

A Long View of the Senate's Influence over Supreme Court Appointments

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This Article offers the first empirical analysis of the Senate's role in constraining presidents' choices of Supreme Court nominees over an extended historical period. It considers ideologies of Senates faced by nominating presidents and measures whether the ideologies of these Senates predict Justices' voting behavior. The analysis substantially qualifies earlier understandings of senatorial constraint.

Earlier empirical studies consider only limited numbers of recent nominees. They suggest that the Senate has constrained presidents' choices, and many scholars theorize that the Senate has enhanced its role in the appointments process since the 1950s. Analysis of a larger group of nominees shows that the Senate's ideology has had significant predictive power over Justices' votes in only two isolated historical periods. Senatorial ideology was last significant in the 1970s, shortly after the filibuster of Abe Fortas's nomination to be Chief Justice, but then it lost significance following rejection of Robert Bork's nomination in 1987.

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INTRODUCTION

Supreme Court Justices sometimes disappoint their appointing presidents, and opposing-party Senates are often blamed for presidents’ “mistakes.”¹ This Article offers the first empirical analysis of the Senate’s

1. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1069–70 (2001) (blaming the Senate for Eisenhower’s “mistake” in appointing Justice Brennan and noting that Justices “tend to reflect the vector sum of political forces at the time of their confirmation”); Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 157–58 (2009) (“Many of the examples of ‘disappointed’ presidents . . . can be traced directly to a president’s need to compromise with an ideologically hostile Senate.”).

role in constraining presidents' choices of Supreme Court nominees over an extended historical period. It considers ideologies of Senates faced by nominating presidents and measures whether these ideologies predict Justices' voting behavior.

The Constitution authorizes the Senate to provide "Advice and Consent"² on presidential nominees but does not resolve controversy over the Senate's proper role.³ There are many open questions about the Senate's ability to constrain presidential nominees.⁴ Beyond rejecting a minority of nominees, has the Senate generally forced presidents to nominate Justices who reflect the Senate's ideology? Or has the Senate by and large deferred to presidential choices?⁵ And has the Senate always played a significant role, or has it aggrandized its position only after recent events, such as Robert Bork's failed confirmation?⁶

To illustrate how the Senate may constrain presidents' choices, contrast the recent experiences of President George W. Bush with those of Presidents George H. W. Bush and Gerald Ford. Both of the second Bush administration's appointees, Justices John Roberts and Samuel Alito, were nominated when Republicans enjoyed a strong majority in the Senate.⁷ Roberts and Alito vote with one another at a relatively high rate, and they are generally thought to align with their nominating president's policy preferences.⁸ Roberts and Alito also vote with appointees of other

2. U.S. CONST. art. II, § 2, cl. 2.

3. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 135 (2000) ("[T]he Senate's formal authority in the appointments process has never been as clear as that of the president.").

4. The Senate's constraint on the president's choice of nominee may be described as part of the "silent operation" of the confirmation process. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 21 (2005) (citing *THE FEDERALIST* No. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

5. See Tonja Jacobi, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NW. U. L. REV. 259, 276 (2006) (raising the question); Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 396 n.32 (postulating that Senators confirm most Justices because they "usually defer to the president in terms of judicial philosophy," or because "presidents generally are careful to choose nominees whom the Senate is likely to confirm"). Stone notes that it is difficult to measure the Senate's influence on the president's choice if the issue is cast purely in terms of nominees that the president did not select. *Id.* Here, I measure whether the president has been forced to select nominees who reflect the Senate's ideology.

6. See SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 7-10* (2009) (summarizing two competing theories of the appointments process, "big bang" versus "nothing-new-under-the-sun"); BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 15-36 (2006).

7. *Party Division in the Senate, 1789-Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Feb. 25, 2013) (listing numbers of Senate seats controlled by each party for all Congresses); *Supreme Court Nominations, Present-1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Feb. 25, 2013) (providing dates of nominations).

8. Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838-2009*, 76 MO. L. REV. 999, 1017 tbl.1 (2011). Roberts'

Republican presidents much more often than they vote with Democratic appointees.⁹

The George H.W. Bush and Ford administrations fared worse when nominating Justices to liberal, opposing-party Senates. Bush chose David Souter as a “safe” nominee in terms of his ability to win confirmation,¹⁰ but Souter turned out to be much more liberal than Bush.¹¹ Souter voted with Bush’s other appointee, Clarence Thomas, in a relatively low percentage of cases.¹² And while Thomas votes with Republican appointees at a high rate, Souter voted with Democratic appointees at an even higher rate.¹³ Ford obtained a similar result when he nominated a known “moderate,” John Paul Stevens, to an “overwhelmingly Democratic Senate.”¹⁴ Once on the bench, Justice Stevens voted with Democratic appointees much more than he voted with fellow Republican appointees.¹⁵

Souter’s and Stevens’ voting records suggest that the Senate may constrain presidents’ ability to nominate ideologically compatible Justices.¹⁶ Their voting patterns reflect the ideologies of Senates faced by nominating presidents rather than the ideologies of nominating presidents themselves. Is there any reason to think these examples are part of a larger pattern of senatorial constraint? If so, one would expect to see evidence in voting records for a larger set of Justices.

To date, there have been a handful of empirical studies addressing the Senate’s role in shaping presidents’ choices of Supreme Court nominees. Byron Moraski and Charles Shipan’s leading study considers twenty-eight persons nominated to the Supreme Court from 1949 to 1994.¹⁷ They find

surprising vote in *National Federation of Independent Business v. Sebelius* may be explained as a departure from his generally conservative voting record. 132 S. Ct. 2566 (2012). Or it may reflect the fact that the Republican party and President Bush’s outlooks on health care policy in 2005, when Roberts was appointed, diverge from the Republican party’s current take on this issue. See Mark Tushnet, *Being “Good” at Picking Judges*, BALKANIZATION (July 7, 2012), <http://balkin.blogspot.com/2012/07/being-good-at-picking-judges.html>.

9. Chabot & Chabot, *supra* note 8, at 1019 tbl.2.

10. GEORGE WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 63 (1995).

11. “[T]he first president Bush’s selection of Justice Souter highlight[s] the risk that agents can deviate from the policy preferences of their principals.” HAROLD J. KRENT, *PRESIDENTIAL POWERS* 25 (2005); see CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 133 (2007).

12. Chabot & Chabot, *supra* note 8, at 1017 tbl.1.

13. *Id.* at 1019 tbl.2.

14. EPSTEIN & SEGAL, *supra* note 4, at 21; DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 175 (1999) (noting that Ford “settled” on Stevens, a “moderate noncontroversial jurist of unquestioned credentials”).

15. Chabot & Chabot, *supra* note 8, at 1019 tbl. 2.

16. See Ringhand, *supra* note 1, at 157–58 (arguing that Bush’s nomination of Souter “can be traced directly” to his “need to compromise with an ideologically hostile Senate”).

17. Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory*

that presidents nominate ideologically compatible Justices when they are unconstrained by the Senate.¹⁸ Constrained presidents, however, nominate Justices closer to the Senate's ideology than the president would otherwise prefer.¹⁹ Christine Nemacheck reaches a similar conclusion by comparing characteristics of thirty-nine actual nominees to those of 240 potential nominees from 1930 to 2005.²⁰ She finds that presidents choose less ideologically proximate candidates when they face an opposing-party Senate.²¹

These studies suggest that the Senate constrains presidents' choices, but limited data forced the authors to consider only small numbers of nominees from relatively recent time periods. They also evaluate outcomes based on candidates' *perceived* ideology at the time of nomination, rather than what they do once they are on the bench.²²

Analysis based on voting records for a larger sample of Justices calls the Senate's ability to constrain presidents' choices of nominees into doubt. My recent historical study, *Mavericks, Moderates, or Drifters*, considers voting records for eighty-nine Justices over a 172-year period.²³ It finds that just under half of these Justices voted with appointees of the *other* party most of the time.²⁴ Senatorial constraint does not explain these independent voting patterns: Presidents did not appoint a greater percentage of ideologically incompatible Justices when they faced an opposing-party Senate.²⁵

This historical analysis raises significant questions about the Senate's actual role. It relies only on count data, partisan measures of presidential and senatorial ideology, and a single cumulative voting record for each Justice.²⁶ These are all rough metrics. They may miss underlying relationships or senatorial influence occurring only in a limited, recent time period.

What is needed, then, is the more precise empirical analysis offered by this Article. It improves on earlier studies of recent nominees by considering actual voting behavior of seventy Justices appointed since

of *Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999).

18. *Id.* at 1077 fig.3.

19. *Id.*

20. CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 119 (2007).

21. *Id.* at 129.

22. Lee Epstein and Carol Mershon point out that the leading measure of perceived ideology used in Moraski and Shipan's study, the Segal-Cover score, does not account for Justices' votes in cases other than civil liberties or votes cast "over the course of an individual's career." Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 282, 284 (1996).

23. Chabot & Chabot, *supra* note 8, at 1019 tbl.2.

24. *Id.* at 1011 fig.2.

25. *Id.*

26. *Id.*

1862. Furthermore, my regression analysis builds on earlier historical work by evaluating relationships among fine-grained measures of voting behavior and presidential and senatorial ideology.

The measure of voting behavior used in this study is paired agreement rates.²⁷ These rates account for every agreement or disagreement between virtually every pair of Justices who sat together in 7520 non-unanimous cases decided over a 147-year period.²⁸ This study also uses leading measures of presidential and senatorial ideology reported in Lee Epstein et al.'s U.S. Supreme Court Justices Database.²⁹ Political scientist Keith Poole and his co-authors developed these measures, which are known as DW-NOMINATE Scores.³⁰ They account for varied "ideological intensity" among presidents or Senators of the same party³¹ and have been found to "outperform" the party of an appointing president as a predictor of judicial behavior.³²

My analysis facilitates more careful understanding of the relationship between Justices' voting behavior and the Senates that confirm them. It is also uniquely well situated to identify the Senate's role in distinct historical and contemporary periods.

Part I describes earlier scholarship evaluating the Senate's constraint and theorizes about how the Senate's role may have changed over time. Part II provides empirical analysis of the relationships among the Justices' agreement rates, the ideologies of the Justices' nominating presidents, and the Senates faced by these presidents.

27. These rates reflect the percentage of times two Justices agreed in a majority or minority vote on the judgment of non-unanimous cases. Justice Alito, for example, agreed with Justice Roberts 87% of the time, while he agreed with Justice Stevens only 44% of the time. Measuring Justices' behavior based on paired agreement rates is a time-honored metric. Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 163 (2009) (discussing paired agreement rates used in C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890 (1941)). Paired agreement rates also reflect the same information contained in another leading measure of judicial ideology, Martin-Quinn scores. See Chabot & Chabot, *supra* note 8, at 1011 fig.2 (comparing rates of agreement to Martin-Quinn scores, as described in 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 (2002)).

28. For a description of the data sets supporting this study, see *infra* Part II.A and Chabot & Chabot, *supra* note 8, at 1006-08.

29. See Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *The U.S. Supreme Court Justices Database*, UNIV. S. CAL. (2010) [hereinafter *Justices Database*], available at <http://epstein.usc.edu/research/justicesdata.html> (documentation; variables 209 & 213).

30. See Royce Carroll et al., "Common-Space" DW-NOMINATE Scores with Bootstrapped Standard Errors, VOTEVIEW, http://voteview.com/dwnomin_joint_house_and_senate.htm (last visited Feb. 25, 2013). See generally KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

31. Fischman & Law, *supra* note 27, at 174.

32. Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 (2007) (describing Giles's study).

Taken as a whole, the data show that presidential ideology has had statistically significant predictive power over agreement rates, while senatorial ideology has not. The Senate's ideology has had significant predictive power in only two isolated historical periods. The Senate's ideology last gained significance around the 1970s, but it failed to maintain significant predictive power after the Senate rejected Robert Bork in 1987.

I. THE SENATE'S ROLE IN SHAPING PRESIDENTS' CHOICES OF NOMINEES

There is no shortage of commentary as to what the Senate's role *should be*.³³ Studies analyzing what the Senate's role *has been* have largely focused on confirmation votes³⁴ or nominees it rejected.³⁵ Presidents' Supreme Court nominees are far more likely to be rejected when they face an opposing-party Senate.³⁶ When placed in historical context, the Senate's rejections of Supreme Court nominees in the 1960s, '70s, and '80s stand out only because they follow lengthy periods of unified government.³⁷

Analysis of rejections addresses only a minority of nominees.³⁸ It fails to account for the "silent operation" of the confirmation process,³⁹ or the Senate's constraint on a president's choice of nominee. This leaves open two important questions with respect to the Senate's influence over presidents' choices of Justices: First, has the Senate generally constrained presidents' choices? Second, has the Senate's role changed over time? The following Subparts outline earlier scholarship addressing these questions and offer a framework for empirical analysis of the Senate's role.

A. HAS THE SENATE GENERALLY CONSTRAINED PRESIDENTS' CHOICES?

If presidents' nominations are more likely to fail under divided government, it may also be that opposing-party Senates constrain presidents' choices of nominees. Presidents facing an ideologically distant Senate may secure confirmation by nominating Justices closer to

33. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (2005); EISGRUBER, *supra* note 11; John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 *TEX. L. REV.* 633, 653 (1993); Stone, *supra* note 5, at 646–66; David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *YALE L.J.* 1491, 1493–94 (1992).

34. Moraski & Shipan, *supra* note 17, at 1070 (summarizing studies of confirmation votes).

35. See Stone, *supra* note 5, at 382–83; Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 *SUP. CT. REV.* 401, 412 (2006).

36. Stone, *supra* note 5, at 383 (“[T]he likelihood that a nomination will fail is much greater when the president faces a Senate controlled by the opposition party.”).

37. *Id.* at 383.

38. *Supreme Court Nominations*, *supra* note 7.

39. See *supra* note 4.

the Senate's ideology than the president would otherwise prefer. Past studies suggest that the Senate constrains presidents' choices in these circumstances.

Moraski's and Shipan's leading study observes that presidents are better able to appoint ideologically compatible Justices when they are unconstrained by the Senate.⁴⁰ Moraski and Shipan model a president's choice of nominee as part of a "nomination game" in which presidents take "into account" the Senate's "preferences."⁴¹ The game begins when a vacancy occurs on the Court. The president's nomination is the second stage of the game, and the Senate's confirmation decision is the final stage of the game.⁴²

Moraski and Shipan assume that the president wants to nominate a Justice who will "move the median of the Court as close as possible" to the president's own ideology.⁴³ However, because presidents have a "strong incentive" to nominate someone who will be confirmed by the Senate, presidents select only the nominee who will "produce the best new median and *who will also be approved by the Senate.*"⁴⁴

They posit that presidents are unconstrained when the president and Senate fall on the same side as the Court's median and the president is closest to the Court's median.⁴⁵ Moraski and Shipan expect unconstrained presidents to nominate Justices who share their own ideology.⁴⁶ Presidents are semi-constrained when the Senate is closer to the Court's median than the president, and they are fully constrained when the Senate and president are on opposite sides of the Court's median.⁴⁷ In both of these cases, Moraski and Shipan's study hypothesizes that presidents will be forced to nominate Justices closer to the Senate's ideal point than they would otherwise prefer.⁴⁸

Moraski and Shipan test whether these different levels of senatorial constraint predict ideology in a group of twenty-eight persons nominated to the Court from 1949 to 1994.⁴⁹ They measure nominees' ideology using Segal-Cover scores,⁵⁰ which are leading ideological measures based on content analysis of "newspaper editorials written between the time of

40. Moraski & Shipan, *supra* note 17, at 1077 fig.2.

41. *Id.* at 1071.

42. They model a single period rather than a repeated game. *Id.* at 1071-72.

43. *Id.* at 1073.

44. *Id.* at 1074.

45. *Id.* at 1075.

46. *Id.* at 1075-76.

47. *Id.* at 1076-77.

48. *Id.*

49. *Id.* at 1078.

50. *Id.* at 1074.

[J]ustices' nomination to the Court and their confirmation."⁵¹ Thus the appointment's outcome, or the liberal or conservative nature of the president's choice of nominee, is reflected by Segal-Cover scores. The study evaluates whether the appointments outcomes reflected by these scores are better explained by the president's or the Senate's ideology.⁵²

Eighteen of the nominations in the study were made by unconstrained presidents.⁵³ Three (Stevens, Bork, and Kennedy) were made by semi-constrained presidents, and seven (Clark, Minton, Harlan, Souter, Thomas, and both Fortas nominations) were made by fully constrained presidents.⁵⁴ Moraski and Shipan find that the ideology of unconstrained presidents significantly predicts the nominees' ideology.⁵⁵ This relationship vanishes for nominees where the president is semi- or fully constrained.⁵⁶ And when the president is fully constrained and disagrees with the Senate "completely about the ideological direction the Court should take,"⁵⁷ the president accommodates the Senate.⁵⁸ That is, fully constrained presidents nominate Justices closer to the Senate's ideal point (and the Court's median) than they would otherwise prefer.⁵⁹

51. Epstein & Mershon, *supra* note 22, at 264.

52. Moraski & Shipan, *supra* note 17, at 1078–79. They primarily use earlier political science measures known as ADA scores as proxies for senatorial and presidential ideology. *Id.* at 1079. Because the Senate is a multi-member body, the study measures its ideology using an ideology score for the median member of the Senate. *Id.* at 1079. If all Senators are ranked from most liberal to most conservative, the "median is the case in the middle of the distribution . . . such that . . . half the senators are to the ideological right of the median and half are to the ideological left." See LEE EPSTEIN ET AL., CODEBOOK: U.S. SUPREME COURT JUSTICES DATABASE 97 (2010) [hereinafter CODEBOOK].

53. Moraski & Shipan, *supra* note 17, at 1082 tbl.2.

54. *Id.*

55. *Id.* at 1081–84, 1083 tbl.3.

56. *Id.*

57. *Id.* at 1076, 1077 fig.3. Moraski and Shipan do not find that the Senate's indifference point significantly predicts nominees' ideology when the president is semi-constrained. *Id.* This result is not surprising given that only three nominees fall into this category.

58. *Id.* at 1083–84, 1083 tbl.3.

59. *Id.* Another study considering twenty-eight nominees suggests that the Senate may not constrain presidents if senatorial ideology is measured according to the filibuster pivot rather than the median member of the Senate. Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS & PRESIDENCY 31 (2005). I ran a separate regression to account for the possibility that filibusters may lead presidents to select Justices closer to the filibuster pivot (currently the sixtieth most liberal or conservative Senator) than to the median Senator. As reported in Appendix A *infra* p. 1270 fig.6, this alternative measure also fails to identify significant predictive power over Justices' votes. Other studies have found ideologies of home-state Senators to predict voting behavior of district and appellate court judges, due to the practice of senatorial courtesy. See, e.g., Fischman & Law, *supra* note 27, at 173–74 n.22 (discussing studies); Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 635–37 (2001). Senatorial courtesy is not understood to play as significant a role across all Supreme Court appointments. See EPSTEIN & SEGAL, *supra* note 4, at 22–23 (noting that, unlike Senators from states where there is a district court or court of appeals vacancy, "senators do not expect to have much of a say in the . . . nomination" of Supreme Court Justices); Giles et al., *supra*, at 628.

Likewise, Nemacheck analyzed whether presidents choose less ideologically proximate candidates when facing an opposing-party Senate. Her study considered presidents' choices of thirty-nine Justices out of a group of 240 potential nominees from 1930 to 2005.⁶⁰ Nemacheck measured the ideology of appointing presidents based on rankings developed by Poole et al.⁶¹ To craft a comparable measure of ideology for her pool of potential nominees, Nemacheck turned to measures reflecting the ideology of elite members of the candidate's political party from the candidate's home state.⁶²

Looking to these proxies for ideologies of all potential nominees, Nemacheck found that presidents preferred "ideologically proximate candidates" when selecting actual nominees.⁶³ When presidents faced an opposing-party Senate, however, "ideological proximity [did] not have a significant effect" on presidents' choice of nominees.⁶⁴

These studies find that the Senate constrains presidents' choices, but they are based on the perceived ideologies of small numbers of appointees. Perceived ideologies are fixed at the time of appointment and thus do not reflect Justices' actual behavior in subsequent years on the bench.⁶⁵ The Segal-Cover scores used by Morsaki and Shipan may also fail to reflect Justices' votes involving issues other than civil liberties.⁶⁶ And analysis based on small samples of individual Justices may not offer an accurate estimate of the Senate's role, even during the time periods covered.

My 2011 study, *Mavericks, Moderates, or Drifters*, calls the Senate's constraint into doubt.⁶⁷ Historical voting records for eighty-nine Justices over a 172-year period show that just under half of these Justices voted with appointees of the *other* party most of the time.⁶⁸ Senatorial constraint does not explain their independent voting patterns. Presidents

60. NEMACHECK, *supra* note 20, at 119, 126 tbl.6.3.

61. *Id.* at 119–20.

62. Nemacheck assumed a same-party member of a state's Congressional delegation represented the views of that party's political elites, and thus Supreme Court candidates, within a given state. NEMACHECK, *supra* note 20, at 120. Poole's ideological scores rank all members of Congress from liberal to conservative on a scale of -1 to +1. *Id.* Nemacheck used this ranking to identify the score for the median member of the group of "same party members of Congress from the candidate's state." *Id.* at 120. If a candidate had served in Congress and had his or her own DW-NOMINATE score, Nemacheck used that score instead. *Id.*

63. *Id.* at 129.

64. *Id.*

65. Epstein & Mershon, *supra* note 22, at 282.

66. *Id.* at 284.

67. Chabot & Chabot, *supra* note 8, at 1019 tbl.2.

68. *Id.*

appoint about the same percentage of ideologically incompatible Justices no matter which party controls the Senate.⁶⁹

This finding, however, does not definitively foreclose results of studies based on contemporary appointments. Perhaps the Senate plays a significant role, but only recently and in the limited time periods covered by other studies. The Justice-level, cumulative voting records used in *Mavericks, Moderates, or Drifters* offer only limited ability to identify changes in the Senate's role over time.⁷⁰ For example, recent divided government appointments such as Justices Anthony Kennedy and David Souter may give some reason to think the Senate has enhanced its role post-Bork. Kennedy sided moderately with Justices appointed by the same party; Souter sided strongly with Justices appointed by the other party.⁷¹ But it is difficult to tell whether things have changed based only on cumulative voting records for eight Justices appointed since that time.⁷²

This study builds on earlier historical work by addressing both the Senate's general influence over appointments and measuring how its role may have changed over time.

B. HAS THE SENATE'S ROLE CHANGED OVER TIME?

Past empirical studies do not adequately address the Senate's historical role. They lack either historical data or analysis designed to pinpoint the Senate's influence in discrete historical time periods. Thus, they fail to account for the Senate's role following early twentieth-century events such as the passage of the Seventeenth Amendment,⁷³ the controversial confirmation hearings of Louis Brandeis,⁷⁴ and the Senate's frequent rejection of nominees in the nineteenth century.⁷⁵ And without an adequate understanding of the Senate's historical role, these studies fail to

69. *Id.*

70. *Id.*

71. *Id.*; see Ringhand, *supra* note 1, at 158 (asserting that the first President Bush and President Reagan "needed to take senatorial preferences into account" when selecting Souter and Kennedy).

72. Chabot & Chabot, *supra* note 8, at 1020–21 (noting that a "small sample" of Justices limits the ability to assess change in recent time periods). The study considered appointments through Justice Sonia Sotomayor. *Id.* at 1017 tbl.1. Of course, voting records may not reflect some instances where the Senate compelled presidents to moderate their choices to a lesser degree. President Bill Clinton, for example, wanted to nominate Justices more liberal than Steven Breyer or Ruth Bader Ginsburg. DAVIS, *supra* note 33, at 158; see MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS 170–71* (1994) (stating that Ginsburg was not the "homerun" nominee Clinton had hoped for). Clinton moderated his choices to avoid a confirmation battle with the Senate. Once on the bench, however, Ginsburg and Breyer sided with other Democratic nominees. See Chabot & Chabot, *supra* note 8, at 1019 tbl.2. Thus, despite his moderation, Clinton basically got what he wanted from his appointees. See EPSTEIN & SEGAL, *supra* note 4, at 132.

73. U.S. CONST. amend. XVII.

74. EPSTEIN & SEGAL, *supra* note 4, at 1–2.

75. Whittington, *supra* note 35, at 413–14; *Supreme Court Nominations*, *supra* note 7.

provide a baseline from which to evaluate the modern appointments process.

Still, scholars offer competing theories as to whether and when the Senate's role changed. Some scholars contend that there has been no "wholesale change" in an appointments process that "is and always has been political."⁷⁶ The Senate has a long history of contesting presidents' Supreme Court nominees. It frequently rejected nominees in the nineteenth century.⁷⁷ Keith Whittington describes the postbellum period as one characterized by "political infighting," "patronage politics," and "pitched battles" between presidents and Senators attempting to "control the appointment power."⁷⁸

Although the Senate stopped rejecting nominees as frequently by the beginning of the twentieth century, it may still have played a significant role. Lee Epstein and Jeffrey Segal point to the raging "confirmation battle" over Woodrow Wilson's 1916 nomination of Louis Brandeis as evidence of historical conflict.⁷⁹ Henry Abraham states that the "confirmation battle still ranks as the most bitter and most intensely fought in the history of the Court."⁸⁰ Thus "political clashes over candidates for the Supreme Court" are anything but a "new phenomenon."⁸¹

Segal and Epstein also explain that factors associated with aggressive confirmation hearings today—media attention and interest group involvement—have also been present throughout history. Brandeis, for example, was "the target of press attacks from the *Wall Street Journal* and the *New York Times*, among others, which deemed him a dangerous 'radical.'"⁸² And in 1930, "labor and civil rights groups sent telegram after telegram to Senators urging them to vote against" nominee John Parker.⁸³ Parker, who was nominated by Herbert Hoover, stands out as the only Supreme Court nominee to be rejected by the Senate in the first half of the twentieth century.⁸⁴

Other scholars posit enhanced politicization of the appointments process and a pronounced shift in the Senate's role at some point in the latter part of the twentieth century. They offer competing theories as to

76. EPSTEIN & SEGAL, *supra* note 4, at 4.

77. Whittington, *supra* note 35, at 413–14; *Supreme Court Nominations*, *supra* note 7.

78. Whittington, *supra* note 35, at 430.

79. EPSTEIN & SEGAL, *supra* note 4, at 1–2.

80. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 135 (rev'd ed. 1999).

81. EPSTEIN & SEGAL, *supra* note 4, at 1–2.

82. *Id.* at 93.

83. *Id.* at 94–95.

84. *Supreme Court Nominations*, *supra* note 7.

the precise date of change. The following Subparts discuss these theories and outline possible, concurrent changes in appointing presidents' roles.

I. Routine Questioning Starting in the 1950s

Benjamin Wittes asserts that “the critical shift in the confirmation process began with *Brown [v. Board of Education]*⁸⁵ and established a new status quo as the Court’s aggressiveness increased over the subsequent two decades.”⁸⁶ Thus, “the first major watershed” occurred far in advance of the Bork nomination. It occurred in response to President Dwight Eisenhower’s nomination of John Marshall Harlan shortly after *Brown*.⁸⁷

The Senate’s questioning of Harlan signaled the start of its “current practice” of requiring nominees to testify before the Judiciary Committee “as a matter of course.”⁸⁸ And unlike in the past, the Senate now used these proceedings to “grill the nominees about individual cases or about their judicial philosophies.”⁸⁹

Whether this immediately enhanced the Senate’s influence over presidents’ choices of nominees is less clear. Wittes notes that the shift marked by the Harlan confirmation proceedings “took place gradually.”⁹⁰ Senators in subsequent hearings “did not immediately push every nominee to bare his soul.”⁹¹ Moreover, both nominees and the press pushed back against the Senate’s initial attempts to raise questions about nominees’ substantive views.⁹² Finally, while Wittes speculates this shift may have ultimately led presidents “to satisfy the opposing party” in their choices of nominees, he does not provide any examples of presidents doing so immediately after Harlan’s confirmation.⁹³

2. Enhanced Political Pressure and the Filibuster in the Late 1960s

Other scholars assert that the Senate’s role changed at later dates. Mark Silverstein posits that a “New Political Calculus” for confirmations emerged in the late 1960s.⁹⁴ By this time, “politically powerful groups” were “willing to invest substantial time and resources in the battle to

85. 347 U.S. 483 (1954).

86. WITTES, *supra* note 6, at 60.

87. *Id.*

88. Stone, *supra* note 5, at 427; see GERHARDT, *supra* note 3, at 68; Wittes, *supra* note 6, at 61.

89. WITTES, *supra* note 6, at 61.

90. *Id.* at 69–70.

91. *Id.* at 69.

92. *Id.* at 67–69, 91 (describing evasive responses given by Harlan and William Brennan, as well as editorial criticisms of Senate’s questioning appearing in the *New York Times* and the *Washington Post*).

93. *Id.* at 92.

94. SILVERSTEIN, *supra* note 72, at 154.

control the judiciary.”⁹⁵ Formal interest group participation in confirmation hearings became a staple after the Fortas filibuster in 1968.⁹⁶

In addition, the “erosion of the old Senate norms” increased incentives for individual Senators to play a more active role in confirmation decisions.⁹⁷ Senators now operated under new norms where it was no longer safe to “simply conform to the expectations of peers and accept the president’s choice.”⁹⁸ Instead, every Senator now faced significant electoral consequences in voting “for or against a particular nominee.”⁹⁹

The Senate may have assumed a greater role in appointments in the wake of these enhanced political pressures. Richard Davis states that calls “for Senate assertiveness in the nomination process began with Republican Senators during the unsuccessful confirmation effort for Abe Fortas as chief justice in 1968.”¹⁰⁰

Silverstein contends that the Senate’s failure to confirm Fortas as Chief Justice in 1968 “signaled an important shift . . . in the process of appointing Supreme Court justices.”¹⁰¹ Although Fortas was nominated at the end of Lyndon Johnson’s term as president, the nomination originally appeared to be a “sure thing.”¹⁰² Fortas had easily been confirmed by the Senate as an Associate Justice three years earlier.¹⁰³ However, “Johnson’s fabled mastery and control of the legislative process evaporated in an astonishing series of events.”¹⁰⁴

The Senate Judiciary Committee grilled Fortas about his role as adviser to the president, as well as the ideological direction of the Warren Court.¹⁰⁵ Although the Judiciary Committee voted to report favorably on Fortas’ nomination, the nomination was filibustered when it reached the Senate floor.¹⁰⁶ Fortas was the first nominee who failed to gain confirmation since John Parker in 1930 and only the second failed Supreme Court nominee in the twentieth century.¹⁰⁷ The Fortas

95. *Id.*

96. NEMACHECK, *supra* note 20, at 48 (citing 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)).

97. SILVERSTEIN, *supra* note 72, at 154.

98. *Id.*

99. *Id.*

100. DAVIS, *supra* note 33, at 20–21.

101. SILVERSTEIN, *supra* note 72, at 12.

102. *Id.*

103. *Id.* at 11–12.

104. *Id.* at 11.

105. *Id.* at 24–25.

106. *Id.* at 27.

107. *Supreme Court Nominations, supra* note 7.

nomination marked the first time the Senate used the filibuster to oppose a Supreme Court nominee.¹⁰⁸

The pattern of opposition continued after Richard Nixon took office. Although the Senate approved Richard Nixon's nomination of Warren Burger as Chief Justice, it went on to reject Nixon's nominations of Clement Haynsworth, Jr. and G. Harrold Carswell.¹⁰⁹

Silverstein contends that this politicized confirmation process changed modern presidents' incentives with respect to Supreme Court nominations.¹¹⁰ It was no longer sufficient to choose Justices based on "excellence on the bench."¹¹¹ Instead, presidents would now be "compelled to seek out nominees" with characteristics that would minimize political opposition to their confirmation.¹¹²

Silverstein focuses on how this political pressure appears to have shaped nomination decisions in the Reagan and first Bush administrations.¹¹³ But the changed confirmation environment also may have influenced earlier presidents. When nominating a Justice in the wake of the Haynsworth and Carswell rejections, for example, Nixon ended up choosing a "moderate conservative," Harry Blackmun.¹¹⁴ And when Gerald Ford faced an "overwhelmingly Democratic Senate," he chose a known "moderate," John Paul Stevens.¹¹⁵

3. *Borking Bork in 1987*

For some observers, the critical shift in the Senate's role was its politically charged rejection of Robert Bork, who was Ronald Reagan's third nominee to the Supreme Court.¹¹⁶ Ideology clearly played a key role

108. DAVIS, *supra* note 33, at 79; EPSTEIN & SEGAL, *supra* note 4, at 24.

109. *Supreme Court Nominations*, *supra* note 7.

110. SILVERSTEIN, *supra* note 72, at 100.

111. *Id.* Silverstein suggests that enhanced political pressure may also make it more difficult for presidents to nominate Justices of great professional stature. *Id.* at 160–62 (indicating that today's more democratic process may make it more difficult to nominate Justices of "talent" and "distinction" similar to that of Thurgood Marshall, Oliver Wendell Holmes, Louis Brandeis, and Charles Evans Hughes). Other scholars suggest that enhanced political pressure may have the opposite effect: It may lead presidents to nominate Justices who have impeccable professional credentials. Stone, *supra* note 5, at 410–14 (proposing that "highly qualified" nominees may have an easier time overcoming senatorial opposition). This study does not attempt to measure professional qualifications of presidents' nominees.

112. SILVERSTEIN, *supra* note 72, at 100.

113. For example, he describes Sandra Day O'Connor, Anthony Kennedy, and David Souter as "stealth" candidates whose unknown political views helped them win confirmation. *Id.* at 164. He also describes Clarence Thomas as a nominee whose known conservatism was offset by the racial and socioeconomic diversity he would bring to the Court. *Id.* at 99.

114. *Id.* at 108–09.

115. EPSTEIN & SEGAL, *supra* note 4, at 21; YALOF, *supra* note 14, at 175 (stating that Ford "settled" on Stevens, a "moderate noncontroversial jurist of unquestioned credentials").

116. JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES 7* (1995) (explaining that

in rejecting Bork, a candidate whose professional and intellectual credentials were beyond reproach.¹¹⁷ Bork, in particular, predicted that the Senate's action would force future presidents to nominate moderate candidates with short paper trails.¹¹⁸ John Maltese has described Bork's defeat as the "watershed event that unleashed what Stephen Carter has called 'the confirmation mess.'"¹¹⁹ Many portray the Bork confirmation process as "unprecedented . . . in terms of the breadth of involvement by organized interests, . . . the length and detail of Bork's public testimony before the Senate Judiciary Committee, and the number of witnesses appearing at the televised hearings."¹²⁰

Whether this actually enhanced the Senate's influence over presidents' choices is less clear. To be sure, much of the mess persists in the ongoing conflict over appointments to federal circuit and district courts.¹²¹ With respect to the Supreme Court, it seems to have constrained Reagan and George H.W. Bush in their next two official nominations of Kennedy and Souter.¹²² But then Bush successfully nominated Clarence Thomas for confirmation by a liberal Senate.¹²³ Since that time, presidents have appointed a string of ideologically compatible Justices, but they have not faced opposing-party Senates.¹²⁴

the Bork confirmation process was "unprecedented" in terms of interest group involvement and nature of hearings); WITTES, *supra* note 6, at 21 (noting one argument that the "watershed event" in changing the appointments process "was the fight over the Bork nomination in 1987" in which the Senate rejected Bork); YALOF, *supra* note 14, at 189 ("Bork's ill-fated Supreme Court bid in 1987 fundamentally changed the nature of public discourse that would surround all future Supreme Court appointments."); see BINDER & MALTZMAN, *supra* note 6, at 7-8 (raising the same argument).

117. SILVERSTEIN, *supra* note 72, at 122.

118. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 347 (1990) ("A president who wants to avoid a battle like mine . . . is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial . . ."); see Stone, *supra* note 5, at 415.

119. See BINDER & MALTZMAN, *supra* note 6, at 7-8 (quoting John Anthony Maltese, *Anatomy of a Confirmation Mess: Recent Trends in the Federal Judicial Selection Process*, JURIST Online Symposium (Univ. of Pittsburgh Sch. of Law, Apr. 15, 2004), <http://jurist.law.pitt.edu/forum/Symposium-jc/Maltese.php#2>); see WITTES, *supra* note 6, at 21.

120. MALTESE, *supra* note 116, at 7; YALOF, *supra* note 14, at 160 ("The Bork nomination became a watershed in terms of interest group involvement in the appointments process.")

121. Sarah Binder and Forrest Maltzman describe an "acrimonious and dysfunctional" confirmation process resulting in "declining confirmation rates and unprecedented delay" for lower federal court judges. BINDER & MALTZMAN, *supra* note 6, at 1; see *id.* at 3-6 figs.1-1 to 1-3 (providing recent statistics on declining confirmation rates and increasing delays in confirming lower court judges); WITTES, *supra* note 6, at 38-39 (same).

122. Ringhand, *supra* note 1, at 158.

123. *Party Division in the Senate*, *supra* note 7; *Supreme Court Nominations*, *supra* note 7.

124. Chabot & Chabot, *supra* note 8, at 1019 tbl.2.

Some scholars contend the Bork nomination was actually the Senate's undoing. The problem may be that the Bork confirmation hearings were *too* successful. As described by Christopher Eisgruber:

The Bork nomination changed the way that confirmation hearings proceed. Never again will a nominee with an extreme or controversial judicial philosophy answer questions as candidly as Bork did. In that sense, the Bork hearings . . . were a success that cannot be repeated.¹²⁵

Thus, the Senate's success in rejecting Bork on ideological grounds gave future nominees tremendous incentives to avoid candid discussion of their ideological views. As described by then-professor Elena Kagan, the Bork hearings were a one-time event that has turned subsequent confirmation testimony into nothing more than a "vapid and hollow charade."¹²⁶

If the Bork debacle undermined the Senate's effective use of confirmation hearings, then presidents may not have felt as much pressure to take senatorial preferences into account. They could nominate an ideologically proximate candidate who could be coached to evade rigorous questioning and withhold revealing answers at a confirmation hearing.

4. *Change in the President's Role?*

However, the Senate does not operate in a vacuum, and it is important to consider whether—in the role of appointing—the president has changed alongside the Senate. Although analysis of presidential nomination decisions is more rare, David Yalof's careful study of the Supreme Court nomination process provides helpful background.

Yalof focuses on a recent period: He "relates how presidents since World War II have selected nominees to serve on the United States Supreme Court."¹²⁷ During this time, presidents employed a very different set of selection strategies. For example, Harry Truman chose "close friends and loyalists,"¹²⁸ and Dwight Eisenhower tried to set himself apart from Truman. Eisenhower adopted an "impersonal" method of selecting nominees.¹²⁹ His selection criteria focused on identifying candidates with outstanding qualifications who shared his moderate political views.¹³⁰

But there is some reason to think that presidents also placed enhanced political emphasis on appointments by the 1970s. Yalof notes that in the 1970s and '80s, Nixon and Reagan pursued "ideological goals"

125. EISGRUBER, *supra* note 11, at 156; Stone, *supra* note 5, at 435 (noting that "after the furor over Bork had passed, subsequent nominees reverted to the safety of the traditional approach" and were closed-mouthed about their views).

126. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995).

127. YALOF, *supra* note 14, at vii.

128. *Id.* at 21.

129. *Id.* at 41.

130. *Id.* at 42 (citing Letter from Dwight D. Eisenhower to Edgar N. Eisenhower (Oct. 1, 1953), in ANN C. WHITMAN FILES).

in appointments “especially aggressively.”¹³¹ Nixon made the issue a central part of his presidential campaign in 1968.¹³² He promised to focus on ideology in making appointments. He blamed “the Warren Court for civil unrest” and “promised to appoint only conservative ‘law and order’ judges who would strictly interpret the Constitution.”¹³³ While Gerald Ford was in too weak a position to continue this role (and Jimmy Carter did not have an opportunity to appoint a Justice), Reagan renewed efforts to appoint conservative Justices.¹³⁴

Still, Nixon’s and Reagan’s pursuit of ideological goals may not indicate a change in the executive role. They were by no means the first presidents to consider the ideology of nominees.¹³⁵ Nor can one fall back on the fact that Nixon and Reagan enjoyed bureaucratic resources unavailable to many early presidents.¹³⁶ It is unclear whether mere use of additional staff enhanced either Nixon’s or Reagan’s appointment power.¹³⁷

Changes in technology may have played a greater part in bolstering presidents’ roles. By the Reagan administration, “[a]dvances in research technology allowed the administration . . . to review the complete body of judicial opinions for every jurist under consideration.”¹³⁸ Access to information in computerized databases such as LexisNexis and WestLaw “increased the amount of readily available information on candidates exponentially.”¹³⁹

Yalof recounts that “never before” the time of President Reagan had the selection process involved “such an excruciatingly detailed examination” of potential nominees’ past writings.¹⁴⁰ And the research technology supporting this analysis remains available to subsequent

131. EISGRUBER, *supra* note 11, at 126; YALOF, *supra* note 14, at 177 (noting that Nixon and Reagan employed “‘criteria-driven’ framework” for selecting Justices).

132. YALOF, *supra* note 14, at 97–98.

133. *Id.*; see EISGRUBER, *supra* note 11, at 126.

134. WITTES, *supra* note 6, at 27 (noting Reagan’s pursuit of conservative judicial appointments).

135. History books are rife with contrary examples and describe “efforts to mold the Court” that “date from George Washington” and have “hardly abated with recent presidents.” DAVIS, *supra* note 33, at 42.

136. FDR’s administration established the Office of Legal Counsel and expanded the White House staff. See YALOF, *supra* note 14, at 12–13. Earlier presidents, who had only a “weak attorney general and Spartan White House” staff, often “sorted through” candidates “on their own.” *Id.* at 10.

137. *Id.* at 186 (stating the “adage too many cooks spoiled the broth never proved more apt” than in the failure of “overlapping staff responsibilities” to select the best nominees for Presidents Reagan and Nixon).

138. *Id.* at 17, 166 (discussing advances in legal research technology available to all “modern participants in the appointments process”).

139. NEMACHECK, *supra* note 20, at 20–21.

140. YALOF, *supra* note 14, at 144; see NEMACHECK, *supra* note 20, at 86–87 (noting heightened research conducted by the Reagan administration).

administrations. The decision to choose nominees almost exclusively from a pool of candidates with prior judicial experience¹⁴¹ and a body of judicial opinions to review may have helped presidents exploit this technology to even greater advantage.

Although presidents since Reagan placed varying levels of emphasis on the ideology of nominees,¹⁴² with the exception of Souter they generally succeeded in appointing ideologically compatible Justices.¹⁴³ This recent string of “successes” coincides with an enhanced ability to scour nominees’ past writings for evidence of their ideology. It may be that technology has enhanced presidents’ ability to appoint ideologically compatible Justices in recent years.

C. TESTABLE THEORIES

As a whole, past studies leave unresolved many important questions about the Senate’s role. Studies based on small samples of contemporary Justices suggest that the Senate constrains presidents’ choices of Supreme Court nominees. But these studies fail to address whether the Senate’s constraint has persisted or evolved historically, and whether there is any association between the ideology of Senates to which Justices are nominated and how Justices vote. The historical voting data used in this study support analysis of these questions.

II. EMPIRICAL ANALYSIS

This Part measures the relationships among Justices’ voting behavior and ideologies of presidents and Senates at the time of nomination. Specifically, it evaluates whether my dependent variable, Justices’ rates of agreement, is predicted by senatorial ideology. It addresses both the general predictive power of the Senate’s ideology and how it may have changed over time.

A. DATA

This study draws on 7520 non-unanimous cases from contemporary and historical data sets¹⁴⁴ to support analysis of voting records for seventy individual Justices and 969 pairs of Justices from 1862 to 2009.

141. See generally Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333 (2007).

142. The first and second Bush administrations shared Reagan’s desire to appoint conservative Justices. See WITTES, *supra* note 6, at 27. Although Bill Clinton and Barack Obama may have placed less emphasis on ideology alone, they generally succeeded in appointing ideologically compatible Justices.

143. See Chabot & Chabot, *supra* note 8, at 1019 tbl.2.

144. I use 1924 non-unanimous cases from my historical data set, see Chabot & Chabot, *supra* note 8, at 1006–08, and 5596 non-unanimous cases from Harold J. Spaeth’s contemporary data set in SUP. CT. DATABASE, <http://scdb.wustl.edu/data.php> (last visited Feb. 25, 2013) (using the Dataset’s 2010

B. DEPENDENT VARIABLE

My dependent variable is Justices' paired rates of agreement in non-unanimous cases. This is a time-honored metric that reflects the same information contained in a leading measure of ideology known as Martin-Quinn scores.¹⁴⁵

This study calculates agreement rates in two steps. First, for each non-unanimous case, it records whether two Justices agreed in a majority or minority vote on a judgment. It counts votes for a majority, plurality, or concurrence as part of the majority coalition and votes for a dissent as part of a minority coalition.

Second, this study adds each case in which the pair agreed and divides this number by the total number of cases in which the pair sat together. This calculation provides a rate of agreement for each pair of Justices who sat together.

Paired agreement rates capture differences and similarities in voting behavior without noise that may be introduced by directional coding of case outcomes.¹⁴⁶ For example, Justice Stevens agreed with Justice Ginsburg in 76% of non-unanimous cases, while he agreed with Justice Scalia in only 43% of non-unanimous cases. Note that it is not helpful to include unanimous cases because they offer no additional information about Justices' relative positions. Stevens agrees with Scalia and Ginsburg at the same rate in unanimous cases.

Release 02, which includes votes from 1953–2009). The historical data exclude a small percentage of individual Justices' votes for opinions that the Supreme Court Historical Society coded as separate opinions or statements rather than majority, concurrence, or dissent. See Chabot & Chabot, *supra* note 8, at 1042 n.142. My historical time period has a smaller number of non-unanimous cases because Justices wrote far fewer dissents and concurrences before 1925. See Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 363 fig.1 (2001); Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471, 476, 478–80 & figs.1–3 (1977).

145. This metric follows “some of the earliest empirical studies of the Supreme Court,” in which “political scientist Herman Pritchett constructed tables showing how often each pair of Justices was in agreement, or how often each pair dissented together.” Fischman & Law, *supra* note 27, at 163 (citing C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890 (1941)). For an illustration of how it reflects the same information contained in Martin-Quinn, see Chabot & Chabot, *supra* note 8, at 1011 fig.2 (discussing similarities between percentages of agreement and Martin-Quinn Scores for 2009).

146. Directional coding would identify whether a Justice voted in favor of a liberal or conservative outcome for each case. While in theory directional coding could capture the same differences or similarities in Justices' votes, it is difficult to identify a single, objective conservative or liberal outcome for cases across all areas of the Court's docket. See Fischman & Law, *supra* note 27, at 160–62; William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 778–79 (2009); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 480, 493 (2009); Anna Harvey & Michael Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG. 414, 415 (2013). This study avoids judgments involved in directional coding by looking to Justices' agreement rates alone.

Paired agreement rates also yield a large number of observations for regression analysis. This study uses rates of agreement for 969 pairs of Justices who sat together over a 147-year period. These data reflect voting behavior for seventy Justices, from Noah Swayne through Sonia Sotomayor, and all other Justices with whom they sat. It excludes a handful of Justices for whom no presidential ideology scores are available.¹⁴⁷ Although the historical data set has voting records for Justices before Swayne, the analysis starts with Swayne because paired agreement rates for earlier appointees are based on smaller numbers of cases.

C. EXPLANATORY VARIABLES

This study considers whether two explanatory variables predict Justices' rates of agreement. The variables are ideologies of presidents and ideologies of median members of the Senate at the time of nomination.¹⁴⁸ It is important to consider both presidential and senatorial ideology when identifying the Senate's role. For example, it may be that Justices' voting patterns are completely unpredictable. Presidents may never appoint Justices whose votes can be explained by presidential or senatorial ideology. This would suggest that judicial independence plays a much greater role than senatorial constraint.

If presidents have some power to predict how their appointees will vote, however, then the Senate may constrain the presidents' choices. If it does, Justices' voting behavior should reflect ideologies of Senates faced by nominating presidents. Of course, presidents and Senates will themselves be ideologically proximate in some cases. But this is not always the case, and regression analysis can identify whether Justices' voting behavior varies according to changes in senatorial ideology. It can also identify whether presidents generally appoint Justices who reflect their own ideology regardless of the Senate. The Subpart below describes measures of presidential and senatorial ideology used to support this analysis.

This Article quantifies presidential and senatorial ideology using leading political science metrics reported in the U.S. Supreme Court Justices Database.¹⁴⁹ The scores it reports for nominating presidents and

147. I exclude Justices for whom no presidential DW-NOMINATE scores are available: Cardozo, Roberts, L.Q. Lamar, Fuller, Matthews, Woods, and Harlan. Also, I was concerned that certain pairs had unusually high rates of agreement based on limited opportunities to agree. To correct for this I eliminated two pairs of Justices that had a 100% agreement rate.

148. If all Senators are ranked from most liberal to most conservative, the "median is the case in the middle of the distribution . . . such that . . . half the senators are to the ideological right of the median and half are to the ideological left." CODEBOOK, *supra* note 52.

149. *Justices Database*, *supra* note 29 (variables 209 and 213). This database is prepared by Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott A. Hendrickson, and Jason M. Roberts, and it documents background information for all official Supreme Court nominees.

median members of the Senate at time of nomination are known as first dimension, common space DW-NOMINATE scores, and they were developed by Poole et al.¹⁵⁰

Poole et al.'s DW-NOMINATE scores (or an earlier variant of these scores) have helped explain judicial behavior or identify judicial ideology in several prominent studies.¹⁵¹ As explained by Lee Epstein et al., Poole's work in this area makes a "profound contribution . . . to the study of American political institutions."¹⁵² The resulting metrics account for varied ideological intensity among presidents or Senators of the same party¹⁵³ and have been found to outperform "other common measures, such as the party of the appointing President" as a predictor of judicial behavior.¹⁵⁴

The DW-NOMINATE scores rank Senators or presidents from liberal to conservative on a scale of -1 to +1.¹⁵⁵ They are derived from roll call votes cast by each member of Congress and are comparable across different Congresses.¹⁵⁶ The scores also rank presidents in equivalent terms, based on the positions they took on particular congressional roll call votes.¹⁵⁷ The first dimension coordinate of the scores used here "typically picks up the liberal/conservative dimension of conflict in American politics."¹⁵⁸ For Justices who were elevated to Chief Justice while serving as Associate Justices, such as William Rehnquist, DW-NOMINATE scores are used for their initial nomination to the Court.

Note that this study focuses on the ideological proximity between the two presidents who nominated a pair of Justices, as well as the proximity between median members of Senates faced by these nominating presidents. To measure ideological proximity, I calculate absolute distance between DW-NOMINATE scores for a particular pair of Justices' nominating presidents or Senates. This provides a metric of how ideologically close or distant the pairs' presidents or Senates may be.

150. CODEBOOK, *supra* note 148, at 95, 97–98 (variables 209 and 213); *see* Carroll et al., *supra* note 30.

151. EPSTEIN & SEGAL, *supra* note 4, at 131 fig.5.4 (finding Poole's measure of appointing presidents' ideology to generally predict the direction of Justices' votes in recent time periods); NEMACHECK, *supra* note 20, at 129 (using DW-NOMINATE score as a measure of nominating president's ideology and finding that unconstrained presidents select ideologically proximate Justices); Giles et al., *supra* note 59, at 631 (using Poole and Rosenthal's "first dimension common space scores to measure the ideological preferences of the appointing president and relevant senators" and finding that both presidential ideology and ideology of home state senator helped predict court of appeals judges' votes); *see* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 166, 172–75 (2007) (using common space scores to identify median judges on panel of court of appeals judges).

152. Epstein et al., *supra* note 32, at 306 n.4.

153. Fischman & Law, *supra* note 27, at 174.

154. Epstein et al., *supra* note 32, at 306–07 (describing Giles's study).

155. *See* CODEBOOK, *supra* note 52, at 95, 97.

156. *Id.*

157. *Id.*

158. *Id.*

For example, Stevens and Ginsburg were nominated by ideologically distant presidents. Ford, who nominated Stevens, has a DW-NOMINATE score of 0.5, while Bill Clinton, who nominated Ginsburg, has a score of -0.514. Thus, the absolute distance between Stevens' and Ginsburg's nominating presidents is 1.014. But the ideological medians of the Senates faced by Ford and Clinton were much closer, with a score of -0.188 for Stevens and a score of -0.193 for Ginsburg. Thus, the distance between the Senates to which Stevens and Ginsburg were nominated is a mere 0.005.

This distance provides "SENDIST" and "PRESDIST" variables that can be compared to paired agreement rates for all Justices.¹⁵⁹ The variables measure whether Justices' rates of agreement are predicted by ideologies of presidents or Senates at the time of their nominations. Returning to the example above, note that Stevens and Ginsburg agreed at a high rate of 76%. This is not a result one would expect, given that they were nominated by ideologically distant presidents. But it can be explained by the fact that their nominating presidents faced ideologically proximate Senates.

D. HYPOTHESES AND REGRESSION ANALYSIS

This study uses regression analysis to identify the relationships among agreement rates, ideologies of Justices' nominating presidents, and ideologies of Senates faced by those presidents. It may be, for example, that Justices agree along apolitical lines that cannot be generally explained by either ideologies of their nominating presidents or Senates faced by these presidents. It may be that senatorial ideology predicts how Justices vote: Justices agree more with Justices whose nominating presidents faced ideologically similar Senates and less with Justices whose nominating presidents faced ideologically distant Senates.¹⁶⁰ Or presidential ideology may predict agreement rates along similar lines.

The regression identifies not only whether senatorial or presidential ideology predict Justices' agreement rates, but how confident one should be that a predictive relationship reflects something other than "mere chance" or random variation in Justices' behavior.¹⁶¹ This allows one to

159. As explained *infra* in Part II.E.3, regression analysis accounts for pairs of Justices whose nominating presidents or Senates have identical scores, and thus a PRESDIST or a SENDIST of zero. Pairs of Justices for whom PRESDIST or SENDIST is zero do not drop out of the regression, but instead their agreement rates are compared to agreement rates of other pairs for whom PRESDIST or SENDIST is greater than zero.

160. Justice Stevens' voting patterns are described above. See *supra* note 14 and accompanying text.

161. MICHAEL O. FINKELSTEIN, BASIC CONCEPTS OF PROBABILITY AND STATISTICS IN THE LAW 53-54 (2009) (describing the concept of statistical significance in regression analysis). All significant results in this study satisfy standard 1% or 5% confidence levels. *Id.* These levels mean that in a very high percentage of cases (99% or 95%, respectively) the regression will correctly identify a predictive

test a number of hypotheses about the Senate's constraint on presidents' choices of nominees:

- (1) Holding presidents' ideologies fixed, Justices whose nominating presidents faced ideologically proximate Senates vote together more often than Justices whose nominating presidents faced ideologically distant Senates.
- (2) The Senate's ideology predicts Justices' rates of agreement in one or more distinct historical time periods.
- (3) The Senate's ideology predicts agreement rates of Justices nominated from 1950–1970, or the time when the Senate adopted its routine practice of requiring nominees to appear before the Judiciary Committee.
- (4) The Senate's ideology predicts agreement rates of Justices nominated from 1970–1990, or the period after it used its first-ever filibuster against a Supreme Court nominee.
- (5) The Senate's ideology predicts agreement rates of Justices nominated from 1990–2010, or the period after its rejection of Robert Bork.

E. REGRESSION ANALYSIS

This study reports results of four regressions. The first regression considers the general relationships among agreement rates and presidential and senatorial ideology across all Justices.¹⁶² The second and third regressions incorporate time dummy variables to identify whether different relationships are present in distinct time periods.¹⁶³ The last

relationship between ideology and agreement rates. *Id.* Other results may identify a relationship between ideology and agreement rates, but the standard error will be too great to confidently reject the possibility that the relationship reflects only random variation in voting patterns. Such relationships are statistically indistinguishable from zero.

162. I estimate the following regression to measure predictive power of presidential and senatorial ideology for agreement rates of all Justices in my study:

$$(\text{Agree_Rate})_{ij} = \alpha_i + \beta_1 * \text{PRESDIST}_{ij} + \beta_2 * \text{SENDIST}_{ij} + \epsilon,$$

where $(\text{Agree_Rate})_{ij}$ is the percentage of cases in which Justice i and Justice j joined the same majority or minority coalition on the judgment, PRESDIST_{ij} is the absolute distance between the DW-NOMINATE scores of the president that nominated Justice i and the president that nominated Justice j , and SENDIST_{ij} is the absolute distance between the DW-NOMINATE scores of the median Senators at the time of nomination for Justice i and Justice j . The intercept (α_i) is allowed to vary across Justices.

163. The second and third regressions add time dummy variables to the initial regression. The second regression (twenty-year time dummy variables) is:

$$\begin{aligned} (\text{Agree_Rate})_{ij} = & \alpha_i + \beta_1 * \text{PRESDIST}_{ij} + \beta_2 * (\text{PRESDIST}_{ij})(1890_1910) + \\ & \beta_3 * (\text{PRESDIST}_{ij})(1910_1930) + \beta_4 * (\text{PRESDIST}_{ij})(1930_1950) + \\ & \beta_5 * (\text{PRESDIST}_{ij})(1950_1970) + \beta_6 * (\text{PRESDIST}_{ij})(1970_1990) + \\ & \beta_7 * (\text{PRESDIST}_{ij})(1970_1990) + \beta_8 * \text{SENDIST}_{ij} + \beta_9 * (\text{SENDIST}_{ij})(1890_1910) + \\ & \beta_{10} * (\text{SENDIST}_{ij})(1910_1930) + \beta_{11} * (\text{SENDIST}_{ij})(1930_1950) + \\ & \beta_{12} * (\text{SENDIST}_{ij})(1950_1970) + \beta_{13} * (\text{SENDIST}_{ij})(1970_1990) + \end{aligned}$$

regression, which is reported in Appendix A, considers whether ideologies of Senators who represent the Senate's filibuster pivot, rather than ideologies of median members of the Senate, have predictive power over Justices' votes.¹⁶⁴

I. Regression Specifications

Because the dependent variable reflects rates of agreement rather than binary (0 or 1) outcomes, the study uses OLS regressions.¹⁶⁵ The regressions are multivariate, meaning that they take both explanatory variables of senatorial ideology and presidential ideology into account. A regression considering predictive power of presidential or senatorial ideology alone could be misleading because it might overlook the fact that presidential and senatorial ideology are sometimes correlated. Thus a regression taking both factors into account can decompose the variation in agreement rates into separate presidential and senatorial coefficients. Coefficients identify the relationship between each explanatory variable and agreement rates, quantifying change in agreement rates predicted by difference in presidential or senatorial ideology.

The regressions also incorporate two additional adjustments to account for idiosyncratic voting patterns that may vary from Justice to Justice. First, they use fixed effect specifications to measure each Justice's patterns of agreement with other Justices. This accounts for different overall levels of agreeability among different Justices. For example, Justice Clarke agreed with all other Justices only 52% of the time, while Justice Blatchford agreed with all other Justices 78% of the time.¹⁶⁶ An agreement rate of 67% might show ideological compatibility for Justice Clarke (indeed, this was his rate of agreement with Justice Brandeis). But the same rate might show ideological *incompatibility* for Justice Blatchford, as he generally agreed with other Justices more than 67% of the time.¹⁶⁷ Thus,

$$\beta_{14} * (\text{SENDIST}_{ij})(1990_2010) + \varepsilon$$

The third regression (event time dummy variables) is:

$$\begin{aligned} (\text{Agree_Rate})_{ij} = & \alpha_i + \beta_1 * \text{PRESDIST}_{ij} + \beta_2 * (\text{PRESDIST}_{ij})(\text{WAR_DUM}) + \\ & \beta_3 * (\text{PRESDIST}_{ij})(\text{FIL_DUM}) + \beta_4 * (\text{PRESDIST}_{ij})(\text{BORK_DUM}) + \beta_5 * \text{SENDIST}_{ij} + \\ & \beta_6 * (\text{SENDIST}_{ij})(\text{WAR_DUM}) + \beta_7 * (\text{SENDIST}_{ij})(\text{FIL_DUM}) + \\ & \beta_8 * (\text{SENDIST}_{ij})(\text{BORK_DUM}) + \varepsilon \end{aligned}$$

164. A table reporting coefficients and standard errors for all regressions in the study is included in Appendix B.

165. OLS stands for "ordinary least squares." FINKELSTEIN, *supra* note 161, at 137. The OLS regression is a linear model. *Id.* It identifies a line that best fits all data points and minimizes the sum of squared differences between the line and data points. *Id.*

166. See Chabot & Chabot, *supra* note 8, at 1029 fig.9, 1032 fig.10.

167. *Id.*

a measure based on average levels of agreeability for each Justice could be far off as a measure of ideological compatibility for all Justices.¹⁶⁸

A fixed effect specification solves the problem by directing the regression to calculate a unique starting point (or intercept) from which to consider variation in each Justice's rates of agreement.¹⁶⁹ Thus, it considers whether Clarke agreed with Brandeis more or less than he agreed with other Justices with whom he sat, and whether Blatchford agreed with Brown more or less than he agreed with other Justices with whom he sat. Over these customized starting points for each Justice, the regression fixes a uniform estimate (or coefficient) reflecting change in agreement rates relative to changes in ideological distances between presidents and Senates at the time of nomination.

Next, the analysis controls for the idiosyncratic voting patterns of different Justices by computing clustered standard errors. Standard errors are reported in all regressions and reflect how confident one can be that the regression coefficients account for relationships identified by all data points. Here, the data points do not reflect agreement rates for 969 unique pairs of Justices, but data points for pairs in which each Justice shows up multiple times.¹⁷⁰ For Alito, to illustrate, the study considers paired voting records between Alito and Sotomayor, Alito and Roberts, Alito and Breyer, and so on. The concern is that unobservable factors other than presidential or senatorial ideology may influence an individual Justice's voting and result in errors that vary unevenly from Justice to Justice.

If Chief Justice William Taft had an unusually rich diet that influenced his voting behavior, for example, his votes may be more erratic than those of his colleagues. Clustered standard errors adjust for unobservable differences in voting behavior that vary from Justice to

168. A particular concern with comparing earlier voting records to later voting records is that the Court's percentages of non-unanimous decisions have increased significantly since the 1940s. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1310 (2001). Some scholars attribute the change to deteriorating norms of consensus on the Court. *Id.* This study avoids many cases affected by changing norms of consensus by considering only non-unanimous decisions where there was no consensus among all Justices, and if norms of consensus led earlier Justices to higher overall levels of agreeability even in non-unanimous cases, the fixed effect specification controls for this difference.

169. I included the fixed effect specification by hand coding binary fixed effect dummy variables and adding them to the data used in the regression.

170. Clustered standard errors adjust for heteroskedasticity, or the possibility of uneven variance in unobservable factors for each Justice. Code to calculate clustered standard errors on a fixed effect regression in MATLAB is described in Ian D. Gow et al., *Correcting for Cross-Sectional and Time-Series Dependence in Accounting Research*, 85 ACCT. REV. 483, 495 n.7 (2010). For more information on this technique, see *id.* I coded data for this regression in Excel, converted it to a text file, and then ran regressions on the text files using MATLAB.

Justice. They group standard errors around changes in agreement rates for each individual Justice, rather than lumping all errors together and considering them with respect to changes in agreement rates across all Justices in the study. This specification requires the data to pass a more difficult test before accepting a relationship between Justices' votes and presidential or senatorial ideology as statistically significant. This more difficult test enhances confidence that significance of any relationship identified in the regression is not distorted by the idiosyncratic voting patterns of individual Justices.

2. *Time Dummy Variables*

A constant measure over time of the relationship between agreement rates and senatorial ideology may obscure the Senate's role during distinct time periods. This study incorporates time dummy variables to identify the explanatory power of the Senate's ideology in distinct historical time periods. The time dummies allow predictive power for presidential and senatorial ideology to vary across particular time periods.

This study relies on two sets of time dummy variables to evaluate change over time. The first set groups data into voting records for Justices appointed during discrete twenty-year time periods. A longer time period might fail to identify predictive power evident in a limited number of years, and a smaller time period (or even voting records for each individual Justice) would rely on samples of underlying data that are too small to yield statistically significant results. Still, the twenty-year periods themselves do not line up precisely with events thought to mark important shifts in the Senate's role, such as its first-ever use of the filibuster against Abe Fortas in 1968, or its controversial rejection of Robert Bork in 1987. The second set of time dummy variables accounts for this by grouping voting records around the three key events thought to mark changes in the Senate's role in the latter part of the twentieth century.

The first set of time dummy variables break historical voting records into seven groups. The groups reflect appointments made in distinct twenty year periods:

- Group (1): Before 1890 (Justices Swayne through Brewer);
- Group (2): 1890_1910 (Justices Brown through Lurton);
- Group (3): 1910_1930 (Justices Hughes through Stone);
- Group (4): 1930_1950 (Justices Black through Minton);¹⁷¹
- Group (5): 1950_1970 (Justices Warren through Burger);

171. I begin with Justice Black because Herbert Hoover's appointees could not be included in the study. They were excluded because there are no presidential DW-NOMINATE scores for Herbert Hoover.

Group (6): 1970_1990 (Justices Blackmun through Kennedy); and
Group (7): 1990_2010 (Justices Souter through Sotomayor).¹⁷²

The study uses 0 or 1 dummy variables to identify interaction between agreement rates and presidential or senatorial ideology for particular Justices. The first group, Justices appointed from Swayne through Brewer, does not receive a time dummy variable. This is because these Justices are used as a baseline from which to compare relationships in other time periods.

For all later groups, the study codes each dummy variable according to a single Justice's paired agreements with all other Justices with whom he or she sits. For example, the data include agreement rates for Sotomayor and all other Justices with whom she sits, then agreement rates for Alito and other Justices with whom he sits, etc. Both Sotomayor and Alito were appointed during the 1990–2010 period (Group (7)). I assign a 1 or 0 according to the first Justice in the pair, so that the Sotomayor and Alito pairs receive a 1 for "1990_2010," and a 0 for all other time dummy variables.

The regression multiplies the time dummies for each group by SENDIST and PRESDIST variables.¹⁷³ The interaction between these variables measures whether there is a significant *difference* between predictive power of presidential or senatorial ideology over agreement rates in distinct time periods. Specifically, it compares the relationship between these variables for Justices in Group (1) to the relationship between these variables for Justices in a later group whose paired voting records are identified by "1" dummy variables.¹⁷⁴

The interaction coefficient reported by the regression allows me to calculate the total predictive power of senatorial or presidential ideology for a time period covered in Groups (2)–(7), by adding the coefficient for Group (1) to the interaction coefficient of each Group. (The coefficients for Group (1) reflect the relationships between ideologies and agreement rates for Justices appointed during that period; the interaction coefficient

172. The 1962–2009 voting records used for this study do not include Justice Kagan. *See supra* note 144.

173. *See supra* note 163.

174. If the effect of distance between presidents or Senates changes for Justices appointed in certain historical periods, it will show up in the data as a significant coefficient on the interaction variables. To see this, note that the expected change in agreement rate for a change in presidential distance is the general PRESDIST coefficient during the time periods when the dummy variable is equal to zero and the PRESDIST coefficient plus the PRESDIST interaction coefficient during the time periods that the dummy variable is equal to one. A formal test of the null hypothesis that the influence of the president did not change is therefore equivalent to a test of the null hypothesis that the PRESDIST coefficient = PRESDIST coefficient + PRESDIST interaction coefficient, or that the PRESDIST interaction coefficient = 0.

reflects the difference in these relationships for Justices appointed during the later period.) Thus, total predictive power for 1890–1910 equals the sum of interaction coefficients of Group (1) and Group (2).¹⁷⁵ The same procedure is followed to calculate total levels of predictive power for Groups (3) through (7). Coefficients reported for distinct time periods below reflect calculations of total predictive power for the time period covered by each group.

The study uses another set of time dummy variables to address how the Senate's role or the appointments process may have shifted in response to key events occurring in the latter half of the twentieth century. Group (A) focuses on Justices appointed before the 1950s, and Group (B) focuses on Justices appointed after the Senate adopted the routine practice of asking nominees to appear before the Senate Judiciary Committee.¹⁷⁶ Group (C) focuses on Justices appointed after the Fortas filibuster, and Group (D) focuses on Justices appointed after Bork's failed nomination. If any of these events enhanced the Senate's power, one would expect its ideology to have more predictive power over voting patterns of Justices appointed after they occurred.

Each group reflects paired voting records for the following Justices:

Group (A): Pre-Warren (Justices appointed before Warren)

Group (B): WAR_DUM (Justices Warren through Marshall)

Group (C): FILI_DUM (Justices Burger through Scalia)

Group (D): BORK_DUM (Justices Kennedy through Sotomayor)

Again, Group A does not receive a time dummy variable because it sets a baseline for comparison to later groups. Time dummy variables for Groups (B)–(D) reflect the same coding conventions and calculations of total predictive power above described for the twenty-year time dummy variables.

3. *Expected Results*

As mentioned above, it may be that Justices' agreement rates reflect independent voting patterns which cannot be explained by presidential

175. I also needed to calculate new confidence levels for sum of two coefficients. This involved a multi-step process. First, $\text{Variance}(\beta_a + \beta_b) = \text{Variance}(\beta_a) + \text{Variance}(\beta_b) + 2 * \text{Co-variance}(\beta_a, \beta_b)$. See generally JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 140–41 (2008). The standard error is the square root of this estimated variance, and the t-stat is $(\beta_a + \beta_b) / \text{SE}(\beta_a + \beta_b)$. The t-stat can then be converted into a p-value, reflecting confidence levels reported in this study.

176. Commentators list Harlan's testimony in 1955 as the precise date of this change. See GERHARDT, *supra* note 3, at 68; WITTES, *supra* note 6, at 64–65; Stone, *supra* note 5, at 427. However, a 1955 cutoff would require me to exclude Justice Warren and consider an incomplete group of Eisenhower appointees. Including Warren gives the Senate the benefit of the doubt, as he was a divided government appointee who disappointed Eisenhower. See Chabot & Chabot, *supra* note 8, at 1019 tbl.2. As explained below, even with this favorable presumption the Senate did not increase its power starting in the 1950s.

or senatorial ideology. In this case the regression will yield coefficients that are either zero or statistically indistinguishable from zero for both of these explanatory variables. In other words, ideologies of nominating presidents or Senates these presidents face will not predict a significant change in Justices' agreement rates.

If either senatorial or presidential ideologies predict rates of agreement, however, the regression will yield a significant negative coefficient for the senatorial or presidential variable. The expected coefficient, or predicted change in agreement rates, is negative for the following reason: Justices whose votes can be explained by ideologies of presidents or Senates to which they are nominated will agree *less* with Justices whose presidents or Senates are *more* ideologically distant.

To illustrate, consider what voting patterns one might expect if either presidential or senatorial ideology predicts rates of agreement. A presidential ideology explanation holds that a pair of Justices appointed by close presidents, such as Reagan and George H.W. Bush, will agree at a high rate, as do Scalia and Thomas. Then, where ideological distance between presidents is greater, such as distance between Reagan and Clinton, rates of agreement should be lower, as they are for Scalia and Ginsburg. If presidential ideology has no predictive power, Justices appointed by close presidents like Reagan and Bush will agree with one another about as often as they agree with Justices appointed by distant presidents like Reagan and Clinton.

Of course, sometimes senatorial ideology has predictive power that presidential ideology lacks. Stevens, for example, is a Ford appointee who agreed more with Clinton appointees (Ginsburg and Breyer) than Reagan appointees (O'Connor, Scalia, and Kennedy). But the Senate that confirmed Stevens was just about as liberal as the Senates that confirmed Ginsburg and Breyer.¹⁷⁷ Stevens' Senate was far more liberal than the Senates that confirmed O'Connor and Scalia.¹⁷⁸ Here, Stevens agrees *less* with Justices whose nominating presidents faced Senates that were *more* conservative than the one Ford faced in nominating Stevens. Senatorial ideology explains Stevens' voting patterns. If senatorial ideology has no predictive power, however, then Justices like Stevens will agree with Justices like Ginsburg and Breyer about as much as they agree with Justices like O'Connor and Scalia.

Finally, regression analysis accounts for pairs of Justices whose presidents or Senates have identical scores, and thus a PRESDIST or a SENDIST of zero.¹⁷⁹ This is because agreement rates for these pairs are

177. See *Justices Database*, *supra* note 29.

178. *Id.* And it was somewhat more liberal than the Senate to which Kennedy was nominated. *Id.*

179. There are sixty-eight Justice pairs with a SENDIST of zero and 160 Justice pairs with a

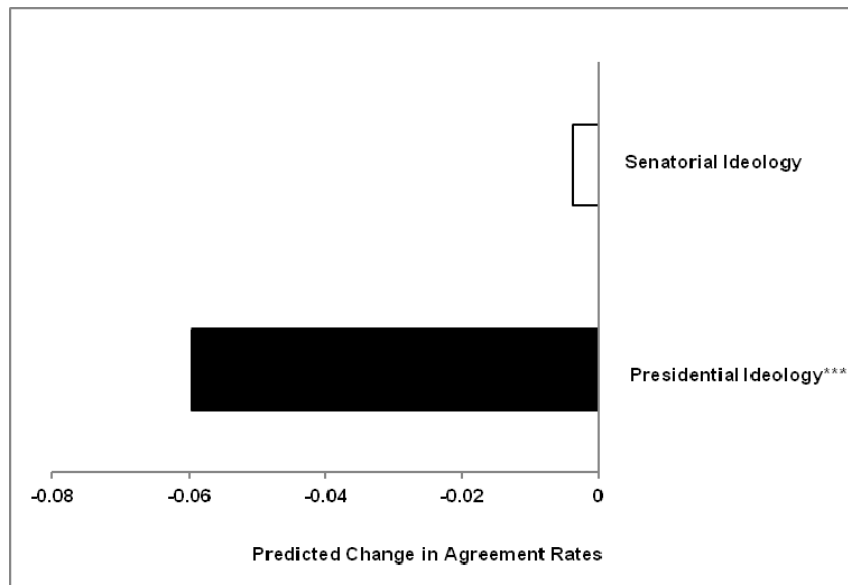
always compared to agreement rates of other pairs for whom PRESDIST or SENDIST is greater than zero. Assume nominations where a conservative president faces a very liberal Senate (Stevens) and a liberal president faces to an almost equally liberal Senate (Ginsburg). Even if Stevens' and Ginsburg's presidents faced identical Senates with a SENDIST of zero, their percentages of agreement factor into the relationship reported by the regression. The Senate would have explanatory power over Stevens' voting, for example, if he agreed with Ginsburg and others like her (Breyer) more than other Justices nominated by conservative presidents facing conservative Senates (such as O'Connor and Reagan or Alito and Roberts).

F. RESULTS

As illustrated by Figure 1, the initial regression shows that senatorial ideology fails to significantly predict Justices' rates of agreement. Presidential ideology, on the other hand, has significant predictive power over Justices' rates of agreement.

PRESDIST of zero. Every time SENDIST is zero, PRESDIST is also zero. There were some times where the same president faced different Senates throughout his time in office, leading to a PRESDIST of zero with a SENDIST of more than zero.

FIGURE I: PREDICTIVE POWER OF PRESIDENTIAL AND SENATORIAL IDEOLOGY OVER AGREEMENT RATES¹⁸⁰



The results fail to support my first hypothesis. Holding presidential ideology fixed, Justices whose presidents faced ideologically proximate Senates do not agree significantly more than Justices whose presidents faced ideologically distant Senates. The standard error is too great to confidently identify a relationship between agreement rates and senatorial ideology, and the relationship is statistically indistinguishable from zero. Thus, senatorial ideology fails to significantly predict how Justices vote.

180. Estimated with all Justices appointed from Swayne through Sotomayor (and for whom nominating presidents have DW-NOMINATE scores). *** denotes a 1% confidence level, and the white bar denotes results statistically indistinguishable from zero. Confidence levels are calculated using clustered standard errors; for an explanation of confidence levels, see *supra* note 161. Change in agreement rates is predicted difference in agreement rates per 1 unit of difference in presidential DW-NOMINATE scores and per 0.1 unit of difference in senatorial DW-NOMINATE scores. N=969.

The study reports change in agreement rates per 1 unit of difference in presidential DW-NOMINATE scores and per 0.1 unit of difference in senatorial DW-NOMINATE scores. These different scales reflect the fact that differences in scores for median Senators fluctuate within a much smaller range, 0.619 to zero, than differences in scores for nominating presidents, which range from 1.44 to zero. For example, ideologically distant presidents may have DW-NOMINATE scores about one unit apart (as noted above, Clinton and Ford were 1.14 units apart). Spreads for the Senate are never this large. The very different Senates to which Stevens and Scalia were nominated, for example, have median Senators with scores of -0.188 and -0.014, respectively. Thus their scores are only 0.174 units apart. See *Justices Database, supra* note 29.

Presidential ideology, on the other hand, predicts a significant negative change in agreement rates. One can be highly confident, at the 1% level,¹⁸¹ that this relationship is not merely the product of random variation in voting patterns. There is strong evidence that, on average, Justices nominated by ideologically proximate presidents vote together at higher rates than those appointed by ideologically distant presidents.

This result shows that ideological proximity of nominating presidents has significant predictive power over Justices' votes, while ideological distance between Senates does not have the same significant relationship.¹⁸² It is consistent with findings suggesting lack of senatorial constraint in my earlier work.¹⁸³ And it fails to support a general understanding of senatorial constraint across the entire time period.

Results for the second regression add nuance by considering the predictive power of the Senate and president's ideology in distinct time periods. Because the overall results show that presidential ideology has more significant predictive power than senatorial ideology, the regression results are first presented showing the president's role in distinct time periods. The associations between presidential ideology and Justices' agreement rates provide a helpful baseline from which to consider results for the Senate.

Figure 2 shows that presidential ideology did not significantly predict Justices' agreement rates in any period before 1970. But after 1970, the president's ideology maintained significant predictive power over agreement rates.

One of the most striking results, consistent with the overall findings above, is that *the president's ideology* gained predictive power over time. In the first five historical periods, spanning years 1862–1970,¹⁸⁴ the predictive power of the president's ideology is statistically insignificant.¹⁸⁵

181. For an explanation of confidence levels, see *supra* note 161.

182. I ran a separate regression to account for the possibility that filibusters may lead presidents to select Justices closer to the filibuster pivot (currently the sixtieth-most liberal or conservative Senator) than to the Senate median. As reported in Appendix A: Alternative Measure of Senatorial Ideology, *infra*, this measure also fails to identify senatorial influence.

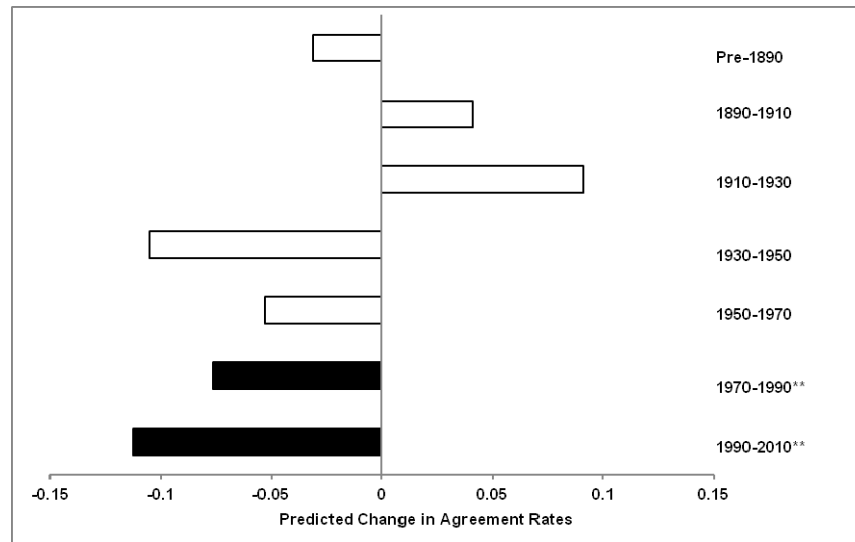
183. Chabot & Chabot, *supra* note 8, at 1019 tbl.2.

184. The Judges of 1925 changed the Court's jurisdiction in ways that allowed it to hear a greater percentage of politically divisive cases than before. See generally Halpern & Vines, *supra* note 144. It may be that this change in the menu of cases before the Court, rather than enhanced ability of presidents or Senates to seat ideologically compatible Justices, led to political voting patterns identified here. In this case, however, the post-1925 changes in jurisdiction do not offer a likely explanation for the study's results. Presidential ideology did not gain significant explanatory power over Justices' votes until many decades after 1925. Further, as explained below, any gains in the predictive power of Senatorial ideology around this time vanished by the 1950s. Thus, changes in politically predictable voting do not seem to have occurred around the same time the Court's jurisdiction changed.

185. Although the predicted change in agreement for 1930–1950 seems large (-0.105), the standard error surrounding this finding (0.0763) is also too large to be confident that the predicted change is not

But the coefficient showing predictive power of presidential ideology then increases to negative 7% after 1970 and negative 11% after 1990. These levels of predictive power in the latter periods are significantly different than zero at the standard 5% confidence level. One can confidently reject the null hypothesis that presidential ideology is unrelated to agreement rates for these periods.

FIGURE 2: PREDICTIVE POWER OF PRESIDENTIAL IDEOLOGY FOR AGREEMENT RATES OVER TIME (TWENTY-YEAR TIME DUMMY VARIABLES)¹⁸⁶



The enhanced predictive power coincides with a period where Nixon and Reagan prioritized ideology in their appointments to the bench.¹⁸⁷ Although in the 1990s, Bush and Clinton may not have placed the same emphasis on ideology, by this point they may have been better able to predict how their nominees would vote. Like the Reagan administration, they had access to enhanced technology allowing them to find and analyze nominees' past writings using computerized databases.¹⁸⁸

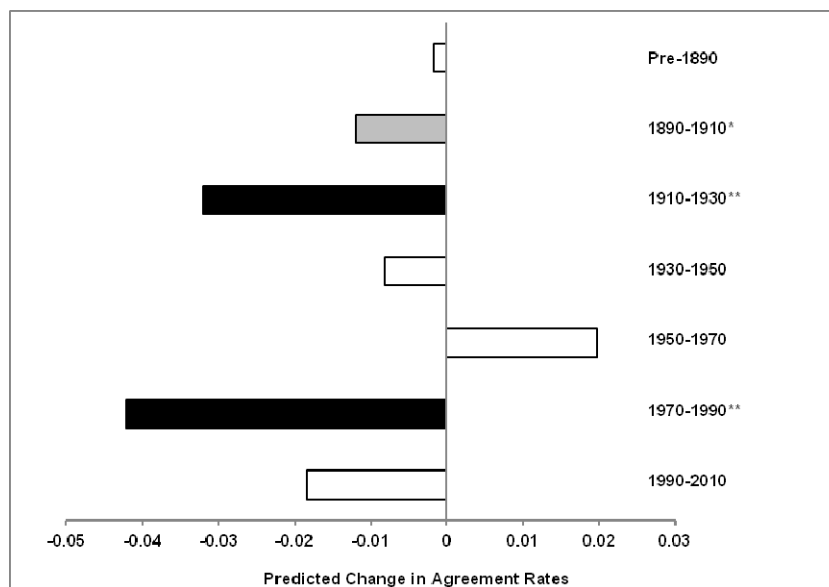
in fact zero. *See infra* Appendix B.

186. Estimated with all Justices appointed from Swayne through Sotomayor (and for whom nominating presidents have DW-NOMINATE scores). ** denotes a 5% confidence level, and white bars denote results statistically indistinguishable from zero. Confidence levels are calculated using clustered standard errors. Change in agreement rates is predicted difference in agreement rates per 1 unit of difference in presidential DW-NOMINATE scores. N=969.

187. *See* YALOF, *supra* note 14, at 169–70.

188. *See supra* note 138 and surrounding discussion.

FIGURE 3: PREDICTIVE POWER OF SENATORIAL IDEOLOGY FOR AGREEMENT RATES OVER TIME (TWENTY-YEAR TIME DUMMY VARIABLES)¹⁸⁹



Given evidence that presidential ideology has become a significant predictor of Justices' agreement rates since 1970, the remaining questions are whether the Senate's role evolved along a similar timeline and whether the Senate held its ground against an increasingly powerful executive. Figure 3 shows a strong association between senatorial ideology and agreement rates during certain historical and recent periods. But it also shows that the Senate's ideology has not consistently maintained significant predictive power over time, and that its predictive power was statistically indistinguishable from zero for Justices appointed after 1990.

Predictive power of the Senate's ideology is statistically indistinguishable from zero before 1890, and it gains some significance from 1890–1910. Lack of more significant power before 1910 may seem surprising, given accounts of an aggressive Senate in the nineteenth century.¹⁹⁰ It may be that confirmation politics in the nineteenth century turned on the parochial concerns of individual Senators¹⁹¹ and that those

189. Estimated with all Justices appointed from Swayne through Sotomayor (and for whom nominating presidents have DW-NOMINATE scores). ** denotes a 5% confidence level, * denotes a 10% confidence level, and white bars denote results statistically indistinguishable from zero. Confidence levels are calculated using clustered standard errors. Change in agreement rates is predicted difference in agreement rates per 0.1 unit of difference in senatorial DW-NOMINATE scores.

190. See Whittington, *supra* note 35, at 430–33.

191. See *id.* at 430–31 (noting the role played by “claims of prerogative of individual senators” in

views are not well reflected in Senate medians used to measure senatorial ideology. Also, the pre-1890 time period excludes five appointees¹⁹² because there are no presidential DW-NOMINATE scores for these Justices. As explained in Part III.C, one cannot reliably measure predictive power of senatorial ideology without considering presidential ideology at the same time.

In any event, things changed markedly from 1910–1930, as the Senate’s ideology significantly predicted change in agreement rates of Justices appointed during this period. This supports my second hypothesis of predictive power in a distinct historical period. It is consistent with Epstein and Segal’s account of a historically aggressive Senate, as reflected in events such as the pitched political battle over Louis Brandeis’ confirmation in 1916.

The Senate’s ideology did not maintain its significance. Although its predictive power is indistinguishable from zero by the 1930–1950 period, this period again reflects an incomplete set of Justices. It does not include voting records for Owen Roberts (appointed in 1930) and Benjamin Cardozo (appointed in 1932) because there are no presidential DW-NOMINATE scores available for these Justices.¹⁹³ Hoover nominated Roberts after the Senate rejected his earlier nomination of John Parker, and he faced senatorial pressure to select Cardozo to replace the vacancy left by Oliver Wendell Holmes.¹⁹⁴ Thus, analysis based on more complete data might show a different result.

In any event, results for the 1950–1970 time period include all appointees, and they offer no reason to think the Senate’s ideology maintained any of its earlier significance. Indeed, the Senate coefficient for this time period is not only indistinguishable from zero, but it is *positive*. This suggests that, if anything, Justices whose presidents faced ideologically distant Senates voted together *more* than Justices whose presidents faced ideologically proximate Senates. Thus, voting records provide no evidence of senatorial constraint in the period post-*Brown* where the Senate adopted a routine practice of grilling nominees about their substantive views.¹⁹⁵ This result does not support my third hypothesis that the Senate’s ideology gained predictive power from 1950–1970. It offers no reason to think that more aggressive confirmation

nineteenth-century confirmation politics).

192. L.Q. Lamar, Fuller, Matthews, Woods, and Harlan I.

193. Presidential DW-NOMINATE scores for Hoover’s first appointee, Chief Justice Charles Evan Hughes, are based on Hughes’ initial appointment by President William Taft.

194. See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 228–29 (1993); see also HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 153–54 (5th ed. 2008).

195. See WITTES, *supra* note 6, at 61.

practices drove presidents to better accommodate the Senate's policy preferences in nomination decisions.

But the Senate's ideology again displayed enhanced significance by the 1970s. Here the Senate's predicted change in agreement rates has a negative coefficient that is significantly different than zero at the 5% confidence level. Ideological proximity between Senates predicts agreement rates for Justices appointed during this time period. On average, Justices nominated by presidents facing ideologically proximate Senates voted together more than Justices whose presidents faced Senates that were far apart.

This result supports my fourth hypothesis of an enhanced predictive power starting in the 1970s. It is consistent with accounts describing how a more politicized appointments process emerged by the late 1960s. For example, Silverstein describes this time period as one with change wrought by increased political pressures stemming from the changing nature of judicial power and the involvement of powerful interest groups.¹⁹⁶ Formal interest group participation in confirmation hearings started to become a staple by the Fortas filibuster in 1968.¹⁹⁷ Senators also operated under new norms where it was no longer safe to simply conform to the expectations of peers and accept the president's choice.¹⁹⁸ Instead, each Senator now faced significant electoral consequences in voting for or against a particular nominee.¹⁹⁹

The Senate's ideology gained significance at a time when commentators assert the Senate assumed a more aggressive and politicized role in confirmation proceedings.²⁰⁰ Davis states that calls "for Senate assertiveness in the nomination process began with Republican Senators during the unsuccessful confirmation effort for Abe Fortas as chief justice in 1968."²⁰¹ The Senate went on to reject Nixon's nominations of Clement Haynsworth, Jr., and G. Harrold Carswell.²⁰² Silverstein posits that this more aggressive role compelled presidents to choose nominees who would minimize political opposition to their confirmation.²⁰³ And indeed, for Justices nominated immediately after these actions, agreement rates reflect the ideology of Senates faced by nominating presidents.

196. SILVERSTEIN, *supra* note 72, at 153–54.

197. See NEMACHECK, *supra* note 20, at 48 (citing 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)).

198. SILVERSTEIN, *supra* note 72, at 152–56.

199. *Id.*

200. *See id.* at 12.

201. DAVIS, *supra* note 33, at 20–21.

202. *Supreme Court Nominations*, *supra* note 7.

203. See SILVERSTEIN, *supra* note 72, at 100.

Most surprising, however, are results for the most recent time period, 1990 through 2010. Though the regression still predicts a decrease in agreement rates as distances between senatorial ideology increase, the coefficient on the predicted change shrinks dramatically. The error surrounding this finding is too great to be confident that the Senate's true predictive power is not zero. Thus, the regression fails to support my fifth hypothesis that the Senate's ideology had predictive power from 1990–2010 or after its rejection of Robert Bork in 1987. It does not allow one to confidently conclude that the Senate's ideology maintained the significant predictive power it had in the 1970s. If presidents continued taking senatorial ideology into account, this practice did not manifest itself in appointees with voting records which significantly reflected the Senate's ideology.

These results are consistent with observations that the Senate's rejection of Bork was a one-time success that could not be repeated.²⁰⁴ To be sure, rejecting Bork had short run benefits and kept at least one extreme candidate off the Court. But in the long run the Senate's controversial strategy may have backfired. Future nominees had tremendous incentives to avoid being as forthcoming as Bork at confirmation hearings. The event may have also raised the political stakes and fortified the resolve of powerful executives—whose ideology maintained a significant level of predictive power after the 1990s.

Still, the fixed twenty-year time periods considered above may not adequately capture appointments occurring immediately after events such as the Fortas filibuster or Bork's rejection. My final regression accounts for this possibility by using a second set of time dummy variables. These variables break data into different time periods reflecting three key events thought to mark significant shifts in the Senate's role since the 1950s: (1) the Senate's routine requirement that nominees appear before the Senate Judiciary Committee starting in the 1950s, (2) the Senate's first ever use of the filibuster against a Supreme Court nominee—Fortas for Chief Justice—in 1968, and (3) Bork's failed nomination.

The results, however, echo my earlier findings. Presidential ideology has some predictive power after the Fortas filibuster, and it gains significant predictive power after the Senate's rejection of Bork. The Senate's ideology gains significant predictive power after the Fortas filibuster but again fails to maintain its significance post-Bork.

204. See generally EISGRUBER, *supra* note 11; Kagan, *supra* note 126.

FIGURE 4: PREDICTIVE POWER OF PRESIDENTIAL IDEOLOGY FOR AGREEMENT RATES OVER TIME (EVENT TIME DUMMY VARIABLES)²⁰⁵

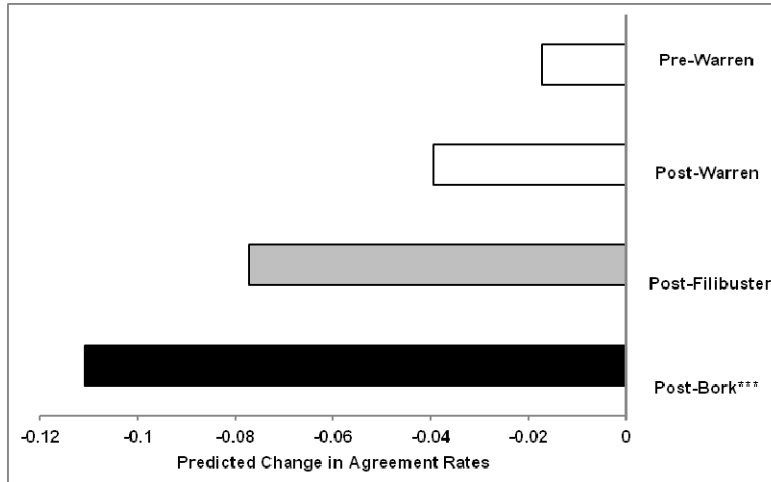
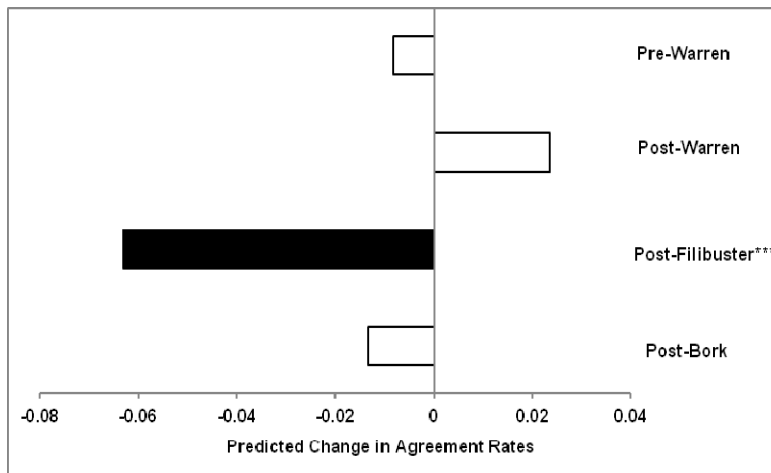


FIGURE 5: PREDICTIVE POWER OF SENATORIAL IDEOLOGY FOR AGREEMENT RATES OVER TIME (EVENT TIME DUMMY VARIABLES)²⁰⁶



205. Both charts report the result of a single regression calculated for all Justices appointed from Swayne through Sotomayor (and for whom nominating presidents have DW-NOMINATE scores). * denotes a 10% confidence level, *** denotes a 1% confidence level, and the white bars denote results statistically indistinguishable from zero. Confidence levels are calculated using clustered standard errors. Change in agreement rates is predicted difference in agreement rates per 1 unit of difference in presidential DW-NOMINATE scores and per 0.1 unit of difference in senatorial DW-NOMINATE scores. N=969.

206. See *supra* note 205.

CONCLUSION

Overall, the Senate's ideology has had little predictive power over the voting behavior of Justices it confirms. Presidential ideology, on the other hand, significantly predicts agreement rates across all 969 pairs of Justices. Although the Senate's ideology significantly predicted Justices' agreements during two isolated historical periods, it never maintained a consistent level of predictive power over time.

Analysis of an extended historical period shows that votes cast by earlier Justices were not completely unrelated to political forces surrounding their appointments. Senatorial ideology had some predictive power over agreement rates of Justices appointed from 1890–1910, and it had significant predictive power over agreement rates of Justices appointed from 1910–1930. But the association between senatorial ideology and Justices' agreement rates did not persist over time.

Any gains the Senate made from 1910–1930 were no longer evident by the 1950s. And although the Senate's ideology regained significant predictive power after the Fortas filibuster and through the early 1980s, it again lost significance after Bork's rejection in 1987. These findings substantially qualify earlier accounts of senatorial constraint.

Taken together, enhanced predictive power of presidential and senatorial ideology support the theory that the appointments process has become more effectively politicized in recent decades. The 1970s were the first time *both* presidential and senatorial ideology significantly explained Justices' voting patterns.

Mounting political pressures placed the Supreme Court appointments process in an unprecedented spotlight by the time the Senate rejected Robert Bork in 1987.²⁰⁷ Voting records of subsequent appointees show that presidents generally persisted in efforts to select ideologically compatible Justices. Presidents did not continue, however, to select Justices whose agreement rates significantly reflected the Senate's ideology.

These results are consistent with observations that the Senate's rejection of Bork was a one-time success that could not be repeated.²⁰⁸ The Senate's primary weapon, aggressive questioning at confirmation hearings, may have been dismantled by evasive nominees who wanted to avoid being "Borked."²⁰⁹ The Senate has deployed other weapons, such as delay, to block lower court nominations.²¹⁰ But these additional weapons

207. MALTESE, *supra* note 116, at 7; YALOF, *supra* note 14, at 160 ("The Bork nomination became a watershed in terms of interest group involvement in the appointment process."); see BINDER & MALTZMAN, *supra* note 6, at 7–8 (noting this position); WITTES, *supra* note 6, at 21 (same).

208. EISGRUBER, *supra* note 11, at 156.

209. *Id.*

210. BINDER & MALTZMAN, *supra* note 6, at 5, 16.

are not as readily available to Senators who wish to oppose highly publicized nominations to the Supreme Court.²¹¹

Presidents, by comparison, faced the political, post-Bork confirmation environment with the benefit of new technological resources: Computerized databases allowed presidential aides to quickly assemble and analyze virtually all of a nominee's past writings.²¹² This improved information may have better enabled presidents and their staff to anticipate not only questions at confirmation hearings, but also the nominee's likely rulings once on the bench. Further, the decision to choose nominees almost exclusively from a pool of candidates with prior judicial experience²¹³ may have helped presidents exploit this technology to even greater advantage.

The voting records of Justices nominated in this most recent period show the Senate has not deterred presidents from appointing Justices who reflect presidential ideology. These records fail to identify an equally significant role for the Senate in presidents' choices of nominees. Despite the Senate's power to keep a limited group of nominees off the Court, it ultimately failed to constrain presidents to nominate Justices who significantly reflected the Senate's ideology.

APPENDIX A: ALTERNATIVE MEASURE OF SENATORIAL IDEOLOGY

The results presented in Part III show that the distance between *median members of the Senate* at time of nomination does not generally predict agreement levels between pairs of Justices. It is still possible that a metric other than distance between median Senators will establish senatorial power.

For example, perhaps the president is more concerned about overcoming a filibuster than winning a simple majority of votes. A filibuster gives weight to vocal minority interests in the Senate, and thus it may lead a president to nominate more moderate candidates even though his party controls the Senate. To secure confirmation in the face of a filibuster, the president needs to win votes of a supermajority, allowing the Senate to invoke cloture and bring the nomination to a vote. This might lead the president to select a nominee who is closer to the filibuster pivot or last Senator whose vote will secure cloture. In the modern Senate, this is the sixtieth-most liberal or conservative Senator.

211. *Id.* at 2 (stating that "lower court" nominations are considered "out of the public spotlight" and thus give opposing Senators a "far easier time" blocking nominations "surreptitiously by exploiting the Senate's formal rules and informal practices").

212. YALOF, *supra* note 14, at 17 (discussing advances in legal research technology available to "[a]ll modern participants in the appointment process").

213. *See generally* George, *supra* note 141.

If this is in fact the president's concern, distance between filibuster pivots may have more predictive value than distance between median Senators.

There is an additional regression exploring this possibility below. This additional measure, however, still fails to identify senatorial influence beyond what is found in the initial specifications.

To calculate historical filibuster pivot scores, the study accounts for different voting rules the Senate has used over time. The Senate did not even have Rule 22, which allows a supermajority to invoke cloture and end debate, until 1917.²¹⁴ Thus, this regression only uses voting pairs in which both Justices were appointed after Rule 22 (Justices Taft and beyond). Cloture required a two-thirds majority vote from 1917 through 1975²¹⁵ and, after that, a three-fifths majority of all Senators duly chosen and sworn.²¹⁶

The filibuster pivot is calculated based on the DW-NOMINATE score²¹⁷ of the Senator needed to secure the appropriate supermajority vote at the time of a Justice's nomination. The regression uses the absolute distance between these filibuster pivots as the independent variable measuring the Senate's ideology. As before, a multivariate regression is run, which considers and isolates the effects properly attributable to distinct independent variables: (1) distance between presidents' DW-NOMINATE scores²¹⁸ and (2) distance between DW-NOMINATE scores for the filibuster pivots at time of nomination.

214. *Filibuster and Cloture*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited Feb. 25, 2013).

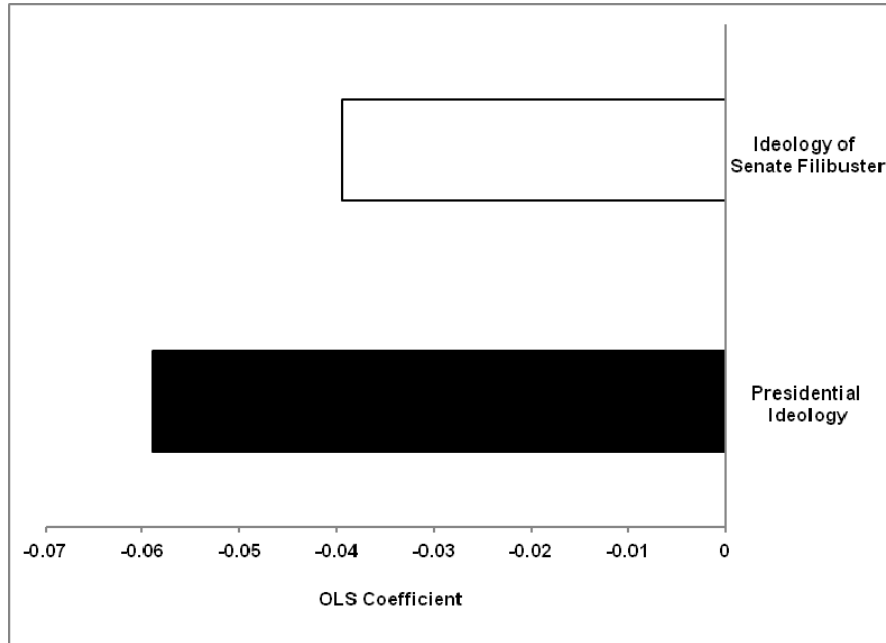
215. Rules for calculating the two-thirds majority also fluctuated between Senators duly chosen, sworn, present, and voting during this time period. See generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 206, 226–47 (2004). The study drew a bright line and calculated two-thirds based on the entire membership of the Senate for my time period.

216. *Filibuster and Cloture*, *supra* note 214.

217. Scores for each Senator are available in Carroll et al., *supra* note 30 (Sept. 2011 version).

218. Here scores for presidents were drawn from the same release of DW-NOMINATE scores used to calculate filibuster pivots.

FIGURE 6: PREDICTIVE POWER OF PRESIDENTIAL IDEOLOGY AND IDEOLOGY OF SENATE FILIBUSTER PIVOT OVER AGREEMENT RATES²¹⁹



Again this fails to show evidence of senatorial power. Although the point estimate (-0.03) suggests that the filibuster pivot has some predictive power over votes, the error surrounding both coefficients is too great to be confident that they are not, in fact, zero.

219. $(Agree_Rate)_{ij} = \alpha_i + \beta_1*(PRESDIST) + \beta_2*(SENFILIDIST) + \epsilon$. Estimated with all Justices appointed from Taft through Sotomayor (and for whom nominating presidents have DW-NOMINATE scores). Confidence levels are calculated using clustered standard errors, and white bars denote results statistically indistinguishable from zero. N=536. For a list of excluded Justices, see *supra* note 147.

APPENDIX B: SUMMARY OF REGRESSION RESULTS

Explanatory Variable	1	.1 Change SenDist	2	.1 Change SenDist	3	.1 Change SenDist	4
PresDist	-0.0596*** [0.0224]		-0.0309 [0.0375]		-0.0173 [0.0294]		-0.059 [0.0524]
PresDist 1890–1910			0.0408 [0.0282]				
PresDist 1910–30			0.091 [0.0614]				
PresDist 1930–50			-0.105 [0.0763]				
PresDist 1950–70			-0.0533 [0.0667]				
PresDist 1970–1990			-0.0763** [0.0379]				
PresDist 1990–2010			-0.1124** [0.0444]				
PresDist Post-Warren					-0.0394 [0.0743]		
PresDist Post-Filibuster					-0.0773* [0.04049]		
PresDist Post Bork					-0.1109*** [0.0353]		
SenDist	-0.0384 [0.0568]	-0.00384	-0.018 [0.0601]	-0.0018	-0.0835 [0.0556]	-0.00835	
SenDist (Filibuster Pivot)							-0.0394 [0.0491]
SenDist 1890–1910			-0.1195* [0.0627]	-0.01195			
SenDist 1910–30			-0.32** [0.1567]	-0.032			
SenDist 1930–50			-0.0822 [0.21]	-0.00822			
SenDist 1950–70			0.197 [0.1525]	0.0197			
SenDist 1970–1990			-0.4214** [0.2022]	-0.4214			
SenDist 1990–2010			-0.1836 [0.2759]	-0.1836			
SenDist Post-Warren					0.236 [0.1530]	0.0236	
SenDist Post-Filibuster					-0.6306*** [0.1395]	-0.06306	
SenDist Post Bork					-0.1334 [0.2422]	-0.01334	
Adj. R2d	0.1533		0.1724		0.1711		0.1566
N	969		969		969		536

Clustered standard errors are reported in brackets. Values for time interaction coefficients (and accompanying standard errors) reflect the total level of predicted change in agreement rates for appointees of a given time period. Senate coefficients reported per 0.1 unit in distance between DW-NOMINATE scores are noted to the left of coefficients per 1 unit of distance.

Column 1 reports results for Figure 1,²²⁰ Column 2 reports results for Figures 2²²¹ and 3,²²² Column 3 reports results for Figures 4²²³ and 5,²²⁴ and Column 4 reports results for Figure 6.²²⁵ * denotes a 10% confidence level, ** denotes a 5% confidence level, and *** denotes a 1% confidence level.

220. *See supra* note 180.

221. *See supra* note 186.

222. *See supra* note 189.

223. *See supra* note 205.

224. *See supra* note 206.

225. *See supra* note 219.