

**Advising and Consenting in the 60-Vote Senate:  
Strategic Appointments to the Supreme Court\***

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**Abstract**

The requirements of presidential nomination and Senate confirmation of Supreme Court nominees present two anomalies: under what circumstances can ideologically extreme nominees win confirmation and, given political polarization and the possibility of a filibuster, how are any nominees successful? This paper employs a simple unidimensional spatial model to explore these anomalies. The principal results show that little change in Court policy is possible with a single appointment, and this fact interacts with certain contexts to give the president a relatively free hand in choosing extreme nominees. Less firm conclusions are reached about the second anomaly, but the analysis sets the stage for further work on that aspect.

## Introduction

Presidential nominations to the Supreme Court and lower federal courts have been governed for two centuries by a constitutional requirement of Senate confirmation. Throughout this period, a simple majority of senators present and voting was sufficient to approve a presidential nominee. But this depended on an up-or-down vote actually occurring. Before 1917 there was no effective way to bring a motion to a final vote without the consent of all. (Practically speaking, of course, the costs to an individual or small group of senators of holding up the Senate was quite substantial.) Early in the twentieth century, new Senate rules of debate formalized a less-than-unanimity approval threshold. In 1917, in the wake of a “small group of willful men” frustrating the agenda of President Wilson, Senate Rule 22 was crafted, providing a method by which debate could be brought to a close and a vote ordered on the motion on the floor. For half a century this rule required support from two-thirds of those present and voting to impose *cloture*. This meant that a minority coalition of one-third plus one of those present and voting could prevent a vote. As a consequence of an upsurge in filibusters in the decade following the civil rights revolution, Rule 22 was amended in 1975, changing the requirement to an absolute standard – sixty votes – to close debate. It remained true that only fifty percent plus one votes of those present and voting (or exactly fifty percent plus the tie-breaking vote of the Senate President) were necessary to pass a motion or confirm a presidential nominee. But it took (and still takes) sixty to bring the proposal to a vote.<sup>1</sup> This has, in the judicial nomination realm, launched what Binder and Maltzman (2005, p. 315) call “new wars of advice and consent.”

In an abstract sense, this super-majoritarian requirement produces what we, in the spirit of Krehbiel (1998), call the *filibuster gridlock region* (or just gridlock region). If the policy ideal

points of the 100 senators of the U.S. Senate were arrayed along the unit interval, with senator one the most liberal and senator 100 the most conservative, and if each senator possessed symmetric, single-peaked, policy preferences on this interval, then the gridlock region is the interval between the most-preferred points of senators 41 and 60 – written  $S = [S_{41}, S_{60}]$ . If senators care only about policy outcomes, and if a court vacancy (nomination opportunity) leaves the expected policy of the remaining eight-member court – called the *status quo* or *reversion policy* – in this region, then no nomination can overcome the filibuster hurdle. If a new, fully staffed court were expected to move policy leftward from a reversion policy in  $S$ , then this would be opposed by senators 60-100 (plus possibly others), at least forty-one in all. If it were expected to move policy rightward, then senators 1-41 (plus possibly others) would oppose, again at least forty-one in all. Even if neither of these opposing coalitions could defeat a nominee on an up-or-down vote, either could block consideration by denying cloture.

If the filibuster gridlock region is small, then it may prove only an occasional irritant. The last twenty-five years, however, have witnessed political polarization in American national politics (McCarty, Poole, and Rosenthal 2006; Rohde 1991). This transformation has expanded the gridlock region as moderate Democratic senators have been replaced by more liberal partisans or conservative Republicans, and moderate Republicans have been replaced by more conservative partisans or liberal Democrats. (There is some evidence of moderate politicians changing their preferences in an extreme direction, but most of the polarization is via replacement; see Theriault 2006.) In effect, the locations of the gridlock interval endpoints,  $S_{41}$  and  $S_{60}$ , have become more extreme, and the gridlock interval has thus grown. As Sinclair (2000) has shown, one consequence of this increased polarization is that minorities in the Senate have resorted more frequently to the use of the filibuster to block policy outcomes they oppose.

This is the context in which nomination politics finds itself.<sup>2</sup> In the present paper we provide a very simple spatial model that captures its essential elements. Two anomalies motivate our analysis. The first is especially apparent in light of the filibuster rule: In what circumstances may extreme justices win confirmation? Scalia, Thomas, and Rehnquist, for example, were thought to be extreme at the time of their nominations. Likewise, nomination failures, including Bork, Haynesworth, and Carswell, also were thought to have foundered on the issue of their ideology (though none were filibustered). We will provide the conditions under which a president may reasonably expect to secure the confirmation of an extreme nominee; on the other hand, we can show when such nominations will likely fail (or be discouraged from being proposed in the first place). The second anomaly follows from the growing polarization to which we just alluded: As the filibuster gridlock interval grows with increased polarization in the Senate, raising the prospect that the reversion policy of the eight-member status quo court falls within it, what conditions allow for the confirmation of any nominee at all? We will consider features of the political context that allow for the possibility of successful appointments despite gridlock.

In 2005 there was much discussion about the *nuclear option*, an attempt by Republicans to eliminate the cloture requirement in Rule 22 for judicial nominations.<sup>3</sup> This would collapse the filibuster gridlock interval to  $[S_{50}, S_{51}]$ . That is, if the status quo policy of the eight-person court were in this interval, then there would not be 51 votes to end debate; of course, the Senate President could break the tie. We will explore this case in more detail below.<sup>4</sup>

## **Theoretical Motivation**

As will become apparent in the formal model developed in the next section, our approach may be described in ordinary language as the analysis of the power (by the president) to make

proposals in a context of institutional rules and constraints (in the Senate). The opportunity to exercise proposal power depends on a prior *nomination-inducing event* – a departure via death or retirement from the court. In most of this paper we consider this to be an exogenous event, as if justices serve for life and depart only when their health no longer permits further service or other personal considerations lead them to retire.<sup>5</sup> For much of our analysis, however, the central point does not depend on whether the nomination-inducing event is endogenous or exogenous. Whichever it is, this event establishes an eight-person court the policy of which will be the reversion policy if a nominee is not confirmed.

The sequence in which the nomination process unfolds may be described as follows:

- A nomination-inducing event occurs.
- The president, with policy ideal in the unit interval,  $P_L$  or  $P_R$ , depending on whether he or she is liberal or conservative, proposes a nominee.
- The Senate takes up the proposal, possibly approving it (by a simple majority vote) after possibly closing debate (by a 60-vote standard).
- If the Senate confirms the nominee, the policy of the new court is the ideal point of the median justice ( $J_5$ ), where justices are re-numbered after confirmation from most liberal to most conservative and  $J_i$  is the ideal point of justice  $i$ .
- If the Senate fails to confirm, either by failing to vote cloture or by rejecting the nominee after cloture has been voted, the policy of the eight-member court is  $r \in [J_4^*, J_5^*]$ , known in

advance, where justices are re-numbered one to eight from most liberal to most conservative and  $J_i^*$  is the ideal point of justice  $i$ .

Given a nomination-inducing event, the president proposes a nominee, appreciating that the policy of the court will either be the new  $J_5$  or  $r$ , depending on the success of the nominee in the confirmation process. Senators decide on how to vote on cloture and, if it succeeds, on final approval in the full knowledge of  $J_5$  and  $r$ . The model is thus parameterized by  $P_i$ ,  $S_{41}$  and  $S_{60}$ ,  $J_4^*$  and  $J_5^*$ , and  $r$ .

This formulation draws directly on an earlier literature on agenda power in institutional settings. The classic of this genre is Romer and Rosenthal (1978). They examine the optimum proposal behavior of a monopoly agenda setter, constrained by the requirement of approval from a majority-rule body, and subject to a fixed, exogenous reversion policy if the proposal is rejected. Like Romer and Rosenthal, our initial effort here is a static, one-shot model.<sup>6</sup> However, unlike their model, the reversion policy in our model depends upon the nomination-inducing event, since this event determines the composition of the eight-member court that will make policy if no nomination is successful. That is, the reversion point is *variable*, and the variability is consequential. We will provide more detail about how the reversion policy gets set, as there are specific features of Supreme Court policy making upon which to draw.

The work of Krehbiel is also relevant to our own formulation. His seminal study of non-majoritarian institutional features in legislatures (Krehbiel 1998, 2005) has guided our own characterization of the filibuster gridlock interval.<sup>7</sup> More recent work by Snyder and Weingast (2000) and Krehbiel (2004, 2006) examines “move the median” politics (through appointments)

where there is a variable reversion policy. It is closely related to our own work (though our emphasis on court appointments give us more descriptive leverage on the reversion policy).

None of this work has accommodated the consequences of polarization. The party contingents in the Congress have become more internally homogeneous and more divergent, and the policies made in Supreme Court decisions have become central elements in partisan conflict. When the filibuster gridlock interval is so large that it contains the reversion policy of almost any eight-member court produced by a departure, then as we shall see, no nomination by a president is confirmable, except for the trivial case of a nominee that generates a new nine-member court policy exactly equal to  $r$ , the eight-member reversion policy. We will offer some ideas about the factors that may overcome this situation before concluding this discussion. Initially, however, we develop a model based purely on policy-motivated behavior.

## **The Model**

Policy Preferences. Policy is represented on the unit interval. Each senator has a symmetric, single-peaked utility function with ideal point  $S_i$ . Each justice also has a symmetric, single-peaked utility function on the same unit interval with ideal point  $J_i$ . Senators and justices are numbered from most liberal to most conservative. Finally, the president's preferences are represented by a symmetric, single-peaked utility function on this interval with ideal point  $P_L$  or  $P_R$  depending on whether he or she is liberal or conservative. (In most of our development we make the president extreme in one direction or the other, though we will remark on the circumstance in which he or she is moderate.) As noted, in this initial formulation all agents care exclusively about policy.<sup>8</sup>

Filibuster Gridlock Region. The subinterval  $S = [S_{41}, S_{60}] \subset [0, 1]$  is the set of points from which any departure is opposed by at least 41 senators. I.e., for any  $x \in S$  and any  $y \in [0, 1]$ , a motion to close debate and bring  $y$  to a vote against  $x$  will fail to obtain the necessary sixty votes.

Histories. For a given court  $J = \{J_1, J_2, \dots, J_9\}$ , a *nomination-inducing event* is the departure of a justice,  $J_i \in J$ . There are three broad types of nomination-inducing event, depending upon whether  $J_i < J_5$ ,  $J_i = J_5$ , or  $J_i > J_5$ , and thus three possible histories confronting a president. After a nomination-inducing event, the reduced court is  $J^* = \{J_1^*, J_2^*, \dots, J_8^*\}$ , where the remaining justices are simply re-numbered.

Judicial Policy on the Nine-Member Court. Court *policy* is determined by a majority *opinion*, quite apart from any vote on the merits of a case that determines a winning and a losing party. This opinion provides the statutory and/or constitutional rationale for the decision. If it is agreed to by a majority of the justices, then it is this rationale that stands as the policy of the court and provides the precedent that governs all similar future cases. As this is a simple majority rule game, the outcome reflects the policy ideal of  $J_5$ , the median justice.<sup>9</sup>

Judicial Policy on an Eight-Member Court. On an eight-member court, policy is still determined by a majority opinion, but this continues to require concurrence among five justices. In this even-numbered majority rule game we assume the outcome is  $r \in [J_4^*, J_5^*]$ .<sup>10</sup> We assume that  $r$  is commonly known for any history. That is, for any nomination-inducing event, the president and senators commonly forecast the outcome of judicial policy on the eight-member court to be  $r$  if no nominee is confirmed.<sup>11</sup> Later we explore the consequences of uncertainty about  $r$ .<sup>12</sup>

Advise-and-Consent Game Form. The game form is as described in the previous section. For any nomination-inducing event, the president proposes a nominee. Senators compare  $r$  to  $J_5$ , where the former is the reversion policy of the eight-member court and the latter is the ideal point of the median justice of the newly constituted nine-member court if the nominee is confirmed. If the Senate votes cloture, then we assume it will also confirm the nominee. Thus, cloture is the key vote. The president's nominee affects the location of  $J_5$  if confirmed. Backward inducting, the president selects the nominee producing a new court median closest to  $P_i$  that is acceptable to sixty senators.

## Results

As we noted above, there are three classes of nomination-inducing event, depending upon the ideal-point location of the departing justice:  $J_i < J_5$ ,  $J_i = J_5$ , or  $J_i > J_5$ . These determine the median interval of the eight-member court,  $J^* = [J_4^*, J_5^*]$ . If  $J_i < J_5$ , then  $[J_4^*, J_5^*] = [J_5, J_6]$ . That is, if a justice to the left of the court median retires, then the median interval of the eight-member court thus created is bounded by the ideal points of justices five and six on the previous nine-member court. If the median on the initial court departs, then  $[J_4^*, J_5^*] = [J_4, J_6]$ . Finally, if there is a right-wing departure, then  $[J_4^*, J_5^*] = [J_4, J_5]$ .

Before presenting the details of our analysis, we report an important preliminary result that follows directly from our formulation<sup>13</sup>:

*Proposition 0.* For any nomination-inducing event, the court policy equilibrium of the advise-and-consent game is contained in  $J^* = [J_4^*, J_5^*]$ .

This result is easy to see. If a nominee is rejected, then the result is  $r \in [J_4^*, J_5^*]$ , by assumption. If the nominee is confirmed, then the nominee's ideal point is either less than  $J_4^*$ , an element of  $[J_4^*, J_5^*]$ , or greater than  $J_5^*$ . If the first, then the median of the newly constituted nine-member court is  $J_4^*$ , that is,  $J_5 = J_4^*$ . If the second, then  $J_5$  is the ideal point of the nominee. If the third, then  $J_5 = J_5^*$ . Thus, the claim is established in all cases. The court policy will be in the  $J^*$  interval whether a nomination succeeds or fails.

Essentially, the result says that a president, in any single appointment to the court, can move judicial policy at most to  $J_4^*$  or  $J_5^*$ . Journalistic coverage of Supreme Court nomination events often fail to take this fact on board, emphasizing the ideological characteristics of the *nominee* rather than the equilibrium policy of the *new court*. A second consequence is also typically missed. If this interval is "small" in some sense, then the court policy equilibrium arising in the advise-and-consent game under a conservative president may not differ much from that arising if the president were liberal.

Note that if  $J_4^*$  is preferred to  $r$  by sixty senators, then a liberal president is free to nominate as extreme a liberal candidate as she wishes. Symmetrically, if  $J_5^*$  is preferred to  $r$  by sixty senators, then a conservative president may nominate as extreme a conservative candidate as he wishes. In either case, it is not the extremeness of the nominee that matters; it is the supermajority preferences between the reversion policy and each of the end points of  $[J_4^*, J_5^*]$ . This hints at the conditions under which extreme nominees may be confirmed – more on that below.

As may already be evident, for any nomination-inducing event, we have two intervals of relevance:  $J^* = [J_4^*, J_5^*]$  and  $S = [S_{41}, S_{60}]$ . The relationship between these two intervals establishes six circumstances. The intervals may be disjoint in either of two ways:  $J_5^* < S_{41}$  (in which case the judicial interval is entirely to the left of the filibuster gridlock region) or  $S_{60} < J_4^*$

(in which case the judicial interval is entirely to the right of the filibuster gridlock region).

Alternatively, the two intervals may intersect in either of two ways:  $J_4^* < S_{41} < J_5^* < S_{60}$  or  $S_{41} < J_4^* < S_{60} < J_5^*$ . Or one interval may be contained in the other in either of two ways:  $S_{41} < J_4^* < J_5^* < S_{60}$  or  $J_4^* < S_{41} < S_{60} < J_5^*$ . We assume that  $P_L \leq \min(J_4^*, S_{41})$  and  $P_R \geq \max(J_5^*, S_{60})$  to simplify the discussion, saying that the president's ideal is *immoderate* relative to centrist preferences in both the court and the Senate. Table 1 displays the universe of cases.

Disjoint intervals. Consider first a nomination-inducing event that produces  $J^* < S$  (Case 1 in the table). For any  $r \in J^*$ , at least sixty senators prefer  $J_5^*$  to  $r$ . So does a conservative president. A conservative president, therefore, may nominate *any*  $J \geq J_5^*$ , confirmation will be successful, and the court policy equilibrium will be  $J_5^*$ . However, no nominee confirmable by the Senate is preferred by a liberal president to  $r$  in this case. This is an instance of *inter-branch gridlock*. The court policy equilibrium will be  $r$  and either an unsuccessful nominee will be proposed by the president or none will.

Now consider a nomination-inducing event that produces  $J^* > S$  (Case 2). This is the mirror-image circumstance. At least sixty senators prefer  $J_4^*$  to  $r$ , so that a liberal president may nominate *any*  $J \leq J_4^*$ , confirmation will be successful, and the court policy equilibrium will be  $J_4^*$ . No nominee confirmable by the Senate is preferred by a conservative president to  $r$  – inter-branch gridlock again – and the court policy equilibrium will remain at  $r$ .

These results may be summarized as:

*Proposition 1 (Disjoint Intervals).* Assume  $P_i$  is immoderate. If  $S$  and  $J^*$  are disjoint, then a president whose ideal is closer to  $S$  than to  $J^*$  is free to nominate any candidate he or she prefers to  $r$ , this

nominee will be confirmed by the Senate, and the court policy equilibrium will be the boundary of  $J^*$  closest to  $P_i$ . If the president's ideal is closer to  $J^*$  than to  $S$ , then no nominee he prefers is confirmable by the Senate, inter-branch gridlock ensues, and the court policy equilibrium is  $r$ .

Since this is a one-shot game, we have nothing to say about what transpires in the gridlock state, except that an eight-person court continues to function producing negotiated policy at  $r$ . In the concluding section we propose a more elaborate model for exploring gridlocked circumstances.

Intersecting Intervals. Consider first the intersecting case in which the left boundary of the eight-member court's median range is to the left of the Senate gridlock region. This is displayed in Figure 1. As before,  $r \in J^*$  and the president is immoderate. There are two sub-cases to consider.

- Suppose  $r \in [J_4^*, S_{41}]$  (Case 3). A liberal president would like to move policy to the left, but this will be opposed by at least 60 senators. Therefore a liberal president may make any nomination he or she prefers, which will fail, or no nomination, and  $r$  will be the court policy equilibrium. A conservative president would like to move policy to the right. Let  $S_{41}(r)$  be the reflection of  $r$  through  $S_{41}$ .<sup>14</sup> With symmetric preferences, senator 41 is indifferent between  $r$  and  $S_{41}(r)$ . If  $S_{41}(r) > J_5^*$ , then a conservative president may nominate any candidate he or she prefers, the nominee will be confirmed, and the court policy equilibrium is  $J_5^*$ . If, on the other hand,  $S_{41}(r) < J_5^*$ , then a conservative president may nominate a candidate no more conservative than  $S_{41}(r)$ , the nominee

will be confirmed, and his or her ideal will be the court policy equilibrium.<sup>15</sup>

- Now suppose  $r \in [S_{41}, J_5^*]$  (Case 4). A liberal president would like to move policy to the left, but such a move would founder on the cloture requirement, with senators 60 to 100 (plus possibly others) opposing. So  $r$  will remain as the court policy equilibrium. A conservative president would like to move policy to the right. But any such move would also founder on the cloture requirement, with senators 1 to 41 (plus possibly others) opposing, with  $r$  the court policy equilibrium. Presidents of either ideological persuasion, then, confront inter-branch gridlock in this circumstance.

The second instance of intersecting intervals (Cases 5 and 6) is the mirror image of the first, with the right boundary of the eight-member court's median range to the right of the Senate gridlock region (see Figure 2). We will not repeat the details given above, but will summarize the results as:

*Proposition 2 (Intersecting Intervals).* Assume  $P_i$  is immoderate and  $r \in J^*$ .

- If  $r \in [J_4^*, S_{41}]$  – Figure 1 ( $r \in [S_{60}, J_5^*]$  – Figure 2, resp.), then there is no nominee that produces a change in court policy preferred by a liberal (conservative, resp.) president that satisfies the cloture requirement (indeed, the simple majority requirement). So  $r$  is the court policy equilibrium and no nomination is confirmed. A conservative (liberal, resp.) president, on the other

hand, is able to move policy in a preferred direction, either to  $J_5^*$  ( $J_4^*$ , resp.) with any preferred nominee, or to the position in  $J^*$  that leaves the pivotal filibuster senator  $S_{41}$  ( $S_{60}$ , resp.) indifferent if that senator prefers  $r$  to  $J_5^*$  ( $J_4^*$ , resp.).

ii. If  $r \in [S_{41}, J_5^*]$  ( $r \in [J_4^*, S_{60}]$ , resp.), then no nominee preferred by the president satisfies the cloture requirement and  $r$  remains the court policy equilibrium.

Set-included Intervals. The last pair of circumstances entails set inclusion. Again assume that the president is immoderate and  $r \in J^*$ . Consider first the case in which  $J^* \subset S$  (Case 7), as displayed in Figure 3. Given the set-inclusion premise, it follows that  $r \in S$ , so no nominee is confirmable and  $r$  is the court policy equilibrium.

Next consider the case in which  $S \subset J^*$ , as shown in Figure 4. There are three sub-cases to consider, depending upon whether  $r$  is an element of  $[J_4^*, S_{41}]$ ,  $[S_{41}, S_{60}]$ , or  $[S_{60}, J_5^*]$ .

- If  $r \in [J_4^*, S_{41}]$  (Case 8), then at least 60 senators oppose a move of policy to the left by a liberal president, so  $r$  is the court policy equilibrium. A conservative president could move policy as far as  $S_{41}(r)$ , the reflection of  $r$  through senator 41's ideal point. If  $S_{41}(r) < J_5^*$ , then the president's nominee can be no more conservative than  $S_{41}(r)$ , and that point would constitute the court policy equilibrium. Only if  $S_{41}(r) \geq J_5^*$  is a conservative president unconstrained in his or her nomination, in which case  $J_5^*$  is the court policy equilibrium.

- If  $r \in [S_{41}, S_{60}]$  (Case 9), then no nominee from a president of either immoderate type is confirmable. With  $r$  in the Senate gridlock region,  $r$  remains the court policy equilibrium.
- If  $r \in [S_{60}, J_5^*]$  (Case 10), then at least 60 senators oppose a move of policy to the right by a conservative president, so  $r$  is the court policy equilibrium. A liberal president, could move policy leftward as far as  $S_{60}(r)$ . If  $S_{60}(r) > J_4^*$ , then the president's nominee can be no more liberal than  $S_{60}(r)$ , and that point constitutes the court policy equilibrium. Only if  $S_{60}(r) \leq J_4^*$  is a liberal president unconstrained in his or her nomination, in which case  $J_4^*$  is the court policy equilibrium.

We summarize these findings as:

*Proposition 3 (Set-included Intervals).* Assume  $P_i$  is immoderate and  $r \in J^*$ . For  $J^* \subset S$ , no nominee clears the filibuster hurdle and  $r$  is the court policy equilibrium. For  $S \subset J^*$ , if  $r \in S$  (the second sub-case above), we again have gridlock and  $r$  is the equilibrium. For  $r < S_{41}$  ( $r > S_{60}$ , resp.), a liberal (conservative, resp.) president is unable to move policy. A conservative (liberal, resp.) president, on the other hand, may move policy toward  $P_R$  ( $P_L$ , resp.), constrained only by the left (right, resp.) filibuster pivot,  $S_{41}$  ( $S_{60}$ , resp.).

Summary. These results in Table 1 are actually quite simple, even if the presentation is somewhat ponderous. A simple way to cut through the detail of the table is to note that for each

presidential type (L or R), three of the ten cases produce a successful nominee. For L-types, the new court equilibrium is  $\max \{J_4^*, S_{60}(r), P_L\}$ , which occurs in cases 2, 5, and 10. For R-types, the new court equilibrium is  $\min \{S_{41}(r), J_5^*, P_R\}$ , which occurs in cases 1, 3, and 8. In practice, the binding constraint for a presidential nominee often is the utility level for the reversion policy of the pivotal senator least sympathetic to the president's preferences; when that is non-binding, then the president can secure his most favorable equilibrium (given Proposition 0). Thus, for six of the ten cases there is the possibility of a way out of the gridlock (though it depends on having the "right" presidential type). For each of the remaining four cases – 4, 6, 7, and 9 – there is no hope of resolving the gridlock, regardless of presidential type, because the reversion policy is in the gridlock interval, i.e.,  $r \in [S_{41}, S_{60}]$ .<sup>16</sup>

Our analysis highlights two tendencies – the serious prospect of gridlock (exacerbated by polarization in the Senate) and the possibility for the president to secure confirmation for an extreme nominee.

The first tendency reflects the capacity of a legislative minority successfully to lean against presidential policy aspirations. But the multitude of theoretical circumstances leading to inter-institutional gridlock identified in the propositions above and displayed in the table, interesting though they are, do not accord well with intuition and casual observation. While presidents surely maneuver strategically in advise-and-consent nomination politics, as do senators, we don't often see eight-member courts persisting for long periods while presidents fail to bring nominees forward or bring only failed nominees forward. Perhaps the reliance on exclusively policy-motivated voting is too restrictive. In any case, something is missing from the analysis, and we address this omission in the conclusion.<sup>17</sup>

The other tendency provides conditions under which a president effectively has a free hand in making nominations (because his or her ability to shape judicial policy is greatly restricted as described in Proposition 0).<sup>18</sup> The latter provides some explanatory traction for what we earlier identified as one of the anomalies in advise-and-consent politics – extremist nominations and their occasional success. In particular, we have shown that there are two circumstances in which a president is free to nominate an immoderate candidate – when no nominee a president prefers is confirmable (in which case the nominee is payoff irrelevant) and when a (super) majority of the Senate wishes to move the court policy equilibrium to a boundary point in  $J^*$ , but does not care what instrumentality (that is, nominee) is employed.<sup>19</sup>

## **Extensions**

In this section we push the boundaries of our simple model, exploring its robustness to variations in our assumptions.

Uncertainty. It is reasonable to assume that the president and the Senate engage in frequent interactions, thus justifying the assumption of common knowledge of their respective preferences, in particular of  $P_i$ ,  $S_{41}$ , and  $S_{60}$ . However, the reversion policy  $r$  of the newly created eight-member court, and the ideological location of a nominee  $J$ , entail a novelty that renders an assumption of common knowledge dubious. Let us take these up one at a time.

Suppose  $r$  were not known with certainty, but rather is a random variable distributed uniformly over  $[\mu_r - \alpha, \mu_r + \alpha]$ . For convenience, assume the distribution of this random variable is common knowledge, the expected value of this random variable,  $\mu_r$ , is identical to no senator's ideal point, and that all utility functions are concave in policy (for example, quadratic loss functions). Each senator will treat the uncertainty regarding this reversion point in terms of the *certainty equivalent* of the random variable.<sup>20</sup> Because utility functions are concave, senators

with ideals to the left of  $\mu_r$  have a certainty equivalent to the right of  $\mu_r$ , whereas senators with ideals to the right of  $\mu_r$  have a certainty equivalent to the left of  $\mu_r$ . That is, for all senators the uncertainty makes the (random) reversion policy less attractive than if it were at its mean for certain. In particular, both filibuster pivots,  $S_{41}$  and  $S_{60}$ , as well as all of their more extreme colleagues, would be prepared to support a wider set of court equilibria than when there was certainty, thus giving the president a wider berth and mitigating potential gridlock in some circumstances.

If uncertainty about the reversion policy of the eight-person court reduces the prospects for gridlock, uncertainty about the nominee's ideology has the opposite effect. Senators will be less certain of the location of the new court's equilibrium policy if they confirm the nominee. With concave preferences, confirmation is less appealing for senators relative to the circumstance modeled earlier of a commonly known nominee's position.

As an empirical matter this suggests interesting implications. On average, if an eight-member court is expected to venture into uncharted territory, this should enhance the prospects for the ultimate confirmation of a president's nominee; the uncertainty works in favor of confirmation. On the other hand, the nomination of a candidate with a limited track record as a judge will prove a more difficult sell than one for whom there are similar expectations but less variance.

Moderate Presidents. Define a *moderate* president as one whose ideal point lies inside the Senate gridlock region –  $P_M \in S$ . That is, the president is more conservative than  $S_{41}$  and more liberal than  $S_{60}$ .

If  $J^*$  and  $S$  are disjoint, then the president may nominate any candidate he prefers and this will be confirmed. The court policy equilibrium will be the end point of  $J^*$  closest to  $P_M$ . Unlike

immoderate presidents, a moderate president always has a confirmable option and always moves court policy toward  $P_M$ .

Next consider the cases of intersection between  $S$  and  $J^*$ . Here again a moderate president has more options than an immoderate one. We won't work through all the details, but the intuition can be conveyed by consulting Figure 1. Consider  $r \in [J_4^*, S_{41}]$  first. A moderate president may nominate any candidate no more conservative than  $S_{41}(r)$ , and this will be the court policy equilibrium. Since  $P_M > S_{41}$  by assumption, this option will always be available. Indeed, if  $S_{41}(r) > J_5^*$  a moderate president can move court policy to  $J_5^*$  if he or she wishes. If, on the other hand,  $r \in [S_{41}, J_5^*]$ , the president cannot move court policy, since  $r$  is in the Senate gridlock region. (A parallel analysis, associated with Figure 2, produces similar conclusions.)

Finally, consider the subset condition. For  $J^* \subset S$  we have gridlock, since  $r \in S$ . Moderate presidents are no more advantaged in this case than immoderate ones (though they may be happier with the result). If  $S \subset J^*$ , then so long as  $r \notin S$  – in which case we have gridlock again – a moderate president may move court policy toward  $P_M$  (possibly constrained by the preferences of the relevant pivotal senator).

It is worth emphasizing that there will be less gridlock when the president is moderate, since the picture painted by Table 1, with immoderate presidents, gives an impression of gridlock as the dominant story line of our analysis. Of course, when  $r \in [S_{41}, S_{60}]$  the ideology of the president will not be relevant.

Extension to the “Nuclear Option”. On May 23, 2005, a deal crafted by fourteen moderate Senators (half Democratic, half Republican, known as “the Gang of Fourteen”) was struck in the Senate which, temporarily at least, shelved the so-called “nuclear option” put forward by

Majority Leader Frist (R TN). This preserved the filibuster, as laid out in Rule 22 and analyzed above, but nevertheless put legislators on notice that the nuclear option gutting the filibuster could be pursued in the future. In effect, this option would make it possible to bring debate on a judicial nominee to a close by a simple majority of those present and voting.

It is simple to see that the nuclear option reduces the gridlock interval to  $S' = [S_{50}, S_{51}]$ , a subset of  $S = [S_{41}, S_{60}]$ . The equilibrium consequences of the nuclear option for the advise-and-consent game may be thought of as a comparative statics inference from our earlier results. Essentially, it characterizes what happens as  $S$  shrinks to  $S'$  (or any other subset of  $S$ ). A quick inspection of Figures 1-4 would allow the reader to work through the effects of shrinking  $S$  in the cases displayed there. Our conclusions for all of the cases continue to hold. The main effect of shrinking  $S$ , however, is potentially to alter the relative frequency of cases that arise. In particular, under reasonable conditions, replacing  $S$  with  $S'$  in Table 1 is likely to increase the empirical prospects of two of the conditions –  $S' \cap J^* = \emptyset$  and  $S' \subset J^*$ .

A proper consideration of the Gang of Fourteen Agreement requires a strategic analysis of its credibility. The agreement is a promise (threat) that extends over a *sequence* of appointments. In effect, it asserts that if a reasonable candidate is unreasonably filibustered, then the moderates will support changing the effect of Rule 22 for this and *subsequent* appointments. To be credible, it must be the case for each particular member of the Gang that he or she would prefer the Court equilibria that arise in these (anticipated) future cases under strict majority rule to those that would arise under the current filibuster rule. This is quite a complicated calculation that, in turn, may compromise the credibility of the threat. Any particular member of the Gang may, upon reflection, not be prepared to sanction a switch to majority rule, even though that is what he or she threatened *ex ante*. If, however, the threat *is* perceived as credible, then it may provide

other senators with a basis for not obstructing a nominee, even though this is contrary to their nominal policy preferences. They can now *explain* this vote to constituents as motivated by the desire to leave the protection of the filibuster rule in place for future nomination battles.

### **Some Empirical Reflections**

Our theoretical discussion has been based on circumstances in the Senate since the development of substantial political polarization through the mid-1980s. Since that time there have been fewer than ten Supreme Court nominations, so any systematic empirical test of our theoretical expectations is not feasible. We can, however, examine the circumstances of some of the nominations to see if what occurred seems consistent with our analysis. We can also draw on these instances of nomination and (usually) confirmation to discover features of the process that should be added to our model as it is developed further.

The first relevant nomination was of Antonin Scalia in 1986. To assess the perceptions of Scalia's ideological position at the time of nomination, we can draw on the analysis by Segal, Cameron, and Cover (1992). The authors conducted a content analysis of newspaper editorials, and computed a summary score for each nominee.<sup>21</sup> Scalia was regarded as very conservative by the editorial writers; indeed he had the most conservative score of any nominee between Warren in 1953 and Breyer in 1994. Yet Scalia was confirmed by a unanimous vote of 98-0. Thus this is a clear case of the acceptance of an extreme justice by the Senate. Here a conservative president clearly wanted to choose a conservative justice, and the Republican Senate would not be expected to resist this effort. It seems plausible that the reversion point of the court was either disjoint to the left of the gridlock interval, or overlapping at that end. This is the circumstance in our model in which  $P_R$  is able successfully to choose a nominee to the right of  $J^*$ , even if she is extreme.

On the other hand, just the next year Reagan chose Robert Bork to succeed Justice Lewis Powell. According to the Segal-Cameron-Cover analysis, Bork was also perceived as extremely conservative, although a bit less so than Scalia. However, the congressional context had changed substantially. In the 1986 midterm elections, the Democrats had gained eight seats in the Senate to retake majority control. This development furthered the polarization in Congress significantly. It would have shifted the Senate gridlock interval to the left, plausibly removing the condition that would have permitted another extreme nominee to be confirmed. Moreover, Bork cooperated with the Democratic effort to portray him as ideologically unacceptable by forthrightly revealing his positions and defending them (see Comiskey 2004). As a consequence, Bork was rejected by a vote of 42-58. No filibuster was necessary, but one might have been employed if it had looked like Bork had the votes for confirmation.

Another highly contested nomination from this period was that of Clarence Thomas by President Bush in 1991. Here again there was a Republican president facing a Democratic Senate, with the Senate somewhat further along the scale of polarization than in 1987. Thomas was perceived by the editorial writers to be only slightly less conservative than Bork. This set the stage for another highly contested nomination fight. After extended racially-charged conflict, the Senate confirmed Thomas 52 to 48. This would have been a possible instance for a filibuster, but one was not mounted, and it is useful to reflect on why this may have been so.

One reason that is potentially relevant to future development of our model relates to public justification of actions in nomination contests. In its one-shot, purely policy motivated form, the initial model yields a high frequency of gridlock, certainly much more than is reflected in real nominations. The most obvious possible change in the model would be to recognize that senators and presidents are motivated by more than policy. All senators and first-term presidents

must maintain public support to retain office, and so in taking positions they must pay attention to popular preferences. Research on public opinion related to Congress clearly shows that the public does not like conflict in Congress (Hibbing and Theiss-Morse 1995). This does not mean that senators cannot oppose nominees, but it does imply that they must convince voters that their reasons for doing so are acceptable. There are at least two considerations relevant to this in the Thomas case. First, there is the racial context. It may be that senators opposed to Thomas, especially Democrats, were reluctant to try to deny him an up-or-down vote after his claims that his opponents were running a “high-tech lynching” (Overby et. al. 1992).

The second consideration relates to potential reasons offered publicly for opposition. As Epstein and Segal (2006) point out, the perceived qualifications of nominees appear to have an effect on their chances of confirmation. Segal, Cameron, and Cover (1992) also used their content analysis of editorials to measure how qualified nominees were perceived to be. Their data show that Thomas was perceived to be among the least qualified nominees since 1953. Indeed, the only nominees that were judged noticeably less qualified were judges Haynesworth and Carswell, president Nixon’s two failed nominees. Thus it is likely that these perceptions made it easier for senators who opposed Thomas to do so publicly, allowing them to provide reasons other than ideology to constituents for their opposition. As in the Haynesworth and Carswell cases, however, opposition was not transformed into obstruction. In the case of the two Nixon nominees, their nominations were doomed so that opponents needed only to cast a vote against them in order to prevail. Thomas, on the other hand, posed a dilemma, since it appeared he would secure nomination if there were no obstruction. Opponents therefore had to decide whether to ratchet their opposition up from voting to filibustering. In all likelihood, the race dimension to this case deterred this escalation.

The interaction of ideology and qualifications also seems relevant to President Clinton's two nominations. Ruth Ginsburg, his choice to succeed Byron White in 1993, was tied for the most qualified nominee in the editorial judgments. This surely would have made it more difficult to justify opposition to her. Moreover, the editorial writers judged her to be only moderately liberal, and this view was shared by others (see Comiskey 2004, p. 65). She secured confirmation with only three negatives votes. Clinton's second nominee, Steven Breyer, was not seen to be as highly qualified as Justice Ginsburg, but he was perceived to be even more moderate, being rated near the dead center of the spectrum (see also Comiskey 2004, p. 65-66). He won confirmation 87 to 9. Thus Clinton's strategy appears to fit our discussion of the situation of moderate presidents, who are relatively advantaged in securing confirmation for their choices and moving outcomes in their direction, albeit perhaps not very far. On the other hand, if there had been court vacancies later in the Clinton administration, after the GOP secured majority control of the Senate in 1994, we might well have seen filibusters of his choices.

Indeed, the juxtaposition of decisions on confirmation and cloture in the polarized Senate were apparent in the nomination process of Samuel Alito in 2006. As is clear from their 4-41 vote on confirmation, Democrats were nearly unanimous in opposition to judge Alito. Yet they were deeply divided over a possible filibuster. When Senator John Kerry (D, MA) announced an attempt to block Alito with extended debate, many Democrats, including Minority Leader Harry Reid, did not support the move, but liberal interest groups applauded (Babington 2006). Some of the opponents were worried about building support for the nuclear option, while others were concerned that public support for this nominee was too strong and voters would object to the resort to blocking tactics. In the end only 25 votes were cast against cloture, far fewer than the number of opponents of the nomination. It appears clear from the Alito nomination (as well as

the fight over Thomas) that senators make a distinction between supporting a filibuster and voting on the nomination itself, and that this distinction explains the fact that we observe successful nominations with fewer than 60 favorable votes. Obstruction, in short, is potentially costly, indeed sometimes more costly than permitting an up-or-down vote on an otherwise unpleasant nominee. It seems, therefore, that an important next step in developing our model is to incorporate potential loss of public support in the calculus of senators if the public does not find their reasons for opposition to a nominee or for supporting obstructionist tactics to be sufficiently persuasive. The same considerations would affect the president in choosing whom to nominate.

## **Conclusions**

We began our analysis of Supreme Court nomination politics with the filibuster gridlock region and suggested that two anomalies required explanation – the success of extreme nominees, and the general problem of overcoming gridlock in a polarized Senate. In distinguishing between the court policy equilibrium in an eight-member and a nine-member court on the one hand, and the ideological flavor of a nominee on the other, we believe we have provided a persuasive account of the first anomaly. Our initial result points out the limited effect of a single confirmation since the outcome is restricted to the  $[J_4^*, J_5^*]$  interval in any event. Moreover, this result will remain true even under the possible revisions of our model discussed above. Thus, there are circumstances – namely where sixty senators prefer one of the end points of  $J^*$  to the reversion policy, and so does the president – in which the president has a relatively free hand in making a nomination.

The analytical project we have summarized contains much unfinished business. The first order of business is to come to terms with the second anomaly. It would be correct to caution

that, because we do not know the distribution of circumstances across the cells of Table 1, we should not infer that there is “too much” gridlock predicted in our model. Nevertheless, it is enough of a nagging concern that we believe it would be very fruitful to explore *non-policy* rationales for senatorial voting behavior.

We propose a way forward by drawing on the work of Grossman and Helpman (1994).<sup>22</sup> There is a model of trade policy in which special interests bid for tariff policy by offering *bribes* or *inducements* to politicians. The Grossman-Helpman approach may be summarized as follows:

“We...consider a political process of economic policy making in the common agency framework. A subset of all individuals is allowed to lobby the government and promise contributions in return for policy favors. The government cares for social welfare defined over the utilities of all individuals (lobbying or not) and for its receipts from the lobbyists.” (Dixit, Grossman, and Helpman, 1997: 27)

Our proposed adaptation allows the President and the interest group world to offer inducements to senators in order to persuade them to vote against their nominal preferences on a court nomination in the direction of the provider of inducements instead. We leave this to a separate paper – see Console Battilana and Shepsle (2006) – where an *inducements budget* provides the president with a powerful tool to break gridlock.

A second direction, already developed casually above as an extension, entails a relaxation of complete and perfect information. Even allowing for the preferences of senators and the president to be common knowledge, it is less plausible to believe the reversion policy ( $r$ ) or the precise location of the nominee are known with certainty in many circumstances. We believe the

qualitative thrust of such an analysis will provide a more nuanced set of expectations and a richer set of empirical directions to pursue.<sup>23</sup>

There are three additional agenda items that merit brief discussion. The first is the idea of *strategic retirement*. We have taken the nomination-inducing event that initiates advise-and-consent politics as exogenous in our analysis. Sitting justices, however, may *choose* when they retire and, given their own policy preferences, they may make that choice in light of expectations about the nomination politics to follow and may time that choice as a function of the electoral calendar. It is popularly alleged, for example, that some liberal justices (and possibly some moderate ones) do not wish to retire while President Bush remains in office. Others may take into account the possibility of ideological change in the Senate in the next election. One could imagine modeling this as a prior stage in the advise-and-consent game. (Clearly a number of modeling choices must be made in order to deal with, or dismiss, the prospect of simultaneous multiple retirements.)

The second idea is that of *multiple nomination-inducing events*. Here we do not have in mind the possibility to which we just parenthetically alluded of more than one nomination-inducing event occurring simultaneously. Rather, we wonder about the prospect (about which many readers may already have speculated) that all actors in the advise-and-consent game at time  $t$  have beliefs about whether the game will be played again at  $t+1$ . Our static analysis in the body of this paper looks at a single play of the game. A president, for example, may have a free hand in his nomination according to our analysis, but may actually be more constrained if it is widely anticipated that the game will be played again soon because of another nomination-inducing event. Our initial result suggests a limited range of prospective policy change from a single nomination-inducing event. The range grows, however, with multiple rounds. And

confirmations at time  $t$  will affect this policy range at time  $t+1$ . Furthermore, where on the court spectrum multiple vacancies come from will affect the possibility of making significant changes in policy outcomes over time. For example, a conservative president will not be able to move the court substantially to the right if all of the vacancies come from among the court's most conservative justices, as has been the case for President Bush. Even with the confirmations of Roberts and Alito in 2005 and 2006, respectively, the court median has moved only from O'Connor to Kennedy, a statistically negligible change (Martin, Quinn, and Epstein, 2006).

Finally, we have been silent about parties in this analysis. Yet there is no gainsaying that partisans of the president almost always support his nominees, while those in the opposition are less reliable. In making no provision for parties, we have undoubtedly exaggerated the "all politics is local" perspective by characterizing senatorial preferences as driven by electoral considerations in their separate constituencies. Yet the correlation among fellow partisans probably extends beyond the correlation in the preferences of their respective constituencies, and this may be due, in part, to the activities of parties. It may also be due to the campaigns mounted by the White House and the denizens of the K Street Corridor (see Console Battilana and Shepsle, 2006). Bringing these collective enterprises into the analysis would surely provide additional realism.

All of these are interesting complications in a prospectively rich analysis of inter-institutional bargaining. There are both technical challenges and questions of substantive scope that must be resolved. There is, as well, the huge issue of empirical operationalization, as the methodological difficulty of scaling justices, senators, and presidents in a common ideological space must be surmounted (see, for example, Bailey, Kamoie, and Maltzman, 2005, for one such effort). We expect these issues to be the focus of future work.

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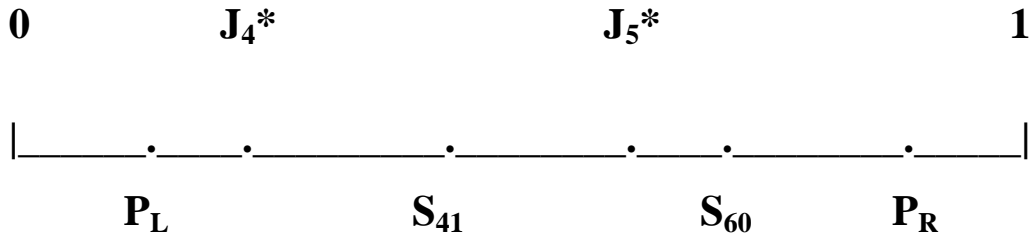


Figure 1

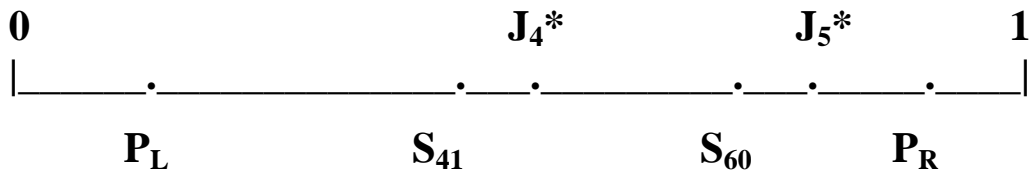


Figure 2

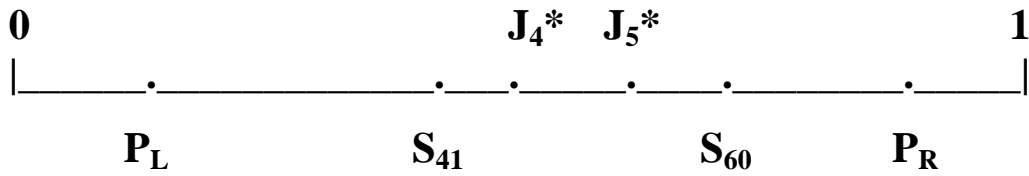


Figure 3

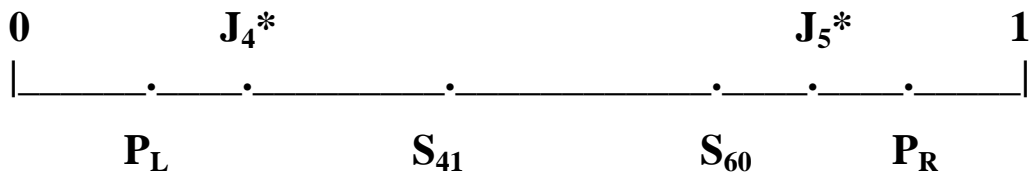


Figure 4

**Table 1. Optimal Nominations and Court Policy Equilibrium in the Advise-and-Consent Game**

| <u>Case</u>                | <u>Presidential Ideal Types</u>           |   |
|----------------------------|---|---|
|                            | $P_L$                                     | $P_R$                                     |
| <b>Disjoint</b>            |   |   |
| 1. $J^* < S$               | gridlock<br>r                             | any nominee<br>$J_5^*$                    |
| 2. $J^* > S$               | any nominee<br>$J_4^*$                    | gridlock<br>r                             |
| <b>Intersecting</b>        |   |   |
| $J_4^* < S_{41}$           |   |   |
| 3. $r \in [J_4^*, S_{41}]$ | gridlock<br>r                             | any nominee ( $J_5^*$ )<br>or $S_{41}(r)$ |
| 4. $r \in [S_{41}, J_5^*]$ | gridlock<br>r                             | gridlock<br>r                             |
| $J_4^* > S_{41}$           |   |   |
| 5. $r \in [S_{60}, J_5^*]$ | any nominee ( $J_4^*$ )<br>or $S_{60}(r)$ | gridlock<br>r                             |
| 6. $r \in [J_4^*, S_{60}]$ | gridlock<br>r                             | gridlock<br>r                             |
| <b>Subset</b>              |   |   |
| 7. $J^* \subset S$         | gridlock<br>r                             | gridlock<br>r                             |
| $S \subset J^*$            |   |   |
| 8. $r < S_{41}$            | gridlock<br>r                             | any nominee ( $J_5^*$ )<br>or $S_{41}(r)$ |
| 9. $r \in S$               | gridlock<br>r                             | gridlock<br>r                             |
| 10. $r > S_{60}$           | any nominee ( $J_4^*$ )<br>or $S_{60}(r)$ | gridlock<br>r                             |

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<sup>1</sup> On the general development of the filibuster, see Binder and Smith (1997), and Schickler and Wawro (2006). On gridlock more generally, see Binder (2003).

<sup>2</sup> We abstract away from “holds” and senatorial courtesy, topics explored in the pivotal politics framework by Jacobi (2005).

<sup>3</sup> This was not to occur by a formal change in Rule 22, as happened in 1975. Any such attempt to change Rule 22 would almost certainly be filibustered and, exclusively for rules changes, cloture requires a *two-thirds* vote. Rather, the elimination of filibustering of judicial nominees would be accomplished by a reinterpretation of Senate precedents by the Senate President, whose ruling could be sustained by a simple majority.

<sup>4</sup> Even if Rule 22 were eventually revised, either by rules change or reinterpretation of Senate precedents, the analysis presented in the bulk of this paper remains relevant to understand appointments over the last century occurring under more robust filibuster requirements.

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<sup>5</sup>We mention the possibility of *strategic retirement* here, which would endogenize the nomination-inducing event, and discuss it in the concluding section. Impeachment and conviction would also endogenize nomination-inducing events, but we exclude this possibility from the present analysis.

<sup>6</sup>Primo (2002) shows that, except for some knife-edge circumstances, the result of Romer and Rosenthal is robust to both finite and infinite repeated proposals if a given proposal is rejected. What neither Primo, nor Romer and Rosenthal, nor we examine is the circumstance in which there is the probability of a nomination-inducing event in each period of a multi-period process. We discuss this at the end of the present paper.

<sup>7</sup>Moraski and Shipan (1999) early on recognized the potential of a pivotal-politics analysis of Supreme Court appointments, though they did not pursue it in their own work.

<sup>8</sup>Our emphasis on policy motivation is not without consequences. For example, matters of nominee competence are put to one side, even though as an empirical matter they are bound to be of significance. Moreover, we drastically reduce the complexity by focusing on a unidimensional policy model. This prevents us from considering multidimensional phenomena, like tradeoffs across policy dimensions. Nevertheless our approach follows a theoretical tradition in the analysis of agenda-setting pioneered by Romer and Rosenthal and Krehbiel that enables us to identify pivotal politicians, both in the Senate and on the Supreme Court. Krehbiel (1998), in fact, argues strongly for the empirical plausibility of unidimensional models, as do students of elections (see McCarty, Poole, and Rosenthal, 2006).

<sup>9</sup>This may be thought of as a bargaining game among justices over opinion language. The language preferred by the median justice is preferred to any other language by a court majority. For a discussion of this bargaining process and the central role of the majority opinion in it, see

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Rohde and Spaeth (1976). It might be thought that an opinion writer could successfully craft an opinion subject only to the constraint that the median justice prefer it to the existing policy (labeled  $r$  – for reversion policy – below). This would be the case if the opinion writer were in a position to make a “take-it-or-leave-it” offer. However, draft opinions may be “amended” – another justice (including  $J_5$ ) could offer an alternative draft more to  $J_5$ ’s liking. This process of give-and-take in opinion drafts converges to  $J_5$ ’s ideal.

This characterization of opinion bargaining is based on the assumption of unidimensionality. In reality, of course, the written policy in the majority opinion may contain various aspects and thus the policy space would really be multidimensional. This is true of virtually any decision situation, however. The unidimensionality assumption is a simplification for the sake of theoretical tractability. With regard to the opinion, the median justice’s position can be thought of as a summary of the policy language that would produce the case outcome on the merits that the justice favors.

<sup>10</sup> We make no particular assumption about the bargaining that transpires in this eight-person court. Effectively it entails negotiation between the four most liberal justices and the four most conservative. Snyder and Weingast (2000) model this as Rubinstein alternating-offers bargaining with an interior equilibrium. Krehbiel (2004) argues for setting the reversion policy of an eight-member court at the ideal point of the median justice of the previous nine-member court. It would be  $J_4^*$  if a left-of-median justice had left the court,  $J_5^*$  if a right-of-median justice had departed, and an interior point in the interval with  $J_4^*$  and  $J_5^*$  as its endpoints if the median justice had left. Pinning down  $r$  in this way makes a lot of sense, we believe, if the previous court had been in equilibrium. However, neither Krehbiel’s model nor ours incorporates features that capture how the court’s agenda is set. In particular, it is entirely possible that, absent a case

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in a particular substantive area of law, a court's policy will not have moved to the median of the contemporaneous court. Indeed, there are instances when the Supreme Court deliberately bypassed issues for strategic reasons, as when the justices refused to take up challenges to antimiscegenation statutes in the wake of the school desegregation decisions (see Rohde and Spaeth 1976: 197). Thus, the reversion policy need not be at the ideal point of the previous median justice. In our model, we do not pin down  $r$  in this way – and this has some costs in terms of what we can deduce – opting instead for a more generic reversion policy that may either be the legacy from the previous nine-member court or a consequence of subsequent bargaining in an eight-member court.

<sup>11</sup> Note that this discussion permits either of the two possible interpretations about  $r$  described in the previous note. It is possible, as Krehbiel recommends, that policy on a given issue had been updated by the previous nine-member court, so that the reversion policy  $r$  is anticipated to be the previous  $J_5$ . Alternatively, if policy had not been updated, then, as Snyder and Weingast suggest, all actors expect  $r$  to be the result of factional bargaining on the existing eight-member court. What we do not permit are beliefs that the eight-member court will leave  $r$  outside the  $[J_4^*, J_5^*]$  interval, as this would entail the justices leaving prospective bargaining gains on the table, so to speak.

<sup>12</sup> Some readers of previous versions of this analysis have objected that  $r$  is not “really” the reversion point, because if the nomination fails the president will propose another and eventually the vacancy will be filled. This is true, but does not, in our view, affect the characterization of  $r$  as the reversion point. Consider first a substantive justification for this claim. It may be noted that the same thing could be said about the consideration of appropriations bills in Congress. Most appropriations apply for a single fiscal year and, unless a new appropriation is passed,

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reverts to zero. But one might ask if the reversion “really” is zero. If a bill fails, surely another will eventually be proposed and adopted. However, as became apparent in the budget battles of 1995-96 between President Clinton and the Republican Congress, until a later bill is actually adopted, the reversion point of zero spending is real and binding. The same thing is true with regard to Supreme Court decisions, and a central consideration in our analysis is that that strategic fact will affect participants’ calculations.

Notice that, as in the case of zero-appropriation reversion levels in budget politics, a reversion level is not a prediction of what *will* happen, but rather a prediction of what *could* happen. Its anticipation conditions beliefs and actions of politicians. In equilibrium if there is potential gain for a decisive coalition of actors, then the reversion prospect is what keeps their eyes focused on the prize. The brilliant insight of Romer and Rosenthal (1978) is that the worse the reversion, the greater the range of possible attractive outcomes for a decisive coalition (and the greater the advantages that accrue to agenda setters).

We believe that implicit in the doubts about the eight-member court reversion policy we characterize is the questioning of the perfect information assumption and of costless obstruction. So let us clarify by turning to a technical justification for our claim. From a strictly game-theoretic perspective, the subgame following the non-confirmation of a nominee is identical to the original game. Since information is assumed perfect and complete, and all behavior is assumed costless, nothing will have changed following obstruction of a nominee. If agents were rational in the original play of the game, then there is no basis for them behaving differently in the subsequent subgame. For the observer to believe otherwise entails an assumption either that some forms of behavior are costly (and won’t be pursued in the subsequent subgame) or that something has been learned by the failed nomination (and thus strategies will change in the

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subsequent subgame). If the former, then our model must be expanded to take into account costly behavior as in Krehbiel (2004, 2006) theoretically and Johnson and Roberts (2004, 2005) empirically. If the latter, then information was not complete or perfect, with one play of the subgame producing updated beliefs and different behavior in the subsequent subgame. Since our model assumes neither costly behavior nor imperfect information (but see the “Extensions” section), the reversion we identify is appropriate.

Finally, let us note that even though vacancies have not persisted for long periods in the Supreme Court, they have persisted, sometimes for years on end, in the lower federal courts, a development that seems to have increased in frequency with growing polarization in recent years. Such courts *do* function with reduced personnel, rendering decisions, formulating policy, etc. – reversion phenomena much like we have modeled.

<sup>13</sup> This formalizes an observation made by Moraski and Shipan (1999).

<sup>14</sup> The reflection of  $x$  through  $y$  is  $z = 2y - x$ . It is easy to see that  $|y - x| = |z - y|$ , i.e.,  $z$  and  $x$  are equidistant from  $y$ .

<sup>15</sup> We assume that an indifferent senator votes for cloture and for confirmation.

<sup>16</sup> Craig Volden suggested this interpretation.

<sup>17</sup> This is not to say that gridlock never occurs. Indeed, with growing polarization, one might expect it to occur more frequently. As alluded to above, lower court nomination fights in both the Clinton and second Bush presidencies – with parliamentary tactics employed to prevent up-or-down votes – constitute anecdotal evidence in this respect. A number of federal circuits have persisted with unfilled vacancies for quite long periods. Inasmuch as so many Supreme Court nominees are drawn from the pool of federal court judges, it may make sense for opponents of a particular flavor of judge to nip his or her candidacy for the high court in the bud by preventing

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confirmation at the lower-court level. Our thanks to Daniel Carpenter for suggesting this latter possibility to us.

<sup>18</sup> This conclusion does not accommodate the effect *any* appointment may have on the granting of writs of certiorari, i.e., the effect of a new member on the endogenous agenda of the new nine-member court. Our thanks to John Aldrich for raising this interesting point.

<sup>19</sup> The model in Krehbiel (2004) adds an interesting feature. In his model it is costly for the proposer to nominate and fail, and it is costly for confirmers to obstruct. These costs will shape backward induction in the advise-and-consent game, affecting both senatorial voting and presidential nominating. It is worth noting that Krehbiel treats these costs as exogenous. It would be especially interesting in future work to focus carefully on the sources of these costs and how they vary with other features in the environment. In recent empirical work, with the president as proposer, costs are considered in light of presidential popularity, or what is referred to as *presidential capital*. Presidents may be bolder in their nominations, and senators more cautious in their obstruction, when the president is riding high in the polls, has just won a convincing election victory, or has a considerable amount of time left in his term. For this and related discussion, see Romaski and Shipan (1999), and Johnson and Roberts (2004, 2005).

<sup>20</sup> The certainty equivalent of the random variable is the value of the variable that yields a senator utility for certain equal to the expected utility of the random variable.

<sup>21</sup> The scores we employ here for the ideology measure, and for the qualifications measure discussed below, were taken from Epstein, Segal, Spaeth, and Walker (2003), p. 361.

<sup>22</sup> Also see Dixit, Grossman, and Helpman (1997).

<sup>23</sup> Our thanks to Alan Wiseman and Jack Wright for this observation.