EDITED BY
LEE
EPSTEIN
STEFANIE A.
LINDQUIST

The Oxford Handbook *of* U.S. JUDICIAL BEHAVIOR

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2017

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2016961438

ISBN 978–0–19–957989–1

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

In Memory of the Incomparable Harold J. Spaeth

In Memory of Scholar, Mentor and Friend Don Songer

Preface

Some Thoughts on the Future of the Study of Judicial Behavior

With its origins in the works of C. Herman Pritchett in the 1940s and Walter F. Murphy, Glendon Schubert, Harold J. Spaeth, and S. Sidney Ulmer (among others) in the 1950s and 1960s, the study of judicial behavior is now an established field in political science and, increasingly in law, history, sociology, psychology, and economics. Written by leading scholars, the chapters in this volume show off the interdisciplinary nature of the factors and institutional dynamic(s) that shape the choices judges make. We hope they offer useful roadmaps to those who are new to the field, and that they provide veteran scholars with ideas for fruitful directions for future research. So too, although the chapters focus exclusively on state and federal American courts, they illuminate theories and perspectives on judicial behavior and provide insights that might assist or inspire comparative research outside the United States. In short, we hope that these chapters push along study in this area by illustrating where we have been and where our scholarly travels might take us.

We have divided the Handbook into five parts. Part 1 focuses on the critical issue of staffing the courts. In her chapter on federal judicial appointments in the lower federal courts, Nancy Scherer explores the changing dynamics and forces that have affected the nomination and confirmation process over time. Chapter 2 shifts to the U.S. Supreme Court. Christine Nemacheck explains the strategies that presidents have used to secure their preferred appointments—including how they anticipate and manage the preferences of senators who must confirm the presidents' choices. James Gibson and Michael Nelson move us from the federal bench to state judges, many of whom must be elected and re-elected to retain their jobs. Gibson and Nelson describe and explain how institutional, electoral, and behavioral factors in the context of judicial elections affect the nature of decisions those state court judges make.

Once appointed or elected, judges must make decisions about when to step down (unless, of course, they are forced to do so because of an electoral defeat, impeachment, illness, or death). In his comprehensive chapter on the factors that affect federal judges' decisions to depart or retire from the bench, Albert Yoon reviews the literature

and presents data demonstrating the effect of personal and institutional factors on federal judges' decisions to leave active status. Judges are not the only court personnel who influence legal outcomes; judges' law clerks also have the potential to shape judicial decisions through the process of advising their judges. Artemus Ward's essay reviews the key decision-making stages in which clerks participate, concluding ultimately that while clerks exercise some influence, it is more modest than we might think.

Part 2 includes four chapters that address the process of appellate review, with emphasis on access to courts and oral argument. Christina Boyd's chapter on access to trial courts highlights the complex dynamics associated with case filings, settlements, and plea bargains—and the influence of parties and lawyers on these key stages in the litigation process. Losers in the trial courts may appeal to an appellate court, though such an appeal does not guarantee that the higher court will grant full review of the lower court judgment. Donald Songer and Susan Haire's chapter on access to intermediate appellate courts explores the calculations made by litigants in deciding whether to appeal, as well as the influence of jurisdictional constraints and other factors on the likelihood and scope of appellate review. Next, Ryan Owens and Joe Sieja take up the process of case selection in the U.S. Supreme Court, focusing on four possible explanations of why the justices grant or deny review. Timothy Johnson explores procedures that govern the litigation process, from trial to appellate review, with a particular focus on variations in procedures across appellate courts. He also explores how oral arguments have the potential to affect case outcomes in the U.S. Supreme Court. Finally, Pam Corley's chapter on opinion writing in the U.S. Supreme Court highlights how bargaining between the justices over opinion content—in combination with the options available to the justices in concurring, dissenting, or joining the majority—ultimately affects the nature of legal rules and holdings.

Chapters in Part 3 take up the core question: How do judges make decisions and what influences their votes? The first two chapters focus on the influence of law and precedent on the outcome of cases. For the sake of efficiency and predictability lower courts are expected to follow the legal principles and interpretations articulated by courts higher in the appellate hierarchy. Thomas Hansford's chapter explores the influence of top-down *stare decisis*, as well as the potential for bottom-up influences on judicial policy-making. David Klein also stresses the influence of law and legal doctrine on court decision-making—an area that has been particularly challenging for social scientists who seek to distinguish between the effects of legalistic versus more political factors. Professor Klein suggests a new strategy for meeting that challenge. Judges may also be strategic as they shape judicial policy in anticipation of reactions from political actors who have the potential to constrain the courts through budgetary and other oversight processes. Chad Westerland's chapter reviews the literature on the U.S. system of separated powers, with emphasis on how it may create an institutional context that causes judges to act strategically under particular circumstances. Tom Clark's chapter is related. He explores both normative and empirical theories of judicial review in U.S. courts, noting the implications for non-U.S. courts as judicial review has become prevalent in many other countries.

Part 3 also includes chapters that consider how judges' personal and policy preferences, along with their background experiences and characteristics, influence the way they resolve the cases brought before them. As Tracey George and Taylor Weaver explain, judges bring their own personal and background attributes to the bench; in fact, they are often selected on the basis of those background characteristics. George and Weaver assess theories that seek to explain judicial decisions on the basis of judges' attributes and experiences. Judges' ideological attitudes are among those key characteristics. In their chapter on partisanship and decision-making, Jeffrey Segal and Justine D'Elia-Kueper consider how partisanship—either as a proxy for ideology or as a group affiliation—influences judicial decision-making, and whether the Supreme Court's decisions reflect party polarization. Lee Epstein and Jack Knight conclude this section with a chapter exploring the economic analysis of judicial behavior that posits judges as rational actors motivated by preferences for multiple goals, including leisure time and policy outcomes. Epstein and Knight apply this approach to help explain judicial behavior in a number of different contexts.

Part 4 shifts our attention to external forces and parties that operate to shape the context in which judges reach their decisions, as well as the effect of their decisions. Although we often think about judges' decisions as having an impact on the public by shaping the rule of law, Lawrence Baum points out that judges are influenced by their audiences, including the elites with whom Supreme Court justices, in particular, interact in Washington D.C. Interest groups, so influential in legislative and executive decision-making, also play a vital role in the litigation process, as Jared Perkins and Paul Collins' chapter reminds us. They explain how interest groups, as parties or amicus curiae, can influence case outcomes. Thomas Keck's chapter explores how the courts interact with another key institutional partner: the legislature. Professor Keck demonstrates that although several theories provide leverage on understanding the relationship between U.S. courts and legislatures, an "interbranch" perspective may be the most promising for future scholarship. Similarly, the executive branch has a significant stake in judges' decisions, with its own administrative agencies and lawyers frequent participants in litigation. Jeffrey Yates and Scott Boddery explain how court decisions have shaped the power of the president; and how the president, in turn, has altered court outcomes through appointments and legal arguments made by the Solicitor General. The general public also constitutes a key constituency. Americans' reactions to court decisions can determine the likelihood of compliance and, ultimately, the strength of the rule of law. Rorie Solberg's chapter explains, first, how the media presents court decisions to the public and second, how media coverage may affect the courts' institutional legitimacy. As for public opinion more generally, Joseph Ura and Alison Higgins analyze the reciprocal relationship between court decisions and public opinion, with each influencing the other in the formation of public policy.

Part 4 concludes with Matthew Hall's discussion of judicial impact. As institutions that lack the power of the purse (appropriation) or the sword (enforcement authority), U.S. courts are formally weak institutions relative to the legislature and executive. Hall addresses the conceptual ambiguity associated with the term "impact," and

identifies conditions under which the relevant actors will follow and enforce judicial policies.

This book concludes with three chapters in Part 5 that address methodological issues and approaches in the study of judicial behavior in U.S. courts. Eileen Braman does double duty, exploring both various theoretical approaches from social psychology and behavioral economics and experiments that scholars have used to assess them. Daniel Ho and Michael Morse revisit how we calculate the justices' ideal points. They argue for the inclusion of more nuanced jurisprudential data that recent advancements in the automation of data collection will allow us to collect. Finally, Sarah Benesh reflects upon the influence and impact of Harold J. Spaeth et al.'s widely used U.S. Supreme Court Database; she also offers insights on how scholars can most effectively deploy it to study the justices' decisions.

As you can probably tell by now, all our authors offer exciting opportunities for research in their particular bailiwick. Again, whether you are new to the field or a veteran court scholar, we urge you to consider their ideas; pursuing any one of them could lead to important breakthroughs.

Here we want to conclude by emphasizing a few broader avenues for future research—some on theory and others on design, data, and methods. Beginning with theory, we have two suggestions. The first centers on the way that scholars have long framed their studies of judicial behavior: as a veritable competition between "law versus politics" or among the "attitudinal model" versus the "legal model" versus "strategic accounts."

Although we too have run these races in our work (e.g., George and Epstein 1992; Hettinger, Lindquist, and Martinek 2004), we now think they are unproductive (live and learn!) and should be abandoned. We suggest supplanting the competing model/division approach with a more encompassing and realistic judicial utility function. Baum (1997, 2006), Epstein and Knight (2013), and Epstein, Landes, and Posner (2013) all gesture in this direction. In different ways, they contend that we should take seriously not only the the political scientists' emphasis on ideology and the law community's interest in legalism but also the importance of personal motivations for judicial choice—including job satisfaction, external satisfactions, leisure, income, and promotion, among others.

Actually, we're now to the point where we no longer "should" but must attend to personal motivations. That's because a growing body of empirical evidence demonstrates their importance. Take external satisfactions. Scholars have long posited that judges, no less than academics, care about maximizing their "reputation, prestige, power, influence, and celebrity" (e.g., Drahzoal 1998; Miceli and Cosgel 1994; Shapiro and Levy 1994). This desire could be related to policy goals. But the pursuit of external satisfactions also takes more direct forms such as when judges (and indeed most humans) engage in "reputation-seeking behavior" (Levy 2005). Garoupa and Ginsburg (2015), for example, find that the increasingly global implications of many court cases have paved the way for a competition of sorts among judges and their "teams" for worldwide influence on law. Advancing in this game seems to require competitor-judges to hone their reputations by hobnobbing at conferences, teaching abroad, and considering developments

elsewhere (see also Breyer 2015). Likewise, in explaining Benjamin Cardozo's fame, Posner (1990: 132) shows that the judge/justice "cultivated the good opinion of academics" by regularly citing to their work in his opinions. Cardozo was also far more likely than his colleagues to cite to the opinions of other judges thus fostering their good will as well. Finally, Baum (2006) and Davis (2011) offer some evidence of Supreme Court justices adjusting their behavior to conform to the preferences of "reputation creators" and "esteem grantors" (Schauer 2000: 629).

Collapsing the various distinctions we have long made (e.g., law versus politics) and simultaneously expanding the set of relevant preferences will help us account for these and the many judicial choices that we simply ignore because they are neither about law nor politics—whether the tendency of busy trial court judges to apply access doctrines more strictly than judges with lower workloads; or the inclination of judges with some potential for promotion (the "auditioners") to impose harsher sentences on criminal defendants, all else equal. Proceeding in this way will also allow us to adapt (or weight) preferences depending on the institutional context in which the judge works. Epstein, Landes, and Posner (2013: 103), for example, offer a simpler utility function for Supreme Court justices than for all other federal judges because the justices can't be promoted to a higher court and have such a large staff (relative to their workload) that "leisure activities and nonjudicial work activities are not significantly constrained by [their] judicial duties."

Note that our suggestion of reconceptualizing judicial preferences does not require a change in a key assumption in many studies: that judges are rational actors (meaning they make decisions consistent with their goals and interests). We believe this is a reasonable assumption, and one that gets us pretty far in developing explanations of judicial behavior. But it's hardly infallible, as Epstein and Knight note in their chapter. The problem is that scores of studies tell us that that in many situations, people—judges not excepted—have difficulty suppressing or converting their intuitions, prejudices, sympathies, and the like into rational decisions (see generally Thaler 2015; Kahneman 2011; on judges, see, e.g., Guthrie et al. 2007; Wistrich et al. 2015).

Which brings us to a second suggestion: We need to take seriously these studies and assess the extent to which non-rational factors alter what we would expect to see if we assume that judges act rationally. Again, Epstein and Knight say as much in their chapter; and we take note of some limited moves in this direction (see, e.g., Owens 2010)—but not nearly enough. We strongly advocate more studies along these lines, whether observational or experimental.

These are some theoretical suggestions. On the design and empirical ends, we think it obvious that we should continue to expand the targets of inquiry. Even today U.S. Supreme Court justices and federal appellate court judges receive the lions' share of attention. We should set our sights on trial court judges (state and federal) and also, despite the Handbook's focus on the United States, on judges abroad for many reasons, including the illumination of the behavior of U.S. judges.

Following from our theoretical suggestion about rethinking judicial preferences, we also want to encourage readers to expand the set of judicial choices. Back in the 1960s

when the systematic study of judicial behavior exploded (see e.g., Schubert 1965; Spaeth 1963; Ulmer 1962), scholars focused on the judges' votes or the dispositions of cases. That emphasis continues today, and with good reason: dispositions and votes matter a lot. But because other aspects of judicial behavior matter too our focus should be far broader. To provide just one example: What with many courts/governments (here and abroad) making judicial decisions available online (coupled with advances in the systematic analysis of text), opportunities now abound for the rigorous study of judicial opinions. Work has already begun (e.g., Black et al. 2016; Corley and Wedeking 2014); and more sophisticated efforts will soon follow as scholars move away from canned one-size-fits-all software and libraries to tools more tailored to our needs.

As we develop new research questions and construct new sources of data to answer them, we must be mindful of the way we design our work and conduct our analysis. Many studies of judicial behavior seek to establish causal relationships, for example, war triggers justices to favor the government in cases of rights and liberties, fear of losing a judicial election causes judges to impose harsher sentences on criminal defendants, concerns about enforcement lead judges to write vague opinions, and on and on. Attention to how to make and test causal claims have become obsessions among political scientists and economists but not so much among scholars of judicial behavior. For example, we can identify only a few studies (e.g., Epstein et al. 2005; Boyd et al. 2010; Black and Owens 2012) that make explicit use of the potential outcomes framework (which emphasizes the counterfactual nature of casual inference; see, e.g., Rubin 1974; Ho and Rubin 2011)—despite its domination in "statistical thinking about causality" over the last two decades or so (Keele 2015: 314).

We could point to other related gaps (e.g., inattentiveness to identification strategies). But rather than belabor the point (or sound like the causal inference cops now terrorizing political science), we'll conclude with the good news: We should embrace, not evade, the challenge of designing studies for credible causal inference; and we should take up, not dismiss, the equally demanding challenges our authors present. As their chapters reveal, meeting them in the past has led to enormous progress; no doubt we'll say the same about the current crop in the next edition of the Handbook.

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Acknowledgments

This project would not have been possible without the cooperation of our outstanding contributors, whose patience and hard work we greatly appreciate. Several other individuals also made this volume possible. First, we thank our Graduate Assistant Thomas K. Valentine, who served as the Technical and Project Editor for this volume and remained dedicated to ensuring that the authors were supported through the drafting process and that the administrative tasks associated with an edited volume were completed. We are grateful for his persistence and dedication to detail. We also thank Olivia Wells, Assistant Commissioning Editor for Oxford University Press, for her great care and helpfulness in completing this volume. Finally, we note, with sadness, that one of our contributors, Professor Donald Songer, passed away before the volume went to press. Don was a wonderful colleague and mentor and a creative scholar in the field of Law and Courts and we are so pleased that his work is included here (co-authored with Susan Haire).

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ABA	American Bar Association
ACA	Patient Protection and Affordable Care Act
ACLU	American Civil Liberties Union
ACS	American Constitution Society
ADA	Americans for Democratic Action
ADR	Alternative Dispute Resolution
AEDPA	Antiterrorism and Effective Death Penalty Act
CFR	call for a response
CVSG	call for the views of the Solicitor General
CRT	Cognitive Reflection Test
FDR	Franklin Delano Roosevelt
FELA	Federal Employee Liability Act
FICA	Federal Insurance Contributions Act
FJC	Federal Judicial Center
FMLA	Family Medical Leave Act
FRAP	Federal Rules of Appellate Procedure
FTC	Federal Trade Commission
GSS	General Social Survey
GVR	grant, vacate, and remand
IAT	Implicit Associations Test
IRT	item response theoretic
JCS	Judicial Common Space
LDF	Legal Defense Fund
MCMC	Markov Chain Monte Carlo
MQ	Martin-Quinn
NAACP	National Association for the Advancement of Colored People
NOW	National Organization for Women
NRA	National Rifle Association

NSF	National Science Foundation
OSG	Office of the Solicitor General
PAIJD	party-adjusted judicial ideology
PLRA	Prison Litigation Reform Act
QPC	*question prioritaire de constitutionnalité*
SG	Solicitor General
SOP	separation of powers
SSA	Social Security Act
SCDB	Supreme Court Judicial Database
WL	Westlaw

List of Contributors

Lawrence Baum is Professor of Political Science at Ohio State University.

Sara C. Benesh is Associate Professor of Political Science at the University of Wisconsin, Milwaukee.

Scott Boddery is Visiting Assistant Professor of Political Science at Davidson College.

Christina L. Boyd is Associate Professor of Political Science at the University of Georgia.

Eileen Braman is Associate Professor of Political Science at Indiana University, Bloomington.

Tom Clark is the Asa Griggs Candler Professor of Political Science at Emory University.

Paul M. Collins, Jr. is Professor of Political Science at the University of Massachusetts, Amherst.

Pamela C. Corley is Associate Professor of Political Science at Southern Methodist University.

Justine D'Elia-Kueper is a Ph.D. candidate, Political Science at Stony Brook University.

Lee Epstein is the Ethan A. H. Shepley Distinguished University Professor at Washington University in St. Louis.

Tracey E. George is the Charles B. Cox III and Lucy D. Cox Family Chair in Law and Liberty at Vanderbilt University.

James L. Gibson is the Sidney W. Souers Professor of Government at Washington University in St. Louis.

Susan B. Haire is Professor of Political Science at the University of Georgia.

Matthew E. K. Hall is Associate Professor of Political Science at the University of Notre Dame.

Thomas G. Hansford is Associate Professor of Political Science at the University of California, Merced.

Alison Higgins Merrill is a Ph.D. candidate, Political Science at Texas A&M University.

Daniel E. Ho is the William Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School.

Timothy R. Johnson is the Morse Alumni Distinguished Professor of Political Science and Law at the University of Minnesota.

Thomas M. Keck is Professor of Political Science at Syracuse University, Maxwell School of Citizenship and Public Affairs.

David Klein is Professor of Political Science at Eastern Michigan University.

Jack Knight is the Frederic Cleaveland Professor of Law and Political Science at Duke University.

Stephanie A. Lindquist is Deputy Provost and Vice President for Academic Affairs, and Foundation Professor of Law and Politics at Arizona State University.

Michael Morse is a Ph.D. candidate, Government at Harvard University.

Michael J. Nelson is Assistant Professor of Political Science at the Pennsylvania State University.

Christine L. Nemacheck is Associate Professor of Government at the College of William & Mary.

Ryan J. Owens is Professor of Political Science at the University of Wisconsin, Madison.

Jared Perkins is a Ph.D. candidate, Political Science at the University of North Texas.

Nancy Scherer is Associate Professor of Political Science at Wellesley College.

Jeffrey A. Segal is SUNY Distinguished Professor at Stony Brook University.

James Sieja is Visiting Assisting Professor of Government at Skidmore College.

Rorie Solberg is Associate Professor of Political Science at Oregon State University.

Donald R. Songer is Professor of Political Science at the University of South Carolina.

Joseph Daniel Ura is Associate Professor at Texas A&M University.

Artemus Ward is Professor of Political Science at Northern Illinois University.

Taylor Grace Weaver is a 2014 J.D. Graduate of Vanderbilt University.

Chad L. Westerland is Associate Professor of Political Science at the University of Arizona.

Jeffrey L. Yates is Professor of Political Science at Binghamton University.

Albert Yoon is Professor and Chair in Law and Economics at the University of Toronto.

PART I

STAFFING THE COURT

CHAPTER 1

APPOINTING FEDERAL JUDGES

NANCY SCHERER

The Lower Court Appointment Process

Although the Constitution did not create the lower federal courts—i.e., the U.S. Courts of Appeals and the U.S. District Courts—it is clear the Framers contemplated that such courts would exist. Article I, Section 8, expressly accords Congress the power to create "inferior courts." Article III further states:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Not surprisingly, one of the first pieces of business taken up by the First Congress was the creation of the lower federal courts through the Judiciary Act of 1789.

As Article III indicates, these lower court judges were to enjoy life tenure ("shall hold office during good behavior"), just as Supreme Court justices do. However, what was less clear in the Constitution was the manner in which these judges should be chosen. The best we can glean from the Constitution is a clause in Article II that vests in the president the power to make high-level appointments, with the "advice and consent of the Senate." The 1789 Act did little to clarify this point. Instead, George Washington and the First Congress merely followed the procedures laid out in the Constitution for the appointment of Supreme Court justices. It is the interaction of the elected branches with lower court nominations/confirmations that is the subject of this chapter.

For most of our nation's history, judicial politics scholars almost exclusively focused their attention on understanding the interaction of politics and the Supreme Court of

the United States, including appointments to the Court. Significantly less attention has been devoted to understanding the political significance of appointments to the lower federal courts notwithstanding the fact that each president makes *hundreds* of lower court appointments each term, and that the lower federal courts decide *thousands* of cases daily.

Because lower court appointments are regional in nature, each judgeship attached to a particular state, they differ in some important respects from the Supreme Court norms in that home state senators wield more power over the fates of the nominations attached to their states (Steigerwalt 2010). After the president nominates someone, likely in conference with the home state senators,[1] the Senate officially begins its vetting process.

There are several paths to confirmation that a nomination may take (Steigerwalt 2010). At several stages in the process the nomination could be stalled by Senators and ultimately blocked from confirmation (Scherer 2005; Bell 2002a). As detailed below, these tactics are largely driven by interest groups, who do most of the vetting of the nominees on behalf of the senators, signaling their objections to a specific nomination (Aron interview 2002).[2] Though once a process that spanned, from nomination to confirmation, just a matter of weeks, in the last few decades the lower federal court appointment process has grown increasingly divisive and lengthy. There are a host of indicators that point to an increase in the politicization of the lower court appointment process over the past few decades. For example, as set forth in Figure 1.1, the percentage of lower court

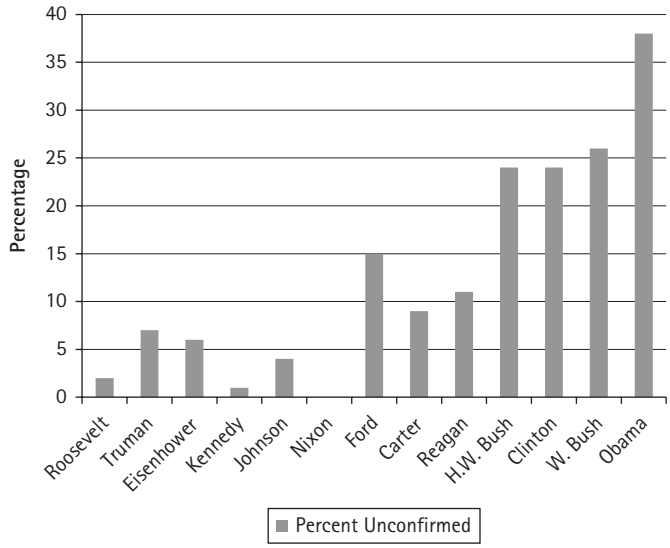

FIGURE 1.1 Percentage of lower court nominations not confirmed by the Senate 1933–2012

Source: Adapted from Scherer, *Scoring Points* (2005) and *The New York Times*, November 15, 2003, at A10. George W. Bush and Obama data obtained through Thomas.org.

Note: The figure for the Ford administration should be seen as an outlier. This is because of the unusual circumstances that put him into office. Twelve of Ford's nineteen months in office were in a presidential election year, when traditionally fewer lower court nominees are confirmed.

nominations *not* confirmed by the Senate has increased dramatically since the Franklin Delano Roosevelt administration, and reached a high water mark of 38 percent in the Obama administration.

Similarly, the average number of days from nomination to confirmation, as well as the median number of days, for lower court judgeships has steadily increased since the Reagan administration. As set forth in Figure 1.2A, the median number of days for an appellate nominee to be confirmed during the Reagan administration was forty-five days; by the G. W. Bush and Obama administrations, that number rose to 216 and 229, respectively. The average number of days for confirmation was highest during the G. W. Bush administration at 350 days.

As seen in Figure 1.2B, the average and median number of days for U.S. District Court judges to be confirmed mimics the pattern seen with courts of appeals nominations. During the Reagan administration it took the median district court nomination merely forty-one days to be confirmed, but 215 days during the Obama administration.

In conjunction with this increased politicization of the lower court appointment process, political scientists have turned their attention to the politics of judicial appointments to the lower courts. Though scholarship on the Supreme Court dominates the field of public law, in the last twenty years, a substantial literature has developed about the presidential appointment process, including the lower federal court appointment process. Books on the issue include Goldman's (1997) historical study of judicial selection from FDR through Reagan; Bell's (2002a) historical analysis of the Senate confirmation process, including lower court judges; Scherer's (2005) book on why there is

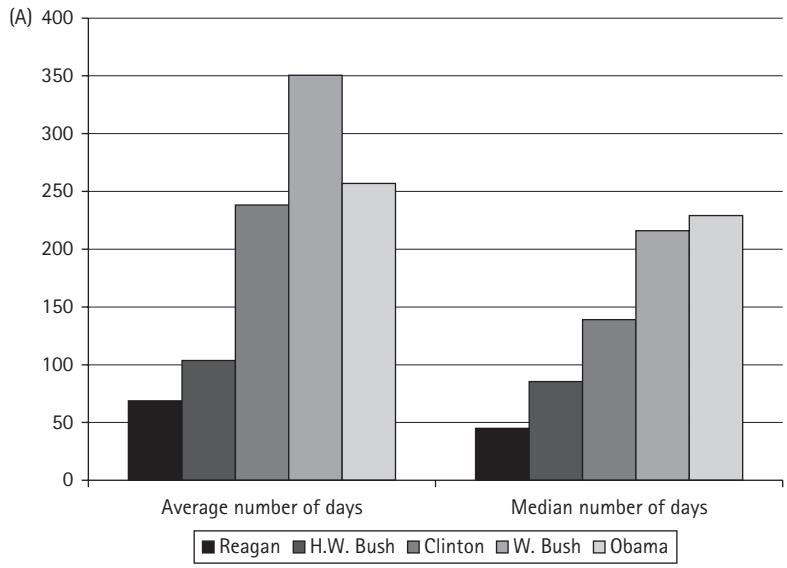

FIGURE 1.2A Average and median number of days from nomination to confirmation on the federal courts of appeals, 1981–January 13, 2013

Source: Brookings Institution, Weaver (2012).

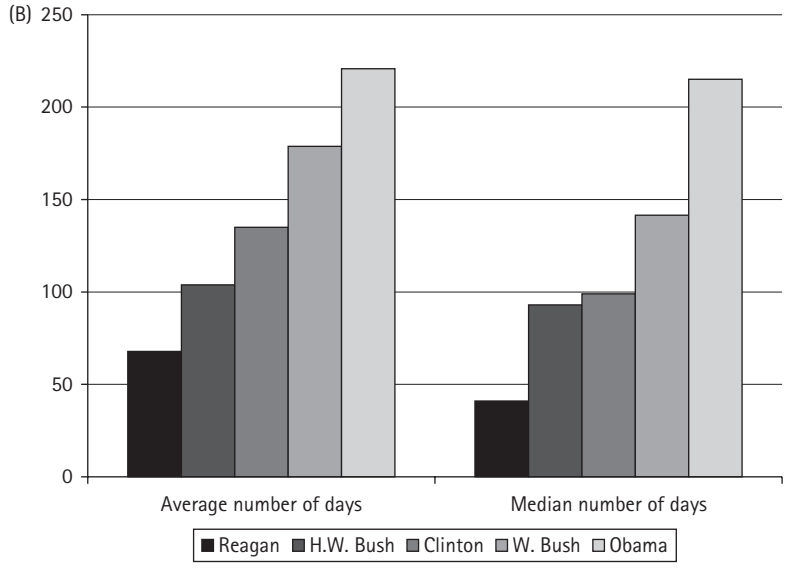

FIGURE 1.2B Average and median number of days from nomination to confirmation on the U.S. district courts, 1981–January 13, 2013

Source: Weaver (2012).

increased politicization of the lower court appointment process; Epstein and Segal's (2006) book focusing on the role of merit and ideology on judicial confirmations, including the lower federal courts; Wawro and Schickler's (2007) historical and theoretical work on the use of filibusters of presidential nominations, including lower court nominations; Graves and Howard's (2009) book on recess appointments to the courts, including lower court nominations; and Steigerwalt's monograph (2010) that maps the paths lower court nominations may take, some on the fast track, some on the slow track to failure.

The number of articles in political science journals devoted specifically to the lower court appointment process has similarly increased, covering a broad array of topics. In terms of nominations to the lower courts, scholars have examined critical pivot points in the Senate that may influence a president's judicial selections (Primo, Binder, and Maltzman 2008). Primo et al. (2008) find that the majority party median and the filibuster pivots best account for confirmation outcomes in both the U.S. District Courts and Courts of Appeals, but more recently, home state senators have influenced district court nominations. There has also been a renewed interest in the presidents' increasing use of lower court recess appointments in the modern political era (Graves and Howard 2010) Graves and Howard studied all recess appointments made from the beginning of the Republic to 2004; they concluded that presidents in the modern political era use recess appointment sparingly and strategically. Much attention has also been paid to the lower court confirmation process in the Senate, since the percentage of nominations unconfirmed, and the span of a confirmation proceeding, has grown substantially.

Because it is rare for senators to win a floor fight to defeat a nominee at roll call,[3] they instead engage in activities intended to delay confirmation of a controversial nomination, and hopefully make the nominee withdraw. Troubled lower court nominations are more often "killed" at the pre-floor stage of the confirmation process through a variety of procedural tactics including secret holds, filibusters, and delay of votes (Steigerwalt 2010). Scholars thus argue that the focus of research on lower federal court confirmations should be on the *process* rather than the *votes*.[4] This corpus of research has sought to identify the forces that impact confirmation *timing*; it presumes that the longer it takes to confirm a lower court nomination, the more "troubled" the nomination. Shipan and Shannon (2003: 656) make the most compelling case as to why delaying a nomination is an important end in and of itself, apart from the ultimate confirmation outcome. They argue that, even if a nomination is ultimately confirmed, delay by the Senate may weaken a president's standing with his constituents and thus hinder the president's ability to enact his policy agenda regarding other matters. Moreover, the longer a nomination is delayed, the more likely the nominee will never be confirmed.

Accordingly, scholars started to turn their attention to the factors driving delay in the lower court confirmation process (Bell 2002; Binder and Maltzman 2002; Martinek, Kemper, and Van Winkle 2002). Although all of these duration studies used similar methodological techniques, hazard-based duration models, their models focused on different possible causes for delay. Bell found that having a "patron" on the Judiciary Committee shortened a nominee's confirmation time. Binder and Maltzman's model demonstrated that the nomination's ideological distance from the median senator increases the number of days a nomination will languish before confirmation, if such confirmation happens at all. Martinek et al. established that, under divided government, a nomination will wait longer to be confirmed. One notable variable missing from all of these studies is interest group opposition. Scherer, Bartels, and Steigerwalt (2008) did a similar examination of confirmation durations, but accounted for the impact of opposition from activists.[5] Holmes (2007) also looked at outside influences on judicial confirmations, and found that the more outside written submissions presented to the Senate Judiciary Committee for consideration, the more likely the nomination will fail; this is true regardless if the submissions are favorable or unfavorable.

Since the filibuster became a common procedural tactic for senators to indefinitely delay confirmation of lower court judges, particularly during the Clinton, G. W. Bush, and Obama presidencies (Steigerwalt 2010), scholars began consider the impact of this Senate procedural tactic on lower court confirmations, and the possibility of doing away with filibustering judicial nominations all together, known as the "nuclear" option (Klotz 2004; McGuiness and Rappaport 2005).[6]

In sum, we have a litany of books and articles about different aspects of the lower court appointment process in the modern political era, from nomination to confirmation to appointment. What all of the articles have in common is a focus on the effects of increased politicization of the lower court appointment process. Yet, as an initial matter, the fundamental question that must be addressed here is: *why* did the lower court appointment process become so politically contentious in the first place, particularly

given the low visibility of these offices?[7] The answer lies in the conjunction of historical changes to two U.S. political institutions: the party system and the U.S. courts (Songer 1991).

Transformation of the Old Mass Party System

Prior to 1968, under the old mass party system, parties were loosely connected systems of local party organizations, established to solve the collective action problem that politicians faced in terms of mobilizing voters (Aldrich 1995; Mayhew 1974). There was one critical aspect of the old party system that shaped judicial appointment politics. Because the activists who ran the local party organizations were predominantly interested in obtaining material incentives from politicians—i.e., jobs and contracts in return for helping the candidate get elected—the activists working within the party system were seen as largely non-ideological in nature (Conway and Feigert 1968). Party activists "engage in a conflict without principles, a struggle between the ins and outs which never become fanatical and creates no deep cleavage in the country" (Duverger 1964: 418). Characterized by a pragmatism that made them willing to compromise and strike deals in order to deliver the jobs and contracts they desired for their supporters, these old-line party activists came to be known as "professionals" (Wilson 1962). Second, as little more than a loosely connected group of local organizations, regional conflicts abounded between politicians in Washington, each representing different factions (Aldrich 1995). It was the job of the national organization to find ways to hold together these various factions (Aldrich 1995).

In the 1960s, the old mass party system crumbled (Aldrich 1995). In place of the professionals came ideologically driven political activists known as "amateurs" (Wilson 1962) or "purists" (Wildavsky 1965); these activists were characterized by their unwillingness to compromise on ideological causes (Wildavsky 1965).[8] "Purists consider the stock-in-trade of the politician—compromise and bargaining, conciliating the opposition, bending a little to capture support—to be hypocritical; they prefer a style that relies on the announcement of principles and on moral crusades" (Wildavsky 1965). During the 1960s, purists came to fill the ranks of both the Democratic (liberal purists) and Republican (conservative purists) Parties (Polsby and Wildavsky 1971). Although activists in the parties had become more unified, mass voters were becoming less enchanted with the two major parties. In short, fewer Americans began identifying themselves as a Democrat or a Republican (Rosenstone and Hansen 1996). This meant that the two major political parties were less capable of mobilizing voters on behalf of political candidates—the very reason they were originally conceived in the early nineteenth century (Aldrich 1995). Picking up much of the slack in national elections were interest groups (Frymer and Yoon 2002; Gibson, Frendreis, and Vertz 1987; Grossman and

Dominguez 2009). Determined to exercise influence over the outcomes of important federal elections, interest groups began spending millions of dollars on campaign advertising aimed at mobilizing voters to support their favored candidates (Frymer and Yoon 2002). Interest groups also began to contribute volunteers and money to their preferred candidates (Gibson, Frendreis, and Vertz, 1987).

By the 1970s, the old mass party system had transformed into the modern party system. According to John Zaller, political parties cater to interest groups because "the public isn't watching, and the interest groups are watching" (quoted in Griffiths 2012). What does party politics have to do with federal court appointments? Under both the old and modern party systems, party activists closely monitored the selection of lower court judges. But, while local party activists under the old party system viewed lower court judgeships as jobs to be distributed to friends and campaign contributors, in the modern political era, party and issue activists view judicial appointments as having crucial policy consequences. Why did lower federal court judgeships begin to figure into the policy goals of the new breed of political activists? The reason turns on the second historic event in American politics to occur during the 1950s–60s period: the transformation of the federal judiciary.

Transformation of the Federal Judiciary

At the same time that the political parties were undergoing seismic changes, federal courts were undergoing major changes as well; they began, once again to engage in social policy-making, only this time it was liberal social policy.[9] As Epp (1998) explains, rights-oriented litigation by interest groups did not begin in the 1960s, it began earlier in the twentieth century; however, there is little doubt that liberal interest groups *intensified* their litigation strategy in the 1960s–70s. Under the leadership of Chief Justice Earl Warren, however, liberal interest groups like the NAACP and the ACLU sensed that the Court was now sympathetic to the claims of liberal activists for broader constitutional protections for individuals, particularly minorities denied civil rights and liberties in Southern states (Epp 1998). These groups correctly gauged the Court's trajectory, as justices during the Warren Court era (Silverstein 1994) significantly expanded civil rights and civil liberties in accordance with their personal social policy preferences (Segal and Spaeth 1993).[10]

The Warren Court also made it much easier for aggrieved parties to bring lawsuits in federal court (Silverstein 1994). By the end of the 1960s, Congress amended the Federal Rules of Civil Procedure, making it easier to bring class action suits.[11] This included rules on standing so as to afford the federal courts the opportunity to hear the substantive claims of aggrieved groups.

This transformation prompted noted scholar Alexander Bickel to observe that "all too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian

institutions do not (Bickel 1970, at 134)." To this day, conservative activists see this litigation strategy as a means to bypass conservative state legislatures (Pilon interview 2002).

Whether a favorable court order standing alone—without some extra-judicial assistance in implementation—can ever deliver the policy results sought by the claimants has been the subject of much scholarly debate (see, e.g., Horowitz 1977; Rosenberg 1991; Scheingold 1974). Nevertheless, what is important is that, during this period, liberal activists came to share a deep-rooted belief in the efficacy of the federal courts to achieve social change. And they continue to cling to this belief even today. As Nan Aron, president of the Alliance for Justice, a liberal interest group that monitors the U.S. judicial appointments, reaffirms:

> The way our democracy works is that poor people, people of color, disenfranchised people, [and] women have very little recourse to the Executive Branch. They don't make contributions to Democratic or Republican presidential campaigns. They tend not to know people in power. And, therefore, [they] have very little access to the executives … of the world. They have almost no access to members of Congress because they clearly don't contribute to congressional or senate races. The only recourse they have is to the judiciary. It's the only branch of government that will hear … cases brought by people without power … This is the only branch whereby a disenfranchised person or group has any ability to have redress for grievances.
>
> (Aron interview 2002)

In sum, the rights revolution of the 1950s–70s encompassed three broad areas of constitutional rights: race, crime, and women's rights. After *Roe v. Wade*,[12] counter-activists began to use the courts to undermine the rights accorded women in *Roe* (Epstein 1985). Thus, conservatives, too, turned to the Court to create social policy. At first, they were met with a liberal majority, but eventually the Court had a majority of justices willing to make conservative social policy.[13] Critically, the Court makes social policy in the very same issues with which the Democratic and Republican Parties' new issue-oriented activists, who had emerged in the 1960s, were concerned.

Activists Begin to Want the "Right" Kind of Judges Appointed

Given these institutional changes to the U.S. political system, critical new demands for certain kinds of judicial appointments were made. Under the earlier regime, party activists demanded only that the president and senators seat campaign contributors and friends on the lower federal courts (i.e., patronage), producing nominations that lacked much party polarization; newly emerging policy-oriented activists had different priorities. Though they understand why a politician may want to reward a big contributor to his or her previous election campaign, the new breed of activists, on both the left and right, do not believe patronage concerns should detract from the main goal

of appointing judges who can be depended on to further the president's policy agenda. What that means is that only patrons who are known to share the activists' commitment to certain policy outcomes are now acceptable to serve on the federal courts (Aron 2002). What we now see are party-polarized nominations who in turn engage in party-polarized voting on the bench.

In her 2005 book, *Scoring Points*, Scherer looks at the judicial decision-making behavior of judges from three distinct time periods in order to establish whether party transformation is, as her theory posits, at the heart of modern-day appointment politics. The hypothesis is that, in earlier periods in history there will be less ideological voting (because judgeships were based on patronage, not ideology) than there is today, when interest groups demand ideologically pure appointments. The three periods are The Old Party System (judges appointed 1921–44), the Party System in Transition (judges appointed 1945–67) and the Modern Party System (1968–2000). She theorized that, in the two early periods, there would be no significant difference between Republican- and Democratic-appointed judges (even though Democrats and Republicans in Washington sharply disagreed on these issues) and in the modern era, there would be a significant difference in the voting patterns of Democratic and Republican-appointed judges, mimicking the party positions of the elected branches.

Set forth in Table 1.1 are the differences between Democratic and Republican-appointed judges in each of the three periods; the numbers are predictions of the likelihood of a liberal vote. And, in order to rule out the fact that Southern Democrats shifted

Table 1.1 Comparison of judicial voting by party of appointing president: Greater likelihood of Republican-appointed judge casting a conservative vote compared to Democratic-appointed judge, U.S. Courts of Appeals

	Old Party system	Party in transition		Modern party system	
	Labor cases	Race discrimination cases		Race discrimination cases	Abortion cases
	Judicial appointees from:	Judicial appointees from:		Judicial appointees from:	Judicial appointees from:
	1920–44	1953–63	1964–74	1977–2000	1977–2000
All circuits	.07	–.05	.17**	.27**	.44**
Non-Southern circuits	.05	–.04	.16*	.26**	.45**
Southern circuits	.12	–.06	.18*	.27**	.42**

Note: *** $p \leq .001$; ** $p \leq .01$; * $p \leq .10$ (all two-tailed test).

to the Republican Party beginning in the 1960s, which is an alternative hypothesis as to why Democrats became more liberal during this period of transition—in other words, as Southerners left the Party, Democrats became more liberal—and could also explain why there is more party–polarized voting in the modern political era, Table 1.1 shows that the results remain the same with and without Southern Democrats in the Democratic and Republican Parties.[14]

Activists, both on the left and right, discourage patronage nominations. As one liberal activist, Nan Aron, stated, "If the [Clinton] administration nominates candidates who lack a sensitivity and commitment to constitutional principles, we will work hard to make our voice heard" (Aron, quoted in Klaidman 1993). A conservative activist would go further than Aron; he would eliminate patronage completely from the judicial selection process (Jipping 2002). His idea to ensure ideological purists are nominated is to bar home state senators and local party leaders from suggesting names to the president for vacancies on the courts. Jipping believes it detracts from the main focus, the judicial philosophy of the nominee (Jipping interview 2002).

As the activists emphasize, what they want is for the president to nominate (or not nominate), and for the Senate to confirm (or not confirm), federal court judges who will be sympathetic to their political causes. Indeed, these activists are so convinced that their desired policy outcomes are dependent on litigation outcomes that, today, seating judges who are sympathetic to their causes, in effect, has become a policy goal unto itself—almost as important as achieving the underlying substantive policy goals at issue. For example, liberal activists spend almost as much time fighting the appointment of pro-life judges as they do fighting pro-life legislation. And, though their desire to secure sympathetic judges originally focused solely on Supreme Court nominations (Silverstein 1994), for a number of reasons, activists began to shift their focus to lower federal court appointments as well.

With regard to the lower courts, most of their attention focuses on the appellate courts; however, activists make clear they monitor judges at all levels of the federal judiciary (e.g., Aron, Gandy, Cavendish, and Jipping interviews 2002). Accordingly, activists monitor all of a president's judicial nominations at all levels of the federal judiciary. Due to the sheer volume of district court appointees every year and the limited resources activists have to monitor these nominations, it makes sense that district court nominations get less attention than courts of appeals nominations.

Activists Shift their Attention from the Supreme Court to the Lower Federal Courts

Why do activists focus so much attention on lower federal court appointments, when the general public has little interest in their decisions? First, activists realize that there

are so few opportunities to affect Supreme Court appointments in the modern political era. Justices are simply serving longer terms than was historically true, affording presidents fewer opportunities to make appointments to the High Court. In contrast, a president names hundreds of judges to the lower federal courts in each four-year term.

Second, with the Rehnquist and Roberts Courts hearing about half the number of cases that the Burger Court did, activists began to recognize that, as a practical matter, the lower federal courts today serve as the final arbiter in over 99 percent of all federal court litigation; in other words, important policy is being made every day in the lower federal courts (Raddazzo and Waterman 2014). According to Elizabeth Cavendish, former Legal Director of NARAL Pro-Choice America (NARAL), today, it is the *lower* federal courts where important legal issues in the pro-choice/pro-life debate are being decided: "There's a real recognition that lower court judges hold vast power over women's reproductive lives and right now the composition of the Supreme Court is stable, and so there isn't an immediate threat to overturn *Roe*" (Cavendish 2002).

Ralph Neas, the director of People for the American Way, believes that certain circuits, specifically the Fourth and the Fifth Circuits, generally considered the more conservative circuits, require special attention because the judges there are setting bad precedents for millions who live within those jurisdictions (Neas interview 2002).

Third, in an apparent attempt to reduce uncertainty about the way Supreme Court nominees are likely to vote once they secure their seats, presidents have increasingly turned to the courts of appeals in searching for Supreme Court candidates.[15] Indeed, eight of the nine current justices were elevated from the federal appellate courts. As Kim Gandy, former president of the National Organization for Women (NOW) aptly notes, the courts of appeals are now the "farm team" for the Supreme Court (Gandy interview 2002). And so, for these litigation- and conservative-oriented liberal interest groups, having the "right" kind of judges seated on the appellate courts ensures the "right" kind of judges on the Supreme Court.

Fourth, Ronald Reagan began a trend of nominating relatively young men and women to seats on the lower federal courts. While less than 3 percent of Eisenhower, Kennedy, Johnson, and Carter appellate judges appointed were under age forty, 10 percent of Reagan's court of appeals appointments were in their thirties (Schwartz 1988: 60). A judicial appointment was once "meant to cap your career" (Gandy interview 2002). Appointing people so young to the federal bench also raises the stakes of these nominations when senators know that many of these nominees will serve for another thirty-plus years.

The Emergence of Elite Mobilization Strategies

In the face of these new policy demands from key political activists, politicians adapted their nomination/confirmation strategies, from patronage to policy, so as to conform

to the changing demands of political activists. Herein lies the core problem with today's lower court appointment process: the system turns on satisfying competing policy demands that center on the most divisive issues of the day such as race, crime, abortion, and homosexual rights. With the Senate so highly polarized today, compromise on these hot-button issues is difficult in the legislature. The courts seem more attractive to settle these divisive policy areas. To satisfy the demands of one party's activists, by definition, means that the other party's activists cannot be satisfied. Indeed, they become extremely *dissatisfied* with appointment outcomes that only lead to more contentiousness in the process. And, yet, politicians continue to accede to these demands even though lower federal court cases are not salient issues with their constituents. Why not simply ignore these demands and continue with the old patronage system? The simple answer: re-election concerns.

Judicial scholars have previously suggested that there is an electoral component to the Supreme Court selection process. For example, Perry (1991) argues that Supreme Court nominations are often made to generate support among the mass electorate—e.g., Reagan's appointment of Sandra Day O'Connor to shore up support among women voters. However, this conventional explanation is problematic even for the Supreme Court, and certainly when we talk about lower court nominations. Consider public opinion polls, which demonstrate that the mass electorate knows virtually nothing about the Supreme Court, let alone the lower federal courts. For example, an oft-cited poll conducted by *The Washington Post* found that more people could identify Judge Wapner, former host of the television program *The People's Court*, than could identify Chief Justice of the United States, William H. Rehnquist (Caldeira 1991). Why, then, would elected officials invest so much political capital in the lower court appointment process if their constituents are not paying attention?[16]

There is, in fact, an electoral strategy at play in the lower federal court appointment process, but one much different from that suggested by Perry. Rather than using lower federal court judgeships to curry favor with the mass electorate, Scherer (2005) argued that these nominations are used by the Democratic and Republican Parties to curry favor with only an elite constituency within each party; specifically, conservative activists affiliated with the Republican Party and liberal activists affiliated with the Democratic Party. This includes both party activists and interest group activists (sometimes called "issue activists"). As stated above, *these* constituents actually care about the composition of the federal bench, and *these* constituents are the key to politicians' re-election prospects.

Activists are central to re-election efforts because they are responsible for mobilizing the party's base to get out and vote on election day (Katz and Eldersveld 1961; Sorauf 1967; Sorauf and Beck 1988). "Under the old party system, political activists would be willing to mobilize voters provided the candidate delivered the promised jobs and contracts—i.e., a patronage-based system" (Aldrich 1995). Today, politicians look to those who are "well-positioned in social networks, people who are influential in politics, and people who are *likely* to participate" (Rosenstone and Hansen 1993: 6–7): In sum, for winning candidates to the Senate or Presidency, lower federal court judgeships were once used as plum jobs that they could bestow upon the activists who helped them

get elected (e.g., Baum 1990; Carp and Stidham 1998; Chase 1972; Evans 1948; Goldman 1997, 1967). Dating back as far back as the Andrew Jackson presidency (Bell 2002b), lower court judgeships were nothing more than "rewards for political service" (Howard 1981). Under the modern party system, however, patronage appointments no longer satisfy political activists; rather, they want all appointments used to further policy goals. If a patronage appointment is to be made, the person must be in line with the Party's base. It has thus become incumbent upon politicians to develop new nomination and confirmation strategies to satisfy the activists' policy-oriented demands—leading to a judicial appointment process based much more on ideological considerations and much less on patronage considerations.

The Methods Used to Satisfy Activists' Demands

Though their efforts to shape the federal judiciary go largely unnoticed by the American public, politicians are nevertheless still engaging in electoral politics through a variety of judicial nomination/confirmation strategies, all designed to satisfy activists' policy demands. Collectively, these new nomination/confirmation strategies are known as "elite mobilization" strategies (Scherer 2005) because they are specifically intended to satisfy key elites affiliated with the two major political parties. Briefly, the new policy-oriented appointment strategies are: (1) presidents choosing judges pursuant to ideological litmus tests; (2) presidents choosing judges pursuant to diversity criteria; and (3) senators engaging in "obstructionist" confirmation tactics against nominees found ideologically objectionable. As previously stated, all of these strategies are ultimately designed to satisfy the policy demands of party elites and activists so that they will aid in mobilizing the mass electorate come election day.[17]

What do all of these strategies have in common? They all involve strategic actions of politicians in choosing (in the case of the president) or confirming (in the cases of sitting senators) on federal court judgeships. By definition, elite mobilization requires politicians to take a *public* stand regarding lower federal court appointments.[18] Politicians let their targeted elite constituents know exactly where they stand on a particular judicial nominee or on the direction of the federal courts as a whole. Politicians thereby send important cues to these elite constituents, telling them that they are directly responding to their demands regarding the composition of the lower federal courts. In this sense, elite mobilization efforts resemble "position taking"—one of the three classic forms of congressional activity identified by Mayhew in his seminal book *Congress: The Electoral Connection* (1974), though the audience to whom the position statements are directed is somewhat different than that envisioned by Mayhew. In the case of judgeships, politicians speak to an elite audience, rather than a mass audience.

To the extent such elite mobilization cues are successful, the political activists at whom the tactics are aimed can then be counted on to mobilize the mass electorate on the

candidate's behalf come the next election (in the case of grass-roots activists), or to donate money to a candidate (in the case of grass-top elites). To the extent such elite mobilization cues are not forthcoming, or convey the wrong message, activists and elites may then choose to mobilize the mass electorate *against* a particular candidate, or alternatively, but an equally effective tactic, *not* mobilize potential voters at all (Gandy interview 2002).

Empirical Testing of the Elite Mobilization Theory

Elite Mobilization Strategy One: Ideological Litmus Tests

Starting with the first strategy, ideological litmus tests, and the first hypothesis is that presidents in the modern political era are more likely to appoint lower court judges who share their party's ideological positions than judges who do not. The data consists of all non-consensual courts of appeals cases 1994–2001 in three legal, but partisan policy issues. The three types of cases chosen to analyze were: search and seizure decisions, pitting tough law-and-order Republicans against more civil-liberties-oriented Democrats; [19] race discrimination cases, pitting civil-rights proponents from the Democratic Party against color-blind-society advocates in the Republican Party;[20] and federalism cases, pitting states'-rights-oriented Republicans against federal-government-oriented Democrats.[21] If partisan voting patterns are detected in these three types of cases, then there is support for the first elite mobilization strategy.[22]

Table 1.2A displays the probabilities that judges appointed by modern Republican presidents vote more conservatively than judges appointed by Democrats, consistent with the theory. Table 1.2B shows the probabilities of a conservative vote by Republican versus Democratic judges, and the appointees of Nixon, Reagan, G. H. W. Bush, and G. W. Bush are, indeed significantly more conservative than appointees of Carter and Clinton. This pattern repeats itself with the race discrimination cases (Tables 1.3A–1.3B) and the states' rights cases (Tables 1.4A–1.4B). The judges voting patterns mirror that of the presidents who appointed them. Just as Clinton shifted the Democratic Party to the center on the crime issue, his appointees voted in a more conservative direction than the Carter appointees. And, just as Nixon was more towards the center of the ideological spectrum than either Reagan, G. H. W. Bush or G. W. Bush, so too did Nixon's judges exhibit less conservative voting than the other Republican presidents' judges.

Elite Mobilization Strategy Two: Diversify the Federal Bench

The hypothesis behind the second elite mobilization strategy, diversifying the bench, is that Democratic presidents will appoint more people of color and women to the federal

Table 1.2A Logit cofficients for the probability of a vote by Court of Appeals judge against a criminal defendant, non-consensual search and seizure cases, January 1, 1994 to December 31, 2001

	B	Robust SE	Δ *Probability*
Constant	–.45*	.20	NA
Appointing president			
Clinton	Baseline	NA	.00
G. H. W. Bush	.74***	.18	.18
Reagan	.79***	.15	.19
Carter	.64***	.18	–.13
Nixon	.73**	.28	.18
(Vote against criminal defendant coded 1; vote for criminal defendant coded 0.)			

Notes: *** $p \leq .001$; ** $p \leq .01$; * $p \leq .10$ (all two-tailed test).

Change in probability is measured at the distance from a probability of 0.5, assuming the presence of that variable.

N = 1,469

Likelihood ratio test (14df) = 162.59***

% correctly predicted = 63.785

% observed in null model = 50.30

Proportional reduction in error = 27.12

Throughout this chapter, non-consensual cases shall be defined as all appellate cases with a dissent plus all unanimous appellate cases that reverse a district court decision.

This represents the change in likelihood of a vote against a criminal defendant from a starting place of .50 probability.

courts than Republican presidents, and that the number of diversity appointments will be significant rather than mere tokenism. The underlying theory is based on the fact that most minority- and women's-based interest groups lean Democratic; they are part of the Democratic Party's base. As such these groups are critical to mobilizing their constituencies on election day. Thus, currying favor with minority and female activists by significantly increasing diversity on the bench has more benefits for Democrats than it does Republicans.

Looking at Figures 1.3A and 1.3B, the evidence is consistent with this hypothesis. Democratic presidents are appointing significant numbers of minority and female judges, much more than Republican presidents. Beginning with Carter, with each Democratic administration we see a focus on raising the levels of diversity on the federal bench across racial, ethnic, and gender lines.

It should be noted that both Presidents G. H. W. Bush and G. W. Bush appointed fair percentages of women to the bench. And, President G. W. Bush appointed more

Table 1.2B Comparison of voting across presidential cohorts: Probability that a judge will vote to uphold a search or seizure, non-consensual search and seizure cases, U.S. Courts of Appeals, January 1, 1994–December 31, 2001

	Clinton judge	G. H. W. Bush judge	Reagan judge	Carter judge	Nixon judge
Clinton judge compared to:		−.18**	−.19**	+.13*	−.18*
G. H. W. Bush judge compared with:	+.18***		−.01	−.32**	.00
Reagan judge compared with:	+.19	+.01		+.33***	.01
Carter judge compared with:	−.13**	−.32***	−.33***		−.32***
Nixon judge compared with:	+.18***	.00	−.01	+.32***	–

Notes: *** $p \leq .001$; ** $p \leq .01$; * $p \leq .10$ (all two-tailed test).

Table 1.3A Logit cofficients for the probability of a vote by Court of Appeals judge against a civil rights plaintiff, non-consensual cases, January 1, 1994–December 31, 2001

	B	Robust SE	Δ *Probability*
Constant	−1.29***	.19	NA
Appointing president			
Clinton	Baseline	NA	.00
G. H. W. Bush	1.29***	.21	.28
Reagan	.1.26	.19	.28
Carter	.16	.22	.04
Nixon	.92**	.32	.21
(Vote against criminal defendant coded 1; vote for criminal defendant coded 0.)			

Notes: *** $p \leq .001$; ** $p \leq .01$; * $p \leq .10$ (all two-tailed test).

N = 1,408

Likelihood ratio test (13 df) = 193.46***

% correctly predicted = 67.75

% observed in null model = 65.28

Proportional reduction in error = 7.11

This represents the change in likelihood of a vote against a criminal defendant from a starting place of .50 probability.

Table 1.3B Comparison of voting across presidential cohorts, probability that a judge will vote for a minority in a race discrimination case, non-consensual race discrimination cases, U.S. Courts of Appeals, January 1, 1994–December 31, 2001

	Clinton judge	G. H. W. Bush judge	Reagan judge	Carter judge	Nixon judge
Clinton judge compared with:	–	–.28***	–.28***	–.04	–.21**
G. H. W. Bush judge compared with:			+.01	+.25***	+.10
Reagan judge compared with:				+.25***	+.08*
Carter judge compared with:					–.18*
Nixon judge compared with:					

Notes: *** $p \leq .001$; ** $p \leq .01$; * $p \leq .10$ (all two-tailed test).

Table 1.4A Logit cofficients for the probability of a vote by Court of Appeals judge against the federal government, non-consensual states' rights cases, January 1, 1994–December 31, 2001

	B	Robust SE	Δ *Probability*
Constant	–.56*	.29	NA
Appointing president			
Clinton	Baseline	NA	.00
G. H. W. Bush	1.21***	.34	.27
Reagan	.90**	.31	.21
Carter	–.29	.37	–.07
Nixon	.67	.65	.16
(Vote against federal government coded 1; vote for federal government coded 0.)			

Notes: *** $p \leq .001$; ** $p \leq .01$; * $p \leq .10$ (all two-tailed test).

N = 337

Likelihood ratio test (9 df) = 31.26***

% correctly predicted = 64.99

% observed in null model = 50.10

Proportional reduction in error = 29.77

This represents the change in likelihood of a vote against a criminal defendant from a starting place of .50 probability.

Table 1.4B Comparison of voting across presidential cohorts: Probability that a judge will vote against the federal government, non-consensual state's rights cases, U.S. Courts of Appeals, January 1, 1994–December 31, 2001

	Clinton judge	G. H. W. Bush judge	Reagan judge	Carter judge	Nixon judge
Clinton judge compared with:		.27**	.21**	+.07	−.16
G. H. W. Bush judge compared with:			+.06	+.32**	+.13
Reagan judge compared with:				+.26**	+.06
Carter judge compared with:					−.18*
Nixon judge compared with					

Notes: *** p ≤.001; ** p ≤ .01; * p ≤ .10 (all two-tailed test).

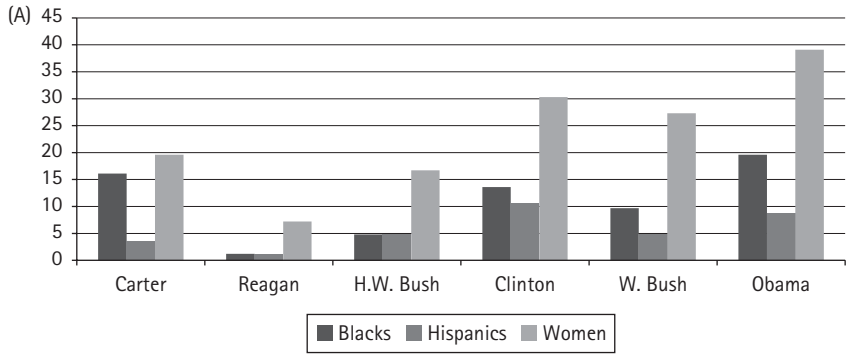

FIGURE 1.3A Minorities and women on the courts of appeals, percentage of total judges appointed by president, January 1977–May 2014

Source: Author.

Hispanics than his predecessor, President Clinton, but not as many as his successor, President Obama, would. Obama would be the first president to appoint more minorities and women to the federal bench than white men. It may be that women and Hispanics fare better under Republican administrations than African Americans do is because most African Americans affiliate with the Democratic Party, and Republicans have yet to make inroads with this voting bloc. Moreover, this being the case, there is presumably a smaller pool of black conservative attorneys than female

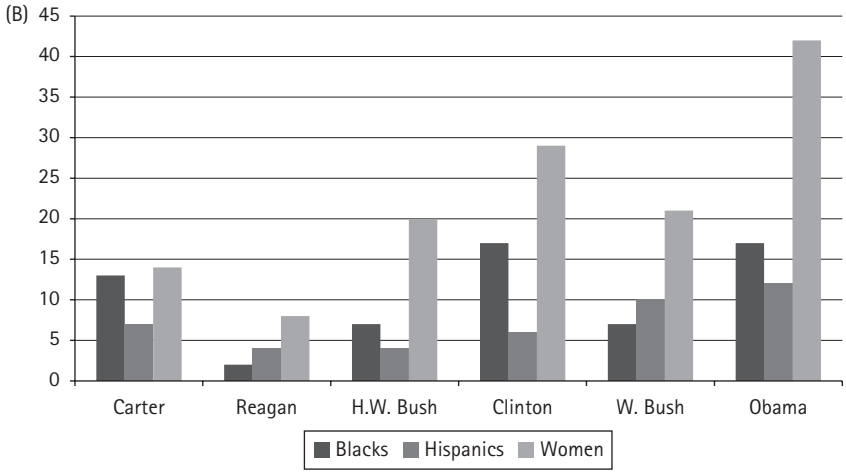

FIGURE 1.3B Minority and female appointees to the U.S. district courts, January 1977–May 2014
Source: Author.

or Hispanic attorneys, from which potential nominations for the federal bench are chosen.

Elite Mobilization Strategy Three: Delay, Delay, Delay

As discussed above, the focus of the lower court appointment process has been on the extraordinary delay nominations suffer at the hands of interest groups (Scherer, Bartels, and Steigerwalt 2008). These scholars examined confirmation delay, but unlike previous studies, accounted for the impact of opposition from activists and interest groups. Their hypotheses was that interest group opposition to a nomination would significantly affect both the likelihood of confirmation and the duration of confirmation notwithstanding the nominee's ideological distance from the Senate. Looking at post-1985 data, about the time interest groups started formally objecting to lower court nominations (Scherer 2005), they found that activist opposition does, in fact, significantly drive both the likelihood of confirmation and the number of days from nomination to confirmation. Also, interest group opposition has a large effect on confirmation and delay, particularly in the G. W. Bush and Clinton administrations. Set forth in Table 1.3A are the predicted probabilities for confirmation and the elapsed number of days from nomination to confirmation for nominations made in the period 1985–2004, with and without interest group opposition. The models also controlled for all of the variables that past studies found to be statistically significant predictors of lower court confirmation durations.

This model predicted fairly stable rates of confirmation for unchallenged nominees in the four presidential administrations (ranging from an 88 percent chance of

confirmation to 98 percent likelihood of confirmation). For challenged nominations, however, the likelihood for confirmation tells a different story. While 80 percent of Reagan nominations were confirmed notwithstanding activist opposition, by the first term of the G. W. Bush administration that number had declined to 46 percent (a difference of 34 percent).

Activist opposition had a similar effect on confirmation durations. The difference between unchallenged and challenged nominations for each appointing president were significant, ranging from a low of two days difference during the G. H. W. Bush administration to a high of 142 days difference in the Clinton administration. Clinton's nominees without opposition could expect confirmation to take sixty days; with opposition, 204 days. Comparing between periods, for opposed nominations we see a low of about thirty-eight days to be confirmed during the G. H. W. Bush administration to a high of 204 days for Clinton nominations. Also notable, and confirming the idea that the impetus for delay comes from interest group opposition, not a senator's own ideological distance from a nominee, Table 1.5 also shows that it takes less time for an ideologically distant nominee without interest group opposition to be confirmed than it does for an ideologically closer nominee with interest group opposition to be confirmed. This suggests that senators do not engage in an independent analysis of a nominee's ideology, instead relying on sympathetic interest groups' analyses of the nominee. If the interest group does not object then the senator does not object.

Table 1.5 Predicted probabilities on confirmation outcomes and predicted median durations until confirmation, nominations to the U.S. Courts of Appeals, 1985–2004

	Likelihood of confirmation		Median duration until confirmation	
	With interest group opposition	Without interest group opposition	With interest group opposition	Without interest group opposition
G. W. Bush nominations	.46	.96***	152.22 days	88.35 days**
Clinton nominations	.76	.88	204.39 days	60.49 days****
G. H. W. Bush nominations	.66	.96**	36.72 days	34.15 days
Reagan nominations	.80	.98*	79.05 days	32.87 days****

Note: All probabilities and median durations assume all other variables set at their means. Tests of significance are two-tailed tests.

Statistical difference between opposed and unopposed: *p ≤ .10; ** p ≤ .05; *** p ≤ .01;**** p ≤ .001 (two-tailed tests).

This is solid evidence consistent with the hypothesis that interest groups are influencing senators to delay, delay, delay, doing whatever possible to see that their objectionable nominee does not get confirmed.

Conclusion

The lower court appointment process has dramatically changed over time. The transformation of the appointment process is the result of two important developments in American politics that began to take shape in the 1950s and 60s. First, there was an historic transformation of the mass party system that had existed since the Jacksonian era. Second, political activists (party activists, affiliated interest groups, and public interest law firms) increasingly began to turn to litigation in the federal courts, rather than lobbying in federal and state legislatures, to achieve policy goals. Working in tandem, these changes would forever raise the stakes of lower federal court appointments leading to drastic changes in presidents' appointment strategies. Presidents and senators would cease using lower federal court judgeships predominantly for *patronage* purposes and instead, in accordance with the demands of political activists, would come to view federal judgeships as a means to satisfy the activists' *policy* demands.

Beginning with the establishment of lower court judicial watchdogs, the interest groups discussed above which monitor the lower court appointment process very carefully, in the late 1980s and early 1990s, the lower court confirmation process went from one that took mere weeks to complete to one in which confirmation delays drag on for hundreds of days (sometimes stretching over multiple congressional sessions if the president chooses to re-nominate the candidate). We have also seen evidence of senators catering to interest groups. While once the use of a filibuster to block a lower court nomination was rare, during the G. W. Bush administration, and then again during the Obama administration, it became one of the most-used weapons in the Senate's arsenal to block lower court nominations. Only the implementation of the "nuclear" option would bring these wars to a temporary truce. And, so, we are left with a confirmation process that has been captured by party and outside activists who want only to seat judges likely to agree with their respective visions of justice, for example, judges who they can count on to decide cases in their favor.

Because presidents and senators are so dependent upon political activists to mobilize the electorate at-large to turn out at the polls, politicians are now forced to pursue nomination/confirmation strategies that satisfy first and foremost the policy demands of these influential players within their respective parties and only then may they consider patronage. Simply stated, it is the politicians' pursuit of these policy-oriented strategies in the selection and confirmation of lower federal court judges, which touch on the most divisive partisan issues of the modern political era, that has led to the heightened politicization of the lower federal court appointment process. It also explains why elected representatives and candidates expend such an inordinate amount of political

capital deciding who shall sit on the lower federal courts when the issue has no salience with the American electorate.

Notes

1. The president, particularly with district court judges, consults with home state senators because, if such senators do not approve of the favored nominee of the president, they may file a blue piece of paper expressing to the Judiciary Committee Chair their lack of support for the nomination (2005). This "blue slip" stops the nomination in its tracks (Steigerwalt 2010).
2. The one exception may be the use of a parliamentary procedure known as a "hold." According to Steigerwalt (2010), a strategic hold "many times capture judicial nominations by coincidence; in a number of instances, the strategic hold was applied to whoever happened to be on the floor at that time" (p. 87). In other words, a nomination is held up by a senator as a strategic ploy concerning another political fight then being waged between that senator and another political actor (e.g., the president or a member of the opposite party).
3. The last time this happened was 1999, during the Clinton administration, when Ronnie White, nominated to a seat on the Eastern District of Missouri was defeated by a floor vote. Though it looked like he had the necessary votes to break a filibuster (sixty votes) with some bi-partisan support, at the eleventh hour, the Republicans switched sides, claiming White was soft on crime (Scherer 2005); the vote thus went strictly along party lines and the Democrats now lacked the votes to break the filibuster. In 2014, fifteen years after his original defeat, Obama nominated White to a seat on the same court, and this time he was confirmed (Raasch 2014).
4. Scholars have also started to broaden the scope of study on the Supreme Court confirmation process beyond mere roll-call voting analyses. Shipan and Shannon (2003), looking at Supreme Court nominations from 1866–1994, found that nominations made during divided government, nominations for Chief Justice, "critical" nominations (those which would tip the ideological balance of the Court) and nominations made at the end of congressional sessions face longer confirmation periods; older nominees and nominees who currently serve in the Senate face shorter confirmation periods.
5. This study will be discussed in detail in the section "Transformation of the Old Party System."
6. In 2013, with the Democrats in control of the Senate, Senate Majority Leader, Harry Reed (D-NV), invoked a procedural tactic whereby only fifty votes were needed (rather than the sixty needed for a filibuster) to end filibusters, in most cases, of judicial nomination and other Executive appointments. Voting along party lines, the motion passed. This cleared the way for three Obama nominations that had been filibustered to be immediately confirmed to the U.S. Court of Appeals for the D.C. Circuit with a simple majority vote (Kane 2013), available at: https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9feo-fd2ca728e67c_story.html. When Republicans took control of the Senate in 2006, they kept the nuclear option in place (Ferrechio 2015).
7. Throughout this chapter, I use the term "modern political era" to mean the period 1968–2000. As explained, I focus on this period because it is when we begin to see the use of the first "elite mobilization" strategies, and it is these strategies that have led to increased politicization of the lower court appointment process.

8. Some have suggested that, in the modern political era, ideologically motivated local party leaders have developed quite sophisticated and professional organizations (Gibson, Frendreis, and Vertz 1989). Thus, the terms "amateur" and "professional" are somewhat misnomers.
9. During the period known as the Lochner era, roughly 1905–37, the Court was controlled by jurists who believed that the government should not interfere with the economy. Thus, they struck down almost every state and federal statute in which the government attempted to regulate working conditions for the protection of laborers (e.g., *Lochner v. N.Y.*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918)). Regarding state statutes, the Court created the Substantive Due Process doctrine, which took the word "liberty" used in the text of the Fourteenth Amendment (states shall not deny "life, liberty, or property without due process of law") out of context; it had previously been interpreted as strictly a trial procedures clause with no substantive rights attached to it (Slaughterhouse Cases, 16 Wall 36 (1873) and imbue it with a new conservative substantive meaning. The Court held in *Lochner* that the liberty protected in the Fourteenth Amendment included a freedom to contract, and that state laws regulating the relationship between employer and employee violated their freedom to contract. (*Lochner v. N.Y.*, 198 U.S. 45(1905)).
10. See e.g., *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955) (school desegregation); *Florida ex.rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956) (school desegregation); *Aaron v. Cooper*, 358 U.S. 5 (1958) (school desegregation); *Garner v. Louisiana*, 368 U.S. 157 (1961) (desegregation of restaurant facility); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (desegregation of restaurant facility); *Griffin v. Maryland*, 378 U.S. 379 (1964) (desegregation of amusement park); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (upholding constitutionality of Civil Rights Act of 1964).
11. Class Action | Wex Legal Dictionary / Encyclopedia, Class Actions, available at: https://www.law.cornell.edu/wex/class_action.
12. 410 U.S. 113 (1973).
13. e.g., *U.S. v. Lopez*, 514 U.S. 549 (narrowing scope of federal power under Commerce Clause); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (finding a constitutional right for individuals to bear arms under the Second Amendment); *Shelby County v. Holder*, 570 U.S. __ (2013) dismantling the Voting Rights act of 1965).
14. For details of this analysis, see Scherer (2005), Chapter 2.
15. Associate Justice Elena Kagan is the one exception to this rule. Her employment background is grounded in academia (former dean of the Harvard Law School) and public service (former Solicitor General) (https://www.oyez.org/justices/elena_kagan).
16. At the behest of activists, senators expend political capital on lower court nominations in several ways, all of which will anger the president and the senators in the president's party: issuing a negative blue slip, harsh questioning at the Judiciary Committee confirmation hearing, voting "no" at the Committee hearing, delaying the scheduling of a floor vote, voting "no" on the floor of the Senate chamber, filibustering a nomination (though that is more difficult to do under today's rules that limit the number of judges that may be filibustered by the opposition party). All of these tactics are discussed later and constitute mobilization strategies by senators to please interest groups.
17. There are two ways these elites help with mass mobilization efforts: large donations which can then be used for "get out the vote" efforts, or (2) large grass roots organizations which have large constituencies and are already organized and willing to engage in "get out the vote" efforts (Skinner 2007).

18. It is clear that "holds" on judicial nominations are not considered elite mobilization strategies because they are not done at the behest of interest groups and they almost always have nothing to do with the nominee's ideological suitability for the bench. The hold is really about a political fight outside the realm of the judiciary.
19. Scherer (2005: 50–3, 58–60).
20. Scherer (2005: 53–5, 60–1).
21. Scherer (2005: 55–7, 61–2).
22. Because the Democratic Party shifted to the right on their long-standing support of criminal rights, particularly between the Carter and Clinton administrations, Scherer looked beyond mere party affiliation of the appellate judges. Instead, she coded them according to the appointing president. Therefore, we should anticipate that the judges appointed by Clinton are more conservative than those by Carter on the crime policy cases. However, both sets of Democrats should be to the left of Republican presidential appointees.

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CHAPTER 2

APPOINTING SUPREME COURT JUSTICES

CHRISTINE L. NEMACHECK

In the eight years since President George W. Bush appointed Third Circuit Court of Appeals Judge Samuel Alito to the U.S. Supreme Court, filling the seat left vacant by Justice Sandra Day O'Connor's retirement, the Court's decisions have changed significantly. In areas such as affirmative action, abortion, or campaign finance reform, the Court's rulings are likely quite different than they would have been had Justice O'Connor, long the Court's swing vote, remained on the bench. One can also reasonably argue that, not only would the language of many rulings have been different if Justice O'Connor had participated in the cases, but that several 5–4 rulings would likely have been resolved for the opposite party. Indeed, Justice O'Connor's own criticism of the Court's controversial 2010 ruling in *Citizens United v. Federal Election Commission,* invalidating much of the Court's decision in *McConnell v. Federal Election Commission* rendered just seven years earlier, provides evidence of the impact that can result from even a single appointment to the U.S. Supreme Court. Referring to the 2010 decision, Justice O'Connor said, "Gosh, I step away for a couple of years and there's no telling what's going to happen" (Liptak 2010).

To put it succinctly, appointments to the U.S. Supreme Court matter. They matter to the president, whose name will forever be associated with his Court appointments, and who hopes to influence the kinds of decisions the Court makes for years after leaving office. They matter for senators who want to influence the Court's composition and, by extension, the policy that results from its decisions. And, of course, appointments matter to the public whose lives and expectations will be shaped by the institution's rulings.

Given its institutional importance, it should be no surprise that staffing the Court has piqued the interest of the popular media and scholars alike. From early historical accounts of individual appointments or those of a particular president, to more recent theoretical and empirical analyses of the nomination and confirmation process, we have learned a great deal about the process of appointing justices to the U.S. Supreme Court,

the actors involved, and the institutional and political constraints on the appointment process.

This chapter discusses the relevant literature on the Supreme Court appointment process, assesses the current state of that literature, and suggests some promising directions for future research. The first section addresses some early efforts to understand Supreme Court appointments by several leaders in the field of judicial politics. That work provided the foundation for more recent inquiries into the process. This more recent literature is divided into the two stages of the appointment process: the selection stage and the confirmation stage. The chapter concludes by discussing some developing questions that may provide interesting avenues for future research.

A Political Court, the Political Environment, and Appointments

Prior to C. Herman Pritchett's work developing a positive theory of Supreme Court decision-making, political scientists largely neglected the politics of the Supreme Court justice appointment process. Indeed, prior to the legal realism movement, there was little reason to critically examine the appointment process since the Court's decisions were largely understood as determined by the logical, mechanical application of legal precedent.[1] Under such circumstances, the identity of individuals seated on the Court made little difference as long as they possessed the necessary qualifications and capability to apply legal precedent.

Pritchett's analysis of justices' votes during the 1939 and 1940 Court terms signaled a major development in the political science literature, and judicial politics more specifically. Pritchett embraced legal realism by evaluating how President Roosevelt's appointees voted compared to other sitting justices, not only in terms of the direction of their votes, but also in terms of agreement or disagreement with other Court members. In doing so, he explicitly recognized the importance of judicial attitudes as an explanatory variable. According to Pritchett, "it is the private attitudes of the majority of the Court which become public law" (Pritchett 1941: 890). And for Pritchett, this conclusion was not only evident based on his analysis of the justices' votes, it was also normatively desirable that the "political philosophies of the justices and their personal judgments as to the role of law and the Constitution in relation to economic and social development" should influence Supreme Court decisions (Pritchett 1946: 499).

Though the debate between legal realists and legal formalists continues in the academy, there is little if any doubt among political actors and the American public that judges' and justices' votes are an expression of their political philosophies and personal judgments regarding the role of the law in American society. The natural extension of that view is that appointments to the federal courts, and to the Supreme Court in particular, are indeed political.

With the publication of his 1964 book, *A Supreme Court Justice Is Appointed*, David Danelski provided the basis for much of the early work on appointments to the Supreme Court. Danelski sought to explain why President Warren G. Harding chose Pierce Butler for appointment to the Court in 1922. By analyzing Butler's nomination, Danelski began to build a framework to examine nominations to the Court more generally (1964). Danelski's transactional theory helped explain Butler's appointment, as well as factors that presidents more generally might consider in making appointments to the High Court. According to Danelski, a nominee's qualifications and personality are integral to the president's choice, but other political actors can also influence the president's decision by shaping how the president views the nominee. In other words, while a candidate's specific characteristics helps to explain their appointment, factors external to the candidate also play a role in that process.

Following Danelski's work, Joel Grossman evaluated the influence of the American Bar Association (ABA), whose ratings of judicial quality have the potential to influence the context in which presidents make appointment decisions (1965). Like his predecessors, Grossman's approach recognized that judicial candidates' backgrounds affected the decisions they reached on the courts. Important for Grossman's argument is the understanding that the courts and judges are political institutions and actors, respectively. Indeed, in one review of Grossman's work, the reviewer took pains to note that while Grossman's work "comes from a political scientist (and from the preface one assumes a 'judicial behaviourist')," it is likely to appeal to all lawyers with an interest in securing better judges (Weir 1967: 243).

Robert Scigliano's 1971 work examining presidential control over the appointment process focused more explicitly on the way institutions shape the appointment process. Scigliano's overarching interest in *The Supreme Court and the Presidency* was the potential for the executive and judiciary to work together to check Congress. His focus on the president's authority in making appointments and the degree to which judicial nominees represented their appointing presidents' views from the bench led Scigliano to distinguish between the selection and the confirmation stages of the process. This is an important distinction on which later work would build; the appointing president has the greatest potential for unfettered authority at the selection stage (the time up until a formal appointment is sent to the Senate), but in making decisions at the selection stage, he must be cognizant of the constraints he faces at the confirmation stage (Moraski and Shipan 1999; Nemacheck 2007).

Scigliano asserted presidents' control over the selection stage has two bases: knowledge and power. Presidents often had personal knowledge of their nominees prior to appointment and that, of course, led to greater confidence in the person's likely behavior as a justice compared to a candidate a president did not know. In particular, Scigliano's treatment of political actors' attempts to influence appointments laid the groundwork for future, systematic analyses of nomination dynamics. While he recognized the importance of considering attributes of those nominated, Scigliano also incorporated into his analyses the political conditions in which the nominations took place. He considered the Senate's partisan composition and the possible exercise of senatorial courtesy by a

senator from a nominee's home state, as well as the time in the president's term at which the nominations arose (1971).

An important question underlying Scigliano's research was whether presidential success in securing Senate confirmation resulted from Senate deference to the president's authority to appoint Supreme Court justices, or from presidential anticipation of the Senate's likelihood to confirm a nominee and choosing accordingly (1971). Later inquiry into the relative power of the president and Senate in the appointment process used various terms, but essentially framed the question as one of presidential domination or presidential anticipation (Chang 2001; Hammond and Hill 1993; Krehbiel 2007). The bulk of the evidence points toward the latter.

Approximately 80 percent of the time, the Senate votes to confirm presidents' nominees to the Court. Based on a theory of presidential anticipation, that success rate is evidence that presidents correctly gauge senators' concerns about nominee ideology or method of constitutional interpretation, along with the potential for those senators to block the nomination, and choose nominees they expect will be confirmed within those constraints (Moraski and Shipan 1999; Nemacheck 2007; Shipan, Allen, and Bargen 2014). But, what explains the 20 percent of nominations that fail in the Senate? This question has animated a number of studies.

Some scholars have examined the appointment process by focusing on unsuccessful nominations (Massaro 1990; Whittington 2007), while others have analyzed the variation in the amount of time it takes the Senate to confirm Supreme Court nominees (Shipan and Shannon 2003). In examining failed nominations, scholars have generally found that "mistakes" presidents make at the selection stage are typically the key to understanding why the Senate refuses to confirm a nominee. If presidents fail to effectively manage what Massaro refers to as the "pre-nomination stage," which might include consulting with members of Congress on the appointment, their nominees are likely to experience difficulty at the confirmation stage (1990).

Whittingon (2007) emphasizes the importance of selection deliberations in examining the relative power of the Senate and the executive in making Supreme Court appointments. If theories of presidential anticipation are correct, and Whittington believes they are, it is important for voters to consider future federal court appointments when casting a presidential election ballot. But, voters should also keep those considerations in mind when voting for their senators. Whittington recognizes that presidents have an advantage over senators in making appointments since senators can only vote to accept or reject candidates, they do not hold the positive power to choose candidates. But, he argues that presidents should anticipate the confirmation process at the selection stage, particularly when the opposite party controls the Senate (2007). Furthermore, analyzing the length of time required for the Senate to act on a nominee, Shipan and Shannon (2003) find that as the ideological distance between the president and the Senate increases, the Senate is increasingly likely to delay voting on the candidate. Thus, under relatively more difficult confirmation settings, strategic presidents should consider that distance when choosing the nominee.

Following Danelski and Grossman, scholars began to analyze more explicitly the factors affecting the relative constraints under which presidents made their nominations. For example, Harold Chase examined factors shaping the confirmation environment and asserted that neither presidents nor senators operate in a vacuum in the judicial appointments process (1972). He identified four contextual elements that would influence the president's choice of a nominee and his discretion in making that nomination. These elements included the balance of power in the Senate, the Senate's support for the president, the public's support for the president, and the attributes of the seat left vacant on the Court.

Although many of the factors shaping the confirmation environment are outside of the president's control, that is not true of all of them. For scholars asserting presidents' ability to improve their nominees' likelihood of confirmation, it was important they consider those variables over which presidents could exercise control. In examining appointments of federal appellate judges, including Supreme Court justices, John Schmidhauser (1979) understood presidential evaluation of nominees' ideological preferences to be primary. In addition, Schmidhauser stressed the importance of appointees' background characteristics, which presidents do control. These include ethnicity, sex, religious affiliation, educational background, prior judicial experience, and paternal occupation. Furthermore, although he emphasized the president's "domination" of the Supreme Court appointment process, Schmidhauser recognized the institutional constraints bearing on the decision, particularly the need for Senate confirmation. Additionally, Schmidhauser examined the role of interest groups in pressuring the president and, in a departure from Grossman's focus on the ABA's role in judicial selection, Schmidhauser analyzed the potential for the group to conflate competence and ideology in conducting its evaluation of a nominee's qualifications for the Court (1979).

In much of the theory-driven empirical studies of the appointment process, judicial politics scholars remained focused on the Senate's confirmation decision. Much of the more recent work seeks to explain the confirmation votes and influence of particular senators and committee chairs. For example, they asked whether members cast their votes according to their own ideological distance from the candidates. Or, did they instead tow the party line regardless of that distance (Segal 1987; Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992)? Given the rise of interest groups, particularly single interest groups, scholars have sought to understand sources of interest group influence (Caldeira and Wright 1998; Segal, Cameron, and Cover 1992). Because these questions are inherently inter-institutional in nature, much of the research has depended on some means of measuring characteristics like ideology across institutions. Thus, several scholars have devoted significant time and attention to finding a means by which to compare the ideological positions of presidents, senators, and justices (Bailey and Chang 2001; Martin and Quinn 2002; Bailey 2007). As a result, we know quite a lot about why senators vote as they do and how characteristics of the candidate, the members' constituents, and interest groups affect senators' confirmation votes. It is to that literature that I now turn.

The Confirmation Stage

Because the Constitution requires the president to appoint justices with the Senate's advice and consent, much of the work on the confirmation stage seeks to explain senators' votes on Supreme Court nominees (Segal 1987; Cameron, Cover, and Segal 1990 and Segal, Cameron, and Cover 1992; Ruckman 1993; Overby, Henschen, Walsh, and Strauss 1992; Guliuzza, Reagan, and Barrett 1994; Moraski and Shipan 1999; Shipan and Shannon 2003; Johnson and Roberts 2004; Shipan 2008). In his initial analysis of Senate confirmation votes, Jeffrey Segal found that partisan and institutional factors significantly affect members' votes (1987). And, in their 1990 and 1992 analyses, Segal, Cameron, and Cover, developed a spatial model of Senate confirmation votes finding that, along with candidates' qualifications, senators' votes were largely a product of their own ideological distance from the nominee.

One factor that is universally thought to be an important, if not *the* most important factor in the appointment process, is the nominee's ideology. There is widespread agreement that justices of the U.S. Supreme Court have discretion in making decisions on the Court; they are not solely constrained by the letter of the law or Court precedent (Spaeth and Segal 1999; Segal and Spaeth 2002; Maltzman, Spriggs, and Wahlbeck 2000; Epstein and Segal 2005; Collins 2008; Bailey and Maltzman 2011; Collins and Ringhand 2013). Even beyond their final votes, the way justices articulate legal rules and the language they use has important consequences for the rule of law (Epstein and Kobylka 1992; Wahlbeck 1997). This has been clear to presidents since the very first appointments to the Supreme Court when George Washington chose six justices who shared his views on the importance of a stronger national government to the U.S. Supreme Court; all were Federalists.

Given the widely asserted prominence of ideology, it is not surprising that scholars have examined its importance relative to, and controlling for, other variables in the appointment process. In order to examine the importance of ideology in the appointment process empirically, however, scholars needed some way to measure a judicial candidate's ideology. This was a difficult proposition, not least because most ideological measures were based in whole or in part on representatives' voting records. Given that Supreme Court nominees came from different walks of life, it was no easy task to develop a single ideological measure across which candidates and those responsible for their appointment, could be compared.

One of the earliest attempts to measure justices' ideology was to analyze pre-confirmation newspaper reports on the candidate's ideological positions between the date the nomination was announced and the date of confirmation (Segal and Cover 1989). These Segal-Cover scores were then compared to scores of senators' relative liberalism or conservatism (through the use of Americans for Democratic Action (ADA) scores), to test the premise that senators were more likely to vote for candidates with whom they were ideologically proximate. Segal and his coauthors utilized these scores