THE ROLE OF QUALIFICATIONS IN THE CONFIRMATION OF NOMINEES TO THE U.S. SUPREME COURT

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In light of concerns that politics, philosophy, and ideology now dominate the federal judicial appointment process—a process that many claim should emphasize ethics, competence, and integrity—scholars have offered a range of proposals. A considerable number, though, aim to compel elected actors to focus on the candidates' qualifications rather than on their political preferences.

Without taking a normative position on these sorts of proposals, we demonstrate empirically that the process leading to the appointment of (at least) Supreme Court Justices may not be the "mess" that the proposals suggest. While it is true that U.S. Senators are more likely to cast votes for nominees who are ideologically proximate to them, qualifications also play a significant role in accounting for the choices Senators make.

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I. INTRODUCTION

In recent testimony before the U.S. Senate, the legal scholar Ronald D. Rotunda declared that:

> Our judicial system is at the top of the food chain, and that is a good reason to leave well enough alone. Given the fact that the Senate has been confirming federal judges for years, and the product is admired around the world, one wonders why we should think of changing the way the Senate confirms.[1]

Without doubt, the vast majority of Rotunda's colleagues—not to mention many members of the Senate—would disagree. For at least two decades now, they have deemed the federal confirmation process a "mess,"[2] "abysmal,"[3] "broken," "going in the wrong direction,"[4] and downright "disorderly, contentious, and unpredictable."[5] Of course, pinpointing the precise cause of the "problem" has generated its own share of controversies.[6] But there does seem to be general agreement that politics, philosophy, and ideology now dominate a process that should emphasize ethics, integrity, and competence—and as a result, the quality of our nation's judiciary, along with its independence, has suffered if not markedly declined.[7]

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1. Ronald D. Rotunda, quoted in *Senate Committee Hearings on the Judicial Nomination Process: Hearing Before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on the Senate's Role in the Nomination and Confirmation Process: Whose Burden?*, September 4, 2001, published in 50 DRAKE L. REV. 511, 524 (2002).

2. STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994).

3. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 301 (2004).

4. John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 184 (2003) (quoting Senator Dianne Feinstein).

5. MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT NOMINATIONS 6 (1994).

6. *E.g.*, HERMAN SCHWARTZ, PACKING THE COURTS 166 (1988) (claiming that the "crusade" of conservative interests to "pack the courts with ideological zealots has induced more rather than less partisanship" in the selection process); SILVERSTEIN, *supra* note 5, at 6 (asserting that the current state of the confirmation process reflects "profound changes in American politics and institutions," not the least of which is the "heightened activism of the modern federal judiciary"); Ruth Bader Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. ILL. L. REV. 101, 117 (arguing that the problem is with the President's failure to "seek[] more 'advice' from the Senate prior to a nomination," which would keep the media and interest group campaigns "within more tolerable bounds"); Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1331 (1997) (suggesting that the problem lies with "[t]he altered relation of President and Congress in the appointment of justices of the Supreme Court").

7. *See, e.g.*, CARTER, *supra* note 2; Choi & Gulati, *supra* note 3. On the other hand, we hasten to note, there are at least a handful of scholars who disagree with the view that politics is necessarily a danger to be avoided at all costs. *See, e.g.*, Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003) (assert-

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In light of these concerns, policymakers, social scientists, and legal academics have offered a range of proposals aimed at refocusing the spotlight on a candidate's qualifications for office, rather than his or her ideology.[8] Some have suggested, for example, that while the President should be free to consider any criteria he deems relevant, the Senate ought to eschew detailed examinations of the nominees' politics and philosophy.[9] As Professor Douglas W. Kmiec recently told the Senate:

> My proposition is simple: the proper Senate inquiry of a judicial candidate is demeanor, integrity, legal competence, and fidelity to the rule of law. It is not partisanship or policy agreement. While textually the Senate is free to inquire and to reject a nominee on any ground—even a highly political, constitutionally problematic one like the nominee's views on outcomes in specific cases—it should not do so. Undertaking to make nominees carry a type of political burden of proof will over time merely invite a subservience of mind and personality that is contrary to an independent judiciary.[10]

Others cast only a partial concurrence, asserting that both the Senate and President should focus exclusively or almost exclusively on a nominee's "objective" or "technical" qualifications.[11] Some even

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ing that both Presidents and Senates have and will continue to make their nomination/confirmation decisions, at least in part, on the basis of ideology and that "[t]his is exactly how it should be"); *see also* Christopher L. Eisgruber, *Democracy and Disagreement: A Comment on Jeremy Waldron's* Law and Disagreement, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 35 (2002).

8. For lists of these proposals, see CARTER, *supra* note 2, at 187-206, and GEORGE WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT NOMINATIONS 214-19 (1995). *See also infra* note 11.

9. *See, e.g.*, 133 CONG. REC. S11,269 (daily ed. Aug. 5, 1987) (statement of Sen. McConnell exhorting his colleagues to consider only the fitness of the nominee); 133 CONG. REC. S10,538 (daily ed. July 23, 1987) (statement of Sen. Dole urging the Senate to focus on the nominee's "ability and integrity"); John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177 (2001); Richard D. Freidman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283 (1986); Stephen L. Martino, Note, *Change on the Horizon: A Prospective Review of the Nomination and Confirmation Process of the United States Supreme Court*, 41 WASHBURN L.J. 164, 174 (2001) (asserting that many Presidents have "argued that appointments to the court are largely the prerogative of the chief executive . . . . [They] have believed that minimal competency standards should serve as the Senate's measuring stick and confirmations should be free of partisanship and ideology."); Randall R. Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 KY. L.J. 767 (1988-89); *see also* John D. Felice & Herbert F. Weisberg, *The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees, 1953-1988*, 77 KY. L.J. 509 (1988-89).

10. Douglas W. Kmiec, quoted in *Senate Committee Hearings on the Judicial Nomination Process: Hearing Before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on the Senate's Role in the Nomination and Confirmation Process: Whose Burden?*, September 4, 2001, published in 50 DRAKE L. REV. 511, 553 (2002).

11. *See, e.g.*, CARTER, *supra* note 2, at 178; HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM

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go so far as to propose a "tournament" among judges of the U.S. courts of appeals to ensure the selection of "effective" Justices,[12] while simultaneously reducing the "level of partisan bickering."[13]

Without taking a normative position on these sorts of proposals—or registering our complete agreement with Rotunda's claim that "[o]ur judicial system is at the top of the food chain, and that is a good reason to leave well enough alone"[14]—we demonstrate empirically that the process leading to the appointment of (at least) Supreme Court Justices may not be the "mess" they suggest. In general, we find that while it is in fact the case that U.S. Senators are more likely to cast votes for nominees who are ideologically proximate to them, it is also true that the nominees' qualifications play a significant role in accounting for the choices Senators make.[15] More specifically, we show that qualifications have a significant impact on Senators who are ideologically distant from a nominee. That is, while Senators may very well support a politically akin candidate regardless of his or her professional merit—they also will cast a yea vote for a high-quality nominee regardless of his or her ideology.

We develop these findings in four steps. In Part II, we briefly consider allegations about the growing role of politics and the concomi-

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WASHINGTON TO CLINTON 328 (new & rev. ed. 1999). Senator Paul Simon, on the other hand, supplies a list of criteria that he thinks ought to guide the President's selection. *See* PAUL SIMON, ADVICE & CONSENT 310-17 (1992). More generally, there are endless variations on proposals designed to reform the appointment process. One particularly prominent set advocates an active role for the Senate in checking the President's nominations (especially if they appear ideologically driven) or, at the very least, recommends that the President seek more advice from the Senate before he announces a nomination. *See, e.g.*, LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); Ginsburg, *supra* note 6; Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633 (1987); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

12. Choi & Gulati, *supra* note 3, at 299.

13. *Id.* at 301-02.

14. In fact, reasons exist to believe that our system is not "at the top of the food chain." *See, e.g.*, Melissa A. Waters, Mediating Norms and Identity 94 (2004) (unpublished manuscript, on file with the authors) (asserting that the Canadian Supreme Court "is rapidly becoming one of the most influential courts worldwide on human rights issues" because of its "active" participation in global judicial networks). Along similar lines, see Anne-Marie Slaughter, *Courting the World: U.S. Judges Must Overcome a Culture of Legal Isolationism—or Risk Being Left Behind*, FOREIGN POL'Y, Mar. 1, 2004, at 78 (claiming that "[b]y exchanging views, sharing expertise, and citing each other's opinions, judges around the world are cobbling together a global legal structure—one the United States ignores at its peril").

15. We are not the first to make this claim. *See* Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992). The conclusions we reach in this Essay flow from our efforts to adapt, refine, and extend the 1990 article.

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tant declining role of qualifications in the appointment of Justices. Part III describes the statistical model we deploy to assess the role of ideology versus qualifications in the Senate's decision over Supreme Court nominees. Because the measures we invoke to animate the concepts of "ideology" and "qualifications" are crucial to the credibility of our modeling exercise, we describe them in some detail. Next, in Part IV, we turn to the results yielded by our statistical analysis; in particular, we examine the substantive effects of ideology and of qualifications on the votes of individual Senators. Since that analysis, as we foreshadow above, underscores the importance of qualifications for a seat on the Supreme Court, our findings deserve some attention in light of existing proposals to change how the United States appoints its judges. We take up this matter in Part V.

II. THE CONFIRMATION OF SUPREME COURT JUSTICES: POLITICS VERSUS QUALIFICATIONS

Academics and policymakers alike have expressed a number of concerns over the process by which Supreme Court Justices attain their seats on the bench.[16] But one concern rising above nearly all others centers on the increasingly politicized nature of the process. In some of this commentary, the focus is on the role of organized interests and the media. Silverstein summarizes their influence by stating that "[t]he harsh reality . . . that modern interest group and media politics shape the selection of judges to our highest courts . . . has provoked a good deal of concern on the part of politician and citizen alike, and calls for the reform of the process of 'advice and consent' are frequently heard."[17] In other investigations elected actors move to center stage. Schwartz, for example, has argued that "[a]lthough partisan politics are inevitable to some extent, such considerations . . . [until the 1980s] played a very minor role in lower court appointments and only a slightly greater role in Supreme Court nominations."[18] Carter, too, agrees that the process is now overtly and overly politicized, but he emphasizes ideology rather than "party labels": "Litmus tests," he writes, "became far more important [during the Reagan and Bush I administrations]—and far more consistent—than at any time in the past."[19]

Has the process, in fact, grown more political in any or all of these ways? If we focus exclusively on the amount of media and interest group attention to nominations, the answer is undoubtedly yes. Consider, for example, Figure 1, *infra*, which shows the number of groups supplying

16. *See, e.g.*, ABRAHAM, *supra* note 11; CARTER, *supra* note 2; Choi & Gulati, *supra* note 3; Ginsburg, *supra* note 6.

17. SILVERSTEIN, *supra* note 5, at 164.

18. *See* SCHWARTZ, *supra* note 6.

19. CARTER, *supra* note 2, at 71.

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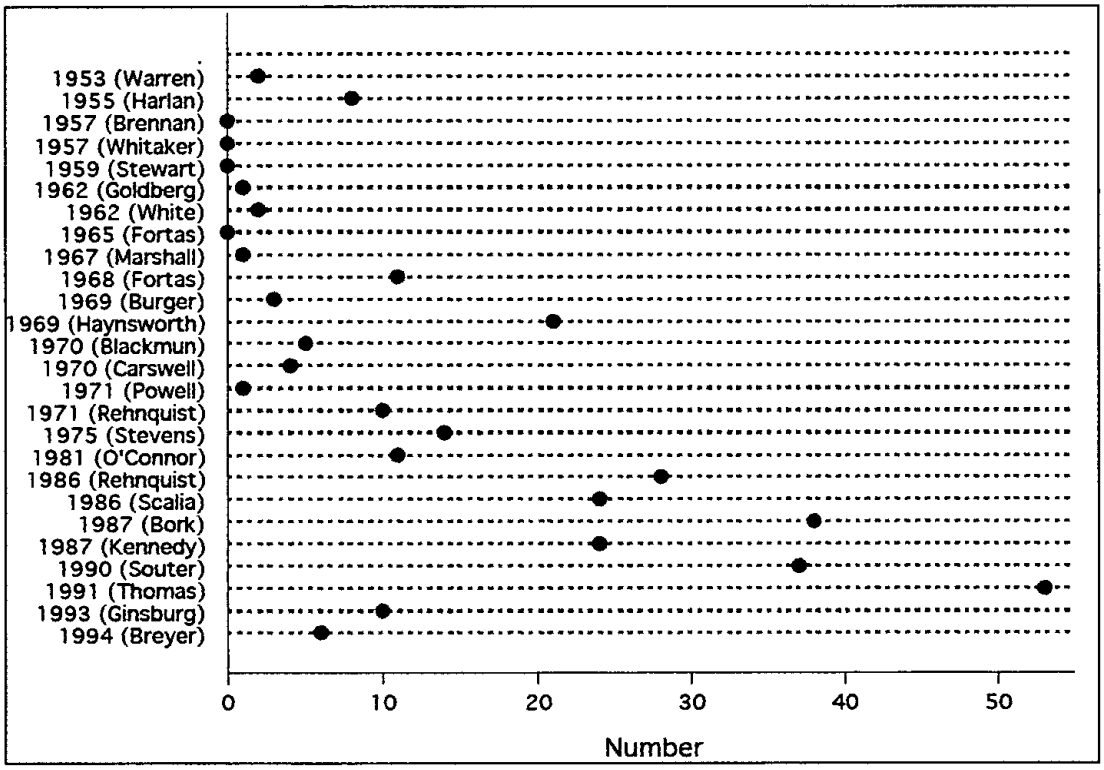
oral or written testimony for or against each nominee since Earl Warren.[20] Even though the most recent nominees (Justices Ginsburg and Breyer) failed to generate substantial interest group opposition (or support) relative to other recent nominees, the data overall evince a clear upward trend: A simple bivariate regression shows that with each passing nomination since Warren's, 1.23 more groups participated.[21]

FIGURE 1

NUMBER OF INTEREST GROUPS PRESENTING ORAL OR WRITTEN TESTIMONY FOR OR AGAINST EACH NOMINEE FROM EARL WARREN TO RUTH BADER GINSBURG.[22]



20. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 361 (3d ed. 2003).

21. Although we should not put much weight on a bivariate regression, the results are as follows (** indicates $p \leq .001$):

VARIABLE	COEFFICIENT	(STANDARD ERROR)
Counter	1.232**	(0.282)
Intercept	-4.557	(4.351)
N	26	
R^2	0.444	
F(1,24)	19.13	

Id.

22. *Id.* Warren was nominated in 1953 and confirmed in 1954; Kennedy was nominated in 1987 and confirmed in 1988. Note that we do not include Homer Thornberry or Douglas Ginsburg because those nominations were withdrawn before any Senate action. The Fortas nomination (for Chief Justice in 1968) was also withdrawn, but only after a Senate vote to end a filibuster failed to receive the necessary two-thirds majority.

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However intriguing the data may be, it represents but the tip of the iceberg. The data captures only activity that occurs in public view—and on the floor of the Senate—when we know interest groups regularly lobby behind the scenes, whether in the corridors of Congress or on the pages of *The New York Times*.[23] But even with this limitation it would be hard to argue that the data displayed in Figure 1 fails to support Caldeira and Wright's astute observation:

> [T]he selection of [Supreme Court Justices]—once a "cozy triangle" of senators, the executive branch, and the bar—has became a major arena for the participation of interest groups . . . . What is more, despite changes in administration, the broad participation of organized interests and the battle lines drawn in the 1980s over the politics of judicial nominations [persist].[24]

Conveying a similar message about the increasingly politicized environment surrounding the appointment process are the data in Figure 2, *infra*. There we illustrate the increase in media coverage of individual nominations over time, with the dots indicating the precise magnitude of the growth (for example, Justice Ginsburg's appointment in 1994 generated 49 more stories [in *The New York Times* and *Time* magazine] than did her predecessor, Byron White's about three decades earlier, in 1962). Note that in every instance the successor nominees received more coverage than their predecessors and that overall, *The New York Times* and *Time* magazine published 358 more stories about the post-1980 nominees, for a mean change of 51.14.

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23. Indeed, one study estimates that at least 150 organizations participated in one way or another in the Bork nomination, David Austen-Smith & John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25, 35 (1994), while just thirty-eight provided testimony.

24. Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships*, *in* CONTEMPLATING COURTS 44-45 (Lee Epstein ed., 1995). Nonetheless, it is worth pointing out that while interest group participation in nominations is on the upswing, it is "not an entirely new phenomenon," as Yalof points out. "Organized interests," he continues, "figured significantly in defeating Stanley Matthews's nomination to the Court in 1881. Almost fifty years later, an unlikely coalition of labor interests and civil rights groups joined together to defeat the nomination of John Parker." DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES 16 (1999) (footnote omitted); *see also* Caldeira & Wright, *supra*, at 47-50.

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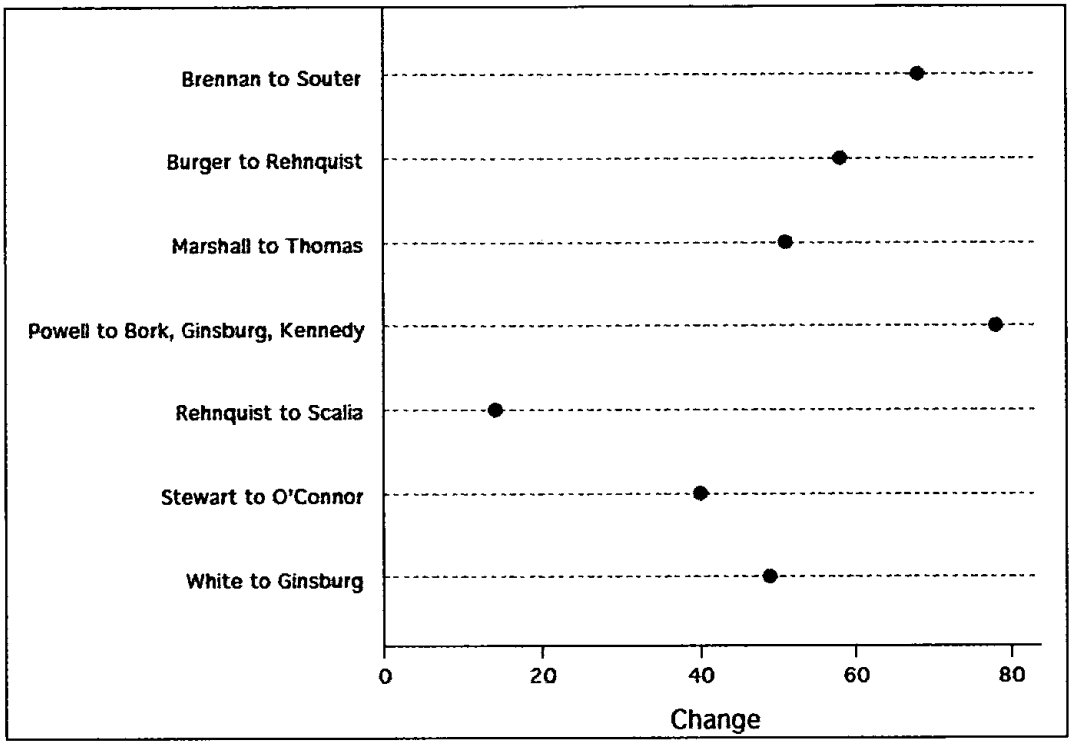
FIGURE 2

CHANGE (INCREASE) IN THE NUMBER OF STORIES PUBLISHED IN *THE NEW YORK TIMES* AND *TIME* MAGAZINE FROM NOMINEES APPOINTED SINCE 1980 AND THEIR PREDECESSORS.[25]



These data lend some support to those who argue that the environment surrounding Senate contemplation of Supreme Court nominees has grown increasingly political and highly charged. But the more relevant question is the extent to which U.S. Senators are political in response. Do Senators' votes, in other words, attend to ideological and partisan-political concerns rather than to a candidate's qualifications to serve on the high Court?

The answer, according to much of the existing commentary,[26] is yes. As Watson and Stookey write, a common complaint about the process is that "voting of the Senate has reflected political motives and ignored whether in fact the nominee is qualified."[27] Carter, the author of *The Confirmation Mess*, surely concurs,[28] as does Silverstein:

> It is difficult, if not impossible, to imagine prominent members of one political party today championing the nomination of a member

25. The source of this data is RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005).

26. Exceptions here include Cameron et al., *supra* note 15; Segal et al., *supra* note 15. In Part IV we refine and update the Cameron analysis.

27. WATSON & STOOKEY, *supra* note 8, at 214.

28. *See* CARTER, *supra* note 2.

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> of the opposition to the Supreme Court, and the notion that a president might be constrained to seek only nominees of stature and prominence is simply too fanciful to be seriously entertained. That a Democratic nominee with the long public career and the controversial publications of a [Benjamin] Cardozo could be nominated by a Republican president and confirmed by a voice vote of a Republican-controlled Senate, all within a period of ten days, is itself beyond modern comprehension.[29]

This is but a sampling of the conventional wisdom regarding the triumph of politics over credentials in the confirmation process; other exemplars would hardly be difficult to unearth.[30] Nor, we hasten to note, would it be difficult to locate social science evidence supporting these beliefs. From their analyses of seven nominations—Fortas (1968), Haynsworth, Carswell, Rehnquist (1971), Rehnquist (1986), Bork, and Thomas—Watson and Stookey claim that they can accurately predict 81.43% (n = 643) of the approximately 700 votes cast based *solely* on the ideology and political party affiliation of the Senators.[31] Massaro, in a study of the failed Fortas, Haynsworth, and Carswell nominations, goes even further—parsing the effect of the Senators' ideology and partisanship on their roll call votes. At the end of the exercise, Massaro concludes that "[i]n all three nominations, ideology is indicated to be a more convincing factor than party affiliation in explaining Senate voting on the Fortas cloture roll call and on the Haynsworth and Carswell nominations."[32]

III. QUALIFICATIONS AND THE CONFIRMATION OF SUPREME COURT NOMINEES: OUR STUDY

While these and other analyses seem to clinch the case—the confirmation of Supreme Court Justices is now much more about politics and ideology than it is about integrity and ethics—they are not without their flaws. Most relevant is that the authors select only those nominations that are controversial, thereby begging the question of what factors, including (the lack of) qualifications, lead to controversy. It also is the case that the authors base their conclusions on

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29. SILVERSTEIN, *supra* note 5, at 2.

30. *See, e.g.*, CARTER, *supra* note 2.

31. *See* WATSON & STOOKEY, *supra* note 8, at 185, 190.

32. *See* JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 15 (1990); *see also* DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 106 (1976). Rohde and Spaeth conducted a similar investigation of the nominations of Fortas (for Chief Justice in 1968), Haynsworth, Carswell, and Rehnquist (for associate in 1971) and reached the same general conclusion: "[I]t is the degree of liberalism of a senator and not his party affiliation which is related to his voting on nominations." *Id.*

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statistical models that take into account *only* politics and ideology; they fail to attend to qualifications, along with other factors that may affect the confirmation decision.[33] As such, they cannot possibly assess the extent to which ideology, qualifications, both, or neither affect the votes cast by Senators. Making that assessment requires a consideration of all the relevant factors simultaneously in one statistical model.[34]

To our knowledge, only one team of researchers has undertaken this task—Cameron, Cover, and Segal in their 1990 article appearing in *The American Political Science Review*[35]—and it is that team's lead that we follow here. Momentarily, we unveil our plan for so doing, that is, for refining and extending this classic study. Here and now, though, we simply want to outline the underlying logic of our (and the Cameron et al.) analysis. For starters, it is important to understand what we are seeking to explain, namely, the votes cast by individual Senators over Supreme Court nominees since Warren in 1953.[36] These votes, in other words and in the parlance of social science, constitute the *dependent variable* in our study.

Second, we attempt to explain these votes via three sets of factors, or *independent variables*: qualifications,[37] ideology,[38] and control variables.[39] The first two—qualifications and ideology—constitute the primary variables of interest; that is, we gear our study toward understanding whether nominees' qualifications, their ideological proximity to Senators, neither, or both account for Senators' votes. Control variables are those that we also think may affect confirmation votes, and therefore we must consider them to avoid "omitted variable bias."[40] Here those variables are, as they were in the Cameron et al. analysis, whether the President is "strong" and whether the Senator is of the same party as the President.[41]

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33. For other problems with these sorts of studies, see Cameron et al., *supra* note 15, at 526.

34. For more on this point, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 76-80 (2002). *See also infra* note 40 and accompanying text.

35. Cameron et al., *supra* note 15; *see also* Segal et al., *supra* note 15. However, here we focus on extending and refining the earlier 1990 piece.

36. Warren was nominated in 1953 and confirmed in 1954. More generally, see *infra* Part III.A for more information on Senate votes over nominations to the Court.

37. *See infra* Part III.B.

38. *See infra* Part III.C.

39. *See infra* Part III.D.

40. Epstein & King, *supra* note 34; GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (1994). Omitted variable bias occurs when a statistical comparison excludes variables that are (a) known to affect the outcome and (b) correlated with the explanatory covariate of interest.

41. Cameron et al., *supra* note 15.

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Finally, we require a statistical method that enables us to estimate the effect of these independent variables on the dependent variables (the votes of individual Senators). For the reasons we explain in Part IV, a maximum-likelihood probit model is ideally suited for our purposes.

With our general plan outlined, let us now turn to the task of fleshing it out by providing details on the dependent variable, the independent variables, and our statistical model. We then, in Part IV, turn to an inspection of the results yielded by our analysis.

A. The Dependent Variable: Confirmation Votes

The dependent variable of our study consists of the 2461 confirmation votes cast by individual Senators on the Supreme Court nominees from Earl Warren, in 1953, through Stephen G. Breyer, in 1994.[42] Of the 2461 total votes, 15.35% (n = 378) were cast against the nominee and 84.65% (n = 2084) were cast in the nominee's favor.

Since our website houses the vote data, along with all other variables included in this study,[43] we merely summarize, in Table 1, *infra*, the aggregate votes for and against each nominee. Note that most votes have not been close. Thus the mode of nay votes is zero. On the other hand, a great deal of variation exists from nominee to nominee, such that the number of nay votes on average is 14.81, with a relatively high standard deviation of 19.94.

42. Inter-University Consortium for Political and Social Research, *United States Congressional Roll Call Voting Records* (Study No. 4), *at* http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/00004.xml (last modified June 17, 2004).

43. Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, *at* http://epstein.wustl.edu/research/qualified.html (last visited Oct. 20, 2004) (providing data for this Essay).

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TABLE 1

SENATE VOTES ON SUPREME COURT NOMINEES, 1953-1994.[44]

NOMINEE	VOTES IN FAVOR	VOTES OPPOSED
Earl Warren (CJ)	96	0
John Marshall Harlan	71	11
William J. Brennan, Jr.	95	0
Charles Evans Whittaker	96	0
Potter Stewart	71	17
Byron Raymond White	100	0
Arthur Joseph Goldberg	100	0
Abe Fortas	100	0
Thurgood Marshall	69	11
Abe Fortas (CJ)	43	44
Warren Earl Burger (CJ)	74	3
Clement Haynsworth, Jr.	45	55
G. Harrold Carswell	45	51
Harry A. Blackmun	94	0
Lewis F. Powell, Jr.	89	1
William H. Rehnquist	68	26
John Paul Stevens	98	0
Sandra Day O'Connor	99	0
William H. Rehnquist (CJ)	65	33
Antonin Scalia	98	0
Robert H. Bork	42	58
Anthony M. Kennedy	97	0
David H. Souter	90	9
Clarence Thomas	52	48
Ruth Bader Ginsburg	96	3
Stephen G. Breyer	87	9

44. The letters "CJ" indicate the President nominated the candidate for Chief Justice. The vote on Fortas for the Chief Justice position was on cloture and failed to receive the necessary two-thirds majority. Voice votes were taken on the nominations of Warren, Brennan, Whittaker, White, Goldberg, and Fortas (for an Associate Justice position). *Id.* The voice votes are treated as unanimous because there is no data on the counts. It is worth noting that we reran the model presented in Table 2, *infra*, at p. 1168, without the six "voice vote" nominees and all the variables continued to generate statistically significant ($p < .05$) coefficients (the p-value for Lack of Qualifications drops from .005 to .032, and the p-value for Ideological Distance drops from .010 to .012). Also worth noting is that Felice and Weisberg report that across four of the voice votes (Warren, Brennan, Fortas, and Goldberg) there was, in fact, opposition from a total of (at least) seven Senators. Felice & Weisberg, *supra* note 9, at 515. Six of these seven Senators' votes were modified from yeas to nays (the seventh did not participate in the vote over the nominee he apparently opposed), and we reran the model depicted in Table 2. Once again, all the variables continue to generate statistically significant ($p < .05$) coefficients (the p-value for Lack of Qualifications moves from .005 to .002, and the p-value for Ideological Distance moves from .01 to $\leq .001$).

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B. An Independent Variable of Primary Interest: Qualifications

What the vote data reveals, to put it simply, is that while Senators overwhelmingly vote in favor of confirmation (84.65% of all votes are yeas), we could hardly deem decisions over Supreme Court nominees consensual. In eighteen of the twenty-six cases, the nominee caused some degree of division among the Senators. This is important for our purposes, since without variation in votes, even limited variation, we would have little to explain; we might well conclude that the Senate merely supported (or opposed) the President's choice.[45]

Since this is clearly not the case, let us now turn to the factors that may explain the variation we observe, beginning with qualifications. As we have noted throughout, many would agree with Choi and Gulati when they write:

> [D]iscussion[s] [over Supreme Court nominees are now] almost entirely political (focusing on litmus tests such as a candidate's likely position on abortion). Occasionally, a nominee's intellectual ability is mentioned, but this topic has time and time again been placed to the side in favor of a discussion of the nominee's political beliefs.[46]

Choi and Gulati may be right in their characterization of the current state of appointment discourse, but does that necessarily mean that qualifications play an insignificant role (relative to other factors) in a Senator's decision to vote for or against a candidate, especially when the Senator is ideologically distant from the candidate?

To address this question, we must develop a measure of "qualifications." Given the disagreement among scholars and policymakers over the characteristics that make for a "qualified" nominee, this is no simple mission. Indeed, there are some who seem to argue that we ought to jettison it altogether. To them, attempts to devise "objective" indicators of qualifications or merit are "doomed to failure" because "'[q]ualifications' always have been and always will be defined politically."[47]

We cannot say we disagree, but devising a measure of merit based on Senators' (or even scholars') colored definitions of merit is not our project. Rather, our goal is to tap into the Senators' or—more precisely, assuming that Senators are oriented toward reelection—their constituents' *perceptions* of whether a candidate is qualified or not. This requires us to locate a measure of qualifications from sources external to and independent of the Senate (and, of course, that is available and observable prior to its vote).

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45. But we could not, nor should we, eliminate the possibility that the President nominated individuals he believed the Senate would confirm. *See* Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999).

46. Choi & Gulati, *supra* note 3, at 300-01 (footnote omitted).

47. WATSON & STOOKEY, *supra* note 8, at 219.

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One measure that comes readily to mind is the Nominee ratings produced by the American Bar Association's (ABA) Standing Committee on the Federal Judiciary. The ABA's ratings are presumably extrinsic to individual Senators, are announced prior to the confirmation vote, and, according to the ABA, are "impartial evaluations of the integrity, professional competence and judicial temperament" that "[do] not consider a nominee's philosophy or ideology."[48] However, they are also problematic in any number of ways. One is that the Committee's rating system has fluctuated with time, and even within particular periods it has lacked consistency. For example, until 1970 it typically rated a candidate as simply "qualified" or "unqualified." In 1963, however, it deemed Arthur Goldberg "highly acceptable," but the ABA thought it inappropriate to proffer "an opinion to the degree of qualification."[49] Also problematic for our purposes are allegations that ABA ratings evince a (liberal) ideological bias;[50] that bias may explain George W. Bush's decision to end the Committee's "semi-official" role in conducting pre-nomination evaluations of judicial candidates, a role it has played since the Eisenhower administration.[51]

Given these concerns, we think it is best to eschew the ABA approach in favor of the one that Cameron and his colleagues developed and used in their study of Senate votes: a measure of qualifications derived from a content analysis of newspaper editorials written from the time of nomination by the President until the vote by the Senate.[52] Specifically, Cameron and his colleagues selected four of the nation's leading newspapers, two with a liberal outlook (*The New York Times* and *The Washington Post*) and two on the more conservative end (the *Chicago Tribune* and the *Los Angeles Times*) and identi-

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48. American Bar Association, *ABA Standing Committee on Federal Judiciary, at* http://www.abanet.org/scfedjud/home.html (last visited Feb. 7, 2005).

49. ABRAHAM, *supra* note 11, at 25. For the language the ABA has used in its ratings, see EPSTEIN ET AL., *supra* note 20, at 359-60.

50. *See, e.g.*, James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1 (2001).

51. *See* Neil A. Lewis, *Bar Association's Role in Screening Federal Judges Is Reviewed*, N.Y. TIMES, Mar. 20, 2001, at A16. The Bush administration has denied this charge, claiming instead, in a letter to the President of the ABA:

> The issue at hand . . . [is] whether the A.B.A. alone—out of the literally dozens of groups and many individuals who have a strong interest in the composition of the federal courts—should receive advance notice of the identities of potential nominees in order to render prenomination opinions on their fitness for judicial service.

Neil A. Lewis, *White House Ends Bar Association's Role in Screening Federal Judges*, N.Y. TIMES, Mar. 23, 2001, at A13. Ultimately, the administration decided the ABA should not receive advance notice. *Id.*

52. *See* Cameron et al., *supra* note 15, at 529-30. The same research team also used the qualifications measure in Segal et al., *supra* note 15, and the scores are reported in EPSTEIN ET AL., *supra* note 20, at 361.

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fied every editorial that offered an opinion on the candidate's qualifications (from the nominations of Earl Warren through Anthony Kennedy). With the editorials in hand, Cameron and his colleagues coded their content on the basis of claims about the nominee's acceptability from a professional standpoint;[53] the research team then created a scale of qualifications for each nominee that ranges from one (most qualified) to zero (least qualified).[54]

Following procedures set forth by Cameron and his colleagues, Segal updated their measure to include the four nominations subsequent to Anthony Kennedy, and we now display the results, the qualification scores for all nominees from Earl Warren to date, in Figure 3, *infra*. From the data it is easy to see why we and others find this measure so compelling: it seems to have a high degree of facial validity; that is, it appears to comport with our existing knowledge of the nominees. Note, for example, that it is Carswell, reckoned "mediocre" even by supporters,[55] who receives the lowest score, while it is Kennedy, Ginsburg, Scalia, and several others—that is, candidates even would-be opponents admitted were qualified to serve[56]—who received the highest score.

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53. To provide an example (one of which comes from our updating of the Cameron et al. qualifications score), consider the following statement, which appeared in an editorial about Ruth Bader Ginsburg in *The New York Times*:

> The bridge she builds to justices like John Harlan, who served from 1957 to 1971, is a reminder of the mediocrity of so many appointees of the Bush-Reagan years. Nominees chosen for ideology, or with sparse credentials out of political necessity, by increments have depressed the Court's performance, professional standing and fidelity to law. President Clinton's nominee brings a touch of class to the Supreme Court.

A Touch of Class for the Court, N.Y. TIMES, July 25, 1993, at E16. We coded this as a positive statement about Ginsburg's professional qualifications.

The following, also appearing in *The New York Times*, would be a negative statement about Clarence Thomas's professional qualifications:

> Believe him or not, nothing in this bizarre episode enhances Judge Thomas's qualifications, which were slim to start. Believe him or not, his behavior on the witness stand does nothing to enhance those qualifications. Believe him or not, to confirm him is to gamble.
>
> If Judge Thomas were a brilliant jurist, a Holmes or a Brandeis, the gamble might be justified. But Clarence Thomas offers no such brilliance, no basis for gambling with the public's confidence in, and the future of, American law.

Against Clarence Thomas: Even 'Don't Know' Calls for a 'No' Vote, N.Y. TIMES, Oct. 15, 1991, at A24.

54. In our analysis, we use a nominee's lack of qualifications, rather than his qualifications, as an independent variable. We derive the Lack-of-Qualification variable simply by subtracting the Qualification measure from one.

55. Recall Senator Roman Hruska's (infamous) defense of Judge Carswell: "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?" LAWRENCE BAUM, THE SUPREME COURT 47 (1st ed. 1981).

56. Note that these three run the ideological gamut from conservative to relatively moderate to liberal, and yet all received the ABA's highest endorsement: well qualified by a unanimous vote. *See* EPSTEIN ET AL., *supra* note 20, at 360.

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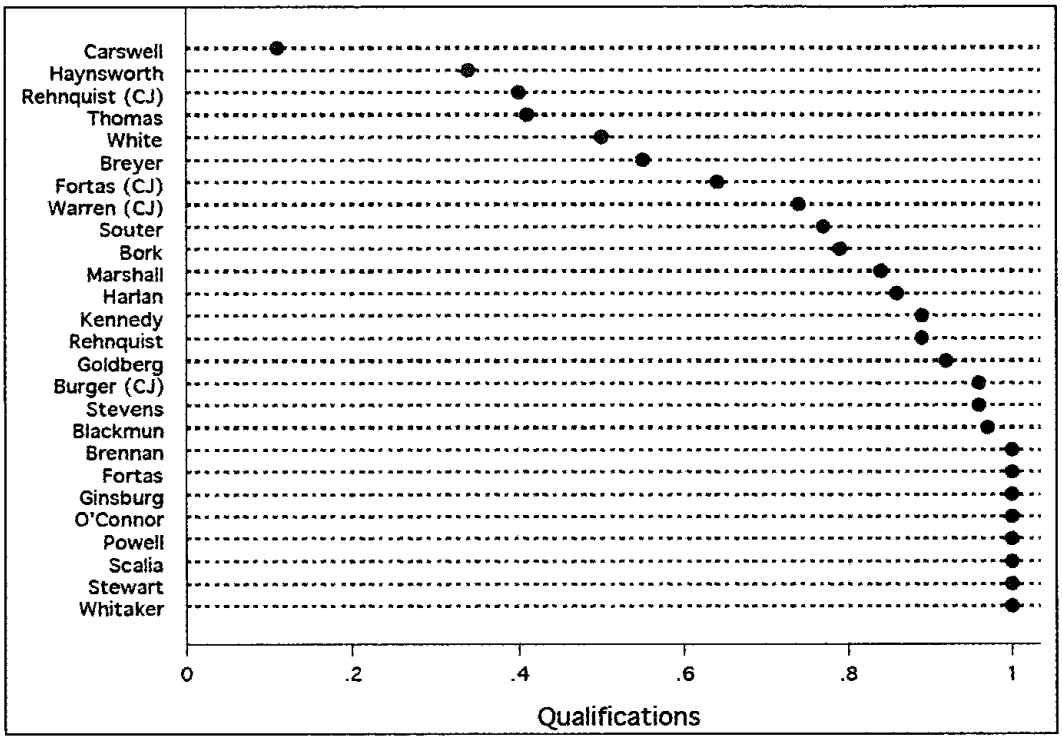
FIGURE 3

PERCEIVED QUALIFICATIONS OF SUPREME COURT NOMINEES, 1953-1994.[57] THE SCORES RANGE FROM ONE (MOST QUALIFIED) TO ZERO (LEAST QUALIFIED).



Facial validity, though, is not the only reason why we invoke these measures in our quest to explain Senate votes for Supreme Court nominees. At least three others come to mind. First, the scores meet our original criteria of being external to the Senate (it is newspaper editors and not Senators from whom we derived the scores) and of being available and observable prior to the Senate's vote. Second, the scores pass standard criteria for intercoder reliability: using π as their index, Cameron and his colleagues report results of .87 ($p < .001$).[58] Finally—and perhaps not so stunningly, given the range of newspapers consulted—the measure does not appear biased by ideology or political party; in other words, neither liberals nor democrats receive higher (or lower) ratings based solely on their policy preferences or partisanship.[59]

Despite these advantages, at least one scholar has critiqued the ap-

57. The letters "CJ" indicate the President nominated the candicate for Chief Justice. We do not include Homer Thornberry or Douglas Ginsburg because those nominations were withdrawn before any Senate action. The Fortas nomination (for Chief Justice in 1968) was also withdrawn, but only after a Senate vote to end a filibuster failed to receive the necessary two-thirds majority. *See* EPSTEIN ET AL., *supra* note 20, at 361.

58. Cameron et al., *supra* note 15, at 533.

59. A bivariate regression of the qualification score on our measure of ideology (*see* Part III.C) produces an insignificant coefficient ($p = .136$), as does a regression of qualifications on the nominee's political party ($p = .642$).

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proach on the ground that it does not fit with his "conviction that the measure of characteristics such as 'qualifications' or even 'ideology' is never static but fluctuates over time in response to the political realities of the day."[60] But because the measure is indeed dynamic in this way—after all, its developers derived it from editorials contemporaneous with the nomination—this is actually yet another benefit of, rather than a fatal flaw in, our approach to assessing a candidate's qualifications.

C. *Ideology*

"Qualifications" is one of our variables of chief concern; the other is ideology (or policy preferences). Specifically, in line with existing commentary, we expect that Senators are more likely to vote for nominees who are ideologically proximate to them (or their constituents)[61] than they are for nominees who are ideologically distant, especially if the nominee is not particularly well qualified.

To assess this hypothesis we require not one but two measures of ideology—the candidate's and the Senator's—as well as a method for comparing the two so that we can calculate the distance between them. In what follows, we elaborate on these requirements and how we fulfilled them.

1. *The Ideology of the Nominee*

To assess the ideology of nominees, we must develop a measure that is independent of judicial behavior (or at least independent of behavior on the Supreme Court), that we can calculate for all nominees (thereby eliminating, for example, votes cast or opinions written as a lower court judge), and that we can observe prior to the Senate's vote.

Since these are some of the very same criteria that guided our selection of a measure of qualifications, it will come as no surprise that our measure of ideology is quite similar to an ideological score developed by political scientists Segal and Cover from newspaper editorials written between the time of nomination to the Supreme Court and the Senate's vote.[62]

The procedures used by Segal and Cover to analyze the editorials are virtually the same as those Cameron, Cover, and Segal invoked to create their measure of qualifications, but here, of course, they focused their

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60. SILVERSTEIN, *supra* note 5, at 5.

61. We do not attempt to separate a Senator's personal ideology from that of his or her constituents; rather, we rely on analyses of roll call votes in the form of NOMINATE scores. For an effort to separate Senate and constituent preferences, see Segal et al., *supra* note 15.

62. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). Segal and Cover made use of the same four newspapers as did Cameron et al. in developing the qualifications measure: *The New York Times*, *The Washington Post*, the *Chicago Tribune*, and the *Los Angeles Times*. Cameron et al., *supra* note 15; *see* Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) (updating the Segal and Cover scores to cover the four most recent nominees: Souter, Thomas, Ginsburg, and Breyer).

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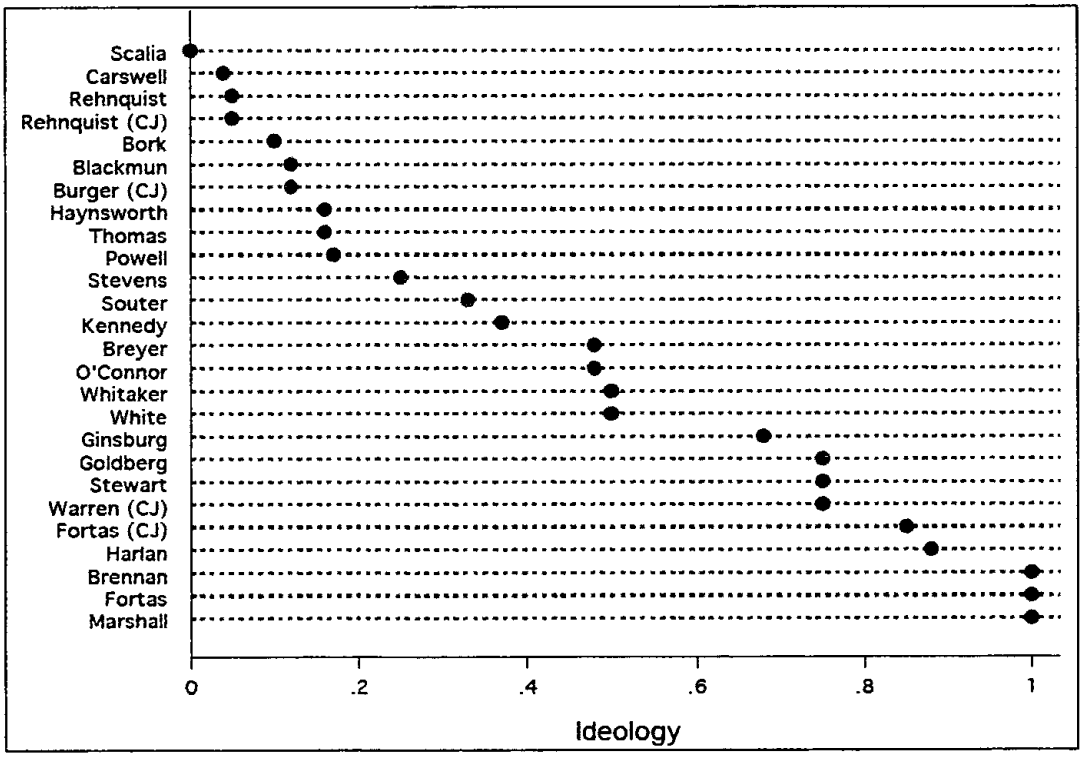
content analysis on ideology. As Segal and Cover tell it:

> [W]e trained three students to code each paragraph [in the editorial] for political ideology. Paragraphs were coded as *liberal*, *moderate*, *conservative*, or *not applicable*. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.[63]

Segal and Cover then measured judicial ideology by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate. The resulting scale of ideology (or policy preferences) ranges from zero (unanimously conservative) to .50 (moderate) to one (unanimously liberal). Figure 4 displays the score for each post-1953 nominee.

FIGURE 4

PERCEIVED IDEOLOGY OF SUPREME COURT NOMINEES, 1953-1994.[64] THE SCORES RANGE FROM ZERO (MOST CONSERVATIVE) TO ONE (MOST LIBERAL).



63. Segal & Cover, *supra* note 62, at 559.

64. The letters "CJ" indicate the President nominated the candidate for Chief Justice. *See* EPSTEIN ET AL., *supra* note 20, at 361.

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These ideological scores have developed quite a following in the social sciences, and it is not hard to see why. Just as the qualification score appears facially valid, so too do the ideological scores. To be sure, there are some exceptions (for example, Clarence Thomas seems more conservative than his score), but overall the measure comports with our impressions of those nominees who ascended to the Court. William Brennan and Thurgood Marshall, generally regarded as liberals, received scores of 1.00; Scalia and Rehnquist, generally regarded as conservatives, received scores of .00 and .05 respectively.[65]

For our purposes the scores' degree of validity (and reliability)[66] is important, but they are also of Court behavior, available for all our nominees, and observable prior to the Senate's vote. In other words, the scores fulfill just about all the needs of our research.

2. *The Ideology of Senators*

Assessing the ideology of Senators is not a particularly challenging task. For over a decade now, social scientists have invoked NOMINATE scores or a variation of them (such as the ones we use here, Common Space Scores)[67] to measure the ideology of Senators.[68] These scores result from subjecting congressional roll call votes to a scaling algorithm designed to identify each Congressional member's position in an ideological space.[69] The first dimension coordinate (which we use here) typically picks up the liberal/conservative dimension of conflict in American politics and

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65. In fact, scholars have found that the ideological scores provide a satisfactory predictor of judicial votes. *See, e.g.*, Segal & Cover, *supra* note 62; Segal et al., *supra* note 62. Certainly they explain the votes in some issues better than they do in others. *See* Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996). But overall, across a range of cases, they have above-threshold predictive power. For example, for the nominees in our study who attained seats on the Court, the correlation between the ideological scores and votes in civil liberties cases is .771 and for economic cases it is .620.

66. Using π, Cameron and his colleagues report reliability results of .72 ($p < .001$). Cameron et al., *supra* note 15, at 533.

67. Some scholars use the Americans for Democratic Action (ADA) vote scorecards to measure the ideology of Senators. But, because the ADA relies only on a subset (and a nonrandom one at that) of votes to compute its scores, we eschew this approach in favor of NOMINATE scores, and specifically the Common Space Scores. We have several reasons for taking this particular tack, most importantly because it provides us with scores for Presidents, and we ultimately deploy those scores to derive Common Space Scores for nominees. *See infra* Part III.C.3.

68. *See* Keith Poole, *DW-NOMINATE Scores*, *at* http://www.voteview.com/dwnomin.htm (last visited Feb. 7, 2005); Keith Poole, Description of NOMINATE Data, *at* http://www.voteview.com/page2a.htm (last visited Feb. 7, 2005) (describing differences among the kinds of NOMINATE coordinates); *see also* KEITH T. POOLE AND HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

69. All votes with less than 97.5% agreement are scaled, and all members who voted at least twenty-five times in a given Congress are scaled.

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ranges from negative one (most liberal) to one (most conservative).[70]

Of course, our interest is in the ideology of the *individual* Senators who voted on Supreme Court nominees. But, for purposes of illustration, we provide, in Figure 5, *infra*, a glimpse of the ideology of the Senate during the nominations under study here. Specifically, we depict the NOMINATE Common Space Score of the median member of the Senate at the time of the confirmation proceedings from Earl Warren though Stephen Breyer.

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70. We should note that by invoking these scores, we depart from Cameron and his colleagues who used the ADA vote scorecards. *See supra* note 67. In computing the ideological distance between the Senators and nominees, Cameron and his colleagues compared, on the same metric, the Segal and Cover scores (their and our measure of nominee ideology) and the ADA scores (their measure of Senate ideology). *See* Cameron et al., *supra* note 15, at 533. We, of course, use a different measure of Senate ideology (the Common Space Scores), and we take a different tack in computing the distance between Senators and nominees. *See infra* Part III.C.3. Nonetheless, we did replicate their model (using their measures but including the four most recent nominees) to assess the compatibility of our approach and theirs. No major distinctions arose, as even a quick glance at the table below and the one presented in Table 2, *infra*, at p. 1168, would reveal.

VARIABLE	COEFFICIENT	(STANDARD ERROR)
Lack of Qualifications	-1.220**	(0.257)
Ideological Distance	-1.156**	(0.251)
Lack of Qualifications × Ideological Distance	-9.678**	(0.954)
Strong President	1.020**	(0.117)
Same Party	0.838**	(0.105)
Constant	1.774**	(0.110)
N	2451	
Log-likelihood	-461.347	
$X^2_{(5)}$	1184.991	

Probit estimates of Senators' votes on Supreme Court nominees, using the Cameron et al. approach (** indicates $p \leq .01$).

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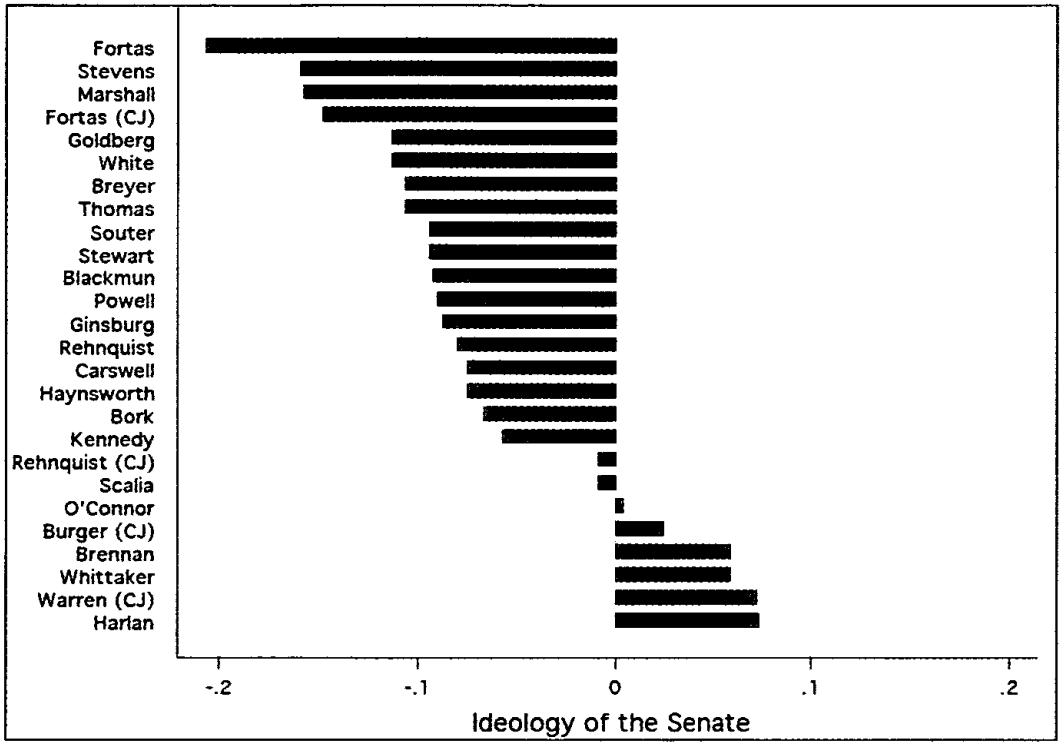
FIGURE 5

THE IDEOLOGY OF THE MEDIAN MEMBER OF THE SENATE DURING SUPREME COURT CONFIRMATION PROCEEDINGS, FROM EARL WARREN TO STEPHEN BREYER.[71] THESE ARE (FIRST DIMENSION) COMMON SPACE SCORES, WHICH RANGE FROM NEGATIVE ONE (MOST LIBERAL) TO ONE (MOST CONSERVATIVE).



Interesting, of course, is the disparate ideological conditions prevailing at the various nominations. Note, for example, the relatively "friendly" environment surrounding the confirmation of Thurgood Marshall: a liberal nominee (Marshall attains a perfect one (liberal) score on Segal and Cover's ideological scale) facing one of the most liberal Senates in our database (a median Common Space Score of -.1575). In direct contrast comes the conservative Robert Bork (a .10 on the Segal and Cover scale), who was forced to confront a relatively liberal Senate (a median Common Space Score of -.0665).[72]

3. *Comparing the Ideology of Nominees and Senators*

Whether the hospitable political environment explains Marshall's success and the relatively hostile environment explains Bork's failure

71. *See* Keith Poole, *Common Space Data*, *at* http://www.voteview.com/readmeb.htm (last visited Feb. 7, 2005).

72. The median Senate first dimension Common Space Score over all the nominations is -.057, and the mean is -.033 with a standard deviation of .314. *Id.*

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remains an open question—and one that the forthcoming analyses are precisely designed to explain. But, before we turn to those analyses, we have several more steps to take, including among the most delicate: devising a method to compare the ideologies of Senators and nominees so that we can compute the distance between them. Only by deriving such a "distance" variable can we determine the extent to which politics enters into the decisions of individual Senators.

This is indeed a delicate task in light of the measures we employ to tap the preferences of these actors: the Segal and Cover scores for nominees and the Common Space Scores for Senators. Because these preference proxies are not directly comparable, merely subtracting one from the other will produce a problematic measure of the distance between them.

We solve this problem by making use of the underlying logic of the Cameron et al. analysis—which conceptualizes distance by squaring the difference between the ideology of the nominee and the ideology of the Senator—but we adapt it to our measurement strategy.[73] Specifically, we arrive at a Common Space Score for each nominee so that we can directly calculate the distance between his or her ideology and that of the voting Senators. (We derived the score by applying a linear transformation, which we generated by regressing presidential Common Space Scores on the Segal-Cover scores.[74])

D. Control Variables

As we have stated throughout, "Ideology" and "Qualifications" constitute our chief independent variables, but there are two others that Cameron and his colleagues (and, indeed, any analysis of Senate voting over Court nominees ought) take into account: the "Strength of the President" and "Same Party."[75] The strength of the President cap-

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73. Recall that Cameron and colleagues compared (on the same metric) the Segal and Cover scores (their and our measure of Court ideology) and the ADA scores (their measure of Senate ideology). Cameron et al., *supra* note 15, at 533; *see also supra* notes 67, 70. We would be in error to do the same given our assessment of Senate ideology via Common Space Scores.

74. The specific steps we took are as follows:

We began by estimating a simple OLS regression model with presidential ideology NOMINATE Common Space Scores as the dependent variable and the Segal and Cover scores as the only independent variable. We included only those Presidents whose party controlled the Senate at the time of confirmation, under the assumption that such Presidents are (relatively) unconstrained and thus able to appoint nominees who mirror their own ideology.

The OLS regression provided the following linear transformation to calculate Common Space Scores for nominees from Segal and Cover scores: Common Space Score = 0.4401225 - 0.9148797 (Segal and Cover).

We then applied that transformation to all nominees to derive the Common Space Scores. The (euclidean) distance variable was calculated according to the following formula: *Euclidean Distance = (cs1 - cs_nom)* (where *cs1* is the first dimension Common Space Score for Senators, and *cs_nom* is the Common Space Score for Nominees).

75. Cameron et al., *supra* note 15, at 530-31.

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tures the idea that some Presidents are simply in a better position to attain approval of their nominees than are others. We attend to this idea as did Cameron and his colleagues,[76] with a variable that takes on the value of one if the President's political party controls the Senate and the President is not in the fourth year of his term of service. Otherwise, the value is zero. The second control variable, which we include for all the obvious reasons, indicates whether the President and the individual Senator are of the same political party. If they are, the variable is coded one. If they are not, the variable is coded zero.

E. Summary of the Model

To summarize, we argue that four factors explain the votes of individual Senators on nominees to the U.S. Supreme Court.

1. Lack of Qualifications: The lower a nominee's qualifications (see Figure 3),[77] the lower the probability of a Senator voting in favor of the nominee.
2. Ideological Distance: The further the ideological distance between a nominee (see Figure 4)[78] and a Senator, the lower the probability of a Senator voting in favor of the nominee.
3. Strong President: If a President is strong, the higher the probability of a Senator voting in favor of the nominee.
4. Same Party: If a President and Senator are of the same political party, the higher the probability of a Senator voting in favor of the nominee.

Given the way we code the variables, we expect the estimated coefficients on the first two variables to be negatively signed, and on the second two variables, positive.

Finally, we incorporate into our model a crucial fifth variable—one representing the interaction between Qualifications and Ideological Distance. This enables us to determine the extent to which Senators vote against unqualified nominees, who are ideologically distant from them (as we might hypothesize), apart from any independent effects the two variables may exert on that vote. For example, just as Republicans found President Clinton's ethical failings to be far more serious than did Democrats, we might expect liberals to be far more affected by the charges against Clarence Thomas, and conservatives far more troubled by the ethical allegations against Abe Fortas. Whether this "conditional" response to a nominee's professional integrity (or, more pointedly, lack thereof) is the result of motivated reasoning, the psy-

76. *Id.* at 529-30.
77. *See supra* p. 1160 fig.3.
78. *See supra* p. 1162 fig.4.

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chological reflex that causes humans to believe those arguments they wish to believe, or sheer hypocrisy is beyond the scope of this study; we simply hypothesize that the data will indicate behavior consistent with the response.

IV. RESULTS OF THE ANALYSES

Because the outcome of our dependent variable, a Senator's vote, is binary (yea or nay), standard OLS regression is inappropriate. Accordingly, we explore the effect of the variables on the vote choice via a probit model, which we estimate using maximum likelihood.

Table 2 summarizes the results, which, all in all, appear satisfactory. Each coefficient runs in the right direction; each is statistically significant at $p \leq .01$; and none is trivial in size. We thus could say much the same of our exercise as did the Cameron team about theirs: "Judged by an array of statistical criteria, the model was very successful."[79]

TABLE 2

PROBIT ESTIMATES OF SENATORS' VOTES ON SUPREME COURT NOMINEES.[80]

VARIABLE	COEFFICIENT	(STANDARD ERROR)
Lack of Qualifications	-0.678**	(0.239)
Ideological Distance	-0.641**	(0.249)
Lack of Qualifications × Ideological Distance	-9.009**	(0.920)
Strong President	0.900**	(0.103)
Same Party	0.367**	(0.089)
Constant	1.507**	(0.094)
N	2461	
Log-likelihood	-584.399	
$X^2_{(5)}$	942.23	

These basic results now noted, let us consider how they inform the major concern of this Essay: the relative roles of politics and professional merit in the confirmation of Supreme Court Justices.[81] Beginning with politics, Table 2 tells us that the coefficient produced by the Ideological Distance variable is negative and significant, indicating that, in fact, politics does play a role in confirmation proceedings: As the ideological distance between a Senator and nominee increases, the probability of a nay vote increases. So

79. Segal et al., *supra* note 15, at 109.

80. ** indicates $p \leq .01$.

81. Note that Table 2 displays probit coefficients, which are not as easy to interpret as, say, OLS regression coefficients. Accordingly, in our discussion of the results here and elsewhere, we transform them into probabilities.

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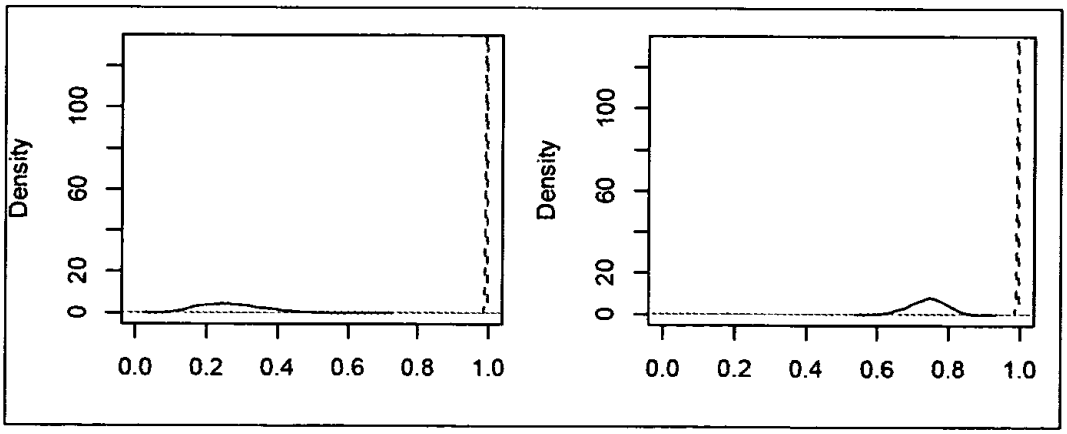
too, as we can see in the left panel of Figure 6, *infra,* this statistical finding is not, especially if we keep in mind that nearly eighty-five percent of all votes are "yeas," without substantive import. Figure 6, *infra,* demonstrates that the probability, across the twenty-six nominees under investigation, of a favorable vote varies depending on a Senator's proximity to the candidate under consideration. When we set all other variables at their mean (or median [in the case of variables that take on values of 0 or 1], except for the interaction term), the likelihood, on average, of a Senator voting for a candidate is .235 when that Senator and the candidate are ideological extremes (the black line). That figure increases by a factor of 4.23, to .994, when they are at the closest levels (the dashed line).

FIGURE 6

THE EFFECT OF IDEOLOGY AND QUALIFICATIONS ON THE VOTES OF SENATORS OVER SUPREME COURT NOMINEES FROM EARL WARREN TO STEPHEN BREYER.[82] EACH CURVE REPRESENTS THE PROBABILITY DENSITY OF VOTING YEA ON THE NOMINEE, ACCOUNTING FOR THE UNCERTAINTY IN OUR ESTIMATES. ALL VARIABLES ARE SET AT THEIR SAMPLE MEANS (OR MEDIANS) (FOR EACH PANEL, THE VARIABLE ON THE X-AXIS IS INTERACTED WITH THE SAMPLE MEAN OF THE OTHER VARIABLE). THE LEFT PANEL SHOWS THESE PROBABILITIES FOR IDEOLOGICALLY DISTANT NOMINEES (BLACK) AND IDEOLOGICALLY PROXIMATE NOMINEES (DASHED); THE RIGHT PANEL, FOR HIGHLY UNQUALIFIED NOMINEES (BLACK) AND HIGHLY QUALIFIED NOMINEES (DASHED).



82. We generated these figures using the program Zelig, Version 1.1-2 2004. *See* Kosuke Imai et al., *Zelig: Everyone's Statistical Software, at* http://gking.harvard.edu/zelig (last visited Feb. 7, 2005); see also Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation,* 44 AM. J. POL. SCI. 347 (2000).

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Nearly as important as the candidate's policy preferences (relative to the Senator's), though, is his or her professional merit. To see this, consider the right panel which demonstrates the probability of a Senator voting for a nominee on the basis of the nominee's qualifications. Notice that when a nominee is perceived as highly unqualified (the black line) and all other variables are at their mean (or median, except for the interaction term), the likelihood of a Senator casting a nay vote is (1 - .75 = .25); that probability decreases 125-fold to (1 - .998 = .002) when the nominee is highly qualified (the dashed line).

Figure 6 depicts the likelihood of a yea vote when all the variables (except those of interest) are set at their mean (or median, except for the interaction term). Also worthy of exploration are other possible scenarios, such as the one we display in Figure 7, *infra*: when the President is at his lowest level of influence because the Senator and the President hail from different parties, the President's party does not control the Senate, or he is in the fourth year of his term of service (and all other variables are set at their mean or median, except for the interaction term). Note, first, the effect of ideological distance (depicted in the left panel): if the ideological distance is minimal (the solid line), the Senator will still, in all likelihood, vote for the President's nominee (.914 probability) even though the President is quite weak. But the odds turn against the President (.025) when the Senator and the nominee are ideological extremes (the dashed line). Now consider the near-parallel effect of qualifications (shown in the right panel): Presidents—even those with severely limited political clout—will have a far easier time attaining the confirmation of their candidate if Senators perceive that candidate as highly qualified (.915 for the solid line) than if they do not (.161 for the dashed line).

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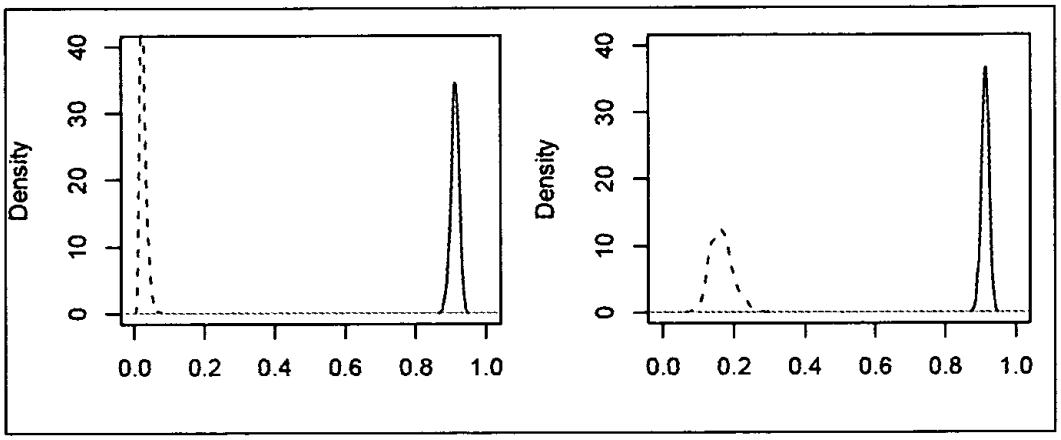
FIGURE 7

THE EFFECT OF IDEOLOGY AND QUALIFICATIONS ON THE VOTES OF SENATORS OVER SUPREME COURT NOMINEES, FROM EARL WARREN TO STEPHEN BREYER, WHEN THE PRESIDENT IS AT HIS LOWEST LEVEL OF INFLUENCE.[83] EACH CURVE REPRESENTS THE PROBABILITY DENSITY OF VOTING YEA ON THE NOMINEE, ACCOUNTING FOR THE UNCERTAINTY IN OUR ESTIMATES. THE LEFT PANEL SHOWS THE PROBABILITY OF A SENATOR CASTING A YEA VOTE WHEN THE SENATOR AND THE NOMINEE ARE IDEOLOGICALLY PROXIMATE (THE BLACK LINE) AND IDEOLOGICALLY DISTANT (THE DASHED LINE).



Taken collectively, these results indicate that both ideology and qualifications have a significant, independent effect on the Senate's decision to confirm. However, it is the interaction between the two that provides the greatest explanatory power. Senators will most certainly vote for candidates who are ideologically close and well qualified, and they also will almost certainly vote against candidates who are distant and not qualified. And, yet, while the odds are high that they will vote for an undeserving candidate who is ideologically proximate (for example, Southern Democrats and Clement Haynsworth)—thereby underscoring the role of politics—it is also the case that they will, under certain conditions, support a distant candidate if they perceive that candidate to be highly meritorious (for example, Republicans and Ruth Bader Ginsburg), thereby underscoring the role of qualifications.

Figure 8, *infra*, explores this relationship between ideology and qualifications. The left panel compares qualified candidates (the top vertical lines, representing a ninety-five percent confidence interval) and unqualified

83. The right panel shows the probability of a Senator casting a yea vote when a nominee is perceived as highly qualified (the black line) and highly unqualified (the dashed line). In both panels we set the President at his weakest: he and the Senator are from different parties and his party does not control the Senate or he is in the last year of his term. All other variables are set at their sample means (or medians) (for each panel, the variable on the x-axis is interacted with the sample mean of the other variable). We generated these figures using Zelig. *See* King et al., *supra* note 82.

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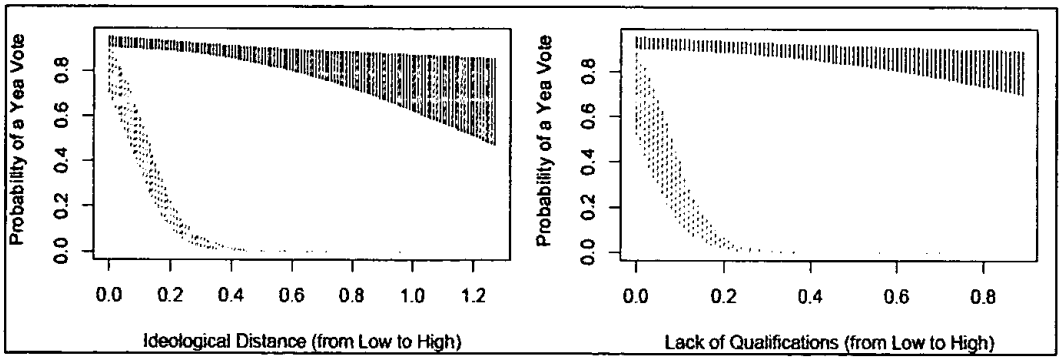
candidates (the lower vertical lines, also a ninety-five percent confidence interval) over the range of the Ideological-Distance variable when the President is weak and all other variables are at their mean (except for the interaction term).[84] The right panel is a comparison between ideologically close candidates (the top vertical lines) and those that are distant (the lower vertical lines), over the range of the Lack-of-Qualifications variable.[85] The results are intriguing and underscore the claim that a significant difference exists, as indicated by the nonoverlapping vertical lines, between qualified candidates and those less qualified in terms of their likelihood of attaining a position on the Court, even at the lowest levels of ideological distance. Candidates who are highly meritorious and ideologically proximate are virtually assured a position on the Court, but the probability of confirmation uniformly decreases as the Lack-of-Qualifications variable moves from the lowest (most qualified) to highest (least qualified) levels.

FIGURE 8

THE RELATIVE EFFECTS OF IDEOLOGY AND QUALIFICATIONS ON THE VOTES OF SENATORS OVER SUPREME COURT NOMINEES, FROM EARL WARREN TO STEPHEN BREYER.[86] THE LEFT PANEL (IDEOLOGICAL DISTANCE) SHOWS THE PROBABILITY OF A SENATOR CASTING A YEA VOTE WHEN THE NOMINEE IS HIGHLY QUALIFIED (DARKER VERTICAL LINES) AND NOT QUALIFIED (LIGHTER VERTICAL LINES) OVER THE RANGE OF THE IDEOLOGICAL DISTANCE VARIABLE. THE RIGHT PANEL (LACK OF QUALIFICATIONS) SHOWS THE PROBABILITY OF A SENATOR CASTING A YEA VOTE WHEN THE SENATOR AND THE NOMINEE ARE IDEOLOGICALLY PROXIMATE (DARKER VERTICAL LINES) AND IDEOLOGICALLY DISTANT (LIGHTER VERTICAL LINES) OVER THE RANGE OF THE LACK OF QUALIFICATIONS VARIABLE.



84. The pooled first difference mean (standard deviation) = -0.8073 (0.158).

85. The pooled first difference mean (standard deviation) = -0.7477 (0.1741).

86. In both instances the President is "weak" and all other variables are set at their mean (or median, except for the interaction term). We generated these figures using the program Zelig. *See supra* note 82.

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V. DISCUSSION

Virtually all contemporary writing on the confirmation of Supreme Court nominees has it exactly right: politics plays a critical role. Our statistical modeling exercise leaves little doubt that Senators are more likely to vote for nominees who share their policy preferences; they also are more likely to support the candidates of Presidents who share their partisanship.[87]

But that same modeling exercise also leaves little doubt about the crucial role of qualifications. Whether Senators perceive a candidate as meritorious affects their votes and, indeed, exerts an effect nearly as strong as ideological proximity. Hence, our results give some empirical teeth to Watson and Stookey's assertion that the current "justices are [not] less well qualified on some objective measure . . . than justices of the past."[88]

Of course, this is not to say that the President always taps the "most capable," the "best qualified," or the "most meritorious" person at any given time to fill any given vacancy. It is possible that there was someone in 1969 more qualified than Warren Burger to serve as Chief Justice or more meritorious than was Stephen Breyer in 1994—to name just two of the twenty-six nominees we examined. It is necessary, however, that any proposals to reform the process account for the chief lesson of this study: qualifications do not appear to play a trivial role in the confirmation of Justices. This result, at the very least, should be a cause for pause before we offer (and policymakers consider) schemes for abrupt change, such as a tournament among judges, which may not only perpetuate perilous norms,[89] but also, by virtue of eliminating all but federal judges, eliminate the "most capable," the "best qualified," and the "most meritorious" person from consideration for a seat on the nation's highest court.[90]

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87. *See supra* p. 1168 tbl.2.

88. WATSON & STOOKEY, *supra* note 8, at 222.

89. *See* Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

90. This is not the place to conduct a detailed investigation of whether nominees with or without prior federal judicial experience make better Supreme Court Justices. (For this type of analysis, see Workshop on Empirical Research in the Law, *On Tournaments for Appointing Great Justices to the U.S. Supreme Court*, 78 S. CAL. L. REV. 157 (2004).) However, it is worth noting that in a 1998 survey (the most recent we could locate) asking scholars to rate the fifty-two Justices appointed in the twentieth century (from Holmes through Breyer), only one appellate court judge (Harlan II) received an "excellent" rating, even though there were plenty of potential candidates. Instead, the balance of the list consisted of the familiar "greats": Holmes and Brandeis (tied for the first and second spots), Cardozo, Brennan, Warren, Hughes and Black, Stone, Frankfurter, and R. Jackson. Michael Comiskey, Has the Modern Senate Confirmation Process Affected the Quality of U.S. Supreme Court Justices? (1998) (unpublished manuscript), *cited in* ABRAHAM, *supra* note 11, at 372. Interestingly enough, as Professor Abraham notes, Comiskey answers his research question in the negative.

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