Presidential Selection of Supreme Court Nominees: The Characteristics Approach

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ABSTRACT

Despite the importance of every nomination to the Supreme Court, a unified theory that illuminates presidential selection of nominees across the modern political era remains elusive. We propose a new theory — the "characteristics approach" — that envisions nominees as bundles of characteristics, such as ideology, policy reliability, and attributes of diversity. We formalize the theory, which emphasizes the political returns to presidents from a nominee's characteristics and the "costs" of finding and confirming such individuals, and derive explicit presidential demand functions for these characteristics. Using newly collected data on both nominees and short list candidates, we estimate these demand functions. They reveal some striking and under-appreciated regularities in appointment politics. In particular, the substantial increase in presidential interest in the Supreme Court's policy output and the increased availability of

potential justices with desired characteristics has led to significant changes in appointment politics and in the composition of the Court.

Introduction

What explains how presidents select nominees for the U.S. Supreme Court? Given the importance and salience of every vacancy and nomination to the Court, one might expect this decision to be well understood by political scientists. Yet, while the literature on Supreme Court nominations is extensive, the literature on presidential selection of nominees is relatively — and surprisingly — small. To be sure, there are notable exceptions that span different approaches to the study of nomination and confirmation politics. On the historical side, many studies provide detailed accounts of specific presidential nominee choices (Dean, 2001; Mayer and Abramson, 1995, *inter alia*). More systematically, Yalof (2001) scours presidential libraries to describe the vetting operations and selection procedures of nine presidents (see also Maltese, 1995). In an innovative quantitative analysis, Nemacheck (2008) uses archival research to reconstruct the nominee "short lists" for 48 nominations. She then examines variables that predict why one individual versus another was selected off the short list; she also shows that the overall process for selecting nominees has become more systematized and professional over time. Finally, Epstein and Segal (2005) place presidential goals when selecting Supreme Court justices in the larger context of the overall selection of judges to the federal judiciary.

This valuable work notwithstanding, a unified theory that illuminates presidential choice of nominees across the modern political era remains elusive. Given the ideological stakes in recent Supreme Court nomination and confirmation battles, a theory of raw ideological calculation would seem likely to have predictive power. Yet, as Cameron and Kastellec (2016) show, the leading candidate in the ideological camp — move-the-median (MTM) theory (Krehbiel, 2007; Moraski and Shipan, 1999) — does very poorly in predicting the ideology of Supreme Court nominees. This suggests that, even if ideology plays a significant role in the majority of Supreme Court nominations, a theory of presidential selection needs to incorporate additional factors into what presidents want from their nominees.

In this paper, we develop the "characteristics approach" to presidential selection of Supreme Court nominees. The general argument of this approach is that a Supreme Court nominee is a bundle of characteristics and it is these characteristics presidents value, rather than the nominee *per se.* One characteristic is the policy positions the nominee is likely to take on the Court. Another is how reliable the nominee is likely to be as a justice. Yet another is any salient characteristic of diversity she possesses, such as gender, race, or ethnicity. Using economic demand theory as a guidepost, we derive presidential demand functions for nominee characteristics. The characteristics approach emphasizes, on the one hand, the political returns to presidents from a nominee's characteristics, and, on the other hand, the "costs" of finding and placing on the Court individuals with desirable characteristics. As a formal theory, the characteristics approach to Supreme Court nominations has roots in classic papers by Becker (1965), Lancaster (1966), and Gorman (1980), as well as the neoclassical theory of the firm. However, while economic applications of the characteristics approach are plentiful, application of these ideas in political science is rare.[1]

We begin with the "characteristics" view of nominees, but then go a considerable step further: we imagine a president "assembling" a nominee by choosing nominee characteristics at some cost; and then enjoying political gains from the selection of those characteristics. Each characteristic of a nominee has a value to the president, and each attribute has a political or effort-cost. The president's demand for the attributes indicates what and how much he "buys" (i.e. chooses), given the respective costs versus benefits to the president. We implicitly assume that any given assemblage or package of nominee characteristics is technically feasible, albeit costly or difficult to procure. This framework allows us to derive presidential demand functions for nominee characteristics. And, it allows an explicit statement of the conditions that lead to the careful (and costly) selection of a nominee, and those that lead to a casual or even haphazard choice. The theory's predictions can readily be taken to data.

The characteristics approach departs in many key respects from move-the-median theory. Not only is MTM-theory one in which ideology is the sole consideration, but its role is quite stark: the president only cares about moving the median of the Court as far as possible, subject to the constraint of Senate confirmation. No room is left for presidents (or senators) to care about any other attribute of a nominee, including quality. Our theory incorporates these

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[1] One important and notable exception is Heckman and Snyder Jr. (1997), who derive a demand model to explain how members of Congress decide to vote on legislation. They apply their model to congressional roll call votes and show that ideology alone cannot explain voting by members — factors such as party and region also matter. While the context of our paper is quite different, our results are broadly similar in that we show that ideology alone cannot explain presidential selection of Supreme Court nominees.

considerations. In addition, unlike MTM-models, we treat the president's choice of nominee as a decision-theoretic problem, and not game-theoretic. Cameron and Kastellec (2016) show that the president has been much less constrained in his choice of nominee than MTM-theories would predict. Accordingly, we focus on how the president optimizes his choice of nominee across multiple characteristics. At the same time, operationalizing the "costs" of additional ideology may naturally lead one to consider factors such as the size of the opposition party in the Senate. The model here can be seen as presidential calculation of the first move in a two-period game, where action in the second period is captured in the cost of ideology. Thus, even as the theory moves away from a stark ideological focus, it is it not as distant from a game-theoretic separation-of-powers approach as it might seem at first impression.

We test the characteristics theory using data on the 54 Supreme Court nominees chosen between 1930 and 2018 — a period that covers 15 presidents. We also extend the theory to the 299 individuals on the president's short list across these nominations. The characteristics approach requires novel measures; accordingly much of the data are newly collected. We use the data to estimate empirical demand functions for three nominee characteristics: ideology, policy reliability, and diversity traits. In other words, we estimate empirical functions to predict the characteristics of short list candidates and selected Supreme Court nominees.

The data reveal some striking and under-appreciated regularities in appointment politics. First, we show that presidential interest in the Court has significantly increased over time, while the difficulty of finding more ideologically reliable candidates has decreased. Moreover, we show that the ratio of benefits to costs generally predicts the level of ideology that presidents choose among their candidates for the Court as well as the degree of policy reliability in their eventual nominees. We also find that presidents choose more ideological nominees when the president is more distant from the ideological center of the current Court — we illustrate how success in moving the center of the Court undercuts this incentive. We also find that the increase in diversity among both short list candidates and nominees over time has followed an increase in presidential demand for diversity on the Court as well as an increasingly diverse pool of potential nominees. These results illustrate the utility of applying a characteristics approach to the study of presidential selection, and help us understand the importance of changes in the selection process over the last nine decades.

The Model

We begin with a general formulation of the theory before turning to a more specific version that guides empirical testing of the theory. We model a president selecting a nominee n_i at a given time i. A nominee comprises three

characteristics: ideology, policy reliability, and diversity traits. Formally, a nominee $n_i = (\widehat{x}_{i,}, \widehat{q}_i, \widehat{y}_i)$ is an ordered triple consisting of ideology, policy reliability, and diversity traits, respectively.[2] (The subscript i denotes a concrete nominee but otherwise subscripts denote partial derivatives, while superscripts denote classes of variables.) The quantities $\widehat{q}_i$ and $\widehat{y}_i$ are non-negative scalars, while $\widehat{x}_i \in \mathbb{R}$ is a point on a liberal–conservative scale; we adopt the usual convention that 0 separates liberal (left) from conservative (right). A negative (positive) choice of ideology ($x_i < 0$) thus indicates the selection of liberal (conservative) ideology.[3]

We divide each characteristic into two components: the first is a "default" component that the president can choose for "free." Denote x_i^0, q_i^0, and y_i^0 as the default levels of ideology, policy reliability, and diversity (these levels vary by nomination, and thus are not constants). Denote x_i, q_i, and y_i as the *additional* amount of each characteristic that the president chooses, at some cost — i.e. "purchases" — by exerting effort. A nominee's total level of attributes is simply the sum of the default and additional levels — define $\widehat{x}_i = x_i^0 + x_i$, $\widehat{q}_i = q_i^0 + q_i$, and $\widehat{y}_i = y_i^0 + y_i$.

For each characteristic, the president takes a cost versus benefit approach to choosing a nominee. Let $r(.)$ denote the political returns accruing to the president from any assemblage of nominee characteristics, while $c(.)$ is the effort or political cost associated with any assemblage of characteristics. Let π_i^x, π_i^q, π_i^y denote the political returns that accrue to the president from each unit of the associated nominee characteristic. Let w_i^x, w_i^q, w_i^y denote the effort cost or political cost required of the president to find ("assemble") each unit of nominee characteristic. In our model, because the president cares about influencing the policy of the Court, he takes into account the characteristics of the eight-member court at the time of a nomination (we call this the "extant" Court). Let $p_i \in \mathbb{R}$ denote the president's most-preferred ideological output of the Supreme Court, which he uses in evaluating the nominee's impact on the Court's policy. Let $\overline{x}_i$ denote the overall ideological composition of the extant Court, while $\overline{y}_i$ denotes the overall diversity of the extant Court. The extant Court's ideological composition influences the president's evaluation of a nominee's impact on the Court's policy outputs, while the diversity of the Court may influence the president's evaluation of the perceived impact of adding an additional non-white-male to the Court.

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[2]Technically, diversity can only be a feature of a group and not an individual. For convenience, we at times abuse this distinction and refer to a nominee as embodying diversity; this should be taken to mean that a female or minority justice would increase the diversity of the Court, since it has always comprised a majority of white males.

[3]One additional characteristic that might seem natural to include is the age of the nominee, given the impression that recent presidents have tended to look for younger nominees who would be expected to have longer tenures on the Court. As it turns out, the mean age of nominees has changed little over time (although the standard deviation has decreased). We thus leave age as an interesting extension of the approach employed here.

We assume that $|p_i| > |\overline{x}_i|$ — that is, the president is more "extreme" than the center of the eight-member Court. We make this assumption for ease of exposition, but as an empirical matter this seems to be true. Bailey (2007, Figure 7), for example, shows that Democratic (Republican) presidents are almost always more liberal (conservative) than the median Supreme Court justice.

We assume that the president has a utility function of the form:

$$u(n_i; \pi_i^x, \pi_i^q, \pi_i^y, p_i, \overline{x}_i, \overline{y}_i, w_i^x, w_i^q, w_i^y)$$
$$= \underbrace{r(n_i, \pi_i^x, \pi_i^q, \pi_i^y, p_i, \overline{x}_i, \overline{y}_i)}_{\text{Returns}} - \underbrace{c(n_i, w_i^x, w_i^q, w_i^y)}_{\text{Costs}}$$

The president's objective is to select a nominee who maximizes this function.

For the purposes of tractability, we focus on a less general formulation:

$$u(\cdot) = r^x(f(\hat{x}_i, \overline{x}_i), p_i, \pi_i^x) + r^q(\hat{q}_i, \pi_i^q) + r^y(g(\hat{y}_i, \overline{y}_i), \pi_i^y)$$
$$- w_i^x |x_i| - w_i^q q_i - w_i^y y_i, \tag{1}$$

which can also be expressed as:

$$u(\cdot) = \underbrace{r^x(f(\hat{x}_i, \overline{x}_i), p_i, \pi_i^x) - w_i^x |x_i|}_{\text{Ideology}} + \underbrace{r^q(\hat{q}_i, \pi_i^q) - w_i^q q_i}_{\text{Policy Reliability}}$$
$$+ \underbrace{r^y(g(\hat{y}_i, \overline{y}_i), \pi_i^y) - w_i^y y_i}_{\text{Diversity}} \tag{2}$$

Here we break the general returns function $r(\cdot)$ into three additively separable sub-components. $r^x(\cdot)$ addresses policy returns, $r^q(\cdot)$ addresses policy reliability, and $r^y(\cdot)$ addresses the returns from diversity. This formulation involves some loss of generality because additive separability precludes complex interactions between nominee attributes.[4] But, it brings major gains in tractability. We employ the simple cost function $c(\cdot) = w_i^x |x_i| + w^q q_i + w^y y_i$, so the cost of assembling a nominee is just the sum of the costs associated with each characteristic.

We also impose more structure on the return functions, detailed explicitly in Appendix B. Several assumptions are worth noting here. First, we assume

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[4]The theory can accommodate complex interactions. For example, an increase in the cost of diversity might lower the amount of ideology demanded (as occurred with President Reagan's selection of Sandra Day O'Connor). However, such a structure entails a much more complex analysis and often leads to ambiguous comparative statics, which could not be estimated with statistical precision absent a great deal more number of observations than exist. We thus opt for the much more straightforward additively separable structure, and leave more general formulations for future work.

that the three return functions are continuous and everywhere differentiable, while $r^x(\cdot)$ is concave in policy output, reaching a maximum when the Court's expected output corresponds to the president's ideal point p_i. (An example, considered below, is a quadratic loss function.) Second, we employ the function $x^J = f(\hat{x}_i, \overline{x}_i)$ to capture the expected ideological tenor of the Court's output, conditional on the composition of the extant court and the ideology of the nominee. The parameter $\overline{x}_i$ captures the ideological central tendency of the extant Court. The nature of the function $f(\hat{x}_i, \overline{x})$ remains an unsettled and vexing question in the study of courts, both theoretically and empirically.[5] While the precise form of $f(\hat{x}_i, \overline{x})$ is not crucial for the purposes of the theory, we do make the (weak) assumption that if $\hat{x}_i > \overline{x}$ then $f(\hat{x}_i, \overline{x}) > f(\overline{x}, \overline{x})$ — that is, the appointment of a nominee who is more conservative or liberal than the central tendency of the other members makes the Court's expected output more conservative or liberal, respectively.[6] Third, the function $y^J = g(\hat{y}_i, \overline{y}_i)$ indicates the perceived level of the Court's overall diversity, given the nominee (recall $\overline{y}_i$ is a measure of the diverse composition of the extant the Court). We assume that this function is increasing in the diversity of the nominee and the other members of the Court, but at a decreasing rate.[7] Thus, the addition of (say) the first woman to a Court possessing none may bring a large reward, while the addition of one more woman to a Court that already has several may bring little.[8]

We wish to examine the president's demand functions for nominee ideology, nominee reliability, and nominee diversity, as expressed in the following implicit functions, respectively:

$$x_i = x_i^*(\pi_i^x, \pi_i^q, \pi_i^y, p_i, \overline{x}_i, \overline{y}_i, w_i^x, w_i^q, w_i^y)$$

$$q_i = q_i^*(\pi_i^x, \pi_i^q, \pi_i^y, p_i, \overline{x}_i, \overline{y}_i, w_i^x, w_i^q, w_i^y) \qquad (3)$$

$$y_i = y_i^*(\pi_i^x, \pi_i^q, \pi_i^y, p_i, \overline{x}_i, \overline{y}_i, w_i^x, w_i^q, w_i^y)$$

The focus of the analysis is drawing out the empirical implications of the characteristics approach. Appendix B presents a full analysis of the theory, while Appendix Table B-1 summarizes the notation in the model.

One additional matter deserves discussion. Given a low political return on an attribute, and considerable expense in procuring it, the equilibrium level

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[5]One possibility is the median function, such that $x(\hat{x}_i, \overline{x}_i) = median(\hat{x}_i, \overline{x}_i)$. Empirical studies of the spatial location of the Court's final opinion tend to reject the median function, however (Carrubba *et al.*, 2012; Clark and Lauderdale, 2010).

[6]We assume that the function is continuous and differentiable with $f_{\hat{x}_i} > 0$, $f_{\hat{x}_i \hat{x}_i} \leq 0$, $f_{\overline{x}_i} > 0$, $f_{\overline{x}_i \overline{x}_i} \leq 0$, and $f_{\hat{x}_i \overline{x}_i} = 0$. An example of such a function, employed later, is the weighted mean $x = a\overline{x}, + b\hat{x}_i$, $a, b > 0$.

[7]The function could even become flat or decreasing if the Court had higher numbers of non-white-males. Of course, this has never been the case.

[8]We assume that the function is continuous, differentiable, with $g_{\hat{y}_i} > 0$, $g_{\hat{y}_i \hat{y}_i} \leq 0$, $g_{\overline{y}_i} > 0$, $g_{\overline{y}_i \overline{y}_i} \leq 0$, and $g_{\hat{y}_i \overline{y}_i} = 0$.

of the demanded attribute may be zero or even negative.[9] In an economic setting, a producer would just not offer a good or attribute that cannot be sold profitably. But here, the president must produce a nominee. What then? In that case, the president chooses the zero-cost attribute, the default attribute, e.g. $\widehat{x}_i = x_i^0$, $\widehat{q}_i = q_i^0$, or $\widehat{y}_i = y_i^0$. In words, the president selects attributes that require no effort to find or verify. Conceptually one might imagine the president simply taking a random draw from a pool of potential nominees.

Estimating Equations

Many of the most "obvious" equations one might be tempted to estimate are not compatible with maximization of Equation (1), a point well understood in demand theory (Deaton and Muellbauer, 1980). To assure that the functions we estimate are indeed compatible with our theory of nominee choice, we specify a tractable form of Equation (1) and explicitly derive the associated demands for ideology, policy reliability, and diversity. We assume that the nominee's ideology is a random variable χ_i with mean $\widehat{x}_i$ and variance $\frac{1}{\widehat{q}_i}$. This means that we assume that policy reliability *is not valued in and of itself, but rather via its indirect effect on the expected ideological output of the nominee.* Of course, this implies that some presidents will value policy reliability very highly.

It is worth noting that our conception of policy reliability is related to but distinct from the standard conception of "legal quality" or "legal qualifications" in the literature on Supreme Court nominations (see, e.g. Cameron *et al.*, 1990; Epstein and Segal, 2005). In these papers the idea is that presidents value high-quality judges both intrinsically and because it may improve a nominee's chances of confirmation, since senators also may value quality. In our conception, policy reliability captures more the idea that a confirmed nominee can be expected to advance the president's policy agenda on the Court. Thus, more reliable nominees will have lower variance in their decisions, resulting in less deviation from the president's preferences. In Section "The President's Demand for Policy Reliability", we detail what characteristics of nominees we believe correlate with policy reliability, such as whether they served as a federal judge and/or as an executive branch lawyer. To give one example of the differences in conception, William Brennan was perceived as having the maximum level of legal qualifications according to the standard newspaper-based measure (Segal, 2012). However, he scores very poorly in terms of our measure of policy reliability, which makes sense given that he was a liberal judge chosen by a Republican president for purely political, not policy, reasons.

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[9]For example, a positive (i.e. conservative) choice of ideology is a sensible decision for a conservative president; a negative (liberal) choice is not.

Note also that from this point forward, for ease of presentation we assume that the president is a conservative (i.e. Republican) president ($p_i > 0$), and that "additional ideology" equates to more conservatism.

The president's utility function is the quadratic-log utility function:

$$u_i(\cdot) = -\pi^x \left(p_i - (a\overline{x}_i + b\chi_i)\right)^2 + \pi^y \log\left(c\overline{y}_i + d\widehat{y}_i\right) - w_i^x x_i - w^q q_i - w^y y_i \quad (4)$$

In words, the president evaluates the Court's policy output using a quadratic loss function. Consequently, the Court's policy output is a weighted average of the ideologies of its members, as determined by the parameters $a > 0$ and $b > 0$, where b captures how much influence the nominee has on the Court's output relative to the existing justices. If, for example, the nine justices have equal influence, a equals $\frac{8}{9}$ and b equals $\frac{1}{9}$. Similarly, the diversity of the Court is determined by a weighted average of the justices, as given by the parameters $c > 0$ and $d > 0$. Again, the most natural interpretation is that c equals $\frac{8}{9}$ and d equals $\frac{1}{9}$.

Taking expectations, the president's utility function becomes:

$$Eu_i(\cdot) = -\pi^x \left(p_i - (a\overline{x}_i + b\widehat{x}_i)\right)^2 - \frac{b^2 \pi^x}{\widehat{q}_i} + \pi^y \log\left(c\overline{y}_i + d\widehat{y}_i\right)$$

$$- w_i^x x_i - w^q q_i - w^y y_i \quad (5)$$

This utility function has the same form as Equation (1) and obeys all the assumptions for general utility indicated in Appendix B. Note that $\pi_i^q = \pi_i^x$; as discussed above, policy reliability is valued but only for its contribution to ideological reliability.

Demand for Nominee Ideology, Policy Reliability, and Diversity

In this subsection we present the comparative statics that emerge from the presidential demand for ideology, policy reliability, and diversity. In the interest of space, we present the full derivation in Appendix B. Table 1 summarizes all the comparative static predictions.

Demand for nominee ideology: Presidential demand for nominee ideology is given by:

$$x_i = \begin{cases} x_i^* & \text{if } x_i^* > 0 \\ 0 & \text{if } x_i^* \le 0 \end{cases} \quad \text{where} \quad x_i^* = \frac{1}{b}p_i - \frac{1}{2b^2}\frac{w_i^x}{\pi_i^x} - \frac{a}{b}\overline{x}_i - x_i^0 \quad (6)$$

Thus, the president will only choose additional ideology (x_i) if his equilibrium level is above zero; it not, he will opt for the default level of ideology. We can think of x_i as a left-censored latent variable, where we only observe the values

Table 1: Summary of comparative statics.

Increase in –	Effect on demand for:			
	Ideology (conservative president)	Ideology (liberal president)	Policy reliability	Diversity
Ideological variables				
President's Ideology (p_i)	+	+	0	0
Benefits from Ideology (π_i^x)	+	−	+	0
Cost of Finding Ideology (w_i^x)	−	+	0	0
Default Level of Ideology (x_i^0)	−	−	0	0
Extant Court's Ideology ($\overline{x}_i$)	−	−	0	0
Policy Reliability variables				
Cost of Finding Policy Reliability (w_i^q)	0	0	−	0
Default Level of Policy Reliability (q_i^0)	0	0	−	0
Diversity variables				
Benefits from Diversity (π_i^y)	0	0	0	+
Cost of Finding Diversity (w_i^y)	0	0	0	−
Default Level of Diversity (y_i^0)	0	0	0	−
Extant Court's Diversity ($\overline{y}_i$)	0	0	0	−

Note: Effects are for signed ideology (negative is liberal, positive is conservative).
"+" indicates a predicted positive relationship, "−" indicates a predicted negative relationship, and "0" indicates a predicted relationship of zero.

of x_i^* if it exceeds a threshold. (This structure suggests a Tobit model, a point we return to below.) First, assume x_i^* is positive. If so, Equation (6) leads to the following comparative statics. The demand for ideology (still assuming the president is conservative) is:

- *increasing* in presidential ideology (p_i) — as the president becomes more conservative, he chooses a more conservative nominee.

- *decreasing* in w_i^x, the cost of ideology.

- *increasing* in presidential interest in the Court (π_i^x).

- *decreasing* in the conservatism of the eight-member court ($\overline{x}_i$); recall our assumption that $p_i > \overline{x}_i$, which means that this prediction is equivalent to saying the president demands less ideology as the extant Court moves toward him.

- *decreasing* in the default level of ideology (i.e. as x_i^0 becomes more conservative, the president demands less additional ideology).

Now, suppose $x_i^* \leq 0$, $x_i = 0$ and hence $\hat{x}_i = x_i^0$; that is, the demand for ideology is so low that a conservative president does not choose any additional ideology. In this scenario, Equation (6) provides information about when one should see the president opt for the default level of ideology. Here, the

comparative statics are the *opposite* of those indicated in the bullet points above.

Several subtleties deserve mention. First, as the price of ideology goes to zero, the value of x_i^* goes to $\frac{1}{b}p_i - \frac{a}{b}\overline{x}_i - x_i^0$. This is exactly the value of nominee ideology needed to move the Court's expected policy output to the ideal point of the president. Second, with plausible values for the weights a and b and the other parameters, x_i^* may well exceed the value of p_i; in other words, a conservative president may nominate someone whose expected ideology is even more conservative than his own, or a liberal president may nominate someone whose expected ideology is more liberal than his own. The reason is that such an extremist nominee drags the Court's expected output closer to the president's ideal point.[10] If the president did not care about the nominee's impact on judicial policy but only about the nominee's proximity to himself, he would never nominate someone more extreme than himself since the same policy utility could be achieved at lower cost with a more moderate nominee.

Demand for Policy Reliability: The president's demand for nominee policy reliability is given by:

$$q_i = \begin{cases} q_i^* & \text{if } q_i^* > 0 \\ 0 & \text{if } q_i^* \leq 0 \end{cases} \qquad \text{where} \qquad q_i^* = b\sqrt{\frac{\pi_i^x}{w_i^q}} - q_i^0 \qquad (7)$$

As with ideology, q_i^* is a left-censored variable, where we only observe the values of q_i^* if it exceeds a threshold. First, assume that q_i^* is positive. If so, Equation (7) leads to the following comparative statics. Demand for policy reliability is:

- *increasing* in presidential interest in the Court's ideology (π_i^x).

- *decreasing* in w_i^q, the cost of policy reliability.

- *decreasing* in the level of default reliability (q_i^0).

As with ideology, if the demand for reliability is too low, the president opts for its default level, and the comparative statics of the threshold are the opposite of those listed above.

Demand for Diversity: Finally, the president's demand for diversity is given by:

$$y_i = \begin{cases} y_i^* & \text{if } y_i^* > 0 \\ 0 & \text{if } y_i^* \leq 0 \end{cases} \qquad \text{where} \qquad y_i^* = \frac{\pi_i^y}{w_i^y} - \frac{c}{d}\overline{y}_i - y_i^0 \qquad (8)$$

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[10]This feature of the model is similar to the move-the-median (MTM) model in Bailey and Spitzer (2017), although the mechanisms differ. See Appendix B for a full explanation.

Again, y_i^* functions as a left-censored latent variable, which we only observe if y_i^* meets some threshold. First, assume that y_i^* is positive. If so, Equation (8) leads to the following comparative statics. The demand for diversity is:

- *increasing* in presidential interest in diversity (π_i^y).

- *decreasing* in the cost of finding a nominee who is a not a white male (w_i^y).

- *decreasing* in the number of non-white-male justices already on the Court ($\bar{y}_i$).

- *decreasing* in the diversity of the default nominee (y_i^0).

If the demand for diversity traits is too low, the president opts for the default level of diversity available without effort (in practice, this will be a white male), and again the comparative statics are reversed.

Data and Measures

We apply the theory to the 54 unique nominations (which comprise 50 unique individuals) made between 1930 and 2018. Our analyses proceed on two tracks, depending on the quantity of interest. We are, of course, interested in who the president ultimately selects to join the Court. In addition, we follow the lead of Nemacheck (2008) and examine the "short list" of candidates for every vacancy.[11] In this time period, there have been 299 total short list candidates, comprising 208 unique individuals.

Analyzing the short list provides multiple benefits. First, the theory arguably applies to the composition of the short list, if the incentives that produce the short list also apply to the final selection of the nominee. Second, it is an interesting question in and of itself whether the selected candidates differ on relevant dimensions from the candidates who make the short list but are not ultimately chosen (as we show below, they do). Third, for many of our analyses adding the short list provides much needed statistical power; for example, while there have only been seven nominees who were not white males, there have been 62 women and/or minority candidates on the short lists.

To clarify our terminology, from this point forward we use "candidate" to generically describe the complete set of individuals who comprise the short list, including the eventual nomines. We use "short listers" to refer to individuals on the short list who were *not* eventually nominated, while "nominees" refers to individuals actually nominated by the president. Readers should keep in mind that nominees are technically a subset of all short listers, as nominees

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[11]Nemacheck coded the short list for most nominations between 1930 and 2005. We have updated her data to include all nominations through 2018.

always (by definition) emerge from the short list. "Candidates" thus describes the union of "nominees" and "short listers."

The characteristics approach to presidential selection of Supreme Court nominees utilizes many variables that are novel and that have never been calculated, much less employed in statistical analyses of nominations. Because of the sheer number of measures we present and tests we conduct, rather than presenting descriptive statistics first and then moving to regressions, we organize our analyses as follows. We begin by describing how we measure the president's interest in the Court. We then turn to the three main outcomes of interest in the theory (ideology, reliability, and diversity), summarizing the relevant variables first and then presenting regression analyses. After summarizing the regressions, we use the overall results from each model to substantively interpret changes in nomination politics.

The President's Policy Interest in the Court

The model requires a measure of the president's policy interest in the court. We combine two variables to measure this interest. First, in line with recent work from the "UCLA School" of political parties, we treat the president as an extension of his political party and tie his interests in the Court to that of the larger party (Bawn *et al.*, 2012; Cohen *et al.*, 2009; Noel, 2013). As part of a larger project on the judicial agenda of the parties, we collected the texts of the Republican Party and Democratic Party platforms, as well as the acceptance speeches of the presidential candidates from each party. We coded statements about the Supreme Court with respect to both particular cases and more general statements and/or promises about favored types of appointments, including "litmus tests" for nominees.[12] From these statements, we counted the number of statements dedicated to the Court, and developed a straightforward aggregate index of presidential/party interest in the court. The indices for each party are displayed in Appendix Figure A-1. Early on, there was little party interest in the Court; most platforms before 1968 featured one or fewer references to the Court. Since the late 1960s, there has been a significant increase in the focus of the parties on the Court. However, consistent with Grossmann and Hopkins (2016), there exists a striking asymmetry between the parties: starting in the early 1990s the Republican Party became much more focused on the Court compared to the Democratic Party. In 2016, Republican statements on the Court numbered three times those of the Democrats.

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[12]For example, since 1980 the Republican platform has often featured a statement along the lines of "We support the appointment of judges who respect traditional family values and the sanctity of innocent human life," which is a litmus test to appoint pro-life nominees to the Court.

Presidents, of course, may have interests in the Court that differ from those of the larger party. And, whereas the platform and acceptance speeches are measured only at four-year intervals, there exists year-to-year variation in presidential interest. We thus employ a more granular measure of presidential interest: public rhetoric regarding Supreme Court policy (Eshbaugh-Soha and Collins Jr., 2015). We explain this measure in detail in Appendix Section A.1; Appendix Figure A-2 depicts the measure over time.

The theory posits a single measure of presidential interest in Supreme Court policy (π_i^x). To accomplish this, we conducted a principal components analysis of the platform-based measure and the presidential rhetoric measure, and employ the first principal component — see Appendix Section A.1 for details. The resulting variable, which we call "presidential interest," is displayed in Figure 1. Shaded regions indicate Democratic presidents, while the dashed (blue) line is a loess line. The solid (red) points indicate years with a nomination. The figure shows a clear upward trend in presidential interest, but interest tends to be higher in Republican administrations in recent years.[13]

Measuring Nominee Ideology

Recall from the president's demand for ideology (Equation (6)) that we require a measure for x_i^*, which is the additional amount of ideology chosen by the
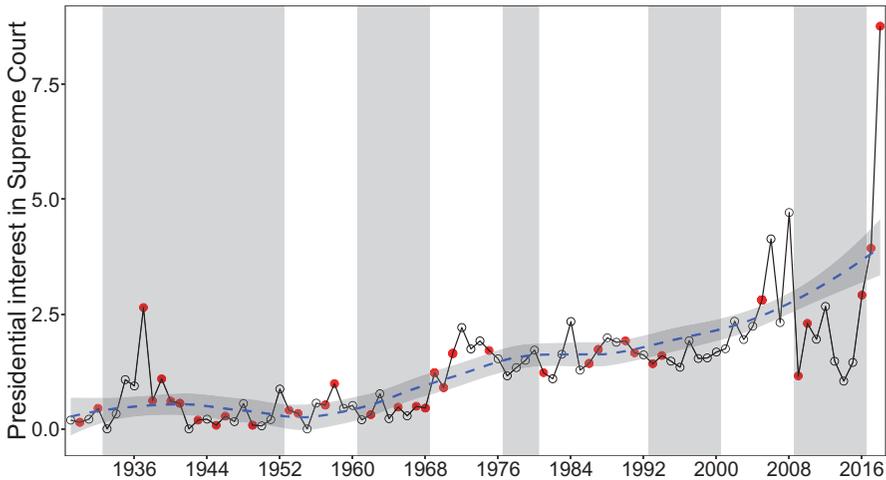

Figure 1: Combined factor score of presidential interest in Supreme Court policy, 1930–2018.

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[13]The index spikes in 2018 because President Trump extensively invoked the confirmation of Brent Kavanaugh in 2018 in the run-up for the midterm elections. See Appendix Section A.1 for further details.

president, at cost, above the "free" default level, x_i^0. This, in turn, requires measures of x_i^0 and $\hat{x}_i$, the total level of ideology.

To measure nominee ideology, we require a measure that meets two criteria. First, it must exist for all short listers, not just nominees. This rules out vote-based measures of justice ideology (see, e.g. Bailey, 2007; Martin and Quinn, 2002), which have two shortcomings: they are inadequate for testing theories of presidential selection and only exist for nominees who are confirmed. Second, we must be able to place the measure on the same scale as our measure of the default level of ideology. Fortunately, Nemacheck (2008) has constructed an inferential measure of ideology based on the average DW-NOMINATE score of a short list candidate's co-partisan members of her home state congressional delegation. (See Appendix Section A.1 for details.)[14] We use this measure to capture $\hat{x}$. As it exists in NOMINATE space, lower (higher) values of the measure indicate that a candidate is more liberal (conservative).

Next, we require a measure of x_i^0, the default level of ideology. To construct this measure, we turn to the Courts of Appeals. This institution has been the stepping stone for a significant number of Supreme Court justices, and thus can serve as an effective proxy for the larger pool of potential justices. For each active judge who served on the Courts of Appeals from 1930 to 2018, we calculated the DW-NOMINATE equivalent of the Giles–Hettinger–Pepper scores, which are based on the ideology of a judge's appointing president and/or home-state senators (Giles *et al.*, 2001) — see Appendix Section A.1 for further details.[15] Then, for each year, we calculated the mean DW-NOMINATE score of all Courts of Appeals judges; we use this measure to capture x_i^0. The idea is that if the president were to randomly select a nominee, this would be his or her expected ideology; equivalently, the president can acquire this amount of ideology for free.[16]

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[14]While using an inferential measure is not ideal, Nemacheck (2008) shows that distance between the president and a candidate is predictive of whom the president selects from the short list, which helps demonstrate the utility of the measure. In addition, for nominees to the Court, we can compare the Nemacheck measure with the NOMINATE-Scaled Perceptions (NSP) scores developed in Cameron and Park (2009). The two correlate at 0.84 (see Figure A-6 in Appendix A), which is reassuring.

[15]The GHP scores are usually measured based on the Common-Space NOMINATE scores; we map the scores into DW-NOMINATE to make them comparable with our other DW-based measures.

[16]A second possibility is to employ the mean score of the president's "co-partisan judges" — the idea being the president would randomly select among judges appointed by presidents of his own party. We do not employ this measure for two reasons; one conceptual, one practical. Conceptually, there have been notable examples in U.S. history of presidents making "cross-party" appointments to the Court when they did not have much interest in the ideological output of the Court — for instance, Eisenhower's appointment of William Brennan. Practically, we attempted to use the co-partisan measure of x_i^0; when we did so, the procedure by which we calculate x_i^* (described shortly) results in a large majority of observations being censored, which does not allow for enough variation to implement our regressions. We thus opt for the overall mean measure.

With these measures of $\hat{x}$ and x_i^0, in hand, we can proceed to develop an estimate of x_i^* that accounts for the censoring implied by the demand for ideology. Specifically, for Republican presidents, let $x_i^* = 0$ if $\hat{x} \leq x_i^0$; thus, if a candidate is (weakly) less conservative than the default level of ideology, we assume the president has chosen no additional ideology. The same is true for Democratic presidents when $\hat{x} \geq x_i^0$ — that is, if the candidate is (weakly) less liberal than the default level. Conversely, if the president is a Republican and $\hat{x} > x_i^0$, then $x_i^* = \hat{x} - x_i^0$; that is, the difference between the total level of a candidate's ideology and the "free" default level. Similarly, if the president is a Democrat and $\hat{x} > x_i^0$, then $x_i^* = x_i^0 - \hat{x}$. Thus, our measure of x_i^* is always non-negative, and is increasing in the ideological *extremism* of the short listers and nominees (for both liberals and conservatives). As noted above, the censored nature of our measure of x_i^* calls for a left-censored Tobit model, and thus we employ Tobit models to estimate the demand for ideology.

Additional Covariates

Returning to the demand equation, we need measures of the following quantities:

Presidential ideology: To measure the president's ideology (p_i), we employ the DW-NOMINATE score of the appointing president. Since we model the choice of additional ideology (as opposed to straightforward liberal-to-conservative ideology), we take the absolute value of the president's score, so more ideologically extreme presidents have higher scores than more moderate presidents.

The extant Court's ideology: To measure the existing Court's ideology ($\bar{x}_i$), for each eight-member Court at the time of each vacancy, we calculate the mean ideology, based on the NOMINATE-Scaled Perceptions (NSP) scores developed in Cameron and Park (2009). These scores exist in NOMINATE space and are thus directly comparable to the president's ideology score. (Figure A-5 in the Appendix depicts the president and the existing Court's respective ideologies over time.) To make this measure reflect ideological extremity, we multiply the mean NSP score by negative one when the president is a Democrat. As seen in Figure A-5, the ideology of the president is always more extreme (higher in absolute value) than the overall Court; thus, higher values of the rescaled values indicate that the Court is closer to the president, and vice versa.

The costs of choosing additional ideology: We employ two different measures to proxy for the president's cost of choosing additional ideology. First, we conceptualize the costs in terms of the president's *search costs*, given positive demand: how easy or difficult is it to find a candidate for

the Court of the desired ideology? To capture this, we assume that the president's search costs are decreasing in the number of co-partisan judges on the Courts of Appeals (as determined by the party of the appointing president.) (Alternatively, we can say that costs are decreasing in the *supply* of co-partisan judges.) This measure is depicted in Appendix Figure A-7. The number of judges has increased for both parties over time as the size of the federal judiciary has grown, but even within eras there is significant variation based on the periods of partisan control of the White House. We let w_i^x = (the number of co-partisans)$^{-1}$; thus, costs are *decreasing* in the number of co-partisan judges on the bench.

Second, we conceptualize the cost of choosing additional ideology in terms of the president's *political costs*: how easy or hard will it be to get an ideologically extreme nominee through the Senate? To capture this, we measure the proportion of senators who are of the president's party. Again, we measure w_i^x = (percent of co-partisan senators)$^{-1}$, so costs are *decreasing* in the proportion of the Senate controlled by the president's party.

The ratio of costs to benefits: Finally, we construct the ratio $\frac{w_i^x}{\pi_i^x}$, which we call the *cost–benefit ratio*. For both measures of costs, the predicted sign on the ratio is negative (see Equation (6)). Appendix Figure A-8 depicts the cost–benefit ratio using both measures of cost; both reveal a clear decrease in the cost–benefit ratio over time.

Regression Results

Table 2 presents eight Tobit models. The dependent variable in each is our measure of x_i^* (which recall is the additional amount of ideology chosen by the president); the censoring point is at zero. Models (1)–(4) employ the measure of costs based on the number of co-partisans on the Courts of Appeals, while models (5)–(8) employ the Senate-based measure. Models (1), (2), (5), and (6) include all candidates,[17] while Models (3), (4), (7), and (8) include only nominees.

The odd-number models present bivariate regressions where the cost–benefit ratio is the only predictor. As predicted in Equation (6), the coefficient is negative in each model; it is also statistically distinguishable from zero. Thus, there exists a significant bivariate connection between the ratio of costs to benefits and the presidential choice of additional ideology.

The even-number models add as predictors the ideology of the president, the ideology of the extant Court, and the default level of ideology — the models thus follow precisely from Equation (6). In each model, the coefficient

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[17]For all regressions in the paper that include the full set of short listers, we employ robust standard errors that are clustered on the nomination.

Table 2: Tobit regression models of the president's demand for ideology.

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Cost–benefit ratio $\left(\frac{w_i^x}{\pi_i^x}\right)$	−1.057	−0.812	−0.807	−0.384	−0.021	−0.014	−0.020	−0.011
	(0.325)	(0.297)	(0.392)	(0.395)	(0.007)	(0.007)	(0.006)	(0.007)
$\mid$ President $\mid$ (p_i)		0.386		0.543		0.364		0.482
		(0.167)		(0.222)		(0.169)		(0.218)
Mean of extant Court ($\bar{x}_i$)		−0.340		−0.489		−0.259		−0.437
		(0.107)		(0.133)		(0.095)		(0.136)
Default ideology x_i^0		−0.078		0.070		−0.027		0.073
		(0.221)		(0.213)		(0.216)		(0.209)
Intercept	0.299	0.123	0.330	0.089	0.312	0.132	0.355	0.130
	(0.027)	(0.092)	(0.035)	(0.115)	(0.028)	(0.096)	(0.035)	(0.112)
σ	0.212	0.203	0.203	0.177	0.209	0.203	0.195	0.174
	(0.013)	(0.012)	(0.022)	(0.019)	(0.012)	(0.012)	(0.021)	(0.019)
Sample	ALL	ALL	NOMS	NOMS	ALL	ALL	NOMS	NOMS
N	299	299	54	54	299	299	54	54
Cost measure?		*Courts of Appeals judges*				*Senate opposition*		

Note: σ gives the estimated standard error of the regression. "ALL" = all candidates, while "NOMS" = nominees only.

on the cost–benefit ratio remains negative; however, it is measured somewhat imprecisely in some of the models (in Models (2) and (6) the coefficient is statistically different from zero, $p < 0.05$, one-tailed test). All told, the models provide suggestive evidence that presidents take the costs and benefits of choosing additional ideology into account — in particular, the ratio is predictive of which individuals make the short list.

Turning to the remaining covariates, more ideologically extreme presidents demand more ideology, which is intuitive. In addition, the coefficient on the overall ideology of the Court is negative and statistically significant. Recall that this variable is scaled such that lower values mean the Court is farther from the president, and vice versa. Thus, as predicted by the theory, presidents choose less ideology when the Court is closer to them. Finally, the coefficient on the default level of ideology is always statistically indistinguishable from zero — the demand for ideology does not seem to vary systematically with changes in the baseline level of ideology, *ceteris paribus*.

The President's Demand for Policy Reliability

Next, we turn to policy reliability, for which we require a plausible measure. We begin by considering the candidates' professional qualifications and backgrounds. We coded several variables that predict judicial professionalism and the likelihood of an established history of legal opinion writing. For each, we identify their expected relationship with reliability; we discuss where these expectations come from shortly.

- **Federal judge**: Was the candidate a federal judge? (Higher reliability)

- **Executive branch lawyer**: Does the candidate have experience working as a lawyer in an executive branch agency? (Higher reliability)

- **Law professor**: Was the candidate ever a law professor? (Higher reliability)

- **Top law school**: Did the candidate attend a "top" law school? (Higher reliability)

- **Politician**: Was a candidate ever an elected politician? (Lower reliability)

- **Executive administrator**: Does a candidate have any experience working in an executive branch agency (at the state or federal level)? (Lower reliability)

Figure 2 depicts how the backgrounds of short listers and nominees have changed over time. For each panel, a given category is depicted (we define "Super Tech" shortly). The "rugs" in the top and bottom of each panel show
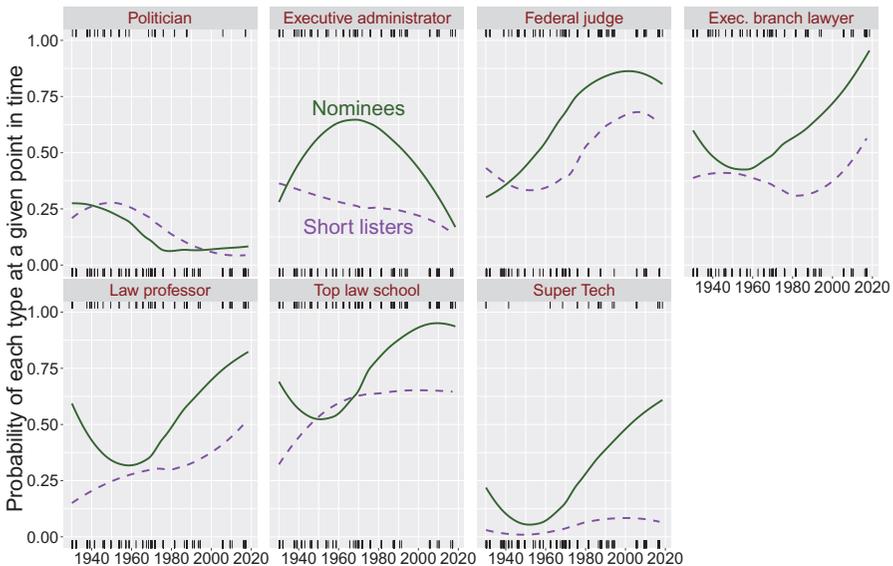

Figure 2: The changing nature of short listers' and nominees' professional backgrounds, 1930–2018.

instances where a candidate takes on a one or zero for a given category (that is, the rugs comprise the entire distribution of candidates). The solid (green) lines depict a loess line for nominees only, while the dashed (purple) lines depict a loess line for short listers only (the two lines thus summarize mutually exclusive sets of short listers). The horizontal axis depicts time, while the vertical axis depicts the probability of that type of candidate.

Figure 2 reveals several interesting patterns, both across time and across nominees versus short listers. In the early period, presidents often nominated elected politicians. Examples include Hugo Black, James Byrnes, and Earl Warren. Presidents gradually turned away from elected politicians. Since 1981, the only nominee with elected experience was Harriet Miers, and very few elected officials have made the short list since the 1990s. Similarly, executive administrators were often favored by presidents; nominees in the "middle period" of 1950–1970 were likely to have served as administrators. Since then, however, the presence of administrators on both the short list and among nominees has declined precipitously. Together, we can think of politicians and administrator as "politicos" — such types were once often considered for the Court, but today are very unlikely to be.

Who has taken their place? Beginning in the 1970s, we see a dramatic change in characteristics. The first change applies across the board: federal judges were more likely both to make the short list and to be nominated (Epstein *et al.*, 2003). The second change involves a divergence between nominees and short listers. Nominees over time were much more likely to have served as an executive branch lawyer, to have been a law professor, and to have attended a top law school (though the trends for short listers have also moved upward over time).

Taken together, this shift in desired experience characteristics points to a new kind of nominee: the highly skilled *legal technician*. Federal judges, particularly those on the Courts of Appeals, are obviously immersed in the law and can use the policy-making discretion of the Courts to signal their reliability. So can individuals who have served in the executive branch as lawyers and legal policy makers — often in the Justice Department but also the White House itself. Finally, attending a top law school and serving as a law professor provide further signals of legal skill. Indeed, over time the new kind of nominee displayed the signature of what can be called a *legal Super-Tech*: the "superfecta" of federal judge, executive branch legal policy maker, law professor, and top law school graduate. The last panel in Figure 2 shows a striking rise in the likelihood of the president nominating a Super-Tech in recent decades; however, there has been no corresponding percentage increase in Super-Techs among short listers. This divergence shows that, on at least this dimension, this president is not randomly selecting names from the short list, but further winnows the candidates and selects a nominee with characteristics to his liking.

What explains the rise in Super-Techs? Notably, the trend is coincident to the institutionalization of a formal vetting process in the Justice Department and White House (Yalof, 2001), in contrast to the often haphazard processes employed by previous presidents. In our view, the cause of the rise of Super-Techs and the institutionalization of the vetting process was one and the same: the drive to find ideologically reliable nominees. In support of this conjecture, Hitt (2013) finds that in the post-1950 period, justices with more judicial and executive branch experience are more likely to have ideal points (based on their voting record) that are closer to the ideal point of their appointing president. The emphasis on Super-Techs can especially be seen in Republican appointments to the Court in the 21st century, where the notion of "No More Souters" has become a rallying cry among activists in the conservative legal movement; Justice David Souter, who was appointed to the Supreme Court in 1990 by President George H.W. Bush despite a thin judicial record, went on to become a reliable liberal vote on the Court.

Accordingly, we construct an index, the Policy Reliability Index (PRI), using biographical data; this measure corresponds to $\hat{q}_i$ in the theory. Define the PRI as $PRI = \sum_i \rho_i$, where ρ_i indicates the four attributes conducive to establishing policy reliability: service as a federal judge, service as an executive branch lawyer, service as a law professor; and top law school attendee. Appendix Figure A-9 displays a dotplot of the PRI measure, focusing just on nominees. "Politicos" like Black and Byrnes score low on the measure, while Super-Techs like John Roberts and Brett Kavanaugh receive the highest score.

Defining the Baseline Level of Policy Reliability

Recall from Equation (7) that we need a measure of q_i^0: the baseline measure of policy reliability. To accomplish this, we return to the Courts of Appeals. For every active judge on the Courts of Appeals from 1930 to 2018, we coded whether they attended a top law school, whether they were a law professor before joining the bench, and whether they served as an executive branch lawyer. We also coded the party of the appointing president. The left-hand panels in Figure 3 depict the aggregate number of judges that had each of the three experience characteristics — the left-bottom panel indicates whether any of the three conditions is met. In line with the distribution of candidates seen above, we see secular increases in all three experience characteristics over time. (We return to the right-hand panels below.) This means that the supply of more reliable judges has increased over time.

From these measures, we create a measure of q_i^0. For each year, we define an index that is parallel to the PRI for candidates. First, because we are working with the pool of federal judges, every judge starts with a score of 1. Then for each of the three experience measures, we add the value 1. Each judge has a score of 1 to 4. Then, for every year, we take the mean of this index. We define
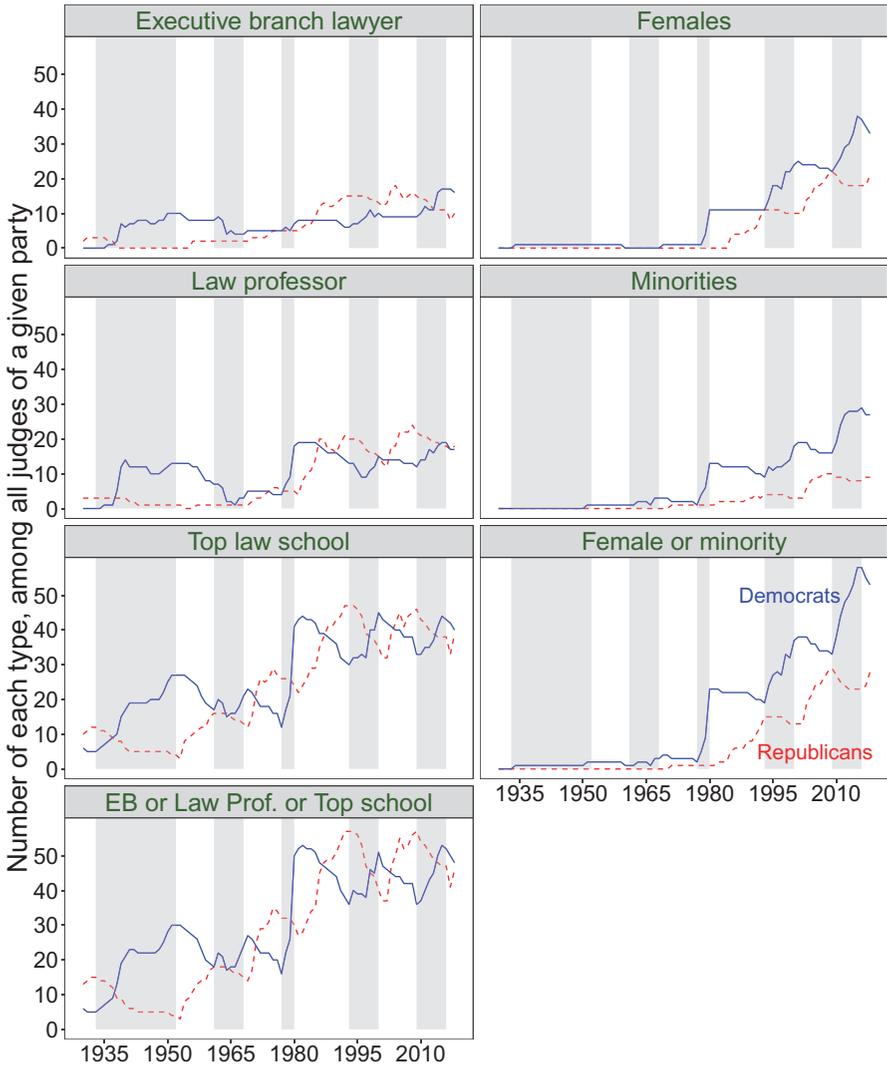
Figure 3: The characteristics of Courts of Appeals judges, 1930 to 2018.

q_i^0 as the rate of reliability among all Courts of Appeals judges.[18] Appendix Figure A-4 depicts the index over time. While overall reliability has ebbed

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[18]As with our measure of the default level of ideology, a plausible alternative would be to calculate the mean reliability levels among a president's co-partisans on the Courts of Appeals. All the regression results we present in Table 3 below are robust to using this alternative measure of q_i^0.

and flowed since 1930, the trend since 1970 has been increasing, indicating that the default level of reliability has increased over time. For instance, a random draw for George W. Bush from the pool of Courts of Appeals judges would have (in expectation) resulted in a more reliable nominee than a similar draw by Eisenhower.

Defining the Level of Additional Reliability Chosen by the President

By operationalizing candidate reliability and baseline reliability on the same scale we can now define q_i^*. The procedure is similar to that used for x_i^* — though reliability is strictly non-negative so we do not to account for the "flipped" measures for liberal presidents. Let $q_i^* = 0$ if $\hat{q}_i \leq q_i^0$; thus, we assume that if a candidate is (weakly) less reliable than the default level of reliability, the president has chosen no additional reliability. Conversely, if $\hat{q}_i > q_i^0$, then $q_i^* = \hat{q}_i - q_i^0$; that is, the difference between the total level of a candidate's reliability and the "free" default level. Thus, our measure of q_i^* is always non-negative, and it is increasing in the reliability of candidates (for both liberals and conservatives). As with x_i^*, the censored nature of q_i^* suggests a left-censored Tobit model.

Additional Covariates

Recall the demand equation for reliability: $q_i^* = b\sqrt{\frac{\pi_i^x}{w_i^q}} - q_i^0$. For π_i^x, we employ the same measure as in the analysis of ideology — the combined factor score of presidential interest. For w_i^q, we again use the inverse of the number of co-partisans on the Courts of Appeals. Our assumption is that as the number of ideologically aligned compatriots on the bench increases, the cost of finding a reliable legal technician, or possibly a Super-Tech, decreases. Equation (7) predicts that demand for reliability is increasing in the square root of interest in the courts over the cost of finding reliability; we create this measure and call it "the benefit–cost ratio." Thus, as the number of co-partisan increases, w_i^q decreases, and the overall ratio increases, leading to the prediction that reliability should be increasing in co-partisans. Finally, we also include the baseline level of reliability as a predictor.

Regression Results

Table 3 presents six regression models of candidate reliability. The first four models are Tobit regressions in which the dependent variable is our measure of q_i^*; the censoring point is at zero (we discuss Models (5) and (6) shortly). Models (1) and (3) include all candidates (short listers and nominees), while Models (2) and (4) include only nominees.

Models (1) and (2) are bivariate regressions in which the benefit–cost ratio is the only covariate. As predicted by the theory, the coefficient is positive and significant — presidents choose more reliability as the cost-weighted benefits

Table 3: Regressions of the president's demand for reliability.

	(1)	(2)	(3)	(4)	(5)	(6)
Benefit–cost ratio $\left(\sqrt{\frac{\pi_i^x}{w_i^q}}\right)$	0.038	0.094	0.025	0.124		
	(0.012)	(0.027)	(0.014)	(0.034)		
Baseline reliability $(q_i{}^0)$			0.616	−1.683		
			(0.648)	(1.174)		
Logged interest $(log(1 + \pi_i^x))$					0.109	0.207
					(0.049)	(0.106)
Logged costs $(log(w_i^q))$					−0.113	−0.210
					(0.061)	(0.099)
Intercept	−0.016	−0.010	−0.992	2.699	0.260	−0.049
	(0.137)	(0.258)	(1.101)	(1.897)	(0.220)	(0.346)
N	299	54	299	54	299	54
Sample	ALL	NOMS	ALL	NOMS	ALL	NOMS
σ	0.960	0.984	0.961	0.964		
	(0.054)	(0.116)	(0.054)	(0.114)		
R^2					0.10	0.26

Note: Models (1)–(4) are Tobit regressions, while Models (5) and (6) are OLS regressions. σ gives the estimated standard error of the regression. "ALL" = all short list candidates, while "NOMS" = nominees only.

of doing so increase. Note, however, the magnitude of the coefficient in the nominee-only model is 2.5 times the size of the model with all candidates. Models (3) and (4) follow Equation (7) and add the baseline level of reliability as a predictor. In Model (4), which includes only nominees, the benefit–cost ratio remains positive and significant, and in fact is larger in magnitude compared to the bivariate regression in Model (1). In Model (3), which includes all candidates, the ratio is statistically larger than zero ($p < 0.05$, one-tailed test). However, its magnitude shrinks relative to Model (1), and is one-fifth the magnitude of the cost–benefit ratio when we look at just nominees in Model (4). Finally, in neither Model (3) nor Model (4) is the coefficient on baseline reliability statistically significant.

The differing results when we compare all candidates with just nominees is perhaps not surprising, in light of the differences in background characteristics over time seen in Figure 2. The benefit–cost ratio predicts the president's choice of reliability when he ultimately makes a nomination, but does not seem to influence whom makes the short list in the first instance. This divergence is noteworthy, as it means that the candidates who eventually become justices have greater professional qualifications and hence higher policy reliability.

Next, it is possible to partition the benefit–cost ratio into separate components by employing a logged specification. We do so in Models (5) and (6), which are derived by rearranging Equation (7) and taking logs of both sides.[19]

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[19]See Appendix Section B.4 for the full derivation.

In the resulting equation, the dependent variable is $log(q_i^* + q_i^0)$. The right-hand side becomes $log(1 + \pi_i^x) + log(w_i^q)$. Model (5) depicts this regression on all the candidates, while Model 6 keeps only the nominees. However, because the censoring point changes across observations using this specification, it is not feasible to employ a Tobit model; accordingly, we run OLS models.

The results indicate that for both all candidates and nominees, reliability is increasing in presidential interest in the courts and decreasing in costs. As the number of co-partisans increase, the costs of finding additional reliability fall, which predicts the larger choice of additional reliability. Interestingly, the coefficients on both logged interest and logged costs are nearly double in magnitude for nominees (Model (6)) compared to all candidates (Model (5)), again suggesting that concerns over reliability are having a larger influence on the president's final choice of nominee that on the composition of the short list.

The President's Demand for Diversity

Finally, we examine the theory's predictions with respect to the president's demand for racial and gender diversity on the Supreme Court. We have collected the race and gender of every candidate from 1930 to 2018. Figure 4 depicts the diversity of the short listers and the nominees over time. The "rugs" in the top and bottom of each panel show instances where a candidate takes on a one or zero for a given category (that is, the rugs comprise the entire distribution of candidates). The solid (green) lines depict a loess line for nominees only, while the dashed (purple) lines depict a loess line for short listers only. The left panel depicts white males; the center panel females; and the right panel minorities.

Unsurprisingly, the diversity of the short lists has increased substantially over time. No woman or minority made a short list until after 1960. Since
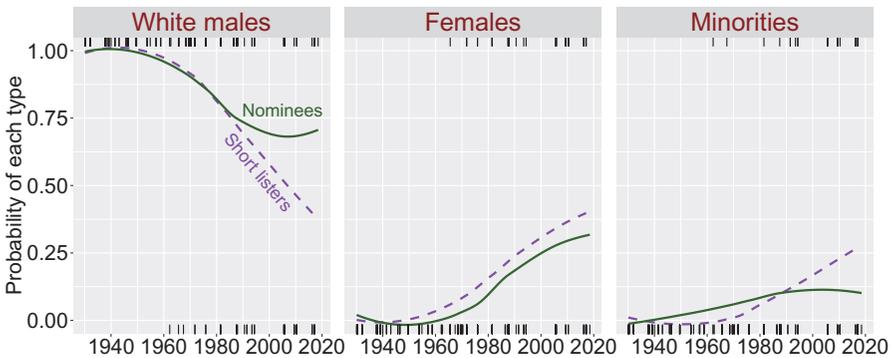

Figure 4: The racial and gender makeup of short list candidates, 1930 to 2018.

then, their number has steadily increased over time. White males, however, still make up a large proportion of candidates. Interestingly, and in contrast to the pattern with reliability, the trends for short listers and nominees have moved on parallel tracks.

Recall that Equation (8) gives the president's demand for diversity, y_i^*. We can operationalize y_i^* in different ways; in theory, one could suppose that diversity is increasing in the number of dimensions on which a candidate differs from the "typical" candidate — that is, a white male. In practice, there have been only four unique candidates who were female *and* a minority, which makes an intersectional approach infeasible. Accordingly, we take the simpler step of assuming that y_i^* equals 1 whenever the candidate is a female or minority, and 0 otherwise. This simplification means that we can employ logistic regression models.

Measuring the benefits and costs of diversity: To measure the president's interest in diversity (π_i^y), we again employ a measure based on party platforms and presidential acceptance speeches (recall the platform-based measure of ideological interest). For each, we code whether a document invokes a desire for increasing the racial or gender diversity of the Supreme Court, or both. From these, we created an additive index based on the number of statements in a given party–year combination that invoke the diversity of the Court.

The resulting measure is displayed in Figure 5. The figure reveals neither party invoked diversity before 1972. Since then, Democrats have tended to stress racial and gender diversity more often, though Republicans have mentioned diversity occasionally. Note that while the index exceeds 1 for Democrats in a few years, these never occur during a Democratic presidency, and so in practice the president's interest in diversity is a binary variable.
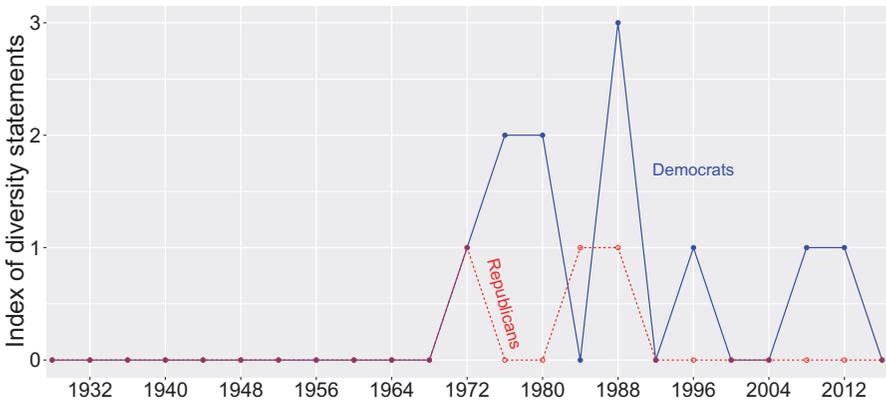

Figure 5: Presidential/party interest in diversity.

Thus, the political return to a president from nominating someone other than a white male has varied dramatically over time; indeed, nominating such a person might well have been political costly for Herbert Hoover and other presidents early in the period we study.

To proxy for the "cost" of locating nominees who are not white males, we again draw on the Courts of Appeals. Returning to Figure 3, the right-hand panels depict the number of females, minorities, and non-white males (i.e. female *or* minority) on the Courts of Appeals, broken down by party of the appointing president. The panels show increasing diversity on the Courts of Appeals, though the increases have been larger for Democrats compared to Republicans. We assume w_i^y (the cost of finding diversity) equals 1 divided by the number of co-partisan judges who are not white males. Thus, the data also indicate that the cost of diversity was very high prior to about 1960 but fell dramatically thereafter (alternatively, the supply of diverse candidates has increased over time). However, Republican presidents continued to face high costs until more recently.

Returning to Equation (8), the demand for diversity is increasing in $\frac{\pi_i^y}{w_i^y}$. Define this quantity as the *benefit–cost ratio* for diversity; thus, as the number of co-partisan non-white-male judges on the Courts of Appeals increases, w_i^y decreases, and thus the overall ratio increases, leading to a prediction that the demand for diversity should be increasing in the number of co-partisan judges who are not white males. For y_i^0, we make the simplifying assumption that the baseline nominee is a white male. Because this is effectively the same as assuming that y_i^0 is zero, this term drops out of the demand equation. Finally, to measure $\bar{y}_i$, the diversity level of the extant Court, we take the number of justices who are not white males on the extant Court at the time of a vacancy and divide by 8.

Regression Results

Table 4 presents six regressions estimating the president's demand for diversity. Models (1) and (2) are bivariate logistic regressions in which the benefit–cost ratio is the only covariate. Model (1) includes all candidates, while Model (2) includes only nominees. As predicted by the theory, the coefficient is positive — presidents are more likely to consider female and/or minority candidates as the cost-weighted benefits of doing so increase. Note that the magnitude of the coefficient in the nominee-only model is double that of the coefficient in the all-candidate model; however, the latter is measured much more precisely (there have been only been seven nominees to the Court who were not white males, so there is little variation to work with in the subsetted regressions).

Models (3) and (4) add the mean diversity level of the Court as a covariate. The coefficients on the benefit–cost ratio remain the same. Surprisingly,

Table 4: Regressions of the demand for diversity.

	(1)	(2)	(3)	(4)	(5)	(6)
Benefit–cost ratio $\left(\frac{\pi_i^y}{w_i^y}\right)$	0.089	0.181	0.072	0.165		
	(0.017)	(0.105)	(0.022)	(0.102)		
Diversity of extant Court $(\bar{y}_i)$			5.930	1.530		
			(1.226)	(3.216)		
Logged interest $(log(\pi_i^y + 1))$					0.408	0.769
					(0.254)	(0.272)
Logged costs $\left(log\left(\frac{1}{1+w_i^y}\right)\right)$					0.193	0.116
					(0.042)	(0.040)
Intercept	−1.671	−2.490	−2.900	−2.692	0.910	0.654
	(0.245)	(0.531)	(0.335)	(0.715)	(0.164)	(0.102)
N	299	54	299	54	299	54
Sample	ALL	NOMS	ALL	NOMS	ALL	NOMS
R^2					0.39	0.32

Note: Models (1)–(4) are logits; Models (5) and (6) are OLS regressions.

however, the coefficient on $\bar{y}$ is positive in Model (3), perhaps suggesting that the level of diversity on the Court has never approached a sufficient level to generate diminishing returns from further diversity (this coefficient is not significant in Model (4)).

As in the reliability analysis, it is possible to parse the relative predictive effects of the costs and benefits of diversity by taking logs.[20] Specifically, the dependent variable becomes $log(1 + y_i^* + \frac{c}{d}\bar{y}_i)$. To implement the measure, we assume $c = 8$ and $d = 1$; that is, each justice contributes equally to the overall diversity of the Court. The right-hand side terms become $log(\pi_i^y + 1)$ (we add 1 to avoid taking the log of zero) and $log(\frac{1}{1+w_i^y})$, with a predicted positive coefficient on each (the latter term is increasing in the number of co-partisans who are not white males on the Court of Appeals). Models (5) and (6) report these regressions. In both models, both coefficients are positive (though logged interest is not statistically significant in Model (5)), suggesting that presidents respond to incentives on both the cost and benefit side when deciding whether to consider and nominate diverse candidates to the Court. Shifts in these costs and benefits over time have led to a more diverse candidate pool and a more diverse Supreme Court.

Using the Models to Interpret Changes in Selection Politics

In this section we move beyond interpreting the sign and significance of the regression models to use them to answer substantive questions about the politics of selection. The models lend themselves to numerous questions; in

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[20]See Appendix Section B.4 for the full derivation.

the interest of space we focus on the rise of ideological nominees and pose counterfactuals about how changes over time have influenced presidential selection of characteristics along our three dimensions of interest.

The Rise of Ideological Nominees

The regression models of ideology allow us to estimate the latent probability (based on the Tobit specification) that a president chose to "buy" additional ideology and did not simply opt for the "default level" of ideology. We employ Model (2) in Table 2 to estimate this predicted probability for the candidates; a probability of zero means the president almost certainly opted for the default, while a probability close to 1 indicates near certainty that the president chose additional ideology.[21]

These estimates are depicted in Figure 6, and show that an important change in appointment politics over the last nine decades was the disappearance of default candidates for the Supreme Court and the rise of what we might call "ideological agenda" candidates. Notably, the figure reveals a significant drop in the later years of FDR's administration and for Truman; indeed several of Truman's candidates are estimated to have had about a 50% chance of being a default nominee with respect to ideology. These estimates are consistent with his overall lack of interest in the Court and with the Court's ideological proximity to him, following 12 years of Democratic appointments to the Court. However, after 1970 almost all nominees had about a 90% chance of being an ideological agenda nominee. Given the rise in the interest in the Court and the
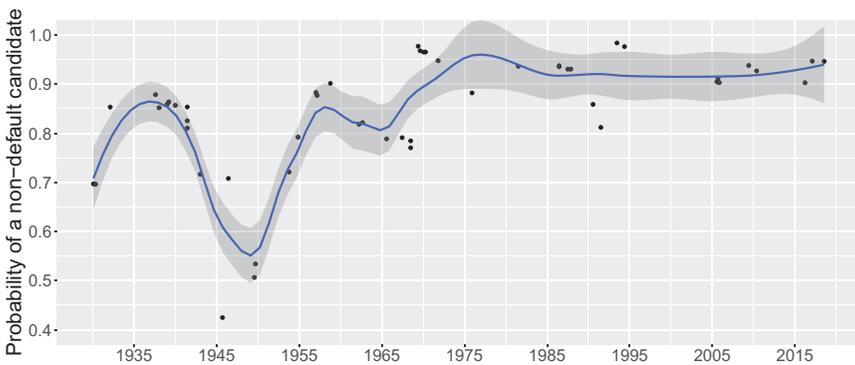

Figure 6: The predicted probability of a non-default ideological candidate, 1930 to 2018.

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[21]We use the `predict` command in Stata to estimate $Pr(x_j b + u_j > 0)$, where 0 is the censoring point.

relative reduction in search costs, due to the growth of the federal judiciary, it is difficult to imagine a scenario in the near future in which the president chooses only the default level of ideology.

The Cost–Benefit Ratio and Nominee Ideology

A distinctive feature of the characteristics approach is its emphasis on the cost–benefit ratio of nominee attributes like ideology. But how important is this measure in practice? We can illustrate its substantive significance by returning to Truman's rather idiosyncratic short lists, which produced three somewhat peculiar nominees (Tom Clark, Harold Burton, and Sherman Minton). As seen in Figure 1, Truman's level of interest in the Court was extremely low (until his last year in office, following the steel seizure decision in *Youngstown Sheet & Tube Company* — by that point he had made all his nominations to the Court). In addition, while the vast majority of federal judges were Democratic appointees during Truman's administration, subsequent increases in the size of the judiciary meant that future presidents would face lower search costs (see Appendix Figure A-7).

If Truman had faced the same cost–benefit ratio as Obama, what kind of nominees would Truman likely have picked? We can address this question by substituting Obama's cost–benefit ratio for Truman's value while keeping all other variables at their means during the Truman Administration. Specifically, we simulate the coefficients from Model (2) in Table 2 to generate 1,000 draws of each coefficient.[22] We use these simulations to generate estimates both of x_i^* (how much ideology Truman chose above the default level) and $\hat{x}_i$ (the total level of nominee ideology, after accounting for x_i^0, the default level of ideology). Based on Truman's actual cost–benefit ratio, we estimate that for his candidates, he selected 0.07 units (x_i^*) of additional ideology in NOMINATE space (95% confidence interval of [0.00, 0.15]); combined with x_i^0, his average nominee ideology $\hat{x}_i$ was -0.21 $[-0.29, -0.14]$.[23] Given Obama's cost–benefit ratio, we estimate that Truman would have chosen 0.17 [0.10, 0.24] units of additional ideology, for a total ideology of -0.31 $[-0.37, -0.24]$. The 0.09 difference between the historical high cost scenario and the counterfactual low-cost scenario is statistically significant [0.03, 0.16].

This difference is not enormous, though it amounts to one-fourth of a standard deviation in candidate ideology in our full sample of candidates. But it still is indicative of how the interaction of lower benefits and higher costs plausibly led Truman to the selection of less liberal nominees than might

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[22]We use the `postsim` function from the MORE_CLARIFY package (Pena, 2014). Using simulations, rather than just the coefficients from the model, allows us to generate estimates of uncertainty.

[23]Because Truman is a Democrat, we subtract x_i^* from x_i^0 (which takes on the average value of -0.14 for Truman) to create $\hat{x}_i$.

otherwise have taken the bench. To be sure, this scenario is strikingly counter-factual: an Obama-era benefit–cost ratio would have required Truman and the Democratic Party to display a pronounced interest in the Court in the late 1940s. They did not. The simulation thus underscores the great importance in appointment politics of presidential and party agendas for the Court.

The Surprising Impact of Success: Moving the Court toward the President

A string of successful appointments moves the Supreme Court closer to the president. The theory predicts that a president in this fortunate position will then have a lower demand for ideology. The most dramatic run of selections was FDR's nine appointments to the Court, remaking it from top to bottom. The appointments substantially changed the center of the Court (see Appendix Figure A-5). The characteristics approach allows us to determine how much FDR's early successes affected his later nominations.

Again we employ the simulated coefficients from Model (2) in Table 2 to investigate this question. First, we estimate x_i^* and $\hat{x}_i$ based on the historical values of all variables in 1937; this year marks the apex of FDR's feud with Court, followed by the "switch in time" and subsequently FDR's first appointment (Hugo Black). In this scenario, the model predicts that FDR chose 0.24 [0.15,0.33] units of additional ideology, for a total level of -0.17 [-0.26, -0.08] (x_i^0 was 0.06). By 1943, when he faced the vacancy that eventually led to the nomination of Rutledge, FDR had made eight appointments, shifting the mean of the Court from -0.03 to -0.20. If we substitute this level of $\bar{x}$, the predicted x_i^* and $\hat{x}_i$ fall to 0.18 [0.08, 0.29] and -0.12 [-0.22, -0.01], respectively. The 0.06 difference between the actual and counter-factual is statistically different from zero [0.02, 0.09]. Hence, the model predicts a sizable though not enormous change in presidential behavior from successfully shifting the center of the Court.

Moreover, if we return to the data, an ideological shift is evident in the average score of FDR's nominees over time. The mean ideology of his first five picks was -0.26; the mean of his last four nominees was -0.17, noticeably more conservative. The difference in the two is largely attributable to his pick of Republican Associate Justice Harlan Fiske Stone for Chief Justice. While one simply cannot know any president's true decisional calculus, the model suggests that FDR's early successes in moving the Court created the space for him to make an appointment like Stone later in his tenure.

The Importance of Seeding the Lower Courts

Participants in the nomination process often discuss the importance of "creating a pipeline" or "building a farm team" in the U.S. Courts of Appeals. This

dynamic has been most notable on the Republican side, where Republican presidents have worked in tandem with the conservative legal movement (the Federalist Society in particular) to stock the Courts of Appeals with reliably conservative judges who make good candidates for the Supreme Court (Toobin, 2017). The characteristics model allows this insight to be analyzed rigorously, both from the perspective of presidents seeking ideology and diversity. In the interest of space, we present an ideological example in Appendix Section A.1 and a diversity one here.

Recall that early in our period of study, presidential interest in diversity on the Court was virtually non-existent; not surprisingly, few women and minorities were appointed to the Courts of Appeals. But, as interest in diversity rose, presidents were then often hamstrung by this lack of representation on the lower courts.

Indeed, the difficulty in finding ideologically compatible nominees other than white males is a recurring theme in nomination selections, at least since the Nixon Administration. In a conversation with Attorney General John Mitchell in 1971, Nixon expressed a strong interest in fielding a woman candidate for a seat on the Supreme Court (Dean, 2001, p. 50). While he would have preferred a circuit court judge, at that time only two women were federal judges and both had been appointed by Democratic presidents. Mildred Lillie, a California Superior Court judge, drew Nixon's attention as both a conservative and a woman, but she was rated as "unqualified" by the American Bar Association. Ultimately Nixon failed to find a suitable woman to nominate. In contrast, at the time of Ronald Reagan's nomination of Sandra Day O'Connor, Republican presidents had appointed 15 seated federal judges who were not white males. Though Reagan nominated a woman who was not a federal judge (O'Connor was an Arizonan state judge), the change in the federal judiciary since Nixon's time — from 0 to 15 seated non-white-male co-partisans — illustrates how his search costs were lower compared to Nixon. Yet, even 25 years later, President George W. Bush still faced sizable search costs — one interpretation of his failed nomination of Harriet Miers is that Bush was eager to appoint a woman to replace O'Connor, yet had difficulty finding a well-qualified one that met his other appointment goals (Greenburg, 2007, pp. 233–235).

We can use our regression models of diversity to estimate how much search costs bind presidents. First, we return to Nixon, and, using Model (2) in Table 4, ask what is the probability he nominated a woman or minority candidate in 1971.[24] Based on the benefit–cost ratio in 1971, we estimate that Nixon had 0.07 [0.03, 0.19] probability of nominating a non-white-male

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[24]To do so, we make a modification to the measure of interest in diversity. The platform-based data measure we employ indicates no Republican interest in diversity on the Supreme Court during Nixon's presidency. The scale of the platform measure is 0–1; based on the "private information" of Nixon's conversation with Mitchell (which was recorded on the infamous White House taping system), we set Nixon's interest to 0.33.

candidate. What if Nixon had faced the reduced costs that George W. Bush faced in 2005 (the year he made his selections to the Court)? We estimate the probability of a diverse Nixon appointee would have increased to 0.22 [00.06, 0.56]. This difference of 0.14 is substantively meaningful and has a 95% confidence interval of [−0.01, 0.46]. This simulation illustrates how the diversity of the farm team can either enable or frustrate a president who is seeking to increase the diversity of the Supreme Court.

Conclusion

Announcing his selection of Neil Gorsuch to replace Justice Scalia, President Trump stated "I have always felt that after the defense of our nation, the most important decision a president of the United States can make is the appointment of a Supreme Court justice." This sentiment approaches conventional wisdom today. But the extent to which presidents have acted as if they believed this is true has varied significantly over the course of American history. In this paper we developed a theory that helps explain much of the variation in presidential selection from 1930 to the present day.

Rather than conceiving of selection as a purely ideological game involving a power struggle between the president and the Senate, the characteristics approach reconceives nominees as bundles of characteristics that are valued by presidents and that can be obtained through effort or at a political price. We formalized the characteristics approach to presidential selection of nominees, structuring the building-blocks of returns and costs into an internally consistent, logical framework. Demand equations explicitly derived from the theory can be estimated straightforwardly, at least if one has the new, unusual and demanding data required by the theory. Much of the effort in this paper turned on finding reasonable proxies for the required variables. Bringing together the new theory and novel data, we uncovered much of the predicted structure in the data.

The models provide several additional substantive insights on the politics of Supreme Court appointments since 1930. First, we demonstrated the importance of the nexus between who sits on the lower courts (particularly the Courts of Appeals) and who becomes a candidate for a seat on the Supreme Court. Building a good "farm team" of co-partisan judges in the U.S. Courts of Appeal is vital, as it reaps benefits down the road in terms of justices appointed. We also showed how successfully moving the Court undermines the president's incentive to work hard to move it further. In addition, the model illuminates the remarkable transformation from "politico" nominees to "Super-Techs," and the secular growth of female and minority candidates for the Supreme Court. The transformative impact of heightened presidential interest in the Court also stands out as particularly important.

The characteristics approach helps explain some apparent puzzles in presidential selection. Cameron and Kastellec (2016) document numerous "own goals" by the president: that is, nominees who are ideologically opposite to the president. From the perspective of both move-the-median theory and modern-day nomination politics, such "mistakes" by the president are inconceivable. However, all of the own goals occurred before 1960. Why is that significant? From the perspective of the characteristics theory, presidential interest in the Court in earlier eras was significantly lower, and the costs of finding ideologically reliable judges were much higher. Thus, it is not surprising that presidents often made seemingly idiosyncratic choices, such as Truman nominating Burton because he *wanted* a Republican judge on the Court. In contrast, presidents from both parties now care a great deal about the policy output of the Court, and the cost of choosing additional ideology and reliability has declined dramatically. It is thus not surprising that the last selection "mistake" (President George H.W. Bush's nomination of Souter) to be confirmed was more than 25 years ago — the failed nomination of Harriet Miers in 2005 due to in-party opposition by Senate Republicans is the exception that proves the rule. In sum, the theory points to and the data suggest a coherent logic underlying presidential choices of Supreme Court nominees over the last 90 years.

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