

Voting for Justices: Change and Continuity in Confirmation Voting 1937–2010

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The contentiousness of Senate voting on Supreme Court nominations increased dramatically from 1937 to 2010. We identify four potential sources of the increase: (1) changes in the Senate; (2) changes in the nominees; (3) changes in the political environment; and, (4) changes in senators' evaluative criteria. Using new data and improved statistical techniques, we estimate a well-performing model of senators' individual voting choices on Supreme Court nominees. Simulations allow an evaluation of the contribution of the four classes of factors to increased contentiousness. The principal source of increased contentiousness was the combination of increasingly extreme nominees and an increasingly polarized Senate. Also significant was the increased mobilization of interest groups. In sum, increased contentiousness seems largely to reflect the ideological polarization of American political elites.

On June 12, 1941, President Franklin Roosevelt submitted three Supreme Court nominations to the U.S. Senate, appointing Justice Harlan Stone to the position of Chief Justice and James Byrne and Robert Jackson to associate justices.¹ Within a month, all three were confirmed by voice votes in the Senate. Thus, Roosevelt was able to secure a new Chief Justice and replace 22% of the Court's membership seamlessly. Today, even the most "routine" Supreme Court nomination involves months of vetting by the Senate, significant media coverage, interest group activity on both sides, and usually a significant number of nay votes by senators. For instance, despite being a relatively uncontroversial nominee, Elena Kagan's confirmation in 2010 was opposed by 37 senators.

These examples bookend a general trend in Supreme Court confirmation politics over the past three-quarters of a century. Figure 1A depicts the percentage of nay votes cast on every nominee from 1937 to 2010.² The line, which is a locally weighted regression line, shows

a clear increasing tendency for senators to vote against Supreme Court nominees. Thus, confirmation politics are clearly becoming more contentious.

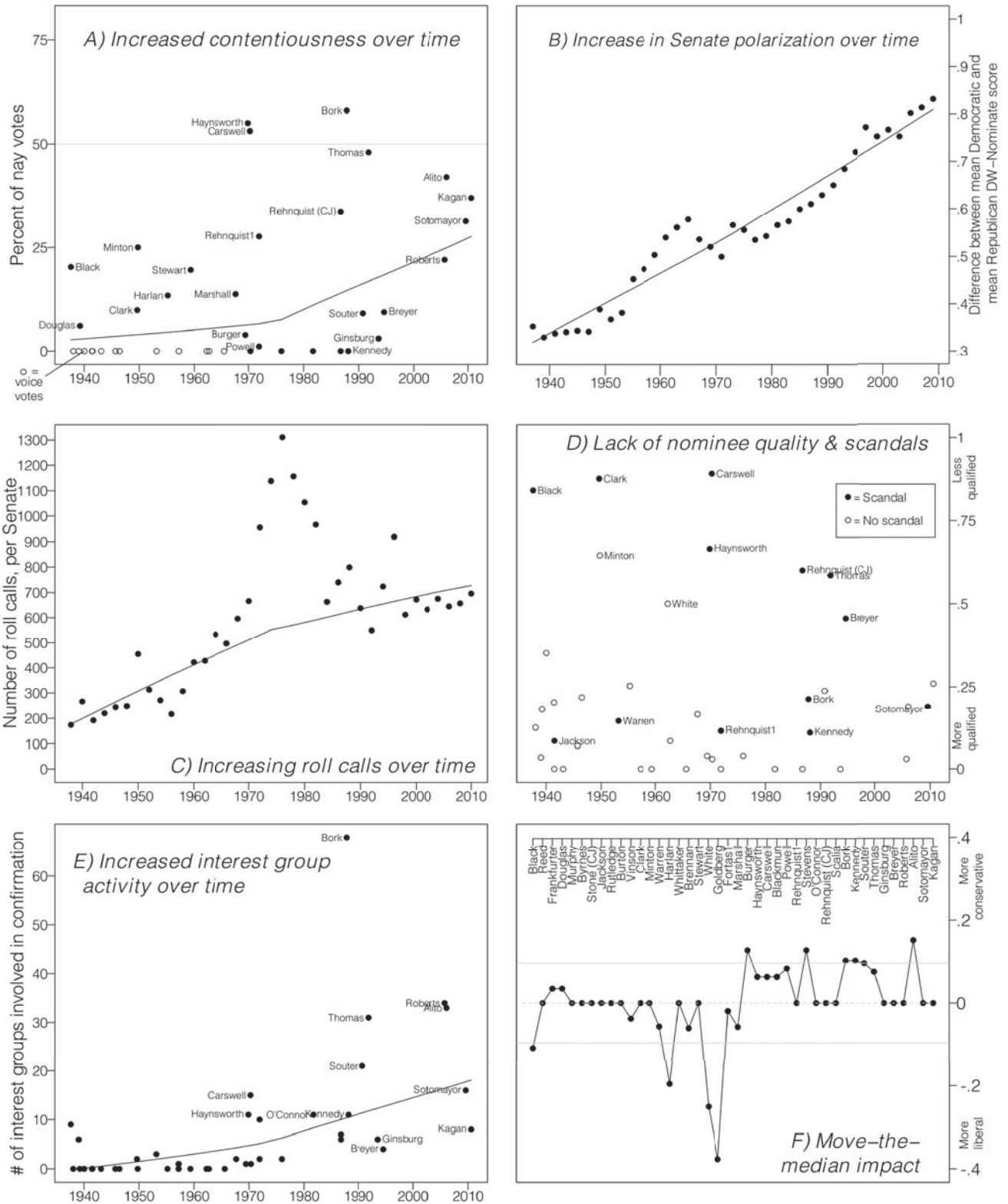
Why has Senate voting on Supreme Court nominees become so much more contentious? Does it reflect changes in the Senate? Or does it reflect changes in the nominees? Is increased contentiousness driven by changes in the evaluative criteria employed by senators? Or does it mirror the growth of ideological interest groups and other changes in society? In this article, we identify four types of changes potentially responsible for the dramatic rise in contentiousness surrounding Senate voting on Supreme Court nominees:

- Changes in the Senate—including the growing ideological polarization of the Senate.
- Changes in the nominees—including the increased ideological extremism of the nominees and changes in their perceived quality.
- Changes in the political environment—including the mobilization of interest groups active in confirmation

¹An online appendix containing supplemental information for this article is available at <http://journals.cambridge.org/jop>. Replication code and data and supporting materials needed to reproduce the numerical results can be found at <http://hdl.handle.net/1902.1/18723>.

²Throughout the article we evaluate the 42 nominees in this time period who received a final confirmation vote by the Senate, including voice votes. Three nominations—Homer Thornberry (1968), Douglas Ginsburg (1987), and Harriet Miers—were withdrawn before they received a vote by the Senate. We exclude Abe Fortas' nomination to become Chief Justice in 1968. Fortas was blocked by a cloture vote and never received a final vote.

FIGURE 1 Changes over Time in Supreme Court Nomination Politics



Note: All lines, except in panel F, are locally weighted regression lines (lowess), with a span of 1. See text for details.

politics and the opportunity to make high-impact move-the-median nominations.

- Changes in senators' evaluative criteria—including the changing significance of race and variation in the importance of ideology as a criterion.

Some of these potential sources have been discussed in previous work. For example, several studies emphasize the role of nominee ideology and qualifications in senators' evaluation of potential justices (especially Cameron, Cover, and Segal (1990) [henceforth CCS]; Epstein et al. (2006); Kstellec, Lax, and Phillips (2010); and Segal, Cameron, and Cover (1992)). Segal, Cameron, and Cover (1992) and Caldeira and Wright (1998) also examine the impact of interest group participation on confirmation voting. Several studies note the changing significance of race in nomination politics (especially Overby et al. 1992, 1994). LeMieux and Stewart (1990) emphasize the importance of "move-the-median" nominees, as does Krehbiel (2007). Nonetheless, many of the possible factors have not been evaluated systematically before, including the racial liberalism of nominees and the heightened ideological polarization of the Senate. No study has evaluated all these factors simultaneously within a unified framework.

In this article, we first review data on each of the factors mentioned above, much of it newly collected. Among the new data are measures of the nominees' racial liberalism (calculated in the second DW-NOMINATE dimension), the number of interest groups involved in all nominations since 1937, and each nominee's move-the-median impact on the Supreme Court calculated in the first (economic liberalism) DW-NOMINATE dimension. We then estimate a multilevel model of individual voting on nominees that incorporates all the identified factors. We evaluate the performance of the model and show that it accounts well for observed vote margins in almost all the nominations over the last 70 years.

Next, we use simulations to evaluate the contribution of each factor to the increased overall contentiousness of confirmation voting. The simulations indicate that the principal sources of this increase were the tendency of presidents to nominate more extreme individuals coupled with the growing ideological polarization of the Senate. Also important has been growing interest group involvement, particularly during high-impact, move-the-median nominations. Finally, we reveal two important trends in the role of ideology in senators' evaluation of nominees. First, in the wake of the Supreme Court's 1954 decision in *Brown v. Board of Education*, the second DW-NOMINATE dimension was highly influential in

the voting calculations of senators, especially Southern Democrats, as the nominees' racial liberalism became an important consideration in confirmation politics. But the first or main dimension returned to a dominant position after the 1960s. In fact, we find that ideological distance on the main dimension has played an unusually important role in explaining the high level of votes against the three most recent nominees to the Court. Our results thus suggest that the increased contentiousness in Supreme Court confirmation politics largely reflects the ideological polarization of American political elites, and contentiousness is only likely to increase further as American politics becomes more polarized.

Sources of Increased Contentiousness

The context of Supreme Court confirmation voting has changed dramatically over the last 70 years. We highlight seven potentially important changes, grouped within four broad categories: changes in the Senate, changes in nominees, changes in the political environment, and changes in senators' evaluative criteria.

Changes in the Senate

Ideological Polarization of Senators. One of the most dramatic developments in contemporary American politics is the ideological polarization of political elites, particularly members of the House and Senate (McCarty, Poole, and Rosenthal 2006). Because ideology is central to Supreme Court nomination politics, this development is potentially of immense consequence because it will increase ideological distances between senators and nominees from the opposite party. Figure 1B depicts polarization in Senate from the 1930s on (the measure employed is the ideological distance between the mean Democratic and mean Republican senator, measured in the first dimension of the DW-NOMINATE space). Polarization in the Senate was low from the late 1930s to the mid-1950s. It then jumped upward somewhat but remained stable until the late 1970s. Since then, however, it has skyrocketed. Current levels of ideological polarization in the Senate resemble those after the Civil War.

Incidence of Roll-Call Votes. Returning to Figure 1A, the open circles depict voice votes, while the solid circles depict roll-call votes. Until the mid-1960s, most votes on Supreme Court nominees were voice votes rather than roll calls. However, this pattern changed dramatically thereafter. More precisely,

from 1937 to 1965, only 29% of the 21 non-withdrawn nominations terminated with a roll-call vote. Since 1965 (from the nomination of Thurgood Marshall in 1967 forward), all 21 non-withdrawn nominees ended with a roll-call vote. Overall, 64% of the 42 non-withdrawn nominations since 1937 resulted in roll-call votes. In this respect, roll-call voting on Supreme Court nominees resembles Senate roll-call voting more generally. As Figure 1C shows, roll-call votes were relative rarities in the Senate from 1937 to 1958, averaging less than 260 per Senate. Beginning with the 86th Congress (1959–60), however, the number of roll-call votes exploded to about 750 per Senate. Thus, in the earlier period, roll calls probably involved matters of particular controversy or visibility; today, even relatively routine matters receive roll-call votes. Potentially this change in roll-call voting could spuriously make the increase in contentiousness look larger than it has in fact been. However, as we discuss below, this does not appear to be the case.

Changes in the Nominees

Ideological Extremity of Nominees. The ideological orientation of nominees appears to be a critical element in senators' voting decision on nominees, arguably the critical element. Therefore, it is important to have a measure of nominee ideology in the same metric as that used to measure senators' ideologies (Epstein et al. 2006). Here we employ Cameron and Park's NOMINATE-scaled Perceptions (NSP) Scores, which project contemporary perceptions of the nominees, derived from content analysis of newspaper editorials, into the first DW-NOMINATE dimension (see Cameron and Park 2009 for details). Figure 2A indicates the NSP Score for each non-withdrawn nominee in the 1937–2010 period. The left-hand panel displays the scores for nominees of Democratic presidents; the right-hand panel those of nominees of Republican presidents. During the 70-year period we study, Democratic presidents tended to nominate individuals perceived as quite liberal, with a few early exceptions. Since the 1940s, Democratic presidents have reliably nominated individuals perceived as liberal. President Eisenhower nominated individuals perceived as moderate, but later Republican presidents increasingly nominated individuals perceived as conservative. At present, the nominees of Democratic and Republican presidents typically display ideologies away from the center of the first-dimension DW-NOMINATE scale. An implication is that nominees are apt to be quite distant ideologically from most senators of the opposite party—especially in recent decades, given the concomitant rise in

polarization in the Senate and the subsequent bimodal distribution of preferences across the two parties.

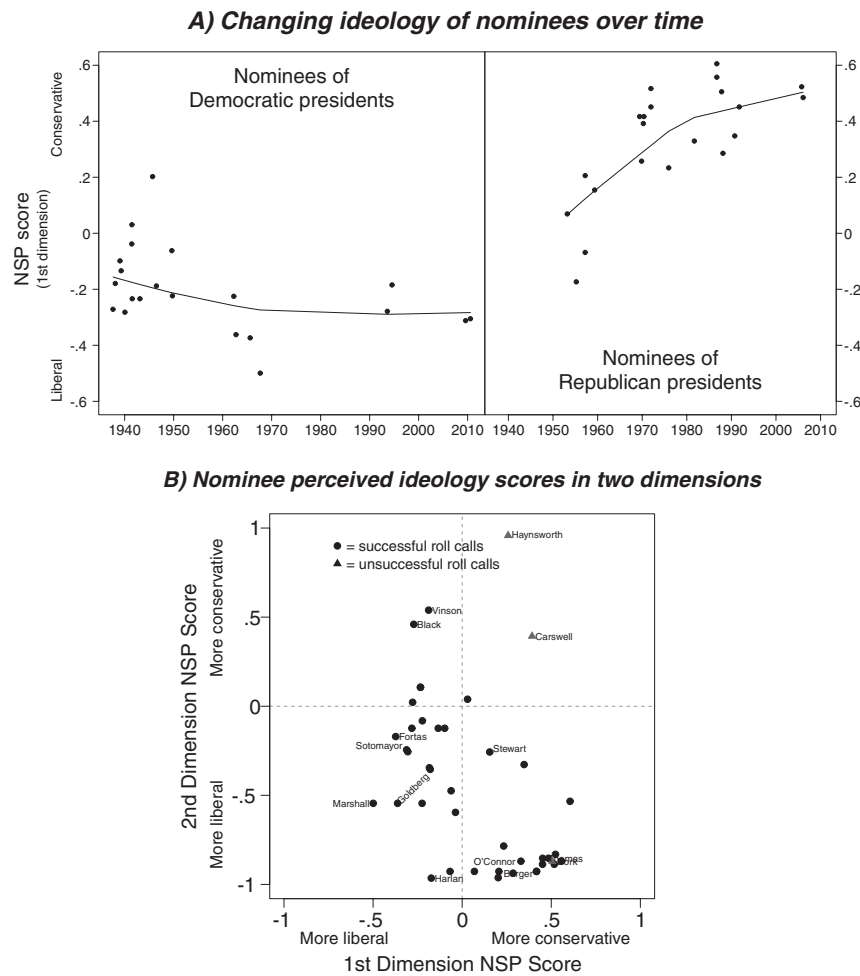
Nominee Quality. Previous research indicates that the perceived quality of nominations strongly affects the voting choices of senators (Cameron, Cover, and Segal 1990; Epstein et al. 2006; Segal, Cameron, and Cover 1992). The most commonly employed measure of perceived quality is derived from content analysis of newspaper editorials (CCS), which we employ. We augment the standard measure of perceived qualifications with a second measure, "accusation of scandal." This measure uses the coding scheme from Cameron, Segal, and Key (2010), who take contemporary accounts in *The New York Times* and *Los Angeles Times* and code them as indicating a scandal (whether supported or not) of unethical or judicially improper behavior. Examples include a nominee who allegedly tried cases in which he had a financial interest, made racist statements, created or belonged to a racially exclusionary club or avowedly racist organization like the KKK, sexually harassed a subordinate, or engaged in extreme partisan actions seen as judicially improper, such as harassing minority voters at the polls.

Figure 1D depicts nominees' perceived *lack of quality* over time and whether they had a scandal. The closed circles depict nominees with scandal, the open circles nominees without scandal. Many observers believe the confirmation process has become harsher over time and hence more likely to damage the perceived quality of nominees. However, as Figure 1D reveals, average levels of perceived lack of nominee quality were almost the same in the first (1937–65) and second (1966–2010) halves of the 1937–2010 period, nor did the variance of the measure increase across the two time periods. On the other hand, in the earlier period only 19% of nominees were accused of scandalous behavior; in the later period, 43% of nominees were, a statistically significant difference. Absent these accusations, perceived nominee quality might well have increased over time. Finally, Figure 1D reveals that while lack of quality and scandal are correlated (at .59), they are not the same thing—Justices Minton and White, for example, were perceived to be relatively low-quality nominees while remaining free of scandal, while Justices Jackson, Warren, and Sotomayor were perceived to be of high quality while undergoing scandals.

Changes in the Political Environment

Interest Group Mobilization. Interest groups have been prominently involved in controversial nominations since at least the 1920s, and perhaps earlier.

FIGURE 2 Nominee Ideology over Time: Changes and Dimensionality



Note: (A) The first-dimension NSP scores of every non-withdrawn nominee from 1937 to 2010. The lines are lowest lines, with a span of 1. (B): Nominee Perceived Ideology Scores in Two Dimensions. Negative numbers indicate economic liberals (first dimension) or racial liberals (second dimension).

However, many commentators have noted an apparent increase in the frequency and intensity of group involvement in politics, including nomination politics, during the last decades (Caldeira and Wright 1998; Schlozman 2010). This increase seems likely to have contributed to rising contentiousness in Supreme Court confirmation politics, as it has in lower court nominations (Scherer, Bartels, and Steigerwalt 2008).

Measuring the involvement of interest groups in Supreme Court nominations over eight decades is not straightforward. Some scholars have employed the number of groups testifying in the hearings as a measure (Segal, Cameron, and Cover 1992). However, testifying requires cooperation from the Judiciary Committee, so such counts probably reflect a combination of group mobilization and Committee hostility to the nominee. As an alternative, we employ a

measure derived from content analysis of all stories in the *Los Angeles Times* covering Supreme Court nominations. The measure is the number of distinct groups mentioned in the newspaper coverage during each nomination.

As shown in Figure 1E, press coverage mentioned relatively few interest groups prior to the Haynsworth nomination in 1969, with the average number of groups mentioned in this period being only two. Subsequently, many more groups were deemed worth mentioning—the average number of groups mentioned increased sevenfold, to 15. The Bork, Thomas, Roberts, and Alito nominations stand out as occasions on which many groups mobilized; also notable were the Haynsworth and Carswell nominations. Even in recent years, interest group mobilization is not invariant. For example, the nominations of Stephen Breyer, Ruth Bader Ginsburg,

and Anthony Kennedy saw little interest group involvement.

Potentially Transformative Nominees. Some nominees alter the position of the median justice on the Supreme Court; others do not. Some analysts have argued that move-the-median nominees ought to have a disproportionate impact on the Court's jurisprudence (Krehbiel 2007; LeMieux and Stewart 1990; Moraski and Shipan 1999). Unfortunately, empirical investigation of this idea remains thin and the findings somewhat contradictory (cf. Baird 2007, 109–10 and Cameron, Park, and Beim 2009). However, if senators *perceive* this to be true, move-the-median nominees may spark unusual contention.

A move-the-median nomination can occur two ways: (1) a nominee on one side of the Court's median justice replaces a sitting justice on the other side of the median, for example, a conservative replaces a liberal; (2) a nominee replaces the median justice himself. Internal promotions to Chief Justice cannot move the median, though the replacement of an exiting Chief may. For the purpose of nomination politics, it is more important whether a nominee was *perceived* to be a move-the-median nominee than whether she actually proved to be one. For example, David Souter—perceived to be a moderate conservative—replaced liberal William Brennan. Souter turned out to be a moderate rather than a conservative and thus was a “maintain-the-median” nominee. Nonetheless, he should have been perceived as a move-the-median nominee at the time of his nomination. Because the NSP scores and the widely used “Judicial Common Space” judicial voting scores (Epstein et al. 2007) are easily scaled into the first DW-NOMINATE dimension, it is relatively straightforward to identify nominees that qualify as *ex ante* move-the-median nominees. The online Appendix A contains additional information on calculating move-the-median nominations.

Figure 1F presents data on perception of nominees' move-the-median impact over time. Each point indicates the change in the location of the median justice that would have resulted from the confirmation of each nominee, assuming she subsequently voted in accord with her NSP Score. Negative numbers indicate a liberal shift in the median; positive numbers a conservative shift. The gray horizontal lines are reference lines, drawn at 0 ± 1 standard deviation in the variable. The graph shows that while most nominees would not have moved the median, a few would likely have been perceived to make a dramatic difference. Goldberg, White, Vinson, Harlan, and Black were potentially liberal transformative nominees. (In the event, Vinson, Harlan, and White did not have the

anticipated liberal impact because their voting behavior was more conservative than their NSP Scores would have suggested.) Alito, Burger, Kennedy, Bork, Souter, Rehnquist, Stevens, Thomas, Blackmun, Carswell, and Haynsworth were potentially conservative transformative nominees. (Souter and Stevens did not have the anticipated conservative impact because their actual voting behavior was more liberal than their NSP Scores would have suggested.)

Changes in Senators' Evaluation Criteria

The Changing Significance of Race. Through most of the period we study, the core issues that have galvanized opposition to Supreme Court nominee have largely been economic or social issues. The earliest nominees we analyze, for example, came to the bench in the wake of the Court's battles over President Roosevelt's New Deal plan. And today, for example, no nominee can escape being asked her views on abortion. Such issues are generally thought to be picked up by the first-dimension DW-NOMINATE score, which thus captures the main dimension in American politics during the period we study (Poole and Rosenthal 1997). Accordingly, most studies of roll-call voting on Supreme Court nominees have focused on the ideological distance between nominees and senators in this first dimension.

However, the middle of the twentieth century witnessed the rise of race as a key issue in American politics. While racial considerations bled into economic issues in general as early as the 1940s (Poole and Rosenthal 1997, 111), questions surrounding race did not take prominence in the Supreme Court's decision making until its landmark 1954 decision of *Brown v. Board of Education*, which initiated the process of desegregating schools. While *Brown* was supported by a majority of Americans, it was overwhelmingly opposed by Southern whites and sparked furious outrage in many parts of the South (Murakami 2008). Thus, the justices' decision in *Brown* firmly thrust the judiciary into the debate over civil rights (Peltason 1961), which in turn meant that future nominees would likely be judged on this dimension as well. Indeed, the next year, Southern Democrats opposed the nomination of John M. Harlan, “contending that he was ‘ultra-liberal,’ hostile to the South [and] dedicated to reforming the Constitution by ‘judicial fiat’” (Abraham 2008, 206).

It is well-established that members of Congress pay close attention to the views of their constituents (Fenno 1978; Mayhew 1974). And we know that senators' systematically follow their constituent views when they vote to approve or reject nominees

(Kastellec, Lax, and Phillips 2010).³ Accordingly, it follows that senators from the South (which, in the middle of the century, were almost all Southern Democrats) would evaluate nominees on their perceived racial ideologies (i.e., on the second DW-NOMINATE dimension), either in addition to or instead of their economic or social liberalism. We know from Overby et al. (1994), for example, that Southern Democratic senators with larger African-American constituencies were *less* likely to support the nomination of Thurgood Marshall, the Court's first black justice, a result attributed to senators' concerns about the views of their white constituents.

We begin with an exploratory analysis in Figure 3 of the possibility that racial considerations systematically influenced senators' evaluative criteria for supporting nominations—conditional on the changing nature of American politics. For the 22 nominees in our study who received a roll-call vote and at least two nay votes, the graphs display senators' estimated ideal points in the two-dimensional DW-NOMINATE space—Northern Democrats are indicated by “D's,” Southern Democrats by “S's,” and Republicans by “R's,” with lower-case letters denoting nay votes. The *x*-axis is the primary, economic/party-based dimension; the *y*-axis is the secondary, race/geographic-related dimension. Also shown is the estimated cutting line that best separates yeas and nays for the roll-call vote on each nominee.⁴

In the 1930s and 1940s, before the Court's decision in *Brown*, we can see that the cutting lines are nearly vertical, with yeas and nays separated primarily along the first, economic, or liberal-conservative dimension. Things change when we examine the confirmations of Justices Harlan, Stewart, and Marshall in the 1950s and 1960s: Harlan's and Stewart's nominations came in the wake of *Brown*, while the 1960s witnessed the high-water mark of the Civil Rights Era. And, as noted above, racial politics unsurprisingly played a role in Marshall's nomination. Compared to the first set of nominees, the cutting lines for the Harlan, Stewart, and Marshall nominations are much more horizontal, with yeas and nays separated primarily or substantially along the second, race-related dimension. In these nomina-

tions, Southern Democrats were much more likely to oppose the nominees than Northern Democrats and Republicans; note the cluster of “s's” at the top of each plot, which is the conservative wing of the second dimension. We see some influence of the second dimension in the Haynsworth and Carswell nominations in 1970. After that, the cutting lines for all nominees returned to the vertical positions. This accords with the general trends in American politics. As Poole and Rosenthal note, following the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, “civil rights could increasingly be accounted for by the first dimension” (1997, 111), and these landmark bills transformed the constituency of the Democratic Party in the South (Rae 1994). By about 1970, the evaluative criteria used by Southern Democrats more closely resembled that used by Northern Democrats (Overby et al. 1992, 1994).

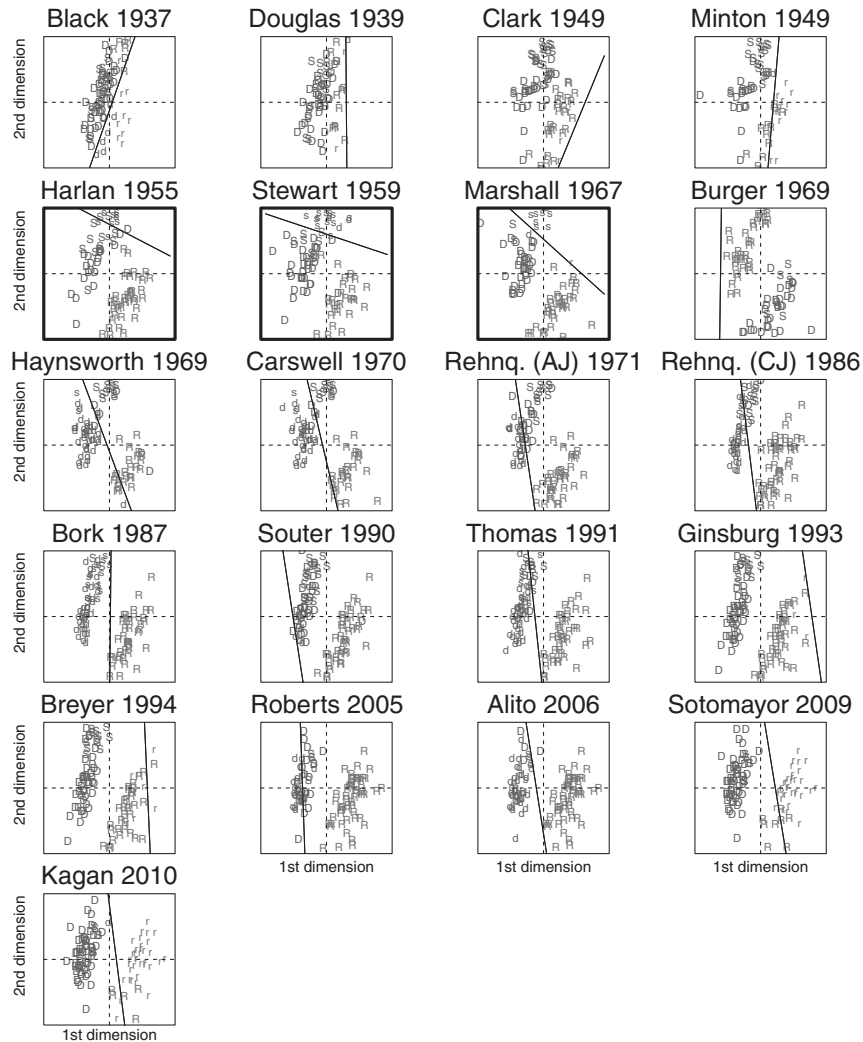
Thus, we find preliminary evidence of the importance of racial considerations in the second period, and we evaluate the effect of the second dimension systematically below. Given this apparent importance, it is important to place Supreme Court nominees on the second, racial dimension. To do so, we employ an inferential procedure based on the second dimension scores of presidents and senators, similar to that used by Giles, Hettinger, and Peppers (2001), to derive first-dimension DW-NOMINATE scores for judges on the U.S. Courts of Appeals. We discuss this procedure in the online Appendix B.

To provide a sense of what the nominees look like across each dimension, Figure 2B depicts a scatterplot of the nominee perception scores in both dimensions. Solid circles indicate successful roll-call votes, while the triangles depict unsuccessful votes. Negative numbers indicate economic liberals (first dimension) or racial liberals (second dimension). The upper-right quadrant contains Haynsworth and Carswell, two economic conservatives who were also racial conservatives/moderates. The upper-left quadrant contains two New Deal nominees who were perceived as economic liberals but racial conservatives (Black and Vinson). The lower-left quadrant contains 20 economic liberals who were racially moderate or liberal (e.g., Goldberg, Fortas, and Sotomayor). This quadrant also contains nominations offered in the wake of *Brown* in which Southern Democrats voted quite differently from Northern Democrats (e.g., Harlan and Marshall). The lower-right quadrant contains nominees who were perceived as economically conservative but racially liberal (e.g., Burger, O'Connor, Thomas). This category includes most recent nominees of Republican presidents.

³We cannot evaluate the role of public opinion in nominations over our 70-year study span since polls were only rarely conducted for nominees before the 1980s.

⁴We created figures based on roll-call data available at <http://www.voteview.com/>. The cutting lines are created by logistically regressing the probability of a yeas vote on each dimension, then estimating the best separating line from the results of each logit.

FIGURE 3 Cutting Lines in NOMINATE Space



Note: Each plot displays senators' estimated ideal points in the two dimensional DW-NOMINATE space. The x-axis is the primary, economic dimension; the y-axis is the secondary, geographic/race related dimension. Shown is the estimated cutting line for the roll-call vote; i.e., the line that best separates yeas and nays. "D's," "S's," and "R's" denote Northern Democratic, Southern Democratic, and Republican senators, respectively; lower case letters denote nay votes.

Modeling Senators' Evaluation of Nominees

In this section, we model senators' individual voting choices on nominees, incorporating all the factors discussed in the previous section. We estimate the model on data from 1937 to 2010 and show that the model's predictions closely track the historic record. To model the relationship between voting on nominees and the variables discussed above, we build on the foundations of the theoretical model developed by CCS. In its basic form, the model assumes senator i votes for nominee j if and only

if i 's utility for j is greater than a random term, that is, $u_{ij} > e_{ij}$. Utility is assumed to decrease mainly in the ideological distance between the senator and nominee, $d_{ij} = \|s_i - n_j\|$, where s_i represents the ideological ideal point of the senator and n_j that of the nominee in the same space. Utility is also affected by the lack of qualifications of the nominee, scandal, and interest group participation—the presence or increase of these is predicted to lead to a *decrease* in the probability of a vote to confirm a nominee.

Empirically estimating this model requires several choices. First, there is the question of how to deal

with the 15 nominees who received voice votes (all of these occurred before 1966). The standard practice in the literature has been to count these votes as unanimous “yeas.” However, the voice votes produce censored observations, where the censoring mechanism is the endogenous choice of the Senate to hold a roll-call vote. In the online Appendix C, we conduct a Heckman analysis of this censoring and conclude that its impact is very small. Accordingly, we follow the standard practice of treating voice votes as unanimous “yeas.” As a robustness check, we replicated all the models that appear here with voice vote nominees excluded. Results were unchanged.

The second choice involves the structure of the data. Roll-call data on Supreme Court nominations (or any vote that takes place in a repeated context) is inherently *multilevel*. The senator constitutes the individual level of the data: i.e., that is where the action of interest (the vote on each nominee) takes place. Each nominee constitutes the group level of the data, with votes clustered within each nominee. Our data contains a combination of individual-level predictors and group-level predictors. At the individual level, we measure the distance between the nominee and the senator in both ideological dimensions; specifically, we employ the quadratic distances between the nominee’s NSP score and the senator’s DW-NOMINATE scores in each dimension (*dist1* and *dist2*, respectively). *Move-the-median* is also an individual-level variable, because the possibility of transformative nominees will likely induce senators who would be predisposed to support the nominee to support her even more, and vice versa. Specifically, *move-the-median* is the ex ante move-the-median impact if the senator is a liberal (has a negative first dimension DW-NOMINATE score) and -1 times the ex ante impact if the senator is a conservative (has a positive DW-NOMINATE score). If liberal senators oppose conservative-movers and support liberal-movers, and conservative senators support conservative-movers and oppose liberal ones, the coefficient on this variable should be negative. Finally, at the group level, we have the variables *lack of quality*, *scandal*, and *interest groups*—each is measured as described above.

The multilevel nature of the data has two implications. First, observations within each nominee are not independent. Second, while the effects of the group-level variables cannot, by definition, vary within nominees, the effects of the individual-level variables can; that is, ideological distance might be a better predictor of voting for some nominees than others. Recent studies of roll-call voting have accounted for the first concern by either adjusting standard errors

(Epstein et al. 2006) or allowing the intercepts for each nominee to vary randomly (i.e., “random intercepts”) (Kastellec, Lax, and Phillips 2010; Shipan 2008), but no study has explored the possibility that the effect of ideology might vary across nominees. We do so by employing a varying-intercept, varying-slope model of confirmation voting that allows the effect of the distance variables to differ within each nominee (i.e., “random effects”). Importantly, this allows us to check whether senators’ evaluative criteria has changed over time, *without* making any arbitrary assumptions about breakpoints in time periods (for example, did the era in which racial politics play a role in nominations end in 1968 or 1970?). Also, it allows: (1) for the inclusion of both group-level predictors and random effects for nominees, something that is not possible with standard fixed effects models; and (2) for information across nominations to be partially pooled.

Formally, let i denote individual votes and n the number of votes in the data, J denote the number of nominees, M the matrix of group-level predictors, and G the vector of coefficients on the group-level predictors.⁵ While, as noted above, *move-the-median* is technically an individual-level predictor, we treat it as a group-level predictor because it takes on a constant value of 0 for most nominees. Table 1 presents the results of several models. Model 1 is a regular logit:

$$\Pr(y_i = 1) = \text{logit}^{-1}(\alpha + \beta_1 \times \text{dist1} + \beta_2 \times \text{dist2} + MG). \quad (1)$$

This model assumes a single intercept for each nominee and a “fixed” (or nonvarying) effect for both distances across all nominees (we employ robust standard errors clustered on the nominee). Model 2 is a multilevel model that allows the intercepts for each nominee to vary:⁶

$$\Pr(y_i = 1) = \text{logit}^{-1}(\alpha_j[i] + \beta_1 \times \text{dist1} + \beta_2 \times \text{dist2}), \quad \text{for } i = 1, \dots, n$$

$$\alpha_j \sim N(\gamma_0 + M_j G, \sigma_\alpha^2), \quad \text{for } j = 1, \dots, J. \quad (2)$$

Model 3 is a multilevel model that allows the intercepts and the distance effects to vary by nominee:

⁵Our notation comes directly from Gelman and Hill (2007, 279–82).

⁶We estimate the multilevel models using the GLMER command in R (Bates, 2005).

$$Pr(y_i = 1) = \text{logit}^{-1}(\alpha_j[i] + \beta_{1j}[i] \times \text{dist1} + \beta_{2j}[i] \times \text{dist2}), \quad \text{for } i = 1, \dots, n$$

$$\begin{pmatrix} \alpha_j \\ \beta_{1j} \\ \beta_{2j} \end{pmatrix} \sim N \left(\begin{pmatrix} \gamma_0^\alpha + M_j G \\ \gamma_0^{\beta_1} \\ \gamma_0^{\beta_2} \end{pmatrix}, \begin{pmatrix} \sigma_\alpha^2 & & \\ \rho_1 \sigma_\alpha \sigma_{\beta_1} & \sigma_{\beta_1}^2 & \\ \rho_2 \sigma_\alpha \sigma_{\beta_2} & \rho_3 \sigma_{\beta_1} \sigma_{\beta_2} & \sigma_{\beta_2}^2 \end{pmatrix} \right), \quad \text{for } j = 1, \dots, J. \quad (3)$$

We begin our evaluation with the group-level predictors. Consistent with prior work, we see that increasing a nominee’s *lack of quality* leads to a significant decrease in the probability of a senator voting to confirm. The presence of a *scandal*, however, does not have a significant effect, suggesting that a nominee’s quality is picking up the effect that a scandal might otherwise have. (*Scandal* is negative and significant in each model when *lack of quality* is omitted.)

Increased *interest group* activity also lowers the probability of a yea vote. Finally, while *move-the-median* is statistically insignificant in the regular logit, it is negative and significant in Models (2) and (3), suggesting that senators do evaluate the nominees’ potential impact on the Court’s median.

Turning to the effect of ideological distance, the coefficients on the distance measures give the average effect of each distance across all nominations.

TABLE 1 Models of the Probability of Senators Supporting a Nominee

	Regular Logit	Varying Intercepts	Varying Intercepts, Varying Slopes	
	(1)	(2)	(3)	(4)
	Coef. (S.E.)	Coef. (S.E.)	Coef. (S.E.)	Coef. (S.E.)
Intercept	5.89* (.71)	10.48* (0.89)	9.07* (.85)	6.54* (.52)
Lack of quality	-4.33* (1.04)	-9.33* (2.45)	-6.50* (1.80)	-5.53* (1.54)
Scandal	-0.14 (0.70)	0.34 (1.50)	0.51 (1.10)	.38 (.95)
Interest groups ^a	-.48* (.10)	-1.05* (0.40)	-0.75* (0.26)	-.65* (.25)
Move-the-median	-1.35 (2.06)	-3.38* (1.49)	-8.01* (2.18)	-5.82* (2.06)
Senator-nominee distance, first dimension	-5.08* (0.81)	-6.87* (0.42)	-6.51* (1.26)	-6.10* (1.03)
Senator-nominee distance, second dimension	-0.24 (0.25)	-0.66* (0.10)	0.61 (0.62)	.58 (.60)
Senator-nominee distance, first dimension × lack of quality				-10.42* (3.18)
Senator-nominee distance, first dimension × interest groups				-1.86* (.67)
Std. dev. of intercepts	–	2.88	1.34	1.09
Std. dev. of 1st-dimension random effects	–	–	5.48	3.47
Std. dev. of 2nd-dimension random effects	–	–	2.83	2.74
N	3,922	3,922	3,922	3,922
% yea votes	87	87	87	87
% correctly classified, all votes	92	95	96	96
% yea votes, non-voice votes	79	79	79	79
% correctly classified, non-voice votes	88	91	94	94
Number of nay votes	511	511	511	511
% correctly classified, nay votes	56	73	82	82

Note: See Figure 4 for depictions of the varying and slopes from Model (3). ^aInterest groups divided by 10 in the data. *p < .05.

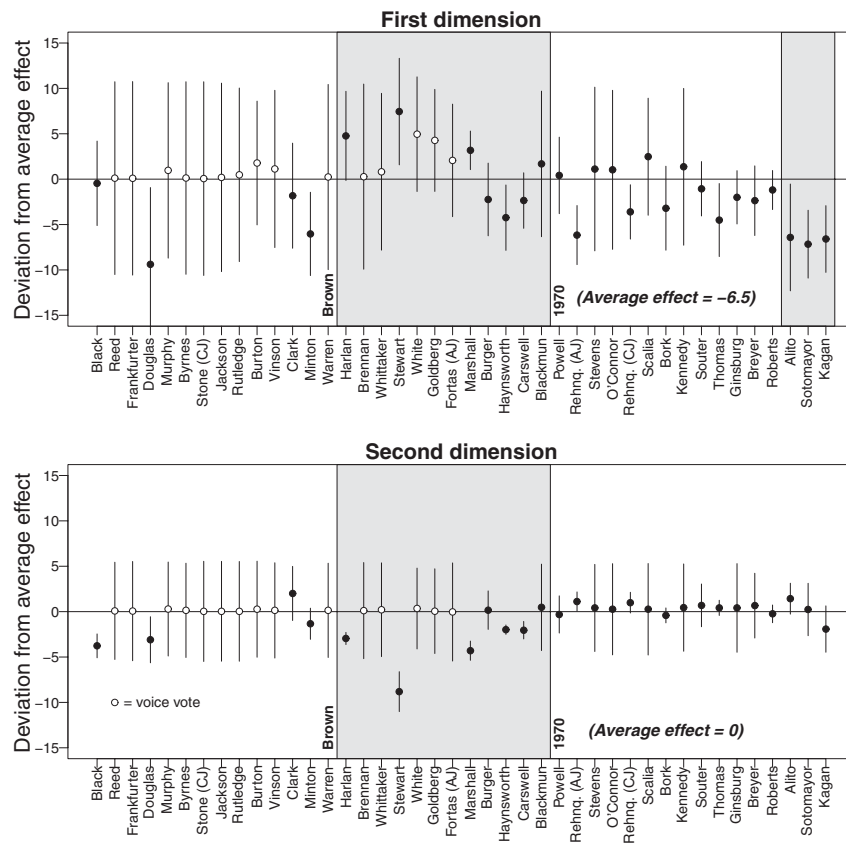
Unsurprisingly, the coefficient on the first-dimension distance is negative and statistically significant. For the second dimension, while the coefficient is negative and statistically significant in the second model, it is essentially zero in Models (1) and (3). In addition, even in Model (2) the magnitude of the coefficient on the second dimension is dwarfed by that of the first dimension. Thus, we conclude that ideological differences between senators and nominees on the first dimension of American politics has played a much more important role in confirmation politics.

Average effects, however, potentially mask important variation across time. To address this issue, we can graphically explore the varying slopes on both distance estimates across time. The panels in Figure 4A depict the varying slopes for ideological distance for each nominee, for both dimensions—that is, whether the nominee-specific slope (or random effect, in terms of a logit coefficient) deviates from the average effect across

all nominees (which is -6.5 for the first dimension and zero for the second dimension). The points depict the varying slopes; open circles denote voice votes, while solid circles depict roll-call votes. Vertical lines depict 95% confidence intervals. If a nominee had a significantly negative varying-slope coefficient, then ideological distance had a greater than average effect; conversely, if the varying-slope coefficient was significantly positive, then distance had a smaller than average effect on voting. Unsurprisingly, none of the varying slopes for voice vote nominees are statistically different from zero, given there is no variation in the dependent variable in these votes.

We can now return to the question of whether racial considerations played a significant role in confirmation politics in the era we would expect them to—the 1950s and 1960s—even when we account for other factors that influence voting on nominees. The bottom graph in Figure 4A depicts the random

FIGURE 4 The Varying Effect of Ideology over Time, on the First and Second Dimensions



Note: The points depict the varying slopes for ideological distance for each nominee, for both dimensions. Each estimate (i.e., logit coefficient) gives the nominee-specific deviation from the average effect for both dimensions, which is negative and statistically significant for the first dimension and zero for the second dimension. Open circles denote voice votes, solid circles roll-call votes. Vertical lines depict 95% confidence intervals. All estimates based on Model (3) in Table 1.

effects for the second-dimension distance across time. Importantly, the only era in which we see systematically significant negative effects on the second-dimension distance is for nominees appointed from 1955 to 1970 (as indicated by the shaded region). For all five nominees who received a roll-call vote and faced significant opposition in this period (Justices Burger and Blackmun received three and zero nay votes, respectively), the varying slope on the second-dimension distance is negative and statistically significant; senators who were distant from the nominee on this dimension were less likely to vote to confirm those nominees. We see particularly large negative slopes for Harlan, Stewart, and Marshall, which is consistent with the evidence on the cutting lines presented earlier. Thus, we conclude that attitudes toward the racial liberalism of the nominees were highly influential in confirmation politics in this period.

Turning to the top graph in Figure 4, we can see that the effect of first-dimension distance has been fairly constant over time, with few statistically significant deviations from the average effect. Many of the nominees with more negative second-dimension coefficients in the 1950s and 1960s had more positive first-dimension coefficients. However, the lack of an overall trend does not imply that ideological differences have a constant impact across time. Because ideological polarization increased dramatically in the Senate, even if the effect of ideological distance on the primary dimension was constant, the increase in Senate polarization would still lead to more votes against confirmation over time, since more senators will be ideologically distant from the nominee. This change could have been mitigated if presidents selected more moderate nominees—but they did not.

This fact makes the following pattern even more striking. As indicated in the second shaded region in the top panel of Figure 4, the last three nominees to the Court (Alito, Sotomayor, and Kagan) all have varying slopes on first-dimension distance that are significantly more negative than the average effect. This indicates that ideological distance played a heightened role in senatorial evaluations of these nominees. Also, examining the varying intercepts from Model (3)—which capture average variation across nominees that is not accounted for by the other predictors in the model—reveals that all three received fewer yea votes than their overall profile of covariates would suggest. Taken together, these results may point to the emergence of an era in which ideology plays an even greater role in senators' evaluation of nominees than was true in the past.

Finally, Model 4 is similar to Model 3, but it also explores the possibility of an interactive effect be-

tween ideological distance on the first dimension and both nominee quality and interest group involvement. (In this model, we center *lack of quality* and *interest groups* at zero, so that the main effect on the distance measures is interpretable as the effect of each when those two variables are at their mean values.) As in the other models, the main effects on *lack of quality*, *interest groups*, and first-dimension distance are negative and statistically significant. In addition, the coefficients on both interactions are negative and statistically significant, meaning that ideological distance between a senator and a nominee leads to an even greater decrease in the probability of a yea vote when a nominee is of lesser quality or when interest groups mobilize. Presidents, of course, can choose high-quality nominees to head off opposition, but interest group mobilization appears to be a permanent feature of modern confirmation politics (if of varying intensity). The combination of polarized politics and increased interest group mobilization leads to even greater contentiousness.

Turning to model performance, the bottom rows of Table 1 present information on the percentage of votes correctly classified. All four models correctly classify more than 90% of the votes, with the varying-intercept, varying-slope models performing best (and equally well). However, since 87% of the votes in our sample were to confirm the nominee, this metric is not very useful. For one, no model is needed to classify the voice votes correctly. The penultimate row examines only nominees with roll-call votes; here 79% of the votes were for confirmation. Model performance drops slightly, but all four models still offer a significant improvement over the modal prediction of yea. The strongest test is how well each model classifies the 511 nay votes that were cast. Here we see a large difference: while the regular logit barely does better than guessing, the three multilevel models offer a large improvement, with the varying-intercept, varying-slope models correctly classifying 82% of nay votes correctly (giving these models an overall classification success rate of 96%).

The Substantive Effects of Interest Group Activity, Senate Polarization, and Nominee Extremism

To analyze the substantive effects of the sources of increased contentiousness discussed in the second section, we create counterfactual scenarios—e.g., suppose presidents had consistently nominated ideological moderates—and then predict each senator's vote in each nomination under the assumed scenario. Aggregating

over senators yields an estimated percent of nay votes for each nomination, and comparisons across scenarios indicate each factor's relative contribution to increased macrocontentiousness over time. We note that varying just one factor, like Senate polarization, is quite artificial since the factors driving Senate polarization probably contributed to increased interest group mobilization and the selection of ideologically extreme nominees as well. In addition, the magnitudes of the changes we simulate are large. Accordingly, even when we vary several factors simultaneously, we do not claim the scenarios are plausible alternatives to the historical reality. Rather, we use the scenarios as an accounting device to identify the most consequential contributors to the increased contentiousness of confirmation voting over time.

Table 2 displays the results of these simulations, which are based on the parameter estimates from Model (3) in Table 1. As baselines, Columns (1) and (2) display the actual percentage of nay votes for each nominee and the percentage of nay votes predicted by Model (3). We can see that the model closely tracks the actual percentage of nay votes and is never off by more than 10 percentage points.

Column (3) in Table 2 asks what would have happened if—all else unchanged—interest groups had eschewed involvement in Supreme Court nominations. This scenario implies little change in the pre-1967 period (compare Columns 2 and 3). This reflects the dearth of interest group mobilization in that era. In the 1967–2010 period, however, the scenario implies larger changes. Estimated nay votes drop more than 15% for the nominations of Clement Haynsworth, Robert Bork, Clarence Thomas, and Samuel Alito. Overall, quiescent interest groups would have depressed estimates of overall contentiousness in the later period from 20% to 15%.

The second counterfactual, presented in Column (4), assumes all else remained the same but the Senate had remained unpolarized. More specifically, the scenario assumes the relatively non-polarized 83rd Senate of 1954 had been in place for all nominations. This Senate was composed of 47 Democrats, 48 Republicans, and one Independent, a remarkably even partisan balance. Moreover, the ideal points of the senators (in the first dimension) followed a unimodal distribution—a sharp contrast to the present-day bimodal distribution. In the pre-1967 period, the model suggests a less massively Democratic Senate than prevailed in 1937 might have voted in greater opposition to the extremely liberal, scandal-plagued Hugo Black. Conversely, Stewart and Minton would have faced less opposition. But the changes in the 1967–2010 period are even more dramatic. A non-polarized, evenly balanced Senate suggests the probable confirmations of Haynsworth, Carswell,

and Bork, a less contentious confirmation for Thomas, and a relatively routine confirmation for Rehnquist to become Chief Justice. Overall, the estimated contentiousness in this period falls from 21% to 15%.

The third scenario, presented in Column (5), keeps all else the same but for each nominee substitutes the ideology on both dimensions of a moderate nominee (that of Chief Justice Stone, whose NSP score on both dimensions is about 0). The “moderate nominee” scenario implies dramatic changes in both periods. The model suggests none of the nominations prior to the Brown decision would have been contentious, with only Black, Minton, and Stewart receiving nay votes. In later years, all nominees would be easily confirmed, with only Haynsworth, Carswell, Bork, Alito and Kagan receiving more than 10 opposing votes.

The final column in Table 2 puts all three counterfactuals together: what would happen with no interest group activity, a non-polarized Senate, and a moderate nominee. Under this scenario, Supreme Court nominations would be nearly completely free of dissent, with on average only one nay vote. In sum, we conclude that the more-than-doubling in contentiousness of Senate voting on Supreme Court nominations was driven primarily by the combination of more extreme nominees and an increasingly polarized Senate. Interest group activity also contributed, but to a lesser extent.

Discussion and Conclusion

What does our analysis of 70 years of Senate voting reveal about change and continuity not only in confirmation voting itself but in American politics more broadly? In our view, changes in Senate confirmation voting highlight or illustrate three broader topics: the changing impact of race in American politics; the “interest group-ification” of American politics; and, the ideological polarization of American political elites. Finally, the simulations we present raise issues about the norms of confirmation and the moderating or centripetal tendencies of American political institutions.

Race. A prominent finding from the empirical analysis is the shifting impact of economics and race within senators' voting calculus on Supreme Court nominees. As we discussed above, Figure 3 shows clearly that economic issues were central in the roll-call votes on nominees from the 1930 and 1940s. This finding is hardly a surprise in light of the Court's role in first opposing, then supporting, New Deal legislation that vastly expanded the federal presence in the economy. Hence, the first dimension

TABLE 2 Actual Nay Votes and Predictions of the Percentage of Nay Votes, by Nominee, under Various Counterfactual Scenarios

Year	Nominee	(1) Actual Percent of No Votes	(2) Model Predictions	(3) No Interest Group Activity	(4) Non-Polarized Senate	(5) Moderate Nominee	(6) No Groups, Non-Polarized, Moderate Nominee
1937	Black	20	13	10	20	5	0
1938	Reed	0	0	0	0	0	0
1939	Frankfurter	0	0	0	0	0	0
1939	Douglas	6	2	2	6	0	3
1940	Murphy	0	0	0	0	0	0
1941	Byrnes	0	0	0	0	0	0
1941	Stone (CJ)	0	0	0	0	0	0
1941	Jackson	0	0	0	0	0	0
1943	Rutledge	0	0	0	0	0	0
1945	Burton	0	0	0	0	0	0
1946	Vinson	0	0	0	0	0	0
1949	Clark	10	0	0	3	0	2
1949	Minton	25	16	16	13	5	4
1953	Warren	0	0	0	0	0	0
1955	Harlan	13	11	11	4	0	0
1957	Brennan	0	0	0	0	0	0
1957	Whittaker	0	0	0	0	0	0
1959	Stewart	20	18	18	12	5	2
1962	White	0	0	0	0	0	0
1962	Goldberg	0	0	0	0	0	0
1965	Fortas (AJ)	0	0	0	0	0	0
1967	Marshall	14	12	12	9	0	0
1969	Burger	4	1	1	2	0	0
1969	Haynsworth	55	52	45	26	13	2
1970	Carswell	53	53	42	29	12	2
1970	Blackmun	0	0	0	0	0	0
1971	Powell	1	0	0	1	0	0
1971	Rehnquist (AJ)	28	28	22	11	0	1
1975	Stevens	0	0	0	0	0	0
1981	O'Connor	0	0	0	0	0	0
1986	Rehnquist (CJ)	34	34	31	21	0	1
1986	Scalia	0	0	0	0	0	0
1987	Bork	58	56	29	36	24	0
1988	Kennedy	0	0	0	0	0	0
1990	Souter	9	4	0	2	0	0
1991	Thomas	48	47	33	22	10	1
1993	Ginsburg	3	4	1	0	0	0
1994	Breyer	9	5	3	1	0	1
2005	Roberts	22	22	0	4	0	0
2006	Alito	42	45	35	22	18	1
2009	Sotomayor	31	32	27	9	4	1
2010	Kagan	37	35	35	14	15	2
	<i>Mean, all years</i>	13	12	9	6	3	1
	<i>Mean, pre-1967</i>	4	3	3	3	1	1
	<i>Mean, post-1967</i>	21	20	15	10	5	1

Note: See text for details.

of the DW-NOMINATE space captured senatorial evaluations of nominees during the New Deal and early post-New Deal periods.⁷ But, in the wake of the Supreme Court's 1954 *Brown* decision, racial liberalism and conservatism assumed center stage. As a result, the second DW-NOMINATE dimension often dominated senators' voting calculations in this period. Concretely, this meant that economically liberal Southern Democrats would often vote against a Supreme Court nominee they perceived as a racial liberal. Beginning about 1970, however, the first dimension, liberalism-conservatism, reasserted itself. Of course racial liberalism remained important in nomination politics (Overby et al. 1992). In addition, new social issues, such as abortion, played an increasingly important role. But, these issues folded into the primary liberalism-conservatism dimension in American politics so that the first dimension increasingly captured senatorial evaluations (Poole and Rosenthal 1997).

How the first dimension came to represent not just economic but racial and social liberalism as well is an important theme in American politics since the 1970s (McCarty, Poole, and Rosenthal 2006). As is well-known, a key part of the story involves the entry of southern Blacks into the electorate as a consequence of the 1964 Voting Rights Act. As a result, Democratic senators from the South increasingly resembled Democratic senators from the North, the Republican Party revived in the South, and southern Republican senators tended to be both economic and racial conservatives (Black and Black 2002). The changing roles of the two NOMINATE dimensions in confirmation voting reflects this process unfolding over time. The end result is that the left-right dimension—now involving a melange of economic, social, and racial issues—dominates contemporary nomination politics.

Interest Groups. The empirical results also highlight the changing role of interest groups in American politics. As shown in Figure 1E, interest group mobilization during nominations has increased greatly since about 1970. Prior to then, large-scale interest group mobilization was a rarity. After that date, and especially after the Bork nomination of 1987, large-scale mobilization became almost routine. The timing of heightened interest group mobilization roughly tracks data on the growth of organized interests in Washington (Schlozman 2010). This growth seems to have been a legacy of social movements in the 1960s and 1970s and the expanded role of government in the 1960s and 1970s (Boyer 2008; Phillips-Fein 2009). An important

development for Supreme Court nominations was the advent of a self-consciously conservative legal movement (Teles 2008).

The simulations show that the new waves of interest group mobilization had a tangible impact on confirmation voting. First, heavy group mobilization seemed directly to alter senatorial evaluation of nominees (see Model 3 in Table 1). In addition, Model 4 provides support for the idea that interest group mobilization increased even further the importance of ideology in senatorial evaluations. Beyond these effects, the empirical results hint at important “indirect” effects. Interest group mobilization is probably implicated in the more frequent—almost routine—accusations of scandal or misconduct that now dog nominees. Interest group concern and mobilization may also be implicated in presidential selection of nominees, especially presidential decisions to eschew centrist nominees in favor of ones more palatable to interest group activists. More broadly, interest group involvement may reframe nominations from a relatively nonpartisan, merit-oriented process into a highly partisan ideological one (Lee 2009). As a result of this reframing, Supreme Court nominations now resemble brief political campaigns. Although speculative, these conjectures about the indirect effects of interest group activity and the resulting drive to turn nominations into political campaigns surely deserve more systematic empirical investigation.

Tandem Polarization. As is well known, and as shown in Figure 1B, the Senate has become vastly more polarized than it was in the 1940s and 1950s. But equally striking is the increased polarization of Supreme Court nominees put forward by presidents, especially Republican presidents since about 1970 (see Figure 2A). As measured in the first DW-NOMINATE dimension, centrist nominees have largely vanished. The contrast with the 1940s and 1950s is dramatic. In short, Supreme Court nominations reveal not just one polarization but two: a *tandem polarization* in both the Senate and the nominees. Obvious questions are: What are the causes of the tandem polarization? And, what are the consequences? The causes of congressional polarization are hotly debated and, we think it fair to say, a consensus remains elusive (Quirk 2011). Much less discussed is the other half of the tandem polarization evident in Supreme Court nominations, the ideological polarization of the nominees. On the one hand, presidential selection of relatively extreme Supreme Court nominees may not be surprising since it is consistent with a picture of ideologically driven presidents. Indeed, agenda-driven presidents are a major

⁷An exception was the nomination of Hugo Black, a Southern liberal who was a former member of the Ku Klux Klan.

topic in recent studies of the presidency (Jacobs and Shapiro 2000; Wood 2009). On the other hand, recent studies of cabinet officials suggest presidents often nominate moderates as well as more extreme individuals (Bertelli and Grose 2011). In that sense, the extreme polarization of Supreme Court nominees presents something of a puzzle. What is special about Supreme Court nominations?

The most immediate consequence of the tandem polarization is the rise of nay voting in confirmations. Other consequences remain more speculative. For example, do polarized nominees inevitably lead to a polarized Court (Clark 2009)? If so, what are the implications for interbranch conflict and legal and constitutional stability? Again, these are very large questions requiring a careful extended analysis, but they almost necessarily present themselves in light of the tandem polarizations of the Senate and the nominees.

Can the Founders Design Force Moderation? The founders constitutional design, in which presidents propose nominees and Congress confirms or rejects them, is “an invitation to struggle.” But what are the bounds of this struggle? Our results suggest that presidents may have to moderate the ideology of their nominees—or face the nominee’s rejection, particularly during divided government.⁸ But will presidents actually offer moderate nominees in order to fill a vacant Supreme Court seat? Or might Supreme Court seats simply remain vacant for extended periods, as now seems to occur for some regulatory bodies like the Federal Reserve? Conversely, if a president persists in nominating relatively extreme individuals, would pressure to fill the vacant seat force Congress to accept such a person, at least after one or more were rejected on purely ideological grounds?

Because the contemporary degree of elite polarization is without recent precedent, the historic experience from the last 70 years of nominations is of little value in answering these speculative questions. The Bork, Haynsworth, and Carswell nominations, for instance, occurred when the degree of polarization in the Senate was much lower. To find Supreme Court nominations occurring under similar levels of polarization, one must turn to the nineteenth century—though whether that historic experience is relevant for today is an obvious issue. But the turbulent nature of Supreme Court nominations in that period—nine out

of 26 nominations (35%) between 1869 and 1895 failed to be confirmed and two more nominees were confirmed by bare margins (see Friedman 1983)—may suggest we are moving into “interesting times.”

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⁸In the online Appendix D, we conduct simulations to predict how moderate a nominee a Republican and Democratic president would have to nominate in order to ensure confirmation during the next divided government nomination, which has not occurred since 1991.

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