The Changing Dynamics of Senate Voting on Supreme Court Nominees

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A near-universal consensus exists that the nomination of Robert Bork in 1987 triggered a new regime in the Senate's voting over presidential nominees—a regime that deemphasizes ethics, competence, and integrity and stresses instead politics, philosophy, and ideology. Nonetheless, this conventional wisdom remains largely untested.

In this paper we explore the extent to which the Bork nomination has affected the decisions of U.S. senators. To do so, we modernize, update, and backdate the standard account of confirmation politics offered by Cameron, Cover, and Segal (1990) to cover all candidates for the Supreme Court from Hugo L. Black in 1937 through John G. Roberts, Jr. in 2005.

Our results confirm conventional wisdom about the Bork nomination but with two notable caveats. First, while the importance of ideology has reached new heights, the Senate's emphasis on this factor had its genesis some three decades earlier, in the 1950s. Second, while ideology is of paramount concern to senators, a candidate's professional merit also remains a significant determinant of success in the Senate.

> The defeat of Robert Bork's 1987 Supreme Court nomination was a watershed event that unleashed what Stephen Carter has called "the confirmation mess." There was no question that Bork was a highly qualified nominee. He was rejected not because of any lack of qualification, or any impropriety, but because of his stated judicial philosopy: how he would vote as a judge.
>
> —John Anthony Maltese, 2004

> For better or worse, the ill-fated 1987 nomination of Robert Bork has continued to cast its long and influential shadow over all high court nominations in its wake.
>
> —David Alistair Yalof, 2001

In 1986, Ronald Reagan, arguably the most conservative president of the twentieth century, nominated the equally conservative Antonin Scalia to the U.S. Supreme Court. Undoubtedly Scalia's political values appealed to Reagan, as did the would-be justice's professional merit. Virtually every commentator of the day—even those to the left of center—agreed that Scalia was well qualified to serve on the high Court. U.S. senators apparently concurred: they confirmed Scalia by a vote of 98-0.

Flash forward two decades, to 2005. Would an ultra conservative (or liberal), even a highly qualified one, generate such consensus among members of the Senate? The vast majority of commentators, including the two prominent scholars we quote above, respond in the negative. What they say is that ever since the 1987 nomination of Robert H. Bork, Senate voting over judicial nominees has followed a new regime: one that deemphasizes ethics, competence, and integrity and stresses instead politics, philosophy, and ideology.[1] Under this regime, an extreme ideologue, a Scalia, would face a far more acrimonious, and perhaps ultimately unsuccessful, battle than did Scalia himself—even if that candidate were highly qualified for service. Less extreme candidates may be no less immune. After George W. Bush announced his selection of John G. Roberts, Jr. to replace Sandra Day O'Connor, key Democrats may have paid lip service

[1]The literature on this point is considerable, consistent, and persistent. For a range of exemplars, see Carter (1994); Totenberg (1988); Massaro (1990); Bronner (1989); Tribe (1992); Bork (1990); Resnik (2001); Martinek, Kemper, and Van Winkle (2002).

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to Roberts' outstanding legal qualifications. But they simultaneously announced plans to subject the nominee to tough questions about his political views. And, ultimately, 22 Democrats voted against him.

In principal, the argument that the Bork nomination was a "turning point" or a "transformative moment" in confirmation politics seems entirely plausible, or at least consistent with available evidence. Caldeira asserts that it stands as a "high-water mark of the influence of organized interests in federal judicial nominations" (1989, 538); Martinek, Kemper, and Van Winkle (2002) demonstrate that subsequent to the Bork nomination the number of days from nomination to confirmation more than tripled (from 42 to 143) for candidates to the U.S. Courts of Appeals; Ogundele and Keith show that the 1987 proceedings "produced a substantively and statistically significant impact on the [Judiciary Committee's] probe of nominees' constitutional views" (1999, 403); and Davis claims that the failed Bork appointment "marked a change in the newsworthiness of Supreme Court nominations" (2005, 98), with media coverage increasing 38% after 1987.

These bits of evidence are intriguing. What they do not provide, however, is sufficient evidence of the conventional wisdom's most consequential contention: that the Bork nomination affected the decisions of senators, such that their votes over nominees now reflect ideology to a far greater extent than qualifications.

Does this contention have merit? We raise this question because—despite the near-universal consensus over the role the Bork nomination played in generating a highly visible and hardly trivial change in senators' voting—it remains untested. Of course, determining whether a piece of received political wisdom can withstand rigorous scrutiny is almost always a worthwhile undertaking but it is made even more so here. First, while claims about the effect of the Bork battle are widespread, they are not without their share of skeptics. Krutz, Fleisher, and Bond (1998, 872) suggest that senators' use of "ideological extremism" as a justification for opposing presidential nominees of all types began during the first year of Ronald Reagan's presidency, and not in its penultimate. Silverstein (1994) traces the change in the Senate's regime back even further, to the Fortas nomination in 1968. And Bork himself points the finger directly at the "increasingly political nature of the Supreme Court, which reached its zenith during the Warren Court" (1990, 348).

Second, revisiting the conventional wisdom also opens the door to revisiting the standard account of Senate voting over Supreme Court nominees. Introduced in 1990, its developers— Cameron, Cover, and Segal (1990)—took advantage of then-appropriate technology to isolate the determinants of senators' decisions over would-be justices. But methodological advances since then raise some concerns over the way that Cameron and his collaborators assessed a key covariate of Senate voting: the ideological distance between judicial candidates and senators. We take advantage of those technical improvements to offer a more valid measure of this critical concept.

By modernizing (and backdating and updating) the Cameron et al. approach with the goal of assessing claims about changes in Senate voting, we hope to make a methodological contribution to this intriguing area of study. But more than that we believe our results offer important substantive insights into the confirmation of Supreme Court nominees—no small matter in light of the number of vacancies likely to arise over the coming decade.

The CCS Model of Senate Voting on Supreme Court Nominees

The nomination of Robert Bork in 1987 not only purportedly ushered in a new regime in Senate voting over Supreme Court nominees. It also generated something of a scholarly cottage industry dedicated to modeling those votes. And, yet, most extant studies, whether in part or in full, rely on the same underlying model: the Cameron, Cover, and Segal (1990) account (hereinafter "CCS"). Indeed, while CCS elaborated (and tested) their model 15 years ago, it continues to figure prominently into many (if not most) essays on the confirmation of justices and judges (see, e.g., Bratton and Spill 2004; Gimpel and Wolpert 1995; Johnson and Roberts 2004; Shipan and Shannon 2003; Watson and Stookey 1995).[2] By the same token, scholars studying other executive appointments have drawn liberally on CCS's insights (e.g., King and Riddlesperger 1996; Nixon 2001; Routh 2004); secondary accounts in the judicial and legislative fields regularly report its results (e.g., Baum 2004; Smith, Roberts, and Vander Wielen 2003); and, it has been a centerpiece of normative debates, particularly in the legal literature,

[2]The Cameron team produced their own extension two years later (Segal, Cameron, and Cover, 1992). The core distinction between Cameron, Cover, and Segal (1990) and Segal, Cameron, and Cover (1992) is the latter's emphasis on parsing the effects of a senator's personal ideology and that of his or her constituents on the senator's roll-call vote.

about the confirmation process. We follow in this tradition, adopting CCS's theoretical approach and adapting their methods for our primary purpose of exploring the changing dynamics of Senate voting over Supreme Court nominees.

In light of its prominence, the CCS study requires little elaboration. Briefly, it operates under the assumption that electorally oriented senators vote on the basis of their constituents' "principal concerns in the nomination politics" (Cameron, Cover, and Segal 1990, 528). Those concerns primarily (though not exclusively[3]) center on whether a candidate for the Supreme Court is (1) qualified for office and (2) sufficiently proximate to the senator (his or her constituents) in ideological space. An analysis of data drawn from the votes of individual senators (the dependent variable in the CCS study) over the 22 nominations between 1953 and 1987 supports the account. "Confirmation voting," Cameron and his colleagues tell us, "is decisively affected by the ideological distance between the senators and nominees. Equally important, as indicated by the virtually identical parameter estimates on the [Ideological Distance and Qualifications] terms, are the qualifications of the nominee. Overwhelmingly, however, it is the interaction of qualifications and ideology that determine the votes of senators" (1990, 530–31).

Modernizing the CCS Model

Surely we need not spill too much ink ruminating over CCS's theoretical account. While Cameron and his colleagues developed it over a decade ago, it seems entirely in line with contemporary congressional scholarship, thus leaving us with no hesitation about adopting it here. What does require some elaboration are the steps we took to adapt their empirical model to suit our purposes. First, investigating whether the Bork nomination initiated a regime change by shifting the attention of senators away from CCS's first factor—a candidate's qualifications—and towards their second—a candidate's ideology—required us to elongate the CCS data set. We accomplished this by moving back in time as far as we could given data constraints[4]—to Hugo Black's nomination in 1937—and moving as far forward as we could—to John G. Roberts in 2005.[5] Overall, of the 3709 votes, 11.97% (n = 444) were cast against the nominee and 88.03% (n = 3265) in his or her favor.[6]

These votes (yea or nay) represent the dependent variable in the CCS (and in our) research. The second step we took to adapt the CCS study centered on the independent variables. Cameron and his colleagues included five:

1) Lack of Qualifications. The degree to which senators perceive the candidate as qualified for office. CCS assessed this by content analyzing newspaper editorials written from the time of the nomination until the vote by the Senate and then deriving a qualifications score for each nominee. The scores range from 0 (most qualified) to 1 (least qualified; see Cameron, Cover, and Segal 1990, Table 2).[7]
2) Strong President. Whether the president was "strong" in the sense that his party controlled the Senate and he was not in his fourth year of office.
3) Same Party. Whether a senator is of the same political party as the president.
4) Ideological Distance. The ideological distance between the senator and the candidate. CCS employed senators' Americans for Democratic Action (ADA) scores to measure their ideology and the Segal-Cover score, which they derived from an analysis of newspaper editorials (see Segal and Cover 1989), to assess nominees' policy preferences. CCS then compared the two on the "same metric" (1990, 533).
5) Interaction between Ideological Distance and Qualifications.

For three of the five CCS variables (1–3), we confronted few problems: we simply updated and backdated them for the nominees and Senates/senators in our database. Variable 4 presented more of a challenge, and Variable 5 (the interaction term) we believe is unnecessary.

Let us elaborate beginning with Variable 4—the ideological distance between candidates and sena-

[3]Other independent variables in the CCS study, as we note below, are whether the president is "strong" and whether the president and an individual senator are of the same political party.

[4]E.g., as we note later, to measure a judicial nominee's ideology we rely on scores developed by Segal and Cover (1989), which are virtually impossible to backdate prior to 1937 (see Segal et al. 1995).

[5]We obtained data on Senate voting from the United States Congressional Roll-Call Voting Records, ICPSR Study No. 4. Our website houses the individual senators' votes over these candidates (along with all other variables included in this study).

[6]Like CCS, we treat the voice votes as unanimous since we do not have counts. In an effort to assess the robustness of our results, however, we eliminated voice vote nominees from the analyses of primary interest. The results, housed on our web site, call for no changes in interpretation.

[7]Unlike other possible measures (e.g., the ABA's ratings), researchers can backdate these scores; they are also valid and reliable. For a more detailed discussion, see Epstein and Segal (2005).

tors—and simply point out the obvious: while the methodology CCS invoked to develop this variable may have been appropriate in 1990, it is now showing its age. To be sure, scholars continue to deploy the Segal-Cover scores to tap the ideology of nominees but they have largely eschewed ADA scores for Keith Poole's NOMINATE scores or a variation on them, such as Poole's Common Space scores, which provide estimates of senators' and presidents' ideal points dating back to 1937.[8] Of even greater concern, though, is CCS's assumption that ADA and Segal-Cover scores are *directly* comparable for purposes of computing the ideological distance between senators and nominees. The methodological technique of "bridging" (which penetrated the political science literature well after CCS published their study), however, renders this (questionable) assumption unnecessary: bridging provides a method of devising comparable estimates of the preferences of political actors of interest without forcing analysts to make the leap of faith inherent in the CCS study (see generally Bailey and Chang 2001).

We adapt this method here, invoking a bridging mechanism to generate Common Space scores for all nominees to the Court so that we can directly compare theirs and the senators' ideology. Serving as our bridge are candidates nominated by presidents whose party held a majority in the Senate at the time of nomination.[9] Specifically, to each of these nominees we assigned the Common Space score of their appointing presidents, which (crucially) produced a set of nominees for which we had *both* Common Space and Segal-Cover scores. Next, for presidents whose party controlled the Senate we estimated a simple OLS regression with their Common Space scores as the dependent variable, and the Segal-Cover scores as the only independent variable. This regression, in turn, generated the coefficients necessary for the following linear transformation, which we used to calculate Common Space scores for nominees from their Segal-Cover scores.

$$\text{Common Space Score} = 0.4507 - 0.9208\,(\text{Segal-Cover Score}).$$

In the final step, we applied this transformation to all nominees to derive a full set of Common Space scores and then calculated the (Euclidean) Ideological Distance variable by subtracting a nominee's Common Space score from the senator's, and squaring the value.

This approach neatly modernizes CCS's ideological distance variable but it still leaves us with their interactive term, (Ideological Distance × Lack of Qualifications). If CCS (or ours) was a linear model, rather than one in which the dependent variable is dichotomous (a yea or nay vote), the interaction would be necessary to capture the nonlinear effect of the two variables. But since the marginal effects in all nonlinear models are conditional on the values of all the other independent variables, we can examine the "interactive" relationship between ideology and qualifications without necessarily including an additional multiplicative term in the model. This is reason enough to exclude the term but there is yet another: researchers cannot interpret and evaluate interaction effects in the typical ways (i.e., by inspecting the sign, magnitude, and statistical significance of the coefficient) in nonlinear models (see Ai and Norton 2003, 129); in fact, for this class of models the sign, magnitude, and statistical significance will always vary across observations, thereby generating a substantial increase in complexity that conventional interpretations of interactions simply ignore. As a result, not only can we explore the conditional relationship between the Ideological Distance and Lack of Qualifications variables in a model without incorporating the interaction term; we also greatly reduce the interpretive burden by proceeding in this way.[10]

For this reason, our model of Senate voting over Supreme Court nominees contains four of the five original CCS variables, though, of course, we have taken a different approach to assessing Ideological Distance. In Table 1 below, we provide descriptive statistics on each, along with the model's dependent variable, senators' votes.

Results of Modernizing the CCS Model

At the end of the day our adaption of the CCS study is hardly trivial—we have added 1,647 votes and 18

[8]Several reasons exist for the move away from ADA scores, not the least of which is that the ADA relies on a subset, and a nonrandom one at that, of votes to calculate its scores. Common Space Scores and all other NOMINATE scores are available on Poole's web site: http://voteview.com.

[9]The assumption here is transparent and well-supported in the literature: Presidents whose party controls the Senate face relatively fewer constraints in nominating a candidate who reflects their ideological preferences than do presidents whose party does not control the Senate.

[10]For the sake of completeness, we did, however, conduct all the analyses to follow with and without the interaction term. The inclusion of the term has little effect on the findings: it does not yield a significantly better (or worse) explanatory model. For the reasons we provide in the text, we report here the results without the term; the results with it are available on our web site.

nominees; we also have modernized Cameron and his colleagues' approach to assessing a crucial variable: the ideological distance between nominees and senators. And yet, even with these changes, the CCS model remains robust.

This much Table 2 demonstrates. There we depict maximum-likelihood estimates of the coefficients of two models: Senators' votes over the nominees in the original CCS study (Warren through Kennedy) and over all nominees since 1937 (having added Black through Minton, and Souter through Roberts). Notice that for both models each coefficient runs in the right direction; each is statistically significant at $p \leq .01$; and none is trivial in size.

Beyond the continued efficacy of the CCS model, we learn from Table 2 that ideology and qualifications remain crucial to confirmation politics: not only do both produce statistically significant coefficients but they are substantively meaningful as well. To see this, consider Figure 1 in which we plot, in the top panel, the change in the predicted probability of a yea vote across the range of values of Ideological Distance for the least qualified, "on average" qualified, and most qualified nominees and with both Strong President and Same Party set at 0; the bottom panel does the same for the range of Lack of Qualifications. Beginning with ideology, notice that the predicted probability of a senator voting for a moderately qualified candidate is a highly unlikely .06 when the candidate and senator are ideological extremes; that figure increases to .90 when they are at the closest levels. Turning to professional merit, we can see that when a nominee is perceived as highly unqualified and Ideological Distance is set at its mean and the other two variables are at 0, the likelihood of a senator casting a yea vote is only about .18. That probability rises to a near-sure bet yea vote (.92) when the nominee is highly qualified.

From Figure 1 we also can observe the conditional nature of the relationship between ideology and qualifications: the effect of ideology, in other words, depends at least in part on the degree to which a candidate is qualified for office, and vice versa. So, for example, increasing the ideological distance between the nominee and the senator (when they are moderately proximate) has a far more depressing effect on the probability of a yea vote if the nominee is highly qualified than if the nominee is highly unqualified. Likewise, professional merit has far less of an impact on nominees who are extremely ideologically distant from senators than on those who are more proximate; the former, even those who are highly qualified (0 in Figure 1), confront low odds (about .15) in their quests for confirmation.

Table 1 Description of the Variables

Variable	Mean	Deviation	Minimum	Maximum
Senate Vote	.880	.325	0	1
Lack of Qualifications	.222	.263	0	.890
Ideological Distance	.182	.21	0	1.268
Strong President	.572	.495	0	1
Same Party	.555	.497	0	1

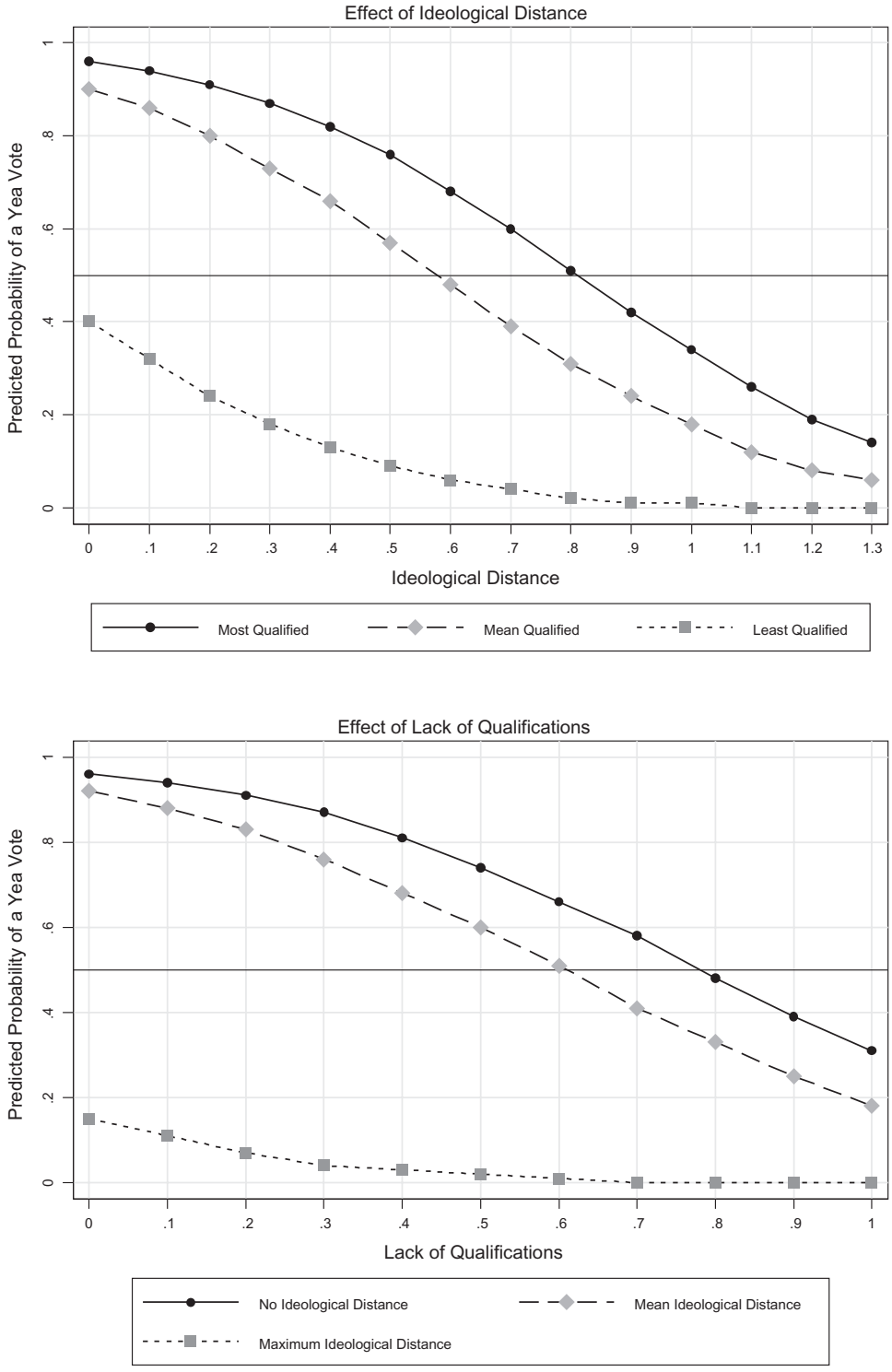
Note: N = 3709. The data cover nominees from Black in 1937 through Roberts in 2005.

Table 2 Senate Voting on Supreme Court Nominees

	CCS Nominees		Additional Nominees	
Variable	**Coefficient**	**(Std. Err.)**	**Coefficient**	**(Std. Err.)**
Lack of Qualifications	−2.518*	(.156)	−2.320*	(.121)
Ideological Distance	−2.128*	(.167)	−2.242*	(.140)
Strong President	.882*	(.106)	.767*	(.073)
Same Party	.477*	(.097)	.707*	(.080)
Constant	1.840*	(.094)	1.816*	(.080)
N	2,062		3,709	
Log-likelihood	−550.328		+846.606	
$\chi^2_{(4)}$	361.360		581.420	

Notes: Cell entries are probit coefficients and robust standard errors (in parentheses).
*indicates $p \leq .01$. The CCS Nominees column models the votes of individual senators over the 22 nominees in the original Cameron, Cover and Segal (1990) study (Warren through Kennedy) using a Common Space score-based ideological distance measure; the Additional Nominees column models the votes for 40 nominees (Black through Roberts) also using a Common Space score-based ideological distance measure.

FIGURE 1 The Relative Effects of Ideology and Qualifications on Senate Voting over Supreme Court Nominees, from Black (1937) through Roberts (2005)



Notes: The top panel shows the probability of a senator casting a yea vote when we set Lack of Qualifications at its maximum, mean, and minimum over the range of Ideological Distance (0 indicates no distance and 1.3 indicates maximum distance). The bottom panel shows the probability of a senator casting a yea vote when we set Ideological Distance at 0, its mean, and its maximum levels over the range of Lack of Qualifications (0 indicates most qualified and 1 indicates least qualified). In both panels Strong President and Same Party are set at 0. We generated this figure via CLARIFY (see King, Tomz, and Wittenberg, 2000), meaning that the values are point estimates which include confidence intervals.

A New Regime in Senate Voting on Supreme Court Nominees? The Bork Effect

These basic substantive findings hardly come as a surprise: Virtually every contemporary study of confirmation politics—whether over judicial candidates or other executive nominees—has pointed to the explanatory power of ethics, competence, and integrity on the one hand, and politics, philosophy, and ideology on the other.

What Table 2 and Figure 1 do not reveal, however, is whether the relative balance between those two variables—represented here as Ideological Distance and Lack of Qualifications—has shifted since 1987, as the conventional wisdom suggests. To be sure, a glimpse at the coefficients in the two models presented in Table 2 suggests that little has changed over time. But we cannot, from the table, know whether the constancy across models masks a post-Bork effect in each.

Making that assessment requires separate analyses of nominations both before and since Bork's in 1987. It also necessitates a consideration of alternative accounts of the (purported) changing dynamics in Senate voting. One, recall, flows from Krutz, Fleisher, and Bond (1998), which, based on an analysis of all presidential nominees, suggests that the shift from a stress on qualifications to ideology occurred earlier, in 1981; another, offered by Silverstein (1994), is that it was the Fortas (and not the Bork) nomination for Chief Justice that generated the new regime. Then there is Bork's assertion; namely, that it was the Warren Court that "created these trends," with his battle only a logical consequence of that Court's "politicized" decisions.

To explore these and other competing claims about when the Senate's attention moved away from qualifications and toward ideology, we estimated two sets of models for each of the 25 nominees between Vinson (1946) and Kennedy (1987): one model that takes into account votes over all nominees before their candidacy (a "before" model) and one that models votes over all nominees subsequent to (and including) them (a "since" model). Comprising the 50 models were the five variables depicted in Table 2.

All 50 returned satisfactory results: With but limited exceptions the estimated coefficients were correctly signed and statistically significant at $p \leq .05$.[11]

[11]The exceptions are Same Party, which is statistically insignificant between White's and Fortas' (Chief Justice) nominations, and Strong President, which fails to achieve statistical significance in the "since" Kennedy model.

Given our specific interest in claims about the changing dynamics of Senate voting (and in saving space), however, we reproduce in Figure 2 only the coefficients on Lack of Qualifications and Ideological Distance.

Beginning with Lack of Qualifications (the left panel), the results are telling: while we observe a slight secular decline in senators' attention to professional merit, it began in the early 1970s, not in 1987. Equally problematic for conventional accounts about the importance of the Bork nomination is that the coefficient attached to the "since" Bork model (−2.55) is well in line with nominees of the 1950s and 1960s and only marginally smaller than those estimated for his three immediate predecessors—O'Connor (−2.71), Rehnquist (Chief Justice) (−2.67), and Scalia (−2.83).

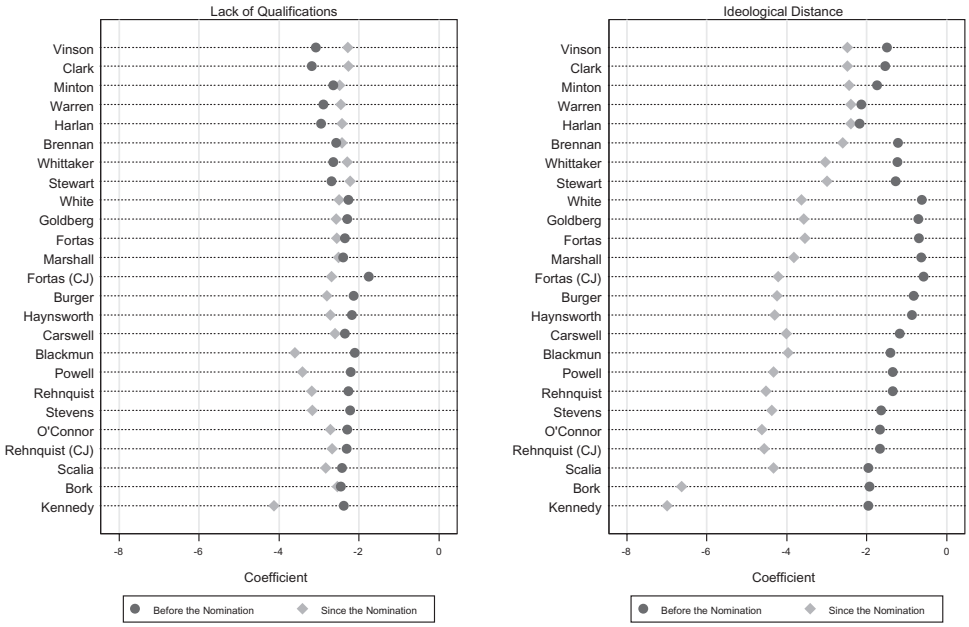
The results for the Ideological Distance variable (right-hand panel of Figure 2) could not tell a more distinct tale. On the one hand, it is almost impossible to ignore the increasing importance of ideology over time: with nearly each passing nomination after Harlan, the politics of the candidate vis-á-vis the senators exerted more and more influence on their votes. The clear implication here is that the "new" emphasis on ideology did not begin with Bork, just as Bork himself claims, but had its genesis some three decades earlier, in the late 1950s. On the other hand, we cannot ignore the real break that occurs after his failed 1987 confirmation: the coefficient skyrockets from −1.93 (for all nominees prior to Bork) to −6.64 (for all nominees after and including Bork).

Since no other nomination exerted an effect of this magnitude, we cannot help but conclude that conventional accounts of the Bork nomination have some basis in fact: while that doomed appointment may not have "caused" increasing attention to ideology—the trend was under way prior to 1987—Bork's candidacy elevated the importance of politics to new heights.

Substantive Implications of the Results

Why the Bork nomination led senators to place more emphasis on ideology, though no less on qualifications, is a question we leave to others to address, with studies by Caldeira (1989), Davis (2005), and Ogundele and Keith (1999) all providing reasonable starting points. What we can say, though, is that the substantive effect of Bork's candidacy was hardly trivial. We make this point in Figure 3, which depicts the probability of a favorable vote over the range of Lack of Qualifications and Ideological Distance during both the pre- and post-Bork regimes.

FIGURE 2 Estimated Coefficients for Lack of Qualifications and Ideological Distance, before and since each Nominee from Vinson through Kennedy



Notes: The larger the coefficient, the greater the effect the variable exerts on the votes of senators. We generated these coefficients by estimating "before" and "since" models for each nominee; the models use the same variables as listed in Table 2. So, for example, to obtain Vinson's "before" coefficient, we estimated a model of senators' votes (again, using the variables listed in Table 2) for all nominees prior to Vinson. Vinson's "since" estimate is derived from a model of votes over Vinson and all nominees subsequent to him. The coefficients depicted in both panels are correctly signed and statistically significant ($p \leq .05$).

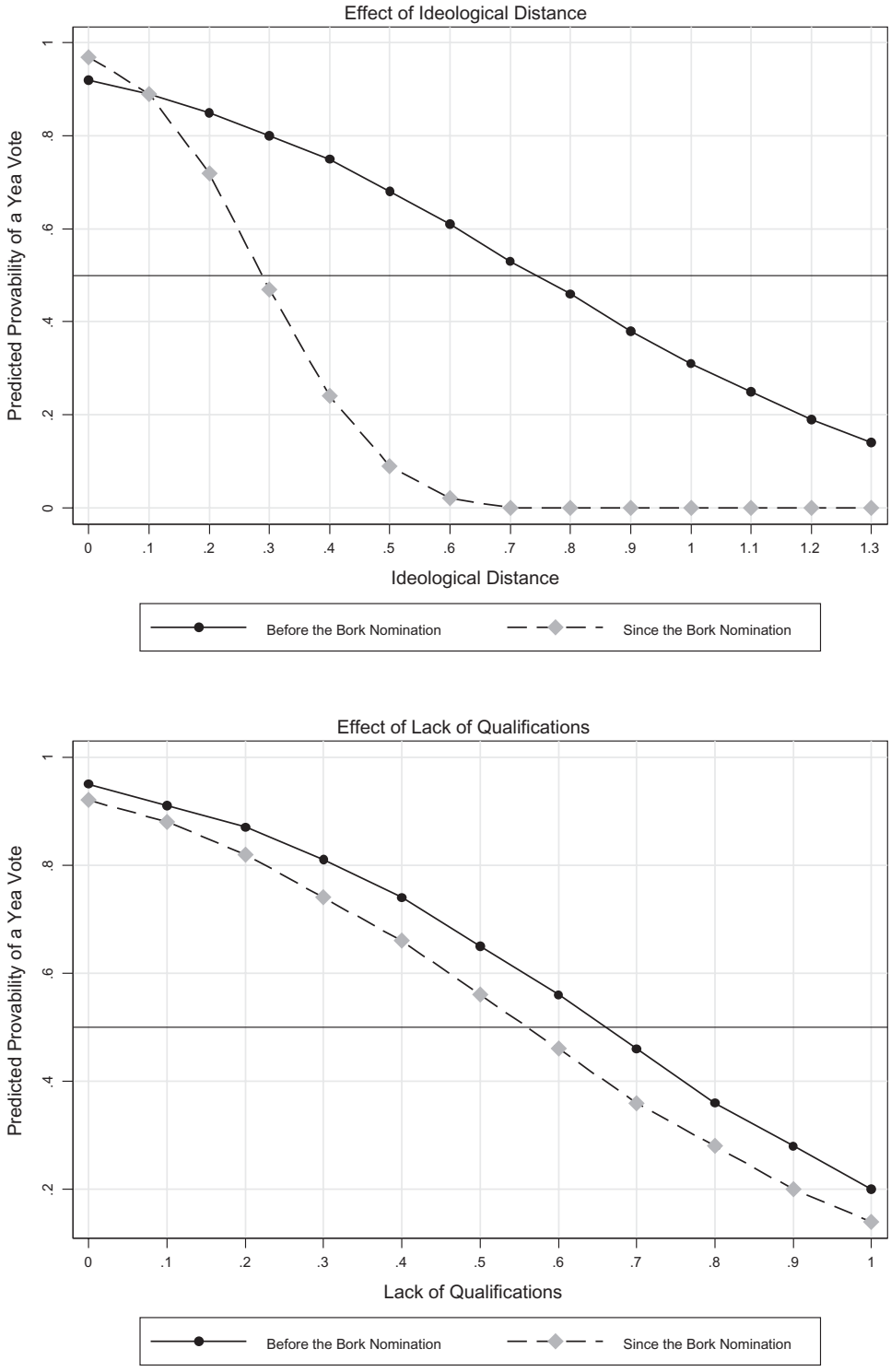
Notice that prior to Bork's nomination, senators were willing to vote in favor of moderately qualified candidates if the ideological distance between them and the candidate was no greater than .74. In the era since Bork, however, their tolerance for ideologically remote nominees has lessened considerably: now moderately qualified candidates, we predict, must be as close to a senator as .29 to receive a vote of yea. Worth noting (though not shown in the figure) is that this pattern repeats for highly qualified candidates: On average, the ideological cut-off point for a yea vote for these candidates was a relatively distant 1.02 prior to the Bork nomination; with the Bork nomination that figure reduces substantially, to .37.

This is a rather large substantive impact, and one that sits comfortably with virtually all contemporary commentary. In line with the results displayed in Figure 2, we should not, however, take this to mean that a candidate's professional merit is as irrelevant as some observers also suggest. Actually, the effect of a nominee's qualifications on senators' votes has shifted only minimally since 1987. As the bottom of Figure 3 shows, a nominee who was moderately distant from a senator could have expected to attain that senator's support in the pre-Bork period if his or her (lack of) qualifications score was in the 0 to .65 range; since Bork that range has decreased but just slightly, to 0 to .55.

Implications of the Results for Future Supreme Court Nominees

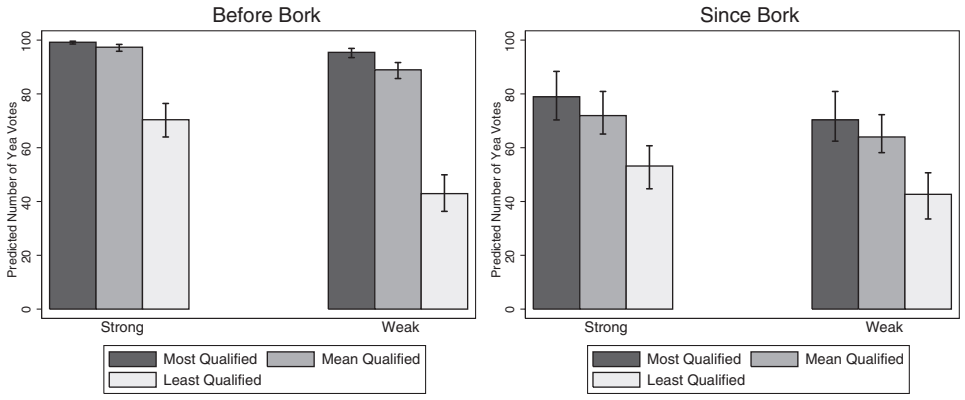
To be sure, these findings are interesting in their own right but so too are their implications for future Supreme Court nominations. Figure 4 makes this clear by exploring predictions (generated from the "Before" and "Since" Bork models) for various confirmation scenarios that could unfold between 2005 and 2008. The left panel displays the likely number of yea votes were President George W. Bush operating under a "before" Bork political context; the right panel shows (what we believe to be) the more plausible outcomes, those for a post-Bork environment. For both scenarios, we generated two sets of predictions. The first set (the "Strong" bars) centers on the first two years of Bush's second term (2005 and 2006)—a period

FIGURE 3 The Relative Effects of Ideology and Qualifications on Senate Voting over Supreme Court Nominees before and since the Bork Nomination



Notes: The top panel shows the probability of a senator casting a yea vote over the range of Ideological Distance (0 indicates no distance and 1.3 indicates maximum distance). The bottom panel shows the probability of a senator casting a yea vote over the range of Lack of Qualifications (0 indicates most qualified and 1 indicates least qualified). In both panels Strong President and Same Party are set at 0. In the top panel Lack of Qualifications is set at its mean and in the bottom panel, Ideological Distance is set at its mean. We generated these figures via CLARIFY (see King, Tomz, and Wittenberg, 2000) (the underlying models are on our web site).

FIGURE 4 Predicted Probability of a Yea Vote during Strong and Weak Bush Presidencies under pre- and post-Bork Regimes



Notes: The "Strong" bars in both panels show the predicted number of yea votes if Bush were to nominate a candidate on his ideal point and his party controls the Senate or he is not in his last year of office. The "Weak" bars show the predicted number of yea votes if Bush were to nominate a candidate on his ideal point and his party does not control the Senate or he is in his last year of office. The lines indicate 95% confidence intervals. For more details on how we generated the predictions, see note 13.

during which Bush is a "strong" president by our definition:[12] not only will his party control Congress but the ideological distance between Bush and the median member of the 109th Senate will remain narrow.[13] Under these circumstances, it matters not whether Bush is operating in the pre- or post-Bork context. Our models predict that the Senate ought be willing to confirm candidates proximate to or even on the President's ideal point *as long as* the candidates are highly qualified for office. Should Bush attempt to appoint a candidate universally perceived as lacking in professional merit, however, we cannot rule out the possibility of a defeat for the President—though before 1987 he may well have succeeded. Such is confirmation politics in the post-Bork era: ideological distance must be minimal and qualifications at least near average—even for a "strong" president. (On the other hand, as we also can observe, if today's Democrats deploy the filibuster, they may well be able to block even an "average" qualified nominee but would likely have failed for all but the least qualified candidates prior to 1987.)

When Bush becomes a "weak" president—which could come as early as 2007 should the Democrats regain control of the Senate or as late as 2008 when he is in his last year of office—his odds of success lessen: as Figure 4 shows, he will, in all likelihood, confront difficulties in attempting to appoint a candidate who reflects his preferences unless that candidate is highly qualified, and even then Bush could face a battle should the Democrats attempt a filibuster. This too is the legacy of the ill-fated Bork nomination—a legacy, if our findings are any indication, that neither presidents nor senators (nor for that matter, justices contemplating retirement) can afford to ignore.

Discussion

Almost since the day Ronald Reagan nominated him to the Court, scholars have asserted that Robert H. Bork generated a seismic change in confirmation politics: ideology, they claim, is now paramount. Our study generally confirms this consensus, though with two twists. First, as Bork himself recognized, the trend toward greater attention to ideology began not with him but with appointments to the Warren Court. Second, while ideological distance may "matter" more than ever, professional merit continues to exert an important influence on senators' votes. To return to the example we invoked at the paper's onset, had Reagan nominated the extremist Scalia after 1987, the

[12]Neither ours nor CCS's definition of a strong president takes into account the president's approval rating. Worth mentioning, though, is research by Segal and Spaeth (2002, 209–210) indicating that very popular presidents can gain votes for their nominees while very unpopular presidents can cost votes. Based on this result, it is possible—should George W. Bush's ratings fall into a dangerously low zone (say, around 30%)—that the predicted number of nay votes shown in Figure 4 could increase.

[13]To generate these predictions, we assume that Bush selects a nominee with a Segal-Cover score of 0 (given our bridging equation, a score of 0 yields the nominee as close as possible to Bush's ideal point). We also make several assumptions about the ideological composition of the 109th Senate given that there are eight new senators since Keith Poole last updated the Common Space scores. We list these assumptions on our web site.

confirmation battle would have been far more arduous—just as the conventional wisdom suggests. Less anticipated is that Scalia's exceptional qualifications would have saved him, even in the post-Bork era. If Scalia's appointment had come under the new (post-Bork) Senate regime and even if Bush is a "weak" president, our model predicts that Scalia still would have been confirmed (though with only 70 yea votes).[14]

We could go on and supply more substantive examples. But they would only serve to highlight the chief lesson of our study: the president's discretion over whom to nominate to the Supreme Court has grown far more circumscribed over the last two decades. Presidents who attempt to appoint well qualified but ideologically extreme nominees, a Scalia on the right or a Brennan on the left, can no longer expect their candidate to be greeted with universal acclaim in the Senate. Likewise, even nominees ideologically proximate to confirming senators are hardly sure bets if they are severely lacking in professional merit. The dynamics of Senate voting over Supreme Court nominees have indeed changed—sufficiently so that future modeling efforts ought to recognize the alteration by assessing their estimates over time, as we have done here.

Beyond offering substantive insights into the contemporary confirmation process, our paper shores up the importance of an often-neglected part of the scientific process: the reinterrogation of well-entrenched theoretical models in light of casual observations of the political world and advances in methodological strategies. To be sure, the model of Senate voting devised by Cameron and his colleagues nearly 15 years ago has passed the test of time. Nonetheless, the Senate's scrutiny of nominees, as commentators have long speculated, has itself changed markedly since CCS produced their study—actually since the nomination of Bork in 1987. Only by taking seriously that speculation and making use of new technologies were we able, we hope, to contribute to our understanding of a reoccurring political event of no small consequence: the appointment of Supreme Court justices.

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[14]The 95% confidence interval is 81–62.

References

Ai, Chunrong, and Edward C. Norton. 2003. "Interaction Terms in Logits and Probits." *Economic Letters* 80 (1): 123–29.

Bailey, Michael, and Kelly H. Chang. 2001. "Comparing Presidents, Senators, and Justices." *Journal of Law, Economics, & Organization* 17 (2): 477–506.

Baum, Lawrence. 2004. *The Supreme Court*. 8th ed. Washington: CQ Press.

Bork, Robert H. 1990. *The Tempting of America: The Political Seduction of the Law.* New York: Free Press.

Bratton, Kathleen A., and Rorie L. Spill. 2004. "Moving Up the Judicial Ladder: The Nomination of State Supreme Court Justices to the Federal Courts." *American Politics Research* 32 (2): 198–218.

Bronner, Ethan. 1989. *Battle for Justice.* New York: Norton.

Caldeira, Gregory A. 1989. "Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests." *Kentucky Law Journal* 77 (3): 531–38.

Cameron, Charles M., Albert D. Cover, and Jeffrey A. Segal. 1990. "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model." *American Political Science Review* 84 (2): 525–34.

Carter, Stephen L. 1994. *The Confirmation Mess: Cleaning Up the Federal Appointments Process.* New York: Basic Books.

Davis, Richard. 2005. *Electing Justice: Fixing the Supreme Court Nomination Process.* New York: Oxford University Press.

Epstein, Lee, and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments.* New York: Oxford University Press.

Gimpel, James G., and Robin M. Wolpert. 1995. "Rationalizing Support and Opposition to Supreme Court Nominations: The Role of Credentials." *Polity* 28 (1): 67–82.

Johnson, Timothy R., and Jason M. Roberts. 2004. "Presidential Capital and the Supreme Court Confirmation Process." *Journal of Politics* 66 (3): 663–83.

King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44 (2): 341–55.

King, James D., and James W. Riddlesperger. 1996. "Senate Confirmation of Cabinet Nominations: Institutional Politics and Nominee Qualifications." *Social Science Journal* 33 (3): 273–85.

Krutz, Glen S., Richard Fleisher, and Jon R. Bond. 1998. "From Abe Fortas to Zoë Baird: Why Some Presidential Nominations Fail in the Senate." *American Political Science Review* 92: 871–81.

Martinek, Wendy L., Mark Kemper, and Steven R. Van Winkle. 2002. "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998." *Journal of Politics* 64 (2): 337–61.

Massaro, John. 1990. *Supremely Political*. Albany: State University Press of New York.

Nixon, David C. 2001. "Appointment Delay for Vacancies on the Federal Communications Commission." *Public Administration Review* 61 (4): 483–92.

Ogundele, Ayo, and Linda Camp Keith. 1999. "Reexamining the Impact of the Bork Nomination to the Supreme Court." *Political Research Quarterly* 52 (2): 403–20.

Resnik, Judith. 2001. "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.

Routh, Stephen R. 2004. "The Contingency of Senate Consent: A Study of the Determinants of Roll Call Confirmation Voting on Executive Branch Appointments, 1945–1996." *Social Science Journal* 41 (1): 67–82.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83 (2): 557–65.

Segal, Jeffrey A., Charles M. Cameron, and Albert D. Cover. 1992. "A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations." *American Journal of Political Science* 36 (1): 96–121.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited.* New York: Cambridge University Press.

Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57 (3): 812–23.

Shipan, Charles R., and Megan L. Shannon. 2003. "Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations." *American Journal of Political Science* 47 (4): 654–66.

Silverstein, Mark. 1994. *Judicious Choices.* New York: Norton.

Smith, Steven S., Jason M. Roberts, and Ryan Vander Wielen. 2003. *The American Congress.* Boston: Houghton Mifflin.

Totenberg, Nina. 1988. "The Confirmation Process and the Public: To Know or Not to Know." *Harvard Law Review* 101 (6): 1213–29.

Tribe, Laurence H. 1992. "Foreword." In *Advice and Consent*, ed. Paul Simon. Washington: National Press Books, pp. 13–21.

Watson, George L., and John L. Stookey. 1995. *Shaping America: The Politics of Supreme Court Appointments.* New York: HarperCollins.

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