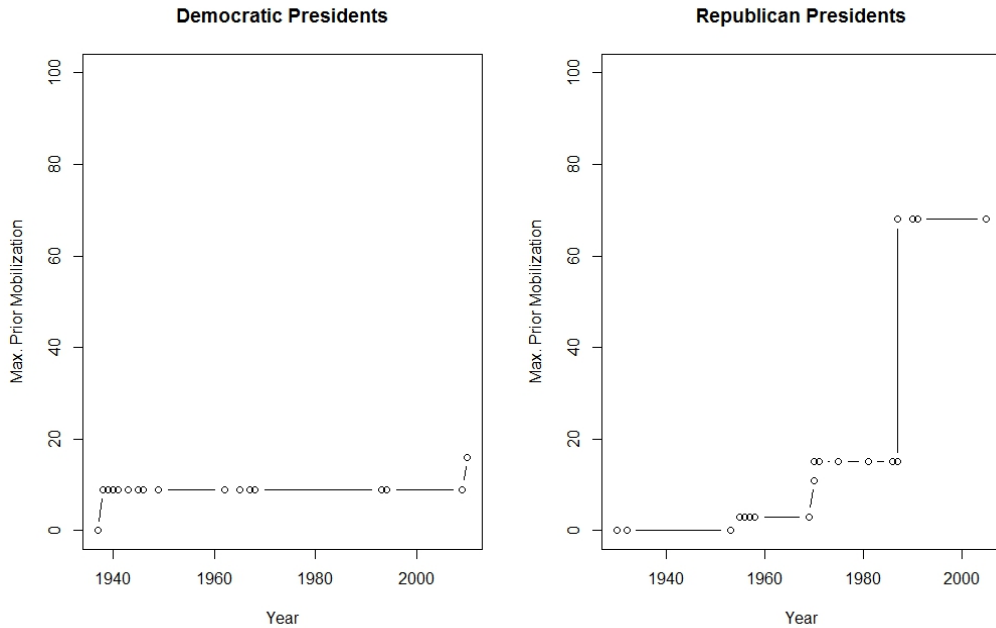


Figure 3: The Threat of Group Mobilization. Shown is the maximum number of groups who have ever mobilized against a Democratic or Republican nominee.

transformation of the group environment during the 1970s that historians have documented.

In Appendix B, we analyze the vote-cost of nominees using these variables. We find the group mobilization variable indeed affects the marginal vote-cost of nominee ideology.

C. Policy Reliability

We require a plausible measure of nominees’ policy reliability. We begin by considering the nominees’ professional qualifications and backgrounds. Nominees who served as a federal judge have extensive biographies available through the Federal Judicial Center. For other nominees, or if details in the FJC data were sparse, we utilized contemporary newspaper profiles of the nominees, confirming facts across a variety of public sources. The details of nominees’ professional lives are often recorded in their confirmation hearings and summarized by the Senate historical office, a source of particular value for the earliest nominees.

The story in the qualifications data is both simple and dramatic; it is easily conveyed in several graphs (Figure 4, Panels A-F). There are two distinct periods, 1930-1970, and

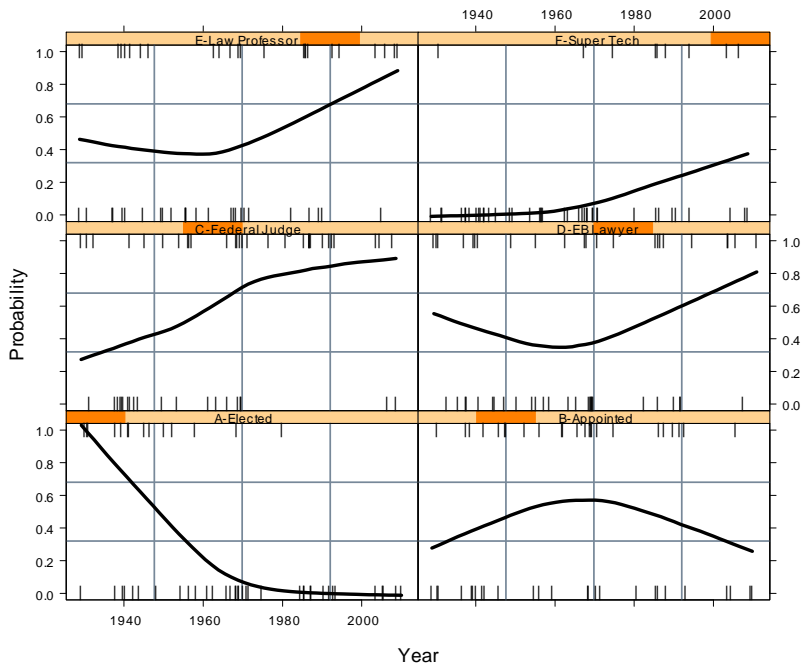


Figure 4: The Changing Nature of Nominees' Professional Backgrounds, 1930-2010. In each panel nominees without the characteristic are shown by a hash mark at zero; those with the characteristic are show by a hash mark at one. The solid black line is the fit from a locally weighted regression. As such, the local probability of a nominee-type (e.g., Executive Branch Lawyer) may be read from the line. Year of Nomination is slightly jittered to enhance visibility.

post-1970.

Early in the first period, it was very common for presidents to nominate elected politicians (see Figure 4 Panel A). Examples include Hugo Black, Jimmy Byrnes, and Earl Warren. Presidents gradually turned away from elected politicians, and virtually ended the practice by the early 1970s. Instead, in the 1930-1970 period they increasingly favored another kind of political animal, the appointed executive branch administrator (see Figure 4 Panel B). These kind of nominees can be called *politicos*.⁸

The 1970s saw a sea change in the nature of the nominees. First, presidents increasingly eschewed *politicos* of all stripes, both elected politicians and executive administrators. Rather, they turned to a new kind of nominee, the *legal technician*. First, they increasingly favored federal judges. Indeed, by the 1980s it was almost *de rigueur* for a nominee to have served as a federal judge (see Figure 4 Panel C). Second, they increasingly favored individuals who had served in the executive branch as lawyers and legal policy makers – often in the Justice Department but also the White House itself (see Figure 4 Panel D). Third, the new type of nominee had often served as a law professor (see Figure 4 Panel E). Indeed, over time the new kind of nominee displayed the signature of what can be called a *legal super-tech*: the trifecta of executive branch legal policy maker, law professor, and federal judge (Figure 4 Panel F).

The rise of the legal super-techs went hand-in-hand with the institutionalization of a formal vetting process in the Justice Department and White House (Yalof 1999). In this regard, the Reagan Administration stands out as a watershed. The "casual" process of the Nixon Administration, invoking Professor Posner's indignant response, appears in historical context as the last of its kind.

In our view, the force behind the rise of the legal super-techs and the institutionalization of the vetting process was one and the same: the drive to find ideologically reliable nominees. Accordingly, we construct an index, the Policy Reliability Index (PRI), using the biographical

data. We define the PRI as:

$$PRI = \left(\sum_i \rho_i \right)^2$$

where ρ_i indicates an attribute conducive to establishing policy reliability, i.e., service as a federal judge, service as an executive branch lawyer, and service as a law professor. The Policy Reliability Index reflects the idea that having one such marker is good, but having multiple markers is much, much better for revealing policy reliability. So, for example, having two such markers is not twice as good as having one, but four times as good, and having three is not 50% better than having two, but over twice as good. Thus, a legal super-tech like John Roberts receives a score of 9 while a pure politico like Hugo Black receives a score of 0.

Figure 5 shows the Reliability Index for each nominee and displays the scores over time. The figure indicates a transformation in the type of nominee selected by presidents over time, presuming reflecting presidential demand for policy reliability.

The Cost of Policy Reliability.—To approximate the cost of policy reliability, we consider the number of co-partisan judges on the Circuit Courts. As the number of ideologically compatriots on the bench increases, the cost of finding a reliable legal technician, or even a super-technician, decreases.

The Federal Judicial Center (FJC) provides comprehensive data on federal judges, including the party of the president who appointed them. Using this data, we calculated the number of seated federal judges who, at the time of nomination, were appointed by the current president or a president of the same party. Figure 6 displays this data. The available pool of co-partisan federal judges increased considerably over time. Notably, though, the pool for an incoming president who follows a president of the other party is smaller, but grows throughout his term. So, it appears easier to find a reliable nominee later in a president's term.

Call the number of seated co-partisan federal judges the "reliability pool," RP . We define the cost of reliability $w_r = \frac{1}{\sqrt{1+RP}}$. This variable takes the value 1 when there are

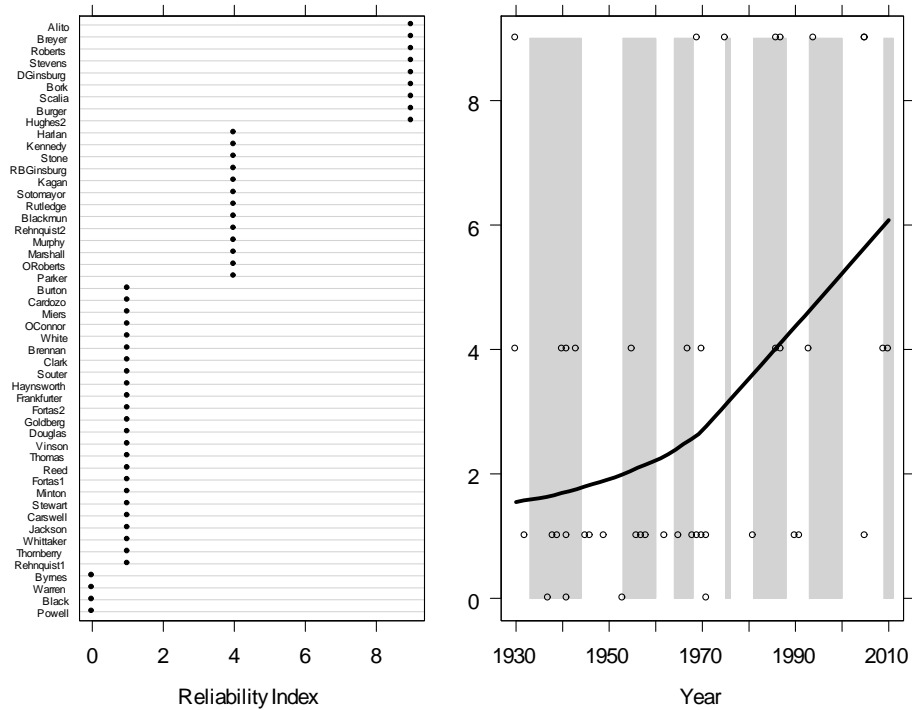


Figure 5: Nominee Policy Reliability. The left-hand panel displays the Policy Reliability Index for each nominee, 1930-2010. The right-hand panel arrays the scores over time; the dark line is the fit from a locally weighted regression (loess span = 1). Shading indicates presidential administrations. The policy reliability index of nominees increased markedly over time, especially after about 1970.

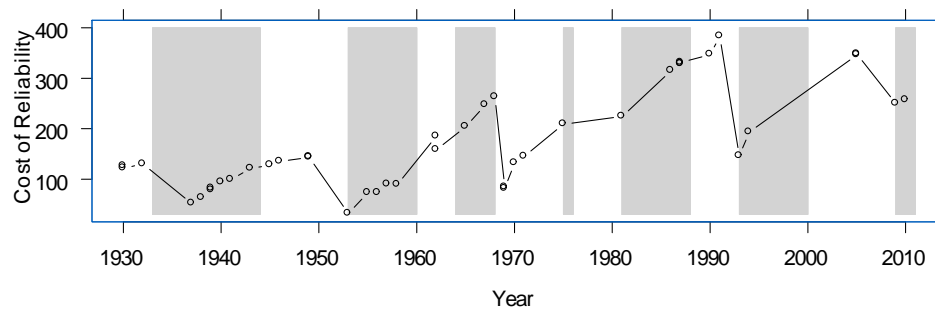


Figure 6: The "Reliability Pool," 1930-2010. Shown is the number of federal district judges who are the president's copartisans, at the time of each nominee. The shading indicates presidential administrations. A larger pool lowers the cost of reliability.

no available co-partisan federal judges; it falls as the number of seated co-partisan federal judges increases.

D. Nominees' Policy Value to the President

An important element in the characteristics approach is the President's valuation of each unit of policy score z , given by the variable π_z . This value reflects how highly the President prizes a nominee's expected policy positions as a Supreme Court justice. But how to measure π_z ?

A straight-forward method to gauge the importance of Supreme Court policy-making to the president involves measuring the president's allocation of what is arguably one of his most potent tools, his public rhetoric. We assume the president allocates more rhetoric to issues that he considers important. In particular, we assume the President displays greater interest in Supreme Court policy-making when he voluntarily allocates more of his total rhetorical agenda to Supreme Court policy, in contrast to other topics. The "voluntary" element is important, since often the President's rhetoric is reactive, for example, in response to questions put to him in press conferences. We require a measure of rhetoric reflecting the president's own choice of topics. To do so, we collect new data measuring the share of the president's rhetoric in which he *voluntarily* speaks on Supreme Court policy.

An outstanding source of presidential statements is the American Presidency Project, which has collected 103,280 documents related to the study of the presidency in a searchable online database. We narrowed the available data to the public papers of all U.S. Presidents dated between January, 1929 and May, 2010, that include the phrase "supreme court" anywhere in their text.⁹ We excluded any statement that the president did not make in his capacity as president. For example, if the statement was issued through the Office of the Press Secretary or as a campaign document, we did not include it. We also excluded statements in which president "goes public" on a specific nominee in order to drum up legislative support. Cameron and Park 2011 show that presidents go public over nominees in a reactive

way, responding to interest group mobilization against nominees – if the nomination isn’t in trouble, presidents do not initiate public campaigns on their behalf. Hence, such statements are not a good measure of the president’s interest in Supreme Court policy.

The resulting data consists of 1546 statements. Of the 1546 statements, most are voluntary (1249 or 81%), in that the president had full control over the entire content of the statement because of the medium of presentation. More specifically, we consider speeches and written statements as voluntary; we exclude press conferences, interviews, and exchanges with reporters because they are less likely to be entirely voluntary in content. Of the voluntary statements, half (624, or 50%) consist of presidential commentary on a Supreme Court case or set of cases and as such they directly address Supreme Court policy. These 624 voluntary, policy-oriented statements are the basis of the presidential interest score.

Normalizing the volume of rhetoric across presidents is important, because some presidents simply speak more frequently and at greater length across the board. To normalize for this variation in presidents’ total issuance of rhetoric, we divide the number of voluntary policy statements about the Supreme Court by the number of total statements about any topic. Thus, the measure is the annual share of voluntary statements about the Supreme Court, as a fraction of total statements. We believe this is a reasonable proxy for presidential interest in Supreme Court policy-making.

Figure 7 displays the rhetoric-based measure of the president’s interest in Supreme Court policy over time (the data cover all years 1930-2010, not just those in which a nomination occurred – nomination years are demarked with dark circles in the figure). Variation within presidential administrations is often substantial. Most dramatically Franklin Roosevelt’s policy interest scores range from the highest in the observed time frame in 1937 during his confrontation with the Supreme Court over New Deal legislation, down to a score of zero from 1942-1944 (the war years). On the other hand, some presidents persist at relatively high levels of interest (George H.W. Bush) or relatively low ones (Lyndon B. Johnson) throughout their administrations. There is a slight upward trend in voluntary rhetoric about Supreme

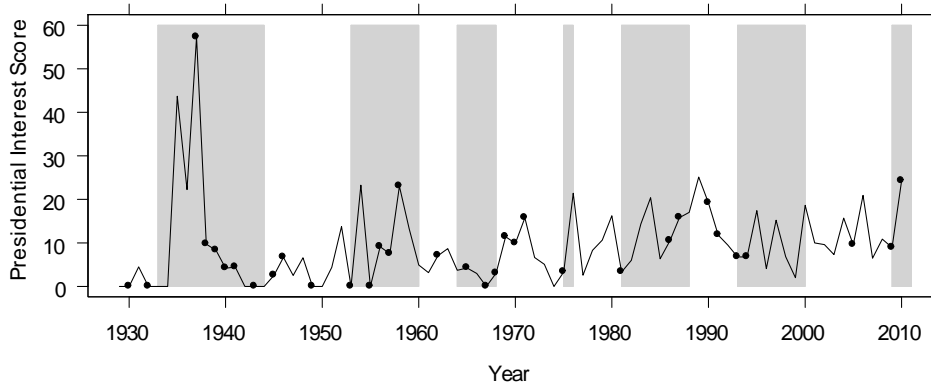


Figure 7: Presidential Interest in Supreme Court Policy, 1930-2010. The measure is the percentage of the president's rhetoric in each year that is both voluntary and directed at Supreme Court policy. Administrations are indicated with shading while black dots indicate a year in which a Supreme Court nomination took place.

Court policy-making from the late 1960s to the present day, as well as the persistence of rhetoric even in years when no nomination occurred.

E. Nominee Ascriptive Characteristics

Non-policy attributes of Supreme Court justices have always been important, perhaps most notably the geographic attachment of the justices during the 19th century. But other prominent features, important at different points in American history, have given rise to such appellations as "the Jewish seat." Ascriptive attributes of nominees have clearly played a role in confirmation voting, perhaps most dramatically in the cases of the Thurgood Marshall and Clarence Thomas (Overby et al 1992). In addition, case studies of nominations, and

primary sources including White House tapes from the Nixon and Johnson White Houses, show presidents carefully weighing such matters.

Although the ascriptive characteristics of nominees can be parsed in minute detail, here we consider only the most outstanding of the possible attributes by contrasting white male nominees with all others (that is, women, African-Americans, and Latinos). Even so, the number of such nominees is very small, only seven (Marshall, O'Connor, Thomas, Ginsburg, Miers, Sotomayor, and Kagan). We create an Ascription Score AS for nominees on which white male nominees score 0 and all other nominees score 1. This becomes our measure of t in the characteristics approach.

The Value and Cost of Ascriptive Characteristics.—The political return to a president from nominating someone other than a white male has varied dramatically over time; indeed, nominating such a person might well have been political costly for Herbert Hoover and other presidents early in the period we study. In addition, at any given time the value of ascriptive characteristics may differ for Democratic and Republican presidents. So how is one to gauge these shifting returns? We take a simple approach: as the political power and organization of groups other than white males increases, their representation in Congress is apt to increase. Hence, the percentage of House members who are not white males can serve as a proxy for the political return from nominating someone other than a white male to a seat on the Supreme Court. To capture possible differences between Democratic and Republican presidents we calculate the variable by party. More specifically we calculate the measure

$$\pi_t = \frac{AfricanAmerican + Woman + Latino}{435}$$

where the numerator is the sum of the number of seated co-partisans with the indicated characteristics in the House of Representatives at the time of the nomination.

To proxy for the "cost" of locating nominees who are not white males, we consider the number of seated non-white male Article III judges appointed by a co-partisan (including the current President himself). In our view, this is a plausible measure of the pool of feasible

candidates for nomination. Even as the population of those educated in law schools became more diverse, the federal circuit remained (and remains) dominated by white men. This fact is particularly true of the appointments made by Republican presidents. Consequently, any president, and especially any Republican president, has a relatively small number of individuals to choose from if he wants to appoint a non-white or female justice. This pool has grown modestly with time and is somewhat a function of the president's own term in office (since presidents make federal judicial appointments at every level of the hierarchy).

The difficulty of finding ideologically compatible nominees other than white males is a recurring theme in nomination selections, at least since the Nixon Administration. For example, Richard Nixon expressed a strong interest in fielding a woman candidate for a seat on the Supreme Court in 1969. While he would have preferred a circuit court judge, at that time only two women were federal judges and both had been appointed by Democratic presidents – there were no female federal judges who had been appointed by Republican presidents. Mildred Lillie, a California Superior Court judge, drew Nixon's attention as both a conservative and a woman, but she suffered a down-check from the American Bar Association. Ultimately Nixon failed to find a suitable woman to nominate. In contrast, at the time of Ronald Reagan's nomination of Sandra Day O'Connor, Republican presidents had appointed 16 seated federal judges who were not white males. Though Reagan reached out to a woman who was not a federal judge, the change in the federal judiciary since Nixon's time – from 0 to 16 seated non-white-male co-partisans – is suggestive.

Call the number of seated co-partisan federal judges who are not white males the "ascription pool," AP . We take as a reasonable measure of the difficulty or "cost" of nominating someone other than a white male as $w_t = \frac{1}{\sqrt{1+AP}}$. If there are no available federal judges who are not white males, this measure take the value 1; as the number increases, the cost or difficulty falls and approaches zero.

In fact, the pool of non-white, non-male federal judges is negligible in the early portion of our data. Fewer than ten total circuit or district court judges of either party were not

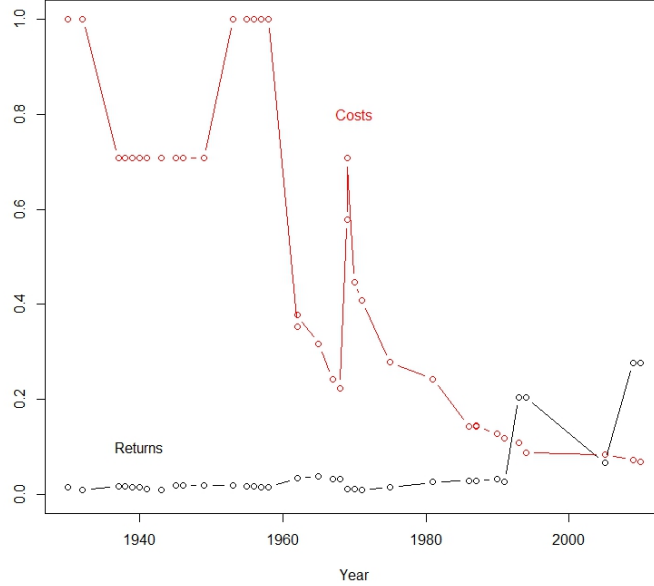


Figure 8: Returns and Costs of Nominee Ascriptive Characteristics, 1930-2010.

white males until 1967. Judicial diversity has increased with time, so that by 2010 there were 215 Democrats who were either non-white or non-male on the federal bench. Thus, the costs of identifying a non-white male co-partisan decreased over the studied period, but this drop in costs has been experienced mostly by Democratic presidents.

Figure 8 displays the values of the two key variables (π_t and w_t) at the time of each nomination. Because the values of the variable reflect the partisanship of the President they display sizeable jumps with the change of administration. The data suggests that political returns on ascriptive characteristics increased after about 1990. The data also indicate that the "cost" of ascriptive characteristics were very high prior to about 1960 but fell dramatically thereafter. However, Republican presidents continued to face high costs until more recently.

IV. Estimating the President's Demand for Nominee Characteristics

We now use the data to empirically estimate presidential demand for nominee ideological proximity, nominee policy reliability, and nominee ascriptive attributes. To be clear, these

demand functions predict presidential selection of nominee characteristics as functions of the political returns of characteristics and the difficulty of acquiring the characteristics.

A. *The Demand for Ideological Proximity*

Recall the expression for the President's demand for ideological proximity, equation 3:

$$n^*(\pi_z, w_n, p, o) = \begin{cases} p + \frac{1}{2} \frac{w_n}{\pi_z} I & \text{if } w_n < 2\pi_z(p - o) \\ o & \text{otherwise} \end{cases}$$

We re-write this relation in terms of distance from the President, $|p - n| = \frac{1}{2} \frac{w_n}{\pi_z}$, and take logarithms to yield $\log(|p - n|) = \log(\frac{1}{2}) + \log(w_n) - \log(\pi_z)$. This is the equation we estimate, that is,

$$(6) \quad \log(|p - n|) = \beta_0 + \beta_1 \log(w_n) + \beta_2 \log(\pi_z)$$

Thus, the estimating equation is directly derived from theory. The theory predicts that the sign of β_1 should be positive (distance increases as the political cost of placing the nominee on the Court increases); and that the sign of β_2 should be negative (distance decreases as the President cares more intensely about Supreme Court policy). For the measure of distance from the President, we employ the "clipped" distance measure; the cost of ideological proximity w_n is that derived earlier, and the measure of return on ideology π_z is the presidential policy interest score derived earlier.¹⁰

Table 1 shows the results from estimating Equation 6. The first column shows the results from OLS estimation, the second column a Tobit regression (hence, accounting for the clipping in the dependent variable). In both estimates, both w_n (the marginal cost of ideological proximity, proxied by the interest group variable) and π_z (the value of proximity to the president, proxied by his expressed interest in Supreme Court policy) take the correct sign and are statistically significant at conventional levels. The fit of the model is quite

	(1)	(2)
$\log(w_n)$	0.023* (.013)	.048** (.023)
$\log(\pi_z)$	-0.023** (.013)	-.043* (.022)
Intercept	0.066* (.034)	-.009 (.057)
N	50	50
R^2	.11	
Adj R^2	..07	

Table 1: Presidential Demand for Nominee Ideology. The dependent variable is the logged clipped distance between the President and the nominee.

low but the estimating equation is extremely demanding, in that it estimates ideological proximity of the nominee to the president rather than the actual position of the nominee, and employs only two independent variables – the two indicated by the characteristics theory.

B. Demand for Policy Reliability

Recall the expression for the President’s demand for ascriptive characteristics, equation 4:

$$r^*(\pi_z, w_r, \bar{v}) = \begin{cases} \sqrt{\frac{\pi_z \bar{v}}{w_r}} - 1 & \text{if } w_r \leq \pi_z \bar{v} \\ 0 & \text{otherwise} \end{cases}$$

We add 1 to both sides and take logarithms to yield $\log(1+r) = \frac{1}{2} (\log(\pi_z) + \log(\bar{v}) - \log(w_r))$. Recall that the cost of reliability was defined as $w_r = \frac{1}{\sqrt{1+RP}}$ where RP is the Reliability Pool, the number of co-partisans on the federal bench. Substituting and simplifying yields $\log(1+r) = \frac{1}{2} \log(\pi_z) + \frac{1}{2} \log(\bar{v}) + \log(1+RP)$. Noting that \bar{v} is a constant, we estimate this equation as:

$$(7) \quad \log(1+r) = \beta_0 + \beta_1 \log(\pi_z) + \beta_2 \log(1+RP)$$

where r is the nominee’s Policy Reliability Index. The characteristics theory predicts that the sign of β_1 should be positive (so that demanded policy reliability increases as

	(1)
$\log(1 + RP)$	0.512** (.167)
$\log(\pi_z)$	0.096 (.106)
Intercept	-1.743* (.882)
N	50
R^2	.19
Adj R^2	.16

Table 2: Presidential Demand for Nominee Reliability. The dependent variable is the logged Policy Reliability Index on nominees.

presidents care more about Supreme Court policy). The sign of β_2 should also be positive (demand for policy reliability should increase as the pool of seated co-partisan judges on the federal bench increases, that is, as the cost of finding reliable nominees decreases).

Table 2 displays the results of the estimation. Both coefficients take the correct sign and the coefficient on the size of the pool of co-partisan seated judges is statistically significant at the 5% level. However the coefficient on the president's interest in Supreme Court policy is not statistically distinguishable from zero.

The data suggest that the rise of legal technicians and the "super-techs" was driven largely by the increased availability of such individuals rather than changes in presidential interest in Supreme Court policy.

C. Demand for Ascriptive Features

Recall the expression for the President's demand for ascriptive characteristics, equation 5:

$$t^*(\pi_t, w_t) = \left(\frac{\pi_t}{2w_t} \right)^2$$

We take logarithms and simplify to yield $\log(t) = 2 \log(\pi_t) - 2 \log(2) - 2 \log(w_t)$. However, the cost of ascription $w_t = \frac{1}{\sqrt{1+AP}}$, where AP denotes the ascription pool (the number of federal judges that are seated co-partisans and who are not white males). Substituting

	(1)	(2)	(3)
$\log(\pi_t)$	1.921* (.664)	2.596*** (.513)	
$\log(1 + AP)$	0.032 (.021)		.071*** (.017)
Intercept	-0.040 (.034)	0.000 (.034)	-.046 (.045)
N	50	50	50
R^2	.38	.35	.27
Adj R^2	.35	.33	.25

Table 3: Presidential Demand for Nominee Ascription. The dependent variable is the logged ascription score for nominees.

for w_t yields $\log(t) = 2\log(\pi_t) - 2\log(2) + \log(1 + AP)$. We estimate this equation as:

$$(8) \quad \log(t) = \beta_0 + \beta_1 \log(\pi_t) + \beta_2 \log(1 + AP)$$

Again, this equation comes directly from the theory. The theory predicts that β_1 should be positive (so that increased political returns from ascription should increase a nominee's likely ascription score). And, the theory predicts that β_2 should be positive (so that greater availability of co-partisan judges with desirable ascriptive features increases a nominee's expected ascription score).

Table 3 presents the results of the estimation. The estimation of Equation 8 is shown as Model (1). The coefficients on both of the key variables take the correct sign, and the variable measuring the president's return from nominating individuals who are not white males is statistically significant at the 10% level. The variable measuring the supply of co-partisan judges who are not white males is not statistically significantly different from zero. However, the correlation between the two key variables is extremely high ($r = .84$). This is hardly surprising since the representation of women and racial minorities in Congress and on the Supreme Court moved hand-in-hand. Models (2) and (3) examine each of the variables separately, and each on its own retains the correct sign and is highly statistically significant.

We interpret these results as broadly supportive of the characteristics approach, but

suggesting the need for measures of return and availability that are more analytically distinct. However, any reasonable implementations of variables will likely be highly correlated.

V. Understanding Presidential Choices 1930-2010

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VI. Conclusion

At first glance, understanding presidential selection of Supreme Court nominees appears deeply problematic, due to the impossibility of specifying the universe of possible nominees and accurately predicting presidents' choices from that universe. And indeed the history of nominations seems filled with idiosyncratic, casual, or even bizarre choices. In this paper, we have taken a fresh look at presidential selection of nominees in an effort to render the problem tractable and presidential choices more understandable. The key to our approach is to re-conceive nominees as bundles of characteristics that are valued by presidents and that can be "purchased" through effort or at a political price. We formulated a formal theory of presidential selection of nominees, the characteristics approach, that structures the building-blocks of returns and costs into an internally consistent, logical framework. The characteristics approach demands many novel measures about nominees and the environment in which presidents select nominees. But, we have shown that it is possible to find reasonable proxies for the new variables that the theory demands. Examples are the president's interest in Supreme Court policy, the availability of highly reliable legal "super-techs," and the likely return on nominating persons other than white males. Bringing together the new theory and novel data, we find the predicted structure in the data. This is not to down-play the considerable randomness in the data – at the end of the day, presidents do what they want to do. Nonetheless, the theory points to, and the data confirm, a sensible logic underlying presidential choices of Supreme Court nominees over the last 80 years.

A Proofs of Propositions

Proof of Proposition 1.—Note that Equation 2 is separable in nominee ideology, and is concave in nominee ideology. The first order condition for an interior solution is $\frac{\partial}{\partial n}u() = 2\pi_z(p - n) - w_n = 0$ (for a conservative president); solving for n yields the demand function in the proposition. The indicated corner solution follows from the fact that the President need never compromise more than nominee ideology that brings no opposition at all. E.g., it occurs for a conservative President when $p - \frac{1}{2}\frac{w_n}{\pi_z} = o$. QED

Proof of Proposition 2.—The relevant first order condition is $\frac{\partial}{\partial r}u() = \frac{\pi_z\bar{v}}{(1+r)^2} - w_r = 0$. The indicated interior solution follows immediately. The second order condition is $\frac{\partial^2}{(\partial r)^2}u() = -\frac{2\pi_z\bar{v}}{(1+r)^2} < 0$, which assures $r * (\cdot)$ is indeed a maximum. The minimum possible value of reliability is 0; the condition for the corner solution follows immediately from $\sqrt{\frac{\pi_z\bar{v}}{w_r}} - 1 = 0$. Q.E.D.

Proof of Proposition 3.—The relevant first order condition is $\frac{\partial}{\partial t}u() = \frac{\pi_t}{2\sqrt{t}} - w_t = 0$. The indicated result is immediate. The second order condition is $\frac{\partial^2}{(\partial t)^2}u() = \frac{\pi_t}{2t\sqrt{t}} < 0$, which assures the indicated function yields a maximum. QED

Proof of Proposition 4.—A closed form solution for $\hat{\pi}_z$ is exceedingly cumbersome so we provide a proof of existence and uniqueness using the intermediate value theorem. We then turn to the comparative static result. We begin by defining the President's value function (indirect utility function) $u^*(\cdot) \equiv u(n^*, r^*, t^*)$, that is, the value of the president's utility function given optimal selection of the nominee. Using Equations 2, 3, 4, and 5 the value function given interior solutions of n^* , r^* and t^* is:

$$u^*(\cdot) = \begin{cases} -w_n(o - p) + w_r + \frac{\pi_t^2}{4w_t} + \frac{w_n^2}{4\pi_z} + a\pi_z - 2\sqrt{\bar{v}w_r\pi_z} & \text{if } p < 0 \text{ (liberal)} \\ -w_n(p - o) + w_r + \frac{\pi_t^2}{4w_t} + \frac{w_n^2}{4\pi_z} + a\pi_z - 2\sqrt{\bar{v}w_r\pi_z} & \text{if } p > 0 \text{ (conservative)} \end{cases}$$

When n^* is an interior solution but $r^* = 0$ the appropriate value function is:

$$u^*(\cdot) = \begin{cases} -w_n(o - p) + \frac{\pi_t^2}{4w_t} + \frac{w_n^2}{4\pi_z} + \pi_z(a - \bar{v}) & \text{if } p < 0 \\ -w_n(p - o) + \frac{\pi_t^2}{4w_t} + \frac{w_n^2}{4\pi_z} + \pi_z(a - \bar{v}) & \text{if } p > 0 \end{cases}$$

Part 1. *Existence.* 1) Note by inspection that $u^*(\cdot)$ is continuous in π_z on any closed interval $[\underline{\pi}_z, \bar{\pi}_z]$, $\underline{\pi}_z < \bar{\pi}_z$. 2) By assumption, $\pi_z \geq 0$. It will be seen that $\lim_{\pi_z \rightarrow 0} u^*(\cdot) = 0$ since n^* and r^* go to their corner solution values, and $\lim_{\pi_z \rightarrow \infty} u^*(\cdot) = \infty$ (using L'Hopital's Rule). 3) These facts combined with the continuity of $u^*(\cdot)$ mean that for any non-negative value \bar{u} there exists a closed interval $[\underline{\pi}_z, \bar{\pi}_z]$ such that $u^*(\underline{\pi}_z) < \bar{u} < u^*(\bar{\pi}_z)$. 4) Existence of $\hat{\pi}_z$ follows immediately from application of the Intermediate Value Theorem. Part 2: *Uniqueness.* To prove uniqueness, we show that the value function is strictly increasing on any interval $[\underline{\pi}_z, \bar{\pi}_z]$ in which the President purchases $n^* \neq o$ (an interior solution). 1) Assume non-zero purchases of r thus yielding the first pair of value functions above. Then $\frac{\partial}{\partial \pi_z} u^*(\cdot) = a - \frac{w_n^2 + 4\pi_z \sqrt{\bar{v} w_r \pi_z}}{4\pi_z^2}$ which clearly becomes negative for small π_z . However, for non-corner purchases of n^* and r^* , it must be that $\pi_z > \max\{\hat{\pi}_z, \tilde{\pi}_z\}$ where $\tilde{\pi}_z$ denotes the value of π_z at which $r^* = 0$. (We assume $\hat{\pi}_z < \tilde{\pi}_z$). Hence, we need check the slope of the value function only at $\pi_z = \max\{\hat{\pi}_z, \tilde{\pi}_z\} = \tilde{\pi}_z$ (note that the second derivative $\frac{\partial^2}{(\partial \pi_z)^2} u^*(\cdot) = \frac{w_n^2 + \pi_z \sqrt{\bar{v} w_r \pi_z}}{2\pi_z^2} > 0$ so if the slope is positive at that point, it is positive for all higher values of π_z). Using Equation 4, $w_r = \tilde{\pi}_z \bar{v}$, and recalling that $a \geq (p - o)^2 + \bar{v}$ we find $\frac{\partial}{\partial \pi_z} u^*(\cdot) |_{\pi_z = \tilde{\pi}_z} = (p - o)^2 - \frac{w_n^2}{4\tilde{\pi}_z^2}$. We require this expression to be positive. Recall from Equation 3 that $w_n < 2\pi_z(p - o)$; we thus have $\frac{w_n^2}{4\tilde{\pi}_z^2} < (p - o)^2$. So it must be the case that the slope is positive. 2) The case where $r^* = 0$ and $n^* \neq o$ can be analyzed in analogous fashion, and leads to the same conclusion. Part 3. The effect on the cut-off level of return on policy $\hat{\pi}_z$ of increased cost of nominee proximity w_n . If the slope of the value function in π_z falls as w_n increases, then the value function crosses \bar{u} at a higher value of π_z , that is, $\hat{\pi}_z$ increases so that a non-policy nominee becomes more attractive. Note that for either value function $\frac{\partial^2}{\partial \pi_z \partial w_n} u^*(\cdot) = -\frac{w_n}{2\pi_z} < 0$. QED.

B The Vote-Cost of Ideological Proximity

Table 4 presents several simple vote models, estimated with data from the 47 nominations from Hoover to Obama that received floor votes.¹¹ Each of the models has the general form $pctnay = \beta_0 + \beta_1|n - o| + \beta_2variable + \beta_3|n - o| * variable$, where $pctnay$ is the number of nay votes divided by the number of Senators in the Senate (which changes from 96 to 100 over the period we study). In such a specification, $w_n = \frac{\partial pctnay}{\partial |n - o|} = \beta_1 + \beta_3 * variable$.

In the table, Model (1) shows the simple bivariate relationship between nay votes and distance between the nominee and the opposition $|n - o|$. Here, $w_n = .313$. Substantively, the model suggests that (say) a Democratic president who nominated a moderate nominee located at 0 in the NOMINATE space could anticipate about $.3 * .7 - .14 = .7$ – that is, about 7 nay votes (a reasonable position for the most conservative senator is usually about .7 in the NOMINATE space though at present the most conservative senator has a score of about .9). Moving that nominee to a rather liberal position, .3, would add $.3 * .3 = .09$, or 9 more nay votes, for a total of 16 nay votes.

Model (2) examines the impact of a larger opposition party, and Model (3) considers the impact of party polarization (measured as the difference in the mean NOMINATE score of members of the two parties). Neither of these variables appears to have an impact on nay votes. Model (4) examines the impact of a potential move-the-median nominee, which again seems to have little impact on nay votes.¹²

Model (5) considers the presence of threatening groups. In the model, the number of threatening groups does not have a direct effect on nay votes (that is, when $|n - o| = 0$); however, the interaction between threatening groups and nominee distance from opposition is positive. Model (5) indicates that $w_n = .153 + .012 * grps$. Thus, an increase of .5 units in NOMINATE points of $|n - o|$ is estimated to increase nay votes by 7.5 directly. In addition, if there were (say) 10 threatening groups, a shift of that size in nominee ideology would further increase nay votes by about 6 votes, for a total increase of about 14 nay votes. However, if there were 50 threatening groups, that shift in nominee ideology would increase

	(1)	(2)	(3)	(4)	(5)
Distance	0.313*** (.088)	0.097 (.328)	-0.150 (.382)	0.317*** (.103)	0.153* (.088)
Opposition		-0.095 (.766)			
Distance x Opposition		0.508 (.805)			
Polarization			-0.563 (.924)		
Distance x Polarization			0.850 (.857)		
MTM Possibility				0.005 (.207)	
Distance x MTM				-0.016 (.214)	
Group Threat					-0.010 (0.007)
Distance x Group Threat					0.012* (.007)
Intercept	-0.144* (.085)	-0.107 (.309)	.149 (.385)	-0.145 (.099)	-.039 (.084)
N	47	47	47	47	47
R^2	.22	.27	.27	.22	.31
Adj R^2	.20	.22	.22	.17	.25

Table 4: Estimating the Cost of Ideological Proximity: Nay Votes as a Function of Nominee Ideology. "Distance" refers to the ideological distance of the nominee from the most extreme senator in the opposing party.

nay votes by about 37 nay votes, a huge increase.

The fit of the models could easily be improved, for example, by using the actual number of groups that mobilized in each nomination rather than the maximum number that had previously mobilized. However, the point of the estimation is summarize what a president could reasonably expect about the relationship between nominee ideology and nay votes, rather than fit a model that tracks the historical experience as closely as possible.

C The Supply of Nominee Policy Value

//This Appendix remains very incomplete //

Here we derive the President's supply of the policy score, that is, the predicted value of the policy score as a function of Presidential interest in Supreme Court policy and the "cost" of the inputs to the policy score.

Recall the definition of the policy score from Equation 1:

$$z(n, r; p, a, \bar{v}) = a - (p - n)^2 - \frac{\bar{v}}{1 + r}$$

In the equation, variance and policy distance enter the policy score with equal weights. To accomplish this, we calculate variance as $v = \frac{1}{1+PRI}$. Under this normalization, the maximum variance is 1 and the minimum is 1/10 (given values of PRI). We normalize quadratic policy distance so that the maximum distance in the data set (Burton) has a value of 1 and the minimum distance (Reed) is zero. We then set $a = 1.5$. The resulting scores are shown in Figure 9.

Most nominees had relatively high scores, especially the recent "super techs," as well as Hughes. However, several nominees stand out for their spectacularly low scores: notably Burton, Cardozo, and Byrnes. Three more nominees had quite low scores: Powell, Black, and Warren. Explaining nominees of this type presents a challenge.

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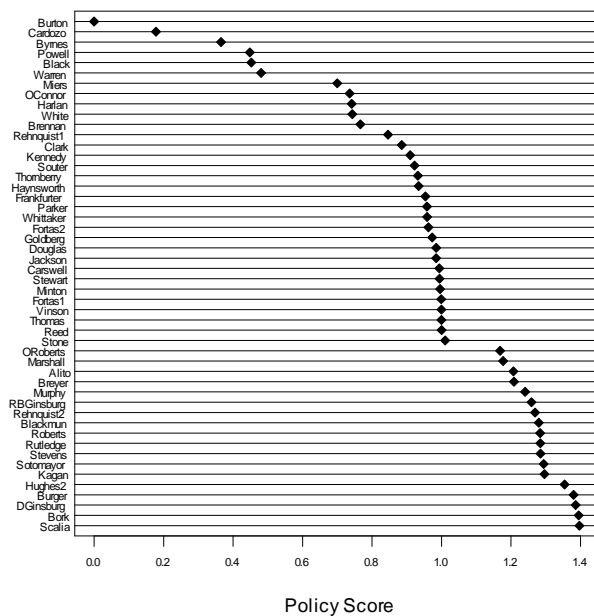


Figure 9: Nominee Policy Score. The Policy Score combines the Nominee-President distance and the Policy Reliability Index; higher scores are better (see text). Most nominees had relatively high Policy Scores but some stand out for having low ones: Burton, Cardozo, and Byrnes had particularly low Policy Scores.

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Notes

*We thank George Kraus and David Lewis for helpful comments. Department of Politics, Princeton University.

¹If one re-conceives the short-list data in terms of the characteristics of the considerees, the short list data is perhaps even better suited to analysis using the characteristics approach than the actual nominee data, since each short list generates a distribution of characteristics apparently valued by the President. We do not pursue this point any farther in this paper.

²The policy score function plays somewhat the same role in the characteristics theory as the production function does in the theory of the firm or in the household production approach to consumer theory.

³This seemingly innocuous assumption is rather potent. For example, if one takes a strict median voter view of the Supreme Court, then the policy impact of a non-median moving nominee is zero irrespective of the nominee's ideology or reliability, while the policy impact of a median moving nominee is just the expected movement in the Court's median (Krehbiel 2007). Following contemporary models of Supreme Court decision-making, we reject a strict median voter view of the Court (see Lax and Cameron 2007, Carrubba et al 2012, Cameron and Kornhauser 2011 and Cameron and Kornhauser 2013).

⁴To see this, note that $\frac{\partial}{\partial n}z(\cdot) = 2(p-n)$ is positive for a conservative president ($p > 0$) and negative for a liberal president ($p < 0$), while $\frac{\partial^2}{(\partial n)^2}z(\cdot) = -2$. Hence, for a conservative president, policy score increases as n increases upto the president's ideal point but at a decreasing rate, while for a liberal president policy score increases as n decreases down to the president's ideal point, at a decreasing rate. The policy score function is strictly concave in nominee proximity.

⁵The method is straight-forward. The authors associate with each nominee his or her "best NOMINATE score," e.g., their score as a congressman or the score of their sponsoring congressman if the nominee had earlier served as a federal judge (Giles, Hettinger, Pepper). Then the authors calculate a principal component from the newspaper and NOMINATE

scores; the loadings allow the principal component to be projected back into the NOMINATE space. The resulting scores largely reflect the newspaper coverage, but are scaled into the NOMINATE space.

⁶NOMINATE scores for presidents beginning with Roosevelt are available in both the House and Senate spaces, at Keith Poole's <http://voteview.com/>. The scores are based on positions announced by Presidents on legislation in Congress; the president is scaled as if he were a legislator casting a vote. Similar scores for earlier presidents were calculated by Nolan McCarty and employed in McCarty (2009).; they are available from the author. These scores need to be translated into the current version of Senate NOMINATE scores (a matter of a simple regression). Poole displays scores for Roosevelt that change rather dramatically over time, probably reflecting the extraordinary change in congressional agendas that occurred with the onset of WWII. Following McCarty (2009) we employ a single score for FDR for the entire term; we employ his first term score as almost surely it is most relevant for Supreme Court politics throughout Roosevelt's term.

⁷The group mobilization data is that used in Cameron et al 2013.

⁸Close examination of the data reveals a prominent exception to "politico" rule: the Hoover Administration. In contrast with the presidents who followed him in the next 4 decades, Hoover favored nominee with some legal background.

⁹Searching on the terms "court" or "supreme" returned many irrelevant public papers for this project's purpose. For example, a search on the word "court" returned President Nixon's Eulogy for Everett Dirksen (D-IL) referring to how he "...added grace and elegance and courtliness to the word "politician."" To check whether substantive mentions of the Supreme Court might still evade coding, we randomly sampled the results of merely searching on "court" and "supreme." Results which did not also include the phrase "supreme court" did not prove relevant.

¹⁰Because the values of the variables may be 0 and hence undefined as logarithms, we add "1" to each variable. E.g, $\log(\pi_z)$ is actually $\log(\pi_z + 1)$.

¹¹Following most studies in the confirmation literature, we treat voice votes as unanimous yea votes. Cameron et al 2013 report results from a Heckman selection estimation showing that this assumption is innocuous.

¹²The variable "Move the median probability" is a dummy variable that takes the value 1 if the vacancy affords the President a chance to move the median on the Court and 0 otherwise. Specifically, it takes the value 1 if the President is a Democrat and the vacating justice were a conservative, or if the President is a Republican and the vacating justice was a liberal. The interaction with $|n - o|$ then provides a measure of whether the President capitalized on the opportunity.