WHAT'S AGE GOT TO DO WITH IT? SUPREME COURT APPOINTEES AND THE LONG RUN LOCATION OF THE SUPREME COURT MEDIAN JUSTICE

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ABSTRACT

For approximately the past forty years, Republican Presidents have appointed younger Justices than have Democratic Presidents. Depending on how one does the accounting, the average age difference will vary, but will not go away. This Article posits that Republicans appointing younger justices than Democrats may have caused a rightward shift in the Supreme Court. We use computer simulations to show that if the trend continues the rightward shift will likely increase. We also produce some very rough estimates of the size of the ideological shift, contingent on the size of the age differential. In addition, we show that the Senate's role in confirming nominated Justices has a significant moderating effect on the shift. Last, we consider the interaction between our results and the oft-proposed eighteen-year staggered terms for Supreme Court Justices. We show that such an institutional change would almost completely wipe out the ideological effect of one Party appointing younger Justices.

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INTRODUCTION

Presidents necessarily consider many criteria when choosing nominees for the Supreme Court. Such criteria include rewarding loyal political support and friendship by an individual, providing an important constituent group (women, racial minorities, southerners, ethnic minorities, etc.) a representative appointment, and putting an ideologically desirable thinker on the Court. Other criteria include educational credentials, professional reputation, intellectual and professional capability, confirmability, and age of the nominee. Many of these criteria interact with one another, complicating the selection decision by requiring trade-offs between them.

One of the more important criteria is the age of the nominee. Age is very important because younger appointees can be expected to serve longer on the Court, influencing Court outcomes for a greater period of time. Republican Presidents regularly appoint younger Justices than do Democrats. Evidence demonstrates that Justices appointed by Republican Presidents average between 1.5 and 5 years younger than Justices appointed by Democratic Presidents, varying with, amongst other things, the historical period from which the data is taken. Using a computer simulation study, we demonstrate three propositions. First, and least surprising, if Republicans and Democrats behave in this fashion for an extended period of time, the Court will yield more conservative holdings, though the exact extent to which the Court's positions will shift rightward in both the short- and long-term depends on which of several models of Supreme Court decision-making most accurately reflects how the Court's opinions are actually decided. Second, and mildly surprising, the Senate confirmation process can greatly reduce the intensity of this rightward shift. Third, and most surprising (and completely unnoted before this article), the widely-touted proposal to limit Supreme Court Justices to a single eighteen-year term will almost completely eliminate the effect of the age differential, moving the Court back to the center of the ideological spectrum. The three propositions supported by our study have important implications for proposals to reform the nomination process and for possible strategic reactions by Democrats and Republicans.

This article proceeds as follows. Section I will review the history of several nominations to the Supreme Court, discussing the factors that led, within the appointment process, to success or failure. Section II will provide a brief overview of the literature and review the various theories explaining precisely how the ideological leanings of particular Justices affects the Court's ideology, and its extent, expressed in the Court's holdings. Section

III will introduce a computer simulation of the nomination process. The simulation will model the interactions of the President, Senate, and Court in the appointment process over a period of 100 years. The model will simulate the elections of both Senators and Presidents and the departure of individual Justices, with the likelihood of a Justice's departure depending partly on the age of the Justice. When a Justice leaves the Court, the President will nominate a replacement Justice, and the Senate will confirm. The appointed Justice will have an ideology dependent on the ideologies of the President and of either the median or the 60th (veto gate) Senator. If the President is Republican, the appointee will be fifty years of age. If the President is a Democrat, the new Justice will be 50+X years of age. X will be kept constant for each batch of runs of the model. The computerized game will run for 100 years, simulating the departures and appointments of Justices over this period, after which the Court median[1] will be recorded. We will then rerun the model with the same X for another 100 years, and note the Court median. By running the model, with fixed X, several thousand times, we can get an empirical distribution of the Court median, contingent on that X. Then, by allowing X to be 1, 2, 3, 4, etc. years, we can map the long-run sensitivity of the location of the Court median to the difference in appointment strategies.

Section III demonstrates three propositions. First, and least surprising, if Republicans and Democrats behave in this fashion for an extended period of time, the Court will become more conservative, though the extent of its rightward pull will vary in accordance with which theory examined in Section I is most accurate. Second, and mildly surprising, the Senate confirmation process can greatly reduce the intensity of this rightward shift. Third, and most surprising—and completely unnoted before this article—the widely touted proposal to limit Supreme Court Justices to a single eighteen-year term will almost completely eliminate the effect of the differential in age, moving the Court back to the center of the ideological spectrum. This last insight is fully explored in Section IV.

Section IV then proceeds to suggest hypotheses that might explain why the parties would choose such different strategies. The hypotheses will include different discount rates, different need to appoint representatives of constituencies, and different attitudes toward the politics of confirmation hearings. Section IV also explores the implications of this article on the age differential and also discusses means of altering the election and retirement

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1. The Court median is the ideological location of the Justice in the middle. That is, there are four Justices to the right and four Justices to the left of the median. Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 37–99 (2008).

models used in the simulation found in Section III to glean additional insights.

I. A BRIEF OVERVIEW OF JUDICIAL NOMINEES AND THE EFFECT OF AGE

This section will provide a wide look at the history of recent judicial nominees to the Supreme Court, both successful and not. These appointments will be analyzed through the lens of a number of factors including conformability, educational credentials, ideological fitness and most importantly, age. This analysis will provide the groundwork for our assertion that the practice of one party nominating consistently younger Justices is likely to have to a quantifiable and substantial impact on the political locus of the Court.

A. Examples of Trade-offs

Presidents often desire to reward a loyal political friendship, and though one means of doing so is through the judicial nomination process, satisfying this criterion at the Supreme Court level proves to be one of the hardest feats to accomplish. George W. Bush's nomination of Harriet Miers provides a recent, vivid example. There is no doubt that Harriet Miers was a long-term, loyal, active supporter of the President. She served as counsel to George W. Bush's gubernatorial campaign in Texas[2] and White House counsel to Bush when he was President.[3] Nominating Miers clearly satisfied his desire to reward a loyal political supporter. In addition, because Miers would be replacing Justice Sandra Day O'Connor, the only Republican woman on the Court,[4] it was expected that Republican women would support another of "their own" as an ideal replacement on the Court.

However, other selection criteria weighed against the Miers nomination, namely educational credentials, intellectual and professional capability, and ideology. Most Supreme Court Justices attend elite, highly-ranked law schools such as Yale, Harvard, and Stanford.[5] In contrast, Harriet Miers

2. Michael A. Fletcher, *White House Counsel Miers Chosen for Court*, WASH. POST (Oct. 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/03/AR2005100300252.html.

3. Timothy Williams, *Bush Names Counsel as Choice for Supreme Court*, N.Y. TIMES (Oct. 3, 2005), http://www.nytimes.com/2005/10/03/politics/politicsspecial1/03cnd-scotus.html?pagewanted =1&_r=0&adxnnlx=1128359309-bSDq8w/TsOCk88gkjBwe8w.

4. *Id.*

5. Of the sitting Justices at that time, Justice Stevens arguably graduated from the least prestigious law school—Northwestern—which was ranked tenth (tied with Duke) in 1995. Dan

graduated from Southern Methodist Univeristy Law School,[6] ranked forty-seventh in the nation in 2005 by U.S. News and World Report.[7] By means of comparison, Justice O'Connor, whom Miers would replace, graduated from Stanford Law School, which ranked third in the nation.[8] In addition, to some, Harriet Miers lacked intellectual and professional capability because she seemed to have little knowledge of Constitutional Law.[9] To be fair to Ms. Miers, her academic and professional experiences demonstrated that she was likely extremely smart and able. Her undergraduate degree was in mathematics, she became the first female President of the Texas State Bar,[10] and she was the managing partner of Locke, Liddell & Sapp, a large Dallas law firm.[11] However, nothing in her background suggested a depth of knowledge about Constitutional Law. The Senate Judiciary Committee asked Miers to redo the answers she had submitted to questions she had been asked because the answers were "inadequate,"[12] which was further suggestive of issues with competency. There were also questions about her ideology; conservatives suspected that she was too moderate,[13] and she lacked a paper trail that would permit vetting of her views.[14] And, because

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Filler, *US News Law School Rankings: A Comparison With 1998 and 1995*, CONCURRING OPINIONS (Apr. 3, 2006, 1:00 AM), http://www.concurringopinions.com/archives/2006/04/us_news_law_sch.html. Justice Stevens not only finished first in his class, but also earned the highest GPA in the history of Northwestern Law. Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES, Sept. 23, 2007, at 650, *available at* http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?pagewanted=all.

6. Michael A. Fletcher, *Quiet but Ambitious White House Counsel Makes Life of Law*, WASH. POST, June 21, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/20/AR2005062001161.html.

7. *See U.S. News Rankings of Law Schools for 2005*, U.S. NEWS AND WORLD REPORT, http://www.lawschool.com/usn2005.htm (last visited Jan. 14, 2014).

8. *See id.*

9. JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 279 (2007); Mike Madden, *Why Elena Kagan Won't Be the Next Harriet Miers*, SALON (May 10, 2010, 5:22 PM), http://www.salon.com/news/feature/2010/05/10/elena_kagan_is_not_harriet_miers.

10. Williams, *supra* note 3, at 1.

11. Fletcher, *supra* note 2, at 1.

12. MARK SILVERSTEIN, JUDICIOUS CHOICES: THE POLITICS OF SUPREME COURT CONFIRMATIONS 214–15 (2d ed. 2007).

13. Elisabeth Bumiller & Carl Hulse, *Bush's Court Choice Ends Bid; Conservatives Attacked Miers*, N.Y. TIMES (Oct. 28, 2005), http://www.nytimes.com/2005/10/28/politics/politicsspecial1/28confirm.html?pagewanted=all.

14. Terry Eastland, *The Lessons of Alito*, WEEKLY STANDARD (Feb. 6, 2006), http://www.weeklystandard.com/Content/Public/Articles/000/000/006/648jhqpm.asp.

she was sixty years old in 2005,[15] she promised to be on the Court for a very long time.

In the end, the opposition from the right wing of the Republican Party, and from Democrats,[16] proved too substantial. Harriet Miers withdrew her name from consideration.[17]

The nomination of John Paul Stevens illuminates the interaction of two criteria, confirmability and ideology, only without the public fight that Harriet Miers's nomination produced. President Gerald Ford, a Republican conservative (by the standards of the day), was regarded as weak,[18] never having been elected to national office.[19] Ford was appointed Vice President when Vice President Spiro Agnew resigned,[20] and ascended to the Presidency only upon the resignation of President Nixon, rather than by election.[21] Thus, President Ford had no national base of voters.[22] When William O. Douglas left the Court in 1975,[23] Robert Bork was the overwhelming preference of conservative Republicans to take Douglas's seat on the Court.[24] However, as liberal Democrats firmly controlled the Senate,[25] President Ford likely anticipated that he could not get Bork's nomination through the Senate, and was unlikely to be able to drum up

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15. Williams, *supra* note 3, at 1.

16. In hindsight, the Democrats might have been better served with Miers on the Court than Alito, who was confirmed in her place. *See* Mark Sherman, *Samuel Alito, Supreme Court Justice, Takes on* Citizens United *Critics*, HUFFINGTON POST (Nov. 17, 2012, 11:35 AM), http://www.huffingtonpost.com/2012/11/17/samuel-alito-supreme-cour_n_2150018.html (showing, in part, Alito's distaste for Democratic principles, such as a strong federal government).

17. Bumiller & Hulse, *supra* note 13.

18. IVAN ELAND, RECARVING RUSHMORE: RANKING THE PRESIDENTS ON PEACE, PROSPERITY, AND LIBERTY 335 (2009).

19. *Id.*

20. *Id.*

21. *Id.*

22. JOHN B. ROBERTS, II, RATING THE FIRST LADIES: THE WOMEN WHO INFLUENCED THE PRESIDENCY 302 (updated ed. 2004). In fact, Gerald Ford was a member of the House of Representatives (R-Mich.) when he was appointed Vice President, and did not even have a statewide voting constituency. *See* DONALD A. RITCHIE, THE CONGRESS OF THE UNITED STATES: A STUDENT COMPANION 95 (2006).

23. James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure with Staggered, Nonrenewable Eighteen-year Terms*, 90 VA. L. REV. 1093, 1094 (2004).

24. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 16–17 (2007).

25. GERALD R. FORD, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD FORD: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT 1976–77: BOOK III–JULY 10, 1976 TO JANUARY 20, 1977, at 2642 (1979).

national support for Bork. So, instead of nominating the very conservative Bork, ideologically ideal but difficult to confirm, Ford nominated a much more liberal Republican, John Paul Stevens.[26] The Democratic Senate responded by confirming Stevens quickly. Stevens, who was fifty-five at the time of his nomination and confirmation,[27] went on to serve thirty-four years on the Court,[28] the third-longest period in history.[29]

Finally, the failed nominations of Clement Haynsworth and Harrold Carswell illustrate the difficulty of providing a political constituency (in these two cases, southerners) a representative appointment while also satisfying the criteria of ideology, educational credentials, professional reputation, and confirmability. When the liberal Abe Fortas left the Court, President Nixon decided to appoint a southerner who believed in a conservative "strict constructionist" interpretation of the Constitution.[30] Nixon's first attempt was Clement Haynsworth, a Harvard graduate who was then sitting on the Court of Appeals for the Fourth Circuit.[31] Haynsworth, who was fifty-six at the time he was nominated,[32] was attacked by Senators as being too conservative and of sitting on cases where he had a financial interest.[33] The barrage of criticism was too much; he was rejected by the Senate.[34] President Nixon then nominated George Harrold Carswell, a fifty-year-old judge of the Court of Appeals for the Fifth Circuit.[35] Carswell's nomination ran into serious trouble when a film surfaced of him

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26. Jan Crawford Greenburg, *Exclusive: Supreme Court Justice Stevens Remembers President Ford*, ABC NEWS (Jan. 2, 2007), http://abcnews.go.com/Nightline/story?id=2765753.

27. J. SCOTT HARR & KÄREN M. HESS, CONSTITUTIONAL LAW AND THE CRIMINAL JUSTICE SYSTEM 70 (4th ed. 2007).

28. Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement is Political Test for Obama*, N.Y. TIMES, April 9 2010, at A1, *available at* http://www.nytimes.com/2010/04/10/us/politics/10stevens.html.

29. Tony Mauro, *Courtside: Stevens May Be the Second-Longest Serving Justice After All*, NAT'L L. J. (July 7, 2010), http://www.nationallawjournal.com/id=1202463293924?slreturn=20140024155916.

30. JOHN P. AVLON, INDEPENDENT NATION: HOW THE VITAL CENTER IS CHANGING THE FACE OF AMERICAN POLITICS 271 (2004).

31. Joseph Calluori, *The Supreme Court Under Siege: The Battle Over Nixon's Nominees*, *in* RICHARD M. NIXON: POLITICIAN, PRESIDENT, ADMINISTRATOR 361, 362 (L. Friedman & W.F. Levantrosser eds., 1991).

32. *See Biographical Directory of Federal Judges: Clement Furman Haynsworth, Jr.*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=1008 (last visited Jan. 7, 2014).

33. Calluori, *supra* note 31, at 363.

34. *Id.*

35. *See id.*; *Biographical Directory of Federal Judges: George Harrold Carswell*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=387&cid=999&ctype=na&instate=na (last visited Jan. 7, 2014).

publicly embracing racial segregation in 1948.[36] And Carswell, a graduate of Mercer University School of Law,[37] lacked satisfactory educational credentials, as demonstrated by the fact that currently Mercer is not ranked in the top 100 of the U.S. News Rankings for law schools,[38] listed instead as a "tier 3" school.[39] Independent of his schooling, Carswell was regarded by many as a "low quality" appellate judge.[40] The debate was sufficiently intense to prompt Senator Roman Hruska to issue his now-famous defense of mediocrity (and, perhaps, a veiled bit of anti-Semitism) as an interest-group issue.[41] Carswell also went down in defeat.[42]

President Nixon then threw in the towel and nominated a middle-of-the-road Minnesotan and Harvard Law graduate, Harry Blackmun.[43] The Senate swiftly confirmed the sixty-one-year-old Blackmun with little fuss.[44] Blackmun served on the Court for twenty-four years.[45]

B. Looking at Age

These examples show that "age happens." The interaction between the President's nomination criteria can be complex, and greatly limits his choices. A President may desire a younger Justice who will influence the Court's ideological direction for a greater span of time, but since the age of the nominees is just one criterion influencing the decision, the trade-off

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36. Calluori, *supra* note 31, at 364.

37. John Schwartz, *An Ivy-Covered Path to the Supreme Court*, N.Y. TIMES, June 8, 2009, at A18, *available at* http://www.nytimes.com/2009/06/09/us/politics/09ivy.html.

38. The U.S. News Rankings did not exist at the time of Carswell's nomination, so we base our assessment of Mercer Law School's reputation on current rankings. *See Best Law Schools: Ranked in 2013*, U.S. NEWS & WORLD REPORT, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+5 (last visited Jan. 14, 2014). We strongly suspect that Mercer has never been regarded as a top law school; there is very little change in U.S. News' rankings of the top twenty-five law schools from year to year.

39. *Id.*

40. *See, e.g.*, Calluori, *supra* note 31, at 364; ROBERT LANGRAN, THE SUPREME COURT: A CONCISE HISTORY 4–5 (2004).

41. William H. Honan, *Roman L. Hruska Dies at 94; Leading Senate Conservative*, N.Y. TIMES (Apr. 27, 1999), http://www.nytimes.com/1999/04/27/us/roman-l-hruska-dies-at-94-leading-senate-conservative.html ("Even if he were mediocre . . . there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Frankfurters and Cardozos.").

42. Calluori, *supra* note 31, at 364.

43. *Id.* at 365.

44. *Id.* at 365; *Biographical Directory of Federal Judges: Harry Andrew Blackmun*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=187 (last visited Jan. 29, 2014).

45. *Biographical Directory of Federal Judges: Harry Andrew Blackmun*, *supra* note 44.

with other criteria may require the nomination of an older Justice. Thus, the overall trade-offs determine the age of the appointees.

Rather than merely accept that age is a significant selection criterion, shrug, and walk away from the issue, we suggest taking a closer look at age's effects on the long-term ideological direction of the Court and, in particular, the magnitude of its effects. These effects may be considerable because Supreme Court Justices are appointed for life,[46] and tend to stay in the job for many years longer than a typical professional in any other job. With this observation in mind, we suggest asking what would happen if one party were routinely to appoint Justices who were older than appointees of the other party. How much difference, we ask, would this make to the political and ideological make-up of the Court in the long run?

Why would we ask this question? Because there is some evidence that one party is routinely appointing older nominees. An examination of recent appointments has revealed that Democrats appoint older Justices than Republicans. The magnitude of the difference in age varies, depending on which nominees are counted.[47] Since the appointment of William H. Rehnquist to the Supreme Court in 1971, Republican appointees to the Court have averaged 50.75 years of age, while Democratic appointees have averaged 55.25 years of age, for a difference of 4.50 years.[48]

Alternative measures also show that Republicans appoint younger members of the Court, but these measures vary in the magnitude of the difference. Thus, for example, if we were to include the failed nominees

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46. *How the Federal Courts are Organized: Federal Judges and How They Get Appointed*, FED. JUDICIAL CTR., http://www.fjc.gov/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214 (last visited Jan. 29, 2014).

47. We are indebted to Tom Miles for a very well organized parsing of this question.

48. In this section, we will designate an appointee by the party of the appointing President, regardless of the actual ideology or party affiliation of the appointee; a Republican appointee is one appointed by a Republican President, and a Democratic appointee is one appointed by a Democratic President. However, parts II (A) and II (B) of this article will feature a more nuanced treatment of the party affiliation of the appointee. The Republican appointees, with their ages at time of nomination, are John Paul Stevens (fifty-five years old), Sandra Day O'Connor (fifty-one years old), Antonin Scalia (fifty years old), Anthony Kennedy (fifty-one years old), David Souter (fifty-one years old), Clarence Thomas (forty-three years old), John Roberts (fifty years old), and Samuel Alito (fifty-five years old). The Democratic appointees are Ruth Bader Ginsburg (sixty years old), Stephen Breyer (fifty-six years old), Sonia Sotomayor (fifty-five years old), and Elena Kagan (fifty years old). *See generally Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Jan. 29, 2014).

Robert Bork (sixty years old),[49] Douglas Ginsburg (fifty-one years old),[50] and Harriet Miers (sixty years old),[51] the average difference diminishes to 2.8 years,[52] and if we include Lewis Powell (sixty-four years old,[53] and confirmed just before Rehnquist)[54] and Harry Blackmun (sixty-one years old,[55] and confirmed just prior to Powell),[56] the difference in average ages diminishes to 1.25 years.[57] On the other hand, if we exclude President Obama's appointments and the failed Republican nominees, and start with Rehnquist, the average difference in appointees' ages balloons to almost eight years.[58] If we include only "first choice" nominees,[59] and measure

49. *Biographical Directory of Federal Judges: Robert Heron Bork*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=216 (last visited Jan. 29, 2014).

50. *See Biographical Directory of Federal Judges: Douglas Howard Ginsburg*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=864 (last visited Jan. 29, 2014); Steven V. Roberts, *Ginsburg Withdraws Name As Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES (Nov. 8, 1987), http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html?pagewanted=all&src=pm.

51. Williams, *supra* note 3.

52. Inclusion of these nominees raises the average age of Republican nominees to 52.45 years old.

53. *Biographical Directory of Federal Judges: Lewis Franklin Powell Jr.*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=1927 (last visited Jan. 29, 2014).

54. *Supreme Court Nominations, present–1789*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Jan. 29, 2014).

55. *Biographical Directory of Federal Judges: Harry Andrew Blackmun*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=187 (last visited Jan. 12, 2014).

56. *Supreme Court Nominations, present–1789*, *supra* note 54.

57. Inclusion of these nominees raises the average age of Republican nominees to 54.00 years old.

58. Inclusion of Rehnquist and exclusion of the failed nominees yields an average age of 50.25 for Republican Justices. Exclusion of President Obama's appointees yields an average age of 58.00 for Democratic Justices.

59. Those who were the first nominated for an open seat, whether or not ultimately confirmed, are "first choice" nominees. For example, Harriett Miers was a first choice nominee. Calculating average age for "first choice" nominees requires the substitution of Robert Bork's age for that of Anthony Kennedy, since Bork was the "first choice" nominee for Justice Powell's seat, and the substitution of Harriet Miers's age for Samuel Alito, since Miers was the "first choice" nominee for Justice O'Connor's seat. *Supreme Court Nominations present–1789*, *supra* note 54. Although John Roberts was technically the "first choice" nominee for Justice O'Connor's seat, since his nomination was withdrawn solely so he could instead be nominated to take Chief Justice Rehnquist's seat, we have elected to consider Miers as the "first choice" nominee for Justice O'Connor's seat. *See* Richard S. Beth & Betsy Palmer, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789–2006*, *in* SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 349, 362 (Jason B. Cattler & Charles M. Rice eds., 2008).

since Rehnquist, the difference shrinks to 2.75 years.[60] However, no reasonable manipulation of the data will completely eliminate or reverse the difference.[61]

"So what?" a skeptical reader might ask, bristling a bit at the hints of ageism implicit in this finding. After all, as we just explained above, when a President chooses a nominee for a vacancy on the Supreme Court, he must balance several often-competing criteria: confirmability, educational credentials, professional reputation, intellectual and professional capability,[62] experience, ideological similarity to the President, providing constituents a representative appointment, paying off political favors, and age. Hence, age emerges from a complex, multifactor balancing process involving numerous trade-offs. In addition, Democratic Presidents have had only four appointments (Ginsburg, Breyer, Sotomayor, and Kagan) during this period.[63] Why should we worry about age, as opposed to other criteria?

This article produces a tentative answer to the "so what" question by focusing on the interaction between two of the many criteria that a President must consider, age and ideology. The basic, intuitive theory runs as follows: the age of an appointee is particularly important because an appointment to the Supreme Court is for life.[64] A Justice may stay for as long as he or she wishes, and cannot be forced to retire.[65] As a matter of common sense, one would expect younger appointees to live longer, and thus have longer

60. Considering only "first choice" nominees would result in the raising of the average age of Republican nominees to 52.50 years old.

61. There is strong evidence that President Obama is nominating older people to the lower federal courts than did recent Republican Presidents. *See generally* David Fontana & Micah Schwartzman, *Old World*, NEW REPUBLIC (July 17, 2009), http://www.tnr.com/article/politics/old-world. Thus, the average age of appointees to the lower federal courts was fifty under President Reagan, forty-nine under President George H.W. Bush and fifty under President George W. Bush, while the average age of appointees to the lower federal courts for President Obama is currently fifty-five. *Id.* Our thanks to Micah Schwartzman for allowing us to use his data.

62. *See generally* Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009) (discussing the difficulties in measuring judicial quality).

63. *See Biographical Directory of Federal Judges: Robert Heron Bork*, *supra* note 49.

64. *How the Federal Courts are Organized: Federal Judges and How They Get Appointed*, FED. JUDICIAL CTR., http://www.fjc.gov/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214 (last visited Jan. 26, 2014).

65. A Justice of the Supreme Court can be removed through the impeachment and conviction process provided in the Constitution, but that is a cumbersome process that has not been invoked for a member of the Supreme Court for approximately 200 years. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 80 (2003).

tenures on the Court.[66] If one allows age to interact with ideology, appointments can have a long-term effect on the ideology of each of the sitting Justices. A younger conservative appointee should be a conservative Justice for longer than an older conservative appointee would be. Similarly, a younger liberal appointee should be a liberal Justice for longer than an older liberal appointee would be. More importantly, with Republican appointees being younger than Democratic ones, a younger conservative Republican appointee should be a conservative Justice for longer than an older liberal Democrat appointee will be a liberal Justice. Thus, the relative youth of Republican appointees should, in the long run, pull the law "rightward"—that is, result in more qualitatively conservative holdings by the Court.[67]

Closely related is the issue of whether Supreme Court Justices should be limited to a single eighteen-year term in office. Many articles, found primarily in law reviews, have been published on the topic, and recently thirty-three leading law professors wrote an open letter to Vice President Joseph Biden, Attorney General Eric Holder, and other public officials urging the imposition of this limitation on Supreme Court Justices.[68] Some of the articles note a connection between unlimited terms of office and pressure to appoint young Justices.[69] Several pieces in the popular press have noted the suggestion for limited terms.[70]

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66. Although a Justice's ideology may drift over time, on average appointing a liberal or a conservative who will sit for many years will tend to pull the court in that direction. *See generally* Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801 (1998). To simplify the modeling, this article will ignore this ideological drift.

67. As we show in section II (A & B) below, the law should follow the ideological preferences of Justices under all of the theories of judicial behavior extant in political science, with the possible exception of a naïve claim that all judges find "the law" in the same way, regardless of ideology.

68. *See* Paul DeWitt Carrington, *Four Proposals for a Judiciary Act* (Feb. 9, 2009), http://paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm.

69. *See generally* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006); *see also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 770, 774 (2006).

70. Robert Barnes, *Legal Experts Propose Limiting Justices' Powers, Terms*, WASH. POST (Feb. 23, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/22/AR2009022201863.html; Jonathan Bernstein, *Term Limits for Supreme Court Justices? Living Under the Dead Hand of the People Who Voted in Decades-Ago Elections*, SALON (May 11, 2010, 8:03 AM) http://www.salon.com/news/opinion/feature/2010/05/11/term_limits_justices_open2010; John A. Farrell, *No Supreme Court Term Limits—Even With Partisan Justices Like Scalia and Thomas*, U.S. NEWS & WORLD REP. (Feb. 23, 2009),

II. LITERATURE REVIEW AND THEORY

Our belief that, as a general matter, retirements and appointments can change the Court's politics is hardly new. Both political scientists[71] and lawyers[72] agree with this proposition. Based on this belief, Senators tend to vote on confirmations based largely on party and ideology.[73]

Farnsworth provides the most complete current discussion of age of appointees and ideology in the legal literature.[74] He argues that most judges retire at about eighty, and that if a President appoints an aged Justice to the Court, the President gives up the possible influence that that Justice might have years from now. To illustrate this proposition, Farnsworth offers an extremely simple statistical model in which one party always offers nominees whose expected years of service on the Court is exactly twice the years of expected service of nominees of the other party, and each party has exactly a 50% chance of making each appointment. This approach is a good

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http://politics.usnews.com/opinion/blogs/john-farrell/2009/02/23/no-supreme-court-term-limits--even-with-partisan-justices-like-scalia-and-thomas; Ruth Marcus, *Term Limits for Supreme Court Justices*, WASH. POST (Apr. 22, 2010, 2:59 PM), http://voices.washingtonpost.com/postpartisan/2010/04/term_limits_for_supreme_court.html.

71. *See generally* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2007).

72. *See generally* Scott A. Moss, *The Courts Under President Obama*, 86 DENV. U. L. REV. 727 (2009).

73. MARK SILVERSTEIN, JUDICIOUS CHOICES: THE POLITICS OF SUPREME COURT CONFIRMATIONS 71 (2d ed. 2007).

74. We have found two articles that examine the age of Justices. *See, e.g.*, Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 (2005); Kevin T. McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8 (2005). McGuire does not, however, investigate party or ideology as it interacts with age. *Id.* Farnsworth, on the other hand, discusses age and its interaction with ideology at length. Farnsworth, *supra*, at 424–30. Farnsworth describes the pressure on Presidents to choose young nominees:

> Presidents from different parties take turns making appointments, creating a natural prisoner's dilemma: if I appoint older Justices while presidents from the other party appoint younger ones, I enlarge the influence of those other presidents at my expense; indeed, no matter what the next president of the other party does, I am better off appointing younger Justices—though we both would be better off appointing older, better ones if we could bind ourselves through limits on their terms.

Id. at 428. Powe provides an excellent comparison of the ages of Justices with the ages of other political leaders and finds that Justices are much older. L.A. Powe, Jr., *Marble Palace, We've Got a Problem—With You*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 69, at 104–07.

first step. Our article is designed to produce a more sophisticated model of these processes and generate more illuminating results.

Our review of the law and political science literature is shaped by a step-by-step examination of the sequential appointment game that eventually, through the votes of appointed Justices, produces legal outcomes on the court (the "Judicial Policy Sequential Game"). In particular, the game has four steps.

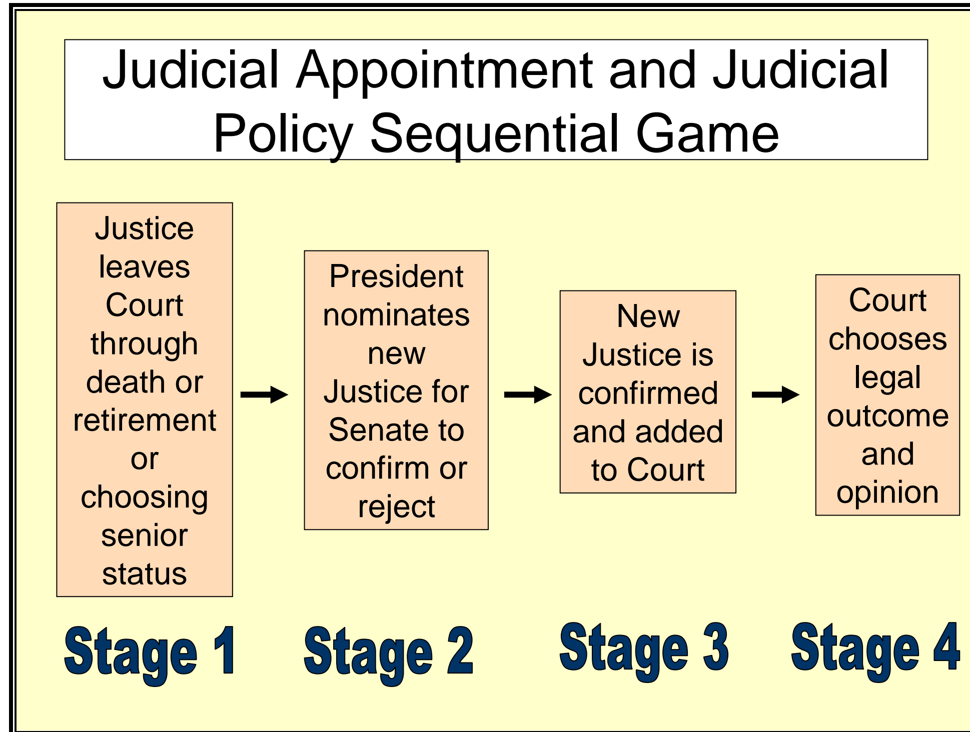

Figure 1

In this paper, as in much of the legal and political science literature, we presume that the strategies chosen by political actors are shaped by their assessment of the outcomes of subsequent stages in the game. For example, in this game, a President would look ahead to Stages 3 and 4 to figure out which person to nominate to the Court, attempting to predict, of those possible candidates who would be confirmed, who will best shape Court outcomes and opinions in a way that will appeal to the President. Likewise, in Stage 3, the Senate will attempt to predict whether the nominee will affect Court outcomes and opinions in a way that will satisfy the Senate.

Thus, to understand the Judicial Policy Sequential Game, we will start with Stage 4, and survey current theories in political science[75] and law that connect the ideology of specific Justices to the Court's outcomes and opinions. With the theories in hand, we can understand what effect, if any, a change in one Justice might produce.

A. Theories Focusing on the Median Justice

1. Median Justice ("MJ")

Most of the literature presumes that outcomes and opinions follow the preferences of the Court's median Justice.[76] Such a model usually assumes that Justices' preferences (amongst the doctrines possibly controlling the case) can be arrayed on a single dimension (usually liberal to conservative) and that Justices have single-peaked preferences over doctrinal outcomes. The further an outcome is from a Justice's ideal location, the less the Justice likes it. Under these circumstances, the Justice who has exactly four Justices to her right and four Justices to her left is the median Justice, and she should be able to get exactly what she wants out of the court. Since the court is assumed to operate under rules that are quite "open"—any Justice can offer an alternative opinion to the one that is circulating prior to a vote—the median Justice should be able to whipsaw those on her left against those on her right. At the end of the day the median Justice should get exactly what she wants.

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75. All of these theories are "political" within Frank Cross's typology of judicial decision making. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1471 (2003).

76. "[C]onsider surely the most prominent theory of Supreme Court decision making, the Median Voter (MV) approach." Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1827 (2009). There are several other prominent examples. *See, e.g.*, THOMAS HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005); Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187 (1996); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996); Epstein & Jacobi, *supra* note 1; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

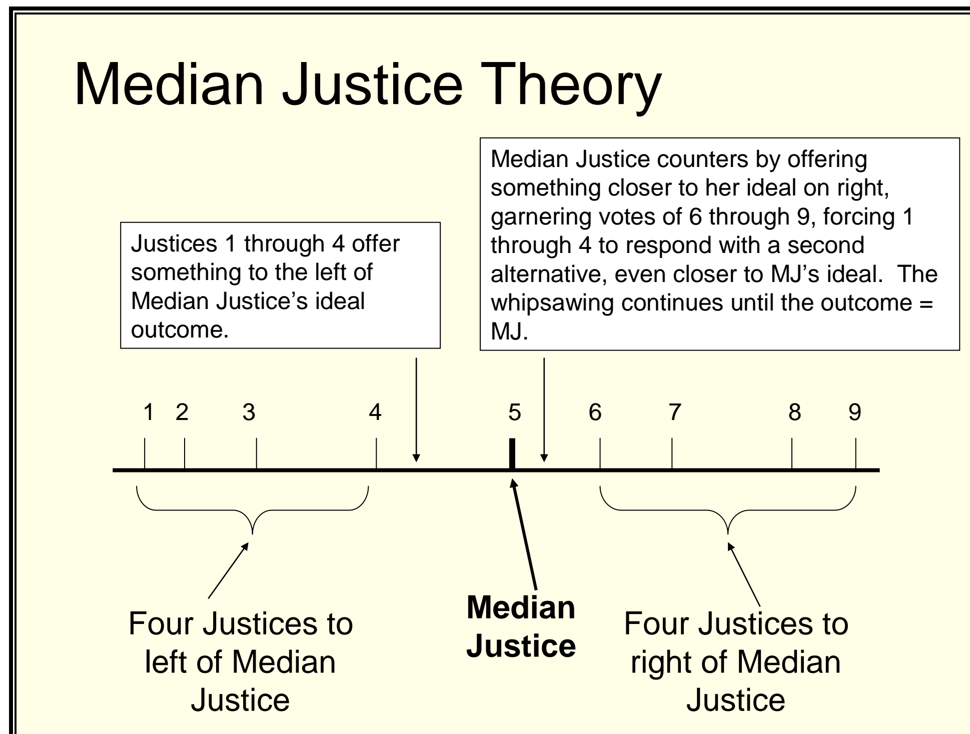

Figure 2

The Median Justice Theory predicts this outcome regardless of who writes the opinion. As long as the ideal policies and outcomes of the median Justice do not change, Court outcomes should be unchanged.

Although the Median Justice Theory is a bit heavy-handed, it does accord with received wisdom that the Justice in the middle gets her way, reflected in casual empiricism and serious scholarship about the Court. Newspapers and magazine articles commonly refer to the "swing" Justice.[77] Estrich and Sullivan's article *Abortion Politics: Writing for an Audience of One* was targeted at Justice O'Connor, widely assumed to be the median Justice.[78] Epstein and Jacobi's "Super Medians" gains its intellectual heft

77. *E.g.*, John M. Broder, *Armageddon! Measuring the Power of a New Justice*, N.Y. TIMES (Nov. 6, 2005), http://www.nytimes.com/2005/11/06/weekinreview/06broder.html; Dahlia Lithwick, *Obama Shouldn't Try to Pick a Persuasive Justice*, NEWSWEEK (May 6, 2010), http://www.newsweek.com/2010/05/07/the-limits-of-influence.html.

78. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 122 (1989); *see also* Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue:* Stenberg *Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1312 (2009).

from the Median Justice Theory, and a substantial literature focuses on techniques for finding empirically the median Justice.[79]

This paper *does not* assume that the Median Justice Theory is correct. Rather, the paper introduces the Median Justice Theory because of its place in the academic literature and in popular accounts of the Court, and, of course, because it *might* be correct. The simulation will be interpreted in accordance with the Median Justice Theory only because it affords an opportunity to quickly show the importance of our computer simulations. However, our work is important even if one of the other theories, detailed below, more accurately predicts how the ideology of an individual Justice affects the holdings by the Court, as even under these other theories, a difference in the age of Democratic and Republican nominees to the Court will change Court outcomes.

2. Majority Median Justice ("MMJ")

The Majority Median Justice Theory significantly extends the Median Justice Theory.[80] The MJ theory assumed that Justices care about exactly one thing—the doctrine (or rule) chosen by the Court. In contrast, MMJ theory is premised on a more complex assumption.[81] Each case is comprised of a set of facts, which is identically and clearly perceived by each of the Justices.[82] A legal doctrine is conceptualized as a mapping of all possible sets of facts into outcomes (plaintiff wins or defendant wins). To make the model solvable, MMJ assumes that facts can be uniquely arrayed on a one-dimensional continuum, and that this is the same dimension that we use for ordering Justice's preferences over legal rules. A rule, in this one

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79. *See, e.g.*, Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of "Natural Courts" 1953–1991*, 112 PUB. CHOICE 55 (2002); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005).

80. *See* Cliff Carrubba et al., *Does the Median Justice Control the Content of Supreme Court Opinions?* 33 (Dec. 23, 2008) (unpublished working paper), *available at* http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/vanberg_does_the_median_justice.pdf.

81. In an important paper, Edward Schwartz provides the first formal model (of which we are aware) of how Justices' consideration of multiple facts rather than the propriety of a single rule can produce an opinion deviating from the MJ prediction. Edward P. Schwartz, *Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision-Making*, 8 J.L. ECON. & ORG. 219, 220 (1992).

82. This is implicit in the structure of the model set out in Carrubba et al.'s article, but not emphasized in its exposition. Carrubba et al., *supra* note 80, at 8.

dimensional setting, is just a scalar.[83] Any case with facts less than the number incorporated in the rule is decided for one of the parties, while a case with facts above the number is decided for the other party.

In real cases the MMJ theory must be applicable to the formulation and application of rules influenced by multiple facts. For example, if the issue is whether probable cause exists for a search warrant, resolving the issue requires examining facts such as the defendant's criminal history, credibility of informants, characteristics of the location searched, etc. A more conservative Justice may more readily find probable cause on a lesser showing of these various facts than would a more liberal Justice.

A clearer demonstration of how this theory functions may be found in the following example, which, for the purpose of illustration, is simplified to involve a rule with a numerical value: the Court is considering a constitutional challenge to a statute penalizing a defendant's "willful failure" to pay parking tickets that are seventy days overdue with a sentence of up to one year in jail. The issue is whether the Due Process Clause of the Fourteenth Amendment puts a lower bound on the number of days overdue a parking ticket must be before the state can attach criminal penalties for failure to pay. In this example, one conservative Justice thinks that a ticket even seven days overdue permits the state to attach criminal penalties in compliance with the Due Process Clause. One liberal Justice believes that the Due Process Clause prohibits attachment of criminal penalties until the parking ticket is at least 180 days overdue. Other Justices will have intermediate views of what the Due Process Clause requires. These views provide the array of ideal doctrinal rules that we see in Figure 3, below.

Each case comes with its own set of legally-relevant facts. In our example, these facts would be the number of days the defendant's parking ticket was overdue. These facts determine, for each Justice, whether the defendant should win his case against the government or go to jail.

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83. This framework is due to Kornhauser. Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 446–51 (1992).

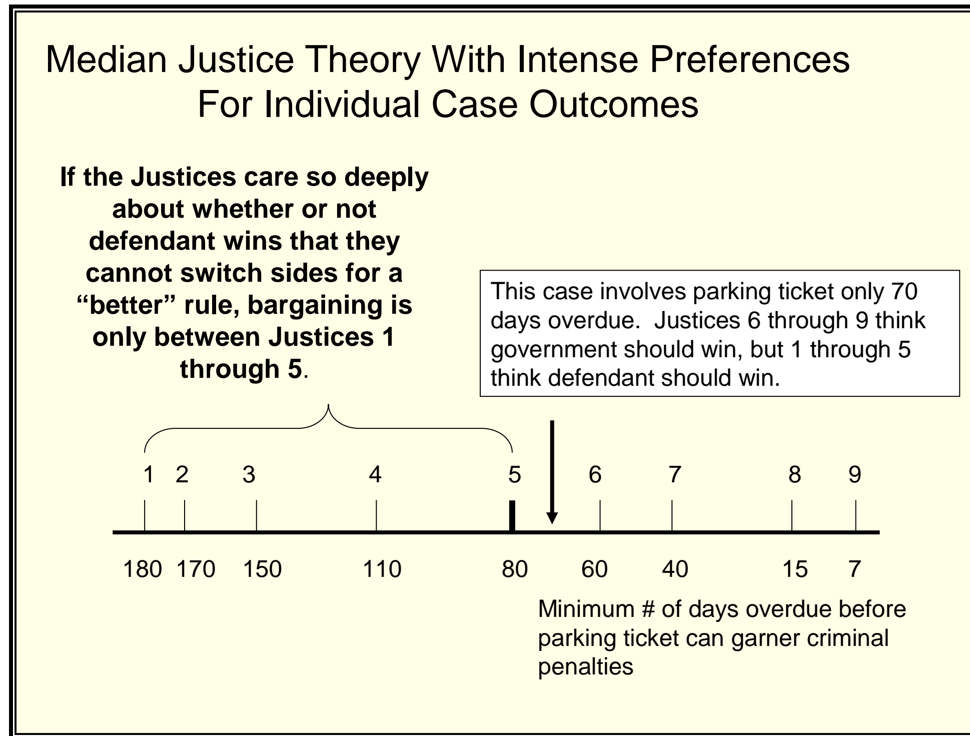

Figure 3

Typically, under the Median Justice Theory, the median Justice determines the holding because that Justice can play off the Justices to the right against the Justices to the left. However, this may not occur when the Justices have such an interest in which party wins that they cannot "switch sides."[84] The following example, built on the earlier parking ticket hypothetical, and illustrated in Figure 3, demonstrates this point. Assume that in the hypo, the defendant's parking ticket is seventy days overdue. Justice 5, the median Justice, wants the defendant to win. Justices 6 through 9, more conservative than (to the right of) Justice 5, want the government to win. Justices 1 through 5, more liberal than (to the left of) Justice 5, want the defendant to win.

Justice 4 proposes a rule requiring at least 110 days. Justice 5 could propose, say, a rule requiring eighty days. Justice 5 would prefer a rule of eighty days to a rule of 110 days. Justices 1 through 4 would prefer a rule of 110 days to one of eighty days. Justices 6 through 9 prefer a rule of eighty days to 110 days, but because a rule of eighty days would result in the

84. Cliff Carrubba et al., *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. POL. SCI. 400, 401–02 (2012); *see also* Cameron et al., *supra* note 76, at 1844.

defendant winning, which is an undesirable outcome, they would not embrace an eighty-day rule. Justice 5 could woo Justices 6 through 9 by offering, say, a rule of only sixty-five days. Because here, the defendant's parking ticket was seventy days overdue, the government would win and thus Justices 6 through 9 would vote for such a rule, it being preferable to a rule of 110 days. But Justice 5, herself, cannot endorse her own proposed rule, as it would require her to switch sides and vote for the government to win, which she would not do.

Thus, under these circumstances, only the views of Justices 1 through 5 will be relevant in determining the final rule, since the normal bargaining between Justice 5 and the Justices to her right is foreclosed by the party-favoring restrictions in place. Within the subset of Justices 1 through 5, Justice 3 is the "Median" Justice, and therefore, by playing off Justices 1 and 2 against Justices 4 and 5, Justice 3's rule of 150 days will be the one expressed in the Court's opinion, rather than the view of Justice 5, the median Justice of the full Court.

Thus, an immediate implication of MMJ theory is that in 5-4 decisions, when the five liberals carry the day, Justice 3 controls the opinion. But in 5-4 decisions where the five conservatives control, Justice 7 controls the opinion. Thus, a small change in facts can produce a big change in outcome. In our example, if the defendant's parking ticket had been eighty-five days overdue instead of only seventy, and Justice 5 wanted the government to win, the doctrine would shift from 150 days (Justice 3) to only forty days (Justice 7).[85]

In this theory, the Median continues to be important because we need to know whether the facts are on one side, or the other, of the Median, as the position of the facts determines whether the median of the liberals or median of the conservatives controls the outcome and the rule established by the Court.

This theory is clearly at odds with what Justices *say* they do. The Justices claim that they do not take cases to effect justice to individuals, but rather to make rules to guide all of the lower federal courts.[86] If that were true, and all that Justices truly care about is the chosen doctrine, then the MJ model might most accurately describe Court opinion-making. But Justices might, in fact, care about more than chosen doctrine, and if so the MMJ model might be closer to the observed truth.

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85. Cameron et al., *supra* note 76, at 1845.

86. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 269 (1991).

B. Theories Focusing on the Authoring Justice

Several theories give a central role to the Justice who authors the opinion. They differ greatly in their structure, however.

1. Author Dominance[87]

This theory asserts that the holdings expressed in the Court's opinion are dictated by the views of the authoring Justice. Author Dominance Theory is the outcome of one or more distinct models of aggregating individual Justices' desires into a Court outcome. Such models include where the Court operates under a "first and final offer" bargaining structure[88] or where the opinion author had much, much lower costs of writing an opinion. Other models may contribute to this outcome, as well. All such models have their roots in the "attitudinal model" of Segal and Spaeth.[89]

The predictions of the Author Dominance Theory are parasitic on the underlying model that predicts Author Dominance as an outcome. In addition, as Cameron, Park and Biem point out, opinion assignment becomes the crucial determinant of Court outcome.[90]

2. Entry Deterring

A more sophisticated author-centered theory of Court behavior is found in the Entry Deterring Theory of Lax and Cameron.[91] This theory emphasizes, among other things, the different costs that the Justices have in writing opinions. Under this theory, the authoring Justice can write an opinion that deviates from the median Justice, or from the majority median Justice, but is still accepted as the Court's opinion by moving just far enough away from the MJ/MMJ position that no other Justice wants to incur the cost of writing an opinion that will woo enough Justices to become controlling. Thus, by paying close attention to the costs of rivals, and by picking exactly the right position, a Justice can deter entry (into the opinion-

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87. *See* Cameron et al., *supra* note 76, at 1847 (calling this "Monopoly Author").

88. HAMMOND ET AL., *supra* note 76, at 111.

89. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

90. Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1848 (2009).

91. Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the Supreme Court*, 23 J.L. ECON. & ORG. 276, 288 (2007).

writing "market") by another Justice. In this regard, their theory resembles "limit pricing" by a monopolist in industrial organization theory.[92]

Under the Entry Deterrence Theory, the Court's opinion must lie between the ideal point of the opinion's author and the median Justice, or the majority median Justice, depending on the underlying model.

3. Clustering and Other Complex Theories

If Justices were to care about the impact of their opinions, and if the impact of an opinion were to rise with the number of Justices who joined the opinion, Justices would tend to try to write opinions that could attract a large number of joins. In spite of Justice Brennan's famous joke that a Justice need only be able to "count to five,"[93] under Clustering Theory,[94] there are gains for a Justice who is able to count all the way to nine. A Justice who is contemplating writing an opinion that deviates from his own ideal point will be tempted to write in the direction of clusters of judges, so as to gain more votes.[95]

Cameron and Kornhauser's conception of Clustering Theory characterizes Judges as caring about many different variables, such as the impact of their opinions, the doctrinal rule chosen, the furtherance of justice in the individual case, and the costs of writing opinions.[96] One can regard Clustering as a combination of other theories, but with an added factor, impact. As with any theory that has a lot of moving parts, it is difficult to get predictions from Clustering Theory without using specific values for at least some of the parameters. In this vein, Cameron, Park and Beim report that for cases involving "moderate" costs of writing opinions, "not overwhelming" importance of case impact,[97] and no value on doing

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92. MARK HIRSCHEY, FUNDAMENTALS OF MANAGERIAL ECONOMICS 563–65 (2008).

93. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 119 (2007), *quoting* Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997).

94. An empirical precursor to Clustering Theory exists, but it is limited to same-President appointments. *See* Stefanie A. Lindquist et al., *The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting Within Presidential Blocs*, 53 POL. RES. Q. 795, 795 (2000).

95. Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1851–52 (2009); Kornhauser, *supra* note 83, at 442.

96. Charles Cameron & Lewis Kornhauser, *Modeling Collegial Courts (3): Adjudication Equilibria* 12 (Pub. Law & Legal Theory Research Paper Series, New York University School of Law, Working Paper No. 09-39, 2009).

97. They term this value "clarity." Cameron et al., *supra* note 76, at 1852 n.108.

individual justice (thus eliminating the MMJ branch of the underlying theory), Clustering Theory pushes extreme Justices to write opinions that are much more moderate than their ideal. Moderate Justices, in contrast, can write opinions much closer to their ideal, as they can get joins from Justices to their left or right.

Other hybrid models exist. Bonneau et al.[98] produce a formal model combining author preferences, MJ theory, and strategic opinion assignment. Schwartz's model[99] combines author preferences with costs and opinion quality. The models are complex and impressive, but for our purposes there is one central similarity that drives our paper: over time, the Court's holdings will tend to move in the direction of the change in the median Justice.

III. COMPUTER SIMULATION OF THE NOMINATION PROCESS

A. Modeling the Justice Selection Process[100]

When a vacancy occurs, a new Justice must be chosen. The well-known process spelled out in the Constitution—nomination by President and confirmation by a majority of the Senate[101]—frames analysis of the choice. The President has a set of possible nominees, and he appraises each of the possible nominees for the possible effect of their appointments on the Court's doctrinal outcomes.[102] To do this well, a President would first need to know about the individual characteristics of each nominee, particularly the nominee's ideology and intelligence. But two other criteria, not peculiar to a nominee's individual characteristics, also bear on the President's choices.

First, the President would like to know which (if any) of the five theories listed above (Median Justice, Majority Median Justice, Author Dominance,

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98. Chris W. Bonneau et al., *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 890, 890, 903 (2007).

99. *See generally* Schwartz, *supra* note 81.

100. Our simulation does not require that we take a position on whether the nomination and confirmation processes "cause" dissenting opinions on the Court. *See* Brian Goff, *Supreme Court Consensus and Dissent: Estimating the Role of the Selection Screen*, 127 PUB. CHOICE 375, 387–88 (2006) (arguing for this hypothesis).

101. *Judicial Nominations and Confirmations*, SENATE JUDICIARY COMM., http://judiciary.senate.gov/nominations/judicial.cfm (last visited Jan. 31, 2014).

102. CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 30–32 (2007).

Entry Deterring, or Clustering) most accurately describes how the views of Justices affect the opinions published by the Court. Each theory posits a different means by which this effect is produced, and therefore, since the President cares about doctrinal outcomes, understanding how outcomes will result is important. Finding the correct theory is not, however, as crucial as it might seem. All of the theories suggest, at least weakly, that a President should strive to appoint a new Justice whose ideology is as close to his own as he can manage. The different theories diverge as to how important this is. Under the Median Justice Theory, a new appointment that does not move the median is, at least in the short run, irrelevant. In contrast, under Author Dominance Theory, the appointment may be extremely important. And the other three theories—Majority Median Justice, Entry Deterrence, and Clustering—all predict that such an appointment may have large effects.

Second, as we discussed in the Introduction, the President would like to know which of the possible nominees will likely be confirmed by the Senate ("confirmability"). Most Senators will have preferences about doctrine, and will also appraise a nominee by his or her likely effect on Court doctrinal outcomes. The Senators' preferences will be expressed through Senate process and norms, including the filibuster and the sixty votes for cloture required to end it.[103] Some candidates will likely make it through this process and be confirmed, while others will not.[104]

The President will thus seek to nominate a new Justice who can be confirmed and who will best affect Court doctrine in a way that pleases the President. These two goals, in a nutshell, frame the strategic problem that confronts the President when a seat on the Court opens up.

As noted in the Introduction, the President's nomination decision is influenced by other criteria. These include rewarding friends who have worked hard for him or for his party during difficult elections; valuing experiences, whether on the bench or in other contexts;[105] and giving important constituencies, such as racial and ethnic groups and women, a

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103. RICHARD S. BETH, CONG. RESEARCH SERV., RL32878, CLOTURE ATTEMPTS ON NOMINATIONS: DATA AND HISTORICAL DEVELOPMENT 1–2 (2013), *available at* http://www.fas.org/sgp/crs/misc/RL32878.pdf.

104. *See* EPSTEIN & SEGAL, *supra* note 71, at 85–116 (explaining the history of confirmations).

105. Chief Justice Taft famously served as President before he joined the Court. *William Howard Taft*, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/williamhowardtaft (last visited Jan. 31, 2014). State supreme court service is increasingly unacceptable and considered an insufficient qualification for appointment to the federal courts. *See* Kathleen A. Bratton & Rorie L. Spill, *Moving Up the Judicial Ladder: The Nomination of State Supreme Court Justices to the Federal Courts*, 32 AM. POL. RES. 198, 198–99 (2004).

representative appointment.[106] For purposes of our exercise, however, we will concentrate on the first consideration—Court doctrinal outcomes—and leave the others for discussion at the end.

Most, if not all, recent models of appointing Justices to the Court[107] presume that both the President and the Senate believe in the Median Justice Theory of Court behavior. We will initially follow Krehbiel's model in our simulation. He sets out a four-stage model[108] in which a vacancy opens up on the Court, the President proposes a new Justice, the Senate confirms or does not confirm, and then the Court (with or without the new Justice) votes and decides a case.

The last stage—voting on the Court—requires discussion of the effects of a failure to appoint. A fully-staffed Court is comprised of an odd number of Justices, nine, so under the Median Justice model the outcome is always determined by a specific median Justice, Justice 5. So, if the Senate confirms the nominee, the outcome of the vote is the ideal point of the median Justice. But what happens if the nominee is not confirmed? The Court then consists of eight members, and the median is the interval between the fourth and fifth Justices (when they are arrayed in order of ideology). However, Court norms require a majority to significantly modify any existing Court precedent.[109] On an eight-member Court, this requires at least five votes out of eight, the same number required even if the ninth Justice had not left the Court. Thus, following Krehbiel, we will assume that the presence of an eight-member Court will not significantly affect whether

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106. The last consideration has become so significant that, as of the time of this article, there are no white Anglo-Saxon Protestants on the Court. Of the six men who are on the court, one is African-American (Thomas), one is Jewish (Breyer), and five are Catholic (Kennedy, Scalia, Roberts, Alito, Thomas). Of the three women, one is Hispanic Catholic (Sotomayor), and the other two are Jewish (Kagan, Ginsburg). *See Roberts Court*, OYEZ, http://www.oyez.org/courts/robt6 (last visited Jan. 10, 2014).

107. Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231, 232–33 (2007); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1072 (1999); David W. Rohde & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court,* 69 J. POL. 664, 666 (2007). *Compare* Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L. ECON. & ORG. 269, 271–73 (2000) (discussing a median-centered analysis of appointments to the NLRB), *with* Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 591 (1989) (exploring an early model without a multimember voting body).

108. Krehbiel deems his model a three-stage model because the first stage is purely random, with no strategic element. Krehbiel, *supra* note 107, at 233.

109. Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646 (2002).

existing precedent is changed.[110] Or, more precisely, we assume that the President and Senate will make this assumption, and propose a nominee and vote accordingly.

In the previous stage, where the Senate is deciding whether to confirm, there are many possible veto pivots. We model a pivot in the Senate. This could be the voter who must be satisfied to vote for cloture. In this case, there can be no more than forty Senators who are unhappy enough with the nomination to vote against it. Or, the pivot could be the median of the majority party. In our simulation, it does not matter how the pivot comes about, only that the pivot exists. In the sections below we will discuss relaxing this assumption.

The President will nominate the "best" candidate, from his perspective, that the Senate—which will be identical to the pivot in the initial version of the simulation—will confirm. If the President is a Republican, he will nominate a fifty year old.[111] If the President is a Democrat, he will nominate a 50+X year old, where X will vary from one simulation to another. Because our simulation presumes that the President is certain about Senators' preferences and the rules of the Senate, and would therefore only nominate candidates certain to be confirmed, every nomination will be confirmed.

B. Modeling Justice Retirements/Appointment Opportunities

The simulation features Justices leaving the Court on a random basis in every year, where the departure probability is a function of age. Statistical literature refers to the age dependence as duration dependence.[112] The simplest duration model that allows for negative duration dependence—i.e., that retirement rates increase with age—is the Weibull distribution.[113] The Weibull distribution's two parameters are referred to as the shape parameter

110. Significant relative to a full nine-member Court—of course, eight-member Courts can change precedent if one opinion receives five votes.

111. Thus, we are implicitly assuming that the net of all of the tradeoffs discussed in the Introduction to this article, where Republicans are giving a fairly heavy weight to age, produces fifty-year-old Republican appointees.

112. *See* Robert J. Willis, *Comment*, *in* THE YOUTH LABOR MARKET PROBLEM: ITS NATURE, CAUSES, AND CONSEQUENCES 386, 388 (Richard B. Freeman & David A. Wise eds., 1982).

113. *See* Stephen Machin & Alan Manning, *The Causes and Consequences of Longterm Unemployment in Europe*, *in* HANDBOOK OF LABOR ECONOMICS: VOLUME 3C 3085, 3099 (Orley C. Ashenfelter & David Card eds., 1999).

and scale parameter.[114] Unfortunately, unlike with the more typical normal (also referred to as the Gaussian) distribution, these parameters only indirectly determine the mean and variance of the expected retirement ages.[115] The values of the parameters in the simulation were chosen to closely match the observed tenure profile on the Court accounting only for age of the Justice.

It is, of course, possible to allow the retirement decision be a function of any observable characteristics, such as to allow for differences for male and female Justices or for the degree of a replacement nominee's partisanship/ideological position. In fact, controlling for these other observables would allow us to improve a very naïve model of strategic retirement; we would allow the retirement probability to vary with the current political configuration of the President and Senate as well as the Justice's own ideology. However, since we currently have only a small set of observed Justice retirements from which to build this improved retirement model, we would want to be careful not to over-parameterize the retirement decision.

As a first step, we chose a simple parameterization that highlights the importance of age of appointees in shaping the ideological distribution of the Court. More complex retirement models may be incorporated into subsequent studies.

C. Modeling Presidential and Senatorial Elections

Since our primary interest is in the appointment process of Justices, the simulation incorporates a very simple model of elections. Presidents are elected every four years. We model this by drawing the ideal point of the President every fourth year as a uniform random variable over the policy space, [-1, 1]. We will assume (without loss of generality) that negative values are associated with Democratic Presidents. Similarly, instead of drawing all Senators at each election, we will just draw the cut point of the pivotal once again as a uniform random variable over the policy space. As we noted above, this pivot could be the median of the full Senate, or the median of the majority party, or the filibuster pivot depending on one's theory of Senate politics. Our simulation is consistent with any model that has only a single pivotal player in the Senate.

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114. BRYAN DODSON & DENNIS NOLAN, RELIABILITY ENGINEERING HANDBOOK 59 (1999).

115. In fact, there is no closed for solution for the mean of the Weibull distribution; it is defined by the Gamma function of the two parameters.

This model of elections is clearly overly simplistic and not realistic. However, by doing many simulations with different draws, we are integrating out the uncertainty induced by a particular choice of politicians. By allowing for uniform distributions, we are evaluating the constitutional appointment process from an *ex ante* perspective allowing for any future political configuration, including ones that, given the current political climate, seem unlikely. This is a standard approach in the literature examining electoral rules, since in the very long run we do not know the likely political preferences that will be run through the game induced by the Constitution.[116]

There are other possible modeling choices. For example, we could take historically-observed election results as a valid sample of all possible political outcomes. We could then sample from this set, somewhat akin to a statistical bootstrap, to generate our simulation runs.[117] Of course, we need to make the strong assumption that the political results of the past accurately represent all possible future sets. In the near-term, this assumption is plausible, but it seems less tenable as we move out a century.

D. Simulation Summary

Since there are several moving parts to the simulation, it is worth recapping the setup.

1. Draw the initial ideal points for the President and for the Senate pivot from a uniform distribution on [-1,1].

2. Draw the initial configuration of the nine Justices' ideal points from a uniform distribution on [-1, 1] and initial ages of Justices from a Normal distribution with a mean of sixty-five and standard deviation of nine.[118]

116. *See, e.g.*, DAN S. FELSENTHAL & MOSHÉ MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS AND PARADOXES 263–74 (1998).

117. This is the approach used by Andrew Gelman in two of his articles. *See* Andrew Gelman et al., *The Mathematics and Statistics of Voting Power*, 17 STAT. SCI. 420, 427 (2002); Andrew Gelman et al., *Standard Voting Power Indexes Do Not Work: An Empirical Analysis*, 34 BRIT. J. POL. SCI. 657, 658 (2004).

118. The starting ages are arbitrary, but the results are not sensitive to the choice parameters. After 100 years, the initial age distribution will have no impact.

3. We then start the simulation. Each iteration corresponds to a year in our model. In each period we calculate the probability of retirement (or death) from a Weibull distribution with location parameter (often referred to as α) of seventy-five and shape parameter (often referred to as ρ) of four for each Justice. The probability randomly determines retirement.

4. If there is a vacancy, the replacement is determined from the equilibrium, described by Krehbiel,[119] between the President and the Senate pivot player. Note that the players' ideal points determine the location of the new Justice on the Court. The age of the appointee depends on whether the President is a Democrat (with negative ideal point) or Republican.

5. We then increment the age of every sitting Justice and every fourth period redraw the President and Senate cutpoint.

6. We continue the simulation for 100 periods (years) and note the location of the median Justice. Then we restart from 1. We typically draw 50,000 simulations of the 100 periods. To summarize the results we average, for each difference in age between Democratic and Republican appointees, the 50,000 simulations of the location of the median Justice in period 100, and report the average.

This simulation should demonstrate how differences in initial age at appointment for Democrats and Republicans affect the extent to which the median position of the Court moves after 100 years.

E. Results

To measure the effects of our model, we compare the results of the simulation, where Republican Presidents nominate fifty-year-olds and Democratic Presidents nominate sixty-year-olds, to a control run where Presidents of both parties nominate fifty-year-olds.[120] The simulation is symmetric, so that it does not matter which party nominates younger candidates, as this would only affect the sign (positive/negative) of the drift.

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119. Krehbiel, *supra* note 107, at n.2.

120. Note that we could have added some noise to the age of initial appointment, but since we will be averaging, this would not change the results at all.

Figure 4 graphs out the median of the Court in each period of the simulation, as averaged over the 50,000 runs, providing a very good estimate of the expected median (which is a highly non-linear function of the game). First, we see that for the control run, featuring no age difference at appointment, the expected median hovers around zero. This is as expected because in this case everything is symmetric.

However, when we turn to the model featuring Republicans appointing Justices that are ten years younger, we see in the long run a clear rightward drift in the median in what is otherwise a totally symmetric model. The intuition for this finding is simple: Republican appointees (with positive ideal points) stay on the court longer. Although the scale of the policy space makes this look like a small difference, the expected median has moved about 3% of the distance of the policy space by year 80.

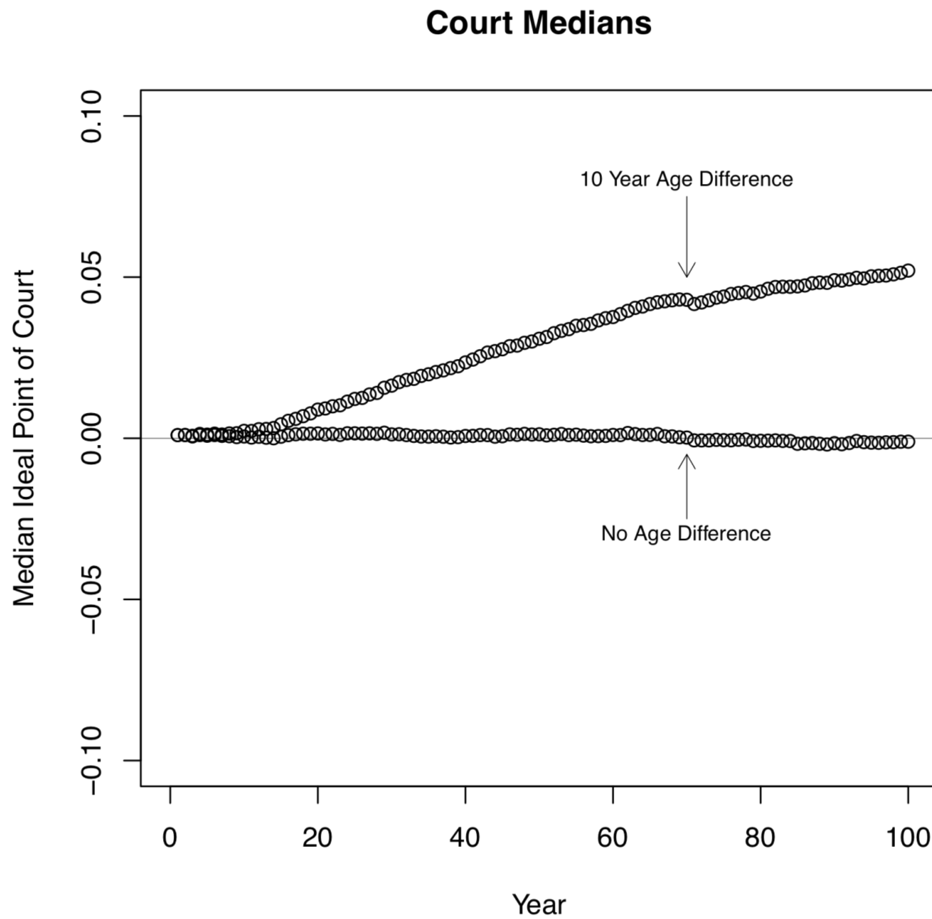

Figure 4: Comparison of the Court's median ideal point averaged over the simulation runs for no age difference at appoint versus 10 years.

Not just the mean has changed. Figure 5, a graph of density plots of the medians in the final year of the simulation (year 100), illustrates not only the rightward shift we saw in the graph of the means, but an increase in variance by 25%. Again, this is happening because with longer tenures, the vacancy profile becomes noisier, allowing the median to move around somewhat more.

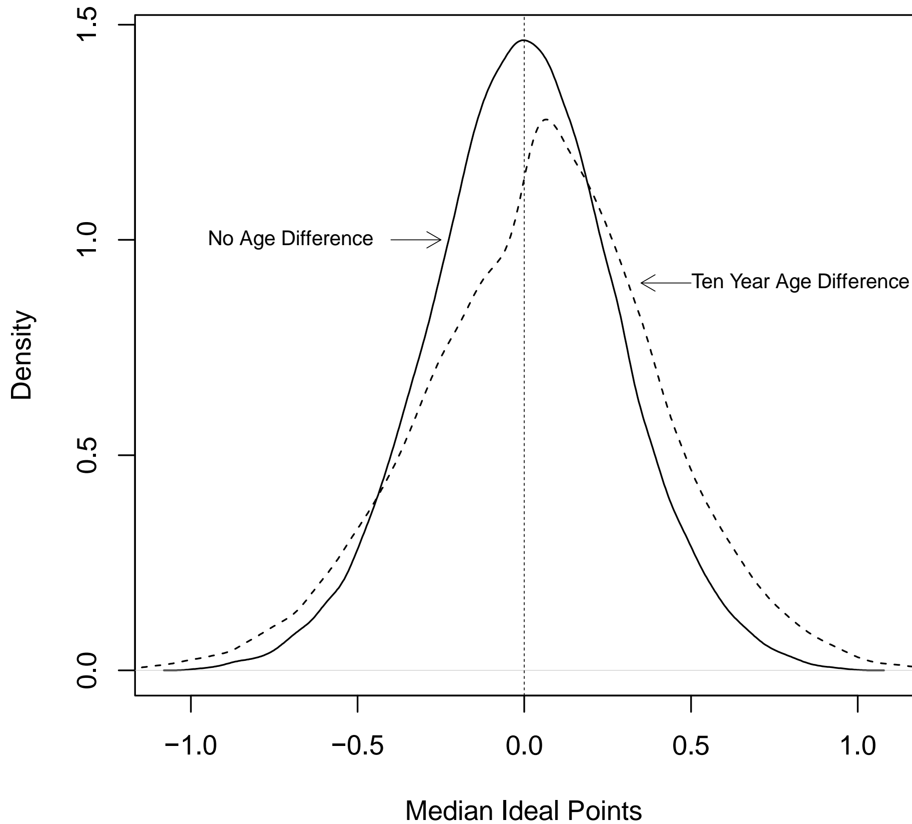

Figure 5: Density plot of the medians in the final year of the simulation (year 100) across the 50,000 runs of the simulation.

We must compare not only an age differential of zero versus ten years, but also how other age differentials lead to predicted changes in the Court median. These comparisons are shown in Figure 6. We run our simulation varying age differentials between two years and twenty, which is larger than any we have observed. The dots in the figure represent the mean of the medians across the simulation runs. The expected rightward drift is linear in the age differential. The picture is not perfectly linear because 50,000 runs of the simulations are not quite enough to average out some slightly odd cases given the non-linearities in the model.

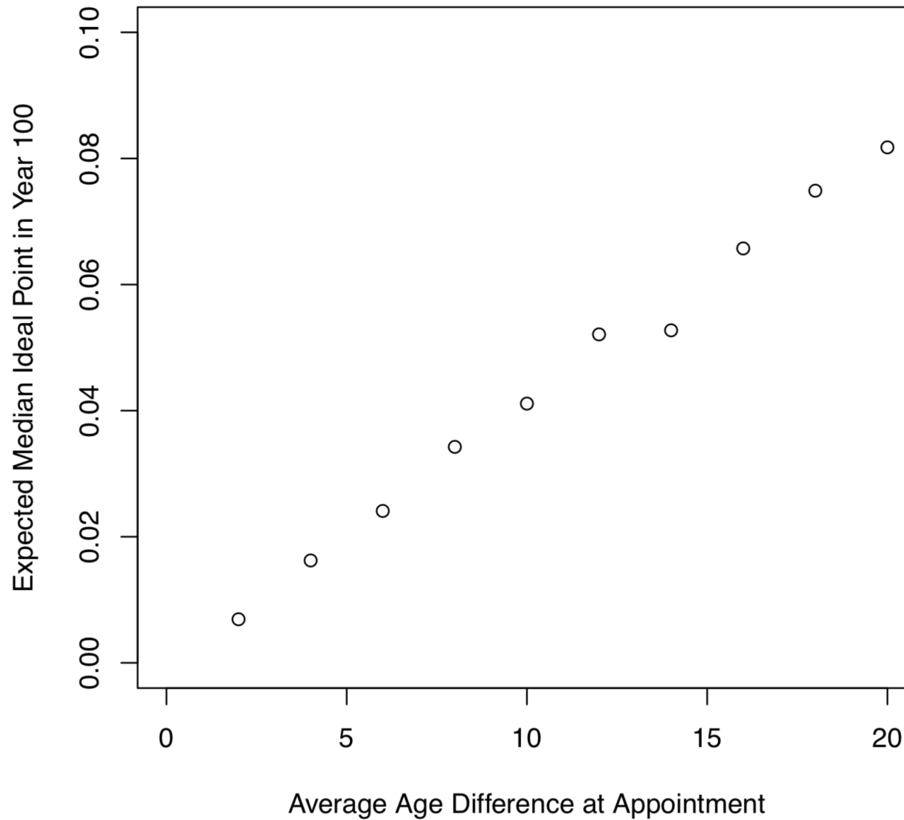

Figure 6: Graph of expected medians in final year as a function of age difference at initial appointment.

At the extremes of the graph, the age differential is moving the Court 4% of the policy space to the right. Even if we look at more reasonable values -- around eight years, there is still a fair bit of rightward shift.

Next, we will model what occurs without the Senate—that is, what occurs if the President could appoint new Justices without the need for Senate confirmation. We ran a simulation without the need for Senate confirmation, but identical in every other way. We find that, with a ten-year disparity between Democratic and Republican appointees, the median moves far more quickly than with Senate confirmation. Without the need to appease the Senate, and hence assess for the criteria of confirmability, the President's dominant strategy will be to appoint a new Justice whose ideological views match the President's ideal point.

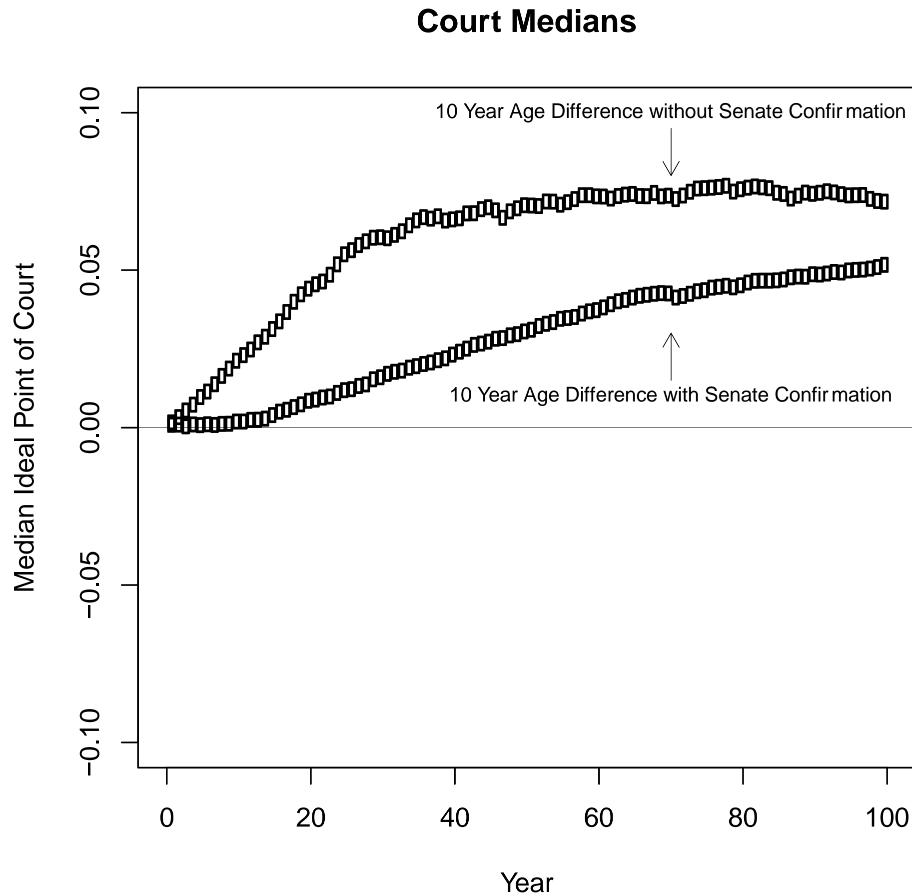

Figure 7: Comparison of simulated median with a 10 year age differential with and without the need for Senate confirmation.

Note that, without the need for Senate confirmation, in the first twenty years of the simulation, Republican Presidents can move the Court median to the right very quickly when compared to where Senate confirmation is required. The Senate, in other words, is quite effective at damping out the effect of the President's preferred ideological views, at least at first. Eventually, the relentless logic of older Democratic appointments moves the median in the Republican direction even when Senate approval is needed.

The vertical difference between the median without Senate confirmation and with Senate confirmation provides some measure of the returns to strategic retirements, that is, the retirement of Justices when the party which most aligns with their ideology controls the Presidency and the Senate, so

the retiring Justice's chosen successor will more likely align with the retiring Justice's views. The larger the difference, the greater the returns to avoiding the checking value of the Senate, which is one of the purposes of strategic retirement.[121] This simulation shows how important strategic retirement can be to the party that chooses older Justices.

Are these results "significant?" We suspect so, based on the following exercise. If we look at the Martin and Quinn scores[122] for the ideal points of the Justices, starting in 1937, and track the score of the median justice from term-to-term, the variation in the median is approximately 4%. Our simulations suggest that a substantial difference in the age of nominees between the two parties can produce a drift equal to 3%. But this 3% figure is a computation of the drift comparing what happens when the parties behave identically to when only one party starts appointing older Justices. It is equally plausible to argue that, in determining the significance of the drift, the pertinent comparison should be to what results when the roles of the parties are fully reversed. If the Democrats are currently appointing older Justices, then perhaps the proper comparison should be to the drift that results were the Republicans to appoint older Justices. If this is the pertinent comparison, then the drift is closer to 6%. In any event, this is in the same general size as the drift we find, on average, between terms, and is systematic.

Of course, these comparisons are just suggestive. The Martin and Quinn scores are computed from the observed votes of the Justices on cases that they have chosen strategically. In addition, there is no way to calibrate precisely the imposed scale of ideology to the scale we utilize in our simulations. Nonetheless, if one thinks it worthwhile to pay attention to Martin and Quinn scores—and we most certainly do—then it is important to pay attention to our results. The drift that our simulation produces is large enough to compare to observed term-to-term movements on the Supreme Court.

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121. Michael A. Bailey & Albert Yoon, *'While There's a Breath in My Body': The Systemic Effects of Politically Motivated Retirement from the Supreme Court*, 23 J. THEORETICAL POL. 293, 301–02 (2011).

122. Andrew D. Martin & Kevin A. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court*, 1953–1999, 10 POL. ANALYSIS 134 (2002).

IV. IMPLICATIONS AND ADJACENT LITERATURE

A. Proposals for Fixed Eighteen-Year Terms for Justices

Our simulation may implicate several key policy issues. One very important issue is the proposal, backed by many law professors and important lawyers, to replace life tenure on the Supreme Court with one fixed, staggered eighteen-year term for each Justice, without the possibility of re-appointment.[123] Such a change would require an appointment to the Court every two years, thus ensuring that every President will enjoy the opportunity to appoint two Justices. This movement has culminated, thus far, with a letter to Vice President Joseph Biden and Attorney General Eric Holder (among others) urging the passage of a constitutional amendment making just such a change.[124] Public intellectuals from across the political spectrum, from Frank Michelman and Judith Resnik on the left to Lino Graglia and Steven Calabresi on the right, actively support the effort to move to staggered eighteen-year terms.[125] In short, the working assumption of those supporting the movement seems to be that this is a nonpartisan and nonpolitical suggestion. As noted by Roger C. Cramton and Paul Carrington, in reference to the impressive list of people supporting this Court reform proposal, "[i]nformed readers will recognize that this list includes persons of almost every imaginable political orientation."[126]

Significant literature provides reasons for the proposed constitutional amendment.[127] Although the following list necessarily does not completely account for the complex and extensive literature on the topic, the chief arguments made in the pro-amendment literature are:

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123. *E.g.*, Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23, *available at* http://www.law.yale.edu/documents/pdf/2002Term.pdf.

124. *See* Carrington, *supra* note 68.

125. *Id.*; Calabresi & Lindgren, *supra* note 69, at 831.

126. REFORMING THE COURT, *supra* note 69, at 7; *see also* Calabresi & Lindgren, *supra* note 69, at 831 n.199 ("Indeed, the diversity of political and jurisprudential viewpoints of the various commentators we follow demonstrates the nonpartisan nature of our proposal.").

127. REFORMING THE COURT, *supra* note 69; *see* Daniel J. Meador, *Thinking About Age and Supreme Court Tenure*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 115, 117–20 (R.C. Cramton & P.D. Carrington eds., 2006); Robert F. Nagel, *Limiting the Court by Limiting Life Tenure*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 127, 127–30 (R.C. Cramton & P.D. Carrington eds., 2006); Sanford Levinson, *Contempt of Court: The Most Important 'Contemporary Challenge to Judging*, 49 WASH. & LEE L. REV. 339, 341–42 (1992); Calabresi & Lindgren *supra* note 69, at 831–42; Powe, Jr., *supra* note 74, at 112–13.

> Justices are staying on the Court longer than they used to. The watershed seems to be approximately 1970. The average tenure on the Court is now more than twenty-five years, which is more than ten years longer than our experience prior to 1970.[128] The long period on the Court erodes conventional legal skills.[129]
>
> As a consequence of Justices staying on the Court longer than they used to, the Justices are older than they used to be. The increase in age produces more frequent cases of physical and mental decrepitude.[130]
>
> The Justices, as a consequence of being on the Court longer, and being older, are less in touch and less in step with the concerns and politics of the day than they used to be.[131]
>
> Confirmation hearings are much more politicized due to the infrequent and uncertain appointments.[132]
>
> Almost no other democratic government has chosen lifetime appointments for its judges.[133]

What does our work bring to this literature? First, and with some apologies, we inject a bit of politics into the analysis. Our analysis shows

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128. Calabresi & Lindgren, *supra* note 69, at 779. Much of the Calabresi & Lindgren article focuses on a critique of Stras & Scott's critique of previous work by Calabresi & Lindgren. For purposes of our article, it is clear that the literature accepts that Justices are staying on the Court longer than they used to.

129. Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 569 (1999); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 543 (1999). *But see* Meador, *supra* note 127, at 130 (illustrating the author's skepticism).

130. David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 995 (2000); Calabresi & Lindgren, *supra* note 69, at 816; Powe, Jr., *supra* note 74, at 102–03.

131. Calabresi & Lindgren, *supra* note 69, at 811–12.

132. *Id.* at 813–14. Many of the commentators complain that the process has become too politicized. *See* Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Process*, 8 TEX. REV. L. & POL. 89, 90. *But see* Steven G. Calabresi, *Advice to the Next Conservative President of the United States*, 24 HARV. J.L. & PUB. POL'Y 369, 377–78 (2001) (arguing for more intense politics). Others point out that it is hard to understand what this argument means, apart from noting intense opposition to one's preferred nominee. Farnsworth, *supra* note 74, at 414. Meador is skeptical about this argument. Meador, *supra* note 127, at 128.

133. Powe, Jr., *supra* note 74, at 101; Calabresi & Lindgren, *supra* note 69, at 819.

that this reform proposal is not exactly the politically neutral suggestion that it appears to be on the surface. Instead, rotating, fixed eighteen-year terms are likely to move the median Justice towards the left, though this may be back towards the center of the political spectrum. This result is the product of the assumptions on which our calculations rest, particularly the differential *on the basis of party* in the age of appointees to the Court. But, as we demonstrated, this assumption rests on a reasonably-firm historical basis.

The impact of term limits can be seen in Figure 8, which charts the results of re-running our simulation incorporating the ten-year age differential, but both with and without an eighteen-year term limit for Justices. In order to model term limits, rather than draw their term directly from the initial age of the Justices, we drew their term as a uniform distribution (with mass only on the integers) on the interval [1,17]. We added their term to the age of appointment, fifty for Republicans and sixty for Democrats, to back out their ages. This will only alter the initial few years of the simulation after which all of the first Justices are off the court. We are also averaging over a large number of simulations, dampening the impact of the initial points.

As we can see from Figure 8, imposing eighteen-year term limits dramatically moves the expected median to the left. The difference does not reach zero, as was the case with the no age differential case we saw in Figure 4, but the difference is not far from zero. This conclusion is subject to several caveats. First, and most importantly, we assumed that the imposition of term limits does not alter the retirement decision of a Justice. This would be the case where, for example, a Justice in her seventeenth year on the Court might want to serve her final year even if the retirement model implied by the Weibull model indicated that she would retire. We also assume that the imposition of term limits does not alter the appointment politics between the President and the Senate, which could occur since likely vacancies would be more predictable. The differences could cut in either of two directions. On one hand, opposition party members in the Senate might stall confirmations, hoping to drag things out until a President of their party can make the nomination.[134] On the other hand, some have

134. For example, appointees to vacancies on the National Labor Relations Board and the Board of Governors for the Federal Reserve have had their confirmations stalled. *See* Hans Nichols & Holly Rosenkrantz, *Obama Bypasses Senate, Makes Appointments to NLRB, Treasury*, BUS. WK. (March 28, 2010), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aKr_AXeeC82k; Robert Schroeder, *Stalled Fed Nominee Shares Economics Nobel*, MARKETWATCH (Oct. 11, 2010, 2:48

suggested that the certainty of having a new seat to fill every two years will lead Senators to be less contentious and overtly political during confirmation hearings.[135] Finally, the imposition of term limits imposes even more non-linearities in the model. This can be seen by the seemingly random movement in the graph. It is likely that with a larger set of simulations, the graph would be linear when we averaged. The qualitative findings, however, would remain unchanged.

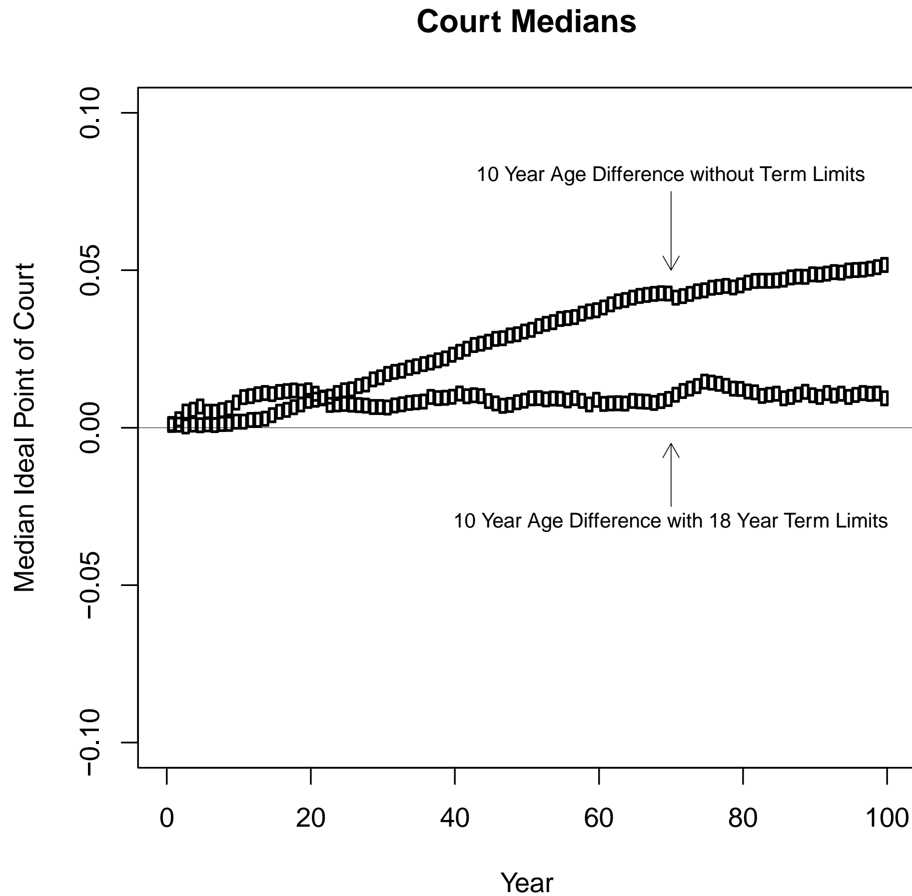

Figure 8: Comparison of expected median with a ten-year age differential with and without an eighteen-year term limit

PM), http://www.marketwatch.com/story/stalled-fed-nominee-shares-economics-nobel-2010-10-11.

135. Calabresi & Lindgren, *supra* note 69, at 814–15.

Do we predict that Republicans will immediately stop and withdraw support for the fixed eighteen-year term once they read this paper? No, because ideological disposition competes with the other above-listed considerations. Consider, for example, mental and physical decrepitude. Assume, for purposes of this analysis, that a system of fixed eighteen-year terms will result in younger, sharper, more energetic Justices than we have at present. A Republican will have to compare the ideological disposition of the Court under present circumstances—older, duller, and weaker but more conservative—with the presumably younger, sharper and more energetic, but more liberal (or centrist) Court afforded by the eighteen-year term proposal. To a Republican assessing the proposal, the favorable shift in youth, mental acuity, and energy afforded by the proposal may offset the unfavorable shift in ideological disposition of the Court. That the younger Justices are probably more in touch with the politics of the day further complicates the Republican decision. Further, the simulation demonstrates the relationship between the *size of the differential* on the basis of party in the age of appointees to the Court and the location of the median Justice. A Republican would need some probability distribution function over the age differential *in the future* to assess his feelings about the fixed eighteen-year term for Supreme Court Justices. The multitude of considerations at play complicates predicting the preferences of Republicans.

On the other hand, we feel comfortable that Democrats will continue to support the fixed eighteen-year term after reading our paper. For a Democrat, all considerations push in the same direction.

B. Reasons for the Differential

As we pointed out in the Introduction, when a President chooses a nominee for a vacancy on the Supreme Court, he must trade off between several criteria: confirmability, intelligence and legal ability,[136] experience, ideological similarity to the President, constituent desires, paying off political favors, and age. Hence, age emerges from a complex, multifactor balancing process. However, age can move the median, which is crucial to the Court's behavior.[137]

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136. *See* Cross & Lindquist, *supra* note 62, at 1436 (discussing the difficulties in measuring judicial quality).

137. This basic point is not new. Many commentators have noted the incentive to appoint young Justices. Powe, Jr., *supra* note 74, at 104; Farnsworth, *supra* note 74, at 424–28; Calabresi & Lindgren, *supra* note 69, at 809.

Assuming that both the Democrats and Republicans are aware of the effect of age, why have the parties acted so differently?

One possibility is that the age difference stems entirely from chance. Democrats and Republicans might similarly value the trade-offs inherent in appointing Justices, and random variance accounts for the age differential. The sample size is small, as there are very few appointments to the Supreme Court, and Democrats have been a bit unlucky in having fewer Justices to appoint than Republicans. If the difference is caused by chance, the difference will disappear given a sufficiently large sample size, as there is no reason to expect this state of affairs to continue.

Although this explanation might be right, it is difficult to confirm, and might be wrong: Democrats might value youth less than Republicans do. We will explore several other explanations for why Democrats and Republicans act differently as to nominations.

One explanation is that Democrats have a much higher discount rate than Republicans. In other words, Republicans care much more about the distant future than do Democrats, and are willing to accept younger, less-accomplished nominees than are Democrats. Although this explanation is feasible, it leaves open a critical question: what accounts for the difference in discount rate?

Alternatively, Democrats may have fewer degrees of freedom in choosing candidates. This explanation envisions the Democrats as a loose coalition of identified interest groups (women, African-Americans, Hispanics) of predominantly liberal views, all of whom want a representative from their own group appointed. A Democratic President, operating under these constraints, will have fewer degrees of freedom to exercise over his choice of nominee, particularly with respect to age. Democratic Presidents will be forced to nominate older candidates, on average, than Republican candidates will nominate. There is one main problem with this explanation: it fits poorly with recent history. The most recent two Democratic nominees, Justices Sotomayor (female Hispanic) and Kagan (female Jewish) were ages fifty-five and fifty, respectively, at the time of their nominations.[138] Female Hispanics and female Jews would seem to be two categories that have the fewest degrees of freedom. In addition, one might also point out that Republicans are also a coalition, comprising social conservatives, fundamentalist Christians, libertarians, and fiscal conservatives. These groups do not cleave neatly along lines of race or sex,

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138. *Biography: Elena Kagan*, OYEZ, http://www.oyez.org/justices/elena_kagan (last visited Jan. 23, 2014); *Biography: Sonia Sotomayor*, OYEZ, http://www.oyez.org/justices/sonia_sotomayor (last visited Jan. 23, 2014).

but have a strong group identity and view their coalition partners with some distrust. Our best guess is that the Republicans seem to have cut a deal between their coalition partners so that social conservatives determine Supreme Court nominations—Scalia, Alito, Roberts, Thomas, and Kennedy.[139] In return, social conservatives have little influence on non-judicial appointees, such as a Secretary of the Treasury. This explanation, if accurate, would explain why Republican Presidents enjoy more degrees of freedom to appoint younger Justices.

A third explanation for the differential would focus on the bargaining positions and strategies of the players in the confirmation process. Perhaps Republicans and Democrats in the Senate respond differently to nominations by Presidents from the opposing party. In particular, perhaps Republicans are more serious about playing hardball politics with nominations by Democratic Presidents than Democratic Senators are with nominations by Republican Presidents. One might expect that there would be some interaction between the age of nominees and the intensity of the politics surrounding the nomination. More specifically, we might expect that the younger the nominee, the more intense the politics. After all, compromising on an older candidate gives away less; an older candidate will sooner leave office and open up the seat. If this were the case, then we might expect Democratic Presidents to nominate significantly older candidates (Breyer, Ginsburg) when facing a Republican Senate than when facing a Democratic Senate (Sotomayor, Kagan).[140] In contrast, Republican Presidents facing Democratic Senates might have no similar reason to compromise on age.

Testing this third explanation would be extremely difficult. To generate concrete predictions about the difference in Republican and Democrat nominees as a consequence of the difference in confirmation politics, we would need to know, at a minimum, about the President's and Senators' relative discount rates and beliefs over future elections. Consider, for example, a situation where a Democratic President faces a Republican Senate, and consider the result of Democratic and Republican Senators' beliefs about which party will hold the Presidency in the future. If both believe that Democrats will hold the Presidency in years to come, but Republicans are less certain that this will be true, Democrats may not feel

139. Some social conservatives would argue against characterizing Kennedy as sympathetic to their views. *See* Patti Waldmeir, *Closet Liberals*, FIN. TIMES (Aug. 6, 2005, 11:07 AM), http://www.ft.com/cms/s/0/db0a17ba-0616-11da-883e-00000e2511c8.html (discussing social conservatives' disgusted reaction to Kennedy's majority opinion in *Lawrence v. Texas*).

140. *See supra* note 48 and accompanying text.

that it is worthwhile to fight about whether a younger or an older Democrat is appointed. After all, when the current appointee leaves the Court he will likely be replaced by another Democrat. Republicans, however, may feel it is worth fighting about the age of the nominee, because they are not as certain that Democrats will be in power. Thus, we observe Republicans fighting harder than Democrats, particularly with a young nominee. And the intensity with which Republicans fight harder than Democrats should be a function of the difference in their beliefs about who will hold the Presidency. Differences in beliefs about which party will hold the Senate should also produce different willingness to fight over the age of nominees to the Court. Similarly, differential beliefs about the likelihood of retirements from the Court will produce different willingness to fight over the age of nominees. Lastly, to pull all of this together, we would have to know what are the relative discount rates of the parties—how much each party cares about the future, relative to the other—for all of the crucial players. Lacking good estimates of the parties' beliefs and discount rates, we cannot generate the sort of predictions that are needed to produce a clean test.

C. This Article's Effects on the Differential

This article may change the politics we observe. Democrats who read this article may realize, for the first time, the long-run effect of selecting older appointees, and alter their conduct to permit selection of younger appointees, possibly eliminating the age differential in the long run. Such a result would be made possible only if Democrats had sufficient degrees of freedom to alter their nomination choices, but the findings of this article may help Democrats secure the necessary degrees of freedom. For example, Democrats may decide to fight harder when Republicans nominate young Justices. Alternatively, Democratic Presidents may search harder for younger candidates, or persuade their coalition's constituent groups that nominating a representative from the group should be less prioritized than nominating a younger liberal Justice. Thus, we do not expect the differential to last.[141]

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141. The closest analog in the literature comes from the finance literature. Finance professors have, at times, noticed imperfections in the market upon which trading strategies can be built. Attempts to find the imperfections several years later may fail; traders read the article detailing the imperfection, trade on the strategy, and squeeze the imperfection out of the markets. Burton C. Malkiel, *The Efficient Market Hypothesis and Its Critics*, 17 J. ECON. PERSP. 59, 71–72 (2003).

This article may also affect support for the eighteen-year term limit proposal. Since this article demonstrates that the proposal would largely eliminate the effects of age on the median Justice, the article may prompt stronger support for the proposal from the left and a weakening of support for the proposal on the right. However, as discussed *supra*, even though the proposal hinders conservative influence on the Court, conservatives may support the proposal regardless because of the other benefits it would confer, such as less contentious confirmation hearings and a younger, more physically vigorous Court.

D. Future Research

Although our simulation, in its current state, yields useful insights into the Supreme Court appointment process, the models upon which the simulation are based heavily simplify the appointment process. Additional insights may be gleaned by modifying the models so they incorporate more complex assumptions regarding elections or retirement decisions of Justices.

1. Elections

Popular reaction to Court opinions may affect Presidential and Senatorial elections. This would likely happen when a Court opinion particularly pleases or displeases a segment of the electorate and candidates respond by running against or in favor of the Court or the issue that it raised. Significant research investigates the correlation of public opinion and the Court's decisions.[142] Egan and Citrin[143] explore the effect of the Court's decisions on views of the Court's legitimacy, and find that general public opinion seldom follows Court decisions. Instead, conservative voters, but not liberal ones, regard the Court as *less* legitimate when it issues a decision with which they substantively disagree.[144]

We could alter our election model to account for popular reaction to Court opinions and see if this alteration affects the movement of the median

142. *E.g.*, Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 74 (2010); VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 30 (2003).

143. Patrick J. Egan & Jack Citrin, Opinion Leadership, Backlash, and Delegitimation: Supreme Court Rulings and Public Opinion 6–7 (August 4, 2009) (unpublished manuscript) (on file with author).

144. *See* Carrubba et al., *supra* note 80.

Justice. Altering the simulation so that the draws for the President and the Senate pivot depend on case rulings would, however, require that we model cases, an additional layer of complexity. As a substitute, we might make the draw depend on the distribution of Justices, but it is not clear how to implement that strategy.

Other means of altering the election model are also possible. We could also alter the draws of the President and the Senate to resemble historical data. For example, we could start with some year, count the number of Democratic victories and Republican victories in the Presidential elections, and then use the relative number to model the chances of drawing a Republican or Democratic President. Such a technique would be very sensitive to the year in which we start. Thus, starting in 1968, we would get seven Republican victories and four Democratic victories.[145] But starting in 1960 would produce seven Republican and six Democratic victories.[146]

In addition, we could alter the distribution function from which the President and Senate are drawn. The American political system does not commonly elect candidates from the ideological extremes. Thus, it might make sense to use a distribution function which puts more mass in the center than in the tails. Our working hypothesis is that this would reduce the movement of the median Justice from the center.

2. Retirement Decisions

The retirement decision model could be altered to account for the effects of strategic retirements. Bailey and Yoon[147] investigate the role of strategic retirements in the context of a two-stage game, in an effort to get beyond the "I know it when I see it" form of analysis. Their effort is understandable; strategic retirements, or the lack thereof, on the Court can change the course of legal history. Consider, for example, the Jimmy Carter era and the failure of both William Brennan and Thurgood Marshall to retire from the Court, thus denying President Carter and a Democratic Senate the chance to appoint their replacements. Marshall, in particular, was openly requested to retire:

145. The seven Republican victories occurred in 1968 (Nixon), 1972 (Nixon), 1980 (Reagan), 1984 (Reagan), 1988 (Bush, Sr.), 2000 (Bush, Jr.), and 2004 (Bush, Jr.). The four Democratic victories occurred in 1976 (Carter), 1992 (Clinton), 1996 (Clinton), and 2008 (Obama).

146. Democratic candidates won in 1960 (Kennedy) and 1964 (Johnson).

147. *See* Bailey & Yoon, *supra* note 121, at 294.

> In 1979, [Marshall] says, two White House aides called him and suggested that he quickly quit the court so President Jimmy Carter could name a new justice. The aides reminded Marshall of his heart attack, his difficulties with blood clots and his bouts of pneumonia. They painted a sad picture of the possible replacements that a Republican like Ronald Reagan might select for the court. The justice slammed the phone down. But that didn't stop it.[148]

Marshall, who was seventy-one years old at the time of the White House call,[149] did not retire until 1991, when he was forced to do so because of ill health.[150] President Bush appointed, as his successor, Clarence Thomas. The resulting Court had Justices Scalia, Thomas, and Rehnquist on the right, leaving either Justices Kennedy or O'Connor as the median Justice.[151]

Consider an alternative history. If Justice Marshall had agreed to retire (instead of slamming the phone down), President Carter might well have been able to appoint a fifty-five-year-old who was as liberal as Justice Stevens in 1979. If this had happened, the new Justice would have been only sixty-seven years old in 1991. There would likely have been no appointment for President Bush. In this alternative history, the median Justice likely would have been Byron White or Harry Blackmun. If the Median Justice Theory is correct, this would have produced only a small move to the left. But if the Median Majority Justice Theory is correct, this may well have produced a massive move to the left. Under the Median Majority Justice Theory, the median of Justices Souter, Stevens, Blackmun, White and new Justice would have controlled the opinion. That Justice would be the most liberal of Souter, Blackmun, and White. In short, a strategic retirement by Marshall may have made a significant difference in the ideology expressed in the Court's opinions.

We could program a strategic retirement as a higher probability of voluntary retirement when a Justice who was appointed by a Republican (or

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148. Juan Williams, *Marshall's Law*, WASH. POST (Jan. 7, 1990), http://www.thurgoodmarshall.com/speeches/tmlaw_article.htm.

149. Justice Marshall was born in 1908. *Biography of Associate Justice Thurgood Marshall*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=1489&cid=999&ctype=na&instate=na (last visited Jan. 23, 2014).

150. *Id.*

151. Epstein & Jacobi, *supra* note 1, at 96–98.

Democrat) observes that a Republican (or Democratic) President is in office and an election is nearing.[152] We could then rerun the simulations.

We have no strong intuitions about whether liberal or conservative Justices strategically retire at a higher rate. Part of the problem is that there is no good method for identifying retirements driven by strategic considerations, as opposed to retirements driven by other considerations.[153] Did Justice Stevens retire strategically so that President Obama could appoint his successor? He was over ninety years of age when he chose to retire. Did Justice O'Connor retire strategically so that President Bush could appoint her replacement? She denies that she did so.[154] We could try modeling strategic retirements based on historical data, and designate certain historical retirements as strategic on a "we know it when we see it" basis, but for now we feel uncomfortable making such a designation.[155] Hence, we take no position on whether there is any difference between the parties.

The retirement decision model could also be modified to account for other variables, such as the sex of the Justice or other observable characteristics.

CONCLUSION

Presidents must weigh, balance, and trade off between many criteria when picking a nominee to the Supreme Court. Age and ideology are only two of the important criteria. However, because Supreme Court Justices serve for life, age at appointment is extremely important; younger appointees can be expected to serve more years on the Court and hence influence the ideological tenor of its opinions for a longer period of time. Because there is some evidence that Republicans appoint younger Justices

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152. This is consistent with Bailey and Yoon's approach. *See* Bailey & Yoon, *supra* note 121, at 295–96.

153. Or even deaths. Consider Justice Rehnquist's death while on the Court. Charles Lane, *Chief Justice William H. Rehnquist Dies*, WASH. POST (Sept. 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301911.html.

154. *Cf.* William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html (citing O'Connor's need to spend time with her husband as her reason for retirement).

155. If we were to do such a thing, we might maintain that, at least recently, Justices appointed by Republican Presidents would be far more likely to retire strategically than would Democratic President appointees, regardless of ideology. We would count Justices Souter, O'Connor, and probably Stevens, as strategic. The two most obvious candidates at present are Justices Breyer and Ginsburg, but neither has made any move to date to retire.

than Democrats, we simulated the effect of a systematic difference in age of appointments on the ideological position of the median Justice. We found three things. First, and least surprising, if Republicans and Democrats behave in this fashion for an extended period of time, the Court will become more conservative. The simulated results clearly showed a conservative drift, and we believe, although are not certain, that the results are significant. Second, and mildly surprising, the Senate confirmation process can greatly reduce the intensity of this effect. Third, and completely unnoted before this article, the widely-touted proposal to limit Supreme Court Justices to a single eighteen-year term will almost completely eliminate the effect of the differential in age, and move the Court back to the center of the ideological spectrum.